



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 33

CA35/21

OPINION OF LORD ERICHT

In the cause

DAVID TANNER

Pursuer

against

E MOSS LIMITED

Defender

**Pursuer: Thomson QC; Brodies LLP
Defender: Massaro; Shoosmiths LLP**

26 April 2022

Introduction

[1] The pursuer granted a lease of a chemists shop to the defender, a member of the Boots group of companies. At the end of the lease, the chemists shop was returned to the pursuer as a shell. The pursuer raised a commercial action seeking various declarators and also concluding for damages. The parties were in dispute as to whether the defender had been entitled to remove moveables and tenant's fixtures.

The lease

[2] The lease between the pursuer and defender was dated 29 August and 1 September 2003 (“the Lease”). It was subsequently supplemented by two licences for works, both dated 9 and 17 September 2009. The first of these licences for work is not relevant to the current dispute. It was for the construction of an internal stair (the “Stair Licence”). The stair was not removed by the defender and so does not form part of the pursuer’s claim for damages. The second licence (“the Works Licence”) was for works shown on drawings set out in the schedule to the licence.

Terms of the Lease documentation

The Lease

[3] The Lease was for a fifteen year term ending on 31 August 2018. The tenant’s obligations were set out in clause 2 of the Lease and included:

“(8) To yield up

At the expiration or sooner determination of the Term quietly to yield up the leased premises to the Landlord in such good and tenantable repair and condition as shall be in accordance with the obligations on the part of the Tenant herein contained and to remove from and vacate the leased premises, leaving them and all Landlords’ fixtures and fittings therein in good repair and condition in accordance with the Tenant’s obligations hereunder. If required by the Landlord acting reasonably the Tenant shall at the expiration or sooner determination of the Term remove its fit-out (if any) of the leased premises and reinstate the leased premises to the Landlord’s reasonable satisfaction. Further provided that if at the expiry or sooner determination of the Term the leased premises are not in such condition as is consistent with the Tenant’s obligations under this Lease then the Landlord may carry out such works and the Tenant will pay to the Landlord within 14 days of written demand the proper and reasonably incurred costs of doing so.

...

(11) Alterations

- (a) Not without the Landlord's consent in writing to make any alterations or additions whatsoever whether of a structural or non-structural nature to the leased premises provided that the Landlord's consent shall not be unreasonably withheld to internal non-structural alterations and additions or a new shop front
- (b) The Landlord may as a condition of giving any such consent as aforesaid require the Tenant to enter into such obligations with the Landlord as the Landlord may reasonably require as regards the execution of any such works and the reinstatement of the leased premises at the end or sooner determination of the Term
- (c) In the event of the Tenant failing to observe this obligation it shall be lawful for the Landlord and its agents surveyors and workmen with all necessary materials and appliances to enter upon the leased premises and remove any alterations or additions and execute such works as may be necessary to restore the leased premises to their former state and the reasonable and properly incurred costs and expenses thereof (including surveyors and other professional fees) shall be paid by the Tenant to the Landlord within seven (7 days) of demand
- (d) The Landlord's consent shall not be required for the installation and removal of internal demountable partitions"

The Works Licence

[4] Clause 2 of the Work's Licence stated:

"2. Grant of Consent

Subject always to the terms and conditions specified or referred to in this Agreement, the Landlord CONSENTS to the Tenant carrying out the Works."

[5] Clause 4 stated:

"4. Lease Obligations

On completion of the Works, all the Tenant's obligations contained in the Lease will apply *mutatis mutandis* to the Property in its then altered state."

"Property" was defined in clause 1.1 as "ALL and WHOLE those subjects known as and forming 2A Hillhouse Road, Hamilton and registered in the Land Register of

Scotland under Title Number LAN 109091 and being the subjects more particularly described in the Lease” The definition did not include moveable property.

[6] Clause 6 stated:

“6. Reinstatement of Expiry

At the end of the Term or the earlier termination of the Lease (howsoever arising) if and to the extent required by the Landlord in accordance with the provisions of the Lease the Tenant shall at their own cost reinstate and make good the Property in compliance with:-

6.1 the provisions of the Lease; and

6.2 the conditions set out in Part 1 of the Schedule [i.e. conditions as to workmanship, compliance with planning permission, building regulations etc.] as if references in that Part of the Schedule to the Works were references to the works for such reinstatement and making good.”

[7] Clause 11 stated:

“11. Ratification of Lease

Except in so far as amended by this Agreement, the Parties confirm that the whole provisions of the Lease shall remain in full force and effect.”

[8] In clause 1.1 of the Works Licence “Works” was defined as “the works shown on the drawings set out in Part 2 of the Schedule”.

Conclusions

[9] The conclusions were as follows:

“1 For declarator that, on a proper construction of the [Lease] as supplemented by [the Stair Licence and the Works Licence] the defender had no right or title to remove its fit out from the subjects known as and forming 2A Hillhouse Road, Hamilton, being the works various detailed in (a) the Stair licence (b) the works licence and (c) the email from the defender’s Janette Sparrow to the pursuer and relative attachments dated 9 October 2015.

2 Attentively, failing decree as first concluded for, for declarator that any right or title the defender had to remove its fit out from the [subjects] expired on 31 August 2018, with the result that, on yielding up the Leased Premises the Defender had no right or title to remove from the Leased Premises its fit out, being the works various detailed in (a) the Stair licence (b) the works licence

- and (c) the email from the defender's Janette Sparrow to the pursuer and relative attachments dated 9 October 2015.
- 3 Alternatively, failing decree as first and second concluded for, for a declarator that, on a proper construction of the Lease as supplemented by [the Stair Licence and the Works Licence] the Defender had no right or title to remove its fit out from the [subjects] being the works various detailed in (a) the Stair licence (b) the works licence and (c) the email from the defender's Janette Sparrow to the pursuer and relative attachments dated 9 October 2015.
4. Alternatively, failing decree as first, second and third concluded for, for declaratory that any right or title the defender had to remove its fit out from the [subjects] expired on 31 August 2018, with the result that on yielding up the Lease Premises the Defender had no right or title to remove from the Lease Premises its fit out being the works various detailed in (a) the Stair Licence (b) the works licence and (c) the email from the defender's Janette Sparrow to the pursuer and relative attachments dated 9 October 2015.
- 5 Alternatively, failing decree as first, second, third and fourth concluded for, for declarator that, on a proper construction of the [Lease] as supplemented by [the stair licence and the works licence] clause 2(8) of the Lease obliged the Defender, on yielding up the Lease Premises, to yield up the Lease Premises as a fitted out pharmacy, such being the condition of the Lease Premises at the Date of Entry in terms of the Lease.
- 6 For payment by the defender to pursuer of the sum of £120,149.45 ...
- 7 For declarator that (1) the defender is bound, in terms clause 2(20) of the Lease to pay to the Pursuer all reasonable costs, professional fees, charges and expenses properly and reasonable incurred by the pursuer in connection with or in procuring the remedy of the breach of any obligation by the Defender under the Lease and (2) the present action is an action in connection with or in procuring the remedying of the breach of obligations by the Defender under the Lease."

Submissions

[10] The case called before me for a debate on the pleas to the relevancy of both the defender and the pursuer.

Submissions for the defender

[11] Counsel for the defender invited me to refuse conclusions 1-5 and put the case out by order to determine which pleadings should be excluded from probation and further

procedure. Counsel submitted that the defender had a right to remove moveables and trade fixtures at the end of the Lease. Moveable items which had not acceded continued to belong to the defender and the defender was entitled to remove them. At common law, the defender has a right to remove trade fixtures (*Syme v Harvey* (1861) 24D 202, *Brand's Trustees v Brand's Trustees* (1876) 3R (HL) 16, *Houldsworth v Brand's Trustees* (1877) 4R 369).

Whether specific items of property were or were not trade fixtures would require proof (*Cliffplant Limited v Kinnaird* 1981 SC 9 at p16-17 and 26: not overruled on this point in *Scottish Discount Company Limited v Blin* 1985 SC 216). The common law was not disapplied by the Lease. There was a presumption that parties do not intend to give up common law rights unless that is clear from the terms of the contract (*HIH Casualty and General Insurance Limited v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349). This was a commercially sensible construction (*Ashtead Plant Hire Co Limited v Granton Central Developments Limited* 2020 SC 244). The right to remove trade fixture was an important right (*Syme* p212). The Lease says nothing about trade fixtures only requiring the defender to leave the landlord's fixtures and fittings (clause 2(8)) and by implication the defender was not required to leave its trade fixtures. (*Gordon Scottish Land Law*) paragraph 4.25-26, 4.28, 4.32. There were no landlord's fixtures at the commencement of the Lease as they were all owned by the company. That interpretation was consistent with the share purchase agreement under which the defender had purchased the company including its rights to the fixtures in the property. At the start of the Lease, the pursuer let the defender a shell fitted out with the company's assets (which the defender acquired by acquiring the company): at the Lease end, the pursuer would obtain a significant windfall if he had a right to insist on having a fitted out pharmacy provided to him. There was no provision in the Lease requiring the defender to yield up the premises as a "fitted out pharmacy" as stated in e.g. conclusion 5.

If this was not the correct interpretation of the Lease, it was necessary to imply a term into the Lease to avoid inconsistency with the share purchase agreement. Clause 6.1 of the works licence makes no difference (*Gerber, Commercial Leases in Scotland* paragraph 16.11). In any event, the pursuer would have been bound to have granted consent to remove the defender's trade fixtures. The pursuer had suffered no loss as a result of the defender's removal of its own trade fixtures. In any event, the warranty and the share purchase agreement provided a basis for the pursuer to be personally barred from now seeking to assert ownership of the fixtures and fittings, and/or a waiver of that right.

[12] Counsel further submitted that the right to remove trade fixtures existed not only during the Lease but for a reasonable time thereafter (*Cliffplant Limited* at p17 and 26; *Reid The Law of Property in Scotland* paragraph 586; *Gordon* paragraph 4.28).

Submissions for the pursuer

[13] Senior counsel for the pursuer invited me to sustain his pleas in law and grant decree in terms of conclusion 1 or alternatively conclusion 2. However, he recognised that what would constitute a tenant's fixture and what would constitute a moveable was a question of fact and enquiry might be necessary, in which case he invited me to decide points of principle and then put the case out by order for further procedure and discussion of which averments should be deleted.

[14] Counsel submitted that what was being let under the Lease was the heritage with the fixtures that had acceded at that date. What had to be yielded up was the leased premises not in the condition at the date of entry but rather with the tenant's fixture and fittings that had consequently been undertaken in terms of the Works Licence. The obligation under the Lease now covered the premises as altered. The Lease contained a right to order removal

with an obligation to yield up the altered premises (Rennie paragraph 9 10, Gordon paragraph 4 25). The right to remove tenant's fittings was a right exercisable during the term and if it was not exercised during the term the fixtures were irrevocably ceded to the landlord (*Brand's Trustees v Brand's Trustees*).

[15] Counsel submitted that the defender's various obligations under the Lease, including its repairing and yielding up obligations and the obligations regarding alterations, all fell to be applied on the basis that the initial fit-out formed part of the Leased Premises. The defender's pleaded position was irrelevant in that (a) it did not provide any basis for discriminating between landlord's fixtures and fittings and tenant's trade fixtures and fittings (b) there was no fair notice of whether any particular items should be regarded as a tenant's fixture or fitting and that the default position was that the property had acceded to the heritage (c) on a proper construction of lease, it was entirely a matter for the pursuer whether any trade fixtures and fittings were to be removed or left: the contractual language was more than adequate to disapply any common law rules and (d) following expiry of the Lease, the defender had no entitlement to exercise any rights to remove fixtures and fittings.

[16] Counsel further submitted that the defender's averments in relation to the share purchase agreement were irrelevant. The share purchase agreement was a contract between the pursuer and the defender for the sale of shares. The "Property" as defined within a share purchase agreement to which the warranties related did not include fixtures and fittings within the leased premises, these premises being Heritable Property not owned by the company. Further, the share purchase agreement was of no moment so far as any further alterations to the leased premises were concerned.

[17] Counsel further submitted that the averments did not satisfy any of the well-established criteria for the implication of contractual terms: the term was not

necessary, not reasonable and was vague and it could not be said that that term and no other would fall to be implied into the Lease.

[18] Counsel further submitted that the averments in support of contractual bar and waiver were irrelevant. The averments in support of contractual bar proceeded on the same essential misconception as to the nature of contract of sale. They did not identify any term of the share purchase agreement or lease which could give rise to contractual bar. They proceeded on the misconception that there was a suggestion that the sale effected by the share purchase agreement was invalid. It was not now open for the defender to enforce the share purchase agreement.

The matters in dispute in the Scott Schedule

[19] Much of the debate focussed on the declarators sought. That was a fairly abstract exercise. A better approach is to take a concrete practical approach to the real matters of dispute between the parties. These were focused in a Scott Schedule dealing in detail with the damages claim and listing all the items which the pursuer says should not have been removed from the premises by the defender. The Scott Schedule sets out the defender's position on each of these items, e.g. whether the sum sought is agreed, whether liability is agreed in principle but there is a dispute about the amount due, whether there is an element of improvement, or whether liability is denied in respect of that item.

[20] The items in the Scott Schedule fall into different categories.

[21] The first category is items which the defender accepts it should not have removed and in respect of which it accepts that it requires to make payment to the pursuer. The defender accepts that it was wrong to reduce the premises to a shell. It accepts, for example, that it was wrong to remove items such as an air condition system, partition walls forming a

consultation room, a CCTV system, sinks and basins, water heaters, power installations, IT cabling and the amount due in damages in respect of such items is agreed in the Scott schedule.

[22] The second category is moveable property. Examples of this from the Scott Schedule are chairs and wastepaper baskets. The pursuer's position is that the defender was not entitled to remove the items of moveable property listed in the Scott Schedule: the defender disagrees.

[23] The third category is items which may have acceded to the heritage. These include items such as cupboards and shelves, retail wall units, retail gondola islands and retail display units. Whether any particular item within this third category has in fact acceded to the heritage or is a moveable cannot be resolved in this debate and enquiry will be required as to whether in respect of each item the legal test for accession has been met.

[24] The items in this third category which are found after enquiry to have acceded to the heritage then require to be further categorised as landlord's fixtures or tenant's fixtures. The difference between these is conveniently set out by Professor Gordon as follows:

“(5) Landlord and tenant

In questions between landlord and tenant fixtures fall into two main categories (a) landlords' fixtures, and (b) tenants' fixtures. (a) Landlords' fixtures in turn may be divided into (i) a narrow class, and (ii) a wider class. The narrow class comprises items that have been annexed to the premises by the landlord and remain his property. The wider class comprises those items which have been annexed by the tenant to the premises, and which he is not entitled to remove at the expiry of the lease. They must be left without indemnity, failing agreement to the contrary or statutory provision. (b) Tenants' fixtures are moveables annexed by the tenant which he has a right to remove, whether by agreement with his landlord, or by operation of law. Our main concern is with landlords' fixtures in the wider sense and with tenants' fixtures. The lease usually governs landlords' fixtures in the narrow sense. They normally fall into, or are retained in, the landlord's ownership, although the lease or custom may provide otherwise.

Prima facie all fixtures attached by the tenant are landlords' fixtures and must be left for the landlord, but as a matter of public policy, so that tenants are not discouraged from making additions to the land, they are presumed to have made improvements for their own benefit, and are entitled to remove three classes of items: (a) ornamental and domestic fixtures; (b) trade fixtures; and (c) agricultural fixtures." (para 4.25)

[25] The total which the pursuer claims under the Scott Schedule is around £120,000. A large proportion of that total falls under the first category and is not in dispute. The dispute between the parties is in relation to the second and third categories, which amount to the remaining sums said to be due.

[26] In considering the pursuer's claim under the second and third categories, I look firstly at the position under the Lease as it was originally entered into, and then the effect on that original position of the Work's Licence and the failure to remove items prior to the expiry of the lease term.

Did the tenant have a right under the Lease as originally entered into to remove tenant's fixtures and moveables?

Nature of the transaction

[27] The Lease was part of a larger transaction whereby companies within the Boots group took over the chemists business previously operated by the pursuer through David Tanner Ltd (the "Company"). The Company owned the premises and the chemists business and all its assets. The Company sold the premises to the pursuer who then leased them to the defender. The pursuer sold the entire issued share capital of the Company to the defender. The effect of the transaction was that the chemists business (including all its assets other than the premises) continued to be operated out of the premises, but under new ownership and from premises which were leased rather than owned. The transaction was

given effect to by various legal documents including the Lease and a Share Purchase Agreement date 1 September 2003. The Lease cannot be considered in isolation from the larger transaction of which it was an integral part. The Share Purchase Agreement is part of the factual matrix in which the Lease was entered into and should not be excluded from probation.

Moveables

[28] There is no provision in the Lease, or any other contractual documentation which provides that any moveables within the premises were owned by the pursuer. This is not surprising given the overall structure of the transaction between the pursuer and the defender in 2003. Prior to the transaction, the premises and the moveable items within it were owned by the Company. The disposition of the premises by the Company to the pursuer carried with it any items which had acceded to the heritage and had therefore become heritable themselves. It would not carry within it any moveable items which had not acceded, and any such moveable items would remain as the property of the Company when the defender purchased the shares in the Company. The Company and all its assets (other than the premises) became part of the Boots group. I find that, leaving aside for the moment the issues of the Works Licence and the occupation after the end of the Lease, the defender was entitled to remove moveable property from the premises.

Fixtures

[29] In granting the Lease to the defender, the pursuer could grant no more than what he had himself received by the disposition. What he had received by the disposition was the heritable property of the premises together with such moveables which had become part of

the heritable property by accession. Any accessions which existed when he granted the Lease were landlord's fixtures, not tenant's fixtures, as they were acquired by the pursuer when he acquired the premises under the disposition, and therefore were owned by the pursuer prior the commencement of the Lease. The requirements of the Lease as to what is to happen to landlord's fixtures on termination are clear: the tenant is obliged to leave "all Landlords' fixtures and fittings therein in good repair and condition" (clause 2(8)). I find that the defender was not entitled to remove any items which after enquiry are found to be landlord's fixtures.

[30] The Lease makes no specific provision as to whether or not the tenant is entitled to remove tenant's fixtures. It provides only that the landlord may require the tenant to remove its fit-out:

"If required by the Landlord acting reasonably the Tenant shall at the expiration or sooner determination of the Term remove its fit-out (if any) of the leased premises and reinstate the leased premises to the Landlord's reasonable satisfaction."
(clause 2(8))

[31] "Fit-out" is not defined. I agree with senior counsel for the pursuer that it means tenant's fixtures. That interpretation is consistent with the common law position that tenant's fixtures are presumed to be for the benefit of the tenant: clause 2(8) sets out a mechanism by which the landlord can ensure the tenant removes its tenants fixtures and makes good the premises.

[32] The Lease is silent on what happens if the landlord does not exercise that mechanism. At common law the tenant is entitled to remove tenant's fixtures, but that entitlement may be excluded in the terms of the lease. There is no express wording in the Lease which excludes the common law position. There is no wording by which such an exclusion can be implied. The Landlord's option in clause 2(8) to require the tenant to

remove tenant's fixtures is no more than a mechanism to enforce the common law by compelling the tenant to remove the tenant's fixtures and reinstate the premises. If the option is not exercised that does not mean that the common law is excluded but merely that the landlord has chosen not to operate that mechanism. I find that, leaving aside for the moment the issues of the Works Licence and the occupation after the expiry of the Lease, the defender is entitled to remove any items which after enquiry are found to be tenant's fixtures.

Was the tenant's right under the Lease to remove tenant's fixtures and moveables amended by the Works Licence?

[33] In terms of the Works Licence, the landlord granted consent to the "Works" which were defined as the works shown on drawings set out in the schedule. These drawings had attached to them a "rebranding draft brief." Section 3 of the draft brief was headed "shop fitting requirement". It provided that certain items were to be retained (e.g. existing consultation room counter). It provided that other existing items were to be removed and replaced (e.g. gondolas). It provided for new shelving to be provided throughout. It provided for moveable items such as baskets.

[34] The pursuer's position was that once the works were done, the tenant's obligations applied to the property in its then altered state and that what had to be given back was the property as altered. However matters are not as straightforward as that. It is necessary to distinguish between landlord's fixtures, tenant's fixtures and moveables.

[35] Prior to the execution of the Works Licence, the defender had the right to remove tenant's fixtures and moveables. Does the Works Licence preserve that right or remove it?

[36] In my opinion all that the Works Licence does is document the Landlord's consent to works, as stated in clause 2 of the Works Licence. The Works Licence does not innovate on the Lease. It does not alter the position under the Lease in respect of tenant's fixtures or moveables. The whole provisions of the Lease remain in full force and effect except in so far as amended by the Works Licence (clause 11 of the Works Licence). On completion of the works the Tenant's obligations under the Lease apply to the Property (defined as the heritable subjects more particularly described in the Lease) in so far as altered (clause 4 of the Works Licence). There is no clause in the Works Licence which amends the provisions of the Lease in respect of tenant's fixtures or moveables. The Works Licence does not amend clause 2(8) of the Lease so as to remove the defender's common law right to remove the tenant's fixtures. Moveables are not covered by clause 4 of the Works Licence which only applies to the "Property" which is defined as heritable property. Accordingly I find that the existence of the Works Licence makes no difference to the finding set out above that the defender is entitled to remove moveables and tenant's fixtures.

Did the tenant's right to remove the tenant's fixtures and moveables expire on 31 August 2018?

[37] The defender did not leave the property on 31 August 2018 when the lease expired. It remained in occupation. A decree of removing was granted by the sheriff on 10 December 2018, further to which the defender returned the keys of the premises on 19 December 2018. The defender accepts that it was wrong to have remained in occupation of the premises. It has paid damages to the pursuer for its unlawful occupation after 31 August 2018, and that forms no part of this action.

[38] The only relevance of the period of unlawful occupation to this action is that it was during that period that the defender removed items which may, after proof, be found to be tenant's fixtures or moveables. The pursuer's position is that the right of the defender to remove moveables and tenant's fixtures was exercisable only during the term of the Lease and expired on 31 August 2018: the moveables and tenant's fixtures not having been removed by then the defender lost the right to do so. The defender's position is that it was entitled to remove the moveable items and tenant's fixtures within a reasonable time after expiry of the Lease.

[39] Prior to this case, the proposition that a tenant was allowed a reasonable time after the expiry of a lease to remove tenant's fittings could well have been described as trite law. The law as understood until now was stated clearly and concisely by Lord Avonside in the Inner House in *Cliffplant v Kinnaird* at p26:

"Where a tenant erects fixtures to be used in his trade on the land of his landlord that tenant has the right to remove these fixtures during his tenure, and on the expiry of his lease, provided in the latter case, it is removed within a reasonable time after the expiry of the lease." (p26)

[40] This orthodox view is also to be found in Professor Reid's *Law of Property in Scotland* (also printed as vol. 18 of the *Stair Memorial Encyclopaedia*) which states that the tenant "has a right of severance which may be exercised at any time during the currency of the lease or within a short period of its termination". (para 586).

[41] It is also to be found in Gordon's Scottish Land Law:

"what happens if the landlord fails to remove the fixtures during the currency of the lease is not entirely clear, but it seems probable that, as in the case of England where there is an express right of removal, a reasonable period after the termination of the lease will be allowed, if no special stipulation has been made in the lease"

[42] However, counsel for the pursuer challenged this orthodoxy. In his submission, the orthodoxy proceeded upon a misunderstanding of *Brand's Trustees v Brand's Trustees*. The

misunderstanding had arisen because although in *Brand's Trustees v Brand's Trustees* the tenant was allowed to remove its fixtures within a reasonable time, this was because of a peculiarity on the facts of that case. In that case, the tenants were under no obligation to leave on the expiry date and were entitled to a reasonable period thereafter to close down their colliery operation. It followed from that that they were entitled to a reasonable period to remove their fixtures. This was different from the normal factual position where, as in the current case, the tenant was obliged to leave on the expiry date and was not contractually entitled to remain for a reasonable period thereafter. In support of that submission Counsel founded on *dicta* in the House of Lords in *Brand's Trustee v Brand's Trustee*. Lord Chelmsford stated:

“The law as to fixtures is the same in Scotland as in England. The meaning of the word 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 credit*’.

Such is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them **during the continuance of the term**. When he brings any chattel to be used in his trade and annexes it to the ground, it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed.” (Emphasis added). (p23)

[43] Lord O’Hagan stated:

“The law as to trade fixtures is well stated (as to cases of mortgage) by my learned friends Lord Hatherley and Lord Selborne.... during the past year, and the observations are of force with reference to the principle by which our judgment should be governed. ‘The law,’ said Lord Hatherley, ‘has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him; **yet, if he do not remove them during the lease, he is held to have allowed them to pass to the owner of the reversion**, because, and only because, they are attached to his reversion; and if they are not removed as the law would have enabled the person to remove them **during the lease**, they must be

considered to have returned at once and finally to the owner of the reversion. The doctrine therefore was that they were a part of the land during the time they remained attached, but that for the benefit of trade they might, during the interest of that person who had only a partial interest in the land, be removed so long as he had that interest, although there was no power whatever given to them for the purpose of removal if he chose to allow the time to pass during which he might have removed them, and so far severed them from the property' – (*Meuse v Jacobs*, Law Reports, 7 E. and I. Appeals, p. 490.)" (Emphasis added). (p26)

[44] In my view these general observations about English law made in the nineteenth century do not displace the modern Scottish orthodox position as set out in *Cliffplant v Kinnaird*. They are *obiter*. They are not made in the context of a detailed discussion of the timing of removal of tenant's fixtures but are general remarks made while discussing the issue of the right to remove rather than the timing of any removal. I was not referred to any English authority, either of the time of *Brand's Trustees* or in modern times, which addresses the specific question relevant here i.e. whether the right to remove tenant's fixtures expires on the last day of the lease. I was not referred to any English authority by virtue of which it could be said that Professor Gordon was wrong in what he said about modern English law. Even if I had been, that would neither have been determinative of Scots law nor overruled the *dicta* of Lord Avonside. The law of Scotland and England on tenant's fixtures is not the same in every detail (Gordon *Scottish Land Law* para 4.02). Accordingly I find that the orthodox view is the correct view. Tenant's fixtures may be removed within a reasonable time of expiry of the lease. What is a reasonable time will depend on the circumstances, and there must be a point of time beyond which a right to remove tenant's fixtures of recovery is lost because it must be presumed that that right has been given up (*Cliffplant v Kinnaird*, Lord Stewart at first instance at p18). The pursuer does not aver an *esto* case that the removal was not within a reasonable time. I find that the defender was entitled to remove

tenant's fixtures between the expiry of the lease on 31 August 2018 and the cessation of occupation on 19 December 2018.

[45] I also find that the defender was entitled to remove moveable items after 31 August 2018. The moveable items on the premises were never owned by the pursuer. The expiry of a lease does not transfer the ownership of moveables in the leased subjects to the landlord. The moveables remained the property of the defender and it was entitled to vindicate its right of ownership against the pursuer.

Conclusion

[46] Although a significant number of the items listed in the Scott Schedule are not in dispute as the defender accepts they should not have been removed, other items remain disputed. I shall allow a proof before answer as enquiry is required into whether each of the disputed items is a moveable, a tenant's fixture or a landlord's fixture. The defender was entitled to remove moveables and tenant's fixtures, but was not entitled to remove landlord's fixtures.

[47] In view of my decision above the defender's *esto* position based on personal bar and waiver need not be considered as it does not arise.

[48] I shall put the case out by order for discussion of the appropriate interlocutor to give effect to my decision, and for discussion of further procedure. I reserve all questions of expenses in the meantime.