

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP640/2015

CATCHWORDS

LANDLORD AND TENANT – Fixtures and fittings – whether chattels annexed to the demised premises is a character as chattels and become part of the realty – relevant principles – whether tenants fixtures can be alienated – equitable right of severance – s 28(2) of the *Landlord and Tenant Act 1958*; s 154A(1) of the *Property Law Act 1958* – whether tenant’s right to sever and possess tenant’s fixtures carries with it a right to transfer or sell the fixtures while still affixed to the demised premises – who is the owner of assets which are installed and fixed into the demised premises by the tenant – estoppel.

FIRST APPLICANT	Denis Liubinas
SECOND APPLICANT	Matthew Liubinas
RESPONDENT	Vicport Fisheries Pty Ltd (ACN 006 845 736)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Preliminary Hearing
DATE OF HEARING	9, 10 and 11 May 2016
LAST DATED FOR WRITTEN SUBMISSIONS	20 May 2016
DATE OF ORDER	7 June 2016
CITATION	Liubinas v Vicport Fisheries Pty Ltd (Building and Property) [2016] VCAT 927

ORDER

In answer to the preliminary question set out under Order 4 dated 29 January 2016, the Tribunal finds and declares:

1. As at the date that the Applicants vacated the demised premises, the subject of this proceeding (**‘the Premises’**), the Applicants owned the fixtures, fittings and fit-out within and attached to the Premises as listed in *Schedule 1* to the *Sale of Business Agreement* dated 15 February 2001 between Romsey Pharmaceuticals Pty Ltd and Romsey Services Pty Ltd and others; together with any additional fixtures, fittings and fit-out installed in or to the Premises by Romsey Services Pty Ltd or the Applicants after 1 January 2001.

2. As at the date that the Applicants vacated the Premises, the Respondent owned the fixtures, fittings and fit-out within and attached to the Premises, other than the fixtures, fittings and fit out referred to in Order 1 of these orders.
3. **This proceeding is listed for a further directions hearing before Senior Member Riegler at 2.15 PM on 22 July 2016 at 55 King Street, Melbourne, 3000, at which time further orders will be made as to the future conduct of the proceeding.**
4. Liberty to apply.
5. Cost reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants

Mr P Best of counsel

For the Respondent

Mr N Frenkel of counsel

REASONS

INTRODUCTION

1. The Applicants are the former tenants of retail premises located in Main Street Romsey (**‘the Premises’**), which they operated as a pharmacy. The Respondent is the registered owner (and former landlord) of the Premises (**‘the Landlord’**).
2. The Applicants vacated the Premises on or around 31 December 2014. Prior to doing so, they removed almost all of the pharmacy fit-out, leaving the Premises in a near bare state and in a condition similar to its condition prior to the Premises first being offered for lease in 1994.
3. The dispute between the parties focuses on the condition of the Premises when the Applicants vacated at the end of 2014. According to the Landlord, it was not open for the Applicants to remove the pharmacy fit-out because it formed part of the Premises. It claims in excess of \$450,000 which it says represents the cost to reinstate the Premises to a condition commensurate with its condition prior to when the Applicants vacated.
4. By contrast, the Applicants contend that the fixtures, fittings and fit-out were theirs to remove at the end of the tenancy. They say that they did what they were required to do under the lease agreement and as a result, the Landlord has no right to claim any money from them. Further, they seek return of the security deposit, which the Landlord holds, plus interest.
5. By order dated 29 January 2016, the Tribunal ordered that the proceeding be listed for a preliminary hearing to determine the following question:

Who owns or owned the fixtures, fittings and fit out of the Premises as at the date or dates which the Tribunal determines to be relevant?
6. The preliminary hearing was conducted over three days with a number of witnesses called by each party. Mr Best of counsel appeared on behalf of the Applicants. Mr Frenkel of counsel appeared on behalf of the Landlord. Both counsel have filed comprehensive and helpful written submissions and supplementary written submissions going to the questions for determination.

BACKGROUND

7. In 1994, the Landlord purchased the Premises. It then undertook significant building work in order to create a building that could be leased as retail premises. The building work was completed towards the end of 1994 or early 1995, with the result that the Premises were in a state that might be described as a bare shell, although the Premises did have a suspended ceiling, fluorescent lights, concrete floor, bathroom and shower facilities, electrical power points, air-conditioner, and glass

entrance doors. Otherwise, the Premises were left in a partially unpainted state ready for fit-out by a prospective tenant.

8. Towards the end of 1994, the Landlord also commenced negotiations with Craig Jamieson, a local pharmacist, with a view to entering into an agreement under which Mr Jamieson would lease the Premises for use as a pharmacy. Those negotiations also entailed Mr Jamieson undertaking significant internal fit-out of the Premises, some of which had to be completed in accordance with regulations relevant to the pharmacy profession. For example, the dispensary area needed to be elevated, which entailed the construction of a mezzanine floor. The internal fit-out (**‘the Fit-out Works’**) were detailed in plans which were approved by the relevant regulatory authority and eventually carried out by fit-out contractors engaged by Mr Jamieson.
9. The Fit-out Works were completed in late January or early February 1995. They included the creation of a slat-wall comprising melamine coated panels to which shelf stripping and bracketing were attached, the construction of a special stepped pelmet or decorative cornice above all of the wall shelving. Carpet was also laid to certain areas, while ceramic tiles and linoleum was laid in other areas. Partition walls were created in addition to other work required to meet regulatory standards.
10. In February 1995, Mr Jamieson commenced operating his pharmacy business from the Premises, pursuant to a lease dated 20 December 1994. Given regulatory restrictions on trade, it was the only pharmacy allowed to operate in Romsey.
11. In November 1998, Mr Jamieson went into partnership with Gary Linton, another pharmacist. Together they registered a company which they named Romsey Pharmaceuticals Pty Ltd, which became the trustee of a unit trust under which Mr Jamieson and Mr Linton (and possibly others) were the beneficiaries. According to Mr Jamieson, all of the assets of the pharmacy business, which included the Fit-out Works, were then transferred to Romsey Pharmaceuticals Pty Ltd, which held those assets on trust for the Romsey Pharmaceuticals Unit Trust. The 1994 lease continued to operate with Mr Jamieson being recorded as the only tenant, notwithstanding the change in the ownership of the pharmacy business operated under that lease.
12. In February 2001, Mr Jamieson sold his remaining half interest in the pharmacy business to Gregory Gibson. In order to give effect to that transaction Romsey Pharmaceuticals Pty Ltd purported to sell the assets of the business, which included the Fit-out Works, to a company known as Romsey Services Pty Ltd. This company was established by Mr Linton and Mr Gibson for the sole purpose of purchasing the assets from Romsey Pharmaceuticals Pty Ltd and transferring the leasehold interest from Mr Jamieson to it.

13. To that end, a sale of business agreement was entered into between Mr Jamieson and Mr Gibson, which was executed on 15 February 2001. The sale of business agreement was said to be conditional upon the contemporaneous completion of a contract between Romsey Services Pty Ltd and Romsey Pharmaceuticals Pty Ltd for the acquisition of the 'plant and equipment' and the transfer of lease or the granting of a new lease over the Premises. The sale of the 'plant and equipment' was documented in a separate agreement also dated 15 February 2001 between Romsey Pharmaceuticals Pty Ltd and Romsey Services Pty Ltd (and others), under which the 'plant and equipment' was listed in Schedule 1 of that agreement. The consideration for that 'plant and equipment' was stated to be \$71,021.
14. The 1994 lease was not transferred from Mr Jamieson to Romsey Services Pty Ltd. Instead, the parties agreed that a new lease would be created in favour of Romsey Services Pty Ltd. That lease was dated 1 February 2001 and was stated to commence on 1 January 2001 for a term of four years, with one further term of 10 years and three further terms of five years each.
15. Given that Mr Jamieson was no longer involved in the pharmacy business and a new lease had been created between the Landlord and Romsey Services Pty Ltd, a *Deed of Surrender* was prepared to formally end the 1994 lease. Under the terms of that *Deed of Surrender*, Mr Jamieson agreed to convey and surrender to the Landlord the Premises so that the residue of the term of years granted under the 1994 lease was to be extinguished in the reversion. The *Deed of Surrender* was executed on 6 July 2001. However, it was expressed to operate retrospectively from 1 January 2001, being the commencement date of the 2001 lease.
16. In 2003, Mr Linton and Mr Gibson decided to end their partnership. To that end, Mr Linton sold his 50 per cent share in the business to Mr Gibson, pursuant to a contract of sale of business which was executed in about June 2003. That transaction also included the sale of Mr Linton's shares in Romsey Services Pty Ltd to Mr Gibson.
17. By letter dated 27 September 2004, Romsey Services Pty Ltd exercised the first option in the 2001 lease for a further term of 10 years. However, a renewed lease was not prepared at that time. Nevertheless, Romsey Services Pty Ltd continued to occupy the Premises, as if a renewed lease, commencing on 1 January 2005 for a period of 10 years, had been prepared and executed.
18. On 15 August 2012, Mr Gibson sold the pharmacy business to the Applicants. This was pursuant to a *Sale of Business Contract* between Mr Gibson and the Applicants of the same date. The *Sale of Business Contract* purported to transfer the assets of the business to the Applicants, which were listed under Schedule 10 of that agreement.

19. In addition, and in order to regularise the renewal of the previous 2001 lease, a *Deed of Renewal* dated 27 August 2012 was prepared and executed by the Landlord and Romsey Services Pty Ltd. Again, the *Deed of Renewal* commenced retrospectively from 1 January 2005, for a period of 10 years with options for three further terms of five years each.
20. By a *Deed of Transfer* dated 10 September 2012, Romsey Services Pty Ltd transferred its right, title and interest as lessee pursuant to the 2005 renewal to the Applicants with effect on and from 10 September 2012.
21. On 31 October 2014 (or 16 November 2014), the Applicants advised the Landlord in writing that they would not be exercising any further options under the 2005 renewal and would be vacating the Premises. In their correspondence dated 31 October 2014, the Applicants stated:

Please provide instructions to reinstate the premises as they were immediately prior to commencement of the current lease starting on 1st February 2001.

22. By letter dated 21 November 2014, the Landlord responded as follows:

With respect to your request for specific instructions to reinstate the premises, please read carefully and follow the terms in the lease. We shall not be reciting them in their entirety here for your benefit. That is the document upon which we shall be relying.

...

The previous tenants whose lease you have taken over (Messrs. Gary Linton and Greg Gibson) commenced a new lease. They acquired the premises with existing shelving, fixtures and fittings from our former tenant Mr Craig Jamieson. You have not sought permission to install any new fixtures, fittings, plant and equipment including any display counters, shelving and office machinery etc. as per Item 7 of the lease.

We draw your attention specifically to Additional Provision AP6. Craig Jamieson moved into brand new premises with brand new carpet, freshly painted and undamaged walls.

Please repair any damage to the walls and repaint same using our approved repairers. The carpets were new when installed, please ensure that they are undamaged and if 'affected by any such removal' please reinstate the carpet to its original new condition as it was when Craig Jamieson first moved in...

23. During November and December 2014, the Applicants decanted and vacated the Premises. In so doing, they purported to reinstate the Premises to a condition commensurate with the condition of the Premises at a time prior to the installation of the Fit-out Works. This entailed removal of all of the partition walls, mezzanine floor, slat wall, shelving, display cases, including the display gondolas and other installations which were previously within the Premises. All that was left of the original Fit-out

Works was some of the tiling and carpet floor covering. Attempts had been made to reinstate and repair damage to walls, although the Landlord contends that the standard of workmanship is poor.

24. The Applicants subsequently reopened their pharmacy business in alternative premises located approximately 150 metres from the Premises. Some of the equipment and other installations that had previously been installed or located within the Premises are now in the alternative premises.
25. As indicated above, the dispute between the parties relates to the removal of the Fit-out Works and in particular, who owned those assets at the time that the Applicants decanted and vacated the Premises.

THE ISSUES

26. The central plank underpinning the Applicants' claim is the assumption that all of the assets comprising the Fit-out Works and removed by the Applicants ('**the Assets**') were progressively transferred from each of the owners of the pharmacy business to them. Therefore, they were entitled and indeed required under the terms of the 2005 renewed lease, to remove those Assets when they decanted and vacated the Premises.
27. By contrast, the Landlord contends that there is a break in the chain of ownership. It submits that there is no evidence before the Tribunal to support the assertion that Craig Jamieson transferred the Assets to Romsey Pharmaceuticals Pty Ltd. That being the case, it contends that Romsey Pharmaceuticals Pty Ltd did not own the Assets at any given time and could not, therefore, sell the Assets to Romsey Services Pty Ltd. By extension, Romsey Services Pty Ltd had no capacity to sell the Assets to the Applicants.
28. In addition, the Landlord contends that even if Craig Jamieson transferred or purported to transfer the Assets, only some of those Assets were capable of being transferred. There are two grounds upon which this argument is couched. First, it is said that some of the Assets, by virtue of their annexation, became fixtures and therefore could not be alienated from the Premises. Second, it is said that some of the Assets removed by the Applicants were not included in the 2012 Sale of Business Contract. Therefore, even if some of the Assets were transferred, many of the items removed by the Applicants were not part of that transfer. In that respect, the Landlord submits that those Assets which were not expressly listed in the 2012 Sale of Business Contract were effectively left on the Premises at the time when the 1994 lease was surrendered under the *Deed of Surrender*. Therefore, those Assets formed part of the reversion.

WHO OWNED THE ORIGINAL ASSETS?

29. A useful starting point is to first identify what Assets were owned by Mr Jamieson during his tenancy of the Premises. In his witness statement,

adopted as his evidence in the proceeding, Mr Jamieson described the Premises prior to the installation of the Fit-out Works as follows:

5. As at 1 January 1995 the premises had an internal ceiling with suspended fluorescent lights, the floor was bare concrete, a bathroom and shower and plumbing had been installed, electrical such as lights and power points had been installed and the premises had an air conditioner. The premises had glass entrance doors at the front and rear. One wall was of new brick and the other was the outside of the old National Bank which had not been rendered or restored but was in its existing unpainted state. The premises was otherwise an empty shell...

30. Mr Jamieson then described the Fit-out Works as follows:

6. I arranged for the fit out on the premises at my sole expense. I arranged with Lees Shopfitters to carry out the fit out. At my request and to my design Lees prepared a floor plan of the premises showing the fit out...

7. The fit out was conducted throughout January and into February of 1995. The fit out works entailed fixing slatwall and melamine coated panels to the walls to which shelf stripping and bracketing were attached. Carpet was laid to the edge of the baseboards at the bottom of the slatwall and shelf stripping. Ceramic tiles were laid in a bespoke fashion to match the shop fit layout and some of the internal wall layout both at the front and rear of the premises. The same tiles were also laid in the toilet and bathroom area. Linoleum was laid in the kitchen/staff room, the storeroom and the beauty room at the front of the building. The dispensary area was constructed of elevated floor sections to meet certain requirements at the time of the Pharmacy Board of Victoria. An upgrade of the switchboard was required to meet the electrical load demands of extra power points and lighting that was installed.

8. The premises was fitted out in accordance with the floor plan with the exception of the lockable door on the beauty room.

9. Not all of the fit out was fixed. The following (as shown on the plan) were freestanding:

- (a) On the left side of the plan:

- (i) the area marked "F/C";
- (ii) the antacid and laxative stand;
- (iii) the eye and ear stand;
- (iv) the asthma and allergy stand;

- (b) on the right side of the plan:

- (i) the family planning stand;
- (ii) the feminine hygiene stand;
- (iii) the skin stand;
- (v) the lifestyles stand;
- (vi) the toys stand;
- (vii) the gift and soap tale stand;
- (viii) the stand marked “G5”.

10. The remaining carpentry and partitions were fixed by screws or bolts and were easily removable.
31. The 2004 lease stated:
- (m) at the expiration or sooner determination of the said term to remove any Lessee’s partitions, fixtures and fittings and so far as the premises are affected by any such removal to re-instate the same in their former condition and make good any damage or injury to the Premises at the expense in all things of the Lessee and to deliver up possession to the Lessor of the Premises together with all Lessor’s fixtures and fittings in such repair, order and condition required to be maintained by the Lessee in accordance with the Lessee’s covenants herein contained.
32. The 2004 lease further provided that the Landlord’s *Fixtures Furniture and Chattels* comprised:
- Staff amenities rooms and toilet block, fixed floor and wall tiling, HWS.
33. Consequently, it would appear that apart from the floor and wall tiling and the bathroom and shower facilities, including the hot water service (HWS), Mr Jamieson was obligated to remove the balance of the Fit-out Works at the expiration of that lease. In my view, that, of itself, creates a strong inference that the bulk of the Assets belonged to Mr Jamieson – consistent with his evidence.
34. During the course of the hearing, Ms Stephanie Wylaars, a director of the Landlord, cast some doubt over who paid for various items of work comprising the Fit-out Works. In particular, reference was made to a number of invoices dated around the period 1993 to 1994, which described certain work having been undertaken and according to Ms Wylaars, paid for by the Landlord. However, many of the invoices simply referred to a list of building materials or labour, making it difficult to identify whether the invoice related to the Fit-out Works or the work undertaken by the Landlord in converting the building into retail premises.
35. Having considered Ms Wylaar’s evidence, together with the documents exhibited to her witness statement, against the evidence of Mr Jamieson,

I do not accept that the work comprising the Fit-out Works was work undertaken and paid for by the Landlord. Consequently, I accept Mr Jamieson's evidence, as set out in the extract of his witness statement above. My finding is reinforced by the terms of the 2004 lease cited above.

DID THE ASSETS OR SOME OF THE ASSETS BECOME UNALIENABLE FIXTURES?

36. It is common ground that a significant portion of the Assets were annexed to the Premises by way of screws and bolts or other fixings. Mr Frenkel submitted that, in those circumstances, there is a prima facie presumption that the relevant Assets installed by Mr Jamieson were fixtures and the Applicants have the burden of then proving that they were not. Mr Frenkel further submitted that many of the Assets were custom made for the Premises and had no other use if they were dismantled and removed from the Premises. For example, the mezzanine floor was custom-made for the Premises and would have had no practical use anywhere else. Indeed, Mr Denis Liubinas, the First Applicant, gave evidence that some of the Assets that were dismantled from the Premises were ultimately thrown out.

37. Both counsel have referred me to numerous authorities going to the question whether the Assets, once fixed or positioned into the Premises, lost their character as chattels. Mr Frenkel referred to *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)*.¹ In that case the majority judgment approved of the following statement by Conti J in *National Australia Bank Ltd v Blacker*:

There is a variety of general principles which should be considered in assessing whether an item of personal property has become attached to land in a manner designed to achieve a specific objective or a variety of objectives, such as to become a part of the realty and therefore, a fixture. Whether an item has become a fixture depends essentially upon the objective intention with which the item was put in place.²

The two considerations which are commonly regarded as relevant to determining the intention with which an item has been fixed to the land are first, the degree of annexation, and secondly, the object of annexation.

38. Mr Frenkel conceded that a tenant may remove fixtures brought onto the land by the tenant if the fixtures were installed for *trade, domestic or ornamental* purposes and if they can be removed without causing significant damage to the demised premises. He referred to examples of

¹ (2010) 241 CLR 576 at [23-24].

² (2000) FCR 288 at [10].

trade fixtures as fittings in a tavern,³ trees planted by a nurseryman,⁴ an engine and boiler in a sawmill,⁵ and petrol pumps at a service station.⁶

39. Examples of *domestic fixtures* have held to be a water pump,⁷ and a kitchen range, stove, copper and grates.⁸ Examples of *ornamental fixtures* have held to be wood panelling,⁹ decorative chimney pieces,¹⁰ and house bells.¹¹
40. However, Mr Frenkel submitted that the Assets did not fall into the category of trade, domestic or ornamental purposes. He argued that the Assets, or at least the Assets which are now in dispute, were by and large, alterations made to the Premises of a permanent nature. The creation of partition walls, box shelving, floor coverings and the like had no use other than improving the Premises. In those circumstances, he submitted that a substantial part of the Fit-out Works had become part of the Premises and could not be alienated.
41. Mr Best also referred to a number of authorities spelling out the test at common law. In particular, in *Reid v Smith*,¹² O'Connor J stated:

In general, it appears to me that the true test to be applied in determining whether a chattel has lost its character of chattel and become part of the freehold, is to inquire what is the object and purpose of its being attached to the freehold? If the object and purpose of its being attached to the freehold is not the enjoyment of the chattel itself, but the better enjoyment of the freehold, it is clear that it must be taken to have become annexed to the freehold, and become part of the freehold. That principle is stated in a very few words in a judgment quoted by Sterling, LJ, in *Re Falbe, Ward v Taylor* [1901] 1 Ch 523 at 541 in which he says this:- “This question what constitutes an annexation sufficient to make the chattel part of the land ‘must depend on the circumstances of each case, and mainly onto circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation.’ Blackburn J gave various examples in which the degree of annexation might be material. As regards the object of the annexation the question to be considered is, whether the object is to improve the freehold to which the annexation is made, or whether it is the more complete and better enjoyment of the chattel itself.’ The expression, ‘improving the freehold’, means

³ *Elliott v Bishop* (1854) 156 ER 534.

⁴ *Wardell v Usher* (1841) 5 Jur 802.

⁵ *Climie v Wood* (1869) LR 4 Ex 328.

⁶ *Smith v City Petroleum Co Ltd* [1940] 1 All ER 260.

⁷ *Grymes v Boweren* (1830) 130 ER 1349.

⁸ *Darby v Harris* (1841) 113 ER 1374.

⁹ *Spyer v Phillipson* [1931] 2 Ch 183.

¹⁰ *Leach v Thomas* (1935) 173 ER 145.

¹¹ *Lyde v Russell* (1830) 109 ER 834.

¹² (1906) 3 CLR 656.

improving the land, to which annexation is made, and it does seem to me that that affords a very good test of the object of the annexation".¹³

42. Mr Best submitted that panelling, cornices, partition walls, partitions generally, counters, cupboards, gondolas, light fittings, machines and carpet have all been held to be chattels, notwithstanding that some damage may have been caused by the removal from the demised premises. He submitted the issue was whether the damage was the repairable rather than substantial damage. He referred to *Horwich v Symond*,¹⁴ which was a case that also concerned a pharmacy business. In *Horwich*, the tenant installed a display unit, counter, cupboard, showcase and bottle rack. The display unit, counter and showcase were all fixed to the premises but ultimately held to be chattels. Buckley LJ stated:

The question whether these articles were so fixed that they ought to be treated as annexed to the freehold, or were merely chattels, is, as I have said, a pure question of fact. The mere fact of some annexation to the freehold is not enough to convert a chattel into realty. That is shewn by the case of carpets, which is certainly not fixtures; and the same principle seems to apply to a shop counter which stands on the floor not as a fixture, but as a chattel with certain amount of fixing to keep it steady.¹⁵

43. In applying the twin test; namely, the degree of affixation and the objective purpose of affixation, I am of the view that the Assets (or at least a substantial component of the Assets) retained their character as chattels, notwithstanding the fact that some of them were fixed to the Premises. I have formed this view for a number of reasons. First and foremost, the 1994 lease expressly required the Assets to be removed at the expiration of the lease. In my view, this condition runs counter to the proposition that the Assets were to become permanent fixtures of the realty. Second, and connected with the first point, it is common ground that the majority of the Assets were specific to the operation of a pharmacy business. This is material because the regulations controlling the operation of pharmacy businesses restricts the number of retail pharmacies which can operate within the same locale. In the present case, the predominance of evidence suggests that only one retail pharmacy business is able to operate in Romsey.¹⁶ Therefore, the Assets were of little use to the Landlord (and by extension, to be regarded as an improvement to the realty) if the pharmacy business operated by Mr Jamieson moved to alternative premises.

¹³ Ibid at 680.

¹⁴ (1915) 84 LJKB 1083.

¹⁵ Ibid at 1087.

¹⁶ Ms Wylaars suggested during cross-examination that she believed another pharmacy existed within a medical facility in the Romsey area. However, Ms Wylaars was not able to elaborate on the nature of the pharmacy or whether it constituted retail premises.

44. Further, Mr Best referred to s 28(2) of the *Landlord and Tenant Act 1958*. This Act was repealed on 1 August 2010, however, it seems to be common ground that it has application in respect of rights which crystallised in favour of Mr Jamieson during his occupation of the Premises. That section states:

If any tenant holding lands by virtue of any lease or agreement at his own cost and expense directs any building either detached or otherwise or erects or puts in any building fence engine machinery or fixtures for any purpose whatever (which are not erected or put in in pursuance of some obligation on that behalf) then, unless there is a provision to the contrary in the lease or agreement constituting the tenancy, *all such buildings fences engines machinery or fixtures shall be the property of the tenant and shall be removable by him during his tenancy or during such further period of possession by him as he holds the premises but not afterwards*; notwithstanding the same consist of separate buildings or that the same or any part thereof may be built in or permanently fixed to the soil; so as the tenant making any such removal does not in anywise injure the land or buildings belonging to the landlord or otherwise puts the same in like plight and condition or in as good plight and condition as the same were in before the erection of anything so removed. [Emphasis added]

45. Section 28(2) of the *Landlord and Tenant Act 1958* was replaced by s 154A(1) of the *Property Law Act 1958*, which came into operation on 1 August 2010. That provision is expressed in similar terms:

A tenant who at his or her own cost or expense has installed fixtures on, or renovated, altered or added to, a rented premises owns those fixtures, renovations, alterations or additions and may remove them before the relevant agreement terminates or during any extended period of possession of the premises, but not afterwards.

46. Mr Best submitted that even if the Assets or some of them lost their character as a chattel at common law, s 28(2) of the *Landlord and Tenant Act 1958* or alternatively, s 154A(1) of the *Property Law Act 1958* would nevertheless deem Mr Jamieson the owner of those Assets allowing him to remove them during the period of his occupancy. As I have already indicated, it is not in contention that Mr Jamieson would have had the right to remove the Assets during his period of occupation under the 1994 lease.

47. What is in issue, however, is whether Mr Jamieson had the right to sell or transfer the Assets to a third party; namely, Romsey Pharmaceuticals Pty Ltd. In my view, Mr Jamieson had that right. Clearly, if the Assets never lost their character as chattels, then the question is beyond reproach. However, even if the Assets (or some of the Assets) lost their character as chattels at common law - by reason of their annexation, I still maintain the view that Mr Jamieson was able to sell or transfer those Assets during his

tenancy or such further period of possession by him, by virtue of s 28(2) of the *Landlord and Tenant Act 1958*.

48. Section 28(2) of the *Landlord and Tenant Act 1958* was comprehensively considered by the Victorian Court of Appeal in *Vopak Terminals Pty Ltd v Commissioner of State Revenue*,¹⁷ where Ormiston JA stated:

In my opinion, therefore, it would not be unsurprising if the Parliament of this State had taken the view that the law of tenants fixtures at that time implicitly accepted that a tenant retain property and chattels which the tenant had fixed to the land in circumstances where they would be otherwise treated as fixtures and would thereafter be treated as fixtures, if the tenant did not exercise the relevant rights to remove those chattels at the end of the tenancy or during any consequential period of possession...(365-6)

It would therefore follow that the Wickland's fixtures [the tenant's fixtures] have not become part of the realty owned by Whitemark [the landlord] nor did they form part of the interest or estate therein sold and transferred by Whitemark to the appellant in the third and final transaction on 8 May 1998. If the property and thus title to Wickland's fixtures remained in Wickland Terminals, then it could not have merged into or become part of the land sold by Whitemark. No doubt Whitemark, and thus the purchaser, might in due course have the right to assert that those chattel interests formed part of the realty, if and when Wickland Terminals' leasehold interest expired and any further period of possession by that tenant came to an end. That was merely an expectation, for, being tenant's fixtures of the kind described in s 28(2), Wickland Terminals had, and perhaps still has, the right to remove them while they remain chattels.¹⁸

49. In my opinion, Mr Jamieson's right to remove the Assets carries with it a right to also transfer those Assets *during his tenancy or during such further period of possession by him as he holds the premises but not afterwards*. The judgment of Ormiston JA above is consistent with that proposition. In particular, his Honour held that under s 28(2), 'tenant fixtures' did not become part of the realty owned by the landlord. Therefore, if the property and title to the Assets remained in Mr Jamieson, I see no reason why he could not transfer those Assets while s 28(2) operated. Of course, the situation would be different if Mr Jamieson did not contract to transfer the Assets during his tenancy or during such further period of possession by him. In that situation, Mr Jamieson's rights under s 28(2) would expire and the Assets, or at least those which were fixtures, would become part of the realty and the reversion.

¹⁷ (2004) 12 VR 351.

¹⁸ *Ibid* at 370.

50. If the Applicants can establish that Mr Jamieson transferred the Assets to Romsey Pharmaceuticals Pty Ltd, while he retained possession and title in the Assets under s 28(2), then it follows that Romsey Pharmaceuticals Pty Ltd acquired an interest in those Assets, including those Assets which would otherwise have become fixtures at common law.
51. An analogous situation arose in *Cottee Dairy Products Pty Ltd v Minad Pty Ltd and Anor*.¹⁹ In that case, Auspower Corporation Pty Ltd was the registered proprietor of factory premises in which it conducted the business of manufacturing and selling food ingredients. It sold that business to Cottee Corporation Pty Ltd under a contract dated 1 July 1994. The sale included certain plant and equipment, some of which was annexed to the factory premises. Cottee Corporation subsequently went into administration and the administrator then sold the business to Cottee Dairy Products Pty Ltd. At around that same time, the freehold was sold under a mortgagee sale to Minad Pty Ltd. The sale contract for the land excluded and made reference to Cottee Dairy's purchase of the plant and equipment, notwithstanding that some of that plant and equipment was annexed to the factory premises and were regarded as fixtures. On 30 May 1997, Cottee Dairy entered the factory premises for the purpose of removing what it regarded as its plant and equipment. Minad however refused to permit the removal from the factory premises of some of the items which were annexed to the premises. In relation to those items which were not annexed to the premises and therefore, regarded as chattels, McClelland CJ stated:

All the items which were not fixtures were in the possession of Cottee Corporation as from 1 July 1994 until completion of the sale by Cottee Corporation to Cottee Dairy pursuant to the contract of 12 May 1997. Possession of a chattel is both presumptive evidence of ownership and a source of transmissible title... Upon completion of the sale by Cottee Corporation to Cottee Dairy, Cottee Dairy acquired as against anyone who could not prove a better title... A right to possession of those chattels.²⁰

52. In relation to the fixtures, his Honour stated:

However the principles relating to the removal of tenant's fixtures apply only to articles brought onto the relevant land and affixed by the tenant. They have no application to fixtures already forming part of the land at the commencement of the relevant tenancy. Any right of a tenant to sever and remove fixtures in the latter category must be found, if at all, in contract... [underlining added]

If Cottee Dairy can establish, in relation to any of the disputed items, that when Auspower sold the business to Cottee Corporation on 1 July

¹⁹ (1997) 8 BPR 15,611.

²⁰ *Ibid* at 15,618.

1994 those items were purportedly included in that sale (notwithstanding that as fixtures they remained as part of the factory premises retained by Auspower), it would follow that, although the legal title to the items did not pass, Cottee Corporation became entitled in equity to sever those items from the factory premises and take and retain possession of them as chattels, and thereby acquired an equitable interest in the factory premises commensurate with that entitlement. On this premise the sale by Cottee Corporation to Cottee Dairy pursuant to the contract of 12 May 1997 would have had the effect of vesting in Cottee Dairy in equity all the right, title and interest of Cottee Corporation in and to those items including, in particular, the equitable entitlement to sever them from the factory premises and take and retain possession of them as chattels, and a commensurate equitable interest in the factory premises.²¹

53. Accordingly, I find that Mr Jamieson had the right to alienate the Assets by transferring those Assets to a third party, which he contends was Romsey Pharmaceuticals Pty Ltd. If it can be established that the Assets were transferred to Romsey Pharmaceuticals Pty Ltd, I see no reason why Romsey Pharmaceuticals Pty Ltd could not have on-sold the Assets to Romsey Services Pty Ltd and by extension, by Romsey Services Pty Ltd to the Applicants. In each case, the relevant owner had an equitable entitlement to sever those Assets fixed to the Premises and take and retain possession of those Assets as chattels. As indicated in the highlighted extract of the judgment of McClelland CJ above, that right is found in each of the contracts under which the Assets (or some of the Assets) were sold.

WHERE THE ASSETS TRANSFERRED FROM JAMIESON TO ROMSEY PHARMACEUTICALS PTY LTD?

54. Mr Frenkel submitted that even if Mr Jamieson had a right to transfer the Assets, there is insufficient evidence to establish that this occurred. He submitted that the only evidence supporting that contention was a single sentence in Mr Jamieson's witness statement:

11. On 16 November 1998 I entered into an equal partnership with Gary Linton. No formal partnership agreement was entered into.
12. Gary and I bought an off-the-shelf company which we named Romsey Pharmaceuticals Pty Ltd. The company was incorporated on 22 October 1998. The company became the trustee for the Romsey Pharmaceuticals Unit Trust. The assets of the business, including the fitout, were transferred into the trust in the name of Romsey Pharmaceuticals Pty Ltd. [underlining added]

²¹ Ibid.

55. Mr Jamieson expanded on his evidence during cross-examination. He said that a written agreement was entered into between him and Mr Linton for the sale of a half interest in the business and that the agreement was ratified by the Pharmacy Board. He said he received a payment in respect of the sale, although he could not recall what amount. He said that Mr Linton was the person who handled the transfer of the Assets to Romsey Pharmaceuticals Pty Ltd. Regrettably, Mr Linton was not called to give evidence.
56. Mr Frenkel submitted that the failure to call Mr Linton or provide a suitable explanation as to why Mr Linton was not called, leads to an inference that the un-called evidence would not have assisted the Applicants' case.²² He argued that Mr Jamieson's evidence was vague as to the details of any transfer of the Assets and this was explicable by reason of him not having any personal involvement in that aspect of the business.
57. Moreover, Mr Frenkel drew my attention to a statutory declaration prepared by Mr Jamieson on 24 December 2014. The statutory declaration was prepared at the request of the First Applicant. The Addendum to the statutory declaration sets out, in summary form, a chronology of Mr Jamieson's involvement in and with the Premises. The last paragraph of that Addendum states:
- At the end of the year 2000 I sold my business to Messrs Greg Gibson and Gary Linton. All the improvements, fixtures and fittings mentioned above were transferred by a Contract of Sale to these gentlemen.
58. The unit trust or Romsey Pharmaceuticals Pty Ltd are not mentioned in the statutory declaration or the Addendum. Indeed, the statutory declaration and Addendum are at odds with what Mr Jamieson states in his witness statement.
59. Mr Frenkel also pointed out that no documents were produced to verify the sale or transfer of the Assets to Romsey Pharmaceuticals Pty Ltd, as trustee of the unit trust. Therefore, he submitted that the Applicants have failed to establish, on the balance of probabilities, that a sale or transfer of the Assets ever occurred. Mr Frenkel submitted that the absence of establishing a sale or transfer to Romsey Pharmaceuticals Pty Ltd, the chain of transfer was broken, leading to a situation where Romsey Services Pty Ltd never required title in order to lawfully sell the Assets to the Applicants. He said that under the principle of *nemo dat qui non habet*, you cannot give what you do not possess.
60. By contrast, Mr Best submitted that Mr Jamieson was a truthful witness who was prepared to make concessions and had no interest in the outcome of the proceeding. He said that his evidence was that he signed a document, although he could not find it. Nevertheless, Mr Best said there

²² *Jones v Dunkel* (1959) 101 CLR 298, 312, 320-1.

was corroborating documentation. He drew my attention to a number of financial documents belonging to the Romsey Pharmaceuticals Unit Trust. These included profit and loss statements and balance sheets from 16 November 1998 to 31 March 2000. Mr Best submitted that the date of 16 November 1998 represented the date that Mr Jamieson entered into a partnership with Mr Linton. He said that it was also the date when the Assets were transferred to Romsey Pharmaceuticals Pty Limited, as trustee of the unit trust.

61. Mr Best drew my attention to a document entitled *NOTES TO AND FORMING PART OF THE FINANCIAL STATEMENTS THE PERIOD 16 NOVEMBER 1998 TO 30 JUNE 1999* for the Romsey Pharmaceuticals Unit Trust, which stated that the plant and equipment beneficially owned by the trust was valued at \$49,294 and that the fixtures and fittings (presumably for the Premises) were valued at \$52,192. The document also referred to other assets beneficially owned by the trust but which related to another pharmacy business located in Goonawarra. In any event, the total declared value of the combined plant, equipment, fixtures and fittings for both businesses was stated to be \$178,964. Mr Best also referred to the balance sheet for the period March 2000 for Romsey Pharmaceuticals Pty Ltd, which stated that the fixtures, fit out, plant and equipment owned by Romsey Pharmaceuticals Pty Ltd was \$101,486, excluding depreciation.
62. Mr Frenkel pointed to various anomalies in the financial documents tendered in evidence. In particular, the Profit and Loss Statement for the year 1 July 1999 to 31 March 2000 states that the rent paid in respect of the Premises was \$34,762.19. However, Mr Frenkel correctly pointed out that Romsey Pharmaceuticals Pty Ltd was not at any time the lessee. The lease at that time was still in the name of Mr Jamieson. There had been no transfer of that 1994 lease. Mr Frenkel suggested that the financial documents merely showed an intention to transfer the Assets to Romsey Pharmaceuticals Pty Ltd but was not proof that this ever occurred.
63. In weighing all of the evidence and the documentation, I find that in all likelihood, the Assets were transferred to Romsey Pharmaceuticals Pty Ltd. I accept that Mr Jamieson was a truthful witness without any interest in the outcome of the proceeding and unlikely to have fabricated evidence of a transfer of the Assets. I also accept that a considerable period of time has elapsed since the transactions occurred and in those circumstances, the finer details of the transaction may not be easy to recollect. Nevertheless, the financial documents reinforce Mr Jamieson's evidence, notwithstanding the anomalies highlighted by Mr Frenkel. In my view, the financial documents go much further than simply indicating an intention to transfer the Assets. The financial documents clearly show that the Assets are held by Romsey Pharmaceuticals Pty Ltd, as trustee for the unit trust. There is a strong inference to be drawn from those documents that a transfer must have been effected in order to bring about that

situation. Therefore, I find that the Assets were transferred from Mr Jamieson to Romsey Pharmaceuticals Pty Ltd on about 16 November 1998.

TRANSFER TO ROMSEY SERVICES PTY LTD

64. It is common ground that the partnership between Mr Jamieson and Mr Linton ended in February 2001 when Mr Jamieson sold his remaining half interest in the business to Greg Gibson. In his witness statement, he sets out the chronology of what occurred as follows:

2. I am a pharmacist by profession. On 15 February 2001 I purchased a half interest in the pharmacy business then owned by Craig Jamieson and Gary Linton which Craig and Gary conducted in partnership at 101 Main Street Romsey...

3. Craig and Gary had conducted the business through a service company called Romsey Pharmaceuticals Pty Limited. Romsey Pharmaceuticals Pty Ltd was the owner of the fit out in the premises. Gary and I incorporated a company called Romsey Services Pty Ltd to purchase the assets, including the fit out, from Romsey Pharmaceuticals Pty Ltd. Romsey Pharmaceuticals Pty Ltd as vendors and Romsey Services Pty Ltd as purchaser entered into an agreement for the sale and purchase of the assets dated 15 February 2001 and being Exhibit "CJ4" to the statement of Craig Jamieson.

...

5. As Craig was the lessee of the premises and was leaving the business Gary and I agreed that Romsey Services Pty Ltd would take a lease of the premises for the remainder of the term plus options. On 1 February 2001 ("the 2001 lease") Romsey executed a lease for a term of four years commencing on 1 January 2001 with one optioned term of 10 years and three further options terms each of five years...

6. Craig has undertaken the fit out in 1995. The fit out remained largely unchanged. During my time in the premises some minor changes were made...

65. The contract under which Romsey Pharmaceuticals Pty Ltd sold the Assets to Romsey Services Pty Ltd is dated 15 February 2001. A copy of that agreement is Exhibit "CJ4" to Mr Jamieson's witness statement. The relevant recitals and clauses of that agreement are as follows:

WHEREAS:

A. Services has agreed to purchase and Pharmaceuticals has agreed to sell certain plant and equipment as described in Schedule 1 ("the Plant and Equipment") on the terms and conditions contained in this Agreement.

...

IT IS AGREED AS FOLLOWS:

1. SALE OF PLANT AND EQUIPMENT

Pharmaceuticals hereby sells and Services hereby agrees to purchase the plant and equipment for the price and on the terms contained in this Agreement.

2. PRICE

The price for the plant and equipment is \$71,021.00.

66. Schedule 1 to the agreement listed the *Plant and Equipment*. It appears that not all of the Assets are contained in that list. In particular, the list does not mention the *slatwall and melamine coated panels to the wall to which shelf stripping and bracketing were attached*. Nor does the list mention the *special stepped pelmet, carpet, ceramic tiles laid in a bespoke fashion* or the partition walls creating the *beauty room*.²³ Similarly, the list does not mention the mezzanine dispensary floor constructed by Mr Jamieson. The list mostly describes what appears to be common chattels. It states:

2 Cash Registers, Screens and Accompanying POS Hardware
1 Back Office POS Computer, Accompanying hardware and brother Laser Printer
1 Sales Counter
7 Rectangular Gondolas
2 Square Gondolas
1 Shower Chair
1 Plastic Chair
1 Air Conditioner
1 Prescription Illuminated Sign
1 Rodex Grill
1 Ronson Mini Oven
1 Toasted Sandwich maker
1 Electric Jug
1 Volta Vacuum Cleaner
1 Mop
1 Mop Bucket
1 Broom
1 Hire Maymed Nebuliser
3 Sets Hire Crutches
1 Epsom Printer
1 NEC Printer
1 Eltron Thermal Printer
1 Dispensary Computer and Accompanying Hardware

²³ Details of the Fit-out Works are set out in paragraph 7 of Mr Jamieson's witness statement dated 29 April 2016.

1 Kambrook Phone Fax
Assorted Cutlery, Plates and Cups
1 LG Fridge
1 Westinghouse Fridge
1 Wall Safe
1 Ladder
1 Plastic Table
3 Wooden Display Tables
1 Floor Display Stand
4 Special Mobile Display Bins
1 Watch Stand
1 Hat Stand
1 Wall Clock
1 Battery Stand
1 Kodak Counter
3 Glass Display Cabinets
1 Passport Camera
2 Ear Piercing Guns
1 Stocking Stand
1 Tender Stand
1 Sunglass Stand
1 Reading Glasses Stand
1 Filing Cabinet
1 Wooden Set of Drawers
1 Desk Lamp
1 Set Dispensary Scales
1 Set of Floor Scales
3 Plastic Rubbish Bins

67. In my view, the Assets that Romsey Pharmaceuticals Pty Ltd sold to Romsey Services Pty Ltd are those set out in the list above. There is no clear evidence to suggest otherwise. Indeed, during cross-examination, Mr Gibson was asked a series of questions concerning the 15 February 2001 *Agreement* referred to above. He said that the copy exhibited to Mr Jamieson's witness statement (which attached *Schedule 1*) was the final draft and that he recalls having *negotiated on fixtures and fittings*.
68. I have formed this view notwithstanding some uncertainty raised by Mr Gibson in his witness statement dated 29 April 2016. In particular, he states:
4. My family trust also made a contribution to the purchase price for the sale of assets of the business, including the fit out, from Romsey Pharmaceuticals Pty Ltd to Romsey Services Pty Ltd, as detailed in the Agreement dated 15 February 2001 and being Exhibit "CJ4" to the statement of Craig Jamieson. The settlement sum for both agreements expressly included a sum

for Craig's interest in the plant and equipment in the premises.

[Underlying added]

69. It is not clear from the above statement whether the settlement sum for *Craig's interest in the plant and equipment* was limited to the items listed in Schedule 1 or included all of Mr Jamieson's interest in the Assets. Similarly, it is not clear whether the expression *plant and equipment* means all of the Assets or only those listed in Schedule 1 of the *Agreement*.
70. Nevertheless, and consistent with my finding, I believe that Mr Gibson was only referring to those Assets which are listed in Schedule 1 of the 15 February 2001 *Agreement*. Indeed, other documents, which appear to have been created contemporaneously and are exhibited to Mr Jamieson's witness statement, include a statement of adjustments for the sale of Mr Jamieson's half interest in the pharmacy business, including the *plant and equipment*. The value attributed to Mr Jamieson's half interest in the *plant and equipment* is \$35,510.50. This is exactly half the amount of the consideration paid by Romsey Services Pty Ltd for the Assets it purchased and which are listed in Schedule 1 of the *Agreement*, which is entirely consistent with my finding that only those items listed in *Schedule 1* of the *Agreement* and referred to above were transferred or sold to Romsey Services Pty Ltd.
71. Other items such as the *slatwall and melamine coated panels to the wall to which shelf stripping and bracketing were attached, the special stepped pelmet, carpet, ceramic tiles, partition walls creating the beauty room or the mezzanine dispensary floor* were not part of that transaction and were left in the Premises when Mr Jamieson surrendered the 1994 lease.

SURRENDER OF 1994 LEASE

72. It is common ground that on 6 July 2001, Mr Jamieson executed a *Deed of Surrender* which was expressed to operate retrospectively to extinguish his rights and obligations under the 1994 lease as of 1 January 2001. The relevant terms of that *Deed of Surrender* are:

RECITALS:

...

- E. The Landlord has agreed to surrender the Lease in consideration of the Landlord and Tenant executing this Deed.

IT IS AGREED AS FOLLOWS:

1. In consideration of the mutual premises contained herein the Tenant hereby conveys and surrenders to the Landlord all and singular the premises demised by the Lease to the intent that the residue of the term of years granted by the Lease may merge and be extinguished in the reversion expectant thereon.

73. It is clear that the execution of the *Deed of Surrender* was contemporaneous with the Landlord entering into an agreement with Romsey Services Pty Ltd to lease the Premises for a term of four years, commencing on 1 January 2001. This tripartite arrangement purportedly allowed Mr Jamieson to exit the pharmacy business without any lingering obligations.
74. Mr Frenkel submitted that the surrender of the 1994 lease was a significant event because it meant that the Assets owned (either legally or by reason of an equitable right to sever) by Mr Jamieson merged with the reversion of the demise. Consequently, those Assets became the property of the Landlord.
75. Having regard to my earlier finding that the Assets were sold or transferred to Romsey Pharmaceuticals Pty Ltd on or about 16 November 1998, it is unnecessary for me to consider this contention further. In other words, irrespective of the fact that Mr Jamieson surrendered his leasehold interest under the 1994 lease on 1 January 2001 or 16 July 2001, he had, prior to that occurring, already disposed of the Assets. In my view, the surrender of the 1994 lease, whether it occurred in January or July 2001 is of no consequence. The fact of the matter is that prior to the surrender all of the Assets were either sold or transferred to Romsey Pharmaceuticals Pty Ltd. That raises another question; namely, who owned or owns those Assets which were not listed in Schedule 1 of the *Agreement* dated 15 February 2001?

WHO OWNS OR OWNED THOSE ASSETS WHICH WERE NOT SOLD TO ROMSEY SERVICES PTY LTD?

76. In my view, the equitable right held by Romsey Pharmaceuticals Pty Ltd to sever and possess as chattels those remaining Assets which were not listed in Schedule 1, was not extinguished when the Landlord and Romsey Services Pty Ltd entered into the 2001 lease. Moreover, that right was not affected by the surrender of the 1994 lease, irrespective of whether that occurred contemporaneously with the entering into of the 2001 lease or in July 2001. The right to sever and possess those Assets as chattels crystallised prior to the execution of that 2001 lease. Consequently, Romsey Services Pty Ltd must be assumed to have taken that lease, subject to those third-party rights, especially in circumstances where many of the remaining Assets possessed the character of a fixture. For example, the partition walls creating the Beauty Room, decorative ceiling cornice, the raised dispensary floor, and various joinery fixed into the Premises.
77. There is no evidence to suggest that Romsey Pharmaceuticals Pty Ltd ever sought to enforce its right to sever and possess those Assets at any time before it was deregistered in 2008. In my view, given the period of time that had elapsed, it is probable that it abandoned that right before that company was deregistered in 2008. In those circumstances, I find that the

Landlord held those remaining Assets, initially as a *gratuitous bailee*,²⁴ and then at some point prior to Romsey Pharmaceuticals Pty Ltd becoming deregistered, acquired title over those remaining Assets by reason of their abandonment.

78. Consequently, those remaining Assets became part of the freehold and reversion. Ownership of those remaining Assets therefore rests with the Landlord.
79. According to Ms Wylaars, the remaining Assets are listed in a Scott Schedule she prepared, which was exhibited to her witness statement.²⁵ In essence, that Scott Schedule sets out the basis of the Landlord's claim in this proceeding. In particular, the claim is couched in terms of reinstating the Premises into a condition commensurate with the remaining Assets listed in the Scott Schedule being reinstalled and the Premises made good where any damage was caused by the removal of those Assets.
80. Supplementary witness statements have been filed by both the First Applicant and Mr Gibson, responding to a number of the items listed in Ms Wylaar's Scott Schedule. In particular, of the items listed in the Scott Schedule, Mr Gibson said that the following were installed by him, through his service company, namely, Romsey Services Pty Ltd and transferred to the Applicants upon sale of the pharmacy business:
 - (a) One wall mounted drug safe. Ms Wylaars' evidence is that two wall safes were acquired by her upon the surrender of the 1994 lease. It is not clear from Mr Gibson's evidence whether one of these wall safes is the wall mounted drug safe that he refers to in his witness statement.
 - (b) All partition wall, shelving and brackets to the front counselling/office area, which Mr Gibson says was installed during the period when Romsey Services Pty Ltd was in occupation and was subsequently transferred to the Applicants. It is not clear whether the Landlord makes any claim in respect of this partitioning and shelving. Further evidence would need to be given in order to make any concluded finding on that aspect of the Landlord's counterclaim.
81. The First Applicant also filed a supplementary witness statement dated 3 May 2016, in which he responded to the items listed by Ms Wylaars in her Scott Schedule. In particular, he itemised those Assets which were installed by Mr Gibson and which were purchased by the Applicants at the time when they acquired the pharmacy business. Many of the items

²⁴ *City West Centre Pty Ltd v Galaxy Media Pty Ltd* (1998) 9 BPR 16, 313 at [28].

²⁵ The Scott Schedule attached to Ms Wylaar's witness statement was updated prior to the commencement of the hearing. The current version is dated 6 May 2016 and was tendered as an exhibit marked 'R-5'.

are common to the list prepared by Mr Gibson. However, there are other items which are not mentioned by Mr Gibson. These include:

- (a) All shelving benches and cupboards in the dispensary/office.
 - (b) The floor safe in the dispensary/office.
 - (c) The sink and bench in the staff/storeroom.
 - (d) The glass, timber shelving, slat-wall and metal brackets in the front retail area.
 - (e) The light fittings, except for the fluorescent lights, in the front retail area.
 - (f) Two serving counters in the front retail area.
82. In addition to the above, the First Applicant said that he purchased other items after September 2012, which included:
- (a) An upgraded security system and surveillance cameras. It is not clear whether this is in addition to the security system that had previously been installed by Mr Jamieson or whether that original security system was replaced.
 - (b) Twenty gondolas, which replaced the original gondolas.
 - (c) Twelve halogen flood lights.
83. The evidence given by Mr Gibson and the First Applicant through their supplementary witness statements was not definitively contested by Ms Wylaars. In particular, in relation to the wall safes, she could not recollect ever seeing the wall safes but recalls them being mentioned in a valuation report prepared at some time prior to the Applicants taking over the pharmacy business. She could not dispute that Mr Gibson may have purchased and installed one or more of the wall safes or floor safe.
84. Having regard to Ms Wylaar's evidence, and in particular the contents of her Scott Schedule, together with the evidence of Mr Jamieson, Mr Gibson and the First Applicant, I find that the following remaining Assets were owned by the Landlord but removed by the Applicants:
- (a) The partition walls, including the creation of the Beauty Room.
 - (b) The doors.
 - (c) The decorative ceiling cornice.
 - (d) The mezzanine floor previously constituting the dispensary area.
 - (e) The lighting installed either by the Landlord or Mr Jamieson.
 - (f) The security system installed by Mr Jamieson.
 - (g) The slat wall and associated shelving.
 - (h) The perfume cabinetry.
 - (i) The joinery in the Beauty Room.

- (j) In the dispensary/office:
 - (i) The floor coverings installed by the Landlord or Mr Jamieson.
 - (ii) The joinery.
- (k) In the staff/storeroom:
 - (i) The floor coverings and light fittings installed by the Landlord or Mr Jamieson.
 - (ii) The joinery.
- (l) In the front retail area:
 - (i) The floor coverings installed by the Landlord or Mr Jamieson (except the tiles).
 - (ii) The shelving installed by the Landlord or Mr Jamieson.
 - (iii) The light fittings installed by the Landlord or Mr Jamieson.
 - (iv) One fire extinguisher.

85. I note that there are other items listed in Ms Wylaar's Scott Schedule which do not appear in the list above. However, I consider that some of those items relate to repair of the Premises rather than an Asset having been removed. For example, some of the air-conditioning control thermostats were left hanging from the ceiling. They were not removed but merely unfixed given that the wall which they had previously been fixed to had been removed. Similarly, some of the tiles had been removed but not all, which I assume resulted from the removal of walls or joinery. In my view, this relates to making good, rather than a particular Asset having been removed.

86. I have also had regard to the documents comprising the sale of the business to the Applicants, which includes a *Sale of Business Contract* dated 15 August 2012. Attached to that document is *Schedule 10*, which lists the items of *plant and equipment* purportedly transferred to the Applicants. The list is comprehensive and includes all light fittings, floor coverings, some joinery and many other items which are common chattels. However, the list also includes items such as the automatic glass doors, the hot water system and the air conditioner. These were not listed in Schedule 1 to the *Agreement* between Romsey Pharmaceuticals Pty Ltd and Romsey Services Pty Ltd. As I have already indicated, Romsey Services Pty Ltd did not have capacity to sell Assets which it did not own. Consequently, *Schedule 10* is to be read down so that it is consistent with the Assets listed in Schedule 1, plus any additional assets introduced into the Premises after Romsey Services Pty Ltd commenced occupation.

ARE THE APPLICANTS ESTOPPED FROM ASSERTING OWNERSHIP OF THE ASSETS?

87. Mr Best submitted that the Landlord's contention that it owned the Fit-out Works (or the Assets) is inconsistent with the terms of the 2001 lease and the 2005 renewal. In particular, the 2001 lease identified the *Landlord's Installations* as:

Staff amenities rooms and toilet block, fixed floor coverings, wall tiling and hot water service.

88. The description of the *Landlord's Installations* is the same as what appeared in the 1994 lease, which was executed on 20 December 1994; and at a time when the Fit-out Works had either not been undertaken or had not been completed. The terms of the 2001 lease were incorporated into the 2005 renewal lease by the *Deed of Renewal* without any additional provisions or expansion on the definition of the *Landlord's Installations*.

89. Mr Best also drew my attention to the *Disclosure Statement* to Romsey Services Pty Ltd for the 2005 Renewal, signed by Ms Wylaars on behalf of the Landlord. He submitted that this document was also limited in its identification of the Landlord's property. The *Disclosure Statement* is in a prescribed form and lists a number of assets under clause 1.4 which allow the parties to tick a box, indicating whether those assets form part of *the existing structures, fixtures, plant and equipment in the premises provided by the landlord*. The items marked include air-conditioning, cool room (even though there is no cool room), hot water service, lighting, painted walls, plastered walls, shopfront, sink, and suspended ceilings.

90. Item 7 of the 2001 lease and by extension, the 2005 renewal, described the *Tenant's Installations* as:

Such fixtures, fittings, plant and equipment including any display counters, shelving and office machinery which may with the consent of the landlord have been brought on to the premises by the Tenant prior to the commencing date of this Lease.

91. Mr Best submitted that this provision must be construed in accordance with the surrounding circumstances known to the parties. He argued that the history of the 2001 lease clearly indicates that the Landlord knew that Mr Linton and Mr Gibson, through Romsey Services Pty Ltd, were to continue the pharmacy business and were bringing the same assets as existed when Mr Jamieson's occupied the Premises into that pharmacy business.

92. Mr Best submitted that in those circumstances the common sense construction of what is meant by the *Tenants Installations* in Item 7 of the 2001 lease is that the Landlord acknowledged that Romsey Services Pty Ltd had purchased all of the Assets for use in the pharmacy business, given that it was an ongoing concern. Mr Best submitted that the Landlord is therefore estopped by the terms of the 2001 lease, reiterated in the 2005

renewal, and by the *Disclosure Statement* from asserting that it has any proprietary right in the Assets installed into the Premises by Mr Jamieson.

93. In my view, the factors identified by Mr Best do not estop the Landlord from asserting its ownership over the Assets or some of those Assets. In particular, I accept the submission made by Mr Frenkel that a statement in a deed which is capable of supporting an estoppel must be *precise, clear and unambiguous: Labracon Pty Ltd v Cuturich & Anor.*²⁶
94. Here, there is no clear statement from the Landlord to the effect that the Assets or at least those Assets which are now in contention, were either not owned by it or owned by Romsey Services Pty Ltd. Indeed, the *Disclosure Statement*, although imprecise in identifying the Assets forming part of the Landlord's property, states that *plastered walls, suspended ceilings, painted walls, hot water service and air-conditioning* are all Assets which are provided by the Landlord. In my view, that statement is, either at odds or inconsistent with, the proposition that the Landlord did not own any of the Assets.
95. Further, the evidence given by the Applicants does not go so far to establish that any reliance was placed upon the 2001 lease or the *Disclosure Statement* in forming their view that they were purchasing all of the Assets listed in Schedule 10 of the *Sale of Business* contract. In those circumstances, I do not accept that the requisite elements to establish an estoppel have been made out.

WERE THE APPLICANTS OBLIGATED TO REMOVE THE ASSETS UPON VACATING THE PREMISES?

96. Mr Best submitted that the terms of the 2001 lease, and by extension the 2005 renewal, only required the Applicants, on removal of the Assets, to reinstate the Premises to an empty shell.
97. Mr Best drew my attention to clause AP6 of the 2001 lease (and by extension the 2005 renewal) entitled *Reinstatement*. That term stated:

At the expiration or sooner determination of the said term the Tenant is to remove the Tenant's partitions, fixtures and fittings in so far as the premises are affected by any such removal to reinstate the same in their condition when first occupied by Craig Jamieson and make good any damage or injury to the premises at the expense in all things of the Tenant and to deliver up possession to the Landlord of the Premises together with all of the Landlord's fixtures and fittings in such repair, order and condition required to be maintained by the Tenant in accordance with the Tenant's covenants herein contained. [underlining added]

²⁶ [2013] NSWLR 97 at [159].

98. Mr Frenkel contends that special condition AP6 requires the Applicants to reinstate the Premises to a condition commensurate with that after Mr Jamieson had completed installation of the Fit-out Works.
99. The parties are at odds as to how clause AP6 is to be construed. On one hand, the Applicants contend that the clause required them to reinstate the premises to a condition commensurate with the condition prior to Mr Jamieson commencing the Fit-out Works. On the other hand, the Landlord contends that the clause requires the Applicants to reinstate the premises to a condition commensurate with the condition after the Fit out Works had been completed.
100. In my view, the question as to how clause AP6 is to be construed goes beyond the scope of this preliminary hearing. Indeed, the submissions filed by both counsel do not comprehensively address this question. In my opinion, it would be unfair to both parties if I were to determine that question, without giving the parties prior notice and the opportunity to address me further. I have formed that view because my findings in relation to the ownership of the Assets clearly elevates the significance of that particular clause, should it be construed in the manner suggested by Mr Best.
101. Therefore, I leave the determination as to the construction of clause AP6, pending further hearing of submissions. I will order that the matter be returned before me for further directions, at which time the parties can address me as to the future conduct of the proceeding.

SENIOR MEMBER E. RIEGLER