HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY No. D2 of 2020

BETWEEN: **AILEEN ROY**

Appellant

and

JULIE O'NEILL

Respondent

OUTLINE OF ORAL SUBMISSIONS OF RESPONDENT

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Part I: Certification

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

Part II: Outline of Argument

2. The existence and scope of the licence is governed by the following principles:

   (a) The licence is implied, as a matter of law, where the means of access to a private dwelling is left unobstructed or unlocked;

   (b) The occupier may negate the licence by giving notice that entry by all, or by designated visitors, is forbidden;

   (c) Any member of the public may go upon the open path or driveway up to the entrance of the dwelling for the purpose of *lawful communication with, or delivery to,* any person in the house (albeit it is a 'licence to knock' only);

   (d) The occupier may revoke the licence at any time, requiring the visitor to depart within a reasonable time;

   (e) The licence also permits any member of the public to go upon the open path or driveway for *any other legitmate purpose that involves no interference with the occupier's possession nor injury to the occupier, guests or their property*.

   - *Halliday v Nevill* (1984) 155 CLR 1 at 6-8; cf 18-20
   - *Robson v Hallett* [1967] 2 QB 939 at 950-954 (RS [23]-[38]; [47])

3. More broadly, the licence engages the following considerations:

   (a) 'Common sense' and public policy drive an enquiry which seeks to reflect and balance a range of interests (occupier, entrant, the public good) so as to produce a qualification to the law of trespass, operating at a level of significant generality, for the convenient functioning of society;

   (b) The question is not whether 'a majority of Australian householders' would consent to entry for a given purpose (cf AS [43], AR [7]-[9]). Rather, individual householders are protected by the ability to negate or revoke the licence;

   (c) The generality of the enquiry draws support from the principles governing the analogous licence for entry onto business premises (RS [46]-[55]).

4. Police have the same breadth of entry under the licence as any other member of the public:

   (a) 'Lawful communication and exchange' covers any intended communication in the course of duty between police and any person in the residence, including those on the spectrum between 'proactive' and 'reactive' policing;

   - *Halliday v Nevill* (1984) 155 CLR 1 at 6-8

- *Robson v Hallett* [1967] 2 QB 939 at 950-954
- *Tararo v The Queen* (2010) 1 NZLR 165 at [11]-[24]

(b) Making enquiries about compliance with the criminal law by persons in the residence is a 'legitmate purpose that involves no interference with the occupier's possession nor injury to the occupier, guests or their property'. The prospect of being investigated for an offence is not an injury protected by the trespass action.

- *Smethurst v Commissioner of Police* (2020) 376 ALR 575 at [73], [85], [104]

(c) No distinction should be drawn between a wide range of *permissible* communications between police and persons on premises (including communications with an occupier about compliance with the criminal law by *other* persons: AS [33]) and a range of *impermissible* communications (those with an occupier about the *occupier's* compliance with the criminal law: AS [34] or about *another occupier's* compliance with the criminal law: AR [6]-[8]);

(d) An occupier retains all protections under the the accusatorial system of criminal justice if the licence has the scope contended for by the Responent;

(e) The scope of the licence is not to be narrowed by assessments whether particular purposes of entry invite 'substantial conflict' between the interests of the entrant and the occupier (cf AS [34]); or might quickly lead to a statutory right to remain on the premises (cf AS [38]); or would invite 'more than embarrassment' if the occupier were to assert rights of negation or revocation (cf AS [40]-[41]);

(f) The Appellant's limitation is not workable in practice. Ascertaining the occupier can be notoriously tricky. The scope of the licence should be ascertainable without fine-grained legal knowledge.

- *Florida v Jardines* 133 S.Ct 1409 (2013) at 1415-1416. (RS [39]-[44], [49]-[55], [61]-[78], [79]-[86])

5. The Appellant must succeed on both grounds of appeal in order to overturn the orders of the Court of Appeal. As to Ground 1:

(a) The 'DVO check' followed upon a check two weeks earlier in which the Appellant had been found potentially about to breach her DVO; she was assisted to a sobering up shelter but later absconded and was taken into protective custody;

(b) The DVO check involved the Constables' stepping from the common property onto the open alcove to approach the front door to make enquiries with one or both occupiers, depending who was there, as to whether the Appellant was currently

complying with the conditions of the DVO, including potentially entering the dwelling if permitted to do so and/or requiring her to provide a breath sample if it were reasonable to do so;

- *Domestic and Family Violence Act 2007* (NT) ss 18-21
- *Domestic and Family Violence Regulations* reg 6(1)
- CAB 58-59 [2]-[6]; ABFM pages 10-13, 15, 17.

(c) At the point of stepping into the open alcove, while it could not be known precisely how the communications would play out, far more than a 'modicum of communication' was involved (cf AR [5]). There was no inevitability that the criminal justice system would be engaged against the Appellant. The range of possible communications which might have ensued included communications for the benefit of the Appellant, Mr Johnson and society generally;

(d) The Constables did not need to have evidence of a recent complaint about the Appellant; reasons to suspect a breach of the DVO or that Mr Johnson was at risk; or an indication that Mr Johnson objected to the Appellant's behaviour (AR [3], [8]); albeit they did in fact have good reasons to carry out the DVO check, including in the interests of Mr Johnson;

(e) That the Constables made observations at the point of knocking at the doorway that revealed a likely contravention of the DVO, subsequently confirmed by the results of the breath sample provided by the Appellant, does not remove their prior entry into the open alcove from the licence (RS [7]-[10] and generally).

6. In any event, Ground 2 should be rejected and the appeal dismissed:

(a) The Constables had a licence from *Mr Johnson*, an occupier, to set foot on the alcove for the purposes of lawful communication or exchange with any person in the residence about *Mr Johnson's welfare* as a protected person under the Act or compliance with the DVO granted for his protection;

(b) The implied licence from Mr Johnson to the police was not negated because the potential offender (the Appellant) was a co-occupier.

- *NSW v Koumdjiev* (2005) 63 NSWLR 353 at [51]
- *Pitt v Baxter* (2007) 34 WAR 102 at [16] (RS [87]-[93])

Dated: 8 September 2020

Justin Gleeson SC

Counsel for the Respondent