THE COURT OF APPEAL

CIVIL

UNAPPROVED
NO REDACTION NEEDED
Court of Appeal Number: 2023/157
Court of Appeal Neutral Citation: [2024] IECA 199
High Court Neutral Citation: [2023] IEHC 25

Whelan J.
Costello J.
Pilkington J.

BETWEEN/

RGRE GRAFTON LIMITED

APPELLANT

- AND -

BEWLEY'S CAFÉ GRAFTON STREET LIMITED AND BEWLEY'S LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 31 day of July 2024

Introduction

1. The salient facts in this case are set out in detail in the judgment of Mr. Justice McDonald delivered in the High Court [2023] IEHC 25. Briefly, the appellant, RGRE Ltd. (the landlord), acquired the freeholder reversionary interest in the premises known as Bewley's Café on Grafton Street in Dublin (the café) by virtue of a Deed of conveyance and assignment dated 1

April 2015. The first named respondent, Bewley's Café Grafton Street Limited (the tenant), has for nigh on a century been in continuous occupation and possession of the café. It initially occupied the café under a lease dated 9 March 1928 for a term of 21 years from 1 April 1927. Its incorporation predates the lease. The second named respondent (the licensee) is, by an Indenture of transfer and license, dated December 2020, assignee from the tenant of six ornamental and decorative stained glass artwork panels (the panels) created by the renowned early twentieth century artist, Harry Clarke.

2. The panels, from a design perspective, fall into two categories – four representing the four orders of architecture (the Four Orders) are located on the western wall of the café. The remaining two by reason of their proximate location, are referred to as the Swan Yard panels. They are mounted internally on a southern wall of the café. In each case the panels are housed within sashes which are readily removable from the overall frame.

The Panels

3. The building was constructed by the original landlord, Ernest Bewley circa 1926/1927. At the date of commencement of the term (1 April 1927) the evidence suggests that on the western wall there were four substantial window opes and on the southern wall, which faced onto Swan Yard, two substantial window opes. The tenant commenced trading on 27 November 1927. It was accepted by the landlord's expert architect, Mr. Slattery, that there were six windows in the building in 1927 when the structure was completed by the landlord. The six Harry Clarke panels were installed at the café in or about April 1928.

4. On the western wall of the café the four stained glass panels depicted the columns, capitals and pillars of the four orders of architecture - Doric, Ionic, Corinthian and Tuscan - as defined by Vitruvius, the Roman architect in accordance with the style and principles of the Arts and Crafts Movement. Each of the Four Orders panels is sub-divided into four sashes. Each sash in turn is divided into three panels, to be read vertically. The trial judge noted:

"Together, these panels depict the overall design comprising an image of a classical column surrounded by the additional decorative images…" (para. 7). The four sashes of each window are housed in a window frame. *"In their current condition, each of the four sashes is capable of being opened by the use of a modern catch… in the nature of 'hopper' sashes in that they open inward with hinges on the bottom of the sash which allow the sash to be opened at an angle. The modern catches are a relatively recent change."*

5. The Swan Yard panels are of a different design aesthetic, each divided into eight sashes of two panels "*mounted in a frame that has the appearance of a window frame*." (para. 10) As with the Four Orders panels, the sashes are in the nature of hopper sashes capable of opening inward. The stained-glass decorative panels were executed by deploying the Grisaille technique involving use of silver stain which when fired turns yellow, ranging from pale yellow to deep amber. The court noted that the installation of a fire escape staircase in the café in 1987 necessitated that both Swan Yard panels being moved and mounted internally on the southern aspect of the ground floor of the café. *"They are now both artificially lit from behind to give the appearance of windows to patrons of the café."* (para. 11) It is not in dispute that that there were window frames *in situ* at the date of commencement of the tenancy in 1927.

6. The central issue for determination before the High Court, and in this appeal, concerns the beneficial ownership of the six panels. The High Court determined that two Swan Yard panels, constitute tenant's fixtures of which the second named defendant, the licensee, is now the beneficial owner. The landlord appeals the said determination. The High Court held that the Four Orders panels, which are mounted behind external screens on four window opes on the western wall of the ground floor of the café, formed part and parcel of the premises. In consequence it ordered that a purported transfer and licence of the six panels by the tenant to the licensee executed in December 2020 be partly set aside insofar as it pertained to the Four Orders panels. The tenant and licensee cross-appeal the said determination.

7. Given the effluxion in time since the installation of the panels in 1928, there were no witness to provide direct evidence of key contemporaneous events, including the nature of the glazing originally in *situ* at the date of completion of the building in 1927 or the manner in which the panels were initially installed.

8. I approach with deference any judgment delivered by the inestimable Mr Justice McDonald. I find no reason to interfere with his conclusions in relation to the beneficial ownership of the Swan Yard works. However, I conclude that the trial judge erred in reaching his conclusions in regard to the Four Orders panels for the reasons stated hereafter.

Judgment of the High Court

9. The case was heard over six days, during which evidence was given by experts on behalf of both parties to determine the ownership of the six stained glass panels. The appellant asserted that they comprised windows which the original landlord had "*commissioned the installation of*" and which "*constituted part of the fabric and structure of the Premises ever since*". It was contended that their ownership was vested in the landlord. The appellant pleaded in the alternative that the panels constituted "*landlord's fixtures annexed to the Premises*".

10. In the course of his judgment, the trial judge identified the following issues as arising for determination in his judgment;

(i) Whether the landlord is correct in its contention that the Harry Clarke panels are part of the fabric of the premises. He held the landlord bore the burden of proof since it had asserted that as windows they formed part of the fabric of the premises.

(ii) If all or some of the panels at the date of installation formed part of the fabric of the café, whether there is nonetheless a legal basis upon which the court can conclude that the panels are the property of the tenant. The burden of proof rested on the tenant in relation to the said issue.

(iii) If some or all of the panels did not form part of the fabric of the premises from installation, whether they constituted fixtures and, if so, were they landlord's fixtures or tenant's fixtures. The burden rested with the tenant to establish that the panels constituted tenant's fixtures and with the landlord to prove that they constituted landlord's fixtures. It was necessary to objectively assess *"the purpose for which the panels were installed in the café premises*".

(iv) Of the tenant's claim that the panels constituted tenant's fixtures, the court had to be satisfied that the conditions in s. 17 of Deasy's Act were met or that there is a basis at common law to hold that they are tenant's fixtures. The burden of proof rested with the tenant.

(v) Depending on the decision the court might reach, the judge observed that "*it may be necessary to consider the effect of the provisions of the 1928 and the 1987 leases*", since both parties sought to rely on certain provisions of the said leases in support of their respective positions.

(vi) Depending on the decision reached in respect of these discrete issues "*it may be necessary to consider the legal effect of the sale and lease back transaction of 1987*". The court noted that each side bore the burden of proof in respect of the arguments respectively advanced by them as to the meaning and import of the terms of the said instrument. (para. 36)

11. The court noted (para. 15) that a fixture may be the property of the landlord or of the tenant. *"...in order to determine on which side of the line, the fixture falls, it is necessary to understand the circumstances in which the chattel was affixed to the premises in question."* The court stated that the rules governing fixtures were not relevant to circumstances "*where an item is an integral element of the fabric of the leased premises*". No particular legal authority was identified for this latter assertion which as a matter of law is confined to irrevocable

integration of a thing into the freehold. It connotes integration and a high degree of assimilation into the freehold. It runs counter to the established exception where the attachment to the freehold by the tenant was for the purpose of trade under which tenants have power of severance and removal during the tenancy as held in *Bain v Brand* (1876) 1 App. Cas. 762 approved in *Hobson v Gorringe* [1897] 1 Ch. 182 at p.192 and by Lord Clyde in *Elitestone v. Morris* [1997] 1 W.L.R. 687 at p.695

12. The tenant argued that there was a distinction to be drawn between windows intrinsic to a building and the "*artwork panels*" at issue in the instant case which it was contended had no intrinsic or structural significance to the building. The tenant maintained that the Harry Clarke panels were tenant's fixtures capable of being removed from the premises without substantial damage either to the premises or to the panels themselves. They were contended to be tenant's fixtures in connection with the trade of café and installed for that purpose or alternatively constituted ornamental fixtures which could be removed without substantial damage to them or the property. (para. 22) The tenant argued that the premises were completed in 1927, several months prior to the installation of the Harry Clarke panels in 1928. The court noted that the landlord disputed the characterisation of the panels as tenant's trade fixtures and contended that there was no relationship between the nature of the panels and the café trade undertaken by the tenant. (para. 28) It was argued that the panels were intended to be a permanent feature of the premises in which the café is housed.

13. The landlord relied on the terms of the 1928 lease pursuant to which upon the expiration or determination of the said lease, the tenant had contracted to deliver up the demised premises together with all fixtures. The tenant countered that the relevant term in the 1928 lease could not avail the landlord since that lease had not been terminated and the tenant had never yielded up possession to the landlord. Reliance was placed on a further lease executed on 20 May 1949

whereby the original landlord, Ernest Bewley's successors granted a further demise of the premises to the tenant for the term of 100 years from 14 August 1948.

14. As the court noted in its judgment, the tenant placed reliance on the fact that no reference to the Harry Clarke panels was made in subsequent contractual documents in 1987 pertaining to the sale and leaseback transaction pursuant to which the tenant as vendor sold its interest in the premises to Royal Insurance plc, the landlord's predecessor in title, which in turn effected a leaseback of the premises to the tenant.

15. The court noted that the tenant relied on clause 3.36.1(B) of the 1987 lease by which the tenant continues in occupation which acknowledged the right of the tenant to remove tenant's fixtures. It was contended by the tenant that the provisions of the 1987 lease did not displace the application of s.17 of Deasy's Act.

16. The trial judge set out in significant detail (paras. 22-38 of the judgment) the arguments and counter arguments advanced on behalf of the landlord and tenant with regard to the legal nature of the panels and as to how the evidence available, which in certain respects was limited, ought to be treated by the court in arriving at a determination as to their true legal characterisation and the consequential beneficial ownership of same.

17. The landlord asserted that when the tenant acquired the landlord's interest by virtue of the indentures of assignment of 1981 and 1987, the tenant's interest thereby merged with that of the landlord. The Harry Clarke panels were not excluded from the sale. The landlord claimed they thereby fell into the ownership of Royal Insurance plc, its predecessor in title.

18. As the judgment records, (para. 35 *et seq.*) the tenant countered by relying on the doctrine in *Walsh v. Lonsdale* (1882) 21 Ch. D. 9, contending that once there was an agreement for a lease same was specifically enforceable and it enjoyed all rights in equity as it would have had in the event that the lease had actually been executed at the date of the contract. There was

said to be no abeyance in time between the date of the assignment and the date of commencement of the 1987 lease.

19. Ultimately the core issues distilled down to these; what is the legal nature to be accorded to the panels; were they part and parcel of the demised premises, landlord's fixtures, tenant's fixtures and arising from that, in whom was the beneficial ownership vested.

20. The judge, having physically inspected the property, concluded at para. 38 that the panels were a striking, "*if not dominant, feature of the interior and assist, and always appear to have assisted, the creation of a particular 'aesthetic' and atmosphere within the café."*

Evidence as to the panels in 1986/1987

21. There was evidence concerning the two Swan Yard panels from Mr. Tony Horan, an architect retained 35 years previously on behalf of the tenant in 1987 to carrying out works of improvement to the café. The High Court (para. 96) noted his witness statement which stated:

> *"9. The two Swan Yard Harry Clarke artworks needed to be repositioned to allow for the construction of the new fire escape stairs. I remember that before the works, only one opening was visible from the exterior of the Swan Yard side. The other opening had been blocked in over prior to the 1987 panels. Save for removing the Harry Clarke artwork, we did not do any works relating to that blocking up opening in 1987. We did not remove the sill or install the blockwork which covers that opening.*
>
> *10. In respect of the remaining opening, in 1987 this housed a separately glazed window to the exterior of the building. The panels of the Harry Clarke artwork were held in wooden sub-frames, which were in turn attached by screwed bottom mounted hinges to an independent frame. That frame was mounted to the wall to the inside of the external window. There was a space between the window and the artwork. The artwork did not perform any structural or other building function — that was done by the independent existing window to the exterior. I do not recall whether natural light*

was visible through that Swan Yard artwork at the time. I think that all six of the artworks were backlit with artificial light prior to the panels."

22. A second architect, Mr. Brian O'Connell, gave evidence for the tenant confirming that the surviving clear glass window overlooking Swan Yard *in situ* in 1987 was the original window installed in the course of the construction of the café by the original landlord, Ernest Bewley circa 1927. The judge notes "*On the basis of his conclusion to this effect and on the basis of Mr. Horan's evidence, Mr. O'Connell has also put forward a theory…that there was a similar double fenestration arrangement in place originally in respect of the Four Orders works*", on the western wall. A good deal of evidence was heard concerning the double-fenestration theory which was ultimately rejected by the trial judge in regard to the Four Orders works and accepted by him in regard to the Swan Yard works.

Contemporaneous Correspondence of Harry Clarke/Joshua Clarke & Sons

29. A small consignment of correspondence written by Harry Clarke pertaining to the project survives. This incomplete and one-sided selection of material is dealt with in some detail by the trial judge at paras. 43 to 67 (inclusive) of the judgment. The court noted that two firms of architects, Messrs. McDonnell & Dixon of 20 Ely Place, and Messrs. Miller & Symes, of 39 Kildare Street, were retained by the landlord in respect of carrying out of the construction of the premises.

30. The landlord, Ernest Bewley, had fixed the 1st April, 1927 as the commencement date of the tenancy. A minute of the board meeting of the tenant company on the 9th March, 1928 was the subject of dispute and will be considered hereafter. A significant factor was that the landlord was a director and chairman of the tenant company. The trial judge observes that the fact that correspondence was addressed to "E. Bewley" "*does not, of itself, suggest that Ernest Bewley had commissioned the works in his capacity as landlord. Given that he was also a*

director and chairman of the tenant, … he could just as readily have commissioned the works in that capacity on behalf of the company." (para. 53).

55. The court accepted the evidence of Mr. O'Connell that the clear-glass window *in situ* overlooking Swan Yard had been there since 1927, (cf. para. 124 *et seq.* High Court judgment), and concluded on balance that the frames with sashes of plain glass dated from 1927 i.e. pre-dating the installation of the Harry Clarke works. The trial judge preferred the evidence of Mr. O'Connell, who had opened up the reveals to the Swan Yard windows and his finding that there was no evidence of any damage to same, as well as his analysis of the mortar in the brick work and bedding of the Swan Yard window frame, to that of the landlord's expert Mr. Slattery.

56. The court noted that there was no challenge to Mr. O'Connell's evidence in crucial aspects, including that the soiling and dust on the plaster reveals to the Swan Yard window suggested it was the original window installed prior to the grant of the lease. Mr O'Connell was not challenged in cross-examination on his clear evidence that the plaster surrounding the surviving Swan Yard window was original and dated from 1927. Neither was he challenged in cross-examination on his evidence that the patina on the timber work of the extant window was consistent with it being the originally installed window of 1927, the court noted. The court observed that the landlord had not asserted that the panels of artwork in their sashes were moved from within the extant original window frame to a new position adjacent to the external wall thereby severing them from the original window frame. The judge rejected the evidence of Mr. Slattery on behalf of the appellant concerning the Swan Yard works insofar as he sought to contradict Mr O'Connell in material aspects - noting that Mr. Slattery had not carried out any investigation himself of the various matters. (para. 131) Despite being the author of an expert report on the premises, he had not taken the photographs annexed to his report and had not been personally present when his colleague inspected the premises. (para. 117)

59. A letter of the 30th April, 1928 from Harry Clarke to the architects, McDonnell & Dixon encloses his account *"…for the stained glass made and fitted in Messrs. Bewleys Café, Grafton Street*". It appears clear that same was not discharged promptly and there is a further letter to "*Charles Bewley Esq., Messrs. Bewleys Café*" dated the 7th June, 1928 seeking payment "*for the Stained Glass work at your New Café in Grafton Street*". The invoice of the 7th June, 1928 bears some scrutiny:

> *"March 31st*
>
> *To designing, making, supplying and fixing stained glass for 3 windows at back of ground floor Café at Messrs Bewley premises Grafton Street as per EST 20th April '27 - £210*
>
> *To designing, making, supplying and fixing stained glass for two windows at side of café as per estimate 27th April 1927 - £180*
>
> *To designing, making, supplying and fixing one extra stained glass window at back of ground floor café, not included in above - £70"*

The trial judge concludes (para. 66 of judgment) that "*it is reasonable to conclude that all of the works had been installed*" by the 30th April, 1928.

60. The ultimate determination on the issue, is found at para. 67 of the judgment:

> "*…it seems to me that, on the basis of the materials before the court and on the balance of probabilities, Harry Clarke supplied not only the stained-glass but also the sashes in which it is housed. That said, I am not convinced that he also supplied the window frames themselves. … there is no evidence in the window surrounds at the location of either the Four Orders works or the Swan Yard panels that the window frames at those locations were ever replaced. Given that there must have been window frames in place when the café opened in November 1927, it seems likely that, when it came to the*

installation of the stained-glass panels in 1928, those frames were retained in place and fitted with the sashes containing the stained glass." (emphasis added)

62. The trial judge expressed the view that:

"The 1998 video … demonstrates that the sashes are capable of being removed from the frames and it is likely that they can just as readily be fitted to an existing frame. While it seems probable that the frames were dealt with in that way, I remain of the view, for the reasons explained above, that Harry Clarke is likely to have supplied the stained-glass in the sashes rather than attempting to fix stained glass to the sashes of the existing windows. I do not believe that this conclusion is undermined by the lack of evidence that Joshua Clarke & Sons had any joinery expertise of their own."

Admissibility of a minute of the board meeting of tenant company dated 9th March, 1928

66. The judgment noted (para. 70) that this document was one of a number which the parties had agreed to admit into evidence on the *Bula/Fyffes* basis. The trial judge identified two key issues to be determined in connection with the minute. Firstly, whether the minute was admittable as to the truth of its contents, and, secondly, whether there was a sufficient basis to find, on balance, that payment for the Harry Clarke panels was included in the sum of £14,900 referenced in the minute as "*he had spent, or authorised the expenditure on the company's behalf, of a sum of £14,900.0.0 largely comprising the cost of ovens, tables, chairs, counters and other café fixtures and fittings*".

67. The landlord asserted that, even if it could be said that the payments to Joshua Clarke & Sons of the sums in respect of the panels were included within the overall sum of £14,900, the tenant had nonetheless failed to prove that it had, in fact, reimbursed the landlord in respect of the payment he made on his behalf. The landlord highlighted that no relevant accounts of the tenant company for the year 1928 recording the payment had been adduced in evidence.

One observes that this is scarcely surprising given that over 90 years had elapsed since the discharge of the account to Harry Clarke.

67. The trial judge observed that it was the landlord who had first sought to deploy the minute in evidence in the course of the testimony of its witness, Ms. Costigan. They were entitled to do so on a *Bula/Fyffes* basis. The court analysed the evidence of Ms. Costigan, noting her reliance on the minute as evidence of the truth of its contents. He rejected the appellant's objections and held (para. 75) that "*Having deployed the minute in that way as part of its case, I do not believe that the plaintiff is now entitled to argue that the minute is not admissible against the plaintiff as evidence of the truth of its contents including the acknowledgement recorded therein by Ernest Bewley that he had spent or authorised the expenditure on the company's behalf of a sum of £14,900 on café fixtures and fittings. I therefore reject the plaintiff's objection to the admissibility of the minute as to the truth of its contents*". The position is reiterated at paras. 68 and 192 of the judgment, the judge concluding that *"... on balance…the bill for the Swan Yard works was for the account of the tenant and …was therefore an expense of the tenant*".

68. The trial judge drew a distinction between the construction of the premises which was finished by the landlord in 1927 and works done thereafter. He noted that the minute recorded that the latter expenditures "*would in due course appear in the Company's accounts, as a Liability of its own*". He observed (para. 79): "*Given that the amount ultimately claimed by Joshua Clarke & Sons was known in advance of the board meeting (having been the subject of correspondence in June 1927 and again in February 1928), it is conceivable that the amount claimed by Joshua Clarke & Sons was included in the sum of £14,900 paid by or to be paid by Ernest Bewley on behalf of the tenant*".

Finding Tenant responsible for payments for fixtures

69. The trial judge returns to the issue at para. 192 in the context of Swan Yard works, concluding that the minute "*clearly identifies that the tenant was to be responsible for the payment of amounts due for fixtures"*, that the Swan Yard works constitute fixtures and the bill for same was an expense of the tenant. He noted that the cash payment of £200 in June 1928 "*is suggestive that the tenant was the source*". The judge concludes:

> "*Alternatively, if it were the case that the bill was paid by Ernest Bewley out of his own resources (and there is no evidence of that), the terms of the minute clearly suggest that any such payment by him for a fixture was, nonetheless, to be for the tenant's account. … Such expenditure was not therefore to be treated as personal expenditure of Mr. Bewley on his own behalf but as an expense of the tenant. Had the cost been paid by Mr. Bewley, the tenant would … have been under an obligation to repay him the cost of the fixture but, in the absence of some agreement to the contrary between them (of which there is no evidence) that would not affect the fact that the purchase was made on the tenant's behalf. If Ernest Bewley paid it out of his own resources and did not thereafter recoup the payment from the tenant, that would suggest that he must have forgiven the debt owed by the tenant to him. But that would not appear to me to alter the conclusion that, as the minute plainly records, payment for a fixture (such as the Swan Yard works) was to be on behalf of the tenant. As a matter of law, any such payment would accordingly be a payment made by the tenant and should not be characterised as a payment made by Ernest Bewley personally*".

I am satisfied that this analysis by the trial judge is correct. However, for the reasons set out hereafter. I am satisfied that this reasoning *perforce* applies equally to the liability of the tenant for payment of the costs and expense of the Four Orders panels with all the legal consequences which flow from same.

The arrangement drawing

71. The trial judge placed reliance on the 1946 drawing of the premises by the architects McDonnell & Dixon as suggestive that "*there is no reason to suppose that the Harry Clarke works had not been restored to the café premises by the time these drawings were undertaken*". That is not disputed by either party. The evidence was that the plan was merely an arrangement drawing rather than a survey and such evidently is the case given the scale of eight feet to one inch. It was of minimal probative value. He infers from the drawing that "*The bricking up of one of the Swan Yard windows must accordingly have occurred at some stage after 1946".*

72. The judge noted at para. 93 that Mr. Campbell's witness statement had stated:

> "*The presence of panelling behind Harry Clarke Artworks was there for all to see, behind the four orders of architecture Harry Clarke Artworks on the Westbury side wall, and blockwork behind the Artwork closest to the fireplace on the Swan Yard wall. Behind all the Artworks you could see a grimy light grey/off white surface*." "*…Fluorescent lighting tubes had been installed in the cavity behind each panel to illuminate the stained glass. That external weather shield was in place when we acquired the Bewley's business in 1986. The existing panelling was removed for a short period in 1998 to facilitate works and the weather shield was then reinstated in blockwork. The blockwork weather shield was removed and replaced with a clear Perspex screen in 2016 which performed the same weather shielding function but permitted entry of a limited amount of natural light*."

73. His witness statement indicated that inspecting Swan Yard wall from the external side:

> *"...I recall that I could see only one window ope (to the right) and that this was protected on the outside by a wire grill. Through the wire grill I could see some kind of opaque panel which may have been timber or painted material. From the interior of*

the Café it was clear to me that the second Swan Yard Artwork was positioned to the inside of that panelling."

He further stated: "*It was not possible to see through either of the Swan Yard Harry Clarke Artworks because of the blockwork or panelling. It was also apparent to me that, by virtue of being blocked up or boxed in from the outside, there was no possibility of access to outside air, or ventilation for the Café…".* Critically, as the trial judge noted (para. 94) of the judgment, "*Mr Campbell's evidence as to the physical state of the premises in 1987 was not challenged. There is accordingly no reason to doubt that, at the time of the Campbell Catering takeover, the works were no longer a source of natural light or ventilation albeit that the hopper sashes of the Four Orders works were capable of being opened…through the use of a brass hopper mechanism*…". This corroborated para. 4 of the admitted statement of Mr. Ebbs.

74. The evidence of Mr. Horan, architect, as the trial judge noted (para. 40) confirmed "…*that the frame holding one of the Swan Yard works was mounted to the wall to the inside of the surviving external clear glass window. There was a space between the window and the artwork."*

75. With regard to the second Swan Yard work, Mr. Horan's witness statement is also significant, in my view, insofar as not contradicted, with regard to the relative mobility of the artwork panels. This an issue will be more fully considered hereafter in evaluating whether the works can be objectively considered to be "*... permanently fixed into and remain in position at the Premises*" as the landlord contends (*Replies to Particulars* 2(a) 24 February, 2021) to the degree requisite to establish that they came to be permanently annexed to the freehold so as to be now incapable of severance and removal by the tenant.

76. The witness statement of Mr. Horan was cited by the trial judge (para. 96):-

"13. When it came to moving the Harry Clarke artworks, this was not a particularly significant job. The panels that make up the artworks sat into wooden subframes. Those

sub-frame (sic) were mounted by a hinge and it was possible to remove them by unscrewing them. The panels were not glazed into the masonry. No damage was done to the building in removing the artworks. To my mind, the Harry Clarke artworks were not of any structural importance."

77. The trial judge noted at para. 98 the evidence of Mr. Horan that in 1987;

"*…when the Swan Yard works were removed for the purposes of reinsertion in the new internal wall between the emergency staircase and the café, there was a clear glass window immediately behind one of the works and a bricked-up window opening behind the other (both of which were in the external wall of the premises). Mr. Horan confirmed that there was a space between the clear glass window and the Harry Clarke work."*

78. In evaluating the evidence of a double fenestration arrangement at Swan Yard the trial judge placed reliance on the evidence of Mr. Horan and Mr. Campbell. He noted (para. 100):-

"…it is sufficient to note that, following two physical examinations of the clear glass window that remains in place at Swan Yard, Mr. O'Connell has expressed the view that this window has been in place since the development works carried out by Ernest Bewley in 1927. Mr. O'Connell is of the view that there is no evidence of disturbance in the mortar or other materials surrounding the window to suggest that it is anything other than the original window dating back to 1927."

The judge (paras. 96 and 99) in assessing Mr. Horan's evidence, notes his *bona fide* efforts to recollect the sequence of events culminating in his evidence "*…that both the sashes and the frame of the Swan Yard windows were moved to the new internal wall dividing the new emergency staircase from the café*."

79. With regard to the 1998 video which showed a semi-translucent screen situated on the exterior of the Four Order panels, the trial judge determined at para. 102:

"There is no evidence to suggest that this shield was in place at the time of construction of the café premises or at the time when the Harry Clarke works were installed. According to Mr. Campbell, the screen or shield was reinstated in blockwork in the course of the 1998 works. In turn, this blockwork was removed and replaced with a Perspex screen in 2016 …" (para. 102)

80. The court was satisfied based on the evidence of Messrs. Ebbs, Campbell and Horan that in respect of all six of the Harry Clarke works there was *"some form of boxing or panelling behind them in the period between 1972 and 1998"*. It was replaced with some form of blockwork outside the Four Orders works in 1998 and subsequently replaced with Perspex in 2016. The evidence of Mr. Campbell that the blockwork and subsequently the Perspex provided weather screening function for the artwork was not contradicted by the landlord. The judge noted *"there is no evidence that, absent such boxing, blockwork or screen, the Four Orders works could not themselves have provided a weather screening function for the café."*

81. Mr. Slattery's evidence to the court also was that there was insufficient space available to operate a double layer of fenestration on the western wall as had been claimed by the tenant. The court noted that this witness had suggested that the mortar in the brick joints was the same mortar and has the same level of soiling on it as the mortar in the vertical joint between the frame and the brick leading him to *"believe that the window had been in that location since the bricks were first pointed."* Mr. Slattery identified that a 1998 video had shown the stained glass works of the Four Orders "*were tight against the bullnose brick forming the external envelope of the building".* (para. 115 of judgment) His evidence was that the current arrangement of the Four Orders works was *"different to that shown in 1998 videos"* and as the court noted "*he suggested that this may have misled Mr. O'Connell"* in regard to his evidence on double fenestration.

82. On the issue of weathering of the windows, under cross-examination on day three, Mr. Slattery stated: *"... I think - the weathering that has occurred in the windows may have occurred for different reasons." "I don't know that you can be certain why it was caused".* He did not dispute the propositions put to him in cross-examination that the condition of the windows as appearing in the 1998 video could have been caused by other factors such as steam and smoke from the café itself. He appeared to agree concerning the state of the panels, characterised as *"weathering"* that *"...how that occurred, I suppose we don't know for sure".*

83. Mr. O'Connell in evidence agreed with Mr. Slattery that in regard to the Four Orders, the 1998 video showed that the frame of the window was against the bull nose brick, stating: *"I had made an assumption ... that in fact the current position, which shows that frame moved back by about a hundred millimetres, and which is illustrated in my report, I believed that to be the position in 1987. So, I'd like to correct it, that in fact, that was the position, I accept that it was not the position in 1987 and that what I put forward in my report in the appendix in fact reflects the position as it was after 1998".* A great deal of the examination of cross-examination of these witnesses engages the hypotheses of double fenestration of the Four Orders panels which the court found not to be proven.

84. Mr. O'Connell's evidence that the plaster surrounding the surviving window at Swan Yard was the original plaster installed in 1927 was not challenged on cross-examination. The trial judge rejected an alternative view of the evidence hypothesised by Mr. Slattery, observing;

> *"...it is difficult to see how Mr. Slattery could have come to that view in the absence of any investigation by him. When pressed on the issue by counsel for the defendants, he appeared to rely on the photograph and he said that: 'We know, not from inspecting this but from the fact of the window having been blocked in, that the render in that area was carried out at a later date. It's not original.'"*

The judge observed:-

> *"Notably, that response does not address the evidence given by Mr. O'Connell that his investigation revealed two layers of plaster or render on the western side of the clear glass window ... and that the layer of green plaster or render on the eastern side of clear glass window … is likely to be the original plaster."*

The court also noted that although Mr. O'Connell had not been cross-examined in relation to the evidence of the patina on the timber of the extent plain glass window frame which Mr. O'Connell had stated was *"quite significant in determining age; in other words, in the degree to which the timber has seasoned and has patinated".* (para. 129), Mr. Slattery purported to dispute the evidence despite it not having been the subject of any cross-examination. However, he did not contradict the evidence of Mr. O'Connell in that regard. The High Court observed that his remarks *"underlines the fact that no formal inspection or investigation of the Swan Yard works was carried out by Mr. Slattery on behalf of the plaintiff".*

85. Concerning the dispute between the experts Mr. O'Connell and Mr. Slattery as to whether the surviving window frame at Swan Yard was the original dating from 1927, the trial judge concluded (para. 136) that the standard of proof was not "'*a matter of certainty' or 'a high degree of probability' or 'a high degree of certainty' (to repeat the turns of phrase deployed by counsel for the plaintiff in his questioning of the experts). Nor is it based upon a need 'to determine absolutely' or on the existence of 'conclusive evidence' (to repeat some of the language used by Mr. Slattery). Instead, as is well established, the standard of proof is based on the balance of probabilities."*

86. The judge observed that although Mr. O'Connell had failed to identify an important feature of the physical arrangement of the Four Orders works evident from the 1998 video, balanced against that the trial judge noted that Mr. O'Connell was *"the only independent architectural expert to conduct any level of detailed physical examination of the works albeit*

that this was concentrated on the Swan Yard works. Mr. O'Connell is therefore a source of potentially relevant evidence."

87. Of Mr. Slattery's demeanour, the trial judge observed that on several occasions, he had been *"unduly combative in his responses to questions put to him on cross-examination…." "…he gave the impression that he found some of the questions offensive or imbecilic."* The court noted that while there had been important evidence derived from Mr. Slattery's careful consideration of the 1998 video, "*his evidence in relation to the Swan Yard works is less helpful in circumstances where he did not undertake an inspection or investigation of the kind which would normally be done by an architectural expert in advance of giving evidence*". (para. 140)

88. Mr. Slattery had accepted under cross-examination that there must have been windows in the six openings in question at the time the café opened in November 1927.

Conclusions of the trial judge with regard to the evidence of the two expert architects.

89. The judge noted (paras. 141–164) significant differences between the physical evidence available in relation to the Four Orders panels on the one hand and the Swan Yard panels on the other.

Four Orders

90. The trial judge's findings of fact with regard to the Four Orders opes included that prior to their installation in 1928 *"…in the window openings of the western façade of the café, there must have been some other form of windows in place."* Mr. O'Connell's theory that at the time of their installation, the Four Orders had been placed to the inside of the extant clear glass windows previously erected was considered to be *"speculative".* The court noted: *"There is no physical evidence to support it.", "There was no space between the façade and the window frame to accommodate a second layer of fenestration…","…there is nothing to suggest that the window frames (in which the individual sashes of the Four Orders works sit) were ever moved".* The trial judge rejected various hypotheses of Mr. O'Connell directed towards

establishing that an inner layer of fenestration once existed at the locus of the Four Orders: *"...there is no sufficient basis to support this new theory. It heaps a new layer of speculation on his existing theory as to the existence of a double layer of fenestration in this location."* (para. 142) The judge observed *"The view of an expert should be based on known or provable facts."* The judge observed, however, that he had not lost sight of the reliance by Mr. O'Connell on the fact that *"...in 1987, Mr. Horan had observed a double layer of fenestration involving one of the Swan Yard works. Mr. O'Connell relied on this fact to suggest that the likelihood was that a similar arrangement was also adopted in the case of the Four Orders works."* The judge accepted the evidence that the Four Orders works had not been exposed to the weather since at least the 1970s. *"Their* [Mr Ebbs and Mr. Campbell] *unchallenged evidence was that from 1972 ... the works were enclosed in some form of external boxing or sheeting albeit that neither of them provided any great level of detail as to the nature of that arrangement".* He concluded at para. 150:-

> *"...I have come to the conclusion that, on the balance of probabilities, the Four Orders works were installed in 1928 in the position shown in the 1998 video and that they operated as windows at that time admitting light and ventilation to the café and also weathering the café from the elements. On that basis, they formed part of the external skin of the café building at that time. I can see no plausible basis upon which a conclusion could safely be reached that, on the balance of probabilities, there was a double layer of windows at the location of the Four Orders works. I therefore reject Mr. O'Connell's theory in so far as these four works are concerned."*

Swan Yard works

91. A critical difference identified by the trial judge was that the Swan Yard works (unlike the Four Orders) by 1987 were not situated on the external southern wall of the premises. At some date unknown long before then, one of the Swan Yard opes had been bricked up

permanently, the surviving window had panels of clear glass in 1987 which remain in place. The sashes were of *"similar dimensions and layout as the Swan Yard works".* The trial judge was of the view that this was potentially *"a significant point of distinction between the Four Orders works and the Swan Yard works."*

92. The trial judge crucially observed (para. 151) of the Swan Yard works *"there is no physical or other evidence that they were ever sited in the external wall of the café building overlooking Swan Yard".* He notes the probability was that the Swan Yard works were not installed until *"some point between 13th March 1928 and 30th April 1928"*.

93. He preferred the evidence of Mr. O'Connell regarding the McDonnell & Dixon arrangement drawings of 1946 as merely demonstrating that there were window openings on the Swan Yard wall *"they do not demonstrate that the openings were occupied by the Swan Yard stained-glass works and they do not preclude the existence of a double fenestration system as postulated by him. Conversely, the drawings do not establish that such a system was, in fact, in place."* (para. 151) Whilst the arrangement drawings showed window openings at Swan Yard, such did not demonstrate that the stained glass works occupied the opes in 1946, he noted. *"The openings overlooking Swan Yard could equally have been occupied by clear glass windows."* No reason was identified for adopting a different probative value which was attributed by the trial judge to the arrangement drawing in relation to the Four Orders works.

94. He was satisfied that there was evidence establishing that such a double fenestration system was *in situ* at Swan Yard in 1987. The trial judge concluded that the evidence of Mr. Horan and Mr. Campbell was that *"one of the Swan Yard works was mounted to that wall on the interior side of the clear glass window while the other was mounted in a similar position alongside the bricked-up window opening."* He was satisfied that there was *"no physical or other evidence to demonstrate that the double fenestration arrangement in relation to the*

second window does not date back to its installation in 1928. No one gave evidence in relation to the physical position or condition of the Swan Yard works prior to 1987."

95. The trial judge laid emphasis on the fact that only the tenant's architect, Mr. O'Connell, had carried out an investigation concerning the location of the Swan Yard window opening housing the clear glass window, observing: *"Based on that investigation, he concluded that the clear glass window that can currently be seen in the external wall of the café overlooking Swan Yard is the original window in that location and that there is nothing to indicate that there was movement of a window at that location."* (para. 152). He concluded that he did not believe that the landlord had established: *"that there is any sufficient basis to reject Mr. O'Connell's evidence at least in so far as the frame of the clear glass window is concerned."*

96. The trial judge identified material deficiencies in the processes adopted by Mr. Slattery which presented difficulties with regard to his evidence for the landlord in relation to the Swan Yard works. These included: *"he has conducted no opening up works himself and his only inspection of the opening up works conducted by Mr. O'Connell was that described in para. 131 above."* (para. 153) The court noted that on the morning of the Day 5 of the hearing, Mr. Slattery *"had merely stood in Swan Yard approximately six feet below the window and used the telescopic lens on his camera to view the exterior."*

97. The judge observed of Mr. Slattery's approach that *"Other than considering Mr. O'Connell's photographs, he never carried out any inspection of the opening up works on the interior side of the window. The fact that he did not carry out any proper inspection undermines the weight of his evidence in response to Mr. O'Connell on this issue."* The trial judge further expressed concern that Mr. Slattery's evidence on Day 5 *"was lacking in any sufficient level of detail to undermine the evidence of Mr. O'Connell."* (para. 153) Mr. Slattery failed to *"explain why he was of the view that the render that is seen today was brought across the entire elevation when one of the window openings was bricked up".* Neither did he *"address Mr.*

O'Connell's evidence in relation to the green layer of render or plaster shown in photograph 1." Further, Mr. Slattery *"did not address Mr. O'Connell's evidence in relation to the importance of soiling and dust as indicia of age."* The trial judge noted that same was unsurprising *"given that he had previously on Day 2 of the hearing relied on soiling in the context of his evidence in relation to the conclusions to be drawn from the 1998 video with regard to the Four Orders works."*

98. The court noted that Mr. O'Connell had "*stressed that he did not see any evidence of movement in the location of the window",* albeit he that he had acknowledged that a crack in the mortar surrounding the clear glass window might possibly have been caused by movement. Of Mr. O'Connell's testimony, the trial judge observed:-

> *"In my view, nothing was put to him which undermined the explanation given by him in his evidence (as summarised in paras. 127 and 130 above) that the likely cause of the crack was natural settlement. He provided a perfectly rational and plausible explanation for the existence of the crack and expressed the professional view that the joint was exactly what he would expect to find if the brick was old. In this regard, he explained that the window frame would have been installed after the brickwork had been put in place and that it would be normal to see a shrinkage joint in those circumstances. That view must also be seen in light of his other evidence (which again is both rational and plausible) that, had the window frame been moved, he would have expected to see the mortar cut back and to see evidence of a new mortar joint. I accept Mr. O'Connell's evidence to that effect."*

99. The trial judge rejected arguments on behalf of the landlord contending that Mr. O'Connell was an unreliable witness:

"…merely because he failed to notice the position of the Four Orders works shown in the 1998 video to be flush against the bullnose brick of the external side of the western wall of the café." (para. 153)

With regard to Mr. O'Connell's evidence the trial judge further observed:-

"There is nothing to suggest that Mr. O'Connell overlooked any aspect of the condition of the mortar or render/plaster in the reveals or surrounds of the clear glass window at Swan Yard. His evidence in relation to that issue was measured, authoritative and very helpful. In these circumstances, I believe that Mr. O'Connell's evidence in relation to the outcome of his physical investigations at this location is to be preferred over that of Mr. Slattery." (emphasis added)

The Burden of Proof

100. On the issue of the burden of proof, the trial judge observed that if the burden of proof in relation to this issue lay on the tenant, "*the evidence of Mr. O'Connell might not be sufficient to prove that the stained-glass work never formed part of the external skin of the café building*." (para. 155) However, he concluded that the defendants did not bear the burden of proof on this specific issue: *"…it is the plaintiff who has alleged that the Swan Yard works constitute windows that form part and parcel of the café building. As part of that case, the plaintiff has contended that the Swan Yard stained glass works were installed in 1928 in the window openings overlooking Swan Yard."*

101. In determining that the burden rested with the landlord to prove that case (para. 155) he noted, *inter alia*, the assertion of Mr. Slattery that the Swan Yard panels *"were not designed as decorative screens or ornaments but as integral parts of the fabric of the structure. The windows are (sic) integrated into the walls of the original structure…"*.

102. The trial judge was satisfied that *"the physical evidence of the existence of a clear glass window at Swan Yard as seen in 1987 is plainly inconsistent with the case that the plaintiff*

seeks to make that, in 1928, the stained-glass work was placed in the window opening now containing the clear glass window." He concluded that the landlord hadn't discharged the burden of proving on the balance of probabilities that the clear glass window *in situ* in 1987 was not part of the original installation and that the Swan Yard works were in fact fitted into the window opes at Swan Yard in 1928. The trial judge observed further that even where, as now, the works do not provide a source of natural light or ventilation *"[i]t is perfectly understandable that they would be referred to as windows. They have all the appearance of windows".*

103. The trial judge observed at para. 159:-

> *"…I have come to the conclusion that the Four Orders works were installed directly in the four window openings in the western wall. The question arises as to why the parties might have decided to install the Harry Clarke works directly in openings on that side of the café but to take a different approach in relation to the Swan Yard windows."* (emphasis added)

At para. 160 he observes of the double layer of windows at Swan Yard: *"If there is no possible reason why they might have decided to do so, that would support the plaintiff's case that it is implausible to think that the double layer of windows observed in 1987 was adopted in 1928. But, in my view, there is at least one possible reason why the parties may have decided to take such a course."*

104. He noted the evidence of Mr. O'Connell in relation to the vulnerability of the Swan Yard windows as representing a weak point of entry to the café. This is referenced, *inter alia*, at paras. 143 and 160 where risks from a security perspective and vandalism are alluded to as well the risk of damage from the sacks of flour. He observed *"While there is no first-hand evidence to substantiate this suggestion, it nonetheless appears to be a plausible explanation.* (para. 11). He noted (para. 161), notwithstanding the arguments about the usage of the Swan Yard

windows for ventilation, *"the fact remains that, in 1987, the Swan Yard works were not providing any ventilation function to the café at that time. If the ventilation function was not considered necessary at that time, why would the position have been any different in 1928?"* Based on the totality of the evidence including aspects analysed at para. 160 – 162, he concluded that he did not *"believe that the presence of the hopper mechanism is sufficient to infer that the Swan Yard works functioned as a direct source of ventilation either at the time of the photograph or in 1928."* As the trial judge observed at para. 163, the fundamental problem from the landlord's perspective was that *"the case it makes that the Swan Yard works were installed in 1928 in the window openings of the external wall also involves a significant level of speculation."*

By contrast, as he noted:

> *"The evidence as to what was observed in 1987 involves no element of speculation. The reality is that there is no evidence before the court which provides a reliable basis on which to conclude, on the balance of probabilities, that the double window arrangement observed in 1987 was not also in place in 1928 when the Swan Yard works were installed. It is possible, as the plaintiff has urged, that the double fenestration system as observed in 1987 was not installed until some time after 1928. But there is no evidence which confirms this. It is, at least, equally possible that the system was installed at the time of the original installation of the Swan Yard works in 1928."*

He concluded that use of such a system on the Swan Yard wall cannot be dismissed as implausible neither was the landlord's *"postulated version of events … the more probable"*.

Four Orders – Cross-Appeal

105. Concluding that the Four Orders works were installed in 1928 *"in the position shown in the 1998 video and that they operated as conventional windows at that time admitting light and providing ventilation to the café and as weathering the café."*, the trial judge held they were

"*part of the external skin of the café*" (para. 165). Citing the English decision *Holiday Fellowship Limited v. Hereford* [1959] 1 WLR 211, he noted that at the time of their installation the works had all the *"usual indicia of what would commonly be accepted as a window".* Aspects considered supportive of that conclusion included: they were made of glass, housed in window frames, installed in openings in an external wall created by the *"removal of earlier windows which they replaced*" (para. 165), capable of passing light from the exterior to the interior, capable of being opened for ventilation, provided protection from the elements for the café. "*…once they were installed in 1928, the Four Orders works formed part of the external shell of the building along with the walls and any doors to the exterior."* (para. 166). Reliance was placed on Willes J. in *Climie v. Wood* (1869) LR 4 Ex 328 for the proposition that they "*were essential to the convenient use of the leased premises*." The finding that earlier windows had been removed appears to be contradictory of his earlier finding at para. 67 of the judgment that *"it seems likely that, when it came to the installation of the stained-glass panels in 1928, those frames were retained in place and fitted with the sashes containing the stained glass."* I note that it was accepted by the landlord that there were window frames installed by the landlord in these opes as of 1927. There was no evidence adduced that the original window frames were ever removed after 1927.

106. To the point raised by the tenant that the Four Orders works were not part of the <u>original</u> construction of the café and could not be said to fall within the parameters of the decisions in *Climie* or *Boswell v. Crucible Steel* [1925] 1 K.B. 119 where the judges (Bankes, Scrutton and Atkin L.JJ.) had noted that glass walls were part of the original construction of a warehouse and in particular to the tenant's contention that the works constituted fixtures within the definition in *Boswell*, the trial judge observed:

> *"…the language used by the members of the court in Boswell v. Crucible Steel must be seen in light of the facts of that particular case. On the facts, the plate glass walls in*

issue had been installed as part of the original structure of the house and it is entirely understandable that the court emphasised that element of the facts." (para. 167)

107. The trial judge was of the view that the removal of the Four Orders sashes "*would amount to a removal of the windows. Without the sashes, there would, in effect, be no windows, only an empty window frame*." Elsewhere he observed; *"In the absence of a clause to the contrary in the lease or contract of tenancy or the consent of the landlord, a tenant has no right to remove a part of the leased premises even where it is possible to replace it."* The tenant, however, nowhere suggests that it proposes to leave "*an empty window frame"* which would be an act of waste.

108. With regard to the Swan Yard works, the trial judge, in light of his findings at paras. 151 – 163 that same were installed in 1928 as part of a double layer of windows of the kind observed by Mr. Horan and Mr. Campbell in 1987, rejected the arguments of the landlord that they must be considered to be part and parcel of the café premises. The judge observed that *"the removal of the Swan yard works would not have interfered in any real way with the convenient use of the café premises."* In particular, given that the external windows were clear glass, the café would still have been weathertight by virtue of the latter. *"The building would still have been complete. No gap would be left in its external shell."* He took a view that the removal of the Swan Yard works would fall far short of the kind of "*inconvenience"* which Willes J. had in mind in *Climie v. Wood.* He found that *"in circumstances where the Swan Yard works were installed parallel to existing windows, they are properly classified as additions to the structure or fabric of the café. They fall within the ambit of things which, in the words of Scrutton L.J. in Boswell v. Crucible Steel, '... have been brought into the house and affixed ... after the structure has been completed'".* Thus the Swan Yard panels were found to be classically in the nature of tenant's fixtures and, as such, *"cannot be considered to be part and parcel of the fabric of the café".* (para.173)

109. The court noted that the burden of proof pertaining to the Four Orders works rested with the defendants. He was of the view that there was insufficient detail available to him on the balance of probabilities "*that the various measures which were put in place had the effect of converting the status of the Four Orders works to fixtures*". (para. 179) He considered that the defendants' witnesses on the issue were *"far too vague in their evidence to allow me to form a view as to the extent and nature of the boxing observable in the 1970s and 1980s and as to the extent and nature of the blockwork put in place in 1998".* (para. 179) He found that *"…the Four Orders works would only lose their status as part of the external shell …of the building if something was constructed on their external side which could plausibly be regarded as replacement shell or skin. … the arrangement would have to be sufficiently significant that a reasonable person visiting the premises would regard the arrangement as the external shell rather than the stained-glass windows to the inside of it. To displace the status of the Four Orders works as part and parcel of the building, the boxing or other arrangement would have to be capable of functioning as the external shell of the building."*

This analysis affords insufficient weight to the admitted witness statement of Mr. Ebbs.

110. The judge was of the view that it was important that *"detail should be provided in relation to the nature of the boxing and blockwork arrangements put in place prior to 2016. Without such detail, it is impossible to form a view as to whether those arrangements could be said to have been sufficient to replace the role of the Four Orders works as an element of the external shell of the café building."* If the Four Orders works continued to form part of the external shell of the building, then it did not matter in his view *"that they no longer functioned as a source of light or ventilation."* He expressed the view that it was not essential that the windows should admit light nor that it was *"not capable of ventilating the building".* He cited *Boswell v. Crucible Steel* in that regard.

111. He rejected the argument of the tenant in respect of the installation of the boxing and blockwork which was *in situ* prior to 2016: *"the defendants have not provided sufficient detail as to the nature and extent of the boxing or blockwork in place from time to time to demonstrate that, on the balance of probabilities, such boxing or blockwork was sufficient to replace the Four Orders works as the outer shell of the café building."* (para. 181). He further stated;

" *... I am of opinion that, notwithstanding the presence of the Perspex sheeting, the Four Orders works continue to form part and parcel of the external skin or shell of the café premises. As such, they are part and parcel of the leased premises. It follows that they do not constitute fixtures".* (para. 183)

THE APPEAL AND CROSS-APPEAL

The Landlord's Appeal

112. The landlord raises 19 separate grounds of appeal. The net issue is whether the two Harry Clarke artworks located at Swan Yard became part and parcel of the landlord's building contrary to the conclusions of the trial judge. Primary grounds of appeal pursued in submissions and arguments included that the trial judge erred:

-In determining that the Swan Yard works were installed solely for the benefit of the tenant and were tenant's fixtures.

-In determining that the Swan Yard works formed part of a double fenestration system from 1928 and that the said finding was not supported by the evidence.

-Even if the trial judge was correct in finding that the Swan Yard works formed part of a double fenestration system, he erred in determining that they did not constitute windows forming part and parcel of the premises. This was said to arise from non-engagement with the evidence.

Submissions on behalf of the landlord

113. The appellant places reliance on the well-established jurisprudence concerning the approach of this Court on appeal, including the Supreme Court in *Leopardstown Club Ltd. v.*

Templeville Developments Ltd. [2017] 3 IR 707 paras. 109 – 110, where MacMenamin J. stated, *inter alia,*:

> *"'Non-engagement' with evidence must mean that there was something truly glaring, which the trial judge simply did not deal with or advert to, and where what was omitted with went to the very core, or the essential validity of his findings. There is, therefore, a high threshold. In effect, an appeal court must conclude that the judge's conclusion is so flawed, to the extent that it is not properly 'reasoned' at all. This would arise only in circumstances where findings of primary fact could not 'in all reason' be held to be supported by the evidence…. 'Non-engagement' will not, therefore, be established by a process of identifying other parts of the evidence which might support a conclusion, other than that of the trial judge, when there are primary facts, such as here. Each of the principles in Hay v. O'Grady… is to be applied."*

The Burden of Proof

114. It was contended that the trial judge erred in considering that the landlord bore the burden of proof to establish to the requisite standard that the stained glass formed part of the external skin of the building. It was argued such an approach was *"artificial and failed to adequately address the fact that Bewley's counterclaimed on this issue which …was premised on Mr. O'Connell's hypothesis."*

<u>Landlord's arguments that Swan Yard works not part of a double fenestration system</u>

115. In support of the landlord's contention that the Swan Yard works did not form part of a double fenestration system, reliance was placed on the fact that the trial judge had reached a different conclusion on this issue in respect of the Four Orders works. It was asserted that the expert called on behalf of the tenant, Mr. O'Connell, architect, had merely offered an "*hypothesis*" which, in the case of the Four Orders works, was said to have been "*debunked"* by a video from 1998 which demonstrated that the Four Orders, "*were each flush to the external*

bull nose brick" of the premises. It was contended that the trial judge's finding of double fenestration at Swan Yard was premised on an inference drawn from circumstantial evidence and that he had materially erred in reaching that conclusion.

116. The landlord disputed the reliance placed by the trial judge on the evidence of the architect, Mr. Horan, employed by the tenant in 1987 who recalled having seen the clear glass window external to one of the Swan Yard windows at that date. It was contended that there was no evidence to demonstrate that such a double fenestration system had existed in 1928. It was argued that there was nothing to suggest that the sashes to the Swan Yard windows had not been originally housed in the windows frame that continues to exist at Swan Yard *"...a possibility that the trial judge alluded to…".* It was contended that the evidence of the witness Mr. O'Connell in regard to the double fenestration at the Swan Yard locus was a "*speculative leap*". Further that Mr. O'Connell had based his hypothesis on a mistaken assumption that the existing gap now *in situ* between the Four Orders windows and the bullnose brick had previously accommodated an exterior weathering window. It was contended that: *"Having found that the Four Orders Windows were not the subject of a double fenestration system, it defies not only logic and common sense, but also the evidence of Mr. O'Connell, for the trial judge to proceed thereafter to find that the Swan Yard Windows form part of the self-same double fenestration system from 1928."*

117. It was contended that if Mr. O'Connell's hypothesis was proven by real evidence (the 1998 video) to be factually incorrect in respect of the Four Orders windows *"…it must, on the balance of probabilities, be incorrect in respect of the remaining two Harry Clarke Windows…"* It was argued that if Mr. O'Connell's contention was that a double fenestration system operated in respect of the Swan Yard windows, he needed to demonstrate how they operated to ventilate the premises. It was contended that there was a lack of any evidence to ground the existence of a secondary hopper mechanism.

118. It was argued that the double fenestration system ran contrary to expert opinions of Dr. Caron and Ms. Lucy Costigan: *"The trial judge failed to check the hypothesis of Mr. O'Connell against the uncontested evidence of Ms. Costigan".* The landlord emphasised the trial judge's assessment of the witness Ms. Costigan and that he found her *"…evidence to be extremely helpful and authoritative*" (para. 42 of landlord's submissions). The trial judge's views appear more guarded. The full sentence in the judgment (para. 42) reads: *"For the most part, I found Ms. Costigan's evidence to be extremely helpful and authoritative."* (emphasis added)

119. It was contended that *"the theoretical hypothesis advanced by Mr. O'Connell does not withstand the scrutiny of other uncontested expert evidence".* (para. 46 of submissions) It was further argued that *"It appears the trial judge inadvertently proceeded on the erroneous basis that absent real evidence to the contrary Mr. O'Connell's hypothesis must hold true."* (para. 51 of submissions)

120. The appellant criticised the manner in which the trial judge analysed the evidence and arrived at his conclusions. It was alleged that he had sought to *"try and justify why Harry Clarke might have designed, constructed and installed the Swan Yard Windows in a manner altogether different to the Four Orders Windows…".* It was contended there was no factual evidence before him to ground any of his reasoning and that same amounted to *"speculation"* premised in part on present day perceptions of Swan Yard and not how it operated in 1927. It was argued that the trial judge's observations (para. 163) that the tenant's contentions that a double fenestration system was *in situ* in 1928 at Swan Yard *"cannot be dismissed as implausible"* and that plausibility was not the applicable standard of proof. It was said to be *"illogical"* that Harry Clarke would have installed the Swan Yard windows in a manner fundamentally different to the Four Orders windows. That conclusion was said to be *"erroneous".*

The composite window ground - even if double fenestration existed from 1928 Swan Yard nonetheless comprised windows that formed part and parcel of the premises from 1927

121. A further ground pursued by the landlord contends that even if the trial judge correctly determined that a double-fenestration system existed from 1928 at Swan Yard, *"they nonetheless comprised part of composite windows that formed part and parcel of the Premises from 1928 according to the evidence of Mr. O'Connell."* The evidence of Mr. O'Connell was combed through in detail, in particular Day 4, pp. 69-70 where that witness observed that as of 1987: *"…there were two screens, if you like, two, within the window, it's – the whole composition, the component is a window, but it's a window made up of two parts, an outer part and an inner part, they happen to be separate in this particular case, there's no physical connection between them as a piece of a joinery, they go in as two separate joinery screens. And anything – any connection between them will take place later, but they both go in…"*

122. The landlord contends that the entire double fenestration system must be taken as a composite to form a window: *"it is that window, as a composite, that forms part and parcel of the Premises. Simply because the stained glass formed the internal screen and not the external screen, does not mean that that part of the window does not form part and parcel of the Premises."* Excerpts from Mr. O'Connell's evidence are extrapolated, including Day 4 pp. 93/113 where, *inter alia,* under cross-examination he stated: *"I believe that if it is a double fenestration then it's a complex component, but they are still all windows. And, as you rightly said at the outset, window is a term a common sense term (sic); and you can use it to describe any aspect of a window or any perception of a window."* The landlord alleges that *"The trial judge did not engage with this evidence in concluding that the Swan Yard windows did not form part and parcel of the Premises."*

The s. 17 of Deasy's Act ground of appeal

123. These arguments capture, *inter alia,* aspects of grounds 3, 12, 15, 16 in regard to tenant's fixtures and ground 15 in regard to s. 17. Reliance is placed on the minute of the Board Meeting 9th March 1928 (the Minute). The landlord asserts that same suggests that *"it was in fact Ernest Bewley who funded the purchase of those items, with the minute recording that such expenditure 'would in due course appear in the Company's accounts as a Liability of its own'."* It was contended that the trial judge surmised that the tenant company *"was responsible for those costs as that was the intention at the time"* and there was no basis for such a conclusion or that the payment under reference in the minute was discharged by the tenant. *"At best, this finding by the trial judge is an inference based upon circumstantial evidence and therefore amenable to being overturned on appeal as recognised by the principles in Hay."*

124. It was asserted that the tenant had produced no accounts nor documentation to prove that it had repaid the monies to Ernest Bewley or accounted for the said expenditures as a liability. *"If Bewley's had documentary evidence, by way of financial statements or otherwise, to prove it actually accounted for this expenditure as a liability, or repaid Ernest Bewley, then such documents could have been produced at the trial."* It is contended that the trial judge reached an erroneous conclusion *"by the inconsistency in both his reasoning and conclusion."* It was contended that the effect of the trial judge's approach and analysis had led to a conclusion that Ernest Bewley paid for the Four Orders windows but that the tenant paid for Swan Yard windows and that such analysis was *"to vest ownership in Bewley's of the Swan Yard windows by default, in a manner almost akin to adverse possession"* which "*simply cannot be correct*". (para. 52 of submissions) "*The evidence to hand, absent supposition, points to the fact that Ernest Bewley as owner of the Premises paid for the Harry Clarke windows*." (para. 72 of the appellant's submissions)

Ground that tenant by the 1928 Lease lost its right to remove its tenant's fixtures - Harry Clarke panels *"just another standard addition to the premises"*

125. It is contended that even if the tenant paid for or was liable for payment of the Swan Yard windows, the tenant nevertheless lost the right to remove same pursuant to the terms of the 1928 lease. Reliance was placed on an obligation of the tenant under that lease to deliver up the premises and *"all fixtures"* at the determination of the term. It was argued that by that covenant the tenant *"acknowledged and agreed that the Harry Clarke windows fell into the ownership of the owner of the premises"… "any rights Bewley's may have had to remove the Swan Yard works were lost by reason of the 1928 Lease."* It was claimed that the said provision in the 1928 lease amounted to a contracting out of the tenant's statutory right to remove tenant's fixtures upon the expiration of the lease by virtue of s.17 of the Landlord and Tenant (Amendment) Act, 1860 (Deasy's Act). It was contended that although the Harry Clarke windows were valued at or over €2,200,000, *"they were not particularly valuable in 1928". "…the fact is they were just another standard addition to the Premises at the time, and given the minimal cost of the Harry Clarke Windows it is little wonder Bewley's did not retain any interest it might have held in them (which is denied)."*

The Tenant's arguments in response to the landlord

126. With regard to the burden of proof, the tenant contends that the trial judge was correct that the burden rested with the landlord to establish that the Harry Clarke works were part of the fabric of the premises, citing *McGrath on Evidence* (3rd ed., Round Hall, 2020) *"…proof of the facts necessary to establish a cause of action will rest with the party bringing the proceedings…".*

127. The tenant argued that all six works were tenant's fixtures. It was contended by the landlord that the finding of the trial judge that the Four Orders works were part and parcel of the building must lead to the conclusion that the Swan Yard works were to be treated likewise.

128. The tenant asserts that in March/April 1928, all six works were situated as decorative and ornamental elements inside the existing external windows of the building, the latter having been installed before the café was opened on 27th November 1927. The tenant asserts "*This issue is critical to whether the Harry Clarke Works were part of the fabric, became annexed to the freehold as suggested by RGRE or were installed as tenants' fixtures*." (para. 19 of the tenant's submissions)

129. The tenant contended that the trial judge fell into error in rejecting Mr. O'Connell's double fenestration hypothesis which was said to be capable of independent corroboration on a number of fronts; (i) from the surviving original exterior window extant at Swan Yard, (ii) in light of the evidence of Tony Horan, architect, as to his observations in the context of carrying out works at Swan Yard in 1987, and (iii) in light of the uncontested evidence of Mr. Larry Ebbs who had been charged with the maintenance of the Harry Clarke works from 1972 onward and whose statement was not contested.

130. The tenant contends that in circumstances where an original configuration of double fenestration continues to exist, as the surviving Swan Yard window demonstrates, and encapsulated double fenestration, the starting point for the trial judge in carrying out his analysis of the factual circumstances at the demised premises ought to have been firstly to consider the Swan Yard works and their configuration. In 1987, the Swan Yard works were relocated on an internal wall with artificial lighting.

131. The landlord's contention that by the terms of the 1928 lease, it acquired the works is contested by the tenant, *inter alia*, by reason of the fact that the tenant never delivered up possession pursuant to the 1928 lease which was superseded by subsequent leases.

The Tenant's Cross-Appeal

The Four Orders Works are tenant's fixtures

132. In its cross-appeal, the tenant contends that the trial judge erred in determining that upon their installation in 1928 the Four Orders works became part and parcel of the café building and were not tenant's fixtures. It argues that the works are decorative and ornamental in nature, were installed for the benefit of the café trade and are not part and parcel of the premises. As such, they are tenant's fixtures which are removable by it.

Landlord's key arguments on cross-appeal

133. Supplemental submissions on behalf of the landlord concerning the cross-appeal place strong reliance on the 1998 video. It had shown a Four Orders window flush to the external bullnose brick of the premises and the court was satisfied it had been so situate since the date of construction. The trial judge reached the latter conclusion because he found it difficult to see where a second layer of fenestration could have been located on the external side of the Four Orders works. I conclude below that the trial judge erred in his approach in failing to identify the true original nature of the Four Orders in 1928 as chattels and their beneficial ownership. This, in turn, led him to err in his analysis and conclusions.

THE STANDARD OF REVIEW

134. A useful analysis of the standard of appellate review was provided by this Court in *Minogue v. Clare County Council* [2021] IECA 98, and further elaborated on by Murray J. in *A.K v. U.S.* [2022] IECA 65.

135. Murray J. in *A.K. v. U.S.* observed that the decision of a court of first instance may variously be based upon the resolution of issues of law, findings of primary fact and/or inferences drawn from those findings of fact. In some instances, findings of fact may be dependent upon the resolution of conflicting oral evidence in others may involve determinations of fact based upon either affidavit or documentary evidence. Differing

standards of appellate review fall to be applied to each different categories of finding. Occasionally, (as occurred in *A.K. v. U.S.* itself) different standards of review fall to be applied to distinct elements of the trial judge's evaluation of a specific issue in a given case.

136. Murray J. in *A.K. v. U.S.* identified that a highly deferential approach to appellate review is appropriate where;

> "*49…the High Court judge makes findings of primary fact based on his or her appraisal of conflicting oral evidence and/or where inferences are drawn by the judge that depend on such findings. In such cases, provided the judge has delivered a properly reasoned judgement that engages with all relevant evidence…the role of an appellate court is limited…in particular it will not upset findings of fact or inferences drawn from those findings where they were supported by credible evidence (Hay v. O'Grady [1992] 1 IR 210).*"

137. At para. 49, he cautioned of this category that;

> *"It is important to stress that it is not sufficient to trigger this standard of review to observe that oral evidence was received in a case and that therefore this is the applicable test. What matters is the basis for the specific finding: to benefit from the high threshold for review arising from this aspect of Hay v. O'Grady, the finding challenged must be one grounded on the resolution of conflicting oral evidence."*

138. Of the intermediate category where a "s*omewhat deferential"* approach applies, Murray J. in *A.K. v. U.S.* observed;

> "*51. …. It arises where the appellate court is addressing alleged errors by a trial judge in inter alia (a) the findings he or she has based on affidavit or documentary evidence alone (Ryanair Ltd. v. Billigfluege.de GmbH [2015] IESC 11; McDonagh v. Sunday Newspapers Ltd. [2017] IESC 46, [2018] 2 IR 1 at para. 163 to 164) or (b) where the court is reviewing 'secondary findings of fact that are not dependent on oral*

evidence such as inferences from admitted facts or those proven otherwise than by way of oral testimony' (per Humphreys J. Minogue v. Clare Co. Council at para. 100). Here, the standard of appellate review is 'somewhat deferential' (id.). Henchy J. explained the position in Northern Bank Finance v. Charlton [1979] IR 149 at p. 192: 'if the question of fact that was answered in the court of trial does not depend on a choice of alternatives arising out of divergent oral testimony, but amounts to a conclusion in the nature of an evaluation of proved or admitted facts, the court of appeal will consider itself free to rely on its own judgment as to whether the evaluation made by the tribunal of fact is correct or not…'

52. As explained in Ryanair Ltd. v. Billigfluege.de GmbH, in cases of this kind the party appealing the decision bears the burden of demonstrating that the trial judge was incorrect in relation to the findings of fact which underpinned the decision so that 'the appellant must establish an error in those findings that is such as to render the decision untenable' (per Charleton J. at para. 5)."

Murray J. continued:

" 53. It follows that in cases to which this standard applies the appellate court is free to correct errors of fact as well as of law, and mistaken inference as well as erroneous application of principle. It is thus not necessary for the appellant to establish that a judge has erred in law or in principle, the appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be necessarily constrained to affirm a finding which is supported by credible evidence (although obviously where a judge has so erred or there is no credible evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in

the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect. ....It is, in particular, the standard to be applied where the issue is whether the combination of a set of primary facts that are either agreed or deduced from affidavit or documentary evidence result in the conclusion reached by the trial judge..."

139. No deferential review arises or is engaged in respect of questions of pure law which fall to be re-evaluated on appeal. As Humphreys J. observed in *Minogue*:

"The trial court is either right or wrong on legal questions, and there is no room for curial deference in that regard. For this purpose, questions of law include both those of substantive law and of whether the procedure and process adopted below was correct in legal terms."

An appellate court reaches its view on such issue untrammelled by the findings of the trial court.

140. As is clear from authorities including the Supreme Court in *O'Reilly v. Lee* [2008] 4 IR 269:-

"It has long been established by courts in this jurisdiction, in the United Kingdom and elsewhere, including the European Court of Human Rights, that a court does not, in law, have to deal with every single issue raised by a party to proceedings and is not required to answer every single complaint or argument. Where representative complaints are considered sufficient for a court to dispose fairly of an action between parties, it cannot be said that the judgment is inadequate or unreasoned or otherwise open to attack on the basis that every other complaint or every other argument was not dealt with in detail or that reasons were not given in respect of each of the same."

The Law

141. As a matter of first principle, given that original ownership of all six panels is at issue it is necessary to ascertain, on balance, in whom the beneficial ownership was vested at the point of initial acquisition in 1928. They left the Harry Clarke studio in March/April as chattels. Even if integrated by the tenant into the freehold for the purpose of its trade or business, if proven, such would not necessarily affect the tenant's right in law to disannex them, so long as they are capable of being brought back to the state of chattel again by severance from the freehold unless it be proven that the panels had become irrevocably integrated part of the building. Irrevocable integration, as the authorities considered hereafter suggest, arises where the item loses its identity or cannot be removed without significant damage to the freehold or to the item itself. Proper characterisation of the panels *ab initio* is critical to a correct legal approach in determining the issues.

Historical context - fixtures

142. It is necessary to consider briefly the history of the law of fixtures. Edward Coke in his "*Commentary upon Littleton*" and academics in this field such as Peter Luther[1] record that from Tudor times, a tenant who took a leasehold interest for the purposes of a trade or business was treated more generously than other limited occupiers in regard to fixtures and was generally permitted to remove them during the term but should they be left behind on the premises after the termination of the tenancy they became the property of the landlord. The general law on fixtures in the 16th and 17th centuries was based on the common law principle which subjected everything affixed to the freehold to the law governing the freehold. The view taken was that the emerging law of fixtures was merely a derogation of that original rule. *Poole's case* (1703) 91 ER 320 is an early authoritative reported decision which in terms recognised the continuing

[1] Peter Luther, "Fixtures and Chattels: A Question of More or Less…" (2004) 24(4) *Oxford Journal of Legal Studies* 597.

entitlement of a tenant to remove fixtures at the end of the term of the tenancy. It formally established the favourable treatment of a tenant's trade fixtures under the law.

Quicquid Plantatur Solo, Solo Cedit

143. The greatly misunderstood maxim first appears in the literature on fixtures in Amos & Ferard, *A Treatise on the Law of Fixtures* (Butterworth, 1827). That maxim was cited in several judgments concerning fixtures reported throughout the 19th century. Academics suggest that it was first referenced in the judgment in *Minshall v. Lloyd* (1837) 2 M. & W. 450 at 459.

144. In *Wake & Anor. v. Hall & Ors* (1883) 8 App. Cas. 195, Lord Blackburn rejected its broad applicability. His analysis warrants consideration where he observed at pp.203/204:

> *"... Quicquid plantatur solo, solo cedit', which I venture to think is much too broadly stated even as the general rule... The maxim cited is to be found in the works of Gaius, and probably he was quoting an older maxim. ...in the 10th law of that 7th section it is said (I translate the Latin), 'If one on his own land has erected a building with materials belonging to another, he is the owner (dominus) of the building, for all that is built into the soil becomes part of it, 'quia omne quod inædificatur solo cedit.' But this is not so that he who was the owner of the materials ceases to be the owner thereof; but, nevertheless, he (the owner of the materials) cannot bring an action to recover them in specie, nor take them away himself ('nec vindicare eam potest neque ad exhibendum de ea agere'), because of that law of the twelve tables, which provides 'ne quis tignum alienum ædibus suis junctum eximere cogatur sed duplum pro eo præstet.' Therefore if by any cause the building is cast down, the owner of the materials can 'nunc eam vindicare et ad exhibendum agere.' So far from meaning by the maxim that the property which had existed in the materials whilst chattels was lost, and vested in the owner of the soil, the maxim is used when Gaius, and the framers of the Digest who adopted his opinion, thought that the property in the materials remained in the person who was*

owner of them whilst chattels, and did not vest in the owner of the building, though by the annexation the materials had become part of the soil, and though by the positive law of the twelve tables he was obliged to leave the building untouched on being paid double the value of his materials. And I do not think that the general rule of English law goes so far as is stated in the passage just read from Smith's Leading Cases, or that the authorities cited bear it out. Even where a person himself the owner of the fee has annexed any chattels of his own to his own land, he does not always cause the property in the chattels to cease to be personalty; he generally intends to make them part of the inheritance, and when he does so intend there can be no question that on his death before severance the heir takes, and not the executor.

Whenever chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to shew that the intention was to annex them only temporarily; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir. Lord Ellenborough, in Elwes v. Maw, says that those cases 'may be considered as decided mainly on the ground that where the fixed instrument, engine, or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personalty.' Even in such a case the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land; and, as Lord Hardwicke said, in Lawton v. Lawton, 'You shall not destroy the principal thing by taking away the accessory to it;' and, therefore,

as I think, even if the property in the chattel was not intended to be attached to the property in the land, the amount of damage that would be done to the land by removing it may be so great as to prevent the removal. But in the case now before the House there can be no doubt on the admissions that the machinery and the buildings were from the first intended to be accessory to the mining, and that there was not at any time an intention to make them accessory to the soil; and though the foundations being… below the natural surface, they cannot be removed without some disturbance to the soil, it is, I think, impossible to hold that the amount of this disturbance is so great as to amount to a destruction of the land, or to shew that the property in the materials must have been intended to be irrevocably annexed to the soil." (emphasis added)

145. Of the Roman maxim Watson L.J., in *Wake* (concurring with Blackburn L.J.) remarked:

"*There is, so far as I am aware, no English authority tending to establish that the maxim has ever been regarded in this country as of universal application. The authorities merely shew that the doctrine which it is understood to embody, which is not the same as the doctrine of the Roman jurists, has been given effect to, with certain differences, in the three classes of cases specified by Lord Ellenborough in his judgment in the case of Elwes v. Mawe."*

The court upheld the decision of the lower court permitting the lessee to pull down and remove several buildings it had erected on the freehold during the tenancy.

146. Thus, in 1883 - long before s. 2 of the European Convention on Human Rights Act, 2003, and the protections afforded to private property under Bunreacht na hÉireann became part of our law - the maxim was found by the House of Lords to have been misunderstood and much too broadly stated. Neither was it accepted to operate as a general rule. As *Wake* and the cases cited therein make clear, it is not the maxim but rather the key factors such as original ownership of the item annexed, the intention at the point of annexation and the object and

purpose of same as well as the possibility of removal without great damage to the freehold reversion or to the thing itself that are the probative considerations when determining a tenant's right to remove what it has brought onto the property. To the extent that the trial judge suggested otherwise in regard to the materiality of the degree, nature and purpose of the annexation of the artworks by the tenant, in my view, he fell into material error.

"The greatest latitude and indulgence…in favour of trade"

147. In so finding the House of Lords in *Wake* was merely reflecting jurisprudence including *Elwes v. Maw* (1802) 102 E.R. 510 which concerned the letting of a farm holding for a period 21 years. Lord Ellenborough C.J. explained the state of the common law and the markedly differentiated approaches to be adopted depending on the legal relationship subsisting between the parties and whether the annexation occurred for the purposes of trade, observing at p. 515:

> "*Questions respecting the right to what are ordinarily called fixtures, principally arise between three classes of persons. ...The 3d case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case between landlord and tenant*." (emphasis added)

He continued;

> *"But the general rule on this subject is that which obtains in the first mentioned case, i.e. between heir and executor; and that rule… laid down at the close of Herlakenden's case, 4. Co. 64, in Cooke v. Humphrey, Moore, 177, and in Lord Darby v. Asquith, Hob. 234, … and in other cases;) … is that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule at a very early period had several exceptions attempted in be engrafted upon it and which were at last effectually engrafted upon it, in favour of trade …"* (emphasis added)

Elwes v Maw did not extend that principle to agricultural tenants but it contains a very comprehensive analysis of the law as it stood in 1802.

148. At p.516 *Elwes* instances decisions from the Year Books, including *Herlakenden*, which was decided circa 1589. Another from circa 1509 in the reign of Henry VII (Year Book of the 20 H. 7, 13 a. & b.), is referenced as stating *"…if a lessee for years make a furnace for his advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them: but if he suffer them to be fixed to the earth after the term, then they belong to the lessor."*

149. Lord Ellenborough C.J. also cited *Poole's Case* (1703), long followed at common law, where a tenant for years granted a sub-lease to a soap boiler who, for the convenience of his trade put up vats, coppers, tables, partitions and paving and later became insolvent. Holt C.J. had held that during the term the subtenant was entitled to remove the vats he had set up in relation to the trade and that he might do so by the common law "*in favour of the trade and to encourage industry*", but after the expiration of the term if there remained unremoved, same were deemed to become "*a gift in law*" to the reversioner and not removable.

150. *Poole* offers insight into the state of the law over three centuries ago regarding preferential rights accorded to tenants over other limited owners to disannex and take away fixtures at the end of the term. It is particularly noteworthy for this passage from Holt C.J.:

> "*Of late years many things are allowed to be removed by tenants which would not have been permitted formerly; As marble chimneys etc.; no more strongly in things relative to trade, as brewing vessels, coppers, fire engines, cider mills etc. the general rule of law is, that whatever is fixed to the freehold becomes part of it, and cannot be moved; but many exceptions have been admitted of late as with the general rule as between landlord and tenant between tenant for life or in tail and the reversion. But the rule still holds as between heir and executor.*"

Holt C.J. further explained in *Poole* concerning ornamental and decorative fixtures that:

> "*The indulgence in favour of the tenant for years during the term has been since carried still further, and he has been allowed to carry away matters of ornament, as ornamental marble chimney pieces, peer glasses, hangings, wainscot fixed only by screws and the like…"*

151. *Lord Dudley v. Lord Warde* (1751) Amb. 113 (concerning whether fire engines erected by a tenant/tenant in tail were to be considered as part of the owner's real estate or personal estate at the end of the term) is illustrative, where Lord Hardwicke remarked:

> "*There have been many questions of this kind, both in law and equity, and some determinations on very nice and almost frivolous circumstances; but some general rules are very clear, as what is annexed to the freehold is to be considered as part of it, and yet there are some exceptions to that rule, as between landlord and tenant; what is erected by the latter for the sake of trade may be removed, though fixed to the freehold; indeed such removal must be during the term, or he will be a trespasser;…but this does not hold between the heir and executor; so might these engines be removed as between landlord and tenant*.
>
> *And though the case between landlord and tenant does not hold so strongly throughout, yet it answers one objection, viz. That a house has been built to which the fire engine is annexed, and that the executor cannot pull down the house; but the distinction is, where the house is the principal, and where only the accessory; here the engine is the principal, therefore it is like the case of coppers, &c., you cannot take them away without spoiling the walls; yet as they are the principal, and the building is only the better to enable the use of them, they may be removed*." (p. 114) (emphasis added)

Law treats tenants more liberally - and leans against permanent accession

152. The progressive relaxation of the common law rule over time in favour of the tenant is illustrated by Lord Chancellor Hardwicke's observations in *Lawton v. Lawton* (1743) 26 E.R. 811 at 13-16:-

> *"What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done."*

This view was separately confirmed in *Elwes v. Maw* (Lord Ellenborough).

In *Grymes v. Boweren* (1830) 6 Bing. 437, Tindal C.J. took into account the fact that the article was only slightly attached to the freehold in arriving at a conclusion that it had not been annexed to the building so as to form part and parcel of same.

153. A liberal approach favouring tenants is found in all common law jurisdictions. The US Supreme Court considered fixtures in *Van Ness v. Pacard*, 27 U.S. 137 (1829). Mr. Justice Story, delivering the judgement of the Court, noted the liberal approach to the construction of the law of fixtures in favour of tenants and even extended the general rights of tenants to remove fixtures to agricultural leases. The US Supreme Court followed a line of authorities from the reign of Henry VII onwards including *Poole's case* (1701), *Lawton v. Lawton* (1743), emphasising that courts had adopted the approach *"…of relaxing the strict construction of law… for the benefit of the public, to encourage tenants for life to do what is advantageous to the estate during the term".*

154. *Beauford v. Bates* (1862) 3. De G. F & J 381 illustrates the Canadian approach, Turner L.J. observing: *"A lease ought not, I think, to be construed so as to take away the ordinary right of a tenant to remove trade chattels unless such an intention is clearly expressed."*

Sufficient annexation* – the rebuttable presumptions- *the essential nature of the item

155. Blackburn J. in *Holland v. Hodgson* (1872) LR 7 CP 328 characterised the governing principles as engaging two rebuttable presumptions:-

> *"Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."* (p. 335 of the judgment)

156. The *dictum* of Blackburn J. in *Holland v. Hodgson* assists as a starting point in ascertaining the essential nature of the item the subject matter of a claim of sufficient annexation such as to preclude the tenant's right to de-annex and remove:-

> *"There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation."* (p. 334)

157. To constitute a fixture there must be annexation. The degree and manner of annexation are factors taken into account in determining whether a fixture is thereafter removable or not by the tenant. It is a relevant factor that the chattel continues to be capable of maintaining a separate existence independent of the freehold. If it shown as capable of being removed, the authorities suggest that provided such removal does not result in its destruction the tenant

should be entitled to remove it, *per* the American author Harrison Arthur Bronson, *Treatise on Law of Fixture*s (Keefe-Davidson, 1904).

The Degree and object of annexation

158. In considering the *dictum* of Blackburn J. in *Holland v. Hodgson* (1872) with regard to the degree of annexation of the object (i.e. intention) of annexation, it is useful to evaluate the facts by considering (i) was there an annexation of the chattel to the real property, (ii) was there an application of the chattel so annexed to the real property for the purpose to which the tenant put the property in question, (iii) the object (or intention) of annexation has over time come to be the critical consideration.

Whether the thing is removable without injury to the freehold or the thing itself

159. Key authorities over the past three centuries demonstrate that the law draws a sharp distinction between fixtures capable of being removed without injury to the freehold or the thing itself, on the one hand, and such as are integrated into and become part of the freehold to a degree that they cannot be severed from it without injury to the lessor's reversionary interest and/or to thing itself by the process of removal.

It must be capable of removal without injury to the landlord's reversion or the thing itself

160. At common law it was an established rule that the freehold reversion ought not be destroyed or permanently damaged by taking away a fixture – *per* Lord Hardwicke in *Lawton v. Lawton* (1743) also Amos & Ferard on *Fixtures* at p. 35. Chattels, even though annexed by the tenant, whose removal would cause irreparable damage or harm to the freehold reversionary interest were held to be amalgamated into and form part of the realty.

General right of tenant to de-annex its Ornamental and Decorative Items

161. From the 18th century, it is evident that, in the case of tenants, the law on trade fixtures was settled and to be so construed so as to accord to a tenant the right to remove his trade fixtures during the term of a tenancy provided it could be shown that they were not so annexed

as to materially injure the realty in the process of their removal or to cause the articles themselves as to be reduced as to their value or destroyed or substantially damaged. A leading authority is the case of *Martin v. Roe* (1857) 7 El. & Bl. 237 where Lord Campbell observed:-

> *"In all cases of this kind, injury to the freehold must be spoken of with less than literal strictness. A screw or a nail can scarcely be drawn without some attrition: and, when all the harm done is that which is unavoidable to the mortar laid on the brick walls, this is so trifling that the law, which is reasonable, will regard it as none. Upon any other principle the criterion of injury to the freehold would be idle."*

At issue in *Martin v. Roe* was the tenant's claim to remove two hothouses he had installed consisting of low brick walls on which mortar was spread and bedded into the mortar wooden frames and glass and glass work the glass work sliding up and down on pullies and not fixed. The court held that the structures in questions - measuring 22ft. 10 ins. by 47ft. in length, and 14 ft. 9 ins. by 17 ft. 6 ins. in depth - were fixtures and not part and parcel of the building. Lord Campbell considered they were:- *"...purely matter of luxury and ornament, which the testator might have pulled down, but which he probably wished to enjoy so long as he lived in the benefice, and therefore did not remove."*

162. The court concluded that the purpose for the installation was an *"ornamental creation"* and as such it was a chattel which was so attached that it could be detached without injury to the freehold. It was capable of being removed and as such had passed to the executors as part of the personal estate of the deceased. The judge observed: *"Had this chattel been merely screwed, or had it been, as a telescope in an observatory, strongly secured, as such instruments commonly are, to what is part of the building itself, we think no question would have been made. And this seems to us to present no substantial difference in principle."*

Ornamental fixtures

163. Part of the respondent/cross-appellant's claim is that the panels constitute *ornamental fixtures*. It is not easy to identify the earliest authority for the extension of the exception accorded to trade fixtures to the tenant's ornamental fixtures. It appears to have been a well-established exception by the time the decision in *Beck v. Rebow* (1706) 1 P. Wms. 94 where the court held that looking glasses and hangings did not form part of the freehold but were ornamental notwithstanding that the evidence established that they had been fastened to the walls and to the freehold structure with nails and screws.

164. The case law particularly from the 19th century suggests that apart from trade fixtures, a tenant was entitled to remove ornamental items appended or installed during the currency of a tenancy provided it could be shown that they were capable of being removed without causing significant damage to the demised property.

165. What degree of annexation of a thing to the real property is sufficient to render it part and parcel of the freehold? Amos & Ferard on *Fixtures* suggest that the chattel should be let into or united to the real property or to some substance which was an integral part of it. Actual physical annexation was the essential constituent requisite of a fixture *per* Amos & Ferard Chapter 1, p. 2. In each case whether a chattel or tenant's fixture became part and parcel of the property is a question of fact dependent on the material circumstances of the particular case. The approach to determination of the issue posited by Amos & Ferard encompassed a consideration of the following key factors:

(i) The nature of the thing affixed to the demised property.

(ii) The circumstances of the party who asserts or claims ownership.

(iii) The intention of the party in making the annexation.

(iv) The injury occasioned to the freehold by the proposed removal of the thing.

(v) The purpose and object for which the article has been put up and in particular, if for the purposes of a trade, agriculture, ornament or for the general improvement of the estate.

Tenant's fixtures encompass both trade fixtures and decorative/ornamental items.

166. The ascertainment of the issue as to whether a chattel affixed to the demised property has become "*part and parcel of the freehold*", being a question of fact, its determination is informed, in part, by an evaluation of the intention of the respective parties to the lease at the time the item was affixed. It is an objective test. The correct approach to the determination is illustrated by decisions such as *Wood v. Hewett* (1846) 8 QB 913 which concerned the removal of a wooden hatch from a mill stream. Lord Denman observed at p. 918/919: *"The question is whether, because the fender in this case had been placed on the defendant's soil, it became his property, as a necessary consequence of its position. I am of opinion that such a consequence never follows of necessity, where the chattel is separable."* The evidence was that the fender slid up and down in a groove and could be lifted out of its location – somewhat akin to the sashes at issue in this case. The case is authority for the proposition that an intention and implied agreement not to make a chattel part of the freehold can in certain instances be inferred from the facts and circumstances of the case but only as established or derived from consideration of the evidence as to the degree and object of annexation in the *Holland v. Hodgson* sense.

167. A key consideration which favoured permitting the removal of ornamental and tenant's fixtures annexed to the freehold was identified by Lord Mansfield in *Poole's case* where he held that account should be taken of whether the premises are left in the same state in which the tenant found them and that it could be shown that there was no injury to the landlord.

168. An authority illustrating the limits of the principle wherein what originally started life as a chattel or tenant's fixture could be deemed in law to have become part and parcel of a building

is *Hellawell v. Eastwood* (1851) 6 Exch. 295, where the Court of Exchequer considered whether cotton spinning machines affixed by means of screws some into the wooden floor some into lead which had been poured in a melted state into holes and stones for the purposes of receiving the screws were by act and operation of law severable and distrainable in respect of unpaid rent for the mill in which they were fixed. Parke B. observed:

> *"At common law, things fixed to the freehold, and which become part of it, could not be distrained, for two reasons. Lord Chief Baron Gilbert says, that whatever is part of the freehold cannot be distrained, for <u>what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal</u>; consequently that cannot be a pledge which cannot be restored in statu quo to the owner"* (emphasis added)

This indicates the threshold to be met by a landlord to establish that a chattel has become an integral element of the freehold.

169. The decision in *Wilde v. Waters* (1855) 16 CB 637 considered whether machines when fixed became part and parcel of the freehold. The court held this was a question of fact:

> "*…depending on the circumstances of each case, and principally on two considerations – first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, integrè, salvè, et commodè, or not, without injury to itself or the fabric of the building, – secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, perpetui usus causâ or …pour un profit del inheritance, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel*." (emphasis added)

Applying those principles to the question, the court in *Wilde* held that:

"…in considering this case, we cannot doubt that the machines never became part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves."

"The premises are left just as good as they were found"

170. The ever-expanding nature of the accommodation afforded to a tenant in regard to the removal of fixtures or structures associated with trade, even where same comprised entire buildings, is repeatedly illustrated. In general, whatever the tenant brought onto the demise could be removed if the tenant demonstrated that same were used in connection with his trade or business. Lord Mansfield in *Lawton* v. *Salmon*, (1782) 1 H. Bl. 259 observed of the exceptions in favour of tenants that "*These are reasonable. It is an encouragement to the tenant, and no hurt to the landlord. The premises are left just as good as they were found*".

In *Dean v. Allalley* (1799) 3 Espin. Ni. Pri. Cas. 11, Lord Kenyon observed of the approach to be taken where a tenant claims entitlement to remove fixtures or even buildings constructed on the demised land for the purposes of their trade; *"…the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so holden in the case of cyder-mills, and other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term."*

171. In *Penton v. Robart* (1801) 2 East 88, at issue was whether a tenant was entitled to dismantle and take away an entire building at the determination of the tenancy. Lord Kenyon observed: "*The mere erection of the chimney will not prevent the right of taking away the rest of the building which surrounded it, where the trade was carried on… Modern determinations have, for the benefit of trade, allowed many things to be removed, which the rigor of former determinations, considering as fixed to the freehold, prohibited*."

172. *Penton* concerned a varnish house with a brick foundation let into the ground of the demise. The court had no difficulty in finding that, notwithstanding that it was a building, since it had been used for the purpose of trade the tenant was entitled to remove same despite the manner of its construction. The court emphasised that the law leant in favour of the interests of trade. Lord Kenyon observed:

> *"The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier: but in modern times the leaning has always been the other way in favour of the tenant, in support of the interests of trade which is become the pillar of the State. What tenant will lay out his money in costly improvements of the land, if he must leave every thing behind him which can be said to be annexed to it."*

173. The rationale underpinning the relaxation of the traditional rules in favour of trade fixture was expressed by Bronson in *A Treatise on the Law of Fixtures* (1904) as follows:

> *"The commercial interests of the country, becoming great and important, demand that the capital employed in trade operations in the way of improvements upon land should not be lost to its owner at the expiration of his lease or term. The spirit of commercialism gave birth to the necessity of an exception*." (Chapter 2, p. 21)

Was there Permanent Accession of the panels as "*integral portions of one composite building permanently annexed to the freehold*"

174. The landlord contends, in effect, that the mere installation by the tenant of the panels into the opes at Swan Yard (and, as argued in response to cross-appeal, at Four Orders opes also) by the withdrawal of the original glass panels *in situ* from 1927 when the landlord completed construction of the building, rendered the panels automatically and irrevocably annexed to the freehold and resulted in their permanent accession to the landlord's reversionary interest. The tenant's right to remove them, notwithstanding that they were acquired, paid for and installed in connection with the tenant's trade, is allegedly lost. Thus, the object and purpose of the

tenant in installing the panels, ordinarily material considerations in determining ownership, are said to have no bearing on their beneficial ownership.

175. Analysis of the case law indicates that the distinction between a tenant's fixture annexed to the property on the one hand and those that have become part of the realty is one of degree. The dividing line appears to be contingent on a number of factors such as:

i. Whether the fixture was annexed for the purposes of carrying on a trade or business of the tenants in the demised premises.

ii. Whether the demised premises after the removal of the chattel can be restored substantially to the state in which the tenant found them at the commencement of the term or whether there was evidence that "*considerable damage"* would be *occasioned to the freehold*", in the language of Amos and Ferard on *Fixtures* pp. 67/68, and

iii. That the removal would not damage the item itself.

176. The absence of the panels from the premises for a continuous period of 5 years (1941-1946) and for other shorter periods of time fundamentally undermines their characterisation by the landlord as having been absorbed into the building to the degree or extent that they could be characterised, in the language of the English Court of Appeal in *Pole-Carew v. Western Counties* [1920] 2 Ch. 97 as being "*regarded as integral portions of one composite building permanently annexed to the freehold*" (headnote to judgment). Lord Sterndale in his judgment at p.117 noted; "*the chambers seem to me to bear no analogy to self-contained structures such as small windmills…which can be lifted up and taken away without disturbing in any way the supports on which they rest…"* He cited with approval the decision of Sargant J. in the lower court where the latter had observed;

> *"If you look at the size and permanence and the general character of the structure and the absence of any definite line of demarcation or division, the absence of any unity in the upper structure as distinguished from the lower structure, I think one is driven to the*

conclusion that the whole structure forms one single unit and is of the nature of a building, that it is not a chattel, that it is a fixture, and that the lower portion of this unit being embedded in the land by ordinary foundations, it cannot be considered a tenant's fixture, and must be considered from the beginning as being something permanently annexed to the freehold of the nature of a building." (emphasis added)

Spectrum of circumstances from mere annexation to total integration into the freehold

177. The case law suggests that (a) the character of the item (b) the purpose and mode of its annexation and (c) the effect of its removal upon both the realty and the thing itself were significant considerations in determining whether it was deemed to irrevocably constitute realty or was removable by the tenant. The impact of its removal on the landlord's reversion was a critical consideration because any act on the part of a lessee that destroyed or caused injury to the landlord's reversionary estate constituted waste. All structures are built from materials which originally constituted chattels. There is clearly a spectrum of scenarios and circumstances depending on the nature of the chattel and its deployment. At one extreme, where a chattel has been so entirely amalgamated into the freehold reversion such that disannexation is factually impossible. An example might be where sand or brick, the property of a tenant, is deployed along with other materials, in the making of a pavement or footpath at the demised property. The sand and bricks are incapable afterwards of being disaggregated from the footpath or restored to its original condition. By a process of accession and amalgamation they became integrated into the freehold. At the other end of the spectrum, where a tenant is in a position to remove trade-related fixtures installed in furtherance of his trade without damage to the freehold or the thing in question and the demise is left in substantially the same state as it was at the commencement of the term, the tenant is to be taken to have a general entitlement to remove same. The mode of annexation of a chattel to real property did

not fix conclusively its character as a fixture but was one of many factors whereby its true character could be determined *per Elwes v. Maw*.

Questions of this kind are questions of degree and not pure questions of law

178. In *Holiday Fellowship* Romer L.J. was critical of the text of Woodfall on *Landlord and Tenant* (25th ed.) for its analysis of *Boswell.* He observed at p. 215:

> *"In my opinion, Boswell … did not decide anything of the kind. The decision in that case is accurately stated in the headnote to this effect:*
>
> *'In a lease of a house the term 'fixture' means something which is affixed to the premises after the structure of the house is completed. It does not include things which form part of the original structure itself.'*
>
> *That was the decision; and at the beginning of Bankes L.J.'s judgment [in Boswell] he said: 'The question' - that is, the question before the court – 'depends upon what the original structure of the house was;'"* (p.121 of *Boswell*) (emphasis added)

Romer L.J. then observed *"and he came to the result which is shown by the headnote."*

179. The unique nature of the facts which obtained in *Boswell* are emphasised by Romer L.J. in *Holiday Fellowship* at p. 215 where he observes:

> *"I think [counsel] would recognise that that was so; but he does rely on certain observations which were made, particularly by Bankes L.J. and Atkin L.J. as showing that windows form part of the walls. Those observations I think cannot be divorced from the facts of the case which was before the court, and the facts were that, the premises being business premises,*
>
> *'practically the whole of the sides fronting the street in question consisted of plate glass windows. The windows were of the usual kind, and were not made to open.'*
>
> *Those being the facts – and Bankes L.J. condescended to detail in the matter of measurements – it is not surprising to find that all the members of the court regarded*

it in that case as being not an abuse of language to say that that plate glass window could be regarded as (in Atkin L.J's language) 'representing the walls of the house.' I think that shows what indeed is obvious – that questions of this kind are questions of degree and not, as [counsel] would have us hold, pure questions of law." (emphasis added)

180. Romer L.J. observed *"it does not appear to me to be possible to say that the windows form part of the walls of the house, still less that they form part of the 'main walls' of the house, 'which' (as the judge said) 'support the structure of the building or have directly to do with its stability.'"* He observed *"Consequently... I think that insofar as there are observations to be found in Boswell … supporting [counsel's] contention, they are to be read in the light of the particular facts which were before the court and were not intended to be of general application*." (emphasis added)

"Skin of the building" ***The issue in Holiday Fellowship was whether windows in the walls of a house can be regarded as part of the 'main walls' of the building***

181. Ormerod L.J. in turn agreed, noting of *Boswell* and *Taylor v. Webb*: *"Those are cases which were decided on their own special facts and are of little avail to the tenants and the particular facts of this case. The issue is whether the windows in the walls of this house can be regarded as part of the 'main walls' of the building."* He also cited with approval the decision of Harman J. under appeal in *Holiday Fellowship* where the latter had defined the "*main walls*" as *"those which support the structure of the building or have directly to do with its stability"*; adding *"and I suppose that in addition they go further than that in that they are necessary part of the building, as they enclose, or help to enclose, the area on which the building or structure, or whatever it is, is erected."* Concurring with Romer L.J., he observed at p. 217: *"It is… a matter of degree. There may be cases where the walls were built of so much of glass that it*

would be impossible to say whether they are walls or windows. In the sense that they admit light they are windows, and in the sense that they enclose the premises they are walls."

182. In the context of assessing where the six Harry Clarke panels lie in this spectrum, it is to be recalled that as the video of 1998 makes clear, they are readily removable in their sashes from the window frames. They have been replaced during the tenancy by plain glass (1941-1946) and from time to time for maintenance. The trial judge has found as a fact, and there is no appeal against his determination, that the Swan Yard window frames are the original frames *in situ* in 1927. The tenant does not seek to remove the window-frames of the Four Orders – but merely the panels which the judge found were housed in the sashes at the time of supply.

Landlord signed the minute as agent

183. It is relevant to the construction of the respective rights of the parties and in assessing intention, in the *Holland v. Hodgson* sense, in light of the object and purpose of annexation of the artwork to the freehold in 1928 that the landlord signed the Minute of 9 March 1928, acknowledging in substance that he had acted as agent for the company in spending or authorising expenditures on its behalf. He acknowledged that the said sum would in due course appear in the company's account as a liability of its own. This Minute, when taken with the other evidence, weighs in favour of all six artworks originally having been tenant's fixtures or chattels. The Minute is inconsistent with an intention as of that date that the landlord was intended to be liable to pay for the panels.

Fiduciary position of landlord

184. The landlord was also, separately, a director of the company and subject to the fiduciary duties well established by then in law which precluded him from being involved in transactions and arrangements that put his own personal interests in conflict with those of the company. The obligations of Mr. Bewley at the time were governed, *inter alia*, by decisions such as *Bray v. Ford* [1896] A.C. 44 para. 51-52 where Lord Herschell had observed: *"It is an inflexible*

rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." Such a principle was especially applicable to a private company such as the first named defendant in which the director was controlling shareholder, director, chairman of the board as well as lessor.

Agency of landlord

185. The Minute evidences the capacity of the director who signed to be the company's agent, and points against there being an intention on the part of the parties that the panels would be annexed irrevocably to the freehold. It made no commercial sense for the landlord to personally pay for the panels – since the rent was already fixed on the basis specified in the minute prior to installation and payment for the panels.

186. The Minute does not support the landlord's contention that the panels were attached to the premises by the landlord and at its expense as landlord's fixtures;

i. By the Minute of 9 March 1928 the landlord acknowledges that the building was completed before April 1927.
ii. The landlord's window sashes were *in situ* in 1927.
iii. The panels were not *in situ* at the commencement of the term in April 1927.
iv. The panels were not *in situ* at the commencement of the café trading in November 1927.
v. The minute supports the tenant's contention that the costs of the panels were a liability of the tenant's.
vi. There is no evidence that the landlord was even consulted in relation to subsequent removals of the panels by the tenant.

The evidence in relation to the Four Orders works on the balance of probabilities equally demonstrated, as the trial judge had determined regarding the Swan Yard works, that they were a liability of the tenants and originally the tenant's beneficial property. As such, the tenant's

powers of severance and removal acknowledged by Lords Cairns L.C. and Lord Chelmsford in *Bain v Brand* continued to be exercisable.

Whether landlord entitled to rely now on terms of 1928 Lease

187. Regarding the relevance of the covenants, conditions and terms in the original 1928 lease, it is clear from long authority that it can have no bearing on determination of the beneficial ownership of the stained-glass panels, as decisions such as *Fitzherbert v. Shaw* (1789) 1 H. Blackstone 258 illustrates. The case concerned the right of the tenant to take away a shed and brickwork constructed by him during the course of the tenancy, together with posts and rails he had erected. The original tenancy had been terminated by the grant of a new contract of tenancy between the parties and the issue was whether the tenant had a right to remove the items or whether same was governed by the terms of the original letting agreement which prohibited such removal. The view of the court (Gould J.) was that the respective rights of the parties was governed by the new tenancy agreement.

188. The trial judge's analysis is entirely correct in any event at para. 195 -

> "*The tenant was not required to deliver up possession of the premises at the end of that term and, so, the fixtures were never delivered up to the landlord. Thus, the obligation to give possession of the fixtures to the landlord was never triggered.*"

Annexation by accession

189. The **degree of the annexation** is to be understood by reference to the nature of the thing itself. It is illustrated at one end of the spectrum such as with sand and cement or where materials are mixed and incorporated wholly into the edifice and amounts to complete amalgamation into the realty. At the other end of the spectrum are chattels, such as the Harry Clarke panels, which have retained their distinct personal characteristics at all times from the date of their installation almost a century ago. Hence, the method of annexation of the panels to the café is a material consideration.

The principle in *Bain v. Brand* - tenant's entitlement to remove chattels and fixtures even where integrated into the building

190. The decision of Lord Cairns L.C. in *Bain v. Brand* (1876) identifies the fundamental exception in favour of tenants to the common law rule and the right of severance vested in a tenant . The key exception to the latter rule was: *"That exception has been established in favour of fixtures which have been attached to the inheritance for the purposes of trade, ... Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy."*

191. Lord Chelmsford emphasised in *Bain v. Brand* at page 772:

> *"...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."*

192. *Bain,* a decision which emphasised that the law on tenant's fixtures was the same in England & Wales as in Scotland, was cited with approval in *Hobson v. Gorringe* (*supra*) and by Lord Clyde in *Elitestone Ltd*.v. *Morris* (*supra*). If, on the other hand, the bungalow was deemed to be a fixture the plaintiffs accepted that the tenant held a protected tenancy under the Act. The core issue for determination in the House of Lords was whether a bungalow had become part of the land or whether it had remained a chattel ever since it was placed on the land in 1945. Lord Clyde stated in *Elitestone* at p. 273:

> *"As the law has developed it has become easy to neglect the original principle from which the consequences of attachment of a chattel to realty derive. That is the principle*

> *of accession, from which the more particular example has been formulated, inaedificatum solo solo cedit. A clear distinction has to be drawn between the principle of accession and the rules of removability."*

He observed that since the bungalow was neither removable in one piece nor demountable for re-erection elsewhere, was *"one powerful indication that it is not of the nature of a chattel."*

193. A clear distinguishing feature in *Elitestone* was that under consideration was an entire building. A further distinguishing feature was that the structure was such that it could not be taken down and re-erected elsewhere; it could only be removed by a process of its complete destruction. The court in *Elitestone* considered this to be *"a factor of great importance"* (*per* Lord Lloyd, p. 690). *"If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel."*

194. Lord Lloyd, in considering the purpose of annexation, looked at differing factors such as *"whether the object which has been fixed to the property has been so fixed for the better enjoyment of the object as a chattel, or whether it has been fixed with a view to effecting a permanent improvement of the freehold."* The view was taken that such a test would be *"useful when one is considering an object such as a tapestry, which may or may not be fixed to a house so as to become to part of the freehold … These tests are less useful when one is considering the house itself."*

195. It is also noteworthy that the House of Lords in *Elitestone* relied on the decision in *Hobson v. Gorringe* as having "*put beyond question*" that:

> *"The intention of the parties is only relevant to the extent that it can be derived from the degree and object of the annexation. The subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of the freehold…."*

Analogy of tenant's right to sever with determinable interests in freehold property

196. The principle in *Bain v Brand* encompassing the power of a tenant by severance to bring back to the state of a chattel once more a thing annexed to the freehold for the purposes of trade is unexceptional as a concept in land law and reflects long established precepts in property law in this jurisdiction such as determinable fees simple and fees simple subject to condition subsequent where the *possibility of reverter* or *defeasance* respectively is an aspect of the owner's title. In the context of freehold interest that are subject to the potential for determination such as determinable fees simple and fees simple upon condition, be they condition precedent or condition subsequent, as *Wylie on Irish Land Law* (6th ed., Bloomsbury Professional, 2020) at para. 4.53 observes *"There are several aspects to the courts' approach to determinable fees and fees simply upon condition in matters of public policy."* Wylie observes that to a large extent in the case of determinable fees, courts take a more lenient approach and he emphasises that courts lean against outcomes bringing about forfeiture – even if they are deemed to have become part and parcel of the freehold.

197. Decisions such as *Martin v. Roe* (1857) illustrate that the test of injury to the freehold or indeed to the chattel itself must be construed in a constructive way and, the authorities also emphasise, in a manner favourable to the tenant. It ought not to be construed with literal strictness once it can be shown that no substantial injury will be done to the landlord's reversion and that the removal does not, practically speaking, irrevocably injure or damage the thing itself. The landlord is generally entitled to get back the property in the state in which he granted it at the commencement of the term.

198. That no damage need be caused to the freehold reversion or to the window frames by the removal are significant factors in pointing towards the right of the tenant in law to de-annex and remove the panels at the end of the term based on the established common law principle enunciated by Lord Cairns LC in *Bain v. Brand* at p. 767, cited with approval in subsequent

decisions such as Lord Clyde in *Elitestone* at p. 698, that "*Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy*".

Public policy and "*the injustice of denying the tenant the right to remove…and deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation*"

199. The trial judge attached insufficient weight to the well-established principle that any claim by a landlord to appropriate tenant's fixtures should be narrowly construed save where the degree of integration or accession necessitates it.

200. This principle is illustrated by *Spyer v. Phillipson* [1931] 2 Ch. 183 (Court of Appeal). The tenant, without the consent of the lessor, installed valuable antique panelling, ornamental chimney pieces and period fireplaces in the demise. Same were inserted into the walls by wooden plugs attached by screws. Structural alterations were made by the tenant to affix the chimney pieces and the fireplaces. The tenant's executors claimed the right to remove them as tenant's fixtures. The lessor contended that they had become part of the demised premises and removal would cause damage it. At first instance Luxmoore J. considered that the first issue was to inquire what was the purpose and the object with which the panelling, fireplaces and mantlepieces had been put in and whether they had they been installed in such a way that they had become landlord's fixtures which could not be removed by the tenant or his assigns. He upheld the right of the tenant's estate to remove them.

201. On appeal, the English Court of Appeal noted that there had been from the earliest times increasing relaxation of the strict rules which had become wider with the passage of time and were increasingly more favourable to tenant. The court reviewed authorities such as *In re De Falbe* [1901] 1 Ch. 523, *Hallen v. Runder* (1834) 1 Cr. M. & R. 266 and *Minshall v. Lloyd* (1837) 2 M. & W. 450, noting that where the tenant for more convenient occupation or for the purposes of trade affixed *"valuable and expensive articles to the freehold, the injustice of*

denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation, became apparent to all; and there long ago sprung up a right, sanctioned and supported both by the Courts of Law and Equity, in the temporary owner or occupier of real property, or his representative, to disannex and remove certain articles, although annexed by him to the freehold, and these articles have been denominated 'fixtures'…".

202. The Court of Appeal approved the judgment of Luxmoore J. that articles *"…which, although they have been annexed with the freehold by a temporary occupier, are nevertheless removable, and of course saleable, at the will of the person who has annexed them"*. Luxmoore J. had followed the decision of the House of Lords in *De Falbe* (otherwise *Leigh v. Taylor*), where valuable tapestries had been installed in a property the issue being whether same had become part of the freehold. The House of Lords had determined that in deciding whether same had become part of the freehold it is necessary to consider (1) the circumstances of the particular case, (2) the taste and fashion of the day, as well as (3) the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty and (4) the mode of annexation, which is only one of the circumstances of the case and not always the most important.

"quantum of attachment is a factor, but not more than a factor"

203. The Court of Appeal in *Spyer v. Phillipson* emphasised that Lord Macnaghten in *De Falbe* had observed that annexation is but one factor to be considered and *"may today be anything but the most important".* Luxmoore J. had attached weight to the fact that the panelling and mantel pieces were valuable chattels. They had been purchased for the purposes of decorating the flat in which the tenant resided and which he had taken for a term of 21 years. He observed; "*I have to consider the interest of the person who puts the particular chattel into the property and bear that in mind in answering the question, what was the object and purpose*

of the annexation?" The court considered that it would be a little surprising if a tenant having expended £5,000 in purchasing panelling and having installed, it would at the end of the term lose all interest in it so that it would "*belong to a complete stranger, i.e., the landlord of the premises*". The court considered that the situation might be quite different were the relationship between the parties that of tenant for life/remainderman. The question to be asked he considered was "*[w]as it likely that he meant to make a gift of the panelling to a complete stranger? Further he must be taken to have known that he would have to make good all damage which had been done by reason of his putting up this panelling in the flat*."

204. The court examined the methodology of attachment. Wooden plugs and nails were inserted into the brickwork and there was inserted into the wall "*wooden plugs to which the panelling is attached by means of screws*". Having considered the conduct of the tenant, the court concluded that the object and purpose of the annexation was the enjoyment of the chattels by the purchaser. *"If that is the answer to the question, the only conclusion I can come to, having regard to the all the cases, is that these things have not become landlord's fixtures. They are tenant's fixtures, and being tenant's fixtures they are removable by the tenant during the currency of his tenancy."* The landlord in the instant case emphasises that the value of the Harry Clarke panels (valued in 2020 at €2,200,000) was not a relevant consideration.

"tenant's right has been consistently, steadily and progressively enlarged"

205. The decision of Luxmoore J. was upheld by the Court of Appeal. Lord Hanworth M.R. observed (at p. 205) *"the law upon this subject has gradually been relaxed in favour of the tradesman and certainly largely in favour of the tenant."* With regard to the annexations, the court had to consider whether they were set up "*for permanence or whether it was set up with a view to its removal*". The Court of Appeal observed (at p. 207): *"We have therefore a rule showing that the tenant's right has been consistently, steadily and progressively enlarged, that the quantum of attachment is a factor, <u>but not more than a factor, and not always the most</u>*

important factor for a decision." (emphasis added) Other factors included: "*Why was the article or ornament ever brought into the flat at all? Was it for the permanent enhancement of the building itself, or was it for the enjoyment of the ornament itself?"* The court concluded they had not become part of the house and it had never been intended in any way to become part of the house. The court agreed with Luxmoore J. that personal chattels that are annexed to the freehold by a temporary occupier were removable by the tenant at the end of the term. The court was of the view that the tenant had not lost his right of removal although he was liable to reinstate the premises. Significantly, Romer L.J. in his concurring judgment observed at p. 210:

> *"I do not think that either the method of annexation or the degree of annexation, or the quantum of damage that would be done to the article itself or the demised premises by its removal, has really any bearing upon the question of the tenant's rights to remove, except insofar as they throw light upon the question of the intention with which the chattel was affixed by him to the demised premises. That, I think, is entirely consistent with the view that was expressed by Vaughan Williams L.J. in his judgment in In re De Falbe."*

Windows

206. Landlord's fixtures include items attached to the premises by the landlord and which were *in situ* at the date of the commencement of the lease. Also included are items that are attached to the premises by a previous tenant which remained *in situ* at the date of commencement of the lease, since same would be deemed to become landlord's fixtures by act and operation of law. Since Bewley's was the first and only tenant of the property and has remained in continuous occupation and possession as tenant, this subcategory does not arise in the instant case. Normally included within the definition are items brought or installed in the premises by the landlord during the term of the current lease and those installed by the current tenant during the term and which by operation of law became landlord's fixtures.

207. In regard to "landlord's fixtures", Scrutton L.J. in *Boswell* observed: *"The meaning of the term 'tenant's fixtures' is well understood, but I have always had a difficulty in understanding what is meant by 'landlord's fixtures'. But at all events it seems to me clear that the expression cannot include a thing which forms part of the original structure of the building. It must be regarded as confined to things which have been brought into the house and affixed to the freehold after the structure is completed."* *Boswell* concerned repairing covenant and all remarks concerning fixtures and windows are entirely *obiter.*

208. This offers a further fundamental distinction between the facts in the instant case and those that obtained in *Boswell v. Crucible* for clearly the art panels were never part of the original structure of the building. There was no good reason identified by the trial judge from deviating from that principle or expanding the category of irrecoverable landlord's fixtures to include chattels brought onto the demised premises by the tenant at its expense or, as here "*for its account*" after the commencement of the tenancy. The trial judge's *obiter* remarks purporting to extend the decision on *Boswell v. Crucible*, which did not concern fixtures runs entirely counter to the decision in *Re Galway Concrete Ltd* [1983] ILRM 402.

209. In the case of *R. v. Hedges* (1779) 1. Leach. 201, where the issue arose as to what should be considered to constitute a fixture to the freehold it was held that where window frames from which six light glazed window sashes were taken were fixed into the proper places and where the sashes were neither hung nor beaded in the frames, but were fastened in by laths nailed across the frames so as to prevent them falling out, same were not fixed to the freehold and did not form part of it.

210. Decisions from Tudor times on windows offer little assistance and the principles have been altered in light of public policy considerations as noted by Rigby L.J. in the English Court of Appeal *De Falbe* [1901] Ch. D. 523 at p. 530 where he noted;

> "*... in Herlakenden's Case it is said that wainscot, in whatever way fastened to the posts or walls of the house, cannot be removed by the lessee. But in modern times there have come to be important exceptions to this rule, one being in favour of trade fixtures and entitling a person who has put up what are now called 'fixtures' (which means removable fixed things) for the purposes of trade to remove them."*

211. It is only where an item or article is so firmly attached to the property that its removal necessarily results in its destruction or substantial damage to it that it loses its character as a chattel and can be deemed to become part of the property it was annexed or affixed (*per D'Eyncourt v. Gregory* (1866) L.R. 3 Eq. 382). The Four Orders panels were not permanent additions to the freehold estate or so united to the building as materially to impair it were they to be removed. Neither were they so firmly annexed to the freehold as to be incapable of removal without visiting substantial injury or destruction on the panels. Therefore they are demountable by the tenant at or prior to the end of the term as a matter of law.

212. At times in his correspondence such as letter of the 7th October, 1927 Harry Clarke appears to use the words "*windows*" and "*stained-glass windows*" interchangeably, as in "*All glass save two windows is cut, and portion acided out ...".* The tenor of the surviving correspondence, when read in its entirety, is consistent with the creation of bespoke stained glass artwork by the artist which he envisaged being installed in a window-frame setting. There was no basis for deploying some of the artist's correspondence to determine whether the panels were part of the building.

213. It is noteworthy that the invoice of the 13th March, 1928, furnished four days after the lease was executed by the parties, references; "*To designing, making, supplying and fixing stained-glass for 3 windows at the back of ground floor Café ..."* but makes no reference whatsoever to joinery. The language in the invoices appears clear and is directed towards the work of Harry Clarke and his studio, namely, designing, making, supplying and fixing stained-

glass. There is no mention of window frames or indeed sashes in any of the invoices or in any correspondence that is extant that could lead one to reasonably infer that the commission undertaken by Harry Clarke and his studio encompassed the construction, supply or installation of timberwork such as window frames or sashes.

214. The key argument advanced before the Court of Appeal in *Boswell* was that the glass was not fixtures at all but in fact constituted part of the walls of the house. Bankes L.J. in the English Court of Appeal observed: *"The question depends upon what the original structure of the house was. From the plan which was put in at the trial it appears that this ground floor, which was of a total height of 11 feet, was enclosed in brick walls to a height of 3 feet 6 inches supporting plate-glass windows 7 feet 6 inches high, and occupying in width, on the Borough Road front 29 feet out of a total width of 33 feet, and in Lancaster Street 23 feet out of a total width of 25 feet; so that we have to deal with a building the ground floor of which was so constructed that its walls… consisted to a large extent of glass*."

215. The decision in *Boswell v. Crucible* turns on the specific facts of the case in question where the Court of Appeal had to evaluate whether the entire glass elements running along two streets constituted in substance a substantial part of the walls of the building for the purposes of interpreting repairing obligations and they found that they were walls – but not windows.

Climie

216. In the case of *Climie v. Wood* (*supra*), the court had to consider whether the exception which applied to "*trade fixtures*" in favour of leasehold tenants might be extended to mortgagors and the court found that it ought not. It will be recalled that the decision concerned mortgages and whether trade fixtures passed under a mortgage of the freehold to the mortgagee. Of such fixtures Willes J. observed:

> "*…things may be made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them. An example of this class of*

chattel may be found in doors or windows. Lastly, things may be annexed to land for the purpose of trade or of domestic convenience or ornament, in so permanent a manner as really to form a part of the land; and yet the tenant who has erected them is entitled to remove them during his term, or, it may be, within a reasonable time after its expiration."

217. It is evident that the relationship of landlord and tenant did not exist between the parties in *Climie.* The trial judge attached insufficient weight to that central fact. Willes J. was citing from *Fisher v. Dixon* 12 Cl. & F. 312, a decision which was not followed seven years later by the House of Lords sitting on an appeal from Scotland, in *Bain v. Brand* (1876). *Fisher v Dixon* concerned the rights of an executor to remove fixtures – a matter of no relevance to the instant case. *Climie v Wood* concerned a mortgagor and mortgagee. Willes J. observed that if the relationship of landlord and tenant had existed and the item had been erected by the tenant it might have been removed by him during the term at p.330 of *Climie* judgment. *Easton v. Isted* [1903] 1 Ch. 405 is entirely irrelevant to this case, it concerned ancient lights and the operation of s. 3 of the Prescriptions Act, 1832 a statute which never applied in this jurisdiction.

218. Neither *Boswell v. Crucible* nor *Climie v. Wood* are germane decisions in relation to windows. They are fundamentally distinguishable in key material respects and did not offer a valid legal basis to divest and permanently deprive the tenant of its beneficial ownership of the Four Orders artwork. Further, the remarks in *Climie* concerning windows are *obiter.*

219. The English Court of Appeal revisited and distinguished *Boswell* in *Holiday Fellowship Limited v Hereford* [1959] 1 WLR 211 and is referred to by the trial judge at para. 165 of the judgment as illustrative of the proposition that there is no standard definition of a window and that each case is to be decided on its own facts The judgments of Lord Evershed M.R., Romer and Ormerod L.JJ. in *Holiday Fellowship* warrant careful scrutiny, particularly in light of the fact that a key issue arising in the case was whether windows should be treated for the purpose

of the lease in question as part of the main walls of the building. Significantly, Lord Evershed M.R. observed at p. 212 that windows *"…are, as physical things, distinct from the walls in which they are inserted…"* further noting *"…to my mind, it is plain that, apart (again) from the effect of any authority, the windows and the walls will be treated as something distinct from the walls themselves."* As in the instant appeal, it had been argued forcefully in *Holiday Fellowship* that the decision in *Boswell* was a binding authority upon the court for a contrary proposition.

220. In *Holiday Fellowship* Lord Evershed M.R. looked at the fundamental facts pertaining to the nature of the premises distinguishing it from the building in *Boswell*, noting at p. 213 *"the premises were shop premises; and … far the greater part of what was called… the 'skin' of the premises consisted of the shop windows."* The court in *Holiday Fellowship* noted that in *Boswell* counsel for the appellant's opening argument was to the effect that *"These windows were not fixtures at all. They were part of the walls of the house."* Lord Evershed M.R. observed at 214: *"The argument was and is that in so far as windows were part of the skin of the house, then it was a step towards the point that they were part of the walls of the house, which were, so to speak, the 'skin' in that sense. So this court held in Boswell v. Crucible Steel Co., on the facts of that case, that the windows could not be regarded as 'landlord's fixtures' because, in truth, they were part of the structure of the building, and in that sense part of the skin of the house – of the walls of the house."*

221. Lord Evershed M.R. in *Holiday Fellowship* analysed in great detail the reasoning in *Boswell*, recalling that in the latter case Scrutton L.J. had stated at p.122 concerning the definition of landlord's fixtures *"…it seems to me clear that that expression .. cannot include a thing which forms part of the original structure of the building."* (emphasis added) He further noted that Atkin L.J. had stated (p. 123) of *Boswell: "As these windows were part of the original structure representing the walls of the house, so that without them there would be*

nothing that could be described as a warehouse at all, they cannot come under the heading of landlord's fixtures." (emphasis added) Lord Evershed M.R. noted that although *Boswell* was a County Court appeal, *"... this court said that the judge had misdirected himself, that it was a question of law, there being no evidence (I take it) to support a contrary conclusion; and they allowed the appeal."*

The weathering of the building

222. It is an artificial and unconvincing proposition for the landlord to say that the weathering of the building will be compromised by the reinstatement of plain glass panels, equivalent to those *in situ* in 1927, since there was no direct evidence in the first place that the Four Orders ever functioned as external windows of the demise. The expert evidence of Mr. Slattery was largely conjectural in the absence of a proper comprehensive survey and given his "*unduly combative*" approach and could not safely be relied upon for that purpose. The admitted statement (para. 6) of Mr. Ebbs was probative of the fact that the external facing sides of the Four Orders had not been exposed to the elements but was not afforded proper weighed by the trial judge. The trial judge erred in disregarding the fact that, as in 1941, the artwork panels could have been readily replaced without injury to the freehold or the artwork and were entirely severable in accordance with the principle in *Bain v Brand*. The trial judge ought to have concluded that the landlord's case was not proven in that regard.

Tenant liable to reinstate the premises

223. The tenant is liable to reinstate the premises at the end of the term or at the time where fixtures are being severed in accordance with its entitlement to remove same. This is uncontroversial contractually in light of the terms of 1987 Lease. Same was re-iterated in *Spyer*. The tenant in the instant case did not deny this. Assertions by the landlord that removal of the panels would expose the building to the elements is unduly alarmist and created an erroneous basis for the court's conclusions that the Four Orders were not severable by the tenant and

could be appropriated by the landlord. Plain panels, as were *in situ* 1941-1946 and pre-April 1928, can be installed in sashes by the tenant and, as such, will represent the *status quo ante.*

Tenant retains the right in law to disannex panels– even if they became part of freehold

224. Even where a fixture or chattel becoming part of the leased property, if, as here, it can be shown that it was installed by the tenant for the purposes of carrying on the trade or business for which the demise was taken and/or by way of ornament or decoration for that purpose, it may be severed during the continuance of the tenancy or prior to its determination and thereupon it ceases to be a part of the reversion and reverts to being chattel once more removable by the tenant where it can be shown that this can be done without injury to the freehold. Early decisions from the 18th century suggest that fixtures that may be removed by the tenant during his terms included those that were deemed to constitute part of the freehold until the point at which the tenant severs them. Lord Cairns L.C. in *Bain v. Brand* explained:

> *"The fixture does become part of the inheritance; it does not remain a moveable quoad omnia; there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right it continues to be that which it became when it was first fixed, a part of the inheritance."*

225. This expansive view, echoed by Lord Chelmsford in the same case, of the tenant's rights to sever and take away trade fixtures which the tenant has affixed to the freehold for the purposes of trade save and except where it can be shown that the removal will cause irreparable damage to the landlord's interest accords with the rights to private property generally recognised in this jurisdiction.

Even integrated fixtures are removable

226. An example of a valuable trade fixture where the tenant was permitted at the end of the term to remove such integrated fixtures is *Howell v. Listowel Rink and Park Co.* (1886) 13 O.R. 476 where a hard wood flooring was installed by the tenant of a roller-skating rink

specially for the purposes of carrying on the business of providing a commercial skating rink. The court held that same was capable of removal at the determination of the term.

227. Decisions from the Canadian courts support the right to disannex such as *Stack v Eaton* (1902) 4 O.L.R. 335 (Div. Ct.) and *Veterans Manufacturing and Supply Co. v. Harris* [1920] 19 O.W.N. 226, a decision of the Ontario Court of Appeal where electrical wiring had been installed by the tenant which the defendant landlady had subsequently prevented it from removing. On appeal, it was held that "*the tenants were entitled to remove the wiring, that the refusal to permit them to do so was wrongful, and that the plaintiffs [tenants] were entitled to damages*".

Approach of Irish Courts to tenant's right to remove integrated part of building

228. A significant decision in this jurisdiction is *Re Galway Concrete Limited* (*supra*). Keane J. (as he then was) held that a tenant could remove a concrete batching plant affixed to the ground by metal plates which were welded to the stanchions and where the metal plates were bolted into concrete and the plates themselves in some instances were covered in concrete. A concrete building was erected around the stanchions of each silo comprising part of the plant which buildings would have to be removed if the plant itself were to be removed. The evidence before the High Court was that the mixing unit was itself bolted into a two foot parapet wall and could not be removed without the wall being damaged. Keane J. rejected the arguments of the liquidator that the property in same had vested in the freehold owners of the land/landlords. The court was satisfied that same continued to constituted tenant's fixtures which were removable at any time. He noted:

> *"It was accepted that the plant had become so affixed to the land as to become part of it. It is also clear, and again this matter was not seriously in dispute, that it was so attached to the land for the purpose of carrying on the Company's trade. It follows that, quoad the owner of the land, the plant was in the nature of a 'tenant's fixture' which*

could be severed and removed by the tenant at any time before the expiration of his tenancy."

The position was succinctly set out in *Cosby v. Shaw* [1887] 23 L.R. Ir. 181 at p. 188 where Naish L.J. observed:

"*As the law now stands, as it stood at the date of the lease and sub-lease, a tenant erecting trade fixtures was prima facie entitled to remove them during or at the end of the term. They were prima facie his property; but then it was open to him and the landlord to enter into such contract as they thought fit with regard to them, and if the tenant contracted not to remove them, it was well settled that such contract made the fixtures part of the freehold without right of removal."*

This case is cited by *Wylie on Irish Landlord and Tenant Law* (4th ed.) at 9.14 where he considers the right of a tenant to remove tenant's fixtures at the determination of the term under common law and the in the context of s. 17 of Deasy's Act.

General right to disannex what were originally tenant's fixtures even where integrated into the freehold

229. The academic Peter Luther, in his article "*The Foundations of Elitestone*" (2008) 28(4) *Legal Studies* 574, reviews the judgment of the House of Lords in *Elitestone* and is critical of its reasoning. In reaching his conclusion, Lord Lloyd had relied on the then current (2008) edition of *Woodfall on Landlord and Tenant* (para. 13.131) and observed at p. 517:

"For my part I find it better in the present case to avoid the traditional two-fold distinction between chattels and fixtures, and to adopt the three-fold classification set out in Woodfall: Landlord and Tenant…para. 13.131:

'An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land.'

So the question in the present appeal is whether, when the bungalow was built, it became part and parcel of the land itself."

230. Peter Luther notes that this threefold categorisation of objects is novel and had only found its way into *Woodfall* at some date subsequent to 1978, being the year when Woodfall first transitioned to a loose-leaf format as a textbook. He observes of this three-fold classification: *"It does not appear in any of the editions of the work to appear between hard covers between 1802 and 1968. The last of these gives a more orthodox account of the law; it uses a term 'part' and 'parcel' but within a different classification".*

231. Luther then quotes from the 1968 edition of *Woodfall* which provides:

"The word 'fixtures' is applied to articles of a personal nature which have been affixed to land. The general rule of law respecting fixtures is that whatever is fixed to the freehold becomes part of it, and is subjected to the same rights of property as the land itself… When the owner of land annexes thereto fixtures (which would in the ordinary case of landlord and tenant be removable by the latter during his term) for a permanent purpose, and for the better enjoyment of the land, they become part of the freehold and cannot be removed. In its most extensive sense the term 'fixture' means anything annexed to the freehold in such manner as to become parcel of it. <u>But as between landlord and tenant it is used to refer also to chattels which, though annexed to the freehold, are removable at the will of person who annexed them, and 'fixtures' may be divided into (1) tenant's fixtures; and (2) landlord's fixtures</u>." (1968 Ed., Vol. pp. 695 -696, para. 1567). (emphasis added)

232. Peter Luther observes of this:

"The last sentence of this extract has an echo in the current edition, in which the extract quoted by Lord Lloyd in Elitestone is followed by the sentence 'In the Law of Landlord and Tenant, although not in all branches of the law, the category of fixtures is further

divided into landlord's fixtures which must be left by the tenant at the expiry of his lease, and tenant's fixtures which the tenant is permitted to remove'" (para. 13.131 of Woodfall)

Luther observes:

"*... there is little resemblance in other respects to the 1968 text. The latter, and similar versions from earlier editions, have a definition of 'chattel' implicit in the first (ie articles of a personal nature which have not been affixed to land), followed by a definition of 'fixture' in its 'most extensive sense' as items which belong to the freehold because they have become 'part of it' (sentence two of the 1968 text) or 'parcel of it' (sentence four). There is no suggestion that there are two separate categories of items other than chattels: fixtures are items which are part and parcel of the land itself. This is certainly the sense in which the phrase 'part and parcel' had been used in case-law and in a standard textbook on fixtures, before Elitestone."*

Landlord's fixtures

233. Luther continues: *"Within the category of fixtures broadly defined, and 'as between landlord and tenant"'(as the 1968 text of Woodfall has it) or '[i]n the law of landlord and tenant, although not in all branches of the law" (as the present-day equivalent says), there were then two sub-categories: landlord's fixtures and tenant's fixtures. That there might be items which fell outside either of the two sub-categories but were still within the main category of 'fixtures' is shown by the definition of 'landlord's fixtures' provided in the 1968 edition of Woodfall: "'Landlord's fixtures'" are chattels which are put up by the landlord and affixed to the structure, before or during the term, or by any previous owner or tenant, or by any other person, but do not form part thereof"* - p.696, para. 1568 of Woodfall (1968 ed.)

234. He observes " *... there might in certain circumstances, especially disputes about a tenant's covenant to keep landlord's fixtures in repair, be the need to distinguish between*

'landlord's fixtures' and the fabric of the building itself, but the building would still be a fixture in the 'most extensive sense' of the term.

235. Crucially, Luther notes*; "The case referred to at this point of the 1968 text – Boswell v. Crucible Steel Company – contains the only statement from an English court which Lord Lloyd could quote in support of a view that a house could not itself be a fixture, but this statement had been made in this narrow context of a dispute between landlord and tenant about the apportionment of repairing obligations."* (emphasis added) Luther observes that the headnote to *Boswell* states: *"The premises were let for the purposes of being used as a warehouse and offices for the lessees' trade, and practically the whole of the sides fronting onto the streets in question consisted of plate-glass windows. The windows were of the usual kind, and were not made to open."* The landlord had covenanted to do all other repairs.

Section 17

236. The right of a tenant to remove trade fixtures arose by the common law independently of contract and was subject only to the obligation of the tenant to make good damage to the freehold. If a tenant's *prima facie* right to remove tenant's fixtures was to be ousted by virtue of the operation of the lease itself, the language contained in the current lease governing the relationship between the parties ought to make same clear.

Analysis of landlord's arguments

Claim that Swan Yard works did not constitute tenant's fixtures

237. Since this is a proprietary claim in connection with items brought onto the property after the commencement of the term and after the tenant had commenced trading, it is a fundamental prerequisite to a satisfactory determination of the legal issues arising to establish in the first instance, on the balance of probabilities, who was the beneficial owner of all six artworks prior to their installation in 1928. The answer to that depends on who is to be deemed in law to have assumed liability in 1928 to pay for the six Harry Clarke works. There is force in the arguments

of both sides that whichever party assumed responsibility for the payment of the panels is likely on the balance of probabilities to have done so in respect of all six panels.

238. The trial judge on the evidence concluded that the two Swan Yard works were tenant's fixtures. The landlord does not properly engage with the comprehensive and nuanced analysis of the trial judge in regard to the evidence, particularly the 1928 Minute and the legal and evidential implications that flow from that analysis. There is no meaningful engagement with the observations of the trial judge and findings (para. 189) that in authorising spending on behalf of the tenant, the landlord did so in his capacity as a director of the tenant company and not as landlord. Given that the landlord (who was also a Director and Chairman of the tenant company) signed the minute, it can be read as recording an acknowledgement by the landlord that he was acting as agent for the tenant and agreement that the tenant was intended to be responsible for the costs of the café fixtures which included all six panels. Section 71(2) of the Companies (Consolidation) Act, 1908 supports its evidential value in that regard:

> *"71.—(1) Every company shall cause minutes of all proceedings of general meetings and (where there are directors or managers) of its directors or managers to be entered in books kept for that purpose.*
>
> *(2) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.*
>
> *(3)…"*

<u>Swan Yard panels - annexation</u>

239. As the trial judge noted (para. 185) whether a chattel becomes a fixture is contingent on establishing annexation. Two factors are relevant – the degree and purpose of annexation. It is the purpose of annexation which is by far the more important consideration. Establishing the annexation is an objective test assessed *"not by reference to the subjective intention of the*

person who fixed the object in place but, instead, by reference to the purpose which the object is serving." The trial judge correctly concluded that the landlord had failed to prove that *"…when the Swan Yard works were first fitted in 1928, they were installed in the window openings… overlooking Swan Yard. As a consequence, it follows that I must proceed on the basis that the 1928 arrangement was the same as that observed in 1987." "Unlike the clear glass windows, they were not a necessary element of the external shell of the café building."* He correctly found they were not required to serve any purpose of the landlord. Their purpose "*must have been to further the interests of the tenant in the operation of its café business."*

240. He correctly reasoned that after the removal of the Swan Yard works to the internal wall and the subsequent installation of the emergency staircase on the south western corner of the café: *"They continued to have an ornamental purpose at that time which could only be said to assist the tenant's café business. I cannot identify any purpose they might have served in the interests of the landlord… They function as mock windows only."* The judge concluded that the evidence strongly supported a conclusion that the Swan Yard works were tenant's fixtures.

241. In light of his comprehensive analysis at paras. 186 – 188 in respect of the Swan Yard works, the judge concluded that "*the Swan Yard works were installed solely for the benefit of the tenant and that they are tenant's fixtures*". He correctly had regard to the following factors (para. 79):

(a) Albeit that the minute of 8th March 1928 did not mention stained-glass, it dealt expressly with café fixtures and made clear that these were for the tenant's account.

(b) There is no reason to suppose that the stained-glass fixtures comprising the Swan Yard works would be treated as an exception to the arrangement recorded in the minute.

(c) Albeit there was no inventory of what was included in the sum of £14,900 acknowledged to be for the tenant's account, there was no reason to suppose that such a large sum did not include the sum due to Harry Clarke for the Swan Yard works.

(d) Given that the works "*are fixtures for the benefit of the café trade carried on by the tenant*", it made no sense that Ernest Bewley would pay for them on his own behalf rather than on behalf of the tenant.

(e) Though the judge was not prepared to consider this factor on its own to be probative, the court noted that it was remarkable that the statement of account furnished with Harry Clarke's letter of 7 August 1928 was addressed to *"C. Bewley Esq. Messrs. Bewley's Café"* which showed that he had been paid £200 in cash on 22 June 1928.

(f) The judge, noting that a part payment made was in the sum of £200 on 22 June 1928, acknowledging the mores of the day, had regard to the fact that the café would have been substantially a cash business predating the advent of electronic payments. He reiterated (para. 192) that the cash payment element of £200 paid in June 1928 *"was suggestive that the tenant was the source."*

(g) There was no evidence adduced by the landlord that Ernest Bewley paid the bill out of his own resources. Even if he had, as the judge correctly observed, *"the terms of the minute clearly suggest that any such payment by him for a fixture was, nonetheless, to be for the tenant's account."*

(h) The minute recorded that Ernest Bewley had spent or authorised the expenditure on fixtures and fittings *"on the Company's behalf"*.

The judge correctly concluded:

> "*Having regard to the terms of the minute (which clearly identifies that the tenant was to be responsible for the payment of amounts due for fixtures) and the fact that the Swan Yard works constitute fixtures, I have, on balance, come to the conclusion that the bill for the Swan Yard works was for the account of the tenant and that it was therefore an expense of the tenant*."

There is no basis identified to disturb any of the trial judge's said findings.

The "composite window theory" ground

242. The arguments advanced by the landlord for the proposition that the Swan Yard windows comprise panels that form part and parcel of the premises, notwithstanding the double fenestration system in place which entirely precluded their exposure to the elements, needs to be considered in the context of the approach adopted by the trial judge. Whilst authorities are cited and it is contended that a number of cases have considered the question as to what comprises a window, the crucial issue is how the judge approached that determination. This is evident, for instance, at para. 97 of the judgment where he observed:

> *"…I do not believe that it would be appropriate to have regard to Mr. Horan's evidence as to what he believes constitutes a window. Moreover, the question of what constitutes a window is a matter of law or a mixed question of law and fact which, to the extent that it is relevant, is a matter for me to determine. It is not the role of an expert to express views as to how the court should determine that issue."*

The landlord has not appealed against that specific analysis which, in my view, is correct.

243. The hypothesis advanced on behalf of the landlord overlooks significant aspects of the evidence of Mr. O'Connell, which were undisputed, as to the structural layout of the two wholly separate elements in the Swan Yard opes, including that there was *"no physical connection between the plain glass external window and the stained glass Swan Yard works.*" (emphasis added) (Day 4, p.70). The composite theory also ignores the fact that, as the trial judge found, there were windows in these opes in 1927 prior to the date when the tenant began to trade as a café. The extant Swan Yard plain glazed window, on the undisputed evidence, was found to be original and had been installed at latest in 1927 to weather the building, a date when the Harry Clarke works did not exist. The Swan Yard works were "mock windows", as the trial judge correctly found.

244. Further, it is of crucial importance that in his analysis at para. 164 of the judgment, the trial judge minutely considered all relevant aspects of the fenestration system at Swan Yard and in reaching his conclusions attached importance to the fact that:

> *"While they also provided light to the café, and while, in 1928, they may have provided some level of ventilation (given that they were capable of being opened), they could not be said to be part of the external skin of the café and they would appear to have made no contribution to the weathering of the café."*

245. The composite hypothesis being advanced by the appellant in substance amounts to an assertion that the Swan Yard arrangement was equivalent to a double-glazed window. It is argued that the tenant of a unit with a double-glazed window would not be entitled to claim that the *internal* pane of glass forming part of such a window was capable of constituting a tenant's fixture but that the *external* pane formed part and parcel of the building. By analogy it is contended that the Swan Yard works must be deemed to be part of a composite glazed arrangement. The trial judge was quite correct to attach no weight whatsoever to this baroque argument.

Conclusion regarding composite window argument

246. The landlord's theory that by internally displaying the Swan Yard stained-glass works in opes behind the existing windows in 1928 the tenant had thereby somehow rendered them "*part and parcel*" of the building and they should be deemed to perform a weathering function is entirely artificial and contrary to the clear evidence that there was "*no physical connection"* between them. It is redolent of the atomic theory propounded by Flann O'Brien in *The Third Policeman*. There was no evidence adduced by the landlord that there was ever any deficit in the landlord's own external conventional window performing its standard weathering function.

247. It is of crucial importance also that the landlord admitted into evidence by agreement the witness statement of Mr. Ebbs and did not seek to cross-examine him or give any indication

that his evidence was in dispute. Mr. Ebbs' unequivocal statement at para. 6 is: *"I have recently inspected the back faces of the Harry Clarke stained glass panels at the Bewley's café on Grafton Street. They are in very good condition. I have forty years of experience of working with stained glass. In my opinion the condition of the stained glass panels is inconsistent with them having been exposed to the elements. There are no visible signs of weathering on the panels."* (emphasis added) There was no probative contradictory evidence adduced by the landlord to show that the Swan Yard panels were ever part of the skin of the building.

248. The selective excerpts from evidence of various witnesses as to whether the Swan Yard works are "*windows*", notwithstanding the absence of any physical connection between the artwork and the plain glass window are highly tendentious and do not assist, since ultimately that issue was one for the judge alone to determine.

249. There was ample evidence before the trial judge on which he was entitled to rely to support his findings and conclusions in relation to the Swan Yard windows to establish that the extant original outer clear glazed window that remains *in situ* to this day in its original location was the original window dating from 1927. As such it was and continues to remain the original skin of the building.

250. The evidence was that each fixture in the Swan Yard ope had the capacity to function separately; one was not functionally dependent on the other. There was no evidence adduced by the landlord to refute the tenant's expert evidence that the extant Swan Yard window was the original installed by the landlord in 1927 or that it is in any way deficient for the weathering of the building since the Swan Yard work was removed.

251. The contention advanced by the landlord that the Swan Yard panels should be deemed to be part of the skin of the building as part of a composite is wholly untenable. But even if it was stateable, the principle in *Bain v. Brand* applied.

Argument that requirements of s. 17 of Deasy's Act not met

252. The trial judge correctly concluded that of the five conditions to be satisfied pursuant to s.17 of Deasy's Act, 1860, four were readily satisfied by the tenant for the reasons identified earlier in his judgment at paras. 186 and 187. He correctly concluded that the Swan Yard works were installed as ornamentation in relation to the tenant's occupation of the building for the purposes of the café trade being operated within the premises. No evidence was adduced that the tenant was obliged by the landlord to install them. Nothing in the 1928 lease prohibited their installation. The judge was satisfied in light of the 1998 video that the sashes containing the panels could be removed without substantial damage either to themselves or to the premises. Thereby the first four conditions in s.17 were satisfied.

253. In considering the remaining issue, whether the parties had contracted out of s.17, the judge considered whether the Swan Yard works had been affixed to the premises at the tenant's expense. Having reviewed the evidence, he concluded that it showed that the tenant was to be responsible for defraying the cost of the café fixtures and fittings. He placed reliance on the minute of the board meeting of the tenant company of 9 March 1928. The court noted that the landlord was recorded to have spent or authorised the spending of a total of £14,900 on behalf of the tenant in respect of ovens, tables and chairs, counters and *"other café fixtures and fittings".* The judge was satisfied that *"In authorising spending on behalf of the tenant, [the landlord] was doing so in his capacity as a director of the first named defendant …"*. He concluded that since he was also the landlord, *"the minutes can be read as recording the agreement or arrangement between the landlord and the tenant as to who should be responsible for the cost of the fixtures and fittings*."

254. These arguments were considered in minute detail by the trial judge and each strand of s. 17 was explored meticulously. It is not necessary to rehearse the High Court judgment further in that regard. The landlord has identified no basis to undermine the trial judge's analysis of

the evidence and his conclusion that the tenant had met the requirements in s. 17. The principles apply equally to the Four Orders works if they are demountable and never truly were so annexed as to become part and parcel of the freehold.

Argument that landlord acquired the artworks by virtue of 1928 Lease

255. Insofar as the landlord contends that the terms of the 1928 lease effected a vesting of tenant's fixtures automatically in the landlord at the end of its term, same is incorrect in law. The arrangement represented a contractual agreement between the parties for 21 years. However, the tenant never ceased to occupy the said premises and the terms of the said lease were superseded by the subsequent 1948 lease, granted for a term of 100 years subject to materially different covenants and conditions which in turn was superseded by the 1987 lease. The latter lease expressly acknowledged the entitlement of the tenant to remove tenant's fixtures. Such a claim was not asserted in 1948 or at any time thereafter. The proposition that the provision in a long-expired lease should be deemed to supersede the express provisions of the current operative lease between the parties is not statable.

256. I am satisfied that the contentions that the terms of the 1928 Lease effected a divestment of the tenant's title to the six Harry Clarke windows are erroneous in circumstances where the tenant remains in continuous in occupation and never yielded up possession to the landlord on foot of the 1928 lease and for all the reasons identified by the judge.

257. There is force also in the tenant's observations that as a matter of law the landlord held the superior title in 1928 on foot of two long leases which contain no provision in relation to delivering up tenant's fixtures. Mr. Bewley did not own the freehold reversionary interest in the part of the café premises where the six panels were situate and if he had ever come into ownership of the Harry Clarke works (as opposed to the tenant company), he was also constituted a lessee as best, in turn entitled to the benefits of s.17 of the 1860 Act. Further, had

he owned the artworks they would have formed part of his estate and no Inland Revenue Affidavit of Mr. Bewley was deployed by the landlord to support its claim to the six panels.

258. The tenant's obligation to deliver up possession under the 1928 lease only arose upon the termination or surrender of same. Neither event occurred. Instead, it transpired that the tenant acquired by two separate transactions the moiety interests in the landlord's reversion by deed of April 1981 (Poynton to the tenant) and in January 1987 (Johnson to the tenant). The landlord's contention that by virtue of any provision of the 1928 lease title to the panels came to vest in it is not maintainable. There is no basis to interfere with the trial judge's conclusions.

259. The 1987 Lease refers to "plate-glass" at 1.2.4, .3.5, 3.11.1 and 3.18.3 and "stained glass" at Clause 10.05.1. This engages the canon of construction *expressio unius exclusio alterius* and references in that Lease and supporting documents to "*plate glass*" must be taken to exclude the "*stained glass*" as a matter of construction. Title to the stained glass did not pass to Royal Insurance plc.

Conclusions on Landlord's various Grounds of Appeal

Claim that Landlord paid for the six panels

260. The trial judge adopted a robust approach to his evaluation of the evidence which led to his conclusion that the tenant commissioned and was responsible for the payment of the Swan Yard works. "*There is no direct evidence that the tenant paid for the Swan Yard works. But there is evidence that the tenant was to be responsible for defraying the cost of the café fixtures and fittings."* (para. 189) The 1928 Minute was one of several factors which, when taken together, entitled the judge to conclude that the tenant had assumed liability to pay for the Swan Yard works. Ultimately the landlord does not go beyond gratuitous criticisms of the trial judge's analysis regarding payment.

261. The judge correctly noted that the Swan Yard panels served no particular purpose of the landlord and in his analysis (including at paras. 186, 187 and 188). Having excluded the

possibility that the Swan Yard works were installed as a necessary element to the external shell of the building, he was satisfied that they were not required in order to serve any purpose of the landlord as the existing clear glass windows protected the property from the elements, he eliminated the likelihood that the Swan Yard works were installed *"with a view to improving the landlord's interest in the café."* He considered their purpose to have been for the enjoyment of those within the café both patrons and staff and to create a pleasing aesthetic. They continued to have an ornamental purpose in the café following their relocation within the property. *"I cannot identify any purpose they might have served in the interests of the landlord" "They function as mock windows only".* This was a sound and uncontradicted analysis. That two mock windows now located internally should be deemed in law to constitute part of the "skin" of the landlord's building never even reached the threshold of stateability as a proposition.

262. An independent factor to be taken into account as tending to support the finding that the tenant was, on balance, intended to be liable for the costs of the Swan Yard (and obviously as explained below for the Four Orders also) works is that the tenant commenced trading in November 1927. It necessarily follows as Mr. Slattery conceded (para. 118 of judgment) that the demised premises included six windows as of that date. This is corroborated by the minute of 9th March 1928 which the landlord signed. It states *"... in as far as the Landlord was concerned, the premises were finished before April 1927…the work done thereafter consisted of fittings necessary to adapt the premises for use as a café, and which expenditure would in due course appear in the Company's accounts, as a Liability of its own."*

Conclusions on the Minute of 9 March 1928

263. In my view, it is consequential that the Minute in and of itself evidences an acknowledgment which was potentially binding on the company in regard to its indebtedness to the landlord for the expenditure already incurred and that same was a liability of the tenant

company. As the judge observes of the Minute, it "…*is evidence that the tenant was to be responsible for defraying the cost of the café fixtures and fittings*." (para. 189) That the Director/Chairman who signed it was also the landlord enhances the Minute's probative value. The landlord failed to undermine its probative worth.

264. The reasoning of the trial judge at paras. 189 and 190 is highly persuasive. At para. 79 of the judgment he also noted that subsequent to the Board meeting on 9th March 1928, Harry Clarke was paid in full six months later by September 1928. The landlord appears to have adopted a somewhat opportunistic approach to the Minute, relying on it when their expert believed it proved that the landlord had paid for the works but seeking to minimise its relevance when it was shown that he had done so *"on behalf of"* the tenant. The trial judge noted that the landlord's expert Ms. Costigan accepted that *"…it is likely that the cost of the stained-glass was included in the sum of £14,900 mentioned in the minute"* (para. 79). The landlord was not entitled to approbate and reprobate the Minute depending on exigencies and expediency.

265. In my view the 1928 board Minute evidences not alone that the tenant was intended to pay for the Swan Yard works but for all six works. It is salient that the said Minute records a variety of details the accuracy of which are independently corroborated by extraneous factors. For instance, the assertion on behalf of the landlord that *"the premises were finished before April 1927"* is corroborated by the terms of the lease itself which was executed by both the landlord and the tenant and which identifies the commencement date of the term as 1st April 1927. The commencement date constitutes evidence that the building works had been finished out prior to the 1st April 1927 and had a dispute arisen in that regard the lease would have been receivable in evidence as being presumed to be correct and constituting *"sufficient"* evidence of that fact by virtue of s.2 of the Vendor and Purchaser Act, 1874 which provision is now replaced by s. 59(1) of the Land and Conveyancing Law Reform Act, 2009. The Lease corroborates the Minute in that sense.

266. Separately it is noteworthy that the Minute, signed by Ernest Bewley the Director and Chairman of the tenant company, makes reference to the sum of £14,900 as having been spent by the landlord *"on the company's behalf"* or that he had *"... authorised the expenditure on the company's behalf".* That amounts to an acknowledgment of his status as agent for and on behalf of the company and bound him as such. Thereafter had a dispute arisen between the company and its director, the Minute was receivable in evidence to demonstrate that he acted as agent on the tenant company's behalf in the manner acknowledged.

267. The Minute amounts to an acknowledgment on the part of the company that the said expenditures were its own and in substance that the company chairman/director was entitled to full reimbursement for same. There is no reason to conjecture that the parties acted otherwise than in accordance with the tenor of the Minute. That was the evidence of Ms. Costigan at the trial where she initially contended that it proved that the landlord had paid for the artworks until it was shown, as the trial judge observed, that she had:

> *"...in transcribing the minute in her report, omitted the very important words 'on the company's behalf'. She accepted that this was an omission. The result was that she could no longer stand over the statement made in her report ..."* (para. 76) (emphasis added)

268. Sight must not be lost of the fact that the landlord, as director of the company at the date of the Board meeting on 9th March 1928, at common law stood in a fiduciary relationship to the company. This in part derives from the principle that directors were agents of the company and the relationship of agent and principal gives rise to fiduciary duties owed to the company rather than to its shareholders as is clear from long authority such as *Percival v Wright* [1902] 2 Ch 421. I am satisfied that the observation of the trial judge that "*The minute does not assist in understanding what took place subsequently."* (para. 75) does not detract from its probative value as to the contemporaneous understanding and intention of the parties on 9th March 1928.

269. In all the circumstances, the Minute can be considered an accurate contemporaneous record of the business of the said meeting, having due regard to its antiquity and the corroboration afforded by surrounding aspects such as the execution of the 1928 lease on the same day. When taken with the uncontradicted evidence that all six works were paid for subsequently in June and September 1928, as found by the trial judge, it leads to a conclusion that on the balance of probabilities the company was liable for payment for all fittings as the Minute in substance acknowledged. Logically, this included all six Harry Clarke works.

270. It is significant, leaving aside the 1928 minute and its contents, that the invoices for all six panels were only discharged after the tenant was trading for an appreciable period - in June and September 1928. The landlord adduced no evidence that the invoices for the six artworks had been discharged before the lease was executed on 9th March 1928. This points to the likelihood, as the trial judge correctly inferred, that the café's trading receipts were available by those dates to defray the costs for these fixtures and fittings which served to enhance the tenant's trade as a café - as it had agreed on 9th March 1928.

271. There is force in the tenant's contention that the witness statement of Mr. Cahill which was analysed and considered by the trial judge (para. 69) contains a comprehensive analysis of the basis of calculation of the original rent set forth in the 1928 Minute. That sum approximates to the rent reserved (£3,500) and establishes a valid basis for the said calculation.

272. Also relevant is the fact that in his witness statement, Mr. Cahill stated that the sum of £14,900 referenced in the 1928 Minute in respect of the fixtures and fittings had been paid by the company. (para. 8) This witness was called at the trial but was not challenged by the landlord regarding that aspect of his statement or the exercise carried out by him.

The same principles apply to the Four Orders

273. The above factors concerning the Minute and inferences otherwise reasonably to be drawn as tending to show that liability for payment of the panels rested with the tenant apply

equally to the Four Orders works as they do to the Swan Yard works. The evidence shows that all six works were the tenant's property at the time of their arrival at the premises. The trial judge erred in failing to reach a clear and specific determination that such was the case. It is an entirely separate issue to determine thereafter whether the Four Orders were absorbed by integration into the fabric of the building or whether having been annexed to the freehold they have nevertheless retained their identity such that they can be disannexed and removed (and if needs be replaced with normal panels) without injury to the freehold or to the Four Orders works themselves.

Argument that Swan Yard panels never formed part of double fenestration system

274. As the trial judge correctly noted, the 1927/8 correspondence provides no detail as to what was involved in the installation of any of the stained glass works. There was no evidence that the artist ever carried out similar commissions to the six works installed at the premises or that Joshua Clarke & Sons ever made or provided joinery. That said, there was no evidence that the Swan Yard panels were ever exposed to the elements. The burden rested with the landlord to establish that fact and it failed to do so. Further, the admitted statement of Mr. Ebbs offered compelling probative evidence which was not contradicted by the landlord that none of the six panels showed signs of weathering by the elements on the exterior sides.

275. There was force in the argument of the tenant that it was distinctly improbable that the landlord would install windows in the six large opes in 1927 only to discard them in 1928. The burden of proof rested with the landlord to demonstrate that the clear glass window at Swan Yard was not the original window installed in 1927 as part of the original skin of the building. No evidence was adduced to that effect. Indeed, the trial judge found that the landlord's expert had never even formally inspected this window- "… *no formal inspection or investigation of the Swan Yard works was carried out by Mr. Slattery on behalf of the plaintiff"*. (para. 132)

Conclusions on impact of 1987 Transactions in respect of Swan Yard works

276. Concerning the Swan Yard works, the judge correctly observed at para. 201:

> "*… the first named defendant owned the Swan Yard works but, for the reasons previously outlined, those works were not part and parcel of the premises. They therefore did not pass to a purchaser of the premises unless the contract for sale either expressly or by implication extended to them. The plaintiff has not demonstrated any sufficient basis to substantiate a case that the contract included everything including fittings and fixtures such as the Swan Yard works. In my view, the burden of proof in relation to this element of the plaintiff's case falls on the plaintiff."*

Like principles apply to the Four Orders works also.

Conclusions regarding s. 17

277. The analysis of the trial judge in regard to the Swan Yard works was very comprehensive. I am satisfied that there was evidence to support his analysis and conclusions in regard to compliance with s.17 of Deasy's Act and in arriving at his conclusions that the Swan Yard works were constituted tenant's fixtures which it is entitled to remove.

278. On the basis of the available evidence and in light of the trial judge's findings, there was ample evidence before the trial judge based not alone on the evidence of Mr. Horan and Mr. Campbell but also of Mr. Ebbs which entitled the trial judge to conclude that the Swan Yard works were installed in 1928 as part of a double layer of windows for all the reasons the judge himself identified at, *inter alia*, paras. 151 -164. There is no basis for disturbing the trial judge's analysis and conclusions that the Swan Yard works are tenant's fixtures.

The Minute and s. 17

279. The judge considered the Minute as outlined above and concluded, "*As a matter of law, any such payment would accordingly be a payment made by the tenant and should not be characterised as a payment made by Ernest Bewley personally*". He was satisfied that there

was sufficient basis on the evidence to conclude that the Swan Yard works were installed at the expense of the tenant and that the final condition of s.17 of Deasy's Act had been satisfied in respect of same. The court correctly concluded that the tenant and the assignee were entitled to rely on s.17 to maintain their claim to ownership of the Swan Yard works and the right to remove them from the premises should they so choose.

280. The landlord came nowhere near establishing that this comprehensive analysis was "*flawed"* or was "*not properly reasoned at all*" or that the "*high threshold*" identified by the Supreme Court in *Leopardstown* was met.

281. I am satisfied, as addressed more fully below in the cross-appeal, that all of the said considerations were applicable equally to the Four Orders which were demonstrably installed for the purpose of the tenant's trade - and once proven that they started life as chattels beneficially owned by the tenant, which they self-evidently did, and that liability for their purchase resided with the tenant. They were capable of disannexation as a matter of law without injury to the freehold or to the artworks themselves under the principle in *Bain v. Brand*. The trial judge erred in failing to have regard to the right of the tenant as between him and the landlord to bring these artworks back to the state of tenant's fixtures and chattels again by the act of severing them from the freehold.

Conclusions regarding Experts

282. The trial judge was best placed to evaluate the witnesses and their demeanour throughout a lengthy hearing and in light of the principles in *Hay v O'Grady* [1992] 1 IR 210, there is no basis to interfere with his conclusion (para. 104) that there was no reason to doubt the evidence of Mr. Horan which in turn was supported by the evidence of Mr. Campbell. The court noted *"...there is no contrary evidence on the plaintiff's side to refute it."* The court's conclusions at para. 105 are sound and based on probative evidence in light of the evidence of Mr. Campbell and Mr. Ebbs that all of the Harry Clarke works were artificially lit from behind and that in

light of the evidence which reach back to 1972 from that date *"they were no longer operating either as a source of natural light or ventilation."* The trial judge noted Mr. Campbell's evidence to that effect was not challenged on cross-examination and, critically, that Mr. Ebbs' witness statement had been admitted into evidence by agreement.

283. There was sound and persuasive expert oral evidence on which the trial judge was entitled to rely which demonstrated that the window *in situ* at Swan Yard is the original dating from 1927 which throughout has weathered the building. Given the deficits in the landlord's expert evidence which the trial judge correctly found to be "*less helpful"* by reason of his failure to carry out an inspection and investigation of the normal kind done by architectural experts in advance of giving evidence, there is no logical basis to interfere with the trial judge's conclusions. The court was satisfied that the extant window at Swan Yard represents the original location of the external facing window at that locus and that the Swan Yard artwork was erected or installed behind it internally. There is no cogent basis identified either in fact or in law to disturb that conclusion.

284. In my view, the totality of the evidence indicates that the trial judge was correct in his conclusions regarding Swan Yard and the tenant was proven on the balance of probabilities to have been liable for defrayal of the cost of same. In the alternative, Mr. Bewley effectively acknowledged, by his signature of the memorandum which thereby bound him, that he acted as agent for and on behalf of the company in spending and authorising expenditures for the tenant company for fixtures and fittings for the café. The invoices were not discharged for both works until after the execution of the lease and when the tenant was trading for over half a year. The minute records an acknowledgment of the company's liability and either way evidences that the title to the artwork on the balance of probabilities vested in the tenant in 1928 and as such, upon their installation not alone the Swan Yard works but all six windows constituted

tenant's fixtures, being decorative and ornamental elements installed for the purposes of the tenant's trade or business.

Conclusions as to applicability of rule in *Walsh v. Lonsdale*

285. The trial judge correctly found that the rule in *Walsh v. Lonsdale* provided a complete answer to the landlord's claim, so far as the Swan Yard works were concerned. *"Crucially, it seems to me that, from the moment the contract of sale was executed, the first named defendant had an enforceable contract for the grant of a lease in the terms of the 1987 lease."* (para. 205) He concluded *"In my view, the Rule in Walsh v. Lonsdale would therefore have applied. The Rule gave the first named defendant the same rights in equity as it would have had if the lease had actually been executed."* In my view, for the reasons stated above it also provided a complete answer to the Four Orders works their true original nature as tenant's fixtures was never irrevocably lost.

286. "*If an escrow has been created, and the condition in question is subsequently fulfilled, the deed becomes operative from the date of its original delivery without any redelivery, ie, it relates back so as to pass the title from that date retrospectively*." *per Woods & Wylie, Irish Conveyancing Law* (4th ed., Bloomsbury, 2019) at 18.123, who cite *Foundling Hospital v Crane* [1911] 2 KB 367 at 376 (*per* Farwell J.) Since the terms and conditions under which the first defendant occupied the premises from 6 August 1987 - 22 September 1987 were the same as the terms of the lease being held in escrow and the first defendant was obliged to comply with its covenants and conditions, it necessarily follows that the sequence of events unfolding between the landlord and the tenant in 1987 engaged the doctrine in *Walsh v. Lonsdale*.

287. Once the lease ceased to be an escrow the parties' rights and obligations were capable of related back to the date that the lease was initially delivered in escrow. The parties are treated as subject to the same rights and obligations they would have had if the grant had been fully valid. The judgment of Moore J. in *Church v. Dalton* (1852) 2 ICLR 249 is cited as authority.

In the instant case the estoppel was clearly fed as of 22 September 1987 and given the explicit terms of the lease indenture itself which specified 6 August 1987 as the commencement date, the relationship between the parties by act and operation of law must be treated as that of landlord and tenant with effect from 6 August 1987. The estoppel was fed by the delivery of the lease. In the intervening time from the execution of the term of the contract for sale, the tenant had a specifically enforceable contract for the grant of a lease in the terms of the 1987 lease and the doctrine in *Walsh v. Lonsdale* applied.

288. The 1987 Lease expressly refers to "*plate glass*" (at Clauses 1.2.4, 3.5 and 3.18.3 for instance) but alludes to "*stained glass*" separately at 10.051. In my view the manner in which "*stained glass*" is alluded to is very strongly indicative that the parties in 1987 drew a clear distinction between plate glass and stained glass and that the latter was not intended to pass to Royal Insurance plc, contrary to the findings of the trial judge at para. 32 of the judgment.

289. Woods & Wylie cite *Alan Estates Ltd. v. W.G. Stores Ltd & Anor* [1981] 3 All ER 481 as authority. The headnote of the majority decision of the English Court of Appeal states;

> *"…when all the conditions of an escrow were satisfied (per Lord Denning M.R.) the title which then passed to the grantee under the deed, (per Sir Denys Buckley) the terms and conditions of the instrument which were necessary to give effect to the transaction, related back so as to operate, as between grantor and grantee only from the time of the conditional delivery of the instrument, and for that purpose the delivery was treated as though it had been unconditional ab initio…"*

290. It might, alternatively, have been argued that as of 22 September 1987 the doctrine of relation back which operated once the deed ceased to be held in escrow took effect to "*feed the estoppel*" and the status of the first defendant *qua* tenant effectively relating back in law to 6 August 1987 by act and operation of law. In regard to *feeding the estoppel*, many authorities, including *Church v. Dalton* (*supra*) and *Sturgeon v. Wingfield* (1846) 15 M&W 224 illustrate

that, as *Wylie on Irish Landlord and Tenant Law*, (4th ed., Bloomsbury Professional, 2022) observes at 4.49 "*Where the doctrine of estoppel applies to a purported tenancy agreement, the tenant becomes a tenant 'by estoppel'."* Either way the outcome is the same.

The Tenant's Cross-Appeal

Are the Four Orders works tenant's fixtures?

291. That the Four Orders are decorative is self-evident. The trial judge cited the biographer of Harry Clarke, Dr. Nicola Gordon Bowe's text where she remarks of the Four Orders *"The windows are four decorative masterpieces;"* (para. 6)

Analysis Tenant's claim to Four Orders *Decorative ornamental panels /Tenant's fixtures*

292. The case advanced by the tenant is persuasive, being that the Four Orders as well as the Swan Yard panels constitute decorative ornamental panels installed by the tenant for the purpose of enhancing its trade or business as an oriental café and removable by it. (Grounds 7(l) and (m)). The key factors relied upon by the tenant in support of this contention included:

(a) Their nature being decorative stained glass.

(b) They were installed after the commencement of the term and five months after the café commenced trading.

(c) They were installed approximately one year following completion of the building by the landlord and the date of commencement of the term (1st April 1927).

(d) The evidence of Mr. Ebbs.

(e) The fact that the minute of 9th March 1928 records that payment *"...fittings necessary to adapt the premises for use as a café"* was for *"... the Company's accounts".*

(f) There was no logical basis identified for reaching a different conclusion as to the purpose for which the Four Orders panels were annexed to the café for the judge's finding as to the purpose for annexing the Swan Yard works:

"…the purpose of the Swan Yard works must have been to further the interests of the tenant in the operation of its café business." (para. 186)

(g) There was no evidence that disannexing the artworks at Four Orders or Swan Yard would injure the external structure of the building.

(h) There was no evidence that disannexing the artworks at Four Orders or Swan Yard would injure the artworks themselves.

(i) The trial judge attached insufficient weight to the fact that these were decorative artwork and were readily removable and replaceable with ordinary glass without damage to the building or the artwork itself.

(j) The trial judge attached undue weight to aspects of the Harry Clarke correspondence which was incomplete and one-sided. In particular, a statement that the windows had been *"erected into position"* did not prove one way or another that the works were supplied in sashes. (The latter finding is not appealed, however).

(k) The mobile nature of the panels and the easy mode of affixing and removing same, as confirmed by Mr. Ebbs at paras. 4 and 6 and the 1998 video and which has been exercised by the tenant throughout the past century is inconsistent with these particular artworks having ever been integrated into the building to such a degree as to irrevocably lose their original identity as tenant's fixtures for the purposes of trade.

(l) The witness statement of Mr. Ebbs at para. 5 makes clear that each panel or sash was readily removable from the frame by simply unscrewing same. *"Removing the stained glass panels is a straightforward job. It is simply a matter of unscrewing the hinges that connect the subframe to the larger frame…all that is required is a screwdriver."*

293. The trial judge held that the Four Orders had become part and parcel of the building on their installation in the western façade in 1928. However, that analysis is unsustainable at a number of levels and is undermined by the trial judge's analysis at para. 175 of the judgment;

"…once the Four Orders works were reinstated, they formed part and parcel of the café premises in substitution for the windows that were put in place during the period of their absence." (emphasis added)

294. The trial judge's own analysis implicitly accepts (as it must), that on their de-annexation in 1941 the six panels ceased, for five years, to be "*part and parcel of the building*". This demonstrates the limited nature of their annexation, the ease of their removal, their demountable nature and their ready substitutability. All these attributes are incompatible with a conclusion that they were ever "*part and parcel of the building*" to a degree which establishes irrevocable integration in the first place.

295. Further, the absence of any evidence that the 1941 de-annexation, or that now sought by the tenant in the exercise of its property rights, caused or might cause injury either to the panels or to the landlord's reversion points strongly to a conclusion that they were never truly "*part and parcel*" of the building in the first place to a degree that precluded de-annexation.

296. Alternatively, even if they ever became such, they are very obviously (as events in 1941 demonstrate and the trial judge in substance acknowledges at para. 175) in truth fixtures of a kind as can be "*brought back to the state of a chattel again by severing it from the soil*", in the words of Lord Chelmsford in *Bain v. Brand* at p.772, was cited with approval by the English Court of Appeal in *Hobson v. Gorringe* at p.192. and approved in the House of Lords decision of *Elitestone v Morris* at p. 695. That those germane authorities were not brought to the attention of the trial judge is to be regretted. The tenant's right of severance was acknowledged by Keane J. in *Re Galway Concrete Ltd* at 405 which is cited in *Wylie on Irish Landlord & Tenant Law* at 9.24. In my view, the trial judge misdirected himself as to the law which led to

an erroneous conclusion in regard to the Four Orders works. There is no room for curial deference where an error of law of such consequence is evident. Further the principle in *Bain* offers a further and independent ground to uphold the trial judge's conclusions in respect of the Swan Yard works

The Four Orders Harry Clarke panels are not part of the skin of the building

297. *Holiday Fellowship* is a relevant decision as to the caution to be exercised in relying on *Woodfall on Landlord and Tenant* in the area of landlord's and tenant's fixtures. The Master of the Rolls observed that:

> *"… In the last edition of Woodfall on Landlord and Tenant, 25th Ed., p.760, where there is the following sentence: 'It would appear that windows in the outer walls of a building are themselves to be regarded as part of the walls and therefore of the external parts.' That passage is based exclusively on Boswell v Crucible Steel Co. With all respect to the editor, I think that it is an over-statement or over-simplification of the matter. It would be correct to say:*
>
> *'It would appear that windows in the outer walls of a building <u>may, in certain contexts and for certain purposes</u>, be regarded as part of the walls';*
>
> *but I do not think that Boswell's case justifies any more extensive proposition. Nor can I agree with [counsel] that because, in Boswell's case, the conclusion is regarded as a matter of law, therefore it is impossible to say, as a matter of fact or degree in another case and in another context that windows are not to be regarded as part of the main walls. The one thing by no means follows from the other."* (emphasis added)

298. It is well to remember that the decision in *Boswell* primarily concerns repairing covenants and turned on its own bespoke facts and ought not to be seen, at least in this jurisdiction, as cutting down or circumscribing the generous construction of the general entitlement of a tenant to disannex and remove items installed for the purposes of decoration

and ornamentation and to advance the tenant's trade. The decision in *Boswell* is not to be seen as of any general or universal application in the context of litigation concerning fixtures which encompasses windows. It is erroneous to reason from the highly particular context and facts in *Boswell,* for a general proposition that the panels inserted into the sashes for enhancement of the tenant's trade are *per se* to be deemed windows or are to be further deemed "part and parcel of" or otherwise "the skin of the building".

299. It is significant that in *Holiday Fellowship* the English Court of Appeal, (the same court which had decided *Boswell)* having considered the earlier authorities, concluded that they did not have any such binding or conclusive effect. The Master of the Rolls observed *"... there is in truth no evidence whether the windows, as I see them, were or were not part of the original structure of this house."* (emphasis added) That aspect of *Holiday Fellowship* was not properly considered and was unduly discounted by the trial judge. As with *Galway Concrete* the landlord in this appeal failed on the evidence adduced to establish that the landlord had purchased the six Harry Clarke works. It failed to establish that the six panels ever irrevocably vested in it.

300. The court in *Holiday Fellowship* had no difficulty in concluding, applying the ordinary standards of common sense and interpretation of language, that the windows in question in that case were not part of the main walls of the building – a conclusion diametrically opposite to that of the trial judge in the instant case in relation to the Four Orders works.

Error by trial judge - Four Orders

301. The trial judge erred in his approach at para. 183 where he opined;

> *"...I believe it is necessary to imagine what would happen if one removed the Four Orders works but left the Perspex sheeting in place."*

Rather, it is merely necessary to imagine what would happen if one removed the Four Orders works and replaced them with sashes housing plain glass panels as they surely were at the commencement of the term in 1927. By that thought experiment it is self-evident that the

landlord gets back what was demised 97 years ago and, as Keane J. made clear in *Galway Concrete*, the landlord is entitled to no more than that.

302. The trial judge erred, not alone in his analysis and application of *Boswell*, but also in his analyses (para. 165 of judgment) of *Holiday Fellowship* and *Climie.* Of the Four Orders works, the trial judge observes at para. 165:

> *"The Four Orders works, at the time of their installation, had all the usual indicia of what would commonly be accepted as a window. They were made of glass. They were housed in a frame that is readily recognisable as a window frame. They were installed in openings in an external wall which had been created by the removal of earlier windows which they replaced."* (emphasis added)

This overlooks the fact that the Four Orders panels (and indeed the Swan Yard panels) were never part of the original structure of the building. They were not and bear no relationship to the glazing which was *in situ* at the commencement of the term. The frames – which belong to the landlord – are not relevant to the legal status of the stained glass inserts. There was no evidence that earlier window frames were removed or that the Four Orders window frames are not the originals in place since 1927.

303. It is not to be overlooked that the tenant's pleaded claim is confined to the artwork panels now housed in the sashes and no claim is advanced anywhere to the window frames. The trial judge fails at para. 165 to attach sufficient weight the anterior question identified in *Holiday Fellowship*, namely, were the artworks part of the original structure of the building? The answer based on the analysis of the trial judge in the earlier part of his judgment was that the frames were original but, crucially, the artwork panels were not, they having been swapped out in March and April of 1928 in replacement of ordinary glazing for the purposes of ornamentation and decoration and for the tenant's trade as an oriental style café.

304. The trial judge erred in appearing to conclude that at the Four Orders locus earlier windows had been removed. No evidence was adduced in support of that fact. There is no suggestion that the tenant is asserting an entitlement to remove the window frames. The counterclaim advanced on behalf of the tenant is confined to its asserted ownership of the stained glass artworks commissioned from Harry Clarke. It seeks *"A Declaration that the Second-Named Defendant is the owner of the Artworks."* It was asserted that as *"a removable and moveable item the Artworks did not and do not form part of the landlord's interests in the Premises."*

Conclusions – Four Orders

The Four Orders

305. In light of the House of Lords decision in *Bain v. Brand* (1876) jurisprudence, the real issue in this case is whether the six panels can be removed by the tenant without injury to the freehold reversionary interest or the panels themselves and that the property can be substantially left in the state in which, on the balance of probabilities, it was at the date of the commencement of the café business in 1927 where plain glass panels adorned the window opes. This question appears to me to be readily answerable in the affirmative.

306. No injury to the freehold reversion has been shown as likely to occur. The hypothesis implicitly underpinning a substantial part of the landlord's argument in regard to the Four Orders windows is that particularly the Four Orders opes would be left without glazing and as such the building would be exposed to the elements. But it was not put to the tenant or its witnesses in cross-examination that it had ever caused the building to be so exposed at times when the panels were removed in the past or that it proposed to do so at the end of the term. The key consideration, overlooked by the trial judge, was that the tenant was in a position to ensure that the Four Orders opes would have sashes with plain glazing inserts instead of the

artwork as was the case in 1927 and up to March/April 1928 and 1941-1946. The landlord would get back what on balance was there at the commencement of the term in 1927.

307. It is significant that in the instant case in evidence before the High Court the tenant established that the Swan Yard panels were installed in connection with its trade as a café, as an expense for the tenant's account and that the panels were removable with relative ease – as the 1998 video and the admitted evidence of Mr. Ebbs clearly confirmed. There was no reason in law for arriving at a different conclusion on the facts in relation to the Four Orders.

308. There was no authority identified for a contrary proposition that where panels – whether encased in a sash or not – are inserted into an existing window frame for the purposes of enhancing the carrying on of the tenant's business, the tenant is thereafter precluded from removing them and reinstating panels akin to the original kind.

309. The trial judge failed to attach sufficient weight to the approach of Romer and Ormerod L.JJ. in *Holiday Fellowship* and the mode and degree of annexation of the panels to the building, and the limited extent to which the panels were connected to the window frame via screws, the ease and facility with which the stained glass panels could be removed and/or replaced as demonstrated in the 1998 video, and the fact that they could be removed without injury either to themselves or the fabric of the building.

310. The trial judge attached excessive weight to the fact that the Four Orders might have been elements in an external window in 1928. There was uncontradicted evidence before the High Court (Mr. Ebbs, Mr. Horan and Mr. Campbell) to establish that continuously throughout the previous 50 years (1972-2022) the panels had never been exposed to the outside elements. That was an established state of affairs in 1972. The conclusions based on his experience and inspection by Mr. Ebbs was that these panels "…*never been exposed to the weather*..." (para. 4) and that their condition "…*was inconsistent with them having been exposed to the elements*…" (para. 6). This direct evidence was probative of a crucial issue but was discounted

or otherwise accorded insufficient weight by the trial judge. The trial judge appears to have, in discounting the "*double-fenestration"* hypothesis for the Four Orders also, implicitly disregarded without explanation the admitted evidence of Mr. Ebbs both as to the factual position for over 50 years and as to the current actual state of the external facing sides of the Four Orders panels as not having been exposed to the weather/elements. At the conclusion of the trial, these two key statements of Mr. Ebbs (paras. 4 and 6) remained uncontradicted by any probative evidence. The trial judge erred in failing to attach sufficient weight to Mr. Ebbs' evidence. Mr. Ebbs' statement showed a fact pattern suggestive that, on the balance, such a treatment of the panels was likely to have obtained from the time of their installation in 1928. The judge erred in substantially disregarding the importance of the direct evidence of the condition of the external side of the Four Orders panels.

311. There was no evidence, circumstantial or otherwise, that could have supported a construction that at the time of their installation in 1928 or the landlord and the tenant intention that the Harry Clarke panels were to be for the permanent improvement of the freehold reversion in the completed building which already included windows as the trial judge found and the landlord's witness acknowledged (in the language of the civil law "*perpetui usus causa*", or … "*pour un profit del inheritance*"), rather than for the enhancement of the tenant's trade. There was no basis for inferring that the Four Orders panels could have been installed for a purpose different the Swan Yard works to have been installed – namely "…*to further the interests of the tenant*" as the trial judge correctly concluded.

Was permanent accession proven?

312. There was clear evidence, not least from Mr. Ebbs, as to the ease whereby the panels could be inserted and removed from the sashes. The 1998 video corroborated that evidence. It is of some relevance, but not in itself outcome-determinative, that in the case of the Four Orders, the panels were frequently removed – once for a five-year period without evidence of

objection from the lessor. The evidence showed that all six works were installed by the tenant exclusively as trade fixtures for the purpose of carrying on of the business of a café. That user has continued for over 97 years.

313. If permanent accession automatically occurred by the act of installation of the panels circa April 1928, title to the glass panels installed between 1941 and *in situ* until 1946 must also, in turn, have vested in the landlord in 1941under the principle of permanent accession. The analysis of the trial judge implicitly accepts that permanent accession had not occurred as of 1941 when the panels were removed, taken off site and replaced with "*embossed glass*". The trial judge's analysis at para. 175 states "*once the Four Orders works were reinstated they formed part and parcel of the café premises in substitution for the windows that were put in place during the period of their absence*." This is consistent only with abeyance of accession for the duration of their absence from the premises. This reasoning implies that integration into the freehold ended in 1941 but was revived once more in 1946. This sidesteps confronting the fact that the physical absence of all six panels from the building from 1941-1946 is fundamentally incompatible with a contention that annexation to the degree of complete integration and accession of the panels ever took place in the first place as a matter of law.

From the trial judge's reasoning the following inferences appear to arise;

(i) The Four Orders were "*part and parcel of the café premises in substitution"* for the original 1927 panels from 1928 – 1941.

(ii) The Four Orders ceased to be "*part and parcel of the café premises"* in 1941 when the embossed panels were installed.

(iii) The embossed panels became "*part and parcel of the café premises in substitution"* for the Four Orders panels from 1941– 1946.

(iv) The Four Orders once more became "*part and parcel of the café premises in substitution"* for the embossed panels from 1946.

Such analysis is fundamentally incompatible with the landlord's argument that the panels were integrated into the freehold in 1928 and thereafter remained at all times part and parcel of it.

314. In my view the trial judge's analysis is correct insofar as he countenanced that when the panels were absent from the window frame they did not constitute "*part and parcel*" of the premises. However, he erred insofar as he found that the Four Orders panels could be deemed when substituted in 1946 for the embossed panels to have become once more part and parcel of the premises to such an extent that they were to be deemed an irrevocable permanent accession to the landlord's reversion. Their capacity for severance in 1941 is incompatible with permanent accession. Their removal and replacement in 1941 by "*embossed glass*" is incompatible with integration and accession to the freehold having occurred in 1928. The analysis and consequent conclusion are inconsistent with the tenant's right of severance in accordance with *Bain v Brand*.

315. Once the judge had, correctly, found that in 1928 *"…the bill for the Swan Yard was for the account of the tenant and,,, an expense of the tenant*…" (para. 192), the same conclusion followed logically in respect of the Four Orders. The landlord had merely acted as its agent and his signature of the Minute was material in that respect. Once that was established then it followed that the tenant had erected the fixtures for the purposes of trade, the trial judge ought to have allowed the tenant to exercise the right of removing them during the continuance of the term. Even if any of the panels had become part of the freehold, a conclusion which was not maintainable in the case of the Swan Yard Works and highly doubtful in the case of the Four Orders, the tenant nevertheless retained the right in law to bring them back to the state of chattels again by severing them from the freehold.

316. The trial judge appeared to have considered that had the panels become part and parcel of the property at any time that such was an irrevocable state of affairs. But that is not the law. It is clear from the authorities that mere annexation or adaptation of a chattel by its annexation

to the freehold is not in and of itself sufficient to irrevocably convert a chattel or fixture into part and parcel of a building unless it is physically annexed in such a manner or to such a degree as to demonstrate an intention to permanently incorporate it into the freehold. In the case of a tenancy, where the article is used in the carrying on of the tenant's trade or where for its greater or more appropriate usage it is required to be attached to the building – as in the instant case the stained glass panels – such attachment is necessary to maximise the beneficial use of the stained glass in connection with the trade of café.

Primary intention of annexation -analysis

317. Intention may be gleaned from express statements or conduct on the part of the parties or implied from surrounding circumstances including the mode of annexation, the purpose and intended user to which the item in question was contemplated being put at the time of its acquisition and installation during the term of the lease.

318. It is necessary to consider whether the degree of annexation of the panels and the object and intention of any annexation to the freehold in order to confirm whether its adaptation to the use of the freehold is merely a secondary or ancillary consequence to the primary adaptation of the chattel by the tenant for the purposes of its business and for the duration of the tenancy. Each of the six panels was initially constituted a chattel. Here the installations were conducive to the tenant's trade as an oriental café. Such is inconsistent with an intention to make the panels a permanent accession to the freehold such that they became irrevocably part and parcel of the freehold reversionary interest vesting in the freehold reversioner in perpetuity. Their mode of adhesion was typical for the display of stained glass but also conducive to easy severance, as Mr. Ebbs and the 1998 video both confirmed.

319. There is no authority identified by the landlord that comprehensively concludes after due analysis that annexation of a fixture by the tenant to the freehold for the purposes of trade – and which is demountable without injury to the freehold or the thing itself - results in its

irrevocable appropriation by the landlord. As shown below, neither *Boswell* nor *Climie* (decided before *Bain v. Brand*) are on point. Such a finding is not compatible with *Re Galway Concrete Ltd*.

320. In the absence of written evidence as to intention, the true intention at the time of annexation in 1928 can be found by determining the primary purpose of the annexation. The Minute of 9 March 1928 demonstrates the status of the landlord as agent in connection with the purchase of the panels. The trial judge correctly concluded that the expenditure in relation to Swan Yard panels was "*'on the Company's behalf'. Such expenditure was not therefore to be treated as personal expenditure of Mr. Bewley on his own behalf but as an expense of the tenant*." (para. 192) This analysis extends to all six panels. They were never intended to be for the improvement of the freehold. Their original nature was that of chattels in the ownership of the tenant. The landlord did not establish that the Four Orders works were intended to be or ever were irrevocably annexed to the freehold for its permanent improvement. All six panels were purchased and annexed to assist the tenant in carrying on its trade as a café.

321. In determining whether a chattel has become a fixture or irrevocably integrated, the intention of the party affixing it to the freehold is objectively established insofar as it can be presumed from the degree and object of annexation. The evidence shows that there was annexation but that it was relatively slight in degree – as described by Mr. Ebbs at para. 5, removal being "*a straightforward job*", "*a simple matter of unscrewing the hinges…*". The object of the annexation informs intention and the trial judge's conclusions concerning the Swan Yard works at para. 186 of the judgment that "…*the purpose of the Swan Yard works must have been to further the interests of the tenant in the operation of its café business*." is correct. Logically, this must have applied to all six panels in 1928. The ease of disannexation, their highly decorative nature, their key role in enhancing the ambience of the premises as an oriental café being self-evident from an inspection of the panels, operate to manifest the

intention at the date of their installation, which was subsequent to the commencement of the term of the lease, that they were not intended to be annexed to the freehold reversion to such a degree as by accession to have become permanently and irrevocably incorporated into the freehold so as to preclude disannexation by the tenant at the end of the term.

322. It is evident from the authorities such as *Bain v Brand* at p. 772 that once such a chattel or tenant's fixture is attached in a manner whereby it can be removed without injury to the freehold reversionary interest or to the chattel itself, then it becomes part of the freehold but with a power vested in the tenant to sever it from the property and bring it back to the state of a chattel again and remove it as the personal property of the tenant. In other words, it does not become some form of permanent appendage irrevocably and absolutely integrated into the realty unless it is shown that it was assimilated into the reversion in such a manner that it cannot be extricated without the destruction of the thing itself or the freehold reversion. The decision in *Galway Concrete* strongly supports that analysis.

Windows

323. The trial judge's analysis at para. 175 amounts to an implicit finding by the trial judge that the Harry Clarke panels ceased to be "*part and parcel of the building*" between 1941 and 1946. Implicitly, his reasoning suggests that the "*ordinary embossed glass*" that replaced them became part and parcel of the building from 1941-1946. This amounts to an acceptance that the tenant had a legal entitlement to disannex the Harry Clarke panels in 1941 without reference to the landlord. This analysis demonstrates that the six Harry Clarke panels were never annexed to the building in the first place to the degree required to render them amalgamated into the landlord's freehold as the phrase "*part and parcel of the building*" necessarily imports. The trial judge offers no explanation as to why the tenant was entitled to disannex the panels from the freehold in 1941 but is precluded now from disannexing them and replace them with "*ordinary embossed glass*" of likely equivalent quality to the glazing installed by the landlord

in 1927. For argument's sake, had the term of the 1928 lease come to an end for any reason in, say, 1943, it is the embossed panels which were then in place.

324. The High Court's analysis is incorrect in law and contrary to established authority such as Lord Chelmsford's dictum at p. 772 in *Bain v Brand,* cited with approval in *Hobson v Gorringe* at p. 191/192 and by Clyde L.J. in *Elitestone Ltd v. Morris* at p. 695. Under the principle in *Bain v. Brand* the tenant enjoys a continuing entitlement in law to disannex and remove all six Harry Clarke ornamental artwork and insert other glasswork in their place.

325. The trial judge erred in relying on the decision in *Climie v. Wood* and failing to distinguish it. The High Court failed to take into account the clear statement of Willes J. in *Climie* who explained that the reasons for a tenant being allowed to remove trade fixtures were not applicable in that case to the owner of the fee. The fundamental distinguishability of *Climie* to cases concerning tenants is made clear in subsequent decisions such as the English Court of Appeal in *Hobson v. Gorringe* at p.190. The decision in *Climie* predated the decision of the House of Lords in *Bain v. Brand. Climie* and *Boswell* are of doubtful authority in this jurisdiction, at least insofar as extinguishment of the private property rights of tenants in their chattels and fixtures is concerned.

326. The clear decision of Keane J. in *Galway Concrete,* which regrettably appears not to have been brought to the attention of the trial judge supports the continuing right of the tenant to sever and remove all six panels.

327. Since the artwork panels were brought onto the premises by the tenant for the purposes of trade and were annexed as such to the property, as the trial judge correctly found in relation to Swan Yard, even if that annexation resulted in the Four Orders panels becoming part of the freehold, then in the words of Lord Chelmsford in *Bain v. Brand* (p.772) they continued to be subject to "…*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."* They can be replaced by plain glass panels of akin

to those in the Swan Yard window, which on the balance of probabilities is likely to have been the kind *in situ* in the sashes in 1928.

328. Given their true decorative and ornamental purpose, the landlord has not discharged the burden of proof that the Four Orders were ever truly annexed to the demised property to a degree or for a purpose which caused them to become irrevocably integrated into the building to such a degree as to lose their identity as severable, demountable and removable tenant's fixtures. It is neither necessary or proportionate to expropriate the Four Orders decorative artworks installed and paid for by the tenant for the purpose of rendering any ope wind and weather proof – a primary function the landlord failed to demonstrate they ever performed in any of the six opes in the first place.

329. The landlord did not establish an entitlement to get back more than was granted by the demise. The plain glass inserts at the Four Orders were disannexed in 1928 to make way for the artworks. The artworks were in turn disannexed for a period of about five years by the tenant in the 1940s. That disannexation was held to result in the panels ceasing to be part and parcel of the building. The reasoning of the trial judge suggests that in 1946 the six panels resumed once more being part and parcel of the building. There is no authority for such a proposition since their disannexation so found to have operated from 1941 - 1946 is wholly incompatible with their ever having become part and parcel of the building in the first place. They can be once more disannexed by the tenant and replaced with plain glass inserts – as undoubtedly occurred in the past.

Error of trial judge in considering capacity of Four Orders panels to be *substituted* for original panels as evidence that panels were part of and parcel of the building

330. Of the Four Orders works, the judge considered whether *"... anything occurred in the years since 1928 which affects the status of the stained-glass works".* At para. 168 he observes of the Four Orders; "*They were installed in the café premises not as additions to the original*

structure but in substitution for what had previously been an inherent element of the fabric of the building – namely the windows in the western wall. On that basis, it seems to me that they must be treated in the same way as the windows they replaced."

331. With regard to the removal of the Four Orders works, for instance during 1941-1946, and their replacement with panels of embossed glass, the trial judge ignores the inexorable logos of his own analysis which is grounded on the novel concept of substitutability rather than annexation by integration. He is partly led into error in this regard by reliance on an *obiter* remark in the decision in *Boswell* – a judgment ever after misunderstood as having a relevance to fixtures when it has none but concerns repairing covenants, a judgment incorrectly characterised in *Woodfall* - as the members of the English Court of Appeal sought (in vain it would appear) to correct in *Holiday Fellowship.* Romer J in *Holiday Fellowship* made clear that the words in *Boswell "were not intended to be of general application."*

332. The trial judge does not confront the inevitable import of his reasoning – that from 1941 the embossed panels had become "*part and parcel of the building*". Inexplicably, he concluded *"I do not believe that those events affected the status of the Four Orders works"*, observing: *"once the Four Orders works were reinstated, they formed part and parcel of the café premises in substitution for the windows that were put in place during the period of their absence."* (para. 175) (emphasis added) I am satisfied that this latter analysis in factually correct in relation to actual substitution, (*viz.* the embossed glass panels were substituted for the Four Orders panels in 1941. The Four Orders, in turn, were substituted for the embossed glass panels in 1946). I am satisfied that the inherent substitutability of the Four Orders panels is wholly incompatible with a conclusion that they ever were annexed to such a degree of irrevocable integration into the freehold that they became part and parcel of the landlord's freehold title to the building. Their very substitutability demonstrates their fundamental characteristic as severable, replaceable and removeable.

333. The tenant never suggested it had an intention to commit waste upon the property. The trial judge erred in, apparently, implicitly assuming that the tenant contemplated leaving the Four Orders sashes vacant. The trial judge erred in concluding at para. 169 that:

> *"In the absence of a clause to the contrary in the lease or contract of tenancy or the consent of the landlord, a tenant has no right to remove a part of the leased premises even where it is possible to replace it*."

On the trial judge's analysis this is precisely what occurred in 1941. Further Clause 3.36.1 (b) of the 1987 Lease, in total contrast with the terms of the 1928 Lease, expressly confers on the tenant the right to remove tenant's fixtures. As stated above, the 1987 lease makes distinct references to both "plate-glass" and "stained glass" (Cl. 3.18.3). The former therefore does not encompass the latter.

334. Integration connotes permanent amalgamation/incorporation into the freehold. It is to be objectively assessed whether this has occurred. Removal of the panels by the tenant, in one instance for years, without any structural or material impact of any kind to the demised premises (or the panels) is incompatible with permanent annexation in the true sense of that concept in the law of fixtures. The Swan Yard panels were found by the High Court (para. 188) to be ornamental and decorative and installed by the tenant;

> "*as ornamentation in relation to the tenant's occupation of the building and for the purposes of the café trade operated by it."*

Their capacity to revert by severance to chattels is already demonstrated. The Swan Yard works have been severed from the freehold for decades and relocated internally. The landlord has actively acquiesced in that state of affairs. Like conclusions apply in relation to the Four Orders panels. Panels of "*ordinary embossed glass"* replaced all six panels without demur in the past.

Judge erred in his treatment of the evidence of Mr. Ebbs

335. The witness statement of Mr. Larry Ebbs dated 31 January 2022 was admitted into evidence by the landlord unchallenged. The legal consequences flowing from that fact evidentially are very clear. The landlord's agreement to admit his statement of intended evidence turned it into an admitted statement of actual evidence. This entirely obviated the necessity to call Mr. Ebbs as a witness as held by Clarke J. in *Moorview Developments v. First Active plc.* [2009] IEHC 214.

336. Mr. Ebbs provided an ongoing specialist service in respect of the maintenance and repair of the stained glass panels for over 50 years, firstly as an employee of Irish Stained Glass from 1972 – 1998 and thereafter through his own firm A.P.L. Stained Glass. He provided first-hand evidence of the condition and treatment of panels over that half century. His evidence, as noted at paras. 88, 105/106, 147/148/149 of the judgment, included that the panels "…*have never been exposed to the weather or let in natural light. There was always something behind all six stained glass panels protecting them from the elements. They were always boxed in either with blockwork or some other panelling, and backlit. I do not recall ever having been able to see through them to the exterior.*" He also described how the panels could be readily removed from the frames; each individual panel being "… *housed in wooden sub-frames. Those sub-frames are attached to a larger wooden frame by screwed in bottom mounted hinges…Removing the stained glass panels is a straightforward job. It is simply a matter of unscrewing the hinges that connect the sub-frame to the larger frame. While great care is taken in this process because the artworks are delicate, the removal of the stained glass causes no damage to the larger frame, or to the building itself and all that is required is a screwdriver."* His expert assessment concerning all six panels after inspecting the back faces or external facing sides of them was *"[t]hey are in very good condition. I have forty years of experience of working with stained*

glass. In my opinion the condition of the stained glass panels is inconsistent with them having been exposed to the elements. There are no visible signs of weathering on the panels."

337. I am of the view, for the reasons stated hereafter, that his evidence was of critical importance, was never directly contradicted by the landlord who had admitted the statement and was accorded insufficient weight by the trial judge - particularly in relation the absence of weathering to the Four Orders panels.

338. There was no evidence adduced by the landlord as to precisely how the Four Orders ever became part of the external skin of the café. All of the witnesses called who had inspected the windows were in a position to confirm that the Four Orders were shielded on the external side at all material times from an unknown date prior to 1972. The landlord failed to demonstrate that that state of affairs had not, on the balance of probabilities, obtained in 1928. In light of the limitations identified by the trial judge with regard to Mr. Slattery's evidence, he was not in a position to satisfy the court on balance, based on any direct inspection of the external parts of the Four Orders that they had ever been exposed directly to the elements without any shielding from the date of their installation in 1928 or to contradict Mr. Ebbs' clear evidence.

339. The landlord is critical of the evidence of Mr. O'Connell, particularly in regard to the 1998 video. However, as the trial judge clearly stated, Mr. O'Connell freely admitted his error. This stance overlooks that the landlord's own witness, Ms. Costigan, whose evidence was in some respects, and no doubt inadvertently, was found to be erroneous. The assertion of the landlord in regard to her errors applies equally to the errors of both experts: *"An independent expert should be commended"* for acknowledging an error, *"... if anything, the ability of an independent expert to do so adds additional weight to he or she says, as it has the benefit of being a truly independent viewpoint."* (para. 25 of the landlord's submissions)

340. Insofar as it is contended by the landlord that the exterior side of the Harry Clarke windows *"had been designed and constructed in a manner to provide a weathering function"*,

there was no evidence whatsoever that at the time of the original commission that any such requirement was specified in 1928.

341. The minute of 9 March 1928 is sufficient evidence to ground a finding that on the balance on probability that the tenant had a legal liability to pay for all six panels - not just the Swan Yard works. Accordingly, even if the payment had never been effected, the obligation to do so was acknowledged in the board Minute which the landlord's own personal solicitor attended and accordingly it was a matter for the landlord as to whether in due course he elected to recover the monies from the tenant or not.

Potential impact of 1987 Transactions on Four Orders works

342. With regard to the Four Orders works, the judge concluded *"it would not have been necessary to expressly include those works in the contract for sale. As part and parcel of the premises, they would be included in any sale of the premises unless they were expressly or impliedly excluded."* That analysis is not correct, since the Four Orders works were capable of being disannexed and re-converted or brought back from being part of the freehold to become once more tenant's fixtures and chattels, as the law clearly provides in *Bain v Brand, Hobson v. Gorringe, Elitestone* and so forth, the same principles apply equally to them as to the Swan Yard works. That is what occurred in 1941. The tenant elected in 1946 to re-install them into the opes in replacement for embossed glass.

343. The Harry Clarke stained glass panels are not mere windows. Their primary nature is as artworks of exceptional artistic merit and beauty capable of being housed in sashes and appended to an extant frame - paid for at the tenant's expense to advance the tenant's trade. Merely because the Four Orders were installed for lengthy periods of time in the opes is no reason to construe the law on tenant's fixtures in an expropriative manner so that they should now, contrary to long authority, constitutional and equitable principles to be deemed to fall like ripened fruit into the landlord's outstretched hand.

Conclusion on Finding that Four Orders are Windows

344. The trial judge erred in finding that the Four Orders were windows which were not removable by the tenant notwithstanding that they were originally tenant's fixtures.

i. The landlord provided no evidence that the external of the Four Orders were ever exposed to the elements.

ii. The trial judge failed to give sufficient weight to the uncontradicted statement of Mr. Ebbs where at para. 6 where he confirms that the condition of the back faces of the panels was "…*inconsistent with them having been exposed to the elements*."

iii. *Holland v. Hodgson* is authority for the proposition that the onus of proof lies "*on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land* ".

iv. The landlord offered no evidence sufficient to contradict Mr. Ebbs' evidence that the external side of the panels had not been exposed to weather/the elements.

v. The trial judge's conclusion is fundamentally incompatible with his correct finding that that the Four Orders ceased to be *"part and parcel of the building"* in 1941.

vi. The trial judge attached undue weight to the 1946 arrangement drawing. It was not a reliable indicator of the external aspect of the windows or the Four Orders panels in 1946.

vii. Deeming the Four Orders panels to be windows overlooks that their ambience was maximised by access to light to illuminate the decorative impact of stained glass.

viii. The 1998 video and the admitted statement of Mr. Ebbs illustrate the ease with which these sashes with stained glass *in situ* can be removed.

ix. Strictly speaking, the tenant's pleaded counterclaim is in respect of the stained glass artworks rather than the sashes.

x. It is clear that the tenant can readily swap out or replaced the plain glass panels in the sashes with the decorative panels.

xi. The decision in *Climie* is entirely distinguishable as it concerns mortgages and should be narrowly construed. It predated and is superseded by the decision in *Bain v. Brand.*

xii. The absence of the panels from the building from 1941-1946 wholly undermines the landlord's assertion that the panels are "*essential to its convenient use*" (*Climie*).

xiii. The landlord failed to prove that the artwork panels within Four Orders ever operated in a manner so as to be "*essential to the convenient use*" of the landlord's reversion.

xiv. The decision in *Boswell* is irrelevant and distinguishable as concerning only the proper construction of a repairing covenant and does not assist the landlord.

xv. The landlord's claim is to be construed in the light of s. 2(1) of the European Convention on Human Rights Act, 2003 in a manner compatible with Article 1 of the First Protocol to the said Convention.

xvi. The stained-glass elements in the Four Orders works - even if found or presumed to have comprised elements in a window at some stage in the past - are governed by the *Bain v Brand* line of authorities as being subject to the right of the tenant to sever and remove same from the freehold at the end of the term.

xvii. The landlord has not demonstrated that there was such a degree of affinity between the panels and the freehold such that they were annexed for a purpose primarily in connection with the realty.

xviii. It is relevant that the removal of the panels will not expose the premises to the elements. The tenant can install replacement glass panels or sashes, as was done

in the past including 1941-1946, 1987 and in the 1990s and at other times, similar to those in place at the commencement of the term.

xix. The finding of fact that all six Harry Clarke panels, and in particular the Four Orders, were removed from the property from 1941-1946, together with his finding that during that time they effectively ceased to be part of the property is incompatible with his ultimate conclusion that they are part of the property because that conclusion is inconsistent with the prerequisite that to become part and parcel of the freehold the annexation in the first instance must be "*in so permanent a manner as to form a part of the land"* in the language of Willes J. in *Climie*.

xx. The trial judge conflated the Four Orders panel inserts with the windows. He erroneously conflated the Four Orders inserts with the fabric of the building itself. A window is not necessarily in all cases part of the fabric of a building as Holiday Fellowship makes clear. There is no authority in this jurisdiction for such a proposition and the academic Peter Luther appears to suggest it derives from a novel or erroneous statement in *Woodfall.*

xxi. Given the expropriative impact deemed by the High Court attributable to a fixture which is capable of becoming an element in a window, the concept of a "window" should be strictly construed and not extended to elements such as the Four Orders panels - which are readily removeable and replaceable.

The presumptive bestowal of the artworks on the landlord is contrary to *Bain v Brand* and contrary to public policy. The trial judge erred in failing to follow the principles enunciated by Keane J. in *Re Galway Concrete Limited* as to the tenant's continuing right to sever and remove the Four Orders.

345. There was evidence to establish on the balance of probabilities that the Four Orders were not so integrated into the building that they had ceased to be capable of being disannexed

without injury either to the building or the artworks themselves. As such therefore, even if it be the case that at some point, they had ever become part of the building, they were nevertheless capable of reverting to their original nature as tenant's fixtures by being disannexed and once more becoming tenant's fixtures. That is so for the following reasons:

(a) The landlord's expert Mr. Slattery conceded that there were windows in place in all six opes at the date the company commenced a trade on 27th November 1927.

(b) The tenant's contention that *"the evidence that the café opened before the Works were installed is prima facie evidence that something else was in place from late 1927 to March 1928."* (para. 50 of submissions) was acknowledged by Mr. Slattery to be correct.

(c) The Harry Clarke artworks could never have been *in situ* in 1927 since none of the six artwork panels pieces then existed.

(d) The tenant proved on the balance of probabilities, by the admitted statement of Mr. Ebbs, that "*the condition of the stained glass panels is inconsistent with them having been exposed to the elements. There are no visible signs of weathering on the panels*." His conclusion was drawn from his having carried out an inspection of the panels. This statement was admitted into evidence by agreement.

(e) The statement of Mr. Ebbs is material on a number of fronts. Firstly, he was an expert on the care and maintenance of stained glass whose statement was admitted into evidence. His maintenance of the panels stretched from 1972 onward and was continuing and thus extended to about half a century's duration. His assessment was not made on a cursory basis. He confirmed that he had never seen the Four Orders (nor the Swan Yard works) exposed to the elements. He confirmed that the external sides showed no evidence of exposure to the elements. The landlord chose not to contradict the accuracy of his statement in any respect but rather admitted it and

must be fixed with the evidential consequences which follow. The trial judge offered no explanation for why he did not accept the clear assertions in the agreed statement of Mr. Ebbs, particularly paras. 4 and 6, and thereby erred in his conclusions at para. 147. It defeats the purpose of having agreed witness statements admitted into evidence by consent in commercial cases if same are not accorded appropriate evidential weight at trial.

(f) The trial judge erred in failing to attach any or sufficient weight to the combined effect of the evidence of Mr. Ebbs that the external parts of the Four Orders showed no evidence of exposure to the elements when taken together with the uncontested evidence of boxing or shielding of the exterior for over 50 years.

(g) No probative evidence was adduced by the landlord to establish that the external sides of the Four Orders works were ever directly exposed to the elements such as could render them part of the skin of the building from the date of their installation in 1928 to date.

(h) Even if the proposition at (e) were proven, it is not dispositive of the issue as a matter of law in light of the principle in *Bain v. Brand*.

(i) The direct evidence available to the court demonstrated that no witness had ever recalled seeing the Four Orders without an external weather shield layer in place. There was evidence of extant blockwork in place in 1986.

(j) This view was supported by Mr. Horan for the period from 1987 onwards.

(k) It is relevant that there was no evidence adduced that anyone had ever observed the Four Orders works without a protective outer screen of some kind.

(l) Reliance on the arrangement drawing of 1946 for any material purpose and in particular to suggest that the Four Orders works were directly exposed to the elements or formed part of the exterior of the building in 1946 was misplaced. This

is an arrangement drawing on a scale of 96:1 and, as such, contrary to the assumptions of the trial judge at para. 177, it is not reliable as evidence that in 1946 there was no external boxing or panelling which shielded the said works from the elements. In any event the arrangement drawing was drafted in June 1946 and there was no direct evidence as to whether the Four Orders by that date had been substituted for the embossed glass panels which were *in situ* 1941-1946 or not Accordingly, it could not support the judge's conclusion at para. 147.

(m) The trial judge erred in affording undue evidential value to the 1946 "arrangement drawings" of the opes on the western wall, such as at para.177.

(n) *"Mr. Slattery's evidence was that the outer side of the frames of the Four Orders works had been painted and carved in a manner that suggested that they were intended to act as part of the exterior of the premises."* The trial judge erred in attaching any weight to this remark which at its height was highly tentative "*suggested that they were intended*". (emphasis added) It pertains to the frames and not to the artwork. "*Suggested*" in this context does not establish any probative fact. Mr. Slattery never inspected the exteriors (or interiors) in the manner in which Mr. Ebbs did. He relied on a video created a quarter of a century before.

(o) Mr. Slattery never carried out an inspection of the kind which is a prerequisite to his giving evidence as an architectural expert (para. 141). The trial judge erred in accepting his views on alleged weathering of the panels based on a 1998 video over the diametrically opposite evidence of Mr. Ebbs in his admitted statement on a matter of such critical importance.

(p) The trial judge erred in effectively treating the evidence of Mr. Slattery as conclusive on the issue rather than merely tentative and suggestive references over

the clear evidence of the agreed witness statement of Mr. Ebbs which he appears to have overlooked, particularly para. 6, in that regard.

(q) The trial judge attached excessive weight to the evidence of Mr. Slattery and failed to attach sufficient weight to the fact that Mr. Slattery had freely "…*conceded that the signs of weathering could have been caused by other factors*".

(r) The judge's supposition that any such outer layer at the Four Orders must have been removed is not supported by any evidence and runs counter to the *status quo* as proved to have subsisted for over 50 years in relation to the Four Orders as it did from 1928 in relation to Swan Yard.

(s) That the Swan Yard works were housed behind plain glass windows from 1928 tends to suggest that the tenant was predisposed throughout the term to protect the panels from the weather/elements. The only hard evidence of what is likely to have occurred in 1928 in protecting the exterior of the Four Orders is to be found in the physical treatment of the one surviving Swan Yard window. On the balance of probabilities, it tends towards a conclusion that some arrangement to protect each panel from the harm of weathering occurred across the entire six panels. In Swan Yard that is as per the existing window. In the case of the Four Orders, on the balance of probabilities, it is likely per 1972 to have been a screening of blockwork as described by Mr. Ebbs.

(t) The combined evidence of a protective window in front of the Swan Yard works continuously from 1928, together with the evidence of Mr. Ebbs of a protective shield external to the Four Orders, in the absence of any evidence to the contrary, coupled with the evidence of Mr. Ebbs that their state is inconsistent with them having ever been exposed to the elements, is sufficient to establish on the balance

of probabilities that they never were exposed to the elements from the time of their installation.

(u) The trial judge erred insofar as he appeared to implicitly consider that the mere fact that the Four Orders works were capable of weathering the building proved that they actually had ever performed that function after installation. There was no evidence that they ever had performed such a function and Mr. Ebbs' evidence (para. 6) was that they had not.

(v) The judge erred in failing to apply the *Bain v Brand* principle and relevant jurisprudence to the issue of severability of the Four Orders.

346. This Court is in as good a position as the trial judge in regard to drawing inferences from circumstantial evidence, as the jurisprudence such as *Emerald Isle Assurances v. Dorgan* [2016] IECA 12 (Ryan P., Irvine and Hogan JJ. concurring) at para. 31 makes clear. I am satisfied that when the above key factors are considered in combination:

(i) The admitted statement of Mr. Ebbs based on his recent direct inspection of the panels and of the condition of the external-facing sides of the said panels that "*the condition of the stained glass panels was inconsistent with them having been exposed to the elements"*.

(ii) The fact that the landlord's own expert never even bothered to inspect the external-facing sides of the Four Orders panels.

(iii) The fact that the uncontradicted evidence before the High Court was that as of 1972 there were established screens *in situ* external to the Four Orders works "*protecting them from the elements*".

(iv) The clear evidence of treatment of the Swan Yard works by the tenant from 1928 onwards as having always had external protection in front of them, in that case in the form of clear glass windows, combined with the inherent likelihood that the

tenant would have endeavoured to equally protect the Four Orders panels from the elements in the manner as the site best allowed.

(v) Even if the Four Orders had been exposed to the elements/weather, and no evidence suggested that they had been, the principle in *Bain v. Brand* entitled the tenant to sever and remove the Four Orders panels unless it would cause injury to the freehold and/or the panels themselves, a fact overlooked by the trial judge.

347. Those factors are to be balanced against the fact that there was no direct evidence based on an actual physical examination of the Four Orders panels put before the High Court for a contrary view or suggesting that they were, from the time of their installation, ever directly exposed to the elements. The trial judge erred insofar as he concluded that the tenant had not proven that the condition of the Four Orders panels was inconsistent with them having been exposed to the elements. Mr. Ebbs' statement at para. 6 satisfies that requirement on the balance of probabilities. The judge's conclusion is erroneous and was based on initial views of the landlord's expert reliant on a 24 year old video. His conclusion disregarded entirely the fact that Mr. Slattery substantially resiled from his position under cross-examination when he conceded that the video may have shown deterioration arising from non-weathering factors such as steam and smoke from inside the café;

> *"…the weathering that has occurred in the windows may have occurred for different reasons. I don't know that you can be certain why it was caused… I suppose we don't know for sure."*

348. The trial judge erred in according insufficient weight to Mr. Slattery's concessions in cross-examination that the "*weathering*" he observed in the 1998 video might equally have been caused by steam and smoke from the café itself. The trial judge erred in concluding that there was evidence before the court which entitled him to conclude that the external side of the

Four Orders panels had been subject to weathering damage from the elements/weather ever actually performed a weathering function.

349. Mr. Slattery, the landlord's key expert witness, had not even carried out any basic or proper investigation either to the interior or the exterior of the building as became evident during the course of his testimony. It was suboptimal of Mr. Slattery who presented as an expert to have furnished a report, which as the report of an expert implied that the assertions therein contained were based on known or provable facts, not to have carried out a comprehensive inspection prior to furnishing the report as an expert report to be relied on at trial. Essential deficits in Mr. Slattery's methodology only became evident in the course of the trial and under cross- examination as is noteworthy in the transcripts particularly, *inter alia,* from paras. 131 and 132 and 139 of the judgment. No probative weight can be attached to his observations regarding weathering of the Four Orders.

350. The cumulative evidential impact of the various elements of the evidence was, on the balance of probabilities, consistent with the Four Orders having been maintained with some external shielding continuously in place in front of them as of 1972 and with no evidence of weathering of the external-facing sides referable to the elements as would be the case had they ever performed a weathering function on the western wall of the premises. The trial judge attached insufficient weight to the sundry inferences reasonably to be drawn from various elements of circumstantial evidence, only some of which are instanced above, which pointed in the opposite direction to his conclusion. The trial judge erred, in particular, in attaching no or insufficient weight to Mr. Ebbs' clear statement which was based on direct contact with the panels for over 50 years and his recent inspection specifically directed towards the issue of weathering of the back sides of the panels which found none. His conclusions in relation to the Four Orders panels was contrary to the evidence and the weight of the evidence and the cross-appeal is made out in that regard. (in particular Grounds 7(d), (e), (h) and (i)).

351. In my view, the trial judge attached insufficient weight to the undisputed evidence before him that the Four Orders panels never reached the degree of integration and did not constitute an essential element of the window structure and could and were on several occasions removed for periods of time throughout the years without permission or objection from the landlord including 1941-1946, 1987 and 1998. Had the term of the 1928 Lease expired while the embossed glass panels were *in situ* perforce they would be constituted part and parcel of the building on the trial judge's logic. It could hardly be argued and was not explicitly contended by the landlord that the absent panels were from 1941-1946 "part of the skin of the building" whilst they reposed in the suburbs. Such reasoning is gratuitously expropriative and incompatible with the concepts of complete incorporation by amalgamation which is inherent in a tenant's chattel becoming irrevocably annexed to the freehold.

352. There was no logical reason identified as to why, subsequent to the commencement of trading and contrary to the agreement memorialised in the company board minutes on the day the lease was executed of 9th May 1928, the landlord, the self-acknowledged agent of the company, would see fit to gratuitously pay for artwork for the tenant. The relationship between the parties was commercial in nature, as the rental calculations illustrate, and the proposition that such occurred is contrary to business common sense.

353. Hence to the extent that the trial judge, by necessary inference, concluded that the Four Orders panels did not constitute tenant's fixtures, he fell into error. Insofar as he failed to expressly determine that they started life in 1928 as chattels or tenant's fixtures in the beneficial ownership of the tenant for payment of which it had assumed liability, he likewise erred. By failing to properly analyse their true original nature as tenant's fixtures, the trial judge conditioned his reasoning to predispose towards an outcome which was unduly expropriative of the tenant's property rights having due regard to public policy, the protections afforded to private property rights and the law of tenant's fixtures. In particular, the trial judge failed to

have due regard to the fact that historically, the jurisprudence from 1701 increasingly favours the tenant having an entitlement to remove fixtures save in exceptional circumstances even where things have become part and parcel of a building, provided they are removable without injury to the building or the thing itself. Such jurisprudence accords with the rights to private property.

Four Orders were never part of the original structure of the building and are severable

354. The trial judge attached undue weight to the decision in *Boswell v Crucible Steel*. Further he erred insofar as he disregarded a key principle acknowledged in *Boswell* that they never formed part of the original structure itself.

355. In light of the direction of travel of public policy and the jurisprudence since 1701 favouring expansion of the rights of tenants to remove their property and fixtures at the end of the term, the trial judge erred in his application of same and in his construction that the Four Orders were part of the skin of the building. He erred in rejecting the clear statement in *Boswell* insofar as it indicated that for plate glass to become "*part and parcel*" of a building, it was incumbent on the landlord to establish that it formed part of the "*original structure*" of the premises. Having referenced the judgments of Scrutton and Atkin L.JJ. in *Boswell,* the trial judge had observed: *"I do not believe that it would be correct to suggest that an item incorporated in a building after its completion can never be considered to be part and parcel of the building."* (para. 21) The approach adopted is contrary to authority including the clear dictum of Keane J. in *Galway Concrete.*

356. Respectfully, the example offered by the trial judge suggesting that the result in *Boswell* would not have been *"any different if the original plate glass installed as part of the original construction of the building had been destroyed in a gas explosion sometime after its construction and had to be replaced"*, overlooks the fundamental fact that the plate glass in question in *Boswell* constituted a structural wall of the building. *Boswell* concerned a dispute

about the construction of a repairing covenant and who was liable for the repairs in question. The outcome depended on the construction of the repairing covenant.

Overall conclusions

357. The landlord failed to adduce any probative evidence to establish on the balance of probabilities that the intention of the parties in 1928 was otherwise than that the costs of the artwork was for the account of the tenant and that same was installed in respect of ornamentation of the demised premises in connection with the tenant's business as an oriental-style café which had commenced trading in late 1927.

358. All the evidence pointed towards a conclusion that the tenant was either obligated to reimburse the landlord for all costs incurred by him in the purchase of same, as evidenced by the Minute of 9 March 1928, or alternatively that the tenant on the balance of probabilities discharged the invoices in 1928.

359. The trial judge infers, in my view correctly, that there were six opes fitted with plain glass panels in 1927. Thus, the demised property did not comprise the panels. The landlord has not established that it is the beneficial owner of the panels. The Minute of 9 March 1928 points in the opposite direction. So do the receipts/invoices paid in June and September 1928 – neither of which are addressed to the landlord.

360. Thus, it is clear that for centuries the common law has favoured a more relaxed approach to the removal of fixtures by a tenant provided the premises the subject of a demise can be left in as good a state as at the commencement of the tenancy. Insofar as the trial judge disregarded consideration of this factor as well as the ease of removal of the panels and the general absence of risk of damage to them by removal in arriving at his overall conclusions, he fell into error. To the extent that the trial judge suggested otherwise in regard to the significance of the fact that the panels can be easily removed without any real "disturbance" to the freehold, in my view he fell into material error.

361. All material factors in the instant case point towards the stained glass having commenced life as chattels commissioned by the landlord as acknowledged agent for the tenant and thereafter having become the tenant's fixtures. Thereafter they were annexed in the year following the commencement of trading to a limited extent as trade fixtures for the purposes of carrying on the business of a café. The evidence including the 1998 video makes clear that the sashes with the stained glass inserts *in situ* can be removed readily without injury to the landlord's freehold reversion and without destruction of harm to the panels themselves.

362. That they are not integrated into the building and their continuing capacity for de-annexation is evidenced by the several occasions when they were removed during the past century including for an appreciable duration of up to five years (1941-1946) on one occasion – without injury to the freehold or the artworks themselves. This raises an inference which has not been rebutted that the tenant retained the right to sever and de-annex all six panels and that they continue to be removable by the tenant at the termination of the term.

The panels were chattels

363. Neither the Four Orders nor the Swan Yard works existed when the café commenced to trade in November 1927. Thus, they never comprised part of the original fabric of the premises. The burden of proof rested with the landlord to demonstrate on the balance of probabilities either that they were part of the original building or that they were original landlord's fixtures. Since, in my view, the material evidence as to the legal liability for payment as analysed by the trial judge (paras. 68, 75 and 192) in concluding that the Swan Yard works were tenant's fixtures applied equally to the Four Orders works, *prima facie* all six panels constituted tenant's chattels at the point of initial delivery. The burden of proof rested with the landlord to show when and how precisely they came to be integrated by a process of integration/amalgamation into the building so as to be irreversibly constituted part and parcel of its the fabric such that the title to them irrevocably passed from the tenant to the landlord with no possibility of

disannexation at the end of the term. The judgment does not appear to engage with the extensive powers of severance and removal vested in a tenant who annexes a fixture to the freehold for the purposes of trade. Neither was weight given to the fact that there was no evidence that removal of the artwork panels *per se* and replacement with other glass panels would cause damage to the building or the panels themselves.

364. A distinguishing factor in the instant case is that, unlike windowpanes in general, the panels have been removed by the tenant from the windows for different and appreciable periods of time over the past 95 years or so. It is noteworthy that from about January 1941 to 1946, a period of 5 years, they were removed and stored off site. During that time, they were replaced by "*ordinary embossed glass*". There was no evidence that landlord's consent was sought or granted for this.

365. In the alternative, if by reason of their installation into a window ope the Four Orders artwork panels are to be deemed to have thereby become part and parcel of the building, nevertheless, the tenant has an entitlement at law as the party who erected them for the purpose of its trade to de-annex them once more and bring them back to the state of chattels or tenant's fixtures again by severing them from the property removing them prior to the determination of the term so long as their removal will not cause substantial damage to the landlord's reversion.

366. Regard must be had their hybrid attributes, both as highly decorative and ornamental elements which are in addition, tenant's fixtures installed and annexed to the demised premises by the tenant in furtherance of its trade as an oriental style café. There was no relevant evidence adduced by the landlord that any substantial injury will be done to the reversionary interest or the artworks themselves by their removal by the tenant and replacement with plain glass sashes into the landlord's four window frames, as permitted by the long and well established exception to the general rule acknowledged in the jurisprudence such as *Bain v Brand*, as cited in *Hobson v Gorringe*.

367. Even if the Four Orders panels ever became "*part and parcel of the building*" when the sashes housing them were inserted into the window frames, the tenant still at law has the continuing right in law to remove them by severance at any time prior to the end of the term under the principle in *Bain v. Brand*. Thereupon they revert once more to their original nature and are removable. This approach is well settled at common law as the authorities above demonstrate. It also accords with legal, equitable, constitutional and ECHR norms and the decision of Keane J. in *Galway Concrete*.

Summary

368. Respectfully, for all the above reasoning, I am unable to agree with the judgment of Costello J. and would dismiss the appellant's appeal on all grounds and allow the respondents' cross-appeal. In consequence, I would affirm the order of the High Court insofar as it declared that the Swan Yard works are tenant's fixtures of which the second-named respondent/cross-appellant is the owner. I would allow the cross-appeal of the respondent tenant. The High Court order declaring that the Four Orders works are part and parcel of the premises ought to be set aside. The respondents/cross-appellants are entitled to a declaration that the Four Orders were tenant's fixtures of which the second-named respondent is now the beneficial owner. The partial set-aside order in respect of the Transfer instrument dated 20 December 2020 ought to be set aside.