FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3) [2024] FCA 786

File number:	QUD 190 of 2022
Judgment of:	**DERRINGTON J**
Date of judgment:	18 July 2024
Catchwords:	**PRACTICE AND PROCEDURE** – application for recusal – regulator's proceeding for the imposition of a civil penalty – where hearing in relation to liability split from hearing in relation to penalty – where credibility findings made against respondent in the reasons relating to the determination of liability – where respondent is to give evidence and be cross-examined in penalty hearing – whether judge is able to continue to hear the matter – application allowed
Legislation:	*National Consumer Credit Protection Act 2009* (Cth)
Cases cited:	*Antoun v The Queen* (2006) 80 ALJR 497 *ASIC v Managed Investments Ltd and Ors (No 10)* [2017] QSC 96 *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd* (2016) 112 ACSR 138 *Australian Securities and Investments Commission v GetSwift Ltd* (2023) 167 ACSR 178 *Australian Securities and Investments Commission v King* (2020) 270 CLR 1 *Australian Securities and Investments Commission v Rent 2 Own Cars Australia Pty Ltd* (2020) 147 ACSR 59 *Australian Securities and Investments Commission v Rent 2 Own Cars Australia Pty Ltd (No 2)* (2022) 159 ACSR 528 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345 *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2015] FCA 1343 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 *Martin v Norton Rose Fulbright Australia (No 2)* [2020]

	FCAFC 42 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419 *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97 *Westpac Banking Corporation v Forum Finance Pty Limited (Apprehended Bias Application)* [2022] FCA 981 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021) Cam Truong KC and Matthew Peckham, 'Civil Penalty Proceedings: A Practitioner's Guide' (15 September 2022) James High (ed), *Speeches of Lord Erskine: While at the Bar* (Callaghan & Company, 1876) vol 1
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	59
Date of hearing:	5 July 2024
Counsel for the Applicant:	Mr M Brady KC with Mr S Cleary
Solicitor for the Applicant:	Gadens
Counsel for the Respondent:	Mr M Wyles KC with Mr A Collins
Solicitor for the Respondent:	O'Shea Lawyers

ORDERS

QUD 190 of 2022

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

ORDER MADE BY: **DERRINGTON J**

DATE OF ORDER: **5 JULY 2024**

THE COURT ORDERS THAT:

1. The following proceedings be transferred to the National Operations Registrar for the purposes of reallocation to another judge of the Court:
   (a) *Australian Securities and Investment Commission v SunshineLoans Pty Ltd (ACN 092 821 960)* (QUD 190 of 2022); and
   (b) *SunshineLoans Pty Ltd (ACN 092 821 960) v Australian Securities and Investment Commission & Anor* (QUD 338 of 2024).
2. The costs in the recusal application be costs in the penalty hearing.
3. The applications for adjournment be dismissed.
4. There be no order as to costs of the adjournment applications.

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

REASONS FOR JUDGMENT

DERRINGTON J:

Introduction

1 In the present proceedings, the Australian Securities and Investments Commission (ASIC) seeks relief against SunshineLoans Pty Ltd (Sunshine Loans) in respect of certain alleged contraventions of the *National Consumer Credit Protection Act 2009* (Cth) (NCCPA). As is not uncommon in proceedings to recover civil penalties, ASIC proposed that the Court deal with the question of whether Sunshine Loans had contravened any statutory provisions ahead of conducting any hearing in relation to the appropriate relief, including penalties. That was acceded to and acquiesced in by Sunshine Loans, and a hearing on liability occurred over six days in July, September and October 2023.

2 Judgment on the issue of liability was delivered on 12 April 2024: *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345. In those reasons, findings were made to the effect that Sunshine Loans had, on numerous occasions, contravened certain provisions of the *National Credit Code*, being Sch 1 to the NCCPA (*Credit Code*). On ASIC's request, no declarations were made on the handing down of the reasons for judgment. The intended purpose of that approach was to allow for the declarations to be made at the same time as the imposition of any penalty, thereby preventing the commencement of the appeal period until that time.

3 On 26 April 2024, directions were made to facilitate the hearing on the question of the relief to be sought against Sunshine Loans (hereinafter, the "penalty hearing"). They included directions requiring the filing and serving of any further affidavits and written submissions on which the parties intended to rely. The matter was listed for hearing on 5 July 2024.

4 On 24 June 2024, following the filing of ASIC's submissions in relation to penalty — which revealed that ASIC sought the imposition of penalties totalling $10.5 million — Sunshine Loans filed an application seeking that I recuse myself from conducting the penalty hearing. That application was heard on 5 July 2024, being the date originally set for the penalty hearing. On becoming aware during the hearing of certain circumstances which had arisen, I concluded that it would be inappropriate for me to proceed to hear the question of penalty, and I made orders that the matter be reallocated to another judge of the Court. These are the reasons for that decision.

The essential issue

5 Ultimately, the quintessence of my conclusion that I should recuse myself was that, as I had made adverse credit findings in relation to the directors of Sunshine Loans in my reasons for judgment on liability, it would be inappropriate for me to conduct the penalty hearing in circumstances where I would again be required to assess the credibility of one or more of them. So framed, the resolution of the recusal application was rather obvious. It ought to be noted, however, that it was not apparent until the hearing that one of the witnesses in respect of whom I had previously made credit findings was to give evidence in the penalty hearing, that he would be cross-examined, and that his credit worthiness would again be put in issue.

Relevant principles

6 The principles relevant to the issue under consideration were not in dispute. Importantly, they have a long and respected history: see *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 343 – 344 [3] – [4] (*Ebner v Official Trustee*) and the discussion in the Australian Law Reform Commission (ALRC) report, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021) 40 – 44 [2.5] – [2.14] (*Without Fear or Favour*), which shows that the principles have a lineage reaching back to ancient times.

7 Even in more modern times the principle has remained clear. In the trial of Thomas Paine on 18 December 1792, Thomas Erskine, who later became Lord High Chancellor of Great Britain between 1806 and 1807, referenced the importance of the impartial administration of justice in his address to the jury, as follows:

> If I were to ask you, gentlemen of the jury, what is the choicest fruit that grows upon the tree of English liberty, you would answer, security under the law. If I were to ask the whole people of England, the return they looked for at the hands of government, for the burdens under which they bend to support it, I should still be answered, security under the law; or, in other words, an impartial administration of justice. So sacred, therefore, has the freedom of trial been ever held in England; so anxiously does justice guard against every possible bias in her path, that if the public mind had been locally agitated upon any subject in judgment, the forum has either been changed, or the trial postponed.
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> (Taken from James High (ed), *Speeches of Lord Erskine: While at the Bar* (Callaghan & Company, 1876) vol 1).

8 The import of that exhortation to the jury envelops the shibboleth that justice must not only be done, but must be seen to be done. This requires that every form of partiality, whether actual or apprehended, be removed from court processes. That has remained a sacral element of the administration of justice in England and, on settlement, it was imported to this country along

with the rest of the common law. It is, perhaps, apt to keep in mind that Thomas Erskine's observations remain as true today as they were when uttered. It is also true that the concept of the impartial administration of justice has never not been under attack from those who would seek to use the court process for collateral purposes. Whilst, in the 232 years since Thomas Erskine's majestic, albeit unsuccessful, address the courts which are derivative of the English tradition have largely remained steadfast in their adherence to strict impartiality, it remains to be seen whether the ideological politicisation of institutions — which is so prevalent in the 21st century — will diminish their hitherto resoluteness. Certainly, when courts readily acquiesce to being used in "lawfare" by political or activist groups, they will sow the seeds of an imminent demise.

9 In any event, for present purposes, the uncompromising protection of that principle remains a dominant consideration when a judge is invited to recuse themselves from the further hearing of a matter on the basis of an apprehension of bias. So much was made clear in *Ebner v Official Trustee*, where the High Court identified (at 344 – 345 [6]) that the relevant test to be applied in such circumstances is whether 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. Importantly, the test does not require that the fair-minded lay observer might reasonably apprehend that the judge *will* not bring an impartial mind to the resolution of the issue. It is whether the judge *might* not bring an impartial mind to it. The bar is set at a relatively low level so that a principle of the highest value might remain protected.

10 The nature and scope of the principles on this topic, including their applicability to decision-making by the executive, were subsequently articulated by Nettle and Gordon JJ in *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, 97 – 98 [53] – [55], where their Honours said:

> **Apprehended bias**
>
> 53 The rule against bias for judicial and administrative decision-makers is long standing. The public is entitled to expect that issues determined by judges and other public office holders should be decided, among other things, free of prejudice and without bias. Bias, although incapable of precise definition, "connotes the absence of impartiality".
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> 54 The rule against bias is one aspect of the requirements of procedural fairness. Breach of the rules of procedural fairness, including where apprehended bias is demonstrated, constitutes jurisdictional error, attracting relief under s 75(v) of the *Constitution*.
>
> 55 As the rule applies to any decision which is subject to the principles of

> procedural fairness, it applies "not only to the judicial system but also, by extension, to many other kinds of decision-making and decision-makers". The rule is concerned with public confidence in the administration of justice. It is important to the quality of decisions being made and to the confidence and cooperativeness of individuals affected by those decisions. By enhancing the appearance and actuality of impartial decision-making, it fosters public confidence in decision-makers and their institutions.

(Footnotes omitted).

11 However, any apprehension of bias is not sufficient. The apprehension must be "reasonable" in the eyes of a fair-minded lay observer. Experience has shown that many seeking to avoid facing the justice of the courts will grasp at allegations of bias or partiality to evade the consequences of their actions. A claim of bias may be made to delay the proceedings whilst the litigant organises their affairs in such a manner to avoid the inevitable judgment which will be made against them, or because they perceive that their case may be more favourably viewed by a different judge. As Lee J observed in *Westpac Banking Corporation v Forum Finance Pty Limited (Apprehended Bias Application)* [2022] FCA 981 [16], whilst judges may hold concerns about the cost, delay, reputational damage and inconvenience of an appellate court taking a different view as to whether they ought to have recused themselves, there exists a countervailing consideration in the equation, being the "duty to sit where not disqualified": see also *Without Fear or Favour* at 206 [6.55], 236 [7.20]. It would erode public confidence in the courts were judges to recuse themselves too readily from further determining matters where allegations of bias or apprehended bias are made frivolously or for an improper purpose: *Ebner v Official Trustee* at 348 [20]. That can be avoided by close and rigorous adherence to the now established principles.

12 In *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 419, 432 – 433 [38], Kiefel CJ and Gageler J reiterated the three-step application of the apprehension of bias principle, as follows:

(a) identification of the factor which it is said might lead a judge to resolve the question required to be decided, other than on its legal and factual merits;

(b) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on the merits; and

(c) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.

13 The application of these principles strikes the required balance between the maintenance of public confidence in the courts by ensuring the exclusion of any apprehension of bias on the one hand and, on the other, ensuring that misguided or opportunistic allegations of bias do not derail the courts' processes.

A second determination of the credit of a witness

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)]
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> (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.

The requirement to make a second credit finding in this case

19 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.

20 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.

21 Despite the foregoing, it is appropriate to briefly address the application as it was initially framed by Sunshine Loans. As is discussed below, I did not recuse myself on that basis.

Sunshine Loans' approach to establishing apprehended bias

22 ASIC submitted that it was unclear whether Sunshine Loans' application, as framed by its written submissions, was founded upon apprehended bias or actual bias. When that was put to counsel on behalf of Sunshine Loans, it was adamantly asserted that the only reliance was upon

apprehended bias. Still, the actual concern on which that was based was not entirely clear. The written submissions did not raise that the Court would be required to assess the credit of a witness whose credit had previously been found to be wanting. On the contrary, the complaint appeared to be that, as a result of the previous findings that certain directors and officers of Sunshine Loans had been untruthful when giving their previous evidence, it would be apprehended that the Court might not bring an impartial mind to bear in relation to the issue of penalty. The submission has the effect that, once a court makes credit findings against a party to a proceeding, it cannot then proceed to determine any further issues in the action. That cannot be accepted. Were that to be so, it would follow that when a judge is deliberating upon a matter and reaches a conclusion that a party cannot be believed, they would be required to cease their decision-making process. No action involving the credit of a party could be finally determined.

23 It may have been that Sunshine Loans was attempting to suggest that the nature and extent of the findings as to the lack of credibility of certain of its directors and officers rendered it impossible for the Court to determine any further issues. Importantly, Sunshine Loans did not submit that the findings were incorrect, or that the Court unfairly assessed the veracity of Sunshine Loans' submissions or the case which it advanced — though it should be noted that there is authority for the proposition that, on applications for recusal, it is not necessary to consider whether the findings made against a party were correct or justified in the circumstances: *Antoun v The Queen* (2006) 80 ALJR 497, 517 [83] – [85]. However, as mentioned, the complaint appeared to be that the manner of the Court's expression in the liability judgment reflected an animus, or the possibility of it, against Sunshine Loans, which would carry over into the penalty hearing.

24 Sunshine Loans relied upon a number of passages from the liability judgment in support of its allegation of apprehended bias. It is helpful to refer to some of them to demonstrate the nature of its initial application.

25 The first passage relied upon was [137] of the reasons, which is extracted below:

> 137 Sunshine Loans also complained that ASIC had adduced "limited evidence" which could enable the Court to reach "a reasonable decision". As is discussed subsequently in these reasons, there is no deficiency in ASIC's case and nor is its evidence limited. On the contrary, the case is a strong one. Once the nature of Sunshine Loans' obligations under the NCCPA are identified and the terms of the SACCs understood, the contraventions alleged by ASIC are almost self-evident, in the sense that they follow from the finding that the Amendment Fee was prohibited.

26 In relation to this passage, it was said that the use of the word "complained" was pejorative. That, itself, is a somewhat unusual criticism, given that a brief perusal of reported decisions from the High Court, and courts below, reveals that the use of that word in that manner is commonplace and carries with it no deprecatory connotations.

27 Secondly, the identification of ASIC's case against Sunshine Loans as being "a strong one" was said to evidence "a predisposition which is irrelevant to the exercise of judicial power". That, too, was an unusual complaint in circumstances where Sunshine Loans' submissions were, in part, to the effect that ASIC's case against it failed *in limine*. The strength of ASIC's case had been raised by Sunshine Loans and it cannot complain if a finding is made in that respect. The fact that it does not like the finding or disagrees with it cannot form a basis for recusal. Moreover, the strength of ASIC's case against Sunshine Loans and its response to it will be relevant to the consideration on any penalty hearing as to what is necessary to deter it from breaching the *Credit Code* in the future.

28 It was next said that the following observation at [152] of the reasons was gratuitous criticism and indicated a "disdain" for Sunshine Loans which would lead the Court away from an impartial determination of the appropriate amount of penalty:

> Whilst the various iterations of the SACCs are poorly drafted, at least to the extent that they were intended to achieve clarity …

29 That is somewhat perfidious in the circumstances — the manner in which Sunshine Loans' loan agreements were drafted was in issue and, as the reasons for judgment reveal, some of the fees which Sunshine Loans had charged were evidenced in their agreements merely by reference to the name given to the fee, without any explanation as to how or when they might be imposed. Though Sunshine Loans sought to rely upon this paucity of expression in support of its propounded construction, it was unsuccessful. Again, the fact that Sunshine Loans disagrees with certain findings cannot form a basis for recusal.

30 At the heart of the case was whether certain fees, which were referred to in the loan agreements and account statements as an "Amendment fee" or a "Rescheduled payment fee", were fees charged upon a borrower's default under the relevant loan agreement. Contrary to the natural assumption that a fee which is charged when the lender and borrower agree to amend the timing of repayments and which is described as an "Amendment fee", is a fee payable upon an amendment to the loan agreement, Sunshine Loans asserted that it was a fee payable on default. In particular, it had submitted that the evidence before the Court demonstrated that its practice

was not to charge an Amendment Fee until the end of the loan period, by which time the borrower had not paid the instalments on the loans in accordance with the initially agreed schedule. The findings made in relation to that submission were as follows:

> 198 The first and most obvious difficulty with Sunshine Loans' contention is that for a fee to be within the scope of s 31A(1)(c), such that it is "payable in the event of a default", its imposition must be occasioned by, or conditioned upon, the occurrence of a default. It is insufficient that the payment is not *recovered* until after a default has occurred. A fee or charge that is incurred by a borrower (in the sense that they become obliged to pay it) before any default has occurred, does not become one payable in the event of default merely because it is paid after a default has subsequently occurred. As determined above, the Amendment Fee was payable on, or occasioned by, an amendment of the terms of the relevant SACC.
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> 199 The second difficulty is that the evidence shows that Sunshine Loans *did* charge the Amendment Fee prior to the occurrence of a default of payment under the agreement. Sunshine Loans' submission in relation to this point proceeded upon the assumption that any agreement or arrangement between it and a borrower to alter the timing and/or the quantum of repayments had no effect on the borrower's obligation to make repayments in accordance with the payment schedule to which the parties had originally agreed. In general terms, its submission was that even where the borrower had contacted it and agreed with a representative that there would be an alteration to the originally agreed repayment schedule and, in respect of which alteration the borrower would be told that the Amendment Fee would be charged, there was in fact no alteration to the terms of the relevant SACC. So the submission went, even where the borrower had contacted Sunshine Loans, been told by one of its officers that Sunshine Loans was agreeable to an alteration of the payment schedule, and a new schedule of repayments was sent to the borrower, there was no alteration to the borrower's repayment obligations as originally agreed. Therefore, it was said, the borrower was in default when they paid in accordance with the agreed schedule.
>
> 200 It is difficult to know whether, in this respect, Sunshine Loans had adopted a deliberately obstruse attitude, was effectively misleading borrowers, or was concocting a fanciful argument to avoid liability in these proceedings. The evidence which is identified below shows that the pattern was that a borrower would contact Sunshine Loans seeking an alteration to their payment obligations (for example, by extending the time for repayment or the amount of each repayment) and a new schedule would be agreed, and the borrower would be charged the Amendment Fee. The agreed amendment would usually be confirmed by the sending of a new payment schedule to the borrower. It is difficult to see how that variation to the initially agreed payment terms could have the consequence that payment in accordance with it by the borrower would mean that a default occurred.
>
> (Emphasis in original).

31 Sunshine Loans submitted that the beginning of [200] contained "gratuitous and inflammatory comments". However, the Court is permitted to identify the dogmatic pursuit of hopeless submissions when that occurs. Courts are not to be vexed with arguments which are lacking

in any substance, whether they be advanced by a party, its lawyers or both. Here, it is apparent that Sunshine Loans' pursuit of insubstantial submissions vastly extended the length of the hearing.

32 Similarly, Sunshine Loans cited the following passage which concerned a proposition advanced by it that, when borrowers sought an extension to the payment terms to which Sunshine Loans agreed and were told that an Amendment Fee was payable for that to occur, no amendment or variation of the relevant agreement occurred:

> 206 Though the recorded interactions appeared to disclose an agreement that the borrower would not be making a forthcoming payment and that the Amendment Fee would be charged, Sunshine Loans submitted that no amendment or variation to the relevant SACC occurred. That submission has more than a degree of unreality about it, and critically, is contrary to the effect of the clear words used by the parties as recorded in the customer transaction logs. It is nonetheless necessary to deal with certain legal arguments which were advanced as denying the possibility of the loan agreements being varied in the known circumstances.

33 It was submitted that the description of the argument having "more than a degree of unreality about it" was also pejorative, such that a fair-minded lay observer would not think that an impartial mind would be brought to the determination of the appropriate penalty. It is relevant that this finding was reflective of the submissions which were advanced by ASIC. There is no difficulty in a court reaching a conclusion which fairly reflects the paucity of a party's position and which also aligns with the other party's submissions made in respect of it. That is particularly so in proceedings such as the present where the manner in which a party conducts the liability part of the proceeding may be relevant to the latter part concerning the imposition of penalty.

34 Similar contentions were made by Sunshine Loans in relation to the following passage in the liability judgment:

> 245 Contrary to an array of unfounded submissions advanced on behalf of Sunshine Loans, the circumstances found in the 66 files show beyond any doubt that, in each case, the parties reached an agreement that there would be an alteration to the borrower's payment obligations under their SACC.

35 As the reasons in the liability judgment reveal, many of the submissions made on behalf of Sunshine Loans were unfounded. The fact that ASIC now relies upon the identified lack of veracity of the submissions made on the part of Sunshine Loans on the hearing for the imposition of penalty only shows that they were relevant to the issues in the matter.

36 A further concern was raised in relation to the following paragraph:

> 246 As a matter of fact, following those communications, Sunshine Loans imposed the Amendment Fee as a fee for the making of the alteration or amendment to the relevant SACC and it was paid by the borrower in accordance with the written terms of their SACC. Despite repeated denials that the Amendment Fee was charged to the account by Sunshine Loans as a charge for the amendment of the terms of the loan, no reasonable submission was advanced which indicated why else it might have been imposed. Although it was said that it was imposed because there was a default under the agreement, as is readily apparent from the above examples and from many of the files, the fee was imposed well prior to there being any default by the borrower. The submissions that the impugned fee was one chargeable to the borrower upon default were wholly unsustainable.

37 Similar criticisms were made in relation to [200], [206] and [245] of the reasons. It is, with respect, difficult to ascertain the import of Sunshine Loans' concerns in relation to these paragraphs. The case which it steadfastly sought to advance was that a fee which was described in the loan agreement as an "Amendment fee" and which was identified on the borrowers' loan account when charged as an "Amendment fee", and which was imposed when the parties agreed to amend the timing of the making of payments under the agreement, was a fee payable "on default" and that no amendment or variation of the agreement had occurred. It was and is a plainly untenable position and Sunshine Loans was unable to advance any submission which justified it.

38 The foregoing is sufficient to evidence the nature of Sunshine Loans' concerns in this case. However, it also relied upon findings made in relation to the evidence given by the directors and officers of Sunshine Loans. For instance, the evidence of Mr Simmons, who sought to support the above position, was described as being "disingenuous". It was concluded that he clung firmly to improbable constructions of the material appearing in the customer transaction logs and that he did not give his evidence honestly. The evidence of Mr Powe was similarly found to be "unsatisfactory" in many respects. In particular, his claim that varying a contract is not changing it was found not to be credible or honest evidence. Mr Bennetts, the Operations Manager and Head of Assessments at Sunshine Loans, was found to have adopted an indefensible position in the giving of his evidence, made no attempts to answer honestly in relation to the questions which were put to him, and deliberately misconstrued the obvious circumstances which were put in front of him.

39 It was also found that the witnesses for Sunshine Loans were, "well schooled". That conclusion was reached on the basis that they each maintained the same improbable position in relation to the charging of Amendment Fees by Sunshine Loans. Whilst it might be accepted that one person in the position of Sunshine Loans' directors or officers could reach a completely

wrongheaded position in relation to the operation of a contract and then maintain it in the face of objectively contradicting evidence, it is improbable that they would all do so and would, if they were behaving honestly, all adhere to that position despite the objective evidence to the contrary.

The reliance on the above matters

40 It is, with respect, difficult to ascertain the import of Sunshine Loans' concerns. Critically, it did not identify any logical connection between the impugned passages and an apprehension that the Court would deviate from deciding the question of penalty on its merits. Rather, it submitted that, "given the cumulative effect" of the passages extracted in its written submissions, the fair-minded lay observer is most likely to consider that the judge "will simply impose the fine which ASIC seeks, regardless of whether such a pecuniary penalty accords with the law".

41 That submission should be rejected.

42 The qualities of the fair-minded lay observer were identified by the Full Court in *Martin v Norton Rose Fulbright Australia (No 2)* [2020] FCAFC 42 [21] as follows:

> … That observer is amongst other things: (1) taken to be reasonable; (2) does not make snap judgments; (3) knows commonplace things and is neither complacent or unduly sensitive or suspicious; (4) has knowledge of all the circumstances of the case; and (5) is an informed one who will have regard to the fact that a judicial officer's training, tradition and oath or affirmation, equip the officer with the ability to discard the irrelevant, the immaterial and the prejudicial. That a judge has made a previous decision on issues in a matter does not "mean either that [the judge] will approach the [other] 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 [the judge's] previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that [the judge] will approach the issues in this way": *In Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 352. …

43 A fair-minded lay observer would accept that it is part of the function and duty of a court to make findings about the veracity of the evidence which is advanced to it. That is particularly so where, as in the present case, submissions were made that the evidence of certain witnesses should not be accepted. A fair-minded lay observer, having knowledge of the circumstances of the case, would also accept that findings made in the liability part of a proceeding for the imposition of a civil penalty are relevant to the question of penalty. They would accept that it is relevant whether the contraventions were intentional and, if so, whether the alleged contraveners are likely to engage in conduct of that nature in the future. Necessarily, that must go to the question of specific deterrence. Similarly, a court is entitled to conclude that a party

who advances various submissions with minimal prospects of success might well be attempting to delay or prolong the proceedings for their own purposes, and that is also relevant to the question of specific deterrence when the question of penalty is assessed.

44 The submissions of Sunshine Loans seemed to adopt the incorrect perspective that the matter previously in issue before the Court, concerning whether it contravened the *Credit Code*, constituted no more than a question of construction. On the contrary, the matters in issue extended to the manner in which the legislative provisions were contravened, and the culpability involved in those contraventions. This was apparent from the affidavits on which Sunshine Loans relied in which the deponents, being its directors and officers, sought to justify its actions in charging the fees as it did. It was also apparent from the cross-examination of those witnesses.

45 In many proceedings brought by regulators for the contravention of legislative provisions, the issues may be litigated relatively simply and on the documents generated by the respondent in the course of its business with minimal, if no, other evidence. Generally, that occurs by reason of the parties agreeing on the issues to be determined and the scope of the relevant documentary evidence. However, that is not to deny a party's right to dispute nearly every aspect of the regulator's claim, as occurred in the present matter. A fair-minded lay observer who was knowledgeable of the facts of the case would appreciate that a party which does so requires the court to make determinations on all the disputed matters. That occurred in this case and the appropriate findings were made. That necessitated extensive reasons for judgment which extended to approximately 350 paragraphs. In part, that was reflective of the substantial number of matters put in dispute which was, perhaps, evidenced by Sunshine Loans' written closing submissions that were 584 paragraphs and 181 pages long. Though the findings of which complaint was made were spread throughout the liability decision, assembled as they were in Sunshine Loans' written submissions, they may give an impression which is wholly unjustified once they are considered in the *mise-en-scène* of the lengthy reasons.

46 In the context of the litigation, the putting of all matters in dispute also invited a determination as to whether Sunshine Loans' disputation of the myriad issues was *bona fide* or for the purposes of delaying the inevitable. The conclusion that many of the arguments advanced were bereft of merit led to the conclusion that Sunshine Loans' intention was to obfuscate. Again, these are matters that any fair-minded lay observer would consider when ascertaining whether

there might be a reasonable apprehension that I might not bring an impartial mind to the resolution of the questions I would be required to decide in relation to penalty.

47 In the result, there is nothing in the comments made about Sunshine Loans or its directors and officers which would have impacted the Court's ability to determine the penalty part of the proceedings. Had the application for recusal proceeded on the basis of the issues raised in Sunshine Loans' written submissions, it would have been dismissed as ASIC indicated.

The position in civil penalty cases

48 Quite properly, once it was determined that I would again be required to assess the credibility of a witness, ASIC did not advance any proposition that the Court should or should not hear the penalty phase of the proceedings. It indicated that the Court should reach its own conclusion on the issue without hindrance from any attempted persuasion by it.

49 In the course of his submissions, Mr Brady KC, counsel for ASIC, merely sought to draw the Court's attention to some important administrative issues which arose in this case as a result of the recusal, and which are likely to arise in other cases. In this way, ASIC's conduct was entirely appropriate.

50 Typically, civil courts are reluctant to engage in the bifurcation of actions which are then determined in multiple stages: see, for example, the authorities cited in *Save the Ridge Inc v Commonwealth* (2005) 147 FCR 97, 103 [15]. One obvious reason is that the judge hearing the matter might make a determination about the credit of a witness in the first stage and the witness may then have to return to give further evidence in the later stage. Despite this, it has become conventional for the trial of a civil penalty proceeding to be heard in two distinct parts: see Cam Truong KC and Matthew Peckham, 'Civil Penalty Proceedings: A Practitioner's Guide' (15 September 2022) 19 [77]. There is an obvious logic to that approach. It is only when the Court makes the necessary factual and legal findings on the questions of contravention that its power to impose civil penalties is enlivened. Usually, but not always, the penalty phase does not involve a great deal of further evidence, and that which is adduced is directed to issues other than those relevant to whether a contravention occurred. It is regularly the case that substantial agreement is reached between the parties about the facts and/or evidence relevant to the court's determination of an appropriate penalty.

51 The pragmatism of "splitting" civil penalty proceedings cannot be doubted. It would be productive of wasted time and costs for evidence on the question of penalty to be prepared,

adduced and considered prior to any determination of liability being reached. There is, in this respect, a coherence with the manner in which criminal hearings occur — namely, that the trial precedes the sentencing hearing. Moreover, the determination of a penalty must necessarily flow from, and be based upon, the findings made in the liability phase. As Lee J held in *Australian Securities and Investments Commission v GetSwift Ltd* (2023) 167 ACSR 178, 182 [9], the Court is required to consider the civil penalty against the background of those matters determined in the liability phase of the proceedings. It would not be practical to require a respondent to a proceeding for the imposition of civil penalties to attempt to adduce evidence relevant to penalty before they know which of the alleged contraventions the regulator had established.

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.

53 Mr Brady KC drew the Court's attention to a few interesting authorities. One was *Australian Securities and Investments Commission v King* (2020) 270 CLR 1. There, the trial judge (a judge of the Supreme Court of Queensland) delivered a judgment concerning liability before hearing evidence and submissions on penalty: see *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd* (2016) 112 ACSR 138. In the judgment on liability, adverse findings were made in respect of the defendants' credit, including that some were dishonest. The trial judge subsequently proceeded to deal with the issue of penalty against all defendants, including those against whom the dishonesty findings were made: see *ASIC v Managed Investments Ltd and Ors (No 10)* [2017] QSC 96. That second hearing included the reception of evidence from those defendants. In none of the judgments of the trial judge, the

Court of Appeal, or the High Court, was it suggested that the trial judge ought not to have determined the penalty on the basis of apprehended bias because he had made findings of dishonesty against the defendants in the liability judgment.

54 A similar scenario arose in *Australian Securities and Investments Commission v Rent 2 Own Cars Australia Pty Ltd* (2020) 147 ACSR 59. In that matter, in the liability judgment Greenwood J held that evidence given by one of the defendants, including evidence given under cross-examination, could not be accepted, was unreliable, and involved obfuscation. Despite that, his Honour went on to deal with the penalty to be imposed on both defendants whose evidence he did not accept, and his Honour's reasoning included consideration of submissions on penalty relevant to the conduct and motives of the party: see *Australian Securities and Investments Commission v Rent 2 Own Cars Australia Pty Ltd (No 2)* (2022) 159 ACSR 528.

55 In neither of those two matters did it appear that any issue was taken as to whether or not the judge who heard the liability proceedings should determine the penalty.

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.

A solution is required

58 The tension between the orthodox principles relating to recusal and the usual way civil penalty proceedings are conducted is evident. It may be that the Court should adopt a protocol for the hearing of such matters which takes the orthodox recusal principles into account. How that might be achieved is unclear, though it may necessitate the parties accepting the most unpalatable proposition that the judge may be called on to determine the creditworthiness of a witness against whom they have already formed strong views. Alternatively, the Court might require the parties to put all evidence going to contravention and penalty before it prior to any decision being made. The difficulties with this have been identified above. Indeed, the difficulties of this issue may require legislative intervention of some description.

59 Unless and until some formal procedure is adopted, it is necessary to apply the cardinal principles of fairness to which this Court has adhered to since its inception. It was for that reason that it was appropriate for me to recuse myself as I did.

I certify that the preceding fifty-nine (59) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 18 July 2024