ANALYSIS: BEACHEN v AUCKLAND COUNCIL [2023]

Decision [2023] NZEnvC 159

IN THE MATTER OF	an appeal under s 325 of the Resource Management Act 1991
BETWEEN	D T BEACHEN
	(ENV-2022-AKL-000241)
	Appellant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Judge MJL Dickey Commissioner A Gysberts
Hearing:	7 June 2023
Appearances:	DT Beachen for himself J McGrath for Auckland Council
Date of Decision:	3 August 2023

ANALYSIS OF THE DECISION OF THE ENVIRONMENT COURT

A: The Beachen decision errs in law
B: Beachen failed to consider stare decisis (established law)

Cases and Legal Analysis cited

- Beachen v Auckland Council Decision [2023] NZEnvC 159
- Elitestone Ltd v Morris [1997] 1 WLR 687
- *Jurisprudence* – 12th Ed (1966) Sir John W. Salmond ISBN: 978-0421056107
- Chelsea Yacht & Boat Company Ltd. v Pope [2000] EWCA Civ 425
- Skerrits of Nottingham v Secretary Of State [2000] EWCA Civ 5569
- Savoye and Savoye v Spicer [2014] EWHC 4195 (TCC)
- Berkely v Poulett and Others [1977] 241 EGD 754
- Law Commission Legislation Manual Structure and Style [1996]
- Thames-Coromandel District Council v Te Puru Holiday [2010] NZCA 633
- Antoun v Hutt City Council [2020] NZEnvC 159
- Dall v MBIE [2020] NZDC 2612

In this brief, Beachen's *tiny home* shall be referred to as a *mobile home* because it was manufactured in a factory, whereas tiny homes tend to refer to DIY (do it yourself) homes.

Summary

[1] This analysis rests on stare decisis (established law) as summarised by Elitestone that mobile homes are chattel (personal property). In Beachen [41], Judge Dickey agreed the mobile home was towed onto the site and could be towed in the future. The tests in Elitestone firmly establish the mobile home is chattel, not realty, hence the abatement order issued to David Beachen was ultra vires and the decision fatally flawed.

[2] This brief covers the following points of established law, primarily cited by Elitestone:

- Not all homes are realty
- Mobile homes which can be moved elsewhere are most likely to be chattel
- If solely held by gravity, the onus is on the party alleging realty to show it is realty
- Removal is an important test. If it can be removed intact, it is likely to be chattel
- Removal every few years to a fresh site makes the class more likely to be chattel
- Temporary is not measured by tenure but by ease of removal without damage
- The test must include both the degree of annexation and purpose of annexation
- Purpose of annexation asks if the object is to improve the land or for its own use
- Before testing if an object is a dwelling, it must be shown to be part of the land
- A movable structure is like a windmill pivoting or a pontoon rising with the tide
- Fixing to keep an object steady does not necessarily make it part of the land
- Tests must be objective, not based on a subjective contract between parties
- Weight in itself is not a test or conclusive evidence the object is realty
- Connections to mains services do not necessarily make an object realty
- Mains services connected by a professional do not necessarily make an object realty
- Movables can be in the earth, immovables can be held only by gravity
- The same object can be chattel or realty, depending on the circumstances

Failure of S5 Purpose of the Resource Management Act 1991 [RMA]

[3] **The purpose of the RMA** is to enable people and communities to provide for their social, economic and cultural wellbeing, health and safety while protecting and preserving the environment. At the most fundamental level, wellbeing begins with the ability of all New Zealanders to afford to rent or own a home.

[4] **The planning systems cause and worsen the housing crisis:** In 2021 in the *Cabinet Paper National Policy Statement Urban-Development* the Chair of the Cabinet Economic Development Committee wrote to the Minister for Urban Development and the Minister for the Environment to say[1]:

> *New Zealand has a severe housing crisis that impacts most on our poor, vulnerable and younger generations. Our planning and urban development systems have helped cause and worsen a large part of this crisis and has dramatically contributed to a lack of housing.*
>
> *Constraints in the planning system have meant local authorities are not providing enough development capacity for people to build and live in the homes they want.*

[1] https://environment.govt.nz/assets/publications/Cabinet-papers-briefings-and-minutes/cabinet-paper-national-policy-statement-urban-development.pdf

> *This has led to high land prices, unaffordable housing, and a system that incentivises land banking and speculation. It has also resulted in people having poor access to employment, education and social services. In short, under the current system, the cost of finding a home and living in our cities is too high.*

Summary

[5] In Beachen v Auckland Council [Decision 2023 NZEnvC 159] (Beachen), Appellant DT Beachen, a digital marketing executive with no qualifications in law represented himself in the appeal. He argued fact without reference to law. While he has common-law right to be a pro se litigant, by doing so, he failed to cite stare decisis.

[6] Auckland Council asserted Beachen's mobile home was a minor dwelling. The court agreed, finding for the respondent.

[7] This brief shows neither the Council's Unitary Plan written under RMA authority nor the Building Act 2004 speak to mobile homes nor to any chattel used as habitat or storage. It is to show there is a gap in the law, where the Council acts ultra vires when they allege chattel habitat (in this case a mobile home) is a minor dwelling.

[8] In Beachen [24] Judge Dickey wrote:

> *In Antoun v Hutt City Council (Antoun) 14 the Court considered whether a tiny home was a "structure" under the RMA. Judge Dwyer concluded that the two main indicators of whether a building is fixed to the land are the degree of annexation and the object of annexation.[15] We agree. Footnote 15 says: Antoun at [53], <u>in reliance on Elitestone Ltd v Morris</u> [1997] 1 WLR 687.*

This reference to Elitestone is helpful because it opens up Elitestone and all case law referenced by Elitestone to analysis in this case. Every single point made by the respondent and accepted by the judge is unsupported by Elitestone. It appears the Judge did not read Elitestone, the respondent's barrister as an officer of the court failed to enlighten the judge on the stare decisis relevant to Beachen and the appellant, acting for himself without a lawyer, did not know to research the established law of Elitestone to present it to the court.

[9] It is helpful to reference the actual case law cited by Judge Dwyer:

Degree and Purpose: In Elitestone, Lord Lloyd set out the central question:

> *The answer to the question* [chattel or realty?]*, as Blackburn J. pointed out in Holland v. Hodgson (1872) L.R. 7 C.P. 328, depends on the circumstances of each case, but mainly on two factors, the degree of annexation to the land, and the object of the annexation.*

Elitestone referenced Hellawell v Eastwood (1851) 155 ER 554 where the question of machines firmly affixed to a factory floor established two tests:

> *Firstly to consider the degree in which the item is annexed to the land and <u>whether it can be removed without damage to it or the land</u>.*
>
> *Secondly, the purpose of the annexation must be addressed. <u>If it is placed to be enjoyed better as an object it is likely to be a chattel</u>. If it is placed for the benefit of the land, it is likely to be a fixture.* [underline added]

[10] **Degree:** In Beachen [41] Judge Dickey writes:

> *We accept that the tiny home was brought/towed onto the property attached to a frame/trailer... The fact that it has a frame and was towed to its current location, and can be towed in the future, does not disqualify it from being a "structure" now that it is located on the property and has been for three years.*

As made clear in Elitestone, as above, the first test is the degree to which the item is annexed to the land and whether it can be removed without damage to it or the land. The Council did not dispute that Beachen's mobile home was solely connected to the land by gravity and offered no evidence that it can be removed without damage to itself or the land. As a matter of fact supporting this, after losing the appeal, David Beachen sold the mobile home that was removed intact, undamaged and transported hundreds of kilometres to a new site where it resumed its purpose as providing a home without committing the land. In terms of the test of degree of annexation, the mobile home clearly fits the description of Elitestone and others as chattel.

The Judge erred in saying the fact it was towed on and can be towed in the future does not disqualify it from being a structure. Elitestone and others make clear it does.

[11] **Purpose (Object):** A minor dwelling adds value to real estate, often more value than it cost to construct, and it appreciated in value returning a capital gain, or at least appreciating to keep up with inflation. In contrast a mobile home depreciates in value, similar to a car because it competes on a mobile regional market. However, if the need is not for a permanent dwelling on the land, but an item to be enjoyed and used only while need exists, a mobile home fulfils that purpose better. When the need passes a minor dwelling must be taken apart or demolished if it is to be removed. Not only does the owner lose the cost of consent and construction, but has to pay the cost of demolition and disposal. In contrast, the owner of a mobile home may do exactly what Beachen did – sell it, remove it intact and be left with bare soil and money in the bank.

Beachen's mobile home was placed to enable his mother to enjoy occasional visits. It added no value to the land, but it did not commit the land. It was there to be enjoyed only as long as it was needed. Had Beachen constructed a minor dwelling, he would have committed the land, increasing the real estate value, but would have had a building that he could not on-sell and remove when the need passed. In terms of the test of Elitestone and others, the purpose or object of annexation describes that of chattel.

[12] **Real Property:** In Beachen [18] the Judge Dickey wrote:

> *There are several relevant definitions in the Plan and the RMA. Broadly speaking, and leaving to one side its use, to be a "minor dwelling" the tiny home must be a "dwelling". To be a dwelling it must, among others, be a "building" and to be a building it must be a "structure".*

This is correct as far as it goes, but it fails to set out the fundamental basis of property law; the linkage between structure and real property (realty)

- All minor dwellings are dwellings.
- All dwellings are buildings.
- All buildings are structures

- All structures are realty (real property/real estate).
- All realty is either land or that which is fixed to land, has become a part of the land and has lost its independent identity.

The linkage between structure and land (realty) is of the utmost importance, but was omitted by Judge Dickey.

[13] This is clearly articulated in *Jurisprudence,* currently in its 12th edition, written by the preeminent NZ jurist, Sir John W. Salmond, former Solicitor General of and Supreme Court Judge in NZ. In §155. **Movable and Immovable Property**, he wrote:

> *Among material things the most important distinction is that between movables and immovables, or to use terms more familiar in English law, between chattels and land. In all legal systems these two classes of objects are to some extent governed by different rules, though in no system is the difference so great as in our own*

This most important distinction lies at the heart of the error in Beachen [2023].

[14] **Movables and Immovables**: It is long established under the principle of dominium that absolute and paramount ownership of land is held by the Crown that issues a bundle of rights known as real estate or realty, the strongest of which is fee simple. It is also long established that realty not only includes land, but everything that is fixed to land, as set out in Roman law 2,000 years ago: *Omne quod inaedificatur solo cedit* [Everything which is erected on the soil goes with it], as Salmond cites below. In §155. Salmond continued, explaining the elements of immovable property:

> *5…all objects placed by human agency on or under the surface with the intention of permanent annexation. These become part of the land, and lose their identity as separate movables or chattels; for example buildings, walls and fences. Omne quod inaedificatur solo cedit* [Everything which is erected on the soil goes with it] *said the Roman Law. Provided that the requisite intent of permanent annexation is present, no physical attachment to the surface is required. A wall built of stones without mortar or foundation is part of the land on which it stands. Conversely, physical attachment, without the intent of permanent annexation, is not in itself enough. Carpets, tapestries, or ornaments nailed to the floors or walls of a house are not thereby made part of the house. Money buried in the ground is as much a chattel as money in its owner's pocket.*
>
> *Footnote 2: Unlike a chattel, a piece of land has no natural boundaries. Its separation from the adjoining land is purely arbitrary and artificial, and it is capable of subdivision and separate ownership to any extent that may be desired*

Under common law derived from Roman property law, a building loses its natural boundary and becomes part of the land. The concept of permanent annexation is the crucial test, with hundreds of years of case law to find the dividing line between chattel and realty. In Beachen [2023] that line was overwhelmingly crossed, primarily because David Beachen had no knowledge of centuries of established law, and failed to know it was his job to inform the court.

[15] **Fatal Flaw:** As discussed in [10] above, in Beachen [41] Judge Dickey accepts the "*tiny home was brought/towed onto the property attached to a frame/trailer*… [and] *it has a frame and was towed to its current location, and can be towed in the future*." In established law, as set out in Elitestone, this means the mobile home is chattel, thus

cannot be a minor dwelling. This analysis could stop there. However, the arguments put forth by Council, such as connection to utilities or length of tenure are common errors made by councils. For that reason, a fuller analysis of the arguments made by Council will be examined in the context of stare decisis.

Not all homes are realty

[16] **Not all homes are realty:** While most *homes* in New Zealand are *buildings* annexed to land it is not necessary to annex a home to the land to enable it to be used as a home. In Chelsea [2000] it is established that not all homes are annexed to land. In that case, it was asserted a houseboat was building because it was moored to a dock. The Court found:

> *It is not necessary to annex the houseboat to the land to enable it to be used as a home."*

The same applies to mobile home. It is not necessary to annex a mobile home to the land to be used as a home.

Mobile homes which can be moved elsewhere are most likely to be chattel

[17] **Mobile Homes are a chattel:** In Elitestone, J Blackburn in delivering the judgement of the Court quite explicitly said that mobile homes are chattel, not realty:

> *It follows that, normally, things which are not fixed to the building except by the force of gravity are not fixtures. However, there can be exceptions e.g. where a wooden bungalow was constructed on concrete pillars attached to the ground – the bungalow was not <u>like a mobile home</u> or caravan which could be moved elsewhere; it could only be removed by demolishing it and it was, therefore, not a chattel but and must have been intended to form part of the realty: Elitestone Ltd v Morris [1997] 1 WLR 687. (underline added)*

David Beachen's mobile home was fixed to land by the force of gravity. In Elitestone exceptions were established where the removal requires demolition. Elitestone specifically cites mobile homes and caravans as not such an exception. It does not get more explicit than that.

Removal is an important test. If it can be removed intact, it is likely to be chattel

[18] In Elitestone, Lord Lloyd writes:

> *A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty.*

Elitestone both addresses the manner in which Beachen's mobile home came onto the land and how it was removed: as a unit. Further, Elitestone rules out connection to mains services such as water and electricity as indicators that it has become part of the land. This will be discussed in more detail below.

If solely held by gravity, the onus is on the party alleging realty to show it is realty

[19] Lord Clyde wrote in Elitestone:

> *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."*

The onus was on the respondent, Auckland Council, who failed to provide facts to support its allegation the mobile home was part of the land. It stated in Beachen [27] the mobile home was not attached to the land other than by its own weight, and further that it sat on a trailer with wheels that is a mechanical device engineered and intended to ensure ease of mobility as was demonstrated by its arrival on the land intact, ready made to be towed into position.

Removal every few years to a fresh site makes the class more likely to be chattel

[20] In Elitestone, Lord Lloyd writes

> *...In Deen v. Andrews the question was whether a greenhouse was a building so as to pass to the purchaser under a contract for the sale of land "together with the farmhouses and other buildings." Hirst J. held that it was not. He followed an earlier decision in H.E. Dibble Ltd. v. Moore [1970] 2 Q.B. 181 in which the Court of Appeal, reversing the trial judge, held that a greenhouse was not an "erection" within section 62(1) of the Law of Property Act 1925. I note that in the latter case Megaw L.J., at p. 187G, drew attention to some evidence "that it was customary to move such greenhouses every few years to a fresh site." It is obvious that a greenhouse which can be moved from site to site is a long way removed from a two bedroom bungalow which cannot be moved at all without being demolished.*

A greenhouse that can be moved from site to site and is customary to be moved is found to be chattel and is a long way removed from a dwelling which cannot be moved at all without being demolished. Greenhouses are not on wheels, and to be moved are designed to be taken apart for transport and reassembled on relocation. A mobile home is easier to move than a greenhouse because it is not disassembled, but towed on the wheels that remain under it.

Temporary is not measured by tenure but by ease of removal without damage

The word temporary and permanent are often confused by councils, ministries and lower courts who are drawn to tenure – length of time. In all stare decisis case law, temporary refers to objective design rather than length of time… *is the object designed to be moved?* In Elitestone the object was a bungalow that had been on the land for over half a century. If time was the determinant, the case would have been very short. But time was not. Instead the question turned on if the design was intended to enable the object to be moved intact.

In Elitestone as above, the greenhouse does not magically transform from chattel to realty if a particular greenhouse, designed to be moved from site to site every few years happens not to be moved. This is well established in multiple cases.

The test must include both the degree of annexation and purpose of annexation

[21] In Beachen [24] as cited in [12] above, the judge cited Antoun [2020] citing Elitestone as to the test of degree and purpose of annexation. The judge in Antoun is quoted:

> *As to the degree of annexation, the Judge observed that large buildings can be, and are frequently, moved about on New Zealand roads.[16] He found that for a building to be annexed to the land it need not be tied or connected by reinforcing, foundations or piles imbedded in the land,[17] and that the definition of "fixed" could include things held permanently in place by their weight and bulk and/or firmly placed in a stable position.[18] In that case, the Court found that the tiny home was annexed to the land in circumstances where the building was held in place solely by its weight and bulk of it's superstructure, meaning that it could not be readily or practically moved.*

In this observation, an important matter of law was overlooked by the Judge in Antoun: while uplifted it is not a building. Only part of the building is detached. The foundation remains, thus as in Elitestone, the building is partially taken apart. The part removed ceased to be a building as soon as the movers lift it off its foundation, detaching it from the land. It is not a building while on blocks in the house-mover's sale yard. It only becomes a building once again when it is purchased by a landowner and affixed to a new foundation. This citation is irrelevant, an unfortunate distraction.

Readily or practically moved: As a question of law, the test is not readily or practically moved, but capable of being moved without damage to the object or the land. But in Beachen there is also a question of fact as to whether Beachen's mobile home would be readily or practically moved, where the proof is in the pudding. After losing the case, Beachen sold the mobile home, it was easily removed intact and delivered to a new buyer hundreds of kilometres away. As a matter of fact, in Antoun [2020], the test was not weight and bulk, but the fact it was landlocked; that it was constructed onsite in the nature of a building with no means to remove it intact unless the school next door would permit a crane to lift it out – permission that had not been sought or granted. In addition, the height of the object in Antoun, when placed on wheels to transport by truck or tow, would have exceeded NZTA permitted height of 4.3 m, and would therefore have been similar to the partial-building transport cited by Judge Dwyer. The facts in Antoun were completely different than in Beachen.

[22] **On the manner of removal:** In Skerritts [2000], stare decisis after Elitestone, Lord Justice Schiemann cites Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited[1949] 1 KB 385, and writes:

13. Jenkins J said this:

> *"It would be undesirable to attempt, and, indeed, I think impossible to achieve, any exhaustive definition of what is meant by the words, 'is or is in the nature of a building or structure'. They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, in relation to the hereditament, answer the description of buildings or structures, or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size: I think of such size that they either have been in fact, or*

> *would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, ie, things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces."* [Underline in original]

A mobile home is normally brought onto the hereditament ready made and once installed – in a matter of hours, mostly levelling and hooking up utilities, is removed the same way it is brought on – intact and not pulled down or taken to pieces. Indeed this was accepted by Judge Dickey in Beachen [41]

Degree of Annexation

[23] In Elitestone, Lord Lloyd write

> *For the photographs show very clearly what the bungalow is, and especially what it is not. It is not like a Portakabin, or mobile home. The nature of the structure is such that it could not be taken down and re-erected elsewhere. It could only be removed by a process of demolition. This, as will appear later, is a factor of great importance in the present case. 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.*

Note the example of what is a chattel: a mobile home.

The test of degree of annexation is found repeatedly in established law. That an object which must be demolished has become part of the land. But, and this is important, in Elitestone, if the object can be taken down and re-erected elsewhere, it is likely to be chattel. A mobile home – as given as an example – does not need to be taken down, it is already on wheels, thus further from the dividing line between chattel and realty. For information a "Portakabin" is a trademark for a small portable office made of steel that is manufactured in a factory, delivered by truck and removed intact when the need passes. In New Zealand, these would be referred to as modules on skids.

[24] As Tuckey LJ wrote in Chelsea [2000] applying the principles of Elitestone:

> *Turning firstly to the degree of annexure it is important to bear in mind that what is required is sufficient attachment to the land so that the chattel becomes part of the land itself.*

Tuckey goes on to examine a case where it was asserted a houseboat was a structure.

> *Here the houseboat rested periodically on the river bed below it and was secured by ropes and perhaps to an extent the services to other structures. It is difficult to see how attachments in this way to the pontoons, the anchor in the riverbed and the rings in the embankment wall could possibly make the houseboat part of the land. One is bound to ask "which land?" There is in my judgment no satisfactory answer to this question. More importantly, however, all these attachments could simply be undone. The houseboat could be moved quite easily without injury to itself or the land.*

As elsewhere the test is the same. *Can it be moved easily without injury to itself or the land?* The same would apply to a mobile home, because the two are very similar – both homes, one on water, the other on land – designed to be homes but not structures.

Judge Dickey accepted in Beachen [41] (see [15] above) the "*tiny home was brought/towed onto the property attached to a frame/trailer…* [and] *it has a frame and was towed to its current location, and can be towed in the future*."

The Council asserted the weight and bulk would make it difficult to remove. They did not prove this, they merely said it, and the Judge accepted it, even as the Judge agreed it had been towed on and could be towed off.

[25] **Weight and Bulk:** In Elitestone, Lord Clyde examines physical attachment:

> *The reasoning in such a case where there is no physical attachment was identified by Blackburn J. in Holland v. Hodgson (1872) L.R. 7 C.P. 328, 335: "But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land." He continued with the following instructive observations:*
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> *"Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels.*
>
> *On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land.*
>
> *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."*

- **Weight:** The anchor of the Titanic was four times the weight of a mobile home but it remains chattel. A mobile home is on wheels, just as an anchor is on a capstan. Both have mechanical devices to enable ease of movement. Weight in itself is not an issue until it exceeds allowable road capacity, such as overweight that can damage a bridge. Mobile homes are mostly empty air, where the fact they are on wheels obviates any obstruction caused by weight. This assertion by Council fails to establish the mobile home has become a part of the land.

- **Bulk:** The bulk of a mobile home is defined by NZTA limits. 4.3m high, typically 3.1 wide (but up to 4.5m maximum) and length (typically 12m). Kept to these limits, bulk does not impinge on the mobile home's capacity to be moved intact.

Before testing if an object is a dwelling, it must be shown to be part of the land

[26] In Beachen [26] Judge Dickey quoted Judge Dwyer:

> *The Court also found that the object of connection was immediately apparent when looking at the tiny house; it was on the property for the purpose of being used as a dwellinghouse – the degree and object of annexation "are patent for all to see".*

[27] **A two-step test**: Until the object is proven to be part of the land, the second question, *is it a dwellinghouse* does not arise. As Lord Justice Morritt wrote in Chelsea:

> *"The provision of a home does not necessitate annexing the structure (be it a caravan or a boat) to the land so as to become a part of it; it is sufficient that it is fitted out for living in. I agree with Tuckey LJ that the Dinty Moore cannot, in these and the other circumstances to which he refers, be regarded as a part of the land. In those circumstances the second question, whether the Dinty Moore is a dwelling house within the Housing Act 1988, does not arise."* [underline added]

The term dwelling or dwelling house is a precise legal term, as accepted by Judge Dickey in Beachen [18]. Thus, before considering if David Beachen's mobile home is used as a dwellinghouse, the court must determine if it is part of the land. If not, then the second question "*is it a dwellinghouse?"* does not arise. It is notable in Chelsea the example given includes a caravan, which is similar to a mobile home.

[28] **Patent for all to see:** This stems from Elitestone where Lord Clyde wrote:

> *It is important to observe that intention in this context is to be assessed objectively and not subjectively. Indeed it may be that the use of the word intention is misleading. It is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there. The question is whether the object is designed for the use or enjoyment of the land or for the more complete or convenient use or enjoyment of the thing itself. As the foregoing passage from the judgment of Blackburn J. makes clear, the intention has to be shown from the circumstances. That point was taken up by A.L. Smith L.J. in Hobson v. Goringe [1897] 1 Ch. 182, 193, a decision approved by this House in Reynolds v. Ashby & Son [1904] A.C. 466, where he observes that Blackburn J.,*
>
> > *"was contemplating and referring to circumstances which shewed the degree of annexation and the object of such annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between the owner of a chattel and a hirer thereof."*
>
> *Regard may not be paid to the actual intention of the person who has caused the annexation to be made. In In re De Falbe [1901] 1 Ch. 523, 535, Vaughan Williams L.J. said that there was not to be an inquiry into the motive of the person who annexed the articles, "but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case." As Lord Cockburn put it in Dixon v. Fisher (1843) 5 D. 775, 793 "no man can make his property real or personal by merely thinking it so." The matter has to be viewed objectively.*

Patent for all to see is a term intended to make clear determination of chattel or realty is not based on the motive of the person (such as an agreement in a contract that says Morris' bungalow in Elitestone was chattel), but the observable, objective facts. This phrase was rightly used in Antoun [2020]. Jono Voss claimed he was making a vehicle,

but the axles were on the driveway not under the home, and he conceded in the hearing that the thing he was making was not a vehicle. It was landlocked. It was made of two steel beams as bearers with cross beams of timber in the manner of a building, not a mobile home. As a two floor unit, it had more ground floor area than the generally accepted size of a tiny home (40 m²). It was patent for all to see Voss had constructed a building, even if he truly believed he was making a vehicle.

But to apply this to the facts in Beachen [26] is in error. It was factory-made, brought on intact, completely meeting the Elitestone and other tests of a chattel home.

Lord Clyde quoted Lord Cockburn in Dixon v. Fisher (1843) 5 D. 775, 793

> *"no man can make his property real or personal by merely thinking it so." The matter has to be viewed objectively"*

The same applies the Council. It cannot make David Beachen's mobile home real property merely by saying so or saying it is "patent for all to see". The onus on the Council is to prove it within the framework of established law.

The tests of attachment is objective and based in part on how it is removed

[29] In Beachen [27] the Council submitted a series of facts, some contestable, that it claimed was evidence the mobile home was a minor dwelling, hence part of the land. The council submitted it was not capable of being moved with ease. In law, this is not the test of Elitestone.

[30] In Elitestone Lord Clyde considered the degree to which a bungalow had become part of the land:

> *The first of these factors may serve both to identify an item as being real property in its own right and to indicate a case of accession. But account has also to be taken of the degree of physical attachment and the possibility or impossibility of restoring the article from its constituent parts after dissolution. In one early Scottish case large leaden vessels which were not fastened to the building in any way but simply rested by their own weight were held to be heritable since they had had to be taken to pieces in order to be removed and had then been sold as old lead: Niven v. Pitcairn (1823) 2 S. 270. In Hellawell v. Eastwood (1851) 6 Exch. 295, 312, Parke B., in considering the mode and extent of annexation of the articles in that case, referred to the consideration whether the object in question "can easily be removed, integré, salvé, et commodé, or not, without injury to itself or the fabric of the building." It is agreed in the present case that as matter of fact that "the bungalow is not removable in one piece; nor is it demountable for re-erection elsewhere". That agreed finding is in my view one powerful indication that it is not of the nature of a chattel.*

The test of Elitestone is objective. Will there be damage to the mobile home or to the land by its removal? In contrast to this, the Auckland Council tests were:

- **It had a cabin floor on a trailer frame**. Far from showing this meets the test of Elitestone as realty, it demonstrates the opposite. It is intended to remain mobile. If it was to be a minor dwelling fixed to land, it would have been detached and mounted on a foundation.

- **The drawbar had been removed**. This is done for security, because mobile homes have been stolen in the past. As chattel they are not fixed to land and if the drawbar is permanent, it is easier to steal. This is like saying a car is immovable because the driver has the key in their pocket.

- **Supported by wooden cores it to keep it level**. Far from showing the mobile home loses the possibility of being restored after removal, this demonstrates the opposite. The mobile home is not damaged or taken apart in any way. It is merely jacked up, the same as changing a flat tyre, the wooden cores (blocks and pallets) removed and the tyres are then touching the ground, ready to tow.

- **Gas, plumbing and water connected**. This is contradicted by in Elitestone:

  > *"A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity.*

- **"A trailer with wheels that are not touching the ground, with the trailer being placed atop several wooden pallets or blocks functioning as a rudimentary foundation for the tiny home."** It is misleading to call the blocks and pallets a rudimentary foundation. A foundation is necessary structural element of a building subject to static conditions including wind load, earthquake and protection from ground water. It is designed to safely transmit loads from the walls to the earth and is part of a complex system of engineering. In contrast a mobile home is designed to travel long distances on roads – sustaining jolts equivalent to earthquakes and wind at cyclone speeds (over 63 km/h – on the road a mobile home travels at 90 km/h). It is not designed to need a foundation. The fact the blocks are present, rather than fixed to a foundation clearly shows the intention is to not cause the mobile home to become part of the land.

  The reason to have the tyres in the air is for comfort and also to prevent the tyres from developing flat spots. Many mobile homes have their tyres removed while in situ to prevent damage from the sun, since they are only needed during transport. In no way does this show the mobile home has become part of the land.

- **Considerable work to move**: As cited in Elitestone, this is not the test. The test asks if the object must be demolished or taken apart. It also is factually incorrect. David Beachen testified the Council was wrong in this assertion, but the Judge gave no credence to that testimony. In fact, the deck was not attached to the mobile home, nor was the adjacent shed or the water tank, and neither were in the way of removal because the mobile home was towable from either end and the deck was in line with the wheel direction. Further, as discussed elsewhere in this analysis, detaching from utilities does not establish the mobile home had become part of the land. The proof was in the pudding. After losing the case, David Beachen sold the mobile home, it was towed off his land intact, transported hundreds of kilometres to a new site where it resumed duty as a home.

A movable structure is like a windmill pivoting or a pontoon rising with the tide

[31] **On a Movable Structure**: The term *movable* has caused considerable confusion in interpretations by New Zealand councils, ministries and lower courts. In Skerritts [2000] Schiemann LJ brought together landmark cases including Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited [1949] 1 KB 385. Lord Justice Schiemann wrote:

12. The words which were used in the context of rating in that case[2] *upon which the judge and Mr Katkowski, who appears for the respondent, rely, are to be found in the judgments of Denning LJ and Jenkins J. Denning LJ said this:*

> *"A structure is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation; but it is still a structure even though some of its parts may be movable, as, for instance, about a pivot. Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a structure but it may be, 'in the nature of a structure' if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site. Thus a floating pontoon, which is permanently in position as a landing stage beside a pier is 'in the nature of a structure', even though it moves up and down with the tide and is occasionally removed for repairs or cleaning. ."* [Underline in original]

"*In the nature of a structure*" is a tight allowance of movement and is far from the mobility of a mobile home which is by definition completely mobile. It arrives intact, it leaves intact leaving nothing more than bare soil.

Note the reference to the floating pontoon as realty, in contrast to the houseboat in Chelsea [2000] that is chattel. Also note the meaning of *structure* in the RMA (…*and includes any raft).* A raft means any moored floating platform which is not self-propelled, but does not extend to a houseboat secured by ropes and perhaps services. A houseboat may be roped to a raft in a marina but the home does not lose its independent identity. The same applies to a mobile home. The movement of a mobile home is not "in the nature of a structure"; indeed it is more accurate to call it mobile than movable.

Mains services connected by a professional do not necessarily make an object realty

[32] **Utility Connections:** This was well established in Savoye [2014] citing Horwich [1915]. HHJ Seymour, QC wrote:

> *The dividing line between things which are fixed and not fixed might be the telephone on one's desk which is not fixed to the land and the socket in the wall which is.*

The socket is part of the building. Removing it may result in exposed wires that could compromise the use of the telephone network in the building, thus, the socket is part of the land. However, the wire running into the socket can be disconnected by a technician to enable the telephone to be disconnected as chattel. In 1915, phones would be hard-wired into the socket with a threaded rod and nut requiring a technician to disconnect,

[2] Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited [1949] 1 KB 385

but Horwich finds the telephone remains chattel. In later years telephones were coupled using phone jacks, similar to caravan electrical connections, making them even easier to disconnect. Thus, the test is not the fact of connection, but removal without damage.

In the facts cited by the Council, that the services would have to be disconnected provides no evidence the mobile home had become part of the land.

[33] In Beachen [29] the Council submitted the sum total support a finding the mobile home is fixed to the land for the purposes of the definition of "structure." As Elitestone and others show, this is completely in error. The sum total support is zero.

The object (purpose) of annexation

[34] In Beachen [29] the Council submitted the mobile home is intended to be used as a dwelling that is demonstrated by various signs of life observed within and around it.

As discussed in [27] above, the Council must first establish the mobile home is part of the land (realty) and only if that is established is the question of dwelling addressed.

[35] As a question of fact, David Beachen should probably have stipulated the fact that it is intended for occupation by people so it need not be argued in the case. Mobile homes are designed to be lived in year round, but to paraphrase Chelsea (see 0 above) it is not necessary to annex the mobile home to the land to enable it to be used as a home.

[36] In addressing the object (or purpose) of annexation, the test is not as set out by the Council. In Elitestone Lord Lloyd referenced Hellawell v Eastwood (1851) 155 ER 554

> *... the purpose of the annexation must be addressed. If it is placed to be enjoyed better as an object it is likely to be a chattel. If it is placed for the benefit of the land, it is likely to be a fixture.*

Savoye expands on this, quoting Halsbury's Laws of England (2012), by reference to various authorities, says at Para. 174:

> *"Whether an object that has been brought onto the land has become affixed to the premises and so has become a fixture (or a permanent part of the land) is a question of fact which principally depends first on the mode and extent of the annexation, and especially on whether the object can easily be removed without injury to itself or to the premises; and secondly on the purpose of the annexation, that is to say, whether it was for the permanent and substantial improvement of the premises or merely a temporary purpose for the more complete enjoyment and use of the object as a chattel. The mode of annexation is, therefore, only one of the circumstances to be considered, and it may not be the most important consideration.* [underline added]

A mobile home is brought onto land to provide interim shelter for people where the objective intent is not to commit the land. In Beachen, David Beachen wanted to provide a place for his mother to stay when visiting. As a landowner he did not wish to commit his land with a minor dwelling that is intended to remain on the land for no less than 50 years, and if removed not only results in loss of the cost invested when demolished, but also incurs demolition charges. By purchasing a mobile home he provides a temporary place for his mother to enjoy visiting her son without imposing on Mr. Beachen's family, while not having to stay in a nearby hotel. When that need

passes, for whatever reason, the mobile home is sold, recouping part if not all of the original cost, and is towed away intact. It exists for the use and enjoyment of the object, not to add permanent and substantial improvement to Beachen's land.

[37] **Purpose of annexation**: In Elitestone Lord Lloyd wrote:

> *Many different tests have been suggested, 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. This and similar tests are 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 part of the freehold: see Leigh v. Taylor [1902] AC 157.*
>
> *These tests are less useful when one is considering the house itself. In the case of the house the answer is as much a matter of common sense as precise analysis. A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty. "* [underline added]

This is a very different test of purpose or object than that submitted by the Council who simply observes it is lived in therefore its purpose must be as a dwelling. Beachen's mobile home was manufactured in a way as to be removable as a unit, and it was connected to mains services in a way that was easily removable. The mobile home was not constructed on site, and as was seen after losing the case Mr. Beachen sold the mobile home and it was removed intact.

Discussion

[38] In Beachen [41], Judge Dickey writes:

> *We accept that the tiny home was brought/towed onto the property attached to a frame/trailer. We accept that the existence of the frame and the wheels on the frame may bring the tiny home within the definition of vehicle under the Land Transport Act 1998. However, that is not the end of the matter, and we need make no finding on it. The fact that it has a frame and was towed to its current location, and can be towed in the future, does not disqualify it from being a "structure" now that it is located on the property and has been for three years.*

Had Mr. Beachen retained a lawyer who read Elitestone, this paragraph [41] would be the basis upon which he would appeal the decision. The fact it has a frame and was towed to its current location and can be towed in the future most certainly disqualifies it as a structure. And as has been show, three years tenure, or fifty for that matter has no bearing.

[39] "**Is it a vehicle?"** Both David Beachen and Judge Dickey speak to a question that has caused considerable confusion in NZ. In [45] below, addressing tangential matters, it is necessary to address the conflation of the meaning of structure in the RMA with the meaning of building in the Building Act because it surfaces in so many cases, including Beachen and Antoun.

[40] **Consistency in law:** The NZ Government's Ministry for Culture and Heritage explains how NZ's judicial system works[3]. In ***precedent and stare decisis*** it writes:

> *"Consistency and stability in the law are values intrinsic to the rule of law, allowing citizens to predict how the law, when applied, will affect them."*

In fact, a careful reading of the meaning of building in the Building Act and structure in the RMA are consistent. However, the interpretations by councils, ministries and lower courts are not consistent. If a mobile home is chattel in a case involving a bank foreclosing on a mortgage, excluding claim on the mobile home, it cannot be found to be realty in Environment Court.

[41] **Judge agrees with the Council:** In Beachen [45], Judge Dickey wrote

We agree with the submissions of the Council that the tiny home is imbedded in the land. It has been in place for three years and the level of integration is clear from the photographs provided in evidence. Features that illustrate the tiny home's degree of annexation to the land are:

(a) the deck located in front of it. While not physically connected, it abuts it and is clearly constructed to complement and fit in with the tiny home's dimensions, and is intended for use as part of the tiny home.

(b) the 'shed' or unit abutting it that is accessed from the deck. Again, the shed/unit complements and fits with the tiny home.

(c) it is partially nestled into the land, sitting on its trailer which in turn sits on wooden framing.

(d) access to the property's water, wastewater and power systems. This is evident from the pipework present beneath the tiny home….

(e) the heat pump.

(f) the kitchen with full cooking and food storage facilities.

[42] These are not degrees that point to annexation, as Elitestone and others make clear.

- **"Imbedded**" is not a bona fide test and is wrongly applied in Beachen. In property law *imbedded* generally refers to a thing whose foundation is laid well below the normal surface of the earth or in the case of chattel, lost or abandoned personal property which by sedimentation over time became part of the natural earth. Removal of something imbedded generally requires digging or pulling with large machinery. It is inaccurately used to describe Beachen's tiny home which Judge Dickey describes as above the soil, on top of a trailer on top of blocks
- **"…in place for three years".** There is no established law that finds tenure changes chattel into realty. Elitestone referenced Hellawell v Eastwood (1851) 155 ER 554 the question of machines firmly affixed to a factory floor established two tests:

[3] https://teara.govt.nz/en/judicial-system/print

> *Firstly to consider the degree in which the item is annexed to the land and whether it can be removed without damage to it or the land.*
>
> *Secondly, the purpose of the annexation must be addressed. If it is placed to be enjoyed better as an object it is likely to be a chattel. If it is placed for the benefit of the land, it is likely to be a fixture.*

Each issue is one of fact in the circumstances. In Hellawell, the cotton spinning machines at issue were be found to be chattels because they could easily be removed and because the purpose of the annexation was to steady the machines in use. It was not for the benefit of the property. The spinning machines had been there far longer than three years. In Hellawell and Elitestone there is no test of tenure. Indeed in Elitestone, the bungalow had been on the property for decades, but the test was not tenure but inability to remove it except by destroying it. It seems the test of tenure arises from a misunderstanding of the meaning of temporary. Temporary refers to ease of removal without damage, destruction or taking apart, not how long it remains in place. A caravan can be in a campground for years, and indeed in New Zealand there are many that pensioners and beneficiaries who call caravans in campgrounds home, but that does not cause the ownership of the caravan to pass from the camper to the campground.

- "**Level of integration"** as used in Beachen is not a legal concept but an aesthetic one. For example where Judge Dickey writes: "*the deck... is clearly constructed to complement and fit in with the tiny home's dimensions.* The fact the unit has adjacent elements that compliment does not cause the unit to become part of the land. The test is *degree of annexation* and *purpose of annexation,* not *"level"*.

  Degree of annexation and purpose of annexation has been discussed at length above.

(a) **The Deck:** As J Blackburn wrote in Elitestone the test is that the mobile home is the extent to which removal requires demolishing or as in Skerrits "*only be removed by a process amounting to pulling down or taking to pieces*". There is nothing in a deck located next to the mobile home, especially as it was not physically connected, that shows any degree of annexation. To the contrary, the fact it is not connected shows an intention that one day the mobile home will be towed away, where connection of deck to mobile home would complicate removal. The appellant testified to this but the Judge chose to accept the Council's assertion removal would be difficult. This is an error in law, but also an error in fact, as proven when the mobile home was removed.

(b) **The Shed**: As above, the fact of a proximate shed, again, not physically connected, and shows no degree of annexation. To the contrary, it objectively shows intention to remain as chattel. It costs less and is stronger to build a shed with three walls fixed to the fourth wall of a minor dwelling. One places a stand-alone shed adjacent to the mobile home to serve at the convenience of the mobile home only during its tenure.

(c) **Nestled into the land**: *Nestled* is an informal fallacy that obfuscates the test of fixed to land.

- *Nestled* means *to lie comfortably close to or against someone or something*. It does not mean that the mobile home has lost its independent identity and become part of the land. If the cabin is sitting on a trailer which in turn sits on wood sufficiently

high that the tyres do not touch the ground, then "nestled" is factually incorrect as well.

- *It is…sitting on its trailer* is a clear indication of intent – that the object is designed to be removed intact, capable of being removed without being taken apart or demolished.

- "[The trailer] in turn sits on wooden framing" is factually incorrect. Wooden framing refers to studs, plates, headers, rafters, girders, flooring and joists and other building components affixed to a foundation to transfer load and stability from the frame to the earth. Beachen's trailer sat on wooden blocks and pallets to level the trailer and prevent it from moving when people were inside, or from wind. As Tuckey LJ wrote in Chelsea applying the principles of Elitestone:

> *Turning firstly to the degree of annexure it is important to bear in mind that what is required is sufficient attachment to the land so that the chattel becomes part of the land itself. Here the houseboat rested periodically on the river bed below it and was secured by ropes and perhaps to an extent the services to other structures. It is difficult to see how attachments in this way to the pontoons, the anchor in the riverbed and the rings in the embankment wall could possibly make the houseboat part of the land. One is bound to ask "which land?" There is in my judgment no satisfactory answer to this question. More importantly, however, all these attachments could simply be undone. The houseboat could be moved quite easily without injury to itself or the land.*

The same question can be asked in Beachen. If all attachments can simply be undone (in Beachen's case attached only by gravity which merely requires jacking up the frame, removing the blocks, disconnecting the utilities and inserting the tow bar), and the mobile home then can be moved quite easily without injury to itself or the land, what makes it realty; how has it become part of the land?

As Lord Clyde wrote in Elitestone:

> *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."*

The presence of a trailer under the home clearly shows the intent is for the home to remain not only moveable but mobile. The onus is on the council to show objectively the intent is the opposite. The council did not do this. The judge accepted council's assertions because D Beachen, acting pro se failed to challenge them based on the precedent of Elitestone, the very case cited by the judge.

(d) *Access to the property's water, wastewater and power systems*: This is clearly addressed in Elitestone where Lord Lloyd wrote:

> *A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity.*

As Elitestone makes clear, connection to services does not in itself show degrees of annexation and the connections were easily removable, of a temporary nature.

The question on utilities turns on the meaning of "temporary".

If a caravan is parked in a campground for a year, with power hooked up to the campground standpipe, is it temporary, or does the campground now own it as realty? Savoye provides guidance on this: tenure is not relevant, it is the fact that at any time it can be detached without damage to either the object or its host. Savoye [2014] cites Horwich v Symond [1915] 84 LJKB 1083 where HHJ Seymour, QC wrote:

> *The dividing line between things which are fixed and not fixed might be the telephone on one's desk which is not fixed to the land and the socket in the wall which is.*

The telephone in Horwich would be in the home or office for years, even decades, but tenure does not make it realty.

As discussed in [32] above, access to utility systems has a dividing line, where realty stops and chattel begins. In 1915, disconnecting a telephone would generally require the services of a telephone technician, but this fact does not cause the telephone to cease being chattel and become part of the land. The socket remains part of the land because if removed, bare wires could compromise the building's system. If the mobile home was connected in such a way that disconnection would compromise or damage the realty, that could show it had lost its independent identity and become part of the land. But that is neither how it worked in Beachen, or in most factory-made mobile homes. Indeed, they are generally designed to a higher level where they do not require a licensed professional. Electrical generally uses a caravan plug that works similar to an EV charger. Water is generally connected using a potable water hose, similar to a garden hose (but uses non-toxic hose). Wastewater generally uses a macerator pump and hose connected with a caravan-type wastewater connection, although some mobile homes use composting toilets and on-site or off-site greywater disposal, depending on council regulations.

(e) *The heat pump:* As above, connection to a heat pump means nothing. A heat pump on chattel is chattel. The respondent supplied the court a photograph of Beachen's mobile home that showed the external unit was fixed to the wall of the mobile home. It is no different than a light fixture by the door or the wheels bolted to the axle.

(f) *The kitchen:* It seems here the respondent is confusing the judge. A kitchen is a test of an accessory building as a second dwelling, but as Lord Justice Morritt set out in Chelsea (see [27] above) before one applies the kitchen test, one must first show the home is regarded as part of the land. If it's not a dwelling, it matters not what is in it. If it is a dwelling, then the presence of a kitchen may indicate it is a second dwelling, presuming there is a primary dwelling on the land, but if it is in chattel it is irrelevant.

Fixing to keep an object steady does not necessarily make it part of the land

[43] **Anchors:** While Beachen's mobile home was solely held by gravity, there will be cases where in mobile homes for safety, the occupant has added anchoring pegs, chains, cables or bolts to prevent the unit from rocking or flipping in high winds, floating away in a flood or being turned over in an earthquake. Provided the means of attachment is easily removable and is not objectively seen as an intent to make the mobile home part of the land, such the fact of fixing to keep it steady does not in itself show annexation. Savoye cites Horwich where Buckley LJ said at page 1087:

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

[44] **Remainder of Beachen:** Having addressed the question of structure, Judge Dickey then turns to the question of building and dwelling. This does not need further refutation if it is accepted the Council has failed to demonstrate Beachen's mobile home is a structure. Had David Beachen either read Elitestone and argued it, or more preferably retained a lawyer to represent him in the hearing, the case most likely would have been won on Beachen [41] where Judge Dickey accepted the mobile home was towed onto the property intact and can be towed off in the future. Or if not, and had David Beachen known in time to appeal, it is likely the decision would have been overturned on appeal on law.

Tangential matters

On Conflating Vehicles in the Building Act

[45] There is a tangential problem in NZ quasi-judicial proceedings including abatement orders, notices to fix, MBIE determinations as well as appeals to the lower courts in New Zealand. Too many cases heard in NZ, including Dall v MBIE [2020] cited in Beachen [34], ask *is it a vehicle*, when case law from the UK, including Elitestone, asks first the question, *is it chattel or realty?* The question arose in Antoun [2020] and in Beachen [2023] which were Environment Court cases under the RMA, but where the Building Act 1991 was cited. This conflation needs to be addressed and answered.

[46] **On adjectives in law:** S8 of the Building Act has been cited by both parties and the judge in Antoun and Beachen. The relevant part of the Act says:

> ***building***— *(a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and (b) includes— (iii) a vehicle or motor vehicle (including a vehicle or motor vehicle… that is immovable and is occupied by people on a permanent or long-term basis".* [underline added]

This complex sentence has produced misinterpretations by councils, ministries and courts,

[47] **Means and Includes:** To understand what s8(b)(iii) says, the NZ Law Commission *Legislation Manual Structure and Style* section on DEFINITIONS speaks to how s8 is structured:

> *208 In drafting definitions, use* ***means*** *if the complete meaning is stipulated.* ***Includes*** *is appropriate if the stipulated meaning is incomplete. Do not use the phrase* ***means and includes****. It is impossible to stipulate a complete and an incomplete meaning at the same time. In an unusual case it may be appropriate to use the formula* ***means . . . and includes*** *. . . if the function of the second part of the definition is to clarify or remove doubt about the intended scope of the first part of the definition:* [underline added]

In s8, ***building****— (a) means …and (b) includes* is such an unusual case where (b) signals a limit to the reach of the Act. A vehicle can become a structure as in s8(a) but whereas s8(a) includes "*occupation by people, animals, machinery, or chattels"*, s8(b)(iii) limits vehicles that have become structures to those "*occupied by people on a permanent or long-term basis".* In other words, vehicles rendered immovable (i.e. fixed to land) that are occupied by animals, machinery or chattels (or by people on a short term basis, such as a bus converted to a hunting blind), are excluded from the reach of the act. Thus, the immovable bus converted to a hen house, tool room or duck blind on a farm does not require building consent and is not subject to the requirements of the NZBC, but if that same bus becomes occupied by hidden homeless on a long-term basis, it comes under the enforcement powers of the Council Building Department. The reason is made clear in Building Act s3 Purposes which is focused on use by people and their health, safety, wellbeing, physical independence and ability to escape a fire.

Unfortunately, councils, ministries and district courts have overlooked this fundamental understanding of legislation. Sequentially, as set out in Chelsea (see [24] above) the first question asks "*is it a structure?"* meaning *is it realty* and only when that has been found in the affirmative does the finder of fact proceed to ask "*is it a vehicle?"* which requires the structure is occupied by people, not animals, machinery, storage or chattel.

[48] **Sequential test.** Before asking "*is it a vehicle?"* one must first ask "*is it a structure?"*. This is because s8(a) begins by saying: *building— (a) means a temporary or permanent movable or immovable structure*… Removing adjectives (*building means a …structure)* returns to the same question… "*is it fixed to land?".* The adjectives: *temporary or permanent* is added to make clear if it is fixed to land tenure is irrelevant. The adjectives, *movable or immovable*, are in the context of Skerritts and others, in which motion is a feature of a structure, such as movement by force of wind (windmill) or tide (pontoon) as opposed to mobile. Only if this first test finds the object is a structure does one then proceed to test immovable vehicles, but only if they are occupied by people on a permanent or long-term basis.

[49] **NZ Court of Appeals [2010]:** In Thames-Coromandel v Te Puru [2010], the appeals court examined the facts related to two mobile homes, one of which was clearly immovable because it comprised of two units locked together, thus rendering them practically immovable without taking apart. As per Skerrits, the two units were, *once*

installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces."

Accordingly the appeals court focused on how the alleged vehicle (as defined in s8(b)(iii) lost its independent identity and became part of the land. Unfortunately, this has tended to turn the question in NZ cases to the subsidiary question: *is a vehicle*, obscuring the precedent question: *is it realty or chattel*?

[50] **Note on language:** The English language is a nuanced language in which different concepts may use different verbs. This is relevant when considering National Planning Standards on Definitions.

- **Reality:** one constructs a structure or builds a building. In *construction,* trades people must be licensed masters of their trade and council officials inspect their work to ensure health, safety and durability. By this approval process, councils take on liability for the performance of the building.
- **Chattel:** tends to be manufactured in factories, engineered to be self-contained and self-supporting, capable of being delivered to site intact and undamaged and to perform to an acceptable standard. In *manufacturing,* quality-control systems and repetitive processes use assembly-line personal supervised by quality-control managers to ensure a consistent product that ensures health, safety and durability. The manufacturer holds complete and exclusive liability for their product, thus relieving authorities, such as district councils of potential liability claims.

The purpose of this brief

Saving the People and Communities from the RMA

[51] **If mobile homes are not realty, what next?** The RMA is not the only arrow in the Council's quiver. This analysis argues mobile homes are not minor dwellings, but in district/unitary plans where there is no provision for chattel housing. What next? Does this mean anyone can bring a mobile home onto any property without any council oversight to protect people, communities and environment? While there are other parts in district/unitary plans that may constrain adverse effects, or councils can accelerate plan changes under urgency, this would continue to place rules over wellbeing. The people and communities are suffering and they need solutions not more rules.

Failure of S5 Purpose of the Resource Management Act 1991 [RMA]

[52] **The purpose of the RMA** is to enable people and communities to provide for their social, economic and cultural wellbeing, health and safety while protecting and preserving the environment. At the most fundamental level, wellbeing begins with the ability of all New Zealanders to afford to rent or own a home.

[53] **The traditional test** of this is a multiplier of median home price three times median household income (3X). When the multiplier rises to 10X, and 62% New Zealanders[4]

[4] https://www.ipsos.com/en-nz/ipsos-nz-issues-monitor-november-2019

believe they cannot afford to buy a home in their local property market, the wellbeing purposes of the RMA are not being achieved.

[54] **The RMA has failed:** Not only have those purposes not been achieved when it comes to housing affordability, an analysis shows a root cause is directly attributable to the administration of the RMA by territorial authorities. The first cause was in council planners restricting new subdivision land so it fails to keep pace with population growth. This results in demand driving up prices.

[55] **The planning systems cause and worsen the housing crisis:** In 2021 in the *Cabinet Paper National Policy Statement Urban-Development* the Chair of the Cabinet Economic Development Committee wrote to the Minister for Urban Development and the Minister for the Environment to say[5]:

> *New Zealand has a severe housing crisis that impacts most on our poor, vulnerable and younger generations. Our planning and urban development systems have helped cause and worsen a large part of this crisis and has dramatically contributed to a lack of housing.*
>
> *Constraints in the planning system have meant local authorities are not providing enough development capacity for people to build and live in the homes they want. This has led to high land prices, unaffordable housing, and a system that incentivises land banking and speculation. It has also resulted in people having poor access to employment, education and social services. In short, under the current system, the cost of finding a home and living in our cities is too high.*

[56] **District/Unitary Plans are non-responsive:** To enable people and communities, councils rely on the glacially-slow process of revising district/unitary plans that can take a decade to change and if those plans are non-responsive, rather than find workarounds, council issues abatement orders because "rules are rules", rather than examining if the rules are obstructing the RMA s5 purposes. As the Ministers were informed in 2021, *our planning and urban development systems have helped cause and worsen a large part of this crisis."*

[57] **No leadership:** While the failure to provide enough development capacity is a macrocosmic issue, there is another more granular failure. Local authorities (councils) do not have responsive planning within their organisations. Thus when the people and communities approach the council asking them to enable them to solve an emerging issue such as the affordable housing crisis there is no department or director responsible for enabling people and community within any reasonable time frame.

[58] **Excessive Complexity:** The second barrier to affordable housing are complex regulations overlaid with excessive costs and delays that drive up the cost of compliance and includes ultra vires use of abatement orders to obfuscate omissions in district/unitary plans.

[59] **Law versus fear:** The NZ Government's Ministry for Culture and Heritage explains how NZ's judicial system works[6]. In ***precedent and stare decisis*** it writes: "*Consistency and stability in the law are values intrinsic to the rule of law, allowing citizens to*

[5] https://environment.govt.nz/assets/publications/Cabinet-papers-briefings-and-minutes/cabinet-paper-national-policy-statement-urban-development.pdf
[6] https://teara.govt.nz/en/judicial-system/print

predict how the law, when applied, will affect them." When it comes to mobile homes as an option for affordable housing, precedent has been ignored, with decisions and determinations by lower courts, quasi-judicial ministry officials and council enforcement officers making inconsistent findings. This results in a fear-based, lawless environment of *don't ask, don't tell and hide from grumpy neighbours.*

[60] **Problem: rules quashing purposes**: The purposes of the RMA have been quashed by the administration of the RMA. Applicants, even well-informed applicants, find their RMA consent applications rejected as incomplete due to the layers of rules, national planning standards and other overlays that require a professional planner to navigate. A body of rules have become an incoherent mess that have undermined the purposes of enabling people and communities. Indeed, the RMA now enables consulting planners, environmental lawyers and council planners, all of whom are paid by the people and communities unable to provide for their wellbeing without a great deal of money and time consumed by the rule-bound process. Changing that system will take decades. As seen in the recent RMA replacement by the 6th Labour Government and subsequent repeal by the 6th National Government, change is hard.

[61] **Solution – use different law:** Instead of trying to force mobile homes under the incoherent processes of the RMA, councils can use another law, **covenant on title** to give surgical precision in controlling adverse effects without the costs, delays and barriers of district/unitary plans. These plans are rigid, and obstruct mobile homes that do not commit the land. The advantage of covenant on title is avoiding the costs, delays and complexities that become insurmountable obstacles to affordable housing.

[62] **Covenant on Title:** A covenant on title can have a simple check list examined by a desk duty officer. The council invites owners of surplus land to volunteer to host one or two or twenty mobile homes where the site is deemed suitable. The duty officer does not necessarily all apply the rules in the district plan for minor dwellings, but instead evaluate the much simpler criteria of:

- Is there sufficient unused site coverage using the district plan permitted rules
- Does the proposed placement fit setbacks based on the rules?
- Is there adequate wastewater disposal capacity?
- Is there adequate parking and suitable road access?
- Does the mobile home meet minimum performance standards (pre-registered)

Then include in the covenant:

- 15 year consent, renewable only if government has not solved the housing crisis
- Controls over noise and nuisance, with powers to evict tenants or remove units
- If councils feel they are losing out on rates revenue, attach an annual fee equal to the lost revenue. For a $65,000 mobile home, that's probably $200/year.

[63] **Conclusion**: New Zealand is facing a slow catastrophe that can be turned around if officials and judges place the purposes of the RMA over the rules that have rendered it toxic to the purposes. It requires pragmatism to find work-arounds by first removing reliance on the ultra vires issue of abatement orders based on asserting the mobile home is a minor dwelling, and then using different law, covenant on title to ensure the adverse effects of permitting placement on surplus land are di minimis.