

NOW YOU SEE IT, NOW YOU DON'T

By Judith I. Johannsen

One of the most common misunderstandings in the sale of real property are items that a buyer believes are part of the property and therefore included in the purchase price but which the seller believes are personal items not included in the purchase price and which will be removed.

Items in or on residences or buildings are classified as either *personalty* or *fixtures* and whether or not they remain on the property or leave with the seller depends upon their classification or agreement between the parties.

Simply stated, *personalty* includes items that can be easily removed without causing damage to the structural integrity of the walls, floors and ceilings, such as window treatments, lighting and chandeliers, window air conditioning units and appliances.

Fixtures, on the other hand, include items that are so attached to the real property that they are not easily removed, such as a furnace, a hydraulic lift in a car mechanic's garage or a megaton cauldron in a smelting plant.

The well-settled standard for determining whether or not an item is a fixture, particularly in a commercial or industrial setting, focuses on the facts and circumstances present at the time the equipment was annexed to the property as well as the newer trend of looking more at the connection between the property's intended use and operation than by how it was annexed. Sometimes, items are so attached to the real property that they are seen as having lost their personalty character.

A recent residential real estate transaction is a classic example of the difficulty a difference of opinion about whether an item is personalty or a fixture can cause.

A buyer's agent found a property through the Multiple Listing Service that fit his buyer's needs and criteria. The property's listing information included the number of bedrooms, bathrooms, square footage, acreage and taxes, and in the space reserved for remarks, there were no comments about items being excluded.

The buyer toured the home, liked it, and prepared a written offer, specifically listing items the buyer wanted to be sure were included in the purchase price - the window air conditioning unit, the kitchen appliances, the hot tub, and all window treatments.

The seller liked the buyer's offer but decided he wanted to take the hot tub, the refrigerator and the baby's room's window treatment when he moved out, but everything else would stay. The buyer and seller came to an agreement regarding these specific items and adjusted the purchase price to reflect their agreement.

At the property inspection before the closing, the buyer found that the seller had moved everything out of the house, including the refrigerator, the hot tub and the baby's room's window treatment, as agreed, and everything else, right down to the gas fireplace logs in the fireplace, was where it was supposed to be.

Upon moving into her new home, buyer discovered that the gas fireplace logs were missing from the fireplace and that the gas line had been capped. Buyer asked her agent to contact the seller through its listing agent or attorney to find out why the gas logs were not in the fireplace where they had been at the pre-closing inspection.

Seller's attorney responded that the seller took the gas fireplace logs when he moved out because he did not consider them to be a fixture, but, rather, personalty because they were never permanently attached to the house. Moreover, the attorney stated that the seller would not be returning the logs, and if the buyer wanted the logs, she'd have to take the seller to Small Claims Court.

If this disagreement makes it to Small Claims Court, the buyer's arguments to dispute the seller's position would probably include 1) that the seller's listing agent did not specifically exclude the fireplace logs in the property's multiple listing fact sheet, so anything not excluded is included, 2) that the buyer and seller discussed and agreed

to the specific items the seller would take with him and the gas fireplace logs were not included in that discussion or agreement, and lastly, 3) that the seller purposefully engaged in an attempt to cheat the buyer of the benefit of their bargain by not removing the fireplace logs until *after* the final walk-through/pre-closing inspection so that the buyer would not know they were gone until after the closing.

Whether or not the seller has a legal leg to stand on is up to the Court, but it seems that with the buyer's arguments, common sense tells us that unless the seller figures out that the smarter, least expensive (time and money) path to resolve this issue is to either return the gas fireplace logs to the buyer or pay the buyer the cost of a new set of logs, the seller will have to go through the same legal process he's demanding the buyer to pursue and to bear its costs, which could exceed the cost of the logs.

Residential buyers typically see a home for sale and assume that everything they see is included in the purchase price. In other words, everything is a fixture to buyers. Sellers, on the other hand, often forget to mention that the very things that set their home apart from all the rest – their one-of-a-kind chandelier, the backyard gazebo, and their custom-built cupola and heirloom weathervane – are personalty and will not be staying in the house.

Fixtures and personalty are not issues found just in residential real estate transactions, they also can be found in commercial real estate transactions. For example, an April 2004 Connecticut Supreme Court decision settled a fixtures dispute in which A, who lost title to an old mill property through condemnation by B, sought to recover items (machinery and equipment) he considered personal property still located in the mill. A began a legal action (replevin) to recover the items claiming that B wrongfully detained his personal property and prevented him from removing it from the property. B declared the items were fixtures and maintained that unless A could show that the items were personal property, goods or chattels, they couldn't be taken under the replevin action, which only applies to goods or chattels, not fixtures.

The trial court reviewed the well-settled standard for determining whether or not an item is a fixture (focusing on the facts and circumstances present at the time the equipment was annexed) and the newer trend of looking more at the connection between the property's intended use and operation than by how it was annexed.

The trial court held, and our Supreme Court affirmed, that the equipment and machinery bolted to the floor were fixtures, not personal property/goods or chattels, because 1) they were originally installed in the mill in the late 1800s, 2) they were necessary for the proper functioning of the mill, 3) there was no separate bill of sale for the items when A bought the mill property, and 4) the warrant authorizing the seizure of the property stated "To protect *fixtures* and other material of historic value".

If you're a buyer and unsure as to whether an item is to remain with the property or will be taken by the seller, ask your agent, the seller's agent, or the seller, and when writing up an offer, list the specific item(s) to be included. Sometimes, if you don't ask, you don't get. If you are a seller, communicate to your agent and/or the buyer which items are definitely not included in the purchase price. Walking into a newly bought property and discovering that that magnificent dining room chandelier, that really cool cupola and weathervane, or the industrial sized cast iron vat is not there can be disappointing and a basis for legal action.