Tenants' Fixtures & Fittings - M. Weatherhead

Papers and articles have been written over the years to address the problems which arise when dealing with claims which involve tenanted premises. The difficulties inevitably relate to the question of "fixtures and fittings" and whether items of expenditure are the responsibility of the tenant or the landlord. As the business of Loss Adjusting has become more commercial and competitive, these problems have become less easy to resolve and unfortunately the days to which Mr Ridley refers in his paper "Fixtures and Fittings" when such matters were decided between Adjusters over a cup of coffee, are long gone.

The world has moved on in the fourteen years since Des Curling updated Ridley's work in his paper, " A New Look at Fixtures and Fittings". There is a need for a review of the legal and insurance position - a document that the modern Loss Adjuster would find of practical assistance in dealing with these difficult claims. The lack of a comprehensive reference document was particularly evident following the IRA's bomb in Manchester in 1996, which affected a wide variety of tenanted premises, especially in the retail sector.

In this paper I hope to provide guidelines to Loss Adjusters by subdividing the problems into separate sections in order to enable a logical conclusion to be reached. No paper can give a definitive answer to every question that might arise in the world of landlords' and tenants' claims but applying the principles I have set out will give a solution which can be supported.

M. Weatherhead

Landlord & Tenant - Who Pays?

Insurance claims involving tenanted premises can be complicated. Difficulties usually arise in determining whether expenditure is the responsibility of the tenant or the landlord. These difficulties are overcome by answering four simple questions in sequence. This paper will set out what those questions are and the order in which they should be considered.

The first question is how an item should be legally defined - a chattel, fixture or permanent part of the land (an improvement) and how that definition determines whether an item can be removed from premises. - see The Legal Position

The second question is whether the legal position is modified by the law concerning Landlord and Tenant, as this is additional to the legal categorisation dealt with in the first section. - see Landlords and Tenants

Third, is whether the insurance policy, in the light of the answers to the first two questions, is likely to cover the Landlord's or Tenant's interest. If not, what should be looked for in the way of modifications or additions to a standard policy? - see Insurance

The final question is that of the terms of any lease which is in force and which, whilst not affecting the legal status of the item, might influence the insurance position. - see Leases

This paper deals with the various issues in these distinct sections, not only for the purpose of setting out a logical sequence of considerations, but also to enable reference to be made to individual sections, where a problem may relate only to one area.

The Legal Position

The legal position is driven by case law, although Statute may be relevant, especially when dealing with agricultural claims (The Agricultural Holdings Act 1986) or domestic tenancies (The Housing Acts). The case law goes back to the 16th Century in so far as it concerns what could and could not be removed from premises by interested parties. As

time has gone by the views of the courts have changed, particularly in the light of the Industrial Revolution, when investment in plant and equipment accelerated and occupiers were loath to leave behind machinery and equipment used in their business simply because their leases had expired and they were vacating the premises. In the interests of prosperity and wealth, the position has gradually been refined and the law now views things differently.

Every item under consideration will fall into one of three categories: chattel, fixture or improvement. The word fitting is often used in insurance policies but has no strict legal standing.

Almost any object which has its own identity can be categorised as a chattel. It is something you might pick up, sell or deliver to someone else - it exists in its own right.

A fixture is a chattel which has become part of the land, or more simply part of the premises, but which may be removable in certain circumstances.

An improvement is a chattel which has become a permanent and irremovable addition to premises.

Many disputes have concerned establishing the distinction between chattels and fixtures. It is easy to be misled by brief reports on the findings of court cases without full knowledge of the particular circumstances under consideration. Indeed, identical or very similar objects have, in different situations, been found to be either a chattel or a fixture.

The development of case law has led to the conclusion that there are two main tests to apply to determine whether an item is a chattel or fixture. These are:-

1. The method and degree of annexation
2. The object and purpose of annexation

The degree of affixation of an item was the primary concern of early legal cases. More recently, however, the purpose of affixation has become more important, to the point

where it is the main consideration and is therefore the dominant factor in deciding whether an item is a chattel or a fixture. This is illustrated by Hamp v Bygrave (1982) in which it was said that the question was whether the article was affixed "for the permanent and substantial improvement of the dwelling" or "merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel". Berkley v Poullet (1976) supports the view that a degree of annexation which the law would in earlier times have seen as conclusive in establishing whether something was a chattel or fixture may now prove nothing. "Today so great are the technical skills of affixing and removing objects to and from land that the second test [the purpose] is more likely than the first [the degree of affixation] to be decisive".

In order to determine whether an item is a chattel or a fixture, the purpose of bringing it on to the premises is more important than how well it was or was not fixed to the building. It is worth exploring this concept of purpose further, although this is by no means purely a modern development, as the case law has been shifting in this direction for the past hundred years.

An important recent case is that of TSB v Botham. This was heard by the Court of Appeal in July 1996 and overturned some aspects of the judgement given in the lower court. It is a case involving a dispute between mortgagor and mortgagee as to what had become part of the freehold relative to various items Mr Botham had installed in his house after he purchased it and before TSB decided to repossess, in view of mortgage arrears. The judgement deals with what is a chattel or fixture relative to over a hundred specific items but, more importantly, is a very recent case on which all three learned Judges agreed. It combines legal precedent and modern thinking in deciding the distinction between chattels and fixtures.

In the leading judgement, Lord Justice Roch quotes with approval from the decision in Holland v Hodgson (1872) which supports the legal maxim "what is annexed to the land becomes part of the land" but also confirms that it is difficult to define what degree of annexation is required to meet the criteria and thus the purpose of annexation must also be considered. An article which simply rests on the land by its own weight may still be a fixture if the intention is to make it part of the land and conversely an article may be very

firmly fixed but if the circumstances show that it was never intended to be a part of the land then it does not become so.

Berkley v Poulett (1976) mentioned earlier is also cited and Lord Justice Roch quotes extensively, again with approval, from the judgement given in that case by Scarman L.J. who reiterated that the two tests of establishing whether an item was a fixture were the method and degree of annexation plus the object and purpose of annexation.

Lord Justice Scarman went on to say "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".

The degree of affixation cannot, however, be totally ignored. Lord Justice Scarman makes it clear that "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". This is further qualified, and returns to the conclusion that purpose must be the dominant deciding factor, by the statement "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".

Lord Justice Roch concludes that both the purpose of the item and the purpose of the link between the item and the building must be considered. "If the item is intended to be permanent and afford a lasting improvement to the building it will 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. If the item is ornamental and its attachment is simply to enable the item to be displayed and enjoyed ... that will often indicate that the item is a chattel".

The findings and reasonings of Roch L.J. confirm that the development of case law continues to favour the purpose of attachment rather than the degree of attachment as the guiding factor in deciding whether an item is a chattel or a fixture.

The Vice-Chancellor, Sir Richard Scott, in agreeing with Lord Justice Roch, makes a few points of his own on the question of attachment. He refers to the case of Leigh v Taylor (1902) which involved some tapestries fixed to walls. He quotes the relevant section "although it may be attached .... it is not intended to form part of the realty, but is a mode of enjoyment of the thing while the person is temporarily there, and if there for the purpose of his or her enjoyment, then it is removable ..." He goes on to quote from the same case the sentence "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 affixation".

In the final part of his judgement, Sir Richard Scott makes a further summarising comment which reinforces the position. He states "Assuming ... that the functional article ... has been affixed to the land ... 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".

It is reasonable to conclude that the courts will generally lean towards deciding that an object brought on to land is a chattel, unless there is compelling evidence that it is a fixture. There are, however, important words in Sir Richard Scott's judgement, particularly "functional article". A "functional article" is something which has a function of its own and will be regarded as a chattel, almost irrespective of its degree of affixation providing that it is there to be used for itself rather than to enhance the premises. An example is an office telephone system. Such systems comprise a main processor housed in a cabinet, which requires screwing firmly to the wall - indeed there is no facility for it to stand alone. The incoming cables all appear mysteriously from the wall and the connecting cables run in ducts, with all sorts of other cables, including those serving the electrical ring main and lighting. All of this system is pretty well "affixed" and if you moved out you would probably at least abandon the wiring, if not the complete system. These are, however, economic considerations and there is no doubt that the system is a chattel. Its degree of affixation, or installation, is no more than necessary for its efficient use and such affixation is purely for the better use of the telephone system - not to enhance the realty.

On the other hand, consider a suspended ceiling, perhaps a typical modern, lay-in grid system, as is used so widely in office buildings. This has a degree of affixation, although being suspended by a few wires, probably less so than the telephone system, but nevertheless it is a fixture. The installation of the ceiling is hardly likely to have been for the enjoyment of the ceiling itself (when you've seen one ceiling tile you've seen them all) but is to enhance the premises, or at least the use of them. Its purpose therefore makes it a fixture.

The question of whether something is a chattel or a fixture can be summarised in a few sentences.

Firstly, the item in question must have its own identity and function, although this relates to the whole which may be made up of component parts.
Secondly, if it is such an item, then the purpose of bringing it on to the premises is the dominant factor and the question of affixation is a clarification, rather than a fundamental issue. If that purpose is for the better use of the item, then the item is a chattel, if to enhance the premises, the item is a fixture.

It is possible for something to be a fixture without any affixation at all if it stands firmly by its own weight, making fixing unnecessary, providing the purpose of the item is to enhance the premises - the best example being garden ornaments (Hamp v Bygrave 1982). Conversely, there may be a high degree of affixation but the item is still a chattel, if the purpose of the affixation is to facilitate the use of the item itself, rather than to enhance the premises - the example of the telephone system holds good in this respect. (Berkley v Poulett, 1976).

There remains the question of improvements - those chattels which become an integral part of the premises. It is worth clarifying that, in the eyes of the law, a fixture is also part of the premises, but by definition a fixture can be removed in certain circumstances, especially by tenants. Those items which are brought on to premises and cannot be removed are improvements.

It could be said that everything starts out as a chattel or series of chattels. The question of whether an item affixed to premises should be classed as an improvement (rather than a fixture) depends mainly on whether it can be removed and the doctrine of waste. Waste arises when lasting damage is done to a freehold or any action alters the basic nature of the property. Therefore, to remove and thus destroy anything which is an integral part of property is to commit waste, which is an actionable tort. Indeed reference to any lease in existence may specifically prohibit removals which would give rise to waste.

Something will be considered irremovable if attempting to do so destroys the item, or causes major damage to the premises, as this is economically unsound and thus waste. A good example to better understand this concept is wallpaper. This starts off as a chattel (a roll of paper) to which are added other chattels (paste and water) to stick it to a wall. Once dry it cannot be removed without its complete destruction, and to do so would be to commit waste. Once hung therefore it becomes part of the building and thus part of the land and an improvement. Plaster put onto breeze block walls is a similar concept.

It may be asked how this differs from the suspended ceiling which was mentioned earlier, which it was concluded was a fixture, as it is unlikely that it would be removed and used elsewhere. The ceiling equally started out as a number of chattels (tiles, strips of aluminium and pieces of wire) and is certainly fitted specially to the area in question. There is, however, no doubt that it could be dismantled and removed and, in theory, installed elsewhere, with some modification. It is this that distinguishes it from the wallpaper, as there is no waste in the ceiling's removal.

In summary, the first question to consider with any item is whether it can be classed as a chattel, having regard to the question of affixation and the purpose of bringing the item on to the premises.

If it is not a chattel, then it is likely to be a fixture, with the alternative that the degree of affixation and incorporation in the premises is such that it could not be removed without causing serious damage, thus making it an improvement.

Everything brought on to premises will be capable of being put into one of these three categories.

Landlords and Tenants

The question of whether an item is a fixture or not has nothing to do with the relationship of the parties involved. It is a matter of fact, and the legal position so far as fixtures are concerned is that they are part of the land. The judgement in the case of Lee v Risdon (1816) states that "once an article has been properly classified as a fixture, it forms part of the land for as long as it remains fixed to the land". This applies whether the fixture is the landlord's or the tenant's as these are sub-classifications and are relevant only to the question of whether the item is removable and not whether it is a fixture.

Looking at the early case law, it was decided that once a fixture had become affixed to the land it became part of the land and could not be removed by someone having a limited interest in the land (such as a tenant). However, the courts moved on to recognize the restrictions placed on tenants by such an interpretation and the rights of a tenant to remove things he had brought to the premises gradually increased. This led to the formation of a distinction between landlords' and tenants' fixtures, the latter being described as those fixtures which a limited owner (e.g. a tenant) of premises could remove and the former, those which he could not. This distinction between landlord and tenant is only relevant once an item has first been properly identified as a fixture. That this is a peculiarity of the landlord and tenant relationship is endorsed by Walmsley v Mile (1859) in which it was said that this distinction between different types of fixture has no place in the relationship between mortgagor and mortgagee - hence the plight of Mr Botham.

The expression "tenant's fixtures" describes those things properly classified as fixtures which have been brought on to premises by the tenant and which the tenant can remove. If there are similar, or identical, items already on the premises which have been affixed by the landlord as part of the demise, then they are not removable by the tenant (Elliot v Bishop 1854). Furthermore, where the landlord lets to a tenant premises including existing fixtures and, under a covenant to repair, the tenant replaces a fixture, he is not

entitled to remove the new item as it will be regarded as a substitute for the original which was let to him (Sunderland v Newton 1830). In that case the reference to the item being replaced because of a covenant to repair does not imply that this only applies in full repairing leases but is intended to make it clear that, despite the fact that the tenant may have nurtured and coaxed the fixture to its eventual life span at his own expense, when it is replaced it is, nevertheless, the landlord's. This immediate transfer of ownership of a substitute fixture can be avoided if the original fixture is retained and set aside for re-fixing, perhaps at the expiry of the lease. In practical terms this is unlikely to be possible without damage to or deterioration of the original fixture, which would be unacceptable to the landlord. This whole situation could be modified or avoided by prior agreement between the landlord and tenant - hence the need to consider any lease or documentation relevant to the situation. Such agreement might particularly exist if the replacement fixture was superior in quality to the original, although that in itself will not affect the legal position.

What then is the position or status of the three categories of chattel, fixture and improvement and does this differ in the landlord and tenant situation?

The two most straightforward categories are those of chattel and improvement. A chattel is clearly an entity in its own right and is the property of whichever party purchased it. The landlord and tenant relationship has no bearing on that situation. An improvement to property, as defined earlier, results in the item in question becoming an integral part of the land, and it cannot be severed from it. From the point of its affixation it belongs to the owner of the land, irrespective of who installed it.

The more complex case is that of the fixture which, outside the landlord and tenant situation, belongs to the owner of the land. The law, however, allows some fixtures to be removed by a tenant and this gives rise to a more involved ownership situation. Whilst it still remains the case that, following affixation, the fixture becomes part of the land, the tenant is entitled to remove it during his period of tenancy (and indeed for a reasonable period thereafter) and during that time it remains the tenant's property. If a tenant quits his premises (on expiry of the lease, or even during the period of the lease) and leaves his fixtures in situ, then they become the landlord's as they are part of the land and the only

person who had the right to remove them did not do so. The outgoing tenant may transfer his fixtures to the incoming tenant (usually of course for a small consideration) or indeed if his lease has not expired, may negotiate a sale of the remainder of the lease to a new tenant. Providing there is continuity, then the right to remove fixtures will pass to the new tenant, again during his period of occupation. This transfer is not automatic as a matter of right but has to be specifically agreed between the parties - otherwise it could be argued that the items were abandoned and reverted to the landlord. In such situations it is important to consider the history of the premises and its occupants, along with any documentation and correspondence from the change of tenant to determine the ownership of the fixtures. In essence therefore, during the period when a tenant can legally remove his fixtures, they remain the tenant's property, but once that period has expired, then all fixtures which remain become the property of the landlord.

A better definition of a tenant's fixture is any item which is properly legally identifiable as a fixture and which was installed and continues to be removable by the tenant, is a tenant's fixture. An extract from the Court of Appeal case of Young v Dalgety (1987) supports this and is as follows "... assuming the items to be fixtures, and having regard to the general principle that fixtures attached by a tenant for the purpose of his trade are tenant's fixtures, the judge had been entitled on the evidence before him to conclude that the items were tenant's fixtures".

An understanding of the legal position and the landlord and tenant law is essential to deal with the concepts of ownership/responsibility relative to items brought onto premises.

It is worthwhile considering the example of the modern shopping centre built in the late 1960s'/1970s' and how the theory might be applied to the practice. Tenants in such units were usually provided with a bare shell to fit out to their requirements, typically having walls of breeze block, a concrete floor and roof, with services terminated at a point just outside or just within the unit. The pipework of the main sprinkler system was brought up to the unit but also terminated to allow the occupier to make his own connection and to set out a system as it suited him. The same applied to the fire alarm - all were brought up to the unit but left awaiting connection. The unit also opened on to the main shopping

mall and was completely open at the front. The landlords usually temporarily boarded the frontage across for security.

What then is needed to make this unit an operational sales outlet? How will the various items be classified and what will be the relationship of the landlord and tenant in so far as such items are concerned? The following might be involved:-

1. First fix electrics - these are the distribution cables, usually run in steel conduit fixed to the blockwork, and the basic socket and outlet fixing plates. All this is then plastered over. Both electrics and plaster are improvements as they cannot be removed without waste and therefore even if they are installed at the expense of the tenant, immediately upon installation they become part of the freehold and thus the property of the landlord, albeit classified as "tenants' improvements".
2. Decoration - the plaster, once dry, is painted or papered. For the reasons set out above, this is also an improvement and therefore also becomes the property of the landlord, even if undertaken by the tenant.
3. Floor finishes - the bare concrete floor is covered with a high quality vinyl tile, bonded to the screed. Again this is a permanent fix and the tiles become a permanent part of the premises, therefore an improvement and once again the landlord's property.
4. Suspended ceiling and integral lighting - this is a fixture as it could, in theory, be removed without waste and installed elsewhere. Its purpose is, however, to enhance the premises and this prevents it from being a chattel. As this is a fixture which has been installed by the tenant, it belongs to the tenant during the period of his occupation. If it were installed by the landlord (perhaps as part of the agreement for the tenant to take the premises) then it would be a landlord's fixture - i.e. being classified as a fixture it belongs to the party who installed it.
5. Air conditioning plant and equipment - again removable without waste but there to enhance the premises and hence a fixture. Once again ownership will depend upon who installed it but in the most likely case of that being the tenant, then this would remain a tenant's fixture.
6. Sprinklers and fire alarm installations (including wiring) - these could be argued to be fixtures but, as an extension to an existing, integral part of the main system

serving the whole premises, there will be waste in their removal and they are improvements. Being part of the freehold they belong to the landlord.

7. Shelving - expensive timber units, specially manufactured, are screwed to the wall. They remain chattels, as the only purpose of affixation is to stop the shelves from falling on customers fighting over the New Year designer label bargains, i.e. the affixation is to facilitate the use of the shelving, not to enhance the realty. Being chattels installed by the tenant they remain the tenant's property.
8. Shop frontage - in to the open area is fitted an aluminium framed, glazed frontage which includes automatically opening doors. This is not a chattel as there is a degree of affixation and this is not for the use of the frontage itself, as it has no independent function. If it were taken out it would have no use without other premises to accommodate it. This precludes it from being a chattel. The argument for an improvement is a stronger one, but applying the principles set out earlier also precludes this. To take out the frontage would not commit waste, as it would simply return the unit to its original state of having a large opening at the front. The frontage could conceivably be used elsewhere, given an opening of the right size, or an opening could be adapted to accommodate it. Indeed it was probably largely manufactured off site and brought to the shop unit for assembly from its component parts. It does not therefore differ significantly from the lay-in grid suspended ceiling, which was mentioned earlier as an example of a fixture. The situation might be different if the shop opened directly on to the street, as in that case it could be argued that the frontage had become an integral part of the premises, and thus an improvement. The distinction is the purpose as, in the case of the shopping mall, the shop front merely separates the unit from the common areas and is used to display goods. Indeed many units have no such frontage, having only shutters to pull down at night, whereas in the case of the independent shop the frontage forms the front wall of the premises and is little different from a brick wall in terms of security and intention. Given that the item is deemed to be a fixture then, once again, if installed initially by the tenant it will belong to the tenant, but if installed by the landlord it will belong to the landlord.

The above illustrates that fixtures belong to the party who installed them and also chattels belong to the party bringing them to the premises. Improvements, however, belong to the

landlord, irrespective of whether installed by the tenant or the landlord, although the tenant will retain an interest in them - this is referred to specifically in the next section on the insurance position. It should also be noted at this stage that the terms and conditions of any lease may well further modify the position, particularly for example with regard to shop fronts which might be specifically mentioned. Again, however, the lease issues are referred to later in this paper.

The position with regard to a new tenant in previously untenanted premises is therefore relatively straightforward but far more complex are cases where the tenant is not the original tenant. It will be recalled that any fixtures which are abandoned by the installing tenant become the property of the landlord and also that any landlord's fixtures which are replaced by a tenant remain landlord's fixtures. The example of the shopping centre above, should also be considered on the basis of the second or subsequent tenant and how that might affect the items in question.

Any improvements made by the previous tenant will already be the property of the landlord, although if the current tenant has made any payment for the previous tenant's improvements, he will still retain an interest in them, just as did the original occupant. Chattels should not present any problem but there are difficulties to surmount with regard to fixtures.

It is often the case, when dealing with these claims, that Loss Adjusters request from the tenant details of expenditure incurred on taking over the premises and, being presented with a shop fitting bill for £100,000, assume that those items in that bill represent the tenant's fixtures; thus any damage thereto is claimable under the tenant's policy. The situation is, however, not so simple in that any incoming tenant in a quality retail unit is likely to undertake a complete re-fit to his own style and requirements but what happens if, when so doing, the new tenant removes similar items in the unit which have, on abandonment by the previous tenant, reverted to the landlord? Typically a new tenant will want a new suspended ceiling (previously a tenant's fixture), lighting, air conditioning and floor coverings, all of which have significant ramifications in relation to the landlord and tenant situation. Remember that if the new tenant removes an existing landlord's fixture (which includes those installed by the previous tenant which have reverted to the

landlord due to abandonment) such as a suspended ceiling, then the new suspended ceiling installed by the tenant immediately becomes the landlord's. This would therefore apply to any pre-existing fixture, the only exception being those fixtures which were purchased by the new tenant from the outgoing tenant which of course can be replaced without any change of ownership. Any tenant's improvements will have become the landlord's property and if existing improvements are enhanced, then that will simply enhance the freehold.

These complexities make it essential to review the documentation which is available relative to the change of tenancy and any agreements reached with either the previous tenant or the landlord at that time. In the absence of any information to indicate one way or the other, however, the original principles should be applied - i.e. fixtures installed by the current tenant remain the tenant's property, unless there is proof to the contrary. Improvements remain the landlord's and the new tenant would have to demonstrate any acquired interest.

Understanding the legal principles leading to the correct identification of whether an item is a chattel, fixture or improvement, and any difference which the landlord and tenant situation might cause, is essential to establishing the position relative to any insurance claim. Once mastered, however, then the principles can be applied to both owner/occupier and tenant/landlord situations, with chattels remaining separate from premises but both fixtures and improvements becoming part of the buildings. In reality the distinction between fixtures and improvements only has any importance in the landlord and tenant situation but this also bears on the insurance position which is now considered in more detail.

Insurance

The insurance position is best considered by going back to basics. As many insurance text books will confirm, it is fundamental that, at the time of taking out an insurance policy, a party has an insurable interest in the item it is intended to insure. Whilst insurable interest is a topic of its own, essentially a person can insure something if he has a financial interest which will be affected by its damage or destruction. Someone who owns

something can insure it, as can someone who is contractually responsible for an item's wellbeing. Even if you do not own something but would be financially prejudiced by its destruction or damage, you can insure it to the extent that you will be so prejudiced.

Taking the three basic categories of chattel, fixture or improvement, it is therefore necessary to consider insurable interest.

Firstly, a chattel belongs to the party who acquired it and therefore he can insure it. If another party is contractually responsible for it, he can insure it as well. A lease or hire purchase agreement would be good examples. Chattels will be designated as "contents" in a domestic insurance policy, or as "trade contents" in a commercial context (such other definitions as machinery, plant also apply).

Fixtures, by definition, become part of the freehold from the moment of their affixation and are therefore a part of the buildings and covered by a buildings insurance policy. Improvements fall within the same category and indeed, from the insurance point of view, the term probably has no relevance outside of the landlord and tenant situation.

The position is therefore clear as far as owners/occupiers are concerned - chattels are contents to be dealt with under a contents policy and fixtures are buildings, and thus dealt with under a buildings policy. How then does the situation differ in the landlord and tenant situation?

Chattels will belong to and be insurable by either landlord or tenant as appropriate under their contents policy but remember, if a landlord has no cover for contents in his building he cannot claim for his chattels. Most insurance policies contain a Designation Clause which allows for items to be given the same interpretation under the insurance policy as in the Insured's financial accounts, which may have a bearing on the situation particularly relative to a landlord's chattels. It is conceivable that, in accounts, these would simply be included as part of the building assets and thus, under a Designation Clause would be rightly considered as a buildings item. Such detail in a set of trading accounts is likely to be the exception rather than the rule.

Inevitably, fixtures represent a somewhat more complicated insurance problem, in that there is likely to be reference to "fixtures" in both buildings and contents policies. It is usual for the insurance policy definition of "buildings" to include "landlord's fixtures and fittings" (remember fittings is legally without meaning) and the buildings policy will therefore only cover those fixtures which belong to the landlord - not those which belong to the tenant. This would include those fixtures which were installed originally by the landlord, or of course those fixtures which had become the landlord's property as the result of a previous tenant abandoning them to him. There is no cover under the buildings policy for any fixtures which belong to the tenant.

Recognising this problem, the insurance industry has responded by allowing a tenant to have a separate item under his policy for tenant's fixtures but it is more common for the definition of trade contents under a commercial policy to include "fixtures and fittings ... but excluding .... landlord's fixtures and fittings". This only covers tenant's fixtures and, by excluding landlord's fixtures, only deals with items which would not fall within the buildings insurance.

More detailed examination of various insurance policies shows that some go further, especially package policies aimed at retail trades. Such policies include specific cover for shop fronts or other trade fixtures which might be peculiar to that occupation.

Given that all fixtures are part of the buildings, it might be argued that both the tenant and the landlord have an interest in all such fixtures, irrespective of who installed them. It may be that the tenant has a contractual obligation (see later comments on "Leases") to insure the landlord's fixtures either in joint names or on behalf of the landlord, or he may be responsible for their well-being and liable for their replacement, because of a term of the lease. In that case of course he has an insurable interest to the extent of his legal, primary liability. In the absence of any contractual terms or obligation, however, the tenant has no insurable interest in the landlord's fixtures. The landlord of course has an interest in, and can insure, his own fixtures irrespective of any agreement with the tenant as they are his property. The landlord does not, however, have an insurable interest in the tenant's fixtures as, although they are annexed to the freehold, they remain the tenant's property and are removable during the tenancy. It is true that, on expiry of the lease, the

tenant may abandon his fixtures, upon which they will become the landlord's but expectation is not sufficient to constitute insurable interest and such interest would only arise on abandonment. This makes it fundamentally important to distinguish between landlord's and tenant's fixtures when dealing with a claim for such items within premises, although again it must be stressed that this position can be modified by contract or agreement. It is a case of determining which party has the primary liability and then deciding if insurance cover is in force to cover the insurable interest in the property in question.

Tenant's improvements are another complex area as both the landlord and tenant do have an insurable interest. Whilst the improvement has become an integral part of the freehold and cannot be severed, thus becoming the property of the landlord, the tenant still has use and enjoyment of the improvement during his tenancy. If it were destroyed the landlord may choose, as is his right, not to replace it and it is therefore lost to the tenant, who is financially prejudiced. As building items, improvements automatically fall within a landlord's policy but the tenant is free to insure them in his own name as a separate item. A good example might be decorations, where a tenant has hung high quality wallpaper in his offices but the landlord is only prepared to replace the original, basic, emulsion finish. To be restored to his pre-incident position therefore, the tenant has to meet the cost of wallpapering again and that cost is insurable.

Tenant's improvements are unlikely to be automatically included within the definition of trade contents under a commercial policy and must therefore be specifically mentioned in the definition or they will not be insured. Alternatively a separate item for "decorations and tenant's improvements" is often readily available with a separate sum insured. Remember, however, that the tenant can only suffer financially in the event that the landlord does not fully reinstate. The landlord can claim under his policy to reinstate to the pre-damage specification, including any tenant's improvements which have become part of his property. The tenant's cover is therefore really a contingency policy, to operate when the landlord does not reinstate.

Problems of dual insurance may arise where the landlord has insured the building and the tenant has insured the decorations (or improvements) as this falls outside both common

law and the ABI Rules on Contribution (ref Rule B8 which states that there is no contribution if the loss is in respect of the building and its fixtures and fittings insured in the name of the tenant and such insurance is restricted to a part or part of the premises demised to him, i.e. if the tenant insures only part of the premises but the landlord the whole, there is no contribution). A further issue arises in the event damage is severe and the tenant decides to relocate, permanently. Improvements tend to be insured under an item of the policy subject to the "Reinstatement Memorandum", which allows reinstatement elsewhere. The tenant may therefore claim the cost of reinstating the "improvements" in the new premises, even though the landlord, under his policy, has been paid the cost of reinstating in the original premises. On the face of it the items could be paid for twice as there is no contribution between Insurers and each Insurer has to satisfy their obligation to their policyholder for losses sustained. The argument which overcomes this problem is that the loss to the tenant arises only from the decision not to return to the original premises - if they did so, then they would find the "improvements" had been reinstated for their continued use and enjoyment at the landlord's expense (or at least at their Insurers'). Most wordings used in the "Reinstatement Memorandum" contain a proviso, with regard to the right to reinstate elsewhere, that doing so must not increase Insurers' liability above that which would have pertained at the risk address. As commented earlier the tenant's policy on tenant's improvements is effectively providing contingency cover, as the improvements belong to the landlord who has the primary interest and the tenant need only insure against the possibility the landlord does not, and cannot be legally or contractually made to, replace the items. If the landlord does replace, then the tenant suffers no loss and cannot claim. This situation cannot change simply because the tenant does not want to return to the premises and it is that decision, not the damage, which is giving rise to the tenant's loss. There is no reason why his Insurer should pay for this.

If the landlord decides not to reinstate then he has not sustained a loss and the tenant can claim for the costs he has to incur to restore him to his pre-incident condition. The lease may resolve the subject but it is also possible for the tenant to invoke the Fires Prevention (Metropolis) Act of 1774 in the event that the landlord has insurance for such improvements. This Act contains provision for a tenant to force a landlord to expend insurance monies on reinstating premises, but only in the event of fire damage. Only

when all means of persuading or compelling the landlord to reinstate improvements have failed will the tenant have a valid loss under his own policy, reinforcing the contingency nature of the cover. If the lease or other agreement required the landlord to reinstate and he failed to do so, the tenant's Insurers would pay for the "improvements" and be subrogated to the tenant's rights against the landlord.

If the basics of legal categorisation of items and insurable interest are borne in mind, coupled with the careful consideration of what insurable interest the policy in question covers (and particularly the definitions under the various sections) then deciding which policy, if any, pays should be relatively straightforward.

Leases

It must be stressed that a lease cannot affect the question of whether an item is a chattel, fixture or improvement (Melluish v BMI (1995) - "the terms agreed between the fixer of a chattel and the owner of the land cannot affect the question of whether, in law, the chattel has become a fixture"). What the lease can do, however, is change the primary liability that would exist without the lease, relative to insurable interest and also whether items can be removed.

It is not unheard of for a lease to have an express covenant for the tenant to yield up the property at the end of the lease, together with all fixtures, and there is nothing unlawful in this. It has, however, been decided in the courts that if the landlord wishes the tenant to give up his otherwise unquestionable right to remove tenant's fixtures then the lease must say so in plain and clear language. If there can be any doubt as to that being the intention, then the tenant's ordinary right will not be affected (Lamborne v McLellan 1903).

Such a restriction, preventing the tenant removing his fixtures, would change the insurance position as if the tenant cannot remove his fixtures during his occupancy they will, from affixation, be the landlord's and part of the premises. The landlord would not then be trying to insure the mere expectation that the items might be yielded up, as they are in reality the landlord's from affixation. This is, however, not the usual situation and in most cases the lease will not require a tenant to yield up his fixtures.

In order to determine whether a lease affects the position there are a number of areas to consider which feature in most leases in one form or another.

Firstly, there will be definitions of the various terms within the lease and particular reference should be made to the definition of "the building" which will generally be what is covered by the insurance. Typically this will describe the address of the premises in question and may also refer to "together with all additions and alterations thereto" which effectively deals with improvements.

The tenant's covenants will often provide clarification relative to alterations to the premises. The tenant will usually be allowed to make non- structural alterations or additions with the landlord's prior consent in writing (thus some documentation should be available to assist in determining what was added by the tenant) but the tenant may be required to remove such additions, and make good, prior to expiry of the lease. Removal is usually at the option of the landlord, however, and is not therefore necessarily something which will have to be done.

A further covenant, which deals with the intentions of the parties, relates to the position at expiration of the lease and will require the tenant to replace any landlord's fixtures and also to remove any tenant's fixtures, at the same time making good the premises. On expiration of the lease the tenant is required to yield up the demised premises, together with all fixtures, fittings, improvements and additions (but excepting tenant's fixtures). The intention is that items which have become part of the building will be yielded up at the end of the tenancy and items which have not can be removed, either if the tenant wishes or the landlord insists. Considering these areas of the lease will give a strong indication as to the intentions of the parties with regard to the various categories of item concerned and may assist in clarifying the overall situation.

The most important covenant to consider is that relative to insurance and this is, more often than not, one of the landlord's covenants. This will usually state that the landlord will keep insured "the building" (as defined earlier) and will also go on to state that the landlord will, in the event of destruction or damage to the building, apply such monies as

are received from Insurers in the reinstatement thereof with all reasonable speed. This wording could provide a solution to the problem mentioned earlier, where tenant's improvements have been damaged. Such tenant's improvements have become part of the building as insured by the landlord and the landlord is required, under the terms of this covenant, to expend the monies he receives to reinstate those improvements. This should not leave the tenant in a position where his improvements are destroyed and are not replaced by the landlord's Insurers, providing the lease did not exclude the improvements from the definition of "the building".

In the event that the lease requires the tenant to insure the premises, a building policy is needed but this will still only cover the subject matter of the lease, i.e. whatever is defined as "the buildings". This will not necessarily include any tenant's fixtures, for which additional cover will be required.

Claims will be encountered where there is no lease and a tenant is in occupation under a licence. Typically licences do not deal with insurance matters and the issues again revert to the question of primary liability. The legal position will therefore prevail.

Household Claims

These claims often require a decision as to whether an item is a chattel, to be considered under the "contents" policy, or a fixture, to be dealt with under the "buildings" policy. It has become usual to consider fitted kitchen units as buildings and the "TSB v Botham" case confirms this. It has also become usual to include fitted kitchen appliances (white goods) housed in those units as buildings. The Court of Appeal is, however, quite clear that these (and indeed such items as gas fires) are not fixtures but thus chattels, where their degree of affixation is slight and such affixation is only to better enjoy the use of the items. They are readily removable and, on doing so, retain their function. They therefore meet all the requirements of a chattel and should be insured under a contents policy. Similarly, fitted carpets are chattels, as are curtains and blinds. Their fitting and affixation are only for their better enjoyment and not to permanently enhance the premises. A degree of gluing, as is often done with foam backed carpets, is only a cheap method of fixing and does not change the item to a fixture. The only exception given in the

judgement is carpet tiles individually glued to a concrete screed in such a manner as to make them a part of the floor, similar to vinyl tiles. Some careful consideration of the handling of domestic claims is, therefore, required in the light of this case, especially taking into account the likely interest of a building society.

Conclusion

There are four basic questions to answer in order to determine which policy meets a claim for any item in commercial premises and these are:-

1. What is the legal category of the item - chattel, fixture or improvement?
2. Is it landlord's or tenant's i.e. who has the primary liability?
3. Does the insurance policy in question cover the party's interest on the basis of primary liability alone?
4. Is the position modified by the terms of any lease?

It is important to deal with each question in the order shown. If any question does not apply (e.g. no tenant/landlord or no lease) it is omitted but the remaining, relevant, questions must still be considered in sequence.

This should give the correct answer to the problem but this will not necessarily be popular with either the landlord or tenant, who may have difficulty in understanding the complexities.