A brief explanation and evaluation of the law on fixtures

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A brief explanation and critical evaluation of the law on fixtures

Introduction

English and Hong Kong land law distinguish between fixtures and chattels. A fixture is an item that has been brought onto the land but is treated as forming a part of the land. A chattel is an item that has been brought onto the land but which is not so treated. The practical effect is that a transfer (or any other type of dealing with land) will take fixtures with it. Title to the fixture passes automatically with title to the land. Title to a chattel, by contrast, does not pass with a transfer of title to the land; it remains in the same ownership as before. In other words, whether an item is a fixture or a chattel has proprietary consequences.

Thus, if an air-conditioning unit is a fixture then ownership of it will pass with ownership of the land to which it is affixed. If not, the seller of the land is free to remove it after sale of the land for it remains the property of the seller. Similarly, if it is a fixture then ownership of it will pass with any change in ownership of the land.

One would expect the law in this area to be settled and to yield simple and clear-cut answers to the question as to whether or not a particular item is part of the land or not. After all, the question has recurred hundreds or thousands of times a day for centuries and is of clear practical importance. This, however, is not the case. It is still not always possible to say with certainty whether or not an item brought onto the land is part of the land. This essay explains the relevant tests and some of the uncertainties surrounding them.

The tests

The tests in this area seek to identify the ‘objective intention’ of the party who brought the object onto the land. There are two tests. The first of these looks at the degree of annexation of the object to the land while the second looks at the purpose of annexation.1

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1 Holland v Hodgson (1872) 7 CP 328 at 334, per Blackburn J. The tests emerged rather suddenly in the nineteenth century as the industrial revolution and the commercial arrangements it generated gave special
Each test can play a part but the current tendency is to give greater importance to the purpose of annexation. The degree of annexation test looks at the physical connection to the land or to something else attached to the land that was undoubtedly a fixture. If the item in question is attached to the land in a particularly permanent way then it would be held to be a fixture. So, for example, if removing the item was likely to cause physical damage to the ground or the fixture to which the item in question was attached then it was likely to be found to be a fixture. It is not necessary, however, that the item should be affixed to the land before it can be considered a fixture; if the item is exceptionally heavy so that it is held very firmly in place by gravity alone then it might be a fixture. The purpose of annexation test asks a different question. It considers whether the item was brought onto the land for the better enjoyment of the land (in which case it is a fixture) or whether it was brought onto the land to be enjoyed in its own right (in which case it is a chattel).

*How the two tests interact with each other*

The purpose of annexation test complements the degree of annexation test: it does not supplant it or render it obsolete. The tests are used as indicators of the objective intention concerning the proprietary status of the relevant item. It is this objective intention that determines whether an item is a fixture or a chattel (whether it is part of the land or not). Haley argues that the degree of annexation test is useful both because a complete lack of annexation would be decisive and because the purpose of annexation is sometimes unclear.²

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Criticism of the tests

Even in modern times, there can be uncertainty as to whether or not quite common items are chattels or part of the land. This fact suggests that there is something unsatisfactory about the present state of the law. Haley argues that, despite a ‘veneer of principle’, the law lacks coherence and certainty. It is hard to disagree with him on this. The problem lies in finding a satisfactory alternative approach.

Objective intention

The objective intention is an intention that a third party (such as a potential purchaser) can determine through a physical inspection. It does not involve any consideration of any dealings entered into by a past or present owner nor does it involve any other kind of inquiry as to subjective intentions or states of mind of the current owner or the person who brought the item onto the land. This is consistent with Lord Wilberforce’s well-known description of proprietary interests in land:

> Before a right or an interest can be admitted into the category of property, or of rights affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

There are decisions that do appear to give weight to subjective intentions but it can be argued either that they are really considering a different question such as whether there has been any contractual dealing with the item or that they are simply inconsistent with authority.

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3 See, for example, the Court of Appeal decision in Botham v TSB bank plc (1997) 73 P & C.R.D. 1. See also the Hong Kong cases of Irene long v Pun Tsun Hang [1959] DCLR 192, Penta Continental Land Investment Ltd v Chung Kwok Restaurant [[1967] DCLR 22 and Orient Leasing (Hong Kong) Ltd v NP Etches [1985] HKLR 292. Different answers were given, on their own facts, to the question as to whether or not an air-conditioning unit became part of the land.


Elitestone

The law in this area was surveyed and clarified in the House of Lords decision in Elitestone Ltd v Morris. This case concerned a bungalow resting on concrete pillars which were attached to the ground. The bungalow was only attached to the pillars by gravity. The House of Lords confirmed that the search is for the objective intention concerning the item and that this intention is to be discovered in the light of the degree of and purpose of annexation tests.

Lord Clyde, however, that the fixture / chattel dichotomy is not always satisfactory when it comes to expressing the conclusion as to whether or not the item is part of the land. He said:

‘An unusual, although by no means unique feature of the present case is that the alleged chattel is the building itself. This invites the approach of asking whether it is real property in its own right. Apart from the considerations which I already mentioned it seems to me that it is proper to have regard to the genus of the alleged chattel.’

Two of the judgments pointed out that the fixture / chattel dichotomy might involve the use of artificial and misleading terminology: it is odd to talk of a house as being a ‘fixture’. Their Lordships indicated that the word ‘fixtures’ was now used in such different ways that it was better to avoid it; there was a danger of confusion because of the category of ‘tenant’s fixtures’. It is important to understand, however, that the House of Lords did not intend to say that the fundamental question concerned anything other than the discernment of the objective intention in the light of the degree and purpose of annexation.

The Recorder at first instance and the judges in the House of Lords were impressed by the fact that a visual inspection that the bungalow was not a temporary structure intended

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9 [1997] 1 W.L.R. 687 at 691, per Lord Lloyd of Berwick.
to be removed but was definitely there to stay. This impression was confirmed by the fact that you would destroy the bungalow if you tried to remove it. This was a strong indicator that it was not a chattel but that the objective intention was that it should be seen as being part of the land.$^{10}$

**Conclusion**

The law in this area is dominated by the degree and purpose of annexation tests outlined in *Holland v Hodgson*. These tests are applied with a view to determining the objective intention as to whether or not the item in question is part of the land. The outcome has long been expressed through a finding that the item is either a fixture or a chattel. *Elitestone* suggests that in some cases this terminology is apt to confuse and proposes that it sometimes makes sense to conclude that the item is part and parcel of the land. This is, however, merely a question of the terminology used to express the outcome; it does not affect the fundamental issues at stake.

The law is imprecise in a number of ways. First, what is the relationship between the degree and purpose of annexation tests? Second, in practice the tests fail to answer the everyday questions of lawyers and their clients. The problem is that there is no obviously superior legal rule that could be applied. As a result, lawyers will need to be alive to the problem and ensure that it is dealt with contractually.

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