Case No: HC-2015-001297

Neutral Citation Number: [2015] EWHC 2556 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 September 2015

Before :

THE HON MR JUSTICE ARNOLD

- -

Between :

	THE CREATIVE FOUNDATION	**Claimant**
	- and -	
	(1) DREAMLAND LEISURE LIMITED **(2) JEREMY MICHAEL GODDEN** **(3) JORDAN HARRY GODDEN**	**Defendants**

- -
- -

John Machell QC and **Adam Rosenthal** (instructed by **Boodle Hatfield LLP**) for the **Claimant**
Romie Tager QC and **Simon McLoughlin** (instructed by **Brook Martin & Co**) for the **Defendants**

Hearing date: 30 July 2015

- -

Judgment**MR JUSTICE ARNOLD :**

Introduction

1. This is an application by the Claimant ("the Foundation") for summary judgment in respect of its claim against the First Defendant ("Dreamland"). The claim is for the delivery up of a section of wall bearing a mural painting known as "Art Buff" ("the Mural"). The Mural is attributed to the street artist known as Banksy. The Mural was removed by Dreamland from a building at 44-46 Rendezvous Street, Folkestone ("the Building"). Dreamland is the tenant of the Building. The Foundation brings the claim as the assignee of title to the Mural and of the cause of action of the landlord and freehold

owner of the Building, Stonefield Estates Ltd ("the Landlord").

2. I should explain before proceeding further that, when I refer to the Mural in this judgment, I am generally referring both to the physical object and to the artistic work fixed on it. For the avoidance of doubt, I am not concerned with the copyright in the artistic work, which *prima facie* belongs to Banksy.

The facts

3.There is no material dispute as to the basic facts, which lie within a narrow compass.

4. The Foundation is a company limited by guarantee and a registered charity based in Folkestone whose objects include contributing to the regeneration of Folkestone by promoting creativity and the arts. By an assignment dated 19 March 2015, the Foundation acquired the Landlord's title to the Mural and its cause of action against the Defendants. If the Foundation succeeds in this claim, it intends to put the Mural on public display in Folkestone.

5. Dreamland is the tenant of the Building under a lease dated 23 January 2003 ("the Lease"), by which the Landlord demised the Building to Dreamland for a term of 20 years from 24 June 2002. It is common ground that the demise included the structure and exterior of the Building. Dreamland carries on the business of an amusement arcade at the Building.

6. The shares in Dreamland are owned by the Executors of the late James Godden. The Second and Third Defendants are James Godden's sons. The Second Defendant is the sole director of Dreamland. James Godden's widow Rochelle Godden has given evidence on behalf of the Defendants.

7. Before the events which gave rise to this dispute, the external flank wall of the Building had attracted graffiti on at least one occasion. A graffito is visible in a photograph dated May 2014. Subsequently, possibly on the same occasion as the Mural was painted, this graffito was painted over or "buffed out".

8. The Mural was spray-painted on the external flank wall of the Building on or around 28 September 2014 during the Folkestone Triennial, a three-yearly public art project organised by the Foundation in Folkestone. It was attributed to Banksy, a famous but pseudonymous street artist whose real identity is unknown. The artist painted the Mural without the prior knowledge or consent of either the Landlord or Dreamland. The image incorporates an area of paint which appears to match the paint used to "buff out" the earlier graffito.

9. The Mural attracted a good deal of local and national press attention. According to press reports at the time, the Mural was valued at around £300,000. Subsequently, an even higher valuation of up to £470,000 was suggested. There is no evidence as to the accuracy of these valuations, however.

10. Shortly after it appeared, Shepway District Council placed a sheet of Perspex over the Mural to protect it. It is not clear what authority the Council had to take this action. It proved to be a wise precaution, however, as the Mural rapidly attracted attention from graffiti artists. Graffiti were painted both on the wall alongside the Mural and on the Perspex. The latter were cleaned off.

11. Between 31 October and 3 November 2014 Dreamland caused a section of the wall of the Building on which the Mural had been painted to be severed from the Building and removed, and thereafter for the wall to be made good. This was done without the knowledge or permission of the Landlord. Mrs Godden's evidence is that it was done on the advice of Robin Barton. Mr Barton runs a gallery known as the Bankrobber Gallery, which Mrs Godden says "specialises in the preservation, restoration and marketing of street art created by … Banksy".

12. Mr Barton has an association with Stephan Keszler, who runs the Keszler Gallery in New York, USA. After the Mural had been removed from the Building, Mr Barton arranged for its shipment to the Keszler Gallery on behalf of Dreamland. It was exhibited for sale for a short period at the Art Basel Miami art fair in early December 2014, but no buyer was found. Thereafter the Mural remained in the custody of the Keszler Gallery in New York until it was placed into the custody of an independent storage facility in New York pursuant to an agreed order made by this Court.

13. Mrs Godden's evidence is that the Defendant intended that the net proceeds of sale of the Mural would be donated by Dreamland to the Jim Godden Memorial Trust in order to fund that trust's day-care centre for terminally ill patients known as The Pilgrim Centre in Folkestone.

14. Since the wall of the Building was made good, it has continued to attract graffiti.

Relevant provisions of the Lease

15. Clause 2 of the Lease includes the following sub-clauses containing covenants by the Lessee (the tenant i.e. Dreamland):

> "(b) To keep the whole of the demised premises including all glass of the windows locks latches and fasteners all boundary fences (if any) and all fixtures and additions thereto in good and substantial

repair and condition.

(d) In every fourth and in the last year of the Term howsoever determined to paint all the outside wood iron and other work now or usually painted with two coats of good quality paint and in a proper and workmanlike manner. And with every outside painting to restore and make good all external rendering wherever necessary.

(h) Not without the consent in writing of the Lessor to cut maim or injure any of the walls or timbers of the demised premises or make any alteration in or addition to the demised premises and not to erect or place on the demised premises or any part thereof any temporary erection or shed of any kind whatsoever and not to dig any sand gravel or earth thereout. And also not to impose or place or allow to be imposed or placed upon any of the floors or to suspend or allow to be suspended from the ceilings or roofs of the demised premises anything which may cause undue stress to the floors or timbers of the building

(p) At the expiration or other sooner determination of the Term peaceably to surrender and yield up to the Lessor the demised premises together with all buildings and erections now or hereafter to be built thereon and all landlords fixtures and all improvements to the demised premises in good and substantial repair and condition as aforesaid."

Summary of the Foundation's claim

16.Counsel for the Foundation summarised its claim as follows:

i) Freehold title to the demised premises is vested in the Landlord. The bricks and cement of the walls of the Building form part of the land.

ii) Upon being sprayed onto the Building, the paint used to create the Mural became part of the land.

iii) During the term of the Lease, Dreamland, as tenant, has a right to use the demised premises as a building in accordance with the terms of the Lease. A lease gives a tenant a qualified right to possession and a tenant has no right to use parts of demised premises, or fixtures, for other purposes.

iv) Dreamland had no right to cut the walls of the demised premises and to remove, and treat as its own, bricks and cement comprising part of the demised premises.

In doing so, Dreamland committed a breach of clause 2(h) of the Lease.

v) Upon being cut from the Demised Premises, the bricks and cement, together with the paint sprayed onto them, regained their character as chattels, and title to those chattels vested in the Landlord.

vi) In cutting the walls of the Demised Premises, removing the bricks and cement, shipping the Mural to the USA and putting it up for sale, Dreamland committed the torts of trespass and conversion.

vii) Ownership of the Mural was vested in the Foundation by the assignment.

viii) The Court has power, which it should exercise, to order the delivery up of the Mural to the Foundation pursuant to section 2 of the Torts (Interference with Goods) Act 1977.

Dreamland's defence to the claim

17. Dreamland's defence to the claim is contained in paragraphs 12 and 13 of the Defendants' Defence. It consists of two contentions:

i) Dreamland was obliged, or at least entitled, to remove the Mural from the Building in order to comply with the Lessee's covenants in clause 2(b) and/or 2(d) of the Lease (paragraph 12)

ii) Once removed from the Building in compliance with its covenants under the Lease, the Mural became the property of Dreamland rather than the Landlord by virtue of an implied term in the Lease (paragraph 13).

18. The Foundation says that the first contention has no real prospect of success and that, even if the first contention is established, the second contention is wrong as a matter of law.

Principles applicable to summary judgment applications

19. Lewison J (as he then was) summarised the principles which apply to an application for summary judgment under CPR 24 in a much-cited passage in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] which was approved by the Court of Appeal in *AC Ward & Sons v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24].

Paragraph 12 of the Defence

20. Clause 2(b) obliges the Lessee to keep the premises "in good and substantial repair and condition". Clause 2(d) imposes an absolute obligation on the Lessee to paint the exterior of the premises every four years, and to restore and make good all external rendering where necessary. Counsel for Dreamland did not in the end rely upon clause 2(d). Nevertheless, it is common ground that its presence in the Lease must be taken into account when construing clause 2(b).

21. It is also common ground that clause 2(h) must be interpreted consistently with clause 2(b). Accordingly, it is not a breach of clause 2(h) for the Lessee to cut the walls of the building to the extent that this is necessary in order to comply with the repairing obligation in clause 2(b).

22. So far as clause 2(b) is concerned, although counsel for Dreamland referred me to a considerable number of decided cases, there did not appear to be any real dispute between the parties as to the applicable principles.

23. First, an obligation to keep a building in good repair and condition is only engaged if that part of the building is out of repair or condition: *Post Office v Aquarius Properties Limited* (1987) 54 P & CR 61.

24. The Foundation contends that Dreamland has no real prospect of establishing that this was the case. Dreamland does not suggest that there was any damage to the structure of the wall itself, but only relies on the presence of the paint sprayed onto the wall by the artist. Counsel for the Foundation submitted that this did not amount to the wall being out of repair or condition for two reasons. First, because the addition of a (valuable) work of art to a wall did not adversely affect the repair or condition of the wall. Secondly, even if it did, because the obligation under paragraph 2(b) was qualified by the absolute obligation under paragraph 2(d), from which it was implicit that the Lessee was not obliged between four-yearly cycles to carry out painting merely for decorative or aesthetic reasons: see *Irvine v Moran* [1991] 1 EGLR 261. (It is perhaps worth making it clear that counsel for the Foundation did not argue that clause 2(b) was not engaged because destruction of the artistic work would be an infringement of Banksy's moral rights, and in particular his integrity right, in it.)

25. Counsel for Dreamland emphasised that this was an application for summary judgment, and therefore Dreamland only had to establish a real prospect of success. He argued that the Mural was a graffito, and needed to be dealt with as such. He also argued that it needed to be dealt with because it was predictable that it would attract other graffiti. I am narrowly persuaded that these arguments have a real, as opposed to a fanciful, prospect of success.

26. Secondly, if the covenant is engaged, the question of what it required to be done is to be objectively assessed. Dreamland was only required to undertake such remedial work as was prudent, i.e. such methods and mode of repair as a sensible person would adopt. Furthermore, if there was more than one objectively reasonable means of complying with its repairing obligation under clause 2(b), it was for Dreamland, as covenanting party, to select which reasonable method it wished to employ: see *Gibson Investments Ltd v Chesterton plc* [2002] 2 P & CR 32 at 38 (Neuberger J, as he then was).

27. The Foundation contends that Dreamland has no real prospect of establishing that removal of the Mural was an objectively reasonable means of complying with its obligation under clause 2(b).

28. It is common ground that there were three ways in which the Mural could be dealt with if it was not simply to be left until the next four-yearly painting cycle under clause 2(d):

    i) it could be simply painted over;

    ii) it could be removed by chemical or abrasive cleaning (with any necessary making good of the paintwork); or

    iii) the underlying section of wall could be removed and replaced.

29. The Foundation accepts that methods (i) and (ii) would both have been objectively reasonable, but not method (iii), which would have been significantly more invasive.

30. In my view it is plain that method (iii) was significantly more invasive than methods (i) and (ii), since it involved interference with the fabric of the Building. That does not necessarily mean that it was not an objectively reasonable method. As counsel for Dreamland submitted, it may be justified for a tenant to take a more invasive or radical step by way of repair if it will prove a more long term solution than a less invasive or radical one. Nevertheless, it does mean that the onus lies on Dreamland to show that it was at least an equally objectively reasonable method to methods (i) and (ii).

31. Dreamland relies on the fact that it was advised to adopt this method by Mr Barton. As counsel for the Foundation pointed out, however, it is not apparent that Mr Barton was appropriately qualified. He has not given evidence, so the only evidence as to his qualifications is that given by Mrs Godden quoted in paragraph 11 above. Thus he does not appear to be a surveyor or a specialist cleaning contractor. Moreover, it is clear that he had an interest in removing the Mural so that it could be sold. Still further, Mrs Godden expressly accepts that Dreamland appreciated that the Mural had a value and that there might be a market for it.

32. Dreamland also relies on Mrs Godden's evidence that Dreamland was advised by Mr Barton that, if the Mural was merely painted over or cleaned off, the knowledge that there had been a Banksy work there would continue to attract other graffiti artists. As Mrs Godden puts it, "The wall would be considered as something of a 'shrine' for Banksy followers and the like".

33. As counsel for the Foundation pointed out, Mrs Godden does not say that Mr Barton advised Dreamland that removal of the Mural would solve, or even reduce, this problem. Counsel for Dreamland argued that this was implicit, given that Mrs Godden does say that Dreamland was surprised when further graffiti subsequently appeared on the wall. In my judgment this is not an issue which is suitable for determination on a summary judgment application. Accordingly, I will assume that that was Mr Barton's advice.

34. On that assumption, counsel for the Foundation pointed out Mrs Godden had not identified any reasons as to why Mr Barton had advised that removal of the Mural would solve, or even reduce, this problem. He argued that, objectively assessed, it was obvious that it was unlikely to do so. Given that the problem arose from the public knowledge that a Banksy had previously adorned the site in question, the problem would remain the same whether the Banksy was removed by overpainting, cleaning or removal and reinstatement of the wall. The shrine, such as it was, would remain a shrine, whichever method was employed. Counsel for Dreamland had no cogent answer to this argument, and I accept it.

35. Accordingly, I conclude that Dreamland has no reasonable prospect of establishing that it was entitled, let alone obliged, to remove the Mural in compliance with its repairing obligation under clause 2(b).

Paragraph 13 of the Defence

36. There is no dispute as to the principles to be applied with respect to the implication of terms in written agreements. As Lord Hoffmann stated in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 [2009] 1 WLR 1988:

> "19.The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:
>
> > '[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to

> interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.'

20. More recently, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn said:

> 'If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.'

21. It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

37. Accordingly, the starting point is the express terms of the Lease set out above. For these purposes, the key provision is clause 2(b), although Dreamland also relies on clauses 2(d) and 2(p). I have discussed clauses 2(b) and 2(d) above. Clause 2(p) requires the Lessee to yield up the premises to the Lessor (i.e. the Landlord) at the end of the term. This requirement will not be satisfied if the Lessee continues to use the property for purposes of its own otherwise than *de minimis*: see *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch) at [41] (Lewison J).

38. It is common ground that it is necessary to imply a term into the Lease to address the question of what happens to parts of the building, whether they are structural (such as

bricks, joists and tiles), decorative (such as ceiling roses and fireplace surrounds) or landlord's fixtures (such as baths and boilers), which have to replaced, or otherwise, removed by the Lessee when complying with its obligations under clause 2(b). As is also common ground, such parts revert to the status of chattels once removed from the building. The dispute is as to what term should be implied with respect to those chattels.

39. There is no dispute that, where the chattels are waste with no value, then it is implicit that they must be removed from the premises and disposed of. But who owns them and who is obliged to dispose of them?

40. The Foundation contends that it is to be implied that: (i) the chattels belong to the Lessor; (ii) nevertheless, where the chattels are of no or *de minimis* value, the Lessee is both obliged and permitted to dispose of them; and (iii) if the chattels are of more than *de minimis* value, the Lessee must not dispose of them, but must deliver them up to the Lessor.

41. Dreamland contends that it is to be implied that: (i) the chattels belong to the Lessee; (ii) it is therefore the Lessee's responsibility to remove them from the premises, and if appropriate, to dispose of them; (iii) but if they have scrap value (such as scrap metal) or salvage value (such as tiles which can be reclaimed and re-used), then the Lessee can recover the scrap or salvage value; and (iv) if they turn out to have more than scrap or salvage value, then the Lessee can recover that too.

42. It will be appreciated that both sides' contentions go rather further than addressing the situation which arises in the present case. The present case is exceptional in two inter-related ways. The first is that it concerns a part of the building, and subsequently a chattel, which has adventitiously acquired substantial value as a result of the spontaneous actions of a third party in painting the Mural. The second is that it concerns a situation in which, it is to be assumed for this purpose, the presence of the Mural justified the removal of that part of the building by way of repair. It is possible to imagine analogous situations, such as the example postulated by counsel for the Foundation of a painted ceiling which has to be replaced because it is about to fall down, and which is attributed to a famous artist. Nevertheless, such cases are far removed from the kind of everyday repair work which both sides' implied terms also cover.

43. Counsel for Dreamland argued that the answer to the question of what term was to be implied must be the same whoever was responsible for painting the Mural and whether the Mural had any value as a work of art or not. I do not think that this is correct. I agree that the answer cannot depend on the reasons why the Mural has substantial value (such as the fact that it is an artistic work or the identity of the artist), nor on the reason why its removal is justified (such as the fact that it attracted graffiti). But in my judgment the fact that the Mural has substantial value (both aesthetic and economic) is plainly a relevant consideration.

44. Counsel for Dreamland also argued that the term to be implied must provide tenants with a simple and practical rule and that tenants could not be required to obtain valuations of parts removed from a building during repairs or to negotiate with landlords over the disposal of such parts. I agree that a simple and practical rule would be desirable, but in my judgment this consideration cannot be pressed too far, for three reasons. First, I am concerned with what term is to be implied into the Lease. As discussed above, this is ultimately a question of interpretation of the Lease. Secondly, as counsel for the Foundation pointed out, even the most conventional and common repairing covenant can give rise to nice questions of judgment in particular factual circumstances. Thirdly, whatever may be the position where one is concerned with parts of the building which, when they become chattels, only have scrap or salvage value, I do not consider that the considerations relied on by counsel for Dreamland have much force when it comes to a part which is known to have substantial value.

45. Surprisingly, there appears to be no authority which is directly in point. My attention was, however, drawn to three authorities that shed some light on the question.

46. In *Farrant v Thompson* (1822) 5 B & Ald 825 the landlord demised a mill to the tenant. The tenant removed some of the machinery from the mill. The machinery was subsequently seized by the sheriff pursuant to a writ of fi. fa. and sold by him. The landlord brought an action for trover against the purchaser of the machinery. The Court of King's Bench (Abbott CJ and Bayley, Holroyd and Best JJ) unanimously held that, when severed from the mill, the machinery became the property of the landlord, and accordingly upheld the claim. It was not suggested, however, that the tenant was acting in accordance with his obligations under the lease.

47. Counsel for Dreamland pointed out that Holroyd J observed at 829:

> "In the case of a lease of a house, if the tenant pulls down any part of it wrongfully, and not for the purpose of repair, so as to constitute waste, the person who has the first estate of inheritance has a right to the materials of which that house was before composed … "

This indicates that the chattel will belong to the landlord if it is removed by the tenant in an act which amounts to (unlawful) waste rather than (lawful) repair. But I not read Holroyd J as meaning that, if the tenant removes the chattel for the purposes of repair, then the chattel will belong to the tenant.

48. In *Elwes v Brigg Gas Co* (1886) 33 Ch D 562 the landlord demised land to the tenant for the purposes of erecting a gasholder and other buildings in accordance with approved plans. Plans were approved which specified excavation of part of the land to a certain depth. During the excavations, a two-thousand year old wooden boat was discovered embedded in the ground. The landlord demanded that the tenant deliver up the boat, but

the tenant refused, claiming that it owned the boat.

49. Chitty J upheld the landlord's claim to delivery up. He first held that, whether the boat was to be treated as a chattel or a part of the soil, at the date of the lease, it was the property of the landlord. Accordingly, the tenant's claim could only rest on the lease. So far as that was concerned, he said at 569-670:

> "The plans, however, are silent as to what is to be done with the soil excavated. In the circumstances some permission ought to be implied as to the removal and disposal of what might be excavated. The question is as to the extent of this implied permission. As against the lessors the permission ought not to be carried beyond what may be reasonably inferred to have been the intention of the parties. The excavations were to be made to a depth of fifteen feet; obviously it was not the intention of the parties that the soil excavated should be piled up on other parts of the small plot of ground comprised in the lease. The implied permission to remove and dispose ought then to extend to what the parties might fairly be deemed to have contemplated would be found in making the excavations; but beyond this point it ought not to be carried. The existence of the boat was unknown and its discovery was not contemplated. In my opinion, then, the license to remove and dispose extended to the clay and ordinary soil likely to be found in pursuing the license to excavate, but it did not extend to what was unknown and not contemplated, and therefore did not comprise the boat."

50. Counsel for Dreamland submitted that excavated soil could have value, and accordingly this reasoning supported Dreamland's case. As counsel for the Foundation submitted, however, there is nothing in the judgment to suggest that the soil had any value. On the contrary, Chitty J proceeded on the basis that it was to be disposed of. Thus his analysis is consistent with the proposition that the tenant has an implied permission to dispose of parts of land which become chattels of no or *de minimis* value. Nevertheless, he reasoned that the tenant did not acquire title to a chattel (or part of the land which become a chattel) of substantial value, because this could not be implied into the lease. This reasoning supports the Foundation's case.

51. In *Herbert v British Railway Board* (Court of Appeal, unreported, 15 October 1999) the landlord demised a railway line called Halls Tramroad to the tenant. Clause 1 of the lease expressly defined this as including the rails and sleepers. The lease also contained a covenant in clause 12 requiring the tenant to keep the track in reasonable repair and working order. Over the years the tenant and its successors periodically repaired the track, in particular by replacing rails and sleepers when necessary. In due course the railway line was closed. The current tenant removed all the rails and sleepers and used them for repairs to tracks elsewhere. The landlord claimed that the rails and sleepers were landlord's fixtures and that the tenant had converted them. The tenant contended

that the rails and sleepers were tenant's fixtures, and thus it was entitled to remove them.

52. The Court of Appeal upheld the landlord's claim, holding that upon the true construction of the lease the rails and sleepers belonged to the landlord. Beldam LJ, with whom Aldous and Tuckey LJJ agreed, stated:

> "I am satisfied that no intention could be inferred from the terms of this lease that at the end or earlier determination of the term the lessees should be able to remove the rails and sleepers which made up, were an integral part of and were incorporated in Halls Tramroad. On the contrary, I am convinced that it was the intention that they should remain attached to the demised land, that during the term any rails and sleepers which were part of the tramroad or of the alterations or extensions to it permitted by the terms of the lease should be kept in repair by the lessees and left in place at the end of the term. The tramroad, as defined in Clause 1, was clearly the property of the lessor as set out not only in Clause 1 but in the recitals. The judge found that, as contemplated by the parties, from time to time rails and sleepers would need to be replaced due to ordinary wear and tear. The obligation on the lessees in Clause 12 is in my view clear and unequivocal. They have the obligation to keep the tramroad in reasonable repair, working order and condition which, in view of the judge's finding, involved the replacement of rails and sleepers from time to time. I can see no warrant for the suggestion that the parties contemplated that the rails and sleepers would become the property of the lessees when removed… "

53. Counsel for the Foundation accepted that the reasoning towards the end of the passage was strictly *obiter* in so far as it went beyond the case before the court. Nevertheless, I agree with him that it provides further support for the Foundation's case.

54. Returning to the present case, for the reasons given above, it is only necessary for me to reach a conclusion as to what term is to be implied into the Lease with respect to the ownership of a part of the demised premises which is justifiably removed by the Lessee from the premises, and becomes a chattel, in accordance with the Lessee's obligation in clause 2(b) to repair the premises, and which has substantial value. In my judgment the term which is to be implied is that the chattel becomes the property of the Lessor. My reasons are as follows.

55. First, I consider that the default position is that every part of the property belongs to the Lessor. The Lessee only has a tenancy for a period of time. Thus it is for the Lessee show that it is proper to imply into the Lease a term which leads to a different result.

56. Secondly, in my view the mere fact that the Lessee is discharging its repairing obligation

does not lead to the implication that it acquires ownership of such a chattel. Dreamland's argument is based upon the Lessee's need to be able to remove items generated by the act of repair from the premises. But that would only justify the implication of a term dealing with permission to remove (and, where appropriate, dispose of) such items. It does not justify the implication of a term transferring ownership of the items: see *Liverpool City Council v Irwin* [1977] AC 239 at 245 (Lord Wilberforce) and compare *Ray v Classic FM plc* [1998] FSR 622 at 642-643 (Lightman J).

57. Thirdly, even if a term may be implied with respect to the ownership of (i) waste or (ii) chattels with no more than scrap or salvage value, it does not follow that it should be implied with respect to the ownership of a chattel with substantial value. Such a term would not be necessary, would not go without saying and would not be one that would satisfy the officious bystander test.

58. Fourthly, I do not consider that it makes any difference that the value is attributable to the spontaneous actions of a third party. It is fair to say that, whatever solution is adopted, one party gets a windfall. But who has the better right to that windfall? In my view it is the Lessor. *Elwes v Brigg* is at least consistent with this assessment.

59. Accordingly, I conclude that the Foundation is correct that the defence advanced in paragraph 13 of the Defence is unsustainable as a matter of law.

Conclusion

60. For the reasons given above, I conclude that the Foundation is entitled to summary judgment on its claim against Dreamland for delivery up of the Mural.