



Précis Paper

Fixtures in Australian Commercial Law Today

Gregory Burton SC and Caspar Conde discuss the modern application of the law of fixtures with reference to a recent commercial dispute.

Discussion Includes

- The difference between real property and personal property
- The law of fixtures, and the modern approach of looking to intention rather than to a simple question of attachment to the land
- Tenant's fixtures
- The application of the law of fixtures as discussed to the facts of Agripower

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Fixtures in Australian Commercial Law Today

1. In this edition of BenchTV, Gregory Burton SC (Barrister) and Caspar Conde (Barrister) present on the unanimous NSW Court of Appeal (Sackville AJA with Bathurst CJ and Beazley P agreeing) decision in *Agripower Barraba Pty Ltd v Blomfield* [2015] NSWCA 30 which considered the law of real property and specifically that relating to fixtures. Mr Burton SC led Mr Conde in successfully acting for the appellants, Agripower.

The Law Relating to Fixtures and Chattels:

2. The traditional distinction in property is between real property and personal property. Simply, land is real property whereas chattels are personal property. In addition, certain interests in land are essentially treated as real property and these include chattels real i.e. leases. The broad category of personal property may be divided into tangible and intangible chattels.
3. The doctrine of fixtures provides that personal property may become real property when it is attached or fixed to the land. Whether an item is found to be a fixture or a chattel is frequently important in disputes concerning the ownership of items on land removed by a seller.
4. Mr Burton SC submits the classic statement of Jordan CJ in *Australian Provincial Assurance Co Ltd v Coroneo* (1938) 38 SR (NSW) 700 at [712] remains influential in determining this question:

A fixture is a thing once a chattel which has become in law land through having been fixed to the land. The question whether a chattel has become a fixture depends upon whether it has been fixed to the land, and if so for what purpose. If a chattel is actually fixed to the land to any extent, by any means other than its own weight, then prima facie it is a fixture; and the burden of proof is upon anyone who asserts that it is not; if it is not otherwise fixed but kept in position by its own weight, then prima facie it is not a fixture and the burden of proof is on anyone who asserts that it is.

5. Although the degree of annexation or attachment of an item remains relevant to the determination, Mr Burton SC emphasises that the law has more recently shifted focus to a primary consideration of the objective purpose or intention behind bringing the item onto the land. In this regard, the presenters highlight the reasons of Sackville AJA in *Agripower* at [75]-[77]:

The law of fixtures is in some ways a relic of a period when greater emphasis was placed on physical acts, such as the annexation of chattels to land, than on whether there were good commercial or policy reasons for concluding that those acts should produce changes in title.

6. Mr Burton SC cites approvingly the reasons of Black J at [30]-[31] in the first instance decision (*Agripower Barraba Pty Limited v Blomfield* [2013] NSWSC 1598) which explains the progression of the jurisprudence of fixtures with particular reference to: *Commissioner of Stamps (WA) v L Whiteman Ltd* [1940] HCA 30; (1940) 64 CLR 407; *Reynolds v Ashby & Son* [1904] AC 466; *National Dairies WA Ltd v Commissioner of State Revenue* [2001] WASCA 112; (2001) 24 WAR 70.
7. In summary, an item that is affixed to land rather than simply standing on its own weight is presumptively a fixture. However, insubstantial evidence is required to displace this presumption. The primary focus should be placed on the objective intention of the parties, that is, whether the item was intended to form part of the land. The degree of annexation will be a consideration in reaching such a conclusion.
8. Finally, the presenters note that items can cease to be fixtures where they are severed by agreement or by operation of law. Perhaps more practically, the concept of tenant's fixtures operates such that "tenants may remove fixtures they have brought onto the land, provided the fixtures were installed for trade, domestic or ornamental purposes": *Agripower* (NSWCA), Sackville AJA at [83].

Agripower Barraba Pty Ltd v Blomfield – Background and Legal Issues

9. In the Supreme Court at first instance, Agripower sought a declaration that it was the owner of plant and equipment on land and orders to permit removal of the items. The plant and equipment had been used since the late 1980's in processing mined diatomaceous earth from surrounding regions. The process of refinement is described in detail in the Court of Appeal's reasons and in Black J's reasons at first instance. The process involves:
 - a. the mined diatomaceous earth passing through rotary crushers,
 - b. being shaken to separate larger and smaller clots of earth and diatoms,
 - c. at which point the diatoms are washed, then dried and
 - d. sent up a series of conveyor belts to a shed where the final product is sealed, weighed and carried off.
10. In total, there were 15 items in dispute. The 15 items were divided into 2 groups: 8 of which were outside a shed and 7 of which were inside the shed. Outside were the primary ore

crushers, shakers and conveyor belts. They sat in steel frames or cradles that were ultimately part of a superstructure which was bolted and welded into concrete pads, embedded in the ground (agricultural paddock). The equipment was hardwired to the electrical system and the air/water systems. Within the shed were the bagging, weighing and processing plant which were partly hard wired but very portable items.

11. Mr Burton SC notes that there had been a series of leases over the land on which the processing plant stood and that these leases were separate and distinct from leases over the land where the ore was taken out of the ground. Mr Burton SC reflected that this distinction separated *Agripower* from other recent cases involving mining tenements with fixtures on them.
12. Not all of the leases were able to be found and placed in evidence. Further, some of the items in the processing plant had been replaced since the 1980's, whilst others had been added to the existing set up.
13. An initial question was whether any of the items could be traced to determine who actually owned the various pieces of equipment which had come onto the land. Additionally, if an item had not been removed by a tenant there was a question as to whether it was then part of the land. Both the Court of Appeal and Black J concluded that these issues could not be determined by reference to the most recent lease, which was said to be ambiguous. Instead, consideration was given to oral evidence which seemed to establish that title was continuous if an item had not become a fixture, with the most recent lessee effectively buying the business. So the real question was whether or not the plant and equipment were fixtures.
14. At first instance, all the items in question were found to be fixtures, which *Agripower* challenged on appeal.

The Test for Determining the Purpose or Object of Annexation

15. As aforementioned, the primary consideration when determining whether an item annexed to land is a fixture is an objective determination of whether this was the intended result in bringing the item onto the land. Mr Burton SC observed that Black J and the Court of Appeal mentioned the following as relevant considerations for this determination:
 - The cost of removing the item compared with the value of the item itself
 - The damage that would be done to the item if it was removed
 - The degree of integration of the item with the surrounding structure and the other parts of the process

- The impact of removal on the land itself and any structures that had been attached to the land
 - The length and nature of the item's use
 - Objective features of what could be gleaned from when the item was brought onto the land
16. The above considerations were not challenged at first instance or on appeal.
17. Both the Court of Appeal and Black J separately applied these considerations to the 8 items outside the shed and the 7 items inside the shed.

The 8 Items Outside the Shed

18. All the judges noted the substantial degree to which the items outside the shed were fixed to the land via the bolts, concrete pads and superstructure. They further noted the significant costs of removing the items which was almost as much as the value of the items themselves. Finally, they gave importance to the effect of the removal on the material on which it sat i.e. the cradle. Using the expert evidence that they preferred, both courts concluded that to effect removal, the surrounding superstructure would have to be destroyed and holes would need to be cut in it. Consequently, what would be left would be a scatter gun of a superstructure which would require substantial rebuilding or expensive removal for the land to be used as either a processing plant or as grazing land.
19. Although the above considerations signal that the items are in fact fixtures, there had been a series of cases where similar items were held not to be fixtures. At [87]-[88] of the NSWCA judgment, Sackville AJA noted *Pegasus Gold Australia Ltd v Metso Minerals (Australia) Ltd* [2003] NTCA 3; 16 NTLR 54, where the Northern Territory Court of Appeal held that "heavy mining equipment bolted to concrete slabs embedded in the soil on a mining tenement were not fixtures within the meaning of the *Workmen's Liens Act* (NT)." His Honour also mentioned *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164, in which material affixed to a superstructure attached to the land was held not to be fixtures.
20. In both previous cases, the mining legislation and environmental impact statements had required that the tenant remove the equipment at the end of their lease and leave the land in good order – a requirement of the law that the land had to be rehabilitated. As a result, the items were not fixtures because they were brought onto the land more for the enjoyment of the equipment as a processing plant rather than for the enjoyment of the land.
21. Mr Burton SC observes that in this case there was no legislative requirement signaling an objective intention for the items not to be fixtures. Hence, both courts relied on the factors

noted above in [16] in conjunction with the fact that most of the items had sat there for a series of leases and had a degree of permanency to their placement, in concluding that the items outside the shed were fixtures.

The 7 Items Inside the Shed

22. In relation to the equipment used for bagging the diatoms, Black J accepted they were all portable. Most of the items stood on the ground largely by their own weight or with some very light bolts, though they were affixed to a pneumatic tube for pressurized air and hardwired to the power supply. Some of the items would require soldering/cutting for complete removal but that would not cause damage to the item or the shed. In fact, the compressor had been replaced once and perhaps twice, including replacement by the most recent tenant. It was accepted that the items could be removed without great cost.
23. Nevertheless, Black J again found that these item were fixtures. The presenters suggest that his Honour reached that conclusion because he considered that the equipment in the shed was part of an integrated process, which started with the crushers and ended up with the dirt in the bag. His Honour reasoned that if you took one item out of the process you would destroy the economic utility of items which were clearly fixtures with a significant degree of cost to replace them. Hence, he held that all the items must be fixtures.
24. The Court of Appeal adopted a different approach, focusing on the features of each individual item. Relying upon the factors noted above in [22], particularly the lack of physical annexation, Sackville AJA reasoned that the degree to which they were integrated was not sufficient for them to become fixtures. Therefore, the items in the shed were removable because they were not fixtures.

Further Evidence Application

25. A separate issue to the substantive dispute on fixtures was that Agripower sought to adduce further evidence on appeal pursuant to s 75A(7) *Supreme Court Act 1970* (NSW). The evidence was not fresh evidence because it was available at the time of the first hearing. The overlooked material included the original mining tenements material that was used to seek approval under the legislation and further environmental impact statements. The Court of Appeal refused leave to adduce the further material because there was insufficient evidence that it would have changed the result as it primarily related to the surrounding mining tenements and not to the land on which the processing took place.

Title to Sell

26. Incidentally, Agripower had bought the plant and materials from receivers of a failed company which had held the lease for the relevant land. Another ancillary question had arisen as to whether the receivers had good title to sell these items. The Court of Appeal determined the receivers did not attain the title but they had the rights to secured credit so they could transfer good title.

Implications

27. Agripower's appeal was allowed in part. The Court of Appeal made declarations that Agripower owned the seven disputed items inside the shed and was entitled to immediate possession. The proceedings were remitted to the primary judge to determine outstanding issues including damages.
28. The *Agripower* litigation is a reminder to parties involved in the sale of land or the sale of items attached to land to be mindful of the classification of plant and equipment as fixtures or chattels. The partially divergent reasons of the Court of Appeal and the primary judge illustrate the complexities involved in making that determination. Finally, the decision highlights that each case will be determined on its own particular facts and although the legal principles are now well-settled, they can be difficult to apply.

BIOGRAPHY

Gregory Burton SC

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Greg was admitted to the bar in 1989 and admitted as Senior Counsel in 2004. He was admitted to the bar of Ireland in 1993. He specialises in trial and appellate advocacy primarily in commercial, equity, intellectual property and IT, competition, property and succession/family provision, insurance, administrative law and associations and charities, professional liability, torts and contracts/sale of goods and services, construction law. He is an arbitrator, expert determiner (including domain name auDA panels), mediator for many years and is on many panels, statutory and private and Court lists with numerous appointments. He has NMAS accreditation. Gregory is an author and editor of and contributor to journals, books, legal encyclopaedias, including Journal of Banking and Finance Law and Practice. He studied a Bachelor of Arts and Law at the University of Sydney, graduating in 1978 and 1980 respectively, and was admitted as a solicitor in 1980. He also graduated with a Bachelor of Civil Law at Oxford University and has a Diploma of International Arbitrations accredited by the Chartered Institute of Arbitrators as of 2012. He is a former member NSW Bar Association professional conduct committee and a current member of the Bar News committee. He is also a Procurator (retained general counsel) of the Presbyterian Church of Australia (in NSW from 2002, federally from 2004, WA from 2005, Queensland from 2006).

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His principal areas of practice are administrative law, appellate, commercial law, common law, constitutional law, contracts, corporations and securities, equity, international law, public law, shareholder class actions and trusts. Caspar is entitled to practice in the Singapore International Commercial Court. He was the Ministerial Adviser to the Commonwealth Attorney-General. Caspar is a member of the NSW Bar Association's Bar Practice Development Committee. He is a contributing author for Lexis Nexis' Australian Corporation Practice and has publications in the Australian Bar Review.

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