HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S101/2022
File Title:	BA v. The King
Registry:	Sydney
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Filing party:	Appellant
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY S101 of 2022

BETWEEN: **BA**
Appellant

and

THE KING
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

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

Part II:

1. *Issues raised* – The issues raised in the appeal are as follows:
   a) whether, for the purposes of an offence which refers to a person who "breaks and enters any … building", an entry effected pursuant to a contractual right will nonetheless involve a "break" if it is made without the consent of "the actual occupant" (CCA [28(3)] per Brereton JA); or "those either in occupation of the premises or those entitled to occupy those premises" (CCA [41] per Fullerton J); or "the sole person in lawful occupation of the property" (RS [20(c)], [54]); and
   b) as raised by the notice of contention, whether s 51(1)(d) of *Residential Tenancies Act 2010* (NSW) (**RTA**) qualified the appellant's right to enter the premises, so that entry in breach of that provision was not effected pursuant to an existing right and therefore involved a "break" (CCA [64] per Adamson J).
2. *Summary of the proceedings below*
3. *Matters not in issue* – Some factual and legal matters are not in issue:
   a) Under the residential tenancy agreement, the appellant and complainant as co-tenants had a right of occupation and the agreement was only terminated after the alleged offence (on 8 July 2019).

b) As at 8 July 2019, the appellant was not residing at the premises, although he still had some property inside the premises.

c) On 8 July 2019, the complainant had locked the front door and did not consent to the appellant entering the premises.

d) In order to enter the premises, the appellant used force which damaged the front door, amounting to "intentionally or negligently caus[ing] … damage to the residential premises" contrary to s 51(1)(d) of the RTA.

e) There was evidence that, when he entered, the appellant committed at least one "serious indictable offence" as defined in the *Crimes Act 1900* (NSW) (s 4(1)) in circumstances of aggravation (s 112(2) of the *Crimes Act*).

4. *CCA's reasoning* – The tests variously adopted by Brereton JA, Fullerton J or the respondent (see [1(a)] above) should not be accepted because:

a) The term "breaks" in s 112 of the *Crimes Act* embraces the common law meaning of that term. Under the common law; authority *or* permission can derive from a proprietary *or* contractual right to enter *or* the consent of the owner *or* lawful occupant.

b) To commit a "break" under the common law, there must be an act of trespass – the statutory replacement of a "break" test with a "trespass" test retained the core trespassory element while removing some archaic distinctions: *Columbia Law Review* Note, JBA v5 p619; Russell, *Crimes and Misdemeanors*, JBA v5 p773. *Barker* (1983) 153 CLR 338 is, therefore, instructive.

c) The use of force to enter does not, of itself, make the entry a "break". Whether a "break" occurs is determined by the scope of the authority or permission to enter.

d) The absence in s 112(1) of the words "of another", as found in s 109(1), does not bear on the meaning of "breaks" in s 112(1). Section 109(1) criminalises an entry, not a "break and enter". It is the word "break" in s 112(1) which operates to preclude commission of the offence where there is authority or permission to enter (and even an owner may "break" if there is no authority or permission for the entry).

e) There is no basis to infer a legislative intention that commission of an offence under s 112 (and other analogous offences) would turn on whether or not an "actual occupant" had given permission to enter, as distinct from the common law test of whether the entrant had authority or permission to enter. The specified premises plainly contemplate premises that are not occupied.

f) There is no authority supporting the analysis of the majority in the CCA, or the modified contention advanced by the respondent.

g) Consent from an "actual occupant" is not an appropriate or stable criterion for the application of a serious criminal offence. It is implausible that the legislature intended such a test.

5. *Notice of Contention* – The argument advanced in support of the notice of contention (embracing the reasoning of Adamson J) should not be accepted because:

   a. There is no apparent reason to infer that a breach of the prohibition in s 51 of the RTA was intended to qualify a tenant's rights of occupation and entry. In fact, there are scenarios that tend to show this was not intended.

   b. No provision of the RTA provides that a tenant's rights are so qualified.

   c. The scheme of the RTA specifies the consequences for breaching s 51 (which do not include a self-executing qualification of the tenant's rights), including:

      i. a termination order by the Tribunal (s 87(4));

      ii. an order for compensation (s 187(1)(d));

      iii. an order that the tenant remedy the breach (s 187(1)(e)); and

      iv. alleviation of the landlord's obligation to repair damage (s 63(3)).

   d. Section 51 is concerned with "use of premises", which would not readily extend to an entry of premises.

   e. Unlike s 51, other provisions (ss 55, 56, 57, 59) expressly deal with and circumscribe a right of "entry" (by a landlord).

6. The appeal should be allowed and in lieu of the orders made by the CCA an order made that the appeal pursuant to s 107(5) of the *Crimes (Appeal and Review) Act 2001* (NSW) be dismissed.

Dated: 7 February 2023

S.J. Odgers
odgers@forbeschambers.com.au
(02) 9390 7777

K. Edwards
kirsten.edwards@forbeschambers.com.au
(02) 9390 7777

E. Jones
ejones@sixthfloor.com.au
(02) 8915 2686