Neutral Citation Number: [2017] EWHC 841 (Admin)

Case No: CO/1511/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2017

Before :

LORD JUSTICE GROSS
MR JUSTICE OUSELEY

- -

Between :

	EUGENE HUDSON	**Appellant**
	- and -	
	CROWN PROSECUTION SERVICE	**Respondent**

- -
- -

Adrian Eissa (instructed by **McGrath & Co. Solicitors**) for the **Appellant**
James Boyd (instructed by **Crown Prosecution Service (Appeals and Review Unit))** for the **Respondent**

Hearing dates: 25 January, 2017

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Judgment Approved**Lord Justice Gross :**

INTRODUCTION

1. This is an appeal by way of case stated from the decision of Deputy District Judge Monro, sitting in the Birmingham Magistrates' Court on the 11th September, 2015, determining that the building in question ("the building") was a "dwelling" for the purposes of s.9(3)(a) of the *Theft Act 1968* ("the Act").

2. The essential question for this Court was whether the Judge was entitled to reach this conclusion.

3. The facts appear from the Case Stated by the Judge ("the Case"). The Appellant and a co-accused were charged with burglary contrary to s.9(1)(a) of the Act. On the 11th September, 2015, the matter came before the Judge for trial. The Appellant and the co-accused had pleaded guilty to "non-domestic" burglary. That plea was not acceptable to

the Crown.

4. As appears from para. 4 of the Case, the Judge found the following facts:

> " a) Sang Ngyen was the owner of 28 Summer Croft, Newtown, Birmingham. He rented out the property to tenants. The last tenant left the property on 3rd May 2015.
>
> b) A burglary occurred at this property on 5th May 2015. The Appellant….and the co-accused…were responsible for committing the burglary.
>
> c) The property was fully furnished in all rooms and equipped to be habitable. The utilities – gas, electricity and water were connected and the house was ready for new tenants to move in albeit at this stage new tenants had not been identified. "

5. The Judge concluded (at para. 7 of the Case) that she was sure that the building was a dwelling and therefore that the Appellant and co-accused were guilty of a domestic burglary. As she put it:

> " In coming to my decision I took account of the fact that the property had only very recently been unoccupied before it was burgled; that the property was a fully furnished property with all amenities connected. I did not consider it to be a commercial property."

6. The following questions ("the Questions") were stated for the opinion of the High Court:

> " a) Was the Court correct in ruling that …[the building]…was a dwelling on 5th May 2015 for the purposes of Section 9(3)(a) of …[the Act]…and therefore the Appellant was guilty of a dwelling house burglary?
>
> b) Does the fact that tenants have moved out of a property mean that the property stops being a dwelling for the purpose of Section 9(3)(a) of ….[the Act]?
>
> c) Is a rental property owned by a non-resident Landlord, where there are no tenants *in situ* to be regarded as a dwelling for the purposes of Section 9(3)(a) of ….[the Act]…when being used by the Landlord, not as his home but as part of a commercial venture? "

7. Ss. 9(3) and 9(4) of the Act provide as follows:

> " (3) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding –

(a) where the offence was committed in respect of a building or part of a building which is a dwelling, fourteen years;

(b) in any other case, ten years.

(4) ….the reference in subsection (3) above to a building which is a dwelling, shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well at times when he is. ”

THE RIVAL CASES

8. We were most grateful to Mr Eissa, who appeared for the Appellant and Mr Boyd, who appeared for the Respondent, for their extremely helpful submissions.

9. Mr Eissa’s submission was that the question was one of fact which the Judge had answered in a manner unsustainable in law. Alternatively, this Court should give guidance as to the law. On the facts found in the Case, the building was not the home of anyone at the time. The particular evil of domestic or dwelling burglary was the invasion of someone’s home. To be a dwelling it had to be someone’s home at the time; whether premises were properly to be regarded as a dwelling was a question of fact, the answer to which depended on whether the property was lived in, inhabited or otherwise occupied in the broadest sense. It thus included a family away from home on a holiday. But it did not include the building here. The property here was a “buy to let” property intended for the rental market. Had the owner been unsuccessful in finding a new tenant at an acceptable rent, he may have chosen to keep it unoccupied or to sell it. In any event, until or such time as the property was occupied it was not a dwelling within the meaning of the Act.

10. Mr Boyd submitted that “dwelling” was an ordinary English word; its meaning was a question of fact for the jury, magistrates or District Judge – not one of law for the Court. A question of law would only arise for this Court if no tribunal of fact acquainted with the ordinary use of language could reasonably have concluded on the facts of the Case that the property in question constituted a “dwelling”. The *Oxford English Dictionary* definition of “dwelling” was “a house or other place of residence”. This was in contrast to buildings which were not places of residence, such as commercial properties. As a matter of ordinary language, the word “dwelling” was capable of including not only a building dwelt in but also a building constructed or designed for dwelling in, although it may at the relevant time be vacant or even not fit or ready for occupation. A more restrictive construction connoting only those buildings occupied or inhabited at the time they were burgled would subvert the policy designed to deter offenders from targeting a building or part of a building used, constructed or designed to be used, for human habitation. Here, the Judge was entitled to reach the conclusion to which she came. The building was ready and equipped to be lived in; it was fully furnished and connected to all utilities. If there was a question of law here, then “dwelling” should be judicially defined in accordance with these submissions.

DISCUSSION

11. *(1) The legal framework:* Prior to the Act, at common law and under the *Larceny Acts*, only a "dwelling" could be burgled. The Act created a unified burglary offence, in the sense that it applies both to dwellings and buildings which are not dwellings: see, ss.9(3) (a) and (b), set out above.

12. There are, however, two noteworthy distinctions between burglary of a dwelling and burglary of a building which is not a dwelling. First, the maximum sentence is different; 14 years in the case of burglary of a dwelling and 10 years in any other case. Secondly, s.111 of the *Powers of Criminal Courts (Sentencing) Act 2000* ("the 2000 Act"), contains the "three strikes" provision requiring a (presumptive) minimum custodial period of three years where an offender aged 18 or over is convicted of a third "domestic burglary" in the circumstances there set out. In turn, "domestic burglary" is defined by s.111(5) of the 2000 Act as "…a burglary committed in respect of a building, or part of a building, which is a dwelling."

13. Despite these differences between burglary of a dwelling and burglary of other buildings, the only definition in the Act is that found in s.9(4), set out above. For my part, to the extent that s.9(4) assists at all, it supports the Respondent's case: for a vehicle or vessel to constitute a dwelling, each needs to be "inhabited". The legislature thus knew how to state the requirement of "habitation" when it wished to do so and, with respect, the good sense of doing so in the case of a vehicle or vessel is readily apparent. By contrast, there is no statutory requirement that a building or part of a building which is a dwelling must be "inhabited".

14. Such limited authority as there is, supports the meaning of "dwelling" being a question of fact – not law. In *R v Flack* [2013] EWCA Crim 115; [2013] 2 Cr App R (S), in an appeal against sentence following a plea of guilty, the Court held that the question whether the burglary had been of a dwelling or not, should not have been determined by way of a *Newton* hearing; instead, it should have been dealt with by way of alternative counts on the indictment, with the matter left to the jury to decide. At [8], Saunders J, giving the judgment of the Court, said this:

> " ….We have been invited to give guidance as to how the issue of whether a property is a dwelling-house should be approached, when and where and if it is in dispute. This is not a suitable case in which to do that. In an appropriate case, it would be a matter for a jury to determine and the directions given by the judge could, if appropriate, be considered by this Court. It is however largely a question of fact in each individual case which the jury would have to decide."

15. So far as authority furnishes guidance, *Flack* probably presents the high point: the question, dwelling or not, is largely a question of fact for the jury, magistrates or District Judge to decide.

16. For my part, I do not read *R v Sticklen* [2013] EWCA Crim 615, as providing any general guidance or undermining *Flack* at all. *Sticklen* concerned an appeal against sentence; the Crown did not appear and was not represented; the defendant had pleaded guilty to burglary of a non-dwelling; the Judge declined to follow the guidelines and treated the difference between a dwelling and other buildings as a technicality. The appeal against sentence succeeded. Giving the judgment of the Court, Macduff J said this (at [10]):

> " In our judgment, the justification for treating a dwelling as being different from other properties (and the judge mentioned a shed or a factory) is the very fact that it is someone's home, occupied, with personal and sentimental property within it. It is for that reason that higher sentences are required, and for that reason that statutory minimum sentences have been deemed appropriate. Those factors do not apply here: there were no occupants, there were no personal objects, this was not someone's home with personal space being violated – indeed, no new tenant or purchaser had yet been identified. The premises were not only unoccupied, they had been empty for many months and were bare and unfurnished. With the greatest respect to the learned judge, we do not see any justification for his observation that this was a 'technicality' resulting from renovations making the premises temporarily not to be regarded as a dwelling."

17. With respect, I do not read these observations as deciding that, as a matter of *law*, premises unoccupied at the time of a burglary, are incapable of constituting a dwelling. The question for the Court was whether, in sentencing for a non-dwelling house burglary, the Judge had been entitled to treat the distinction between the two types of burglary as a technicality, in the circumstances of that case. The Appellant had to be sentenced for that to which he had pleaded Guilty. *Sticklen* in no sense purported to give general guidance and, as already noted, the Crown was not represented. *Flack* had been decided only a matter of a little over two months earlier, with one member of the constitutions in common.

18. For completeness, although we were supplied with the definition of "dwelling", found in s.8 of the *Public Order Act 1986* and s.121 of the *Terrorism Act 2000*, the contexts of those statutes were so different that they did not assist in advancing the argument before us, either way.

19. *(2) Conclusions:* In my view - in agreement with the primary submissions of both Mr Eissa and Mr Boyd, as I understood them – "dwelling" is an ordinary English word; its meaning is a question of fact for the jury, magistrates or a District Judge. It follows that a question of law would only arise for this Court if the Judge gave it a meaning which was unsustainable in law. Mr Eissa submitted that the Judge had indeed done just that; Mr Boyd submitted that she had not. I agree with Mr Boyd. On the facts set out in the Case, the Judge was amply entitled to conclude that the building was a dwelling. My reasons follow.

20. The paradigm case of a dwelling is one which is occupied by an owner or tenant. It is

thus someone's home. It is that feature which attracts the particular gravity of dwelling-house burglary: it is an offence against the person as well as an offence against property, undermining a sense of security, violating privacy and causing disturbance and distress as well as economic loss: see *passim, R v Saw* [2009] EWCA Crim 1; [2009] 2 Cr App R (S) 54. All these factors underpin the severity with which the law views the burglary of a dwelling.

21. It does not, however, follow that the policy or logic of dealing severely with burglary of a dwelling means that a building, otherwise obviously a dwelling, ceases to be one for the purposes of s.9(3) of the Act, the moment the dwelling becomes unoccupied. As it seems to me, where a dwelling has become unoccupied, it is a question of *fact* and *degree* – not *law* – as to whether it is no longer a dwelling within s.9(3). There is a spectrum of factual possibilities.

22. Thus, in *Sticklen*, there were numerous factual pointers in favour of the building not being a dwelling: the premises were unoccupied and had been for many months; they were bare and unfurnished. The significance of all these factors would be a matter for the tribunal of fact.

23. However, in stark contrast, here, on the facts in the Case, the building had been occupied by a tenant until two days before the burglary. Until then, it was plainly a "dwelling" and not, for example, a commercial property. Between the 3rd and 5th May, 2015, the property remained fully furnished and equipped to be habitable. The utilities were connected and the building was ready for new tenants to move in – albeit at the time of the burglary, new tenants had not been identified. No doubt if these premises had remained unoccupied for an extended period of time and had ceased to be fit for habitation, different questions would have arisen. But, on the present facts and on the natural meaning of the word, the building here on the date of the burglary was a "dwelling", albeit temporarily and recently unoccupied. It had been constructed and designed as such and was habitable as such, even though at the precise time of the burglary it was vacant. It had not changed its nature in the intervening 48 hours or so. At all events, in my judgment, the Judge was amply entitled so to conclude.

24. In broad terms, the more habitable a building as a matter of fact, the more, other things being equal, it is likely to be a "dwelling" within s.9(3)(a) of the Act. Beyond that I would not go. In particular, I would not read wording into s.9(3)(a) to the effect that the building must be "inhabited" at the precise time of the burglary for it to be a "dwelling" – but that is essentially what the Appellant's submissions require.

25. I am happy to reach this conclusion.

i) First, it avoids fine distinctions and the introduction into standard burglary cases of arguments of some nicety as to the tenancy status of the property in question. For example, there is no need to inquire in a case such as this as to the marketing efforts made to re-let the premises; whether a lease is under negotiation or has been agreed; whether a new tenant has begun to move his/her possessions into the premises and, if so, to what extent. Nor should it be thought that such cases

would otherwise be rare. There are many "dwellings" where there is a change of occupancy at frequent intervals, so that there will, very frequently if not invariably, be short periods where the properties are vacant or unoccupied.

ii) Secondly, the approach to which I am attracted leaves the risk on the burglar. On the face of it, the Appellant was burgling a dwelling; that is what it would have looked like to him and the policy of the law is and ought to be to deter the targeting of residential and apparently residential properties.

iii) Thirdly, this approach is consistent with the broad view taken in other situations as to what constitutes a "dwelling" – by way of examples, a garden shed (*R v Rodmell*, unreported, 24 November, 1994) and a hotel room (*R v Massey* [2001] EWCA Crim 531; [2001] 2 Cr App R (S) 80).

iv) Fourthly, no unfairness is involved. At least in cases other than those where s.111 of the 2000 Act is applicable (in which case the defendant will already have committed two domestic burglaries), the fact that the premises are temporarily vacant can be reflected in arguments as to mitigation.

26. It follows that I would dismiss this appeal.

ANSWERING THE QUESTIONS

27. It remains to answer the Questions:

i) *Question a):* Was the Court correct in ruling that …[the building]…was a dwelling on 5th May 2015 for the purposes of Section 9(3)(a) of …[the Act]… and therefore the Appellant was guilty of a dwelling house burglary?

Answer: The Judge was entitled to rule as she did. The Appellant was guilty under s.9(3)(a) of the Act of burglary of a dwelling.

ii) *Question b):* Does the fact that tenants have moved out of a property mean that the property stops being a dwelling for the purpose of Section 9(3)(a) of the Act?

Answer: Not necessarily. This is a question of fact and degree for the tribunal of fact.

iii) *Question c):* Is a rental property owned by a non-residential Landlord where there are no tenants *in situ* to be regarded as a dwelling for the purposes of Section 9(3)(a) of ….[the Act]…when being used by the Landlord, not as his home but as part of a commercial venture?

Answer: It depends. As with Question b), this is a question of fact and degree for the tribunal of fact.

Mr Justice Ouseley:

28. I agree.