

BATTLES ABOUT CHATTELS

- fixtures and chattels in dilapidations disputes

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Introduction

This paper addresses four issues:

- Classification - chattels, fixtures, landlord's fixtures, tenant's fixtures, fittings, part of the building
- How to determine if an item is a fixture
- The tenant's obligations if a chattel is let with the building
- When the tenant must remove tenant's fixtures

Classification

If you visit an office building you will see a variety of things that, at one time or another, have been brought to the land. At one extreme there is the structure of the building itself - the foundations, main structure, roof and so on. This is made up of building materials that were originally brought to the site and put together to make up the structure. At the other extreme, you may see an office chair, sitting on the floor.

For a variety of different purposes, the law divides the things that have been brought on to land into different categories.

Things that are part and parcel of the land itself

Some things which are an integral part of a building are referred to as being "part and parcel of the land itself".

Boswell v. Crucible Steel Co. [1925] 1 K.B. 119 the question was whether plate glass windows which formed part of the wall of a warehouse were landlord's fixtures within the meaning of a repairing covenant. Atkin L.J. said, at p. 123: "...they are not landlord's fixtures, and for the simple reason that they are not fixtures at all in the sense in which that term is generally understood. A fixture, as that term is used in connection with the house, means something which has been affixed to the freehold as accessory to the house. It does not include things which were made part of the house itself in the course of its construction."

Elitestone v Morris [1997] 1 W.L.R. 687. A bungalow resting on concrete pillars which rested on the ground was part and parcel of the land, because it could only be removed by demolishing it.

Fixtures

Fixtures are things that were originally chattels, but which have become part of the land or building to which they are attached.

Landlord's fixtures

A landlord's fixture is a fixture which cannot be removed by the tenant. This can be either a fixture which was present when the lease was granted, or a fixture installed by the tenant. For dilapidations purposes, there is normally no difference between landlord's fixtures and items that are part and parcel of the building. However, there may be lease covenants that only apply to fixtures, in which case it may be necessary to decide whether an item is a landlord's fixture or part and parcel of the building.

Tenant's fixture

A tenant's fixture is an item which is:

- 1 annexed by a tenant to the land so as to become a fixture;
- 2 is so annexed either for the purposes of his trade or for ornament and convenience; and
- 3 physically capable of removal without causing substantial damage to the land and without losing its essential utility as a result of the removal

see *Woodfall* 13.141, *Webb v. Frank Bevis* [1940] 1 All E.R. 247; *Young v. Dalgety* [1987] 1 EGLR 116

In practice, the crucial question is normally whether the item can be removed and installed elsewhere, or whether the process of removing the item will result in its destruction. Normally, any damage caused to the building by removing the item can be made good and will not prevent it from being a fixture.

Where the landlord lets to the tenant a building containing a fixture, and during the tenancy the tenant replaces the fixture, the new fixture is still a landlord's fixture: *Sunderland v. Newton* (1830) 3 Sim. 450

Chattels

A chattel is anything which is neither part and parcel of the land, nor a fixture. It is therefore a moveable, and not treated as being part of the land.

Fittings

Although the expression "fixtures and fittings" is sometimes found in leases, "fittings" has no status as a legal expression. If the expression "fixtures and fittings" is used, then depending

on the context, it may be appropriate to interpret “fittings” as referring to chattels which are let with a property. For example, if offices are let with carpets which are not fixtures (as to which see below), they could fall within a covenant to “keep the landlord’s fixtures and fittings in good condition and where necessary replace them”.

Brudenell-Bruce v Moore [2012] W.T.L.R.

Framed paintings were not fixtures and nor were they “fittings”. Newey J said:

“... the Paintings do not represent “fittings”. The word “fittings” is not a legal term of art (see Woodfall, “Landlord and Tenant”, at paragraph 13.131). It is often used in combination with “fixtures” (as in “fixtures and fittings”). That was the case in *Berkley v Poulett* (see [1977] 1 EGLR 86 at 88), but no one appears to have considered the addition of “fittings” important. Nor does reference to the Oxford English Dictionary suggest that the word “fittings” extends the scope of clause 1 in a relevant way. The Dictionary defines “fittings” as “Fixtures, apparatus, furniture”. Clause 1 makes separate reference to “fixtures” and “furniture”, and the Paintings would not normally be regarded as “apparatus”. Further, the word “fitted” would not naturally apply to the Paintings. A carpet or cupboard might be “fitted”. The Paintings were surely hung rather than “fitted”. The value of the Paintings is also, to my mind, of significance. Had the parties intended the Lease to extend to such valuable items, they might have been expected to refer to them specifically, not to rely on the somewhat vague word “fittings”.”

Tenant’s fixtures

Subject to any contrary provision in the lease, a tenant has the right to remove tenant’s fixtures at any time up to the end of the lease.

A tenant retains the right to remove tenant’s fixtures if he is granted a new tenancy: *New Zealand Government Property Corp. v. H.M. & S.* [1982] Q.B. 1145, CA.

The repairing covenant and covenant to yield up will normally require the tenant to leave the premises in good repair. This means that if fixture are removed, any damage caused by the removal must be made good: *Spyer v. Phillipson* [1931] 2 Ch. 183, *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212

Failure to make good the consequences of removal may amount to the tort of waste, in which case the director(s) of a tenant company may be personally liable for the cost of making good the damage caused by the removal

Mancetter Developments Ltd v Garmanson Ltd [1986] QB 1212

The director of a tenant company was held liable in waste for causing the company to remove industrial machinery without making good the holes made in the walls for the installation of the fans and pipes.

Is it a fixture?

The cases on fixtures are not always easy to reconcile with each other, and disclose a lack of a real consistent principled basis for determining whether an article is a fixture or a chattel

Reynolds v Ashby and Son Limited [1903] 1 KB 87, CA; [1904] AC 466, HL

Lord Lindley:

“I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute.”

Jordan v May [1947] KB 427

Asquith LJ:

““Many authorities have been cited to us which purport to lay down criteria for determining what is and what is not a “fixture”. Those criteria are not always easy to harmonize ...”.

Degree and purpose of annexation

The two key questions are:

- 1 The degree of annexation: is it attached to the land, and if so, how firmly?
- 2 The purpose of annexation: for what purpose was it brought on to the land?

Presumption that anything affixed to land is a fixture

Where an article is affixed to the land, even slightly, there is a rebuttable presumption of law that it is a fixture.

Holland v Hodgson (1872) LR 7 CP 328 Exchequer Chamber

The freehold owner of land granted an equitable mortgage of it. He erected a mill, and installed machinery in it. He then mortgaged the machinery, and a dispute arose between the mortgagee of the land and the mortgagee of the machinery as to who was entitled to the machinery. The machinery in issue constituted looms in a mill. It was essential to the proper working of the looms that they should stand on the level, and be steady and kept in their true direction perpendicular to the line of shafting. The looms were attached to the floor by nails driven through holes in the feet of the looms, in some cases into beams built into the stone, and in other cases into plugs of wood driven into holes drilled in the stone for the purpose. The Court of Exchequer Chamber (predecessor to the modern Court of Appeal) reviewed the authorities, and held that the looms were fixtures and the mortgagee of the land was entitled to them.

Blackburn J, delivering the judgment of the Court, said:

“There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel; see *Wiltshier v. Cottrell*, and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v. Gregory*. Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels.

On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land.

Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J., in *Wilde v. Waters*. This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus. In some cases, such as the anchor of the ship or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they should be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord) have always been considered as part of the land, though severable

by the tenant. In most, if not all, of such cases the reason why the articles are considered fixtures is probably ... that the tenant indicates by the mode in which he puts them up that he regards them as attached to the property during his interest in the property”.

Things not fixed to the premises are therefore normally chattels

It follows that, normally, things which are not fixed to the building except by the force of gravity are not fixtures. However, there can be exceptions e.g. where a wooden bungalow was constructed on concrete pillars attached to the ground – the bungalow was not like a mobile home or caravan which could be moved elsewhere; it could only be removed by demolishing it and it was, therefore, not a chattel but and must have been intended to form part of the realty: *Elitestone Ltd v Morris* [1997] 1 WLR 687.

Items not fixed to ground or a building can be fixtures if it is clear that they are in place to effect a permanent improvement of the land.

Holland v Hodgson (1872) LR 7 CP 328 Exchequer Chamber
Blackburn J:

“... blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels.”

Monti v. Barnes [1901] 1 QB 205

A mortgagor of a house removed from the house a number of ordinary fixed grates and substituted for them dog grates “ of considerable weight” which were not affixed in any way to the freehold. The question arose whether they were fixtures or chattels. A.L. Smith MR said:

“... the articles in question are of considerable weight, and, as regards the intention with which the mortgagor placed the dog grates in the house, it is obvious that he could not have intended that the house should be without grates; and I have no doubt that the dog grates were put in to fill the place of the old fixed grates, which he took out, and to pass with the inheritance. The question which has to be considered in such a case is whether, having regard to the character of the article and the circumstances of the particular case, the article in question was intended to be annexed to the inheritance or to continue a mere chattel, and not to become part of the freehold. The learned Judge has held that in the circumstances of this case these dog grates were substituted for the old fixed grates with the former intention, and not only am I unable to say that he was wrong in that conclusion, but I agree with him.”

Pole Carew v. Western Counties and General Manure Co. [1920] 2 Ch. 97 CA

A large chemical plant for manufacturing acid was a fixture, even though it was not attached to the land. The plant consisted of pyrites burners, four reaction chambers, and two towers.

Three of the chambers were of about 140ft. long, 20ft. wide, and 14ft. high, and consisted of a rectangular leaden container supported by and enclosed in a substantial wooden framework, the lowest part of which consisted of a series of beams resting mainly on but not fixed to stone walls and pillars, except in the case of one chamber, which rested almost entirely on unfixed iron columns. The fourth chamber was an open tank standing on a wooden platform upon beams themselves rested on the stone walls and pillars. Each of the towers was an upright chamber enclosed in a wooden framework and supported by four wooden posts having iron shoes and resting by their own weight on a necessary foundation. The Court of Appeal held that the chambers and the towers must be regarded as integral portions of one composite building permanently annexed to the freehold, and not as chattels or as tenant's fixtures, and that the tenant was therefore obliged to yield them up in repair.

Lord Sterndale MR said:

“... I think one is driven to the conclusion that the whole structure forms one single unit and is of the nature of a building, that it is not a chattel, that it is a fixture, and that the lower portion of this unit being embedded in the land by ordinary foundations, it cannot be considered a tenant's fixture, and must be considered from the beginning as being something permanently annexed to the freehold of the nature of a building. The towers present more difficulty. From their construction, which I have already described, there would be some reasonable ground, if they stood alone and unconnected with anything else, for contending that they were chattels, but they were not isolated or unconnected. They were connected by pipes, as I have described, with the burners and chambers, and were a necessary and integral part of a sulphuric acid plant, and in my opinion they must be considered as a part of the whole structure, in the same way that movable parts of an engine are considered as an integral part of the engine”.

Tenant's trade equipment fixed to the premises to enable it to be operated treated as a fixture

The case of *Holland v Hodgson* (1872) LR 7 CP 328 followed a number of previous cases where the same issue had arisen. It settled the law. Where a tenant fixed a machine to the floor of a factory, for the purpose of holding it steady while in use, then it was a fixture. That was so even if (as in *Holland*) the machine could easily be detached.

***Hobson v Gorringe* [1897] 1 Ch 182, CA**

The freehold owner of a sawmill acquired a gas engine on hire purchase and affixed it to the land by bolts and screws to prevent it from rocking and shifting, as it would have done had it not been bolted down. The hire purchase agreement said that the engine would not become the property of the hirer until payment of all the instalments, and that the owner could remove it if any instalment was not paid. The freeholder then granted a mortgage of the land, and then defaulted in payment of sums due under the hire purchase agreement. A dispute arose between the owner of the machine and the mortgagee of the premises as to who was entitled

to the machine. The Court of Appeal held in favour of the mortgagee, holding that when affixed to the land, the machine became part of the freehold and was comprised in the mortgage. The Court treated the question of whether the engine was a fixture as one of law, settled by a series of authorities culminating in *Holland v Hodgson*: see at p.189-191. AL Smith LJ, giving the judgment of the Court, said (at 191):

“If there had been in this case nothing but the existing visible degree of annexation of the gas engine to King's freehold, and the known object for which such annexation had taken place, the authorities conclusively establish that the gas engine had ceased to be a chattel, and had become part of the freehold.”

He went on to consider if the hire purchase agreement altered the position, and held that it did not: pp.192-3

Reynolds v Ashby and Son Limited [1903] 1 KB 87, CA; [1904] AC 466, HL

A lessee under a 99 year lease erected a factory on the demised premises. He then mortgaged the factory. Subsequently, the lessee entered into a hire purchase agreement with the Plaintiff, under which the Plaintiff supplied machinery to the lessee which was affixed to the factory. The machinery was bolted to the floor, and could be removed by unscrewing the nuts and lifting the machines off the bolts. There was evidence that such machines could be, and often were, used without being fixed to the premises, but it was better to have them steadied by being so fixed - in order to avoid vibration, and to prevent the machine from shifting its position. The issue in the case was whether the owner of the machine, who had let it on hire purchase, or the mortgagee of the factory, was entitled to the machinery. Lawrence J at the trial held that the machines had become fixtures and that property in them had therefore passed to the mortgagee of the land, and he declined to leave any question to the jury. Appeals to both the Court of Appeal and the House of Lords were dismissed.

The speeches in the House of Lords are not very satisfactory. Only Lord Lindley delivered a speech considering the case as a matter of principle. The other three Law Lords who delivered speeches all said, in effect, that the matter was settled by authority and that it was too late to change the law, while expressing some dissatisfaction with the state of the law. Lord Lindley, however, appeared content with the result reached by the authorities. He said:

“The purpose for which the machines were obtained and fixed seems to me unmistakable; it was to complete and use the buildings as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as movable chattels”.

Crossley Brothers Limited v Lee [1908] 1 KB 86

An engine was screwed by the tenant to upright bolts which in turn were affixed to the floor to keep it steady while working. It was seized by the landlord of the premises when distraining for rent. The Divisional Court held that the engine was a fixture, and could not be distrained on. The Court held that there was no difference between the law applicable to mortgages and to landlord and tenant cases.

Domestic items: a different approach - Botham v TSB Bank plc

Botham v TSB Bank plc [1996] EGCS 149 CA

Mr Botham was the owner of a flat which he mortgaged to TSB. An order for possession was made. There then arose a dispute between Mr Botham and his parents to whom he had purported to assign the contents of the flat on the one hand and TSB on the other as to which of the items which were in the flat at the time of the execution of the order for possession were fixtures.

Roch LJ gave the leading judgment. Scott VC agreed, and delivered his own judgment. Henry LJ agreed with both judgments.

Roch LJ said that the most helpful statement of the legal principles in this area of the law was to be found in the judgment of the Court of Exchequer Chamber delivered by Blackburn J in *Holland v Hodgson*. He said:

“The tests, in the case of an item which has been attached to the building in some way other than simply by its own weight, seem to be the purpose of the item and the purpose of the link between the item and the building. If the item viewed objectively, is, intended to be permanent and to afford a lasting improvement to the building, the thing will have become a fixture. If the attachment is temporary and is no more than is necessary for the item to be used and enjoyed, then it will remain a chattel. Some indicators can be identified. For example, if the item is ornamental and the attachment is simply to enable the item to be displayed and enjoyed as an adornment that will often indicate that this item is a chattel. Obvious examples are pictures. But this will not be the result in every case; for example ornamental tiles on the walls of kitchens and bathrooms. The ability to remove an item or its attachment from the building without damaging the fabric of the building is another indicator. The same item may in some areas be a chattel and in others a fixture. For example a cooker will, if free standing and connected to the building only by an electric flex, be a chattel. But it may be otherwise if the cooker is a split level cooker with the hob set into a work surface and the oven forming part of one of the cabinets in the kitchen. It must be remembered that in many cases the item being considered may be one that has been bought by the mortgagor on hire purchase, where the ownership of the item remains in the supplier until the instalments have been paid. Holding such items to be fixtures simply because they are housed in a fitted cupboard and linked to the building by an electric cable, and, in cases of washing machines by the necessary plumbing would cause difficulties and such findings should only be made where the intent to effect a permanent improvement in the building is incontrovertible. The type of person who installs or attaches the item to the land can be a further indicator. Thus items installed by a builder, eg the wall tiles will probably be fixtures, whereas items installed by eg a carpet contractor or curtain supplier or by the occupier of the building himself or herself may well not be.”

The decision of the Court on the items in dispute was as follows:

1. *Fitted carpets, cut to size and kept in place by gripper rods.*
2. *Curtains and blinds including a shower curtain in one of the two bathrooms.*

Chattels.

Roch LJ:

“These items, although made or cut to fit the particular floor or window concerned, are attached to the building in an insubstantial manner. Carpets can easily be lifted off gripper rods and removed and can be used again elsewhere. In my judgment neither the degree of annexation nor the surrounding circumstances indicate an intention to effect a permanent improvement in the building. Although many people take with them their curtains and carpets when they move, it is true that others leave curtains and carpets for the incoming occupier, but normally only where the incoming occupier has bought those items separately from the purchase of the property itself. Curtains are attached merely by being hung from curtain rails. The removal of carpets and curtains has no effect damaging or otherwise on the fabric of the building. In my opinion, the method of keeping fitted carpets in place and keeping curtains hung are no more than is required for enjoyment of those items as curtains and carpets. Such items are not considered to be or to have become part of the building. They are not installed, in the case of new buildings, by the builders when the building is constructed, but by the occupier himself or herself or by specialist contractors who supply and install such items. The same is true of curtains. Both will be changed from time to time as the occupier decides to change the decoration of one or more rooms in his or her house or flat. There may be cases where carpeting or carpet squares are stuck to a concrete screed in such a way as to make them part of the floor and thus fixtures. In this case, there was no evidence, in my opinion, to justify the judge’s finding that the carpets in this flat were fixtures.”

Scott VC:

“Carpets, whether or not fitted, and curtains lack that quality of permanency that is to be expected of articles that have become in the eye of the law part of the realty. In *Young v Dalgety* Mervyn Davies J. said that he “inclined to the view” that fitted carpeting installed in 19 Hanover Square was a fixture (see transcript of judgment given on 14 April 1986, p 15). The case went to the Court of Appeal ([1987] 1 EGLR 116) on another point. For my part I very much doubt whether fitted carpeting could ever be held to be a fixture. It is relatively easy to take up fitted carpeting. A leaky radiator often necessitates that a carpet be taken up in order to allow the floor underneath to dry out. There will be many other reasons why a fitted carpet may be taken up. No damage at all to the structure of the building will be caused. Fitted carpets do not become part of the floor itself and do not, in my judgment, become fixtures. A fortiori, curtains cannot be fixtures.”

3. *Light fittings which were not merely lamp shades but were lights fixed to walls or ceilings, some of them being in recesses in the ceilings and some being attached to the ceiling by tracks.*

It was conceded that the light fittings recessed into the ceilings were fixtures. As to the remaining fittings, they were chattels.

Roch LJ:

“I would hold that the respondents on the admissible evidence have failed to show that the other lighting items were fixtures. There is no admissible evidence as to the method of attachment of these items to the walls and ceilings other than that the photographs show that they must be attached in some manner. Mr Moraes submitted that their removal cannot be too difficult because in many cases the fitting would have to be removed in order to replace a bulb or connection that had failed. In my judgment, these light fittings, in the absence of evidence other than the photographs of them, remain chattels as would lamp shades or ornamental light fittings or chandeliers suspended from a ceiling rose. To adopt a test used by Lush J in *British Economical Lamp Company (Ltd) v Empire Mile End (Ltd)* and another Times Law Reports, Friday April 18th 1913, these light fittings were not shown by the evidence to be part of the electrical installation in the flat.

Scott VC:

“Light fittings may or may not be so incorporated into the wall or ceiling to which they are fixed as to become fixtures. If they are to be held to have lost their identity as chattels, evidence of the nature of annexation is essential. In the present case there was no admissible evidence to justify a conclusion that the light fittings had become fixtures.”

4. *Four decorative gas flame effect fires of the mock coal type which had gas piped to them and which had been installed in four fireplaces in the hallway, the sitting room and two of the bedrooms*

Chattels.

Roch LJ (Scott VC added nothing on this item):

“In their case the only connection between them and the building was a gas pipe. In the gas pipes, shortly before the pipes enter these gas fires, gas taps are to be seen in the photographs. Apart from that link, which essential if they are to be used as gas fires, nothing secures the gas fires, on the evidence, other than their own weight. Mr Moraes argues that their function was purely ornamental, the flat actually being heated by water filled radiators. I would not accept that submission. These fires have two purposes: one decorative, the mock coal fire aspect, and one functional, the gas fire aspect. Nevertheless I am of the view that electric fires and heaters which are simply plugged into the electricity supply of a house are not fixtures and I do not see any sensible distinction between such electric fires and these four gas fires”

5. *Towel rails, soap dishes and lavatory roll holders.*

6. *Fittings on baths and basins namely the taps, plugs and shower heads.*

Fixtures.

Roch LJ

“Those items are attached to the building in such a way as to demonstrate a significant connection with the building, and are of a type consistent with the bathroom fittings such as the basins, baths, bidets and lavatories, as to demonstrate an intention to effect a permanent improvement to the flat. They are items necessary for a room which is used as a bathroom. They are not there, on the evidence which was before the judge and which is before us, to be enjoyed for themselves, but they are there as accessories which enable the room to be used and enjoyed as a bathroom. Viewed objectively, they were intended to be permanent and to afford a lasting improvement to the property.”

Scott VC

“The question whether a tap has become a fixture will, in my opinion, depend in most cases on whether the bath or basin or sink to which the tap is an appendage is a fixture. It is possible, in my view, that a Victorian bath, standing on its four short legs and connected by appropriate plumbing to the water system and drainage system, might retain its identity as a chattel. If the bath remains a chattel, its taps would be part of the bath, not part of the realty. In most cases, however, and, in my opinion, in every case in which the bath had been fitted or built into the bathroom, the bath would have become a fixture and its taps would, prima facie, follow suit. Very special evidence would, in my opinion, be needed to justify a conclusion that although the bath, basin or sink (as the case might be) was a fixture, its tap or taps remained chattels. The naturally inferred intention would be that the taps had become part of the bath, the basin or the sink. The decorative nature of particular top-of-the-market taps would not suffice, in my view, to shift this inference. The primary nature of taps is functional”.

7. *Kitchen units and work surfaces, including a fitted sink.*

Fixtures.

Roch LJ

“... the degree of annexation, the fact that between the working surfaces and the underside of the wall cupboards of the wall units there is tiling, demonstrates both a degree of annexation and an intention to effect a permanent improvement to the

kitchen of the flat so as to make those units fixtures. Further, as a matter of common sense, those units could not be removed without damaging the fabric of the flat, even if the damage is no more than the leaving of a pattern of tiling which is unlikely to be of use if different units had to be installed.”

Scott LJ

“Here, too, the evidence of the photographs and common knowledge of the nature of fitted kitchen units justify the conclusion that the units installed in Mr Botham's flat had become fixtures”.

8. *Neff white goods in the kitchen, namely the gas hob, the extractor fan unit, a wall fitting holding a cordless electric carving knife, spare blade and a rechargeable torch, a freezer fitted under the worktop, an oven fitted into the kitchen units, an integrated dishwasher, an integrated washing machine and dryer and a refrigerator fitted under the work top. They were manufactured to standard sizes, they were fitted into standard sized holes and they were removable*

Chattels

Roch LJ ((Scott VC added nothing on this item):

“What one might expect to be in a flat if one were taking a flat, would depend on the type of letting one was seeking. That is not, in my view, a test of whether an item is or is not a fixture. Clearly all of these items are items one would not be surprised to find in a kitchen, but then so is an electric kettle, a food mixer and a microwave oven, which are all normally plugged in. No one, I venture to suggest would look on these as fixtures. Here the judge should have reminded himself that the degree of annexation was slight: no more than that which was need for these items to be used for their normal purposes. In fact these items remain in position by their own weight and not by virtue of the links between them and the building. All these items can be bought separately, and are often acquired on an instalment payment basis, when ownership does not pass to the householder immediately. Many of these items are designed to last for a limited period of time and will require replacing after a relatively short number of years. The degree of annexation is therefore slight. Disconnection can be done without damage to the fabric of the building and normally without difficulty. The purpose of such links as there were to the building was to enable these machines to be used to wash clothes or dishes or preserve or cook food. Absent any evidence other than the photographs, it was not open to the judge, in my opinion, to infer that these items were installed with the intention that they were to be a permanent or lasting improvement to the building. This is not a case where the intent to effect a permanent improvement in the building by installing these machines so that they became part of the realty was incontrovertible, as the judge's doubts illustrated”

The problem created by Botham v TSB Bank plc

Although Roch LJ said that his principles were taken from *Holland v Hodgson*, in reality there is a large difference in his approach. In *Holland*, machines which were affixed to hold them steady while in use were treated as fixtures. They would not have passed the Roch LJ test.

Perhaps the most satisfactory way of reconciling the cases is to say that *Holland* laid down a clear rule of law in relation to trade machinery, that it is to be treated as a fixture if it is affixed to the property, even if only intended to be kept there so long as the tenant traded from the property. In the case of domestic property, *Botham* held that an item is to be treated as a fixture only if it was intended to be permanently attached.

That is given some support by the judgment of Sir Richard-Scott VC. He agreed with Roch LJ, but added:

“There is, I think, some danger in applying too literally tests formulated for the purpose of decisions regarding machinery in factories to cases regarding articles in residences. There is a danger, also, in applying too literally tests formulated for the purpose of decisions regarding articles of ornamental value only to cases regarding articles whose prime function is utilitarian ...

The issue whether functional articles in a house or flat, such as those with which we are concerned in this case, have become fixtures depends, in my opinion, on the intention with which they were brought into the flat and fixed in position. That there must be some degree of affixing is obvious. It has been suggested that it may, in some cases, suffice that the affixing is no more substantial than the placing of an electric plug in an electric point in the wall. I would reject that suggestion. I do not think that an item of electrical equipment eg. a dishwasher, a refrigerator, a deep freeze or a washing machine, affixed, if that is an apt word, by no more than a plug in an electric point, could ever be held to have become a fixture.

Assuming, however, that the functional article in question has been affixed to the land or building in a sufficiently substantial manner to enable a contention that it has become a fixture to be conceptually possible, the critical question will be that of intention.”

Furniture

The cases are not consistent or clear on the treatment of furniture which is attached to the land

Lyon & Co v. London City And Midland Bank [1903] 2 KB 135 Joyce J

Chairs were hired from the plaintiffs for use in a hippodrome by the owner and occupier of the building under an agreement for hire containing an option of purchase which was never exercised. The chairs were fastened to the floor of the building by means of screws, in accordance with the requirements of the local authority. Joyce J held that the chairs did not cease to be chattels because they were screwed down to the floor, and that the property in them did not pass as against the plaintiffs to the mortgagee of the freehold under a mortgage of the building and fixtures.

He said:

“I must decide this case in accordance with the law already laid down, and in my opinion it differs in several respects from the decisions which are relied on by the defendants. In the first place, we are dealing with seats, and not with engines, boilers, or trade machinery. Then the seats were complete in themselves and might have been used as seats without any annexation, though no doubt, apart from the requirements of the town council, it was better, considering the place where and the purpose for which they were used, that they should be screwed down to the floor. Further, the agreement under which these chairs were provided was not an ordinary hire-purchase agreement, and the case of *Hobson v. Gorrings* and other decisions have generally been treated as proceeding on the ground that the agreements under which the chattels were supplied were hire-purchase agreements. It is no doubt true that the agreement in the present case, though an agreement for hire only, contained an option of purchase; but that option was never exercised. At the date of the mortgage the property in these chairs was the plaintiffs', and it never passed to Brammall, the mortgagor, who had only that special property in them which every hirer has in hired chattels; it is difficult, therefore, to understand how the legal ownership could have passed to the defendants by virtue of their mortgage. If the chairs had been brought upon the premises by a tenant or occupier after the date of the mortgage, it seems clear that they would not have passed to the defendants as mortgagees, and I see no stronger reason for their so passing in the facts of the present case. No doubt a chattel on being attached to the soil or to a building *prima facie* becomes a fixture, but the presumption may be rebutted by showing that the annexation is incomplete, so that the chattel can be easily removed without injury to itself or to the premises to which it is attached, and that the annexation is merely for a temporary purpose and for the more complete enjoyment and use of the chattel as a chattel. That seems to me to be what has been done in the present case. The mode of annexation of these chairs to the freehold is analogous rather to the mode in which a carpet is fastened to a floor than to the mode in which engines, boilers, and heavy machinery are affixed to the freehold, and moreover the purpose of the annexation is only temporary. In my opinion these chairs did not cease to be chattels on being screwed to the floor, and I hold that the property in them did not pass to the defendants”.

Vaudeville Electric Cinema Limited v Muriset [1923] 2 Ch. 74 Sargant J

V ran a cinema, and mortgaged the cinema and its fixtures. The issue was whether four items were fixtures: (a) two oil paintings in the hall of the nature of frescoes; (b) the cinema screen, fixed by blocks in the wall; (c) four advertising boards fastened outside the cinema by screws to the hall posts; and (d) 477 plush tip-up seats in blocks of four or eight attached to the floor between the seats by iron standards with iron feet. Sargant J held that they were all fixtures.

On the first three items, Sargant J said:

“To my mind they are all fixtures; for, although they can be removed, still they are attached to and form part of the building, and are part of the ordinary equipment of the building for the purpose for which it was used and was intended to be used. It is quite clear that the cinema must have a screen on which images are thrown. The paintings or frescoes, in my judgment, form part of the permanent decoration of the hall; and in the same way, the advertising boards outside, fixed as they are, form part of the permanent structure and ordinary adjuncts of the hall as a cinema.”

On the seats, he distinguished *Lyon & Co. v. London City and Midland Bank*, on the basis that there was a hiring for a short period of twelve weeks only, but that term had been afterwards extended.

Horwich v. Symond (1915) 84 L.J.K.B. 1083

The tenant of a chemist’s shop brought a display unit, a counter and show case, and a bottle rack into the shop, and fixed them lightly in place. The display unit, counter and show case were fixed with two wire nails. The bottle rack was fastened by a screw to two wall hooks. The Court of Appeal upheld the trial judge’s decision that they were not fixtures. Buckley LJ and Pickford LJ said it was a pure question of fact. Bankes LJ thought it was a mixed question of fact and law, but the judge had not misdirected himself. No attempt was made to reconcile the decision with the line of cases concerning machinery in factories, of which only *Holland v Hodgson* was cited. It is difficult to see why a shop counter nailed down to steady it in a shop should remain a chattel, while a spinning machine, nailed down in a factory to steady it should become a fixture.

Partitions

Partitions are there to divide up the space in the building.

If it is not possible to dismantle them and re-use them elsewhere, they will be part and parcel of the property.

If they are freestanding screens, they are chattels.

If they are fixed to the structure, but can be dismantled and used elsewhere, then the question is whether the *Holland v Hodgson* approach or the *Botham v TSB* approach is applicable.

In *Short v Kirkpatrick* [1982] 2 NZLR 358 (Eichelbaum J, High Court of New Zealand) partitions in lawyers' offices had been put in by the tenants. They were solidly affixed to the concrete floor by means of ramset pins. At the top they were nailed to the ceilings through the plaster, into ceiling joists. It was possible to remove the partitions without irreparable damage to the interior or the partitions themselves. They were described as "demountable partitions", meaning they could be detached and removed elsewhere. The Court held that they were tenant's fixtures.

Carpets

In *Holland v Hodgson*, Blackburn J referred to "the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only fastened as a chattel temporarily, and not affixed permanently as part of the land". He was not, of course, referring to carpet tiles or fitted carpets, but to a self contained carpet brought into a room.

In *Lyon v London & Midland Bank* [1903] 2 KB 135, Joyce J said:

"No doubt a chattel on being attached to the soil or to a building *primâ facie* becomes a fixture, but the presumption may be rebutted by shewing that the annexation is incomplete, so that the chattel can be easily removed without injury to itself or to the premises to which it is attached, and that the annexation is merely for a temporary purpose and for the more complete enjoyment and use of the chattel as a chattel. That seems to me to be what has been done in the present case. The mode of annexation of these chairs to the freehold is analogous rather to the mode in which a carpet is fastened to a floor than to the mode in which engines, boilers, and heavy machinery are affixed to the freehold, and moreover the purpose of the annexation is only temporary."

In *Botham*, the Court of Appeal held that carpets were not fixtures, unless perhaps they were glued down – see the passages quoted above.

In *Palumberi v Palumberi* [1986] NSW Conv R 55,673, special circumstances led Kearney J to hold that carpets were fixtures. D renovated a flat belonging to his parents and in the course of doing so laid a new carpet and put in a stove. The flat was then given to him and to his brother and he then sold his half interest to his brother. The issue was whether D was entitled to take away the carpet and stove. Kearney J held he could not because it was that the new stove and carpet were fixtures that passed with the sale. This was because, given the circumstances in which those items were put in place, it was to be inferred the intention was to make them part of the flat. Kearney J said:

"... the defendant, without reference to the owners of the property, simply removed and discarded these items and then replaced them with new items. At that stage the defendant anticipated that he would become an owner of the property, and it would seem that he carried out this work of replacement upon the basis that he would, in due course, be deriving the benefit of them as owner of the property and, doubtless, anticipated further that he would continue indefinitely to enjoy such benefit.

I do not consider that I should impute to the defendant the intention of committing a tortious, and probably also criminal act in relation to the property of the owners of the premises without making good the loss and damage so inflicted by replacing the items removed and discarded by him. I think that the proper inference to draw from the circumstances in which the stove and carpet were installed in the premises, is that the defendant intended them to form part of the premises; and this intention is, of course, supported by his anticipated entitlement to indefinite enjoyment of the benefit of such items in his character as prospective owner of the premises.”

Data cabling and sockets

Cabling laid in trunking inside a wall, leading to sockets in the wall, is clearly a fixture.

Surface mounted cabling which is not affixed to the building is equally clearly a chattel.

Surface mounted cabling, attached to the wall by cable stays, would probably not be a fixture.

NH Dunn Pty Ltd v. LM Ericsson Pty Ltd (1980) ANZ Conv R 300, 2 BPR 9241

A PABX telephone system rented by a tenant from a third party and fixed to the land and cabled throughout several rooms was held not to be a fixture. The tenant had a ten year lease with an option for renewal and it was contemplated that the system would remain in place for that period of time. The degree of annexation was small, being mainly to steady the parts, the purpose was to afford a means of communication to the people in the office rather than for the better enjoyment of the land.

The tenant’s obligations if a chattel is let with the building

The tenant’s obligations in respect of chattels let with the building e.g. carpets which are not fixtures will depend entirely on the terms of the lease; it is not possible to give any general guidance. They may be referred to in the lease expressly, or as “fittings” (see above), in which case the terms of the lease will govern the situation.

Or the lease may be entirely silent on them, in which case the issue will be what intention should sensibly be imputed to the parties in respect of them. This may depend on considerations such as the nature of the chattels, their condition, value, and importance to the business to be conducted on the premises.

Must the tenant remove tenant’s fixtures?

Chattels

Nearly every lease has an express covenant by the tenant to yield up possession at the end of the term. Even if there is no express covenant, there will be an implied obligation to deliver

up vacant possession when the lease ends. This means that the tenant must remove all his chattels from the premises.

Fixtures - the general rule

What, however, if the item is not a chattel, but a tenant's fixture, which the tenant is entitled to remove?

Woodfall 13.148 and *Dowding & Reynolds* (4th ed.) para 25-41 say that, absent any covenant in the lease, there is no general obligation on a tenant to remove tenant's fixtures. They refer to *Never-Stop Railway (Wembley) Ltd v. British Empire Exhibition (1924) Inc.*

Never-Stop Railway (Wembley) Ltd v. British Empire Exhibition (1924) Inc. [1926] Ch. 877
That case concerned the British Empire Exhibition at Wembley, in 1924. The year before, in 1923, the company running the exhibition, BEE entered into an agreement with Never-Stop Transit granting Transit the right to occupy so much land as might be reasonably necessary for the purpose of the construction, erection, equipment and operation of a Never-Stop Railway line in the grounds of the Exhibition. Transit then assigned the benefit of the agreement to Never-Stop Railway, which built a railway line. For about half its length, the line was carried on a viaduct supported by a number of massive concrete pillars. The foundations of these pillars, as well as of the rest of the track, were firmly embedded in the soil. After the exhibition ended, in October 1925, the BEE required Never-Stop to remove the railway and structures it had erected. There was no express provision in the agreement for the removal of the railway, but BEE argued that an obligation was to be implied. Lawrence J held in favour of Never-Stop. He said:

“Mr. Jenkins contended as a proposition of law that, apart from any express or implied agreement, if a freeholder grants to A. a licence to occupy part of his land for a purpose involving the erection on such land of a building for A.'s sole use during the currency of the licence, then, at the termination of the licence, A. is bound not only to remove himself and all his goods and chattels from the land, but also to take down and remove the building which he has erected. No authority in support of any such general proposition was produced; and, in the absence of any such authority, I decline to accept it as sound. In the case of landlord and tenant, it is well settled that, in the absence of an agreement to the contrary, any building erected by the tenant upon the demised land immediately becomes part of the land itself, and at the expiration of the lease reverts to the landlord. In such a case, unless the building has been erected in contravention of some stipulation in the lease, the landlord obviously has no right to compel the tenant to take it down and remove it. The relationship of licensor and licensee which existed here seems to me to present an a fortiori case.”

Although Lawrence J said that the point was “well settled”, in fact there is no other authority on the point. However, the decision seems right in principle. If a tenant installs a fixture and does not breach any covenant in doing so, and has not covenanted to remove it, then it is not surprising if he is entitled to leave it at the end of the term.

Express covenant to remove fixtures

Some leases and licences for alterations contain express covenants requiring the tenant to reinstate the premises and remove fixtures at the end of the term. They are of two types:

- Those that require reinstatement unless the landlord notifies the tenant in writing prior to the expiry of the lease that reinstatement is not required
- Those that require reinstatement only if the landlord serves notice

In the latter case, the service of a schedule of dilapidations requiring reinstatement will suffice: *Westminster City Council v HSBC Bank* [2003] 1 EGLR 62. If the obligation to reinstate arises under a licence, the schedule should refer to the licence. If it does not, the court will have to consider if a reasonable recipient would understand the schedule as referring to the licence. In *Westminster City Council v HSBC Bank* the court held in favour of the landlord on this issue.

There may also be an implied term that the notice must be served a reasonable time before the lease expires, so as to give the tenant time to carry out the work. However, in those cases where this issue has arisen, the courts have not accepted that implication.

Plummer v Ramsey (1934) 78 SJ 175

Four sub-leases each provided that the subtenant would paint during the last month of the tenancy. Clause 15 provided:

“The lessor may at his option elect that the lessee shall at the expiration or sooner determination of the said tenancy pay to the lessor the sum of ... in lieu of painting and decorating the said premises in the last year or at the sooner determination thereof, and upon the lessor notifying the lessee of such election the lessee shall pay to the lessor the said sum of ...”.

Branson J held that clause 15 did not specify any length of notice, and notice could be given at any time so long as the tenant’s obligation existed and the tenant was not in breach.

Scottish Mutual Assurance Society Ltd v British Telecommunications plc (Unreported decision of Anthony Butcher QC sitting as a deputy Official Referee on 18 March 1994).

A licence for alterations provided that the tenant “should reinstate the property to its original design and layout at the expiry of the Lease at its own cost should the Lessor reasonably so require.” A notice requiring reinstatement was served only 6 days before the lease expired. The judge held that the correct implication was that the tenant was entitled to a reasonable time after the expiry of the lease to complete the works, and not that the notice was invalid.

Covenant to yield up with vacant possession “tenant’s fixtures excepted” or “other than tenant’s fixtures and fittings”

This sort of covenant could mean either:

- “but the tenant is under no obligation to leave behind tenants fixtures if it wants to remove them”, or
- “but the tenant must remove all tenants fixtures”

Which is right will depend on the language and other provisions of the lease. *Dowding & Reynolds: Dilapidations* para 25- expresses the view that the second will not normally be the correct construction

Covenant against alterations

The installation of a fixture may constitute a breach of the covenant against alterations. Whether it will do so will depend on the terms of the covenant and the nature of the fixture. Some covenants against alterations allow the tenant to install internal partitions without consent. Further, the installation of trade fixtures will often not constitute a breach of a covenant not to make alterations.

Bickmore v Dimmer [1903] 1 Ch 158

There was a covenant in a lease that the tenant would not “make or suffer to be made any alteration to the said premises, except as herein expressly provided, without the consent in writing of the lessors first had and obtained.” The tenant carried on the business of a jeweller and watchmaker. He wanted to fix a large clock on the outside of the wall of the premises. He applied to the landlords for their consent to his doing this; but they refused to give it, and he then fixed the clock without their consent. The clock was about thirty feet above the ground. The clock was lighted at night by electricity. It was four feet in diameter. The clock was fixed to the stone wall of the premises by means of six iron bolts, which were bored into the stone to a depth of six inches. If the clock was taken down, it would be necessary to take out the stones in which the holes were bored and put in new stones. The works of the clock were inside the building, the hands of the clock being connected with them. The Court of Appeal held that the clock was not an “alteration”. It was necessary to interpret the covenant in a sensible way which allowed the tenant to carry on his business. *Vaughan Williams and Cozens-Hardy LJJ* held that the covenant only applied to alterations which affected the form or structure of the premises. *Stirling LJ* said that the covenant did not apply to anything fixed to the premises and convenient for the carrying on the business in a reasonable, ordinary, and proper way.

With a lease under seal, there is a 12 year limitation period for bringing a claim for damages for breach of the covenant against alterations. So even if the installation of fixtures is a

breach of the covenant, if the landlord's claim form is issued more than 12 years later, the claim will be time barred.

Covenant to leave in good repair and condition

Shortlands Investment Ltd v Cargill [1995] 1 EGLR 51

The lease contained covenants by the tenant to keep the interior of the demised premises and the Landlord's fixtures thereon properly cleansed and in good and tenantable repair and condition, and to yield up the demised premises with all Landlords' fixtures and additions thereto wires cables and lighting apparatus and pipes at the determination of the term in such repair and decorative condition as shall be in accordance with the covenants hereinbefore contained. The tenant left various pieces of incomplete or redundant pieces of equipment behind. Judge Bowsher QC said:

Air-conditioning/perimeter heating units: items 48 and 50.

... The defendants removed a heating unit and did not replace it. The only dispute is as to whether the tenant was liable to replace it. The unit is part of a heating system which without that unit is not effective in the room from which the unit was removed. If a tenant removes part of the premises or of the landlord's fixtures in those premises, the premises or the fixtures are out of repair. The tenants were not permitted by this lease to remove the landlords' fixture and they were under an express covenant to yield up the premises and the fixtures at the end of the term in good repair. The proviso which entitled the tenants to carry out internal non-structural works cannot sensibly be relied on to excuse the damage which has been done here. These items are proved.

Clips on heating unit: item 119.

This item, costed at £500, requires the removal of clips which the defendants fixed to the heating unit to hold cables installed by the defendants, but removed when the defendants vacated. They therefore serve no purpose at all any more. The defendants say that the clips are in good condition and there is therefore no disrepair. I reject that argument. The heating unit is the landlords' fixture. Leaving it with the redundant clips affixed to it is not leaving it in a good and tenantable state of repair or condition and there is therefore a breach of the covenants to keep in tenantable repair and condition.

Redundant ventilation ducts: items 122, 127, 136, 141.

These are ducts which the defendants installed to serve equipment, which was also installed by them. The ducts enable the equipment to be ventilated through grilles or vents cut into windows ... The defendants removed the equipment, but did not

remove the ducts which served the equipment. ... I take the view that the plaintiffs are entitled to the full sum of £5,150.

Redundant halon gas fire extinguishers: item 137.

This is a single item costed by both parties at £1,450 which the defendants dispute on the footing that, while it was installed by the defendants as fire-protection equipment ancillary to other equipment which the defendants have removed, the defendants are under no obligation to remove the fire-protection equipment. However, the fire-protection equipment is incomplete and therefore not in good and tenable condition. The equipment would not be acceptable to an incoming tenant. One should look at this matter more broadly than either party has done. The halon gas fire extinguishers are specialist pieces of equipment in a particular place in the building and there was only a remote possibility that an incoming tenant would want to position equipment in such a place as to find it useful to take over the redundant part of the fire-extinguishing equipment by purchasing those extra parts which would make it usable and placing new equipment under it. The question is not, 'Was this equipment left in good and tenable condition?' (as to which the answer would be, 'No', because it was not working) but, 'Were the premises as a whole delivered up in good and tenable condition?' to which the answer would be certainly 'No', because the premises were left with some redundant equipment in them which would have to be removed to make the premises usable. There was general agreement on the evidence that the redundant equipment was valuable. Whether its value was greater than the cost of removing it was not established to my satisfaction and the question is, in any event, irrelevant. There was no obligation on the plaintiffs to take on the role of scrap merchants when possession was up to them. I find this head of claim proved.

The Judge's treatment of the last item is interesting. He said that leaving redundant fixtures which need to be removed to render the premises useable was a breach of the covenant to leave the premises in good and tenable condition. *Dowding & Reynolds* para 25-41 argue that this was wrong. They say that the covenant is concerned with whether the premises are defective, and not with what the premises consist of. They suggest that the decision can be justified on a different basis - that leaving only part of a system in place meant that the system as a whole was not left in good and tenable condition. That is not, however, the basis on which the Judge decided the point.

Wincant Pty Ltd v State of South Australia [1997] 69 SASR 126

A 25 year lease of a new office building in Adelaide was granted in 1970 to the Minister of Works, to be used for the South Australian Health Commission. The building was leased with the offices in an open plan condition. The Commission made various alterations to the premises, including installing partitions, altering the layout of the lighting, and building various cupboards. The landlord consented to those alterations and imposed no conditions. The partition fit-out was not symmetrical and was obviously made for the particular purposes

of the Commission. The material used for the partitioning was dated. There was limited demand for this type of accommodation in the market at the expiry of the lease, and the parties agreed that unless the partitions and other alterations were removed, the premises would not be in a reasonably lettable condition. They also agreed that the partitions and alterations were tenant's fixtures.

The majority of the Supreme Court of South Australia (Doyle CJ and Matheson J, Olsson J dissenting), upholding the decision of the District Court judge, held that the tenant was obliged to remove the partitions and other alterations it had made at the end of the lease under clause 17 of the lease which provided:

“17. That the Tenant will at the expiration or other sooner determination of the said term peaceably yield up unto the Landlord all the said premises in good and substantial repair and condition reasonable wear and tear and damage by fire (except fire caused by the Tenant) storm explosion flood lightning earthquake the Queen's enemies shells or bombs excepted TOGETHER WITH all the appurtenances thereto belonging and all improvements and additions made to the said premises and all Landlord's fixtures and with the glass in all the windows whole and unbroken and the locks and keys door-fastenings electric light water and other fittings and conveniences thereto belonging in good order and condition and complete in every respect”.

In a powerful dissenting judgment, Olsson J held that, at common law, a tenant was entitled but not obliged to remove fixtures. There was no express obligation to remove fixtures in the lease, and none could be implied. He said:

“First, the Clause also requires the delivery up, in appropriate condition, of “all improvements and additions made to the said premises”, expressions which are wide enough to include tenant's fixtures remaining on the premises. Secondly, the express reference to landlord's fixtures does no more than recognise the fact that the tenant has absolutely no right to remove them in any circumstances, whereas it might well, in its discretion, elect to remove some or all of the tenant's fixtures - in which case it would be incongruous to include an unqualified covenant also to yield up all tenant's fixtures in good repair.

It is, in any event, a quantum leap to move from a proposition that the tenant may not be under a contractual obligation to maintain tenant's fixtures, so as to yield them up in good repair if left on the premises, to a situation that there is a term clearly implied in the lease to remove all tenant's fixtures on yielding up the premises. There is simply no suasive reason for making that leap. By operation of law the tenant's fixtures had, at time of installation, become portion of the “said premises”, subject only to the common law right of defeasance, if exercised.”

Dowding & Reynolds refer to that decision in para 25-42 and say “it is very doubtful to what extent it would be followed in England” (the 3rd edition was more circumspect: “it is not clear to what extent it would be followed in England”). The dissenting judgment of Olsson J might well be followed by an English court, although *Shortlands* in relation to the fire extinguishers gives support to the majority approach.