FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v SunshineLoans Pty Ltd [2025] FCAFC 32

Appeal from:	*Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3)* [2024] FCA 786
File number:	QUD 436 of 2024
Judgment of:	**PERRAM, BROMWICH AND COLVIN JJ**
Date of judgment:	24 March 2025
Catchwords:	**PRACTICE AND PROCEDURE** – appeal of primary judge's recusal decision – where civil penalty case split into a liability and penalty hearing – where primary judge had already determined liability – where primary judge had made findings of credit about a witness who would give further evidence at the penalties stage – where statutory regime required regard to be had to the contraventions and surrounding circumstances in determining penalty – HELD: by majority recusal not reasonable in the circumstances – appeal allowed – orders for reallocation of the liability hearing be set aside **CONSUMER LAW** – interaction between ss 166 and 167 of the *National Consumer Credit Protection Act 2009* (Cth)
Legislation:	*Corporations Act 2001* (Cth), ss 1317E, 1317G *National Consumer Credit Protection Act 2009* (Cth) ss 166, 167, Schedule 1 (*National Credit Code*) *Federal Court Rules 2011* (Cth) r 30.01
Cases cited:	*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 *Australian National Industries Ltd v Sedley Securities Ltd (in liq)* (1992) 26 NSWLR 411; 9 ACSR 309 *Australian Securities and Investments Commission v Sunshine Loans (No 2)* [2024] FCA 345 *Australian Securities and Investments Commission v Sunshine Loans (No 3)* [2024] FCA 786 *Bob Jane Corporation Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343 *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; 242 CLR 283

	CNY17 v Minister for Immigration and Border Protection [2019] HCA 50; 268 CLR 76 *Commonwealth v Director, Fair Work Building Inspectorate* [2015] HCA 46; 258 CLR 482 *Director of Public Prosecutions v Smith* [2024] HCA 32 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 *Isbester v Knox City Council* [2015] HCA 20; 255 CLR 135 *Jess v Jess* [2021] FamCAFC 159; 361 FLR 126 *Johnson v Johnson* [2000] HCA 48; 201 CLR 488 *Livesey v New South Bar Association* (1983) 151 CLR 288; 57 ALJR 420 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15; 97 ALJR 419 *R v Lars* (1994) 73 A Crim R 91 *R v Masters* (1992) 26 NSWLR 450; 59 A Crim R 445 *R v Reid* [2004] 148 A Crim R 425; NSWCCA 301 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; 50 ALJR 778 *Re JRL; Ex parte CJL* [1986] HCA 39; 161 CLR 342 *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2025] FCAFC 34
	Australian Law Reform Commission's Report, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021) at pp 366-367 [10.77]
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	168
Date of hearing:	12-14 November 2024
Counsel for the Appellant:	Mr T Begbie KC with Ms L Cameron
Solicitor for the Appellant:	Gadens Lawyers
Counsel for the Respondent:	Mr M Wyles KC with Mr A Collins

Solicitor for the Respondent: O’Shea Lawyers

ORDERS

QUD 436 of 2024

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant
AND:	**SUNSHINELOANS PTY LTD (ACN 092 821 960)** Respondent

ORDER MADE BY: **PERRAM, BROMWICH AND COLVIN JJ**

DATE OF ORDER: **24 MARCH 2025**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Order 1(a) and order 2 made on 5 July 2024 be set aside.
3. The hearing and determination of the penalty to be imposed on the respondent and any other relief be remitted for hearing and determination by the primary judge.
4. There be no order as to costs.

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

REASONS FOR JUDGMENT

PERRAM J:

1 This appeal is concerned with the principles which govern the circumstances in which a judge will be disqualified from the hearing of a case on the grounds of apprehended bias. The primary judge conducted a trial in which the Appellant ('ASIC') sought against the Respondent ('Sunshine Loans') a declaration that it had contravened certain civil penalty provisions of the *National Consumer Credit Protection Act 2009* (Cth) ('the Act'). Such a declaration is authorised by s 166(1) of the Act.

2 In the same proceeding, ASIC also sought orders imposing a civil penalty on Sunshine Loans. On 3 July 2023, Derrington J ordered that claim for relief was not to be dealt with at the initial trial. A subsequent hearing on penalty would be held if Sunshine Loans was found to have contravened the Act after the first hearing.

3 Having heard the question of whether a declaration of contravention should be made, the primary judge then reserved his decision. Subsequently, he delivered judgment and concluded that a declaration of contravention should be made: *Australian Securities and Investments Commission v Sunshine Loans (No 2)* [2024] FCA 345 at [183], [319], [345], [346].

4 Those reasons reveal that Sunshine Loans had called as a witness at the trial, Mr Powe. Mr Powe was a director of Sunshine Loans. The primary judge was not impressed with Mr Powe as a witness. At [268] his Honour described some of Mr Powe's evidence as '*unsatisfactory*', at [302] that he had given his evidence '*in the manner of someone who had been schooled to advance a particular theory*', at [303] that his evidence had become at one point '*preposterous*' and, at [304], that his evidence was '*not credible*' and that he was not a witness '*who tried to give his evidence in an honest manner*'.

5 After the delivery of these reasons, a declaration of contravention was formally made on 5 July 2024 and steps were then taken to prepare for hearing ASIC's application for a civil penalty. One of these steps included the foreshadowed preparation by Sunshine Loans of a further affidavit of Mr Powe addressing issues relating to the Court's determination of an appropriate penalty.

6 Sunshine loans then applied to the primary judge to disqualify himself from the hearing of ASIC's application for a civil penalty on the basis of an apprehension of bias said to arise from

the fact that his Honour had already made adverse credit findings about some of Sunshine's directors, including Mr Powe, and would be called on again to do so at the penalty hearing. In effect, it was said that an apprehension of prejudgment arose.

7 At the time that this application came to be heard by the primary judge, the foreshadowed affidavit of Mr Powe had been prepared and served. Sunshine Loans made clear that it would read Mr Powe's new affidavit at the penalty hearing and, for its part, ASIC indicated that it would cross-examine Mr Powe on that affidavit including as to his credibility.

8 Sunshine Loans submitted to the primary judge, and it was not in dispute, that whether an apprehension of bias arose depended upon whether a fair-minded lay observer might reasonably apprehend that his Honour might not bring an impartial mind to his assessment of Mr Powe's evidence at the penalty hearing. This is the 'double might' test restated by the High Court in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 ('*Ebner*') at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

9 Sunshine Loan's submission was that having concluded that Mr Powe was not a credible witness in some respects at the first trial, including that his evidence was preposterous and given in a manner indicative of a witness who was not trying to give his evidence honestly, a fair-minded lay observer might reasonably apprehend that his Honour might not bring an impartial mind to his assessment of Mr Powe's evidence. No suggestion of actual bias was made.

10 The primary judge accepted this submission and disqualified himself from hearing ASIC's case on penalty: *Australian Securities and Investments Commission v Sunshine Loans (No 3)* [2024] FCA 786 at [4].

11 In reaching that conclusion, his Honour relied upon the summary of principles given by Besanko J in *Bob Jane Corporation Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343 ('*Bob Jane*') at [14] in these terms:

> Ordinarily, a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide where the judge in a previous case has expressed clear views, either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question…
>
> (citations omitted).

12 His Honour also relied upon a statement made in the Australian Law Reform Commission's Report, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021) at pp 366-367 [10.77] in these terms:

> A previous decision of the same fact or expression of clear views about the credit of a relevant witness, whether in the same proceedings or different proceedings, will amount to a disqualifying ground. [See, eg, *Jess v Jess* (2021) 63 Fam LR 545 [396] (Alstergren CJ, Strickland and Kent JJ); *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343 [20]–[22] (Besanko J); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [145] (Heydon, Kiefel and Bell JJ); *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 300 (Mason, Murphy, Brennan, Deane and Dawson JJ); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 264 (Barwick CJ, Gibbs, Stephen and Mason JJ)]
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> (Footnoted references included in text).

13 It is not consistent with authority to approach the question of apprehended bias on the basis of a universal rule of the kind identified by the ALRC and, as I will explain later in these reasons, the cases cited by the ALRC for such a universal proposition do not, with the possible exception of *Jess v Jess* [2021] FamCAFC 159; 361 FLR 126 ('*Jess v Jess*'), support it.

14 I therefore agree with ASIC that the primary judge did approach the question of apprehended bias on an erroneous basis. His Honour approached the matter on the footing that because he had made adverse credit findings against Mr Powe at the first hearing and would have to consider his evidence again at the second, that disqualification was essentially unavoidable. However, even if his Honour had approached the matter on the more nuanced way which I read the authorities as requiring, the correct conclusion would have been that his Honour was disqualified. Thus, whilst I accept that error has been demonstrated, I do not agree that the error was material. I therefore conclude that the appeal should be dismissed with costs.

15 The central principle appears in *Livesey v New South Bar Association* (1983) 151 CLR 288; 57 ALJR 420 ('*Livesey*') at 299-300 per Mason, Murphy, Brennan, Deane and Dawson JJ:

> Necessity and the extraordinary case (see, e.g., *Ex parte Lewin Re Ward* [1964] NSWR 446 at 447) make it impossible to lay down an inflexible rule; each case must be determined by reference to its particular circumstances. It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact.

16 *Livesey* was concerned with two separate proceedings. In the earlier proceeding to which Livesey QC was a not a party, two members of the Court of Appeal had made very adverse findings about Livesey QC and Ms Bacon. The question in the first case was whether Ms Bacon was a fit and proper person to be enrolled as a barrister. The first Court of Appeal concluded that Livesey QC and Ms Bacon had entered into a corrupt arrangement whereby bail money had been posted on behalf of Livesey QC's client using the client's own money which was made to appear as if it had been lodged by Ms Bacon. The Court rejected Ms Bacon's evidence and reached instead a conclusion of corrupt collusion with Livesey QC. In the subsequent proceeding to remove Livesey QC's name from the roll for the same incident, Ms Bacon was a material witness and two of the members of the first Court of Appeal were to sit again. They refused to disqualify themselves but the High Court held that they were disqualified by their participation in the first case. It was in that context that the above statement was made.

17 This case is not concerned with separate proceedings for ASIC's claim for a declaration of contravention and the imposition of a civil penalty is made in the one proceeding. But there is no reason to think that the principle stated in *Livesey* cannot be applied to statements made by a judicial officer at different points during a single proceeding. *Johnson v Johnson* [2000] HCA 48; 201 CLR 488 ('*Johnson v Johnson*') was a case concerning remarks made by a trial judge during the course of a trial. Although a majority of the High Court (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) did not think that a reasonable apprehension of bias arose, nothing in their Honours' reasons suggests that they approached the matter on the basis that an apprehension of bias could not arise during the course of a single trial. Rather, their Honours thought that the apprehension of bias only arose from considering what the judge had said in isolation and that to read the words without their accompanying context was unreasonable: at 494 [16]. Indeed, the High Court's earlier decision in *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; 50 ALJR 778 ('*Watson*') is an example of a case where something said by a trial judge at the outset of the trial was, in fact, held to give rise to an apprehension of bias: at 266; see also *Johnson v Johnson* at 494-495 [17].

18 The test in *Ebner* is couched in terms of what a fair-minded lay observer might reasonably apprehend about how a judge might approach an issue. The 'double might' test is therefore applied through the prism of a fictitious fair-minded lay observer whose purpose is to ensure that the test is objective. Whilst the fair-minded observer is not assumed to have a detailed knowledge of the law, the reasonableness of any apprehension of bias is to be considered in

the context of ordinary judicial practice which is not frozen in time but develops to take account of the exigencies of modern litigation: *Johnson v Johnson* at 493 [13].

19 The question of apprehended bias is therefore, in part, a function of ordinary judicial practice. Such practice does not form an element in determining the apprehensions which might be engendered in the fair-minded lay observer by a statement made by a judge but it acts as a metric to gauge whether any such apprehension is a reasonable one.

20 *Johnson v Johnson* illustrates the principle. Whilst the words said by the judge in that case might, if viewed in isolation, have led a fair-minded lay observer to think that the judge might not approach the credit of the husband impartially, such an apprehension was not a reasonable one when the context was brought to account. As the Court noted at 493 [13], the context of ordinary judicial practice included the fact that 'modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.' And the judge's mid-trial statements included, as the Court noted at 494 [16], not just the remarks about which the complaint was made but other subsequent ameliorating remarks too.

21 What constitutes ordinary judicial practice will vary depending upon the procedural landscape. But that landscape remains only a contextual input into the question and then only at the level of gauging the reasonableness of any putative apprehension which might arise. The central input remains what it is alleged that the judge has done or said which gives rise to the apprehension of bias.

22 These are complex concepts whose interplay admits of no bright lines. As such, there can be no hard and fast rules about this as the High Court itself has accepted. As the Court observed in *Livesey* in the passage cited above, 'Necessity and the extraordinary case (see, e.g., *Ex parte Lewin Re Ward* [1964] NSWR 446 at 447) make it impossible to lay down an inflexible rule; each case must be determined by reference to its particular circumstances.'

23 Thus, each case depends upon its own circumstances. For example, it has been said that a trial judge presiding at a criminal trial is not necessarily disqualified because he or she makes an adverse credit finding about the accused on the resolution of a voir dire (*R v Lars* (1994) 73 A Crim R 91 ('*Lars*') at 108 per Wood, Mathews and Badgery-Parker JJ) or a pre-trial bail application (*R v Masters* (1992) 26 NSWLR 450; 59 A Crim R 445 ('*Masters*') at 470-472

per Hunt CJ at CL, Allen and Badgery-Parker JJ). The common feature of these cases is that the criminal procedures in play required the judge to make the credit finding.

24 I do not think, however, that the cases stand for the larger proposition that a judge in such a situation can never be disqualified as a result of an adverse credit finding. With sufficiently inflammatory language a reasonable apprehension of bias could arise even in the context of ordinary judicial practice insofar as it relates to criminal process.

25 ASIC submitted that the liability and penalty hearings were but a single trial or hearing. I think it may be accepted that the two hearings are interconnected. ASIC's application for a civil penalty may but need not be sought in the same proceeding: see ss 166(1) and 167(1) of the Act. Any declaration of contravention must specify, amongst other matters, the civil penalty provision that was contravened and the conduct which constituted the contravention (ss 166(3)(b) and (d)) and the declaration, once made, is conclusive evidence of those matters: s 166(4). At any penalty hearing the Court must take into account, amongst other matters, the nature and extent of the contravention, the nature and extent of any loss it has occasioned and the circumstances in which the contravention took place: ss 167(3)(a), (b) and (c). In many cases these will require fact finding beyond the terms of the conclusive declaration. But a trial judge's reasons for granting a declaration of contravention will often traverse many of these matters. Where they do, issue estoppels are likely to arise between the parties which will bind them in any penalty hearing. Attempts to contradict such findings at any penalty hearing may also, in appropriate circumstances, constitute an abuse of process.

26 Thus, where a declaration of contravention and a civil penalty are sought in one proceeding and result, as they almost invariably will, in two hearings, I accept that those two hearings are closely interconnected in the way I have described.

27 But accepting that, I do not think it useful to determine the correctness of ASIC's submission that what occurs is a single trial or single hearing. To draw such a conclusion necessitates an exercise in legal characterisation but there is no ready set of principles by which such an exercise may be carried out and, in a sense, the question may perhaps have no answer. More importantly, even if it does have an answer, whatever the answer to this difficult legal question might be, I do not see that it can be material to the inquiry required by the 'double might' test in *Ebner*. The fair-minded lay observer is not to have attributed to them detailed legal knowledge and certainly not knowledge of complex legal and procedural taxonomy. And, whilst ordinary judicial practice is relevant to assessing whether any apprehension of bias that

the fair-minded lay observer might have is a reasonable one, the legal question of whether a bifurcated hearing constitutes a single trial or hearing is not itself part of ordinary judicial practice.

28 What is part of ordinary judicial practice is the manner in which judges ordinarily dispose of civil penalty hearings. On that count, I do accept that it is ordinary judicial practice for the question of liability to be tried in advance of the determination of any penalty and, further, that ordinarily the judge who has heard the liability hearing will also hear the civil penalty hearing. There are significant reasons of practicality from all parties' perspectives for this practice just as there are considerable reasons of practicality which make it ordinarily appropriate for a judge who conducts a criminal trial also to conduct any sentencing proceeding.

29 From time to time, the procedural structure of a proceeding for a declaration and a civil penalty will require a trial judge to make credit findings during the liability hearing. Given the interconnectedness of the two proceedings and the ordinary judicial practice to which I have referred, I do not think that an adverse credit finding per se will result in disqualification on the grounds of apprehended bias. The situation resembles, although is not identical with, the situations which arose in the context of criminal trials in *Lars* and *Masters*.

30 The ordinary judicial practice in civil penalty proceedings to which I have referred carries as its corollary some restraint, if possible, on the part of trial judges conducting liability hearings. Perhaps in some cases damning credibility findings may be unavoidable, but with a bifurcated hearing structure it will generally be better for a judge simply to say that evidence is not accepted, for example, because it is inconsistent with contemporaneous documents. If this course is open to a judge (and it may not be in every case), then in my view the judge should take it to avoid the risk of disqualification.

31 It becomes necessary then to set out precisely what the primary judge did say in this case and to determine whether the findings made by the primary judge were merely credibility findings per se or whether they travelled further than that. At [268] his Honour said this:

> 268. The natural inference to be drawn is that the Amendment Fee referred to was charged on occasions when the customer was amending the contract in *other* respects. It is apparent that Mr Powe made those comments at a time when he was unaware of their importance. His evidence in these proceedings to the effect that the fees were only charged upon a borrower's default sits uncomfortably with the above comments, and reveals the evidence given in his affidavit and during cross-examination to be unsatisfactory.

32 And at [301]-[302] this:

> 301 The effect of Mr Bennetts' evidence was that Sunshine Loans and the customers did in fact come to agreements from time to time to vary their original agreement. Those variations could, in the circumstances, only mean that the customer was not obliged to make the originally scheduled payment but would, instead, make a different payment. Sunshine Loans gave effect to that agreement by putting a hold on the making of a direct debit from the customer's account. It is, with respect, nonsense to think that there was no amendment to the SACC in such circumstances. On no sensible view could it be accepted that, despite the agreement, the customer would be in default if they did not make the payments in accordance with the originally scheduled arrangement.
>
> 302 In a similar manner, Mr Powe adhered to the contention that despite the obvious agreement to vary the loan contract between Sunshine Loans and its customers for which the Amendment Fee was paid, no such agreement existed. He, too, gave evidence in the manner of someone who had been schooled to advance a particular theory.

33 At [303]-[304] this:

> 303 Mr Powe accepted that, from time to time, customers who were unable meet their originally agreed repayments would contact Sunshine Loans to see if they could come to some arrangement. He also agreed that Sunshine Loans was able to agree with a customer to defer a scheduled repayment. However, in the maintenance of the theory which he sought to propound, his evidence became preposterous. He asserted that an agreement between Sunshine Loans and a customer that a repayment be deferred to a date other than that identified in the original payment schedule did not amount to any change to the terms of the original contract. He denied that such an agreement changed the terms of the relevant SACC:
>
> > "You don't agree with that?---No, I don't. Because the original term of the contract is what they signed, and that is the term of the contract.
> >
> > And that can't be changed by agreement of the parties?---Yes, of course it can, but if they're going to agree to a - a whole new contract, we would have to issue a new contract.
> >
> > But you can vary the existing contract in terms of its payment terms, can't you, if you choose to do so?---Yes, but that's not – that's not ---
> >
> > Are you saying ---?---That's not changing the contract. Varying it is not changing it.
> >
> > Okay. I see?---We can vary - we can vary the terms of the contract. That is not changing the essence of the original contract that was - that was written."
>
> 304 If he actually believed his statement, "[v]arying it is not changing it", it might be somewhat revelatory in this matter. It might explain why Sunshine Loans treated a customer's payment in accordance with an agreed new payment schedule as constituting default of their SACC. However, Mr Powe was also a not unintelligent person. He was a businessman of some ability and success in his area. It is highly unlikely that he would view the interactions recorded

> in the customer transaction logs as notifications of default. Rather, it is clear that he gave his evidence in an attempt to avoid the conclusion that Sunshine Loans was charging fees otherwise than on a default, and in an attempted justification of its actions. Ultimately, his evidence was not credible in the face of the objective evidence, and he was also not a witness who tried to give his evidence in an honest manner.

34 At [312] this:

> 312 In its written submissions, it claimed that the facts which it had established, by the evidence of Mr Powe, Mr Bennetts and Mr Simmons, were that: prior to the charging of the $35.00 Amendment Fee to the customers' accounts, it had a reasonable belief that the SACC between it and the relevant customer had not been varied to change the date for the next repayment; and that it had a reasonable belief that the customer was defaulting in making the payment under the SACC. The essential difficulty with this is that both propositions are not about the existence of "facts", rather they are each matters of the legal effect, within the context of the parties' respective legal rights, of the facts which had occurred. Even if Mr Powe, Mr Bennetts and Mr Simmons had those beliefs about the facts, which is doubtful, they were not reasonable. It is pellucid in this case that the Amendment Fee was charged for the making of an amendment or variation to the repayment terms under the SACC. A cursory consideration of the events and the relationship between the parties makes that clear beyond question. Any suggestion to the contrary is disingenuous.

35 The primary judge could have reached the conclusions he reached about the evidence of Mr Powe in more moderate language. In saying that, I am not being critical of his Honour. A judge must give their reasons for judgment whatever they are. However, even taking into account the context that ordinarily a judge hearing a liability hearing will also hear any civil penalty application, I have come to the view that a reasonable apprehension of bias arose from these remarks. A fair-minded reasonable lay observer might well apprehend that the primary judge might not bring an impartial mind to his assessment of Mr Powe's evidence.

36 Thus, this case falls on the side of the line illustrated by *Livesey* and *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2; 242 CLR 283 ('*British American Tobacco*') at [145] rather than the side of the line illustrated by *Johnson v Johnson*.

37 ASIC submitted that assigning the matter to a new judge would not solve the problem. This was because Mr Powe might well be cross-examined on the same material as he was in the first hearing and because any new judge would be required to apply the findings made in the first hearing. The first and short answer to that submission is that the *Ebner* test does not call for, or indeed permit, any consideration of how a new judge assigned to the matter might approach the fact-finding process. The second answer is that the cross-examination aspect of the problem arises in any case involving allegations of pre-judgment arising from an earlier judgment.

Thus, in *Livesey* Livesey QC and Ms Bacon might well have been cross-examined before the second Court of Appeal on their testimony before the first Court of Appeal but there is nothing in the reasons of the High Court to suggest that the difficulties to which this might have given rise provided any reason why the apprehension of bias did not arise. The third answer is that the primary judge's findings about the credibility of Mr Powe do not give rise to an issue estoppel since his credit was not one of the issues to be determined in the case. Whether Mr Powe gives credible evidence at the second hearing is a matter to be determined by the judge conducting that hearing. I therefore do not accept ASIC's submission.

38 For completeness, it is convenient to say something of the two statements of principle upon which the primary judge relied. The first of these is from the reasons of Besanko J in *Bob Jane* at [14] set out above. I would draw attention to the first word in that quote which is 'Ordinarily'. As Besanko J thereby observed, the rule is not absolute for the reasons I have given. The second is from the ALRC's report, *Without Fear or Favour* set out above. In my view, the ALRC's statement of principle that 'A previous decision of the same fact or expression of clear views about the credit of a relevant witness, whether in the same proceedings or different proceedings, will amount to a disqualifying ground' is too absolute and is not supported by the authorities cited for it.

39 First, part of the statement of principle appears to derive from what is said by Heydon, Kiefel and Bell JJ at [145] in *British American Tobacco*. The full text of [145] is in these terms:

> 145 Whenever a judge is asked to try an issue which he or she has previously determined, whether in the same proceedings or in different proceedings, and whether between the same parties or different parties, the judge will be aware that different evidence may be led at the later trial. Judge Curtis's express acknowledgment of that circumstance does not remove the impression created by reading the judgment that the clear views there stated might influence his determination of the same issue in the Laurie proceedings. Allsop P's conclusion was correct. In addition to the possibility of the evidentiary position changing, a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about [British American Tobacco Australia Services Ltd]'s denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial – that is, bring an impartial mind to the issues relating to the fraud finding. Johnson v Johnson is distinguishable.

40 It will thus be seen that their Honours were not saying that a previous decision of the same fact or expression of clear views about the credit of a relevant witness, whether in the same proceedings or different proceedings, will amount to a disqualifying ground. Indeed, it is apparent that their Honours regarded the case as an 'unusual' one. If the statement for which [145] is cited by the ALRC is correct then their Honours would have needed to have overruled *Johnson v Johnson* which cannot be reconciled with any such absolute principle. However, as is apparent, their Honours were content to distinguish *Johnson v Johnson*.

41 Secondly, in my view *Livesey* does not support such an absolute principle either. The Court was there explicit that it was 'impossible to lay down an inflexible rule; each case must be determined by reference to its particular circumstances': at 299-300.

42 Thirdly, as I have already explained, the principle described in *Bob Jane* is expressly said only to be the ordinary approach: at [14].

43 Fourthly, the High Court's statement in *Watson* at 264 is couched in the absolute terms suggested, but recourse to 262 shows that their Honours considered the question of apprehended bias was one to be judged 'in all the circumstances' and any doubt about that is resolved by the clear statement to the same effect in *Livesey*.

44 Finally, I do accept that the Full Court of the Family Court's decision in *Jess v Jess* at [396]-[399] is couched in terms which may suggest that the principle is absolute in its application. However, in my view, the statement at [396] that a finding expressed in unqualified terms 'almost inevitably gives rise to a reasonable apprehension of bias' is, in my respectful opinion, too wide and fails to deal with the subtle situations which may arise in a variety of procedural contexts (such as during criminal trials or in proceedings of the present kind). Of course, the Full Court was not confronted with such a situation in the case before it, so this is unsurprising.

45 The Full Court also referred in the same paragraph to the statement made by Mahoney JA (with whom Meagher JA agreed) in *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411; 9 ACSR 309 at 442 that '…a previous decision of the same fact or upon the credibility of a relevant witness will create such an apprehension, normally if not inevitably.' But *Spedley* was almost immediately not followed by the NSW Court of Criminal Appeal in *Masters* and *Lars* by criminal judges clearly alarmed at its application in the special procedural context of a criminal trial: see also *R v Reid* [2004] 148 A Crim R 425;

NSWCCA 301 at [14]-[15] per Spigelman CJ (with whom Wood CJ at CL and Howie J agreed at [30] and [31]-[33]). In the same vein, the quotation at [399] in *Jess v Jess* from [145] of *British American Tobacco* suffers from the same problem I have outlined above, namely, that the paragraph does not, with respect, actually stand for the proposition for which it is cited.

46 This is not to suggest that *Jess v Jess* is wrongly decided or that, ordinarily, the rule is other than as the Full Court says. The point for present purposes is only that *Johnson v Johnson* requires the reasonableness of any apprehension of bias to be gauged in a context which includes ordinary judicial practice. Because that question is acutely contextual in nature there are necessarily difficulties in framing any rule in universal terms. On my reading of the authorities, the High Court (and Besanko J) have been careful to avoid such a universal statement.

47 The appeal should be dismissed with costs.

I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perram.

Associate: NDF

Dated: 24 March 2025

REASONS FOR JUDGMENT

BROMWICH J:

Introduction

48 This is an appeal by the Australian Securities and Investments Commission (**ASIC**) against an order made by a judge of this Court that a civil penalty proceeding in which his Honour had delivered a liability judgment be transferred to the National Operations Registrar for the purpose of reallocation to another judge for the determination of relief. An appeal against declarations made as a consequence of the liability findings has been dismissed, except as to a change in the form but not substance of the declarations made, in a judgment of the same bench of the Full Court published immediately before this judgment: *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2025] FCAFC 34. The liability appeal having been dismissed, the question raised by this appeal as to whether the primary judge should hear and determine the question of relief, including in particular pecuniary penalties, therefore requires determination. Injunctions against further contraventions were also sought. The reasoning in the liability appeal judgment is important context for these reasons.

49 The proceeding below was bifurcated in a way common to civil penalty proceedings, with questions of liability to be heard and determined before questions about the appropriate penalty quantum. The transfer order was made following a finding by the primary judge of apprehended bias arising from adverse credit findings his Honour had made in the liability judgment about a trial witness for the respondent below and in this appeal, SunshineLoans Pty Ltd (**Sunshine Loans**): *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3)* [2024] FCA 786 (**RJ**). The same witness had sworn an affidavit for the purposes of the penalty hearing. ASIC had confirmed that his credit was going to be in issue at the penalty hearing. His Honour refused to recuse himself upon a wider basis advanced by Sunshine Loans arising only from parts of the liability judgment relevant to relief.

50 ASIC's case on appeal is that there was no proper foundation for the primary judge to conclude that there was a reasonable basis for any apprehended bias leading to recusal, the transfer order and an order reserving costs. Sunshine Loans both defends the primary judge's finding of a reasonable basis for apprehended bias, and by a notice of contention asserts that a wider basis for such a finding that was advanced by Sunshine Loans and rejected by his Honour should have been accepted.

51 For the reasons that follow, the primary judge ought not to have recused himself and accordingly the appeal should succeed and the notice of contention should fail, with no order as to costs. The question of relief, and especially penalty, should be remitted to the primary judge for hearing and determination.

The statutory context

52 Under s 166(1) of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**), within 6 years of a person contravening a civil penalty provision, ASIC may apply for a declaration of contravention. The Court must make the declaration if satisfied that the person has committed the contravention: s 166(2). That declaration must contain specified information, and is conclusive evidence of the matters within the declaration: sub-ss 166(3) and (4).

53 Section 167 similarly provides that ASIC may seek orders for the payment of a pecuniary penalty within 6 years of a person contravening a civil penalty provision, and the Court may order such pecuniary penalty as it considers appropriate: s 167(1), (2). In determining the pecuniary penalty, the Court must take into account "*all relevant matters*", including the nature and extent of the contravention, loss or damage caused by the contravention, the circumstances in which the contravention took place and whether the contravenor has previously been found to have engaged in similar conduct: s 167(3).

54 A legislative progression from the determination of contravention (that is, liability), to declarations and then to pecuniary penalty orders and other relief is not unusual: see, eg, *Corporations Act 2001* (Cth), ss 1317E, 1317G. In any case, it is common practice in civil penalty cases in this Court, for reasons of practicality, to hear the question of contravention and thus liability prior to considering the question of penalty and other relief. A reason for that practice is that the second stage may never be reached, or may only be reached as to a portion of the contraventions alleged.

55 Structuring the hearing and determination of the different issues in this way avoids evidence being adduced and submissions being made on such discrete issues as penalty quantum in relation to conduct in cases where the regulator is not successful in establishing an alleged contravention. It also allows parties to address the need for a penalty to be imposed and quantum informed by how the trial judge views what has taken place.

56 In this proceeding, as is common, the primary judge made procedural orders for the conduct of proceedings in this bifurcated way. Those orders did not entail any provision for the determination of a separate question under r 30.01 of the *Federal Court Rules 2011* (Cth). However, engagement in such a process by the primary judge would not have been likely to make any difference to the issue required to be determined in this appeal, nor the outcome.

57 ASIC submits that the applications made under ss 166 and 167 give rise to what is truly only one question: should ASIC get the remedies it seeks? In that sense, it contends that a single substantive hearing was simply split in two. As considered in more detail below in the section dealing with separate determinations in the same proceeding, the better view is that the proceeding raises a number of questions for determination, all of which are connected, which were split out into two distinct hearings for practical reasons, in order to determine:

(a) whether there has been a contravention of a civil penalty provision, in which case a declaration must be made;

(b) if so, whether a penalty should be imposed;

(c) if so, in what quantum.

58 Findings made in a liability judgment about the nature, extent and circumstances of the contravention must therefore be taken into account and will be central to the question of whether a pecuniary penalty should be imposed, as well as its quantum. As counsel for ASIC put it, the penalty hearing is the occasion for both the establishment of the necessary foundation for the grant of penalties (the finding of a contravention) and the determination of a range of facts that will be relevant to determining relief. The penalty hearing is then the occasion for hearing further evidence, if there is any, relevant to the question of the appropriate penalty and its quantum.

59 Regardless of the identity of the judge who ultimately determines the penalty question, the consideration of the aspects of the liability judgment that gave rise to Sunshine Loans' recusal application detailed below, and much more besides, is going to be indispensable. Sunshine Loans' apparent submission suggesting that this would in some way be a clean slate with a replacement judge for the primary judge cannot be accepted. The reality that the liability findings must, be carried through to the remedy determination is an important part of the determination of this appeal.

Before the primary judge

60 On the suggestion of ASIC, and without objection from Sunshine Loans, the primary judge made orders for separate liability and penalty hearings, to the extent the latter proved necessary. The liability hearing took place, and his Honour found that all the alleged contraventions had been proved: *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345 (**LJ**). Declarations of contravention were made subsequently, on the date on which the penalty hearing had been listed to be heard. This delay was at the request of ASIC, apparently in order to avoid difficulties with the period in which appeals could be brought beginning to run from the time of the making of the declarations, though no penalty decision had yet been made: LJ [347].

61 Soon after the delivery of the liability judgment, the primary judge made timetabling orders, with the dates subsequently extended, for the furnishing of evidence and submissions on the question of the relief sought by ASIC against Sunshine Loans. Pursuant to those extended orders, on 19 June 2024, ASIC filed detailed written submissions on relief.

62 ASIC's submissions included references to findings made in the liability judgment. Those references summarised the findings made about three of Sunshine Loans' witnesses, including a director of Sunshine Loans, Mr Shane Powe. Mr Powe had already sworn an affidavit for the penalty hearing after the delivery of the liability judgment. The other two Sunshine Loans witnesses criticised by the primary judge had not filed affidavits for the penalty hearing. ASIC's summary of Mr Powe's evidence at [11(h)] of its submissions was as follows:

> Mr Powe gave evidence during cross-examination that was unsatisfactory, (LJ[268]) and "in the manner of someone who had been schooled to advance a particular theory" (LJ[302]) which resulted in his evidence being "preposterous" (LJ[302]). Ultimately, in relation to Mr Powe the Court found that "it [was] clear that he gave his evidence in an attempt to avoid the conclusion that Sunshine Loans was charging fees, otherwise than on a default, and in an attempted justification of its actions. Ultimately, his evidence was not credible in the face of the objective evidence, and he was also not a witness who tried to give his evidence in an honest manner." (LJ[304])

63 The paragraphs of the liability judgment referenced in that part of ASIC's submissions, being LJ [268], [302] and [304], together with the contextual paragraphs at LJ [267] and [301] and [303], were as follows (adverse conclusions identified in ASIC's submissions emphasised):

> [267] One admission was in a letter from Mr Powe of Sunshine Loans to ASIC in response to inquiries being made as to the circumstances in which Sunshine Loans charged Amendment Fees in relation to its SACCs. The letter was dated 23 November 2020 and it stated, in part:

> We would like you to understand that an amendment fee is never charged if a customer is simply amending the contract by informing us of a change in their –
>
> - Personal or employment details.
> - Regular payday from one day to a different day of the week, fortnight, or month.
> - Regular pay frequency.

[268] The natural inference to be drawn is that the Amendment Fee referred to was charged on occasions when the customer was amending the contract in *other* respects. It is apparent that Mr Powe made those comments at a time when he was unaware of their importance. **His evidence in these proceedings to the effect that the fees were only charged upon a borrower's default sits uncomfortably with the above comments, and reveals the evidence given in his affidavit and during cross-examination to be unsatisfactory**.

…

[301] The effect of Mr Bennetts' evidence was that Sunshine Loans and the customers did in fact come to agreements from time to time to vary their original agreement. Those variations could, in the circumstances, only mean that the customer was not obliged to make the originally scheduled payment but would, instead, make a different payment. Sunshine Loans gave effect to that agreement by putting a hold on the making of a direct debit from the customer's account. It is, with respect, nonsense to think that there was no amendment to the SACC in such circumstances. On no sensible view could it be accepted that, despite the agreement, the customer would be in default if they did not make the payments in accordance with the originally scheduled arrangement.

[302] In a similar manner, Mr Powe adhered to the contention that despite the obvious agreement to vary the loan contract between Sunshine Loans and its customers for which the Amendment Fee was paid, no such agreement existed. **He, too, gave evidence in the manner of someone who had been schooled to advance a particular theory**.

[303] Mr Powe accepted that, from time to time, customers who were unable meet their originally agreed repayments would contact Sunshine Loans to see if they could come to some arrangement. He also agreed that Sunshine Loans was able to agree with a customer to defer a scheduled repayment. **However, in the maintenance of the theory which he sought to propound, his evidence became preposterous**. He asserted that an agreement between Sunshine Loans and a customer that a repayment be deferred to a date other than that identified in the original payment schedule did not amount to any change to the terms of the original contract. He denied that such an agreement changed the terms of the relevant SACC:

> You don't agree with that?---No, I don't. Because the original term of the contract is what they signed, and that is the term of the contract.
>
> And that can't be changed by agreement of the parties?---Yes, of course it can, but if they're going to agree to a – a whole new contract, we would have to issue a new contract.
>
> But you can vary the existing contract in terms of its payment terms, can't you, if you choose to do so?---Yes, but that's not – that's not - - -

> Are you saying - - -?---That's not changing the contract. Varying it is not changing it.
>
> Okay. I see?---We can vary – we can vary the terms of the contract. That is not changing the essence of the original contract that was – that was written.

> [304] If he actually believed his statement, "[v]arying it is not changing it", it might be somewhat revelatory in this matter. It might explain why Sunshine Loans treated a customer's payment in accordance with an agreed new payment schedule as constituting default of their SACC. However, Mr Powe was also a not unintelligent person. He was a businessman of some ability and success in his area. It is highly unlikely that he would view the interactions recorded in the customer transaction logs as notifications of default. Rather, it is clear that he gave his evidence in an attempt to avoid the conclusion that Sunshine Loans was charging fees otherwise than on a default, and in an attempted justification of its actions. **Ultimately, his evidence was not credible in the face of the objective evidence, and he was also not a witness who tried to give his evidence in an honest manner**.

64 It is important to note that each of the bold passages are addressing an issue that was critical for the determination of liability and at the very least of great importance to the question of penalties, namely the approach that was taken by Sunshine Loans to the charging of amendment fees that were proscribed.

65 On 24 June 2024, Sunshine Loans filed an interlocutory application for the primary judge to recuse himself from hearing and determining ASIC's application for the pecuniary penalty, together with supporting submissions. Sunshine Loans' recusal submissions foreshadowed the filing of a further affidavit by Mr Powe.

66 Sunshine Loans' written submissions sought recusal upon the basis that the fact of adverse conclusions reached in the liability judgment, including adverse credit findings made against the three Sunshine Loans witnesses, meant that an objective observer could not form the view that the primary judge would bring an unbiased mind to the determination of the issues going to penalty. That assertion is more than what would be needed to meet the test for apprehended bias articulated in ***Ebner*** *v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ), most recently endorsed again by all seven justices of the High Court in ***QYFM*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15; 97 ALJR 419. That test requires only that a reasonable and fair-minded observer *might* believe that a judge *might* not bring an impartial mind to the question before them: *Ebner* at [6]. Both *Ebner* and *QYFM* are considered in more detail below.

67 The relevant question that was to have been addressed by the primary judge was the appropriate penalty in *all* the circumstances, including the stance of Sunshine Loans towards its contravening conduct. That stance was able to be most tellingly gleaned from their attitude towards that conduct as revealed at the liability hearing and assessed in the liability judgment. There was no getting away from the characterisations made by the primary judge.

68 Sunshine Loans' written submissions thereafter, however, did no more than refer to, quote from and characterise numerous paragraphs of the liability judgment as being of themselves a foundation of the asserted apprehension of bias. The primary judge refused to recuse himself upon the basis advanced in Sunshine Loans' written submissions: see RJ[14]-[47]. In particular, his Honour correctly observed at RJ[40] that Sunshine Loans did not, in its written submissions, identify any logical connection between the impugned passages of the liability judgment, which his Honour had already addressed in some detail at RJ[22]-[39], and the apprehended deviation from deciding the question of penalty on its merits, as required by *Ebner* at [8]. Importantly, this wider basis for recusal was not developed any further by Sunshine Loans at the recusal application hearing before his Honour.

69 As foreshadowed in Sunshine Loans' written submissions, Mr Powe swore a further affidavit a week later. It is not necessary to consider that affidavit in any detail in these reasons. It is sufficient to note that he addresses numerous paragraphs of ASIC's penalty submissions, and in so doing also traverses aspects of the findings in the liability judgment relied upon by ASIC. In particular, Mr Powe:

(a) deposes to not believing that Sunshine Loans was in contravention at any time;

(b) asserts that Sunshine Loans had a culture of compliance;

(c) reiterates that the amendment fee was charged to customers because Sunshine Loans was told by them that he or she was going to default in making the next scheduled payment, rather than being charged for the amendment to the payment timetable – an aspect of his evidence that had already been rejected by the primary judge; and

(d) deposes to the significant financial difficulty that would be caused if Sunshine Loans had to pay any penalty that has a deterrent effect, relying upon other affidavit evidence as to its financial resources.

70 At the hearing of Sunshine Loans' recusal application, the primary judge of his own initiative raised a problem he perceived with the prior credit findings his Honour had made in the liability

judgment, the additional affidavit from Mr Powe, and cross-examination of him on that affidavit. His Honour summarised what had taken place at RJ[19]-[20]:

> Sunshine Loans' written submissions in support of the application did not suggest that the Court would be required to form a second assessment of the credibility of any witnesses. As is discussed below, its submissions were directed to other matters. Nevertheless, on the morning of the application I inquired of counsel for ASIC as to whether Mr Powe, a director of Sunshine Loans, and who had filed an affidavit for the purposes of the penalty hearing, would be cross-examined. I was told that he would be. I then asked whether he would be cross-examined as to his credit and, again, I was informed that this would be the case. Mr Powe had given evidence in the liability hearing in relation to whether the alleged contraventions of the *Credit Code* had occurred, and I reached an adverse view of his credibility as is set out in my reasons for judgment on liability.
>
> On ascertaining those circumstances, my position was that it would be inappropriate for me to further hear the matter. Mr Wyles KC, counsel for Sunshine Loans, immediately adopted that position and, in accordance with the authorities referred to above, I recused myself on that basis.

71 The substance of the credit findings made by the primary judge in the liability judgment is reflected in the extracts from the liability judgment reproduced above at [63]. The key passages concerning Mr Powe were relied upon by ASIC in its penalty submissions, and also by Sunshine Loans for its recusal application, including as it developed at the recusal hearing. Those passages involved findings that were part of the "*nature and extent of the contravention[s]*" and formed an important part of "*the circumstances in which the contravention[s] took place*", both being factors required to be taken into account in a penalty determination by s 167(3)(a) and (d) of the CCA.

72 The primary judge's published reasons for recusal elaborated upon his Honour's oral reasoning described at [68] above, but in substance treated it as self-evident that a judge in his position would have no alternative but to recuse. The following extracts from the recusal judgment contain the essence of his Honour's formal and published reasoning:

(a) At RJ[14]-[18]:

> [14] Where a judge is called upon to determine a matter in which she or he has previously made a finding against a person who is then to give further evidence, the concern for the avoidance of any apprehension of bias is acute. Much will, of course, depend upon the circumstances and no general rule is available to resolve every matter. However, in the ordinary course, where a judge has made a finding as to the credit of a witness who will then subsequently give contentious evidence, it is difficult to imagine a circumstance in which that judge may proceed to hear the matter. So much was observed by Besanko J in *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343 [14], where his Honour said:

> Ordinarily, a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide where the judge in a previous case has expressed clear views, either about a question of fact which constitutes a live and significant issue in the subsequent case, or about the credit of a witness whose evidence is of significance on such a question: *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 300. (See also *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 265-266 per Barwick CJ, Gibbs, Stephen and Mason JJ.)

[15] Similar views were aired in the ALRC's report, *Without Fear or Favour*, where the following appears at 366 – 367 [10.77]:

> A previous decision of the same fact or expression of clear views about the credit of a relevant witness, whether in the same proceedings or different proceedings, will amount to a disqualifying ground. [See, eg, *Jess v Jess* (2021) 63 Fam LR 545 [396] (Alstergren CJ, Strickland and Kent JJ); *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343 [20]–[22] (Besanko J); *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 [145] (Heydon, Kiefel and Bell JJ); *Livesey v New South Wales Bar Association* (1983) 151 CLR 288, 300 (Mason, Murphy, Brennan, Deane and Dawson JJ); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, 264 (Barwick CJ, Gibbs, Stephen and Mason JJ)]
>
> (Footnoted references included in text).

[16] That statement, identified by the ALRC as a key principle and as being well established, was cited with approval by Lee J in *Westpac Banking Corporation v Forum Finance Pty Limited (Apprehended Bias Application)* at [13].

[17] The principle as identified is entirely correct. It could easily be seen to be an affront to justice were a judge, who has previously found that a witness (who has taken an oath or affirmation) has been untruthful in their evidence, to attempt to impartially assess that person's credibility on further issues in the same or any other matter. The lack of propriety in the judge attempting to perform a second assessment of the person's credibility is patently self-evident. Indeed, it would be little more than a solemn judicial farce.

[18] No authority was identified which suggested that, in the face of opposition from one of the parties, it was appropriate for a judge to attempt to assess the credibility of a witness for a second time whether in the same proceeding or in separate proceedings. Given the fundamental principles to which I have referred, it is unlikely that there are any.

(b) At RJ[52], after discussing the common practice of bifurcating the hearing and determination of liability in civil penalty cases, and a further hearing as to remedies if a contravention is found to have taken place:

> [52] These matters highlight a tension between the orthodox principles concerning recusal as have been identified above, and the now orthodox method of conducting civil penalty proceedings. Where a judicial officer makes a credit finding against a respondent in civil penalty proceedings in the

> process of determining whether a contravention has occurred, it would follow that they would be required to recuse themselves from determining the appropriate penalty if the respondent was also to give evidence in that second phase of the proceedings. Of course, the mere fact that a judicial officer has made findings against a person in a civil penalty proceeding does not preclude them from hearing the penalty part of the action — that was the thrust of Sunshine Loans' submissions in this case (as initially advanced) and, as I have indicated, it should be rejected. The difficulty arises where a judge will be required to decide an issue based upon contentious evidence from a witness in relation to whom they have previously made an adverse credit finding. As the authorities make clear, that would contravene the long-held traditions of our courts.

(c) At RJ[56]-[57]:

> [56] As ASIC submitted, there are difficulties in a judge hearing a civil penalty action being required to recuse themselves after making a determination on liability, merely because credit findings have been made and the same witnesses may give evidence in the penalty phase of the proceedings, and their credibility may again be put in issue. Importantly, it will regularly be the case that findings as to the credit of witnesses in the liability phase as well as to their conduct of the litigation in that phase will be relevant to penalty and, in particular, the issue of specific deterrence. It is therefore problematic where a judge in a liability judgment makes a finding which may be relevant to both liability and penalty and is then disqualified from subsequently determining penalty. That is especially so given that the penalty determination is, of necessity, based in part on the findings made in the liability judgment. That is true regardless of whether the penalty is determined by the judge who made the findings in the liability phase of the action or not. In the latter case, a different judge would still be required to determine the matter based upon the findings as to credibility made by the initial judge.
>
> [57] In its written submissions, ASIC noted that the present circumstances were, in some ways, akin to a criminal trial determined by a judge alone. That is a useful analogy. In such cases the trial judge is likely to make credit findings about the accused and, often, that will include disbelieving the accused's evidence. The judge is then required to determine the appropriate sentence and may well hear further evidence from the accused during that process. It would be productive of an unnecessary waste of costs were a new judge required to determine an appropriate sentence in such circumstances, and no instance of a trial judge recusing themselves from the imposition of the sentence has been located. If that were to be the process, it would necessitate the new judge familiarising themselves intimately with the liability phase of the proceedings. That would be a significant task, even though the written determination of the first judge might alleviate that to a large degree.

73 The essence of ASIC's appeal is that the primary judge erred by failing to carry out the assessment of the second step of the test at [8] of *Ebner*, discussed below; and that had the second step been properly taken, recusal would not have been required.

Apprehended bias principles

74 In order to frame this unusual appeal from a recusal, rather than the more conventional appeal from a failure to recuse, it is necessary to consider in some detail the principles that apply to an apprehension of bias.

75 The principle that judges must be, and must be seen to be, impartial is of course foundational to the administration of justice. As a majority of the High Court articulated in *Ebner*, subject to the exceptions for waiver and necessity, a judge will be disqualified from deciding a matter where a fair-minded lay observer might reasonably apprehend that the judge in question might not bring an impartial mind to the matter before her or him: *Ebner* at [6].

76 The apprehension of bias will create an exception to a judge's ordinary duty to exercise the jurisdiction of this Court, properly invoked, where a case has been allocated to her or his docket: *Ebner* at [19]. The majority in *Ebner* at [8] set out a two-step process in identifying the reasonableness of the asserted apprehension of bias:

> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

77 The test to be derived from the above passage in *Ebner* may be shortly stated as requiring:

(a) identification of what is said might lead a judge to decide a matter on something other than its legal or factual merits; and

(b) articulation of the logical connection between that factor and the feared deviation from deciding the matter on its merits.

To this is added the express or implied requirement, also sometimes referred to as a third step to the test, that the apprehension of bias so identified must itself be reasonable in all the circumstances: *Ebner* at [8], last sentence; *QYFM* at [38] (Kiefel CJ and Gageler J); ***Isbester v Knox City Council*** [2015] HCA 20; 255 CLR 135 at [59] (Gageler J).

78 The source of apprehended bias in *Ebner* was the trial judge's small financial interest in a bank that, while not a party to the proceedings before his Honour, was a creditor of the bankrupt

defendant before him, and would have benefited from the making of orders sought by the plaintiff. The majority was at pains to emphasise that disqualification would not occur "*automatically*" on identification of a judge's financial interest in a party affected by the litigation before them: *Ebner* at [37], [54]-[55]. Rather, in such cases, "*in the absence of some countervailing consideration of sufficient weight*", a fair-minded lay observer might reasonably apprehend that the judge would not bring an impartial mind to the matter before them: *Ebner* at [37].

79 That is not to say that there are not cases where, as a precaution, it may be appropriate for a judge to recuse herself even if not positively satisfied that the *Ebner* test is met. That will most obviously be the case where an objection is raised early on in a proceeding and where a judge might doubt that the test is met but there is no practical inconvenience in its reallocation to another judge: *Ebner* at [20]-[21]. That process is consistent with modern principles of case management. Indeed, many modern docket allocation systems attempt to pre-empt precisely these issues. Even in such cases, however, it would be "*intolerable*" for parties to invoke some small or trivial basis for an apprehension of bias to seek a judge's recusal: *Ebner* at [21].

80 Several aspects of the test in *Ebner* bear noting. *First*, *Ebner* situates the principle of apprehended bias between two fundamental duties of judicial decision-makers. On one hand, the obligation of a judge *to exercise* the jurisdiction of a court, properly invoked, where a case has been allocated to that judge: *Ebner* at [19]. On the other hand, the obligation *not to exercise* that jurisdiction where an apprehension of bias that meets the test set out above exists: *Ebner* at [6].

81 *Second*, the *Ebner* test is to be applied in all cases: *QYFM* at [39] (Kiefel CJ and Gageler J), [83] (Gordon J), [173] (Edelman J), [245] (Gleeson J, dissenting, though not on the applicable principles), [293] (Jagot J). There is no source of apprehended bias which leads to a presumption of, or an automatic, recusal.

82 *Third*, the hypothetical fair-minded lay observer will be aware of the question the judge is tasked with deciding and its legal, statutory and factual context: *Isbester* at [20, [23] (Kiefel, Bell, Keane and Nettle JJ). Such a hypothetical observer would be aware of the substantial overlap and relationship between contravention findings and remedy (here, penalty) findings in a case such as this, arising from the statutory regime, and more generally for cases of this kind.

83 *Fourth*, the relevant perspective is not that of another judge or member of the legal profession, but a notional member of the public, properly informed.

84 *Fifth*, the sources of an apprehension of bias are "*as diverse as human frailty*": *Ebner* at [8], see also *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; 268 CLR 76 at [132] (Edelman J). Relevantly, this includes pre-judgment of the issues, as was alleged in ***British American Tobacco*** *Australia Services Ltd v Laurie* [2011] HCA 2; 242 CLR 283 at [104].

85 *Sixth*, it is a "*double might*" test, requiring a possibility, on reasonable grounds, that a hypothetical lay observer think it possible that the judge fail to bring an impartial mind to the question she is tasked with resolving.

Categories of pre-judgment cases

86 An examination of key categories of cases in which pre-judgment has been said to give rise to an apprehension of bias introduces a degree of nuance that might otherwise be absent by a consideration only of the principles in the abstract. It is also important to keep steadily in mind that the application of apprehended bias principles is unavoidably case and fact specific. For example, in a given case, the nature of a prior finding on credit, and the way in which it has been expressed may have a material effect on the articulation required by the second step in *Ebner*, and perhaps even more so on the question of the reasonableness of the articulated apprehension.

87 It is helpful to discuss at least some of the situations in which prior credit findings may give rise to consideration of recusal, and then consider how each type has been addressed in practice. The following three categories are not universal or exhaustive, and are no more than a useful tool for analysis:

(a) Separate proceedings, for which a fresh mind must be brought to bear to the determination required in the subsequent proceeding.

(b) Separate determinations in the same proceeding, for which a fresh mind must be brought to bear in each determination.

(c) Separate determinations in the same proceeding, for which conclusions reached in one determination must, or at least may, be brought into account in the other determination, especially when the two determinations have been separated for reasons of efficiency or other case management considerations.

88 It is well-recognised that a judge's previous determination of facts in issue in a proceeding, or the credit of a witness whose evidence is relevant to the determination of a factual dispute, might give rise to an apprehension in the fair-minded observer that the judge might be unable to bring an impartial mind to a new proceeding in which the same facts must be determined: ***Livesey*** *v New South Wales Bar Association* [1983] HCA 17; 151 CLR 288 at 300; *British American Tobacco* at [139]-[145]. In such cases, the logical connection required by the second *Ebner* step is commonly supplied by two bases:

(a) *First*, that expressed findings on a factual matter might lead to the apprehension that the judge will be immovable, or at least difficult to move, from the position reached in the previous proceeding, especially where their findings were expressed in strong or certain terms: *British American Tobacco* at [139], [145]; see also, *Livesey* at 300.

(b) *Second*, given the overlapping subject matter between the previous and subsequent proceedings, the judge may not be able to put from their mind evidence to which regard may not be had: *British American Tobacco* at [140], [145].

89 An implicit presumption in such cases is that judges are not permitted to bear in mind their previous findings, and indeed are often required to make determinations on a wholly new evidential basis. Though this will often be true, and certainly was in *Livesey* and *British American Tobacco*, it is not universally the case. It is useful to step through several examples.

Separate proceedings, for which a fresh mind must be brought to bear to the determination required in the subsequent proceeding

90 Usually, the clearest case is one in which a judge has previously made, in an entirely separate proceeding, findings of fact relevant to a live issue or credit about witness who will give evidence on a live issue in a subsequent matter. In almost all such cases, a judge will be required to put those previous findings from her mind, and to determine questions in the new matter on a wholly different evidential basis. An apprehension that the judge has pre-judged the matter, or will be unable to exclude previous similar evidence from her mind, will ordinarily provide a strong basis for the logical connection required by the second *Ebner* step, and recusal or reallocation will be necessary.

91 *British American Tobacco* is one such example. There, the primary judge was to consider claims brought by the widow of a smoker against a tobacco company, including that the company had destroyed documents evidencing its negligence in the supply of tobacco products.

In a different proceeding, the primary judge had previously made findings that the company had adopted a document retention policy for the purpose of fraud.

92 Those prior findings were in large part based on the acceptance of the evidence of the tobacco company's former in-house counsel and company secretary, who would likely be called to give evidence in the new proceeding: at [107].

93 By majority, the High Court held recusal of the judge to be appropriate. In the joint judgment of Heydon, Kiefel and Bell JJ, their Honours found that the primary judge's previously expressed view on the document retention policy, including his Honour's "extreme scepticism" toward the tobacco company's denials that it was fraudulent, created the distinct possibility that a reasonable observer might apprehend that he would not change his mind even if presented with different materials: at [145].

Separate determinations in the same proceeding, for which a fresh mind must be brought to bear in each determination

94 A more complex situation arises where findings have been made in an interlocutory matter that has issues requiring resolution that are different from, or at least separate and distinct from, those requiring determination in the substantive proceeding. Examples include:

(a) the determination of a privilege claim, which may then affect the admission of evidence on a key issue in a proceeding that would otherwise not be viewed by the trial judge;

(b) an interlocutory injunction application, brought or to be heard before, during or after the substantive hearing or determination, which may involve a preliminary assessment of the very issue still to be determined in the substantive proceeding.

Again, in circumstances such as these, if the problem does arise, recusal or reallocation is likely to be necessary. The risk of this happening is often avoided by allocation of the interlocutory matter to another judge in the first place.

95 Several aspects of the relationship between these kinds of interlocutory decisions and the substantive judgments bear noting. *First*, while the outcome of the interlocutory judgment might affect the determination of the substantive matter – for example, especially in the case of a privilege claim, by preventing the production or admission of certain evidence – the relief sought by the interlocutory application will often be conceptually distinct from the relief sought in the substantive proceeding, with different evidentiary rules applying, such as hearsay being allowed. That is, a different or the same remedy may be sought at the interlocutory stage,

requiring the judge to determine distinct questions to the substantive proceeding, and may involve different, additional or less evidence.

96 *Second*, depending on the nature of the interlocutory application, ordinarily much of the same evidence on which it was decided will form the evidential basis on which the substantive application will be decided. That evidence will have been evaluated for the interlocutory purpose, which may give rise to prejudgment. Those features distinguish it from the first category of cases involving separate proceedings.

97 *Third*, the decision in the interlocutory judgment will often be based on a different or lesser evidential basis than the substantive judgment will be.

98 *Fourth*, in some cases, the judge will be required to have regard to evidence that will not be part of the evidential basis on which the substantive application must be determined (for example, if a privilege claim is upheld preventing certain evidence from being admitted, it is often best that the trial judge never sees that material).

99 All of these aspects might, depending on the nature of the interlocutory application and the findings made about it, give rise to a reasonable apprehension that a judge might not be able to bring an impartial mind to the substantive application. It is therefore common practice that, where it is likely that determination of the interlocutory application will require resolution of a factual issue in dispute in the substantive proceeding, or the credibility of a witness whose evidence will be relevant to that kind of factual determination, a different judge than the trial judge determines the interlocutory dispute.

Separate determinations in the same proceeding, for which conclusions reached in one determination must be brought into account in the other determination

100 A third type of case can be distinguished from the first and second. This is one where the judge is permitted or required to have regard to, and apply, findings made at an earlier stage of the proceedings. In this category of case, a logical connection between findings made at the earlier stage of the proceedings and the feared impartiality at the later stage cannot be established merely on the basis that the judge has determined facts in dispute, or had regard to evidence that is not led at the penalty hearing. These two bases on which the second *Ebner* step may be established in true prejudgment cases are absent here. That is because the judge is *required*, or at least is *entitled*, to have regard to those factual findings, and the evidence on which the appropriate penalty will be determined will overlap, perhaps entirely, with the evidence on

which liability was established. Moreover, the party the subject of the liability finding may wish to revisit aspects of what has been determined, such as to adduce evidence of what has been done to address the problem of a kind that would not be relevant or admissible, or may be prejudicial, at the liability determination stage.

101 In this category of cases, having decided earlier a fact in issue is ordinarily not a case of pre-judgment at all; it is just judgment of a kind that must be carried forward to the next stage no matter who hears it. In those circumstances, a fair-minded lay observer could not find, on the basis only of an earlier credit finding or determination of a live factual issue, that a judge might not be able to bring an impartial mind to the later stage of the proceeding. That is because, in this class of case, the earlier findings and evidence remain relevant to the question before the judge at the next stage, and that is part of the circumstances of which the lay observer is taken to be aware. Not only will it not be impermissible to have regard to them, but any later determination may be required or may be permitted to have regard to them. Neither of the two bases on which previous findings might commonly be said to give rise to a failure to consider a question on its merits – a perception that a judge will be unable to move their mind and that they have been tainted by evidence to which regard should not be had – necessarily applies in these cases. Something more is needed for recusal on the basis of liability findings. The two (or perhaps, three) stage test in *Ebner* needs to be strictly adhered to, so as to ensure that the duty to exercise jurisdiction is not too readily departed from.

102 Sunshine Loans rejects the distinction made for this third kind of case, pointing to the following statement from the majority in *British American Tobacco* at [145]:

> Whenever a judge is asked to try an issue which he or she has previously determined, **whether in the same proceedings or in different proceedings**, and whether between the same parties or different parties, the judge will be aware that **different evidence may be led at the later trial**. … In addition to the possibility of the evidentiary position changing, a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about BATAS's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial – that is, bring an impartial mind to the issues relating to the fraud finding.
>
> (Emphasis added).

103 *British American Tobacco*, however, is an example of the first category in which prior findings are not relevant and the evidential basis for new findings may well be different. That is to be distinguished from this category of case, for the reasons already outlined. In any event, I do not read this as a statement to the effect that, in all cases in which an issue has previously been determined, whether in the same or different proceedings, the logical connection between those previous findings and the feared impartiality in the later matters will necessarily be established. The High Court was simply stepping through, in the specific case before it, how findings made previously on a different evidential basis might reasonably affect the assessment of apprehended bias.

Consideration and determination of ASIC's appeal

104 The primary judge, with respect, appears to have addressed the question of apprehended bias at an instinctive level. Having identified the source of the apprehension of bias, being his Honour's earlier findings about Mr Powe's credit in circumstances in which Mr Powe was to give new evidence, his Honour reasoned at RJ[52]:

> Where a judicial officer makes a credit finding against a respondent in civil penalty proceedings in the process of determining whether a contravention has occurred, it would follow that they would be required to recuse themselves from determining the appropriate penalty if the respondent was also to give evidence in that second phase of the proceedings.

105 In so doing, his Honour completed the first step of the *Ebner* test, but did not squarely address the second (or third). That is, his Honour did not identify the logical connection between the adverse credibility findings about Mr Powe in the liability stage and the feared impartiality at the penalty stage, nor the reasonableness of that fear.

106 That was understandable given that the problem his Honour identified and ultimately perceived as giving rise to the apprehension of bias did not emanate from the parties, was not properly developed or addressed by Sunshine Loans, and was approached in a somewhat deferential way by ASIC having apparent regard to model litigant responsibilities and the personal nature of the determination required to be made.

107 Regrettably, in doing so, his Honour, while obviously well aware of the principles and their ordinary application, was not directed, and did not direct himself, to the statutory regime not only not requiring a fresh mind to be brought to bear, but positively requiring in many respects, or at least permitting in others, the substance of the prior adverse findings, among other things,

to be taken into account. This necessarily extended to the stance taken by Sunshine Loans to the contravening conduct, evidenced through its witnesses' testimony.

108 The source of apprehended bias relied upon in this case is the previous adverse findings made by the primary judge as to the credit of a witness, Mr Powe, who is expected to be cross-examined at the penalty hearing and whose credit will again be in issue, at least to some extent. The substance of the relevant adverse credit finding was in a quite narrow compass, directed to the unsuccessful attempt by Mr Powe to recharacterise the basis for the impugned charge to customers as being for an anticipated default, rather than for changing the agreement as to when a payment was to be made. While that endeavour was described by his Honour as unsatisfactory, schooled to advance a particular theory, preposterous, not credible and not as a witness who tried to give his evidence in an honest manner, those were all important findings focused on a key aspect of the stance taken by Sunshine Loans to the conduct found to be contravening. There was no wider rejection of his evidence or impugning of his character beyond that limited, but important, topic, directly relevant to penalty imposition, and in particular to the need for specific and general deterrence.

109 At this juncture, it is worth reproducing the observation made by the High Court (Mason, Murphy, Brennan, Deane and Dawson JJ) in *Livesey* at 294-5:

> Once it is accepted that a judge should not automatically stand aside whenever he is requested so to do, it is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight and, conceivably, further material and information, will on occasion conclude that a decision of a judge at first instance that he should sit was mistaken and has resulted in a situation where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or prejudgment. Such a conclusion does not involve any personal criticism of the judge at first instance or any assessment of his qualities or of his ability to have dealt with the case before him fairly and without pre-judgment or bias. It is simply an instance of the ordinary working of the appellate process in which the views of the judges who constitute the appellate court prevail over the views of the judge or judges who constituted the court from which the appeal is brought.

110 The case at hand is the reverse situation to that identified in the above passage from *Livesey*. Rather than the primary judge declining to recuse and an appeal court taking a different view with the benefit of being "*removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight and, conceivably, further material and information*", the appeal court here is addressing a problem of possible unjustified recusal with the benefit of time and that perspective.

111 The applicable statutory regime means this case falls in the third category outlined above, with some refinement. In determining ASIC's s 167(1) application for a pecuniary penalty, the judge is compelled by s 167(3) to consider the findings made at the liability stage of the hearing, at least insofar as they include findings about the nature and extent of the contraventions and the circumstances in which they took place; and is entitled to have regard to any other finding that are relevant in the general sense of having a bearing on whether a penalty should be imposed, including as to quantum. That is, the judge is both generally permitted, and in some respects required, to have regard to and apply the findings made in the liability judgment. The same conclusion should apply to other civil penalty proceedings that have been conducted in this bifurcated way, even where the underlying provisions are not set out in this bifurcated way: see the discussion by Keane J of similar provisions in *Commonwealth v Director, Fair Work Building Inspectorate* [2015] HCA 46; 258 CLR 482 at [102]-[103]. The conclusion does not depend on this particular statutory regime.

112 It follows that a logical connection between findings made at the liability stage and the feared impartiality at the penalty stage cannot be established merely on the basis that the judge has already determined facts in dispute, or had regard to evidence that may be revisited or supplemented at the penalty hearing, or even has made adverse credit findings directed to the evidentiary explanation given for what had occurred. That is because the judge is required in some respects, and permitted in others, to have regard to those factual findings. The evidence on which the appropriate penalty will be determined will at least overlap with the evidence on which liability was established.

113 Relevantly, this includes the primary judge's findings about the credibility of Mr Powe and indeed all of Sunshine Loans' witnesses. These findings were relevant to his Honour's findings about the fact and nature of the contraventions, which includes the stance taken to those contraventions. But they will also be relevant to the determination of the appropriate penalty, which must involve regard to the Sunshine Loans' circumstances, including its acknowledgment of wrongdoing and its culture of compliance, which is directly relevant to the central concern with deterrence: see *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 at [18]-[19], [68]-[69].

114 Another way of testing the issue that arises in a case such as this is to consider what a new judge, determining the appropriate penalty, should do with the findings in the liability judgment. Pursuant to s 67(3), the new judge would be required to have regard to some these

findings, and would be permitted to have regard to others. If Sunshine Loans' view were correct however, the new judge would also be tasked with making fresh credit findings about Mr Powe on any new evidence given, untainted by those by the primary judge. Apart from this being an inherently problematic situation, it is difficult to see how the new judge could be seen as bringing a more impartial mind to this task than the primary judge, especially if considering and perhaps applying his Honour's credit findings.

115 This situation also gives rise to the possibility that the new judge could or would make contradictory findings, and then would be impossibly tasked with deciding the appropriate penalty based on the findings of the primary judge (which adopted a dim view of Mr Powe's credit in relation to the contravening conduct) as well as findings in which new evidence he offers, which is accepted. That task is even more complex because, as noted from [69] above, Mr Powe's new evidence retreads ground already covered by the primary judge, in some parts arguably directly refuting his Honour's findings.

116 Ironically enough, the primary judge may be better placed to revise his earlier conclusions in light of new evidence than the new judge might be. His Honour will likely better appreciate nuances and subtleties that explain or qualify the material upon which the particular and narrowly focused adverse conclusions previously reached were based, especially as to the views of the conduct held at the time of the contraventions, at the time of the liability hearing, and at the time of the penalty hearing. No-one is likely to be better placed than the judge who determines liability to understand fully the basis for the conclusions reached. That judge will correspondingly be best placed to bring that knowledge and understanding forward to the penalty determination stage, including in evaluating the relevance and significance of any additional evidence adduced, and additional submissions, made at that stage. In particular, assessment of the stance of the contravenor towards the contravening conduct is likely to be an important consideration on the need for deterrence.

117 There is also a broader question about the extent to which the new judge would be bound by to apply all relevant portions of the primary judge's findings. Sunshine Loans' position raises the prospect that a new judge might reject any of the primary judge's findings in the liability judgment, while also being limited by the declarations his Honour made as a consequence of those findings: s 166(4).

118 Finally, there is a conundrum for the future as to what a judge determining liability, with remedies to be decided if that point is reached as to some or all of the case brought by the

moving party. This cannot readily be put to one side as having no bearing on the question of recusal, because it has a bearing on what a trial judge is meant to do at the liability determination stage.

119 At the penalty stage, Sunshine Loans will need to address these conclusions, and will need to know about them in order to be able to do so. An absence of candour could give rise to issues of denial of procedural fairness to the parties. Addressing those conclusions is precisely what Sunshine Loans sought to do, but without having the primary judge who had reached those conclusions conduct the penalty hearing and determine the appropriate penalty.

120 Should the primary judge tone down the views expressed so as to avoid the basis for recusal, while still holding that view or conclusion? If so, the responding party is denied the opportunity to address this, by way of evidence and/or submissions. Does that stronger withheld view then become manifested for the first time in the remedy judgment, or does it fester below the surface and become a subliminal factor in ascertaining the degree of deterrence required and thus the quantum of the penalty imposed?

121 Or does candour prevail, and recusal become common place, or does the general practice change towards separate judges for the two phases in a case in which moral culpability is or may be important, such as misleading or deceptive conduct, unconscionable conduct, or other breaches of statutory norms? In that case, what is the new judge to do with the candid assessment that has already taken place? Revisit and reassess it? Review the underlying evidence, including the transcript of the evidence and the documents to which it relates? That may be a considerable burden. Or should such conclusions be treated as essentially fixed and immutable? Or some complicated and convoluted combination of the two?

122 These issues are not merely inconveniences that are sometimes the unavoidable price of upholding the principle of apprehended bias. Instead, they point to the conceptual mistake in regarding these previous findings as part of a wholly distinct judicial inquiry and therefore capable of giving rise to the apprehension of bias without more than was present in this case. In proceedings such as this, the second step of the *Ebner* test will require consideration of the logical connection between the credit findings in the liability judgment (as the source of the apprehension of bias) and the findings to be made at the penalty stage (the feared deviation from determining the question on its merits, which must be reasonable). For the purposes of that test, the reasonable lay person is taken to understand, at least in a basic sense, the connection between those liability and penalty determinations. Where, as here, the liability

findings must be, or are permitted to be, carried through to the penalty stage, the logical connection will not easily be established. It was not established in this case. A useful way of framing that assessment can be to consider the proceeding into which a new judge would be stepping, and the extent to which they would be required to pay heed to the previous judge's findings.

123 In my opinion, the better solution lies in attributing to the reasonable and fair-minded observer a better appreciation of what is involved in the process. As Mason J pointed out in *Re JRL; Ex parte CJL* [1986] HCA 39; 161 CLR 342 at 352:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way.

124 The primary judge deciding earlier a fact in issue, namely the credibility of Sunshine Loans' witnesses, was not in truth a case of pre-judgment, but rather a judgment of a kind that was required to be carried forward to the remedies stage regardless of who heard it. In those circumstances, I consider that a fair-minded lay observer, properly informed in even fairly general terms of the relationship between the impugned findings in the course of the liability determination, and their role in relation to the determination of the appropriate remedies (especially penalty), would not find that his Honour might not be able to bring an impartial mind to bear at this second stage of the proceeding. That is not to say that there will never be a case in which liability findings indicating a pre-determined outcome for the next stage could not give rise to recusal.

125 The earlier findings and evidence (including assessment of that evidence following trial) remain relevant to the issues before his Honour, or to any new judge, at that next stage. Not only will it not be impermissible for his Honour to have regard to them, but any later determination may be required or may be permitted to have regard to them. Any new judge would have to do the same, and start with the impugned findings, being in a poorer position in which to reconsider them by reason of not having first-hand knowledge of the evidence from the liability stage, including the oral evidence.

126 It follows that, subject to the notice of contention, the appeal brought by ASIC should succeed.

The notice of contention

127 By the notice of contention, Sunshine Loans in substance seeks to reagitate the reasons initially advanced for the primary judge to recuse himself, which had been rejected by the primary judge: see RJ[22]-[47]. No identification of error in his Honour's careful and thorough reasons in that regard has really been attempted, much less established. His Honour's reasons cannot be improved upon and do not need to be repeated. It follows that the notice of contention must fail.

Conclusion

128 The appeal should be allowed and the notice of contention should be dismissed. ASIC does not seek any order as to costs. In all the circumstances that was a proper and appropriate stance to take and accordingly there should be no order as to costs.

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate: 

Dated: 24 March 2025

REASONS FOR JUDGMENT

COLVIN J:

129 The Australian Securities and Investments Commission alleged that SunshineLoans Pty Ltd had contravened the *National Credit Code*. It sought declarations of contravention and orders imposing pecuniary penalties. A final hearing was conducted on the basis that issues relating to jurisdiction and liability would be determined first, with the terms of any relief, including any orders as to pecuniary penalties, to be addressed later, if required.

130 The primary judge accepted ASIC's case on jurisdiction and liability finding that Sunshine had contravened the Code in the manner alleged. Reasons for those conclusions were published by the primary judge. The reasons included adverse findings as to the credibility of the testimony given by certain officers of Sunshine, particularly Mr Powe a director of Sunshine.

131 Thereafter, Sunshine sought the recusal of the primary judge from conducting a hearing as to penalty. During the hearing of that application, it became apparent that ASIC proposed to cross-examine Mr Powe as to the credibility of statements made by him in a further affidavit said by Sunshine to be relevant to penalty. In consequence, the primary judge formed the view that if he was to conduct the penalty hearing he would be invited to make a second credit finding as to a witness in circumstances where he had already formed an adverse view as to the credit of that witness. His Honour described any attempt by a judge to perform a second assessment of a person's credibility as being 'little more than a solemn judicial farce' that would be lacking in propriety. He determined that it would be inappropriate for him to further hear the matter and ordered that the proceedings be reallocated to another judge. The order as to reallocation also applied to separate proceedings brought by ASIC against Sunshine that were being case managed by the primary judge (although nothing turns on that aspect of the order).

132 If the primary judge is correct then, where a trial is conducted on the basis that the question whether there has been a contravention will be determined before considering the question of penalty, an adverse finding as to credibility in reasoning as to liability will mean that in all likelihood a different judge must determine whether there should be a pecuniary penalty and, if so, the amount of that penalty. The reasoning of the primary judge may also apply to other instances where some issues are tried before others.

133 Leave was granted to ASIC to appeal against the recusal.

134 Significantly, the basis for the recusal in the present case was confined to the primary judge's view that he was being called upon to make a second finding as to the credit of a witness about whom he had expressed adverse views on the issue of credibility. Other matters had been raised by Sunshine before the primary judge in support of the recusal application. However, none of those matters were accepted by the primary judge as reasons for recusal. A notice of contention was filed by Sunshine that sought to rely upon some of those matters in answer to ASIC's appeal. The notice of contention is addressed separately at the end of these reasons. As is there explained, the contention that there had been some aspect of the way in which the hearing as to jurisdiction and liability had been conducted that gave rise to a reasonable apprehension of bias on the part of the primary judge in further adjudicating the proceedings between the parties should not be accepted.

135 Therefore, the appeal raises a short but important question. Speaking broadly, it concerns the circumstances in which a reasonable apprehension of bias may arise where a judge who has made an adverse finding as to the credit of a witness in one hearing is called upon to evaluate the credit of the same witness in a subsequent hearing within the same proceeding.

136 As to the resolution of the appeal, I have the considerable benefit of being provided with a draft of the reasons of Bromwich J in which the relevant principles as to apprehension of bias are summarised in terms with which I respectfully agree. I also have the considerable benefit of being provided with a draft of the reasons of Perram J.

137 For the reasons which follow, I agree with Bromwich J that the appeal should be allowed with the proceedings being remitted to the primary judge to conduct the further hearing as to penalty.

138 The primary judge reasoned by analogy from instances where it was concluded that a fair-minded lay observer might reasonably apprehend that a judge might not bring an impartial mind to the resolution of an issue as to the credibility of the testimony of a witness where the judge had expressed clear views about the credit of the witness in a previous case. In my view, there are important distinctions between an instance of that kind and the present case where the trial in a single proceeding is conducted by way of successive hearings.

139 Application of the test as to apprehension of bias requires the consideration of what the fair-minded lay observer would be taken to know: *Director of Public Prosecutions v Smith* [2024] HCA 32 at [95] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ). While the fair-minded lay observer is not assumed to have a detailed knowledge of the law, the reasonableness of any

suggested apprehension of bias is to be considered in the context of ordinary judicial practice: *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [13] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). Also, in assessing possible bias, the fair-minded lay observer 'is to be taken to be aware of the nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision': *Isbester v Knox City Council* [2015] HCA 20; (2015) 255 CLR 135 at [23] (Kiefel, Bell, Keane and Nettle JJ).

140 The hearing that was conducted by the primary judge was a form of trial that is commonly undertaken. It involves the Court separating the trial of what may be loosely referred to as 'liability' from the later adjudication of certain aspects of the relief that may be appropriate if liability is established. In some cases, the assessment of the quantum of any compensation or damages to be awarded is deferred. In others, the precise terms of appropriate relief may be deferred.

141 In a case like the present where there is a claim to pecuniary penalties, it is common to defer the question whether there should be a pecuniary penalty and, if so, the quantum of the penalty, until after the Court has determined whether there has been a contravention of a kind for which a pecuniary penalty may be imposed.

142 In each instance where the final resolution of the case is split in the way I have described, reaching a conclusion as to those issues which must be resolved in order to determine whether there is substantive liability before addressing issues as to the form or quantum of relief is a course that promotes obvious efficiency. It means that the parties do not need to make submissions as to the form or quantum of relief unless and until liability is established. It also means that evidence that is relevant solely to the form or quantum of relief need not be adduced unless there is a need to do so. If the Court determines that there is no substantive liability then those further matters fall away. This is not just a matter of avoiding unnecessary costs. In many instances, there are different permutations as to possible outcomes that mean it would be very difficult to be able to present a case that addresses the full range of possibilities that may bear upon the terms of relief. In such instances, fairness to both parties in the conduct of the proceedings is aided by addressing questions as to the form or quantum of relief after the nature and extent of any liability as determined by the Court is known to the parties.

143 In addition, it is a decision-making practice that enables a judge to determine the appropriate penalty or the quantum of damages or other relief by taking into account all that occurs during

the first hearing as well as any additional evidence and submissions presented at the second hearing.

144 In such cases, the first and second hearings are not separate judicial adjudications. Rather, the first hearing is conducted on the basis that everything that occurs in that hearing that might also bear upon the form or quantum of relief may be brought to account in adjudicating the matters to be addressed at the second hearing (if required). This goes beyond evidence in the first hearing being able to be relied upon in the second. It concerns all aspects of the first hearing, including any views of a kind that quite properly might be formed in the course of adjudicating a trial conducted at a single hearing.

145 Significantly for present purposes, inherent in the staged nature of the trial is the contemplation that the same judge would conduct both hearings. In my view, the fact that the two hearings are to be conducted by the same judge and the prospect that any aspect of what might occur at the first hearing might be brought to bear by the judge at the second hearing are matters that the fair-minded lay observer would be taken to know.

146 For present purposes, instances in which the final trial as to liability is conducted before those aspects of the final trial that concern remedies are to be distinguished from other forms of separate hearings within the same proceedings.

147 Here, we are concerned with instances where the final trial is conducted in two stages in the manner just described. In such instances, the first hearing has a particular characteristic that is a function of the fact that it is conducted in the contemplation that the second hearing will take on a particular form; namely anything that occurs at the first hearing may be brought to account in resolving the issues that have been held over to the second hearing (if required). The second hearing has a supplementary character. It proceeds on the foundation of what has happened at the first.

148 For example, in a case like the present, when it comes to determining an appropriate penalty the court must have regard to the need for the penalty to operate effectively by way of specific and general deterrence. Undertaking an assessment of that kind requires a view to be taken as to the nature and quality of the contravening conduct; that is, it requires an assessment to be made of the level of seriousness of the contravention. However, in determining at the first hearing whether particular conduct contravenes a statutory proscription it will not be necessary for a judge to form a view as to the seriousness of the conduct. Therefore, in providing reasons

after the first hearing as to whether liability has been established, the primary judge may not be called upon to make findings characterising the seriousness of any contravention that is found to be established. Nevertheless, in all likelihood, the judge conducting the first hearing, knowing that there will be the second hearing if liability is established, will form views as to the seriousness of the conduct. The fact that views of that kind might be formed, of itself, would not give rise to a reasonable apprehension of bias on the part of the judge that would disqualify the judge from conducting the second hearing. That is because, as I have mentioned, a fair-minded lay observer will know that the second hearing is not to be conducted as a separate and fresh adjudication unaffected by what has occurred in the first hearing.

149 Of course, as with any trial, there is the possibility that a judge may conduct some part of the proceedings in a manner that may give rise to a reasonable apprehension of bias. If that occurs during the course of the first hearing then that may found a basis for recusal (just as it may found an application for recusal during a trial). However, the due performance by a judge of the judicial function during the first hearing could not found a basis for recusal from conducting the second hearing (any more than it would during a trial). The making of credibility findings as to the testimony of a witness, even if firmly expressed, is an example of the due performance of the judicial function. Indeed, given the nature of the procedure, where such findings may be expected to have significance for the second part of the hearing process, it would be appropriate for the terms in which they are expressed to reflect the conclusions that have been reached by the judge.

150 All this flows from the particular nature of the successive hearings that are contemplated when arrangements of the kind that occurred in the present case are made for the conduct of a trial. They contemplate, in effect, one trial that is interrupted by a decision given by the judge on some but not all issues which then governs the next stage of the trial.

151 Consequently, in the present case, the primary judge was not called upon to make a second adjudication of the credibility of Mr Powe that was to be formed independently of any view as to his credibility that was formed in the course of the first hearing. Rather, he was able to carry forward those views into the second hearing. Indeed, it was expected from the nature of the successive hearings that he would do so.

152 Importantly, in cases like the present where the trial is split in the manner described, the parties know from the outset that the second hearing (if required) will proceed on the foundation of all that has occurred in the first hearing. The prospect that an adverse view may be formed in the

first hearing as to the credibility of a witness or as to the significance of aspects of the evidence that will have a bearing upon matters to be determined in the second hearing (if required) or even as to matters that will be required to be found in the second hearing (provided the judge does not do anything that would cause a fair-minded lay observer to question whether the judge remains open to be persuaded by other evidence that may be adduced in the second hearing) will not give rise to a reasonable apprehension of bias. It will not do so because the fair-minded lay observer will be aware of the particular nature of the successive hearings.

153 Further, because the parties will be aware from the outset of the first hearing that events that occur during the first hearing (including views formed by the judge as to the credibility of witnesses) may have consequences for the second hearing, they will approach the first hearing on that basis. They will be aware that the due discharge by the judge of the judicial task of adjudicating the issues in the first hearing might have adverse consequences for the way in which the judge is likely to determine matters at the second hearing. The impartiality that the judge must bring to the determination of the issues to be considered at the second hearing (if required) could not be called into question for the purposes of the second hearing on the basis of the judge's due discharge of the judicial responsibility in undertaking the first hearing.

154 There would be considerable unfairness to a party in the same position as ASIC in the present case if the second hearing were now to be conducted by a judge who had not heard and determined the issues raised at the first hearing. Having participated in the first hearing on the basis that it will be the foundation for the judge proceeding to determine penalty (if required) at a second hearing in which the views formed by the primary judge in the first hearing may be brought to account at the second hearing, any such party would then have to conduct the second hearing before a judge who had not participated in the first hearing. Which is not to say that the second hearing could not be conducted by another judge. But the consequences I have described would be very significant reasons as to why, in the ordinary course, both hearings would be conducted by the same judge.

155 The above analysis depends upon the successive hearings having the character and qualities I have described. Not all successive hearings within a single proceeding will be conducted on such a basis. For example, a judge may be called upon to determine whether an interlocutory injunction should be granted. Usually, an application of that kind is able to be disposed of by the judge without forming firm views as to whether the account of a particular witness is to be accepted. However, it is possible that the respondent to an application may succeed in opposing

the grant of an injunction on the basis that the account of a key witness relied upon to demonstrate that there would be considerable damage if an injunction was not granted may be found to lack any credibility with the consequence that the application for an interlocutory injunction is refused. If the applicant was to then take the case to trial and seek to rely upon evidence from the same witness, then a fair-minded lay observer may have a reasonable apprehension that the judge who declined the application for injunctive relief on the basis of a view as to the credibility of that witness might not bring an impartial mind to the resolution of the question whether the key witness is to be believed. The reason why that may be so is because the hearing of an application for injunctive relief is not conducted as the first of two hearings in which all that occurs at the first is to form the foundation for the second.

156 A different example is presented by an instance where a judge inspects privileged material for the purposes of adjudicating a claim to privilege. In such instances an issue may arise as to whether the same judge should preside at the trial of the substantive claim. In order to avoid any issue of that kind it is relatively common for any significant interlocutory issue of that kind to be heard by a judge other than the case managing judge (being the judge who would usually preside at the trial). Again, in such an instance, different considerations pertain when it comes to assessing whether any apprehension of bias may arise from a judge conducting the interlocutory hearing concerning the privilege claim. That is because the hearing is not conducted on the successive basis that I have described, where there is a separation of the trial of issues as to liability and relief.

157 I note that a ruling on evidence in the course of a trial would give rise to a different analysis because the trial would be undertaken on the basis that the judge would conduct the whole of the trial, including forming views as to evidence received on a voir dire that may be adverse to a particular party.

158 Where orders are made for a trial of separate questions then much will depend upon the circumstances in which the orders are made and whether it might be concluded that it was contemplated that the presiding judge would carry forward views formed in the course of such a trial into any subsequent trial of the remaining issues.

159 It is also important to distinguish the point at issue in the present appeal from principles that are concerned with issue estoppel. In a case like the present, the reasons given by the primary judge after the first hearing will give rise to findings of fact and law. Issue estoppel (and related parts of the doctrine of abuse of process) would mean that in the ordinary course findings as to

the nature and quality of the contravening conduct made at the first hearing could not be called into question at a later hearing as to penalty. Evidence that seeks to contradict those findings could not be led. For example, it would not be open to Sunshine to seek to contradict findings made by the primary judge on the questions of jurisdiction and liability (as upheld in the separate reasons published as to Sunshine's appeal as to those findings). However, the point at issue in the present case concerns those issues which have not yet been determined in respect of which evidence is sought to be led from Mr Powe. It is not the relevance of the findings at the first hearing to what must be decided in the second hearing that gives rise to the point that led the primary judge to order the reallocation of the penalty hearing.

160 The particular concern that caused the primary judge to recuse himself from the conduct of the penalty hearing in the present case was the formation of adverse views as to the credit of Mr Powe expressed in the reasons published by the primary judge in concluding that the contraventions alleged by ASIC had been established. They have been set out in the reasons of Perram J.

161 It may well be the case that the primary judge will be called upon to determine whether further evidence of Mr Powe that relates solely to the question of quantum (and therefore is properly to be adduced at the second hearing) should be accepted as credible. It is true that the primary judge will not have made any finding as to whether that additional evidence should be accepted as credible and the primary judge is likely to bring to account the views as to credit that have already been formed. However, for reasons that have been given, that is not a reason why a fair-minded lay observer would apprehend that the primary judge would not bring an impartial mind to the resolution of the question of the credibility of Mr Powe. That is because there is no reason to question the impartiality of the adjudication made in the first hearing and, as has been explained, the particular nature of the successive hearings to be conducted by the primary judge means that views formed in the first hearing are properly to be brought to account in undertaking the adjudication at the second hearing.

162 It follows that ASIC's appeal must be upheld. However, it is appropriate to be clear that I do not accept certain aspects of the way in which ASIC put its case in support of its appeal. ASIC contended that there was no apprehension of bias when it came to the further hearing as to penalty because any judge who undertook a determination of the appropriate penalty would be required to consider, not to disregard, the earlier evidence (and its credibility) insofar as it bears on the question of deterrence. That is to say, any new judge on reallocation would have to

reach a conclusion as to the character and quality of the conduct that amounted to a contravention, including the credibility of any account given by a person like Mr Powe, who was in a position of authority within Sunshine, as to why the relevant conduct had occurred.

163 The fact that aspects of the findings made in the first hearing would bear upon the conclusions to be reached as to the issues for determination in the second hearing was not a basis for concluding that there was no apprehension of bias when it came to determining the credibility of the *further evidence* from Mr Powe that Sunshine sought to rely upon at the second hearing. The fact that the judge conducting a hearing will be bound to give effect to findings made between the parties in an earlier hearing is not a reason, in and of itself, as to why it would be appropriate for a judge who had formed adverse views in the earlier hearing as to matters to be decided in the further hearing would be able to do so without giving rise to an apprehension of bias. If the issues in the further hearing were required to be determined independently of views formed in the first hearing then the adverse views previously formed may well give rise to an apprehension that the judge would not bring an independent mind to bear in resolving the issues at the further hearing. Much depends upon due understanding of the basis upon which the first hearing was conducted.

164 Respectfully, the error of the primary judge in the present case was to view the penalty hearing as if it was a separate and distinct hearing to be conducted without any of the views formed during the first hearing being carried forward into the second hearing. It led the primary judge to adopt that same perspective for the independent fair-minded lay observer. It thereby attributed the observer with a false understanding of the nature of the second hearing. An observer who knew that the first hearing was conducted on the basis that views formed by the primary judge in the first hearing would be carried forward into the second hearing would not reasonably apprehend, on the basis that credibility findings had been made and expressed in the terms they were expressed in the present case, that the primary judge would not bring an impartial mind to the conduct of the two staged hearing process.

165 ASIC further submitted that there could be no automatic disqualification in a case where a judge was called upon to make an assessment of the credibility of a witness who had been the subject of adverse credit findings by that judge at an earlier time. Rather, what was required was close attention to the question that was required to be decided. In a case where a claim was made for the imposition of civil penalties this was said to give rise to a single question, namely whether to order the penalties sought. The fact that the primary judge had first heard

and determined issues of jurisdiction did not detract from the fact that there was a single question to be determined. This notion of a single overall question was said to be determinative in the sense that its existence meant that no apprehension of bias could arise from the adjudication of the single question being conducted in two stages.

166 The precise content of this 'single question' analysis was somewhat illusory. In a sense, every case involves a single question as to whether the remedy sought by the applicant should be granted. Yet, ASIC's submissions tended to suggest that there was something about the nature of the claim to a pecuniary penalty that meant that the division of the adjudication of the case into a hearing on liability followed by a hearing on penalty meant that there was, in effect, one hearing and, consequently, no apprehension of bias in one judge determining one hearing. Precisely why that may be so, was not clear. I am not persuaded by ASIC's single question analysis.

167 Which leaves only the notice of contention advanced by Sunshine. In that regard, I respectfully agree with Bromwich J that Sunshine has not really attempted, much less established, error in the primary judge's reasons for rejecting Sunshine's other alleged grounds for recusal. As explained in the separate reasons in respect of the appeal brought by Sunshine as to the decision of the primary judge on jurisdiction and liability (published at the same time as these reasons concerning ASIC's appeal), the findings by the primary judge in the reasons on that part of the case, including those as to the lack of credibility of Mr Powe and other witnesses, were impeccably made. The suggestion that there was some aspect of the way in which those findings were made that called into question the impartiality of the primary judge when it came to the question of penalty was ill-founded.

168 I agree with Bromwich J as to the orders to be made.

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

Associate: 

Dated: 24 March 2025