**I TE KOOTI PĪRA MĀORI O AOTEAROA**
**I TE ROHE O TE WAIARIKI**
*In the Māori Appellate Court of New Zealand*
*Waiariki District*

**A20200010442**
**2020/8**

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| WĀHANGA<br>*Under* | Section 58 of Te Ture Whenua Māori Act 1993 |
| MŌ TE TAKE<br>*In the matter of* | Ruatoki B Sections 23 and others |
| I WAENGA I A<br>*Between* | TE PIKA NUKU RATANA AND HINEHOU TIMUTIMU AS EXECUTORS OF THE ESTATE OF HARE NUKU RATANA<br>Kaitono pīra<br>*Appellants* |
| ME<br>*And* | SAMANTHA TIHI<br>Kaiurupare pīra<br>*Respondent* |

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| Nohoanga:<br>*Hearing* | 10 February 2021, 2021 Maori Appellate Court MB 242 - 268<br>(Heard at Rotorua) |
| Kooti:<br>*Court* | Judge CM Wainwright (Presiding)<br>Judge MJ Doogan<br>Judge MP Armstrong |
| Kanohi kitea:<br>*Appearances* | J Pou for the Appellants |
| Whakataunga:<br>*Judgment date* | 1 August 2021 |

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**TE WHAKATAUNGA Ā TE KOOTI**
*Judgment of the Court*

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**Hei tīmatanga kōrero**
*Introduction*

[1] In 1991, Hare Ratana and his wife, Tei Ratana, built a house on Māori freehold land in Ruatoki. They did so pursuant to a tripartite deed entered into between them, the Housing Corporation of New Zealand (Housing Corp), and the trustees who administered the land.

[2] Hare passed away in 2015. Tei predeceased him. A year after Hare's death, an application was filed to determine ownership of the house. That issue has been circling through the Māori Land Court, and this Court, for the last six years.

[3] The Māori Land Court first determined ownership of the house in 2017.[1] It then amended that order in 2018.[2] The amended order was appealed to this Court. In 2019, this Court upheld the appeal, quashed the amended order and sent it back to the Māori Land Court for rehearing.[3]

[4] In 2020, Judge Coxhead conducted that rehearing. He found that:[4]

(a) The house is a fixture; and

(b) Hare owns the house.

[5] Hinehou Timutimu and Te Pika Nuku Ratana are the executors of Hare's estate. They appeal Judge Coxhead's decision. They do not challenge the finding that Hare owns the house. Rather, the sole issue on appeal is whether the house is a fixture or a chattel.

[6] During the course of these proceedings, concerns have also been raised concerning the administration of Hare's estate, debts owed by the estate, and how those debts should be met. Those issues are not the subject of this appeal, however, the appellants seek a finding that the house is a chattel to assist with this. They contend that if the house is a chattel, this will lead to it being vested in them as the administrators of the estate and it can then be

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1 178 Waiariki MB 253-262 (178 WAR 253-262).
2 188 Waiariki MB 121-122 (188 WAR 121-122).
3 *Tihi v Nuku – Ruatoki B Section 23 [and others]* [2019] Māori Appellate Court MB 531 (2019 APPEAL 531).
4 *Tihi v Nuku – Ruatoki B Section 23 [and others]*[2020] 238 Waiariki MB 127 (238 WAR 127) at [16]; at [24].

realised to meet estate debts. We do not comment on this as it is a live issue before the lower Court.

**He aha te take o te pīra nei?**
*What is the decision under appeal?*

[7] Judge Coxhead identified that the main indicators of whether a house is a fixture or a chattel are the degree and purpose of annexation. He found that this house was built for the purpose of providing a home for Hare and his wife. Judge Coxhead considered the terms of the tripartite deed but followed the approach in *Anderson,*[5] and found that the deed did not rebut the presumption that the house is a fixture. Judge Coxhead noted that the mortgage had been repaid and so the removal provisions in the deed did not apply. Judge Coxhead also took into account the terms of Hare's will and determined that the house is a fixture.

**He aha ngā kōrero o ngā kaitono pīra?**
*What is the appellants' case?*

[8] Mr Pou, for the appellants, argues that the approach in *Anderson,*[6] which Judge Coxhead followed, is wrong. In particular, Mr Pou challenges the concept expressed in that decision, that a structure can go from a chattel, to a fixture, and back to a chattel.

[9] In *Anderson,* the late Judge Ambler found:[7]

> [54] As the *Kay's Leasing Corp Pty Ltd v CSR Provident Fund Nominees Pty Ltd* decision makes clear, the general law will in certain circumstances recognise security interests in a chattel that has become a fixture on land. Further, a chattel that becomes a fixture may once again become a chattel depending on how the security interest works. That is how I consider the tripartite deed to work: the house that is constructed/transported onto the land (initially as a chattel) becomes affixed to the land (thereafter becoming a fixture) but upon default may be severed and removed from the land (thereafter becoming a chattel again). Of course, the parties are always free to agree that the house is a chattel the whole time it is on the land, but that did not occur here.

[10] Mr Pou submits that a house is either a fixture or it is not. He contends that once a structure becomes a fixture, it cannot then become a chattel. Mr Pou argues that the approach in *Anderson* is contrary to mainstream authority concerning fixtures.

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5 *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206).
6 Ibid.
7 Ibid at [54].

[11] Mr Pou contends that, in the present case, the terms of the tripartite deed and Hare's will demonstrate that the house has remained a chattel.

**He aha te tikanga ki ngā kēhi rangatira?**
*What do the authorities say?*

[12] Mr Pou relies on the decision of the House of Lords in *Elitestone Ltd v Morris and another*.[8] He contends that this decision contravenes the approach in *Anderson*, that a house can transition from a fixture to a chattel.

[13] *Elitestone* concerned a bungalow which rested on concrete foundation blocks in the ground. The bungalow was not physically attached to the land. The House of Lords had to determine whether the house had formed part of the land.

[14] Traditionally, the test for whether a chattel had become part of the land was expressed as whether it was a fixture. In *Elitestone*, the House of Lords moved away from this formulation of the test. They took a broader approach to consider whether the chattel could properly be said to have become part and parcel of the land. They considered that the two main indicators of whether the structure had become part of the land were the degree and purpose of the annexation. They expressed that each case would depend on its facts and a common sense approach was required.

[15] In *Elitestone,* the Lords took into account whether the structure could be removed without requiring its destruction. Lord Lloyd held:[9]

> 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 a chattel. It must have been intended to form part of the realty.

[16] Lord Clyde took a similar approach:[10]

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8 *Elitestone Ltd v Morris and another* [1997] 2 All ER 513 (HL).
9 Ibid at [519].
10 Ibid at [523] and [525].

> It is agreed in the present case that as a 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.
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> …
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> 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. The bungalow has been standing on its site for about half a century and has been used for many years as the residence of Mr Morris and his family. That the bungalow was constructed where it is for the purpose of a residence and that it cannot be removed and re-erected elsewhere point in my view to the conclusion that it is intended to serve a permanent purpose. If it was designed and constructed in a way that would enable it to be taken down and rebuilt elsewhere, that might well point to the possibility that it still retained its character of a chattel.

[17] The fact that the bungalow could not be removed without requiring its destruction was a significant factor in the Lords determining that it had become part of the realty. The Lords also noted the *possibility* that a house constructed in such a way as to be removable *may* remain a chattel. However, this is not authority for the proposition that, because a house is capable of removal, it *must* remain a chattel. Regard must always be had to the circumstances of the case.

[18] The approach in *Elitestone* was followed by the Court of Appeal of New Zealand in *Auckland City Council v Ports of Auckland Ltd.*[11] This is now the leading authority in New Zealand and was recently affirmed by the Court of Appeal in *Lakes Edge Development Ltd v Kawarau Village Holdings Ltd.*[12] There, the Court of Appeal summarised the approach as follows:

> [56] The principles on which the Court proceeds in determining whether a structure on or under land is a fixture are not in dispute. As this Court found in *Auckland City Council v Ports of Auckland Ltd* the traditional test for whether a chattel had become part of the realty of the land on which it was situated was to determine whether it was a "fixture". The Court pointed out that in *Elitestone Ltd v Morris* the House of Lords had moved away from this formulation. Instead, a broader formulation was proposed, namely whether the chattel could properly be said to have become part and parcel of the land. The two main indicators were the degree of annexation of the structure to the land and the object or purpose of the annexation. Each case would depend on its particular facts. A common sense approach was required.

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11 *Auckland City Council v Ports of Auckland Ltd* [2000] 3 NZLR 614 (CA).
12 *Lakes Edge Development Ltd v Kawarau Village Holdings Ltd* [2017] 3 NZLR 336 (CA).

[19] Returning to the approach in *Anderson*, it is clear that in *Elitestone* and *Auckland City Council* the courts accepted that when a structure or materials are brought onto the land they are a chattel, and they may then become part of the realty depending on the degree and purpose of annexation. This supports the first part of the approach in *Anderson*. *Elitestone* also recognised the possibility that a house which is capable of removal *may* remain a chattel. This is not authority that a house capable of removal *must* remain a chattel. It is also inherent within these comments that a house which is capable of removal *may* also remain a fixture. Regard must be had to the particular circumstances of the case.

[20] In the New Zealand context, it is common for houses to be built on wooden piles. Such houses are capable of uplift and removal and there is an established trade where such houses are uplifted, sold and transferred to a new site. The prospect of a future uplift, removal and sale, does not, on its own, affect the degree and purpose of annexation at the time the house was built. At that time, if the house was constructed to provide a permanent dwelling, it would likely become part of the realty.

[21] If such a scenario applied, and a house capable of removal nevertheless forms part of the realty, what then occurs if the house is removed? Mr Pou argued that in those circumstances the house would remain a fixture. Mr Pou was unable to refer to any authority in support of this proposition. Such an argument is also contrary to common sense and the approach set out in *Auckland City Council*. The main indicators of whether a house has become part of the realty depends on the degree and purpose of annexation. If a house, which forms part of the realty, has been severed from the land and removed, it is no longer annexed to the land. As a matter of fact, it must, at that time, become a chattel.

[22] If Mr Pou's approach was applied, a house built on piles as a permanent dwelling, which becomes part of the realty, but which is later severed, sold and moved to a new site, would remain part of the realty of the first site. That would mean that ownership of the house would continue to run with ownership of the land on the first site. Such an approach is not sensible and cannot be maintained.

[23] For these reasons, while the authorities referred to have not expressly determined the status of a structure which formed part of the realty, but was then removed, they do recognise the possibility of a house that is capable of removal nevertheless forming part of the land.

In those circumstances, once the house is removed it becomes a chattel as a matter of fact. Accordingly, we have no difficulty with the concepts expressed in *Anderson*.

[24] The question of whether the house has formed part of the realty here depends on the circumstances of this case.

**Kua whakauruurua te whare nei ki te whenua?**
*Has this house formed part of the land?*

[25] There is no dispute that the house in this case is fixed to the land. Judge Coxhead found that the house was built on the land for the purpose of providing a home for Hare and his wife. There is no challenge to that finding of fact and we endorse it as the proper and sensible finding in this case. These factors suggest that the house was to form part of the realty.

[26] Generally, the subjective intention of the parties is irrelevant. The purpose of the annexation is to be assessed objectively.[13] However, in this case, the tripartite deed is relevant as to purpose.

[27] The tripartite deed is an agreement between Hare and his wife, Housing Corp, and the trustees who administered the land. Under the deed:

(a) The trustees granted to Hare and his wife a licence to occupy a house site on the land;

(b) Housing Corp granted to Hare and his wife a loan to build a house on the site; and

(c) The deed regulated the repayment of the loan, what would occur on default, and the rights of the respective parties.

[28] These tripartite deeds were commonly entered into at that time to assist Māori landowners to build and live on their ancestral land.

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13 *Lakes Edge Development Ltd v Kawarau Village Holdings Ltd*, above n 12 at 57; *Elitestone Ltd v Morris*, above n 8 at 519.

[29] In *Anderson*, the house in question was also built pursuant to a tripartite deed. The deed in *Anderson* and the deed here are identical in all material respects. The differences are either incidental or immaterial.

[30] A striking feature of both deeds is that the house had to be capable of removal. This formed the essential security under the deed so that if the borrower defaulted on the loan, Housing Corp could uplift the house, and sell it, to meet the loan and any outstanding costs.

[31] In *Anderson,* Judge Ambler found that:

(a) The deed did not expressly state that the house was to be regarded as a chattel;

(b) The house, as a question of fact, was fixed to the land and had become part of the realty; and

(c) It was only if Housing Corp exercised its rights upon default, and uplifted the house, that it was severed and became a chattel.

[32] The same applies in the present case. The overall purpose of the deed was to allow Hare and his wife to raise a loan, build a house, and live on his ancestral land. Pursuant to the deed, the trustees granted a licence to Hare and his wife authorising them to occupy the house site for their lifetime, or for 20 years, whichever was longer. The deed also incorporated a right to renew the licence. While the deed empowered Housing Corp to uplift the house in the event of default, that provision was to form part of its security. The object of the deed was to allow Hare and his wife to build, and live in, their home. The house was not erected for some temporary purpose. The default mechanisms provided security to the lender but did not override the overall object of the deed. The degree and purpose of annexation was to provide a permanent home (at least for Hare and Tei's lifetime). If Housing Corp had exercised its powers on default and uplifted the house, at that time it would have become a chattel as a matter of fact.

[33] The deed also provided that once the loan had been repaid, if Hare and Tei had fulfilled their obligations, they could serve notice on the trustees and uplift the house themselves. Similar to the rights in favour of Housing Corp, while the deed provided those

rights, that did not change the overall purpose which was to provide a permanent home. A right to uplift does not on its own demonstrate an intention to uplift. The overall object of the deed was to allow for the construction of a permanent home.

[34] Mr Pou argued that if the house became part of the realty, legal ownership would vest in the trustees who would own the house on behalf of the beneficial owners. He submits that Hare, and Housing Corp, would only have had an equitable interest in the house. Mr Pou contends that the provisions in the deed, which allow Housing Corp and Hare to uplift the house in certain circumstances, demonstrate that it was never intended that ownership of the house would intermingle between them and the other owners of the land.

[35] Clauses 20 and 23 of the deed state:

> 20. THAT should the house or any part thereof be uplifted from the Site whilst any monies are outstanding and owing hereunder to the Lender, the House or such part **shall immediately upon being uplifted become the exclusive property of the Lender**:
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> …
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> 23. THAT if the Borrower shall have fulfilled, (insofar as the Lender is concerned), all of the Borrower's obligations under this Deed, and if the Borrower shall not be in breach of any one or more of the obligations of the Borrower under this Deed to the Trustees, the Borrower shall have the right, upon giving at least one month's notice in writing to do so, to uplift and remove the House from the land whereupon the House, **having been so uplifted and removed, shall become the exclusive property of the Borrower**:
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> [Emphasis added]

[36] The deed expressly contemplates that exclusive ownership rights, in favour of Housing Corp or Hare, would only crystallise once the house had been uplifted. This is consistent with the concept of the house moving from being part of the realty, where ownership is intermingled, to separate and exclusive ownership, once uplifted. This is also consistent with the approach in *Anderson* that, once uplifted, the house would become a chattel, severing the rights of the owners in the land.

[37] Clause 22(2) of the deed is also relevant. This provides that if the lender uplifts and removes the house, the house, excluding the site, should be valued as a "chattel personal". This is the only reference to a chattel in the deed. As noted in *Anderson*, this is for the purpose of assessing value and again only crystallises once the house has been uplifted.

[38] Accordingly, Judge Coxhead correctly identified that the house has become part of the realty of this land.

[39] Finally, Mr Pou argued that the terms of Hare's will also demonstrates that the house was to remain a chattel. We reject this argument.

[40] The will was executed on 22 November 2015. This is 24 years after the deed was signed. Hare's subjective view, as expressed in his will, is irrelevant when determining the purpose of annexation.[14]

[41] Even if we were to take the will into account, it does not have the effect as argued by Mr Pou. The will provides that the house is to be vested in the Hare and Rangiakume Nuku Te Ratana Whānau Trust. Hare vested his interests in the land, in the whānau trust, in 2004. Mr Pou submits that, as the house was not vested in the whānau trust along with the land interests, this demonstrates that Hare treated the house separately to his interests in the land and so regarded it as a chattel. There is no objective or cogent evidence to support this. The terms of the will do not support such an inference being drawn. When considering the terms of the will, Judge Coxhead considered that seeking to vest the house in the whānau trust, where the land interests were held, demonstrates that the house was to remain permanently on the land. We prefer that view. It may also be that vesting the house in the whānau trust was simply overlooked in 2004. Ultimately, we place no weight on this as we have already found that the house has formed part of the realty of the land.

**Kupu whakatau**
*Decision*

[42] The appeal is dismissed.

[43] As the respondent did not appear, or participate in the appeal, costs do not arise.

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| C M Wainwright<br>**JUDGE**<br>(Presiding) | M J Doogan<br>**JUDGE** | M P Armstrong<br>**JUDGE** |

[14] *Lakes Edge Development Ltd v Kawarau Village Holdings Ltd*, above n 12.