IN THE COURT OF APPEAL OF NEW ZEALAND

CA504/2016
[2017] NZCA 205

BETWEEN	LAKES EDGE DEVELOPMENTS LIMITED Appellant
AND	KAWARAU VILLAGE HOLDINGS LIMITED Respondent

Hearing:	27 April 2017
Court:	Randerson, Harrison and Cooper JJ
Counsel:	J E Hodder QC and J C Adams for Appellant M D Arthur and D T Street for Respondent
Judgment:	24 May 2017 at 11 am
Reissued:	25 May 2017
Effective date of Judgment:	24 May 2017

JUDGMENT OF THE COURT

A The application by the appellant to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant must pay costs to the respondent for a standard appeal on a band A basis with usual disbursements.

D Any outstanding costs issues in the High Court are to be dealt with in that court.

REASONS OF THE COURT

(Given by Randerson J)

Table of Contents

	Para No
Introduction	[1]
Relevant facts	[8]
The Melview Group of companies and the development of the land	[8]
The relevant resource consents and building consents	[16]
The rock anchors	[22]
Summary to this point	[26]
The High Court judgment	[27]
The appellant's case on appeal	[36]
Analysis	[39]
Trespass	[39]
Fixtures	[55]
Result	[69]

Introduction

[1] The parties to this appeal (LEDL and KVHL) own adjoining parcels of land on the shores of Lake Wakatipu. A dispute has arisen between them over rock anchors installed underground in 2008 which straddle the boundary of their respective properties. All the affected land was in common ownership at the time the rock anchors were installed. LEDL did not acquire its land until some years later. It then claimed the rock anchors constituted a continuing trespass and brought proceedings against KVHL for injunctive and other relief. LEDL now appeals against the refusal by Associate Judge Doogue of its application for summary judgment on liability.[1]

[2] By way of brief background, Peninsula Road Ltd (PRL) purchased the whole of the land comprising over 6.5 hectares in 2005. It was then in a single title (the original site). PRL was a member of the Melview Group of companies which, at material times, was owned and controlled by Mr Nigel McKenna. The Melview Group proposed a substantial development on the original site to be known as the Kawarau Falls Station Development. For that purpose, a number of resource consents were required from the Queenstown Lakes District Council (the Council).

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1 *Lakes Edge Developments Ltd v Kawarau Village Holdings Ltd* [2016] NZHC 2141, [2017] 2 NZLR 421 [High Court judgment].

[3] The first stage of the proposed development involved, amongst other things, the construction of a hotel on what is now the KVHL land. The resource consent obtained from the Council for that purpose required that the first stage of the development be secured by means of the rock anchors in order to stabilise the land. When the anchors were installed in 2008, separate titles had been issued but both the LEDL land[2] and the KVHL land[3] continued to be owned and controlled within the Melview Group.

[4] It was not until 2014 that LEDL acquired from PRL the land it currently owns. LEDL wishes to develop its land and to excavate for that purpose. LEDL says that it only discovered the rock anchors after it purchased the land. LEDL maintains that the existence of the rock anchors underneath its land will impede its proposed development. It gave notice to KVHL as the present owner of the adjoining land that it considered the rock anchors constituted an unlawful encroachment amounting to a continuing trespass. KVHL denies responsibility and maintains that the rock anchors constitute a fixture belonging to the owners from time to time of the respective parcels of land.

[5] It did not prove possible to resolve the issue between the parties. LEDL issued proceedings in the High Court seeking a declaration that the presence of the rock anchors on its land constituted a continuing trespass by KVHL. At the same time LEDL applied by way of summary judgment for a ruling in its favour on liability. In dismissing the summary judgment application Associate Judge Doogue found that the rock anchors were a fixture rather than a chattel. He was satisfied that a structure which, by the consent of the landowner, is affixed to neighbouring land cannot give rise to an action in trespass.

[6] LEDL's principal ground of appeal is that the Associate Judge was wrong to find the rock anchors were a fixture and that their presence did not constitute a continuing trespass.

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[2] Lot 3 DP492490.

[3] Lot 101 DP416176.

[7] We record that during the hearing we declined LEDL's application to adduce further evidence on appeal. This related to LEDL's plans to develop its land. While this material may be relevant to relief, it is not material on the liability issue before us.

Relevant facts

The Melview Group of companies and the development of the land

[8] As noted, PRL acquired a block of land located on Peninsula Road, Queenstown in mid-2005. The following year another company within the group acquired three neighbouring blocks. These blocks together comprise the original site. Mr McKenna intended to build the Kawarau Falls Station Development, a very substantial project involving five hotels, visitor accommodation, residential development, a conference centre, staff accommodation and other facilities. For this purpose, PRL applied for and obtained a number of resource and building consents. We will refer in more detail to these below.

[9] Melview intended to undertake the development in three stages. As matters turned out only stage 1 has been completed. This involved development of two hotels including what is now known as the Double Tree (Hilton) Hotel. The KVHL land is located within the area of the stage 1 development while the LEDL land is located within the area to be developed in stages 2 and 3.

[10] In 2007 Melview (Kawarau Falls Station) Investments Ltd (MKFSIL) and a sister company Melview (Kawarau Falls Station) Development Ltd (MKFSDL) were incorporated. Both companies were wholly-owned subsidiaries of PRL. Later that year, PRL sold the land on which stage 1 was to be built to MKFSIL but PRL retained direct ownership of the land required for stages 2 and 3 (including the LEDL land at issue).

[11] MKFSIL was to undertake stage 1 of the development together with MKFSDL. While MKFSIL owned the land, MKFSDL entered into the necessary construction contracts. In late November 2007 PRL applied for the building consent necessary to complete the retaining work required before construction could

commence. This included the rock anchors in dispute. MKFSDL contracted with Fulton Hogan Ltd to carry out the civil works required. This contract covered the earthworks and retaining structures required for what was then known as the Kingston West development proposal including the rock anchors in dispute. By April 2008, as part of the necessary earthworks on the original site, the rock anchors were installed by subcontractors.

[12] Until this point, the land and various companies involved in the Kawarau Falls Station Development were all owned and controlled by Mr McKenna. PRL owned the LEDL land and MKFSIL owned the KVHL land. Thereafter, the Melview Group encountered financial difficulties. In May 2009 receivers were appointed in respect of MKFSIL and MKFSDL. Ultimately, further funds were provided by financiers and stage 1 was completed. In April 2010 the receivers of MKFSIL and MKFSDL incorporated KVHL as a wholly-owned subsidiary of MKFSIL.

[13] Receivers were also appointed for PRL on 2 March 2010. Then, in February 2014, PRL sold the stage 2 and 3 land to Winton Partners Investments Ltd or nominee. LEDL was nominated as purchaser. The total purchase price was $10.15 million including the cost of purchasing two blocks in addition to the subject LEDL land.[4] The conditions of sale relevantly provided that:

(a) The purchaser was to undertake a due diligence process. PRL's receivers agreed to provide access to the land and to permit any relevant surveys and testing including the drilling of bore holes. They also agreed to provide the purchaser with copies of all relevant documents and reports in their possession as well as details of all current resource consents and related plans in their possession.

(b) The property was sold on an "as is, where is" basis. LEDL acknowledged that PRL gave no warranty that the property was suitable or could be employed for any particular use.

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4 The LEDL land affected by the rock anchors comprises 3814 square metres.

(c) PRL was not to be liable to LEDL for non-compliance with any regulatory requirement nor in respect of the condition or status of the land.

[14] LEDL undertook the due diligence process but maintains it was unaware of the presence of the rock anchors on the site until after completing the purchase. KVHL disputes this and points to knowledge held by certain consultants previously involved in the Kawarau Falls Station Development who are now said to be involved with or connected to Winton Partners. For present purposes, it is unnecessary for us to resolve the factual dispute on this issue.

[15] It was not until March 2016 that solicitors representing LEDL notified KVHL of its claim for trespass and proceedings were then commenced.

The relevant resource consents and building consents

[16] The evidence before the Associate Judge established there were many applications by PRL to the Council for resource and building consents relating to the original site. Those relevant for present purposes are:

(a) An earthworks resource consent in July 2006 (RM050909).

(b) A comprehensive development resource consent in July 2006 (RM050908).

(c) A subdivision resource consent in April 2007 (RM070189).

(d) A rock anchors building consent in January 2008 (BC080013).

[17] The original site slopes downwards from Peninsula Road to the lake edge. The LEDL land is above that of KVHL. For the purposes of the resource consent applications, consultants' reports were obtained including geotechnical investigations undertaken by Tonkin & Taylor Ltd in 2005. These investigations identified the need for permanent and temporary retaining walls on the site. The Tonkin & Taylor report showed proposed excavation profiles through Kingston West (now the site of the Double Tree Hotel) and the north face of the Escarpment Building (the building

intended to be built on what is now the LEDL land). The report stated that anchored shotcrete walls were likely to be needed where retaining over 4.5 metres was required. The report further stated that excavation in the underlying schist rock was likely to be relatively straightforward for the most part although some areas would require stabilisation, typically in the form of rock bolts, anchors or shotcrete facings.

[18] The earthworks consent issued to PRL in July 2006 was subject to a number of conditions including that the development be carried out in accordance with the application submitted and with listed approved plans. This included the 2005 Tonkin & Taylor report and a retaining walls plan prepared by Holmes Consulting Group. The undisputed evidence of Ms Bain, a surveyor who provided an affidavit for KVHL, was:

> In summary, I consider that the retaining wall and associated rock anchors constructed on the south side of the Kingston West site were authorised by the Earthworks Consent. In implementing the Earthworks Consent, PRL was required by the consent conditions to construct the retaining wall and associated rock anchors in the location shown on the Approved Plans, with the detailed design being subject to further geotechnical investigations and recommendations of Tonkin & Taylor to be incorporated in the EMP [Environmental Management Plan]. A building consent would also be required prior to the installation of the retaining walls and rock anchors.

[19] Shortly after the earthworks consent was granted, the Council issued the comprehensive development resource consent to PRL. This involved a master plan for 13 new buildings including Kingston West (now the Double Tree Hotel) on the land now owned by KVHL and the Escarpment Building on what is now the LEDL land.[5] A condition of this consent was that the existing four titles comprising the original site be amalgamated prior to the implementation of the consents. A further condition required that all construction activity be carried out in the terms approved under the earthworks consent. The Council noted in its decision that the land was included in its natural hazards register and that the work to be carried out would improve the stability of the land.

[20] As matters transpired, the titles were not amalgamated. Instead, PRL applied in 2007 for a resource consent to relocate boundaries and to create lots 1–4 DP385775 being a subdivision of the original site. The Council granted the

[5] The Escarpment Building was never constructed.

subdivision consent in April 2007. The subdivision was completed shortly afterwards and created the boundary between what is now the KVHL land and the LEDL land. Right-of-way easements were required as a condition of the subdivision consent to ensure that access for each lot and the public was provided from Peninsula Road.

[21] The final relevant step was the grant of the January 2008 building consent to PRL for the erection of the Kingston West retaining walls, including the rock anchors at issue. The documents approved in relation to this consent showed the location and construction detail of the rock anchors. These were two further reports prepared by Tonkin & Taylor in 2006 and associated drawings prepared by Holmes Consulting. In April 2011 the Council issued a code compliance certificate to MKFSDL (in receivership) confirming that the retaining wall authorised by the building consent was completed in accordance with the Building Code. All these documents including the consents would have been available to LEDL as part of the due diligence process.

The rock anchors

[22] A geotechnical engineer, Mr Neil Jacka, deposed for KVHL that rock anchors are used to increase the stability of sloping ground and deep excavations. They impose a stabilising force on the exposed face of the ground. This adds to the resistance against instability of a theoretical wedge of material which could otherwise slide down onto the land below. The stabilising force is provided by drilling and grouting a tensile element into the rock behind the theoretical wedge of unstable material. Rock anchors are tensioned at the anchor head to develop the required stabilising force.

[23] Drilling logs obtained from McMillan Drilling Ltd show that the rock anchors have a total length of 12 metres. Ms Bain's evidence established that, on average, the anchors are half on the KVHL side of the boundary and half on the LEDL side. The plans she examined also show that the rock anchors on the KVHL land are predominantly beneath Alpine Lakes Drive (which provides access along the route of the easements required when the land was subdivided).

[24] Mr Jacka's undisputed evidence about the benefits of the rock anchors and the effect of their removal was expressed in these terms:

> 24 The predicted failure surface shown on the drawing sits across the KVHL/LEDL boundary, with approximately 3m of failure surface on the LEDL Land. If the anchors were removed the predicted wedge of failure material would include up to three metres of LEDL Land. This means that three metres of LEDL Land would be at risk of failure.
>
> 25 If the anchors were removed and the predicted failure wedge were to slide away, the LEDL Land above the predicted failure surface would be at limiting equilibrium and require stabilisation in order to support further development.
>
> 26 In addition to the three metres of failure surface on the LEDL Land, the failure surface also includes the land underneath Alpine Lakes Drive. If the anchors were to be removed that land would require further stabilisation to support the road. I understand that this road is used for access to parts of the LEDL Land.
>
> 27 On this basis, I believe that it is clear that the anchors are benefiting both the land owned by LEDL and the land owned by KVHL.

[25] Mr Hodder QC for LEDL submitted that the rock anchors were essentially required in order to support the Double Tree Hotel. That submission is not sustainable in the light of Mr Jacka's evidence. Mr Hodder also submitted that only a three-metre wedge of unstable land was involved on the LEDL side of the boundary. However, as Mr Arthur submitted for KVHL, the three-metre edge extends along the entire length of the common boundary. The extent of the identified failure surface cannot be dismissed as inconsequential. To the contrary, the rock anchors are plainly an important means of stabilising the land on both sides of the common boundary.

Summary to this point

[26] The evidence before the Associate Judge establishes in summary:

(a) At the time the rock anchors were installed, both the LEDL land and the KVHL land was in common ownership by companies in the Melview Group controlled and ultimately owned by Mr McKenna.

(b) The rock anchors were required as a condition of the resource consents issued by the Council upon PRL's application.

(c) The installation of the rock anchors was undertaken by or on behalf of PRL. That company owned what is now the LEDL land and, through its subsidiary MKSFIL, owned what is now the KVHL land.

(d) The installation of the rock anchors was for the benefit of both the LEDL and KVHL land by providing necessary stabilisation on both sides of the boundary. The rock anchors also support Alpine Lakes Drive which provides access to both the LEDL and KVHL land.

(e) Removal of the rock anchors would place not less than three metres of LEDL land at risk of failure. If the anchors were removed and the predicted failure wedge were to slide away, the LEDL land would require stabilisation in order to support further development. Further stabilisation measures would also be required to support Alpine Lakes Drive.

The High Court judgment

[27] It was common ground in the High Court and on appeal that the installation of the rock anchors could not amount to a trespass while the LEDL and KVHL land remained in common ownership. That is because the assumed consent by the then-owner of the LEDL land amounted to a lawful justification for what might otherwise have amounted to a trespass. Rather, LEDL's case was that consent, without the grant of an interest in the land such as an easement, would constitute only a bare licence between the parties. LEDL's submission was that any such licence did not bind third parties and hence the licence expired upon the transfer of the land from PRL to LEDL. At the least, the licence was said to have expired from the time when LEDL gave notice to KVHL that the presence of the rock anchors amounted to a continuing trespass and required the removal of the rock anchors (or alternatively compensation for the continuing trespass).

[28] In consequence, the focus of the judgment in the High Court was on KVHL's submission that the rock anchors amounted to a fixture and therefore formed part of

the land and property of LEDL. On that basis, KVHL submitted there was no trespass. To the contrary, LEDL submitted there was no distinction between chattels and fixtures for the purposes of determining whether a trespass had occurred. The Associate Judge identified the two issues he was required to decide in these terms:[6]

(a) Was there a valid distinction between fixtures and chattels in the law of trespass?

(b) If so, what was the status of the rock anchors?

[29] As the Associate Judge noted, if it were arguable that the fixtures/chattels distinction was valid and that the rock anchors were fixtures, it followed that the application for summary judgment on liability must be dismissed.

[30] A large number of authorities were cited to the Associate Judge and before us on appeal. We discuss some of these authorities below. While accepting that the insertion of a subterranean object into the land of another could amount to a trespass, Associate Judge Doogue was satisfied that a fixture, which, by the consent of the landowner, is affixed to neighbouring land, could not give rise to an action in trespass.[7]

[31] Whether an object has the status of a chattel or a fixture depended on an objective assessment of its properties. This was not dependent upon whether the landowner initially consented to its placement on the land. If the object is a fixture, then, in the Associate Judge's view, it formed part and parcel of the land. Because the object became part of the real property of the landowner if it were a fixture, the presence of the fixture could not give rise to an action in trespass.

[32] The Associate Judge did not consider his conclusion was affected by the fact that the owners for the time being of the respective land parcels would effectively share ownership of the rock anchors. Each would own the portion of the rock anchors beneath their land. He also rejected a submission made on behalf of LEDL

[6] High Court judgment, above n 1, at [11].
[7] At [22].

that the implementation of a distinction between chattels and fixtures in the law of trespass would undermine the objectives of the land transfer system.

[33] Addressing the status of the rock anchors, the Judge reviewed relevant authorities and concluded that relevant considerations included the degree or mode of annexation by the structure in question and its object or purpose. He was satisfied the degree of annexation was such that it must have been intended the rock anchors would become a permanent part of the LEDL land. On this issue, he said:

> [43] … First, the anchors are buried deep below the surface and are set in concrete. Any attempt to withdraw and recover possession of the anchors would be a difficult, expensive and disruptive process. In fact, it may be that because of the degree of attachment, any attempt to withdraw them would be impossible because it would result in their destruction. On the basis of the evidence which is before this Court on the summary judgment application, the natural inference is that once the rock anchors were placed in the ground, they were there to stay.

[34] As to the purpose of the annexation, the Judge said:

> [44] The purpose of the annexation also supports a finding that the rock anchors have been converted into fixtures. The rock anchors were installed in order to preserve land stability, which would in turn enable the construction of a high value hotel and, later, a larger development. So long as the development loaded the downhill site, there was going to be a continuing need for the rock anchors. Further, insofar as the rock anchors were required by the terms of the resource management consents, it can be supposed that rock anchors were intended to remain in place permanently. The conditions did not require the maintenance of rock anchors only for a particular period, after which the developer would be at liberty to remove them.

[35] In summary, the Judge found:

(a) The rock anchors were attached to the LEDL land in a manner which caused them to become a fixture.

(b) It was at least reasonably arguable that the owner of the LEDL land consented to the incorporation of the rock anchors into its land. There was therefore no trespass at the time of installation.

(c) The rock anchors now formed part and parcel of the LEDL land and were therefore the property of LEDL. On that basis, the presence of

the rock anchors could not give rise to an action in continuing trespass against KVHL.

The appellant's case on appeal

[36] On appeal, Mr Hodder essentially reiterated the arguments advanced unsuccessfully in the High Court. His overall submission was that LEDL's application for summary judgment on liability for continuing trespass relied on the insertion and presence of portions of the rock anchors under the LEDL land, to the benefit of the KVHL land, after an assumed initial consent or licence had been revoked either by LEDL's purchase of its land or LEDL's notice of revocation of the licence. Mr Hodder further submitted that the fixtures analysis advanced by KVHL was irrelevant and wrong. Principally, this was because the use and value of the land encroached upon was not enhanced by the encroachment. Counsel submitted it was necessary to establish that the objective purpose of any annexation was to enhance the use and/or value of the affected land. This could not sensibly be applied to an encroachment for the benefit of the neighbouring land. As well, he submitted the rock anchors retained their physical integrity and could not sensibly be divided into separately-owned fixtures.

[37] Finally, counsel submitted that the fixtures analysis was inconsistent with most of the relevant common law cases on trespass, the law on which was said to be well settled. It was submitted that the "relevant trespass principle" was that:

> A trespass may be committed by the continued presence on a plaintiff's land of a structure, chattel or other thing which a defendant (or the defendant's predecessor in title) has placed on the surface or under the surface of the plaintiff's land with consent of the person then in possession of such land, if the defendant fails to remove it after the consent has been effectively terminated.

[38] In support of this proposition counsel relied on case law cited in the American Law Institute's Second Restatement of Torts and relevant texts.[8]

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[8] American Law Institute *Restatement (Second) of Torts* (1965) (online looseleaf ed, Westlaw) § 160; W Page Keeton (ed) *Prosser and Keeton on the Law of Torts* (5th ed, West Publishing Co, Minnesota, 1984) at 82–84; and Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (10th ed, Lawbook Co, Sydney, 2011) at [3.50].

Analysis

Trespass

[39] The general principles guiding the law of trespass are not in doubt. An unjustified interference with land in the possession of another is a trespass and is actionable without proof of actual damage.[9] Interference with land may include interference with the subsoil and airspace although the limits of these concepts for the purposes of the law of trespass may be subject to debate.[10]

[40] Justification in this context may include necessity and consent or licence (express or implied).[11] An action that might otherwise amount to a trespass may also be justified if the interference is authorised by statute.[12] A common example is that of a public entity empowered to enter land to install utilities to convey water, power or gas.

[41] We agree with Mr Hodder's general proposition that where a plaintiff consents to a structure being placed on his or her land by the defendant, no trespass is committed. In such a case, the plaintiff is treated as having granted an express or implied licence to the defendant to place the structure on the plaintiff's land. Ordinarily, such a licence would be a bare or gratuitous licence, revocable at will or at least on reasonable notice.[13] Whether a licence is revocable or irrevocable depends on the circumstances.[14] Upon revocation, the defendant will be liable for trespass while the structure remains on the land. In that case, there is said to be a continuing trespass and a purchaser of the plaintiff's land may be entitled to a remedy.[15] As well, a transferee of the defendant's interest in the structure may be

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9 Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) at [9.2.01]; Sappideen and Vines, above n 8, at [3.40]; and Michael A Jones (ed) *Clerk & Lindsell on Torts* (21st ed, Sweet & Maxwell, London, 2014) at [19-01].

10 Todd, above n 9, at [9.2.03(2)].

11 At [9.2.06].

12 At [9.2.06(2)].

13 At [9.2.06(1)].

14 Different issues may arise if consideration is given for the consent or licence since contractual rights are then likely to govern the relationship and the terms of entry authorised. See the discussion in *Canadian Pacific Railway Co v R* [1931] AC 414 (PC) at 432.

15 *Di Napoli v New Beach Apartments Pty Ltd* [2004] NSWSC 52, [2004] Aust Torts Reports 81-728 at [28] and *Taylor Land Group LLC v BP Products North America Inc* 2011 WL 2119670 (Court of Appeals of Michigan) at [11].

liable.[16] However, as we later discuss, if the structure has become part of the plaintiff's land, a different outcome may arise.

[42] While accepting the general propositions advanced by LEDL, we do not accept its submission that they apply on the facts of the present case. This case does not involve one landowner encroaching on the land of a neighbour with the neighbour's consent. We have summarised the undisputed facts at [26] above. The rock anchors were installed by the common owners of the affected land for the purposes of a comprehensive development for their mutual use and benefit. Installation was undertaken by or on behalf of PRL, LEDL's immediate predecessor in title. PRL did not need consent for the use of its land for this purpose. Rather, as it was entitled to do, it undertook the installation work on its own land and on the KVHL land it controlled. That work was required as a condition of the Council's consents. In these circumstances, the conceptual underpinning for the tort of trespass is absent and there is no room for its application.

[43] It follows that there could be no continuing trespass for two principal reasons. First, there was no trespass at the time of installation and therefore none to be continued. Second, the submission that there was a consent or licence which LEDL was entitled to revoke upon acquiring the property must also be rejected since it is not established on the facts that any such consent or licence was required or given.

[44] Only one of the many cases cited to us involved land in common ownership at the time of the alleged trespass. This was a decision of the Supreme Court of South Australia in *Billiet v Commercial Bank of Australasia*.[17] The land in question had originally been owned by the same person in two halves under separate certificates of title. Buildings were constructed on the land while they were in common ownership. A wall extended over the boundary. Later, each title was sold separately. One of these titles was sold to the defendant bank. The other was ultimately sold to the plaintiff Mr Billiet. The encroachment upon Mr Billiet's land was then discovered. The case was put on the basis of a continuing trespass or continuing nuisance. The plaintiff contended that, immediately upon the transfer of

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16 *Restatement*, above n 8, at § 160; Keeton, above n 8, at 83; and Sappideen and Vines, above n 8, at [3.40]–[3.50].

17 *Billiet v Commercial Bank of Australasia* [1906] SALR 193 (SASC).

the land to him, there was a continuing trespass or nuisance by reason of the encroachment.

[45] Wray CJ accepted that when a trespass or nuisance of a continuing nature has been committed, the original wrongdoer and his successors in title are liable for the continuance of the wrong.[18] But the Chief Justice found that it must be shown that the encroachments were unlawfully erected at the time this occurred. The original owner had erected the buildings on his own land. As he was the owner of both titles, the Chief Justice concluded the owner had:[19]

> … exercised his undoubted right of building on his own property as he thought best. He was also at liberty to sub-divide and sell his land and the buildings on it as he and any purchaser he could find thought expedient.

[46] Addressing the issue of annexure, the Chief Justice said:[20]

> The so-called encroachments of brick, stone, iron, and wood were annexed to the freehold by the Bank's predecessor in title, Mr. McLean, who, when transferring the Cyclorama buildings to the Bank, retained (probably unwittingly) the small portions of those buildings which encroach upon the Coffee Palace half-acre. The defendant Bank, in fact, would be a trespasser if it entered upon the plaintiffs' property to remove walling and other materials belonging to the plaintiffs and annexed to their freehold, and this action is brought because the Bank has left the plaintiffs' property alone and has not committed a trespass upon it.

[47] The final point made by the Chief Justice[21] was in response to a submission by the plaintiff that the encroachment had continued by the implied leave and licence of the original owner and his successors in title. It had been submitted that such leave and licence had been revoked by a solicitor's letter issued by the plaintiff requiring the Bank to remove the encroachments. On this point, the Chief Justice said:[22]

> But this is a misapplication of the term "leave and licence," which implies consent to an act which would otherwise be unlawful. Here the so-called encroachments were made by McLean, the common predecessor in title of both parties to this action, and the user complained of was intended by him to be continuous, and is the necessary consequence of what he did in the

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18 At [12].
19 At [13].
20 At [13].
21 At [15].
22 At [15].

> lawful exercise of his right as owner. But even if the walls and other encroachments had been placed in their position by the leave and licence of the plaintiffs or their predecessors in title, the licence being given to acts having a permanent result would, as Mr. Murray pointed out, be "a licence executed," and, therefore, "not countermandable."

[48] The facts of the *Billiet* case have strong similarities to the present. *Billiet* is authority for the following propositions with which we agree:

(a) No issue of leave or licence applies where a structure is erected by the owner of the land upon which it is built, whether or not it may extend into an adjoining property owned in common.

(b) In such circumstances, there cannot ordinarily be a continuing trespass since there is no trespass in the first place.

(c) Even if an encroachment has occurred with the leave and licence of the land encroached upon or of a predecessor in title, where the licence was given to acts having a permanent result, the terms of any such licence would have been executed and could not be countermanded.

[49] We have reviewed the authorities and other materials referred to by Mr Hodder. He placed particular reliance on the Second Restatement of Torts.[23] The relevant principle is there stated in these terms:

> A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land
>
> (a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated, or
>
> (b) pursuant to a privilege conferred on the actor irrespective of the possessor's consent, if the actor fails to remove it after the privilege has been terminated, by the accomplishment of its purpose or otherwise.

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[23] *Restatement*, above n 8, at § 160.

[50] We do not view this statement as supporting the proposition that a trespass may be committed in the circumstances disclosed by this appeal. Rather, the reference to the placement of a structure on land with the consent of the person then in possession of it shows that the statement is concerned with the placement of a structure on land by someone other than the owner of that land.

[51] Mr Hodder accepted that none of the authorities he cited involved equivalent facts. All the cases to which we were referred involved an encroachment onto land by a neighbour or by someone other than the owner of the plaintiff's land. Generally, these cases involved encroachment onto the land of another without consent or actions extending beyond the scope of the consent.[24]

[52] Other cases cited involved the grant of consent to an encroachment which was treated as revoked when the land of the consenting owner was transferred to another. Counsel referred us, for example, to the oral judgment of the Court of Appeal of British Columbia in *Maeckelburg v Radium Waterworks District.*[25] The defendant appears to have had responsibility for waterworks in the district concerned. With the consent of the then-owners of the subject land, a water main and sewer were installed on the subject land. No registered easement or other charge was given in favour of the defendant and the existence of the pipes under the property was not disclosed to the plaintiffs when the land was bought some years later. The case was mainly concerned with a challenge to an award of damages in favour of the plaintiff by the trial Judge. However, in response to a limitation argument, the Court of Appeal observed that because of the consent given by the owner at the time the pipes were installed, the cause of action in trespass did not arise until the plaintiffs purchased the property thereafter or when they discovered the existence of the pipes. The consent was then treated as having been withdrawn and the trespass was found to have continued on a day-by-day basis thereafter. The Court added that an easement was required.

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[24] *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA) involved a dispute over a party wall where adjoining properties were in common ownership but the case was primarily concerned with the power to grant relief under s 152 of the Property Law Act 1952. LEDL disavowed reliance on this jurisdiction or its equivalent under ss 321–325 of the Property Law Act 2007.

[25] *Maeckelburg v Radium Waterworks District* 1983 CarswellBC 429 (BCCA).

[53] The Associate Judge distinguished *Maeckelburg* on the footing that the appeal was primarily concerned with the quantum of damages and that neither the appellate court nor the trial court discussed the chattels/fixtures distinction at all. We agree with the observations made by the Associate Judge and do not view *Maeckelburg* as supporting LEDL's case. Apart from the points made by the Associate Judge, we note that *Maeckelburg* involves the placement of pipes by a local authority on the private land of another. In those circumstances, an easement may well have been required but that is not the present case.

[54] We do not accept Mr Hodder's submission that the fixtures analysis relied upon by KVHL does not apply in the context of the law of trespass. The cases to which counsel referred do not address the fixtures issues and we see no reason in principle why the usual principles do not apply, involving as they do, orthodox principles relating to the ownership of land. Indeed, as we shortly discuss, there are authorities specifically relying on the doctrine in cases of trespass to land.

Fixtures

[55] We agree with Associate Judge Doogue that the rock anchors are properly to be regarded as fixtures on both the LEDL and KVHL land with the consequence that they form part of the property owned by the respective owners of the LEDL and KVHL land from time to time.

[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".[26] The Court pointed out that in *Elitestone Ltd v Morris* the House of Lords had moved away from this formulation.[27] 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

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[26] *Auckland City Council v Ports of Auckland Ltd* [2000] 3 NZLR 614 (CA) at [72] and [73].
[27] *Elitestone Ltd v Morris* 1 WLR 687 (HL) at 690–691.

annexation. Each case would depend on its particular facts. A common sense approach was required.

[57] This approach was adopted by this Court with the observation that it reflected the classic statement of the test as expressed by Blackburn J in *Holland v Hodgson*.[28] Two other points should be noted. The subjective intention of the parties is irrelevant. The purpose of the annexation is to be objectively assessed. Relevant considerations may include whether the structure was intended to be permanent (not merely for some temporary purpose) and whether the structure was intended to benefit or improve the land on which it is installed.[29]

[58] KVHL relied on several authorities to support the proposition that where structures are installed on or under land, they may become part of that property. Apart from *Billiet*, we need mention only two. Mr Arthur referred us first to the English Court of Appeal decision in *Armstrong v Sheppard & Short Ltd.*[30] The defendants had entered the plaintiff's property and constructed a sewer for the discharge of sewage and effluent. The plaintiff had orally informed the defendants that he did not object to the construction (although he was not aware he was the owner of the land in question). The Court of Appeal found that the plaintiff could not complain later of the presence in the land of the pipes and a manhole. That was because there was no agreement or arrangement made that would alter "the ordinary consequence that that which is put into a man's land becomes part of that man's property".[31]

[59] A similar conclusion was reached more recently by the English Court of Appeal in *Blake v Highways Departments.*[32] The case involved the tipping of soil by a county council onto the plaintiff's land with the landowner's agreement. A term of the arrangement was that the soil was to be spread and levelled but the plaintiff alleged this had not happened. A claim for breach of contract failed for limitation reasons but a claim for continuing trespass was upheld by the Recorder at first

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28 *Auckland City Council v Ports of Auckland Ltd*, above n 26, at [72]; *Holland v Hodgson* (1872) LR 7 CP 238 at 334.
29 *Pukuweka Sawmills Ltd v Winger* [1917] NZLR 81 (CA) at 89.
30 *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384 (CA).
31 At 401, per Lord Evershed MR.
32 *Blake v Highways Departments* EWCA (Civ) B2/2000/6434, 6 October 2000.

instance. The Court of Appeal found that the Recorder was wrong to find there was a cause of action in trespass. Aldous LJ found that once the soil was dumped on the plaintiff's land and levelled so as to make it part of the land he owned, the plaintiff became the owner.[33] The Council's failure to re-seed and restore the land was an act of omission which could have given rise to a claim for breach of contract if it had been brought in time but not one for which an action for trespass could lie. As his Lordship said:[34]

> One can look at it in this way. Assume that Mr Blake wished to sell his land in 1981 or 1982 and executed a transfer to a third party. Would the property and the soil which had been roughly levelled have passed to the transferee? The answer must be "yes". In those circumstances, it cannot be said there was a continuing trespass.

[60] Sedley LJ agreed:[35]

> The fallacy in this, … is that soil once placed on the surface of land ordinarily accrues to the land. It becomes part of the realty, not movable property. It would follow, for example, that once the soil had been dumped, the local authority could not change its mind, enter on Mr Blake's land and take it away again.

[61] Turning to this case, no attempt was made by LEDL to challenge the findings of Associate Judge Doogue we have cited at [33] above. In particular, his findings that the anchors are buried deep below the surface, are set in concrete, and that any attempt to withdraw them might well be impossible because it would result in their destruction. It would be a difficult, expensive and disruptive process.

[62] We agree with Associate Judge Doogue's findings as to the degree of annexation of the rock anchors. The photographic evidence confirms just how substantial the rock anchors are and the permanence of their installation. As Mr Jacka deposed, the rock anchors are installed by drilling and grouting a tensile element into the rock. Rock anchors are then fixed at the head. The cost and difficulty of attempting to remove them may be readily inferred. So too the likelihood that removing the anchors would result in their partial or complete destruction.

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33 At [21].
34 At [21].
35 At [27].

[63] We also agree with the conclusion reached by the Associate Judge that, objectively assessed, the purpose of the annexation was to enhance land stability to enable the construction of the stage one buildings and, later, a larger development. There could be no suggestion that the rock anchors were installed only for some temporary purpose. A compelling factor in that respect is that the rock anchors were required by the Council as a condition of the resource and building consents to enable the subdivision and development of the land. The obvious conclusion is that the rock anchors were intended to be permanent. Once installed, they could not be removed without an application to the Council to vary the terms on which the consents were granted. As the Associate Judge said, the rock anchors were there to stay.

[64] There is no factual foundation for LEDL's submission that the presence of the rock anchors did not provide any benefit or improvement to the LEDL land by contributing to its stability and by supporting the access road on which it relies. Mr Jacka's evidence which we have cited at [24] above makes it impossible to sustain this submission on the facts.

[65] We conclude that the rock anchors became part of the land under which they were installed and that they are owned by the owner for the time being of the respective parcels of land. We agree with the Associate Judge that the fact this means that each of the adjoining owners have property in the portion of the rock anchors underneath their land does not create any insurmountable difficulties or lead to the consequence that the rock anchors should not be treated as part of the land. If, as LEDL intends, its land is to be developed then it will be a matter for negotiation with KVHL as to how that might be achieved without compromising the integrity of the rock anchors for the purpose they are designed to serve. Mr Jacka's evidence is that there may be ways this could be achieved.

[66] Nor do we see any inconsistency with the principles upon which the land transfer system is based. In particular, we do not consider it was necessary for PRL to obtain a registered interest in its own land. Simply put, PRL installed the rock anchors on its own land and thereby obtained ownership of them. The rock anchors form part of the land transferred to LEDL. This is sufficient to distinguish the

decision of the Supreme Court of Canada in *Ross v Hunter*.[36] In that case the defendant relied on a deed entered into with a predecessor in title to the plaintiff's land. This permitted encroachment onto the plaintiff's land. The deed was unregistered and void against subsequent purchasers for value under legislation. The plaintiff could therefore maintain an action in trespass.

[67] In the present case there is no encroachment onto the LEDL land by the owner of a neighbouring property for the reasons already given. No issue arises in relation to unregistered interests.

KVHL's alternative argument

[68] In view of the conclusions we have reached, it is unnecessary for us to deal with KVHL's alternative argument that if the rock anchors are not fixtures, their continued presence is supported by an equitable easement of which LEDL arguably had knowledge.

Result

[69] For the reasons given:

(a) The application by the appellant to adduce further evidence is declined.

(b) The appeal is dismissed.

(c) The appellant must pay costs to the respondent for a standard appeal on a band A basis with usual disbursements.

(d) Any outstanding costs issues in the High Court are to be dealt with in that court.

Solicitors:
Wynn Williams, Christchurch for Appellant
Chapman Tripp, Auckland for Respondent

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[36] *Ross v Hunter* (1884) 7 SCR 289.