HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S101/2022

BETWEEN:

BA
Appellant

and

THE KING
Respondent

APPELLANT'S REPLY

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Reply

2. This appeal concerns what the Crown is required to prove, beyond reasonable doubt, in order to establish the element of "breaks" in an offence against s112 of the *Crimes Act 1900* (NSW).[1] The appellant's argument is that a "break" could not be established in circumstances where the Crown could not exclude that the appellant had a right to enter the apartment into which he was alleged to have broken by virtue of his position as a tenant under the residential tenancy agreement. The Crown advances two contentions for why that argument should be rejected by this Court, namely:

   a. it was not necessary for the Crown to disprove the existence of a proprietary or contractual right to enter on the part of the appellant in circumstances where the complainant, as the actual occupant of the apartment, did not consent to the entry, that being the reasoning of the majority of the Court of Criminal Appeal (**CCA**); or

[1] So much is reflected in the question of law alone articulated by the Crown in the Court below: see *R v BA* (2021) 105 NSWLR 307 at [4] (Brereton JA) (Core Appeal Book (**CAB**) 19).

b. the Crown was able to disprove a proprietary or contractual right to enter because s51(1)(d) of the *Residential Tenancies Act 2010* (NSW) (**RT Act**) operated to restrict the appellant's right to enter the apartment with the result that he did not enter pursuant to a proprietary or contractual right when he entered by force, that being the ground advanced in the proposed notice of contention.

3. Neither of the Crown's arguments disputes that the residential tenancy agreement remained on foot at the time of the offence or that the appellant continued to enjoy rights thereunder, save for the extent to which a breach of s51(1)(d) of the RT Act impacted those rights. Much of the factual narrative in the Respondent's Amended Submissions (**RS**) at [9]-[14] is irrelevant as it does not support proof of the element of "breaks" on either of the bases now relied on by the Crown. Nor do the submissions retained at RS [47]-[51] and [54]-[55] address the arguments presently advanced, in circumstances where the Crown has withdrawn reliance on a second ground in its notice of contention to which those submissions initially related.

Construction of s112

4. There appears to be no dispute that, at common law, a person who entered a dwelling-house either with consent, or by legal right, did not commit a break. Instead, the Crown submits that s112 of the *Crimes Act* deliberately departed from the common law such that an entry by legal right can be a break for the purposes of the statutory provision, whereas an entry with consent continues not to be a break (RS [30]). It should not be accepted that such a significant departure from the common law was intended or occurred. While the Crown relies on the repeal of s108 of the *Crimes Act* as indicative of a movement away from the common law (RS [27]), it is clear from the extrinsic material that this repeal was not intended to substantively change the scope or application of the law relating to burglary offences (see Appellant's Submissions (**AS**) [29]).

5. Moreover, the Crown accepts that the word "breaks" in s112(1)(a) of the *Crimes Act* bears its common law meaning (RS [25]). One aspect of that meaning is the absence of permission to enter (see AS [20]). The absence of permission is critical to both the Crown's arguments. In support of the reasoning of the majority of the CCA, the Crown submits that the appellant committed a break because he entered without the consent of the complainant. By its notice of contention, the Crown submits that the legal position of the appellant as a tenant must be examined to ascertain whether his entry was authorised.

Thus, it appears to be common ground that the element of "breaks" is a "limiting element" to the offence in s112 which requires consideration of the absence of permission (see AS [42]-[43]).[2] The appellant submits that a permission derived from a proprietary or contractual right is sufficient to preclude a "break". As outlined at AS [32]-[33], the appellant's argument does not require the words "any dwelling-house" in s112(1) of the *Crimes Act* to be read as if the words "dwelling-house of another" had been used (as they were in s109(1)). The appellant's focus is on "the character of the 'breaking'" rather than on "the class of dwelling-houses".[3] On the appellant's argument, a person might break into their own dwelling-house if they do not enjoy a relevant right to enter.

6. Aside from the use of the language "any dwelling-house" rather than "dwelling-house of another", Brereton JA relied on a second reason for concluding that an entry pursuant to a proprietary or contractual right may be a "break" for the purposes of s112 of the *Crimes Act*, namely that the purpose of the offence is "to protect any occupant, regardless of whether they have a legal right of possession or occupation" (see AS [31]).[4] The Crown does not seek to support that reasoning. The Crown disclaims the conclusion that the consent of a person without a legal right of possession or occupation may be determinative of whether a "break" has occurred because it is actual or *de facto* occupation which matters (RS [54]).[5] Yet, if the result in the CCA is to be justified, it must be the case that s112 draws some relevant distinction between persons with a legal right of possession or occupation, as both the appellant and the complainant answered that description in this case. For the reasons given at AS [39]-[46], the test of the consent of an "actual occupant" adopted by the majority of CCA, which the Crown seems to modify to be a test of an "actual *lawful* occupant" (RS [54]), is problematic.

7. Without contending that they altered the legal position under the residential tenancy agreement, the Crown emphasises certain factual matters, such as the appellant not living at the apartment at the time of the offence; him having relinquished some keys; and most of his possessions having been removed. In the appellant's submission, it is unclear why, and at what point in the breakdown of a domestic relationship, factual matters of that kind will produce the result that one person with a legal right of possession or occupation can refuse consent to the entry of another with the same legal right and thereby render

[2] *Ghamrawi v R* (2017) 95 NSWLR 405 at [91] per Leeming JA (Bellew and Lonergan JJ agreeing).
[3] *Ghamrawi* (2017) 95 NSWLR 405 at [91] per Leeming JA (Bellew and Lonergan JJ agreeing).
[4] *BA* (2021) 105 NSWLR 307 at [17], [21] (CAB 26, 27-28).
[5] *BA* (2021) 105 NSWLR 307 at [22], [28] (Brereton JA) (CAB 28, 29-30).

the latter liable to break into their own dwelling-house for the purposes of the criminal law. This Court should not accept that the application of a serious criminal offence is to be determined in that way.

8. At RS [51], the Crown submits that the appellant was not entitled to force entry into the apartment in order to commit offences therein. It is again noted that the appellant pleaded guilty to common assault, intimidation and destruction of property (AS [13]). The circumstances in which he entered the apartment will be an aggravating factor in sentencing.[6] But if the offence against s112 of the *Crimes Act* was to be made out, the Crown had to establish, beyond reasonable doubt, that the appellant broke into the
10 apartment and a person who enters their own dwelling-house in accordance with a proprietary or contractual right does not commit a break, even if they have an intention to do something unlawful inside.[7]

Notice of contention

9. In the alternative argument by notice of contention, there is no dispute that it is necessary to consider whether the appellant had a relevant right to enter the apartment by virtue of his position as a tenant under the residential tenancy agreement (RS [35]). Contrary to the Crown's contention, however, s51(1)(d) of the RT Act did not relevantly affect the appellant's position. That provision does not qualify a tenant's right to enter and occupy leased premises.[8] Section 51(1) imposes obligations on a tenant, breaches of which
20 permit a landlord to claim compensation (or require the tenant to the remedy the breach) and/or terminate the residential tenancy agreement.[9] These consequences of a breach of s51(1) are not self-executing. Where a breach occurs, a landlord may, under s87 of the RT Act, give a termination notice and apply to the Tribunal for a termination order. The tenant is to be given at least 14 days' notice (s87(2)) and the Tribunal will only make a termination order if satisfied that the breach is sufficient to justify termination (s87(4)(b)). That is understandable because breaches of s51(1) could be quite minor (for example, any negligent damage to the premises or being too noisy for a neighbour). In the meantime, until the residential tenancy agreement has been effectively terminated, the tenant retains their right of occupation, which carries with it a right to enter.[10]

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[6] See *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(eb); *Jonson v R* [2016] NSWCCA 286.
[7] *Ghamrawi* (2017) 95 NSWLR 405 at [97]-[98] per Leeming JA (Bellew and Lonergan JJ agreeing).
[8] Cf *BA* (2021) 105 NSWLR 307 at [64] (Adamson J) (CAB 40); RS [20(b)] [39], [41].
[9] RT Act, ss 63(3), 64(2)(a), 187(1)(e), 187(1)(g), 187(2)(b), 190. See also, in the current RT Act, s 65B.
[10] See *BA* (2021) 105 NSWLR 307 at [12] (Brereton JA), [40 (Fullerton J) (CAB 23, 33).

10. For present purposes, it is not sufficient to observe that the appellant breached s51(1)(d) of the RT Act. What must be established is that, because of his conduct, he had no right to enter the apartment. The appellant was entitled to enter the apartment until the residential tenancy agreement came to an end (regardless of the liability he might incur by damaging the premises). To illustrate the point, a tenant who locks themselves out of residential premises, breaks a window to obtain entry and then repairs the window at their own expenses – without the landlord taking action for termination – does not lose their right to enter and occupy the leased premises. They do not become, in effect, a trespasser. Analogously, a co-owner of a dwelling-house may act unlawfully by damaging jointly owned property, for example, by forcing and damaging a sliding door to enter the dwelling-house. Yet, again, the co-owner would not thereby lose their right to enter and would not commit a break.

11. Section 81(1) of the RT Act provides that a residential tenancy agreement terminates only in the circumstances set out in the Act and the Crown does not contend that the residential tenancy agreement to which the appellant was a party was or had been terminated at the time of the offence.[11] It was not for the appellant to establish that he entered the apartment pursuant to a proprietary or contractual right (cf RS [46]). Rather, as the terms of the question of law alone in the CCA suggest, the prosecution was required to establish that the appellant did not have a relevant pre-existing right to enter the apartment as a pre-condition of the element of 'breaks' in s112.[12] That pre-condition could not be established in circumstances where the appellant retained a right to occupy the apartment under the residential tenancy agreement.

Dated: 23 September 2022

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[11] See RT Act s 81(2)-(4). See also s 106.
[12] See *BA* (2021) 105 NSWLR 307 at [4] (Brereton JA) (CAB 19).