Dealing with fixtures on a lease renewal – A trap for the unwary?

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Introduction

1. In negotiations or proceedings for the renewal of a lease, parties often focus on the level of rent, the length of the new term, break options, rent review provisions and what "reasonable modernisation" entails. The extent of the demised premises and the treatment of fixtures installed during the previous terms(s) are not usually in the spotlight. In this short article the question is posed as to whether greater care needs to be given to the treatment of fixtures added during the earlier term: is there a real risk that tenants may inadvertently lose their right to remove their fixtures at the expiry of the new lease (or that landlords may inadvertently become burdened at the end of the term with fixtures that they did not bargain for and have to pay to be removed)?

Overview of the law

2. The old law was that fixtures - without more - became part of the freehold, and that a tenant was not to remove them. Modern leases typically contain provisions, however, dealing with "tenant's fixtures" – i.e. fixtures that the tenant is permitted (often

3. *required*) to remove at the end of the lease (or, perhaps, within a specified time thereafter). "Landlord's fixtures", conversely, must remain – and they may include those fixtures which the tenant attaches to the premises such that they become part of the structure itself (*Boswell v Crucible Stell Co* [1925] 1 KB 119).

4. A tenant is also entitled to remove articles (e.g. machinery) which have been attached to the demised premises for the purposes of trade, and which are chattels perfect in themselves, independently of their union with the soil, and can be removed without being entirely demolished or losing their character or value (*Spyer v Phillipson* [1931] 2 Ch 183 at 192). Such fixtures are called "trade fixtures".

5. So, tenants may (or must) remove "tenant's fixtures" as provided for in the lease, including their "trade fixtures". It was at one time thought that this right needed to be exercised during the term, and that if the tenant failed to do so then the fixtures became the absolute property of the landlord (*Pool's case* (1703) 1 Salk 368).

6. It is now well established, however, that where the tenant remains in possession with the landlord's consent, or pursuant to statutory provisions granting additional time to stay, the tenant retains the right to remove its fixtures during that time (*New Zealand Government Property Corpn v HM & S Ltd* [1982] QB 1145) (including, for example, during proceedings under the Landlord and Tenant Act 1954, "the 1954 Act").

7. Many leases fail to require a tenant to remove fixtures at lease expiry. They often give the tenant the right to do so but, save where the works are carried out pursuant to a Licence for Alterations, they frequently do not provide for removal or re-instatement. This is particularly so in relation to partitioning or other works which can be carried out without landlord's consent. In such cases, the tenant can elect whether or not to remove its fixtures and fittings.

Does the grant of a new tenancy affect the position?

8. That brief overview of the regime governing when tenants may remove fixtures at the end of the lease gives rise to the following query: what happens to the tenant's right to remove tenant's fixtures upon the grant of a *new* tenancy, following the expiry of the earlier tenancy? If the tenant had remained in possession with the landlord's consent (or by operation of statute) in the intervening period, the tenant could have removed its fixtures at any time *up to* the grant of the new lease. Is that right lost on the grant of the new lease? Is it all a question of what the new lease says? And, if so, what is the default position if the lease is silent?

9. In *Pole-Carew v Western Counties and General Manure Co* [1920] 2 Ch 97, the defendant carried on business manufacturing artificial manure and sulphuric acid at premises let to it by the plaintiff under three successive leases. In 1916, during the term of the third lease, a fire destroyed much of the tenant's equipment. At the time of the first lease, none of the equipment was in existence. Much of it was constructed during the term of the first lease. The remainder was constructed during the term of the second lease.

10. Following the fire, the landlord claimed damages for breaches of the tenant's repairing, reinstatement and insurance covenants. The tenant defended the claim insofar as it related to the equipment on the basis that the items of equipment were (if not chattels, then) tenant's fixtures which fell outside the scope of the covenants.

11. So far as relevant for present purposes, the landlord argued that if the items were tenant's fixtures, then they had lost that characteristic at the time of the fire by the deeds of surrender and grants which gave rise to the second and third leases.

12. Lord Sterndale MR, giving the leading judgment, found that all of the relevant equipment formed part of the buildings demised by the lease, and was therefore within the terms of the relevant covenants. He therefore declined to consider the question as to whether, if initially tenant's fixtures, they subsequently lost that status (at 119). Warrington LJ, however, did turn to consider the alternate argument, i.e. on the assumption that the items of equipment at one stage did amount to tenant's fixtures (at 112*ff*).

13. In relation to the equipment built during the term of the first lease, Warrington LJ held (*obiter*):

> *"I think it is clear that after a surrender of the term in the land to which the tenant's fixtures are attached and a subsequent lease to the same tenant the latter can no longer remove the tenant's fixtures unless his existing right to remove them is reserved expressly or by necessary implication… The lease itself, so far from reserving to the lessee any right to remove the erections in question, is expressed in terms which would include them in the demise, and the covenant to repair and to leave at the end of the term is wide enough to cover them.*
>
> *"In my opinion, it was impossible for the lessees, after the execution of that lease, successfully to insist on a right to remove any of the erections then in existence."*

14. The same reasoning applied to the further equipment erected or installed during the course of the second lease. So, following *Pole-Carew*, it would seem that where a lease is *surrendered*, and there is no express provision in the lease to the contrary, a tenant's fixtures will become part of the demise, and the right to remove them lost.

15. The case of *New Zealand Government Property Corporation v HM & S Ltd* [1982] QB 1145 concerned the renewal of a lease of Her Majesty's Theatre in Haymarket. The initial lease was due to come to an end in 1970. There was an uncontested lease renewal under the provisions of the 1954 Act, but it took some time for the terms to be agreed. The old lease continued automatically by operation of the 1954 Act until 1973, when the parties executed a new lease. Seven years after the execution of the new lease, and in the context of a rent review, the question arose as how the tenant's fixtures were to be treated – in particular, those which had been installed during the term of the first lease.

16. Lord Denning MR noted that it was "clear law" that the tenant could have removed its fixtures during the continuation of the old lease by operation of law, in other words until the new lease was granted in 1973. The question, however, was whether those old tenant's fixtures and fittings became a gift to the landlord on the grant of the new lease.

17. Lord Denning's view was that a tenant *"remains entitled to remove the "tenant's fixtures" so long as he remains in possession"* (at 1157), whether under the old lease, during an extension of that lease by operation of law, or under a new lease.

18. Lord Denning cited (at 1158-9) cases which appeared to suggest the contrary (including *Pole-Carew*), but noted that Lord Sterndale MR had expressly left the question open in that case and that the Court of Appeal had also left the question open in *Ex parte Baroness Willoughby D'Eresby* (1881) 44 LT 781.

19. Lord Denning's reasoning was illustrated by four hypothetical examples (at 1159), as follows:

    a. First, a tenant holding over at the end of a lease with the landlord's consent should be entitled to take his fixtures with him when he leaves.

    b. Second, the analysis should not be any different if the tenant takes a new lease, which is silent as to tenant's fixtures – there is no difference between the grant of the new lease and holding over under the old one.

    c. Third, assume that the tenant takes a new lease, which is back-dated to overlap with the previous lease and again says nothing about the tenant's fixtures, and

the previous lease is then surrendered by operation of law. Again, the tenant ought to be able to take his fixtures at the end of the new lease.

d. Fourth, assume the same as the third example, but that the tenant *expressly* surrenders the lease. Again, Lord Denning considered that the tenant should be able to take his fixtures, without having needed expressly to reserve the right to do so.

20. So, in conclusion, Lord Denning held (at 1160), *"that when an existing lease expires or is surrendered and is followed immediately by another, to the same tenant remaining in possession, the tenant does not lose his right to remove tenant's fixtures. He is entitled to remove them at the end of his new tenancy."*

21. It is to be noted, however, that the meaning of "demised premises" in the new lease was *"elucidated by reference to the repairing clause which is to keep "the demised premises and the appendages thereof, including the "landlord's fixtures" in good repair. That indicated that "tenant's fixtures" are not part of the "demised premises.""* (see 1160)

Getting it wrong

22. That final observation from Lord Denning tends to suggest that the position he articulated might not be quite as clear-cut as it first appears: subject to how "demised premises" is defined in the new lease, there may be scope for argument that it should be taken to include the tenant's fixtures.

23. Moreover, whilst it now appears that a deed of surrender which is silent on the point will not cause a tenant to lose its right to remove tenant's fixtures during or at the end of a new lease, the deed must be reviewed carefully to ensure that it is, in fact, silent.

24. If one is carrying out that review, it would no doubt be prudent to include express provision for tenant's fixtures in both the definition of the "demised premises" under the new lease and in any deed of surrender – especially where the tenant's fixtures are extensive or valuable.

25. Whilst not in the context of lease *renewals*, the problems that a failure to understand, or to set out clearly, what the lease provides as regards the right to remove tenant's fixtures is well illustrated by *Peel Land and Property v TS Sheerness Ltd* [2014]

EWCA Civ 100. In that case, the tenant of a substantial steel factory entered into administration, and the landlord sought to restrain the administrators from removing and selling the tenant's fixtures in the factory (which comprised very large steel manufacturing equipment, some items of which weighed in excess of 1,000 tonnes).

26. It was common ground on appeal that tenant *prima facie* had a right to remove tenant's fixtures during the term, the question was whether the lease excluded that right. The landlord argued: (1) that there was no rule to the effect that especially clear words must be used in the lease to exclude that right: ordinary principles of construction applied; and (2) that the language of the lease did serve to exclude the right.

27. The landlord's first argument was held to be correct (at [24]): the "rule" that clear words must be used to exclude the right, *"amounts to no more than a statement that if a tenant's* prima facie *right to remove tenant's fixtures is to be ousted, the language of the lease must make that clear. The rule was not prescribing how such language should do so; and whether or not, in any case, it does make it clear must in my view be a question to be answered by a consideration of the particular lease, applying to it the approach to the construction of contractual documents… If the outcome of that exercise is that the court arrives at a confident conclusion that the intention of the parties was that the tenant's right to remove the tenant's fixtures was to be ousted, that will be the effect of the lease. If the court's conclusion is that the exercise leaves it unsure that that was the intention of the parties, or perhaps that the lease is ambiguous as to whether that was their intention, the right will not be removed. That is not a revolutionary concept: if a party to a document claims that it has the effect of removing the other party's common law rights, it is obvious that the document must make clear that it does."*

28. The landlord's second argument was that the lease *did* remove the tenant's common law rights. In outline, the lease imposed an obligation upon the tenant to construct a new building containing a fully-equipped steelmaking plant, according to a particular specification. Clause 2(6) of the lease, thereafter imposed a negative obligation not to alter or change "the said premises" other than in connection with the use of the premises as a steelmaking plant. The question arose as to whether "the said premises" should be taken to include tenant's fixtures in the new steelmaking plant. If it did, the

removal of them would be prohibited – their removal not being in connection with the use of the premises as a steelmaking plant.

29. Allowing the appeal, Rimer LJ held (at [37]) that "the said premises" *included* the tenant's fittings. Any other construction was "commercially unrealistic":

> *"Clause 2(6) was directed at imposing a negative obligation in relation to the making of alterations or changes to 'the said premises' save in connection with… the steel making use… . It appears to me obvious… that such negative obligation was not intended to be confined simply to what was proposed to be done to the original buildings and the site in their respective original states. A central commercial obligation under the lease was the imposition upon the tenant of… covenant to build and equip a steel-making plant. That of course involved an alteration and change to 'the said premises' as they were at the grant of the lease… . I regard it as clear, however, that the sense of clause 2(6) must also have been to proscribe any alterations or changes to the building and plant erected in compliance with that covenant, save in so far as permitted by its proviso. To interpret 'the said premises' in clause 2(6) as not meaning this would in my view be to rob it of what I would regard as its primary intent. In short, I regard it as apparent that whatever sense may be attached to the use of the phrase 'the said premises' in other provisions of the lease, there can be no doubt that in clause 2(6) 'the said premises' is a reference to the buildings and site from time to time."*

Conclusions

30. Notwithstanding the reassurance for tenants following Lord Denning's judgment in the *New Zealand* case, there remains a risk that the renewal of a lease may have unforeseen and undesirable consequences for the landlord or tenant if careful thought is not given to the treatment of fixtures put in place during the earlier lease(s).

31. The greatest risk is to be found in the definition of "demised premises" in the new lease: does it, for example, purport to include "*all* fixtures" in place at the time the lease is granted?

32. Similarly, if the new lease is to be granted following a surrender of the old lease, the terms of that surrender need to be considered carefully to ensure that the tenant is not inadvertently surrendering his right to remove its fixtures at a later stage.

33. Finally, save in cases where the statutory disregard as to improvements under s.34 (1) (c) of 1954 Act applies, fixtures that become part of the demised premises will be rentalised both on reviews and also on the grant of any new lease so any oversight in this respect can result in the tenant paying a greater rent.

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