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

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of issue

2. The issue presented by this appeal is whether the element of "breaks" in s 112 of the *Crimes Act 1900* (NSW) can be established where an accused person has a proprietary or contractual right to enter the dwelling-house or other building the subject of the alleged offence. That question should be answered in the negative.

3. A majority of the Court of Criminal Appeal of New South Wales (**CCA**) held that an entry to a dwelling-house or building effected pursuant to a proprietary or contractual right would involve a "break" if made without the consent of the occupant. Thus, the majority concluded that the District Court of New South Wales was wrong to direct that the appellant be acquitted of an offence against s 112(2) of *Crimes Act* on the basis that he enjoyed a contractual right, as a co-tenant under a residential tenancy agreement, to enter the apartment into which he was alleged to have broken.

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

4. The appellant does not consider that any notice is required in compliance with s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citation of judgments below

5. The reasons of the trial judge for directing that the appellant be acquitted, delivered on 8 September 2022, have not been reported (Core Appeal Book (**CAB**) 6–10).

6. The decision of the CCA has been reported as *R v BA* (2021) 105 NSWLR 307 (**CCA Judgment**).

Part V: Narrative of relevant facts

7. The appellant was charged by indictment with an offence of breaking and entering the dwelling-house of the complainant and committing a serious indictable offence of intimidation therein, in circumstances of aggravation being the use of corporal violence against the complainant, contrary to s 112(2) of the *Crimes Act* (CAB 5). Section 112 relevantly provided:

> **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[1] therein, …
>
> is guilty of an offence and liable to imprisonment for 14 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.

8. The appellant pleaded not guilty and the matter proceeded to trial in the District Court before Judge Williams SC (**trial judge**), sitting without a jury.

9. The facts that the trial judge found had been established in the Crown's case were as follows (CAB 6-7 [3]-[4]).[2]

a. The appellant and the complainant were in a relationship, which had broken down by the time of the alleged offence.

b. The appellant and the complainant were co-tenants of an apartment under a residential tenancy agreement, which commenced on 12 September 2018 for a period

[1] *Crimes Act*, s 4(1): a "serious indictable offence" includes any indictable offence punishable by a term of imprisonment for 5 years or more.
[2] The summary at CCA Judgment [2]-[3] (Brereton JA) (CAB 18) and [50]-[52] (Adamson J) (CAB 35-36) is of the facts alleged in the Crown case, not all of which were the subject of express findings by the trial judge.

of 12 months. When outlining the argument advanced on behalf of the appellant, the trial judge said that there was "no doubt that the tenancy agreement granted to the complainant and the [appellant] a right of occupation at the relevant time" (CAB 7 [5]).

c. Prior to the alleged offence, the "great bulk of the possessions belonging to the accused" had been removed from the apartment. Reference was later made, again in the context of the appellant's argument, to evidence that "there was at least an aquarium and other items belonging to the children of the [appellant], left in the tenanted premises after other items had been removed" and to the fact that the appellant retained "at least one key to the premises" (CAB 7–8 [7]).

d. On the morning of 8 July 2019, the appellant entered the apartment "using a degree of force which damaged the front door".

e. There was evidence to support the allegations that, while inside the apartment, the appellant intimidated the complainant and used corporal violence. The Crown case, in this regard, was that the appellant grabbed the complainant by the shoulders, shook her, yelled at her and threw her mobile phone on the floor.

10. Although not the subject of an express finding by the trial judge, it was not disputed that the appellant was not residing at the apartment and had ceased paying rent at the time of the alleged offence. It was also not disputed that, on 8 July 2019, the front door to the apartment was locked.

11. At the close of the Crown's case, the appellant's counsel applied for a directed verdict of not guilty, on the basis that, because the appellant "was a tenant at the time of the alleged offence, he had a right to enter, and therefore could not be guilty of breaking into his own premises" (CAB 7 [4]). The trial judge referred to the decision of *Ghamrawi v R* (2017) 95 NSWLR 405 (***Ghamrawi***), on which the Crown relied as distinguishing forcible and non-forcible entries (CAB 8-9 [8], [13]-[14]).

12. The trial judge concluded (CAB 10 [16]-[17]):

> … there is no valid basis for a distinction between a forcible and non-forcible entry … Many examples could be called in aid in support of a conclusion that an entry with force may not attract criminality. One which readily comes to mind is if a person used forced to enter because he had lost his keys or his keys had been taken from him. Any of the underlying factual circumstances that can be contemplated do not, in my view, vary the outcome if the person entering has a contractual right such as the accused has in this case under the residential tenancy agreement.

> For those reasons I accept [the appellant's counsel's] submissions that the Crown has not established in its case an essential precondition to liability for the offence and there will be a directed verdict of not guilty.

13. Having been acquitted of the offence against s 112(2) of the *Crimes Act*, the appellant pleaded guilty to common assault, intimidation and the destruction of property.[3]

14. The Crown appealed against the acquittal, pursuant to s 107 of the *Crimes (Appeal and Review) Act 2001* (NSW) on the following ground involving a question of law alone (CAB 11):

> Whether his Honour erred in determining that, as a pre-condition of the element of 'breaking' in an offence pursuant to s 112(2) *Crimes Act 1900*, the prosecution was required to establish that an accused person did not have a pre-existing right to enter the subject dwelling house, notwithstanding that entry was effected by an actual breaking involving force.

15. The Crown argued that the trial judge erred in holding that the appellant had a right to enter the apartment in the way that he did. The Crown relied upon s 51(1)(d) of the *Residential Tenancies Act 2010* (NSW), which prohibited intentional or negligent property damage by tenants, to contend that the appellant exceeded the scope of his authority to enter the apartment by breaking down the front door. This argument proceeded on the basis that a person who has a legal right to enter, and enters pursuant to and in accordance with that right, does not thereby commit a break.

16. The majority (Brereton JA and Fullerton J) of the CCA rejected the Crown's argument in support of its appeal.

    a. *First*, their Honours held that there was no relevant difference between the entry the appellant obtained by force and a non-forcible entry.[4]

    b. *Secondly*, their Honours held that the prohibition in s 51(1)(d) of the *Residential Tenancies Act* did not operate to constrain the appellant's right to enter the apartment for the purposes of the alleged offence.[5] It operated only to regulate the respective rights and obligations *inter se* of the landlord and the appellant as a tenant.[6] Justice Adamson dissented on this point, accepting the Crown's argument that the

[3] See CCA Judgment [34] (Brereton JA) (CAB 32), [67] (Adamson J) (CAB 41).
[4] CCA Judgment [10] (Brereton JA) (CAB 22), [40] (Fullerton J) (CAB 32-33).
[5] CCA Judgment [11]-[12] (Brereton JA) (CAB 22-23), [40] (Fullerton J) (CAB 32-33).
[6] Ibid.

appellant did not have authority to enter the apartment forcibly.[7] Her Honour upheld the appeal on that basis.

17. The majority upheld the Crown's appeal on a different basis, which had not been advanced by the Crown. So much was expressly acknowledged by Brereton JA.[8] Their Honours held that the appellant's right to enter the apartment under the residential tenancy agreement did not preclude the prosecution from establishing the element of "breaking" because there would be a break, regardless of that right, if the appellant's entry was contrary to the consent, either express or implied, of the complainant who was occupying the apartment at the time.[9] Justice Brereton, with whom Fullerton J agreed, summarised that conclusion in the following way:[10]

> (1) the preferable explanation of the basis on which a person who is permitted to enter premises may do so without committing a 'break' is the consent of the occupant in fact, as distinct from proprietary or contractual rights derived from third parties;
>
> (2) whether or not a forcible entry pursuant to a consent is a break depends on the scope of the consent. A person who, with the occupant's consent enters the property in a manner within the scope of the consent commits no 'break'; and
>
> (3) an entry effected pursuant to a proprietary or contractual right can nonetheless involve a break, if it is made otherwise than in compliance with the consent of the actual occupant.

18. Thus, the case available to the Crown was that "when the [appellant] moved out, although he retained a legal right derived from the lease to enter the property, the consent of the complainant as actual occupant to him entering the property at all, let alone by force, was implicitly if not explicitly revoked" and, by entering without the complainant's consent and committing a serious indictable offence in the apartment, the appellant would commit the charged offence against s 112(2) of the *Crimes Act*.[11]

19. The Court declined to exercise its residual discretion not to intervene on the Crown's appeal.[12] Orders were made quashing the appellant's acquittal and for a re-trial.

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[7] CCA Judgment [63]-[64] (Adamson J) (CAB 39-40).
[8] CCA Judgment [33] (CAB 31); see also at [61] (Adamson J) (CAB 39).
[9] See CCA Judgment [10], [17], [20]-[21], [30] (Brereton JA) (CAB 22, 26, 27-28, 30), [40]-[41] (Fullerton J) (CAB 32-33).
[10] CCA Judgment [28] (Brereton JA) (CAB 29-30).
[11] CCA Judgment [29] (Brereton JA) (CAB 30).
[12] CCA Judgment [31]-[35] (Brereton JA) (CAB 30-32), [70]-[71] (Adamson J) (CAB 42).

Part VI: Argument

20. The premise of the analysis of each member of the CCA was that "[b]reaking" involves an absence of some permission. Thus, if a person misplaces their keys and opens a closed window to gain entry to their home, there is no break. The issue raised in the present case concerns the source of the relevant permission: is a permission at law – that is, a proprietary or a contractual right – sufficient, or must the permission be sourced from the person (or, perhaps, a person) in actual or *de facto* occupation? In the appellant's submission, a person does not "break", for the purposes of s 112 of the *Crimes Act* (or other offences for which breaking is an element), where the person enters a dwelling-house or building pursuant to a proprietary or contractual right, even if they do so without the consent of the actual or *de facto* occupant.

21. In many cases, whether permission was given by an occupant for the accused to enter the dwelling-house or building will be determinative of whether a break occurred. A stranger, with no legal relationship or connection to a dwelling-house or building, must rely on such permission in the form of an invitation or a licence to enter.[13] That scenario is very different, however, from a conclusion that the absence of an invitation or a licence from the occupant can overcome and, for the purposes of the criminal law, negate a legal entitlement otherwise enjoyed to enter the dwelling-house or building pursuant to a proprietary or contractual right.

22. In the present case, the appellant enjoyed a pre-existing and free-standing right to enter the apartment, as a tenant with a right of occupation and possession under the residential tenancy agreement. Had the complainant said nothing – in the sense of there being no implicit or explicit indication of a revocation of her consent for the appellant to enter – the appellant could have continued to exercise his contractual right to enter the apartment, without any question of s 112 of the *Crimes Act* applying to his conduct. As accepted by Brereton JA, the appellant was not a trespasser.[14] In the appellant's submission, the majority of the CCA was wrong to hold that the complainant's refusal to let the appellant into the apartment on the morning of 8 July 2019 produced the result that his otherwise lawful entry constituted a "break" for the purposes of s 112 of the *Crimes Act*.

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[13] See, for example, *R v Williams* [1988] 1 Qd R 289. See also CCA Judgment [23]-[27] (Brereton JA) (CAB 28-29).
[14] CCA Judgment [29] (CAB 30).

Common law

23. The offence of burglary – of which "breaking" was an essential element – has a long history at common law. The *Crimes Act* does not define "breaking" or "breaks". Yet those terms are used "in precisely the same sense as … at common law" and it has been accepted that they carry their meaning under the common law.[15]

24. At common law, a person could not "commit burglary by breaking open his own house".[16] Thus, in Sir John Eardley-Wilmot's *A Digest of the Law of Burglary* published in 1851, it was said (at 105):

> A. could not be guilty of burglary in breaking into part of a dwelling-house which he might occupy in partnership with B., for although it is the dwelling-house of another, it is also his own dwelling-house.

25. Whether a dwelling-house was the accused's own or a dwelling-house of another was not a question simply of ownership. For example, a landlord could be guilty of breaking and entering a dwelling-house owned by the landlord, if possession of the dwelling-house had been given over to tenants.[17] Importantly for present purposes, an accused's entitlement to enter a dwelling-house could also be contractual. Sir Matthew Hale gave the following example:[18]

> … if a thief be lodged in an inn, and in the night he stealeth goods, and goeth away, or if he enter into the house secretly in the day-time, and there stayeth till night, and then steals goods and goes away, this is not burglary.

As observed by the CCA in *Ghamrawi* (2017) 95 NSWLR 405 at [81], the "first part of that example turns on the contractual right of a lodger to enter and leave the inn". Russell and Eardley-Wilmot explained this example as the lodger "having a kind of special property and interest in his chamber, and the opening of his own door being therefore no breaking of the innkeeper's house".[19]

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[15] *R v Stanford* (2007) 70 NSWLR 474 at [25]-[31] per Simpson J (Grove and Hulme JJ agreeing); *Ghamrawi* (2017) 95 NSWLR 405 at [83] per Leeming JA (Bellew and Lonergan JJ agreeing); *Singh v The Queen* [2019] NSWCCA 110; 278 A Crim R 103 at [27]-[39] per Payne JA (Harrison and R A Hulme JJ agreeing).
[16] Hyde East, *A Treatise of the Pleas of the Crown* (1903) Vol II at 506; Russell, *A Treatise on Crimes & Misdemeanors* (1824) Vol II, Book IV at 940; Blackstone (with notes by Christian), *Commentaries on The Law of England* (1830, 17th ed) Vol IV, Ch XVI at 225 (especially at note 9: "a man cannot be guilty of burglary in his own house"); *Kenny's Outlines of Criminal Law* (1920) at 170.
[17] Eadley-Wilmot, *A Digest of the Law of Burglary* (1851), at 105.
[18] *Historia Placitorum Coronae: The History of the Pleas of the Crown*, (1800) Vol I at 553.
[19] Russell, *A Treatise on Crimes & Misdemeanors* (1824) Vol II, Book IV at 905; Eardley-Wilmot, *A Digest of the Law of Burglary* (1851) at 18-19.

26. Consistent with this position, a survey of the law of burglary in the *Columbia Law Review* described the common law in the following way:[20]

> Where a breaking is required, it has generally been held that a right to enter or consent of the owner to the entry precludes a breaking, even though the physical requirements of breaking have been fulfilled. While these decisions turn on the requirement of breaking, they appear to be based on the judgment that burglary sanctions cannot justifiably be imposed on persons who enter by right or with consent.

Legislative history

27. The *Crimes Act* was enacted in 1900 to consolidate statutes relating to the criminal law.[21] From that time, s 112 referred to a person who "breaks and enters". As has been discussed, "breaks" had an established meaning in the criminal law in 1900, and the use of that word in s 112 was intended to incorporate its established meaning.[22] Upon enactment, the relevant offences took the following form:

> **108** Whosoever commits the crime of burglary shall be liable to penal servitude for fourteen years.
>
> **109** Whosoever –
>
> enters the dwelling-house of another, with intent to commit felony therein, or,
>
> being in such dwelling-house commits any felony therein,
>
> and in either case breaks out of the said dwelling-house in the night, shall be deemed guilty of burglary, and shall be liable to penal servitude for fourteen years. …
>
> **112** Whosoever –
>
> breaks and enters any dwelling-house, or any building within the curtilage of any dwelling-house and occupied therewith but not being part thereof, or any school-house, shop, warehouse, or counting house, and commits any felony therein, or,
>
> being in any dwelling-house, or any such building, as foresaid, or any school-house, shop, warehouse, or counting-house, commits any felony therein and breaks out of the same,

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[20] "A Rationale of the Law of Burglary" (1951) 51 *Columbia Law Review* 1009, referred to in *Barker v The Queen* (1983) 153 CLR 338 at 355 per Brennan and Deane JJ and in *Ghamrawi* (2017) 95 NSWLR 405 at [95] per Leeming JA (Bellew and Lonergan JJ agreeing).

[21] Relevantly, ss 108, 109 and 112 of the *Crimes Act* consolidated the *Criminal Law Amendment Act 1883* (NSW), ss 102, 106, 107: see *Ghamrawi* (2017) 95 NSWLR 405 at [71] per Leeming JA (Bellew and Lonergan JJ agreeing).

[22] See *Aubrey v The Queen* (2017) 260 CLR 305 at [34] per Kiefel CK, Keane, Nettle and Edelman JJ; (in the context of a Code) *R v LK* (2010) 241 CLR 177 at [96]-[97] per Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Brisbane City Council v Amos* (2019) 266 CLR 593 at [24] per Kiefel CJ and Edelman J.

shall be liable to penal servitude for ten years.

28. In 1924, a number of further buildings were added to the list in s 112 ("office, store, garage, pavilion, factory, or workshop, or any building belonging to His Majesty or to any Government department or to any municipal or other public authority").[23] Historically, the purpose of enacting an offence in the form of s 112, in addition to an offence of burglary, appears to have been to expand the types of buildings to which the offence would otherwise apply.[24]

29. In 1974, the offence of burglary in s 108 of the *Crimes Act* was omitted and the reference to burglary in s 109 was removed.[25] These amendments did not, however, mark a legislative intention to move away from the common law, particularly in relation to the understanding of what constitutes a "break" for the purposes of s 112 and other offences retaining the language of "breaks". It is clear from the extrinsic material that the amendments implemented recommendations from the Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure from 1973, which had been led by Judge Amsberg.[26] Of the amended offences, the Report said:[27]

> In recent times charges are very seldom laid under sections 108 or 109; the elements of the offences dealt with in those sections constitute offences under other sections, and the other sections are more appropriate and convenient in every way. Our recommendation for the repeal of sections 108 and 109 is on the basis of pruning away some dead wood.

30. The current form of s 112 was introduced in 2007, whereby the list of buildings, which was described as "lengthy, old-fashioned and potentially contain[ing] gaps", was replaced with the general reference to "other building".[28]

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[23] *Crimes (Amendment) Act 1924* (NSW).
[24] See *Ghamrawi* (2017) 95 NSWLR 405 at [68]-[69] per Leeming JA (Bellew and Lonergan JJ agreeing).
[25] *Crimes and Other Acts (Amendment) Act 1974* (NSW).
[26] Second Reading Speech for Crimes and Other Acts (Amendment) Bill 1974 (NSW): *Hansard*, Legislative Assembly, 13 March 1974 at 1356.
[27] Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure (1973) at 8.
[28] *Crimes Amendment Act 2007* (NSW); Second Reading Speech for Crimes Amendment Bill 2007 (NSW), *Hansard*, Legislative Assembly, 25 September 2007 at 2259. Sections 106 and 107 of the *Crimes Act* were omitted at this time on the basis that those offences would "be covered by the proposed extension of the offences in sections 112 and 113": Explanatory Note to Item 18 in Schedule 1 to the *Crimes Amendment Act 2007* (NSW).

Construction of "breaks" preferred by the CCA majority

31. In the CCA, the majority concluded that a proprietary or contractual right to enter a dwelling-house or building did not preclude there being a break.[29] It is possible to identify two principal reasons for this conclusion in the judgment of Brereton JA. They are:

    a. *first*, a person can break into their own dwelling-house for the purposes of s 112 of the *Crimes Act*, given that this offence applies to "any dwelling-house or other building", rather than to the "dwelling-house of another" as in the case of s 109(1);[30] and

    b. *secondly*, the purpose of the offence in s 112 is "to protect any occupant, regardless of whether they have a legal right of possession or occupation".[31]

32. In relation to the first reason, s 112(1) refers to "any dwelling-house" (as does s 110, s 111 and s 113), whereas s 109(1) refers to "the dwelling-house of another". But the language in s 112(1) ("breaks and enters any dwelling-house or other building"), as compared with the language in s 109(1) ("enters the dwelling-house of another"), does not indicate that an entry effected pursuant to a proprietary or contractual right involves a break for the purposes of s 112. The words "any dwelling-house" in s 112(1) may be capable of including reference to a person's own dwelling-house. It is not part of the appellant's argument that the words "of another" should or need to be read into s 112(1).[32] Thus, for example, a circumstance might arise where an entry into one's own dwelling-house constitutes a "break" where there is no relevant proprietary or contractual right to enter, such as where a lease or exclusive licence had been granted to another. Equally, if a boarder in a boarding house has a right only to enter common areas and his or her own bedroom, but enters and commits a serious indictable offence in one of the other bedrooms, that person may be guilty of an offence under s 112, notwithstanding that he or she was (arguably) within their own dwelling-house.

33. In the appellant's submission, as well as in the view of the CCA in *Ghamrawi* (2017) 95 NSWLR 405,[33] the "limiting element" of the offence in s 112 is not "the class of

[29] CCA Judgment [17] (Brereton JA) (CAB 26), [41] (Fullerton J) (CAB 33).
[30] CCA Judgment [16] (CAB 24-26).
[31] CCA Judgment [17], [21] (CAB 26, 27-28).
[32] *Ghamrawi* (2017) 95 NSWLR 405 at [88] per Leeming JA (Bellew and Lonergan JJ agreeing).
[33] At [91] per Leeming JA (Bellew and Lonergan JJ agreeing).

dwelling-houses, but … the character of the 'breaking'". As has been seen, the meaning of "breaking" and "breaks" in the *Crimes Act* is taken from the common law and, at common law, a person who entered with consent *or* by right did not break.[34]

34. In relation to the second reason ([31.b] above), there is no basis for inferring a legislative purpose of "protect[ing] any occupant, regardless of whether they have a legal right of possession or occupation".[35] No support for that kind of legislative purpose can be found in the common law history of such offences given that burglary was not committed, at common law, where a person entered lawfully or entered their own dwelling-house. Nor is support for that kind of legislative purpose found in the extrinsic materials. In the appellant's submission, it is unlikely that offences involving an element of breaking were intended to protect the sanctity of the home for one co-tenant or co-owner as against another co-tenant or co-owner who enjoys the same legal rights but has been ejected from their home (even if wrongfully).

35. There are other reasons to doubt that s 112 of the *Crimes Act* was intended to give decisive significance to the permission of "actual occupants", whether lawful or not:

a. The offence applies to dwelling-houses which have never been occupied or are temporarily unoccupied, and also to "other buildings", including commercial buildings and churches.[36] The scope of the offence in that regard does not support a conclusion that the identification of an "actual occupant" and the ascertainment of their consent or otherwise to the entry is determinative of the application of the offence.

b. Justice Brereton contemplated that an "owner-occupier" could be guilty of an offence against s 112 in certain circumstances. His Honour hypothesised that the offence would be committed if "an owner breaks into his or her owner-occupied home, in which the owner's child is also resident, to assault the child's partner".[37] Justice Fullerton recognised that the application of the offence would be unclear in circumstances where there were multiple occupants of differing views as to whether or not the accused was welcome.[38] In so far as it is not clear how s 112 can coherently

[34] See also *R v Williams* [1988] 1 Qd R 289 at 305-306 (de Jersey J) ("[i]t is difficult … to accept that burglary might occur in cases of consensual *or authorised* 'breaking and entering' of buildings" (emphasis added)).
[35] CCA Judgment [17] (Brereton JA) (CAB 26).
[36] *Crimes Act*, ss 4(1) (definition of "dwelling-house"), 4(2), 105A(1) (definition of "building").
[37] CCA Judgment [17] (CAB 26).
[38] CCA Judgment [46] (CAB 34-35).

protect any and all occupants, regardless of their legal rights, it should not be accepted that this is the legislative purpose which animates the offence.

c. Justice Brereton placed some weight on the fact that there is "no offence of 'breaking', or 'breaking and entering' … *simpliciter*" and that the commission of a serious indictable offence is necessary to establish criminal liability under s 112.[39] It ought be noted, however, that the commission of a serious indictable offence will not necessarily involve any violence or action against the occupant. Indeed, as Fullerton J observed, it would not matter if the occupant were absent at the time.[40] The theft of property would be sufficient, as would many drug offences.[41]

10 36. It may be that the majority of the CCA viewed their conclusion as supported by the decision in *Ghamrawi* (2017) 95 NSWLR 405. But, if so, that involved a misreading of the decision. Justice Leeming (with whom Bellew and Lonergan JJ agreed) reasoned:[42]

> [T]he problem of a person 'breaking' into a dwelling-house to which he or she is entitled is enter is acute in the statutory offences derived from burglary in the *Crimes Act*. That in turns makes it helpful to consider the most common cases of entry into a dwelling-house:
>
> 1. It seems unlikely that a co-owner or a co-tenant who enters his or her own home by opening a door, with the purpose of (say) stealing his or her spouse's or flatmate's jewellery thereby "breaks" as well as enters. *The co-owner or co-*
> 20 *tenant is a thief, but is authorised to enter the house because of his or her pre-existing property rights*.
> 2. The same is surely true when an adult child living with his or her parents enters the family home, or when an owner's friend enters with the owner. Even if the adult child or the friend has an intention to steal, once again it seems most unlikely that there is a "breaking". The adult child or friend enters with the permission of someone with a proprietary right. There seems no difference between a long-term licence (such as that enjoyed by the adult child) and the ad hoc permission granted to the owner's friend.
>
> …
>
> 30 Recognising that in this quaintly technical area of the law, replete with fine distinctions, regard to ordinary usage is not necessarily a sound guide, *it still seems wrong that non-forcible entry effected pursuant to a proprietary or a contractual right could be a breaking*. The principle underlying this whole area of the law is that criminality is more serious if it takes place in a victim's home into which the offender has broken without permission, or where permission has only been obtained by a trick or artifice or threat.

[39] CCA Judgment [15] (CAB 24).
[40] CCA Judgment [40] (CAB 32-33).
[41] *Crimes Act*, s 117; *Drug Misuse and Trafficking Act 1985* (NSW), ss 32, 33AB.
[42] *Ghamrawi* (2017) 95 NSWLR 405 at [89], [92] (emphasis added).

37. Of the "common cases" referred to above, Brereton JA reasoned that it was "preferable to see these permissions as relevant not because they derive from a proprietary or possessory right, but because they are given by the occupant for whose protection these offences exist".[43] That is not consistent with Leeming JA's explanation of those cases, emphasised above. Additionally, the second emphasised statement – "it stills seems wrong that non-forcible entry effected pursuant to a proprietary or a contractual right could be breaking" – could not be distinguished on the basis that the appellant's was a forcible entry, because the majority of the CCA viewed that distinction as inconsequential.[44] Justice Fullerton expressly stated that even if the appellant "gained entry by non-forcible means … his liability for an offence under s 112(2) would be no different."[45] Of course, the Crown did not argue in the CCA (unlike at trial) that the use of force, *per se*, would necessarily render an entry a "break". As Adamson J observed:[46]

> It was common ground that the sole registered proprietor of an estate in fee simple of residential premises would not commit any offence, even if that person broke into the premises by force and damaged the property to effect entry.

38. In any event, no force was used in the entry to the dwelling-house in *Ghamrawi* (2017) 95 NSWLR 405. Thus, where Leeming JA stated that there is no break when a person who has permission to enter enters "without using any force" (so long as the permission was obtained "without any trickery, artifice or threat"), his Honour was not addressing (indirectly) the position where entry was obtained by force. Instead, his Honour limited his conclusion as to the relevant principle to the facts of that case.[47]

Test of "actual occupant"

39. Having rejected the relevance of a legal right to enter, the majority of the CCA identified a new test for when there will be a break for the purposes of s 112, namely, whether or not the "actual occupant" or the "occupant in fact" consented to the entry.[48] With respect to their Honours, it is not clear what is meant by an "actual occupant" or "occupant in fact" and, in any case, this is not an appropriate criterion for the application of a serious criminal offence.

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[43] CCA Judgment [22] (CAB 28).
[44] CCA Judgment [10] (Brereton JA) (CAB 22), [40] (Fullerton J) (CAB 32-33).
[45] CCA Judgment [40] (Fullerton J) (CAB 32-33).
[46] CCA Judgment [61] (CAB 39).
[47] *Ghamrawi* (2017) 95 NSWLR 405 at [97(3)].
[48] CCA Judgment [21], [28]-[29] (Brereton JA) (CAB 27-28, 29-30), [41] (Fullerton J) (CAB 33).

40. It is clear that Brereton JA did not consider that an "actual occupant" or "occupant in fact" was limited to a lawful occupant. The view of relevant occupants which his Honour expounded extended to squatters and former tenants who remained "in occupation even after an order for ejectment".[49] It is not clear that Fullerton J understood the category of relevant occupants in the same way. Her Honour stated:[50]

> I agree with Brereton JA that in respect of the offences in Part 4, Division 4 of the *Crimes Act* which involve proof beyond reasonable doubt of a breaking into or out of premises (both the dwelling-house of another under s 109 and any dwelling-house or other building under s 112, including, as his Honour observed, a dwelling-house owned or occupied by an accused) where a right to enter the premises is asserted or raised by the evidence, it is the scope of the permission, express or implied, of those either in occupation of the premises *or those entitled to occupy those premises* that is the critical focus.

41. It is difficult to understand the reference to persons "entitled to occupy" premises in this passage, given that Fullerton J accepted (for the purposes of her analysis) that the appellant had "a contractual right to enter under an extant tenancy agreement".[51] It could be that her Honour was concerned with a case where, unlike the present, there was no one in actual occupation of the premises. Either way, Fullerton J agreed with Brereton JA that "without the express or implied permission of his former partner as the person in continuing occupation of premises", the appellant was liable to commit a break by entering the apartment.[52]

42. Thus, as between Brereton JA and Fullerton J, is not clear by what criteria "actual occupancy" is to be determined, save that a legal right to enter will not be determinative. For example, it is not clear whether the mere presence of a licensee or a squatter would be sufficient to render them an actual occupant. Nor is it clear at what point one occupant assumes the capacity to refuse consent to the entry of another occupant, nor when a lawful tenant loses their status as an "actual occupant". Justice Fullerton doubted that there would be an offence under s 112 where:[53]

> one partner in an existing domestic relationship is temporarily, even physically, ejected from the premises in which she resides as a co-owner after a verbal argument, but who returns some hours later, entering through the unlocked front door knowing that entry was against the express wishes of the other partner and an assault ensues

[49] CCA Judgment [17] (CAB 26).
[50] CCA Judgment [41] (CAB 33).
[51] CCA Judgment [40] (CAB 32-33).
[52] CCA Judgment [40]-[41] (CAB 32-33).
[53] CCA Judgment [46] (CAB 34-35).

where serious injuries are inflicted by the returning partner or another serious indictable offence is committed by that person.

43. Whether the distinction between that example and the present case turns on the passage of time, the unlocked door, the type of lawful right (ie ownership) and/or the retention of possessions within the premises, was not explained by Fullerton J and there was no suggestion in the reasons of Brereton JA that his Honour would adopt any of those possible criteria for who is the "actual occupant". Indeed, his Honour considered that an owner-occupier could break into his or her owner-occupied home.[54] It would seem that, in the view of Brereton JA, the complainant in the present case could become liable to an offence under s 112 if, in her absence, the appellant had returned to the apartment, changed the locks, and refused the complainant entry, and she forced entry to retrieve disputed possessions. The reasoning of the majority of the CCA is therefore likely to produce inconsistent and arbitrary results in trial courts. More importantly, however, the ambiguities involved in applying the reasoning show the implausibility of the legislature having intended that the application of the offence would turn on this kind of enquiry.

44. Examination of a number of the examples given by Brereton JA as illustrative of his reasoning further demonstrates why it should not be accepted that the consent of the "actual occupant" or "occupant in fact" is determinative of whether a break has occurred, irrespective of whether the entrant has legal authority (in the form of a proprietary or contractual right) to enter:[55]

a. Justice Brereton considered that an owner of a dwelling-house would commit an offence under s 112 if he or she broke into his or her own dwelling-house to remove a former tenant who remained in occupation after an order for ejectment and the owner committed a serious indictable offence in that process (for example, by causing damage to the former tenant's property[56]). This would suggest that where a landlord exercised common law rights to re-enter and use reasonable force to expel a tenant (at least prior to the introduction of legislation controlling those rights),[57] the landlord was exposed to potential criminal liability for an offence of break and enter.

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[54] CCA Judgment [17] (CAB 26).
[55] CCA Judgment [17] (CAB 26).
[56] *Crimes Act*, s 195(1)(a).
[57] See *MacIntosh v Lobel* (1993) 30 NSWLR 441 at 461-462 per Kirby P and the authorities there discussed; Butt, *Land Law* (6th ed, 2010) at [15 212].

b. His Honour also considered that an owner of a dwelling-house would commit an offence under s 112 if he or she broke into the dwelling-house to remove a squatter and committed a serious indictable offence in that process. This would suggest that on any occasion when an owner of property sought to obtain possession from a squatter, as was permitted at common law without the aid of the courts,[58] the owner was exposed to potential criminal liability for an offence of break and enter.

c. As has already been noted, Brereton JA further suggested that a person who owned *and occupied* a dwelling-house, which was also occupied by another person (such as their child), would commit an offence under s 112 if he or she broke into that dwelling-house, presumably when locked or otherwise restricted by the other person, and committed a serious indictable offence. By contrast, Fullerton J doubted if an offence would be committed in those circumstances.[59]

45. It is difficult to understand how the criterion of "compliance with the consent of the actual occupant" can operate sensibly where there are multiple occupants with divergent views as to who is welcome in the dwelling-house.[60] Where there is a dispute amongst tenants, it is not clear why the tenant who – by happenstance or perhaps due to their vulnerability – has been ejected or otherwise restricted from returning to their home should be exposed to criminal liability for a break and enter offence.[61]

46. At various points, the majority of the CCA sought to emphasise the complainant's position as a continuing rightful occupant of the apartment. Justice Brereton observed that the appellant's rights of possession and occupation under the residential tenancy agreement were "against the landlord" and that this was not the "relevant consent to an entry … vis-à-vis the complainant".[62] As between the complainant and the appellant, however, the complainant did not have authority to exclude the appellant from the apartment by simply indicating that he was no longer welcome.[63] That is presumably

[58] *McPhail v Persons, Names Unknown* [1973] Ch 447 at 456-457.
[59] CCA Judgment [46] (Fullerton J) (CAB 34-35).
[60] CCA Judgment [28(3)] (Brereton JA) (CAB 29-30).
[61] See CCA Judgment [46] (Fullerton J) (CAB 34-35). Whether one tenant may revoke a licence granted by another tenant is the subject of some uncertainty: see and compare *New South Wales v Koumdjiev* (2005) 63 NSWLR 353 at [40] per Hodgson JA (Beazley JA and Hislop J agreeing); *Pitt x Baxter* (2007) 34 WAR 102 at [17] per Wheeler JA (Buss JA and Miller AJA agreeing); *Marks-Vincenti v R* (2015) 45 VR 313 at [40]-[42].
[62] CCA Judgment [13] (CAB 23-24).
[63] There was no suggestion that the complainant had sought to engage any legal mechanism to prevent the appellant from attending or entering the apartment – for example under the *Residential Tenancies Act*, s 102 or Part 5, Division 3A, or by way of order under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

why Brereton JA acknowledged that the appellant was not a trespasser.[64] In any case, the critical point of the CCA's decision is that the fact that the appellant had a pre-existing right to enter the apartment did not matter for the purposes of the prosecution's ability to establish the element of "breaking". It is that conclusion which the appellant submits cannot be sustained.

Conclusion

47. The decision of the majority of the CCA does not accord with the common law by reference to which "breaks" in s 112 of the *Crimes Act* is to be understood. In rejecting the previously accepted position that entries with consent or by right were beyond the scope of the offence, the majority of the CCA endorsed a test which turns on the views of the "actual occupant" or "occupant in fact". The question of *de facto* occupation, especially in the context of the breakdown of domestic relationships, is very likely to be ambiguous. Indeed, there appear to have been differences between Brereton JA and Fullerton J in terms of how their Honours' reasoning would apply in various scenarios. It should not be accepted that the legislature intended that the application of a serious criminal offence should depend on such an unstable and potentially arbitrary criterion. The appellant urges this Court to allow the appeal.

Part VII: Orders sought

48. The appellant seeks the following orders:

a. Set aside Orders 1 and 2 made by the CCA on 20 August 2021; and

b. In lieu thereof, order that the Crown's appeal to the CCA be dismissed.

Part VIII: Time required for oral argument

49. The appellant estimates that 2 hours will be required for the presentation of his oral argument.

Dated: 5 August 2022

[64] CCA Judgment [29] (CAB 30).



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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **BA**
Appellant

and

THE QUEEN
Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS
LIST OF PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS

STATUTES

1. *Crimes (Appeal and Review) Act 2001* (NSW), current
2. *Crimes Act 1900* (NSW), current
3. *Crimes Act 1900* (NSW), on enactment at 31/10/1900
4. *Crimes (Amendment) Act 1924* (NSW)
5. *Crimes and Other Acts (Amendment) Act 1974* (NSW)
6. *Crimes Amendment Act 2007* (NSW)
7. *Residential Tenancies Act 2010* (NSW), current
8. *Crimes (Domestic and Personal Violence) Act 2007* (NSW), current
9. *Drug Misuse and Trafficking Act 1985* (NSW), current