

Chapter 2: What is Land?

Additional Material for section 2.3.1

Botham and ors v TSB Bank plc

[1996] EWCA Civ 549, CA

Facts: Mr Botham owned a luxury flat at 90 Cheyne Walk, Chelsea, London. He borrowed money from TSB Bank and, in return, granted TSB a mortgage over his flat. TSB thus acquired a property right (technically, a charge by way of legal mortgage—see Chapter 5, section 6) in the land. Mr Botham failed to repay TSB as agreed; TSB therefore acquired a power to sell the flat and use the proceeds towards meeting Mr Botham’s debt. A dispute arose as to the scope of TSB’s property right in the land: did it give TSB a power to sell (and use the proceeds) of particular objects within the flat, such as the fitted carpets, light fittings, the dishwasher in the fitted kitchen, etc.? Mr Botham claimed that such items were *not* covered by TSB’s property right, because they were not fixtures and therefore not part of the land.

The first instance judge split the various objects in dispute into nine groups. Table 2.1 sets out the groups, along with the related decision of the first instance judge and then of the Court of Appeal.

The first instance judge, by examining the degree and purpose of annexation, thus found that almost all of the disputed objects (including the kitchen sink) were fixtures, and therefore that TSB did have the power to sell those objects and use the proceeds of sale towards meeting Mr Botham’s debt.

The Court of Appeal applied the same basic test, but reached different conclusions. (See Table 2.1.)

Table 2.1 Items considered in *Botham and ors v TSB Bank plc*

	First instance judge	Court of Appeal
1. Fitted carpets	Fixtures: part of the land	<i>Not fixtures</i>
2. Light fittings fixed to a wall or ceiling	Fixtures: part of the land	<i>Not fixtures</i> ¹
3. Four decorative gas flame-effect fires of the mock coal type	Fixtures: part of the land	<i>Not fixtures</i>
4. Curtains and blinds	Fixtures: part of the land	<i>Not fixtures</i>
5. Bathroom fittings A (towel rails, soap dishes, and lavatory roll holders)	Fixtures: part of the land	Fixtures: part of the land
6. Bathroom fittings B (fittings on baths and basins—namely, the taps, plugs, and shower heads)	Fixtures: part of the land	Fixtures: part of the land
7. Bathroom fittings C (mirrors and marble panels on the walls)	Conceded by Mr Botham as fixtures: part of the land	Conceded by Mr Botham as fixtures: part of the land
8. Kitchen units and work surfaces (including a fitted sink)	Fixtures: part of the land	Fixtures: part of the land
9. White goods in the kitchen (the oven, the dishwasher, the extractor, the hob, the fridge, and the freezer)	Fixtures: part of the land	<i>Not fixtures</i>

¹ [Under silence; without comment.]**Lord Justice Roch**

The tests, in the case of an item which has been attached to the building in some way other than simply by its own weight, seem to be the purpose of the item and the purpose of the link between the item and the building. If the item viewed objectively is intended to be permanent and to afford a lasting improvement to the building, the thing will have become a fixture. If the attachment is

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

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

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

The third group about which I have no doubt is Group 8, the kitchen units, including the sink [...] Again in my judgment the degree of annexation, the fact that between the working surfaces and the underside of the wall cupboards of the wall units there is tiling, demonstrates both a degree of annexation and an intention to effect a permanent improvement to the kitchen of the flat so as to make those units fixtures. Further, as a matter of common sense, those units could not be removed without damaging the fabric of the flat, even if the damage is no more than the leaving of a pattern of tiling which is unlikely to be of use if different units had to be installed.

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

I would allow the appeal with regard to the fitted carpets and the curtains and blinds i.e., Groups 1 and 4. These items, although made or cut to fit the particular floor or window concerned, are attached to the building in an insubstantial manner. Carpets can easily be lifted off gripper rods and removed and can be used again elsewhere. In my judgment neither the degree of annexation nor the surrounding circumstances indicate an intention to effect a permanent improvement in the building [...]

With regard to Group 2, the light fittings, [counsel for Mr Botham] conceded that two of the light fittings recessed into the ceilings shown in photographs 129 and 138 were fixtures. I would hold that [TSB Bank] on the admissible evidence have failed to show that the other lighting items were fixtures. There is no admissible evidence as to the method of attachment of these items to the walls and ceilings other than that the photographs show that they must be attached in some manner. [Counsel for Mr Botham] submitted that their removal cannot be too difficult because in many cases the fitting would have to be removed in order to replace a bulb or connection that had failed. In my judgment, these light fittings, in the absence of evidence other than the photographs of them, remain chattels as would lamp shades or ornamental light fittings or chandeliers suspended from a ceiling rose.

Group 3 were the gas fires. In their case the only connection between them and the building was a gas pipe. In the gas pipes, shortly before the pipes enter these gas fires, gas taps are to be seen in the photographs. Apart from that link, which is essential if they are to be used as gas fires, nothing secures the gas fires, on the evidence, other than their own weight [...] I am of the view that electric fires and heaters which are simply plugged into the electricity supply of a house are not fixtures and I do not see any sensible distinction between such electric fires and these four gas fires on the evidence which was available to the judge and is available to us [...]

Many of [the items in Groups 8 & 9] were made by a single manufacturer, Neff. The judge said that whilst the kitchen units and sink were manifestly fixtures, the white goods he had found to be the most difficult items he had had to decide. He found that they were manufactured to standard sizes, they were fitted into standard sized holes and that they were removable. They were very probably expensive items, although he had no direct evidence of their value [...] Clearly all of these items are items one would not be surprised to find in a kitchen, but then so is an electric kettle, a food mixer and a microwave oven, which are all normally 'plugged in'. No one, I venture to suggest would look on these as fixtures. Here the judge should have reminded himself

that the degree of annexation was slight: no more than that which was needed for these items to be used for their normal purposes. In fact these items remain in position by their own weight and not by virtue of the links between them and the building. All these items can be bought separately, and are often acquired on an instalment payment basis, when ownership does not pass to the householder immediately. Many of these items are designed to last for a limited period of time and will require replacing after a relatively short number of years. The degree of annexation is therefore slight. Disconnection can be done without damage to the fabric of the building and normally without difficulty. The purpose of such links as there were to the building was to enable these machines to be used to wash clothes or dishes or preserve or cook food. Absent any evidence other than the photographs, it was not open to the judge, in my opinion, to infer that these items were installed with the intention that they were to be a permanent or lasting improvement to the building. This is not a case where the intent to effect a permanent improvement in the building by installing these machines so that they became part of the realty was incontrovertible, as the judge's doubts illustrated.