

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

SUNSHINELOANS PTY LTD

APPELLANT

AND

AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION

RESPONDENT

*SunshineLoans Pty Ltd v Australian Securities and Investments
Commission*
[2026] HCA 8
Date of Hearing: 16 October 2025
Date of Judgment: 18 March 2026
B23/2025

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

M D Wyles KC and K A O'Gorman SC with A C Pogson for the appellant
(instructed by King & Wood Mallesons)

T M Begbie KC with P J Melican for the respondent (instructed by Gadens)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

SunshineLoans Pty Ltd v Australian Securities and Investments Commission

Courts – Judges – Bias – Reasonable apprehension of bias – Where proceedings for contraventions of civil penalty provisions of *National Consumer Credit Protection Act 2009* (Cth) bifurcated into liability and penalty stages – Where primary judge made adverse credit findings at liability stage – Where contraventions established – Where primary judge recused himself from hearing penalty stage – Whether recusal justified on basis of reasonable apprehension of bias – Whether findings at liability stage revealed animus or prejudgment.

Words and phrases – "adverse credibility findings", "adverse credit findings", "animosity", "animus", "bifurcated hearing", "civil penalty proceedings", "double might test", "fair-minded lay observer", "finality of judicial decisions", "impartial mind", "logical connection", "ordinary judicial practice", "prejudgment", "reasonable apprehension of bias", "recusal".

Federal Court of Australia Act 1976 (Cth), ss 37P, 59.

National Consumer Credit Protection Act 2009 (Cth), ss 166, 167, Sch 1.

Federal Court Rules 2011 (Cth), rr 30.01, 30.02.

Introduction

1 This appeal concerns the correct application of the principle by which a judge is disqualified, on the ground of apprehended bias, "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".¹ The correct application requires: "(1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer".²

2 The issue arises in the context of a proceeding for civil penalties brought by the Australian Securities and Investments Commission ("ASIC") against SunshineLoans Pty Ltd ("SunshineLoans") in the Federal Court of Australia in which the primary judge (Derrington J) adopted the orthodox approach of bifurcating the hearing into two stages. The first stage of the hearing (the "liability stage") was limited to a determination of SunshineLoans' liability. Issues of penalty were deferred to be dealt with, if necessary, at a later stage of the hearing (the "penalty stage"). Having completed the liability stage of the hearing, the primary judge delivered reasons for judgment in which he determined SunshineLoans to be liable for conduct of a kind for which civil penalties may be imposed ("the liability judgment").³

3 SunshineLoans makes no complaint about the manner in which the primary judge conducted the liability stage of the hearing and does not suggest that the liability judgment strayed beyond the issues raised for determination at the liability stage of the hearing. SunshineLoans nevertheless argues that findings made by the primary judge in the liability judgment concerning the conduct of SunshineLoans and the credibility of its witnesses, including Mr Powe, a director of the company, in determining the issues raised at the liability stage of the hearing are such that a

1 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]. See also *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11]; *Director of Public Prosecutions (Vic) v Smith* (2024) 98 ALJR 1163 at 1183 [88]; 419 ALR 212 at 233.

2 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at 163 [38].

3 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345.

fair-minded lay observer might reasonably apprehend that the primary judge might not bring an impartial mind to the resolution of the issues to be determined at the penalty stage of the hearing. The argument is put on the wider basis that the findings might give rise to a reasonable apprehension of animus on the part of the primary judge against SunshineLoans. The argument is put as well on the narrower basis that the findings might give rise to a reasonable apprehension that the primary judge might not fairly evaluate further evidence proposed to be given by Mr Powe at the penalty stage of the hearing.

4 The primary judge rejected SunshineLoans' argument put to him on the wider basis, but recused himself from continuing to hear the proceeding on the narrower basis.⁴ The Full Court of the Federal Court of Australia by majority (Bromwich J, Colvin J separately agreeing; Perram J dissenting) allowed an appeal from the recusal decision of the primary judge, ordering that the proceeding be remitted to the primary judge to determine the penalty to be imposed and any other relief.⁵

5 For reasons to be explained, SunshineLoans' argument that the findings made by the primary judge in the liability judgment might lead a fair-minded lay observer reasonably to apprehend that the primary judge might not bring an impartial mind to the resolution of issues to be determined at the penalty stage of the hearing fails. In our opinion, the argument fails because it breaks down at the second stage of the requisite analysis. There is no logical connection between the identified source of apprehended bias and the postulated deviation from the course of deciding the case on its legal and factual merits. Though expressed in language that is highly critical, the findings to which SunshineLoans points in the liability judgment were all open to be made by the primary judge in the proper discharge of his function of determining the issues of fact and law raised for his determination at the liability stage of the hearing. Having been so made, those findings are all available to be taken into account by the primary judge to the extent they are relevant to such issues as may be raised for determination at the penalty stage of the hearing. In determining penalty, the primary judge is not required to put aside the views he has already expressed concerning the conduct of SunshineLoans. And, in evaluating such further evidence as may be given by Mr Powe at the penalty stage of the hearing, the primary judge is not required to put aside the views he has already expressed concerning the credibility of Mr Powe as a witness.

4 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [No 3] [2024] FCA 786.

5 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514.

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6 The majority of the Full Court were correct. SunshineLoans' appeal by special leave to this Court must be dismissed.

Background to the appeal

7 ASIC brought proceedings for relief against SunshineLoans in respect of alleged contraventions of the *National Consumer Credit Protection Act 2009* (Cth) ("the Credit Act") in the conduct of SunshineLoans' money lending business. ASIC alleged that SunshineLoans charged its customers, who had entered into "small amount credit contracts" as defined in the Credit Act ("credit contracts"), fees which were prohibited. The relief sought by ASIC against SunshineLoans included declarations of contravention, injunctions and civil penalties. SunshineLoans denied the alleged contraventions and claimed that the fees in issue were fees payable on the customers' default and so were permitted under the Credit Act.⁶

8 The proceedings concerned five different versions of credit contracts containing essentially the same terms.⁷ The parties agreed that, during the relevant period, SunshineLoans made 670,609 credit contracts on the terms set out in the liability judgment.⁸ ASIC's case concerned the inclusion of a fee in all of the credit contracts, referred to in the liability judgment as an "Amendment Fee" (although, in some of the contracts, the fee was labelled "Rescheduled payment fee"); the alleged charging of that fee on 12,693 occasions; the alleged payment of the fee by borrowers on 8,376 occasions; and the alleged receipt of \$293,160 by SunshineLoans in respect of that fee.⁹ ASIC's principal contention was that the Amendment Fee was not permitted under s 31A(1) of the *National Credit Code* (Sch 1 to the Credit Act) ("the Credit Code"), which provides:

"A small amount credit contract must not impose or provide for fees and charges if the fees and charges are not of the following kind:

(a) a permitted establishment fee;

6 *National Consumer Credit Protection Act 2009* (Cth), Sch 1, ss 23A, 24(1A), 31A.

7 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [103].

8 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [114]-[117].

9 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [116], [123].

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- (b) a fee or charge (a *permitted monthly fee*) that is payable on a monthly basis starting on the day the contract is entered into;
- (c) a fee or charge that is payable in the event of a default in payment under the contract;
- (d) a government fee, charge or duty payable in relation to the contract."

9 The main issue between the parties was whether the Amendment Fee was a "fee or charge that is payable in the event of a default in payment under the contract" within s 31A(1)(c) of the Credit Code.¹⁰ If not, SunshineLoans contravened: (1) s 24(1A)(a) of the Credit Code by entering into the contracts on terms imposing a monetary liability prohibited by, relevantly, s 23A(1)(b); and (2) s 24(1A)(b) of the Credit Code by requiring payment of an amount in respect of a monetary liability that cannot be imposed consistently with the Credit Code, and, thereafter, receiving payment. Section 23A(1)(b) provides that a small amount credit contract must not impose a monetary liability on the debtor in respect of a fee or charge prohibited by the Credit Code. Section 24(1A) is a civil penalty provision with a maximum penalty of 5,000 penalty units.

10 ASIC also contended that each of the alleged contraventions amounted to a breach of s 47(1)(d) of the Credit Act, which requires a person who holds an Australian credit licence to comply with the credit legislation, including the Credit Code.

Hearing on liability and judgment

11 On 3 July 2023, the primary judge ordered that the trial of the proceedings commencing on 17 July 2023 be limited to a determination of the question of SunshineLoans' liability, and that all issues relating to questions of penalty would be heard at a later date if necessary. The orders were made on the suggestion of ASIC and without objection from SunshineLoans. That hearing was held over six days in July, September and October 2023.

12 On 12 April 2024, the primary judge delivered the liability judgment. His Honour found that SunshineLoans committed numerous contraventions of s 24(1A)(a) and (b) of the Credit Code, and a contravention of s 47(1)(d) of the Credit Act.¹¹ In the judgment, the primary judge criticised aspects of

10 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [143].

11 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [183], [319], [345]-[346].

SunshineLoans' case, and witnesses who gave evidence for SunshineLoans, including Mr Powe. The details of those criticisms are set out below.

13 The findings of contravention contained in the liability judgment were subsequently embodied in declarations from which SunshineLoans appealed unsuccessfully.¹² Accordingly, for the purposes of the penalty stage of the proceeding, SunshineLoans is bound by the findings in the liability judgment, including the primary judge's criticisms of it and Mr Powe. SunshineLoans accepted that the findings in the liability judgment do not extend beyond the issues raised by the parties for determination by the primary judge on questions of liability, and that no complaint could be made of procedural unfairness.

14 In overview, the liability judgment reveals that ASIC's case was strong and substantially based upon SunshineLoans' own documents. Conversely, the primary judge found SunshineLoans' defence to be unpersuasive and that aspects of it merited criticism. The following outline of the primary judge's reasons illustrates the strength of ASIC's case and places the primary judge's criticisms in context.

15 The primary judge found that, once the nature of SunshineLoans' obligations under the Credit Act were identified and the terms of the contracts understood, the contraventions alleged by ASIC were "almost self-evident, in the sense that they follow from the finding that the Amendment Fee was prohibited". The label "Amendment Fee" gave "some primary indication as to when the fee was payable", that is, when the terms of the agreement were amended, including where the scheduled repayments were altered and a rescheduled timetable of repayments was agreed to. The primary judge identified several matters that supported that primary indication and concluded, as a matter of contractual construction, that the Amendment Fee was a fee which was to be paid by a borrower who entered into an arrangement whereby their repayment obligations were amended by agreement with SunshineLoans.

16 The primary judge further found that the contractual obligation to pay the Amendment Fee did not arise consequent upon the borrower having made a default in payment of any amount otherwise payable under the agreement. It followed that the Amendment Fee was not a fee or charge which was payable "in the event of a default of a payment" under the contract. It was a fee or charge prohibited by s 31A of the Credit Code. The Amendment Fee therefore met the description of a "monetary liability prohibited by [s] 23A(1)", and, on each occasion on which SunshineLoans entered into a contract containing an Amendment Fee, it contravened s 24(1A)(a). It followed, subject to certain "defences" raised by

12 *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* (2025) 308 FCR 474.

SunshineLoans, that SunshineLoans contravened s 24(1A)(a) of the Credit Code on 670,609 occasions during the relevant period.

17 The primary judge gave detailed reasons for finding that SunshineLoans required or accepted payment of a prohibited monetary liability in contravention of s 24(1A)(b) of the Credit Code. The primary judge observed that SunshineLoans' case "led one of SunshineLoans' directors to the absurd proposition that a variation to a loan agreement did not result in there being any amendment to it". In rejecting a contention that SunshineLoans' practice was not to charge an Amendment Fee until the end of the loan period, by which time the borrower had not paid the instalments on the loans in accordance with the initially agreed schedule, with the result that the fees were payable in the event of a default in payment, the primary judge observed:

"It is difficult to know whether ... [SunshineLoans] had adopted a deliberately obstruse attitude, was effectively misleading borrowers, or was concocting a fanciful argument to avoid liability in these proceedings."

18 The primary judge next painstakingly addressed and rejected SunshineLoans' contention that there was no evidence of any amendments to the contracts. His Honour found that the contention had "more than a degree of unreality about it, and critically, [was] contrary to the effect of the clear words used by the parties as recorded in the customer transaction logs". His Honour made findings to substantiate this conclusion, including that the evidence established "to a high degree of probability, in fact, almost certainly, that in all cases where [SunshineLoans] imposed an Amendment Fee, it did so following the borrower's request to alter or amend the previously agreed schedule of payments and [SunshineLoans'] agreement that this may occur". Further, the primary judge found that, "[c]ontrary to an array of unfounded submissions advanced on behalf of [SunshineLoans], the circumstances found in the [evidence] show beyond any doubt that, in each case, the parties reached an agreement that there would be an alteration to the borrower's payment obligations under their" credit contract. The primary judge concluded:

"The submissions that the impugned fee was one chargeable to the borrower upon default were wholly unsustainable."

19 After identifying other aspects of the evidence that supported ASIC's case, the primary judge next addressed and rejected SunshineLoans' submission that requests by borrowers to reschedule their payments amounted to notifications by them that they intended to default on the terms of their contract. His Honour referred to affidavit evidence of Mr Simmons, SunshineLoans' Chief Operations Manager, to the contrary followed by his assertion that, if SunshineLoans agreed to hold the payment, the fee was payable because of the borrower's default in making the payment. The primary judge described that affidavit evidence as

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"disingenuous[,] as was Mr Simmons' oral evidence" and gave additional reasons leading to a conclusion that there was "more than sufficient evidence to establish the purpose of the Amendment Fee and the occasions on which it was charged".

20 The primary judge next addressed statements made by, or on behalf of, SunshineLoans, relied upon by ASIC as admissions, that the Amendment Fee was payable when the credit provider and the borrower agreed to an alteration to the repayment schedule. His Honour referred to a letter from Mr Powe to ASIC stating that an amendment fee is "never charged" in three circumstances. The primary judge observed that the natural inference from the letter was that the Amendment Fee was charged when the contracts were amended in other respects and that Mr Powe's evidence that the fees were only charged upon a borrower's default "sits uncomfortably" with the letter and "reveals the evidence given in his affidavit and during cross-examination to be unsatisfactory".

21 Under the heading "The evidence from [SunshineLoans'] witnesses", the primary judge made negative observations about SunshineLoans' witnesses' evidence including that the witnesses appeared to have been "well schooled in what to say under cross-examination" and "stubbornly clung to the notion" that evidence on the customer transaction logs of requests for deferral of a scheduled payment was that the requests were merely for a "stop" to be placed on the next direct debit.

22 Concerning Mr Simmons, the primary judge found that he maintained the "somewhat disingenuous claim" that a customer's request for deferral of a scheduled payment amounted merely to a request for SunshineLoans not to effect a direct debit on the customer's bank account. His Honour said that Mr Simmons "clung firmly to that impossible construction of the customer transaction logs". The primary judge did not accept that Mr Simmons sought to give his evidence honestly in this respect.

23 Concerning Mr Bennetts, SunshineLoans' Operations Manager and Head of Assessments, the primary judge found that he gave evidence in a manner which suggested that he had been "schooled to deny that any agreement existed to amend the terms of the loan and to assert that the customer would be in default if they requested a deferral of a payment". The primary judge observed that, in cross-examination, Mr Bennetts was "forced to the indefensible position of accepting that there was an agreement between [SunshineLoans] and the customer that the latter could defer the payment, but that the fee was charged because there was a default in the repayment terms". His Honour concluded:

"Like Mr Simmons, I do not accept that Mr Bennetts sought to answer honestly the questions put to him in relation to this issue. His approach was not merely to take every opportunity to advance [SunshineLoans'] case and his evidence extended to a deliberate misconstruction of the obvious circumstances which were in front of him."

24 The primary judge continued to analyse Mr Bennetts' evidence, finding that its "absurdity" was further revealed by evidence that his Honour set out, and that it was "with respect, nonsense" to think that there was no amendment to the credit contracts in the relevant circumstances.

25 Finally, the primary judge assessed Mr Powe's evidence, saying:

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

26 The primary judge found that "in the maintenance of the theory which [Mr Powe] sought to propound, his evidence became preposterous". After setting out some of Mr Powe's evidence, the primary judge concluded:

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

27 After rejecting SunshineLoans' submission that the primary judge should draw an adverse inference from ASIC's failure to adduce evidence from customers, his Honour addressed and rejected SunshineLoans' claim of mistake of fact under s 175C of the Credit Act, and SunshineLoans' reliance upon s 183 of the Credit Act, which permits relief from liability for contravention of a civil penalty provision if the person has acted honestly and ought fairly to be excused for the contravention. As to reliance on s 175C, the primary judge found that, even if Mr Powe, Mr Bennetts and Mr Simmons had the asserted beliefs about the facts, which the primary judge doubted, those beliefs were not reasonable because it was "pellucid" that the Amendment Fee was charged for the making of an amendment or variation to the repayment terms under the credit contracts, and "[a]ny suggestion to the contrary is disingenuous".

28 The primary judge added:

"Though many of [SunshineLoans'] submissions were what might be described as 'hopeful', the submissions in relation to this section were at the extreme end of that descriptor. Leaving aside for one moment the question of whether it could be said that [SunshineLoans] acted honestly, the Court would need to be satisfied that, in the circumstances, it ought fairly to be excused. Here, there is nothing in its conduct which suggests that it ought to be entitled to any leniency in any finding as to the appropriateness of its conduct."

29 His Honour observed that it was "not unfair to say that [SunshineLoans] has acted in a wrongheaded manner over an extended period of time and, it is apparent, has not attempted to ascertain the true effect of the *Credit Code* in relation to its operations". As to whether SunshineLoans acted honestly, his Honour said:

"Again, were it necessary to determine whether [SunshineLoans] acted honestly, I would have to conclude that it did not. If one ascribes to its directors and officers a reasonable level of integrity and intelligence, it would be difficult to conclude that they held any belief that the manner in which [SunshineLoans] charged the Amendment Fee to its customers was permitted under the *Credit Code*. As I have found, that lack of honesty extended to the evidence which they gave."

The primary judge's reasons for recusal

30 On 26 April 2024, directions were made for the penalty hearing. On 24 June 2024, after ASIC filed its submissions on penalty, which revealed that ASIC sought the imposition of penalties totalling \$10.5 million, SunshineLoans filed an interlocutory application seeking orders that the primary judge recuse himself from conducting the penalty hearing.¹³ At the hearing of the application, SunshineLoans stated that the basis of the application was apprehended, and not actual, bias.¹⁴

31 Though the primary judge rejected the wider basis of SunshineLoans' argument, he found a reasonable apprehension of bias on the narrower basis. Upon learning that SunshineLoans proposed to adduce further evidence from Mr Powe at the penalty stage of the proceeding, and that ASIC would dispute Mr Powe's credibility in giving that further evidence, the primary judge noted that he would

13 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [No 3] [2024] FCA 786 at [4].

14 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [No 3] [2024] FCA 786 at [22].

be required to decide, for a second time, the question of Mr Powe's credibility. Accepting that no general rule is available to resolve every matter, the primary judge considered that "[t]he lack of propriety in [a] judge attempting to perform a second assessment of [a] person's credibility is patently self-evident".¹⁵ His Honour concluded that there was a reasonable apprehension that he might not bring an impartial mind to the resolution of that question at the penalty stage, because of the adverse findings his Honour had expressed about Mr Powe's credibility at the liability stage.¹⁶

32 The primary judge considered that the circumstances highlighted a tension between the orthodox principles concerning recusal and the now orthodox method of conducting civil penalty proceedings by hearing them in two distinct parts. The difficulty was said to arise where a judge will be required to decide an issue based upon contentious evidence from a witness in relation to whom they have previously made an adverse credit finding. The primary judge acknowledged that findings about the credit of witnesses in the liability phase, including about their conduct of the litigation in that phase, will often be relevant to penalty; and that the penalty determination is necessarily based in part on findings made in the liability judgment regardless of which judge decides questions of relief. However, his Honour considered that "cardinal principles of fairness" required his recusal.¹⁷

Appeal to the Full Court of the Federal Court

33 By a grant of leave to appeal, ASIC appealed the primary judge's decision to recuse himself, arguing that there was no reasonable basis for apprehended bias.

34 Concerning the narrow basis for apprehended bias, Bromwich J concluded that no logical connection was established between the primary judge's adverse credit findings about Mr Powe and the apprehended deviation from deciding the question of penalty on the merits because those findings were required or permitted to be taken into account at the penalty hearing. As his Honour put it, the primary judge's findings about the credibility of SunshineLoans' witnesses were "not in truth a case of pre-judgment, but rather a judgment of a kind that was required to be carried forward to the remedies stage regardless of who heard it". Bromwich J considered that, where the judge is permitted or required to have regard to, and

15 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786 at [17].

16 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786 at [19]-[20].

17 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786 at [59].

apply, findings made at an earlier stage of the proceedings, the requisite logical connection cannot be established by the fact that the judge has determined facts in dispute because the judge is required or at least entitled to have regard to those findings.

35 Similarly, Colvin J reasoned that:

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

36 Colvin J identified the primary judge's error as viewing the penalty hearing as a separate and distinct hearing to be conducted without any of the views formed during the first hearing being carried forward into the second hearing, and thereby attributing to the fair-minded lay observer a false understanding of the nature of the second hearing. Colvin J distinguished between a case where a fair-minded lay observer might reasonably apprehend bias on a question about the credibility of the testimony of a witness where the judge had expressed clear views about the witness's credit in a previous case, and the present case where the trial in a single proceeding is conducted by way of successive hearings. According to Colvin J, the fair-minded lay observer will know that the second hearing is not to be conducted as a separate and fresh adjudication unaffected by what has occurred in the first hearing.

37 Colvin J observed that the making of credibility findings as to the testimony of a witness is an example of the due performance of the judicial function. It is to be expected from the nature of the successive hearings that the primary judge in this matter would carry forward his views on the credibility of witnesses formed at the first hearing to the second hearing. The likelihood that the primary judge will bring to account the views as to credit that have already been formed is not a reason why a fair-minded lay observer would apprehend that the primary judge would not bring an impartial mind to the resolution of the question of the credibility of Mr Powe at a hearing on penalty, because there is no reason to question the impartiality of the adjudication made in the first hearing given the particular nature of the successive hearings.

38 Perram J found that the primary judge approached the question of apprehended bias on the erroneous basis that, because he had made adverse credit findings against Mr Powe at the first hearing and would have to consider his evidence again at the second, disqualification was essentially unavoidable.

However, Perram J considered that the error was immaterial because the primary judge was disqualified on a correct application of the relevant principles. After reviewing the impugned passages of the liability judgment, Perram J concluded that a fair-minded lay observer might well apprehend that the primary judge might not bring an impartial mind to his assessment of Mr Powe's evidence.

39 Finding no error in the primary judge's rejection of the broad basis for apprehended bias, Bromwich J endorsed the primary judge's finding that SunshineLoans did not identify any logical connection between the impugned passages of the liability judgment and the apprehended deviation from deciding the question of penalty on the merits. Colvin J similarly considered the contention "ill-founded" and said that the primary judge's findings in the liability judgment were "impeccably made". Having affirmed the primary judge's finding of apprehended bias on the narrow basis, it was unnecessary for Perram J to address the broad basis.

The fair-minded lay observer and ordinary judicial practice

40 The well-settled test for ascertaining whether there exists a reasonable apprehension of bias postulates a fair-minded lay observer "to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues".¹⁸ The fair-minded lay observer will be aware of the question the judge is tasked with deciding and its legal, statutory and factual context;¹⁹ and that the test is applied to "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial".²⁰ Accordingly, the reasonableness of an apprehension of bias is assessed in the context of ordinary judicial practice.²¹

41 Once this is appreciated, the perception of the primary judge that there exists a tension between the orthodox principles concerning recusal and the now orthodox method of conducting civil penalty proceedings by hearing them in two distinct parts is misplaced. There can be no reasonable apprehension of bias that results from an apprehension that a judge might do exactly what the judge is

18 *Johnson* (2000) 201 CLR 488 at 493 [12].

19 *Smith* (2024) 98 ALJR 1163 at 1184 [95]; 419 ALR 212 at 235. See also *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [20], [23].

20 *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527, quoted in *Johnson* (2000) 201 CLR 488 at 493 [12].

21 *Johnson* (2000) 201 CLR 488 at 493 [13].

permitted to do in the proper discharge of the judicial function. Hence the need for a logical connection between the asserted source of apprehended bias and some deviation from the proper course of deciding the case on its legal and factual merits to be established as a precursor to the assessment of the reasonableness of the asserted apprehension from the perspective of a fair-minded lay observer.

42 Articulating the logical connection between the identified source of bias and the feared deviation from the course of deciding the case on its merits requires that the party fearing bias identify an objectively credible reason why the judge might lack the requisite impartiality to decide the case. In *Ebner v Official Trustee in Bankruptcy*, examples given of assertions generally insufficient to articulate such a connection were that the judge has a mortgage with a bank that is a party to litigation or that the judge knows a party's lawyer.²² A logical connection was accepted to exist, by contrast, in the realistic possibility that the outcome of the litigation would affect the value of the judge's assets.²³

43 In *Livesey v New South Wales Bar Association*²⁴ the apprehension arose from earlier proceedings, in which Mr Livesey was not a party or a witness, when two judges had expressed the view that Mr Livesey had actively and knowingly participated in a corrupt scheme or a conspiratorial arrangement to secure the release of his client on bail by the use of the client's own money. There was said to be a reasonable apprehension of bias by prejudgment where, in the absence of any overriding consideration of necessity, special circumstances or consent of the parties, "a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact".²⁵

44 In *R v Watson; Ex parte Armstrong*, during interlocutory applications, the judge stated that he would not accept the evidence of either party at the trial without corroboration. A majority of this Court found that the judge's formation of a preconceived opinion that neither party was worthy of belief gave rise to a reasonable apprehension that he could not bring a fair and unprejudiced mind to the issues that would arise for decision at the trial. The judge was not entitled to form a settled view that neither party was worthy of credit, or to impose an extra-

22 (2000) 205 CLR 337 at 350 [30].

23 *Ebner* (2000) 205 CLR 337 at 351 [36]-[37].

24 (1983) 151 CLR 288 at 299-300.

25 *Livesey* (1983) 151 CLR 288 at 300.

judicial requirement that their evidence must be corroborated. The majority arguably expressed themselves in absolute terms, saying:²⁶

"As the cases show, there are some matters on which a judge may have preconceived opinions, and yet be qualified to sit, but speaking generally the credit of an essential witness, where the case may turn on credibility, is not one of them."

45 However, that statement must be understood in the context of earlier observations to the effect that regard must be had to "all the circumstances".²⁷

46 In *Antoun v The Queen*,²⁸ the trial judge peremptorily announced that he would dismiss the accused's no case to answer submission, as soon as that submission was mentioned. The Court found an appearance of lack of impartiality from the trial judge's failure to give counsel an opportunity to put the argument in support of the submission, notwithstanding that the trial judge had good reason to think that the submission was implausible. The trial judge's conduct was a "departure from the standards of fairness and detachment required of a trial judge"²⁹ and an "impermissible indication of prejudgment".³⁰

47 Finally, in *British American Tobacco Australia Services Ltd v Laurie*, a reasonable apprehension of bias was found because of a judge's findings, on an interlocutory application in unrelated proceedings, that a company had adopted its document retention policy for fraudulent purposes. The majority of this Court found that the judge should be prohibited from further hearing or determining the case of a smoker's widow, who alleged that the company had a policy of destroying documents that may have provided evidence adverse to its interests in litigation, giving the following reasons:³¹

"In addition to the possibility of the evidentiary position changing, a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on

26 *Watson* (1976) 136 CLR 248 at 264.

27 *Watson* (1976) 136 CLR 248 at 262.

28 (2006) 80 ALJR 497; 224 ALR 51.

29 *Antoun* (2006) 80 ALJR 497 at 502 [21]; 224 ALR 51 at 57.

30 *Antoun* (2006) 80 ALJR 497 at 504 [29]; 224 ALR 51 at 59. See also (2006) 80 ALJR 497 at 508 [56], 518 [87]; 224 ALR 51 at 65, 78.

31 *Laurie* (2011) 242 CLR 283 at 333 [145].

actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about [the company's] denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial – that is, bring an impartial mind to the issues relating to the fraud finding."

48 None of these cases is analogous to the present, in which the primary judge adopted the ordinary judicial practice in civil penalty proceedings of bifurcation of the final hearing in the one proceeding into liability and penalty stages and in which the apprehension of bias at the penalty stage is argued to arise solely from language used by the judge in determining issues which arose at the liability stage.

49 As recognised in the Full Court in the judgment under appeal, bifurcation of the hearing ordinarily has significant advantages for the court and for the parties, including that: (1) no evidence or submissions directed to form or quantum of relief are required unless and until liability is established;³² (2) if liability is established, the parties can identify and address the issues relevant to the question of relief informed by the determinations of liability,³³ and by the manner in which the parties conducted themselves at the liability stage.³⁴ At least where parties are legally represented, their forensic decisions at the liability stage can be informed by the anticipation of a penalty stage and the issues that might arise at that stage.

50 As further recognised in the Full Court in the judgment under appeal, this ordinary judicial practice critically entails that determinations of issues of fact and law, including collateral findings concerning the forensic postures of the parties and the credibility of witnesses, made at the liability stage will provide the foundation for the assessment to be made at the penalty stage to the extent relevant

32 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 526 [54], 545 [142].

33 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 526 [55].

34 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 545 [143].

to the determination of penalty.³⁵ To take such findings into account in the determination of penalty to the extent relevant is not a departure from, but rather part of, determining the case on its legal and factual merits.

Broad basis for apprehended bias fails

51 The broad basis for apprehending bias on the part of the primary judge has no merit. The asserted source of apprehended bias is possible antipathy towards SunshineLoans, said to be revealed by the whole of the liability judgment, and, specifically, findings in that judgment adverse to SunshineLoans and as to the credibility of SunshineLoans' witnesses and their evidence. The logical connection posited between the asserted source of apprehended bias and the feared deviation from the course of deciding the penalty stage of the proceeding on its merits is that the primary judge's possible antipathy might cause him to accept uncritically ASIC's contentions as to an appropriate penalty.

52 The liability judgment does not create an apprehension of bias on the part of the primary judge arising from a possible antipathy towards SunshineLoans. As Colvin J observed, the reasoning of that judgment was found, on appeal, to be impeccable. The fair-minded lay observer is taken to know, in accordance with ordinary judicial practice, that the function of the primary judge in giving the liability judgment was to determine finally the issues raised by the parties concerning the contraventions alleged by ASIC. The case may be contrasted in that respect with *Watson and Johnson v Johnson*,³⁶ where the judge had not reached the stage of making findings. None of the findings in the liability judgment were gratuitous; rather, they were relevant to the issues presented for determination. There is no suggestion that any aspect of the judgment was affected by procedural unfairness by the primary judge, such as in *Antoun* and, apparently, *Livesey*. In the context of the issues presented for determination, the primary judge's careful but firm rejection of SunshineLoans' case, albeit expressed in strong terms in parts, does not demonstrate a lack of professional detachment or, conversely, antipathy towards SunshineLoans. To the contrary, there was no complaint that the liability judgment revealed that the primary judge was actually biased against SunshineLoans.

Narrow basis for apprehended bias also fails

53 The narrow basis for apprehending bias on the part of the primary judge also fails. The asserted source of apprehended bias is findings in the liability

35 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 537 [100], 545 [142].

36 (2000) 201 CLR 488.

judgment said to indicate that the primary judge has reached a state of actual persuasion as to the credibility and character of Mr Powe as a witness, which will be an issue at the penalty stage. As set out above, they include that his evidence on the issues of liability was, non-exhaustively, "unsatisfactory" and, ultimately, "preposterous" as well as "schooled" and not given in an honest manner. The logical connection posited between the prejudgment of Mr Powe and the feared deviation from the course of deciding the penalty stage of the proceeding on its merits is that the primary judge might be "unable to return to the sufficiently impartial state of suspended judgment in which he is to evaluate Mr Powe's second tranche of evidence" by reason of a combination of "cognitive anchoring", having taken an "adversarial position" in respect of him and "the subconscious pressure that the institutional pressure to maintain consistency in fact-finding imposes".

54 Neither the fact that the primary judge made findings pertaining to the credibility and character of Mr Powe as a witness nor the manner in which the primary judge expressed those findings in the liability judgment provides a foundation for considering that the primary judge will not properly evaluate Mr Powe's second tranche of evidence properly taking those earlier findings into account. There was no dispute that the impugned findings are expressly directed to the evidence given by Mr Powe at the liability stage and reflect the proper function of the primary judge in determining the issues presented to him at that stage. There is nothing in the primary judge's findings that prejudices any new issue that might arise for determination at the penalty stage of the proceeding. Once the parties' participation in the liability stage in the expectation of a possible penalty stage is understood, the relevance of the impugned findings at the penalty stage is recognised, and the primary judge is shown to have confined his findings to the issues presented to him on liability, there can be no apprehension of bias arising out of those findings.

Conclusion

55 The appeal must be dismissed with costs.

56 GORDON J. This proceeding concerns the application of principles of apprehended bias to a civil penalty proceeding in which the primary judge had heard and determined questions of liability ("the liability reasons"), including making adverse credibility findings against the witnesses for the appellant ("SunshineLoans"). Those witnesses were senior officers of SunshineLoans – Mr Bennetts, Mr Simmons and Mr Powe. Mr Powe is expected to give further evidence in the penalty hearing and to be cross-examined, including as to his credit. On ascertaining this fact, the primary judge recused himself from conducting the penalty hearing. His Honour's decision was overturned by a majority of the Full Court of the Federal Court of Australia.

57 The appeal raises a question as to when a judge conducting a final hearing in a civil penalty proceeding, having made adverse credibility findings against a witness during the liability stage of the proceeding, should recuse themselves from hearing the penalty stage of the proceeding on the ground of apprehended bias.

58 I agree with Gageler CJ and Gleeson J that the appeal should be dismissed with costs. I gratefully adopt the description of the background to the appeal set out in their Honours' reasons.

Principles – *Ebner* test

59 The applicable principles are well established. In *Ebner v Official Trustee in Bankruptcy*, the Court held that the governing principle is that a judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".³⁷

60 The *Ebner* test might be described as having three steps: (1) identification of the factor which it is said might lead a judge to resolve the question (or case) other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question (or case) on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.³⁸

SunshineLoans' arguments

61 SunshineLoans submitted that a reasonable apprehension of bias could arise on two bases. The first ("the broad argument") was that the language used by

37 (2000) 205 CLR 337 at 344 [6].

38 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at 163 [38], 171 [67]. See also *Ebner* (2000) 205 CLR 337 at 345 [8]; *Charisteads v Charisteads* (2021) 273 CLR 289 at 296-297 [11].

the primary judge in the liability reasons revealed a kind of animosity or animus against SunshineLoans, such that a fair-minded lay observer might fear that the judge might be unable to exercise the degree of neutrality required in dealing with the question of penalty. The second ("the narrow argument") was that the language used by the primary judge in making adverse credibility findings against Mr Powe revealed a prejudgment as to Mr Powe's credit with respect to the evidence Mr Powe was anticipated to give at the penalty hearing, and the weight to be given to that evidence.

The first step: relevant factor

62 The first step, with respect to each argument, is to identify the relevant factor that it is said might lead a judge to resolve the question other than on its legal and factual merits. In *Ebner*, this factor was a financial interest.³⁹ During the hearing in this Court, the factor identified by SunshineLoans was distilled to the language used by the primary judge in the liability reasons when making findings of fact on the issues in front of him given the evidence presented at the trial. This factor applied to both the broad argument and the narrow argument.

The second step: logical connection

63 Having identified the relevant factor, SunshineLoans submitted that, in each case, there was a logical connection between its identified factor and the apprehension that the primary judge would deviate from deciding the relevant question on its merits.

64 In respect of the broad argument, SunshineLoans did not contend that the language used by his Honour in the liability reasons indicated any form of prejudgment of the merits of the issues to be decided in the penalty hearing. Rather, its argument was that the language revealed a kind of animosity or animus against SunshineLoans, involving gratuitous observations about SunshineLoans' witnesses that were unnecessary to decide the issues before his Honour. To that extent, a logical connection was identified.

65 The position in relation to the narrow argument, however, was different. No logical connection was identified. SunshineLoans contended, in substance, that the language used by his Honour in the liability reasons revealed a prejudgment as to Mr Powe's credit and the weight to be given to his evidence. This was cast in terms of his Honour being seen to have "moved out of his initial stance of neutrality" to be in opposition to Mr Powe, or his Honour being cognitively anchored to his adverse credibility determination, where the determination was expressed in findings using "extreme language"

39 (2000) 205 CLR 337 at 342-343 [1].

or language that was "extremely sceptical". In support of this submission, SunshineLoans referred to *British American Tobacco Australia Services Ltd v Laurie*, in which a majority of this Court considered that a judge should be prohibited from further hearing a case involving allegations that a company had implemented a policy of destroying documents that may have provided evidence adverse to its interests in litigation, where that judge had accepted similar allegations in a previous case.⁴⁰ One circumstance to which the majority had regard was that the judge had, in the previous decision, "express[ed] himself in terms indicating extreme scepticism".⁴¹

66 A complete answer to the narrow argument is that, when SunshineLoans applied for the primary judge to recuse himself, the issues relevant to the assessment of penalty were unknown. The question of the precise issue or controversy to be determined on the penalty hearing had not yet crystallised, and so it was unclear what aspect of the affidavit or oral evidence to be given by Mr Powe could have been prejudged by the primary judge or otherwise give rise to a reasonable apprehension of bias. In so far as SunshineLoans' case included an abstract allegation of a prejudgment of Mr Powe's credit generally, again, precisely how and on what basis Mr Powe's credit would be challenged at the penalty stage had not crystallised. Consequently, SunshineLoans was not yet in a position to articulate a logical connection between the primary judge's findings with respect to Mr Powe's credibility and the issues and questions that might arise with respect to Mr Powe's evidence at the penalty hearing.

67 Nevertheless, these reasons go on to consider the third step with respect to both arguments.

The third step: reasonableness

68 The question is whether the fair-minded lay observer, reading the language in the liability reasons, would reasonably apprehend that the primary judge might deviate from deciding either the question of the appropriate penalty (the broad argument), or the question of the credibility of and weight to be given to Mr Powe's evidence at the penalty stage (the narrow argument), on its merits. The answer is "no".

69 The fair-minded lay observer is taken to be aware of the nature of the decision to be made and the context in which it is to be made, as well as

40 (2011) 242 CLR 283 at 322 [103], 326 [122], 333 [145], 335 [153].

41 *Laurie* (2011) 242 CLR 283 at 333 [145].

the circumstances leading to the decision.⁴² The fair-minded lay observer is taken to have sufficient understanding of the circumstances of the case to make a reasonable judgment, taking into account that the judge is a professional whose training, tradition and oath require them to discard the irrelevant, the immaterial and the prejudicial.⁴³ The reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice.⁴⁴ That includes that there was no requirement that the liability and penalty hearings be separated, but that "splitting" the final hearing of the proceeding was a pragmatic decision in accordance with ordinary judicial practice.

The context

70 In the present case, the fair-minded lay observer would have been aware of the following: (a) the fact that this case involved a final hearing in a civil penalty proceeding; (b) the statutory context; and (c) the manner in which SunshineLoans conducted its defence. Each will be considered in turn.

(a) Final hearing in civil penalty proceeding

71 First, the fair-minded lay observer is taken to be aware that this case involved a final hearing in a civil penalty proceeding,⁴⁵ which was conducted in two stages in a way common to civil penalty proceedings, involving a first stage determination as to questions of liability, and a second stage determination as to questions of penalty. This can be distinguished from other cases in which this Court has accepted that a reasonable apprehension of bias may arise where a judge has previously made findings on facts in issue or with respect to a witness's credibility and may be required to adjudge those same matters in a *subsequent case*.⁴⁶

42 *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [23]; *QYFM* (2023) 279 CLR 148 at 172-173 [72].

43 *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12], citing *Vakauta v Kelly* (1988) 13 NSWLR 502 at 527, adopted in *Vakauta v Kelly* (1989) 167 CLR 568 at 584-585.

44 *Johnson* (2000) 201 CLR 488 at 493 [13]; *Charistead* (2021) 273 CLR 289 at 297 [12].

45 A civil penalty proceeding is distinguishable from a criminal prosecution: see generally *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 458-459 [14], citing *The Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at 505-507 [51]-[57].

46 See, eg, *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 300; *Laurie* (2011) 242 CLR 283 at 333 [145].

72 The fair-minded lay observer is also taken to know that the findings made in the first stage, to the extent relevant in the second stage, would be binding on the judge hearing and determining the second stage regardless of which judge heard the second stage.⁴⁷ The observer is taken to know that the second stage would proceed on the foundation of what happened in the first stage.

73 In this case, the findings made by the primary judge in the liability reasons were appropriately to be carried forward, to the extent relevant, to the penalty hearing. With knowledge of the relationship between the liability and penalty stages of the hearing, the fair-minded lay observer must also be taken to know that the primary judge was not required to approach the penalty stage with a "state of suspended judgment" as if the liability stage had not occurred.

74 Indeed, SunshineLoans accepted that this was not a case in which findings made previously would be inapplicable in a subsequent adjudication. As explained, SunshineLoans' submission in this Court was not a general proposition that a judge, having made adverse findings generally (or adverse credibility findings against a witness) in a decision on liability, was required to recuse themselves from hearing questions of penalty (or from making any subsequent findings on the witness's credibility at the penalty stage). Rather, SunshineLoans' argument was concerned with specific instances of language adopted by the primary judge.

(b) Statutory context and issues in proceeding

75 Second, the fair-minded lay observer is taken to be aware of the statutory context and the way the issues in the proceeding arose. The proceeding involved an application by the respondent (the Australian Securities and Investments Commission or "ASIC") under the *National Consumer Credit Protection Act 2009* (Cth) ("the Credit Act") for declarations that SunshineLoans had contravened certain civil penalty provisions, namely ss 24(1A)(a) and 24(1A)(b) of the *National Credit Code*⁴⁸ and s 47(1)(d) of the Credit Act, and other relief. ASIC's case against SunshineLoans concerned small amount credit contracts entered into between SunshineLoans and borrowers. Under those contracts, a borrower would enter into a direct debit arrangement, pursuant to which scheduled repayments would be automatically debited from the borrower's bank

47 See, eg, the analysis of findings made at the first stage in *Australian Securities and Investments Commission v Westpac Banking Corporation [No 3]* (2018) 131 ACSR 585 at 597 [65]; *Australian Securities and Investments Commission v National Australia Bank Ltd [No 2]* (2023) 171 ACSR 176 at 204-205 [116], 206 [121]; *Transport Workers' Union of Australia v Qantas Airways Ltd* (2025) 343 IR 59 at 74-75 [40]-[41]. See also the "French factors": *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152-52,153.

48 The *National Credit Code* is Sch 1 to the Credit Act.

account and electronically transferred to SunshineLoans. ASIC's claim specifically related to a fee ("the Amendment Fee") in the small amount credit contracts, which ASIC contended was not within the scope of fees and charges permitted under s 31A(1) of the *National Credit Code*. The parties disputed whether the Amendment Fee fell within s 31A(1)(c) as "a fee or charge that is payable in the event of a default in payment under the contract". ASIC claimed that SunshineLoans contravened s 24(1A)(a) of the *National Credit Code* by entering into the small amount credit contracts on terms imposing the Amendment Fee, and contravened s 24(1A)(b) by requiring and receiving payment of the Amendment Fee.

(c) Manner in which SunshineLoans conducted the liability hearing

76 Third, the fair-minded lay observer is taken to be aware that, in defending the application in respect of its liability, SunshineLoans made a forensic decision to take every point and to run an evidentiary case by adducing evidence from its senior officers. SunshineLoans' case included raising arguments as to standing and jurisdiction; the standard of proof to be applied in the proceeding; the proper construction of SunshineLoans' contracts and the nature of the Amendment Fee; whether entering into contracts containing the Amendment Fee amounted to a breach of s 24(1A)(a) of the *National Credit Code*; and whether SunshineLoans' charging and acceptance of the Amendment Fee involved it requiring or accepting "payment of an amount in respect of a monetary liability that cannot be imposed consistently" with the *National Credit Code*, contrary to s 24(1A)(b).

77 The primary judge determined that the Amendment Fee was payable on, or occasioned by, an amendment of the terms of the relevant small amount credit contract and was therefore a prohibited fee. SunshineLoans adduced evidence from its senior officers, including Mr Powe, in support of its submission that its practice was not to charge the Amendment Fee until the end of the loan period, by which time the borrower had not paid the instalments on the loans in accordance with the initially agreed schedule. This had the result that the fee was "payable in the event of a default in payment", which was a kind of fee permitted by the *National Credit Code*.⁴⁹ Specifically, SunshineLoans' witnesses gave evidence that denied that the Amendment Fee was paid when SunshineLoans and the borrower agreed to a variation of the relevant small amount credit contract. The witnesses' evidence was that requests from borrowers to reschedule or defer their payments amounted to notifications by them that they intended to default on the terms of their contract. SunshineLoans also sought to rely on s 183 of the Credit Act to seek relief from liability.

49 *National Credit Code*, s 31A(1)(c).

Whether language in liability reasons gave rise to reasonable apprehension of bias

78 SunshineLoans referred to specific findings and language used in the liability reasons that it said gave rise to a reasonable apprehension of bias.

79 With respect to the broad argument, those findings included that: (i) in cross-examination, a SunshineLoans director was led to what the primary judge called the "absurd proposition that a variation to a loan agreement did not result in there being any amendment to it"; (ii) regarding SunshineLoans' submission that the Amendment Fee was payable upon a borrower's default, the primary judge wondered whether SunshineLoans had "adopted a deliberately obtruse attitude" or "was concocting a fanciful argument to avoid liability"; (iii) SunshineLoans made "an array of unfounded submissions" regarding the circumstances in which the Amendment Fee was allegedly charged; (iv) SunshineLoans' submissions that the Amendment Fee was chargeable to the borrower upon default were "wholly unsustainable"; (v) Mr Simmons' evidence that the Amendment Fee was payable because of the borrower's default in making the payment was "disingenuous"; (vi) SunshineLoans' witnesses had been "well schooled in what to say under cross-examination" and "stubbornly clung" to the notion that a request by a customer to defer a scheduled payment was merely a request for a "stop" to be placed on the customer's next direct debit; (vii) Mr Simmons did not seek to give his evidence honestly in respect of an "impossible construction" of customer transaction logs that claimed that, where a customer service officer recorded that a customer had requested a deferral of a scheduled payment, that amounted merely to a request for SunshineLoans not to effect a direct debit on their bank account; (viii) Mr Bennetts did not seek to "answer honestly the questions put to him" in relation to the issue of whether a borrower would be in default if they requested a deferral of a payment and SunshineLoans agreed to that deferral; and (ix) in relation to SunshineLoans' claimed defence under s 183 of the Credit Act, it was "not unfair to say that [SunshineLoans] [had] acted in a wrongheaded manner over an extended period of time" and had a "lack of honesty".

80 Those findings do not reveal the animosity or animus for which SunshineLoans contends. First, the findings were not general findings adverse to SunshineLoans or its witnesses. Each was made in the context of addressing a specific issue or argument raised by SunshineLoans – namely, whether the Amendment Fee was charged upon a variation to the agreement between SunshineLoans and the borrower, and whether SunshineLoans could be relieved from liability under s 183 – or the evidence of a witness in respect of that issue. Second, each of the findings was directed at the substance of an issue or argument raised by SunshineLoans, or the manner in which SunshineLoans' witnesses gave evidence about that specific issue or argument. Each was an issue or matter the primary judge was required to address and, in addressing those matters, the primary judge's findings were not gratuitous. Finally, none of the primary judge's findings were unfounded or said by SunshineLoans to be unfounded.

To the contrary, SunshineLoans accepted that the primary judge's findings were open on the evidence and reflected his Honour's actual reasons for giving final judgment on those issues. Taking these matters together, it would not be reasonable for the fair-minded lay observer, with knowledge of the relevant context, to apprehend that the primary judge might deviate from deciding the question of the appropriate penalty on its merits.

81 The findings that a SunshineLoans director was led to an "absurd proposition" in giving evidence, and that witnesses were "disingenuous" or "well schooled", were observations that were appropriate for the primary judge to make in determining whether the witnesses' evidence should be accepted. These findings were directed at the witnesses' evidence in support of the submission that the Amendment Fee was payable on a borrower's default. A finding that a witness's evidence is absurd characterises that evidence as being particularly implausible, compared with, for example, evidence that is "unlikely" or "unsatisfactory". Similarly, a finding that the evidence is "disingenuous" simply reflects an observation that the evidence is dishonest. The primary judge's findings that SunshineLoans' witnesses appeared "well schooled" also reflected the primary judge's observations of the manner in which the witnesses gave evidence on the circumstances in which the Amendment Fee was payable. Again, such findings did not give rise to any perceived animosity or animus against SunshineLoans or its witnesses. They were not broad findings as to a witness's character but confined to the evidence given by the witness in respect of the issues in dispute at the liability hearing.

82 Nor did the primary judge's findings that SunshineLoans raised "unfounded" or "wholly unsustainable" submissions reveal any animosity or animus. It was appropriate for the primary judge to assess and make observations as to the prospects of the submissions advanced by SunshineLoans that the Amendment Fee was payable upon default, rather than upon a variation of the loan agreement. The language adopted indicated the force of the primary judge's rejection of those particular submissions.

83 Further, findings that SunshineLoans itself had "adopted a deliberately obtruse attitude" or had concocted "a fanciful argument to avoid liability", while critical of SunshineLoans, also did not display any animosity or animus. Rather, they expressed criticism about SunshineLoans' approach to defending its charging of the Amendment Fee, which the primary judge considered to be contrary to the documentary evidence, including "the effect of the clear words used by the parties as recorded in the customer transaction logs".

84 Finally, the findings that SunshineLoans had acted in a wrongheaded manner and not honestly were made in the context of addressing SunshineLoans' submissions as to relief under s 183 of the Credit Act, with respect to which the primary judge would be required to assess if SunshineLoans had acted honestly

and ought fairly to be excused for the relevant contraventions. They were findings the primary judge was required to make.

85 With respect to the narrow argument, SunshineLoans referred to five specific findings the primary judge made with respect to Mr Powe's evidence. Those findings were that: (i) he "gave evidence in the manner of someone who had been schooled to advance a particular theory"; (ii) "in the maintenance of the theory which he sought to propound, his evidence became preposterous"; (iii) he gave evidence that, the primary judge implied, he did not believe; (iv) "he gave his evidence in an attempt to avoid the conclusion that [SunshineLoans] was charging fees otherwise than on a default"; and (v) "[u]ltimately ... he was also not a witness who tried to give his evidence in an honest manner". As explained earlier, SunshineLoans characterised the language adopted by the primary judge as "extreme" or "extremely sceptical".

86 The findings to which SunshineLoans referred do not reveal a prejudgment of Mr Powe's credit with respect to the evidence he might give at the penalty hearing or the weight to be given to that evidence.

87 First, as with the other witnesses, his Honour's findings were made in respect of the evidence given by Mr Powe at the liability hearing as to a specific argument raised by SunshineLoans. They did not reveal any appearance that the primary judge had "moved out of his initial stance of neutrality", or that his Honour might be cognitively anchored to his previous findings. For example, it was said that Mr Powe "gave evidence in the manner of someone who had been schooled to advance a particular theory" and that, in maintenance of that theory, "his evidence became preposterous". The "particular theory" referred to SunshineLoans' case that there was no agreement between it and its customers to vary the loan contracts.⁵⁰ This was an element of SunshineLoans' case in respect of its liability. The fair-minded lay observer would not read these findings as expressing any prejudgment as to the credibility or weight to be given to Mr Powe's evidence at the penalty stage. Similarly, a finding that Mr Powe was "not a witness who tried to give his evidence in an honest manner" was not a broad finding as to Mr Powe's character as a witness generally. It was a characterisation of Mr Powe's manner in giving his evidence at the liability hearing. The primary judge did not make any findings about Mr Powe's willingness to give honest evidence generally.

88 Second, the findings were not expressed in language involving "extreme scepticism".⁵¹ The finding that Mr Powe's evidence was "preposterous", like the finding that a witness's evidence was "absurd", indicated that the plausibility of the evidence went beyond being merely "unlikely"

50 See [77] and [79] above.

51 *Laurie* (2011) 242 CLR 283 at 333 [145].

or "unsatisfactory". As explained above, this was an appropriate observation for the primary judge to make in considering the reliability of Mr Powe's evidence. There was nothing "extreme" about any of the primary judge's remarks. To the extent the language might be described as "strident", it was acceptable for the primary judge to use that language in making his findings.

Conclusion on reasonableness

89 Ultimately, SunshineLoans did not identify any aspects of the primary judge's reasons which were expressed in such terms as to give rise to a reasonable apprehension of bias on either its broad or narrow argument, having regard to the context of: (a) the conduct of a final civil penalty proceeding divided into questions of liability and penalty; (b) the statutory context; and (c) the conduct of the proceedings by SunshineLoans.

90 With respect to both arguments, the language used by the primary judge was couched in strong terms, but it was not so intemperate as to give rise to a reasonable apprehension of bias by the fair-minded lay observer.

Recusal not categorical

91 In *Ebner*, a number of important observations were made that should be restated. First, it is not "improper for a judge to decline to sit unless the judge has affirmatively concluded that [they are] disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification."⁵² But that observation was qualified: "if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."⁵³

92 Second, it is "not possible to state in a categorical form the circumstances in which a judge, although personally convinced that [they are] not disqualified, may properly decline to sit".⁵⁴ Some of the reasons were identified in *Ebner*: "[c]ircumstances vary, and may include such factors as the stage at which an objection is raised, the practical possibility of arranging for another judge to hear the case, and the public or constitutional role of the court before which

52 *Ebner* (2000) 205 CLR 337 at 348 [20].

53 *Ebner* (2000) 205 CLR 337 at 348 [20].

54 *Ebner* (2000) 205 CLR 337 at 348 [21]. See also *QYFM* (2023) 279 CLR 148 at 163-164 [39].

the proceedings are being conducted. These problems usually arise in a context in which a judge has no particular personal desire to hear a case. If a judge were anxious to sit in a particular case, and took pains to arrange that [they] would do so, questions of actual bias may arise."⁵⁵

⁵⁵ (2000) 205 CLR 337 at 348 [21].

EDELMAN J.

Introduction

93 A trial in the Federal Court of Australia was bifurcated into a hearing concerning liability and a hearing, if necessary, concerning penalty. In the trial judge's liability judgment the trial judge was highly critical of SunshineLoans Pty Ltd ("Sunshine Loans"), including saying that the evidence of one of Sunshine Loans' directors was "preposterous", that the director had given evidence "in the manner of someone who had been schooled to advance a particular theory", and that the director had not "tried to give his evidence in an honest manner".⁵⁶

94 Sunshine Loans correctly accepted that it was "entirely proper" for the forceful criticisms by the trial judge (Derrington J) to be recorded in his meticulous and typically prompt judgment. But Sunshine Loans submitted that the trial judge was disqualified from presiding over the penalty hearing for reasons of apprehended bias. The trial judge accepted that submission. A majority of the Full Court of the Federal Court of Australia (Bromwich J and Colvin J; Perram J dissenting) rejected the submission and allowed the appeal.

95 Although this appeal was presented as raising important issues of principle concerning when a trial judge is disqualified from presiding over part of a bifurcated hearing for reasons of apprehended bias, the resolution of this appeal should involve nothing more than the application of well-established principles to the facts of the case. Those facts, and the findings of the trial judge in the liability judgment of the bifurcated hearing, are set out in the other judgments of this Court. There can be no doubt that, as Perram J observed in the Full Court, the principles of apprehended bias can operate upon matters that arise during the course of a single trial, whether bifurcated or not, in the same way that those principles can operate upon matters that arose prior to the trial.⁵⁷

96 In some cases, the trial judge might be disqualified. In others, the trial judge might not be disqualified. For instance, an apprehension of bias might arguably have arisen if the trial judge had expressly said or implied during the liability hearing, or recorded in his liability judgment, that he had formed such a hostile and fixed view of the director that no matter what was said by the director at the

56 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* [No 2] [2024] FCA 345 at [302]-[304].

57 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 518 [17]. See also *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 119 [135].

penalty stage of the hearing, he would disregard that evidence.⁵⁸ Conversely, no reasonable apprehension of bias could have arisen if the trial judge had, unfairly, failed to expose his thought process by conducting the liability hearing as a Sphinx and by intentionally suppressing his criticisms of Sunshine Loans and expressing himself in a muted and lacklustre fashion in his liability judgment.⁵⁹ This case involves neither extreme.

97 As this Court said in *Livesey v New South Wales Bar Association*,⁶⁰ it is "impossible to lay down an inflexible rule". Everything depends on evaluation of the facts from the perspective of a hypothetical lay observer. On such conclusions reasonable minds will differ, often depending upon the degree of impartiality that they consider to be expected in the legal system by the hypothetical lay observer.⁶¹ In *British American Tobacco Australia Services Ltd v Laurie*,⁶² four of the eight appellate judges in the two courts that heard the appeals held that there was a reasonable apprehension of bias but the other four held that there was not.

98 Although judicial conclusions in cases of this nature are sometimes expressed with a confidence approaching certainty, this case is yet another example where reasonable minds might differ. It is unsurprising, therefore, that before the matter reached this Court, two judges (including the trial judge, who took a more robust approach) had concluded that the trial judge was disqualified and two judges had concluded that he was not. It is unnecessary to conduct a minute examination of the reasons of the Full Court of the Federal Court to determine whether error occurred in the reasons of the majority as alleged in the grounds of appeal in this Court. In this Court, the dispositive question was the asserted presence of either of two of the protean categories of apprehended bias: apprehended prejudgement bias and apprehended animosity bias. In my view, the correct conclusion is that there was no reasonable apprehension of bias in this case on either basis.

99 Two matters of confusion must, however, be clarified at the outset. First, if a trial judge has crossed the line and exhibited conduct that gives rise to a reasonable apprehension of bias, then in resolving an objection to that judge sitting

58 Compare *Antoun v The Queen* (2006) 80 ALJR 497 at 504 [29]-[30], 508 [56], 517 [81]; 224 ALR 51 at 59, 65, 76; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 333 [145].

59 See *Antoun v The Queen* (2006) 80 ALJR 497 at 504 [32]; 224 ALR 51 at 59-60.

60 (1983) 151 CLR 288 at 299.

61 See *Antoun v The Queen* (2006) 80 ALJR 497 at 504 [29]; 224 ALR 51 at 59.

62 (2011) 242 CLR 283. See also *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414.

it cannot be decisive that it would be more efficient in the administration of justice for the trial judge to hear the penalty stage of the proceeding. Natural justice is not subservient to efficiency.

100 Secondly, merely because a judge acts in the proper discharge of the judicial function during a hearing or in their manner of expression of a judgment does not preclude a conclusion that there is a reasonable apprehension of bias. For instance, it is ethically essential, and not merely a proper discharge of the judicial function, for a judge to enunciate during a liability hearing or in a liability judgment if they have formed a personal animus against a witness that is so strong that the judge feels that they can no longer discharge their duties impartially. In such a highly unusual case, which is not this case, there would not merely be a reasonable apprehension of bias at the penalty stage; there would be actual bias.

The spectrum of bias and the test for apprehended (undue) bias

What is apprehended bias?

101 Apprehended bias involves undue partiality. The undue partiality might be perceived in a number of ways, including undue partiality towards an outcome, towards a witness, or in relation to a fact in issue. The adjective "undue" is important. No person, judge or otherwise, is immune from conscious or subconscious prejudice.⁶³ As the Australian Law Reform Commission has said:⁶⁴

"Human reasoning and decision-making can never be completely impartial or neutral, because our decision-making may be influenced by many factors of which we are not consciously aware. Judges are human and, notwithstanding their role as professional decision makers, are necessarily constrained by the limits of human cognition and reasoning."

102 As Sunshine Loans submitted, it was said in 1979 that an approach "which is commonly adopted in respect of disputes of fact" has been for a trial judge to make no findings as to the honesty or dishonesty of a witness but to confine themselves to a determination of the fact on the evidence as a whole.⁶⁵ But that convenient practice is neither transparent nor always appropriate. If the trial judge has reached a forceful conviction then, as Sunshine Loans accepted had occurred in this case, it can be entirely proper for the judge to record that strength of

63 *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 118-119 [133].

64 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) at 133 [4.81].

65 *McCormack v Federal Commissioner of Taxation* (1979) 143 CLR 284 at 313.

conviction even if doing so properly, and transparently, manifests a degree of partiality. As Brennan, Deane and Gaudron JJ said in *Vakauta v Kelly*,⁶⁶ in remarks equally applicable to a judgment on liability in a bifurcated hearing, "a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated". In the course of judicial hearings, silence is not golden.⁶⁷ Even for judges, it is often the case that "passive participation in litigation is no longer an option".⁶⁸

103 It is impossible to identify in the abstract the point at which a forcefully expressed conviction of a trial judge crosses the line between, on the one hand, an expression of permissible partiality, from which the fair-minded lay observer would understand that the trial judge remains open to persuasion otherwise, and, on the other hand, an expression evidencing a closed mind or undue animosity. But the line exists. As Gleeson CJ said of criminal trials and appeals in *Antoun v The Queen*,⁶⁹ in words which apply with equal force in civil trials and appeals:

"Indignation is a natural reaction to some facts that are disclosed, or some events that occur, at a criminal trial or, for that matter, on an appeal. It should never be permitted to compromise the appearance of impartiality that is required of judges."

The test for apprehended bias

104 The legal test for an apprehension of bias is now established. The test, distilled from key authorities, deploys the construct of a "fair-minded lay observer" to determine whether, from the perspective of that construct, there is a reasonable possibility (ie, the fair-minded lay observer might reasonably apprehend) that the adjudicator, for reasons of prejudgement or any other preponderating disposition

66 (1989) 167 CLR 568 at 571.

67 See *Royal Guardian Mortgage Management Pty Ltd v Nguyen* (2016) 332 ALR 128 at 173 [235].

68 *Rozenblit v Vainer* (2018) 262 CLR 478 at 501 [76].

69 (2006) 80 ALJR 497 at 502 [22]; 224 ALR 51 at 57.

or tendency, might not bring an impartial and independent mind to the issue to be decided.⁷⁰

105 In *Ebner v Official Trustee in Bankruptcy*,⁷¹ four members of this Court identified three steps (or two anterior steps followed by the ultimate evaluation process) that are required in the assessment of an apprehension of bias by the construct of the fair-minded lay observer: (i) "the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits"; (ii) "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits"; and, following these two steps, (iii) the ultimate evaluation of "the reasonableness of the asserted apprehension of bias".

Sunshine Loans' submissions of two different types of bias

106 Sunshine Loans had effectively two submissions in support of its claim of a reasonable apprehension of bias, the former of which was said to be a "subset" of the latter: (i) the submission that the trial judge's finding that a director of Sunshine Loans was untruthful in his evidence gave rise to a reasonable apprehension of bias when assessing the evidence to be adduced from the director at the penalty hearing; and (ii) the submission, or "umbrella" ground, as it was described by Sunshine Loans, that "the observer can fear that in dealing with the question of penalty ... the primary judge might be unable to exercise that degree of neutrality required dispassionately to weigh ... [the] considerations relevant to the questions involved".

107 The "umbrella" submission by Sunshine Loans might have been thought to subsume its "subset" submission. If the trial judge's findings concerning the director witness were not sufficient to establish a reasonable apprehension of bias together with all other matters relied upon by Sunshine Loans then the findings would not be sufficient to establish a reasonable apprehension of bias by themselves. But the presentation of those submissions in oral argument revealed that the submissions were actually concerned with two different allegations of reasonably apprehended bias.

70 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345 [6]-[8]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 563 [183]; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 322 [104], 331 [139]. See also *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 118 [132].

71 (2000) 205 CLR 337 at 345 [8]. See also *Charisteads v Charisteads* (2021) 273 CLR 289 at 296-297 [11].

108 The factually narrower basis for reasonably apprehended bias focused only upon the trial judge's remarks concerning the director witness. Sunshine Loans submitted that those remarks exhibited prejudgement on issues of the credit of the director witness that might arise at the penalty hearing. That can be described as apprehended prejudgement bias.

109 The factually broader basis for reasonably apprehended bias focused upon the trial judge's reasons in his liability judgment as a whole, including the remarks concerning the director witness. This submission was concerned with whether at the penalty hearing there would be a reasonably apprehended bias due to animosity towards Sunshine Loans. That can be described as apprehended animosity bias.

No reasonable apprehension of bias arose

Apprehended prejudgement bias

110 In *Laurie*,⁷² the apprehended prejudgement bias was said to arise from views expressed by the trial judge in an interlocutory judgment in unrelated earlier proceedings raising the same issue in relation to one of the parties. The views expressed by the trial judge were "in terms indicating extreme scepticism about [the party's] denials".⁷³ The trial judge expressed "strong doubt about the possibility of different materials explaining the difficulties experienced", and described the nature of the fraud about which he had been persuaded as "extremely serious".⁷⁴ A majority of this Court, comprised of Heydon, Kiefel and Bell JJ, held that the impression created by reading the interlocutory judgment was that "the clear views there stated *might* influence [the trial judge's] determination of the same issue in the [later] proceedings".⁷⁵

111 The decision in *Laurie* concerned the reasoning of a trial judge in an interlocutory hearing in an unrelated matter. The issue was whether the trial judge would have an impartial state of mind at the commencement of the trial in the later, unrelated proceedings. By contrast, the present case concerned a bifurcated hearing. Although a judge's judgement should be suspended before considering any submissions or evidence, judgement is rarely, and is not expected to be, entirely suspended throughout the hearing. It is ordinary judicial practice for strong

72 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283.

73 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 333 [145].

74 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 333 [145].

75 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 333 [145] (emphasis in original).

views to be formed during the course of a hearing and this includes instances where those strong views are recorded in a liability judgment.

112 Contrary to the submissions of Sunshine Loans at one point, therefore, it would not be a reasonable apprehension of bias if the fair-minded lay observer were to form the view that the trial judge might be, at the penalty stage of the proceeding, "unable to return to the sufficiently impartial state of ... suspended judgment in which he is to evaluate [the director's] second tranche of evidence". As Sunshine Loans ultimately, and properly, accepted, it was necessary to show the possibility that the trial judge might not retain a "capacity" to accept the evidence of the director on penalty issues.

113 Sunshine Loans articulated five "critical findings" by the trial judge upon which Sunshine Loans relied: (i) the finding that the director gave evidence "in the manner of someone who had been schooled to advance a particular theory"; (ii) the finding that the evidence of the director was "preposterous"; (iii) the finding that implied that the director gave evidence that he might not "actually believe[]"; (iv) the finding that the director gave his evidence in an attempt to avoid a particular legal conclusion; and (v) the finding that the director was "not a witness who tried to give his evidence in an honest manner".⁷⁶

114 Despite the clarity with which this submission was presented by Ms O'Gorman SC, who presented the submissions for Sunshine Loans concerning apprehended prejudgement bias, the submission failed sufficiently to articulate a logical connection between the trial judge's findings about the credibility and character of the director and the feared deviation from the trial judge deciding the penalty hearing on its merits. The only possible connection could be that the remarks by the trial judge in the liability judgment might lead the fair-minded lay observer to conclude that, contrary to "ordinary judicial practice", of which the fair-minded lay observer is aware,⁷⁷ the trial judge's views about the credibility and character of the director were so fixed that nothing that the director or counsel for Sunshine Loans might say about an issue in the penalty hearing could persuade the trial judge otherwise. But what was that issue?

115 The closest that Sunshine Loans came to articulating an issue about which a fair-minded lay observer might reasonably think that (based on the strong views expressed by the trial judge in the liability judgment) the trial judge might have formed a fixed, and immutable, view concerned the factors generally relevant to penalty, the only two specifically identified being "[w]hether the company has a

76 See *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [302]-[304].

77 See *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13]; *Charisteas v Charisteas* (2021) 273 CLR 289 at 297 [12]-[13].

corporate culture conducive to compliance with [the law], as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention" and "[w]hether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of [the law] in relation to the contravention".⁷⁸ But, in this Court, Sunshine Loans did not point to any matters in dispute in the evidence that was proposed to be given by the director which might give rise to an issue between the parties concerning corporate culture or Sunshine Loans' disposition to co-operate with the Australian Securities and Investments Commission in relation to the contraventions.

116 In the Full Court of the Federal Court, it appears that Sunshine Loans did descend to the detail of evidence that would be given by the director at the penalty hearing.⁷⁹ This included: a statement that the director did not believe that Sunshine Loans was in contravention at any time; an assertion that Sunshine Loans had a culture of compliance; a reiteration of evidence that had been rejected by the trial judge in the liability judgment; and a reliance upon other affidavit evidence to depose to the financial difficulty for Sunshine Loans if it had to pay a penalty that has a deterrent effect. But even in the Full Court of the Federal Court, where this evidence was the subject of submissions, it does not appear that Sunshine Loans suggested that there was any dispute about these particular matters about which the trial judge might have formed a fixed, and immutable, view. The finding of the trial judge which rejected particular evidence from the director in the liability judgment could not raise the possibility of prejudgement in the penalty stage of the proceeding because that finding could not be an issue at the penalty stage. Any judge hearing the penalty aspect of the proceeding, including the trial judge, would be bound by that finding.

117 I do not consider that apprehended prejudgement bias was established.

Apprehended animosity bias

118 Sunshine Loans' submission of reasonably apprehended animosity bias was effectively concerned with a circumstance of apprehended bias, within what has been described as a category of bias by "conduct",⁸⁰ which arises where a judge has developed an animus against one of the parties (or their witnesses), at least for

78 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 460 [18], quoting *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41,076 at 52,153.

79 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 530 [69].

80 *Webb v The Queen* (1994) 181 CLR 41 at 74.

reasons unconnected with the legal or factual merits of the case.⁸¹ Sunshine Loans, however, relied upon assertions of animosity that arose only for reasons connected with the legal and factual merits of the case.

119 In this submission of apprehended animosity bias, Sunshine Loans relied not merely upon the trial judge's findings concerning the director but also upon his findings concerning other witnesses. This included findings that "[i]t appeared from the course of the evidence given by Sunshine Loans' witnesses that they had been well schooled in what to say under cross-examination" and "stubbornly clung" to a particular notion.⁸²

120 Sunshine Loans also relied on a finding by the trial judge that the Chief Operations Manager of Sunshine Loans gave written and oral evidence that was "disingenuous", and that the Chief Operations Manager "clung firmly" to an "impossible construction of the customer transaction logs" and did not seek to "give his evidence honestly in this respect".⁸³

121 Sunshine Loans further relied upon findings by the trial judge that the Operations Manager and Head of Assessments at Sunshine Loans: (i) gave evidence "in a manner which suggested that he had been schooled to deny that any agreement existed to amend the terms of the loan and to assert that the customer would be in default if they requested a deferral of a payment"; (ii) had been "forced to [an] indefensible position"; (iii) did not seek "to answer honestly the questions put to him" on an issue; (iv) had engaged in "deliberate misconstruction of the obvious circumstances which were in front of him"; and (v) gave evidence the nature of which was an "absurdity".⁸⁴

122 In oral submissions, the respondent to this appeal, the Australian Securities and Investments Commission, "accept[ed] ... in relation to the broad argument" that there was a logical connection between the alleged apprehension of bias, by animosity arising from these matters, and the feared deviation from deciding the

81 *Serafin v Malkiewicz* [2020] 1 WLR 2455 at 2464 [37]-[39]; [2020] 4 All ER 711 at 720-721, citing *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) at [31].

82 See *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [290].

83 See *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [252], [293].

84 See *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [294], [297]-[299].

case on its merits. The only issue, assessed from the perspective of the fair-minded lay observer, is the reasonableness of such an asserted apprehension of bias.

123 No submission was made by the Australian Securities and Investments Commission that an apprehended animosity bias could never arise from matters related to the legal and factual merits of a case. Clearly, it can, especially where the matters giving rise to the apprehended animosity bias are proximate in time and nature to an issue to be decided.⁸⁵ Nevertheless, cases of apprehended animosity bias arising from a judge's assessment of the legal and factual merits of a case are likely to be very rare. A trial judge is expected to form views, even robust views, about the legal and factual merits of the case and those views might be very strongly adverse to a witness. Putting aside the separate ground of apprehended prejudgement bias, characterising strongly adverse views of a witness as an animus should rarely be sufficient to establish apprehended bias. In my opinion, it was not sufficient in this case.

124 I do not consider that an apprehended animosity bias was established.

Conclusion

125 The trial judge recused himself from hearing the penalty stage of the proceeding only on the ground of apprehended bias. No issue arises in this case concerning the misnomer of "duty to sit",⁸⁶ which is really a loose-thinking expression to describe an ethical principle that is subject to a counsel of prudence.⁸⁷ The sole issue on appeal to the Full Court of the Federal Court, and on this further appeal, was whether such a reasonable apprehension of bias existed. None did. The appeal must be dismissed with costs.

85 Daly, "On Time and Space: Proximity in the Law of Bias", in Aronson and Weeks (eds), *Controlling the Administrative State: Essays in Honour of Matthew Groves* (2025) 147 at 160-162.

86 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

87 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348 [20]-[22]; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 119 [135]. See also the reasons of Steward J at [128] and Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) at 349 [10.28].

126 STEWARD J. I respectfully agree with the reasons of Gageler CJ and Gleeson J, of Gordon J, and of Edelman J. The appeal must be dismissed with costs.

127 I write separately only further to add that the Federal Court of Australia has the broad discretionary power to make any order it considers appropriate in the interests of justice,⁸⁸ including with respect to matters of case management, such as the determination of the judge(s) to hear a given dispute (or part of a dispute). In accordance with s 37M of the *Federal Court of Australia Act 1976* (Cth), that broad power is to be exercised in the manner that best promotes⁸⁹ the overarching purpose of "facilitat[ing] the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible"⁹⁰ – with one objective of the overarching purpose relevantly being "the efficient use of the judicial ... resources available for the purposes of the Court".⁹¹

128 As a matter of good case management, it is open to a primary judge – having determined issues of liability at the first stage of a bifurcated civil penalty trial – in the exercise of their broad discretion, to decline also to determine the residual penalty issues (with the effect that a different judge must preside over the penalty hearing), where to do so is in the interests of justice. That is so even where the primary judge considers that they are not disqualified from determining the penalty issues on the ground of apprehended bias.

129 As Gordon J points out, the categories of occasions in which this is in the interests of justice are not, and cannot be, closed.⁹² However, such occasions should be rare; the ordinary course should be for the same judge to hear both stages of one trial.

88 *Federal Court Rules 2011* (Cth), r 1.32; *Federal Court of Australia Act 1976* (Cth), ss 23, 28.

89 *Federal Court of Australia Act 1976* (Cth), s 37M(3). As the Explanatory Statement to the *Federal Court Rules* provides (at 7): "[r 1.32] support[s] the overarching purpose of civil practice and procedure set out in section 37M of the *Federal Court of Australia Act 1976*".

90 *Federal Court of Australia Act 1976* (Cth), s 37M(1).

91 *Federal Court of Australia Act 1976* (Cth), s 37M(2)(b).

92 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348 [21].

JAGOT J.

Overview of the appeal

130 The outcome of an application of the test for apprehended bias of a judge – whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide"⁹³ – will depend on the context in which the test is to be applied. In the three elements which are to be considered in applying the test – "(1) identification of the factor which it is said might lead a judge to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer"⁹⁴ – each element (the factor, the logical connection and the reasonableness of the apprehension) arises from the context in which the judge is required to decide.

131 A judge may say something at any stage in a proceeding which suffices to satisfy the test for apprehended bias, thereby precluding the judge from hearing and determining either that or another proceeding. However, for the purpose of deciding if a reasonable apprehension of bias arises, the factual and legal context of any such statement is as important as the content of the statement made. As will be explained, an important part of the context in the present case involves the operation of the common law principle of the finality of judicial decisions, including the finality of judicial decisions in respect of separate questions in a proceeding.

132 The present case involves a proceeding commenced by a regulator (the Australian Securities and Investments Commission or "ASIC") against a corporation (SunshineLoans Pty Ltd or "SunshineLoans") alleging contraventions of civil penalty and other provisions of consumer credit legislation.⁹⁵ The primary judge (Derrington J) made orders in the proceeding on 3 July 2023 as follows:

"1. The trial of this action ... be limited to a determination of the question of [SunshineLoans'] liability.

93 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]; *Charistead v Charistead* (2021) 273 CLR 289 at 296 [11].

94 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at 163 [38].

95 *National Consumer Credit Protection Act 2009* (Cth).

2. All issues relating to questions of penalty will be heard at a later date if necessary."

133 In referring in order 1 to "liability", the primary judge meant that the question whether SunshineLoans had contravened civil penalty and other statutory provisions as ASIC alleged was to be determined separately from and before any hearing concerning and determination of the penalty to be imposed and relief to be granted for any contravention as found. In accordance with those orders, the primary judge heard and determined the question of whether SunshineLoans had contravened the civil penalty and other statutory provisions as ASIC alleged. In reasons for judgment published on 12 April 2024 ("the contravention judgment"), the primary judge held that SunshineLoans had contravened a civil penalty and another statutory provision.⁹⁶ The primary judge said at the conclusion of the contravention judgment that the parties were to be "heard as to the appropriate declarations, injunctions, and civil penalties as a result of the findings of contravention".⁹⁷ SunshineLoans then applied to the primary judge seeking his Honour's recusal from further hearing the proceeding on the ground of apprehended bias said to arise from the contravention judgment. The primary judge recused himself for apprehended bias. In his reasons for so doing ("the recusal judgment") the primary judge observed that there was evident "tension" between the "orthodox principles relating to recusal and the usual way civil penalty proceedings are conducted".⁹⁸

134 In referring in the recusal judgment to the "usual way civil penalty proceedings are conducted", the primary judge meant that it is standard practice in the interests of efficiency in such cases for a judge to hear and determine whether a party has contravened a civil penalty or other statutory provision separately from and before conducting a hearing concerning and determining the penalty to be imposed and relief to be granted for any contravention as found. By this means, judicial efficiency is potentially maximised. If no contravention is found, the proceeding will be complete. If a contravention is found, the hearing about and the determining of the penalty to be imposed and relief to be granted can be confined to that contravention as found.

135 In referring in the recusal judgment to an evident "tension" between the "orthodox principles relating to recusal and the usual way civil penalty proceedings

96 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345.

97 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [348].

98 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786 at [58].

are conducted", the primary judge meant that, in determining whether a contravention of a civil penalty or other statutory provision has occurred, the judge may have to make adverse credit findings against a person in the reasons for judgment on contravention and, in subsequently determining the penalty to be imposed and relief to be granted for the contravention as found, the judge may have to consider the credit of the same person against whom the judge has already made adverse credit findings.

136 As will be explained, the orthodox principles relating to a judge recusing themselves from hearing a matter for apprehended bias and the "usual way civil penalty proceedings are conducted" involve no particular tension. The majority of the Full Court of the Federal Court of Australia (Bromwich and Colvin JJ) were correct in holding in the appeal from the primary judge's recusal judgment that the test for apprehended bias was not satisfied in the present case by reason of the factual and legal context in which the test had to be applied.⁹⁹

137 A judicial determination of a contravention of a civil penalty or other statutory provision separately from and before any hearing concerning and determination of the penalty to be imposed and relief to be granted for the contravention as found has a specific legal character carrying specific legal consequences. Such a judicial determination, and each of the determination's essential underlying elements, is final, binding, conclusive and incontrovertible as between the parties, subject only to appeal rights¹⁰⁰ and other confined circumstances in which a party might be granted leave to re-open.¹⁰¹ The common law principle of finality means that in the subsequent hearing as to penalty and relief for the contraventions as found in the present case SunshineLoans cannot adduce any evidence or make any submission purporting to controvert any finding or conclusion of law on which the contravention judgment is founded. Moreover, irrespective of the judge who hears and determines the issue of penalty and relief, the principle of finality of the contravention judgment and its application to the hearing and determination of penalty and relief will be the same. Reflecting (but not exhausting the scope of) the principle of finality, s 167(3) of the relevant consumer credit legislation, the *National Consumer Credit Protection Act 2009* (Cth), provides that in determining the pecuniary penalty, the court must take into

99 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514.

100 Note: SunshineLoans' appeal against the contravention judgment was dismissed in substance in *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* (2025) 308 FCR 474.

101 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34].

account all relevant matters, including, amongst other things, "the nature and extent of the contravention", meaning the contravention as found.

138 Within the paradigm of a single proceeding in which a judge decides if a party has contravened a civil penalty or other statutory provision separately from and before a hearing concerning and determination of the penalty and relief for the contravention, something more than a mere adverse credit finding or rejection of a party's case in a judgment on contravention will be required to create the possibility of a reasonable apprehension of bias on the part of the judge in respect of the balance of the proceeding. The classes of conduct which might give rise to apprehended bias in this context cannot be exhaustively identified. What can be said in respect of this context is that, ordinarily, a judge making an adverse credit finding against a witness's evidence in a judgment on contravention will not suffice to give rise to a reasonable apprehension of bias on the part of that judge in respect of the balance of the proceeding, where the witness will again give evidence. Rather, in this context, as a result of the principle of finality of a judgment on contravention and its operation in respect of the hearing and determination of penalty and relief for the contravention as found, and by analogy to actual bias, the "question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion".¹⁰² That is, for apprehended bias to arise in this context what is required is something from which it may rationally appear that the judge's mind may not be *relevantly* open to persuasion as to penalty and relief for the contravention as found. In this context, the relevant appearance of being open to persuasion does not include any openness of the judicial mind about the factual findings (including adverse credit findings about the evidence of a witness in respect of contravention) and legal conclusions in and essential to the judgment on contravention.

139 That this paradigm applies in the present case is apparent from the fact that in the contravention judgment the primary judge correctly identified the remaining question to be the "appropriate declarations, injunctions, and civil penalties *as a result of the findings of contravention*".¹⁰³

140 Accordingly, SunshineLoans' appeal to this Court and its submissions in support start from a fundamentally incorrect premise. In the hearing and determination of penalty and relief for the contraventions as found in a judgment on contravention, no judge may adopt a "frame of mind"¹⁰⁴ in which judgment is

102 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 531 [71].

103 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [348] (emphasis added).

104 *Isbester v Knox City Council* (2015) 255 CLR 135 at 157 [63].

wholly suspended. It would be legally impermissible for a judge to start from any premise other than that the factual findings and conclusions of law in and essential to the judgment on contravention (including relevant adverse credit findings about the evidence of a witness in respect of contravention) are final, binding, conclusive and incontrovertible in their application to the subsequent hearing and determination of penalty and relief.

141 Contrary to SunshineLoans' calling in aid of Keatsian "negative capability"¹⁰⁵ as the hallmark of the judicial disposition, judges are not required to hold themselves in a state of uncertainty when the very purpose of ordering a separate hearing and determination in respect of the alleged contraventions of the statutory provisions is to quell that controversy and thereby to set a known, final and binding framework for the subsequent hearing and determination of penalty and relief. It also follows that SunshineLoans' submissions calling in aid "cognitive anchoring" (that the primary judge might be "anchored" to the adverse credibility findings made in the contravention judgment), suggesting that the primary judge may be perceived to have taken an "adversarial position" against SunshineLoans (by comprehensively and in no uncertain terms having rejected SunshineLoans' case that it had not contravened any statutory provision in the contravention judgment), and suggesting "institutional pressure to maintain consistency in fact-finding" are each inapplicable in this case. This is not to say that the terms in which a judge frames an adverse credit finding in a judgment on contravention can never give rise to a reasonable apprehension of bias for the purpose of a hearing and determination of penalty and relief, but for that to be so what is required is not merely an adverse credit finding in a judgment on contravention, but such a finding in terms from which it may rationally appear that the judge's mind may not be *relevantly* open to persuasion as to penalty and relief for the contravention as found.

142 Even when a judge is undertaking an initial hearing in respect of alleged contraventions of statutory provisions, the required judicial mindset is not a vacuum. It is a mindset of being open to persuasion (the absence of actual bias) and being able to be seen to be open to persuasion (the absence of apprehended bias) about the issues required to be decided as a result of that hearing. In the context of the separate hearing and determination of contraventions of statutory provisions to be followed by a hearing and determination of penalty and relief, the required judicial mindset in the usual course is best described as a mind firmly closed about the contraventions as found and a mind manifestly open to persuasion about the penalty to be imposed and relief to be granted for the contraventions as found. That the principle of finality in its application to the contravention judgment

105 Keats, "John Keats' letter of about 21 December 1817 to George and Tom Keats", in Rollins (ed), *The Letters of John Keats 1814-1821* (1958), vol 1, 191 at 193.

demands the very outcome which SunshineLoans contends gives rise to the apprehension of bias exposes the error in its approach in this case.

Separate questions in a single proceeding and apprehended bias

143 By s 37P(2) of the *Federal Court of Australia Act 1976* (Cth) the "Court or a Judge may give directions about the practice and procedure to be followed in relation to the proceeding, or any part of the proceeding". A "proceeding" is defined in s 4 of that Act to mean "a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal". By s 59(1) of that Act the "Judges of the Court or a majority of them may make Rules of Court, not inconsistent with this Act, making provision for or in relation to the practice and procedure to be followed in the Court". By r 30.01(1) of the *Federal Court Rules 2011* (Cth) a "party may apply to the Court for an order that a question arising in the proceeding be heard separately from any other questions". By r 30.02 of those Rules if "a decision on a question substantially disposes of the proceeding or renders any further trial of the proceeding unnecessary, a party may apply to the Court for: (a) judgment; or (b) an order dismissing the whole or any part of the proceeding".

144 The orders that the primary judge made on 3 July 2023 are orders in accordance with r 30.01(1) of the *Federal Court Rules*. Those orders enabled ASIC's proceeding against SunshineLoans to be heard and determined in two parts. The orders did not have the effect, however, of creating two separate proceedings or of rendering the contravention judgment other than final, binding, conclusive and incontrovertible as between the parties. That judicial decisions are final "expresses the need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct".¹⁰⁶ In the context of civil litigation, the need reflects the fundamental nature of judicial power to quell the controversy between the parties¹⁰⁷ and serves the interests of justice in preventing fresh litigation in respect of matters already decided between parties and the "scandal of conflicting decisions",¹⁰⁸ thereby enhancing public confidence in the judicial system on the basis that a "central and pervading tenet of the judicial system is that controversies,

106 *Rogers v The Queen* (1994) 181 CLR 251 at 273.

107 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

108 *Rogers v The Queen* (1994) 181 CLR 251 at 273, quoting Spencer Bower and Turner, *The Doctrine of Res Judicata*, 2nd ed (1969) at 411.

once resolved, are not to be reopened except in a few, narrowly defined, circumstances".¹⁰⁹

145 The principle of finality operates in the present case so that in the next part of the hearing, dealing with penalty and relief, neither party may purport to controvert the factual findings (including adverse credit findings) or conclusions of law in and essential to the contravention judgment. The contravention judgment quelled the controversy between ASIC and SunshineLoans in respect of all questions relating to SunshineLoans' contraventions of the civil penalty and other statutory provisions as alleged by ASIC and did so finally and conclusively, subject only to rights of appeal and other confined exceptions to the principle of finality (none of which are in play in the present case).

146 While the construct of the fair-minded lay observer in the test for apprehended bias is not to be attributed with a "detailed knowledge of the law",¹¹⁰ the three elements of the test described above (the factor, the logical connection and the reasonableness of the apprehension) cannot be considered in a legal or factual vacuum. The fair-minded lay observer therefore is to be attributed with knowledge of "the nature of the decision and the context in which it was made ... [and] the circumstances leading to the decision"¹¹¹ and "the context of ordinary judicial practice".¹¹²

147 It follows that in applying the test for apprehended bias of a judge there must be attributed to the fair-minded lay observer an understanding of the principle of finality of the contravention judgment and its operation in respect of the subsequent hearing and determination of penalty and relief for the contraventions as found. That is, the fair-minded lay observer is to be taken to know that the hearing and determination of penalty and relief is not at large but is confined by the factual findings made and conclusions of law in and essential to the contravention judgment irrespective of the identity of the judge involved.

148 A case such as the present may be contrasted with the position which arises in other, different but common-place, contexts of a judge who has made an adverse credit finding against a person, for example: (a) in an interlocutory judgment when the same person will be giving evidence at the final hearing; (b) in a final judgment when the same person will be giving evidence in another, unrelated, proceeding before the same judge. There are several key differences between these two

109 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34].

110 *Webb v The Queen* (1994) 181 CLR 41 at 73.

111 *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [23].

112 *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13].

examples and the paradigm of judicial decision-making represented in the present case.

149 First, in both examples, no finding in the interlocutory judgment or the judgment in the one proceeding will be binding on the parties in respect of any issue to be determined in the final judgment or in the judgment in the other, unrelated, proceeding. Second, and that being so, all issues arising for determination in the final judgment or in the judgment in the other, unrelated, proceeding are at large and must be determined and be seen to be determined on their merits in accordance with the evidence adduced in those proceedings. Third, this difference in the operation of the principle of finality enables a potential apprehension of bias to arise from the making of an adverse credit finding in the two examples given. In the two examples given, all issues remain at large in the subsequent hearing. In the paradigm of the determination of a separate question of contravention in a single proceeding, all issues concerning the contravention as found have been quelled and are final and binding in the balance of the proceeding.

Cases relied on by primary judge

150 The cases on which the primary judge relied to support the conclusion that "as [he] had made adverse credit findings in relation to the directors of [SunshineLoans] in [his] reasons for judgment on liability, it would be inappropriate for [him] to conduct the penalty hearing in circumstances where [he] would again be required to assess the credibility of one or more of them"¹¹³ must be understood in their specific factual and legal context. Sensitivity to context means that the statement in the Australian Law Reform Commission ("the ALRC") Report on which the primary judge relied,¹¹⁴ that a "previous decision of the same fact or expression of clear views about the credit of a relevant witness, whether in the same proceedings or different proceedings, *will amount to* a disqualifying ground",¹¹⁵ is expressed in terms which are unduly absolute.

151 The only case the ALRC cited involving the hearing and determination of a separate question in a single proceeding is *Jess v Jess*.¹¹⁶ That case involved a proceeding in which a judge heard and determined a separate question concerning

113 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786 at [5].

114 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786 at [15].

115 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (2021) at 367 [10.77] (emphasis added).

116 (2021) 361 FLR 126.

a deed and declared the deed void for fraud effected by a party to the proceeding. The party applied for the judge to recuse herself from dealing with the balance of the proceeding. The Full Court of the Family Court of Australia, noting that the judge had made serious adverse credit findings in unqualified terms against the party and other witnesses who would be giving evidence in the balance of the proceeding, held that the judge ought to have recused herself for apprehended bias, saying that in "the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the Court might not move its mind from the position reached on one set of materials, even if different materials were presented at the trial".¹¹⁷

152 The difference between the circumstances in *Jess v Jess* and the present case is that in *Jess v Jess*, while the determination that the deed was fraudulent would bind any judge hearing and determining the balance of the proceeding, the decision concerned a single discrete issue in circumstances where the balance of the proceeding involved a general property claim the issues in which remained at large. The case was not one in which the only remaining question was the penalty to be imposed and relief to be granted for a contravention of a civil penalty or other statutory provision in which all findings (including adverse credit findings) underlying the judgment on contravention would be binding in and the central foundation of the determination of the remaining question.

153 Otherwise, the cases cited by the ALRC involve circumstances not comparable to a case in which a judge hears and determines a separate question of contravention of a civil penalty or other statutory provision leaving only the question of penalty and relief to be heard and determined subsequently.

154 In *R v Watson; Ex parte Armstrong*¹¹⁸ the judge made remarks during an interlocutory hearing said to give rise to a reasonable apprehension of bias. The remarks involved adverse credit findings against the parties who would be giving evidence in the final hearing and extended to the judge saying, in effect, that "he would not accept the evidence of either party – or even an admission – unless it were corroborated".¹¹⁹ First, the context was an interlocutory hearing to be followed by a final hearing. That the judge made the adverse credit findings in the interlocutory hearing, and not any other judge, was relevant because, as explained above, the principle of finality would not have attached to the judge's interlocutory judgment in the context of the final hearing and determination. The statement of Barwick CJ, Gibbs, Stephen and Mason JJ that "there are some matters on which a judge may have preconceived opinions, and yet be qualified to sit, but speaking

117 (2021) 361 FLR 126 at 215-216 [396], 218 [400].

118 (1976) 136 CLR 248.

119 (1976) 136 CLR 248 at 264.

generally the credit of an essential witness, where the case may turn on credibility, is not one of them"¹²⁰ is to be understood in the context in which it was made: a judge making remarks in an interlocutory hearing to be followed by a final hearing.

155 Second, and more importantly, the judge in *R v Watson; Ex parte Armstrong* did not merely make an adverse credit finding about the evidence of the parties in the interlocutory hearing. The judge said that he would not accept the evidence of the parties in any future hearing without corroboration. A judge stating an intention not to hear and determine a case on its merits, and in accordance with the quality of the evidence as adduced in the relevant hearing, has the same effect in law as a judge stating that their mind is closed and not open to persuasion on the evidence. Such an indication at any stage in any proceeding, if sufficiently clear and unequivocal, is capable of founding a reasonable apprehension of bias.

156 *Livesey v New South Wales Bar Association*¹²¹ involved two separate proceedings where judges had, in the first proceeding, made adverse comments about the credit of a witness giving evidence on a topic but refused to withdraw from a separate subsequent proceeding involving different parties in which the same witness was to give evidence about the same topic. That the judges had made the adverse comments in the first proceeding was therefore contextually relevant because, as explained above, the principle of finality of the first judgment had no role to play in respect of the separate subsequent proceeding. As Mason, Murphy, Brennan, Deane and Dawson JJ explained, "a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact".¹²² Their Honours plainly did not have in mind a case in which factual findings made in a judgment determining a separate question in a single proceeding would bind any judge in hearing and determining the balance of the questions in that same single proceeding.

157 *British American Tobacco Australia Services Ltd v Laurie*¹²³ involved an interlocutory hearing in a proceeding in which a judge had made interlocutory findings about an issue where that issue would be relevant to a separate subsequent unrelated proceeding. Again, no judge hearing the separate subsequent unrelated proceeding would be bound by any of the interlocutory findings so the fact that the

120 (1976) 136 CLR 248 at 264.

121 (1983) 151 CLR 288.

122 (1983) 151 CLR 288 at 300.

123 (2011) 242 CLR 283.

judge had made those findings was contextually relevant to the application of the apprehended bias test. Heydon, Kiefel and Bell JJ said:¹²⁴

"Whenever a judge is asked to try an issue which he or she has previously determined, whether in the same proceedings or in different proceedings, and whether between the same parties or different parties, the judge will be aware that different evidence may be led at the later trial. Judge Curtis's express acknowledgment of that circumstance does not remove the impression created by reading the judgment [of the first proceeding] that the clear views there stated *might* influence his determination of the same issue in the [separate subsequent] proceedings ... In the circumstances of this unusual case, a reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at the trial – that is, bring an impartial mind to the issues relating to the fraud finding."

158 Again, it is apparent from these observations that their Honours did not have in mind a case in which factual findings made in a judgment determining a separate question in a single proceeding would bind any judge in hearing and determining the balance of the questions in that same single proceeding.

159 *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd*¹²⁵ is a single judge decision in which Besanko J, having previously determined that a party was in contempt of orders his Honour had made (for which his Honour made declarations and imposed fines) and having said in the reasons for judgment that the party's evidence was not "particularly convincing" and involved "only half of the story" and that the contempt the party had committed was "wilful and in contumacious disregard for the orders made",¹²⁶ recused himself from hearing another application for contempt against the same party on the ground of apprehended bias. While subsequent contempt applications may be filed in a single proceeding, the factual findings in the first contempt judgment were immaterial to the second contempt application, which involved other alleged breaches of orders not considered in the first contempt judgment.

124 (2011) 242 CLR 283 at 333 [145] (emphasis in original).

125 [2015] FCA 1343.

126 [2015] FCA 1343 at [7], quoting *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* [2014] FCA 637 at [16], [56].

160 SunshineLoans also relied on the reasoning in *Antoun v The Queen*.¹²⁷ In that case a judge in a judge-alone criminal trial rejected a submission that there was no case to answer before having heard any submissions in support of the application. While the judge then permitted counsel to make submissions in support of the application, the judge then again rejected the application for the same reasons as previously indicated in the peremptory rejection before any submissions had been made. Such a circumstance is far removed from the present case.

Apprehended bias in the present case?

161 It may be accepted that the primary judge comprehensively rejected SunshineLoans' case that no contravention was committed and, in so doing, made adverse credit findings against witnesses called by SunshineLoans, including evidence given by a director of SunshineLoans, Mr Powe, from whom SunshineLoans also intends to adduce evidence in the subsequent hearing relating to the penalty to be imposed and relief to be granted for the contraventions as found in the contravention judgment. It may be accepted, moreover, that the primary judge's adverse credit findings, including against Mr Powe, were in relatively strong terms. For example, the primary judge characterised the evidence from various witnesses who gave evidence on behalf of SunshineLoans as: (a) having led "one of [SunshineLoans'] directors to the absurd proposition that a variation to a loan agreement did not result in there being any amendment to it";¹²⁸ (b) making it "difficult to know whether, in this respect, [SunshineLoans] had adopted a deliberately obtruse attitude, was effectively misleading borrowers, or was concocting a fanciful argument to avoid liability in these proceedings";¹²⁹ (c) "disingenuous";¹³⁰ (d) "unsatisfactory";¹³¹ and (e) appearing to be "well

127 (2006) 80 ALJR 497; 224 ALR 51.

128 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [197].

129 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [200].

130 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [252].

131 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [268].

schooled", in which "each of the witnesses stubbornly clung to the notion that the request was merely for a 'stop' to be placed on the next direct debit".¹³²

162 In respect of Mr Powe specifically the primary judge also said that: (a) he "gave evidence in the manner of someone who had been schooled to advance a particular theory";¹³³ (b) "in the maintenance of the theory which he sought to propound, his evidence became preposterous";¹³⁴ and (c) he "gave his evidence in an attempt to avoid the conclusion that [SunshineLoans] was charging fees otherwise than on a default, and in an attempted justification of its actions" and "[u]ltimately, his evidence was not credible in the face of the objective evidence, and he was also not a witness who tried to give his evidence in an honest manner".¹³⁵ As a result, the primary judge did not accept the evidence to the effect that SunshineLoans was charging a fee for borrowers' defaulting (which would have been permissible) rather than a fee for amending the loan agreements (which was impermissible).¹³⁶

163 What is relevant is not that the findings involve "extreme scepticism"¹³⁷ about SunshineLoans' case and supporting evidence. What is relevant is that all of these findings concerned evidence from witnesses called by and submissions of SunshineLoans intended to rebut ASIC's case that certain fees SunshineLoans had charged borrowers were in contravention of civil penalty and other provisions of the *National Consumer Credit Protection Act*. The findings related only to the alleged contraventions and explained why the primary judge found those allegations to be sustained in the contravention judgment. The primary judge having so found, the principle of finality applies to those findings for the subsequent hearing and determination of penalty and relief for the contraventions as so found.

132 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [290].

133 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [302].

134 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [303].

135 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [304].

136 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [313].

137 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 333 [145].

164 SunshineLoans' submission that the primary judge's findings relate or might appear to relate to the general character of the witnesses as dishonest people (from which an appearance of pre-judgment on the part of the primary judge in respect of the evidence of those witnesses in the subsequent hearing about penalty and relief might arise) is unsustainable. That the primary judge found that those witnesses were willing to give dishonest evidence in respect of the alleged contraventions may be accepted. The relevant point, however, is that those findings relate only to SunshineLoans' evidence about the conduct constituting the contraventions.

165 The primary judge also rejected all of the submissions for SunshineLoans to the same effect (that SunshineLoans was charging a fee for borrowers' defaulting, which was permissible, and was not charging a fee for amending the loan agreements, which was impermissible) in similarly firm terms.¹³⁸ The primary judge further rejected SunshineLoans' attempt to rely on s 183 of the *National Consumer Credit Protection Act*, which enables a person who appears to be in contravention of a civil penalty provision to be wholly or partly relieved from liability if the person had acted honestly and, having regard to all the circumstances of the case, ought fairly to be excused for the contravention. As the primary judge put it: "[l]eaving aside for one moment the question of whether it could be said that [SunshineLoans] acted honestly, the Court would need to be satisfied that, in the circumstances, it ought fairly to be excused. Here, there is nothing in its conduct which suggests that it ought to be entitled to any leniency in any finding as to the appropriateness of its conduct";¹³⁹ it "is not unfair to say that [SunshineLoans] has acted in a wrongheaded manner over an extended period of time";¹⁴⁰ and "were it necessary to determine whether [SunshineLoans] acted honestly, I would have to conclude that it did not".¹⁴¹

166 Again, strongly worded those findings and conclusions may be, whether they concern the evidence of witnesses called by SunshineLoans, the submissions SunshineLoans made, or SunshineLoans' attempt to bring itself within s 183 of the

138 eg, *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [206], [245], [246], [251], [315].

139 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [315].

140 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [316].

141 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345 at [317].

National Consumer Credit Protection Act, the findings all concern the conduct of SunshineLoans in committing the contraventions as found.

167 Moreover, nothing in any such finding or conclusion suggests or supports any apprehension of any possible pre-judgment by or lack of impartiality of the primary judge in respect of any fact, matter or circumstance as might be relevant to the subsequent hearing and determination of penalty and relief to the extent that any such fact, matter or circumstance has not already been the subject of a final, binding, conclusive and incontrovertible finding or conclusion in the contravention judgment. It follows that it cannot be said, at least not on any logical basis, that the primary judge might be in a position different from any other judge in evaluating, within the framework fixed by the contravention judgment, any undecided matter relevant to penalty and relief such as SunshineLoans' contrition and commitment to remediate harm done by the contraventions.

168 In these circumstances, a fair-minded lay observer could not reasonably apprehend that the primary judge might not bring an impartial mind to the resolution of the question the primary judge would be required to decide in the subsequent hearing and determination of penalty and relief for the contraventions as found in the contravention judgment. For the reasons given above, once the principle of finality of the contravention judgment and its application to the balance of the proceeding is recognised and attributed to the fair-minded lay observer (as it must be): (1) the adverse credit and other factual findings in the contravention judgment, in and of themselves, are incapable of constituting a factor which it is said might lead a judge to resolve the question of the penalty to be imposed and relief to be granted other than on its legal and factual merits; (2) there can be no logical connection between that factor and the apprehended deviation from deciding the question of the penalty to be imposed and relief to be granted on its merits; and (3) any such apprehension from the perspective of a fair-minded lay observer could not be reasonable.

169 Therefore, the appeal is to be dismissed with costs.

170 BEECH-JONES J. In proceedings commenced by the respondent in the Federal Court of Australia, the primary judge found that the appellant contravened various civil penalty provisions of the *National Consumer Credit Protection Act 2009* (Cth) ("the Credit Act")¹⁴² (the "liability judgment").¹⁴³ In so finding the primary judge made findings which were strongly adverse to the appellant and its witnesses. Later, the primary judge recused himself from determining the penalty to be imposed on the appellant on the basis that a reasonable apprehension of bias arose from the findings in the liability judgment concerning one of those witnesses who was to give evidence at the hearing in relation to penalty (the "penalty hearing").¹⁴⁴ A majority of the Full Court of the Federal Court held that the primary judge should not have recused himself.¹⁴⁵

171 The "double might" test¹⁴⁶ of apprehended bias asks whether "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide".¹⁴⁷ Two issues are raised by this appeal concerning the application of that test. One issue is whether the primary judge was correct in concluding that such an apprehension arose in relation to his Honour's assessment of the credibility of the evidence to be given by a witness for the appellant at the penalty hearing (and the weight to be attached to that evidence) where findings adverse to that witness' credibility had been made in the liability judgment.¹⁴⁸ The other issue is whether, based on all the findings in the liability judgment, such an apprehension arose in relation to the broader question the primary judge had to decide as to the appropriate penalty to be imposed on the appellant.

142 *National Consumer Credit Protection Act 2009* (Cth) ("the Credit Act"), s 166(1).

143 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 345.

144 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786.

145 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514.

146 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6]; *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76 at 87 [18].

147 *Ebner* (2000) 205 CLR 337 at 344 [6]. See also *Charistead v Charistead* (2021) 273 CLR 289 at 296 [11].

148 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786 at [5], [19].

172 For the reasons that follow, the resolution of those issues involves the attribution to the fair-minded lay observer of knowledge that the liability judgment was part of the final determination of the proceedings and that the findings made in that judgment are not separate from the assessment of the appropriate penalty to be imposed, but instead are binding upon any judge who undertakes that task. Having regard to that attributed knowledge, such an observer would not conclude from the stern language in the liability judgment that the primary judge might not bring an impartial mind to the resolution of the question of what penalty should be imposed on the appellant, or the assessment of the credibility of the evidence to be given by the appellant's witness and the weight to be attached to that evidence in assessing that penalty. Accordingly, the appeal should be dismissed.

The framework for assessing claims of apprehended bias

173 In *Ebner v Official Trustee in Bankruptcy*,¹⁴⁹ a majority of this Court identified a two-stage approach to the application of the double might test. In *Director of Public Prosecutions (Vic) v Smith*,¹⁵⁰ this Court restated that approach as effectively involving three steps, namely: "(1) *identification* of the factor[s] which it is said might lead a judge to resolve the question other than on its legal and factual merits; (2) *articulation* of the logical connection between that factor [or those factors] and the apprehended deviation from deciding that question on its merits; and (3) *assessment* of the reasonableness of that apprehension from the perspective of a fair-minded lay observer".¹⁵¹

174 With respect to the first step, it is necessary to identify a "factor", being an alleged "incompatibility, association, conduct or interest"¹⁵² or other circumstance associated with the judicial officer, that is said to give rise to the relevant apprehension that they will not decide the relevant "question" other than on its "legal and factual merits". This requirement confirms that it is insufficient to simply assert that the judicial officer might be diverted from deciding the relevant question according to its merits. This requirement also reinforces that the relevant "question" to be decided should be identified and that the relevant inquiry concerns

149 (2000) 205 CLR 337 at 345 [8].

150 (2024) 98 ALJR 1163 at 1183-1184 [92]; 419 ALR 212 at 234.

151 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 279 CLR 148 at 163 [38] (emphasis added), applying *Ebner* (2000) 205 CLR 337 at 345 [8] and *Charisteads* (2021) 273 CLR 289 at 296-297 [11]. See also *QYFM* (2023) 279 CLR 148 at 171-173 [67]-[73], 175 [81], 187 [119], 202 [163], 202-203 [165], 210-211 [194], 222 [225], 238 [274], 238-239 [278], 240 [282].

152 *QYFM* (2023) 279 CLR 148 at 175 [81].

an apprehended deviation from deciding that question according to its merits as opposed to an inquiry into whether that question will be decided adversely to a particular party.¹⁵³

175 With respect to the second step, the "articulation of the logical connection" means that "[i]t must be explained" and not just asserted that the existence of the identified factors might give rise to the apprehended deviation.¹⁵⁴ Hence the mere existence of an asserted interest on the part of the judicial officer in the outcome of the litigation, such as a small financial interest¹⁵⁵ or an association, such as the judge having held a previous office as a prosecutor,¹⁵⁶ will not, without further explanation, give rise to an apprehension of bias.¹⁵⁷ Even so, in some cases it may be that the nature of the interest, association or other factor is such that little elaboration is required to determine whether an apprehension of bias arises.¹⁵⁸

176 Critical to applying the third step is correctly attributing the appropriate knowledge and characteristics to the "construct"¹⁵⁹ that is the fair-minded lay observer. Once the appropriate knowledge and characteristics are attributed, the reasonableness of an apprehension of bias based on the identified factors and the articulated logical connection between the factors and the apprehended deviation can then be assessed.

177 The construct of the fair-minded lay observer provides the "standard by which the courts address what may appear to the public served by the courts to be a departure from standards of impartiality and independence".¹⁶⁰ The knowledge attributed to that construct is informed by the objective of maintaining public confidence in the impartiality of the justice system.¹⁶¹ That objective is distinct

153 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.

154 *QYFM* (2023) 279 CLR 148 at 175 [81].

155 *Ebner* (2000) 205 CLR 337 at 358 [58].

156 *QYFM* (2023) 279 CLR 148 at 164 [42].

157 *QYFM* (2023) 279 CLR 148 at 163-164 [39]; see also at 244 [293].

158 *QYFM* (2023) 279 CLR 148 at 164 [40].

159 *QYFM* (2023) 279 CLR 148 at 230 [249], 245 [297].

160 *QYFM* (2023) 279 CLR 148 at 165 [45].

161 *QYFM* (2023) 279 CLR 148 at 165 [45], 172 [71], 230 [249].

from asking whether the judicial system has confidence in itself¹⁶² and does not correspond to an objective of simply maintaining the confidence of the general public based on "public opinion" or "on matters of general impression".¹⁶³

178 Thus, the fair-minded lay observer is taken to be reasonably well informed of: (1) the nature of the decision that must be made according to its legal and factual merits and the "legal, statutory and factual contexts"¹⁶⁴ in which that decision is made¹⁶⁵ but not to have a "detailed knowledge of the law";¹⁶⁶ (2) the broader context for the decision, including the general structure and operation of the judicial system and the legal profession,¹⁶⁷ but not to have knowledge of some idealised version thereof that "ordinary experience suggests not to be the case";¹⁶⁸ and (3) the nature of the decision-maker, be they a judge or a jury,¹⁶⁹ but not to be aware of the decision-maker's personal characteristics or abilities.¹⁷⁰

162 *QYFM* (2023) 279 CLR 148 at 237 [273].

163 *QYFM* (2023) 279 CLR 148 at 231 [252]. See also *Webb v The Queen* (1994) 181 CLR 41 at 68.

164 *CNYI7* (2019) 268 CLR 76 at 99 [58].

165 *Isbester v Knox City Council* (2015) 255 CLR 135 at 146 [23]; *QYFM* (2023) 279 CLR 148 at 172-173 [72], 212 [199].

166 *QYFM* (2023) 279 CLR 148 at 172-173 [72], citing *CNYI7* (2019) 268 CLR 76 at 99 [58].

167 For example, the functions of the Commonwealth Director of Public Prosecutions (*QYFM* (2023) 279 CLR 148 at 173 [74]); the role and ethics of a prosecutor (*QYFM* (2023) 279 CLR 148 at 204 [170], 213 [201], 245 [296]; cf 230-231 [251]); "ordinary judicial practice" and "exigencies of modern litigation" (*Johnson v Johnson* (2000) 201 CLR 488 at 493 [13]).

168 *Vakauta v Kelly* (1989) 167 CLR 568 at 585; *QYFM* (2023) 279 CLR 148 at 165-166 [48], 172-173 [72], 204 [171].

169 Judges are said to have greater capacity than most to disregard the irrelevant, immaterial and prejudicial: *Johnson* (2000) 201 CLR 488 at 493 [12]; *CNYI7* (2019) 268 CLR 76 at 89-90 [27]; *QYFM* (2023) 279 CLR 148 at 204 [170], 213 [200]. It is also said that judges may discharge functions uninfluenced by past professional associations: *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 at 87-88.

170 *Charisteads* (2021) 273 CLR 289 at 297 [12]; *QYFM* (2023) 279 CLR 148 at 165-166 [48], 204-205 [172].

Background

179 The full background to this appeal is set out in the judgment of Gageler CJ and Gleeson J. In summary the respondent, the Australian Securities and Investments Commission, brought civil penalty proceedings against the appellant seeking a declaration that the appellant had contravened various provisions of the Credit Act.¹⁷¹ The respondent also sought an order that the appellant pay a pecuniary penalty for the alleged contraventions.¹⁷²

180 On the respondent's application, and without opposition from the appellant, the primary judge made orders separating the hearing on "liability", that is, the hearing of whether the appellant had committed the contraventions, from the hearing on "penalty", that is, the hearing on the appropriate penalty to be imposed in the event that any of the alleged contraventions were established.

181 After the hearing on liability the primary judge published the liability judgment, finding that all of the alleged contraventions were established.¹⁷³ Subsequently, and in accordance with s 166(1) of the Credit Act, his Honour made a declaration of contravention specifying the conduct that constituted the contraventions.¹⁷⁴ An appeal against the liability judgment altered the declaration in a presently immaterial respect but was otherwise dismissed.¹⁷⁵

182 In the liability judgment, his Honour made findings critical of the appellant and the credibility of its three witnesses, including a director of the appellant, Mr Powe. In anticipation of the penalty hearing and after the liability judgment had been delivered, the appellant filed an affidavit from Mr Powe. The respondent filed written submissions in relation to the penalty hearing which referred to the primary judge's adverse findings against Mr Powe, specifically findings that aspects of his evidence on material issues were "unsatisfactory", "schooled to advance a particular theory", "preposterous" and not given "in an honest manner".

183 Prior to the penalty hearing, the appellant applied to the primary judge to disqualify his Honour from hearing the remainder of the proceedings. The written submissions in support of the disqualification application stated that a further

171 The making of such a declaration is authorised by the Credit Act, s 166(1).

172 The ordering of such a pecuniary penalty is authorised by the Credit Act, s 167.

173 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 2]* [2024] FCA 345.

174 Credit Act, s 166(3)(d).

175 *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* (2025) 308 FCR 474.

affidavit would be filed by Mr Powe. However, the disqualification application was not then focussed upon Mr Powe alone. Instead, the appellant relied on the entirety of the findings in the liability judgment, including the adverse findings against its three witnesses, as establishing an apprehension of bias on the part of the primary judge in relation to the assessment of penalty ("the broad argument"). The primary judge rejected the broad argument and refused the application.

184 After the primary judge refused to disqualify himself, the appellant filed a further affidavit from Mr Powe which addressed aspects of the respondent's written submissions on the penalty hearing and also addressed some of the factors relevant to the assessment of penalty. For example, Mr Powe deposed that he did not believe that the appellant had contravened the Credit Act at any time and asserted that the appellant had a "culture of compliance".¹⁷⁶ The primary judge was advised that Mr Powe would be cross-examined at the penalty hearing and that Mr Powe's credit would again be put in issue. His Honour then reconsidered the question of disqualification and recused himself.

185 Subsequently, the primary judge published reasons for his recusal.¹⁷⁷ His Honour considered that an apprehension of bias necessarily arose where a judge had previously found that a particular witness (ie, Mr Powe) "has been untruthful in their evidence [and where that same judge would subsequently] attempt to impartially assess that person's credibility on further issues in the same or any other matter" ("the narrow argument"). His Honour's reasons also explained that he rejected the broad argument because the appellant did not identify any logical connection between the identified passages from the liability judgment and any feared deviation from a determination of the appropriate penalty according to the legal and factual merits of the case.¹⁷⁸

186 On appeal, a majority of the Full Court of the Federal Court (Bromwich and Colvin JJ) set aside the primary judge's decision to recuse himself. In relation to the narrow argument, Bromwich J concluded that a logical connection was not established between the primary judge's adverse credit findings about Mr Powe and the feared deviation from deciding the question of penalty on the merits of the case.¹⁷⁹ His Honour held that the primary judge's findings about the credibility of

176 See *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450.

177 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd [No 3]* [2024] FCA 786.

178 *Ebner* (2000) 205 CLR 337 at 345 [8].

179 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 542 [122].

the appellant's witnesses were "not in truth a case of pre-judgment, but rather a judgment of a kind that was required to be carried forward to the remedies stage regardless of who heard it".¹⁸⁰ Colvin J did not expressly reject the existence of a logical connection between the primary judge's adverse credit findings and the feared deviation from deciding the question of penalty on the merits of the case, but his Honour's reasoning was otherwise similar to that of Bromwich J. Colvin J emphasised that the fair-minded lay observer is taken to be aware that the "second hearing is not to be conducted as a separate and fresh adjudication unaffected by what has occurred in the first hearing".¹⁸¹ Via a notice of contention, the appellant reagitated the broad argument. Both Bromwich and Colvin JJ rejected that argument for the reasons given by the primary judge.¹⁸²

187 In dissent, Perram J found that the ordinary judicial practice in civil penalty proceedings of bifurcating a hearing on liability from penalty carries a correlative obligation of restraint, "if possible", on the part of trial judges when making findings on liability.¹⁸³ His Honour reviewed the primary judge's credibility findings and concluded that a fair-minded lay observer might well apprehend that the primary judge might not bring an impartial mind to his assessment of Mr Powe's evidence at the penalty hearing.¹⁸⁴

The identified factors and the articulated logical connection

188 In this Court, the appellant sought to restore the decision of the primary judge to recuse himself by relying on both the broad argument rejected by the primary judge (ie, all the adverse findings against the appellant in the liability judgment, including the adverse findings against the appellant's three witnesses) and the narrow argument accepted by the primary judge (ie, the findings specifically concerned with Mr Powe's credit).

189 The broad argument was directed to a purported apprehension of bias with respect to the outcome of the penalty hearing, whereas the narrow argument was

180 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 542 [124].

181 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 546 [148]; see also at 542 [122].

182 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 529 [68], 550 [167].

183 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 520 [30].

184 *Australian Securities and Investments Commission v SunshineLoans Pty Ltd* (2025) 308 FCR 514 at 522 [35].

directed to a purported apprehension of bias with respect to the weight to be attached to Mr Powe's evidence to be given at the penalty hearing.

190 With respect to the broad argument and applying the framework for the application of the double might test,¹⁸⁵ the "factor" relied on by the appellant to contend that an apprehension of bias arose is the severity of all the findings made against the appellant in the liability judgment. The appellant sought to articulate or explain the "logical connection" between those findings and the apprehended deviation from determining the appropriate penalty according to the merits of the case by contending that the terms of the findings were "gratuitous" and displayed such an "antipathy" to the appellant's defence of the alleged contraventions that those findings did (or at least might) reveal a "frame of mind" on the part of the primary judge that precludes (or at least might preclude) his Honour from determining the appropriate penalty according to the legal and factual merits of the case. Leaving aside whether the findings were in fact gratuitous and suggested such an antipathy, this line of reasoning articulates a "logical connection" between the identified factor(s) and the apprehended deviation from deciding the question of penalty according to the merits.

191 So far as the narrow argument is concerned, the factor relied on by the appellant is the severity of all the adverse credit findings made against Mr Powe in the liability judgment. The articulated "logical connection" between those findings and the apprehended deviation from assessing Mr Powe's evidence according to its merits was that the emphatic terms of those findings might leave the primary judge "unable to return to the sufficiently impartial state of suspended judgment in which he is to evaluate Mr Powe's second tranche of evidence" at the penalty hearing. As will be explained, that contention misstates the approach that the primary judge (or any other judge) was required to adopt towards any further evidence given by Mr Powe at the penalty hearing. Even so, the potential for a judge's adverse findings about a witness' credit to be expressed in such strong terms so as to suggest that the judge might not give the appropriate consideration to any relevant evidence that the witness may give at a penalty hearing can be accepted. In that limited respect a logical connection is articulated.

No apprehended deviation

192 Regardless of whether the decision that must be made by the judge according to its legal and factual merits is to be characterised as the assessment of the appropriate penalty or the assessment of Mr Powe's contested evidence in the course of determining the appropriate penalty, knowledge of the following three

185 See above at [173]-[177].

matters concerning the nature and context of both types of decision to be made by the primary judge is to be attributed to the fair-minded lay observer.¹⁸⁶

193 First and foremost, the fair-minded lay observer is taken to understand that the liability hearing and the penalty hearing were part of a bifurcated final hearing of the proceedings. The bifurcation of the hearing facilitated procedural fairness by enabling the parties to address any penalty that might be imposed based on any findings of the primary judge of contravention and their circumstances. It follows that, leaving aside the manner in which the adverse findings were expressed, the fair-minded lay observer can be taken as having understood that it was the function of the primary judge following the liability hearing and before considering penalty to make conclusive (ie, final) findings of fact.

194 Second, the fair-minded lay observer can be taken as having understood that the scope of the primary judge's obligation to make (final) findings of fact, including as to credit, following the liability hearing extended to such findings as were necessary or appropriate to determine the dispute between the parties about whether the appellant contravened the Credit Act.¹⁸⁷ In this Court, the appellant accepted that the adverse findings in the liability judgment said to give rise to the apprehension of bias: were open on the evidence; were within the boundaries of the dispute between the parties; and did not involve any denial of procedural fairness.

195 Third, the fair-minded lay observer is taken to be aware of the legislative requirement that the assessment of the appropriate pecuniary penalty for the contraventions of the Credit Act requires that "all relevant matters" be taken into account, including the "nature and extent of the contravention"¹⁸⁸ and the "circumstances in which the contravention took place".¹⁸⁹ These matters and circumstances include the deliberateness of the contravention, whether the contravention arose out of the conduct of senior management or at a lower level and whether the contravener has a culture conducive to compliance with the Credit Act.¹⁹⁰ Those matters were the subject of findings in the liability judgment and, as noted, were based on evidence and were made within the confines of the dispute between the parties.

186 Having regard to the principles identified above at [176].

187 Specifically, Credit Act, s 166(1).

188 Credit Act, s 167(3)(a).

189 Credit Act, s 167(3)(c).

190 *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152-52,153, cited in *Pattinson* (2022) 274 CLR 450 at 460 [18].

196 As noted, the appellant pursued the narrow argument on the basis that the adverse findings in the liability judgment might have given rise to the apprehension that the primary judge might have been "unable to return to the sufficiently impartial state of suspended judgment in which he is to evaluate Mr Powe's second tranche of evidence" at the penalty hearing. That contention is misconceived because in determining the appropriate penalty the primary judge was not (and nor is any other judge) required or permitted to "return" to some suspended state of judgment that existed prior to the liability hearing and otherwise proceed on the basis that the liability judgment had not been delivered. Instead, the assessment of the appropriate civil penalty following a finding of contravention in civil penalty proceedings and the consideration of any evidence given by a witness in relation to penalty are simply a continuation of the final hearing of which the liability hearing and judgment forms part. The findings in the liability judgment, including as to a witness' credit, are the foundation upon which the appropriate pecuniary penalty is assessed and the terms of those findings are binding on any judge who makes the assessment of the appropriate pecuniary penalty. Similarly, a finding of guilt to the criminal standard by a judge or magistrate conducting a criminal trial or hearing without a jury, and any findings rejecting any evidence of exoneration that the accused may have given (or any innocent explanation they may have provided to the police or others), form part of the factual foundation for assessing the appropriate sentence to impose on the offender.¹⁹¹ Those findings are binding upon the judge who sentences the offender.

197 Once the fair-minded lay observer is attributed with the requisite knowledge as to the nature of the task a judge undertakes in conducting a bifurcated final hearing of civil penalty proceedings, it follows that merely because the judge makes adverse findings about a defendant or the credit of its witnesses in determining "liability" does not mean that such an observer might reasonably apprehend that the judge might decide the question of penalty or assess a witness' evidence in relation to penalty other than according to its merits. Similarly, a judge or magistrate conducting a criminal trial or hearing without a jury who rejects an accused's evidence of innocence and finds them guilty of a crime, including a crime as serious as murder, sexual assault or fraud, is not thereby per se precluded from determining the appropriate sentence or assessing any evidence the offender may give at the sentencing hearing.

198 The position of a judge conducting a bifurcated hearing of a civil penalty proceeding, and a judge or magistrate conducting a criminal trial or hearing without a jury, can be contrasted with decisions and findings made by judges in other cases of alleged prejudgment. Thus, a judge who has determined an issue of fact or the credit of a witness in "a previous case" will ordinarily be precluded from

191 As to the relationship between the verdict of the jury and the judge's sentencing function, see *Cheung v The Queen* (2001) 209 CLR 1 at 9-11 [4]-[10], especially at 9 [5].

hearing a related but different case involving the same or a similar question or issue.¹⁹² Similarly, a judge who makes an unqualified¹⁹³ adverse finding about a witness' credit following an interlocutory hearing may often be precluded from conducting a final hearing in the same proceeding if that witness is to again give evidence and a question arises as to their credit.¹⁹⁴ In both such cases the hearing which resulted in the impugned finding is not part of the hearing to decide the question in respect of which the apprehension of bias is said to arise, and the impugned finding is not a foundation or premise upon which that judge must act in deciding that question. To the contrary, the impugned finding is legally irrelevant to the merits of the question the judge must decide.¹⁹⁵ However, the impugned finding having been made, it may give rise to the apprehension that the judge "might not move [their] mind"¹⁹⁶ in deciding the same or a similar question which they answered previously even though the judge might be required to address different evidence or different arguments.

199 Although the findings in the liability judgment were the foundation upon which the civil penalty is to be assessed and binding on any judge who makes that assessment, that does not mean that those findings are exhaustive of the facts, matters and circumstances that must be found and considered in determining the appropriate pecuniary penalty. Further facts may need to be found and further arguments will need to be considered at the penalty hearing. In undertaking that task of making further factual findings and considering additional arguments, the judicial officer must be relevantly impartial but in doing so that judicial officer decides questions within the context of what has already been finally decided following the liability hearing.

200 Nothing that has been stated is meant to deny that the particular language employed by a judge in addressing liability may give rise to a reasonable apprehension of bias in relation to the assessment of penalty or the credibility of a particular witness who gives evidence at the penalty hearing. The relevant inquiry in such a case is whether the fair-minded lay observer might reasonably apprehend

192 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 300; see also *Australian National Industries Ltd v Spedley Securities Ltd (In liq)* (1992) 26 NSWLR 411.

193 *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 331-333 [140]-[145].

194 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262-266; *British American Tobacco* (2011) 242 CLR 283 at 333 [145].

195 *British American Tobacco* (2011) 242 CLR 283 at 331-332 [140].

196 *British American Tobacco* (2011) 242 CLR 283 at 333 [145].

from that language that the judge might deviate at the penalty hearing either from deciding the question of the appropriate penalty or from determining the credibility of a witness or witnesses, and the weight to be given to their evidence, according to its "merits". However, those "merits" are not assessed independently of the findings made at the liability stage but are dependent upon those findings in the sense that has been explained. One matter of potential significance in determining whether such an apprehension arises is the extent to which the judge made and expressed findings and statements at the liability stage that went beyond what was necessary or appropriate for the resolution of the issues raised by the parties' respective cases or otherwise involved a departure by the judge from "proper process"¹⁹⁷ or "ordinary judicial practice".¹⁹⁸

201 In the end result, the appellant's submissions in support of both the broad argument and the narrow argument reduced to focussing on the language employed by the primary judge in the liability judgment which was adverse to the appellant, and to Mr Powe in particular. The manner in which the primary judge expressed his adverse findings was generally described by the appellant as "gratuitous". The particular statements relied on in relation to both arguments are addressed in the judgment of Gordon J.¹⁹⁹ I agree with her Honour's analysis of those statements. I also agree with her Honour's conclusion that the language employed by the primary judge would not give rise to a reasonable apprehension of bias on the part of the fair-minded lay observer.

Conclusion

202 The appeal must be dismissed. I agree with the orders proposed by Gageler CJ and Gleeson J.

¹⁹⁷ *Antoun v The Queen* (2006) 80 ALJR 497 at 518 [87]; 224 ALR 51 at 78.

¹⁹⁸ *Johnson* (2000) 201 CLR 488 at 493 [13].

¹⁹⁹ Reasons of Gordon J at [77]-[89].

