HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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Important Information

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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 OUTLINE OF ORAL SUBMISSIONS

Part I: This outline is in a form suitable for publication on the internet

Part II: Outline of propositions the Appellant intends to advance

1. The Respondent and Hewett were employed by the Appellant to work in a restaurant at the Appellant's resort on Daydream Island. They each entered a tenancy agreement with the Appellant, though the agreements were not in evidence, and paid rent to the Appellant to reside in shared studio-style accommodation on the Island. Early in the morning, Hewett urinated on the Respondent while the Respondent lay asleep, in what was found at trial to be a "drunken misadventure"[1], causing personal injury to the Respondent. That was the wrongful act for which the Appellant has been held liable[2] – as opposed to "occupying the room".[3]
(AS [6]-[7])

2. The provision of "company housing" as referred to in the Appellant's letter of appointment[4] was for private shared accommodation, rather than premises occupied as part of the Respondent's or Hewett's work duties. It was the island location

[1] Supreme Court Reasons at [138], CAB 44.
[2] cf. *New South Wales v Lepore* (2003) 212 CLR 511 at 539 [51].
[3] Court of Appeal Reasons at [42], CAB 70.
[4] Treated as showing also the terms of Hewett's appointment: Court of Appeal Reasons at [32], CAB 65.

rather than any kind of work required that explained the provision of work accommodation. The references to the lost tenancy agreement document suggest strongly an ordinary residential leasehold.
(AR [5]-[7])

3. Whether or not the courts adjudicating the tort claim did hold or should have held that the residents of the shared accommodation enjoyed exclusive possession by way of an estate, nonetheless there is no indication at all of the employer overseeing conduct within the residential premises during the period of residence, whether by way of uninvited supervisory entry or otherwise.
(AR [5]-[7])

4. By contrast, the "Workplace Health & Safety" stipulation concerning the health and safety of other persons was directed to a safe and secure workplace. The finding otherwise by the Court of Appeal[5] has no support factually.
(AR [5]-[7])

5. This setting provided none of the features of the employment role which might meet the general notion of being in the course or scope of employment to describe the mishap in residential premises. Hewett's drinking and incontinence out of hours and in his private space were not work activities, were not forbidden so far as the evidence shows with respect to his employment duties, and were beyond any practical control by the Appellant as employer.
(AS [8]-[10], AR[8]-[9])

6. Consideration of other decided cases, as mandated by *Prince Alfred College* at [46]-[47], does not involve unprincipled according of precedential value to fact findings in other cases on other evidence, but rather provides content that assists the understanding of general formulations such as those in paragraph 5 above.
(AR [10]-[11])

7. Nothing in *Bugge v Brown* supplies a persuasive analogy to provide a principled basis of liability in this case. Lighting a fire in order to prepare lunch to be eaten in

[5] Court of Appeal Reasons at [42], CAB 70.

the outdoors workplace was necessarily incidental to the assigned task in that case. The same cannot be said for the daily need for sleep (and associated ablutions) in private quarters in order to be available for work day to day: that is a circumstance true of all human workers, wherever they reside. Leisure activities out of work hours are similarly simply part of life, not of work.
(AS [11])

8. The expected lighting of a cooking fire during work hours in the workplace must be on the other side of the line from this "drunken misadventure" out of hours in private quarters. The reference by Justice Isaacs to the "unauthorised act of a stranger"[6] is the putative characterisation of the wrongdoing for which the plaintiff sues (i.e. "the act of the servant complained of"), rather than the character of the aspect of the employment relationship merely providing an opportunity[7] for that wrongful act.
(AS [11]-[12])

9. None of the various connective descriptions between an employee's wrongful act and the nature of the employment noted in *Prince Alfred College* at [54]-[56] has any footing in the facts of this case.
(AS [9])

10. This is not a case to which there ought be applied the approach taken in cases such as positions *in loco parentis*, like those discussed in *Prince Alfred College* at [80]-[84]. For instance, Hewett was given no "special role" in relation to the Respondent, and sharing accommodation is not "a position of power and intimacy" like that of a housemaster of schoolchildren.
(AR [9]-[11])

Dated: 9 March 2023

BRET WALKER

Senior Counsel for the Appellant

[6] *Bugge v Brown* 117-118, 121, 122.
[7] *Prince Alfred College* [52], [80], [83].