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RESEARCH ARTICLE

The law of fixtures and chattels: recalibration, rationalisation and reform

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Abstract
This paper examines the law of fixtures and chattels which governs the circumstances in which items of personal property that are attached to land become part of that land. Whether a chattel has become a fixture is crucial in a range of contexts including when land is sold or mortgaged. However, the law of fixtures has long garnered a reputation for complexity and obscurity; a position that endures today. Through examination of historical accounts and decided case law, this paper explores the reasons for this reputation; identifies the central deficiencies and defects inherent in the law and argues that the existing approach is anachronistic, inconsistent and incoherent. Building on this, the paper concludes by proposing a new framework for rationalisation and reform which would bring long-overdue certainty and clarity to the law in this area.

Keywords: fixtures; chattels; property; property law

Introduction

This paper proceeds in three parts. In this first part, the law of fixtures and chattels is introduced and the place and importance of the legal principles for property law are explored. Part II, drawing on key case law, isolates the key deficiencies and defects in the operation of the law in this area and, finally, Part III proposes how the law can be rationalised and reformed through a new framework to govern the principles of fixtures and chattels. The law of fixtures and chattels[1] comprises the corpus of law which determines whether an item of movable, personal property brought onto land has become so attached to the land that it is properly to be regarded as having become part of that land. This is traditionally captured by the Latin maxim *quicquid plantatur solo, solo cedit* (whatever is attached to the land becomes part of it) which is routinely proffered as the cornerstone or bedrock of the law in this area. Once designated as a 'fixture', an item loses its character as personalty and, in effect, is regarded as being subsumed within the land itself and 'annexed' to it. As this paper explores, this apparently simple distinction between fixture and chattel has, nonetheless, given rise to hundreds of years of confused and, at times, unhelpful case law, has vexed some of the greatest legal minds and, consequently, has failed to result in a clear or coherent legal 'test'.[2] Yet, the distinction is a key one in property law. The fixture/chattel divide can have significant consequences in disputes that arise when land is sold, or mortgaged, or, after a landowner's death, where parties tussle over who owns what. This is made all the more important by s 62 of the Law of Property Act 1925 which, described as a 'word saving provision', provides that, if no contrary intention is expressed, a

[1]On which see generally *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 9th edn, 2019) ch 22.
[2]See P Luther 'Fixtures and chattels: a question of more or less…' (2004) 24(4) OJLS 597; M Haley 'The law of fixtures: an unprincipled metamorphosis' (1998) Conveyancer and Property Lawyer 137.

conveyance of land is deemed to convey, 'all buildings, erections, *fixtures* … at the time of the conveyance'.[3] On sale of freehold land, for example, a disgruntled purchaser may seek to argue that particular items on the land amounted to fixtures and ought to have passed automatically to the new owner on conveyance under s 62 but were wrongly removed by the vendor. Questions also arise in the leasehold context as to when, and in what circumstances, fixtures can be removed from the land,[4] for example, where a tenant has attached objects to the leased premises during the life of the tenancy, the tenancy has come to an end or the land sold and dispute ensues as to ownership of the items.[5] There is, therefore, a need to be able to determine with precision and predictability whether a given item is or is not a fixture. If one reaches for the textbooks or to decided case law, it is common to see the words of Blackburn J given as the starting point for an enunciation of the modern law of fixtures and chattels. As Blackburn J in *Holland v Hodgson*[6] explained, '[i]t is a question which must depend on the circumstances of each case, and mainly on two circumstances … the degree of annexation and the object of the annexation'.[7] Blackburn J subsequently expanded on these words, refining and expanding his thoughts on these two 'tests':

> 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.[8]

Thus, the court is to deploy two 'tests' in determining the fixture/chattel status of an item; the former focusing on the degree or extent to which the item was annexed, attached, affixed to the land; the latter centring on inquiring as to the purpose and intention for which the item was so annexed. We are told, the question is ultimately one of fact and objective determination.[9] As is explored in the next section, however, navigation of these two apparent 'tests' has proved surprisingly confounding, and indeed clarity of exposition by the court has been severely lacking. Nevertheless, these two tests remain today as the applicable law.[10] Despite repeated references to the second purpose test as being the most decisive largely due to advances in technology which has made affixing and removing objects to and from land more straightforward,[11] both tests remain in place and are engaged by the courts, most recently endorsed by the Supreme Court in *Dill v Secretary of State for Housing, Communities & Local Government*.[12] In assessing the 'degree' of annexation, the court considers the extent of the connection between the item and the land; for example, whether the item is resting on the ground

[3]LPA 1925, s 62(1); this provision replaced s 6 of the Conveyancing and Law of Property Act 1881, which had a similar effect. Section 62 applies to all conveyances of land made after 31 December 1881: s 62(6); the Law of Property Act 1925, s 205(1)(ii) defines 'conveyance' as including, 'a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will…'

[4]This is known as the right to remove fixtures; see discussion in *Megarry*, above n 1, at [22-011]–[22-022].

[5]Specific rules and exceptions have developed in the law that allow trade, ornamental and agricultural fixtures.

[6](1872) LR 7 CP 328.

[7]Ibid, at 334.

[8]Ibid, at 335.

[9]*Riverside Park Ltd v NHS Property Services Ltd* [2016] EWHC 1313 (Ch), [2017] L & TR 12 at [33]–[34] per HHJ Saffman.

[10]See, for example, engagement of both tests in *Tower Hamlets LBC v Bromley LBC* [2015] EWHC 1954 (Ch), [2015] 7 WLUK 214.

[11]*Berkley v Poulett* [1977] 1 EGLR 86 at 89; see also *Hamp v Bygrave* [1983] 1 EGLR 174 at 177: 'the purpose of the annexation is now of first importance' per Boreham J; see also *TSB Bank plc v Botham* (1997) 73 P & CR D1 at D2.

[12]*Dill v Secretary of State for Housing, Communities & Local Government* [2020] UKSC 20, [2020] 1 WLR 2206 per Lord Carnwath at [40]–[44].

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by its own weight[13] or is freestanding, the means by which it is physically fixed to the land whether by screws or nails, the ease of removal of the item and whether this would involve demolition or damage to the item.[14] As Scarman LJ famously noted in a leading case in this area, *Berkley v Poulett*, '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'.[15] Under the purpose of annexation test, the court considers whether the item is only annexed to the land for its better enjoyment as a chattel or whether to improve the land permanently. If the former, the item remains a chattel; if the latter, it has become a fixture. Again, this is an objective question and, we are told, is not concerned with the subjective intentions of the parties.[16] As Lord Clyde explained in the House of Lords in *Elitestone Ltd v Morris*, 'the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there'.[17] Further clarification (and perhaps complication) was added to the fixture/chattel distinction in *Elitestone*, which signalled a move towards adding a third categorisation to our understanding here, namely where an item is found to be 'part and parcel of the land itself'. Under this tripartite categorisation, as noted in Woodfall's *Landlord and Tenant*,[18] an object brought onto land may be classed as: (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects falling into categories (b) or (c) are treated as being part of the land; those in category (a) are not. This third category was explored and applied in *Elitestone* itself,[19] where the House of Lords held that a bungalow resting on land by its own weight atop concrete pillars and which could only be removed with serious damage to the building, formed 'part of the land itself' and was not a chattel. Generally applying in cases concerning buildings, this third category and the language of 'part of the land' is preferred to 'fixture' in this context because, as Lord Lloyd explained, 'in ordinary language one thinks of a fixture as being something fixed to a building. One would not ordinarily think of the building itself as a fixture'.[20] Having laid down a summary of the existing law, the next part of this paper now moves to explore how the courts have struggled in navigating and explicating the fixture/chattel distinction and the deficiencies, defects and complexities in the law that this judicial treatment has both revealed and indeed promulgated.

1. Judicial treatment of the law of fixtures and chattels: confusion, defects and deficiencies in the law

The law of fixtures and chattels has received heavy criticism for being, 'complex and confusing',[21] 'elusive' and for lacking uniformity and clarity.[22] Indeed, it is almost 20 years since Luther explored the unstable, historical foundations of our law.[23] There has, however, been little close scrutiny of the key deficiencies beyond broader statements of dissatisfaction with the established principles[24] and less attention still paid to probing the problems in the modern law. This section fills this gap, drawing on decided case law to identify the central failings and defects in the governing principles. It is argued that there are four key deficiencies which can be identified, each warranting further examination and, taken together, make the case for reform in the area. These are:

[13] *Holland v Hodgson*, above n 6; *HE Dibble Ltd v Moore* [1970] 2 QB 181; *Deen v Andrews* (1985) 52 P & CR 17.
[14] *Elitestone Ltd v Morris* [1997] 1 WLR 687; *Elwer v Maw* (1802) 3 East 38.
[15] *Berkley v Poulett*, above n 11, at 88 per Scarman LJ.
[16] *Deen v Andrews*, above n 13, at 22.
[17] *Elitestone Ltd v Morris*, above n 14, at 698 per Lord Clyde.
[18] *Woodfall, Landlord and Tenant* (looseleaf) vol 1, para 13.131.
[19] This classification has also since been applied in *Chelsea Yacht & Boat Co Ltd v Pope* [2000] 1 WLR 1941 and in *Wessex Reserve Forces & Cadets Association v White* [2005] EWHC 983 (QB), [2005] 5 WLUK 519.
[20] *Elitestone Ltd v Morris*, above n 14, at 690 per Lord Lloyd.
[21] Luther, above n 2, at 597.
[22] Gray and Gray *Elements of Land Law* (London: Butterworths, 3rd edn, 2000) at 45, 51.
[23] Luther, above n 2, at 597.
[24] See, for example, Haley, above n 2.

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(a) inconsistent and conflicting case law;
(b) the development of confused, complex and arbitrary analytical factors and indicators;
(c) the problematic concept of 'architectural design';
(d) the lingering uncertainty as to the role of intention.

(a) Inconsistent and conflicting case law

When Blackburn J expounded his two 'tests' in *Holland v Hodgson* for determining the status of fixtures and chattels, these principles, in theory at least, appeared straightforward, clear-cut and defensible. One test would look to the degree of annexation; the other to the purpose for that annexation. As Blackburn explained with apparent ease:

> [B]locks of stone placed one on 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 top of each other … would remain chattels …[25]

So far, so ostensibly simple. Indeed, one can readily conjure examples to which Blackburn J's tests can easily be applied. Thus, as Blackburn himself noted, 'the anchor of a large ship must be very firmly fixed in the ground…yet no one could suppose that it became part of the land'.[26] However, as the jurisprudence has developed in this field and the courts have been called upon to apply the law to evermore complex scenarios and have sought to make practical sense of Blackburn's 'tests', inconsistency and incoherence have abounded and the apparent clarity and lucidity of Blackburn J's words have been lost. The result is a body of case law that betrays contradiction and is difficult to reconcile (and at times even explain), which ultimately undermines rationality in the law.

A number of case law examples will exemplify this incoherence and, in particular, serve to highlight how, despite applying the same legal tests and in very similar factual matrices, quite divergent results are reached. Thus, in *Holland* itself, wool looms in a worsted mill fixed with nails to wooden beams and in plugs driven into holes in stone were held to be fixtures and therefore part of the land. This was so despite evidence that they could be easily removed without causing any damage to the building. As Vaughan Williams LJ put it in *Re De Falbe*, 'one must ask oneself, is there any more fixing than was necessary for the enjoyment of the chattel as such?'[27] Engaging this question, why, then, could it not be said that the looms in *Holland* were chattels on the basis that they were affixed merely so as to be enjoyed and function as looms? In *Re De Falbe* itself,[28] tapestries stretched over canvas, fastened by tacks and affixed to wood that covered the walls were held to be chattels on the basis that they were affixed purely for 'ornamentation'. Yet by contrast, in the renowned case of *Lord Chesterfield's Settled Estates*,[29] Grinling Gibbons carvings, which had been affixed to a suite of rooms, were held to be fixtures. In *Hulme v Brigham*,[30] printing machines weighing 9–12 tons and standing by their own weight in a factory were held to be chattels and, so too, in the recent 2015 case of *Fahstone Ltd v Biesse Group UK Ltd*,[31] was an enormous and hefty computer-controlled woodworking machine held to be a chattel despite being bolted to the ground with 54 bolts resin-grouted into the floor. All these decisions engaged Blackburn J's two tests and yet, in similar or comparatively similar factual contexts, the final determination of fixture/chattel status varied widely.

As any student of property law will recount, many of the cases in the law of fixtures and chattels involve (perhaps curiously) garden statues, figures, vases and sundials. Again, here, there is a deep

[25] *Holland v Hodgson*, above n 6, at 335 per Blackburn J.
[26] Ibid.
[27] *Re De Falbe* [1901] 1 Ch 503, at 536.
[28] A case which reached the House of Lords as *Leigh v Taylor* [1902] AC 157, [1902] 2 WLUK 24.
[29] *Lord Chesterfield's Settled Estates* [1911] 1 Ch 237.
[30] *Hulme v Brigham* [1943] KB 152, a case involving a dispute between a mortgagor and a mortgagee.
[31] *Fahstone Ltd v Biesse Group UK Ltd* [2015] EWHC 3650 (TCC), 164 Con LR 121.

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incongruity and contradiction in the approach of the courts and the decisions are difficult to reconcile. This lack of clarity is seen most clearly in case of *Berkley v Poulett*,[32] where Scarman LJ offered an important but regrettably confused and chaotic account of the competing impetuses in the law. As Scarman explained, where there was no physical annexation of an item, there could be no fixture, yet he added that where there was 'a high degree of physical annexation' the item could still, nevertheless, amount to a chattel. In addition, an object resting on the ground by its own weight could be a fixture if it was 'so heavy that there [was] no need to tie it into a foundation'.[33] With due respect to Scarman LJ, as a summary of the law, this is a seriously confused picture. Ultimately, the court in *Berkley* found that paintings set into oak panelling, a large statue of a Greek athlete and a sundial resting on its own weight were chattels, all affixed for their enjoyment as chattels and not to permanently improve the land. Yet, there are many further cases which, on very analogous facts, reach polar opposite conclusions. In sharp juxtaposition to *Berkley*, in *Hamp v Bygrave*,[34] garden ornaments and stone fittings resting on their own weight were held to be fixtures. Again, in *D'Eyncourt v Gregory*,[35] lion statues, vases and stone garden seats resting on their own weight were, in contrast to *Berkley*, held to be fixtures on the basis that they formed part of the architectural design of the property. This concept of 'architectural design' is deeply problematic and is explored further below. Taken together, *Berkley, Hamp* and *D'Eyncourt* demonstrate the erratic and unpredictable nature of decision-making on the dividing line between fixtures and chattels.

This same judicial muddle is discernible when contrasting case law on temporary or semi-temporary structures. Thus, in *Elitestone*, the House of Lords drew a distinction between mobile homes (which were easily moved) and the bungalow in issue which, despite resting on its own weight on concrete pillars, was held to be a fixture as removal was only possible by causing damage to the structure. The Court of Appeal incidentally, applying the same 'tests', had reached precisely the opposite conclusion.[36] Similarly, in *Spielplatz Ltd v Pearson*,[37] a chalet resembling a bungalow on a naturist site in St Albans was held to be 'part of the land' as moving it would require dismantling it into several parts. In *Webb v Frank Bevis Ltd*,[38] a temporary structure comprising a corrugated iron shed resting on concrete was also found to be a fixture. Yet, by contrast, in *Billing v Pill*,[39] an army hut, constructed in seven sections resting on a concrete foundation, the floor of the hut being secured by bolts into the concrete, was deemed to be a chattel. So too, in *Gilpin v Legg*,[40] beach huts were held to be chattels on the basis that they were removable even if this would result in some degree of damage to the huts. In the same vein, in a series of recent cases concerning houseboats, the court has found in favour of chattel status. In *Chelsea Yacht & Boat Co Ltd v Pope*,[41] a houseboat was attached using ropes to the river wall, by way of anchor to the river bed and connected (on the houseboat owners' evidence) 'permanently' to pontoons in order to receive electricity, gas and water supplies. The Court of Appeal held the boat to be a chattel as it could be removed from its position and disconnected from its utility supplies. In *Mew v Tristmire Ltd*,[42] the Court of Appeal again held that boats, converted into landing craft and resting on wooden platforms driven into the harbour bed, were chattels. The Court of Appeal held that the boats could be removed without being unduly dismantled or destroyed and therefore did not enjoy the characteristics of fixtures.

[32] *Berkley v Poulett*, above n 11.
[33] Ibid, at 913 per Scarman LJ.
[34] *Hamp v Bygrave*, above n 11.
[35] *D'Eyncourt v Gregory* (1866) LR 3 Eq 382.
[36] *Elitestone Ltd v Morris* [1995] 7 WLUK 361.
[37] *Spielplatz Ltd v Pearson* [2015] 2 P & CR 17.
[38] *Webb v Frank Bevis Ltd* [1940] 1 All ER 247.
[39] *Billing v Pill* [1954] 1 QB 70.
[40] *Gilpin v Legg* [2017] EWHC 3220 (Ch).
[41] *Chelsea Yacht & Boat Co Ltd v Pope*, above n 19.
[42] *Mew v Tristmire Ltd* [2011] EWCA Civ 912; see also *Hale v Watt* LTL 11/3/2016, where a houseboat was also found to amount to a chattel.

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What becomes clear is that cases with ostensibly equivalent or, in many examples, near-identical facts are routinely argued and decided in an entirely divergent fashion, reaching diametrically opposed conclusions when outwardly applying the same legal principles and 'tests'. Many of these cases and the differential treatment of almost indistinguishable facts defy rational or coherent explanation. How can it be defensible that beach huts and houseboats connected to utility supplies are chattels yet sheds, army huts and bungalows resting on their own weight are fixtures? How can it be that statues and garden items are deemed chattels in *Berkley* but fixtures in *D'Eyncourt*?

It is contented that a key reason for this indeterminacy in the case law is the uneasy interaction and unresolved tension between Blackburn J's two 'tests' of object and purpose. Presented as cumulative by Blackburn J, in practice the importance of each test vacillates wildly from case to case and the tests are seen to bend and shift depending on the nature of the factual matrix before the court, resulting in something of an unpredictable, analytical soup. Hundreds of years ago, as demonstrated by judgments such as *Herlankenden's Case*[43] and *Cave v Cave*,[44] the degree of annexation (later formulated into Blackburn's first test) took centre stage as the decisive and determining feature of the status of objects on land. This position was echoed and, to some degree, remains dominant in Australian jurisprudence in cases such as *Australian Provincial Assurance v Coroneo*[45] and *Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning Pty Ltd*,[46] where the Australian courts have indicated that the degree of annexation of an item alone can give rise to a presumption of fixture status subject to the availability of evidence that the affixer intended the object to be a chattel.[47]

However, incrementally, as Amos & Ferard noted in their *Treatise on Fixtures* in 1827,[48] this predominant and almost exclusive emphasis on the extent of physical annexation has become viewed as too severe and outmoded, 'inequitable in its principle and injurious in its effects'.[49] In England, then, if not to the same extent in Australia, this has led to a recognition that the degree of annexation is not, of itself, a reliable determinant of fixture/chattel status. An early example of this shift towards greater consideration of the purpose for which items were brought onto land can be observed in the comments of Smith MR in *Monti v Barnes* in 1901:

> The question … 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 to be a mere chattel.[50]

As Scarman LJ famously noted in *Berkley v Poulett*, '[A] degree of annexation which in earlier time the law would have treated as conclusive may now prove nothing … 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'.[51] Thus, whereas historically the affixment of an item made it almost impossible to sever from the realty, today, this is not the case – even seemingly permanent structures and buildings can be dismantled and reinstalled in a new location with little or no damage being caused, thus making it nonsensical to ascribe too great a weight to the means by which items are fixed to land. In light of Scarman's comments, one may have assumed, then, that the degree of annexation test was no longer relevant or perhaps even inapplicable. Yet, notwithstanding Scarman's words, and looking at decided case law as explored above, it seems the court has evidently not discounted the degree of annexation test in any real sense. This does not mean, however, that the test is engaged consistently or rationally.

[43] *Herlankenden's Case* (1589) 4 Rep 62a.
[44] *Cave v Cave* (1705) 2 Vern 508.
[45] *Australian Provincial Assurance v Coroneo* (1938) 38 SR (NSW) 700.
[46] *Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning Pty Ltd* [1984] VR 947.
[47] Ibid, at 951 per Kaye J.
[48] Amos & Ferard *Treatise on Fixtures* (1st edn, 1827).
[49] Ibid, p xxi.
[50] *Monti v Barnes* (1901) 1 QB 205 at 207 per Smith MR.
[51] *Berkley v Poulett*, above n 11, at 913.

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In fact, as we have seen, much uncertainty springs from the court's handling of 'degree of annexation', with some cases insisting on physical annexation before a fixture can exist,[52] others demonstrating that fixtures can exist without any physical attachment to the land at all,[53] and the continued importance of the degree of annexation in the Australian courts. Indeed, in England, in recent cases such as *Elitestone*, *Chelsea Yacht & Boat Co* and *Mew,* paradoxically, the degree of annexation test appears to be making a significant revival, again taking centre stage in the court's determination. The resulting position is incoherent: in some cases (and in some jurisdictions including Australia), the degree of annexation still appears crucial; in other cases, it appears to fall away in deference to analysis of the purpose of annexation. How one is to assess the precise role and significance to ascribe to the degree of annexation test is therefore yet another problematic area in the law and represents a key deficiency in the current legal framework.

(b) The development of confused, complex and arbitrary analytical factors and indicators

A second key deficiency in the law of fixtures concerns the raft of complex and often arbitrary analytical principles and factors that have emerged in the case law. As the court has attempted to navigate the choppy waters of the fixture/chattel divide, judges have along the way sought to devise a series of analytical indicators to assist them in their determinations.[54] These factors take the form of evidential presumptions and considerations to be explored subject to the particular facts of the case. These indicators are not expressed in Blackburn J's classic enunciation of the two 'tests' for fixture status but rather have developed piecemeal through subsequent struggles by the court to interpret and apply the law. It is argued here that this development of a catalogue of, at times, complex, contradictory and artificial factors has only further obscured the legal principles, muddying the waters and rendering judicial reasoning less robust and less defensible. Key factors and considerations divined by the court include: an assessment of the relationship of the parties;[55] whether any customary practice exists in the context or as regards the object in dispute;[56] the difference in the value of the item if it is considered to be part of the land or not part of the land;[57] the physical weight of the item and whether this has any bearing on annexation;[58] and any damage that removal of the item would cause to the item itself or the land.[59] The difficulties caused by these 'analytical indicators' is seen most explicitly, however, in the contemporary case law. The decision which perhaps best captures and epitomises this problem is that of *Botham v TSB Bank plc*.[60] It is contended that *Botham* represents the high-water mark of the artificiality and arbitrariness extant in the law of fixtures and provides further evidence of the unsatisfactory nature of the law in this area.

In *Botham*, the Court of Appeal was called upon to determine the status of a wide range of everyday, household items ranging from carpets, to light fittings, to curtains, to bathroom accessories, mirrors, kitchen units, to kitchen appliances. In considering these items, Roch LJ who delivered the leading judgment, highlighted four 'indicators' which he said guided application of the two 'tests' in the law of fixtures.[61] First, if the item is essentially ornamental, it will in most cases indicate a chattel. There would be items, however, such as kitchen or bathroom tiles, which despite being ornamental would be fixtures. Secondly, the ability to remove items without damaging the fabric of the building will indicate a chattel. If easily removed, it will be a chattel but there would, said Roch LJ, be examples such as integrated hobs and cookers set into worktops which would nevertheless be fixtures.

[52]See dicta of Sir Richard Scott in *Botham v TSB Bank plc* (1997) 73 P & CR D1.
[53]See discussion of *D'Eyncourt v Gregory* above.
[54]See Haley, above n 2.
[55]*Norton v Dashwood* [1896] 2 Ch 297.
[56]*Bain v Brand* (1876) AC 762.
[57]*Re Whaley* [1908] 1 Ch 615.
[58]*Berkley v Poulett*, above n 11.
[59]*Spyer v Phillipson* [1931] 2 Ch 183; *Elitestone Ltd v Morris*, above n 14.
[60]On which, see Haley, above n 2, at 137–144.
[61]*Botham*, above n 11, at D3.

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The lifespan of the item would also be considered. The longer the lifespan, the greater the likelihood of it being a fixture. Thirdly, the nature of ownership of the item would be a further indicator. If the item is owned by the land owner, it will be a fixture; if it belonged to another (eg bought on hire purchase), it will be a chattel. Fourthly, the person who installed the item was a highly relevant factor. It the item was installed by a builder, it would likely be a fixture. If the item was installed by a carpet fitter or curtain supplier or the occupier herself, it would likely be a chattel.

These four 'indicators' presented in *Botham*, almost as presumptions of fixture or chattel status, mark a new turn in the law of fixtures. Not before *Botham* have such explicit analytical factors and presumptive 'indicators' been expressed in a judgment in this area. Much of Roch LJ's reasoning was also new to the law here. Indicators four and five, for example, represent a surprising departure and expansion in the considerations to be taken into account when determining the fixture/chattel distinction. Focusing on ownership of the item and third party rights over those items was a novel intervention in *Botham* and a stark move beyond the narrower terms of Blackburn J's tests as explored by the House of Lords in *Elitestone*. Roch LJ referred to the 'modern judicial gloss' placed on Blackburn J's tests in the law of fixtures. However, it is submitted that Roch LJ's approach far exceeds a gloss and takes the law into entirely new territory which, sadly, only serves to further demonstrate the artificiality of the principles in this area. Taking Roch LJ's indicators to their logical conclusion would lead to the absurd position that items installed by a builder in a newly-constructed house would seemingly automatically become fixtures yet those installed later by another contractor would remain as chattels. This is, respectfully, irrational. Given the courts have gone to great lengths to re-emphasise that the determination of an item's status is an objective test,[62] it must be untenable to permit an inquiry into the identity of the item's installer. For hundreds of years, there has been a near-incontestable understanding that the focus should be on the nature of the item itself as opposed to who put it there.[63] Enquiries into third party rights in the objects and slender distinctions between builders and contractors appear unhelpful, distinctly subjective in nature and arbitrary.

Reflecting on the decision in *Botham*, Haley wrote that, '[i]t is, indeed, a sad commentary of the present law that it requires the Court of Appeal to decide whether mundane, household items, such as a sink and cooker, are fixtures and chattels'.[64] Certainly, the conclusions reached by Roch LJ in *Botham* do little to soothe concerns at the incongruity, artificiality and capriciousness of the law. Exemplifying the arbitrariness of the decision, the Court of Appeal concluded that while soap dishes, toilet roll holders and towel rails were to be regarded as fixtures; carpets, curtains, gas and electric fires and kitchen appliances were chattels. These determinations are hard to justify and even harder to explain, highlighting both the problems inherent within the law but also its limits. A legal framework that is unable to be deployed rationally and convincingly in the everyday world of soap dishes and kitchen sinks is surely a framework not fit for purpose. In truth, many of the determinations made in *Botham* could readily have been decided in the opposite direction. There are, for example, strong grounds for arguing that soap dishes should be regarded as chattels and built-in fireplaces as fixtures. The result, post-*Botham*, is a ragbag, a farrago of analytical 'indicators', factors and considerations, many with little provenance or practical utility. This is perhaps unsurprising given the inconsistency already present in the jurisprudence in this field. In short, what we see in *Botham* is the culmination of years of decided case law that 'lacks coherence and clarity'[65] under which the law of fixtures collapses into a series of often conflicting considerations operating chiefly at the impulse of the judge determining the case. This has serious consequences for legal certainty and predictability in the law, especially for those advising clients of their rights.

[62]This 'objective determination' is explored and challenged discussed below.
[63]See for example *Viscount Hill v Bullock* [1887] 2 Ch 482; dicta Lord Clyde in *Elitestone Ltd v Morris*, above n 14, at 698.
[64]Haley, above n 2, at 144.
[65]Ibid.

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(c) The problematic concept of 'architectural design'

One concept that is particularly problematic in the law of fixtures is that of the so-called 'architectural design' or 'aesthetic scheme'. As noted earlier in this paper, an item which would otherwise appear to constitute a chattel may, nevertheless, be afforded fixture status if it is found to form part of a composite, architectural design or aesthetic scheme. Naturally, this renders crucial the ability to determine with precision the circumstances in which such a scheme will arise. It is argued here, however, that the boundaries of this concept of 'architectural design' are deeply ambiguous and far from certain.

Authority for this approach comes from the case of *D'Eyncourt v Gregory*, where lion statues, vases and stone garden-seats resting on their own weight and not otherwise fixed to the land were held to be fixtures as they, 'formed part of the original design of the house' and were therefore 'irremovable'.[66] Lord Romilly MR expanded on his thinking:

> [The items] appear to me to come within the category of articles that cannot be removed. I think it does not depend on whether any cement is used for fixing these articles, or whether they rest by their own weight, but upon this – *whether they are strictly and properly part of the architectural design* for the hall and staircase itself, and put in there as such, as distinguished from mere ornaments to be afterwards added. There may be mansions in England on which statues may be placed in order to complete the architectural design as distinguished from mere ornament; and when they are so placed, as, for instance, they are in the cathedral of Milan, I should consider that they could not properly be removed, although they were fixed without cement or without brackets, and stand by their own weight alone.[67] (emphasis added)

Lord Romilly noted other examples such as the stone of a mill which is so much a part of the mill that it is to be regarded as part of the land itself. This designation of 'architectural design' is, however, problematic and its boundaries unclear. Indeed, in an earlier edition of *Megarry & Wade*, the authors noted in a footnote corresponding to *D'Eyncourt*, 'the authority on this decision is not great'.[68] Serious doubt was also expressed as to Lord Romilly's reasoning by Rigby LJ in *Re De Falbe*:

> As regards *D'Eyncourt v Gregory*, I do not hesitate to say that I feel great difficulty, owing in part to what seems to me the very inconclusive reasoning of Lord Romilly MR in support of his decision. Another instance which was referred to by Lord Romilly, namely, the upper grindstone of a mill, does not appear to me to be at all applicable. In my opinion the ruling as to [architectural design] in that case cannot be maintained, unless it should turn out that there was some proof (of which I can find no trace in the report) that the house was fitted to the tapestry rather than the tapestry to the house, and in that way (although I do not say that even then it would be clear) it might be possible to support the decision, on the ground that the tenant for life who affixed the tapestry had shewn a plain intention to add it irrevocably and permanently to the house … the decision in *D'Eyncourt v Gregory* is not right … I must hold that the decision ought not to be followed.[69]

The issue was again revisited in the case of *In Re Whaley*[70] in which Neville J considered the status of tapestries which were fixed to the walls, nailed onto wooden frames themselves fastened with screws, and a picture of the Queen painted directly onto wood. Neville J concluded that the tapestries and paintings amounted to fixtures as they were part of a general scheme of decoration and not fixed for their better enjoyment as chattels. Neville J explained:

[66] *D'Eyncourt v Gregory*, above n 35, at 391.
[67] Ibid, at 396.
[68] Megarry & Wade, *The Law of Real Property* (3rd edn, 1966).
[69] *Re De Falbe*, above n 27, per Rigby LJ at 531–532.
[70] *In Re Whaley* [1907 W 3120], [1908] 1 Ch 615.

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> [The] decoration originally was intended to give the whole room the appearance of an Elizabethan room, that the whole decoration was in unison, and that the ornaments were inserted, primarily, for the purpose of creating a beautiful room as a whole.[71]

The decision of *In Re Whaley* was cited with approval though went entirely untested by Scarman LJ in *Berkley v Poulett*.[72] In *Kennedy v Secretary of State for Wales*,[73] a carillon clock housed in a Grade II listed building and resting by its own weight was considered to be a fixture as it was held to form part of the design of the historic house and of the tradition of the building that the clock bells would ring out across the local countryside.

The decisions of *D'Eyncourt*, *In Re Whaley* and *Kennedy* can, however, be contrasted sharply with decisions exploring the concept of 'architectural design' in more contemporary contexts. Thus, in *Botham*, so-called 'white goods' including fridges, dishwashers and washing machines were held to be chattels even though it might conceivably have been argued that they formed part of an overall 'kitchen design'. The most recent pronouncement on the issue is *London Borough of Tower Hamlets v London Borough of Bromley*.[74] This case is interesting for several reasons: first, it provided an opportunity to revisit the law on the classification of ornamental objects resting on land by their own weight; secondly, the facts were quite distinct from the standard fixture/chattel cases in that it concerned a work of *public* art – a bronze sculpture 'Draped Seated Woman' by Henry Moore which had been placed in 1962 by London County Council in the grounds of the far-from-affluent Stifford Estate which comprised three tower blocks in Stepney, East London. This was not, therefore, a case involving tapestries or oak panelling or statues of lions in large country estates; and finally, this case offers the latest discussion of the law surrounding 'architectural design' in a decision involving a work of sculpture. Dispute broke out between two councils, with Tower Hamlets wishing to sell the sculpture, and Bromley London Borough Council (as successor to London County Council) opposing the plan and wanting the sculpture to remain in place 'for the benefit of the people of London'. For our purposes, the key question was whether the sculpture was a chattel or a fixture. Norris J in the High Court engaged a strict and narrow reading of the 'architectural design' concept, noting that:

> The sculpture is an entire object in itself. It rested by its own weight upon the ground and could be (and was) removed without damage and without diminishing its inherent beauty. It might adorn or beautify a location, but it was not in any real sense dependant upon that location … in my view the sculpture's power was no greater in Stepney than in Cologne or Melbourne. The sculpture did not form part of an integral design of the Stifford Estate; and whilst it must have been intended to confer some benefits upon the residents of the Stifford Estate it conferred equal benefits upon anyone passing along Jamaica Street or Stepney Green.[75]

The sculpture was therefore a chattel. On one view the result is surprising. One might have thought that, given the purpose for which the art was placed on the land, namely to enhance the enjoyment of the property and for the benefit of the public, that this might have been influential in persuading the court that the sculpture was 'part of the land' and thus a fixture. The finding by Norris J that the sculpture conferred 'equal benefit' on those passing by it as those residents of the estate and that this was indicative of a chattel is curious and, it is argued here, wrong. We are told that the degree and purpose of annexation tests are to be engaged objectively, yet the court in *Tower Hamlets* focused on the particular audience for the art as a relevant consideration. In none of the leading case law is the visibility

[71] Ibid, at 619–620.

[72] *Berkley v Poulett*, above n 11, at 89.

[73] *Kennedy v Secretary of State for Wales* [1996] EGCS 17.

[74] *Tower Hamlets LBC v Bromley LBC*, above n 10; on which see M Iljadica 'Is a sculpture "land"? London Borough of Tower Hamlets v London Borough of Bromley [2015] EWHC 1954 (Ch)' (2016) Conveyancer and Property Lawyer 242 at 250.

[75] *Tower Hamlets LBC v Bromley LBC*, above n 10, at [17].

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and audience for the object cited as a relevant factor. The key distinguishing feature that sets apart the case of *Tower Hamlets* from *D'Eyncourt*, *In Re Whaley* and *Kennedy* is its public-facing context in that it concerned a piece of art installed in a *community* setting for the enjoyment of the wider viewing public. Given the public nature of the sculpture, it is argued that this should have been examined more closely by the court as going to the issue of the overall 'architectural design' and purpose for the installation. Documentary evidence before the court highlighted London County Council's intention that placement of the sculpture was 'not for purely aesthetic reasons … [but] part of the policy to improve Londoners' lives and living standards. The new Stifford Estate was a prestigious site and a suitable prestigious sculpture was therefore required to put in it'.[76] The conclusion by the court, then, that the item was a chattel could be construed as overlooking the wider social, public benefits of art installations. There are other implications of the judgment. The decision that the art was not part of the design scheme of the property would suggest that only those objects installed at the time buildings are constructed are able to satisfy the 'architectural design' test. Yet, there is no evidence that this was the case in *D'Eyncourt* nor in *In Re Whaley* or *Kennedy*. An argument can, therefore, be made that the 'test' for architectural design was applied far too restrictively in *Tower Hamlets* and could usefully be expanded to embrace a wider conception of aesthetic schemes in the public realm in order to reflect the public benefits such art can bring when placed with a broader social purpose in mind.

Taken together, on decided case law, the boundaries of the 'architectural design' principle are far from clear. It appears the principle is available only in scenarios concerning private land, private objects and private spaces as opposed to public art installations placed for wider community consumption. How could this be justified? Perhaps this public-private distinction and differentiation of treatment might be explained, for example, on policy grounds that public art should be capable of removal, relocation and re-installation to ensure its maximum impact and to increase and spread public access to and enjoyment of the art as opposed to private items fixed to private land with a necessarily narrower audience. Nevertheless, this is vital discussion and analysis that should have been aired and explored by the court in *Tower Hamlets* yet was absent. Without such clarity and exposition, the very concept of 'architectural design' or aesthetic scheme is left to discriminate inexplicably and problematically between public and private spaces and contexts.

Stepping back and reflecting on the assembled case law around 'architectural design', it appears that what has developed is a rather precarious, anachronistic and antiquated principle according to which ornamental objects placed in historic houses, Grade-listed mansions in privately-owned spaces may be classed as fixtures but those installed in the public sphere in less auspicious and less affluent public locales will not attract the same protections. In essence, the principle has become one closer to the ambitions of Heritage England or the National Trust in its application: focused on preserving a 'beautiful room' (*In Re Whaley*) or maintaining archaic traditions (ringing of the bells in *Kennedy*) rather than a principle that is strictly defensible by reference to wider property law conceptions. Even if one were to accept that mass produced, fungible objects (such as white goods in *Botham*) do not form part of an aesthetic scheme as compared to, say, rarer, bespoke, ornamental items (such as tapestries or clocks), how can we explain *Tower Hamlets*? It is striking that the principle was regarded as inapplicable in relation to a rare, ornamental sculpture in the public context in *Tower Hamlets*. Seemingly, the law does not extend to public art and housing estates. In short, the line between a finding of, on the one hand, an architectural scheme and, on the other hand, chattels that are attached to land merely for their own 'better enjoyment as chattels', is a narrow and unsatisfactory one. This is something Lord Romilly MR himself acknowledged in *D'Eyncourt*:

> I admit that the distinction between such statues as are added by way of ornament, and such as belong to an architectural design, and form part of the design itself, is extremely thin, and that in

[76]Ibid, at [10], citing the words of Pat Hardy, curator of painting, prints and drawings at the Museum of London.

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> many cases it would be difficult to distinguish them, unless it were done in an arbitrary manner, so closely might one run into the other.[77]

It is hard to justify why a piece of art that is carefully selected, placed in a public setting to accrue benefits for those on the land as well as the wider public cannot be viewed as falling within a specific design scheme when wall-mounted tapestries in a single room can. Again, we see the law of fixtures drawing indefensible distinctions, struggling to adapt to modern society and to new contexts just as it failed to provide credible answers to the status of everyday items in *Botham*. This severely undermines the 'architectural design' principle, a principle that the authors of *Megarry & Wade* and even Lord Romilly MR himself doubted.

(d) The lingering uncertainty as to the role of intention

A final area for discussion is the ongoing and vexed question of the role of intention in the court's determination of the fixture/chattel divide. Despite judicial pronouncements, this remains a highly contested and problematic issue. The matter was inevitably sparked by the words of Blackburn J himself who, in his formulation of the two 'tests' in *Holland*, made several references to considering the intention behind the object and purpose of any annexation:[78]

> 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 considered as part of the land, *the onus of shewing that they were so intended* on those who assert that they have ceased to be chattels.[79] (emphasis added)

Any confusion in this area appears to have been sown by Blackburn J and, despite judicial statements since, the matter continues to rumble on and present difficulties for the clarity of the law. As Luther has examined, tracing the pre-*Holland* case law, there are scant references to intention present in the earlier decisions of the court and those that do exist relate to case law or aspects of cases that are not directly concerned with the law of fixtures.[80] Questions as to the role of intention therefore appear to have been transplanted afresh into the law expressly through Blackburn J's words. In fact, Blackburn J even sought to explain Lord Romilly's decision in *D'Eyncourt* on the basis of intention, noting, '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*',[81] a case in which Lord Romilly expressly did not use the word intention in determining the fixture question. As Luther observes:

> The difficulty with Blackburn J's broad formulation of intention [is that] in his apparent desire to make the law seem more logical and coherent, Blackburn J made an over-general statement which increased the potential for uncertainty and confusion.[82]

Blackburn J's invocation of intention has resulted in a series of attempts by the court to 'clarify' the precise ambit of intention in the law of fixtures. A first serious attempt was offered in *Hobson v Gorringe*,[83] where a dispute arose as to whether an engine bolted and screwed to the mill floor was a chattel or a fixture. There was an agreement in writing between the parties and even a metal plate attached to the engine making plain the item belonged to the claimant. Despite this and contrary

[77] *D'Eyncourt v Gregory*, above n 35, per Lord Romilly MR at 392–393.
[78] *Holland v Hodgson*, above n 6, per Blackburn J at 334–335.
[79] Ibid, at 335.
[80] Luther, above n 2, at 615.
[81] *Holland v Hodgson*, above n 6, per Blackburn J at 335.
[82] Luther, above n 2, at 617.
[83] *Hobson v Gorringe* [1897] 1 Ch 182.

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to the agreement reached, the court held that the item was a fixture and passed to the mortgagee as it was annexed to the land. The agreement was not relevant to the status of the engine. As AL Smith LJ explained, intention should be assessed objectively:

> Lord Blackburn, when dealing with the 'circumstances to shew intention' was contemplating and referring to circumstances which shewed the degree of annexation and the object of such annexation … not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and [another].[84]

Gorringe was applied by the House of Lords in *Melluish v BMI*,[85] and notably endorsed in *Elitestone v Morris* where, again, the House of Lords disregarded subjective assumptions and an inferred agreement between the landowner and bungalow occupier as to separate ownership of the bungalow. As Lord Lloyd held, the agreement did not impact on the legal status of the bungalow:

> The decision of the House in *Melluish* put beyond question, the intention of the parties is only relevant to the extent that it can be derived from the degree and object of the annexation. The subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of the freehold.[86]

The effect of Lord Lloyd's dictum is that not only would the court not have regard to express agreements between the party attaching the chattel and the land owner but even inferred or implied agreements or any assumptions existing between the parties would be discounted. Lord Lloyd's words have subsequently been applied in *Wessex Reserve Forces & Cadets Association v White*,[87] *Spielplatz v Pearson*[88] and in *Riverside Park Ltd v NHS Property Services Ltd*.[89]

To what extent, then, can it be argued that the issue of intention continues to vex the law of fixtures? There are three key grounds here. First, despite repeated statements that the question of fixture and chattel status is a matter of *objective* determination, there are case law examples which appear, in practice, to fly in the face of this assertion. This is observed most notably in the architectural design cases where it is impossible to argue that the court confined its analysis to a purely objective account. How can the cases such as *D'Eyncourt*, *In Re Whaley* and *Kennedy* (all explored above) be explained except by acknowledging that the court made reference to the subjective intention underlying the architectural designs? In other words, in all three cases, in order for the court to satisfy itself that the items (tapestries, painting and a clock) were connected to their respective buildings not purely as ornamentation but as part of an architectural design and thus part of the land, the court intuitively considered the subjective motivations underlying those designs. The court could, of course, have confined itself to an entirely objective examination by asking, for example, what would a reasonable bystander have understood from the attachment of the items to the land? Or, alternatively, would a reasonable bystander have considered a particular item to form part of an architectural or aesthetic scheme? While this objective approach might be criticised for its potential for unpredictability and artificiality, adopting such an approach would nevertheless have remained faithful to the court's earlier rejection of subjectivity. Instead, the court's analysis reached beyond a solely objective assessment and extended into an inquiry of matters of pure subjectivity such as the wishes and desires of those creating the architectural aesthetic (*D'Eyncourt*), the ambition and intention to ensure a themed and 'beautiful room' (*In Re Whaley*) and the local traditions of hearing the ringing of the bells (*Kennedy*). Such an

[84]Ibid, at 193.

[85]*Melluish v BMI* [1996] AC 454.

[86]*Elitestone*, above n 14, at 693; for a discussion of this case see H Conway '*Elitestone Ltd v Morris*' (1998) Conveyancer and Property Lawyer 418 at 426.

[87]*Wessex Reserve Forces & Cadets Association v White*, above n 19.

[88]*Spielplatz Ltd v Pearson*, above n 37.

[89]*Riverside Park Ltd v NHS Property Services Ltd*, above n 9.

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assessment is distinctly subjective in nature and runs counter to the apparent rejection of subjectivity espoused in *Melluish* and *Elitestone*, casting doubt on the rationality of those assertions.

Secondly, as Luther has argued, even if one were to accept or approve of the rejection of subjective intention as expressed in *Melluish* and *Elitestone*, such a rejection nevertheless can be construed as doing 'considerable harm to Blackburn J's formulation if an express agreement cannot be taken as evidence of a party's intention, whereas nuts and bolts can be'.[90] Here, Luther is referring specifically to the case of *Gorringe* itself, where priority was given to the nature of the annexation (with nuts and bolts) over the express agreement as to ownership entered between the parties. It might be argued that Blackburn J's classic formulation of the 'tests' in the law of fixtures and the logic of his analysis is heavily undermined, and arguably fairness in the law is compromised, if express agreements such as this are ignored. Blackburn J in *Holland* noted how intention may sometimes run counter to and even contradict assumptions that might otherwise be made based on physical attachment. However, whether or not there is such a conflict, one might ask where is the harm in ascribing weight to express or inferred agreements entered with eyes open between consenting, informed adults aware of the legal consequences? Surely, recourse to such evidence of intention provides further (and arguably a firmer) basis for determining the status of the items than is observed in much of the inconsistent case law; the courts grappling often to make sense of how easily an item might be dismantled or how robustly it be fixed to the ground. Are these not questions for determination by experts and engineers rather than jurists? It is contended that the court might meaningfully engage with subjectivity as an additional evidential tool as part of its wider, contextual analysis in reaching a settled view of the status of an item. This may serve to increase the rationality and predictability in the law and offer a more stable, transparent basis for justifying the court's conclusions.

Thirdly, and building on the above, looking outside England one can find support from other Commonwealth jurisdictions for taking a different approach to intention, departing from that espoused in *Melluish* and *Elitestone*. In Australia and New Zealand, the suggestion has been raised that parties' subjective intentions ought to be taken into account when determining if an item has become a fixture, especially where there is no third party involved in the dispute.[91] The thrust of the argument is that, if no third party exists to be prejudiced by an agreement reached between two parties going to the issue of the status of the item, why should this agreement not be given full effect and contribute to determination of the issue? In support of this view, Tipping J in the New Zealand case of *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd*,[92] remarked that:

> [T]he advantage of a wholly objective … approach is that this is all that will ordinarily be apparent to a third party not having had any dealing with the owner of the realty or the owner of the chattel. [This approach] … need not necessarily apply when a question arises between the landowner and the person claiming that the item has remained a chattel. Those persons may regulate the issue between them as they see fit by contract or otherwise.[93]

Similarly in Australia, in *Ball-Guymer v Livanes*,[94] a case concerning construction of an office inside a warehouse, the court found that the plaintiffs were entitled to erect and remove the office as it amounted to a chattel. The court was heavily influenced by the subjective intentions of the parties as evidenced from the licence agreement they had reached. Peter Butt, who has advocated in Australia for a greater role for subjective intentions in this area, argues:

[90]Luther, above n 2, at 618.

[91]An example of a third-party dispute would be sale of land where dispute arises as to the status of an item attached to that land.

[92]*Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22.

[93]Ibid, at 29.

[94]*Ball-Guymer v Livantes* (1990) 102 FLR 327.

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> While private agreements concerning the intended status of an item as chattel or fixture are not permitted to prejudice the interests of third parties, it is difficult to see why the courts should discount the parties' actual intentions where no third parties are involved.[95]

More recently, in the Australian case of *National Australia Bank Ltd v Blacker*,[96] Conti J acknowledged the approach in *Elitestone* as to objective determination but noted the argument for greater engagement with subjectivity:

> Despite this, there are some modern authorities which would leave room for recourse to actual and hence subjective intention. This may be more accurately limited to the extent that it would assist the Court to determine the level of permanence or temporariness for which the item is intended to remain in position and the purpose to be served by its affixation or annexation: see *NH Dunn Pty Ltd v LM Ericsson Pty Ltd* (1979)… observations of O'Connor J in *Reid v Smith* [1905] HCA 54 … and Walsh J in *Anthony v The Commonwealth* (1973) 47 ALJR 83… it may well be that there will be some scope in future litigious disputes which will require a closer examination of [Butt's] argument.[97]

Although there is a degree of tentativeness in these suggestions for engagement of subjective intentions, there is a long-standing and growing debate as to the defensibility of the prohibition on consideration of subjective matters. In many cases, especially those where evidence is short as to the purpose of annexation of an item, it is difficult to understand why the court should not have regard to any agreement reached between the parties as part of its wider analysis of the facts of the case. This is not to suggest that the agreement of itself can alter, in law, whether the items is properly to be regarded as a chattel, fixture or part of the land but rather the agreement can provide crucial evidence from which a court can discern the status of these items. In *Botham*, for example, there was no direct evidence of the nature and degree of annexation of the items. Surely anything which might support the court in its determination is to be welcomed. In view of the energy in this debate in New Zealand and Australia, this matter remains a live one and is yet another example of the continuing vagaries and unsettled nature of the law of fixtures. Having outlined four key deficiencies in the law, this paper now moves in its final part to propose a new framework to govern the principles of fixtures and chattels which, it is argued, redresses these defects.

2. A new framework for the law of fixtures and chattels

As this paper has demonstrated, the current law of fixtures and chattels is incoherent, inconsistent and unpredictable. Determinations as to whether an item attached to land is a chattel or fixture are often arbitrary, artificial or reasoned on a confused or ambiguous basis. In particular, the uneasy interaction and unresolved tension between the degree and purpose of annexation tests has resulted in a body of inconsistent case law and legal principles that have been described as 'unsatisfactory, unclear and unduly cumbersome'.[98] In short, the law in this area, long regarded as problematic, is anachronistic and requires reform. As Luther has explored at length,[99] the historical foundations of the law of fixtures are shaky and the assumptions underlying Blackburn J's classic formulation of the two 'tests' for fixture status are open to significant challenge. Even the ancient Latin maxim *quicquid plantatur solo, solo cedit*, said to be the foundation stone of the law in this area, on close reading of the authorities, is revealed to have a questionable provenance, only a loose and somewhat dubious connection with our

[95]P Butt 'What is a fixture?' (1997) 71 ALJ 820 at 821.
[96]*National Australia Bank Ltd v Blacker* (2000) 179 ALR 97.
[97]Ibid, at [12].
[98]Ibid.
[99]Luther, above n 2, at 597.

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law and is of little practical utility.[100] The maxim has been stretched and adapted by the common law to such an extent that it is barely recognisable from its Roman Law origins. Yet, until now, there has been no clear proposal for a way forward that addresses these concerns. In this part, a proposal is offered for the development of a new framework to govern the law of fixtures and chattels that offers certainty, clarity and coherence and sits in sharp contrast to the current approach.

This paper has explained that the deficiencies and defects in the law of fixtures spring chiefly from the amalgam of complex, often conflicting and confounding 'tests' and analytical factors, presumptions and indicators taken into account by the courts. In proposing a new approach to the law, therefore, the central ambition is to streamline, simplify and clarify the applicable legal principles to overcome the identified defects of the current regime. With that in mind, what is proposed is a stripped-back, readily-understood and easily-applied model designed to remove much of the indeterminacy of the existing 'rough and ready mechanism'.[101]

The proposed new framework discards Blackburn J's two 'tests' and the myriad of analytical 'indicators' and replaces them with an overarching presumption that all items brought onto land prima facie amount to chattels. This presumption would be a heavy but rebuttable one and, if rebutted, an item would then be regarded as a fixture and part of the land. The presumption of chattel could be rebutted on two principal grounds. First, the presumption could be rebutted by adducing evidence of an agreement (express, implied or inferred) between the parties as to the ownership and status of the item. Secondly, the presumption could be rebutted if the court was satisfied that it would be unreasonable or inequitable to allow removal of the item from the land. Under this new framework, the uneasy tension between the object and purpose of annexation tests that has bedevilled the law of fixtures for almost 150 years would be banished; the panoply of artificial indicative factors engaged by the court would be jettisoned, the principle of 'architectural design' rendered unnecessary and the long-running debate as to the role of subjective intentions finally settled. Under the new framework, the starting point would not be the object or the purpose of annexation – unhelpful considerations such as items 'resting by their own weight' and conceptions such as instalment for 'better enjoyment' would no longer be operative – instead, the starting point would be the rebuttable presumption of chattel. The uncertainty of the swathe of unpredictable and inconsistently-applied factors would give way to the clarity and simplicity of a presumed departure point of chattel status. In many instances, disputes could begin and end at this stage, bringing much needed clarity and coherence to the law. If cases did proceed to the rebuttal stage, one or both grounds of rebuttal could be explored.

Rebuttal on the first ground by reference to an agreement would involve adopting the approach of Peter Butt and suggestions in the jurisprudence of New Zealand and Australia. The result would be to reverse the authority of the English and Welsh court in *Melluish* and *Elitestone* and the apparent prohibition on adducing subjective intentions. Instead, examination of the parties' subjective intentions would be permissible in order to inform the court's determination of the status of an item. As a consequence, the ongoing contestation seen in the case law as to whether or not subjective intentions are pertinent would be resolved in the affirmative. Under the new framework, the subjective intentions of the parties would be relevant and could be adduced as evidence of the status of an item on land. If, for example, there was evidence of an agreement between the parties that an item was a fixture, and if this evidence was deemed credible by the court, the presumption of chattel would be rebutted and result in a finding that the item was a fixture. Provided the court was satisfied that the agreement between the parties was entered into freely without coercion or other vitiating factors, as Peter Butt has argued in Australia, adducing subjective intentions does not prejudice the parties but, rather, can strengthen and inform the court's decision. If the court was not satisfied that any agreement between the parties existed or could be inferred from conduct, the presumption would remain in place and the item would be deemed to be a chattel unless rebutted under the second ground.

[100]Ibid, at 598–600.

[101]Haley, above n 2, at 144.

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Under the second ground for rebuttal, the presumption of chattel would be displaced if the court – having considered the circumstances of the case, including the nature of the item, the intentions of the party who brought the item onto the land, and the impact of removal of the item on the object itself and on the land – is satisfied that it would be unreasonable or inequitable to allow the item to be removed. The court's determination would be highly fact-sensitive but focused on one central issue, namely, the unreasonableness or inequity of removal of the item. In so far as this central issue is defined and delimited, it is submitted, this enquiry obviates much of the obscurity and analytical messiness of the current law. By way of illustration, it might be unreasonable to remove an item that has been so fixed to the land as to become, in essence, part of the fabric or structure of the realty. It might be inequitable to remove an item on land on the basis of estoppel where assurances were made as to the nature or status of the item and those assurances were reasonably relied upon by another party to their detriment.

The proposed framework has the advantage of offering clarity yet flexibility. In contrast, a hard, irrebuttable presumption would be entirely unresponsive to the particular facts of each case and would cause injustice; so too would a starting presumption that items brought onto land were fixtures. A presumption of fixture would operate unfairly and disproportionately benefit landowners who, historically the wealthier and more powerful party (as opposed to, say, tenants), would be unjustly enriched through operation of a presumption of fixture which would mean items on land were de facto in their ownership. Thus, it is contended that the proposed heavy but rebuttable presumption of chattel strikes the appropriate balance between rationalising and streamlining the law yet without imposing a rigid and unjust rule. Endowing the court with the ability to admit evidence of subjective intentions, plus the safety-net provided by the potential for rebuttal of the presumption where its application would be unreasonable or inequitable, ensures the law of fixtures is rationalised and simplified yet maintains the scope for examination of the particularities of each individual case. It has the added benefit of avoiding that jumble of conflicting tests and analytical factors of the current law whilst still permitting the court to engage in a broad and case-sensitive examination of the factual matrix before it. Of course, one concern may be that the new framework would, in practice, involve slipping back into a consideration of the same factors and indicators so problematic in the current approach. However, respectfully, this view should be rejected. It is argued that, by starting from a position of a rebuttable presumption of chattel, the result is that many disputes would be disposed of more speedily at this presumption stage without the need for further enquiry – and without recourse to the deficiencies of the current regime. This would be the case, for example, where disputes arise as to the status of items on land yet there is no meaningful evidence available to the court going to the issue of whether the items are chattels or fixtures, as occurred in the case of *Botham*. Of course, there will always be difficult cases and one can conjure more vexed scenarios such as items retro-fitted into existing buildings, for example, light fittings, air conditioning units and smart or green energy improvements. Here, applying the proposed framework, the retro-fitted items would be presumed to be chattels. However, it is anticipated that the presumption would be rebutted either by evidence of an express, implied or inferred agreement between the parties (that the retro-fitting was intended to be a permanent part of the fabric of the building) or, alternatively, rebutted on the second ground: that, given the permanent nature of the retro-fitted items, it would be unreasonable to remove them. The point is a simple one: even when one conceives of more complex or thornier scenarios, they can still be analysed with precision and rigour through the proposed new regime.

In addition to the potential to significantly facilitate and expedite speedy resolution of disputes, a clear, starting presumption of chattel would furthermore serve as a powerful incentive to parties to record in writing the precise status of items brought onto the land and would provide a further motivation to be explicit as to which items are and are not included, for example, in any sale of land, when a tenancy agreement is reached or when buildings are retro-fitted. In short, the proposed framework will galvanise parties to better reflect on and record the status of items they bring onto land; stimulating an increase in and greater robustness of written agreements in relation to items on land. The effect will be to reduce the incidence of disputes over items on land and remove much of the inconsistency and

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complexity in the law. Finally, this would also allow practitioners the ability to advise their clients with greater confidence of the likely outcome if disputes were litigated.

How, then, would this new framework function, in practice? It is instructive to explore how the framework might be operationalised by considering the facts of *Botham*, a case this paper has argued represents the high-water mark of artificiality and absurdity in the law. Rather than fixating on unreasoned and unprincipled distinctions such as the objects' 'lifespan' or whether the items were installed by a builder or a contractor, all objects in *Botham* would, at the outset, be presumed to be chattels subject to evidence of contrary intention or if, in the court's assessment, it would be unreasonable or inequitable to remove them. On this assessment, toilet roll holders, towel rails and soap dishes would remain chattels (rather than the absurd finding of fixture status as seen in *Botham*). The presumption of chattel would not be rebutted in relation to these items as, first, there was no agreement between the parties or basis for inferring one on the facts of *Botham* and, secondly, it would clearly not be 'unreasonable' to remove these items from the land. However, fitted kitchen units and built-in sinks would be regarded as fixtures as the court would likely regard removal as unreasonable. The abandonment of the existing antiquated, anachronistic and arbitrary rules in favour of this new approach would have simplified the court's determination of the fixture/chattel issue in *Botham*, avoided irrational determinations (eg that a showerhead is a fixture) and injected much needed common sense and predictability into the law. The same would be true for the so-called 'architectural design' cases, which – as this paper has exposed – lack coherence and logic. The proposed framework would replace the problematic principle of 'aesthetic scheme' altogether. Were this framework to have been applied in, for example, the *Tower Hamlets* case, it would have sanctioned and opened up a fruitful examination of the subjective intentions of those who initiated the erection of the public art. This, in turn, would have allowed for a discussion as to why the object was erected, its public function and its intended community engagement. This evidence could have been the basis for rebuttal of the presumption of chattel and consequently have led to a finding that the sculpture was not a chattel as the court held in *Tower Hamlets* but was, in fact, a fixture – a far more defensible and common sensical result, it is submitted. Equally, the new framework would have the effect of reversing the decisions of *In Re Whaley* and *D'Eyncourt* – two of the most contested and maligned 'architectural design' cases – on the basis that the presumption of chattel would be engaged but not be rebutted on the case facts, meaning the items would have remained chattels. Many would accept this to be a more vindicable and rational outcome and would welcome the abandonment of the 'architectural design' concept that adoption of this new framework would messenger.

This paper has offered an analysis of the defects and failings of the current law of fixtures and chattels. In so doing, it has revealed the inconsistency and arbitrariness at the heart of decided cases applying the existing principles. Building on the problematic nature of the law, this paper has made the case that new thinking is required in order to simplify, clarify and rationalise the court's approach to fixtures and chattels. A new framework for governing the court's determinations of the fixture/chattel divide has been offered which, it is contended, responds to the existing problems in the law and provides a significant contribution to the reform that is sorely needed in this area.

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