FEDERAL COURT OF AUSTRALIA

BSF Solutions Pty Ltd v Australian Securities and Investments Commission [2025] FCAFC 88

Appeal from:	*Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Liability)* [2024] FCA 553
File number:	NSD 738 of 2024
Judgment of:	**ANDERSON, CHEESEMAN AND ROFE JJ**
Date of judgment:	10 July 2025
Catchwords:	**CONSUMER LAW** – appeal from findings of contraventions of the *National Consumer Credit Protection Act 2009* (Cth) ss 29, 32 – whether first and second appellants were conducting a shared business model – whether fees charged by second appellant were charges made for the provision of credit by the first appellant – whether first and second appellants should be precluded from recovering principal – appeal dismissed **CONSUMER LAW** – accessorial liability – whether case of accessorial liability was properly pleaded against directors of first and second appellants – whether primary judge erred in granting leave to file amended concise statement – whether primary judge adopted the correct approach to accessorial liability – whether findings of knowledge of essential facts of primary contraventions were sufficient to establish accessorial liability – appeal dismissed
Legislation:	*National Consumer Credit Protection Act 2009* (Cth) *National Consumer Credit Protection Act 2009* (Cth) Schedule 1 (National Credit Code)
Cases cited:	*Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388; [2021] FCAFC 121 *Anchorage Capital Master Offshore Ltd v Sparkes* (2023) 111 NSWLR 304; [2023] NSWCA 88 *Australian Securities and Investments Commission v National Australia Bank (No 2)* (2023) 171 ACSR 176; [2023] FCA 1118 *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* (2022) 293 FCR 330; [2022] FCAFC 108

	Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298; [2015] FCAFC 25 *Giorgianni v The Queen* (1985) 156 CLR 473 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 4198 ALR 30; [2024] HCA 27 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; [2003] HCA 75 *Yorke v Lucas* (1985) 158 CLR 661
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	123
Date of hearing:	14 November 2024
Counsel for the Appellants:	Mr PD Crutchfield KC with Mr PA Travis and Ms A Zheng
Solicitor for the Appellants:	Russells
Counsel for the Respondent:	Mr LT Livingston SC with Mr SJ Cleary
Solicitor for the Respondent:	DLA Piper

ORDERS

NSD 738 of 2024

BETWEEN:	**BSF SOLUTIONS PTY LTD (ACN 648 900 896)** First Appellant
	CIGNO AUSTRALIA PTY LTD (ACN 648 971 626) Second Appellant
	BRENTON JAMES HARRISON (and another named in the Schedule) Third Appellant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Respondent

ORDER MADE BY: **ANDERSON, CHEESEMAN AND ROFE JJ**

DATE OF ORDER: **10 JULY 2025**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellants pay the Respondent's costs of the appeal, as agreed or assessed.
3. The stay of proceeding NSD 1110 of 2023 be discharged.
4. Within 7 days of these orders, the parties contact the Associate to the Primary Judge seeking a case management hearing in relation to the penalty hearing in proceeding NSD 1110 of 2023.

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

REASONS FOR JUDGMENT

THE COURT:

1. Introduction

1 The appellants appeal from the decision of the primary judge given on 24 May 2024 that two fees charged by the second appellant (**Cigno**) – an Account Keeping Fee (**AKF**) and a Change of Payment Schedule Fee (**CPSF**) – under Account Keeping Agreements (**Services Agreements**) satisfied the statutory criterion of being a "charge [that] is or may be made for providing the credit" under s 5(1)(c) of the *National Credit **Code*** (Sch 1 to the *National Consumer Credit Protection **Act** 2009* (Cth)): *Australian Securities and Investments Commission v BSF Solutions Pty Ltd (Liability)* [2024] FCA 553 (**Primary Judgment** or **PJ**).

2 The primary judge found that the AKF and CPSF were, as a "matter of practical commercial substance", "imposed on account of, or by reason of, the provision of credit by [the first appellant (**BSF**)], and was imposed in exchange for that credit": PJ [121], [127]. As O'Bryan J stated in the Full Court's decision of *Australian Securities and Investments Commission v **BHF** Solutions Pty Ltd* (2022) 293 FCR 330; [2022] FCAFC 108, this requires "a direct relationship between the charge and the provision of credit by looking to the circumstances in which, or conditions on which, the charge is made or imposed and the reason for the charge. It looks to the substance of the credit arrangements rather than their contractual form and ensures that the remedial provisions of the Code are not easily avoided by carefully structured credit arrangements": at [172] (Besanko and Lee JJ agreeing).

3 It followed from the primary judge's finding that the AKF and CPSF were charges made for the provision of credit, as the appellants conceded before the primary judge, that both BSF and Cigno were engaged in credit activity for the purposes of s 6(1) of the Act. It also followed that both BSF and Cigno thereby contravened s 29(1) of the Act, which prohibits a person from engaging in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity, and s 32(1) of the Act, which prohibits a person from demanding, receiving or accepting any fee, charge or other amount from a consumer for engaging in a credit activity if, by engaging in that credit activity, the person contravenes s 29. The primary judge also found that the third appellant (**Mr Harrison**) and the fourth appellant (**Mr Swanepoel**) were involved in the contraventions of the Act by BSF and Cigno respectively.

2. Background

4 On 27 June 2022, the Full Court delivered judgment in *BHF*, in which it was held that an earlier lending model established by parties related to BSF and Cigno was unlawful. In particular, the Full Court held that a "Financial Supply Fee" charged by Cigno Pty Ltd (of which Mr Swanepoel was sole director) was a charge that was made for the provision of credit.

5 Approximately three weeks later, on 20 July 2022, BSF and Cigno entered into a Loan Management Facilitation Agreement (**LMF Agreement**). The transactions the subject of the proceedings involved consumers entering into two agreements. Consumers would enter into a Loan Agreement with BSF under which the loan amounts would be advanced. Consumers would also enter into the Services Agreement with Cigno.

6 Before the primary judge, the respondent (**ASIC**) alleged that BSF and Cigno established a lending business model (referred to as the **No Upfront Charge Loan Model**), which they implemented from about July 2022 to 3 October 2023 (**Relevant Period**). Under that model, Cigno marketed small loans to consumers, processed loan applications and managed repayments, and BSF advanced those loans to consumers. Although loans ceased being written pursuant to the No Upfront Charge Loan Model from 21 December 2022, BSF and Cigno continued to demand, receive and accept fees, charges and other amounts from consumers, pursuant to agreements entered into before that date.

7 ASIC alleged that, pursuant to the No Upfront Charge Loan Model, if a consumer borrowed money from BSF, and repaid the loan in accordance with the terms of the Loan Agreement without defaulting, the consumer would not be required to pay any amounts to BSF other than to repay the principal. ASIC accepted that there was, pursuant to the terms of the Loan Agreement, no requirement to pay BSF interest or any other fees or charges for the provision of the credit. The only fee payable under the Loan Agreement was a late payment fee of $20 if a borrower failed to make a required payment when due to BSF, however BSF retained a discretion to waive the late payment fee or apply a 50% discount where the borrower gave advance notice of an impending late payment.

8 ASIC contended that it was pursuant to the Services Agreement with Cigno that consumers were charged for the provision of the credit they obtained pursuant to the No Upfront Charge Loan Model. ASIC contended that the AKF, and any CPSF, paid by consumers to Cigno was the fee by which consumers paid for the loan.

9 Neither BSF nor Cigno held an Australian Credit Licence (**ACL**). Before the primary judge, ASIC alleged that both BSF and Cigno contravened the prohibition against engaging in a credit activity without a licence contrary to s 29(1) of the Act, and the prohibition against demanding or accepting fees, charges or other amounts from a consumer for engaging in a credit activity, contrary to s 32(1) of the Act. ASIC also alleged that Mr Harrison and Mr Swanepoel were, during the Relevant Period, sole director and secretary of BSF and Cigno respectively and were "involved in" the respective contraventions by BSF and Cigno, within the meaning of s 5(1) of the Act: PJ [2], [4] and [5].

10 Without seeking to restate each of the factual findings of the primary judge, it suffices to summarise the present proceeding as follows:

(a) Cigno operated websites which advertised the loans and through which consumers applied for loans from BSF: PJ [39]-[58];

(b) The online loan application process included a step which enabled customers to deal directly with BSF, rather than to apply through Cigno;

(c) Cigno, through its largely automated processes, collected information from customers in support of their loan applications and provided those applications electronically to BSF. Cigno also performed a preliminary assessment of loan applications before referring customers to BSF. Under the LMF Agreement, Cigno paid BSF an assessment fee for each referral assessed by BSF, which fee was paid regardless of the outcome of BSF's assessment. Upon receipt of the application, BSF would assess the application against its lending criteria through its automated system and communicate to Cigno whether the application was approved or declined: PJ [52]-[54], [84];

(d) If the application was approved, Cigno would advise consumers that the loan applications had been approved and provide them with the proposed Loan Agreement with BSF: PJ [55]-[57];

(e) Consumers entered into two agreements, being a Loan Agreement with BSF, and a Services Agreement with Cigno. Pursuant to the Services Agreement, Cigno charged the consumers fees, one of which was the AKF, which was a variable fee calculated, in part, by reference to the size of the loan, the term of the loan agreement and the number of repayment instalments: PJ [35]; and

(f) Cigno received and processed loan repayments, including all fees, whether payable to Cigno or BSF. Having received payments from consumers, Cigno remitted funds to

BSF: PJ [38], [86]. BSF did not have the internal infrastructure to collect the principal amounts which were owed to it by its customers who dealt with it through Cigno: PJ [82].

11 The primary judge found that, during the relevant period, BSF received referrals of customers from no entity other than Cigno (PJ [74]), and Cigno did not refer customers to any lenders other than BSF (PJ [73], [75]). The primary judge found that, between 18 July 2022 to 26 June 2023, BSF entered into Loan Agreements with a total of 100,583 different customers and entered into a total of 150,114 Loan Agreements. Of the 100,583 customers, only two entered into Loan Agreements without having been referred to BSF by Cigno: PJ [70]-[75].

3. This appeal

12 The appellants, by an amended notice of appeal filed 13 August 2024, raised 20 grounds of appeal. Senior counsel for the appellants, Mr Crutchfield KC, at the commencement of his oral submissions on 14 November 2024 informed the Court that the appellants were not pursuing grounds of appeal 5 through to 8 inclusive, which related primarily to the issue of accessorial liability. In addition, Mr Crutchfield KC advised that the appellants would not be pressing, in respect of the CPSF, particulars (e) and (g) to ground 14, and in respect of contraventions of s 29 of the Act, ground 16. The appellants confirmed post hearing in a short written note those grounds which they did not press and those parts of their written submissions which were withdrawn.

13 The grounds pressed by the appellants may be conveniently distilled to the following:

(a) In relation to the primary contraventions which are the subject of grounds 15 and 17:

  (i) Reliance on the "model" (Ground 1);

  (ii) The AKF (Ground 13);

  (iii) The CPSF (Ground 14);

  (iv) Construction of "other amount" in s 32 of the Act (Grounds 18 and 19);

(b) In relation to the accessorial liability case:

  (i) Failure to plead a case of accessorial liability (Grounds 3 and 4);

  (ii) Leave to file the Amended Concise Statement (Grounds 2 and 2A);

  (iii) Errors in the primary judge's approach to accessorial liability (Grounds 9 and 10);

(iv) Errors of the primary judge in finding knowledge of the "essential facts" by Mr Harrison and Mr Swanepoel (Grounds 11 and 12).

14 We now turn to consider each of these grounds of appeal. We note that the relevant legislative provisions are sufficiently set out at PJ [7]-[21], and it is not necessary to re-outline the provisions within these reasons.

4. The primary contraventions

4.1 Reliance on the "model" (Ground 1)

15 The appellants' first ground of appeal contends that the primary judge erred by conflating the separate activities of BSF and Cigno into an integrated business lending model, failing to give proper weight to the terms of the LMF Agreement, and the separate legal personalities and commercial interests of BSF and Cigno.

16 The appellants submit that the primary judge erred in relying on ASIC's contention that BSF and Cigno established and implemented the No Upfront Charge Loan Model: PJ [75]-[76].

17 The appellants submit that, in doing so, the primary judge adopted two indeterminate definitions of the model. One definition adopted was submitted to be ASIC's vague and incomplete definition that made no reference to Cigno websites: PJ [2]. The other definition, it was submitted, extended the model to include "elements" set out "in aspects of the Cigno websites", without identifying the relevant elements or aspects: PJ [75]. The appellants submit that by adopting ASIC's broadly articulated model case, the primary judge strayed from the Full Court's approach in *BHF*. There, it was submitted that the Full Court factually characterised the relevant fees by contextualising the express and implicit (albeit non-determinative) representations about them in the central agreements. The appellants submit that the Full Court in *BHF* did not resort to "abstract 'models' or other distracting and imprecise glosses on the evidence". The appellants submit that in contrast to the primary judge's analysis (at PJ [96]-[97]), the Full Court in *BHF* did not make the error of relying on a "Continuing Credit Model" or making findings that matters were "pursuant to…the Continuing Credit Model".

Consideration

18 The primary judge did not err in concluding that Cigno and BSF established and implemented an overarching lending business model, being the No Upfront Charge Loan Model.

19 There was ample evidence that it was appropriate to consider and refer to BSF and Cigno having established and implemented the No Upfront Charge Loan Model as a shared overarching business model. The primary judge stepped through this evidence, which is largely unchallenged on appeal, in fair detail in the Primary Judgment, which included consideration of:

(a) as noted above, the fact that during the Relevant Period, BSF received referrals of customers from no entity other than Cigno, and Cigno did not refer customers to any lenders other than BSF. Of the 100,583 customers BSF entered into Loan Agreements with, only two entered into Loan Agreements without having been referred to BSF by Cigno;

(b) BSF and Cigno's use of the same service provider to support their information technology systems, including in circumstances where Cigno's computer system managed loan applications and the loans themselves, while BSF did not have the internal infrastructure to collect the principal amounts which were owed to it: PJ [82]-[83];

(c) the automated and integrated manner in which BSF's and Cigno's computer systems operated: PJ [84];

(d) BSF and Cigno's engagement of service providers to perform support functions, where those service providers were either related bodies or independent third-party entities: PJ [87]-[91];

(e) BSF and Cigno's common bank account signatories and delegated users: PJ [93]; and

(f) Cigno having taken legal advice from Piper Alderman, and "in conjunction with BSF Solutions Pty Ltd, made any necessary changes to its business model to both trade legally and comply with the ASIC Product Intervention Order": PJ [94].

20 It should also be noted that the primary judge, in finding that BSF and Cigno were operating the shared business model, explicitly noted, in our view correctly, that the finding did not require a finding that BSF and Cigno were in any kind of ongoing legal relationship beyond the LMF Agreement. The primary judge stated at PJ [76]:

> The conclusion that BSF and Cigno participated in an overarching business model does not depend on any finding that they were in a relationship of agency, partnership or joint venture or any other kind of ongoing legal relationship apart from the contractual relationship under the Loan Management Facilitation Agreement, and I do not make any such finding. Accordingly, the conclusion that BSF and Cigno participated in the No Upfront Charge Loan Model is not contradicted by cll 12 and 13 of the Loan

> Management Facilitation Agreement (in which Cigno and BSF confirmed that they were unrelated parties and that the agreement did not create an agency relationship, partnership or joint venture between the parties).

21 The primary judge correctly identified the elements of the model that were set out in the LMF Agreement, Loan Agreements, Services Agreements, as well as aspects of the Cigno websites (PJ [22]-[58]). As noted by the primary judge in respect of the Cigno website, the website accurately reflected the services which were, in fact, provided by Cigno, including where such services were not within Cigno's binding contractual promise under the Services Agreement. The primary judge stated at [77]:

> There are some inconsistencies between the agreements, on the one hand, and the Cigno websites, on the other hand, which I resolve in the following way… I find that the Cigno websites correctly described the services provided by Cigno as including a range of services which pre-dated the entry by the customer into a Loan Agreement. That is a matter which is reflected in Version 1 of the Services Agreement. While I accept that the limitation in the description of services in Version 2 of the Services Agreement provides an accurate statement of the binding contractual promise on the part of Cigno under Version 2, limiting its contractual promise to provide services to those which were provided after the Commencement Date, I do not regard that as an accurate statement of the services in fact provided by Cigno. That does not require me to find that Version 2 of the Services Agreement was a sham, but merely that the binding contractual promises by Cigno did not correspond to what Cigno told potential customers who read its websites it would provide, and what Cigno did in fact provide, by way of services.

22 By reference to the model, in answering the question of whether s 5(1)(c) of the Code applied, the primary judge correctly analysed "the circumstances in which, or conditions on which, the charges made or imposed and the reason for the charge", consistent with the Full Court's reasoning in *BHF* at [172]. Those characteristics of the model were appropriately identified by the primary judge. The reference by the primary judge to the descriptor "No Upfront Charge Loan Model" was a convenient, accurate and precise approach to the examination of the factual circumstances under which BSF and Cigno operated during the Relevant Period.

23 There was no error by the primary judge in concluding that Cigno and BSF established and implemented, for their joint benefit, a shared business model, namely the No Upfront Charge Loan Model. It follows that ground 1 of the appeal must be rejected.

4.2 The Account Keeping Fee (Ground 13)

24 The appellants contend that the primary judge erred in finding that the AKF was a fee for the provision of credit for the purposes of s 5(1)(c) of the Code. That error, in the appellants' submission, was borne of the following incorrect findings:

(a) the pronoun "it" in a heading of a page on a Cigno website referred to "the provision of credit" (PJ [110]), where, in fact, "it" was a reference to the cost of a loan only if a customer also chose to use Cigno's services;

(b) the AKF enabled Cigno to carry out pre-contractual services on behalf of prospective customers (PJ [113]), where, in fact, there was no evidence that automated pre-contractual services involved any marginal cost, or that any speculated cost was funded by any particular source of Cigno revenue;

(c) the loan triggered the imposition of the AKF (PJ [114]), where, in fact, the choice to use the Cigno account keeping service triggered that fee;

(d) the customer promised to pay the AKF to get the loan, where, in fact, the evidence showed only that the promise was given for Cigno's bona fide services; and

(e) Cigno's services lacked value independent of the loan (PJ [114]), where, in fact, Cigno's services were valuable, accurately explained, optional, delivered, at times resource intensive, and relieved the customer of self-administering the account.

25 The appellants contend that the primary judge also erred in finding that:

(a) the AKF being charged for a service after the loan was advanced "does not matter" (PJ [126]);

(b) the fee being charged only for so long as there was an account to administer lacked "any real significance" (PJ [115]); and

(c) the lack of credit risk transfer between BSF and Cigno lacked "any material bearing" (PJ [116]),

in circumstances where those factors were significant to the Full Court in *BHF* in characterising similar fees: *BHF* [184]-[185].

26 The appellants further contend that the primary judge erred in failing to give proper weight to:

(a) the legal, economic and financial independence of BSF and Cigno, submitting that the primary judge appeared to be distracted by the effective way in which they cooperated to achieve the objectives of the LMF Agreement; and

(b) Cigno's repeated offer to prospective customers to deal directly with BSF: PJ [49]-[50], and [56].

27 The appellants contend that the primary judge erred in inferring that certain features of Cigno's website were not designed to enhance the prospect of customers deciding to deal directly with BSF, consistent with the expectations and intentions of each of the appellants that customers would prefer to use Cigno's services: PJ [72].

28 The appellants further submit that the primary judge, having acknowledged that a person would not ordinarily expect a business to disclose how it sets its fees and that Cigno did not do so in respect of the AKF, erred to the extent his Honour relied on how the fee was calculated.

Consideration

29 It is convenient to refer to the following features of the AKF summarised by the primary judge at [34]:

> An Account Keeping Fee was payable by the customer to Cigno for the provision of the Services [as that term was defined in the Services Agreement] provided to the customer under the Services Agreement (cl 3.1). The Account Keeping Fee was expressed to be payable by the customer to Cigno "for costs associated with maintaining your Cigno Account including but not limited to communications between us and you, communications between us and the Lender and various reconciliations" (cl 3.3). The Account Keeping Fee was payable weekly in advance (cl 3.1 and Item 4 of the details). The Account Keeping Fee continued until the "Total Amount Owing" under the Services Agreement, and any amount owing under the Loan Agreement (including if the customer chose to deal directly with the "Lender"), was repaid or Cigno terminated the Services Agreement (cll 3.3, 8.1– 8.4 and 9). The customer could close his or her Cigno Account only if he or she repaid the Total Amount Owing under the Services Agreement, and any amount owing under the Loan Agreement: cl 8.2. In effect, whether the initial term was shortened or extended, once there was no customer account to keep, no Account Keeping Fee was charged. There was no penalty or fee payable under the Services Agreement for early repayment of the Total Amount Owing.

30 The AKF was a variable fee which was calculated as (a) a fixed amount of $5.95 plus (b) the sum of $13 and a percentage of the loan amount (calculated by reference to the term of the Loan Agreement and the number of repayment instalments), divided by the number of weeks in the loan term. After the final instalment repayment date (which was referred to as the Initial Period Finalisation Date in the Servies Agreement), the AKF reduced to $5.95 per week.

31 We detect no error in the primary judge's reasoning, nor in the conclusion, that the AKF was for the purposes of s 5(1)(c) of the Code, imposed on account of, or by reason of, the provision of credit by BSF, and was imposed in exchange for that credit, assessed as a matter of practical commercial substance: PJ [121].

32 In respect of the Cigno website's reference to "How Much Does it Cost", at PJ [110], the primary judge identified that one of the so-called Frequently Asked Questions on the Cigno website was "What is the cost of a Cigno loan?". The answer given on the website was that fees varied depending on the length of the loan and the terms of the lender and invited the reader to look at the "Costs" page for more information. The primary judge noted (at PJ [41]) that this appeared to be a reference to the page headed "How Much Does it Cost?" which stated that there were no costs payable to the lender, BSF, for the provision of the loan, but that those who engaged Cigno would be required to pay a weekly AKF. The answer also referred to other fees that could be incurred, including the CPSF.

33 In our view, the primary judge was correct to construe the reference to "it" as a reference to the provision of credit, considering what a prospective customer would want to know, and in the context of Cigno's website. The primary judge (at PJ [110]) correctly regarded that aspect of the answer relating to the AKF as a "practical and commercial response, reflecting the commercial reality that the [AKF] was an important element in the costs to customers of the credit which was proposed to be provided".

34 At PJ [111] the primary judge expressly acknowledged that the Full Court in *BHF* rejected the view that whether a charge was made for the provision of credit depends on analysing the contractual form of, or the contractual consideration for, the provision of credit: see *BHF* [171]-[172]. The primary judge then expressly referred to the terms of cl 3.3 in both Version 1 and Version 2 of the Services Agreement, which provided that the AKF "is payable by you to us for costs associated with maintaining your Cigno account". The primary judge was correct to hold that the language used in cl 3.3 does not expressly confine the relevant "costs" to those incurred by Cigno, as distinct from those incurred by BSF as lender. The primary judge was correct to hold that the language used in cl 3.3 does not, in and of itself, determine the issue of the purpose for which the charge was to be made.

35 At PJ [112]-[117] the primary judge compared the features of the AKF in the present case with the four matters referred to by O'Bryan J's reasons at [182] in *BHF*, in relation to what was known as the "Financial Supply Fee". The first matter was that the service supplied by Cigno Pty Ltd in return for the Financial Supply Fee were all anterior to and directed to the provision of credit by BHF Solutions Pty Ltd (**BHFS**). The primary judge correctly observed that that is not true of the AKF in the present case, because some of the services supplied by Cigno related to the period after credit was provided and the Loan Agreement was entered into. The primary

judge then observed, correctly, that nothing in the terms, context or purpose of the Code requires that the charge spoken of in s 5(1)(c) pertains only to services provided before the advance of the loan amount. The primary judge referred to the observations of Lee J in *BHF* at [4] that the language of s 5(1)(c) of the Code identifies "what it actually is that the consumer pays or promises to pay in order to obtain a provision of credit". The primary judge then observed, correctly, that it follows that a charge may be made for the provision of credit even though it may also be made for other purposes, such as for administrative services or to defray administrative expenses. The primary judge therefore correctly observed that it was relevant to consider if some, even if not all, of the services supplied by Cigno in return for the AKF were anterior to the provision of credit by BSF.

36 At PJ [113], the primary judge observed that under the terms of Version 1 of the Services Agreement, some of the services supplied by Cigno in return for the AKF were anterior to the provision of credit by BSF. This included assisting a customer to source credit from BSF, and to conduct a preliminary assessment of a customer's credit application. Additionally, while the services promised in Version 2 of the Services Agreement all post-dated the provision of credit by BSF, as the primary judge noted, in our view correctly, at PJ [77] (extracted in these reasons above), Cigno did, in fact, provide a range of services to customers before credit was provided by BSF.

37 The primary judge observed that while the AKF was not treated as contractual consideration for those services, the commercial reality is that those services were provided by Cigno to customers anterior to, and directed to, the provision of credit by BSF, and Cigno would need to defray the costs of providing those services from the revenue it earned from customers. The main source of that revenue was the AKF. The 100,581 customers who entered Loan Agreements with BSF through referrals from Cigno borrowed a total of $34,709,015 from BSF and, as at 3 October 2023, were charged fees by Cigno in excess of $63,426,811.85 which comprised of AKFs of $33,961,220.31, CPSFs of $4,783,557, and default fees of $24,682,034.55: PJ [78]. The primary judge then found, correctly, that the practical commercial reality was that charging the AKF would enable Cigno to provide pre-contractual services to customers which were directed to the provision of credit by BSF, and that a customer's promise to pay the AKF throughout the life of the loan, in exchange for the services supplied by Cigno (whether before and after, or only after) entry into the Loan Agreement, was made in order to obtain the provision of the credit.

38 At PJ [114], the primary judge referred to the second matter of O'Bryan J at [182] that, from the perspective of a credit applicant, the services provided by Cigno Pty Ltd were not an end in themselves and had value to the credit applicant only if the application was approved and credit was provided. The primary judge noted, in our view correctly, that that proposition is also true of the services in fact provided by Cigno in the present case. The appellants submitted that Cigno's services were valuable and relieved a customer from self-administering the account. While so much can be accepted, it does not detract from the finding that the services which Cigno did in fact provide that were anterior to and directed to the provision of credit by BSF only had value to the credit applicant if their application was approved and credit was provided.

39 The third matter referred to by O'Bryan J at [182] was that the Financial Supply Fee in that case was not charged unless credit was provided by BHFS, and that it was the provision of credit that triggered the imposition of that fee. The primary judge observed, correctly, that that proposition is equally true of the AKF in the present case. The appellants submitted that the loan was triggered by a customer's choice to use the account keeping services provided by Cigno. The submission fails to properly recognise that, as with the Financial Supply Fee in *BHF*, the AKF would only be charged to customers where the customer obtains a loan from BSF. In the absence of a provision of credit from BSF, there would be no relevant Services Agreement or Cigno account in respect of which the AKF would be payable. In this sense, the primary judge was correct to observe that the third matter O'Bryan J referred to in *BHF* at [182] was equally true of the AKF.

40 The fourth matter referred to by O'Bryan J at [182] was that the Financial Supply Fee was calculated as a percentage of the loan amount and therefore varied according to the amount of credit provided by BHFS. The primary judge, at PJ [114], observed that that proposition is also true of the AKF in the present case. It is unclear how the reference to the primary judge's observation at PJ [35], that one would not ordinarily expect that an agreement such as the Services Agreement would disclose how the AKF was calculated, is said to impugn the primary judge's reliance on the manner in which the AKF was calculated. The primary judge, in our view, appropriately and correctly identified that the AKF was calculated by reference to the loan amount, as was identified in relation to the Financial Supply Fee in *BHF*.

41 At PJ [115], the primary judge observed that the timing of the payment of a fee, or whether it ceases to be payable when the loan is repaid, are not matters of any real significance in

determining whether a charge was made for the provision of credit under the Code. Considering the examples discussed by the primary judge, including interest which is payable periodically throughout the life of a loan, and a loan establishment fee typically paid upfront and irrespective of whether a loan is repaid early, the primary judge's observations are plainly correct. As the Full Court agreed in *BHF*, the relevant question focuses on if a charge is made in exchange for, on account of or by reason of the provision of credit, applied in a commercially practical manner. In the context of the present case, the primary judge was correct to observe that the fact that the AKF was charged after the loan was advanced, and that the AKF was only charged for so long as there was an account to administer, lacked any real significance.

42 In *BHF*, the Loan Facilitation Management Agreement between Cigno Pty Ltd and BHFS included a clause whereby Cigno Pty Ltd guaranteed repayment of the loan to BHFS and ultimately bore the financial risk of the loans. The appellants submit that the primary judge erred in finding, at PJ [116], that the lack of credit risk transfer between BSF and Cigno in the present case lacked any material bearing, in circumstances where that was a factor significant to the Full Court. It is firstly relevant to note that O'Bryan J's comments at [184] regarding the credit risk transfer followed his comments at [182]-[183] where his Honour already concluded that the four matters identified at [182] provided a sufficient basis on which to conclude that the Financial Supply Fee was a charge made for the provision of credit by BHFS. Additionally, the primary judge was also correct to observe at PJ [116] that O'Bryan J referred to the guarantee in *BHF* as explaining why the majority of credit charges were imposed by Cigno Pty Ltd and not by BHFS, and that it was not necessary in the present case to form a view as to why the majority of credit charges were imposed by Cigno rather than BSF in order to deal with whether the AKF was a charge for the provision of credit.

43 At PJ [117]-[120], the primary judge rejected the respondents' (now appellants) attempt to draw analogies between the No Upfront Charge Loan Model and the position of "Buy now, pay later" providers. For the reasons given by the primary judge, his Honour was correct to reject those submissions and to conclude, at PJ [121], that the AKF was a fee imposed on account of, or by reason of, the provision of credit by BSF, and was imposed in exchange for that credit, assessed as a matter of practical commercial substance, and that there was a direct relationship between that charge and the provision of credit.

44 The primary judge was, as we have already noted above, correct to emphasise at PJ [76] that the finding that BSF and Cigno participated in an overarching business model did not depend

on any finding of a relationship of agency, partnership, joint venture, or any other kind of ongoing legal relationship outside the LMF Agreement. These were findings which the primary judge expressly eschewed. The primary judge correctly found that the features of the website he described at PJ [72] "were not designed to enhance the prospect of customers deciding to deal directly with the lender" and the inference he then drew was sound.

45 The path of reasoning by the primary judge at PJ [110]-[121] discloses no error in the analysis undertaken, nor in the conclusions which the primary judge reached. For the reasons given, ground of appeal 13 must be rejected.

4.3 Change of Payment Schedule Fee (Ground 14)

46 The CPSF was a flat fee of $15 which Cigno charged where a consumer requested a change to their payment schedule: PJ [37].

47 The appellants submit that the primary judge erred in finding that the CPSF was a fee for providing credit. The appellants advance the same grounds that they relied upon for the AKF.

Consideration

48 The primary judge was correct to find that, as a matter of practical commercial reality, the CPSF was a charge that is or may be made for the provision of credit provided by BSF: PJ [127]. As the primary judge correctly identified at PJ [123]:

> [T]he commercial reality was that the [CPSF] was a fee imposed in exchange for, or by reason of, the service provided by Cigno of arranging with BSF a change to the payment schedule on the basis that BSF had provided credit to the consumer and, for the purpose of the provision of that credit, BSF was agreeing to an adjusted timeframe for payment involving a further deferral of the time for repayment.

49 As the primary judge noted, the definition of "credit" in s 3(1)(a) of the Code provides that credit is provided if, under a contract, payment of a debt owed by one person to another is deferred. The primary judge was correct to accept that, consistent with s 3(1)(a) of the Code, the provision of credit involves both the amount that is owing and also the period before which it has to be repaid. It follows from the primary judge's finding that a fee which is paid in order to extend the period by which a debt, involving a scheduled payment, is deferred under a contract is a charge that is or may be made for the provision of credit as a matter of practical commercial reality.

50 The matters noted above in respect of the AKF, particularly in relation to the fee not being an end in itself, and the fee being payable following the provision of credit, apply equally to the CPSF. We agree with the primary judge's observations at PJ [125]-[126] in this respect.

51 The primary judge was correct to conclude at PJ [127] that, as a matter of practical commercial substance, the CPSF was imposed on account of, or by reason of, the provision of credit by BSF, and was imposed in exchange for that credit, and that there existed a direct relationship between the charge and the provision of credit.

52 For the reasons given, ground of appeal 14 must be rejected.

53 Grounds 15 and 17, which provide that the primary judge erred in finding that BSF and Cigno contravened ss 29(1) and 32(1) of the Act, are effectively contingent upon the appellants' success on grounds 1, 13 and 14. It follows that grounds 15 and 17 must also be rejected.

4.4 Construction of "other amount" under s 32 of the Act (Grounds 18 and 19)

54 The last grounds of appeal in respect of the primary contraventions relate to the primary judge's formulation of injunctions by reference to s 32 of the Act. Section 32(1) of the Act relevantly provides:

> **32 Prohibition on charging a fee etc.**
>
> (1) A person must not demand, receive or accept any fee, charge or other amount from a consumer for engaging in a credit activity if, by engaging in that credit activity, the person contravenes, or would contravene, section 29 (which deals with the requirement to be licensed).

55 Section 29(1) of the Act relevantly provides:

> **29 Prohibition on engaging in credit activities without a licence**
>
> (1) A person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

56 The appellants submit that the primary judge erred in restraining BSF from recovering principal under the Loan Agreements by interpreting "other amount" under s 32(1) of the Act as including the repayment of principal by customers to, or for the benefit of, BSF. The appellants submit that the primary judge adopted this interpretation by reference to the terms of the restriction on engaging in credit activities without a licence under s 29.

57 The appellants submit that s 29 of the Act prohibits engaging in unlicenced "credit activity" while s 32 prohibits demanding, receiving, or accepting a fee, charge or "other amount" *for* engaging in a "credit activity". The appellants submit that, on the proper construction of s 32,

the recovery of principal advanced under the Loan Agreements is neither an amount within the class formed by "fee" and "charge", nor, in any case, is it demanded, received or accepted "for" engaging in a credit activity.

Consideration

58 Section 29(1) of the Act prohibits a person from engaging in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity. The definition of "credit activity" in s 6(1) of the Act includes item 1(c), which provides, relevantly, that a person engages in a credit activity if the person exercises the rights of a credit provider in relation to a credit contract (whether the person does so as the credit provider or on behalf of the credit provider).

59 The primary judge observed at PJ [173] that the issue of whether the respondents (now appellants) should be prohibited from demanding, receiving or accepting repayments of principal was best resolved by reference to the terms of s 29(1) which the respondents (now appellants) had also contravened and should be restrained from contravening in the future. The primary judge was correct to find that demanding, receiving, and accepting repayments of principal are all rights of BSF (as a credit provider) under the Loan Agreements (being credit contracts). Indeed, the repayment of principal by customers to, or for the benefit of, a credit provider, is an essential element of engaging in "credit activity". The primary judge was correct to find that the prohibition in s 29(1) therefore applies to prohibit BSF from exercising those rights in relation to the repayment of principal, given that BSF does not hold an ACL authorising it to do so.

60 The primary judge, at [174], having considered the scope of the prohibition under s 29(1), held that it was appropriate to adopt the statutory language in s 32(1) in formulating the injunctions which correspond to the contraventions of that provision, on the basis that the words "other amounts" in the injunctions include amounts by way of repayment of principal.

61 We detect no error in the reasoning of the primary judge. The injunctive relief is supported by, and appropriate to restrain continued contravention of, s 29(1) in circumstances where the unlicensed and unlawful "credit activity" includes the recovery of principal.

62 For the reasons given, grounds of appeal 18 and 19 must be rejected.

5. Accessorial liability

5.1 Failure to plead a case of accessorial liability (Grounds 3 and 4)

63 The appellants submit that it is "axiomatic that a regulator must frame the case that it seeks to bring against an alleged contravener with a degree of specificity" or "clarity and exactness": *Australian Securities and Investments Commission v National Australia Bank (No 2)* (2023) 171 ACSR 176; [2023] FCA 1118 (***NAB***) at [10] and [13] (Derrington J). The appellants submit that there must be "some quality of rigidity" to the regulator's case that is "policed assiduously by the Court", avoiding the treatment of terms "as plastic or open textured" so as to allow a case that has not been disclosed "entirely openly from the outset" to be raised belatedly in a prejudicial manner: *NAB* at [18]. The appellants submit that these principles are especially important when ASIC proceeds against an individual who is entitled to claim the penalty privilege, relieved of the requirement to file a defence that complies with the rules: *NAB* at [32]-[34]. The appellants submit that these general principles "do not apply in any materially different fashion in circumstances where a concise statement has been used in place of conventional pleadings" and a "concise statement is not an excuse for laziness in analysis or vagueness or imprecision in expression", especially against an individual: *NAB* at [35].

64 The appellants submit that the Concise Statement and subsequent Amended Concise Statement (**ACS**) violated these principles. The appellants submit that ASIC relied at trial before the primary judge on plastic, open-textured, vague and imprecise notions of a "model", under and pursuant to which fees and charges imposed by a Services Agreement were alleged to take on a different character to what was apparent on the face of the agreement. The appellants submit that for the directors, Mr Harrison and Mr Swanepoel, this unfairness was compounded by ASIC's failure to identify the "essential facts" comprising the primary allegations or plead "actual knowledge" of those essential facts.

Consideration

65 The primary judge at PJ [144] referred to the nature and purpose of a concise statement as explained by McKerracher and Colvin JJ in ***Allianz*** *Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2021) 287 FCR 388; [2021] FCAFC 121 at [140]-[154], where their Honours stated:

> [140] The purpose of a concise statement is to enable the applicant to bring to the attention of the respondent and the Court the key issues and key facts at the heart of the dispute and the essential relief sought from the Court before any detailed pleadings. It is not intended to substitute the traditional form of pleading with a shorter form of

> pleading. Rather, it is a different form of document directed to exposing the real nature of the dispute and the use of a brief narrative form is encouraged where appropriate.
>
> …
>
> [144] Where the matter proceeds on the basis of a concise statement and concise response then, unlike pleadings, those documents are not conceived as a comprehensive statement of all the matters that must be established in order for a claim or defence to succeed. In such instances, the concise statement and response serve a broader function of providing a fair disclosure of the nature of the case to be advanced with more precise issues being disclosed by other means and to the extent considered to be appropriate in the interests of fairness.

66 As the primary judge identified at PJ [146], in the present case, the Concise Statement alleged that by reason of the matters in paragraphs 11 to 13 of the Concise Statement, Mr Harrison and Mr Swanepoel were involved in the contraventions of ss 29(1) and 32(1) of the Act by BSF and Cigno. Paragraphs 11 to 13 of the Concise Statement were as follows:

> 11. In the Relevant Period, Harrison was the sole director of BSF, had an indirect ownership interest in it, managed its business, was responsible for its day-to-day significant decisions, exercised control over its systems and processes and designed and implemented the No Upfront Charge Loan Model on behalf of BSF, including by approving the terms of the Loan Agreement.
>
> 12. In the Relevant Period, Swanepoel was the sole director of Cigno Australia, had an indirect ownership interest in it, managed its business, was responsible for its day-to-day significant decisions, exercised control over its systems and processes and designed and implemented the No Upfront Charge Loan Model on behalf of Cigno Australia, including by approving the terms of the Services Agreement.
>
> 13. The respondents implemented the No Upfront Charge Loan Model shortly after the decision of the Full Court in *ASIC v BHF Solutions Pty Ltd* (2022) 293 FCR 321, [2022] FCAFC 108 (**BHF Proceeding**) on 27 June 2022.

67 As the primary judge at PJ [147] noted, paragraphs 11 to 13 of the Concise Statement did not make any express allegation in terms of actual knowledge of particular facts by Mr Harrison or Mr Swanepoel.

68 On 18 October 2023, the solicitors for the respondents (now appellants) sought particulars of the "design and implementation" steps alleged in paragraphs 11 and 12 of the Concise Statement, which was responded to by ASIC on 27 October 2023 (**Response**). The terms of the Response are outlined by the primary judge at PJ [148]. It is not necessary to restate them here.

69 The primary judge, at PJ [149], accepted ASIC's submission that the concepts of "design" and "implementation" necessarily involved actual knowledge of what was being designed and implemented. The primary judge observed that the particulars provided in the Response of

paragraphs 11 and 12 of the Concise Statement were expressed in terms which inherently involved actual knowledge of the transactions and processes referred to. The primary judge also accepted that the first of the particulars for both paragraphs 11 and 12, which referred to each of the directors formulating, or participating in formulating, the No Upfront Charge Loan Model, necessarily involved actual knowledge of both the BSF and Cigno side of what was an integrated and overarching business model. The primary judge observed that while the particulars in relation to Mr Harrison tended largely to focus on the transactions and processes undertaken by BSF, and the particulars relating to Mr Swanepoel tended largely to focus on the transactions and processes involving Cigno, it could not be said that the particulars as a whole stopped short of alleging that Mr Harrison knew of the Cigno transactions and processes and that Mr Swanepoel knew of the BSF transactions and processes.

70 Paragraphs 11 and 12 of the Concise Statement alleged that Mr Harrison and Mr Swanepoel, as sole directors of BSF and Cigno respectively, were responsible for the day-to-day significant decisions of the companies and exercised control over the systems and processes of the companies. In that context, Mr Harrison and Mr Swanepoel are alleged to have designed and implemented the No Upfront Charge Loan Model on behalf of BSF and Cigno respectively.

71 The primary judge was correct to find that it was plain from the language used in the Concise Statement and the particulars in the Response that ASIC was making an allegation of actual knowledge of those elements on the part of Mr Harrison and Mr Swanepoel. That is clear from the express language used to allege Mr Harrison and Mr Swanepoel's involvement. Mr Harrison and Mr Swanepoel could not "design" or "implement" a business model without actual knowledge of that model and of the steps taken in designing and implementing it. The appellants' submissions that ASIC relied on "vague and imprecise notions of a 'Model'" should be rejected on a fair reading of the Concise Statement.

5.2 Leave to file the Amended Concise Statement (Grounds 2 and 2A)

72 During the course of final address before the primary judge, senior counsel for ASIC sought to amend paragraphs 11 and 12 of the Concise Statement as follows:

> 11. In the Relevant Period, Harrison was the sole director of BSF, had an indirect ownership interest in it, managed its business, was responsible for its day-to-day significant decisions, exercised control over its systems and processes and designed and implemented the No Upfront Charge Loan Model (as described in paragraphs 3 and 4 above) on behalf of BSF, including by approving the terms of the Loan Agreement. Harrison had actual knowledge of each of the matters alleged in paragraphs 10, 11 and 13 of this Amended Concise Statement, and the

matters alleged in paragraph 18 of the letter dated 27 October 2023 from the applicant's solicitors to the respondent's solicitors.

12. In the Relevant Period, Swanepoel was the sole director of Cigno Australia, had an indirect ownership interest in it, managed its business, was responsible for its day-to-day significant decisions, exercised control over its systems and processes and designed and implemented the No Upfront Charge Loan Model (as described in paragraphs 3 and 4 above) on behalf of Cigno Australia, including by approving the terms of the Services Agreement. Swanepoel had actual knowledge of each of the matters alleged in paragraphs 10, 12 and 13 of this Concise Statement, and the matters alleged in paragraph 22 of the letter dated 27 October 2023 from the applicant's solicitors to the respondent's solicitors.

73 The paragraphs to which cross-references are made are outlined in PJ [152].

74 Although the amendments were opposed by the respondents by reason of their lateness, the prejudice which was said would be caused, the lack of an affidavit explaining the reason for the lateness of the amendments, and the supposed futility of the amendments, the primary judge granted leave to ASIC to file the ACS.

75 The appellants submit that the primary judge erred in granting ASIC leave to file the ACS, referring to the decision of *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2015) 230 FCR 298; [2015] FCAFC 25 where Logan, Bromberg and Katzmann JJ said, at [64], "[n]or would it be just to permit an applicant to change the nature of its case after the evidence has closed and its weaknesses pointed out".

76 The appellants submit that ASIC's failure to identify essential elements of the contravention or allege actual knowledge of (the unidentified) essential elements was raised during opening submissions yet ASIC waited until after close of evidence to address those issues without explanation. The appellants submit that the late grant of leave denied the directors in a civil penalty proceeding, subject to the *Briginshaw* standard (as observed in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 at 362), the opportunity to seek particulars, give evidence and make submissions on that evidence. It exposed the directors to the risk of adverse inferences about not giving evidence on unpleaded allegations (which risk the appellants say materialised at PJ [160] and [166]), or the judge relying on "inexact proofs" or "indirect inferences" to fill perceived evidentiary gaps.

77 The appellants further submit that the ACS still did not identify the "essential elements" and that the ACS merely alleged "knowledge" that each director "designed and implemented" the No Upfront Charge Loan Model, "shortly after the decision" in the *BHF* proceeding, and that each director knew that neither BSF nor Cigno held an ACL. The appellants submit that the

directors were plainly prejudiced by the late amendments as each was denied any opportunity to explore or explain any of those matters, especially relating to the other director's company, including its ACL status, website and use of contractors.

78 The appellants submit that the primary judge, in finding that no prejudice resulted from the late amendment, incorrectly:

(a) applied a "clearly inherent" standard to serious allegations central to a civil penalty proceeding: PJ [154];

(b) misconstrued allegations of "conduct" (ACS [11] and [12]) as allegations of "knowledge": PJ [154];

(c) found the directors had notice of "those elements": PJ [154]; and

(d) found that neither director could contend that he did not know the licence status of the company controlled by the other individual: PJ [155].

Consideration

79 The primary judge did not err in granting ASIC leave to file the ACS.

80 As we have stated in respect of grounds of appeal 3 and 4 above, the primary judge was correct to find that it was plain from the language used in the Concise Statement and the particulars in the Response that ASIC was making an allegation of actual knowledge on the part of Mr Harrison and Mr Swanepoel. In this context, the primary judge was correct to find at PJ [154] that the amendments to paragraphs 11 and 12 of the Concise Statement did not alter their substance or effect when read in conjunction with the particulars provided in the Response. The primary judge was correct to find that the proposed amendments merely made explicit what was clearly inherent in the matters alleged in paragraphs 11 and 12 of the Concise Statement and paragraphs 18 and 22 of the Response. Indeed, with the exception of the cross-reference to paragraph 10 of the ACS, the substance of the amendments to paragraphs 11 and 12 of the Concise Statement were expressly confined to what had been expressly articulated in ASIC's particulars.

81 The amendments to the Concise Statement did not alter the issues in dispute or the substance of ASIC's case against the directors. The case that ASIC particularised in its Response on 27 October 2023 was the case that ultimately succeeded before the primary judge. The application, while late, was made out of an abundance of caution in circumstances where the amendments were not necessary in order to fairly disclose the case which ASIC sought to

establish. The amendments did not alter the nature of ASIC's case against the directors and, as a consequence, there was no denial of any opportunity for the directors to make forensic decisions and no prejudice to them. It follows that grounds of appeal 2 and 2A must be rejected.

82 As the primary judge identified at PJ [155], the only respect in which the amendments made a substantive addition to the previously articulated allegations was the cross-reference to paragraph 10, whereby the ACS alleged that Mr Harrison and Mr Swanepoel had actual knowledge that neither BSF nor Cigno held an ACL. For the reasons provided by the primary judge at PJ [155], we agree that the primary judge was correct to consider that the additional allegation of actual knowledge did not cause prejudice to the appellants.

5.3 Errors in primary judge's approach to accessorial liability (Grounds 9 and 10)

83 At PJ [143], the primary judge outlined his approach to accessorial liability in the present case, stating:

> Applying those principles to the present case, it was necessary for ASIC to allege and prove that Mr Harrison and Mr Swanepoel had actual knowledge of the relevant facts leading to the conclusion that the Credit Code applied, and leading to the conclusion that the other elements of ss 29(1) and 32(1) also applied, but not that Mr Harrison and Mr Swanepoel knew that those conclusions were correct or appropriate. In particular, it was necessary for ASIC to allege and prove that Mr Harrison and Mr Swanepoel knew the facts which lead to the conclusion that charges were (or may be) made for the provision of credit, but it was not necessary for ASIC to allege and prove that Mr Harrison and Mr Swanepoel were actually aware that charges were (or may be) made for the provision of credit.

84 The appellants submit that the primary judge erred in this approach and rely on the High Court's explanation in ***Productivity Partners*** *Pty Ltd v Australian Competition and Consumer Commission* (2024) 419 ALR 30; [2024] HCA 27 (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), that it is first necessary to identify the "essential facts" of the principal's contravention which the accessory must have knowledge of: see at [339] (Beech-Jones J, with whom Gleeson J agreed), [82] (Gageler CJ and Jagot J), [149] (Gordon J), and [265] (Edelman J). The appellants submit that those "essential facts" are not limited to primary facts and may necessarily require knowledge of an evaluative concept: see at [82] (Gageler CJ and Jagot J), [149] (Gordon J), and [267] (Edelman J).

85 The appellants submit that *Anchorage Capital Master Offshore Ltd v Sparkes* (2023) 111 NSWLR 304; [2023] NSWCA 88 (Ward P, Brereton JA and Griffiths AJA) illustrates the point by holding that accessorial liability for misleading or deceptive conduct involving a false

representation requires proof that the accessory knew the representation was false. The appellants submit further that consistent with ***Yorke*** *v Lucas* (1985) 158 CLR 661 (Mason ACJ, Wilson, Brennan, Deane and Dawson JJ) and *Giorgianni v The Queen* (1985) 156 CLR 473 (Mason ACJ, Wilson, Deane and Dawson JJ), mere knowledge of primary facts from which falseness could be inferred or deduced, short of wilful blindness, did not suffice. The falsity of a representation is a question of evaluative fact which is not to be confused with knowledge that the false representation is "misleading or deceptive" within the meaning of the relevant statutory provision: see *Productivity Partners* at [83] (Gageler CJ and Jagot J), [149] and [153] (Gordon J), [268]-[269] (Edelman J), and [360] (Beech-Jones J).

86 The appellants submit that the primary judge ought to have held that an individual could only be "involved" in the alleged primary contraventions if the person actually knew the essential fact that the AKF or CPSF was a charge "for the provision of credit in a practical commercial sense". The appellants submit that there being no finding that Mr Harrison or Mr Swanepoel knew that either fee was a charge for providing credit in a practical commercial sense, nor any evidence to support such a finding, that the case against them ought to have been dismissed.

Consideration

87 The primary judge delivered judgment on 24 May 2024 prior to the High Court's judgment in *Productivity Partners* which was delivered on 14 August 2024.

88 The primary judge, in determining the approach regarding accessorial liability outlined at PJ [143], considered the authorities of *Yorke* and ***Rural Press*** *Ltd v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

89 In our view, the primary judge correctly applied the principle in *Yorke* at 670 (Mason ACJ, Wilson, Deane and Dawson JJ), that a person will only be liable as an accessory under statutory provisions to the same effect as those applicable under the Act if the person has actual knowledge of the essential facts constituting the contravention. Similarly, the primary judge correctly applied the principles in *Rural Press* at [48] (Gummow, Hayne and Hayden JJ) that in order to know the essential facts, it is not necessary to know that those facts are capable of characterisation in the language of the statute.

90 ASIC submits, and we accept, that the correctness of the primary judge's approach was confirmed by the High Court's analysis in *Productivity Partners* where the High Court held

that it was not necessary for an alleged accessory to know that the impugned conduct was "unconscionable" for the accessory to be found to have been knowingly concerned in the primary contravention of s 21 of the Australian Consumer Law. The High Court held that the question of whether conduct is unconscionable, is one of legal characterisation, not fact, and that, to be knowingly concerned in the contravention, it is necessary only to prove that the accessory knew the essential matters which together made up the conduct ultimately characterised by the court as unconscionable; not that the accessory knew that the conduct could, let alone would, be so characterised: see [82] (Gageler CJ and Jagot J), [148]-[149] (Gordon J), [266] (Edelman J), [339] (Beech-Jones J).

91 The reasoning of the primary judge at PJ [143] is consistent with the High Court's analysis in *Productivity Partners*. The primary judge correctly applied the principle in *Rural Press* at [48], as endorsed by the High Court in *Productivity Partners* at [72], [79]-[80], [148], [270]-[271], [352]-[354], [357] and [363], namely that in order for an accessory to know the essential facts, it is not necessary to know that those facts are capable of characterisation in the language of the statute.

92 Contrary to the appellants' submission, it was not necessary for ASIC to plead or prove that Mr Harrison or Mr Swanepoel knew that either the AKF or the CPSF was capable of characterisation in the language of s 5(1)(c) of the Code as being "a charge [that] is or may be made for providing the credit". On the contrary, we accept ASIC's submission that that is a question of legal conclusion or legal characterisation.

93 It was not necessary for ASIC to prove that Mr Harrison and Mr Swanepoel knew that the AKF or the CPSF had the statutory quality of satisfying the language of s 5(1)(c) of the Code. To do so would require the imposition, contrary to the principles stated in *Productivity Partners*, of a requirement to prove actual knowledge not merely of essential matters of evaluative fact, but of matters of legal characterisation. It follows that the primary judge was also correct in his approach at PJ [150] to find that it was not necessary for the Concise Statement to allege that Mr Harrison and Mr Swanepoel actually knew that the No Upfront Charge Loan Model involved a charge for the provision of credit, since it was not necessary for ASIC to prove as part of their accessorial liability case.

94 For the reasons given, grounds of appeal 9 and 10 must be rejected.

5.4 Errors in finding knowledge of the "essential facts" (Grounds 11 and 12)

95 Alternatively to grounds of appeal 9 and 10, the appellants submit that the primary judge erred in finding that each director had knowledge of "sufficient essential facts" to establish accessorial liability for five reasons.

96 First, the appellants submit that the primary judge failed to identify the "essential facts" or how the findings of knowledge at PJ [157]-[159] in respect of Mr Harrison, and at PJ [163]-[166] in respect of Mr Swanepoel, support the conclusions drawn at PJ [160] and [167] that each knew the "essential facts" that led to those conclusions.

97 Second, the appellants submit that to the extent that "essential facts" were the matters relied on to characterise the AKF and CPSF as being "for the provision of credit" (at PJ [110]-[121] in respect of the AKF and at PJ [122]-[127] in respect of the CPSF), the findings of knowledge in respect of the directors (at PJ [157]-[159] and [163]-[166]) do not support the conclusion that each director knew of those matters.

98 In relation to the AKF, the appellants submit that the primary judge characterised the fee as being "for the provision of credit" on the basis that it enabled Cigno to provide pre-contractual services (PJ [113]). The appellants submit that there is no finding that Mr Harrison or Mr Swanepoel actually knew what pre-contractual services were provided, what expenses (if any) was associated with them, or how any expense was funded. The appellants further submit that knowledge of the terms of the Services Agreement does not entail knowledge of any "practical commercial reality" that the AKF defrayed unidentified expenses for pre-contractual services.

99 Additionally, in relation to the AKF, the appellants submit that to the extent the primary judge relied on the fact that the AKF was calculated, in part, as a percentage of the loan amount, there is no evidence that supports the finding that either director knew this fact. The appellants submit that the formula for calculating the AKF was provided through expert evidence and was not set out in the Services Agreement or the Cigno website, and therefore, there is no reason why Mr Harrison would have known that formula and it should not be inferred that Mr Swanepoel did know the formula.

100 Further, in relation to the CPSF, the appellants submit that there is no evidence that either director knew the "practical commercial reality" that the CPSF was paid to extend the repayment period. The appellants submit that there is no evidence that either director knew

there was no fee for early repayment under either of the Services Agreement or the Loan Agreement.

101 Third, the appellants submit that the primary judge also erred in relying on inexact proofs or indirect inferences to find that Mr Harrison knew the internal workings of Cigno's operations, the Services Agreement's terms, or the workings or wording of Cigno's websites: PJ [159].

102 Regarding the primary judge's inference that Mr Harrison's had actual knowledge of the terms of the Services Agreement (PJ [159]), the appellants submit that (i) the fact that the Loan Agreement cross-references a generic "Service Contract" and a generic "Service Provider" is not evidence of actual knowledge of the terms of any such contract, (ii) the fact that Cigno provided those services says nothing about the terms of the agreement under which Cigno did so, and (iii) the importance of the Services Agreement to the "model" does not support a finding that Mr Harrison familiarised himself with its terms particularly in circumstances where there was no evidence BSF or Mr Harrison received any financial benefit from the fees charged by Cigno, and where the terms of the Services Agreement did not affect any right or obligation of BSF under the Loan Agreement.

103 The appellants also submit that the primary judge erred in speculating that Mr Harrison read the website's content (PJ [159]) because loan applications were made through it, and therefore, he (via BSF) had an indirect financial interest. The appellants submit that such an interest could only entail possibly having a general interest in the attractiveness of the website to potential loan applicants.

104 Fourth, the appellants submit that the primary judge ought not to have inferred knowledge more confidently in reliance on *Jones v Dunkel* contrary to the primary judge's reasons at PJ [160] and [166].

105 Fifth, the appellants submit that the primary judge failed to give proper weight to the directors' state of mind as reflected in the LMF agreement, the letter from BSF to ASIC dated 22 December 2022 seeking regulatory relief from the anti-avoidance provisions of the Act in relation to the No Upfront Charge Loan Model (**Exemption Application**), and the evidence of changes being made to "trade legally" on Piper Alderman's advice to Cigno and BSF (at PJ [94]).

106 As to the LMF Agreement, Recital F stated Cigno "does not provide credit to its customers and does not charge any fees to its customers for the provision of credit and will not do so": PJ

[22]. Cigno also warranted that, insofar as it paid an assessment fee to BSF, it would not pass on the fee to customers either directly or indirectly: PJ [23(b)]. BSF, in turn, warranted it would not charge customers for the provision of credit: PJ [23(c)]. The appellants submit that there was no evidence that suggested the directors did not believe those warranties and representations, and submit that the LMF Agreement's terms that the directors approved and executed were compelling evidence of what they knew.

107 As to the Exemption Application, the appellants submit that the primary judge placed significance on this as revealing what Mr Harrison knew: PJ [158]. However, the appellants submit the primary judge failed to interpret the terms of the letter correctly, which in fact supported a finding that Mr Harrison did not know that any fees charged by Cigno were for the provision of credit and that what Mr Harrison knew reflected the terms he had approved in the LMF Agreement. The appellants submit that there are no references to any particular fees charged by Cigno that support an inference that Mr Harrison was familiar with the Services Agreement, as opposed to the LMF Agreement.

108 As for the advice from Piper Alderman, the appellants submit that ASIC's evidence was that BSF and Cigno took legal advice and believed that they were trading legally. The appellants note that there are no details as to what factual aspects were the focus of that advice, but submit that, as per observations of the primary judge during the trial, "if one assumes that the [appellants] acted consistently with that legal advice then it would seem to indicate that the legal advice was to the effect that these were not fees for the provision of credit. And Mr Harrison and Mr Swanepoel… accepted that as part of their subjective thinking".

109 The appellants submit that the documents and the inferences available from what was done in reliance on the legal advice, are actual evidence of what each director knew. The appellants submit that had the primary judge given proper weight to the terms of the LMF Agreement, the Exemption Application and ASIC's evidence about the legal advice, the primary judge ought to have dismissed the case against the directors.

Consideration

110 It is convenient to consider each of Mr Harrison's and Mr Swanepoel's accessorial liability separately.

111 The findings made by the primary judge at PJ [157]-[160] provide ample evidence to underpin the primary judge's finding that Mr Harrison had actual knowledge of the essential facts which

led to the conclusions that Cigno made charges for the provision of credit, the engagement by BSF in credit activities, the demanding, receiving and accepting of fees, charges or other amounts from consumers for engaging in credit activities, and the fact that BSF did not hold a licence authorising it to engage in those credit activities.

112 At PJ [157], the primary judge found that Mr Harrison was the sole director and secretary of BSF during the relevant period. Mr Harrison approved and executed the LMF Agreement on behalf of BSF on or about 20 July 2022. Mr Harrison also approved and executed the template loan agreement which was provided by BSF to ASIC in response to a statutory notice, as director on behalf of BSF stating that thereby, BSF "accepts the borrower's offer to borrow". Mr Harrison was identified as having been the main decision-maker at BSF. During the Relevant Period, BSF only had two employees in addition to Mr Harrison.

113 At PJ [158], the primary judge found that on 22 December 2022, Mr Harrison signed the Exemption Application made to ASIC in relation to the No Upfront Charge Loan Model. The primary judge found that the contents of that letter demonstrate a detailed knowledge of the operation of the No Upfront Charge Loan Model. The primary judge relevantly found that although Cigno was not referred to by name in the application, there were extensive references made to the involvement of a "third party", and the terms of the transactions between customers and the third party, being elements of what was referred to as the "Potential Scheme". The primary judge was correct to infer knowledge of the model from the Exemption Application, including in relation to the terms on which Cigno would deal with consumers. The appellants are incorrect to suggest that the primary judge, in some way, erred in his findings as to Mr Harrison's knowledge because the Exemption Application included assertions to the effect that Cigno would not impose a charge on a prospective customer in exchange for, on account of or by reason of the provision of credit by BSF. The Exemption Application is to be read in context. The characterisation of the conduct of BSF and Cigno therein may be relevant to, but is not determinative of, the findings made in relation to Mr Harrison's knowledge. A further difficulty with the appellants' submission is that it assumes that Mr Harrison was required to have knowledge that fees charged by Cigno would have the statutory quality of satisfying the language of s 5(1)(c) of the Code. As noted in respect of grounds 9 and 10, this is not required.

114 At PJ [159], the primary judge found that the Loan Agreement signed by Mr Harrison contained cross-references to the Services Agreement and to the "service provider". The primary judge was correct to infer that Mr Harrison had actual knowledge throughout the Relevant Period of

the terms of the Services Agreement (both Version 1 and Version 2), in light of the references to it in the Loan Agreement, the fact that Cigno was the only entity which referred customers to BSF, and the importance of the Services Agreement to the No Upfront Charge Loan Model. The primary judge was also correct to infer that Mr Harrison read the contents of the Cigno websites from time to time during the Relevant Period, and was familiar with what was said on the Cigno websites throughout the Relevant Period. We agree that this was an appropriate inference for the primary judge to draw in circumstances where the Cigno websites were the vehicle by which the customers made loan applications and found out about the terms of borrowing from BSF. The primary judge was correct to infer that Mr Harrison, during the Relevant Period, would have taken time to satisfy himself as to the correctness and appropriateness of the contents of Cigno's websites in light of the very substantial amounts of money lent by BSF and the very substantial amounts of money that BSF received by way of assessment fees and late payment fees.

115 The primary judge's inferences and conclusions as to Mr Harrison's actual knowledge were also supported by other findings made by the primary judge earlier in his Honour's reasons including: based on the design of the features of the Cigno website, a very small number of customers chose to deal directly with BSF and this was consistent with the expectations and intentions of Mr Harrison (PJ [72]); during the Relevant Period, Cigno did not refer its customers to any lenders other than BSF (PJ [73]); BSF held three bank accounts with ANZ (including the account from which loans to customers were advanced), in respect of which Mr Harrison was signatory (PJ [86]); the businesses of Cigno and BSF were closely intertwined (PJ [75]); BSF did not have the internal infrastructure to collect the principal amounts which were owed to it by customers who dealt with it through Cigno (PJ [82]); the integrated manner in which BSF and Cigno's automated systems operated (PJ [84]); Cigno remitted to BSF the amount of $41,879,702.59 and, from that amount, funds were paid by BSF to accounts of other entities in which Mr Harrison had a commercial interest (PJ [86]); and Mr Harrison was the sole director and secretary of BHFS, which was the subject of the Full Court judgment in *BHF*. The above findings and inferences drawn by the trial judge provided a sound foundation for the conclusion which the primary judge reached at PJ [160] that Mr Harrison had actual knowledge of the "essential facts" to establish accessorial liability.

116 At PJ [163]-[167], the primary judge identified the findings and the inferences upon which he relied to conclude at PJ [167] that Mr Swanepoel had actual knowledge throughout the Relevant Period of the essential facts which led to the conclusions that Cigno made charges for

the provision of credit, that Cigno engaged in credit activities without holding a licence authorising it to engage in those credit activities and that Cigno demanded, received and accepted fees, charges and other amounts from consumers for engaging in those credit activities.

117 At PJ [163], the primary judge found that Mr Swanepoel was the sole director and secretary of Cigno during the Relevant Period. Mr Swanepoel approved and executed the LMF Agreement on behalf of Cigno. The primary judge inferred that Mr Swanepoel must have been familiar with the terms of the Services Agreement (both Version 1 and Version 2), which were fundamental to Cigno's performance of the LMF Agreement. The primary judge noted that during the Relevant Period, Cigno had only one employee apart from Mr Swanepoel. The primary judge found that Mr Swanepoel must have known the terms of the Loan Agreement, being the agreement into which Cigno recommended that customers enter.

118 At PJ [164] and [165], the primary judge found that Mr Swanepoel was the sole director of **Swan Group** Holdings Pty Ltd, which was the sole shareholder of Cigno. The primary judge referred to the Directors' Report of Swan Group dated 30 November 2022 which stated that Cigno took legal advice from Piper Alderman and, in conjunction with BSF, made necessary changes to its business model to both trade legally and comply with ASIC's product intervention order. The primary judge found that Mr Swanepoel must have known of the terms of that advice from Piper Alderman, and the changes made in conjunction with BSF to the business model.

119 At PJ [166], the primary judge inferred that Mr Swanepoel was familiar with the contents of Cigno's websites throughout the Relevant Period, given the importance of the websites as a means of communicating to customers Cigno's services and BSF's offer of loans, and as the vehicle through which loan applications were made.

120 The primary judge's inferences and conclusions as to Mr Swanepoel's actual knowledge were also supported by other findings made by the primary judge earlier in his Honour's reasons, including: based on the design of the features of the Cigno website, the very small number of customers who chose to deal directly with BSF was consistent with the expectations and intentions of Mr Swanepoel (PJ [72]); during the Relevant Period, Cigno did not refer its customers to any other lenders other than BSF (PJ [73]); Mr Swanepoel executed, on behalf of Cigno, the agreement dated 10 May 2021, with Ezidebit Pty Ltd (PJ [85]); Mr Swanepoel was the signatory of BSF's bank account with BNK Corporation Ltd and a signatory of Cigno's

two accounts with ANZ (PJ [86]); Cigno received a total of $78,772,698.56 and paid funds to accounts of other entities in which Mr Swanepoel had a commercial interest (PJ [86]); Mr Swanepoel, one of the directors of **MiFin** Services Pte Ltd during the Relevant Period, executed on behalf of Cigno, the services agreement with MiFin dated 5 May 2021 and executed on behalf of MiFin the software development and maintenance agreement with Mantaq Solutions Pty Ltd, dated 10 March 2023 (PJ [88]); Mr Hussein, as Chief Technical Officer for Swan Management Services Pty Ltd, reported to Mr Swanepoel (PJ [89]); during the Relevant Period, Mr Swanepoel was the sole director of Swan Management Services which received substantial funds from Cigno as a result of the model (PJ [92]); Pyramid Capital Pty Ltd, a company associated with Mr Swanepoel, received $14,000,000 from Cigno (PJ [93]); and Mr Swanepoel was the sole director and secretary of Cigno Pty Ltd, which was the subject of the Full Court judgment in *BHF*.

121 The primary judge's findings and inferences provide a sound foundation for the conclusion that Mr Swanepoel had actual knowledge of the essential facts throughout the Relevant Period to establish accessorial liability.

122 For the reasons given, grounds of appeal 11 and 12 must be rejected.

6. Disposition

123 The appeal is dismissed. The appellants will pay the respondent's costs of the appeal.

I certify that the preceding one hundred and twenty-three (123) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Anderson, Cheeseman and Rofe.

Associate:

Dated: 10 July 2025

SCHEDULE OF PARTIES

NSD 738 of 2024

Appellants

Fourth Appellant: MARK SWANEPOEL