HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BA**
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S AMENDED SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issue presented by the appeal is whether a person is capable as a matter of law of breaking and entering a dwelling-house for the purpose of s 112 of the *Crimes Act 1900* (NSW) (**Crimes Act**) in circumstances where they are identified as a co-tenant of the subject property on an extant residential tenancy agreement.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. The Respondent considers that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

4. The facts set out in the Appellant's submissions (**AS**) at [7] to [14] are broadly accurate, but incomplete in some respects.

Background

5. The Appellant and the complainant lived together in an apartment in Queanbeyan (the **apartment**) from September 2018. They resided at the apartment pursuant to a residential tenancy agreement dated 29 August 2018, which was granted under the *Residential Tenancies Act 2010* (NSW) (**RT Act**).[1] That agreement commenced on 12 September 2018 for a fixed term of 12 months. It was terminated on 23 July 2019.[2] The

[1] Respondent's book of further materials (**RFM**) at 4.
[2] Core Appeal Book (**CAB**) 18 at [2].

complainant and the Appellant were each identified as "tenants" on the residential tenancy agreement, and each affixed their signatures to that document.

6. On 20 April 2020, the Appellant was charged by indictment with one count of break and enter and commit serious indictable offence (intimidation) in the apartment, in circumstances of aggravation (use of corporal violence), contrary to s 112(2) of the Crimes Act. The alleged offence occurred on 8 July 2019. He entered a plea of not guilty, and was tried by Judge alone pursuant to s 132(2) of the *Criminal Procedure Act 1986* (NSW).

7. At the conclusion of the Crown case, the trial judge acceded to the Appellant's application to direct a verdict of not guilty on the basis that the Appellant had a "contractual right" to enter the apartment under the residential tenancy agreement and that, accordingly, the Crown had not established "an essential precondition to liability for the offence".[3]

8. The Appellant was thereby acquitted of the offence against s 112(2) by direction of Williams SC DCJ on 8 September 2020.

The alleged offence

9. It is well-established that on an application for a directed verdict, the Crown case must be taken at its highest and all inferences favourable to the prosecution case that are reasonably open should be drawn.[4] In accordance with those principles, the evidence adduced by the Crown at trial was as follows.

10. In about May 2019, the Appellant moved out of the apartment following the breakdown of his relationship with the complainant, and he ceased to reside in the apartment thereafter.[5] He took with him most, but not all, of his possessions.[6] The Appellant had ceased paying rent in April 2019, and from that time the complainant paid the rent in full without contribution from the Appellant.[7]

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[3] CAB 6 at [2], 10 at [16]-[17]. While not articulated in his Honour's judgment, the "necessary pre-condition" to liability upon which the Appellant's counsel relied in support of his application for a directed verdict was that the residential tenancy agreement had been terminated: Transcript, 8 September 2020, 62.20 to 63.30 (RFM 87-88).
[4] *Doney v The Queen* (1990) 171 CLR 207 at 214-5 (***Doney***); *R v A2* (2019) 269 CLR 507 at [88], [91] (Kiefel CJ and Keane J) (***A2***).
[5] CAB 6 at [3], 18 at [2], 36 at [50]; AS at [10].
[6] CAB 18 at [2], 36 at [50].
[7] CAB 18 at [2], 36 at [50].

11. On 4 July 2019, the complainant telephoned her mother after becoming concerned about threats of violence said to have been made by the Appellant.[8] The complainant's mother immediately drove to the apartment from her own home in Melbourne, and assisted the complainant with packing the Appellant's remaining belongings.[9] She stayed with the complainant at the apartment until 7 July 2019 when she returned to Melbourne.[10]

12. One salient aspect of the evidence was not referred to in the reasons of the trial judge. On 5 July 2019, the Appellant attended the apartment on four occasions. On the first occasion, he "banged loudly" on the front door to the apartment at approximately 6am, and the complainant allowed him inside.[11] He spoke with the complainant on the balcony and then in the car. After he left, the complainant told her mother that the Appellant had tried to force her to have sex with him.[12] On the next three occasions, the Appellant knocked on the front door to the apartment while the complainant was at work.[13] He asked the complainant's mother whether he could come inside to collect the rest of his belongings or, in one instance, to say goodbye to the complainant's son. On each occasion, the complainant's mother refused entry and the Appellant left. By prior arrangement with the complainant, the Appellant then attended the apartment in her absence on the morning of 6 July 2019 to collect whichever belongings he wished to keep.[14]

13. The trial judge found that by the time of the alleged offence on 8 July 2019, the Appellant had removed the "great bulk" of his belongings from the apartment.[15] His Honour referred to a submission advanced on the Appellant's behalf that he had left behind a fish tank[16] and some of his daughter's possessions, which were located in a storage cage in the garage.[17] The trial judge also referred to the Appellant's submission that he "still had at least one key to the premises" at the time of the alleged offence.[18] That submission reflected the evidence given by the complainant at trial, namely, that the Appellant had left his security token for the garage, and his key for the deadlock on

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[8] CAB 18 at [3], 36 at [51].
[9] CAB 18 at [3], 36 at [51].
[10] CAB 18 at [3], 36 at [51].
[11] Transcript, 8 September 2020, 46.1 to 47.35 (RFM 71-72).
[12] Transcript – evidence of complainant's mother, 8 September 2020, 46.1 to 47.31 (RFM 71-72).
[13] Transcript, 8 September 2020, 48.32 to 49.50 (RFM 73-74).
[14] Transcript, 7 September 2020, 11.1 to 12.21 (RFM 35-36); Transcript, 8 September 2020, 50.5-43 (RFM 75).
[15] CAB 6 at [3].
[16] Which the Appellant had given to the complainant in April 2019: Transcript, 7 September 2020, 31.21-50 (RFM 55).
[17] CAB 7-8 at [7]; Transcript, 7 September 2020, 7.12-13, 39.17-37 (RFM 31, 63).
[18] CAB 8 at [7].

the front door to the apartment, on a bench inside the apartment on the morning of 6 July 2019.[19] The key to a separate lock on the front door handle was missing.[20] Both keys were required in order to unlock the front door.[21]

14. On 8 July 2019 at approximately 6am, the complainant heard the Appellant screaming at her outside the front door to the apartment and demanding to be let inside.[22] The front door was locked.[23] The complainant refused to let him into the apartment.[24] The Appellant then kicked down the front door (which was secured by three locks), causing the deadlock to shatter the wooden doorframe.[25] Once inside, he grabbed the complainant by her shoulders, shook her and yelled at her.[26] The complainant attempted to make a telephone call, but the Appellant grabbed her mobile telephone and threw it to the ground.[27]

15. Following the Appellant's acquittal of the offence against s 112(2) of the Crimes Act, he pleaded guilty to charges of common assault, intimidation and destroy property in respect of the events of 8 July 2019.[28]

The Crown appeal

16. The Crown appealed against the Appellant's acquittal to the Court of Criminal Appeal (**CCA**) on the question of law articulated at CAB 11, in accordance with s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW).

17. All three members of the CCA, in separate reasons for judgment, found appellable error in the approach adopted by the trial judge. The CCA unanimously allowed the appeal, quashed the Appellant's acquittal of the charge under s 112(2) and ordered a retrial.

Part V: Argument

18. The sole ground of appeal advanced by the Appellant is that the CCA "erred in concluding that there should not have been a directed acquittal for the offence against s 112(2)".[29] That ground asserts a conclusion, but does not identify a specific error.

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[19] Transcript, 7 September 2020, 12.20 to 13.2 (RFM 36-37).
[20] Ibid.
[21] Transcript, 7 September 2020, 3.9 (RFM 27).
[22] CAB 18 at [3], 36 at [52].
[23] AS [10].
[24] CAB 18 at [3].
[25] CAB 7 at [4]; CAB 18 at [3], 36 at [52].
[26] CAB 18 at [3], 36 at [52].
[27] CAB 18 at [3], 36 at [52].
[28] CAB 32 at [34].
[29] CAB 49.

19. In substance, the Appellant's argument in the appeal (as before the trial judge) reduces to a single proposition: that he could not "break" into the apartment for the purpose of s 112 of the Crimes Act because his name was (and remained) on the residential tenancy agreement, with the asserted consequence that he entered the apartment on 8 July 2019 "pursuant to a proprietary or contractual right": AS [20].

20. For the reasons developed below, those contentions should be rejected on the basis that:

(a) properly construed, s 112 of the Crimes Act is capable of rendering a person criminally liable for breaking and entering their *own* dwelling-house (and the Appellant accepts as much). Whether the evidence is capable of sustaining a guilty verdict in such a case may therefore depend upon consideration of all of the relevant facts and circumstances;

(b) by breaking down the front door to the apartment in order to effect his entry to the property, the Appellant exceeded the scope of the permission or authority to occupy the apartment that had been conferred on him by the landlord, so as to ground liability for an offence under s 112(2). Put another way, he did not break and enter in a manner that complied with his proprietary or contractual rights with respect to the apartment. It is that argument which underpins ground 1 of the Respondent's Notice of Contention (**NOC**);[30] and

(c) further or in the alternative to (b), the Appellant forcefully entered the apartment on 8 July 2019 without the consent and over the express protest of the complainant (being the sole person in lawful occupation of the property), and he therefore committed a "break and enter" without authority for the purpose of s 112(2). ~~Although not explicitly formulated in these terms in the judgments of the majority in the CCA, the withdrawal of consent by the complainant and the acceptance of that withdrawal by the Appellant at the time of the alleged offence can also readily be characterised in terms of an implied contract (as reflected in ground 2 of the Respondent's NOC).~~

21. Each argument is addressed in turn below.

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[30] As to which, see [34] to [46] below.

The elements of the offence

22. The question of law alone raised by the Crown's notice of appeal to the CCA (and, in turn, by the Appellant's appeal to this Court) concerns the proper construction of s 112 of the Crimes Act and the constituent elements of the offence created by that provision.[31]

23. Section 112 relevantly provides as follows:

> **112 Breaking etc into any house etc and committing serious indictable offence**
>
> (1) A person who—
>
> (a) breaks and enters any dwelling-house or other building and commits any serious indictable offence therein …
>
> is guilty of an offence and liable to imprisonment for 20 years.
>
> (2) **Aggravated offence** A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 20 years.

24. It is axiomatic that the provisions of a statute must be construed together and as a whole.[32] To that end, s 112 is located within Division 4 of Part 4 of the Crimes Act, which Division is entitled "Sacrilege and housebreaking". Sections 109, 110, 112 and 113 each include "breaking" into or out of a dwelling-house (as defined in inclusive fashion by s 4) as an element of the respective offences thereby created.

25. The term "break" is not defined in the Crimes Act. It is common ground that s 112 embraces the common law meaning of that term.[33] That is, it imports the respective concepts of actual and constructive breaking as had developed at common law in connection with the offence of burglary, together with the proliferation of "fine distinctions" that have emerged as to what will, and will not, constitute a "break".[34] However, s 112 also differs in important respects from its common law antecedents. The common law is therefore "no more than a starting point" when determining the elements of the offence created by s 112, which is a question of statutory construction.[35]

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[31] CAB 35 at [49].
[32] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 (Mason J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ) (***Project Blue Sky***); *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 452 (Toohey J).
[33] AS [23]; *Ghamrawi v The Queen* (2017) 95 NSWLR 405 at [83] (Leeming JA; Bellew and Lonergan JJ agreeing) (***Ghamrawi***).
[34] *R v Stanford* (2007) 70 NSWLR 474 at [25], [31], [44] (Simpson J; Grove and Hulme JJ agreeing); see also *Ghamrawi* at [2], [84], [92], [96].
[35] *Ghamrawi* at [82], [96].

26. The offence of burglary at common law was defined as the "breaking and entering of the dwelling-house **of another** in the night-time, with the intent to commit a felony therein".[36] As that definition makes plain, it was an essential element of the offence of burglary that the dwelling-house in which the offence was committed was *not* that of the accused. That was not a consequence of the way in which the term "break" was understood and applied, but rather, a function of the express inclusion within the common law offence of the emboldened phrase (cf. AS [23]-[24]). That formulation of the offence underpinned the observation in Russell's *A Treatise on Crimes and Misdemeanors* (1877, 5th ed) that, at common law, "a man cannot commit burglary by breaking open his own house".[37]

27. Section 108 of the Crimes Act as enacted picked up the offence of burglary at common law, but that provision was repealed decades ago.[38] What remains is a collection of statutory offences derived from the common law offence but in various ways expanding upon it.[39] Significantly for present purposes, while s 109 refers to "the dwelling-house **of another**" (much like the offence of burglary at common law), each of ss 110, 111, 112 and 113 instead refer to entry, or breaking and entry, into "**any** dwelling-house".[40] That contrast is striking.

28. Applying ordinary principles of statutory construction, that legislative context and history provides a powerful basis for concluding that the phrase "any dwelling-house" in ss 110 to 113 of the Crimes Act *includes* the dwelling-house of the offender.[41] Indeed, the Appellant accepts that s 112 is "capable" of bearing that construction (AS [32]).

29. In the Court below, and in accordance with the foregoing, Brereton JA correctly recognised that s 112 on its proper construction does not exclude liability for breaking into one's own dwelling.[42] By corollary, his Honour rejected the single premise for the trial judge's directed verdict – namely, that a person "who has a legal right to enter cannot be guilty of breaking".[43] The observations of Fullerton J are to like effect.[44] Critically for present purposes, as Brereton JA explained, the fact that s 112 does not

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[36] Archbold's *Pleading, Evidence and Practice in Criminal Cases* (35th ed, 1962, London, Sweet & Maxwell) at 1798; *Ghamrawi* at [54].
[37] Vol II, Book IV, Chapter 1 at 36.
[38] *Ghamrawi* at [75], [84].
[39] *Ghamrawi* at [82].
[40] *Ghamrawi* at [77].
[41] *Ghamrawi* at [88], [91].
[42] CAB 24 at [16].
[43] CAB 26 at [17].
[44] CAB 32-3 at [40]-[41].

exclude liability for breaking into a dwelling which one has permission to enter "is indicative that a right to enter, founded on a proprietary or leasehold interest, **does not of itself negate a 'break'**".[45] That follows inexorably from the language of s 112 construed in its statutory context.

30. Accordingly, the CCA was correct to conclude that the trial judge should not have directed a verdict of not guilty *simply by reason of* the Appellant's status as a co-tenant under the residential tenancy agreement. In its terms, and having regard to its statutory context, s 112 reflects a legislative intention to depart from the common law requirement attending the offence of burglary that the offence take place in the dwelling of another. As a matter of law, the Crown case at trial was therefore capable of sustaining a guilty verdict to the charge under s 112(2), because any "contractual right to enter"[46] retained by the Appellant under the residential tenancy agreement as at the date of the alleged offence did not, in itself, negate liability for that offence.

31. Given the narrow basis for the directed verdict of the trial judge, that is sufficient to dispose of the single ground of appeal.

The scope of the Appellant's authority to break <u>into</u> and enter the apartment

32. The right of entry upon which the Appellant relies to negate a "break" in connection with the alleged offence is sourced in (and only in) the residential tenancy agreement. That agreement is governed by the RT Act.

33. Section 13(1) of the RT Act defines a "residential tenancy agreement" as an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence. Such an agreement is a statutory creature distinct from a common law lease, in that it embraces agreements which fall short of conferring the right to exclusive possession that characterises the latter.[47] So, while a lease at common law will ordinarily constitute a residential tenancy agreement, the converse proposition does not follow.

The rights conferred by the landlord

34. The legal incidents of the residential tenancy agreement, and the respective rights and obligations thereby created, are enumerated in the RT Act. In accordance with s 15(1)

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[45] CAB 26 at [17] (emphasis added).
[46] CAB 10 at [16].
[47] *Radaich v Smith* (1959) 101 CLR 209 at 222 (Windeyer J); *Case v Frimont* [2021] NSWCA 30 at [15], [27] (Leeming JA; Basten and Gleeson JJA agreeing) and the authorities there cited.

of the RT Act, as at 29 August 2018 (being the date on which the agreement was executed) Schedule 1 to the *Residential Tenancy Regulations 2010* (NSW) prescribed a standard form of residential tenancy agreement. The terms of that standard form are taken to have formed part of the agreement entered into by the complainant and the Appellant.[48] The RT Act itself contains a number of provisions that are expressly designated as terms of every residential tenancy agreement.[49] A residential tenancy agreement is not permitted to contain terms that are inconsistent with the RT Act and Regulations, nor terms that are prohibited by the RT Act, and any such term is void to that extent.[50]

35. One of the rights conferred by the landlord as a result of the residential tenancy agreement in question was the right of occupation of the apartment for the purpose of use as a residence. It is that right which anchors the Appellant's entire argument on the appeal. However, the right of occupation cannot be marshalled in answer to the charge under s 112(2) of the Crimes Act without examining its conditions and limits. As the proceeding analysis demonstrates, the right of occupation is not an exhaustive description of the legal relationship between the landlord and the tenants at the time of the alleged offence, and nor was the right so conferred unqualified in its scope.

36. The nature and contours of the legal relationship between the landlord and tenant can be tested in this way. The Appellant accepts that a person might "break" into their own dwelling-house within the meaning of s 112 of the Crimes Act, and seeks to illustrate that proposition by reference to an owner who has granted a lease over their property so that "there is no relevant proprietary or contractual right to enter" (AS [32]). But that analysis is incomplete. Where an owner of property grants a residential tenancy agreement under the RT Act, the owner does not surrender their right to enter the subject property. That right of entry is preserved, but it is tightly circumscribed by the terms of the RT Act.

37. So for instance, the landlord has a right to enter without the consent of the tenant, and without giving the tenant any notice, in the circumstances set out in s 55(1) (including in the event of an emergency, or to carry out urgent repairs, or where health or safety concerns are reasonably held in respect of the occupant(s) and reasonable attempts have

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[48] RT Act s 15(5); see also Clause 1 of the residential tenancy agreement (RFM 6), which states that the "attached Standard Residential Tenancy Terms and the Tenant Acknowledgment apply to this Residential Tenancy Agreement". The agreement tendered at trial did not contain any attachments.
[49] Namely ss 27, 33-35, 37(3)-(4), 38-40, 41(1)-(7), 43, 48-59, 63-64, 66-67, 70-72, 74, 75(1)-(3).
[50] RT Act ss 15(3)-(4), 19, 21-22.

been made to obtain consent to entry). The landlord may also lawfully enter without the consent of the tenant, but upon the giving of notice, in the circumstances set out in s 55(2) (including for the purpose of inspections or necessary repairs, or to conduct a valuation of the property, or to show the premises to prospective tenants). Section 55 of the RT Act is a term of every residential tenancy agreement: s 55(4).

38. If a landlord enters tenanted property by using a key to open the front door in one or more of the scenarios identified in ss 55(1) or 55(2), it is highly unlikely that they have committed a "break" in the sense contemplated by s 112 of the Crimes Act. The landlord has carried out the physical components of a "break and enter" in the residence of the tenant, but has done so in accordance with (and within the bounds of) an express legal right governing the landlord-tenant relationship. Plainly, then, the "proprietary or contractual right" of the *owner* to enter property that is subject to a residential tenancy agreement can only be understood by reference to the terms of the RT Act. The bare fact that the owner has granted a right of occupation or exclusive possession does not of itself conclude the analysis.

39. So too here, the Appellant's rights with respect to the apartment can only be ascertained by an examination of the RT Act in its entirety, and not simply by cherry-picking one of those rights (the right of occupation) without regard to the balance of the applicable terms governing that relationship. To that end, s 51(1)(d) of the RT Act prohibited the Appellant from intentionally or negligently causing or permitting any damage to the apartment. That provision was also a term of his residential tenancy agreement: s 51(5). The Appellant's authority to enter and occupy the apartment (an authority derived *from the landlord*) was therefore not "at large" but qualified. In particular, that authority did not extend to entry that was effected through the infliction of damage to the property. By kicking down the front door to the apartment and causing the deadlock to shatter the doorframe, the Appellant plainly committed an actual "break" in the sense that that term is used in s 112 of the Crimes Act, in that he interfered with the physical integrity of the property; but he also exceeded the parameters of his legal authority or permission to occupy the apartment by intentionally causing damage to the property, in breach of s 51(1)(d) and the residential tenancy agreement itself. In accordance with ground 1 of the Respondent's NOC, the decision of the CCA should be upheld on that further or alternative basis.

40. For that reason, the essential premise for the Appellant's argument on the appeal – namely, that he entered the apartment "pursuant to" a proprietary or contractual right or

in a manner that was "otherwise lawful" (AS [20], [22]) – must be rejected. Far from authorising him to act in the manner that he did, the residential tenancy agreement and the RT Act expressly *prohibited* him from so acting. The Appellant did not enter the apartment on 8 July 2019 in accordance with any proprietary or contractual rights, but rather, in flagrant disregard for those rights.

41. Consistently with that analysis, in the CCA Adamson J found that the Appellant's right to possession of the apartment did not authorise him to enter by using force to inflict damage to the property, because that would exceed the scope of the permission granted by the landlord and reflected in s 51(1)(d) of the RT Act.[51] The right of occupation conferred by the residential tenancy agreement therefore could not be relied upon to authorise the Appellant's conduct in kicking down the front door. As her Honour put it, "the prohibition in s 51(1)(d) qualified the [Appellant's] right to enter the premises which was otherwise conferred by" the RT Act.[52] It is that reasoning which forms the basis for ground 1 of the Respondent's NOC.

42. Justice Adamson diverged from the majority of the CCA in that respect, in that each of Brereton JA and Fullerton J approached the question of "break" by interrogating the consent or permission given to the Appellant by the *complainant* rather than that given by the landlord.[53] However, common to all three judgments in the CCA is a critical examination of the ambit of the Appellant's permission or authority to enter the property, from whatever source that authority be derived.

43. That approach accords with the authorities on the offence of burglary at common law where the question of permission or authority to enter property arose on the evidence.[54] As Brereton JA observed in the Court below, the scope of a person's permission to enter a building was relevant to the "breaking" element of the common law offence in circumstances where a right of entry was raised on the facts (there, the permission of a servant to enter his master's house).[55] For instance, a servant did not commit burglary by unlatching a door and turning a key in a door of his master's house, because such opening was "within his trust". But if a servant broke open a door and stole goods then such opening, "not being within his trust, will amount to a breaking".[56] The mere fact

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[51] CAB 40 at [64].
[52] CAB 40 at [64].
[53] The majority addressed s 51 of the RT Act at CAB 23 at [12] (Brereton JA), CAB 33 at [40] (Fullerton J).
[54] See also *Ghamrawi* at [79], [89]-[90], [92]-[93], [97]-[98].
[55] CAB 22 at [10]; *R v Williams* [1988] 1 Qd R 289 at 300 (Carter J).
[56] Russell, *A Treatise on Crimes and Misdemeanours* (1877), Vol II, Book IV at 10.

that the servant was authorised to be in his master's house therefore did not determine his liability for burglary, which depended instead upon the *manner* of entry or the "character of the 'breaking'"[57] and its consistency or otherwise with the authority conferred by the master.

44. Consent is also the underlying rationale for the notion of "constructive breaking" at common law as picked up by s 112 of the Crimes Act.[58] Thus, where a burglar gains entry to a building with the consent of an authorised person, but the consent was obtained by artifice, trickery or threat, the consent is "deprived of all its ordinary legal effect by the way in which it was obtained".[59] The consent so given is vitiated, with the result that a "breaking" of the requisite kind has taken place.

45. The above approach is also consistent with the object, scope and purpose of s 112.[60] Although Brereton JA focused on the protection which that provision affords to occupants of dwelling-houses and other buildings,[61] s 112 is also concerned with protecting the physical security of property. That purpose is evident in the breadth of the term "dwelling-house", which is defined by s 4 of the Crimes Act to include any building or other structure intended for and capable of occupation as a dwelling, as well as a boat or vehicle in or on which any person resides. It is confirmed by the non-exhaustive definition of "building" (which is purposefully inclusive in its scope so as to avoid potential gaps in coverage)[62] and by the inclusion of places of Divine worship within that definition (s 105A), so that for instance a church or mosque can be the site of an offence under s 112. It is supported by the suite of authorities of longstanding on the meaning of the term "break", which universally establish that an actual break requires some interference with the physical integrity of the property in question (so that, for instance, taking advantage of a partly ajar door or window does not constitute a breaking).[63] And it is fortified by the circumstance that it is no element of the offence created by s 112 that any person be resident or even present within the dwelling-house or other building when the offence is committed; to the contrary, a building is capable of constituting a dwelling-house even where it has "never" been so occupied.[64] For that

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[57] *Ghamrawi* at [91].
[58] *Ghamrawi* at [84].
[59] Kenny's *Outlines of Criminal Law* (Cambridge University Press, 1902) Chapter 12 at 173.
[60] *Interpretation Act 1987* (NSW) s 33; *Project Blue Sky* at [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ).
[61] CAB 26-28 at [17], [21]-[22].
[62] Second Reading Speech, *Crimes Amendment Bill 2007* (NSW), Hansard, Legislative Assembly, 25 September 2007.
[63] *Stanford v The Queen* (2007) 70 NSWLR 474 at [25]-[28], [47] (Simpson J; Grove and Hulme JJ agreeing).
[64] Section 4 of the Crimes Act (definition of "dwelling-house").

reason, to breach the physical security of the apartment in a manner which transcends the limits of the authority conferred upon the Appellant by the *owner* of the property (the holder of the estate in fee simple) is to engage in an unauthorised "break" for the purpose of s 112, consistently with the overarching object of that statutory offence.

46. Taken together, those circumstances disclose a legislative intention to capture within the reach of s 112 precisely the form of conduct in which the Appellant engaged on 8 July 2019. That conduct involved the use of force to breach the physical integrity of a securely locked property in which the Appellant did not reside, but which was instead lawfully occupied as a residence by the victim of the offences committed on that date. It culminated in violent entry into the property in defiance of the express wishes of the sole occupant, and in breach of the legal obligations assumed by the Appellant to the landlord under the residential tenancy agreement. The Appellant cannot point to any legal right or authority to act in that way such as to negate a "break" for the purpose of s 112(2).

The complainant's sole occupation of the apartment

47. In accordance with the RT Act, the residential tenancy agreement conferred upon each of the complainant and the Appellant a right of occupation of the apartment. It may also be accepted that the agreement in question conferred (as between the landlord and the two tenants) a right to exclusive possession so as to constitute a lease at common law.

48. However, the Appellant was no longer in occupation of the apartment at the time of the alleged offence, but resided elsewhere. That is, he did not as a matter of observable fact enjoy the rights and incidents of an estate or interest in the land as at 8 July 2019.[65] He had not lived in the apartment since May 2019 – a period of approximately two months – during which time the complainant had been in sole occupation of the property. He had extracted almost all of his possessions, demonstrating the permanency of his exit from the premises. He had ceased paying rent in exchange for the right of occupation[66] approximately three months prior to the alleged offence (with the complainant paying the entirety of the rent owing to the landlord), and he had relinquished the keys necessary to effect entry to the apartment. Thereafter, he was in no position to discharge many of his remaining obligations as a tenant.[67] In fact, the Appellant entered the

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[65] *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at [102] (Barrett J); *Hampton v BHP Billiton Minerals Pty Ltd [No 2]* [2012] WASC 285 at [275] (Edelman J); cf. *Forgeard v Shanahan* (1994) 35 NSWLR 206 at 221G (Meagher JA; Mahoney JA agreeing).
[66] RT Act s 33.
[67] E.g. RT Act ss 51(2)-(3).

apartment only with the express consent or permission of the complainant. Consistently with that proposition, in the days leading up to the alleged offence, the Appellant requested and was denied entry to the apartment on at least three separate occasions, and on each occasion he departed the building accordingly.

49. At least to that extent, the position is analogous in some respects to that of a breakdown in a matrimonial or de facto relationship between co-owners, where it is unreasonable or impracticable for the partners to continue to occupy the one property. The owner who remains in possession is taken to do so to the exclusion of the other, albeit that there has been no actual ouster or exclusion by the former of the latter.[68]

50. The Appellant had not obtained, and knew that he did not have, the complainant's consent to enter the apartment on the morning of 8 July 2019. So much is plain from the events that took place in the days leading up to 8 July 2019. It was explicitly confirmed by the complainant through her verbal refusal to unlock the front door and allow him into the apartment on that date. The Appellant did not have the means to facilitate his own entry into the apartment at the time of the alleged offence, having surrendered to the complainant the keys necessary to unlock the front door. No doubt for that reason, he had to resort to kicking down the door in order to break through the locked deadlock.

51. Confronted with that set of circumstances, and in the context of the Appellant's conduct in the days prior to 8 July 2019, the complainant was entitled to protect herself from apprehended violence to her person in the security of her own home by refusing to unlock the front door. And the Appellant, meanwhile, was *not* entitled to force entry into the locked apartment against the express wishes of the lawful occupant in order to commit a criminal assault and associated offences in the sanctity of the victim's home.[69]

~~52. In addition, the complainant's revocation of consent or permission for the Appellant to enter the apartment at the time of the alleged offence can readily be described in terms of an implied contract between the two co-tenants (though that aspect of their relationship was not drawn out in the judgments of the CCA). That proposition underpins ground 2 of the Respondent's NOC. True it is that the residential tenancy agreement remained on foot at the time of the alleged offence, so that the complainant and the Appellant remained jointly and severally liable to the landlord for the obligations assumed thereunder. However, the rights and obligations as between the~~

[68] *Callow v Rupchev* [2009] NSWCA 148 at [59]-[60], approving *McKay v McKay* [2008] NSWSC 177 at [51].
[69] *Ghamrawi* at [92].

tenants themselves were regulated by a separate agreement to which the landlord was not privy.[70] That intra-tenant relationship had altered in significant respects since the execution of the residential tenancy agreement, as a result of the breakdown of the de facto relationship between the complainant and the Appellant.

53. The terms of an implied contract between the two as at the date of the alleged offence, and the parties' performance of those terms, are borne out by the Crown case at trial. Among other things, the pair had agreed by at least 8 July 2019 that the Appellant would no longer reside at the apartment, which would be occupied by the complainant to the exclusion of the Appellant; that as consideration for that arrangement, the complainant would shoulder the burden of meeting all rental obligations and would not seek any contribution from him;[71] and critically, that the Appellant would not enter the apartment otherwise than with the express consent or advance agreement of the complainant. That is what transpired on 6 July 2019, when the Appellant sought and secured in advance the complainant's consent to attend the property in her absence for the purpose of removing the last of his belongings and returning his keys. The parties' objective intention to create contractual relations was at least capable of being inferred from that conduct (including post-contractual conduct)[72] and from the surrounding circumstances known to them, including the breakdown of their domestic relationship.[73] In accordance with that implied agreement, the complainant was entitled to withhold consent for the Appellant to enter the apartment on the morning of 8 July 2019.

54. Whether by reason of the implied contract between the complainant and the Appellant, or for the reasons articulated in the judgment of Brereton JA at [29]-[30] (CAB 30), tThe majority of the CCA was therefore correct to conclude that the Crown in the present case was obliged to establish that the Appellant's entry to the apartment occurred without the consent or permission of the complainant as the actual lawful occupant.[74] To that end, Brereton JA held that when the Appellant moved out of the apartment, the consent of the complainant to him entering the property "at all, let alone

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[70] Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice, New South Wales* (Federation Press, 7th ed, 2017) at [2.3.7].

[71] Transcript, 7 September 2020, 6.29-30, 33.11-12 (RFM 30, 57).

[72] *Pavlovic v Universal Music Australia Pty Ltd* (2015) 90 NSWLR 605 at [118] (Beazley P; Bathurst CJ and Meagher JA agreeing); *County Securities Pty Ltd v Challenger Group Holdings Pty Ltd* [2008] NSWCA 193 at [17] (Spigelman CJ).

[73] *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at [25]-[26] (Gaudron, McHugh, Hayne and Callinan JJ); *Popiw v Popiw* [1959] VR 197 at 198 (Hudson J).

[74] CAB 30 at [30] (Brereton JA), 32-33 at [40]-[41] (Fullerton J).

by force, was implicitly if not explicitly revoked".[75] There is no dispute but that the complainant was, to use the language of Fullerton J, the sole "person in continuing occupation of the premises".[76] That arrangement reflected the particular manner in which the complainant and the Appellant had chosen to conduct their tenancy relationship vis-à-vis one another, with the Appellant electing not to exercise his right of occupation since May 2019. Nor is there any dispute as to the complainant's legal right to occupy the apartment. Thus, while Brereton JA considered that the protection afforded by s 112 was not limited to those with a legal right of possession or occupation,[77] those observations were not necessary for the resolution of the appeal (and do not form part of the Respondent's argument) in circumstances where the complainant here was – on any view – a person with a legal right of that character.

55. In those circumstances, the evidence at trial was capable of sustaining a verdict of guilty in respect of the alleged offence against s 112(2). The Appellant plainly satisfied the physical elements of an actual "break" and enter by kicking down the locked front door to the apartment on 8 July 2019 and entering the property; that much is uncontroversial. But he also did so knowing full well that he did not have the consent or permission of the sole (lawful) occupant of the property to carry out either act ~~(which was also contrary to the agreement then in place between the two)~~. That is the very conduct that is, and ought to be, proscribed by s 112 of the Crimes Act.

Conclusion

56. The Appellant's designation as a tenant on the residential tenancy agreement did not automatically place him outside of the purview of s 112 of the Crimes Act or signal that he had no case to answer in respect of that charge. Rather, as the reasons of the CCA demonstrate, whether that agreement precluded any finding of guilt for such an offence turned upon consideration of all of the evidence, including the breakdown of the Appellant's relationship with the complainant by the time of the alleged offence, the termination of his actual occupation of the apartment some months earlier, ~~the agreement between the complainant and the Appellant~~ and the ambit of the authority conferred upon the Appellant by the landlord.

57. For the purpose of the application for a directed verdict, the Crown case ought to have been taken at its highest and the application should have been granted only if there was

[75] CAB 30 at [29].
[76] CAB 33 at [40].
[77] CAB 26 at [17].

a defect in the evidence such that it was not capable of sustaining a guilty verdict.[78] In disregard for (and indeed without any actual acknowledgement of) those principles, the trial judge failed to look beyond the bare fact of the Appellant's name on the residential tenancy agreement. The CCA was correct to discern error in that approach.

58. The appeal should therefore be dismissed.

Part VI: The Respondent's notice of contention

59. The Respondent's argument on the NOC is set out in paragraphs 34 to 46 ~~(ground 1) and paragraphs 52 to 54 (ground 2)~~ above.

Part VII: Estimate of time

10 60. It is estimated that 1 to 1.5 hours will be required for the presentation of the Respondent's oral argument.

Dated: ~~2~~6 September 2022

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[78] *Doney* at 214-5; *A2* at [88], [91] (Kiefel CJ and Keane J).

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY S101/2022

BETWEEN: **BA**
Appellant

and

THE QUEEN
Respondent

10 **ANNEXURE TO THE RESPONDENT'S SUBMISSIONS**

LIST OF STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

1. *Crimes Act 1900* (NSW), as in force on 8 July 2019, s 4 and Div 4, Pt 4
2. *Crimes (Appeal and Review Act) 2001* (NSW), as in force on 1 October 2020, s 107
3. *Criminal Procedure Act 1986* (NSW), as in force on 20 April 2020, s 132
4. *Interpretation Act 1987* (NSW), current version, s 33
5. *Residential Tenancies Act 2010* (NSW), as in force on 29 August 2018, whole Act
6. *Residential Tenancies Regulation 2010* (NSW), as in force on 29 August 2018, Sch 1