HIGH COURT OF AUSTRALIA

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File Number:	B23/2025
File Title:	SunshineLoans Pty Ltd (ACN 092 821 960) v. Australian Secu
Registry:	Brisbane
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	25 Sep 2025

Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN:

SUNSHINELOANS PTY LTD (ACN 092 821 960)
Appellant

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

APPELLANT'S REPLY SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: REPLY

The relevant credibility findings

2. ASIC's submissions (**RS**) assume that the only relevant credibility findings that the primary judge made were findings as to the credibility of the evidence of the appellant's witnesses: RS [6], [24], [25], [27], [39], [40], [44], [48]-[49]. That fails to recognise that those findings involved and proceeded upon findings made as to the character of Mr Powe, Mr Simmons and Mr Bennetts as witnesses.[1] The primary judge described those findings as "adverse credit findings in relation to the directors of Sunshine Loans"[2] and confirmed that he had "reached an adverse view of [Mr Powe's] credibility".[3] The fair-minded lay observer (the **observer**) understands from those findings that the primary judge considered that those witnesses were prepared not to tell the truth in the witness box.[4]

3. The RS fail to address the fact that the primary judge did not just find the evidence of the appellant's witnesses was not truthful, but also found that those witnesses were willing

[1] Appellant's submissions dated 4 September 2025 (**AS**) at [9], [30], and [31].
[2] *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 3)* [2024] FCA 786 (**Recusal Decision**) at [5]. See also at [14], referring to "a finding against a person" and "a finding as to the credit of a witness", and at [17] referring to "a judge, who has previously found that a witness (who has taken an oath or affirmation) has been untruthful in their evidence" and referring to "a second assessment of the person's credibility".
[3] Recusal Decision at [19].
[4] See AS [30] and [31].

not to be truthful in giving their evidence.[5] For the reasons given in AS at [31], the delta between a finding merely that evidence of a witness was not truthful and the finding as to the character of the witness is significant.

Relevance of the findings at the liability hearing

4. Both the majority[6] and ASIC[7] err in confusing the issue of whether the credibility findings may be relevant to the penalty judge's determination of penalty (which the appellant accepts) with the separate issue; whether those findings might reasonably give rise to a reasonable apprehension that the primary judge might not be able to bring to the penalty hearing the requisite impartiality.

5. The distinction between these issues is critical. The earlier credibility findings might be relevant to some issues to be determined at the penalty hearing, and might also give rise to an apprehended bias in respect of other issues to be determined at the penalty hearing.

6. The fact that Mr Powe "gave evidence in the manner of someone who had been schooled to advance a particular theory"[8] and was "not a witness who tried to give his evidence in an honest manner"[9] may be relevant to some of the French factors.[10] For example, the finding of Mr Powe's failure to give evidence honestly at the liability hearing may be relevant to "[w]hether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention."[11]

7. The relevance of those findings to that issue does not preclude the apprehension of bias to which the making of the earlier findings gives rise in respect of other, different issues. The observer can reasonably apprehend that, by reason of the earlier findings, the primary judge might not have the requisite impartial frame of mind at the penalty hearing to determine the credibility and weight to be given to the evidence that Mr Powe is to give at the penalty hearing and thus to make findings in respect of some of the considerations relevant to penalty. The primary judge reached a state of actual persuasion that Mr Powe

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[5] E.g *Australian Securities and Investments Commission v SunshineLoans Pty Ltd (No 2)* [2024] FCA 345 at [302], [303] and [304].
[6] *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514, [2025] FCAFC 32 at [58], [59], [67], [71], [100], [101], [107], [108], [111]-[116], [124] (Bromwich J); [144], [147], [148], [152] (Colvin J).
[7] RS [28], [30], [31], [34], [35], [39], [44], [50].
[8] Liability Decision at [302].
[9] *Ibid* at [304].
[10] *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450, [2024] HCA 13 (***Pattinson***) at 460-461 [18]-[19] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) citing *Trade Practices Commission v CSR Ltd* [1991] ATPR ¶41-076 at 52,152-52,153 (French J).
[11] *Pattinson* (2022) 274 CLR 450, [2022] HCA 13 at 460 [18] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

was "not a witness who tried to give his evidence in an honest manner".[12] This might lead an observer to apprehend that the primary judge might to be slow to see, or might not see as completely as the evidence adduced at the penalty hearing shows, that the appellant through its witness Mr Powe had (in his evidence adduced at the penalty hearing) expressed genuine contrition;[13] or exhibited a genuine eagerness to remediate the appellant's contravening conduct.

8. The penalty judge is required to use nuance (cf "mental gymnastics"[14]) to determine when to take the previous adverse credibility findings into account. Nuance is required to ensure that the earlier credibility findings are taken into account only if relevant (eg, in respect of some specific French factors), and not if they are irrelevant (eg, to determine whether Mr Powe had evidenced genuine contrition in the evidence adduced at the penalty hearing). ASIC's submission at RS [44] that "[t]he primary judge will, of course, have regard to his views about the credibility of Mr Powe's earlier evidence" over-states the extent to which the penalty judge may rely on earlier credibility findings. In any event, that the primary judge will do so cannot deny the observer making a logical connection between those findings and the feared lack of impartiality in the determination of the appropriate penalty.

Criminal law proceedings

9. It is not, as ASIC contends at RS [40], well-established in criminal law proceedings that the observer "would not reasonably apprehend bias when a judge might make a second credibility finding within a single proceeding." In *Antoun v The Queen*,[15] this Court applied the *Ebner* principles to find that there was an apprehension of bias as alleged against the trial judge in consequence of the manner in which he dealt with a submission of no case to answer, and his manner of raising and dealing with the question of bail. The application of the *Ebner* principles in any case – whether it be civil penalty, civil, or criminal – will depend in each instance on the facts of the case.

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[12] Liability Decision at [304].
[13] *Pattinson* (2022) 274 CLR 450, [2022] HCA 13 at 470 [47] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson J); *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (t/as Captain Cook College) (in administration) (No 6)* [2025] FCA 542 at [57] (Stewart J).
[14] RS [37].
[15] (2006) 80 ALJR 497, [2006] HCA 2 at 499 [1] (Gleeson CJ), 507 [51] (Hayne J), and 516-517 [80]-[85] (Callinan J). See also *Polimeni v The Queen* [2014] VSCA 72 at Schedule A, [33]-[34] (Nettle J); *R v White* [2021] NSWSC 962 at [19] (Johnson J).

Impartiality prevails over case management principles

10. At RS [50]-[51], ASIC contends that "the fair-minded lay observer would view a judge recusing themselves for the reasons advanced by SunshineLoans as undermining, rather than enhancing, confidence in the fairness of the decision-making process" because the primary judge was "best-equipped" to make the determination as to the appropriate penalty. The *Ebner* principles do not permit or require the courts to ascertain the views of the observer as to all matters concerning the administration of justice with which the primary judge needed to be concerned. The courts need and may ascertain the apprehensions of the observer only to the extent that they concern a reasonable apprehension "that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".[16]

11. In no sense has there been, by the primary judge or Perram J in dissent, "too ready acceptance of an apprehended bias application".[17] To the contrary the adverse credibility findings[18] are sufficient to firmly establish the possibility that the "observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question"[19] of penalty.

12. The case management concerns fixed on by ASIC[20] are irrelevant to "a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal".[21] The issue for determination is whether the majority erred in failing to find that upon application of the *Ebner* principles to these circumstances, the observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question of penalty. If there were an apprehension of bias, the primary judge's judicial power to determine penalty is negated.[22]

Dated: 25 September 2025

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[16] *Charisteas v Charisteas* (2021) 273 CLR 289, [2021] HCA 29 (***Charisteas***) at 296-297 [11] (Court) quoting *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (***Ebner***) at 344–345 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ) and referring to *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 (***Concrete***) at 609 [110] (Kirby and Crennan J).
[17] RS at [52].
[18] See footnotes [1], [2], and [3] above.
[19] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148, [2023] HCA 15 (***QYFM***) at 163 [37] (Kiefel CJ and Gageler J).
[20] RS [52]-[58].
[21] *Charisteas* (2021) 273 CLR 289, [2021] HCA 29 at 296 [11] (Court). See also *Ebner* (2000) 205 CLR 337, [2000] HCA at 343 [3], 344-345 [6]-[7], 348 [22]-[23] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 362 [79] (Gaudron J); *Concrete* (2006) 229 CLR 577, [2006] HCA 55 at 611-612 [117] (Kirby and Crennan JJ).
[22] *QYFM* (2023) 279 CLR 148, [2023] HCA 15 at 159-160 [26] (Kiefel CJ and Gageler J); *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76, [2019] HCA 50 at 97-98 [54] (Nettle and Gordon JJ).

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