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

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION FOR PUBLICATION

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

PART II: ISSUES

2 The issue before the court is whether the negligent act of the employee, Hewett, was one committed in the "course or scope of employment", engaging then the issue of how that is to be judged, here in the context of an unintentional tort.

PART III: SECTION 78B OF THE JUDICIARY ACT 1903

3 The respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and concluded that no such notice is necessary.

PART IV: CONTESTED MATERIAL FACTS

4 The respondent accepts the background facts of this case that can be extracted from the quotes set out in paragraphs 6 and 7 of the appellant's outline.

5 Although referred to at footnote 3 in the appellant's submissions, certain further material facts regarding the terms of Hewett's employment with the appellant are germane.

6 Exhibit 1, document 1 before the trial judge was the respondent's "letter of appointment"[1] containing certain contractual terms relating to the appellant's accommodation arrangements. The Court of Appeal noted, and it is not disputed on this appeal, *"the case was conducted upon the premise that the terms of [Hewett's] contract, more precisely in relation to his accommodation, were relevantly the same."*[2]

7 Relevant contractual terms relating to Hewett's employment were summarised by the Court of Appeal at [42], though given the arguments of the appellant in this court some expansion upon that summary is warranted.

8 Under the heading of "*Company Housing and Meals*" it was said:

> *"As your position requires you to live on the island, furnished shared accommodation located at Daydream Island Resort and Spa will be made available to you while you are engaged in this position at a cost of $70 per week".*

9 The employee agreed *"…to abide by the conditions associated with living on Daydream Island as detailed in the Staff Village regulations"*. The regulations themselves were not in evidence. As noted by the Court of Appeal, it was an express term of Hewett's employment, which term governed his occupation of the room, that he take reasonable care that his acts did not adversely affect the health and safety of other persons.

10 Staff meals would be provided in the resort canteen at a charge of $5.00 per lunch/ dinner.

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[1] Reproduced at AFM 4-9
[2] CAB 65 [32]

11 It was further provided that a *"Tenancy Agreement"* would be provided for review and execution though no such agreement concerning either Mr Hewett or the respondent was in evidence. It was an admitted fact at the trial that the respondent had occupied the subject accommodation on his own from his arrival on the island on 25 October 2016 through until Hewett's arrival on the island on 1 November. Hewett was not known to the respondent and the respondent was not consulted about Hewett moving into the accommodation.[3]

12 The allocation of the respondent to the particular room was also admitted as something done by the appellant.

13 Further, as the trial judge found:

a. "As is shown in Exhibit 1, the photograph of the room, Mr Schokman's bed was located in close proximity to the toilet"[4]; and

b. "it was a studio type apartment;… it comprised one bedroom with two beds;… it contained one bathroom located at the front of the unit, near the front entranceway."[5]

PART V: ARGUMENT

14 In *Prince Alfred College Inc v ADC*[6] the plurality said[7] that a touchstone for vicarious liability remained whether the act could be said to be *"in the course or scope of employment."* It was noted that the test was though to some extent conclusionary and offered *"little guidance as to how to approach novel cases"*.

15 In *Bugge v Brown*[8] Isaacs J said of the test of *"the course of the employment"* or *"the sphere of the employment"* that it had as its limit *"when the servant so acts as to be in effect a stranger in relation to his employer with respect to the act he has committed, so that the act is in law the unauthorized act of a stranger"*.[9]

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[3] See CAB 16-17 [45] and footnote 43
[4] CAB 42 [132]
[5] CAB 16 [45] at "6."
[6] (2016) 258 CLR 134
[7] At 149 [41]
[8] (1919) 26 CLR 110
[9] At 117 and 118

16 His Honour approved of the observation of Lord Macnaghten in *Lloyd v Grace, Smith & Co*[10] that the expression *"must be construed liberally"*. His Honour had immediately before then observed that the question was one of fact *"dependent entirely upon the circumstances of the particular case"* and was a matter upon which *"minds often may differ"* though on the facts there before the court his Honour considered the matter clear.

17 The acting as a stranger test formulated by Isaacs J was approved as marking the outer limits of the test for vicarious liability by the House of Lords in *Dubai Aluminium Co Ltd v Salaam.*[11]

18 In *Deatons Pty Ltd v Flew*[12] Dixon J said that acts (there self defence) may *"so arise out of a servant's acts done in furtherance of his master's interests as to be considered incidental to the performance of his duties and so in the course of his employment"*.

19 In *New South Wales v Lepore*[13] Gleeson CJ said that the fact *"wrongdoing occurs away from the workplace, or outside normal working hours, is not conclusive against liability"*.

20 The appellant in its submissions at [16] refers to the Salmond test. The plurality referred to that test in *Prince Alfred College v ADC*[14] but did not adopt it as a test exclusively defining the area of vicarious liability.

21 In *New South Wales v Lepore*[15] Gleeson CJ said of the test that it:

> *"…serves well in many cases but it has its limitations. As has frequently been observed, the answer to a question whether certain conduct is an improper mode of performing an authorised act may depend upon the level of generality at which the authorised act is identified".*

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[10] [1912] AC 716 at 736
[11] [2003] 2 AC 366 per Lord Nicholl at [32], cited with approval in *Various Claimants v WM Morrison Supermarkets plc* [2020] AC 989 at [38]
[12] (1949) 79 CLR 370
[13] (2003) 212 CLR 511
[14] (2016) 258 CLR 134 at 149 [42]
[15] (2003) 212 CLR 511

22 In *Barwick v English Joint Stock Bank*[16] it was said by the Court of Exchequer, consistent with the view of the plurality in Prince Alfred College of the *"course of employment"* remaining *"a touchstone for liability"*, that the wrong was committed *"in the course of the service"* was the test for vicarious liability, whether it was a case of fraud, trespass, false imprisonment or a running down case[17] noting that the additional element of the wrong being committed *"for the master's benefit"* was to be later corrected as not being an essential element to establish vicarious liability – see *Prince Alfred College v ADC.*[18]

10 23 To pose the test as being whether the act was connected or *"closely connected"* with the employment of itself is to pose no different question than whether the act was *"in the course of employment*" or incidental to employment. The same problem as to the conclusionary nature of such a test applies as was identified in the plurality judgment in *Prince Alfred College.*

24 Contrary to what the appellant submits in its outline at [17], the conclusion of the plurality in *Prince Alfred College* was that vicarious liability would attach where the employment was the occasion and not just the opportunity for the commission of the tort.[19]

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25 There are many cases where the identification of the act as being one that occurred in the course of employment will give rise to *"no serious difficulty"*, to use the expression of Isaacs J in *Bugge v Brown.*[20] Where that is the case, no more abstract analysis of how the test is satisfied is necessary.

26 Where the case is somewhat novel, and the answer is not so obvious, some more abstract analysis will be called for.

27 The approach in *Prince Alfred College* of examining the relationship between the
30 offender and the plaintiff created by the employer to see whether the employment was not just the opportunity but the occasion for the tort was an exercise of that

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[16] (1867) LR 2 Ex 259; [1861-73] All ER Rep 194
[17] At 265-6.
[18] (2016) 258 CLR 134 at 150 [48]
[19] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 159 [80]
[20] (1919) 26 CLR 110 at 121

kind. It was not to deny that it was a question as to whether or not the tort was committed in the course of employment.

28 Turning to the facts of this case, Hewett was employed to work on the appellant's island resort. It was a *"requirement"* imposed by his employer, and described as such in the contract of employment, that he live in shared accommodation (with another worker) in a single room unit with an attached bathroom. That was a requirement for the purposes of his employment, no doubt reflecting the hours of work and the circumstance that this was a remote workplace.

29 The room was allocated to the workers in the employer's discretion and the workers did not have the choice of roommate.

30 The need to use a toilet is "incidental" to work. That circumstance is reflected in the conventional provision of toilet facilities by employers for employees.

31 The appellant falls into error in its outline at [31] by treating the relevant act for the purpose of assessing the scope of employment as being urinating upon a co-worker. The relevant act was urinating. It was that act which was incidental to the employment of Hewett. The Salmond test, for instance, asks, *inter alia*, whether the employee was authorized to perform the act which, as it happened, was performed negligently (an unauthorized mode of performing an authorized act). Vicarious liability under that test does not depend on the employee having been authorized to perform the act negligently.

32 The need to live on the island was an incident of the employment of Hewett and the other workers subject to the requirement. The provision of a toilet within the room that they were to live in reflected that the need to use it was incidental to that requirement.

33 McMurdo JA considered that the case was squarely one committed in the course of employment. His Honour's approach[21] was to regard that as somewhat obvious, drawing on an analogy with the facts of the case in *Bugge v Brown.*[22]

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[21] CAB 70 at [41]-[42]
[22] (1919) 26 CLR 110

34 It is submitted that his Honour's analysis was apt. There is no reason to distinguish as incidental or connected to employment, or as being in the course of employment, the need to take sustenance during a break from work duties from the need to urinate during a break from work duties.

35 The appellant's contention that Hewett's act of urination was of *"alien character from the course or duties of employment"*[23] and that *"the conduct of Hewett cannot sensibly answer the necessary description"*[24] of being in close connection with and in the scope or course of employment, fails. While Hewett's specific act was not, in isolation, an obvious part of his employment as a restaurant worker, the *scope* of his employment explicitly extended to the accommodation arrangement and therefore to the implied requirement to perform bodily functions in that shared room. None of the relevant circumstances described in *WM Morrison*[25] exist. Hewett was not "*pursuing a personal vendetta"* or "*seeking vengeance"* or engaged in any other act unconnected with his employment.[26] Utilising the words of the court in *WM Morrison*[27], Hewett's wrongful conduct was so closely connected with acts which he was authorised to do that, for the purposes of the appellant's liability to the respondent, it can fairly and properly be regarded as done by him while acting in the ordinary course of his employment. The wrongful conduct was, in fact, an act Hewett was impliedly *authorised* to do had he not done so negligently.

36 To the extent that the somewhat unusual facts of this case called for more abstract analysis, the reasoning in *Prince Alfred College* can be availed of as confirming the correctness of the conclusion reached in the Court of Appeal.

37 The appellant created a relationship between Hewett and the respondent of roommates. They did not choose it for themselves – it was imposed upon them both in terms of the requirement itself and as to who their roommate would be. The accommodation selected by the appellant to house them was an intimate space.

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[23] Appellant's submissions 17 [31]
[24] Appellant's submissions 17 [32]
[25] *Various Claimants v WM Morrison Supermarkets plc* [2020] AC 989 at [47]
[26] Such as the employee in *Blake v J R Perry Nominees Pty Ltd* [2012] VSCA 122; 38 VR 123.
[27] [2020] AC 989 at [47]

That the respondent would be asleep in the same room as Hewett meant that the respondent would be vulnerable to the actions of Hewett within the room. The appellant created a situation where the respondent had to trust that Hewett would not cause him harm and in particular when he was asleep. The employment was the occasion for the commission of the tort.

38 The appellant has failed to make out any of its grounds of appeal. The appeal ought to be dismissed with costs.

PART VI: RESPONDENT'S ARGUMENT ON NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

40 Not applicable.

PART VII: ESTIMATE OF TIME REQUIRED

41 The respondent estimates 2 hours will be required for his oral argument.

Dated 2 December 2022

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