HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **CCIG INVESTMENTS PTY LTD**
(ABN 57 602 889 145)
Appellant

and

AARON SHANE SCHOKMAN
Respondent

APPELLANT'S REPLY

Part I Certification for Publication

1 These submissions are in a form suitable for publication on the internet and respond to the submissions on behalf of the Respondent filed 2 December 2022.

Part II A Concise Reply to the Argument of the Respondent

2 In *Prince Alfred College Incorporated v ADC*[1], the Court stated at paragraph 40:

> *40 … The traditional method of the common law of confining liability, in order to reflect some balance between competing interests, is the requirement that the employee's wrongful act be committed in the course or scope of employment. At the least this provides an objective, rational basis for liability and for its parameters.*

3 In this case, the Respondent's arguments give no consideration to the balancing of rights between employer and employee and, in effect, reach a conclusion of absolute liability. A principled approach needs to be taken in order to justify the requisite conclusion of liability in every particular case.

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1 (2016) 258 CLR 134 ('*Prince Alfred College*').

4 That approach should consider the requirements of close connection and scope of employment.

5 On any analysis of the Respondent's arguments, the tenancy agreement and the employment provided no more than the opportunity for the commission of the act of urination. If that is vicarious liability, every interaction causing injury between employees or employees and guests on the island would constitute vicarious liability. That conclusion makes the employer's liability absolute.

6 The Respondent submits the employee agreed to abide by the conditions associated with living on Daydream Island, as detailed in the Staff Villages Regulations. Such Regulations also provide for the provision of meals:

> *10 Staff meals would be provided in the resort canteen at a charge of $5 per lunch/dinner.*

7 If there is an assault while the employees are eating breakfast, with the employer having no prior knowledge or indication of any violent propensity, the employer would be held to have been vicariously liable. The employer in *Deatons Pty Ltd v Flew*[2] would similarly have been held liable. Such an approach would see the establishment of an unstable principle[3].

8 It is an important consideration to identify, at the appropriate level of specific description, just what was the employment role, as was discussed in *Prince Alfred College*[4].

9 Schokman was employed as a supervisor in the restaurant where he worked with Hewett. The approach mandated by *Prince Alfred College*[5] stresses the fundamental importance of the identification of the features of the role as follows[6]:

> *47 Such a process commences with the identification of features of the employment role in decided cases which, although they may be*

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2 (1949) 79 CLR 370; [1949] HCA 60.
3 *Prince Alfred College* (n 1) [39].
4 *Prince Alfred College* (n 1).
5 Ibid.
6 *Prince Alfred College* (n 1) [47].

dissimilar in many factual respects, explain why vicarious liability should or should not be imposed.

10 The Respondent contends that the employment was the occasion for the commission of the tort. *Prince Alfred College*[7] stated at paragraph 81:

> *81 Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for*
> 10 *the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.*

11 There was nothing about Hewett's role as a Supervisor that provided the occasion for commission of the tort.

20 **Conclusions**

12 Hewett was employed in the restaurant as a supervisor. The act of misplaced urination had no connection, directly or indirectly with his work in the restaurant.

13 The employer cannot be said to authorise necessary bodily functions, such as urination. It is not sensible to regard an employer as permitting them either. Exercising necessary bodily functions are certainly not actions that an employer directs adult employees to carry out.

14 Hewett's role as a supervisor did not give the occasion for the wrongful act.

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7 *Prince Alfred College* (n 1).

15 He exercised no authority, power, trust, control or the ability to achieve intimacy with the victim – Schokman was not vulnerable.

16 The act of urination did not further his master's interests.

17 It would be unjust to mete out liability on the not at fault employer that was providing no more than the opportunity (in the broadest and therefore least relevant sense of that word) for the tort to occur.

Dated: 22 December 2022

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