IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUAO AOTEAROA
KI WHAKATŪ

No: _____

Under the Resource Management Act 1991 (RMA)

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|---|---|
| IN THE MATTER OF | **Decision [2024] NZEnvC 280** |
| BETWEEN | MATHIAS SCHAEFFNER AND CHRISTIN SCHAEFFNER<br>Appellant) |
| AND | TASMAN DISTRICT COUNCIL<br>Respondent |

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Title of Document

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**Cases and Legal Analysis cited**

- Elitestone Ltd v Morris [1997] 1 WLR 687
- Savoye and Savoye v Spicer [2014] EWHC 4195 (TCC)
- Chelsea Yacht & Boat Company Ltd. v Pope [2000] EWCA Civ 425
- Skerritts of Nottingham v Secretary Of State [2000] EWCA Civ 5569
- Berkely v Poulett and Others [1977] 241 EGD 754
- 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
- Tasman District Council (TDC) v Schaeffner Decision [2024] NZEnvC 280
- *Jurisprudence* – 12th Ed (1966) Sir John W. Salmond ISBN: 978-0421056107
- Legislation Design and Advisory Committee (LDAC) Legislation Guidelines (2021)

## Background

The underlying error at law was best stated by Lord Clyde in Elitestone Ltd v Morris [1997]:

> *As the law has developed it has become easy to neglect the original principle from which the consequences of attachment of a chattel to realty derive.*

In 2021, the appellant, the Schaeffners, a family that migrated to Tasman from East Germany invited an older woman who spoke German to move rent-free onto the Schaeffners' land. This was an informal agreement that she would act as a surrogate grandmother for the Schaeffners' children. Rather than live in the Schaeffner's home or that a granny flat building would be built, she would tow her own mobile (tiny) home onto the land.

The elder's mobile home was towed on site by a ute, the tyres were left on and the corners blocked with jacks to provide stability. The mobile home rests on the land solely by gravity. The mobile home is owned by the elder, not the land owner, and it is expected to be removed by the elder, when one day she will leave; which is why the mobile home remains removable.

Tasman District Council (TDC) interpretation of the Tasman Resource Management Plan (TRMP) asserted the mobile home is a building under the TRMP and a structure under the Resource Management Act 1991 (RMA) s2.

The appellant argued in Environment Court that TDC was wrong, that the mobile home was not annexed to land, does not meet the tests of "fixed to land" as found in RMA s2 meaning of structure and therefore the enforcement order of the Environment Court is ultra vires. Among other case law Judge Reid accepted as relevant was Elitestone [1997], which was also featured in the other two cited NZ EC cases, Beachen [2023] and Antoun [2020].

This appeal to the High Court pleads for a ruling on the meaning of "fixed to land" but also asks the court to address the many erroneous interpretations of property law that can be found in abatement orders, notices to fix, lower court decisions, MFE National Planning Standards definitions, and MBIE Determinations by examining the law to remind the authorities of *the original principle from which the consequences of attachment of a chattel to realty derive.*

## Terms

1. **Mobile Home**: The terms *tiny home on wheels (THOW) and tiny home* and *tiny house* as used in this case and in popular language in New Zealand have the same meaning in this document as **mobile home** which is the preferred term that is used

in New Zealand statute such as the Residential Tenancies Act 1986 (2) (5)(t). For the purpose of this appeal, these terms are interchangeable.

2. **Realty:** Has the same meaning as real estate or real property. Realty is never chattel.

3. **Dwelling, building and structure**: In TDC v Schaeffner, Reasons para. 4 Judge K G Reid wrote:

*"... under the relevant definitions for the tiny home to be a "dwelling" it must be a "building", for it to be a building it must be a "structure", and for it to be structure* [sic] *it must be "fixed to the land".*

This linkage by the court is accepted by the appellant as accurate, as far as it goes, but it is missing the final link: *For it to be a structure, it must be realty*.

4. **Hidden Homeless:** People living in cars, tents, garages, sheds or overcrowded conditions

**Common Notions**

5. 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. *(Salmond Jurisprudence 1902)*

6. Land subdivision is two dimensional. Its separation is set out using latitude and longitude, but not the third dimension of altitude or the fourth of time. These dimensions can be referred to as XY coordinates or XY. This XY concept is useful in determining if an object on the land is realty (it remains at its XY coordinates) or chattel (is capable of being relocated from one set of XY coordinates to another, especially if the second location is on a different parcel. For example, the windmill given by Skerritts [2000] as an example of a movable structure (*in the nature of a structure*) turns in a circle around its fixed XY coordinates. Similarly, a pontoon fixed to a pier remains on its XY coordinates, but rises and falls on its Z coordinate (altitude or vertical motion) and from time to time (the 4th dimension of time) is removed for maintenance or cleaning, but is still considered realty because its purpose is only achieved while it remains at its XY coordinates.

**Established Law**

7. **Realty:** Realty includes land and all objects fixed to land and annexed to title. Under the principle of *imperium*, the Crown holds absolute ownership of all land and their fixtures in New Zealand and issues a bundle of rights called *real estate*, the strongest of which is fee simple. People do not own land, they own rights to land called realty or real estate. Ownership of these rights is transferred by title. The current land transfer registration system (known as the 'Torrens system') replaced the deeds system in 1870. Use of this system is compulsory - no legal interest in land may be created except by registration under the Land Transfer Act 2017. Fixtures include structures, buildings and dwellings, which are always realty, never chattel. In law a structure cannot be chattel.

8. **Chattel** is property that remains in the ownership of the person who brought it onto the land while a fixture passes with land regardless of whomever first brought the item to the land. Ownership of chattel is generally transferred by changing hands with payment or a contract for payment. Except for the Personal Property Securities Registry, which is voluntary, the Crown has little involvement in chattel property unless the subject of a contractual dispute.

**Neglect by Regulatory Creep**

9. At the heart of this appeal is administrative and judicial neglect of the original principles of property law. When the original principle of law is neglected, regulatory creep sets in. Regulatory creep sets in with respect to legislation that has been subject to little or limited judicial consideration, a consequence of which is that the rules are unclear.

10. **Regulatory creep** is a gentle form of "herding" where, to fill in gaps in law, regulators embellish or steer the law to extend beyond the reach of established law. They develop closed social networks that are self-confirming… council officers, central government ministry officials, consulting planners, lawyers and judges all talk to each other within a bubble that becomes so subject-focused, they lose sight of the law as they push beyond their powers under the law. When pushed back, they do not reconsider. They push harder.

11. In TDC v Schaeffner, the question "*is the mobile (tiny) home realty or chattel?",* can only be properly answered when *the original principle from which the consequences of attachment of a chattel to realty derive* is not overlooked or neglected. In other words, what does *attachmen*t mean, in terms of finding the line between *chattel* and *realty*?

**The dichotomy of chattel and realty**

12. **Dividing Line:** Savoye [2014] cited Horwich v Symond [1915] 84 LJKB 1083 where HHJ Seymour, QC spoke about :

*The dividing line between things which are fixed and not fixed*.

13. **Dichotomy (law):** In property law, the dividing line is absolute, a dichotomy, either black or white, but never both. A mobile home cannot be chattel under one law and realty under another. Once the finder of fact has found it has crossed the line, it is realty in all law.

14. **Continuum (fact):** In property law, finding that dividing line is the grey area between black and white is the role of the finder of fact because the grey area is a continuum. But, once that line is found, in law the thing is either realty or chattel, and if the mobile (tiny) home in question is realty under the RMA, as Judge Reid has decided in TDC v Schaeffner, it must be realty under all law.

**What does "annexation" mean?**

15. In para 26, Judge Reid introduces the test adopted by the House of Lords in Elitestone

*…of whether the chattel could be said to have become "part and parcel of the land" in question. The main two indicators being the degree of annexation and the object of annexation*. [underline added]

16. In para 43, Judge Reid writes:

*I turn to my analysis of the facts and approach the issues by considering the degree of annexation to the land and the object of annexation.* [underline added]

17. Judge Reid used the word **annexation** but neglected to examine what **annexation** means in law. In failing to do so, he introduced a series of irrelevant tests, such as

proximity to a yellow building, while failing to consider the established tests found in Elitestone, Chelsea and others. This failure lies at the heart of this appeal.

18. This failure is not unique to Judge Reid. In Beachen, Judge Dickey made the same error at law. Unfortunately, Mr. Beachen chose to represent himself pro se in that case, did not cite Elitestone, which had been introduced by the council's lawyers, who failed to put all relevant and significant law known to those lawyers before the court, whether such material supported their client's case or not. The same omission occurred in this case.

19. Instead Judge Reid moved directly to Elitestone's tests, where Lord Lloyd said:

*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.*

*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.*

20. Before moving to Judge Reid's question, the meaning of **annexation** must be agreed. The original principle from which the consequences of attachment of a chattel to realty derive lies in the meaning of the word **annexation.**

21. **Annexation is the process** where chattel brought onto the land loses its independent identity and becomes part of the land. Or, as Judge Reid himself writes, "*of whether the chattel could be said to have become "part and parcel of the land"*

22. In para. 56, Judge Reid wrote "*...separate ownership has not prevented the tiny home being integrated into the property*". If chattel is property that remains in the ownership of the person who brought it onto the land while a fixture passes with

land regardless of whomever first brought the item to the land, Judge Reid has made a fundamental error at law. The mobile home can be subject to a leasehold agreement registered against the title on the LIM (there was no evidence of this in Schaeffer [2024]), but for this to happen, it must be realty, not chattel.

23. **Annexation** is not an incidental word, it is a formal way of describing how chattel becomes realty. It is how chattel that may have been listed on the New Zealand Personal Property Register loses its independent identity, and instead, if regulation is properly followed, becomes recorded on the deed to the land under the Land Transfers Act 2017.

24. **Chaos:** The implications of annexation cut across a wide range of well-established law, where, if Environment Court Judge Reid's interpretation is accepted, property law would be tipped into chaos - *realty* for the purposes of the Tasman Resource Management Plan, but *chattel* for all other applicable property law.

    24.1. For example, in Dall v MBIE [2020], District Court Judge Mark Callaghan found that under the Building Act, Dall's mobile home (almost identical to the mobile home in Schaeffner [2024]), was chattel. But under Judge Reid's interpretation, Dall's mobile home would be realty.

    24.2. If Dall's land was subject to a foreclosure, would the bank claim it as realty under Judge Reid, or be blocked as chattel under Judge Callaghan? If Dall sold his land, and the sale agreement made no mention of the mobile home, would the buyer have a claim on it if Dall towed it away after signing the sales agreement, but before title passed to the buyer?

**Integration with the Existing Body of Legislation and Common Law**

25. As stated above, regulatory creep sets in in respect of legislation that has been subject to little or limited judicial consideration. The RMA does not exist in isolation. Interpretations of it must be consistent with all property law. As LDAC writes in the Legislation Manual:

*Legislation is part of wider regulatory systems and must work effectively within them (including, increasingly, the international legal system) as well as integrating with the existing body of legislation and common law*

**Common Law**

26. Having established that annexation in law is a dichotomy, the fact test of degree and object of annexation is the continuum to find the dividing line. The test examines the facts to find which side of the dividing line the thing rests. However, in the absence of those tests being found in statute, the court looks to common law.

27. Judge Reid relied heavily on Beachen and to a lesser extent Antoun, both of which cited Elitestone. But the lawyers for the councils failed to put all relevant and significant law known to those lawyers before the court, whether this material supported their client's case or not. Accordingly, Judge Reid was unaware that the tests cited in Elitestone would have shown the facts put forth by the councils' lawyers would have undermined their case and would have supported David Beachen's case. Unfortunately Mr. Beachen chose to act pro se, with no legal advice, and he therefore was unaware the extent to which Elitestone's tests supported his case. Instead of filing an appeal, he proved his mobile home was in fact and in law chattel by listing it for sale, whereupon it was towed away, intact, to become chattel housing for someone far away.

28. **Elitestone**, the House of Lords case cited by Judge Reid, is a case in which Morris argued his bungalow was realty, not chattel, thus granting Morris protection under the Rent Act 1977. Elitestone Ltd argued that while Morris' bungalow was constructed on site, and could only be removed from the site by demolition, it was not physically fixed to land, except by gravity and therefore was chattel. If the House of Lords found for Elitestone, it could evict Morris and require him to remove the bungalow so they could develop the land for other purposes. But the House of Lords found for Morris, that his bungalow had been annexed to land, was realty, and in doing so confirmed a wide range of tests that began with **degree** and **intent / object of annexation.**

29. In framing the question as Elitestone sets out, first the meaning in law of **annexation** must be agreed, that it marks the dividing line between realty and chattel. Only then can the factual tests of **degree** and **intent** must be examined to determine which side of the dividing line the mobile home in TDV v Schaeffner lies.

**The Legislation Act 2019 s10**

30. However, before turning to Judge Reid's findings of fact, section 10(1) of the Legislation Act 2019 requires:

*… the meaning of legislation must be ascertained from its text and in the light of its purpose and its context.* [underline added]

30.1. If the meaning is in the text, that meaning is paramount. If meaning is not found in the text, one looks to the purpose of the Act and its context. If that does not provide clarity, one then examines the common law - stare decisis.

30.2. Therefore, before finding fact, one must examine the statutes.

**The Purpose of the RMA**

31. LDAC writes in the Legislation Manual Chapter 13 Part 1:

*…the purpose of the legislation is a key aid to interpretation. If possible, every provision in the legislation should be interpreted consistently with its purpose.*

32. In the RMA there is no definition of **fixed to land** nor **building**, but s5 sets out the RMA purposes, which are relevant to the bigger picture - the affordable housing crisis that is impacting New Zealand nationwide. The Schaeffner's seek to address this crisis which became the target of Judge Reid's enforcement order. For the Schaeffner's, this is a nationwide test case.

33. As it relates to this case, the purpose of the RMA is to sustainably manage resources, which includes sustainably managing development to enable people and communities to provide for their social and economic wellbeing as well as

health and safety. In Tasman District and elsewhere in New Zealand, councils have failed in their duty.

33.1. *Development* in this case refers to housing development, where to enable people and communities, housing must be affordable, good for society and healthy and safe for the people who live in those houses.

33.2. *Economic wellbeing* means people can afford to buy or rent a home in their community. The right to adequate housing is fundamental to society. This right is found in Article 25 of the United Nations Universal Declaration of Human Rights to which New Zealand is a signatory. If a community has people who cannot afford to live in their community because the council has failed to sustainably manage housing development, the council has failed to discharge its duty under law.

33.3. In 2019, the "father of the RMA" Sir Geoffrey Palmer said the RMA has had devastating consequences for New Zealand's housing market because the Resource Management Act is an "incoherent mess"[1]

33.4. The RMA has had devastating consequences for New Zealand's housing market because council planning authorities failed to ensure the new housing supply matched population growth, housing has become unaffordable for the bottom half of society. It is a very simple formula:

**For each net new family in the district there must be a net new family home in the district. If not, prices go up. Unaffordability sets in.**

33.5. This is common sense and Business 101. If demand exceeds supply either prices go up or shortages occur. In a capitalist economy society polarises between haves and have nots - those who can pay the higher price and those who are locked out of the market. In a socialist economy where the object in question is provided by the state (in this case, affordable housing), waiting lists grow.

[1] https://www.newshub.co.nz/home/new-zealand/2019/07/resource-management-act-s-creator-sir-geoffrey-palmer-labels-it-an-incoherent-mess.html

33.6. In New Zealand both have occurred. In the open market the traditional multiplier ratio of 3X median house price to median family annual income has exploded to 10X or worse. In the state house waiting list, the number of families on the list grew from 6,000 when the Sixth Labour government took office in 2017 to 24,000 when it left office in 2023. In June 2024, 23,000 families were on the list, and an uncounted number have become hidden homeless; people living in cars, tents, garages, sheds and overcrowded conditions..

34. When the council's planning authority fails to enable people and communities to provide for their wellbeing, the people take action independently of the authority. The people and the private sector do not stand idly by when the authorities have failed in their purpose. Instead they examine the law and district plans, looking for areas either intentionally omitted or by loophole. Out of this grassroots action came the mobile home movement, and in specific came the Schaeffner's hosting an elderly woman's mobile home.

**Examining why "building" and "fixed to land" is not defined in the RMA**

35. The RMA defines **structure** but does not define **building** or **fixed to land**. This is not an omission, it is consistent with New Zealand's constitution. New Zealand's constitution is not found in one document. Instead, it has a number of sources, including crucial pieces of legislation, several legal documents, common law derived from court decisions as well as established constitutional practices known as conventions. If a meaning is well established in common law, it is not defined in statute unless the statute changes policy or clarifies the meaning.

**On Writing New Legislation and the Common Law**

36. Parliament's Legislation Design and Advisory Committee (LDAC) provides advice to Parliament when writing new legislation. As such its explanation provides a helpful understanding of why *fixed to land* is not found in the statute.

37. As part of its work, LDAC published the Legislation Guidelines: 2021 edition[2], which in s3(6) explains:

[2] https://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/early-design-issues-2/chapter-3

*Part 6: Does the common law already satisfactorily address those matters that the new legislation is proposing to address?*

*New legislation should not address matters that are already satisfactorily dealt with by the common law. New legislation should only address matters already covered by the common law where it can result in improvement (such as increased clarity or a policy change). The common law is able to evolve flexibly and so is more adaptable than legislation. The cost and the potential risks of legislating should not outweigh the benefits of the new legislation.* [underline added]

38. The meaning of **building** and **fixed to land** is well established in common law and a careful reading of all New Zealand statutes that speak to property law are consistent. **Building** and **fixed to land** are words solely referring to **realty**.

39. LDAC guidelines Chapter 3 state the reason why this is important:

*The common law is a body of law developed by the judiciary. It consists of both deeply embedded constitutional principles and rules that arise from particular judgments or a series of cases. The common law is relatively stable. It can be altered by the judiciary, but fundamental shifts do not occur quickly and the courts are careful not to stray into territory that is more properly addressed by Parliament.*

**Change in the Housing Economy**

40. The need for judicial guidance on the question put forth to the High Court in this case is due to the changes in the New Zealand housing economy since 1991, when the Act was written and 1996 when the Tasman Resource Management Plan (TRMP) was first notified. Prior to 2000, buildings (realty) as homes were affordable by everyone, thus the need for judicial guidance on chattel housing had not yet arisen. That is no longer the case in 2024.

**The Text in the RMA**

41. The Legislation Act 2019 s10 requires first the text in the statute is examined. The relevant portion is found in s2, interpretation:

***structure:*** *any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft.*

42. This is the sole text in the statute that addresses the question if the meaning of building, as both written in the TRMP and and interpreted by the TDC enforcement officers and Judge Reid are consistent with the meaning of structure as found in the RMA.

43. The RMA does not define **building** or **fixed to land.**

**Other Statutes**

44. Having examined the purpose of the RMA, the next step set out in the Legislation Act 2019 is to examine other statutes where the Parliament has written a definition related to the meaning of structure. This is done in Appendix B, below, except for drawing attention to the Heritage New Zealand Pouhere Taonga Act 2014, which offers the best meaning of **building** in its s6 *Interpretation:*

***building*** *means a structure that is temporary or permanent, whether movable or not, and which is fixed to land and intended for occupation by any person, animal, machinery, or chattel*

45. In order to maintain consistency and integrity in New Zealand law, this is the meaning that should be given in any interpretation of the meaning of **building** in the context of the RMA meaning of **structure.**

**Common Law**

46. The RMA does not define **building**, and other statutes that do, do not define **fixed to land.** Thus, the judiciary in looking for guidance then turns to common law: that which has been decided (stare decisis).

47. In this, Judge Reid turned primarily to Elitestone which is a treasure-trove of relevant guidance, but unfortunately, he only went as far as citing degree and object of annexation.

**Fundamental Law**

**What is the established law on the meaning of fixed to land?**

48. **Chattel and Realty**: 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*

49. 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 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.*

50. In Elitestone, Lord Clyde examines fixed to land

*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.*

**Movable and immovable**

51. The RMA meaning of **structure** includes the adjectives **temporary** and **permanent**, and **moveable** and **immovable.** In the context of common law, looking to Elitestone, what do these words mean?

52. **In the Nature of a Structure:** In Skerritts v Secretary of State [2000] Lord Justice Schiemann quoted Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen Baldwin's Iron and Steel Company Limited [1949] 1 KB 385 in which Denning LJ in said:

> *"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."* [underlining is in the original]

53. **Reference Language for Moveable:** To understand the meaning of movable as set out in Cardiff [1949], the common notion set out in paragraph 6 above, is a useful aid.

    53.1. **Realty is two-dimensional** meaning it is defined by XY coordinates, latitude and longitude.

    53.2. *Movable* is of the 4th dimension (time) when the object remains on the same XY coordinates as in the example of the windmill, where the windmill that pivots around its centre but does not relocate from its XY centre. Likewise with the pontoon that remains in its XY coordinates while moving on the 3rd dimension (altitude), its Z coordinate as it rises and falls with the tide. In the example of the pontoon, Cardiff also found that while it may be removed from time to time for cleaning or maintenance, when it is not on its fixed XY coordinates it is not serving its purpose, but is nevertheless "in the nature of a structure".

    53.3. The other adjective *temporary* and *permanent* is of the 4th dimension, time. Because the RMA says a structure may be either temporary or permanent, this has no relevance to the question at hand.

**Degree and Intent of Annexation**

54. As noted above, Judge Reid in para. 26 introduced the test adopted by the House of Lords in Elitestone Ltd v Morris "*of whether the chattel could be said to have become "part and parcel of the land" in question. The main two indicators being the degree of annexation and the object of annexation*."

    54.1. In para 43, Judge Reid writes: *I turn to my analysis of the facts and approach the issues by considering the degree of annexation to the land and the object of annexation.*

    54.2. 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.*

*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.*

54.3. While Judge Reid correctly cited the test of degree and object of annexation, he neglected the tests Lord Lloyd set out.

*Firstly, can the mobile (tiny) home parked on the Schaeffner's land be removed without damage to it or to the land?*

*Secondly, cui bono? Who benefits from the placement of the mobile home parked on the Schaeffner's land?*

54.4. The facts cited by Judge Reid make clear the answer to the first question was "yes" not only can it be moved without damage to it or the land, this was shown in the video. And further, one option in Judge Reid's order was for the mobile home to be towed off the land, which confirms it has not been annexed

54.5. The facts cited in answer to the second question make it clear the benefit of the presence of the mobile home falls both to the occupant, who would otherwise be hidden homeless, and to the land owner's children who gain the benefit of a surrogate grandmother who speaks their parents' native tongue. Should the surrogate grandmother die or otherwise need to move away, the mobile home owned by her would be of no benefit to the land, which is why the land owners required it remain a removable chattel that can be easily towed away.

**Error on implications of towing and of connected utilities**

55. In para. 44, Judge Reid writes:

*Firstly, the degree of annexation. In the 2021 video the tiny home can be seen being towed, somewhat awkwardly, by a ute to its current location. Since that time modifications to the tiny home have been made. It has been connected to infrastructure installed on the property, in particular water and electricity, and wastewater. These systems are all self-contained. They do not connect to the mains or other services on the property.*

55.1. **"Somewhat awkwardly":** In the first part of para. 44, Judge Reid introduces "somewhat awkwardly" as a test suggesting this makes the mobile home realty not chattel. "Awkwardly" is not a test of *fixed to land*. Indeed, to the contrary, "can be seen being towed" is a clear statement that the mobile home is not fixed to land.

55.2. **Connected to Infrastructure, in particular water and electricity and wastewater:** In the second part of para. 44, Judge Reid introduces connection to utilities as a test suggesting this makes the mobile home realty not chattel. Elitestone disagrees:

55.3. In Elitestone, Lord Clyde said:

*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]

55.3.1. The first part of Lord Clyde's test addresses how the object in question is removed. The video submitted as factual evidence showed the ease to which the mobile home is moved as a unit (noting it even could be removed in sections) rather than requiring destruction.

55.3.2. The second part of Lord Clyde's test addresses Judge Reid's second part of para. 44. The video submitted as factual evidence showed the ease to which the utilities are disconnected.

55.4. In para. 46-47, in applying the tests of degree and intention of annexation, Judge Reid writes:

*[46] Mr Olney made much of the fact that the pipes are not glued to the gully trap, rather they simply connect through holes made in the gully trap. I find that this makes no material difference to the degree of annexation. The pipework and gully trap are part of a purpose-built wastewater disposal system that connects and attaches the tiny home to the ground.*

*[47] The infrastructure for the supply of water consists of an underground power cable leading from the tiny home to the pump and a water pipe returning underground, to the tiny home. The infrastructure can be disconnected with tools, but I find that these connections mean the tiny home is attached to the ground.*

55.4.1. As the tests in Elitestone clearly show, Judge Reid failed to apply the established tests, and as Lord Clyde noted in Elitestone, Judge Reid neglected *the original principle from which the consequences of attachment of a chattel to realty derive.*

56. **Temporarily:** In Elitestone, Lord Clyde spoke of "*connected temporarily to mains services"* where the court may misunderstand what is meant by temporarily. It is not a matter of tenure but rather how the service is connected. In the case of most mobile homes these services are connected in a way that is lawfully removable by anyone, not requiring the services of a licensed professional. However, even if the service requires a licensed professional to disconnect, this does not necessarily make the object part of the realty. Savoye [2014] cited Horwich [1915]. where HHJ Seymour, QC said:

*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.*

56.1. It should be noted this finding was from 1915, when telephones were hardwired by professional telephone technicians using threaded nuts inside the socket to hold the telephone cable to the socket . The socket was part of the building, but the cable wired into the socket, as well as the telephone were chattel. Among other things, this would mean when the occupant moved out or if the building was sold, the owner of the telephone was entitled to take the phone and wire with them, but not the socket, which would be the property of the building owner, even if the owner of the telephone paid for it to be installed. In later years telephones were coupled using phone jacks, similar to caravan electrical connections, making them even easier to disconnect by anyone.

56.2. The importance of this is to ask the High Court to confirm the principle that temporary connection is applicable even if disconnection of the utility requires a licensed professional. Thus for example, if the water connection was not potable water garden hose, but grey PB plastic that could be cut and capped, this would not in itself indicate a greater degree or intent of annexation

57. In para. 48, Judge Reid writes:

> *The rainwater collection system including the down pipe and water tank, as well as the gardens, plantings, gravel pad, driveway, pallets and the proximity and integration with the yellow building, shed and water tank all show that the tiny home is integrated into the site. It has the appearance of a separate lived-in, residential unit.*

57.1. In this paragraph, the judge introduces two news tests, unsupported by established law. First new test Judge Reid introduces is "*integrated into the site*" rather than applying the established standard annexed to land. This was also a failing in Beachen where Judge Dickey wrote:

> [45] *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.* [underline added]

57.2. "Integrated into the site" or "imbedded in the land" are not the same as annexed to land. There is no argument the gardens, perhaps the plantings, gravel pad, driveway, and a yellow building and shed are realty. But this has no bearing on the degree or intention of integration. The pallets and water tank are probably chattel, but regardless, all of this is irrelevant. Even if the mobile home were connected to power, water and wastewater pipes serving the primary dwelling on the land, and if the primary dwelling services were connected to town water and wastewater and mains power, such connections in themselves do not cause the chattel to transform to become realty.

58. In para. 48, the second new, unsupported test Judge Reid introduces is writing the mobile home has "*the appearance of a separate lived-in, residential unit"*. This is factually correct, but the fact finds no support in law in the established tests of degree or intent to annex the mobile home to the land.

58.1. In para. 41, Judge Reid takes notice of Chelsea v Pope [2000] but appears to have failed to note that in Chelsea, the court found "*It is not necessary to annex the houseboat to the land to enable it to be used as a home*."

58.2. The same applies to mobile homes. It is not necessary to annex the houseboat to the land to enable it to be used as a home.

59. In para 49, Judge Reid writes *I agree with Mr Quinn that much of this infrastructure would be rendered purposeless if the tiny home were to be towed away*.

59.1. Firstly, in so writing this, Judge Reid has, unwittingly agreeing with 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."*

59.2. Secondly, what is the relevance of Mr. Quinn's point that towing away the mobile (tiny) home renders much of the infrastructure purposeless? Yellow buildings and pallets have nothing to do with the question of

annexation of the chattel to the land. It is unclear who invested in these fixtures attached to land, or the chattel lying on the land, or who is responsible to remove them when the mobile home is towed away, but neither Mr. Quinn nor Judge Reid has shown any test of law relevant to these ancillary objects.

59.3. The degree of annexation is tested by removable, which Judge Reid accepts is how it would leave the property. The standard in Elitestone is cited using Latin:

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

59.4. In para 49, Judge Reid accepts the object can be moved *integré, salvé, et commodé* but instead focuses on what this would mean to the chattel and realty left behind. Consider in Elitestone, what Lord Clyde said:

*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.*

60. In para 50, Judge Reid writes:

*I find as a matter of fact that the tiny home cannot simply be driven away, contrary to Mr Schaeffner's assertions. The demonstration video showed the tiny home can be disconnected and towed a short distance (with the assistance of a tow truck). The video also showed the piping underneath the tiny home remained in place as it was towed, as did the water connecting hose/pipe and the pipe connecting to the urine container. I find that the various modifications to the tiny home, particularly the connected wastewater infrastructure which hangs underneath the tiny home, mean that it can only be moved with difficulty.*

60.1. Judge Reid's use of the term "driven away" misstates the process of removal. There is no requirement under any law that a mobile home must be drivable, meaning it moves under its own power. In Elitestone Lord Lloyd disagrees with Judge Reid. Indeed Lord Lloyd 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 <u>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:* [underline added]

60.2. The test of degree of annexation does not include "*it can only be moved with difficulty"* as described by Judge Reid. As a matter of fact, hundreds, perhaps thousands of mobile homes are towed on New Zealand roads with wastewater pipes hanging below. But this is fact. In the established tests of law, difficulty is not the same as demolition.

**The meaning of moveable and temporary**

61. As discussed above, Judge Reid and many other NZ cases have confused the meaning of movable with relocation or mobile. In para 39, Judge Reid writes:

*I do not see any difficulty with the concept of an object being fixed to land and also being temporary and moveable. One example might be a building secured to the ground for a specific event to be removed afterward: such buildings are commonly controlled as structures by rules in district plans such as the TRMP*

61.1. This observation has multiple flaws. It fails to address what is meant by *temporary* and what is meant by *movable*, and the example is flawed because it is unrelated to the case before the judge.

61.2. Beginning with the example, the mobile home is not secured to the ground, thus introducing examples that are fixed to land but are temporary and moveable are not relevant unless it can be shown they are in the same nature as the object in question - the mobile home parked on the Schaeffner's land.

61.3. Judge Reid's example is ambiguous, because it may be secured by gravity or by tent pegs which is unlikely to make it a building, or it could be secured in a way that requires it be taken apart in a way that makes it a structure. Had the judge used the term "fixed to land" instead of secured to the ground, and then cited how, that would make the example more useful.

61.4. Consider a building that is deemed surplus by landowner A and is purchased by a house removal company B to be removed and sold to a third party C to become a building on land C. While still on its foundations at land A, it is a building, a structure. Presuming any mortgage holder has released their interest, and any council consents acquired, as soon as the house removal company lawfully separates the foundation from the home above, the home ceases to be realty and becomes chattel. While on the road and while in the removal company's sales yard, sitting on pallets on land B, it remains chattel. Only when relocated to land C and fixed to a new foundation does the object once again become realty.

61.5. Judge Reid may not have been thinking of a building relocation, a popular business in New Zealand, but an object that is designed to be put up at

location A and later removed from location A, such as a military quonset hut. But the same test as to the meaning of fixed to land remains. Consider the example of the greenhouse in Elitestone, where Lord Lloyd said:

*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.*

61.6. The greenhouse would fit the example given by Judge Reid (*a building secured to the ground for a specific event to be removed afterward)* but as Elitestone makes clear, it is not a building. Indeed, it should be noted that while in para 56, Judge Reid considers two and a half years to be sufficient for the mobile home to have become annexed to the land, In Elitestone, Lord Lloyd considers customary moving <u>every few years</u> of a greenhouse to be evidence it remains chattel. Tenure in itself is not a test of realty versus chattel.

61.6.1. In fact, TradeMe or Facebook advertisements will show mobile homes change hands all the time, and move every few years to a fresh site. Indeed, in the Beachen [2023] case cited by TDC, the proof was in the pudding. Having argued pro se and lost, rather than appeal the decision, he listed it for sale whereupon a mobile home transporter arrived on his land, hooked it up and towed it hundreds of kilometers away to its new owner, thus proving it was in law chattel, not the realty as decided by the court.

61.7. There is no difficulty in an object being temporary and moveable, provided the judge understands the meaning of movable and temporary. Turning first to **movable**, this finding by Lord Lloyd in Elitestone is helpful:

*For the photographs show very clearly what the bungalow is, and especially what it is not. It is not like a Portakabin, or mobile home. The nature of the structure is such that it could not be taken down and re-erected elsewhere. It could only be removed by a process of demolition. This, as will appear later, is a factor of great importance in the present case. If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel.* [underline added]

61.7.1. It is notable that when Lord Lloyd gives an example of an object that is not a structure, he specifically names a mobile home.

61.7.2. In Judge Reid's example, writing *One example might be a building secured to the ground for a specific event to be removed afterward*, he fails to provide sufficient facts to test the validity of the example. As Lord Clyde said, if the structure cannot be taken down and re-erected elsewhere, but only be removed by demolition, it is likely to be a building / structure.

**Movable: Size**

61.8. It would have been helpful to know the size of the building used as an example by Judge Reid. As Akenhead J observed in Savoye:

*A structure is something which is constructed, but not everything which is constructed is a structure. A ship, for instance, is constructed, but it is not a structure. A structure is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation;* [underline added]

*Jenkins J as he then was said in the same case:*

*"It would be undesirable to attempt, and indeed, I think impossible to achieve, any exhaustive definition of what is meant by the word "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 onto the hereditament ready-made. It further suggests some degree of permanence in relation to hereditament, i.e., 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. I do not, however, mean to suggest that size is necessarily a conclusive test in all cases, or that a thing is necessarily removed from the category of buildings or structures or things in the nature of buildings or structures, because by some feat of engineering or navigation it is brought to the hereditament in one piece…"*

61.8.1. **Size:** The size of an object is related to mechanics and engineering. A ship may be the size of the Titanic and still be chattel because there are few limits on the open sea. A mobile home that is designed to be relocated on New Zealand roads is limited by the engineering standards for roads. Width, height and length, as well as weight, limit the size.

61.8.2. Indeed, while TDC cited Antoun [2020], the facts in that case strongly point to Jono Voss' fabrication being realty due to its size and characteristics. It was not a tiny home or a mobile home because Voss said so, or because he intended to put axles and wheels under it. Indeed, the facts appear to show an unlawful and unsafe building, not properly fixed to land in earthquake territory. It was landlocked unless the school behind the property gave permission to tear down their fence and have the construct removed and towing it out would

be more like house moving where power lines have to be shut off and moved due to total height over the permitted 4.25 m above ground (including the trailer underneath). Jono Voss' not-so-tiny home was far closer to the test J Jenkins set out, as above and probably was in fact and in law, a building. While the case was thrown out on a technicality (Antoun won), it has very little value in assessing the meaning of fixed to land in this appeal by the Schaeffner family.

**Meaning of Temporary**

61.9. As noted above, it is useful to think about realty in terms of the geographic coordinates as opposed to altitude or tenure. Temporary refers to time, the 4th dimension. As such, when it comes to land, in property law, time has far less relevance than longitude and latitude. Where it does apply is in improvements to land that are intended to have a shorter period of time. However, while time may be regulated under the effects controlled by the RMA and district plans, it is an error to conflate those effects with chattel becoming realty.

61.10. A temporary activity is not so much defined in terms of tenure, but intent. A circus tent is clearly temporary, but so is Elitestone's glasshouse. The test is not how long, but how hard it is to remove. If it must be demolished, it is almost certainly realty. But if it can be removed *integré, salvé, et commodé [integrated (meaning as a whole), saved (meaning undamaged) and conveniently], without injury to itself or the fabric of the building,* it is temporary chattel not realty. While councils may require a resource consent for a circus tent under the RMA, by regulating the effects of the activity, they cannot base this on rules written for buildings.

62. In para 51, Judge Reid writes:

> *While in my assessment a matter of much less significance in terms of the degree of annexation, I find that at the time of the demonstration video the weight of the tiny home was resting on the wheels and also on the wooden blocks which are seen underneath it. The video shows a jack being used to lift the tiny home so that these can be removed.*

62.1. In Elitestone, Lord Clyde disagrees when he said:

*"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 show that they were intended to be part of the land, the onus of showing 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."*

62.2. While Judge Reid assessed the fact the weight of the mobile (tiny) home was resting on the wheels and wooden blocks, removable using a jack, and found those facts of much less significance in terms of the degree of annexation, Elitestone disagrees. Those facts place the onus on Tasman District Council to show the circumstances are such as to show they were intended to be part of the land. Instead of applying the tests of Elitestone, the Council and its counsel put forth irrelevant facts like gardens, nearby yellow buildings and things hanging on the walls.

62.3. Lord Clyde also said:

*" 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.*

62.4. The anchor of a ship is instructive. The anchor of the Titanic weighed 16 tonnes, but it is considered chattel, whereas a similar anchor bearing the strain of a suspension bridge chain is realty. The difference is mechanical.

The ship has a capstan designed to lift the anchor, the bridge does not. Likewise the mobile home has wheels designed to make the unit mobile, but a building does not.

**Object or Intention of Annexation**

63. In para 52, Judge Reid moves on to object or intention of annexation, writing:

*As to the object, or intent of annexation, I find that it is intended that the tiny home is fixed to the land. The modifications made to the tiny home make it clear that the intention is that the tiny home will remain on the site. As I indicated, the tiny home has been modified so that it can only be moved with difficulty.*

63.1. It seems the judge is repeating the degree of annexation arguments as a basis for intent. In Elitestone Lord Clyde said:

*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."*

63.2. Judge Reid states the intention is that the mobile (tiny) home will remain on the site. This is factually incorrect, but also irrelevant. Factually, it will only remain on site as long as the older, German-speaking woman, who

was invited to bring her mobile home onto the Schaeffner's land so that she may have adequate housing and act as a "surrogate grandmother" to the Schaeffner's children chooses to remain. The purpose of the mobile home is to provide a separate place for the surrogate grandmother while she is there. When she leaves, which may be due to age, illness, a desire to move on, or things just did not work out, she is expected to take her mobile home with her. Its sole purpose on the land is to provide shelter for her while she is there. In other words, an objective evaluation finds the fact that it remains relocatable indicates intent to relocate at some time.

63.3. In contrast, if the Schaeffners wanted to make a permanent and substantial improvement to their land, they would have applied for consent to build what is called a granny flat (noting that now Parliament, in its frustration with the failure of councils like TDC to fulfill their duty under the RMA, are in the process of making 60 m2 granny flats a permitted activity). When the surrogate grandmother moved out, the Schaffner's would have been left with a building that they may or may not have regarded as a desirable improvement. They would have to maintain it, pay rates on it, insure it, but may have no use for it. But they did not choose that approach.

63.4. Regardless, these facts cited by Judge Reid are irrelevant to *intent of annexation*.

63.5. The question of intent was expanded in Savoye quotings Halsbury's Laws of England (2012), by reference to various authorities, where it 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.*

63.6. A mobile home is mobile. Objectively, it is "*patent for all to see*" including for Judge Reid to see, as he cited in para. 50, that it can be removed without injury to itself or to the premises. While Judge Reid apparently disagrees with the "easily" standard as found in Savoye, the criteria applied is plainly wrong. There are towing companies all over New Zealand who every day are moving wider, longer and more complicated mobile homes on public highways that have plumbing pipes below the chassis. Some are towed on their wheels, others are relocated on roads by flatbed truck, then towed into place on the land. No expert witness was called from a mobile home towing company to provide evidence to support Judge Reid's conclusion that the pipes below would make it difficult to tow.

64. In para 54, the basis of intent of annexation cited by Judge Reid turns to furnishings:

*The tiny home is also furnished and set up internally in a way that indicates that it is intended that it will continue to be used in its current location as a long-term or permanent residence. There are numerous loose personal effects, pot plants, pictures hung on the wall. Items are loosely stored in cupboards. There is no system to contain these items as would be needed if the tiny home was being transported on a road.*

64.1. This is factually incorrect and irrelevant to determining the intent or object of annexation. When mobile homes are prepared to be moved, all contents are packed into boxes. In some cases the boxes are stored in the mobile home, strapped down, whereas in others, they are carried by the owner in their own car. Drawers, doors and cabinets are taped. And as noted above, this happens every day all over New Zealand. This has no relevance to the question at hand.

64.2. Recall again, as in 54.2 above, Lord Lloyd observed: *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.* The fact the mobile home is furnished, with pot plants, pictures hung on the wall and items loosely stored in cupboards are evidence the occupant (who is not the land owner) is enjoying her mobile home as an object. The land owners neither use, nor enjoy the use of the mobile home or its pot plants and hanging pictures. If the land was to be sold, the numerous personal effects inside a mobile home would not benefit the land; indeed they would be taken away by the mobile home owner, just as would be the pictures on the walls in the Schaeffner's home.

65. In para 44, Judge Reid writes:

*The tiny home has in fact been occupied on a permanent basis for over two and a half years. Mr Schaeffner says that the tiny home can be taken away at any point by its owners. However, I find that the removal of the tiny home from the site is not what is intended. The modifications to the tiny home and the infrastructure surrounding it indicate that it is intended to be used as a separate self-contained residential unit in the long-term.*

66. Judge Reid appears to misunderstand the meaning of intention in the test of Elitestone. Indeed, in Elitestone, the bungalows had been there for decades, but the case was not decided on tenure because time is not a consideration in itself in annexation. In Elitestone, Lord Clyde said:

*Accession also involves a degree of permanence, as opposed to some merely temporary provision. This is not simply a matter of counting the years for which the structure has stood where it is, but again of appraising the whole circumstances.*

67. Judge Reid counted two and a half years, citing that as evidence the mobile home had crossed the dividing line from chattel to realty. Elitestone disagrees.

68. In para 56, Judge Reid wrote:

*As to Mr Olney's submission that the separate ownership of the tiny home is inconsistent with any intention that it be part of the land, the court was not told who owns the tiny home or what relationship the owners have (if any) with Mr and Mrs*

*Schaeffner. But in any event, I do not agree that there is any inconsistency. Any separate ownership has not prevented the tiny home being integrated into the property in the way I have described.*

68.1. This finding by Judge Reid goes to the heart of the appeal. In the absence of a leasehold agreement registered on the Schaeffner's title (there is no such agreement), the separate ownership of the tiny home goes to the heart of property law. Recalling Lord Clyde in Elitestone: *As the law has developed it has become easy to neglect the original principle from which the consequences of attachment of a chattel to realty derive,* the interpretation of Judge Reid neglects the original principle from which the consequences of attachment of a chattel to realty derive.

68.1.1. Consider, for example the Personal Properties Securities Act 1999 (PPSA) Part 6, s57 **Interpretation** states:

> ***motor vehicl****e or* ***vehicle****— (a) means a vehicle, including a trailer, that—*
>
> *(i) is equipped with wheels, tracks, or revolving runners on which it moves or is moved; and*
>
> *(ii) is drawn or propelled by mechanical power; and*
>
> *(iii) has a registration number or a chassis number, or both of those numbers;*

68.1.2. The court was not told who owns the mobile (tiny) home, but in many cases, such units are in fact owned by investors who derive a return on investment either by renting the unit, or on a lease with option to purchase. To protect their interest, they register the mobile home on the PPSR as a vehicle. This clearly establishes the mobile home is personal property or chattel. However, if the finding of Judge Reid is accepted, that the mobile (tiny) home is integrated into the land, this means the Schaeffners, not the investor, owns it. In Elitestone, the case turned on the question of realty versus chattel, which determined who owned the bungalow. The whole point of

Elitestone is to ensure Property Law, perhaps the oldest law in the realm, remains paramount.

68.1.3. In Elitestone, the House of Lords found Elitestone owned the bungalows, but was then prevented from evicting Morris to use the land for development because the Rent Act protected Morris.

68.2. When Judge Reid writes "*Any separate ownership has not prevented the tiny home being integrated into the property in the way I have described",* he again uses a novel concept of "integrated into the property" rather than "attached to the land", which is the standard he has set out to test. Nevertheless, presuming he means *integrated* is the same as *attached*, in asserting this, he turns property law upside down. This is a severe error at law.

68.3. Such an interpretation by Judge Reid would create a conflict at law, if for example, a bank foreclosed on the Schaeffner's land and they claimed the mobile home had been annexed to the land. Because the mobile home was listed on the PPSR as a vehicle, legal chaos would emerge. However, in such a case, the claim by the bank would likely be dismissed on summary judgement because the onus would be on them to show the mobile home had become annexed to the land based on the baseless interpretations of law as put forth by Judge Reid.

**Tasman Resource Management Plan meaning of Building**

68.4. In para. 11, Judge Reid connects the definition of building to the Schaeffner's mobile home. In para. 14, Judge Reid states both lawyers for TDC and the Schaeffners agree the issue turns on the meaning of "fixed to land". In para. 13 Judge Reid writes "*However in this case the tiny house is clearly a "building… or other facility made by people*".

68.5. Judge Reid errs in asserting *the tiny house is clearly a "building"*. It is not at all clear, indeed it goes to the heart of the case, which as Lord Clyde said in Elitestone: *As the law has developed it has become easy to*

*neglect the original principle from which the consequences of attachment of a chattel to realty derive.*

**National Planning Standards (NPS) Definitions meaning of building.**

69. Normally, the above would be sufficient to plead with the High Court to clarify the law to enable a single set of ground rules and tests to enable councils and private industry to have certainty in understanding the law. However, a more recent error at law has arisen, embedded in four words found in the recent National Planning Standards meaning of **building**. NPS only becomes binding when an authority adopts a new district or unitary plan and includes the NPS definitions by reference. The four words in NPS meaning of building slipped through, where the explanation given by the Ministry for the Environment (MFE) is damning. Accordingly, in order to prevent cases like this returning to the courts after an authority adopts the NPS meaning of **building** into their next resource management plan, the appellant pleads with the High Court to review the legal foundation of the NPS definition of **building** now.

70. As secondary legislation, the NPS definition of **building** breaches s20 of the Legislation Act 2019 which states:

*Words used in secondary legislation or other instruments have same meaning as in empowering legislation.*

71. The meaning of structure in the RMA states

***structure** means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft*

72. The meaning of **building** in the National Planning Standards definitions states

***building** means a temporary or permanent movable or immovable <u>physical construction</u> that is: (a) partially or fully roofed; and (b) fixed <u>or located on or</u> in land; but excludes any motorised vehicle or other mode of transport that could be moved under its own power.* [underline added]

73. In the Appendix to this appeal, the full discussion by the Ministry for the Environment shows the gyrations to which MFE went to distort the meaning of **building** so that it would capture mobile homes and other forms of chattel that are

increasingly being used for shelter, storage and commerce due to the unaffordability of buildings.

74. In the final NPS text, MFE replaced the word **structure** with a new term "**physical construction"** and they replaced "**fixed to land**" as used in the RMA with "**fixed or located on or in land**". The latter meaning in the secondary legislation is not the same as the meaning in the empowering legislation and is, therefore, ultra vires.

75. This is a breach of the Legislation Act 2019 because the meaning in NPS secondary legislation or other instruments must have the same meaning as the RMA's empowering legislation

76. This is relevant to this appeal and should be decided now. Otherwise, another case will have to be brought against TDC when it replaces its Resource Management Plan or against another territorial authority when it does so. This will clutter the court docket while authorities continue to fail in their duty to enable people and communities.

## Plea to the High Court

### Part One: Quash and Clarify meaning of Fixed To Land (RMA) and Building (TRMP)

77. Did the Environment Court err in deciding the mobile (tiny) home on the Schaeffner's land is a building?

    77.1. If yes, the appellant asks the High Court to quash the enforcement order and declare the Environment Court's interpretation, based on the meaning of **structure** under the RMA and **building** under the TRMP, that the mobile (tiny) home is a building is an error at law.

78. Did the Environment Court wrongly interpret the meaning of building in the TRMP? If yes, the appellant asks the High Court to provide a correct interpretation of the meaning of building.

    78.1. The TRMP relevant language states:

***Building:*** *any structure (as defined in the Act) or part of a structure whether temporary or permanent, movable or immovable, including accessory buildings but does not include:*

> *(g) any vehicle, trailer, tent, caravan or boat whether fixed or movable, unless it is used as a place of long-term accommodation (for two calendar months or more in any year), business or storage;*

78.2. The appellant asks the High Court to declare:

*The TRMP Chapter 2.2 Meaning of Words meaning of* ***building*** *does not apply to chattel, only to real property that meets the test of fixed to land and annexed to title"*

**Problem:** In the notice of appeal, the appellant asks the high court to clarify the meaning of *fixed to land* and of *building*. However, when actually trying to place this into a plea to the High Court, it does not quite work out that way.

What actually is being asked?

The appellant in this brief asserts *fixed to land* solely refers to realty, and it is administrative creep that has caused TDC to extend it to chattel. In other words, to affirm that property law is based on a dichotomy (dividing line) between realty and chattel, where the meaning of "fixed to land" is subject to a continuum - a set of factual tests to determine if the mobile home is realty or chattel.

Thus, it seems the appellant is asking the court to affirm that fixed to land solely refers to realty (the dividing line in law) and then to disallow factual tests used by Judge Reid (and in Beachen 2023) that are not consistent with stare decisis, most notably in Elitestone.

**Part Two: Provide clarity nationwide**

79. The appellant asks the High Court to provide clarity of law for all persons associated with interpreting the law and for all persons associated with mobile homes who seek clarity as to the scope of the law.

80. The appellant asks the High Court to declare the meaning of **fixed to land** in the RMA meaning of **structure**, solely refers to realty (real property).

81. The appellant asks the High Court to affirm the tests set out in stare decisis, most notably in Elitestone, but also in Chelsea, Savoye and Skerritts.

81.1. **Onus: (Elitestone[3])**

81.1.1. If a mobile home is not otherwise attached to the land than by its own weight, it is not not to be considered as part of the land, unless the circumstances are such as to show that it were intended to be part of the land, the onus of showing that it was so intended lying on the territorial authority that asserted the mobile home has ceased to be chattel.

81.1.2. To the contrary, if the mobile home 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 the land owner who contends the mobile home is chattel.

81.2. **Design (Savoye[4]):** A mobile home which is designed and manufactured in such a way so as to be removable, that has been, in fact brought on to the

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[3] Elitestone: *"Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing 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."*

[4] Savoye: *"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."*

land intact, and which is able to be removed from land intact without damage to itself or to the land is likely to be chattel.

81.3. **Annexation (Chelsea[5] and Savoye[6]):** It is not necessary to annex a mobile home to the land to enable it to be used as a home.

81.4. **One law:** An object cannot be chattel under one law and realty under another. It must be one or the other under all law.

81.5. **Objective Tests (Elitestone[7]):** Determination must be objective, not subjective. Saying an object is a mobile home does not necessarily make it so. If the object is over 4.3m metres above the road surface, requiring special services to clear power lines and other obstructions, or is wider than a Class 2 NZTA oversize, and the object in question has been made on site and is effectively land locked, it may have lost its independent identity and become part of the land, requiring demolition or taking apart to remove it from the land.

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[5] Chelsea: *It is not necessary to annex the houseboat to the land to enable it to be used as a home*.

[6] Savoye: "*A structure is something which is constructed, but not everything which is constructed is a structure. A ship, for instance, is constructed, but it is not a structure. A structure is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation;"*

[7] Elitestone: "*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."*

82. **Degree of Attachment:** The appellant asks the High Court to specifically address errors at law as found in Schaeffner [2024} and Beachen [2023]

82.1. **Modifications:** The fact that the mobile home may have had modifications to it after being brought onto the land, does not in itself indicate that it has become part of the land unless those modifications clearly fix it to the land.

82.1.1. A mobile home may become a building by removing its under-carriage and fixing the chassis to a foundation, permanently connecting utilities, and annexing it to the title to the land (see intent of annexation).

82.2. **(Elitestone[8]) Safety features**, such as cables or chains attached to anchors that are fixed to land for the purpose of stablising the mobile home in extreme conditions, such as storm, earthquake or flood, do not themselves indicate affixing to land, provided the restraints are easily accessible and easily removable.

82.3. **Utilities (Elitestone[9]):** Connection to services, such as electricity, water or wastewater, even if connected to mains services, do not in themselves indicate affixing to land, provided the cables, wires or pipes are easily accessible and removable, either by a licensed person or a non-licensed person, as is the case if caravan-type connections are used.

82.4. **Removable Bolts:** Bolting two mobile homes together to form a larger space does not in itself indicate affixing to land, provided design for the bolts allow for easy and intended removal of the bolts to separate the units intact. However, if the two units are welded together or modified in a way

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[8] Elitestone: *" 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.*

[9] 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."*

that requires significant damage or demolition to detach, this may indicate the units have become part of the land.

82.5. **Removable accessories:** Removing and storing accessories for safety and security, such as removing a drawbar to eliminate a trip hazard or to make the unit harder to steal, or removing tyres or axles to inhibit deterioration of rubber or rust of steel, does not in itself indicate affixing to land, provided the removed accessories can be reinstalled the same way as they were removed.

**82.6. Long term residence (Elitestone[10]):** Tenure of residency does not, in itself, indicate affixing to land.

**82.7. Proximity to property**: Proximity to buildings, structures, decks, plants, driveways, water tanks or other realty or chattel does not, in itself, indicate affixing to land.

**82.8. "Chattel" not "vehicle" is the test**: While mobile homes may be vehicles, that fact does not require said vehicle to have a registration plate, warrant of fitness or meet NZTA standards for it to be determined to be chattel. A mobile home, may for example, have wheels and axles but not springs or brakes, where the wheels allow relocation on the land, to a pickup point for transport by a hiab or trailer.

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[10] Elitestone: *Accession also involves a degree of permanence, as opposed to some merely temporary provision. This is not simply a matter of counting the years for which the structure has stood where it is, but again of appraising the whole circumstances.*

and Elitestone again:

*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.*

83. **Intent or Object of Annexation:** The appellant asks the High Court to clearly recite and affirm the tests regarding intent or object of annexation.

83.1. (Salmond[11]) If the requisite intent of permanent annexation is present, no physical attachment to the land is required. Conversely, physical attachment, without the intent of permanent annexation, is not in itself enough.

83.2. (Elitestone[12]) If the mobile home 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.

83.3. (Elitestone [13]) If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel. In contrast, if a mobile home can be enjoyed anywhere, and can be removed intact, there is a strong inference it is a chattel.

83.3.1. If, for example, a mobile home has been placed on the land to provide adequate housing for a friend, family member, during construction of a main dwelling or emergency housing after a flood, fire, earthquake or other disaster, or to provide rental income whilst one owns the underlying land, the presence of a relocatable living unit rather than constructing a building tends to indicate the object is intended to be enjoyed by its occupant, rather than benefiting the land

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[11] Sir John W. Salmond, Jurisprudence, §155. **Movable and Immovable Property**

[12] Elitestone: …*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.*

[13] Elitestone: *If a structure can only be enjoyed in situ, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel.*

as an improvement. When the need for housing has passed, the use of a relocatable living unit means it can be removed, perhaps some of the capital investment recovered, and the unit repurposed on a third party's land.

83.4. If the territorial authority or the court includes alleging the mobile home is fixed to land, and its enforcement order includes removal of the object from the land, and the object can be removed intact without damage to itself or the land, this order in itself indicates the object is chattel, not realty and the enforcement order is inherently ultra vires..

84. **Further Guidance:** Due to confusion as to the meaning of subsidiary words as used in the RMA, the appellant asks the High Court to provide guidance based on common law:

85. **Meaning of movable (Skerritts[14]):** *Movable* as found in the RMA meaning of **structure** has been established in common law as an object that is "in the nature of a structure" but has some element of limited movement. This means while it is fixed to its geographic coordinates, it may move vertically while remaining on the geographic coordinates, in a circular motion around the geographic coordinates, or

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[14] Skerrits: *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."* [underlining is in the original]

And Elitestone

*"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":*

in unusual cases may be temporarily removed from those coordinates for repair or maintenance, provided it is returned to its geographic coordinates where it performs its purpose attached to the land.

*85.1.* For clarity, *movable* does not mean the same as *relocatable*. An object that is relocatable can be moved from its geographic coordinates to other geographic coordinates without requiring demolition, taking apart or significant damage to itself or to the land.

*85.2.* For clarity, an object that is mobile means it is designed to be relocated from its geographic coordinates to geographic coordinates on separate parcels of land, usually by road, which inherently limits length, width and height and requires fabrication standards sufficient to withstand the shocks and pressures of road transport.

*86.* **Meaning of temporary and permanent (Elitestone[15]):** *Temporary* and *permanent* as found in the RMA meaning of **structure** is not relevant to determining if an object is attached to land. It is used in the RMA to make clear a structure is not dependent on tenure. Temporary refers both to time, and to design. In the latter, temporary means designs that are easily removable, such as caravan-type utility connections that may remain connected for decades, but are designed to be disconnected in minutes by non-licensed persons.

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[15] Elitestone: *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.*

And Elitestone again:

*Accession also involves a degree of permanence, as opposed to some merely temporary provision. This is not simply a matter of counting the years for which the structure has stood where it is, but again of appraising the whole circumstances.*

**Futureproofing**

87. **National Planning Standards Definition meaning of Building:** Eventually, all territorial authorities will adopt the National Planning Standards to provide national consistency. However, one of these standards, the meaning of **building** in the National Planning Standards (NPS) definitions is in breach of the Legislation Act 2019 s20 and is therefore ultra vires.

88. It states:

> ***building*** *means a temporary or permanent movable or immovable* ***physical construction*** *that is: (a) partially or fully roofed; and (b) fixed or located on or in land; but excludes any motorised vehicle or other mode of transport that could be moved under its own power.*

88.1. The substitution of "physical construction" to evade the meaning of **structure** in the RMA. Words used in secondary legislation or other instruments must have the same meaning as in empowering legislation.

88.2. The alteration of *fixed to land* to *fixed <u>or located on or in</u> land*, has been used to conflate realty and chattel to evade the meaning of structure in the RM.

88.3. If the High Court chooses to provide a replacement definition of **building**, the meaning found in the Heritage New Zealand Pouhere Taonga Act 2014 s6 *Interpretation* is recommended*:*

> ***Building*** *means a structure that is temporary or permanent, whether movable or not, and which is fixed to land and intended for occupation by any person, animal, machinery, or chattel*

# Additional Matters

# Appendix A

**National Planning Standards (NPS) Definitions - meaning of building**

NOTE: This section is long because it shows how, in the words of Lord Clyde in Elitestone, "*As the law has developed it has become easy to neglect the original principle from which the consequences of attachment of a chattel to realty derive*." It will require editing by the solicitor on the case.

The appellant asks the High Court to rule on its compliance with the Legislation Act.

***building*** *means a temporary or permanent movable or immovable* ***physical construction*** *that is:*

*(a) partially or fully roofed; and*

*(b) fixed or located on or in land;*

*but excludes any motorised vehicle or other mode of transport that could be moved under its own power.*

89. In formulating a meaning for **building** in the NPS, the Ministry for the Environment (MFE) consultation commentary shows the confusion and the

neglect of original principles. In reading it, keep in mind the requirement of the Legislation Act 2019 s20: *Words used in secondary legislation or other instruments have same meaning as in empowering legislation*.

89.1. This means if the word **structure** is defined in the empowering legislation (it is), then words in the National Planning Standards must have the same meaning. In its first draft, the person who wrote the draft appears to have been unaware of this requirement, and if the standards were even reviewed by the Parliament Council Office, it was missed by the lawyer responsible.

89.2. The NPS commentary is long, but deserves a full read to appreciate how bad secondary legislation develops. The document is entitled the **Ministry for the Environment. 2019. *2I Definitions Standard – Recommendations on Submissions Report for the first set of National Planning Standards.* Wellington: Ministry for the Environment**

**(https://environment.govt.nz/assets/Publications/Files/2I-definitions-standard.pdf).**

Begin on page 50:

***Relationship between the definitions of structure and building***

*The original definition of structure in the draft planning standards was included to capture structures that are located on land but not fixed to land on the basis that it is becoming more common for relocatable structures to be used that are not fixed to land. Shipping containers have been difficult to manage under the RMA as it is their own weight that holds them down (they are not fixed to land) and small mobile/relocatable buildings have become more common over recent times.*

*The majority of submitters were opposed the definition of structure and requested that the RMA version from section 2 of the Act should apply. We accept that there could be unintended consequences and difficulties with the draft version of the structure definition. We therefore recommend that the RMA version be included instead. For ease of reference the RMA definition of structure is as follows:*

> ***"structure** means any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft".*

*As a result of the adoption of the RMA definition of structure in the Standards it is considered necessary to remove the link to structure in the definition of building, to enable moveable or relocatable 'buildings' that do not need to be fixed to land to be captured by the definition. Instead, we recommend the definition include a requirement to be "fixed to or located on or in land". This will enable both shipping containers and relocateable homes to be included – but still retains a land based requirement. By land, we confirm this has the meaning in the RMA (and in the Standards) which includes land covered by water. Therefore where the definition of building refers to being fixed to or located on land, this also applies to any buildings fixed to land covered by water.*

*Contrary to those submissions that requested only one combined definition of structure and building, we consider it is useful to have separate definitions. This gives councils the ability to address either or both as required. In addition, regional councils are more likely to need to address structures separately from buildings and so the separate definitions allow for this. Feedback from a regional council pilot council requested that the definition of structure remain so that structures in the coastal marine area could be addressed.*

*In addition, as a result of removal of the reference to structure in the building definition many of the exclusions that are often included in council plan definitions of buildings*[1] *(such as retaining walls less than 1.5m high) do not need to be excluded in the recommended building definition; they are not captured by the term.*

*Submitters identified that the two terms are circular in that each refers to the other as 'building' was part of the structure definition and 'structure' was part of the building definition. We agree that this is poor drafting and the removal of the interdependency has resolved this issue.*

*We recommend replacing the word 'structure' in the 'building' definition with the words 'physical construction'. The two definitions work together now so that that any building that is fixed to land would be captured by the term structure but not all*

*buildings may be structures through the recommended use of the term 'physical construction' rather than 'structure' in the definition of 'building'.*

*We considered other terms which could be applied instead of 'physical construction'. We tested the word 'facility' with our pilot councils and they queried the meaning and certainty of that word. They sought clarity about whether some items such as shipping containers, caravans, motorhomes or house trucks would come within the meaning of the term. We consider that part of the uncertainty about that word relates to the fact that 'facility' may bear the meaning of a larger building or complex often used for a public or community purpose (eg, educational facility or community facility). We consider that the term 'physical construction' carries the meaning of a structure that is manmade and tangible, but it does not need to be fixed to land. While this is a new term, we consider that it is broad enough to cover all types of buildings without setting any parameters other than that there must have been some form of manmade construction. It will not be taken to exclude some items because they don't qualify; as the word 'facility' may have been.*

*As referred to above, the removal of the word "structure" from the definition of building, decouples a building from the requirement to be fixed to land which is specified in the RMA definition of "structure". This would result in vehicles being captured by the definition if no additional changes were recommended. The submission from Christchurch City Council raised this as an issue. We do not consider that in the common use of the term "building", vehicles would be considered to be included. We consider that vehicles (or other transport modes like railway carriages or boats) that come and go and are used for transportation should not be covered by this definition. We note that the Building Act 2004 includes in its definition only those vehicles that are "immovable" and "occupied by people on a permanent or long-term basis".*

*RMA plans seek to manage effects from buildings in the main where those effects are more long term than from, for example, a car parked on a section and used every day. However, where those vehicles no longer move (likely no longer used for transportation but for activities such as business, storage or accommodation) we consider they would have similar effects as buildings and should be captured by the definition. We therefore recommend excluding motorised vehicles or any other mode*

*of transport that could be moved under its own power. We considered the alternative to exclude vehicles where they are used for business, storage or residential activity – but given the fact that the definition applies to facilities that are located on land – the definition would then have encompassed any business vehicles or even trucks when located or parked on land. We consider it is more certain to only exclude those vehicles that can be moved under their own power.*

*We acknowledge that there are other items that are moveable and have a roof and so could meet the recommended definition of a building. In particular, tents, caravans, and marquees would be included. We acknowledge that the definition of building is broadly crafted and councils will need to use subcategories or narrower application definitions and rules to manage or permit these items where required.*

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89.3. As can be seen, MFE acknowledges the rise of chattel shelter, including mobile homes, tiny homes on wheels and converted shipping containers. However, instead of addressing this as forms of shelter that are becoming prevalent and need their own definitions, MFE persists in trying to pound a round peg into a square hole; by fitting relocatable chattel into the law of realty.

89.4. The first error by MFE is to not examine common law to find the meaning of movable and immovable. Elitestone provides this guidance, which in this document is referred to movement in relation to the XY coordinates. Relocation or mobility is not the same as movable.

89.5. The second error comes from the first. There is no reason why a new term found in other legislation, such as the Residential Tenancy Act 2019 (RTA) cannot be set out and defined. *Mobile home, caravan, cabin, caravan, vehicle, tent, relocatable home* and other means of chattel shelter are all mentioned in the RTA. Each of these forms of chattel habitat have different impacts on the natural and physical environment. Why did MFE not do this in its NPS definitions?

89.5.1. All the above citations in the RTA are chattel. All can be:

- removed from a parcel without injury to themselves or the land
- legally transported on public roads - 2.5m wide and under as a permitted vehicle and 3.1 as a Class One regulated overwidth.
- used for human shelter as holding habit on land slated for real estate development so the land can productively be used for the year or more it will take to secure consents for buildings.
- used as a medium-term accessory living unit for elderly parents, school leavers who cannot afford rent or home purchase but want to remain in their home community.
- used for seasonal farm workers on farms, or in resorts for low-paid but essential hospitality workers.

89.5.2. As such, for NPS to define them based on their effects, rather than try to make chattel fit into a realty category is the best way for MFE to have proceeded. Instead, funds will need to be raised to bring action for a High Court declaration and review.

89.6. The third and most egregious error is to trifle with the most fundamental law of New Zealand, the law of property. MFE proposes to decouple structure from building. This would be a radical change, something that lies with the power of Parliament in enabling legislation, not medium level civil servants who slip it into a 55 page document without advising the Minister it contains such a radical change in law.

# Appendix B

**Meanings found in other NZ Statutes**

**Building Act 2004:**

90. The meaning of **building** in the Building Act 2004, has been subject to what Lord Clyde in Elitestone called *neglect* [of] *the original principle from which the consequences of attachment of a chattel to realty derive.*

91. Because the Building Act included a subsidiary qualification that vehicles and motor vehicles may be buildings if they are immovable and occupied by people on a long-term basis, regulatory creep has resulted in neglect of the original principle of chattel becoming realty..

***8. Building: what it means and includes***

*(1) In this Act, unless the context otherwise requires,* ***building****—*

> *a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and includes—*
>
> *iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or long-term basis;*

92. The meaning of **building** in the Building Act has been interpreted differently by different councils and lower courts. Confusion arises because of the use of *means and includes*, where it is helpful to refer to the NZ Law Commission Legislation Manual Structure and Style DEFINITIONS that 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]*

93. 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.

93.1. **"Means"** stipulates the complete meaning. Removing the adjectives that make clear the scope, the complete meaning of building reads **building…is a structure**. The next part states the *scope of intent*, which includes occupation by people, animals, machinery or chattels.

93.2. "**and includes"** does not expand the scope of "means", it further restricts it. Motor vehicles are only included if they are immovable, whereas in 8(1)(a) both movable or immovable are within the scope.

93.3. Further, instead of "temporary", 8(1)(c)(iii) limits motor vehicles to ones that are occupied by people on a permanent or long term basis. This part does two things. It excludes vehicles used for occupation by animals, machinery or chattels (which is not relevant to the mobile home argument, but noted), and it limits occupation by people on a permanent or long-term basis (but not on a temporary basis only if the vehicle is immovable.

93.4. An example would be a bus that has been driven to a farm and rendered immovable by allowing it to sink into the ground, something that can be found in rural areas of New Zealand. The motor does not work. It was not designed to be towed. It is literally stuck in the mud. If that bus is used for occupation by animals, say chickens, or storage of machinery or other chattels, it is not subject to the Building Act. If it is used, say as a hunting blind, occupied only during hunting season, it is not subject to the Building Act. But if a family or person moves in and makes the bus their home (on a long-term or permanent basis) then the Building Act applies, and the enforcement authority can use it to order the occupants to vacate the bus because it does not meet the safety standards of the Building Code.

93.5. However, recent case law even calls this into question, because the Act governs building work, and the bus has already been manufactured, and it

is unclear if parking a bus on the land and allowing it to become immovable constitutes building work. De facto enforcement ends up being an unequal contest where the forces of the council are pitted against a poor person who cannot afford legal defence and is unlikely to possess the education to make their own successful argument.

93.6. This is relevant to mobile homes because the question often asked in New Zealand asks *is it a vehicle or not* before asking the primary question *is it realty or chattel?*

93.7. In Chelsea, Lord Justice Morritt said:

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

93.8. In interpreting the Building Act, the primary question asks *is it a structure*? Only when that is answered in the affirmative, does the second test *is it a vehicle*, with its more restrictive tests arise. If it is not fixed to land, it is not a building, and if it is not a building the question asking if it is a vehicle does not arise.

93.9. As Lord Clyde observed in Elitestone: *As the law has developed it has become easy to neglect the original principle from which the consequences of attachment of a chattel to realty derive.*

**Residential Tenancies Act 2019**

94. The **Residential Tenancies Act 2019** does not define **building**, but it is one of the few acts that specifically mentions mobile homes, which it excludes from the Act

*2 Interpretation (1) … premises includes..*

*c) any mobile home, caravan, or other means of shelter placed or erected upon any land and intended for occupation on that land…*

*5. Act excluded in certain cases*

*1. This Act shall not apply in the following cases:*

*(t) where the premises comprise bare land (with or without facilities) on which the tenant has the right under the tenancy agreement to place or erect a mobile home, caravan, or…*

**Personal Properties Securities Act 1999 (PPSA)**

**95.** PPSA Part 6, s57 Interpretation states:

***motor vehicl****e or* ***vehicle****— (a) means a vehicle, including a trailer, that—*

*(i) is equipped with wheels, tracks, or revolving runners on which it moves or is moved; and*

*(ii) is drawn or propelled by mechanical power; and*

*(iii) has a registration number or a chassis number, or both of those numbers;*

**Property Act 2007**

**96.** The **Property Act 2007**

*97. Part 1(4) Interpretation:*

***property****— (a) means everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property;...*

***structure****,— (a) in Part 6, means any building, driveway, path, retaining wall, fence, plantation, or other improvement*

**Land Transfer Act 2017**

**98.** The **Land Transfer Act 2017**

*5 Interpretation (1)*

*land includes—..*

*(a) estates and interests in land:*

*(b) buildings and other permanent structures on land:*

*(c) land covered with water:*

*(d) plants, trees, and timber on or under land*

99. **Discussion:** The Property Act confirms separation of real and personal property (realty and chattel). It defines **building** as a subsidiary of **structure**. The Land Transfer Act 2017 clarifies that land includes **buildings.**

100. The PPSA does not define **building**, but it raises a conflict at law if Judge Reid's interpretation of **building** under the RMA is found to be law.

101. In the Schaeffner case, the court was not informed as to the ownership of the mobile (tiny) home except to accept that it was owned by a 3rd party, probably the "surrogate grandmother". However, it is common practice in New Zealand for mobile home manufacturers to seek passive investors to pay for the manufacture and management of a rental book, because mobile homes tend to serve the bottom end of the market where the occupants cannot afford the $50-80,000 price of a mobile home. As such, the investor pays for the manufacture of the mobile home that is then leased to the occupant and towed to the designated parcel where the unit will be parked and set up as habitat for people on leases typically one year or longer.

102. When this occurs, the informed investor registers the mobile home on the Personal Property Securities Register as a vehicle as defined in PPSA s57. In the recent liquidation of a major manufacturer, Coastal Cabins of Silverdale, investors who had their investment listed on the PPSA found their interest was perfected. Those who had not were required to pay $15,000 per mobile home to buy the mobile home they had financed because their interest was not perfected.

103. However, under Judge Reid's interpretation, the mobile home parked on the land designated by the occupant of the land would have been the property of the landowner from the time it arrived on their land and was occupied by the resident. This would create chaos in the financing industry as the courts would be asked which was binding, the PPSR or the implication that the mobile home should be on the LINZ land title record.

**Heritage New Zealand Pouhere Taonga Act 2014:**

104. s6 *Interpretation:*

***building*** *means a structure that is temporary or permanent, whether movable or not, and which is fixed to land and intended for occupation by any person, animal, machinery, or chattel*

# Appendix C: Comment

105. In bringing Elitestone Ltd v Morris [1997] 1 WLR 687 to the attention of Judge Reid, the lawyers for the Applicant (TDC) failed in their duty under s13.11 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008:

> *The duty to the court includes a duty to put all relevant and significant law known to the lawyer before the court, whether this material supports the client's case or not.*