Request for Peer Review

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AMICUS CURIAE ON THE STATUS OF MOBILE HOMES AS CHATTEL

Summary

A mobile home is a self-contained, movable and mobile living unit made in a factory to a specific and repeated standard. It contains a kitchenette/lounge, bathroom and bedroom and is intended for long-term or permanent occupation by people. It is a two-part design with a cabin fixed on a trailer designed to be permanently mobile. Mobile means it is capable of being transported intact on NZ roads, either towed or trucked. Wider cabins are detachable payloads to ensure compliance with overwidth transport rules. For clarity, the term ***tiny home on wheels*** is similar to a mobile home, except it is made by a do-it-yourself (DIY) person that is not made to any consistent standard, and as such is outside the scope of this brief. Mobile homes and tiny homes on wheels can be generically referred to as **trailer homes**.

This brief addresses the question of mobile homes and their place in New Zealand law, in particular the Resource Management Act 1991 (RMA) and the Building Act 2004 (BA). It argues mobile homes are chattel, not realty, hence not dwellings, buildings or structures. Under the BA to declare mobile homes are buildings, or under the RMA to declare mobile homes are structures, is incorrect and application of either law in this way is ultra vires.

Cases and Legal Analysis cited

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

What are mobile homes in the context of statute and common law – realty or chattel?

[1] In New Zealand, councils, ministries and lower courts have argued mobile homes are minor dwellings, dwellings, buildings or structures. In doing so they fail to recognize the fundamental difference between real property, sometimes called ***immovables*** and personal property, sometimes called ***movables***. Real property is real estate or realty. Personal property is chattel. A review of established law finds the dividing line between the two, while always a matter of fact finding, has been clearly demarcated. However, in New Zealand this demarcation appears to have been ignored. This brief analyses most of the arguments put forth in NZ, and shows how established law has tested each of them.

[2] The terms ***realty*** and ***chattel*** represent polar opposites in property law. Whether it is a foreclosure, an insurance claim, a criminal prosecution or an abatement notice or notice to fix, the meaning of realty and chattel has not been changed in case law or statute.

Consistency in Law

[3] The requirement of consistency is deeply rooted in New Zealand law, which is based on English law harking back to 1066 and further back to Roman law. New legislation should, as far as practicable, be consistent with fundamental common law principles. New legislation interacts with the common law. Where the meaning of a word is established in common law, it does not mean something different in legislation unless the legislation clearly intends to change the meaning. Definitions in legislative texts are stipulative; they state what a term is to mean in the text. They are only required if they depart from the commonly understood meaning of the term or clarification is needed.

[4] If the word *structure* means *realty* in a bank foreclosure, as a well-established, precisely defined word, under stare decisis it should mean the same in the BA and RMA. This has not been the case in recent decisions and determinations by councils, ministries and lower courts. Regulatory creep has occurred, with adverse impact on NZ's poor, vulnerable and younger generations. This brief argues for consistency in all NZ law.

Meaning of Chattel and Land (realty) – The law of movables and Immovables

[5] New Zealand's most eminent jurist[1], Sir John W. Salmond, former NZ Solicitor General, NZ Supreme Court Judge, and author of Jurisprudence, (1902 currently in 12th edition), set out the fundamental basis of NZ land law. In Jurisprudence §155. **Movable and Immovable Property**, Salmond wrote:

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

Salmond equates *movable* as *chattel* and *immovable* as *land.* He goes on to explain what land means in NZ law, writing in the next paragraph:

> *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*

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

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.

[6] **Realty:** The word *land* can be confusing for a lay person who presumes it means soil, the earth, that with no natural boundary. But in property law, it has a different, precise meaning, harking back to 1066 when, after winning the battle of Hastings, King William I claimed absolute ownership of all land in England, including all fixtures annexed to land, such the duke's castle and the villein's cottage. This is known as *dominium*: the Crown's ultimate title to all the territory on which it is located. This is in contrast to *imperium* which is the government's authority to rule. In this brief, we choose to use ***realty*** (real property) to express the meaning of land and all that is a part of the land, including dwellings, buildings and structures. ***Realty*** in contrast to ***chattel.***

[7] The basic principle of reality can simply expressed in this way:

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

Fixed to land (and *annexed to title*) is the test to determine if habitat made by people is chattel or realty. It asks if this habitat has lost its independent identity and become part of the land.

[8] In historic England this can be understood as the difference between tenants and travellers. A lord of the manor (a landlord) was granted title to land by the Crown who would not only own his manor, but the cottages in his village. As title holder, the ultimate ownership of those cottages (and the manor house) was (and still is) the Crown. In contrast, travellers were (and still are) whole communities who live in what historically have been called caravans – in effect, mobile homes as they are for long-term occupation not the Kiwi meaning of a home to take on holiday. Unlike the tenant's cottage, absolute ownership of the mobile home is held by the traveller. Provided the mobile home remains mobile, it does not lose its independent identity.

Meaning of Structure

[9] Elitestone Ltd v Morris [1997] 1 WLR 687 is generally accepted as the best summation of established law on the meaning of structure. In Elitestone, Lord Lloyd set out the central question and provided the answer

The answer to the question [chattel or realty?]*, as Blackburn J. pointed out in Holland v. Hodgson (1872) L.R. 7 C.P. 328, depends on the circumstances of each*

case, but mainly on two factors, the degree of annexation to the land, and the object of the annexation.

Elitestone referenced Hellawell v Eastwood (1851) 155 ER 554 where in answer to the question Hellawell 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. [underline added]

Degree of Annexation

[10] In Elitestone, a bungalow was subject to a claim that, while not physically fixed to the land, it never the less would have to be demolished to be removed, thus it had ceased to be chattel when the materials were brought on site and assembled, and had instead become part of the land, hence realty owned by the landowner.

[11] **Can it be moved integré, salvé, et commodé [integrated** (as a whole)**, saved** (undamaged) **and conveniently], without injury to itself or the fabric of the building?**

In Elitestone, Lord Clyde addressed degree of annexation:

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

[12] **Can it be removed without demolishing it?** In Elitestone, J Blackburn in delivering the judgement of the Court backhandedly but explicitly named mobile homes held by gravity that can be moved elsewhere are considered 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 like a mobile home 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]

[13] Thus, the first test of structure versus realty examines whether the item can be removed intact without damage to itself or to the land. In giving the example of the mobile home,

this should be sufficient to put an end to the question, however councils and ministries do not so easily give up, thus additional stare decisis needs to be cited to refute.

[14] **Not all homes are realty:** While most *homes* in New Zealand are *buildings* annexed to land, it is not necessary to annex a home to the land to enable it to be used as a home. In Chelsea Yacht & Boat Company Ltd. v Pope [2000] EWCA Civ 425, it is established that not all homes are realty. In that case, it was alleged a houseboat was building because it was moored to a dock. The Court found:

> *It is not necessary to annex the houseboat to the land to enable it to be used as a home."*
>
> Tuckey TJ explains
>
> *"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 <u>could be moved quite easily without injury to itself or the land</u>.* [underline added]

This is the same standard as in Elitestone… "moved quite easily without injury to itself or the land" and is consistent with Salmond's distinction of movables and immovables.

[15] Removal every few years to a fresh site: In Elitestone Lord Lloyd wrote:

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

A mobile home is made to be moved from site to site, indeed it happens often, especially for investment units that may be redeployed annually. Mobile homes are easier to move than greenhouses because they are already on their wheels.

[16] **On movable structures:** In Skerrits of Nottingham v Secretary Of State [2000] EWCA Civ 5569, the precedent of Elitestone is explained. Lord Justice Schiemann cites Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited[1949] 1 KB 385:

> *12. The words which were used in the context of rating in that case 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]

Movement: This very limited concept of movement by a structure has been expanded by regulatory creep to embrace a mobile home that, for example, as in Beachen [2023]. Mr. Beachen's mobile home had no springs because it was designed to be towed on the building lot but then placed on a truck for carriage on public roads. The Council argued this made it a minor dwelling (an immovable). Clearly Skerritts meaning of a movable structure, a windmill pivoting or a pontoon rising up and down with the tide is, to quote Elitestone, "a long way removed" from a mobile home on a trailer without springs.

[17] **On the manner of removal:** Lord Justice Schiemann then moves to same point as in Elitestone citing Hellawell:

> *13. Jenkins J said this:*
>
> > *"It would be undesirable to attempt, and, indeed, I think impossible to achieve, any exhaustive definition of what is meant by the words, 'is or is in the nature of a building or structure'. They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, in relation to the hereditament, answer the description of buildings or structures, or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size: I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, ie, things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces."* [Underline in original]

A mobile home is normally brought onto the hereditament ready made and once installed – in a matter of hours, mostly levelling and hooking up utilities, is removed the same way it is brought on – intact and not pulled down or taken to pieces

[18] **On physical attachment.** In Elitestone, Lord Clyde examines physical attachment:

> *The reasoning in such a case where there is no physical attachment was identified by Blackburn J. in Holland v. Hodgson (1872) L.R. 7 C.P. 328, 335: "But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land." He continued with the following instructive observations:*
>
> > *"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.*

This distinction on degree of annexation begins to move into the purpose of annexation, which will be discussed below, but it makes the clear point that degree of annexation is not dependent on physical attachment despite its weight and bulk.

[19] **Weight on its own is not a test:** The anchor of the Titanic weighed 16 tonnes, four times that of a mobile home, but it is considered chattel because it is attached to a chain that uses a capstan – a mechanical device – to easily enable the 16 tonnes to be lifted so the ship is free to move. In contrast, the same anchor similarly fixed for a suspension bridge has no such mechanical device, thus removal would require bringing in a very large crane and taking the bridge apart. Similar to the ship's anchor, a mobile home uses a mechanical device – a chassis with road-going wheels to enable it to be moved. It is this intentional mechanical device that is a permanent part of the chattel, the same as the capstan, which shows the degree of annexation, regardless of weight, is insufficient to cause the mobile home to lose its independent identity and become part of the land.

[20] **Onus to prove**: Lord Clyde continues:

> *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."*

Proof a chattel (the mobile home) has become part of the land (a structure) lies with the Council. It cannot simply claim it is realty, it must prove it objectively.

[21] **A two-step test**: Until the object is proven to be part of the land, the second question, *is it a dwelling* 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]

In many cases, a council will allege the mobile home is being used as dwelling therefore it must be a dwelling. This is circular logic, as made clear in Chelsea. Because

all dwellings are buildings, hence a part of the land, there is a two-step series of questions. If the mobile home is not part of the land, the second question: *is it a dwelling?* does not arise.

[22] **Fixing to keep steady does not necessarily make it realty**: 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."* [underline added]

This is relevant in mobile homes where for safety, the occupant has added anchoring pegs, chains, cables or bolts to prevent the unit from rocking or flipping in high winds, floating away in a flood or being turned over in an earthquake. Provided the means of attachment is easily removable and is not objectively seen as an intent to make the mobile home part of the land, such the fact of fixing to keep it steady does not in itself show annexation. It is no different than the anchor of a ship, or for that matter, the ship's ropes tied to a mooring bollard. The bollard is part of the land (realty), but the rope or cable is chattel as is the ship or mobile home. A tent peg, however, is chattel.

[23] **Utility Connections do not necessarily make it realty:** In Elitestone Lord Lloyd wrote:

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

Councils frequently allege because a mobile home is connected to mains services (or even a rainwater tank) this connection automatically makes the mobile home part of the land. Elitestone makes clear this is not correct.

[24] **Dividing Line:** This was further explained in Savoye [2014] citing Horwich [1915]. HHJ Seymour, QC wrote:

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

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

using phone jacks, similar to caravan electrical connections, making them even easier to disconnect by anyone. This rules out two arguments often made by councils:

1) The fact a utility is connected to the mobile home does not make it realty
2) The fact a utility requires, under law, a licensed professional to attach or detach does not in itself make the mobile home realty

The true test examines the effect of detachment. If detachment damages the realty, such as leaving exposed telephone wires, then the object (the socket) is realty. In the case of mobile homes they are brought on intact, their utilities have an exterior connection, be it cable, pipe or hose. These are the same as the telephone wire that runs from the phone (chattel) to the socket (realty). Even if a licensed professional is required to disconnect, that fact does not cause the mobile home to become part of the land.

As a matter of fact, in most factory-made mobile homes, connections are designed to not need a licensed professional. Just as a wall phone now uses a removable jack rather than being hardwired by a telephone technician, caravan connections do not require a licensed professional. Electrical generally uses a caravan plug that works similar to an EV charger. Water is generally connected using a potable water hose, similar to a garden hose (but uses non-toxic hose). Wastewater generally uses a macerator pump and hose connected with a caravan-type wastewater connection, although some mobile homes use composting toilets and on-site or off-site greywater disposal, depending on council regulations.

[25] ***Housed and linked* does not necessarily make it realty:** 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.*

A cooker hardwired and fitted into a cupboard is much closer to Horwich's dividing line (see [24] above) than a mobile home parked on land. Thus, it would be a very unusual case where a mobile home's connection to realty would cause the mobile home to lose its independent identity, and only is cases where there was a clear objective intent to effect a permanent improvement in the land.

[26] **Welding**: In [23] above, 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…"*[underline added]

While the first focus in [23] above was on utility connections, a house which can be removable in sections may still remain a chattel. In some NZ cases, councils have argued two mobile homes that are physically connected, either by bolts or welding have been made immovable. Lord Lloyd disagrees if the sections can be removed intact. If bolted, it would be most likely the act of unbolting does not damage either unit or the land. If welded, it would depend on how. If walls must be cut open, that would seem to cross the line, but if it merely requires a grinder to break the weld, it may still be on the side of chattel. A prudent mobile home owner would be well advised to avoid welding, but in examining the facts, the circumstances may still show it remains as a chattel.

Purpose of Annexation

[27] The tests on degree of annexation are substantial, but they are only the first test. The second is the object/purpose of annexation, and both are taken together, not sequentially.

[28] **Intent of Annexation:** Savoye quotes Halsbury's Laws of England (2012), by reference to various authorities, says at Para. 174:

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

The test of degree of annexation is evaluated along with the purpose of annexation, not sequentially.

[29] ***Cui bono*? (to whom is it a benefit?)**. While this question was famously asked by the Roman judge Lucius Cassius in criminal cases, it is equally applicable in determining if something brought onto the land is chattel or becomes realty. The objective test asks the extent to which the bringing on of a mobile home adds to the use or enjoyment of the land, thus making it realty, or where the mobile home is on the land for its own use or enjoyment. Who benefits, the land or the temporal needs of the occupant and host? This is also discussed in Elitestone:

[30] **For the use/enjoyment of the land, or the object itself**: In Elitestone, Lord Clyde wrote:

> *It is important to observe that intention in this context is to be assessed objectively and not subjectively. Indeed it may be that the use of the word intention is misleading. It is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there. The question is whether the object is designed for the use or enjoyment of the land or for the more complete or convenient use or enjoyment of the thing itself. As the foregoing passage from the judgment of Blackburn J. makes clear, the intention has to be shown from the circumstances. That point was taken up by A.L. Smith L.J. in Hobson v. Goringe*

[1897] 1 Ch. 182, 193, a decision approved by this House in Reynolds v. Ashby & Son [1904] A.C. 466, where he observes that Blackburn J.,

> *"was contemplating and referring to circumstances which shewed the degree of annexation and the object of such annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between the owner of a chattel and a hirer thereof."* [underline added]

[31] **Tests must be objective:** The first principle Lord Clyde sets out is the degree and object of annexation must be "*patent for all to see*", as opposed to what the parties believe. A contract between land owner and a tenant mobile home owner is not a sufficient test because it is subjective. In Antoun [2020], Jono Voss declared his fabrication was a vehicle (a declaration he revoked after he retained a lawyer shortly before trial when the lawyer showed Voss the error of his belief), but an objective analysis by Judge Dwyer correctly found it was a building regardless of what Voss believed he was making.

[32] **Third-party mobile homes:** In many cases, the landowner and the mobile home owner are different. The landowner charges ground rent, giving the tenant permission to bring the mobile home on the site for their enjoyment and use. Obviously, such a tenant has no intention of giving up ownership of their mobile home by agreeing to pay rent to park it on the landowner's property. This would most likely be tested if the landowner defaulted on the mortgage and the bank foreclosed. Elitestone and others show the bank is unlikely to prevail provided the mobile home does not meet the test of fixed to land. As discussed in [3] above, if it is chattel in a foreclosure, it cannot be realty under the RMA/BA.

[33] **Landowner mobile homes**: When a landowner brings a mobile home onto their property and chooses to leave it mobile, they generally do so to solve a present need as opposed to making a capital investment in improving their land. When that temporal need passes, they dispose of the mobile home, usually recovering some or all of their investment by selling it and having it towed off the land, leaving only bare soil. This was the case in Beachen [2023] where DT Beachen wanted to provide a place where his occasional-visiting mother could stay without having to share a house with her adult son, or stay in a hotel while visiting. Other examples include adult children of an elderly parent who needs supervision but wants the autonomy of their own kitchen and bathroom. When the parent dies or goes into a nursing home, the child has no need for the mobile home, thus sells it and moves it off the land. Or the parents of a solo mum who needs to get back on her feet after a relationship breakup, who provide land rent-free to allow her to put aside money for a deposit to buy her own home. Or a school leaver who would rather move away from their parents' home, but cannot afford the rent but eventually saves enough money to move on, after which the parents sell the mobile home and get their land back.

[34] **Capital Value:** In all these case, the alternative of building a minor dwelling does not appeal, because when the need passes, the landowner is stuck with a building they don't need but have to maintain, insure and pay rates on. To remove it, they have to demolish it, losing all their capital investment as well as paying demolition fees. And unlike a mobile home which is removed in a couple of hours leaving only bare soil, demolition of a minor dwelling can take weeks, is noisy, dusty and invasive, leaving the land damaged.

[35] **Conversion from chattel to realty**: There are times when landowners choose to convert mobile homes from chattel to realty. There is a consenting cost they must pay, but they

can finance the mobile home as part of the land using lower-cost mortgage financing. They can insure it the same as a home. And in many cases, while chattel depreciated like a car, when it becomes realty, it adds value to the land that may be more than it cost. In such a conversion, generally the landowner applies for a consent, builds a foundation, removes the axles and springs, cuts off any drawbar that is not removable, and permanently fixes the premade module to the foundation according to the Building Code.

The above Stare Decisis applies to both the RMA and the Building Act

[36] The RMA defines *structure* consistent with stare decisis, but not *building*. The Building Act 2004 (BA) uses the word *structure* in defining *building* but does not define *structure*.

[37] In Beachen [2023] and Antoun [2020], Building Act 2004 [BA] arguments were raised in what were RMA abatement cases. Under the principle of consistency of law, it is a valid argument, even if the judge chose not to consider it. In historic cases that consider stare decisis, it is not at all unusual for cases decided on facts far more different than BA and RMA, such as foreclosures or even criminal cases where penalties are different for a crime related to chattel has a lesser penalty than if it was related to realty.

[38] In New Zealand, there has been a tendency by councils, ministries, lower courts and even those issued abatement orders and notices to fix to focus on *is it a vehicle or not* rather than *is it chattel or realty?* This appears to be due to the unusual wording of the meaning of *building* in the Building Act, and Te Puru [2010] where the appeals court made a ruling that focused on vehicle rather than chattel. To clarify where NZ has diverged, one must examine not only the definition, but clear instructions on how law is to be drafted.

The Building Act 2004 [BA]

[39] BA s8 defines the meaning of building and in doing so, defines the reach of the Act:

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

This complex sentence has produced misinterpretations by councils, ministries and lower courts and misunderstanding by people living in trailer homes.

[40] **Means and Includes:** The NZ Law Commission *Legislation Manual Structure and Style* DEFINITIONS instructs how s8 is structured:

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

[41] In s8, **building**— *(a) means …and (b) includes* is the unusual case where (a) stipulates the complete meaning and (b) signals a limit to the reach of the Act – in other words, it serves as a limiting filter.

[42] ***"Means"*** stipulates the complete meaning. Removing the adjectives there to make clear the scope, the complete meaning of *building* reads *building…is a structure*. *Structure* is a precise legal term based in ancient, well-established property law, as discussed above.

[43] Only once it is established the object is a structure, that the second test, by adding ***and includes*** the Act clarifies the reach of s8(b)(iii). This reach is to restrict it in cases where the declared structure is/was a vehicle. A vehicle that has become a structure is unusual, but in NZ a common example is an old bus parked on land that becomes immovable whereupon it is used as a chook house, a tool shed or duck blind (occupied by people on a short term basis). S8(b)(iii) makes it clear these are not covered by the Act, but if that bus is occupied by hidden homeless on a long-term basis, they would be subject to a notice to fix (probably ordering the occupants to vacate).

[44] S8 has been badly interpreted by enforcement authorities who focus first on inspecting a mobile home as a vehicle, and then apply the test of immovable in ways completely unsupported by stare decisis (established law), for example that connection to utility services makes it a building. Elitestone and others explicitly say this is wrong. The first question is degree and purpose of annexation to determine if it realty or chattel.

[45] Therefore, if one is to follow the Legislation Manual (see [40] above), one first must ask: *is it a structure?* Are the degree of annexation and the purpose of annexation sufficient for the mobile home to have become part of the land (and therefore owned by the landowner, insurable as real estate, financeable on the mortgage and subject to rates)?

[46] If the answer to this is *yes*, that still does not mean the Building Act applies to it. This is because there is a special case in regard to vehicles. While a structure includes a structure intended for occupation by people, animals, machinery, or chattels), a vehicle that has become an immovable (to use the term set out by Salmond [see [5] above]), is only within the reach of the Building Act if it also is occupied by people on a permanent or long term basis. A vehicle that has become a structure but is used for other purposes is outside the reach of the Act, even if it is subject to foreclosure or insurance.

[47] The test of structure in regard to a mobile home can be simple. In a foreclosure would the bank claim it? In the case of a third-party tenant, does the land owner own the mobile home even if the tenant is paying rent? This is precisely what happened in Elitestone, but the test was on how it would be removed. In the case of a mobile home there would have to be some very unusual circumstances to require the mobile home would be demolished to remove it.

[48] It matters not whether the test – *building or realty?* – is under the Building Act, RMA or bank mortgage foreclosure – law must be consistent. For a mobile home to be a structure or building, it must be part of the land. *Part of the land* has long-established tests, and in the case of most mobile homes, the characteristics clearly show it is chattel, not part of the land. In New Zealand, this has become an object of regulatory creep, to the point where personal property (chattel) is said to real property (realty).

Why this matters

[49] Mobile homes are one step above hidden homelessness. Councils and governments turn a blind eye to people living in cars, tents, garages and overcrowded conditions, but throw the full weight of the law on those who seek to better themselves with warm, dry,

acceptable-yet-affordable housing. In part this is a silo mentality where the duck test applies… it looks like a building, it is lived in like a building, therefore it must be a building. As Chelsea (see [14] above) makes clear, this is erroneous.

[50] This erroneous interpretation may be due to senior management pressure in departments that are self-funded by fees, fines and contributions. Establishing that mobile homes are not structures or buildings forces councils, ministries and lower courts to face the affordable housing crisis head on. It takes away the instrument used by council regulators where, in the case of the RMA, they could just amend their district/unitary plan to regulate chattel housing. But this would continue the silo mentality when at a senior management level, councils are aware of the affordable housing crisis, and under the purposes of the RMA, it is their job to enable people and communities to provide for their wellbeing. Living in a car is not wellbeing. Living in a mobile home enables wellbeing.

What needs to change?

[51] **Building Act 2004**: Dall v MBIE [2020] established mobile homes are not necessarily buildings, with many councils now leaving them alone if they fit a similar profile to that in Dall [2020]. Nevertheless, mobile homes made in factories can and should be designed to an acceptable and appropriate standard, but not necessarily the same as a dwelling. These standards should ensure warm, dry, safe and adequate habitat, with durability both to sustain annual long over-road transport and designed to be refurbished more like an aeroplane than a building. But most importantly, they cannot be shackled with the extensive approval and consenting costs of buildings. Requiring a manufacturer invest tens, even hundreds of thousands of dollars before they are permitted to make their first sale becomes an insurmountable obstacle. The state subsidises state housing. It should pay for the approval of mobile homes, so all the costs passed on to the occupant represent labour and materials for manufacture. Do not apply the Building Act, write a new Act.

[52] **Resource Management Act 1991**: A district plan may regulate a mobile home. The wrong way to do it can be found in the proposed Queenstown Lakes District Plan Definition of Building:

> *Notwithstanding the definition set out in the Building Act 2004, and the above exemptions a building shall include:*
>
> *a. any vehicle, trailer, tent, marquee, shipping container, caravan or boat, whether fixed or moveable, used on a site for a residential accommodation unit for a period exceeding 2 months.*

The right way to do it is to define chattel shelter as its own form of shelter. Make rules that address its difference from buildings. These residential accommodations (vehicle, trailer etc.) are different and they need rules that recognise their transitory nature, especially in Queenstown where there is a severe affordable housing shortage. The above definition is lazy and fails to enable communities to provide for their wellbeing

[53] **Covenant on Title**: The better approach is to use a proactive, precise process to invite owners of surplus land to volunteer their property to host mobile homes for a fixed term of 15 years. A covenant on title allows surgical precision in specifying what is permitted site-by-site, including specific mobile home terms as well as nuisance eviction clauses. It is recommended councils use covenant on title to remove consenting entanglement.