

DERIVATIVE ACQUISITION OF OWNERSHIP

PART 1 – THE REAL AGREEMENT

Introduction

Derivative acquisition is **dependent on the lawfulness of the previous owner's title** and only takes place **with the previous owner's co-operation**. The two principal examples of derivative acquisition are **delivery** and transfer through **registration**. We will deal with the various forms of delivery and the principles applicable to registration in later lectures. In this lecture, we will focus on the requirements of the transfer of ownership through derivative acquisition. The principles are relatively simple. But their application can be counter-intuitive.

The role of the previous owner's title to a thing is embodied in the Latin maxim **nemo plus juris transferre ad alium potest quam ipse habet**, which translates as "no-one may transfer a greater right to another than he himself has". The practical application of this principle is, essentially, that only the lawful owner may transfer ownership of a thing to another. If a person's title to a thing is in some way defective, and he purports to transfer title to someone else, then the transaction is subject to challenge and may be undone.

Derivative acquisition of ownership is accordingly subject to the following requirements. It only takes place where –

1. The owner (transferor) of a thing capable of ownership, and with full contractual capacity;
2. Transfers a thing through one of the recognised forms of delivery (or by a registration);

3. To another person (the transferee);
4. Where the owner of the thing intends to pass ownership to the transferee;
5. And transferee intends to become the owner of the thing.

Each of these elements must be satisfied before ownership passes through derivative acquisition. If any one of them is not satisfied, the transfer may be void.

Of particular importance is the state of mind of the transferor and the transferee. Both must have the intention to pass and receive ownership. If there is no such intention, then ownership does not pass. This meeting of minds relating to transfer of ownership is known as “the real agreement”.

The Real Agreement and the Abstract System of Ownership Transfer

A real agreement must be distinguished from a contract which causes ownership to pass (for example a contract of sale or donation). They are entirely different things.

This was set out in **Commissioner of Customs and Excise v Randles Brothers**.

There, Watermeyer JA held as follows (at 398) –

“Ownership of movable property does not in our law pass by the making of a contract. It passes when delivery of possession is given accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it. If it is delivered in pursuance of a contract of sale, the ownership may pass at the time of delivery or it may not. Conditions may occur in the contract of sale which will delay or, if they are not fulfilled, altogether prevent the passing of ownership . . . whether or not an intention to transfer ownership by delivery exists is a question of fact, not of law.”

In contracts of sale, there are some general rules governing when ownership passes. These are –

1. On a cash sale, ownership passes when the full purchase price is paid, even if delivery has already taken place. Notwithstanding delivery, the parties to the

agreement are presumed to have intended ownership to pass only when the full purchase price has been paid.

2. On a credit sale, however, ownership is presumed to pass on delivery, because a credit sale is in essence the sale of a thing to another person against payment of the purchase price at some future time on agreed terms as to interest etc. as are agreed.

However, both of these rules are limited by the actual intention of the parties. If, notwithstanding the cash sales rule, it is clear from the circumstances that ownership was intended to pass on delivery despite the fact that the purchase price was not paid, then ownership passes on delivery. Conversely, in a credit sale, if it is clear that the owner of the property does not intend to pass ownership on delivery, ownership does not pass until whatever condition in the credit agreement governing passing of ownership is fulfilled (think, for example, of a hire purchase agreement).

Eriksen Motors v Protea Motors and Another

These principles are illustrated by the case of Eriksen Motors v Protea Motors. Protea Motors, based in Warrenton, was approached by a Mr. and Mrs. Ellis, who were interested in purchasing a Ford station wagon. Protea did not have any in stock, and so telephoned Eriksen Motors to ask if they had any in stock. This was part of a long standing arrangement whereby each dealership would buy stock from the other in order to re-sell to a customer in the event that either did not have a particular car in stock.

On this occasion, Eriksen had two Ford station wagons and invited a representative of Protea to come to Eriksen's to inspect them, together with the Ellises. Eriksen's was in Welkom. Protea was in Warrenton. Warrenton and Welkom are around 240 km apart.

An employee of Protea, called Turner, drove the Ellises to Eriksen's, where they inspected the Ford station wagons and agreed to purchase one of them. Then Turner paid Eriksen's for the car, and then re-sold it to the Ellises straight away. The Ellises left Welkom in their new car, and Turner returned in his car to Warrenton.

Turner's cheque then bounced. Eriksen's subsequently went into liquidation, and Protea Motors applied for an interdict placing the motor car in the care of the Sheriff pending an action to return it to them.

The interdict was refused in the High Court, and Protea appealed to the Appellate Division.

The Appellate Division accepted that the sale of the car was probably a cash sale, which generally means that ownership does not pass until payment of the purchase price. Because Protea's cheque bounced, the purchase price was never paid.

However, the court then examined whether there was nonetheless a real agreement to pass ownership to Protea Motors notwithstanding the fact that the purchase price was not paid. Remember that this, according to the Appellate Division in Randles, is a question of fact.

Having regard to the facts that –

1. The sale of the car was part of an ongoing practice of sale and resale between the two dealerships and customers;

2. There could have been no doubt on the part of Eriksen that Turner intended to immediately resell the car to the Ellises; and
3. The Ellises drove away from Eriksen's in the car.

There probably was an intention on the part of Eriksen to pass ownership to Protea. There could also be little doubt that the Ellises intended to become owners of the car.

Accordingly, there was, on the probabilities, a real agreement between Protea and Eriksen to pass ownership, and the prospects of success in the trial action were weak. There were accordingly insufficient grounds to grant an interim interdict. The appeal was dismissed.

Du Plessis v Proffitius

The principles of real agreement are also applicable to immovable property. This is illustrated by the case of Du Plessis v Proffitius. In that matter, a Trust, known as the Campbell Children's Trust sold land to a company called Whiktel for R45000. Whiktel then sold the property on to Du Plessis.

In the meantime, the Campbell Trustees received a better offer for their land from a Mr. and Mrs. Proffitius. The Proffitiuses offered R195000 for the land. Accordingly, the Campbell trustees, before transfer to Whiktel was effected, applied for a new title deed for the land by fraudulently misrepresenting that the old title deed had been lost.

The Campbell Trust then sold the land for R195000 to the Phrophitiuses and transfer to the Prophitiuses took place on the second title deed. Meanwhile, transfer to Whiktel and then to Du Plessis was effected on the first title deed.

On discovering the double registration, the Registrar of Deeds advised the Prophitiuses and Du Plessis that the High Court would have to decide who the owner of the land was.

The High Court decided in favour of Prophitius. Du Plessis appealed.

The Supreme Court of Appeal held that the real intention of the Campbell Trustees was to pass ownership of the land to the Prophitiuses. The Prophitiuses did not know about the Trust's fraudulent scheme, and so they really intended to receive transfer. That was the real agreement to which the court was required to give effect. It did not matter that the scheme was fraudulent. Even if it was, the scheme could only be given effect to if ownership actually passed to the Prophitiuses. The intention must, therefore, have been to pass ownership to them. The appeal was accordingly dismissed.