Retaining Title to Fixtures

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What happens when a vendor sells goods under a hire purchase agreement or romalpa clause to a landowner who affixes them to land? Who owns the goods? And what if the landowner sells or mortgages the land after affixation? These factual problems create a number of complex and interesting legal problems. The purpose of this article is to examine and hopefully resolve those problems.

INTRODUCTION

In order for that examination and resolution to succeed a number of preliminary issues need to be discussed. First, what is affixation? When does it occur and what does it mean? Second, various fundamental legal principles need to be considered. This area of the law is complex and uncertain because it involves conflict between fundamental principles and the authorities.

The terminology I will use requires brief explanation. The term vendor refers to the party selling the chattels (that later become fixtures) under a hire purchase agreement or romalpa clause. It does *not* refer to the vendor of land unless that is expressly provided. Purchaser refers to the buyer of the chattels (that later become fixtures). The purchaser will usually also be the landowner. I have used these terms even in discussing hire purchase agreements — rather than the more standard hirer and hiree— in an attempt to clarify the parties' relationship. Third parties with interests in the land are defined by reference to that interest, that is, for example, as mortgagees or floating charge holders.

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Affixation

Once a chattel becomes a fixture it is part of the land. That principle is central to this discussion. It is first necessary to know what constitutes a fixture.

One could make a long list of items that have been held to be fixtures, and one of those held not to be fixtures. But that would not be very productive. To define by example can confuse essence with attribute. What is productive is to look at the reasoning behind those findings and to reduce that to a formula of some sort. That the formula resulting is imprecise does not so much reflect conceptual uncertainty as recognise the infinite range of circumstances of affixation. A flexible legal formula can still be conceptually certain - only it may be certain of concepts which themselves must be fluid in order to cover all the relevant situations.

The formula applied is basically:

1. Is the article concerned attached to the land, and
2. For what purpose and with what intent was the article attached?

The formula requires explanation. First, if attachment is shown then there is a presumption that the article is a fixture. Likewise, if there is shown to be no attachment it is presumed that the item is not a fixture. The second factor operates by way of rebuttal. The party alleging contrary to the presumption must produce evidence of purpose or intent to show that the article is, or is not, a fixture.[1] Both attachment and intent are matters of degree.

Attachment means simply being attached. That can be by screws, nails, cement, or by any other means. How the article is attached does not matter. What does matter is the *fact* of attachment. If it is attached it is likely to be a fixture; if it is not it is likely to remain a chattel. The clearest examples involve machinery. Machinery bolted or concreted to the land is likely to be a fixture. If it is freestanding and easily removable it is likely to remain a chattel.[2] To say attachment is a matter of degree is possibly misleading. The *degree* of attachment goes not to the *fact* of attachment but is evidence of the purpose or intent behind that attachment.

It is that purpose or intent which will finally determine the item's status as chattel or fixture. Purpose or intent could alternatively be termed the *circumstance* of attachment. That is the context in which the attachment was, or was not, made. It is this factor that has come to dominate. In the Australian case of *Palumberi v Palumberi* Kearney J held:[3]

> [T]hat there has been a perceptible decline in the comparative importance of the degree or mode of annexation, with a tendency to greater emphasis being placed upon the purpose or object of annexation, or, putting it another way, the intention with which the item is placed upon the land. This shift has involved a greater reliance upon the individual surrounding circumstances of the case in question as distinct from any attempt to seek to apply some simple rule or some automatic solution.

[1] See *Neylon v Dickens* [1979] 2 NZLR 714; and *Adele Holdings Ltd v Westpac Finance Ltd* [1988] ANZ Conv Rep 20.

[2] See *Hobson v Gorringe* [1897] 1 Ch 182, 189-191 both for a factual example and for a discussion of relevant authorities.

[3] [1986] ANZ Conv Rep 592, 596.

So to talk of intent or purpose in defining this second and governing factor is to put too narrowly what is really the wider issue of circumstance. But the purpose for which the item is brought onto the land will usually be the most important relevant circumstance. By purpose the cases mean:[4]

> If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and it does not become part of the realty.

Thus purpose as an aspect of circumstance involves the perspective of intended use — either the attachment increases the utility of the chattel or it increases the utility of the land. It also involves the intended permanence of the attachment[5] — although permanence alone is not, of course, decisive.[6]

Another aspect of circumstance is the degree of attachment: not so much the *physical* fact of attachment as the *practical* fact of the degree of effective attachment. The concept can best be explained by asking how easily the item can be removed. An item which cannot be readily removed is more likely to be a fixture.[7]

The dominance of circumstance over attachment is well established.[8] It will often mean that even a securely attached item remains a chattel. Thus theatre seats can be chattels.[9] And, in New Zealand, milking machinery attached to a milking shed can be a chattel.[10] The formula can, of course, work the other way. That is, an article can be unattached, yet still, in the circumstances, be a fixture.[11]

To analyse the issue of affixation as I have should reveal the distinction between chattels and fixtures to be logical and according to set principles. But the detailed analysis should not be allowed to complicate an essentially simple approach: the courts look at attachment and, more importantly, at circumstance.

The Effect of Affixation

I have discussed the factors constituting affixation. But what does affixation mean? Why is it important to distinguish between a fixture and a chattel?

There are two types of tangible property: personalty and realty. A non-affixed article is a chattel and is personalty; an affixed article is a fixture and is realty. Thus the process of affixation changes the very nature of the item in question. Upon affixation the item is not only attached to the land, it *is* land:[12]

4 *Halsbury's Laws of England* (2nd ed) vol 20, para 107; quoted and approved by Lord Goddard CJ in *Billing v Pill* [1954] 1 QB 70, 75.

5 See *Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 700, 712 per Jordan CJ.

6 See *Leigh v Taylor* [1902] AC 157, 162, per Lord Macnaghten.

7 See *Spyer v Phillipson* [1931] 2 Ch 183, 209–210.

8 See *Feickert v The Perpetual Trustees Estate and Agency Co of NZ Ltd* (1989) ANZ Conv R 236.

9 See, for example, *Lyon and Co v London City and Midland Bank* [1903] 2 QB 135.

10 See, for example, *Johnston v International Harvester Co of NZ Ltd* [1925] NZLR 529 (CA).

11 See, for example, *D'Eyncourt v Grogary* (1866) LR 3 Eq 382, 396-397.

12 *Bain v Brand* (1876) 1 App Cas 762, 772. Notice that the definition of a fixture here reflects the earlier emphasis on attachment over intention.

> The meaning of the word [fixture] is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim *"Quicquid plantatur solo solo cedit"*.

The strength of that doctrine cannot be put too strongly. It has its origins in Roman law, it is an accepted doctrine of common law, and it is also part of the French Civil Code. It is said in Brooke's Abridgement:[13]

> If a piece of timber which was illegally taken from J.S. have been hewed, this action (viz., trespass) does not lie against J.S. for retaking it. But if a piece of timber . . . have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed; for by annexing it to the freehold it is become real property.

The doctrine certainly forms part of New Zealand law. In 1894 Williams J said of affixation:[14]

> [I]t is not so much because the chattel loses its identity by being fixed in the soil, but because by being so fixed it becomes part of the frank tenement, that it ceases to be a chattel. . .

If I have overdone the quoting it is only to show the degree to which the maxim *quicquid plantatur solo solo cedit* is entrenched as an unquestionable principle of law: whatever is affixed to the soil belongs to the soil. Once the fact of affixation is shown it is not open to one party to claim that the item in dispute is still a chattel and does not form part of the land. It may, of course, still be possible for that party to have some interest that confers rights to the item. But such an interest must be compatible with the item's new status as realty.

The Agreement of Sale

The real difficulty arises where three factors are present. First, goods are sold under terms that the vendor retains title until payment is made. Second, the goods become fixtures. Third, the purchase price is not paid. If the vendor's personal remedy against the purchaser for breach of contract is inadequate then a proprietary remedy is sought. This, after all, is the purpose behind the attempted retention of title.

HIRE PURCHASE AGREEMENTS

Contracts of sale involving a retention of title by the vendor, even though the purchaser has possession, are of two types. The first of these is the hire purchase agreement. In their most common form the purchaser is bound to pay regular instalments during the period of hire, and at the end of that period, so long as all instalments have been paid, title passes to the purchaser. This is sometimes called a *Lee v Butler*[15] hire purchase agreement, or, more often in modern times, a conditional purchase agreement. If such an agreement concerns normal chattels —

[13] Brooke's Abr. Property, 2, reproduced in Bacon's Abr. Trespass, E.2, 673 quoted and approved by Lindley LJ in *Gough v Wood* [1894] 1 QB 713, 719.

[14] *Nicholson v BNZ* (1894) 12 NZLR 427, 440.

[15] [1893] 2 QB 318.

that is those not becoming fixtures — then issues of title are simple: the vendor owns the chattel until it is paid for in full. If the purchaser defaults the vendor is safe: she can simply take back the goods.

ROMALPA CLAUSES

The second type of title retention sale is a recent development. The romalpa clause is named after the 1976 case *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd.*[16] The clause provides that title is to remain with the vendor until the price is paid. Such clauses often go further, purporting to vest in the vendor any proceeds of sale of the goods and even products of manufacture of the goods. Their effectiveness in relation to products and proceeds is now doubtful.[17] But that is not relevant here. What is relevant is the attempted retention of title.

RETENTION

In so far as they relate to goods becoming fixtures, there is no material difference between a hire purchase agreement and a romalpa clause. Their effect, or, more often, lack of effect, is the same. Both purport to retain title in the goods for the vendor. Where the subject matter of the sale is such that affixation is anticipated, vendors will include a contractual term conferring on them a right, in the event of default in payment by the purchaser, to enter the land, sever the fixture, and remove it. The nature of the vendor's right so conferred is the essence of this article. My purpose at this stage is to dispel one obvious fallacy: that the vendor's right is simply one of retained title to the subject of the sale. There is no such retention. Upon affixation the goods are part of the land: *quicquid plantatur solo solo cedit.* Any proprietary interest in them as personalty is no longer of any effect. The only effective proprietary interest will be one in the land itself. To appreciate this point is to appreciate the vendor's problem. It also explains the absence here of any detailed analysis of romalpa clauses and their usual consequences. The vendor's remedy must lie elsewhere than in a retained title.

STATUTORY INTRUSIONS

The position stated above is the common law. There has been some statutory intrusion. Most notable is s 57(7) of the Chattels Transfer Act 1924:

> (7) Any chattels which now or hereafter are the subject of a customary hire purchase agreement shall, notwithstanding any rule of law to the contrary, remain and be deemed to have remained in all respects chattels although the same may have been fixed or attached to any land or building, and shall be removable by the vendor or bailor if and when he shall become entitled to possession of the same under the provisions of such customary hire purchase agreement:
>
> Provided that such vendor or bailor shall not be entitled to remove any such chattels fixed to such

[16] [1976] 1 WLR 676.

[17] See especially *Tatang (UK) Ltd v Gatex Telesure Ltd* (1988) 5 BCC 325. But in New Zealand the leading case is still the pro-romalpa clause decision in *Len Vidgen Ski and Leisure (1982) Ltd v Timaru Marine Supplies Ltd* [1986] 1 NZLR 349.

land or building without first giving to the owner or other person for the time being in possession of the said land one month's previous notice in writing of his intention to so remove them.

The effect of the section on those chattels within its scope is dramatic: the maxim *quicquid plantatur solo solo cedit* no longer applies. Affixed chattels remain chattels. There are, however, very few chattels falling within the class of customary hire purchase agreements that are likely to be affixed to land. The Act defines a customary hire purchase agreement as one where:

1. the vendor is either the manufacturer or a person engaged in the business of dealing in such goods,
2. the agreement is in writing; and
3. the chattels concerned are described in the Seventh Schedule to the Chattels Transfer Act 1924.[18]

The third requirement is the most limiting. The Seventh Schedule defines by listing; anything not in the list is not capable of being the subject of a customary hire purchase agreement. The list includes such diverse chattels as pianos, motor mowers, Halsbury's Laws of England and windmills.[19] But very few of the listed items are likely to be affixed to land and so the impact of s57(7) is far more limited than may at first appear.

The other statutory intrusion is s 3(2) of the same Act:

Machinery and plant used in milking, and machinery and plant used for shearing, shall not by reason of being attached to buildings or land become part of the land, nor shall any estate or interest therein pass by virtue of such attachment.

Again this is a total reversal of common law principle but again its application is restricted to a very small class of items: milking and shearing equipment.[20]

These statutory exceptions to the general rule are interesting but their impact is limited. The remainder of this paper is based on the premise that the agreements considered do not come within a statutory exception. But it is as well to keep those exceptions in mind. In a few cases they will give the vendor the desired proprietary remedy.[21]

Contractual Intention and Affixation

It is obvious that conflict arises between the vendor's intention under the

18 These requirements are imposed by s 57 Chattels Transfer Act 1924.
19 The list is presumably intended to cover such items as are commonly purchased under hire purchase agreements.
20 Although for milking equipment at least this may have already been the common law position in New Zealand: see *Johnston v International Harvester Co of NZ Ltd* [1925] NZLR 529 (CA).
21 One further statute, though now repealed, is worthy of mention. The Wages Protection and Contractor's Liens Act 1939 protected contractors and subcontractors who worked on land against non-payment by entitling them to a lien upon the employer's estate or interest in that land. Thus where a vendor was a contractor or subcontractor he was protected. The Act was repealed in 1987 and no similar protection has been reinstated. Nevertheless the original Act is of interest here in so far as it sought to protect vendors against non-payment — at least where those vendors were contractors or subcontractors.

agreement of sale and the consequences of the subsequent affixation of the subject of that sale. It has been argued that this conflict is to be solved by interpreting the terms of agreement as influencing affixation. That is to say that because the agreement of sale provides for retention of title the subject of sale does not become a fixture. The argument has an appealing simplicity. But is has the support of neither authority nor principle.

The argument first appears in 1896 in *Hobson v Gorringe*.[22] The case concerned a gas engine. It was sold under a hire purchase agreement which provided that the engine was to remain the property of the vendor until payment of the full purchase price. In the case of default the vendor was to "be at liberty to repossess himself of and to remove the gas engine".[23] The engine was attached to the land by bolts and screws. The English Court of Appeal had to decide whether or not the engine was a fixture. Counsel for the vendor submitted it was not:[24]

> The engine does not become part of the freehold until there is a present intention to make it so; but here it was affixed to the land upon an express agreement between the owner of the land [the purchaser] and the owner of the thing [the vendor] that it should not become part of the freehold.... There being, then, no intention ... to make the engine part of the freehold, it remained a chattel ...

That is to say, affixation requires an intent to affix and there can be no such intent where the contract of sale expressly stipulates for the item to remain a chattel. The same argument has been repeated by counsel in other cases.[25] It was argued this year in the High Court of New Zealand in *Trust Bank Central Ltd v Southdown Properties Ltd.*[26]

Frequency of repetition does not always result in acceptance, and it has not done so here. The courts have rejected the idea that a contractually stipulated retention of the vendor's title can prevent affixation. In *Hobson v Gorringe* Smith LJ held:[27]

> That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession we do not doubt, but how a de facto fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced.

The basis of Smith LJ's rejection of the argument is that the contractual intention is covert and subjective, whereas the intention relevant to affixation is the overt and objective intention.[28] The rationale of that distinction is the protection of third parties. This was clearly expressed by Williams J in *Nicholson v BNZ*:[29]

> [T]he intention to be sought is not the undisclosed purpose of the author, but the intention implied and manifested by his act. The rights of parties who may acquire interests in the property depend upon the inferences to be drawn from what is external and visible.

22 Supra at note 2.
23 Ibid, 183.
24 Ibid, 185-186.
25 See, for example, *Gough v Wood* [1894] 1 QB 713, 715-716 and *Kay's Leasing Corp Pty v CSR Provident Fund Nominees Pty Ltd* [1962] VR 429.
26 High Court, Auckland. 1 May 1991 (CP 59/90), Robertson J.
27 Supra at note 2, at 195.
28 This is shown more clearly earlier in the judgment. See especially 193.

The same reasoning will apply equally to a romalpa clause as to a hire purchase agreement.[30]

It should be noted that in one case contractual intent was allowed to influence affixation. In *The Austral Otis Elevator Co Ltd v Kerr* machinery was attached to land but was held not to be a fixture because "the parties did not so intend".[31] The intention referred to appears to be the subjective and covert intention to which other judges have been so opposed. The case was not followed in *Craven v Geal*[32] and should be dismissed as wrongly decided on this point.

While the general view that contractual intent will not prevent affixation is undoubtedly correct, the reasoning behind that view is open to criticism. To base the irrelevance of contractual intent upon its subjectivity and covert nature is, I think, to miss the point. The real issue is not the form of the intent but the substance of the intent. When the affixation cases say that intent is relevant to the fact of affixation they are referring to the intent as to the relationship between the chattel and the land — what I have previously described as the perspective of intended use.[33] That is to say, what matters is how attachment affects utility. Adam J, of the Supreme Court of Victoria, alluded to this when he said:[34]

> The intention of the person fixing it must be gathered from the purpose for which and time during which user in the fixed position is contemplated.

That is quite different from saying that the relevant intention is that of the parties as to title in the goods. One concerns intention as to the goods in relation to the parties, while the other concerns intention as to the goods in relation to the land. Only the latter intent is relevant to affixation. The former intent should be ignored, not so much because of its subjective form as because of its irrelevant substance.

Whether it is based on subjectivity or substance, the fact remains that a contractual intent to reserve title is irrelevant to affixation. Vendors will probably continue to argue otherwise. Those arguments should continue to be rejected.

THE AUTHORITY

The examination of principle above has shown the items concerned to be fixtures and therefore realty. Some courts have, however, still found a proprietary interest in favour of the vendor. That interest is said to be equitable, and in land. Sykes says:[35]

> [I]t has been *clearly recognised* that the hiring owner by virtue of the contractual right he has against the hirer to sever and remove the chattel possesses a kind of equitable interest.

[29] Supra at note 14, at 439. See also *Palumberi v Palumberi*, supra at note 3 at 594–595; *Hoppe v Manners* [1931] 2 DLR 253, 257; *Kay's Leasing Corp*, supra at note 25, at 433.

[30] See Hill-Smith, "The Romalpa Clause in Relation to Land" (1983) 133 NLJ 207.

[31] (1890) 16 VLR 744, 746.

[32] [1932] VLR 172, 176.

[33] See text, supra at p 479.

[34] *Kay's Leasing Corp* supra at note 25, at 433. But Adam J also adopted the more conventional subjectivity point as the basis of his decision. See also the comments of Robertson J in *Trust Bank Central*, supra at note 25, at 13–17.

[35] Sykes, *The Law of Securities* (4th ed 1986) 761. Emphasis added.

The footnote to the passage cites the Australian case *Kay's Leasing Corp v CSR Provident Fund Nominees Ltd.* In that case A sold machinery to B under a hire purchase agreement. That machinery was affixed to the land. Then B granted a legal mortgage to C. The dispute was between A and C. The Supreme Court of Victoria first rejected the argument that the terms of the hire purchase agreement prevented affixation. They went on to hold:[36]

> [T]he contractual right, which the owner has against the hirer, to repossess on default confers on him a species of equitable interest which entitles him, as against the hirer, to enter upon the premises and sever and remove the chattels which have become fixtures. As against the hirer and those claiming through him in circumstances which have not destroyed this equitable interest, this right to enter and repossess remains.

That is clear acceptance of the equitable interest theory: it is neither dicta, nor dependent upon peculiar facts.

With such clear support for the vendor's equitable interest in land it is not surprising that later writers have so readily accepted the same view. But I think that acceptance has been too hasty. A closer examination reveals weakness in the judicial support. First, there have not been many cases adopting the equitable interest theory — so the support is weak in quantity. Second, and more telling, is the weakness in quality: the cases that do support the theory are notable for their careless use of authority and their disregard for principle.

Kay's Leasing Corp cites three cases in support: *Re Samuel Allen and Sons Ltd,*[37] *Re Morrison, Jones and Taylor Ltd,*[38] and *Craven v Geal.*[39]

Craven v Geal was decided by the Supreme Court of Victoria in 1931. A was a purchaser of land under an agreement of sale and purchase with B. A had possession and an equitable interest as purchaser, but not legal title. A then purchased machinery from C under a hire purchase agreement. The machinery was affixed to the land. A defaulted under the agreement with B for the sale and purchase of land and B sold the land to D. The dispute was between D and C as to who owned the affixed machinery. D won.

Cussen ACJ cited *Re Samuel Allen and Sons* and *Morrison, Jones and Taylor* in response to the question "did the plaintiff by his contract of letting and hiring and the affixing of the articles to the land acquire an equitable interest in the land".[40] He went on to discuss the priority of the vendor's interest as against that of the new landowner, and so impliedy supported the vendor's equitable interest in land. But that support was only by implication and was without explanation. The cases cited were not discussed in any detail and were not expressly approved.

The two Australian cases are of little help. They do not discuss policy or principle and cite the English cases without analysing them. So it is to the English cases that we must turn. They were decided between 1890 and 1920, the time when hire

[36] Supra at note 25, at 436.
[37] [1907] 1 Ch 575.
[38] [1914] 1 Ch 50.
[39] Supra at note 32.
[40] Ibid, 175.

purchase agreements began to be commonly used. In settling the disputes involving vendors that arose, the courts used two different solutions to protect the vendor: implied authority and equitable interest. The implied authority cases are of interest both in themselves and in so far as they are relied on as authority by the equitable interest cases.

Gough v Wood

Gough v Wood[41] was decided by the English Court of Appeal in 1894. The facts were a little complex. A was a leaseholder who carried on business as a nurseryman. A entered into a hire purchase agreement with B for a boiler, which was affixed to the land. The agreement purported to confer on B the right to enter, sever, and remove the boiler upon A's default. A's landlord agreed to that. A then granted a legal mortgage to C. C did not know of the hire purchase agreement and B did not know of the mortgage. A defaulted under the hire purchase agreement and B repossessed the boiler. C sued B. B won.

The decision was based on implied authority. By the nature of the purchaser's business as nurseryman, trees fixed to the land were to be severed and sold. The Court held that the mortgagee must have impliedly authorised such sales. Lindley LJ reasoned:[42]

> This implied authority can hardly be confined to [trees], but may fairly be regarded, and I think ought to be regarded, as authorizing the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired.

So the basis of the decision, implied authorisation, arose out of the peculiar facts of the purchaser's business as a nurseryman. Two points should be made. First, it is difficult to see why an implied authority to remove trees should extend to boilers. Second, by justifying the imposition of implied authorisation mainly on policy grounds, Lindley LJ implied that it is not necessarily confined to fact situations where actual authority was present. He said that if an implied authority by the mortgagee to the vendor's rights were not imposed:[43]

> [P]ersons dealing bona fide with mortgagors in possession will be exposed to very unreasonable risks; and honest business with them will be seriously impeded.

But I think this policy concern is misplaced. The unreasonable risks with which Lindley LJ is so concerned are only those facing any other unsecured creditor. If the vendor wants security then there are many established means available; a mortgage, or a floating charge, or a personal guarantee. The necessity that Lindley LJ perceives for some special interest does not exist. In any event the decision turns on the implied authorisation of the mortgagee to the vendor's removal of fixtures. It does not concern vendors' equitable interests in land. The two approaches are different and

[41] Supra at note 25.
[42] Ibid, 720.
[43] Ibid.

can produce different results. On the facts of *Gough v Wood*, for example, the vendor would lose on the equitable interest approach because the mortgagee's interest was legal, but would win on the implied authorisation approach. Nevertheless, as will be seen, *Gough v Wood* and other similar cases are used as authority for the equitable interest cases.

Implied Authorisation

I have criticised *Gough v Wood* on the implied authority point. That criticism requires qualification and explanation. The problem is simply that there appears to be no basis for implying authority for the removal of the boiler. Implied authorisation by the mortgagor for the removal of trees is a separate issue. The removal for sale of what amount to crops is totally different from the removal of a fixture because the mortgagor has defaulted under a hire purchase agreement. Maybe other factors, not appearing in the judgment, led the Court to apply the mortgagee's implied authority so widely. I think the case is wrong and should, at most, be confined to its own peculiar facts. That restrictive interpretation of *Gough v Wood* is supported by later cases. In *Huddersfield Banking Co Ltd v Henry Lister and Son Ltd*, decided in 1895, Kay LJ said:[44]

> [I]f the case of *Gough v Wood* is examined it will be found that it proceeded absolutely and entirely upon this, that from the circumstances of that particular case the mortgagees must be taken to have assented to that which the mortgagors did in removing the fixtures before they took possession.

HOBSON v GORRINGE

In the 1896 case of *Hobson v Gorringe*[45] (another Court of Appeal decision), *Gough v Wood* was again held not to apply. A sold an engine to B under a hire purchase agreement. The engine was affixed to the land. B granted a mortgage to C. B defaulted under both the hire purchase agreement and the mortgage. C entered into possession. A sued for the engine. C won. Smith LJ rejected the alleged relevance of *Gough v Wood*, saying that it:[46]

> [I]n no way assists the plaintiff, and has no application to the present case. That case was decided solely upon the ground that the mortgagee had acquiesced in the removal by the mortgagor during his tenancy of trade fixtures.

ELLIS V GLOVER

Another interpretation of *Gough v Wood* is found in *Ellis v Glover*.[47] The facts of the two cases are very similar except that in *Ellis v Glover* the mortgage contained an express term forbidding the removal of fixtures. That term was held to prevent the implication of any contrary authority. However the Court did first consider the circumstances in which such authority might ordinarily be implied. Fletcher

[44] [1895] 2 Ch 273, 286. Interestingly Kay and Lindley LJJ were members of the court in both *Huddersfield* and *Gough v Wood*.
[45] Supra at note 2.
[46] Ibid, 189.
[47] [1908] 1 KB 388.

Moulton LJ saw *Gough v Wood* as extending to all trade fixtures.[48] A trade fixture is one affixed for the purpose of trade or business.[49] It is a classification usually relevant to leases: the tenant can remove trade fixtures as against the landlord.[50] Fletcher Moulton LJ extended the relevance by interpreting *Gough v Wood* as implying the mortgagee had authorisation for the removal of all trade fixtures. He did not see the case as depending on any other peculiarities:[51]

> The judgements shew clearly that the Court fully appreciated that it was dealing with a general principle, and not with the case of a particular trade.

But the other judges in the case, Cozens Hardy MR and Farwell LJ, were less willing to interpret *Gough v Wood* so widely. Farwell LJ went so far as to say:[52]

> *Gough v Wood* was relied on, but it is clear that it depended on the special circumstances of the case, and I do not think it has ever been cited except to be distinguished.

So the implied authority theory has received mixed press. And it faces one major hurdle. Many mortgages now contains terms, similar to that in *Ellis v Glover,* which expressly prohibit the removal of fixtures without the mortgagee's consent. In the face of such a term it is clearly impossible to imply any authority for vendors to remove fixtures. This was Robertson J's reasoning in *Trust Bank Central.* That case concerned joinery sold under a romalpa clause and removed by the vendor after affixation. Robertson J implied that but for the express term an argument of implied authorisation may have succeeded. He did not see the implied authority principle as necessary limited to trade fixtures and saw:[53]

> no reason why the principle ... should not extend to mortgagee in relation to land on which the mortgagee is aware of major construction work being undertaken.

With respect, it is somewhat unreal to imply authorisation by the mortgagee for the removal of fixtures which form an integral part of the building's structure. This must be especially so where the mortgage is by way of progress payments so that the mortgagee is relying on the improvements to constitute his security. Furthermore, Robertson J relied on *Gough v Wood* without discussing the later English judgments which clearly seek to restrict the implied authority principle.

The better view is to restrict implied authority to those cases where there is some real evidence upon which to base the implication. That would require some special circumstances of the sort existing in *Gough v Wood.* In the absence of such special circumstances the authority is not so much implied as imposed by the Court. That is unfair to mortgagees.

In any event the implied authority approach is of limited scope. It is probably only relevant to disputes involving mortgagees and even then will often be defeated by

[48] Ibid, 397.
[49] See Hinde, McMorland and Sim, *Introduction to Land Law* (2nd ed 1986) para 12.038.
[50] Ibid.
[51] Supra at note 47, at 394.
[52] Ibid, 401.
[53] Supra at note 26, at 25.

contrary mortgage terms. As a solution for vendors it appears to have been superseded by the equitable interest theory.

Equitable Interest in Land

The digression into the implied authority cases is largely by way of comparison. They recognise a right of the vendor but that right is of little use: in four of the five cases discussed the vendor lost, and the other, *Gough v Wood*, either turns on its own peculiar facts or is wrong. So the vendor's lot was not a happy one. It was against that background that the equitable interest cases were decided.

REYNOLDS v ASHBY AND SON[54]

The only House of Lords case directly on point is *Reynolds v Ashby and Son*, decided in 1904. The facts sound familiar. A was the owner of land and B was the mortgagee. A entered into a hire purchase agreement with C. The agreement provided that title remained in C, and if A defaulted C could enter, sever, and remove the goods. The goods became fixtures. A defaulted under both the hire purchase agreement and the mortgage. B entered into possession. C sued B. B won.

Even if it had been held that the vendor had an equitable interest in the land then he would still have lost: the mortgagee's interest was a legal one and therefore took priority. But that was not the reasoning adopted by the House of Lords. They did not hold the vendor to have *any* interest in land. Rather, the decision was based on an absence of any implied authorisation and on the absence of any contractual obligation owed by the mortgagee to the vendor. Lord Lindley stated:[55]

> After the machines were fixed, and before the [vendor] claimed them, the mortgagee took possession; the [vendor's] right to enter and remove the machines, resting as it did on his contract with [the purchaser], ceased to be exercisable.

The key words there are "resting as it did on his contract". The vendor's right was seen as contractual. His lack of any right against the mortgagee resulted from a standard application of the absence of privity, and in the absence of any independent authorisation, the mortgagee won. That is an entirely logical and correct application of principle. There was no discussion of the vendor having an equitable interest in land. It comes as a shock therefore to find the case used by a later court as authority for conferring such an interest on vendors.

RE SAMUEL ALLEN AND SONS LTD

Samuel Allen and Sons Ltd[56] was decided by Parker J in the Chancery Division in 1907. It was the first case to adopt the equitable interest theory as a means of protecting the vendor. It is not a good case. The facts were similar to those of *Reynolds v Ashby* except that here the mortgage was equitable and was granted after

[54] [1904] AC 466 (HL).
[55] Ibid, 475.
[56] Supra at note 37.

the hire purchase agreement. The vendor won on the grounds that he, by virtue of the hire purchase agreement, had an equitable interest in the land, and that that interest, being prior in time, took priority over the mortgage. That is, of course, a very great change in the law. It warrants close scrutiny. It should be noted that Parker J dealt with the issue only briefly: the judgment is three pages long. The relevant passage reads:[57]

> Now I do not think I should be right if I were to hold that an agreement of this sort was of a purely personal nature. These agreements are very common and very useful, and, of course, it is open to a mortgagee, when he takes his mortgage, to make what inquiries he likes as to whether there are any agreements affecting the fixtures upon the property. If he does not do so, and is a mere equitable mortgagee, in my opinion he must be held to take subject to those agreements, and I think that those agreements, if they are in the form which has been used in this case, do create an equitable interest by which a subsequent mortgagee who does not get the legal estate is bound, and that, applying the ordinary principles of priorities as between the interest of the hirer under the hiring agreement and the interest created by the equitable mortgage, the interest created by the hiring agreement takes precedence; and on that ground I think that the interest of the bank under its mortgage is postponed to the interest of the persons who own the chattels under the hiring agreement.

Those words are not entirely clear. Is the equitable interest in the land or in the goods? Counsel for the vendor had referred to the vendor's "equitable interest in the machinery".[58] Despite that ambiguity I think it is reasonable to assume that Parker J meant an interest in land: that is how he defines it earlier in the judgment[59] and that is certainly how he treats it.

The real problem with the case is its treatment of authorities. Two cases were cited in support: *Hobson v Gorringe* and *Reynolds v Ashby and Son*. Parker J saw both as adopting the vendor's equitable interest in land. It will be remembered that in both cases the vendor lost. But that alone does not negative their probative value: given that in both the dispute was between a vendor and a legal mortgagee and therefore even with an equitable interest in land the vendor would have lost.[60] Nevertheless, it is difficult to see Parker J's use of these cases as logical.

First, *Reynolds v Ashby*. I have said that case rejected the applicability of *Gough v Wood* implied authority and therefore found against the vendor.[61] The House of Lords found that the vendor's right existed only against the purchaser. Parker J was not constrained by that: he did not discuss the House of Lords' speeches at all. He relied solely on the Court of Appeal decision, quoting Romer LJ:[62]

> With regard to the absence of title in the mortgagor as between himself and the plaintiff, I may observe that the mortgagee was not affected with any notice of the rights of the plaintiff, or for any other reason prevented from claiming these fixtures, which he found forming part of the premises when he entered into possession; and though the mortgagor knew of the plaintiff's rights, he may well have thought, when the goods were affixed, that he would be able to duly to pay for them, and so acquire a good title, and so there was no objection to making them part of the premises subject to the right of the plaintiff to remove them if default in payment for them occurred.

57 Ibid, 581–582.
58 Ibid, 577.
59 Ibid, 579 where Parker J clearly defines it as "an equitable interest *in the land*" (emphasis added).
60 But see the cases discussed infra at note 115.
61 See text, supra at p 489.
62 Supra at note 37, at 581. Quoted from *Reynolds v Ashby and Son* [1903] 1 KB 87, 101-102 (CA).

That is said to be dictum supporting the vendor's equitable interest. But that is very doubtful. First, any support is only by remote implication. There was no express finding that notice on the part of the mortgagee would have protected the vendor — the link between notice and the protection of the vendor was not discussed. Second, the passage is taken from a discussion on implied authorisation. There was no discussion of vendors' interests in land — it simply was not an issue. Third, Romer LJ went on to say:[63]

> how important it is that the law with regard to fixtures as between mortgagor and mortgagee hitherto regarded as settled should not now be departed from.

Those are hardly the words of a judge seeking to establish a new equitable interest in land. Fourth, Parker J was quoting from a Court of Appeal judgment in a case where the House of Lords later clearly defined the vendor's rights as "resting . . . on . . . contract".[64]

Parker J sought to rely on an imagined implication, later contradicted, from dicta in a case later decided in a higher court. That is not good use of authority. *Reynolds v Ashby* does not support the equitable interest approach and Parker J was wrong to say it does.

The other case cited by Parker J was *Hobson v Gorringe*. There Smith LJ said of the vendor's right that it:[65]

> [W]as not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser . . . without notice of the right, and the defendant Gorringe is such a purchaser.

Parker J saw that also as dicta supporting the vendor's equitable interest. Admittedly it is better authority than *Reynolds v Ashby*. Smith LJ was saying that the vendor has no legal interest in the land and that in the absence of notice no equitable interest can prevail against the mortgagee and therefore the mortgagee wins. That might, if read on its own, appear to presuppose the existence of an equitable interest in land on the part of the vendor. But again that is negated by the context. No argument as to such an interest was put to the Court and none was expressly adopted. Furthermore, Smith LJ clearly viewed the vendor's rights as purely contractual, not proprietary. He said of the fixture:[66]

> [I]t was annexed to the soil by screws and bolts, subject as between Hobson [vendor] and King [purchaser] to this, that Hobson had the *right by contract* to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture — ie part of the soil — subject to this right of Hobson which was *given him by contract*.

And in any case Parker J's reasoning is flawed. In *Hobson v Gorringe* the vendor would only have had an effective proprietary right if he had had a legal interest in the land. Smith LJ said that he did not and therefore the vendor lost. But that rejection

63 *Reynolds v Ashby and Son*, ibid at 103.
64 Supra at note 54, at 475, per Lord Lindley.
65 Supra at note 2, at 192.
66 Ibid. Emphasis added.

of a legal interest does not necessarily imply the existence of an equitable interest. The rejection of the greater state does not logically conclude the existence of the lesser.

MORRISON, JONES AND TAYLOR

Given such unsound reasoning one may have expected Parker J's judgment in *Re Samuel Allen and Sons* to have been quickly overruled. It was not — indeed it was followed six years later by the Court of Appeal in *Morrison, Jones and Taylor.*[67] The facts were similar to those in *Samuel Allen and Sons* in that the vendor was competing with the holder of a subsequent equitable interest in land — this time the grantee of a floating change. The status of the vendor's rights was directly considered, with counsel for the charge holder addressing the issue as to whether or not the vendor's right was an interest in land. He submitted:[68]

> [T]hat it is not, and that, if necessary, the decision of Parker J in *Samuel Allen and Sons* that it is should be overruled.

The Court rejected that submission, and clearly upheld *Re Samuel Allen and Sons* and the equitable interest approach. In support they cited *Hobson v Gorringe*—relying on the same passage as did Parker J.[69] Cozens Hardy MR also cited *Gough v Wood,* quoting Lindley LJ saying:[70]

> This . . . [hire purchase] agreement was not under seal, and did not therefore amount to a grant of land or of an easement, to which any subsequent mortgage would be subject.

That is, of course, similar to the passage from *Hobson v Gorringe* and its relevance is again dependent on the flawed logic that rejection of the legal interest equals acceptance of the equitable interest. In any case the quoted passage is not truly representative of the Court's decision in *Gough v Wood,* which was decided on the implied authority point.[71] Kay LJ was at pains in *Gough v Wood* to reject any greater right of the vendor as against holders of other interests in the land in the absence of implied authority. He refered to the vendor's right as a "licence"[72] and emphasised the absence of any property rights in the vendor:[73]

> If fixtures could be removed under an agreement like this against a subsequent purchaser or mortgagee without his consent, he would be subject to a danger which at present has never been understood to exist. Besides the chance of infirmity of the mortgagor's title to the land there would be the risk that the fixtures upon it might, by a contract between the mortgagor and a third person, remain the property of such third person and be removable by him. I should be sorry to see this additional danger imposed upon a bona fide purchaser or mortgagee. A case may easily be supposed where such a law might deprive him of a large part of the value of the property, as, for example, the machinery in a mill or large manufactory.

67 Supra at note 38.
68 Ibid, 57.
69 See text, supra at p 491.
70 Supra at note 38, at 59 (and quoted from *Gough v Wood*, supra at note 25, at 717).
71 See text, supra at p 486.
72 Supra at note 25, at 723.
73 Ibid, 722.

The equitable interest cases discussed above have been approved and followed. In the recent Australian cases, *Sanwa Australia Leasing v National Westminister Finance Australia Ltd*[74] and *Hazelwood v BP Australia Ltd*,[75] the vendor was said to have an equitable interest in the land. Both cases cited *Re Samuel Allen and Son* and *Morrison, Jones and Taylor* and both were happy to support that authority without any further analysis of the principles involved. One New Zealand Court of Appeal case, *Johnston v International Harvester Co of New Zealand Ltd*,[76] also cited the same English cases and, in dicta at least, they were approved by MacGregor J. But MacGregor J's reasoning in this case is suspect[77] and, like the Australian judges, there was no discussion of the principles. In *Trust Bank Central* Robertson J followed these cases and held that the equitable interest may arise from a romalpa clause just as it does from a hire purchase agreement. That interest was said to be:[78]

> more than a merely personal right, being a proprietary interest which may be asserted against third parties.

Against all this support for the vendor's equitable interest stands Master Gambrill's judgment in *Carter Holt Harvey Ltd* v *Southern Cross Building Society*.[79] This case concerned an application that a caveat lodged to protect a vendor's equitable interest not lapse. The application failed. Master Gambrill discussed *Morrison, Jones & Taylor* but not the other equitable interest cases. (Robertson J's judgment in *Trust Bank Central* was delivered two weeks later.) She concluded that the romalpa clause in that case, which included a right to enter and sever, did not create anything more than a contractual licence:[80]

> The agreement to give a right of entry is not expressed in a form that purports to establish more than an individual right of entry and there is no expression of intent to create an interest in land as such that would be recognised under the provisions of the Land Transfer Act 1952.

The authority for the vendor's interest in land starts with *Re Samuel Allen and Sons* and *Morrison, Jones and Taylor*. Those cases themselves purported to rely on authority which did not in fact exist. They contain no proper consideration of principle. I submit they are both wrongly decided. But later courts have been happy to rely on them without themselves considering the principles involved. And so one court's mistake becomes the justification for its own repetition. Lucius Cary wrote: "Every new nonsense will be more acceptable that any old sense."[81] It should not be. Both cases are wrong on their facts and wrong on principle. That some later courts may have followed them does not make them correct.

[74] (1989) NSW Conv R 55–437.
[75] [1987] ANZ Conv R 192, 193.
[76] Supra at note 10, at 543–544.
[77] See text, infra at p 495.
[78] Supra at note 26, at 31.
[79] High Court, Auckland. 18 April 1991 (M No. 2061/90) Master Gambrill.
[80] Ibid, 9.
[81] *The Infallibilities of the Church of Rome* (a. 1643) 98.

PRINCIPLES

Lord Mansfield said:[82]

> [T]he law does not consist in particular cases; but in general principles, which run through the cases, and govern the decision of them.

The case authority for the vendor's equitable interest is weak. So is the support of principle. This is best shown by a two-step process. First, by attempting to define the interest if it were to exist. And second, by considering why as a matter of construction and principle it does not exist. There is a considerable overlap between these two steps.

Definition

THE EFFECT OF THE INTEREST

It is helpful to first review the implications of the equitable interest approach. These have already emerged in the discussion of the cases and need be dealt with only briefly here. If the vendor has an equitable interest in land then the usual priority rules must apply — the vendor's interest will rank ahead of subsequent equitable interests and behind later legal interests,[83] subject to the doctrines of postponement[84] and Land Transfer Act fraud.[85] Often these priority rules will render the vendor's right, even if seen as an interest in land, ineffective. That is because the dispute will most often be with a registered mortgagee whose legal interest will prevail, subject to fraud.[86] But in a variety of other situations the equitable interest *will* provide an effective proprietary remedy. Thus, subject to the doctrine of postponement, the vendor will win against a later equitable mortgagee, a purchaser under an agreement of sale and purchase of land (prior to registration), and the grantee of a later floating charge. In all those cases the vendor would lose if his right was seen not as proprietary in the land but as contractual with the purchaser, because a contractual right is not binding on third parties. And so the real importance of the equitable interest arises where the dispute is between the vendor and the holder of a subsequent equitable interest.[87] If the equitable interest analysis is adopted, the vendor may win. If the contractual analysis is adopted, the vendor must lose. That priority difference makes the classification of the vendor's right important.

THE SUBJECT OF THE INTEREST

To define the vendor's interest it is necessary to identify its subject. That is, to ask in what is the vendor's interest. It has already been established that affixation turns

[82] *Rust v Cooper* (1777) 2 Cowp 629, 632; 98 ER 1277, 1279.
[83] See *Samuel Allen and Sons*, supra at note 37, at 582. But see the discussion infra at note 115.
[84] See *Butler v Fairclough* (1917) 23 CLR 78, 91.
[85] See the Land Transfer Act 1952, ss 62, 63, 182, and 183.
[86] See, for example, *Kay's Leasing Corp*, supra at note 25, and *Trust Bank Central Ltd*, supra at note 26.
[87] As, of course, it was in both *Samuel Allen and Sons* and *Morrison Jones and Taylor*.

personalty into realty and that nothing in the contract of sale can change that. The logical extension of this is that if the vendor is to have a proprietary interest it will be in the land. It is important that it be recognised as such. That requires that it never be described as an interest in chattels. To do so would be to create an ambiguity; one is left wondering if the interest is in personalty or realty. Thus when Dugdale, in describing competition between the unpaid vendor of affixed goods and the mortgagee of land, talks of "an equity in the goods",[88] he inevitably confuses the reader. Does that mean an interest in land or an interest in chattels? It must, of course, mean an interest in land. So why not say so? Failure to admit that the interest is in land disguises the extreme nature of the interest itself. That failure to properly define the subject of the equitable interest has also lead to confused judicial reasoning. In the New Zealand case *Johnston v International Harvester Co*[89] the Court held machinery — the subject of a hire purchase agreement — to be a chattel and not a fixture. Thus the vendor's proprietary interest was retained. But the Court continued:[90]

> [T]he equitable interest of the [vendor of the machinery] being prior in time to the equitable estate of the [mortgagee] must prevail over that estate.

The cases upholding the vendor's interest in land were cited as authority.[91] But that is to confuse two different issues. If the machinery is still a chattel then the vendor wins because she has retained legal title to the chattel. There is no question of competing equitable interests. That can only arise if the machinery were affixed so as to become land. The mortgage is, of course, over the realty and not over chattels. MacGregor J's brief discussion of the equitable interest cases may be justifiable to the extent that it is the alleged equitable interest which creates the right to enter the land in order to remove the machinery, even if it does not create the proprietary interest in the machinery itself. But that is not the context in which the cases were cited, and it appears that the vendor's equitable interest was indeed seen — wrongly, I submit — as relevant to the proprietary interest itself.

Clear definition of the vendor's interest as in either chattels or land will prevent such confusion. If the subject of the sale is affixed and the vendor has an equitable interest then that interest must be in the land.

THE STATUS OF THE INTEREST

The vendor's interest in land is said to be equitable. None of the cases have gone so far as to suggest that the interest could be legal. Thus it is said to been an interest which exists in equity only. Under our Torrens System such an interest is not, of course, registrable. How then might the vendor seek to protect this interest in the purchaser's land which he is said to have acquired? Equitable interests are usually protected by caveat. But can an interest in land that exits in equity only, and is

88 Dugdale, *New Zealand Hire Purchase Law* (3rd ed 1978) 62.
89 Supra at note 10.
90 Ibid, 544, per MacGregor J.
91 Ibid, 543–544.

incapable of ever being registered, be caveated? The point has arisen before in relation to restrictive covenants and there has been some suggestion that such an interest will not support a caveat.[92] But that is by no means certain and the issue remains undecided.

The recent Australian case *Hazelwood v BP Australia Ltd*[93] concerned an attempt to caveat a vendor's equitable interest. The caveat was not allowed because it was said to be defective in form in that the land subject to the caveat was not described with sufficient certainty. But Cox J implied that but for that defect in form the caveat would have been allowed. There was no suggestion that the interest might itself be incapable of supporting a caveat. So the question of caveatability remains open. Vendors who fear that dealings with the land will prejudice their own rights are probably best advised to try to caveat their alleged interest. In *Carter Holt Harvey* Master Gambrill decided against such a caveat on the grounds that the vendor's interest was merely a contractual licence. But, as I have pointed out, other courts have come to different conclusions.

If vendors were to seek to protect their interests by caveat then in a large building development there could well be a great many caveats lodged. That would create an enormous procedural task with which the current administrative structure may have difficulty coping. While not itself a good argument against caveatability, this administrative difficulty must be acknowledged as a relevant consideration.

THE NATURE OF THE INTEREST

The discussion of caveats, and especially the *Hazelwood* case, raises the issues of the extent and nature of the vendor's interest. I have established that it is said to be equitable and in land. But in what is the vendor's interest and to what is she entitled? The cases have referred to it as a "species"[94] or "kind"[95] of equitable interest. But what species? What kind? These questions simply must be answered. Interests in land must be definite and they must be defined. There is no place for ambiguous interests conferring undefined rights for an uncertain period.

The main problem is that of determining in what land the interest is held. Is it in all the land in the particular certificate of title or is it only in that part of the land that is the fixtures concerned? And if the more restrictive approach is adopted does the interest also cover that part of the land over which access is required in order to remove the fixtures? Cox J said:[96]

> If the fixtures are situate on only some small part of the land in a title and the means of access are in fact such as to enable their removal without the necessity of tranversing any other part of the land and the title, I do not know how it could be said that the original owner of the fixtures can have an equitable interest in the entirety of the land and can forbid registration of a dealing which affects only that other part and does not in fact affect that part of the land where the fixtures are situate. On the other hand,

[92] See the discussion in Hinde, McMorland and Sim, supra at note 49, at para 2.125.
[93] Supra at note 75.
[94] *Kay's Leasing Corp*, supra at note 25, at 436.
[95] Sykes, supra at note 35, at 761.
[96] *Hazelwood*, supra at note 75, at 193–194.

the fixtures though only on portion of the land in a given title may be so spread as to cover almost all of the land and the access required to remove them may as matter of reality cover its entirety. Accordingly, though the fixtures themselves may cover only a portion of the land, it is at least arguable that the estate or interest of their owner is an equitable interest in the whole of the land.

In *Morrison, Jones and Taylor* Cozens Hardy MR described the interest as being "in this part of the freehold property".[97] Clearly he saw the interest as limited to a part only of the land, although given that the fixture concerned was a sprinkler installation the extent of that part remains unclear. In *Trust Bank Central* Robertson J held, citing *Morrison, Jones & Taylor*, that "the interest arises in respect of the affixed chattel as part of the land rather than more generally in the land itself".[98]

This is a very difficult issue. On the one hand, if the fixture concerned is only a small and easily detached item on one easily accessible part of the land it would be unnecessary that the vendor should have an interest over all of the land. On the other hand, if the fixture was a heating system spread throughout a building such that its removal would necessitate extensive structural work then the interest could not be said to be limited to the fixture itself. The solution may be to see the extent of the interest, as did Cox J, as dependent on the nature and position of the fixtures concerned. But that creates ambiguity and uncertainty. The problem is more theoretical than practical, but it does become important where, as in *Hazelwood*, the caveat procedure requires that the land concerned be defined with certainty.[99] That could be achieved by defining the vendor's interest by reference to the contract of sale (of the items that are now fixtures). And so the caveat is over the title but the interest itself is confined to the fixtures concerned. That would then allow future registration of such interests as did not prejudice that of the vendor-caveator.

A related question is when does the interest arise. Presumably it arises upon affixation and terminates upon full payment of the purchase price or upon the vendor's removal of the fixture. The right to remove arises upon the purchaser's default in payment. Thus (as with a mortgage) the interest and the right arising thereunder should be seen as separate. The interest arises immediately upon affixation but the right is contingent upon default.[100]

It should not be thought that by defining the vendor's interest, or at least by attempting such definition I am supporting the validity of the interest. Rather, the purpose of definition is twofold. First, one should know one's enemy. In order to attack the idea that a vendor obtains an interest in land we must first know the nature of that alleged interest. Second, the definition itself proves the interest to be something greater than its proponents appear to have contemplated. Perhaps this explains their own reluctance to define.

97 Supra at note 38, at 58.

98 Supra at note 26, at 31.

99 In New Zealand that requirement is established by the Land Transfer Act 1952, s 138(1), and the Land Transfer Regulations 1966 (SR 1966/25), reg 24.

100 The analysis has not been expressly adopted in the cases but Adam J, in *Kay's Leasing Corp*, supra at note 25, at 436, does use the terms "interest" and "right" in this context.

Applying Legal Principles

There is an overlap between the issue of definition and that of rejecting the equitable interest approach as a matter of construction and principle. That overlap occurs when classification of the interest is attempted.

IS IT A PROFIT À PRENDRE?

None of the cases have addressed this issue of classification. In *Morrison, Jones and Taylor, Re Samuel Allen and Sons*, and *Kay's Leasing Corp* the vendor's equitable interest was accepted and applied but never classified. That is not good enough. Interests in land, both legal and equitable, are classified into various categories. That is not rigid formalism but simply reflects the requirement of logical structure. It is not logical to create an equitable interest without classifying it. Such classification does not necessarily require that the vendor's interest conform with one of the established categories: it can be classified as *sui generis.*[101] That would, of course, be a far more radical approach. The equitable interest cases would then not only recognise an equitable interest in a new situation but would create an entirely new equitable interest.

If the interest does come within an established category then it will be a profit à prendre. The case in favour of such classification has some strength. The vendor is given the right to enter the land, sever part of it, and then to remove that severed part. To that extent the interest is consistent with a profit. But in other respects the profit classification does not work. Profits generally relate to the natural produce of the land.[102] Thus they concern interests conferring rights to enter, sever, and remove minerals, or fish, or game, or trees, or crops. Not fixtures. This natural produce rule might itself be said to preclude a profit classification. But that would probably be going too far. It is not firmly established that the restriction to natural products will always apply. Some authorities repeat the rule[103] but the cases appear to bend it.[104] In any case vendors' interests could be seen as exceptions to the natural products restriction and thus as an extension of the class profits à prendre. If that is what the cases said, then to the extent that the interest is valid at all, the exception should be allowed. The problem, of course, is that the cases do not say that: they are silent on the matter. Here we are only attempting to explain what the courts have been happy to do without explanation. That may well be attempting to rationalise the irrational.

IS IT AN INTEREST AT ALL?

The only academic discussion of the vendor's interest as a profit is by Guest, both

[101] Such classification is adopted by Guest, *The Law of Hire Purchase* (1966) para 956; and Guest and Lever, "Hire Purchase, Equipment Leases, and Fixtures" (1963) 27 Conv (NS) 30, 33.

[102] Guest and Lever, ibid 33; *Halsbury's Laws of England* (4th ed) vol 13, para 242; Gale, *A Treatise on the Law of Easements* (15th ed 1986) 4.

[103] Ibid.

[104] See, for example, *Mills v Stokman* (1966) 116 CLR 61.

in his book on hire purchase agreements and in an earlier article.[105] He rejects the profit classification both on the natural products rule and because of the uncertainty as to duration. I agree with the rejection of the profit classification, but for different reasons and with a different alternative answer. The real question is whether or not the vendor has an interest in land at all. In answering the profit question this greater question is also answered. Both turn on the distinction between an interest and a licence.

Intention

Where there is dispute as to whether a profit à prendre or a licence has been created it will be settled by reference to the intention of the parties.[106] Thus if the parties objectively intend to create an interest in land, then, subject to the usual requirements,[107] the interest is created. Applying that apparently simple test to hire purchase agreements and contracts including romalpa clauses creates all sorts of problems. In one respect there is an intention to create an interest in land. After all, the whole purpose of selling goods by hire purchase agreement or romalpa clause is to protect the vendor against non-payment. That protection is sought by a right in property that will protect the vendor against the purchaser's insolvency and the interests of third parties. So, the argument may go, the parties intended a proprietary interest and therefore the vendor has a proprietary interest in land.

That argument does have a superficial logic. But it does not withstand close scrutiny. Despite the intent to create a proprietary right, all the vendor gets is a licence; a contractual right. That is because as a matter of construction the intent to create a property right cannot be logically taken as an intent to create a profit à prendre, or for that matter, to create any interest in land. It all turns on the construction of the agreements.

Construction

It is necessary to examine the contents of hire purchase agreements and romalpa clauses where affixation is foreseen. In *Morrison, Jones and Taylor* the agreement was one of hire purchase concerning sprinkler equipment. The relevant clause read:[108]

> The basis of this contract is that the sprinkler installation and all its appurtenances shall remain and be the sole and exclusive property of the contractors until the entire sum of £237 aforesaid shall have been paid to them by the purchasers and accordingly in the event of any such default as aforesaid the contractors in addition to any other remedy may enter upon the premises of the purchasers and remove such installation and its appurtenances.

A romalpa clause is, in this respect, much the same. Both devices seek to retain

[105] Supra at note 101.
[106] See Hinde, McMorland and Sim, supra at note 49, at paras 6.009 and 6.065.
[107] See Hinde, McMorland and Sim, supra at note 49, at para 6.051. In hire purchase agreement or romalpa clause cases those elements are likely to always be present.
[108] Supra at note 38, at 51. Emphasis added.

title in the vendor and to give a right to enter and sever upon default in payment.

Those clauses should be compared with grants of interests in land. The most apt comparison is with a grant of a profit à prendre (although it is accepted that the vendor's right may be classified as a *sui generis* interest rather than as a profit). A typical example of a profit is where a grant is made to confer:[109]

> [T]he sole and exclusive right to fell and remove all trees suitable for milling now growing or being on the said land.

Comparison

The hire purchase agreements and romalpa clauses are in two parts. The first part is the retention of title. That is, in the quoted example from *Morrison, Jones and Taylor*, the part up to the word "accordingly". There is no doubting that this is an attempt to give the vendor a proprietary right; a right achieved by retaining title. The second part, after the word "accordingly" in the quoted example, gives the vendor the right to enter, sever, and remove. But the profit grant cannot be so divided into two parts. It is simply one grant to enter, sever, and remove a specified part of the land. That distinction is very important.

In the hire purchase agreement or romalpa clause cases the proprietary entitlement of the vendor is not expressed as an interest in the land. Rather it is expressed as a property right of retention in goods. So in *Morrison, Jones and Taylor* the vendor purported to retain title to sprinklers, and in *Trust Bank Central* the vendor purported to retain title to joinery. Those purported rights fail: *quicquid plantatur solo solo cedit.*

The courts' solution has been to ignore both that the interest is purportedly retained and that it is purportedly in goods. They have viewed the agreements as creating an obtained interest in land. That solution is illogical. The right to enter, sever, and remove in the hire purchase agreements and romalpa clauses was only ever intended as the means by which the retained property interest in the goods was to be exercised. It was a right to go and take that which was already owned. It was not itself creative of a proprietary right but only a subsidiary means by which an independent proprietary right could be conveniently exercised. A profit, on the other hand, is quite different. There the grantee's interest in the part of the land is generated by the grant itself. The right to enter, sever, and remove and the proprietary right cannot be separated. They are both aspects of the same interest created simultaneously by the same grant.

The distinction warrants repetition. In the case of a hire purchase agreement or romalpa clause the property right is by way of retention. The grant of a right to enter, sever, and remove was never intended to *create* a property right since that was purported to already exist. Whereas in a grant of an interest it is just that: a grant. The proprietary right is not retained but is obtained. The conferral of the right to enter, sever, and remove is not a separate and subsidiary right but is axiomatic of the transaction itself. And that is why it can create an interest in land if the parties so intend.

[109] *Hutchinson v Ripeka te Peehi* (1919) 38 NZLR 373, 374 (CA).

So how is it that a subsidiary attempt to retain title in goods, which fails, has come to be seen as a grant of an estate in land? By judicially transferring the parties' proprietary intent from the goods to the land. So an intent to retain title to goods becomes an intent to obtain title to land. But that is not finding an equitable interest, nor even implying an equitable interest. It is inventing one.

A licence

If the vendor's right is not an interest in land, it is a licence.[110] The vendor can enter and take the fixtures concerned from the purchaser because, and only because, the purchaser so promised. It is a personal, contractual promise. But the mortgagee never made that promise, nor did a later purchaser of the land nor a grantee of a later floating charge. The vendor's right is not proprietary in land but is personal, based on the purchaser's promise. The burden of that promise binds the purchaser, but the absence of privity means it will never bind third parties. So those third parties will beat the vendor in a fight over fixtures.[111]

Policy

For the courts to have gone so far out of their way to misuse authority, forget principle and invent intent it might be supposed that they had good reason; that the end justified the means. In *Re Samuel Allen and Sons* Parker J said:[112]

> Now I do not think I should be right if I were to hold that an agreement of this sort was of a purely personal nature. These agreements are very common and very useful, and, of course, it is open to a mortgagee, when he takes his mortgage, to make what inquiries he likes as to whether there are any agreements affecting the fixtures upon the property.

The other cases favouring the vendor's equitable interest, *Morrison, Jones and Taylor* and *Kay's Leasing Corp*, did not expressly consider policy, but clearly they also sought to protect the vendor from the status of unsecured creditor.

Why this desire to protect vendors above all others? The vendor may have tried to secure a property right, but she failed. To invent a right in land, a sort of judicial recompense, creates many more problems than it solves. If A sells steel to B under a romalpa clause and B uses it as reinforcing in the foundations of a large building then — according to the cases — A acquires an equitable interest in the land.[113] If B then grants an equitable mortgage to C, then C's interest, being later in time, is subservient to that of A. It necessarily follows that upon B's default A can enter and remove the steel regardless of C's interest as a bona fide mortgagee.

In some circumstances vendors may be deserving of some protection and hence the statutory provisions discussed earlier. But to effect that protection by way of an interest in land goes far too far. There is no conceptual distinction between a

[110] It is accepted here that the category of a "licence coupled with an interest" adds nothing to the law of real property. See Hinde, McMorland & Sim, supra at note 49, at para 7.006.

[111] This is Master Gambrill's point in *Carter Holt Harvey*, supra at note 79.

[112] Supra at note 37, at 581.

[113] The example of steel reinforcing is borrowed from Robertson J in *Trust Bank Central Ltd*, supra at note 26, at 12.

structural fixture, such as steel reinforcing, and a non-structural fixture, such as carpet.[114] The inflexibility of interests in land renders the vendor entitled to sever and remove both. No policy argument can support that. If vendors are to be protected beyond the statutory provisions presently in force then further statutory reform is necessary. That would act to restrict the maxim *quicquid plantur solo solo cedit* and so preserve the chattel status and hence title will be retained in goods — not obtained in land. I am not saying that such reform *is* required, simply specifying the manner in which it might best be done.

Priority

There are a number of other problems in this area that have not been discussed. They arise where the vendor's right is seen as an equitable interest and then that interest is given, or is refused, priority over other interests with disregard to the normal priority rules.[115] They are further evidence of the courts abandoning principle. By refusing to admit that the vendor obtains an interest in land at all, as I have done, these priority problems are avoided.

CONCLUSION

What is needed is a return to principle — even if that does involve rejecting some authorities. The issues arising can be dealt with very simply by applying very basic principles. The danger is that blind reliance on authority may lead to the repetition of earlier mistakes. That danger is compounded by the possibility of the vendor's equitable interest being accepted by default. By that I mean that the courts may be faced with cases where the easiest solution is to say the vendor does have an interest in land, but, as a matter of priority, that interest is subservient to the interest of a third party. A typical example is that of a vendor competing with a legal mortgagee. If such cases are decided as a matter of priority, existence of the equitable interest is implied. The result of that is more bad authority.

The solution is a much needed resort to principle. Then the answer becomes very simple. The vendor tried to retain title to the goods but could not because they became land. As between the vendor and the purchaser, the vendor can remove the fixtures because the contract so provides. But as between the vendor and third parties there is no such contractual right and so the third party wins because only he has an interest in land.

[114] *Masefield v Rotana* (1892) 10 NZLR 169, 178 per Richmond J (CA).

[115] See, for example, *Sanwa Australia Ltd* supra at note 74, where the vendor of goods prevailed over a registered mortgagee. The case has been criticised by Bennetts, "Reservation of Title — The Effectiveness of a Seller's Reservation of Title Clause Over Goods Which Become Fixtures on the Purchaser's Premises" (1989) Vol 7, No 6, Company and Securities Law Journal 420. In *Trust Bank Central Ltd*, supra at note 79, Robertson J implies that the vendor's equitable interest may, in effect, rank ahead of the mortgagee's legal interest prior to the mortgagee entering into possession. This is only by implication but the reasoning appears to be other than that of normal priority rules. See also *Cumberland Union Banking Co v Maryport Hematite Iron and Steel Co* [1892] 1 Ch 415 where a hire purchase agreement takes priority over an earlier mortgage even though the mortgage was expressed to include all later attached fixtures.

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