IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MR. JUSTICE JACOB)

CHANI 95/0243B

Royal Courts of Justice
Strand
London WC2

Tuesday 30 July 1006

B e f o r e:

THE VICE-CHANCELLOR
(Sir Richard Scott
LORD JUSTICE ROCH
LORD JUSTICE HENRY

GRAHAM CHARLES BOTHAM & ORS

Defendants/Appellants

- v -

TSB BANK Plc

Plaintiff/Respondent

(Handed down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

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MR. F MORAES (Instructed by Messrs. Meredith Smith & Pratt) appeared on behalf of the Appellants

MR. V R CHAPMAN & MR. C CANT (Instructed by Messrs. Belvederes, London WC2A 1HD) appeared on behalf of the Respondent

J U D G M E N T
(As approved by the Court)

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Tuesday 30 July 1996

LORD JUSTICE ROCH: This is an appeal from the judgment of Jacob J given on the 12th January 1995, in what the judge described as:

> "perhaps the last battle in a long running saga between the plaintiffs TSB Bank plc and Mr Graham Charles Botham."

Mr Botham was the owner of a flat which he mortgaged to TSB on the 18th June 1986. Arrears arose under the mortgage and, ultimately, on the 9th February 1993 the bank obtained a Writ of Possession. On the 23rd February 1994 that Writ of Possession was executed. On the 2nd March 1994 TSB obtained an injunction restraining Mr Botham from entering the flat.

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.

The Schedule to the Notice of Motion of the bank seeking a declaration that those items were fixtures to which they were entitled as mortgagees, listed 109 items. The judge held that all 109 items save for one, a wall mounted electric razor, were fixtures to which TSB as mortgagees were entitled. The judge did not consider each of the 109 items separately but dealt with them grouped into 9 classes, those classes having been agreed by counsel prior to the start of the hearing on the 12th January last year. On the 10th February 1995, Mr Botham appealed the judge's decision.

The subsequent history of these proceedings is that on the 24th March 1995, Lightman J made an order authorising the bank to sell the flat and the items which Jacob J had held were fixtures, on the

bank undertaking to account for the value of any items sold which were later held on appeal not to be fixtures. Applications for a stay to Jacob J and to this court failed. On the 27th April 1995, the flat was sold by the bank, realising £170,000 less than the sums owed by Mr Botham to the bank under the mortgage. Since that time the bank have served a statutory demand on Mr Botham and are seeking to have him made bankrupt. This has lead to numerous applications and appeals by Mr Botham which are not relevant to the present appeal.

The 9 classes under which the items were grouped were:

1. Fitted carpets, cut to size and kept in place by stretching devices, known as "gripper rods".

2. 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.

3. 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, it being accepted by Mr Botham's counsel that the fireplaces in which the gas fires were placed were themselves fixtures.

4. Curtains and blinds including a shower curtain in one of the two bathrooms. It was accepted by Mr Botham's counsel that in the cases of the curtains the matching pelmets were fixtures.

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

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

7. Mirrors and marble panels on the walls in the fitted bathroom. Mr Botham's counsel conceded that these were fixtures. This class does not feature in this appeal.

8. Kitchen units and work surfaces, including a fitted sink.

9. White goods in the kitchen, namely the oven, the dishwasher, the extractor, the hob, the fridge and the freezer. The judge found that the white goods were made to standard sizes and were removable.

The Grounds of Appeal are threefold. First, that the judge was wrong to refuse the appellant's counsel's application to adjourn the case. As a consequence of this refusal, it is said, the judge did not

receive expert evidence which would have assisted him in coming to correct decisions on the question of which items were and which items were not fixtures. Second, that the judge was wrong in law or erred in deciding on the evidence he did have, that many of the items were so annexed to the property or had been annexed for such a purpose that they became subject to the bank's mortgage. The third ground is directed to the costs order made by the judge and does not affect the substance of the appeal.

The first ground can be dealt with quite shortly. There had been a hearing before the judge on the 16th December 1994 when he had stood the bank's motion over until a date to be fixed, to enable the appellant to obtain the evidence he said he required. On the 22nd December, 1994, the Listing Officer fixed the date for the hearing as the 12th January 1995, that being consistent with the judge's direction that the matter should be listed before him as soon as possible after the commencement of the Hilary term. Information before us indicates that the appellant probably learned of the appointment before the Listing Officer only on the morning of the 22nd December. The appellant's mother faxed the Listing Officer that day, writing that the question of her son receiving Legal Aid and his choice of counsel had yet to be determined; that affidavits had still to be exchanged and that an exchange of affidavits might resolve many of the issues. On the 10th January 1995 Mr Botham wrote to the Bank's solicitors seeking to have the hearing put back one week, saying that the Listing Officer had indicated that the case could be fitted in during the following week if the bank agreed and the judge approved. The Bank did not give its consent to that postponement. Mr Botham was represented by counsel on the 12th January 1995 but was not present himself. The judge on the 12th January 1995 took the view that Mr Botham was guilty of deliberate delaying tactics and his application to adjourn on that day was yet another attempt to put off the day of reckoning. The information available to the judge entitled him, in my opinion, to be of that view. However, it does not appear that the judge had the exchange of correspondence which has been placed before this court. The power to adjourn is discretionary. The judge considered that Mr Botham had had ample time to obtain the evidence he said he needed and that, in any event, such evidence would be of doubtful and limited value in assisting the court to reach

proper decisions. Again, in my opinion, the judge cannot be criticised for reaching that conclusion on the material that was before him.

There is consequently no reason that I can see for saying that the judges' exercise of his discretionary power was clearly wrong on the material before him and I would reject this ground of appeal.

Whilst rejecting this Ground of Appeal, my view is that Mr Botham is entitled in the substantive appeal, to require us to approach the issues which arise on the basis that it is for the respondents as the bringers of the originating summons who successfully opposed his application for an adjournment, to establish that the items they claim were fixtures and to restrict the respondents, when seeking to establish their claim to the material before the judge which was evidence properly admitted under the rules.

The most helpful statement of the legal principles in this area of the law, in my opinion, is to be found in the judgment of the Court of Exchequer Chamber delivered by Blackburn J in the case of Holland -v- Hodgson [1872] LR 7CP 328 starting at page 334.

> "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 Wiltshire -v- Cottrell (1 E&B 674; 22LJ (QB) 177) 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. (Law Rep 3 Eq 382) Thus blocks of stone placed 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 shewing 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. (16 CB 637; 24 LJ (CP) 193) 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 shews it is only fastened as a chattel temporarily, and not affixed permanently as part of the land."

These principles have to be applied with the observations of Scarman LJ, as he then was, in Berkley -v- Poulett and Others [1977] 261 EG 911 at 913, in mind. At page 912 Scarman LJ identified the two tests as being:

> "(1) the method and degree of annexation;
>
> (2) the object and purpose of the annexation. "

At page 913 Scarman LJ said:

> "In other words, a degree of annexation which in earlier time the law would have treated as conclusive may now prove nothing. If the purpose of the annexation be for the better enjoyment of the object itself, it may remain a chattel, not withstanding a high degree of

> physical annexation. Clearly, however, it remains significant to discover the extent of physical disturbance of the building or the land involved in the removal of the object. If an object cannot be removed without serious damage to, or destruction of, some part of the realty, the case for its having become a fixture is a strong one. The relationship of the two tests to each other requires consideration. If there is no physical annexation there is no fixture. Quicquid plantatur solo solo cedit. Nevertheless, an object, resting on the ground by its own weight alone, can be a fixture, if it is so heavy that there is no need to tie it into a foundation, and if it were put in place to improve the realty. Prima Facie, however, an object resting on the ground by its own weight alone is not a fixture: see Megarry and Wade, p 716. Conversely, an object affixed to realty but capable of being removed without much difficulty may yet be a fixture, if, for example, the purpose of its affixing be that "of creating a beautiful room as a whole" (Neville J in In Re Whaley [1908] 1 Ch 615 at p 619. An in the famous instance of Lord Chesterfield's Settled Estates [1911] 1 Ch 237 Grinling Gibbons carvings, which had been affixed to a suit of rooms 200 years earlier, were held to be fixtures. Today so great are the technical skills of affixing and removing objects to land or buildings that the second test is more likely than the first to be decisive. Perhaps the enduring significance of the first test is a reminder that there must be some degree of physical annexation before a chattel can be treated as part of the realty."

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 instals 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 judge's directions to himself on the law were these: that the primary test whether an item is or is not a fixture is the degree of annexation of the item to the building. He cited Megarry and Wade on Real Property at page 732:

> "An article is prima facie a fixture if it has some substantial connection with the land or a building on it"

Then a little later:

> "A chattel attached to the land or a building on it, in some substantial manner, eg by nails or screws, were prima facie a fixture even if it would not be difficult to remove it. Examples in this category are a fireplace, panelling, wainscot and a conservatory on a brick foundation."

The judge then went on to direct himself that the second matter relevant to the issue was the purpose of the annexation of the item to the land or building. That consideration could in some cases render an item a chattel in law although it was attached to the land. The judge continued that the conventional test was whether or not the purpose of annexation was or was not to effect a permanent improvement

in the land or was merely to enable the owner of the chattel to enjoy it as a chattel. The judge then referred to the case of Leigh -v- Taylor [1902] AC 157 where valuable tapestries were displayed in the drawing room of a mansion house by being stretched over canvas and tacked to the canvas which in turn was stretched over strips of wood and nailed to those strips of wood which in turn were nailed to the walls of the drawing room. The tapestries could be removed without doing any structural damage to the building. The House of Lords held that despite the degree of attachment to the walls of the house, having regard to the nature of the items and the purpose of their being placed as they were, the tapestries did not become fixtures. The judge continued by acknowledging a submission made by Mr Botham's counsel that the value of the item could be a relevant factor in the resolution of the question whether the item was or was not a fixture. Another relevant matter was whether or not the item could be removed without damaging the fabric of the building. Finally the judge directed himself that the purpose test was objective and could not depend on the particular intention of the person who had attached the item to the building.

The other authority to which the judge specifically referred during his judgment was that of Young -v- Dalgety plc reported on appeal in 1987 {1 EGLR 116. In that case the Court of Appeal did not disturb the decision of Mervyn Davies J that fitted carpets were fixtures, although the Court of Appeal did not expressly agree with that finding.

In my judgment, no criticism can be made of the judge's statement of the tests and principles which had to be applied in this case save for his reliance on the last authority in respect of fitted carpets. Nevertheless, it remains to be considered whether the judge correctly applied those principles and tests to the 8 classes of items which remained in dispute. As the evidence before the judge consisted of an affidavit and documents exhibited to that affidavit, this is a task which this court can perform as well as could the judge.

The evidence was the affidavit of Mr Campbell with the schedule attached to it of the 109 items which were in dispute and the folder of photographs of the disputed items, exhibit RC 11. The judge relied on the description of the items and of the method by which they were attached to the building contained in the schedule. The schedule was attached to the affidavit of Mr Campbell, the bank's solicitor and is referred to in paragraph 52 of that affidavit. Order 41 Rule 5(1) provides that, subject to certain exceptions, none of which apply in the present case,:

> "An affidavit may contain only such facts as the deponent is able of his own knowledge to prove."

Rule 5(2) provides:

> "An affidavit sworn for the purpose of being used in the interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."

The schedule was not prepared by Mr Campbell, nor did he have knowledge of its contents. His affidavit did not contain statements of information or belief with the sources and grounds thereof. To be contrasted with the schedule in Exhibit RC 11, is the inventory RC 10 referred to in the same paragraph of Mr Campbell's affidavit which was prepared by a professional inventory taker, Catherine Williams, on the instructions of the Bank. Even in relation to that document Mr Campbell made no statement of information or belief. Neither the schedule nor the inventory were evidence because neither document was proved. No application was made to the judge to call evidence which would have proved the schedule. Had such an application been made, it would, no doubt, have lead to a further application for an adjournment by the appellant's counsel, which might have succeeded.

Mr Chapman invited this court to take account of the contents of the schedule on the basis that the failure to prove it strictly was an irregularity which this court could and should waive. I would not accede to Mr Chapman's proposal. To do so would be to allow the respondents to introduce fresh

evidence before this court, although they could not satisfy the tests in the well know case of Ladd -v- Marshall. To permit the respondents to use the contents of the schedule as evidence would be particularly unjust, in the light of their successful opposition to the appellant's counsel's application to Jacob J for an adjournment. They chose to insist on the matter being heard on the 12th January last year on the evidence then available. In my view they must be confined in this court to that evidence.

On the other hand the photographs were agreed. They are coloured photographs and show clearly the items they are intended to show. It is those photographs which represent the admissible evidence before this court, and the admissible evidence before the judge on which these disputes had to be resolved.

Applying the principles which I have sought to identify and taking account of what can be seen in those photographs certain classes of items can, in my judgment, safely be found to be fixtures.

I have no hesitation in agreeing with the judge that Groups 5 and 6,the bathroom fittings namely the taps, plugs and showerhead together with the towel rails, soap dishes and lavatory roll holders which are all the items listed under the heading “Ironmongery” in the schedule of disputed items helpfully prepared by Mr Chapman, the Bank's counsel for the purpose of this appeal, are fixtures.

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.

The third group about which I have no doubt is Group 8, the kitchen units, including the sink. These are illustrated in various photographs but particularly in photographs between pages 199 and 207. Again in my judgment 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 that the leaving of a pattern of tiling which is unlikely to be of use if different units had to be installed.

The seventh group of items, the marble panels and mirrors in the principal bathroom were conceded by Mr Botham's counsel before the judge to be fixtures and Mr Moraes for Mr Botham in this appeal, accepts that that concession was rightly made.

This leaves Groups 1 to 4 and 9 of the original list of groups that is to say the fitted carpets, Group 1, the light fittings, Group 2, the four gas fires, Group 3, the curtains and blinds Group 4, and the white goods in the kitchen Group 9. The items in those Groups are also illustrated in the photographs. For example there are curtains shown at pages 139, 144 and 150. The fitted carpets are shown in many of the other photographs which also demonstrate other items for example the gas fires. The white goods in the kitchen are shown at pages 202 to 207 of the folder of photographs.

I would allow the appeal with regard to the fitted carpets and the curtains and blinds i.e., Groups 1 and 4. 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.

With regard to Group 2, the light fittings, Mr Moraes for Mr Botham, conceded that two of the light fittings recessed into the ceilings shown in photographs 129 and 138 were fixtures. 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. Thus I would hold that items 6, 7, 16, 31, 32, 41, 42, 55, 69, 79, 92 and 96 in Mr Chapman's schedule were not fixtures and allow the appeal in respect of those items.

Group 3 were the gas fires. 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 on the evidence which was available to the judge and is available to us. Items 9, 19, 35 and 72 as described in Mr Chapman's schedule, were not shown by the admissible evidence to be fixtures.

This leaves the final group, Group 9 the white goods in the kitchen. They are, using Mr Chapman's schedule,

item 101 the gas hob;

item 102 the extractor fan unit;

item 103 a wall fitting holding a cordless electric carving knife, spare blade and a rechargeable torch,

item 104 a freezer fitted under the worktop,

item 105 an oven fitted into the kitchen units,

item 106 an integrated dishwasher,

item 107 an integrated washing machine and dryer and

item 109 a refrigerator fitted under the work top.

There is no photograph of the refrigerator but there are photographs of the other seven items.

Many of those items were made by a single manufacturer, Neff. The judge said that whilst the kitchen units and sink were manifestly fixtures, the white goods he had found to be the most difficult items he had had to decide. He found that they were manufactured to standard sizes, they were fitted into standard sized holes and that they were removable. They were very probably expensive items, although he had no direct evidence of their value. He held them to be fixtures because:

> "They were there as part of the overall kitchen. If one were taking a flat on a lease one would expect them to be there. They were put in to be part of the kitchen as it stood. They were all physically fixed in, not only resting on their own weight, but being plumbed in, wired in and in most cases aligned with and perhaps to some extent abutted to, so that they could not be too easily removed, the remaining parts of the fitted kitchen. A fitted kitchen is a whole."

I differ from the judge on this group of items on the slender facts in this case. 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.

Consequently I would allow the appeal in respect of these group of items.

In summary I would refuse the appeal in respect of Groups 5, 6, 7 and 8 and allow the appeal in respect of Groups 1 to 4 and 9.

THE VICE-CHANCELLOR:

I have had the advantage of reading a draft of Lord Justice Roch's judgment. I agree with it.

This issue in this case is whether a number of articles of ordinary household use which, in varying degrees, were incorporated into Mr Botham's flat at 90 Cheyne Walk, Chelsea, had thereby become fixtures. The issue is one between mortgagor and mortgagee. If the articles had became fixtures they were part of the mortgage security held by TSB Bank plc., the Respondents to this appeal. If they were not fixtures, they remained free of the TSB mortgage. As a result of various interlocutory hearings and orders, the flat has been sold by TSB together with all the articles in issue. If any of them is held not to have been a fixture, Mr Botham is entitled to be paid by TSB, or, if Mr Botham is still indebted to TSB, credited by TSB, with a sum equivalent to their value.

We have been referred to a number of authorities in which guidance has been given as to the criteria to be applied in order to decide whether articles which have in some fashion been attached to land, or to a building, have lost their individual character and become in the eye of the law part of the land or the building itself.

Some of these cases have related to machinery in factories; several have related to ornamental articles without utilitarian value and placed on land or in a building for no purpose other than to gratify the aesthetic senses of the occupiers or owners. These authorities have established that two prime factors to be taken into account are the degree of permanency attending the manner in which the articles have been attached to the land or the building and the intention of the person who has attached, or has directed the attachment of, the articles to the land or the building.

Thus, in Hellawell -v- Eastwood (1851) 6 Ex. 295, a case concerning machines in a factory,

Baron Parke said:-

> "The only question, therefore, is, whether the machines when fixed were parcel of the freehold; and this is a question of fact, depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, integrè, salvè, et commodè, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, perpetui usus causâ, or in that of the Year Book, pour un profit del inheritance (a), or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel".

In Leigh -v- Taylor [1902] AC 157, a case concerning tapestries fixed to the walls of a house, Lord Halsbury L.C. said:-

> "Another principle appears to be equally clear, namely, that where it is something which, although it may be attached in some form or another (I will say a word in a moment about the degree of attachment) to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor".

And in Berkeley -v- Poulet; a decision of the CA reported in the Estates Gazette of 26 March 1977, which concerned various ornamental features of a stately home, Scarman L.J. said:-

> "As so often, the difficulty is not the formulation but the application of the law. I think there is now no need to enter into research into the case law prior to Leigh -v- Taylor [1902] AC 157. The answer today to the question whether objects which were originally chattels have become fixtures, that is to say part of the freehold, depends upon the application of two tests: (1) the method and degree of annexation: (2) the object and purpose of the annexation.
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> Since Leigh -v- Taylor the question is really one of fact. The two tests were explained in that case by the Lord Chancellor (see the report at pp 158 and 159), who commented that not the law but our mode of life has changed over the years; that what has changed is "the degree in which certain things have seemed susceptible of being put up as mere ornaments whereas at our earlier period the mere construction rendered it impossible sometimes to sever the thing which was put up from the reality". In other words, a degree of annexation which in earlier times the law would have treated as conclusive

> may now prove nothing. If the purpose of the annexation be for the better enjoyment of the object itself, it may remain a chattel, notwithstanding a high degree of physical annexation. Clearly, however, it remains significant to discover the extent of physical disturbance of the building or the land involved in the removal of the object. If an object cannot be removed without serious damage to, or destruction of, some part of the reality, the case for its having become a fixture is a strong one".

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.

In the present case all the articles in respect of which there is an issue are utilitarian. The function of taps on baths, hand basins and sinks is to provide a means for the ingress of water to the receptacle over which the tap is placed. However stylish and expensive taps may be, they are utilitarian objects intended to serve a specific purpose. Gas fires in a room are there to provide heat. Mr Moraes contended that the approach to the taps, the gas fires and the light fittings in the present case was to regard them as articles whose main function was to gratify the eye. They should be regarded in the same sense as pictures or tapestries fixed to the walls of a dwelling in order to be gazed upon with enjoyment. I am unable to accept that that is the right approach. Most functional articles in most houses, and in a so-called "luxury flat", such as the flat at 90 Cheyne Walk with which we are concerned, probably all the functional articles, will have been chosen by the occupiers or owners for reasons which include style and visual attraction. That circumstance will be of minimal if any significance, in my opinion, in considering whether or not the articles have become fixtures.

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 e.g. 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. In Mellhuish -v- BMI (No. 3) Ltd [1996] 1 AC 454, Lord Browne-Wilkinson said (at p. 473) that "... the intention of the parties as to ownership of the chattel fixed to the land is only material so far as such intention can be presumed from the degree and object of the annexation". The "degree" and the nature of the annexation can, and should, be the subject of direct evidence. The object of the annexation, on the other hand, will usually be a matter of inference from the nature of the article and the nature of the annexation.

In the present case there was no direct evidence of the nature or degree of the annexation of the articles in issue. I agree with Lord Justice Roch that the photographs, which were agreed by the parties, constituted the only admissible evidence before the court on this critical matter. The evidence constituted by the photographs can, naturally, be supplemented to some extent by the knowledge that each member of this or any court will have, in common with everyone else, of normal household appliances and functional articles such as fitted carpets and curtains. We know how taps are fixed to baths; we know that light fittings are screwed on to walls or ceilings and can be unscrewed; we know that curtains and carpets fade, wear out and are then replaced. Evidence of what is common knowledge does not need to be given.

I turn, therefore, to the groups of items referred to by Lord Justice Roch.

1. Fitted Carpets and Curtains

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.

2. Light Fittings

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. Save for the fittings recessed into the ceilings that were conceded to have become fixtures (photographs 129 and 138), I would allow the appeal in respect of the light fittings.

3. Gas Fires

I agree with and cannot usefully add to the remarks and conclusions of Lord Justice Roch on the gas fires. There was no admissible evidence justifying a conclusion that they had become fixtures.

4. The Bathroom Fittings

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. I agree that the taps and the other bathroom fittings in the flat at 90 Cheyne Walk should, on the evidence of the photographs, supplemented by common knowledge as to their permanency, be held to be fixtures.

5. The Fitted Kitchen Units

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.

6. The White Goods

Lord Justice Roch has listed the items falling under this head. I agree with the remarks and conclusions expressed by Lord Justice Roch to which I cannot usefully add.

I accordingly agree with the Order Lord Justice Roch has proposed.

LORD JUSTICE HENRY: I agree.

Appeal partially allowed. No order for costs below. Appellant to have costs of this appeal. Legal Aid Taxation.