What’s the Difference?

It’s an hour before settlement. The matter has gone swimmingly. There’s just the settlement to go and soon the file can be consigned to the “storage” pile. What can go wrong? Silly question really. A lot can go wrong but frustratingly one of the most common causes of a delay in settlement is the final inspection where the purchaser is upset that an item or feature that they had particularly wanted and had assumed would be included has been removed.

The first thing the conveyancer does of course is to rush to the contract to check the list of inclusions (and exclusions) on the front page only to find that the item is not mentioned. Representations are made to the Vendor’s conveyancer. The Vendor says it was never their intention to leave it and from there the argument usually revolves around the marketing campaign, and predominantly, whether or not the item is (was?) a fixture or chattel.

Chattels are the items belonging to the Vendor that can be easily moved, such as furniture or household appliances and are considered to be personal property. If they are not marked as an inclusion in the sale, the Vendor is entitled to remove them when he vacates the property.

A fixture on the other hand is something that is attached to the land in such a way that it becomes part of the land. Therefore, when land is sold, the title to the land will also include all fixtures. Often, deciding if an item is a fixture or a chattel, will depend on:

- The degree of annexation
- The intention at the time the item was fixed to the building (or land)
- The nature of the item and
- The purpose of the annexation.

Generally speaking, if the item can be easily moved without causing too much damage to the land or building to which it is affixed, then an argument can be made that it is a chattel. However, if removal of the property will cause damage, then it can be argued that it is a fixture.
In *Re May Bros Ltd* (1929) SASR 508, Murray CJ said:

“If an article is embedded in the soil or is attached to any building or permanent erection thereon by cement, mortar, solder, bolts, screws, nails, spikes or other permanent fastening, it is a prima facie a fixture unless it has been agreed between the parties or can be inferred from the circumstances, that it was not to be a fixture.”

However notwithstanding the annexation, a fixture can be deemed to be a chattel takin the reasons for the annexation and the intention of the owner when affixing the chattel. In *Australian Provincial Assurance Co Ltd v Coroneo*, the Court was asked to determine if the theatre seats bolted to the floor, and attached with one another were fixtures or chattels. The Court decided that the seats were chattels, Jordan CJ held:

“The test of whether a chattel which has been to some extent fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period... or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose...”

In Palumberi v Palumberi (1986) NSW ConvR 55-287 two brothers agreed that one brother would sell to the other his interest in property comprising two self-contained flats which they held as tenants in common. There was no discussion regarding inclusions and the selling brother stripped the flat. The Court held the stove and carpet to be fixtures but all the other items where chattels. In his judgement Kearney J. cited several cases including Coroneo and formed the following view:

“It would seem from perusal of these and other authorities in the field that 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 land. The shift has involved a greater reliance upon the individual surrounding circumstances of the case in question as district from any attempt to seek to apply some simple rule or automatic solution.”

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