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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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S101 of 2022

BETWEEN:

BA
Appellant

and

The King
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The circumstances

2. Although the Appellant was named as a co-tenant on the residential tenancy agreement, he had not lived in the apartment for a period of approximately two months; he had extracted almost all of his possessions; he had ceased paying rent (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: CCA (Brereton JA) at [2]-[3] (**CAB 18**); **AS [10]; CAB 6**. To that end, the complainant gave evidence at trial that two keys were required in order to unlock the front door: a key to the deadlock, and a key to a separate lock on the door handle (**RFM 27.9-19**). She said that the Appellant had returned his key to the deadlock prior to the date of the alleged offence (together with the security token for the garage), though the key to the separate lock on the handle was missing (**RS [13]; RFM 36.20-37.2**). She also said that she declined in clear terms his request to be allowed into the apartment on the date of the alleged offence: **RFM 18**.

Proper construction of s 112 of the Crimes Act

3. Section 112 may apply where a break and enter is effected by a co-tenant under a residential tenancy agreement who is not in fact in occupation of the property (**RS [22]-[31]**; CCA (Brereton JA) at [16] (**CAB 24**)).

4. The proper construction of s 112 and the meaning of the term "break" is informed by the common law and by the history of Division 4 of Part 4 of the Crimes Act. Section 108 of the Crimes Act as enacted replicated the common law offence of burglary (**JBA p. 45**). That common law offence required that the offence take place in the dwelling "of another" (see relevant older texts at **JBA pp. 633, 683, 714, 717**). The focus of that aspect of the offence was upon occupation, as distinct from legal title (**JBA pp. 639, 688, 733**).

5. Although s 102 of the *Criminal Law Amendment Act 1883* (NSW) maintained the offence of burglary, ss 106 and 107 did not contain any requirement that the offence take place in the property "of another" (**JBA p. 194**). Sections 106 and 107 were substantially reproduced in s 112 in 1900 (**JBA p. 45**). In the 1974 amendments to the Crimes Act, s 108 (replicating the common law offence of burglary) was removed on the basis that the offending was relevantly caught by s 112 (**JBA pp. 104, 761**). Section 112 did not

replicate the common law requirement that the property entered be "of another", and even if it did, the complainant here would answer that description.

6. It will remain to be determined whether or not on the facts there has been a "break and enter". This will turn on questions of authority and consent. But contrary to the Appellant's position, and as accepted by the trial judge, the Appellant's right of occupation under the RT Act is not conclusive: CCA (Brereton JA) at [17] (**CAB 26**).

The rights conferred by the landlord

7. The rights and obligations created by the residential tenancy agreement are enumerated in the RT Act. One of the rights conferred on the Appellant by the landlord was the right of occupation of the apartment for the purpose of use as a residence: RT Act s 13(1) (**JBA p. 258**). However, that right was not "at large". Division 3 of Part 3 of the RT Act delineated rights and obligations of the tenant under the residential tenancy agreement. Amongst those obligations, 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) (**JBA p. 276**).

8. The Appellant's authority to occupy the apartment (as conferred by the landlord) therefore had express limits. It did not extend to breaking the door down. Nor did it extend to occupation other than for the purpose of use as a residence (ss 13, 49 and 50 RT Act), with its attendant rights and obligations under Part 3 Division 3: cf. *Barker v The Queen* (1983) 153 CLR 338 at 343-4, 346 (Mason J), 357, 364 (Brennan and Deane JJ) (**JBA pp. 328-9, 331, 342, 349**).

9. The right of occupation *simpliciter* conferred on the Appellant could not be conclusively relied on to authorise his conduct: CCA (Adamson J) at [64] (**CAB 40**); **RS [41]**. An evaluation of the *scope* of the Appellant's authority accords with the authorities on the common law offence of burglary in circumstances where a right of entry was raised on the facts (**RS [43]; JBA 781**). By kicking down the door and causing the deadlock to shatter the doorframe, the Appellant exceeded the parameters of his legal authority under the residential tenancy agreement so as to commit a "break and enter" (**RS [39]**).

10. The Appellant's contention that the consequences of a breach of s 51(1) are "not self-executing" (Reply at [9]) is not to the point, nor is it relevant that s 51(1) may not create an independent statutory obligation: cf. CCA (Brereton JA) at [12] (**CAB 23**). The Appellant rests his entire case upon the right of occupation conferred by the residential tenancy agreement. Section 51(1)(d) is an aspect of the limits of the consent given by the

landlord, and constitutes a term of that agreement. The RT Act also limits the purposes for which entry may be effected. Section 51(1)(d) demonstrates that the landlord did not relevantly authorise the Appellant to enter the property by breaking down the front door. Nor was the Appellant entitled to enter the premises other than for the purposes of lawful occupation – which at that time had ceased.

The complainant's sole occupation of the apartment

11. The Appellant forcefully entered the apartment without the consent of the sole person in lawful occupation of the property (**RS [47]-[55]**).

12. While the residential tenancy agreement conferred a right of occupation and possession, the Appellant was not in fact in occupation of the apartment as an observable fact: **RS [47]-[48]**; *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at [102] **(JBA p. 453)**. As at the date of the alleged offence, the complainant was in sole (and lawful) occupation of the premises.

13. The Appellant had returned one of the two keys necessary to effect entry to the apartment, and was no longer in (co)occupation of the property. The only way that he could obtain entry was with the consent of the complainant, which he did not have. 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. The majority was correct to conclude that the Crown in the present case was obliged to establish that the Appellant's entry into the apartment occurred without the consent of the complainant as the actual lawful occupant (**RS [54]**; CCA (Brereton JA) at [30] (**CAB 30**), CCA (Fullerton J) at [40]-[41] (**CAB 32-33**)). The Appellant had not obtained, and knew he did not have, the complainant's consent to enter (**RS [50]**).

Conclusion

14. Properly construed, s 112 extends to a circumstance where the offender, although an existing tenant under the RT Act, is no longer in occupation of the property; another person (the victim of the offence) *is* in lawful occupation; the offender does not have the lawful occupant's consent to enter the premises; and the offender obtains entry by force, in breach of the conditions of the residential tenancy agreement.

Dated: 7 February 2023

T. Game

L. Coleman

M. Millward