ANALYSIS

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: The Beachen errors of law enable analysis to set out stare decisis (established law)

National Policy Statement on Urban Development (NPS-UD)

In 2021, in the NPS-UD and The Resource Management (Housing Supply and Other Matters) Amendment Act 2021 [Housing Supply Act] Central Government made clear the council planning system was not working. It wrote: "*Constraints in the planning system have made it harder for people to build and live in 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. This impacts most on our poor, vulnerable and younger generations.*"

It is an extreme measure when Parliament votes to overrule council policy, to say council planning has failed. But in the Housing Supply Act, Parliament did exactly that.

It is a numbers game. Every single new home placed somewhere within the council's territory is one less hidden homeless living in cars, tents, sheds, garages or overcrowded conditions. The mobile home industry offers one answer to this housing crisis, perhaps the most immediate and cost effective. But it is as invisible as the hidden homeless. The mobile

home industry in NZ emerged as housing costs rose. Unlike the DIY tiny home trend publicised by tech-savvy Millennials, the mobile home industry is very low profile, as it serves poor people with a disproportionate representation by Māori, Pasifika, elders, school leavers, solo mums and divorced women. Just as the clients are hidden, the industry maintains a low profile to avoid the sort of entanglement with authorities as seen in Beachen.

The fastest way to get homes on the ground are mobile homes made in NZ factories. They are manufactured to an acceptable standard in two weeks, installed in two hours, cost under $100,000, and when the need passes they can be removed in two hours, leaving only bare soil, having never committed the land the way buildings, such as minor dwellings do.

Overlooked: Unfortunately, they were not included in the House Supply Act because the industry is so invisible. They were not considered when the Resource Management Act 1991 (RMA) and the Building Act 2004 were written, thus as chattel housing there is a gap in the law. They only come to the attention of the council when a grumpy neighbour complains, at which time an adversarial contest begins. This is what happened in Beachen v Auckland Council Decision [2023] NZEnvC 159 [Beachen], resulting in a court decision that is, in a negative way, helpful. It sets forth all the wrong arguments that have been used by councils against tiny homes on wheels (DIY trailer homes) and to a lesser extent mobile homes (trailer homes made in factories), thus providing an opportunity to examine and disprove them.

A way forward: This analysis will show the abatement order issued to DT Beachen is ultra vires, but also propose a lawful way to use mobile homes to address the issues in the Housing Supply Act that requires no new legislation or changes to the Unitary Plan, and can be implemented immediately.

Summary

[1] In Beachen v Auckland Council [Decision 2023 NZEnvC 159] (Beachen), Appellant DT Beachen, a digital marketing executive with no qualifications at 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 lost a case he should have won.

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

[3] The purpose of this brief is to establish neither the RMA (and Unitary/District Plans 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 Councils act ultra vires when they allege a chattel habitat is a minor dwelling.

[4] This analysis finds the court erred by not considering the established law on ***fixed to land*** in the context of the ***Chain of Realty***. The chain conjoins minor dwelling to land:

Realty = Minor Dwelling > Dwelling > Building > Structure > *Fixed to Land* > Land

Realty is a legal term for real property/estate, as opposed to chattel. The chain begins with land, and includes all that is fixed to land. For Beachen's mobile home to be a minor dwelling, it must be realty, meaning the respondent must prove it is fixed to land. If not proven to be fixed to land, the chain breaks, and the mobile home is chattel.

[5] This is not a loophole. In property law, as preeminent NZ jurist, Sir John W. Salmond, former Solicitor General of and Supreme Court Judge in NZ, wrote in *Jurisprudence*.

> *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*

[6] The Respondent cited *Antoun v Hutt City Council [2023] NZEnvC 159* [Antoun] and Judge Dickey cited both Antoun and the precedent-setting case *Elitestone Ltd v Morris [1997] 1 WLR 687*. [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 established law relevant to Beachen and the appellant, acting for himself without a lawyer, did not know to research law and present it to the court. Had he done so, the precedents therein would have supported his appeal.

[7] There is a dividing line between realty and chattel. The line is *fixed to land*. If not fixed to land, the line is crossed from realty to chattel. The line does not move, but must be tested on facts considered within the context of established law. In Beachen, rather than cite established law found in Elitestone and others, the respondent moved the goal posts to get their abatement order over the line. They did so by citing Elitestone but not disclosing Elitestone's tests that would show Beachen's mobile home was chattel. Judge Dickey, while citing Elitestone, seems not to be familiar with its precedent.

[8] 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)

[9] 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*.

[10] In Beachen [41] Judge Dickey makes the admission 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.

[11] Had DT Beachen engaged a lawyer to appeal Judge Dickey's decision, this admission would likely have been the basis to overturn the decision on matters of law as the subsequent facts cited in the decision to support it are not supported by settled law.

[12] **The Distraction of the Vehicle Test:** Case law in New Zealand has been distracted by the question *vehicle or not* because of the Building Act s8 meaning of building includes vehicles that have become immovable. Te Puru Holiday Park [2010], Dall [2020] and Voss [2020] all focus on the question of "*vehicle or not?"* whereas Elitestone, Skerritts, Chelsea, Savoye and others go to the heart of the question "*chattel or realty?"* In Antoun, application of the precedent in Elitestone and others is valid because J. Voss, an amateur tiny home builder (see [22] below) thought if he called his creation a vehicle (as opposed to actually making a vehicle) that exempted him from regulation. To the contrary, in Beachen, Elitestone and other case law supports the finding the factory-made mobile home (see [21] below) is a chattel not a minor dwelling (realty).

[13] ***Patent for all to see***: In Antoun, Judge Dwyer visited the site and using the archaic Middle English term "patent" (meaning *clear* or *obvious*), observed that it was *patent for all to see* that Voss constructed a large structure that was fixed to land by virtue of being landlocked and not easily moved. Indeed at 52 m² on two floors, it was larger than the usual 37 m² maximum for a "tiny home" and while Voss called it a vehicle, it was clear for all to see (both in the site visit and in the photographs provided in the decision) that Voss was building a non-complying structure intended as a minor dwelling. In contrast, in Beachen, Judge Dickey did not visit the site, apparently relied on a photograph in which the critical test of attachment is hidden by plants, as well as council submissions by council compliance officers who would be unlikely to be conversant with Elitestone [1997] on questions of realty versus chattel. While Judge Dickey used the same *patent for all to see* (as in Antoun [2020] citing Elitestone (1997) citing Reynolds (1904)), in fact, the judge had not visited the site to see it and the sole photograph does not patently show a minor dwelling/building/structure or realty.

In short…

[14] ***Minor dwelling* and *building* are precise legal terms**; a precision overlooked by council officers, lawyers and judges in lower courts who presume chattel habitats are minor dwellings (realty) to capture activities that are, in established law, outside the powers accorded to territorial authorities by the RMA and Building Act. While councils can define mobile homes as chattel and regulate their effects, most have not done so.

[15] **"*Fixed to land*" is settled law**. As of late, councils and judges have failed to consider this settled law as they extend the reach of law beyond its powers. Parliament and higher courts may change settled law, but not a lower court or council administration.

[16] **Innocent by Execution:** Mr. Beachen was found by the court to have brought onto the land a minor dwelling. The resolution proposed by Council was to apply for a resource consent for a minor dwelling or to remove the mobile home. Mr. Beachen chose the latter, selling it. It was not demolished or taken apart (the test of minor dwellings [realty] as set out by Elitestone and others), it was towed on its wheels to the bottom of the driveway, intact and undamaged, loaded onto a transporter and legally driven hundreds of kilometres to another jurisdiction to be re-inhabited. The execution order proved the mobile home was in fact not realty, hence not a minor dwelling. One is reminded of the trial of witches in 16th century England where *trial by ordeal* was used. If the accused were unharmed, they were deemed guilty (and then burned at the stake), but if they not, they were innocent, albeit also often dead from the injuries of the trail.

Terms

[17] **Chain of Law**: As diagrammed in [4] above, *Minor Dwelling* is a precise legal term that sits within a chain of law called *realty* or *real property*. If the weakest link breaks, the chain fails. The chain that begins with **minor dwelling** ends with **land** (real property / real estate). If it is not realty, it is not a minor dwelling. The weak link is "fixed to land" The chain of title in law is as follows:

- All **minor dwelling** are dwellings
- All **dwellings** are buildings
- All **buildings** are structures
- All **structures** are realty (real property/estate), fixed to land (and annexed to title)
- All **realty** is either land or that which is fixed to land

[18] **Fixed to land (which also includes "annexed to title")** is the test that determines if habitat made by people is chattel or realty. It is the subject of this brief.

[19] **Chattel Habitat** is human habitat not fixed to land, thus not annexed to title. As such it does not lose its independent identity and does not become part of the land. It is not realty, structure, building, dwelling or minor dwelling, all of which are part of the land. It is personal property/chattel that can be absolutely owned by anyone.

[20] **Realty Habitat** (a residential building) is human habitat that is fixed to land, thus has lost its independent identity and become part of the land, annexed to title. Absolute ownership is held by the Crown who grants a bundle of rights to the land known as realty/real estate/real property, of which the strongest rights are those of fee simple. All realty (land and all things fixed to the land) in New Zealand is *owned* by the Crown.

> **Note:** This statement of absolute ownership excludes debate on Te Tiriti o Waitangi status of native title but solely focuses on the long-established principle of *imperium* (the right of government) and *dominium* (the Crown's paramount ownership of its territory). Realty is Crown-owned by dominium, chattel is not.

[21] **Mobile Home** is chattel habitat made in factories, manufactured to a standard specification and sold or leased to the general public. Mobile homes are also known as **cabins**, although more precisely, if over 2.55m in width, NZTA compliance requires the cabin is a removable overwidth payload on top of the road-legal trailer. In some cases the two parts, trailer and cabin, are made as one unit. This has no effect on their status as chattel, and numerous are towed anyway, but legally if the unitary trailer/cabin is over 2.55m wide, it must be carted on a hiab, flatbed or on another trailer. In the case of Beachen, the cabin was fixed to the trailer using shipping container locks.

> **US Law:** In the USA, until 1974 *mobile home* was used. With the passage of the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401–5426) *mobile home* was changed to *manufactured home*.
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> **NZ legislation:** In the absence of such legislation in NZ, *mobile home* shall be used. In NZ law *mobile home* is used in the Residential Tenancies Act 1986 s5(1)(t).

[22] **Tiny Home (or House) on Wheels** is chattel habitat made by a DIY (do it yourself) person, generally for themselves or family/friends, although some then go into the

business, but still call their product a Tiny House on Wheels for marketing purposes. Tiny homes are more likely to breach the line between chattel and realty (such as in Antoun) when one examines facts related to fixed to land. They also tend to be placed in more affluent neighbourhoods (such as in Dall v MBIE [2020]) where they attract complaints that drive council enforcement action. (**Note:** in Beachen, the trailer home is called a tiny home, but for consistency herein, it is called a mobile home because it was manufactured in a factory, mounted on a trailer using container locks that make the mobile home a lawful overwidth-payload on a road-legal trailer).

[23] **Trailer Home**: To avoid confusion, *trailer home* shall refer to both a mobile home made in a factory and *tiny home on wheels* made by a DIY person.

Why this analysis is important? To achieve RMA s5 purposes of wellbeing

[24] **S5 RMA Purposes** includes enabling people and communities to provide for their wellbeing, health and safety, while protecting of the environment. However, when environment protection is given priority over people's wellbeing. The upshot is an affordable housing crisis. Affordable homes are essential to people and communities' wellbeing, health and safety, and mobile homes are the most affordable solution. As such they need protection under the RMA, which unfortunately failed to anticipate the affordable housing crisis, thus overlooked this most ancient form of human habitat.

[25] **Affordable housing** is a ratio of 3:1, cost of a home to annual household income. Until recently adequate housing was affordable by all. But restrictive and reactive legislation and regulation added cost to construction. Immigration increased demand, but planning failed to increase house supply to house population growth. Studies show about 62% of Kiwis can no longer afford to buy a home in their home community. For those who purchased their home before the price rise, they can use inflated equity to stay in the housing market, but for those who did not, NZ is polarising into a class of haves and a class of haven-nots. This has negative implications that result in people and communities unable to provide for their wellbeing, health and safety.

[26] **Interim Solution:** Mobile homes often provide habitat for an interim period, perhaps for an elderly parent who needs a modicum of supervision, but when they die or move to a nursing home, the mobile home is removed. Or it is for grown children lacking savings to buy a home, thus using rent-to-own, they move a mobile home on their parents' property to save on rent. Having saved, they sell the mobile home to raise the down-payment. Or it can be a land owner with surplus land who wishes to be part of the affordable housing solution by renting parking space for others who bring their own mobile home on site. But in any of these cases should the landowner decide to sell the land, unless the land buyer agrees to side agreements to keep them on site, the mobile homes must vacate the property – the same as removing the furniture in the home and the cars and tools in the garage. And in doing so all this chattel are removed intact. It is the same as a storage shed on the land versus a shipping container used as storage. When the land is sold, the seller must take the container away as chattel, but the storage shed used stays with the land. The shed has no independent identity; it is realty. In contrast, the shipping container is chattel. If the buyer wants to own it, it is listed in a chattel side contract not in the real estate contract.

Polarisation

[27] **Law** is the foundation of the Social Contract made by the people to balance the needs and interests of the one with those of the many. Law exists to ensure wellbeing, keeping of the peace, and protecting the life-supporting capacities of Nature. When it becomes unbalanced, the Social Contract becomes threatened. This is happening now in New Zealand, due to unaffordable housing.

[28] **Comfortable Class** refers to people whose income / savings enables them to meet their needs – the haves. In the 20th century, almost all New Zealanders were in this class including pensioners and beneficiaries.

[29] **Struggling Class** refers to people whose income/savings do not enable them to meet their needs; they must sacrifice basic needs such as adequate housing – the have-nots. This class has emerged in the 21st century, and is growing.

[30] **Predator Class** refers to the next generation of a struggling class, who – finding no opportunity for them to get good jobs, start a family and buy a home – turn to crime. As teens and preteens they break windows, tag buildings, then graduate to stealing cars, ram-raiding shops, and turning to drugs to ease the pain of poverty. When they come of age, they are remanded to prisons where they hone their skills of crime, networking with gangs and syndicates. When they are released, they prey on the comfortable class. As society breaks down – examples include Brazil and South Africa – carjacking, home invasion and violence as a means of intimidation and competition become the norm.

[31] **Housing crisis linked to predation:** While government says the affordable housing crisis results in people having poor access to employment, education & social services, impacting most on the poor, vulnerable and younger generations, it is what comes next that engenders fear: Poverty begets predation; when it begets, no one is safe.

Context

[32] **Fixed to land:** The question in Beachen turns on the meaning of **fixed to land**. In the RMA, a structure is defined as fixed to land. This definition is embedded in common law and statute and careful reading of all related NZ statute finds such laws have not changed the principles established in case law.

[33] **Not all homes are realty:** In Chelsea Yacht & Boat Company Ltd. v Pope [2000] EWCA Civ 425 Tuckey LJ, it is established that "*It is not necessary to annex the houseboat to the land to enable it to be used as a home*." In other words, not all homes are realty. A home can be realty habitat (a building annexed to land) or chattel habitat (a chattel not so annexed).

[34] **Dividing Line:** As case law shows, *fixed to land* is not binary. It is a continuum in which facts must be examined, both physical and intent. Savoye and Savoye Ltd v Spicers Ltd. [2014] EWHC (TCC), cites Horwich v Symond [1915] 84 LJKB 1083 where HHJ Seymour, QC speaks to: *The dividing line between things which are fixed and not fixed*. There is a line, which when crossed causes chattel to lose its independent identity, and the closer the facts get to that line, the more difficult the question. In Antoun v Hutt City Council, Jono Voss presumed that if he called his contrivance a

vehicle that made it a vehicle not a minor dwelling. Judge Dwyer correctly found Voss's not-yet-on-wheels-not-so-tiny home had crossed the line and was a non-complying structure. This brief limits its examination to facts far from the dividing line.

[35] **Then and Now:** Realty housing (buildings) dominated NZ until the affordable housing crisis. In response the private sector, following advice from their lawyers that there is a gap in the law, began to manufacture mobile homes as chattel. The affordable housing crisis emerged faster than changes to statute, thus creating a gap in both the RMA and Building Act 2004. There is a critical need for the law to catch up.

[36] **Ultra Vires Enforcement:** Neither RMA nor Building Act speaks to chattel housing, and attempts by local government to issue abatement notices or notices to fix on clear cases (such as Dall v MBIE) are found to be ultra vires (beyond the powers of the authority). There is no consistent enforcement policy, with contests too often pitching the power of the territorial authority against low-income peoples who lack education or resources to defend themselves. The de facto rule for trailer home occupants is *don't ask, don't tell, and don't annoy your neighbours*. Most of the cases involve DIY tiny homes parked amid grumpy neighbours in well-off neighbourhoods who complain to Council. While the Building Act is clearly limited to realty, the RMA focuses on effects, thus if a unitary/district plan includes chattel housing, it is within the reach of the Act. However, in Beachen, the Auckland Unitary Plan does not include chattel housing, thus the Council alleged the mobile home was a minor dwelling (realty).

[37] **Chattel Shelter (not fixed to land) exclusions**: Chattel Shelter is a broader category than trailer homes, including shipping containers converted for storage, or for occupation by people, or for pop-up commercial establishments (such as after the Christchurch earthquake), as well *modules* that are factory-made chattel that are self-contained and self-supporting, typically delivered to site by truck, lifting on site by crane or hiab and rest on skids, not wheels. This brief limits its scope to trailer homes, but opens the door for analysis of the broader question that may be asked in the future.

Analysis of Beachen v Auckland Council (2023 NZEnvC 159) [Beachen]

[38] **Beachen v Auckland Council 2023 is, in the negative, a helpful case:** It sets out the confusion as to the status of mobile homes (chattel or realty), and puts forth all the arguments that can then be subject to analysis to show how presumptions about mobile homes are not supported by established law. This analysis of Beachen demonstrates the gap in the RMA (and Building Act) that calls for a High Court declaration and an alternative solution for councils' management of chattel housing.

[39] In Beachen, Judge Dickey decided Beachen's mobile home was a minor dwelling and upheld the abatement order. This analysis will show how the judge erred in this decision.

[40] Stare Decisis (that which has been decided) looks to case law in New Zealand, and case law from the United Kingdom and the Commonwealth. Some judges prefer examining domestic precedent, but in Beachen, it was Judge Dickey who cited *Elitestone Ltd v Morris [1997] 1 WLR 687*. (Elitestone).

[41] 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], in reliance on Elitestone Ltd v Morris [1997] 1 WLR 687.*

[42] The judges in both Antoun and Beachen cited Elitestone, but it seems in Beachen the respondent's counsel chose not to advise the judge as to its content, and one must presume Judge Dickey was unfamiliar with the case. Unfortunately, the appellant, DT Beachen was not a lawyer and did not know his case would stand a better chance of winning had he read and cited the established law to support his appeal.

Established law

[43] As established law, a simple reading of Elitestone finds it is exceptionally clear the dividing line between chattel and realty habitat is far away when testing factory-made mobile homes. To paraphrase Lord Lloyd of Berwick (as in [47] below), minor dwellings are a long way from Beachen's mobile home.

[44] **On attachment:** In Elitestone, Lord Lloyd of Berwick 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."*

Beachen's mobile home was manufactured in such as way so as to be movable onto the property as a unit, and to removable as a unit. It included temporary connection to mains services such as water and electricity, although not city water.

[45] In Elitestone Lord Clyde wrote:

> *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."*

Beachen's mobile home is much like the ship, moved on to serve a purpose, which when need passes, moves off again. It also makes clear size is not a consideration, the ship's anchor probably weighs more than Beachen's mobile home. The test is intention. Mobile homes are so called because they are intended to be mobile.

[46] **On intention:** Lord Clyde continued:

> *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.,*
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> > *"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."*

This is instructive in Antoun, where Jono Voss argued his intent was to make a vehicle that could be moved off. Elitestone, based on Hobson [1897] and Reynolds [1904] find Voss' subjective intent is immaterial. The objective assessment suggests the facility Voss was building for workers, including himself, to live while repairing Antoun's earthquake-damaged home was being built in the fashion of a building, not a chattel.

Voss was making a DIY home onsite 4.5m high (the maximum NZTA permitted height from the road surface is 4.3m), beginning with two steel girders with timber crossbeams, which is not how trailers are made. Even Voss' use of the term *tiny home* may be inaccurate as there is general agreement that a tiny house is between 60 and 400 square feet (5-37 m^2). Taking the dimensions of Voss's facility (8 x 3.2 x 2 floor), at 51 m^2 (550 ft^2), it not only is not a vehicle, it may not be a tiny home.

Voss had two axles in the driveway which he claimed he intended to insert below the steel girders. Because the site landlocked his fabrication, he said he would remove a fence between the property and the school next door and tow it out over their land. He had no permission to do so. It is highly questionable that Voss could safely move his creation off the property, much less on public roads, even if the school gave permission to cross its land. As a case to cite, it offers no guidance, especially for Beachen.

Whether Voss' fabrication is objectively for the use of the land or enjoyment of the thing itself is an open question, but in Voss' case the way he constructed it onsite suggested he had not seriously considered how it was to be removed, rather using a "she'll be right" approach that does not pass tests of law. Anyone replicating Voss would likely meet the same end, and if appealed to the highest court in the land, would be unlikely to prevail. It is unfortunate that Judge Dickey chose to give it prominence when it was such a weak case, with facts exceptionally different than Beachen.

In contrast to Antoun, in Beachen, the mobile home was manufactured off site, and as a product is designed for the convenient use of the thing itself. Mobile homes as chattel do not add value to land. They depreciate in value, selling for less than their new price because they compete with new mobile homes from factories precisely because they are mobile; they are not part of the land. In contrast, minor dwellings add to the value of land. They typically realise capital gains for their owners because they do not compete against minor dwellings on other lots.

[47] **On relocation:** Elitestone continues with Lord Lloyd writing:

> *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.*

Elitestone finds it is obvious a greenhouse which can be moved every few years to a fresh site is a long way from a bungalow that cannot be moved at all without being demolished. Likewise a factory-built mobile home is designed to be moved from site to site, is a long way from a minor dwelling (a building) that cannot be moved at all without being taken apart or demolished. Indeed a mobile home, by virtue of its design to be mobile, is easier to move than Elitestone's greenhouse.

[48] **Note on language:** The English language is a nuanced language in which different concepts may use different verbs. With realty, one constructs a structure or builds a building. But chattel tends to be manufactured in factories. If they are intended as homes, they are engineered to be self-contained and self-supporting, capable of being delivered to site intact and undamaged. They must endure the equivalent of earthquakes as they travel NZ potholed and metalled roads and the equivalent of cyclones as they pass through rainstorms whilst driving at speeds up to 90 km/h. They must arrive onsite with no significant damage, a test no in-situ constructed building must endure. In *construction,* trades people must be masters of their trade and local government officials inspect their work to ensure health, safety and durability. 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. This exclusion of liability has its foundation in the difference between chattel housing, which is not the responsibility of council, and realty housing which is.

[49] **Note on compliance:** In Auckland, at least one mobile-home manufacturer decided fighting Council was not worth it, so they negotiated a protocol that did not require booking an inspector each step along the way. This is cited by Auckland Council senior regulatory management in correspondence. However, the upshot is that manufacturer ceased selling affordable housing to the struggling class, and doubled its prices to sell manufactured housing to the comfortable class, adding the consenting costs to the list price. The consenting inspection regime makes no sense in a factory setting, but the manufacturer acceded to it as a commercial decision, not because it is helpful.

[50] **Skerritts**: The dividing line is further confirmed more recently in Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions [2000] EWCA Civ J0225-7[1] in which the justices 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.

On moveable realty: 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]*

[51] Skerritts addresses an object that has movement but still may be a structure. The example of a windmill allows a structure to have moving parts. The example of the pontoon that rises and falls with the tide, and may, from time to time be removed for repairs or cleaning, is reflected in the RMA meaning of structure that says "*and includes any raft*". These are structures that have movement, which is a long way from something that not only moves, but is designed to be mobile. Movement by wind or tide while the object remains in place is very different than a truck towing a trailer home that can be here today, gone tomorrow. Indeed, thousands of mobile homes used as rental units are typically redeployed every year throughout NZ, apparently invisible

[1] https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2000/5569.html
[2] Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited [1949] 1 KB 385

to council district plan enforcement officers due to the de facto policy of *don't ask, don't tell and don't annoy your neighbours.*

[52] Skerrits is relevant to understanding s8 of the Building Act, where it says *building— (a) means a temporary or permanent movable or immovable structure*… To parse this, one must begin with the word structure: *building is… a structure.* In NZ, council officers and judges make interpretations that ignore the noun, *structure*, while focusing on the adjectives. The adjective referring to time, *temporary or permanent*, is added to make clear if it is fixed to land. Tenure is not relevant. The next adjectives, *movable or immovable*, must be understood 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. This is also reflected in the RMA meaning of structure, when it says "*and includes any raft"* where "*raft*" *means any moored floating platform which is not self-propelled.*

[53] A movable structure is not the same thing as a mobile home. A mobile home is *mobile* which means it is more fluid in movement than movable. To illustrate, a cell phone is mobile, clearly chattel. A telephone jack hard wired into a wall is clearly realty. And as established in Savoye and Savoye Ltd v Spicers Ltd. [2014] (see [61](e) below for detail), the wired telephone which can be unplugged and moved to another building is also chattel. This difference between mobile and movement has been overlooked due to the gap in the RMA and Building Act.

[54] **On the manner of removal:** Skerritts continues:

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]

[55] This test of what is required to remove is central in all case law, and it clearly places mobile homes as chattel, not realty. They are designed to be removed intact.

[56] A unit that is made offsite and can be moved from one hereditament (building lot) to another establishes a stronger case than a unit that would be more difficult to remove intact from the lot to be somehow transported on New Zealand roads. However, this is not to say a mobile unit intended to be moved around the property becomes realty. It just gets closer to the line dividing chattel from realty.

[57] **On the most important distinction in property law of material things:** Before examining the details of Beachen, it will be helpful to read New Zealand's most eminent jurist[3], Sir John W. Salmond, former Solicitor General of and Supreme Court Judge in NZ, who in 1902 wrote Jurisprudence, currently in its 12th edition, that set out the fundamental basis of NZ property law. In Jurisprudence §155. **Movable and Immovable Property**, Salmond explains the elements of immovable property:

> *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 …*
>
> *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.*

[58] Salmond emphasises the distinction between chattels and land is central to NZ property law: "*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*." and "*in no system is the difference so great as in our own*". This is why a careful reading of every NZ law having to do with real property, including the RMA and Building Act show they do not conflate realty with chattel. The RMA meaning of structure and the Building Act meaning of building limit their reach to realty.

[59] In common law, regardless of the issue at hand (for example, foreclosure or abatement order) the test must be the same. If an object is ready made, brought onto the land (realty / hereditament) intact, and can be removed the same way without being taken apart, and no intention to fix it to land (typically by building a footing and foundation that transfers load from the structure to the land), then it is not realty.

[60] As Salmond makes clear, *fixed to land* does not require physical attachment. The stone wall example is found in many cases. A pile of stones is chattel, but when stacked to form a boundary or contain livestock, it becomes realty. If the landowner sells the land, they can take the pile of stones with them, but not the wall. When the stones are assembled to improve the appearance and value of the land, they become part of the land. Likewise, a minor dwelling erected on the land improves the value of the land, and often the minor dwelling appreciates in value. In contrast a mobile home is brought

[3] https://nzhistory.govt.nz/people/john-salmond.

on to the land to be enjoyed for itself – to provide habitat without committing the land. When the need passes, it is towed away, never having lost its independent identity.

Examining Beachen [45]

[61] In Beachen [45], Judge Dickey writes

> *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.*

Parsing this:

[62] **"Imbedded**" is not a bona fide test and is wrongly applied in Beachen. One wonders if the respondent knew it would fail in the proper test (fixed to land), thus chose an obfuscatory word instead. 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.

[63] **"…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:

> *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.

[64] "**Level of integration"** as used in Beachen is not a legal concept but an aesthetic one. The fact the unit has adjacent elements that may be realty does not make the unit realty. The test is *degree on annexation* and *purpose of annexation*.

[65] **"Level of annexation**" is presumed to mean *degree of annexation,* but the facts cited do not show any annexation:

(a) **The Deck**: The location and function of the deck does not change the target from chattel to realty. Indeed, lack of physical connection demonstrates intention to avoid permanent annexation. A wooden deck is easily lifted and moved out of the way, whereas a deck attached to the building is intended for permanence and would be harder to remove without damage. "*Compliment and fit*" do not mean annexation.

(b) **The Shed**: The same as with the deck, physical proximity does not establish permanent annexation. Indeed, it implies the opposite. If one is constructing a shed as a part of building, it costs less to build three walls than four, and by affixing it to the main building, it is structurally stronger. Placing a separate shed adjacent is done in anticipation either unit may be removed in the future with the intent is to remove them intact, not to be taken down or apart.

(c) **Nestled into Land**: *Nestled* is an equivocating term apparently selected because the test of *fixed to land* is not met. Nestled means to lie comfortably close to or against someone or something. It does not mean that it has lost its independent identity and become part of the land. The test is *fixed to land*. Use of nestled is a way to give an impression that is misleading.

…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 more equivocating language that 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. In contrast, in 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.

This is far from being fixed to land. This matter is addressed in Chelsea Yacht & Boat Company Ltd. v Pope [2000] EWCA Civ 425 Tuckey LJ, applying the principles of Elitestone, where it was asserted a house boat was realty because of how it was held in place. Tuckey LJ writes:

> *"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. [emphasis added]*

The same question can be asked in Beachen. If all attachments can simply be undone (in Beachen's case attached only by gravity), and the mobile home can be moved quite easily without injury to itself or the land, what makes it realty?

This also was addressed in Elitestone where Lord Clyde referenced Holland v Hodgson (1872) where Blackburn J observed:

> *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.*

An anchor holding the chain of a suspension bridge gives the object its structural integrity. In contrast, a ship has its own integrity where the sole purpose of the anchor is to keep it in place until it is time to relocate. The foundation of a building is akin to the suspension bridge anchor, necessary to give the wooding framing, including its studs, plates, headers, rafters, girders, flooring and joists the structural integrity it requires to perform. In contrast, the blocks and pallets under a mobile home trailer are there to keep it in place. They elevate it off the land to keep the trailer from corroding, and at the corners, keep the cabin from rocking back and forth. But like the ship, the mobile home as its own internal integrity, not needing a foundation to transfer load and hold it intact.

(d) **Access to the property's water, wastewater and power systems**: The respondent has failed to show where anything in access to utilities that makes the mobile home realty; it simply asserts a fact and invites the reader to make a leap of faith.

Established law disagrees, as citied 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.*" The argument on utilities turns on "temporary". Pipes and cables behind walls are permanent, to remove them requires making holes in walls and it damages the house systems. Pipes and wires connected to a mobile home are accessible, and if the installer took the manufacturer's advice, they use caravan-type connectors so the owner can disconnect in seconds. There are no walls leading to a mobile home. All utility connections are exposed by the very nature of the design of a mobile home.

Judge Dickey does not discuss this, but instead writes in [27](b) Gas and plumbing installed that is connected to the ground and a large water tank, placed in the front of the unit. How do these facts suggest a strong degree of annexation?

Presumably, the gas probably refers to a califont connected to an LPG tank resting on the ground. The tank is not realty, it probably is owned by the gas supplier who regularly changes it out. How is the gas tank connected to the ground? By gravity? And how is the gas tank connected to the mobile home? Most likely the same as every other LPG tank, by a user-removable connection.

The same holds true with the water tank, which may be realty or chattel depending on its purpose. If it is a 25,000 litre tank providing water to the main house, it is realty because the tank improves the value of the land and living in the primary dwelling required potable water. In the absence of town water or a bore, such a tank would be realty. But the connection to it will be another matter entirely.

In case law on the question, chattel that is made a part of the building becomes part of the realty. Savoye and Savoye Ltd v Spicers Ltd. [2014] EWHC (TCC), 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.*

Water connections to mobile homes are similar to telephone sockets. There is a tap to which a removable hose is attached. The hose, like the telephone wire to the socket, is chattel. The mobile home, like the telephone handset, is chattel.

The same holds true for the power, which in most mobile homes uses a caravan connection. These are similar to EV power points, and function the same as in Savoye and its telephone.

It is difficult to discern in Beachen if the judge is referring to that which flows (water, gas, electricity) or the conduit (hose, pipe, cable).

In *Property Implications of the Separation of Land and Water Rights*[4] by Henning Bjornlund & Brian O'Callaghan Pages 54-78 | Published online: 13 Mar 2015, writing on water rights in Australia, the abstract says "*Water is not any longer a fixture of land but a personal chattel*". This should be obvious, because while the river bed is realty, as Heraclitus (500 BC) reminds us, "*No one ever steps in the same river twice"* meaning water constantly changes, thus it is chattel, never becoming part of the land. As for the conduit, Savoye makes clear, everything from the connection on to the end is chattel, and Elitestone specifically rules out utilities connected temporarily to mains services such as water and electricity.

Note however, Elitestone adds the qualifier *temporarily*. What constitutes temporarily? If a caravan is parked in a campground for a year, with power hooked up to the campground standpipe, is it temporary. Savoye provides guidance on this: tenure is not relevant, it is the fact that at any time it can be detached without damage.

[4] https://www.researchgate.net/publication/237755116_Property_Implications_of_the_Separation_of_Land_and_Water_Rights

A mobile home connected by caravan-type conductors is by design intended for temporary connection, regardless the tenure of the connection. It's not *how long* it is connected, but if the design is intended to be easily connected.

A question arises if the trailer home owner does not know any better and employs a professional plumber or electrician to connect the unit, and the professional treats the unit the same as a building, hardwiring the circuit breaker to the mains, or clamping butynol fittings to the cabin water ingress. This is not the case in Beachen, but it is anticipated to arise at some point.

At that point, one must examine Elitestone's use of the words "*connected temporarily*" to decide if the connection has made the trailer home realty, and if it has, if it is reversible in law by the professional returning to install a detachable socket or hose connector in between.

Because of the nature of a mobile home, all of the utility connections must be exposed, unless the mobile home is transformed into realty by fixing it to a foundation. In this latter case, the pipes and cables would most likely be hidden behind the foundation walls. But if it is on blocks and perhaps pallets as Judge Dickey reports in Beachen, the conduits or connectors will be fully exposed. If the plumber or electrician did not include caravan-type connectors, this is easily rectified by calling them back to install the caravan connectors, but why bother?

Is there something in using the services of a licensed professional that transforms chattel into realty? Chattel can become realty and then return to chattel, depending on the level and purpose of annexation. If it is as simple as installing intermediary connectors, it is likely the chattel when delivered on site and connected to utilities never lost its independent identity, even if hard connected by a professional.

(e) **Heat Pump**: Unfortunately, as with the water, wastewater and power systems, Judge Dickey does not write how the heat pump was installed. Let one presume it is a split heat pump with an exterior compressor bolted onto a concrete pad with a conduit containing refrigerant gas and power lines which are then hard wired into the mobile home's breaker box that is connected to mains power by a caravan connector.

The concrete pad upon which the compressor rests is the only realty (presuming it was poured, not simply laid on top like a rug), where the pad and bolts embedded in it are the sole parts that have become in law, one with the land (presuming the concrete is poured and not simply sitting on the soil as chattel). The compressor is bolted down with removable nuts. Thus one must look to case law on bolts, again with Savoye citing 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."*

This eliminates the bolt to nut connection, leaving only the conduit containing a refrigerant gas line and power cables which connect the outside chattel to the inside chattel. Does this configuration of the exterior chattel compressor, chattel conduit and interior chattel air handling unit somehow make the mobile home realty? Let us turn to settled law where chattel links to realty, noting in Beachen we have eliminated the bolts and nuts on the concrete pad as a way to extinguish independent identity.

In Berkely v Poulett and Others [1977] 241 EGD 754, Roch LJ said at page 6:

> *…a cooker will, if free standing and connected to the building only by an electric flex, be a chattel. But it may be otherwise if the cooker is a split level cooker with the hob set into a work surface and the oven forming part of one of the cabinets in the kitchen. It must be remembered that in many cases the item being considered may be one that has been bought by the mortgagor on hire purchase, where the ownership of the item remains in the supplier until the instalments have been paid. Holding such items to be fixtures simply because they are housed in a fitted cupboard and linked to the building by an electric cable, and, in cases of washing machines by the necessary plumbing would cause difficulties and such findings should only be made where the intent to effect a permanent improvement in the building is incontrovertible.*

Since there is no building to make a permanent improvement, this seems to be the final nail in the coffin. But to prevent the dead from arising, add one more nail. Savoye goes on to quote 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.*

Clearly a heat pump is for the more complete enjoyment of the mobile home, thus it is chattel in that regard. It does nothing for the realty. When the mobile home is towed away, the compressor on the pad will be unbolted and affixed to the outside of the mobile home for transport, or degassed and placed inside for transport. Such an object can easily be removed from the pad without injury to itself or to the premises, and the fact degassing may require a licensed gasfitter to prevent release of greenhouse gasses seems insufficient to make the mobile home realty, as discussed above in Berkely. Thus one must conclude the heat pump provides no support to the finding that it has increased the mobile home's degree of annexation to the land.

As a footnote to this section, subsequently (2024) David Beachen confirmed in a telephone conversation that the heat pump on his mobile home was attached to the

exterior wall, with no attachment to the ground at all. As such, the heat pump has no bearing on the question before the court – *is the mobile home a minor dwelling*? – and is merely obfuscation in the absence of relevant facts that would be supported by established law. However, as this was not mentioned in Beachen, and because future respondents may cite heat pumps that are on concrete pads, not bolted to the chattel wall, the analysis herein is retained.

(f) **Kitchen with full cooking and food storage**: There is nothing about a kitchen that transforms chattel into realty. Caravans and mobile kitchens are common in New Zealand and both have full cooking and food storage. In New Zealand, the full kitchen test is used in buildings to determine if an adjacent building is a second dwelling because it has a kitchen, versus a sleepout that does not have a kitchen, thus is considered an extension of the primary residence. But this test is irrelevant to chattel housing and there is no case law to support it.

[66] It is clear the evidence cited to prove degrees on annexation actually prove the opposite. The evidence Judge Dickey cites to support a decision the mobile home is realty, when tested against Elitestone et al. demonstrates it is chattel, hence not a minor dwelling.

Judge Dickey gave considerable credence to Antoun v Hutt City Council

[67] **Buildings are not buildings when on the road**: In Beachen [25] Judge Dickey wrote: *As to the degree of annexation, the Judge [in Antoun] observed that large buildings can be, and are frequently, moved about on New Zealand roads*. While this is correct, an important matter of law was overlooked: while uplifted it is not a building. The object to be moved is a building until the movers lift it off its foundation and detach it from the land. Detached from its foundation it loses it structural integrity. It becomes chattel, and as a matter of law, is no longer realty. If the property was subject to a mortgage, the bank may have to give permission to remove it, as it is part of the land thus the bank has a security interest in it – security that is lost when it is detached from the land. If removed without permission, the bank is in its full rights to declare the mortgage breached and demand full payment of the loan. Also, if the building had rateable value, the land owner would ask that it be removed from the LIM and the land record. Then, if it is taken to the mover's yard and stacked on wooden blocks or pallets, it is not a building in the yard, it is chattel for sale. It only becomes a building when it is purchased by a landowner and is then affixed to a new foundation. Contrast this with a mobile home that maintains its engineered integrity on road or on site, always a chattel.

[68] **Building movers do not move buildings; only the top part:** Further, while Judge Dwyer in Antoun made the observation that large buildings can be moved, in fact only part of the building is moved. Such buildings are (as in Skerrits), partially taken apart, i.e. the building is detached from its foundation. The foundation is part of the building, but the upper part of the building is detached. The foundation remains on site, and in many cases it is then demolished. The superstructure's structural integrity is compromised and it is carefully set on heavy steel bearer beams to prevent it from falling apart. What is transported is not a habitable dwelling but a shell that can be revived. In some cases, before moving, the wooden building is cut into parts. Unlike a mobile home which is ready to occupy in a few hours, large buildings brought onto site

require weeks or months to be made habitable. They need to be fixed safely to the newly-constructed foundation and then may require considerable work, including remedial work to repair broken plaster, distorted door and window frames and a host of other repairs that are expected because buildings are not designed to be moved.

[69] **Annexed to Land does not require a foundation:** Judge Dickey continued in Beachen [25] *He [Judge Dwyer] 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, 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. 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*." As far as it goes, this is correct – indeed it is long settled case law, as in Elitestone (see [44] above). And it is relevant in Antoun. But does nothing to support Judge Dickie's finding in Beachen.

[70] **Antoun sets no precedent:** Judge Dickey failed to address the critical difference between Antoun and the case before her. The weight and bulk of its superstructure is not a determining factor as suggested in Beachen. Instead it was the fact that Voss's creation was landlocked behind a house, the methods and materials used in its fabrication were not appropriate for mobile homes, and his proposed method of removal off the property was not supported by evidence. Voss had no clear and simple exit plan and seemed to think two axles situated on the driveway make the two-storey creation on the back of the lot a vehicle. His own lawyer, as well as Judge Dwyer rightly disabused Voss of this notion, thus as a case for Judge Dickey to rely on, it is of no value. In Beachen [37] Judge Dickey acknowledges DT Beachen argued the circumstances in Antoun were different, but Mr Beachen failed to convince the judge of those differences, most likely because he was not conversant with the law, thus argued facts without the support of established law. In Beachen, the facts cited in Antoun were not applicable.

[71] **The fatal error in Beachen:** In Beachen [41] Judge Dickey makes the admission "*We accept that the tiny home was brought/towed onto the property attached to a frame/trailer."* She goes on to write "*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*." This is a severe error in law, and drives a stake into the heart of the decision. The fact it was towed to its current location and can be towed [off the site] in the future are precisely the tests of established law. Had Beachen retained a lawyer and appealed the decision to the high court on points of law, the decision most likely would have been overturned on this point of law in Beachen [41].

Note: In a 2024 phone call with David Beachen, he confirmed after losing the case, he sold the mobile home which was then towed off the property intact and delivered to another jurisdiction to serve as chattel habitat, thus proving no annexation to land.

Degree and object of annexation are *patent for all to see*

[72] **Patent for all to see:** In [26] Judge Dickie writes "*The Court [in Antoun] 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 "<u>are patent for all to see</u>*". "Patent",[5] a Middle English word that means "clear", as in *clear for all to see*, was correctly used by Judge Dwyer but not in Beachen. In Antoun, Judge Dwyer made a site visit (Antoun [20]) and describes inspecting a non-complying, landlocked, not-mobile-not-on-wheels project where Voss was under the illusion if he said he was making a vehicle, his project was a vehicle. It was patent (clear) for all to see, including the judge, this was not a vehicle. Nor was there any indication it could be removed from the site intact, not because of its weight but because there was a building between it and the street, and once on the street, it would exceed the permissible height for transport and would be in the same class as oversized buildings where power lines and traffic lights would have to be moved. The photographs attached to Antoun in Appendix B show a two-floor facility with gables, overhangs where one must even question if it is a tiny home. In the USA, from where the idea of a tiny home emerged, there is general agreement that a tiny house is between 60 and 400 square feet (5-37 m²). Taking the dimensions of Voss's facility (8 x 3.2 x 2 floor), at 51 m² (550 ft²), it not only is not a vehicle, it may not even be a tiny home.

[73] **Not patent for all to see:** In contrast, Judge Dickie did not visit the Beachen site, but relied on photographs and council inspectors' evidence. That evidence has been examined herein and found wanting. The photographs show a factory-made mobile home of a design that delivered over public roads and when the need passes, is removed the same way – intact and ready to be deployed elsewhere to serve the same purpose. The use of *patent for all to see* in Beachen is inaccurate; the facts lack foundation.

[74] **"…on the property for the purpose of being used as a dwellinghouse"** In [59], the Council presents evidence the mobile home is living accommodation designed for and used for residential purposes. Until it is proven to be fixed to 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 (<u>be it a caravan or a boat</u>) 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. <u>In those circumstances the second question</u>, whether the Dinty Moore is a <u>dwelling house</u> within the Housing Act 1988, <u>does not arise</u>."* [underline added]

This principle applies in Beachen. The fact the mobile home is fitted out for living in does not necessitate annexing it to the land (becoming part of the realty). Until fixed-to-land is proven, the second question, whether the mobile home is a dwelling house does not arise. Further, it is notable that Lord Justice Morritt uses the example of a caravan or boat. A mobile home is in the same class as a caravan. It is not automatically regards as part of the land.

[5] **Patent** is an archaic word from Middle English meaning *wide open, unobstructed, of the ocean unconfined, of a city accessible;* used in Beachen [2023] citing Antoun [2020] citing Elitestone (1997) citing Reynolds (1904).

[75] **Circular logic: *It is used as a dwellinghouse, so it must be a dwelling house*:** It is the obligation of the respondent to prove the mobile home is a dwellinghouse (realty), not merely saying so makes it true. This is no different than Voss believing because he says he was making a vehicle, it was a vehicle. As Chelsea makes clear, not all homes are realty. Beachen's mobile home was being used as a home, as chattel habitat, not a dwelling house, a legal term meaning realty. The respondent failed to prove this allegation based on established law.

[76] **False Abductive Reasoning:** "Used as a dwellinghouse" is the duck test… if it looks like a duck, quacks like a duck and poops like a duck, it must be a duck. In fact, the saying originated in 1738 to prove the opposite. The French automaton maker Jacques de Vaucanson created a mechanical duck in 1738. It would quack, eat grain, and after a short time would excrete a mixture that looked and smelled like duck droppings. While often cited as abductive reasoning, it is the opposite. It looked like a duck but was not. Too often in NZ this erroneous abductive reasoning has been used by respondents and to some extent accepted by judges, even though it has no place in law. "Looks like" is not the same as "it is". To say chattel is realty because it looks like realty undermines what Salmond calls the most important distinction in New Zealand property law.

Degrees and Objects of Annexation versus Purpose of Annexation

[77] In Beachen [27] and [28] Judge Dickey discusses the degree of annexation, and in [29] and [30] the objects of annexation. She then accepts this discussion in Beachen [45]. However, she fails to cite the Purpose of Annexation that is central to property law. The most important test to distinguish between a chattel versus a fixture is evaluating the purpose which the item was brought on to the premises. If the item was brought for the purpose of permanently or substantially improving the space, it is likely a realty. If the item was brought on to the property for a temporary purpose or so the item itself can be enjoyed by the occupiers of the space, it is likely chattel.

[78] This is supported by Holland v Hodgson (1872) where Blackburn J at 334–335 wrote:

> *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 considered as part of the land, the onus of shewing that they were so intended on those who assert that they have ceased to be chattels.*

Beachen's mobile home was not attached to the land other than by its own weight, and there were no circumstances introduced that show it was intended to be considered a part of the land. The onus of proving this objective intention falls to the respondent who issued an abatement order alleging the mobile home was a minor dwelling. But the respondent did not show the mobile home was intended to be considered as part of the land. Instead the respondent listed a string of immaterial facts, unsupported by established law, that were presented by the respondent to the judge who accepted them in Beachen [45]. While the judge cites Elitestone in footnote 15 to [24] neither she nor the respondent applied the tests set out in Elitestone that would have showed the mobile home as realty or not.

Vehicles

[79] **On Vehicles**: 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, focuses on the correct question, *is it chattel or realty?*

[80] In Beachen [42], Judge Dickey writes "*We do not, therefore, accept Mr Beachen's argument about whether the tiny home is a vehicle because it is not relevant to our assessment*". Nevertheless, having stated in [42] it was not relevant, in [44], she writes "*While the trailer is registered, it does not have a warrant of fitness….*" Judge Dickey has it backwards. The warrant of fitness is irrelevant, but the question of vehicle or not is relevant in terms of mobility because vehicles are by definition mobile. If it is a vehicle, apply Holland [1872]'s test (see [78] above), where onus is on the respondent to show it is not mobile nor movable.

[81] In Antoun, Voss believed if he called it a vehicle he was immune from the reach of the district plan. He was caught out. Indeed at the 11th hour when Antoun retained barrister P Milne to appear, in Antoun [32], Judge Dwyer writes: *The inherent absurdity of the proposition that the tiny house might be a vehicle was apparently evident to Mr Milne, who was instructed by Mr Antoun just prior to the Court hearing. Mr Milne acknowledged that the tiny house is not a vehicle, although he said that it is "intended to be a vehicle, but it's accepted that it's not at the moment*".

[82] But in Beachen, the vehicle argument is dismissed without considering the implication of the facts. In [44] the Council describes circumstances that make the mobile home easily accessible (…*at the time the Council officers inspected the property the wheels of the trailer were not in contact with the ground, and the tiny home was supported off the ground by timber blocks*). In terms of removal, because the wheels were on the trailer, preparing it to be moved is a matter of jacking it up (no different than changing the tyre of a car), pulling out the blocks (no different than removing jack stands when working under a car), and disconnected the utilities (no different than charging an EV).

[83] In law, the EV question is useful. Increasingly, people are using Electric Vehicles to store energy from roof-top solar panels that are then fed back to the house at night. Does this mean the EV became a permanent and substantial improvement of the premises? A court of law would be most unlikely to find the EV had lost its independent identity and become part of the realty, even if it was jacked up and placed on jack stands. In contrast, if the EV owner removed the EV battery and hard-wired it into a whole-house solar system, it would likely be part of the realty, but if they retained the EV charging plug, to enable easy disconnection of the battery, it would not become part of the land.

The chaotic implication of mobile homes being classified as realty

[84] At https://teara.govt.nz/en/judicial-system/print the NZ Government explains how NZ's judicial system works. In ***precedent and stare decisis*** it says "*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." This means a legal principle found in one law, such as the division between realty and chattel, must be consistent with all other laws.

[85] The RMA and Building Act cannot establish new law unless they expressly state such an intention. Law must be consistent and stable, thus if a mobile home is found to be realty for the RMA, it must be found to be realty for all law. While they are subject to the same sort of judicial and administrative creep as in other areas of law, creep does not legitimise. Thus if a mobile home is realty for the purposes of the RMA in receiving an abatement order or for the purposes of the Building Act in receiving a notice to fix, this does not mean the mobile home can remain as chattel for the purposes of mortgages, insurance, rates or property sales. A careful reading of both the RMA and Building Act show they have not made such new law. The RMA limits the reach of *structure* to realty and the Building Act limits the reach of *building* to realty.

[86] In Beachen, Judge Dickey finds the act of towing a mobile home on site, connecting to utilities and placing decks and sheds nearby makes it realty. Realty under the RMA means realty under all law. There are an estimated 10,000 mobile homes in NZ. If realty, all owners who pay ground rent would lose ownership to the land owner. All registered on the PPSR (Personal Property Security Register) would be invalidated; hundreds of investors funding low-income rentals and rent-to-purchase mobile homes would lose their investment. Consistency and stability, bedrock of NZ law, would be extinguished. Law would be turned upside down. But if mobile homes are chattel, all that changes is territorial authorities being instructed abatement orders and notices to fix based on the allegation mobile homes are minor dwellings are ultra vires.

Conclusion

[87] In Beachen Judge Dickey erred at law. The appellant, representing himself failed to present legal arguments and the respondent represented by a lawyer did not enlighten the Judge. As such, the decision is flawed and should not be relied upon in future cases

How to address these legal conundrums

[88] **Afterword:** Normally a critique of a court decision does not offer a solution. However, as discussed in [30] above, there is a very real and present danger in New Zealand of a chronic and dangerous predator class emerging out of the affordable housing crisis.

[89] **Breaking out of silo thinking**: Councils regard mobile homes as a problem to be abated or fixed, not a symptom of the affordable housing crisis that government created. The solution is not to bully mobile home owners but to fix the crisis. Amending the law takes years, but herein an immediate solution is proposed:

[90] **Covenant on title** In the absence of proper regulatory framework using the RMA and Building Act, it is proposed to examine covenants on title as a way local councils can give permission for mobile home placement where appropriate, and have stronger regulatory enforcement than abatement orders and notices to fix.

[91] **A standardised covenant on title** would allow land owners to volunteer surplus land to host mobile homes to help alleviate the affordable housing crisis. In the covenant the Council can specify any conditions to ensure it meets the same tests of health, safety,

durability as well as not being a nuisance or a poor uses of resources. The covenant can specify conflict resolution, of which the ultimate is an order to tow the mobile homes away. In terms of tenure, it is recommended to limit such covenants to 15 years, giving councils and central government sufficient time to fix the affordable housing crisis.

[92] **Councils have used covenant on title to resolve issues**: Use of covenant of title to resolve regulatory concerns is not new. It is not restricted by the RMA or Building Act. As such use of it requires no amendments to law or public plan changes to the unitary or district plans. It can be implemented immediately without significant cost either to the Council or to the applicant. It is worth examining as an interim solution.

[93] **Trailer homes should be a separate category**: Trailer homes should be dealt with as a separate category rather than treated as either caravans or minor dwellings both in terms of RMA and Building Act. If the USA model is used, instead of amending the Building Act, Parliament should adopt a Manufactured Mobile Home Act, fit for purpose.

- **Statutory Law:** RMA issues should be dealt with separately from Building Act but both should adhere to "*the most important distinction is that between movables and immovables, or to use terms more familiar in English law, between chattels and land*." Rather than saying mobile homes are buildings (chattel is realty), define mobile homes as their own form of habitat and ensure the rules are fit for purpose, noting the RMA as structured has been found by Parliament to be a cause of the unaffordable housing crisis. In the interim, excluding mobile homes from the reach of the RMA, and using an alternative method of control (covenants) is advised.

- **District/Unitary plans** should address the environmental effects of these units, noting that unlike buildings, trailer homes are transitional and do not permanently change the character of the land. They can be here today, gone tomorrow, leaving only bare soil. The environmental impact is light due to their size, where the primary impact is social, related to cross-boundary conflicts (noise and visual effects of more people on the land – especially in cases where low income is associated with unruly behaviour – annoying the neighbours).

- **Standards:** In terms of construction there need to be manufacturing standards… the same the caravan electrical and gas, however these should not be subject to the full requirements of the building code because mobile homes have different performance requirements and are manufactured in factories where quality control and repetitive assembly precludes the need for council inspections. A NZMHC (NZ Manufactured Housing Code) should focus on engineer-approved designs and quality control protocol in factories, as opposed to the NZBC which focuses on bespoke construction on site using NZ-Approved building materials.

  Note: This analysis does not speak to DIY Tiny Homes on Wheels that should be treated similarly to low-volume certification for motor vehicles.

- **Council Liability:** From a liability standpoint, because they are mobile, councils should not be held liable as was the case in the leaky home crisis. If there is a regulatory body, it should be national, similar to the way NZTA is a national body because motor vehicles are mobile, not fixed in one territorial authority.

APPENDIX – CHATTEL OR REALTY

This is the first draft of a checklist of factors that may assist in determining if a mobile home or DIY Tiny Home meets the test of chattel or not. If likely chattel, no abatement order is likely.

Exclusions and notes

- There is a gap in the law, neither RMA nor Building Act anticipated chattel habitat
- Owner's intention is irrelevant. Objective assessment only. (*Reynolds v Ashby 1903 AC 466*)
- Tenure has no relevance. Mobility is tested on ability to move, not how long it is in place
- Adjacent realty (decks, sheds) not attached to the mobile home have no relevance
- For the most part, utility connections should be irrelevant unless inaccessible
- NZTA rules excluded from Building Act or RMA enforcement. WOF is not a determinant
- This checklist does not address shipping containers used as storage nor modular housing

Factors that suggest chattel

- Made in a factory to standard specifications as a mobile home intended for road deployment
- Transported to site intact (can be towed or trailer/cabin placed on a hiab or flatbed)
- Installed in such a way that it can be removed intact (same as above)
- 4.3m height maximum including the trailer or if carried on a truck or heavy trailer
- Cabin is 2.55m or less in width, or if wider has a separate floor from trailer (cabin is a payload)
- If an on-road trailer, specifications that would pass WOF (but only if trailer is to be road towed)
- Trailer wheels and removable draw bar located onsite or stored for easy access (prevent theft)
- Held in place by gravity. Stability blocks or flood/wind/quake safety anchors do not imply realty
- Power supply uses a caravan-type socket and fitting, or solar panels used
- Water supply uses caravan type connection
- Waste water uses caravan type connection or waterless toilet and greywater disposal

  Note: Grey water disposal must not contravene Council regulations on land use

Factors that suggest realty

- Fixed on a purpose-built foundation in a way that improves the realty
- Added to the title for mortgage and insurance purposes, to increase land value
- Tiny Home fabricated on site and is landlocked (cannot practically be removed from the site)
- Mobile home brought on site but boxed in by fixtures that make removal impractical
- DIY made on site that is too high, too heavy, too top-heavy to be moved safely on roads
- Mobile homes or DIY joined together in a way that cannot be disconnected without damage
- Same as above, with permanent connection to buildings, decks, porches and other realty.

Factors that require further examination (this does not imply realty, only to examine more)

- Any DIY tiny home on wheels made on site (because DIY has no set standard)
- DIY cabin without an engineer inspection confirming it will hold together when moved on roads
- If on a trailer, is it roadworthy? Springs, axle rating, braked, width, engineered for mobility
- If trailer not designed for road use, examine if it can be transported on hiab, flat bed, trailer, etc.
- Made onsite, exit roads unsuitable for towing or trucking off the site. In effect locked to lot.
- Disingenuous claims to be a trailer such as inadequate wheels bolted to floor and a rego plate
- Larger module (factory-made) designed to rest on skids (this brief does not address modules)
- Held in place on piles with easily removable bolts (debatable question, advise to avoid)
- Utilities connected by licensed professional that cannot be easily removed on extraction