ORIGINAL ACQUISITION OF OWNERSHIP

PART 2

Introduction

We now turn to accession. The basic idea is this: where a principal object and an accessory object join together, such that the accessory object ceases to exist independently and becomes part of the principal object, ownership of the accessory object transfers to the owner of the principal object. More precisely, the owner of the principal object becomes the owner of a changed thing, which incorporates both the principal and the accessory object.

Principal and Accessory Objects

Where a movable accedes to an immovable, it is fairly clear that the movable becomes part of the immovable. But what about when a movable accedes to another movable? Which is the principal object and which is the accessory?

This question came up for decision in **Khan v Minister of Law and Order**. In that matter, Khan took the wreck of a 1985 BMW and contracted a panel beater to reconstruct the wreck such that it would look like a 1988 BMW. The panel beater used parts from a 1988 BMW and attached the back end and interior of that car to the front end of the wreck. The whole construction was then re-sprayed.

It turned out that the 1988 BMW was stolen. The police seized the reconstructed car as a stolen vehicle. Khan claimed the vehicle back from the Minister of Law and Order on the basis that, by a process of accession, he had become owner of the reconstructed car. Khan claimed that the 1988 BMW acceded to the wreck of the 1985 BMW.

In order to decide the issue, the Court had to consider which was the principal object and which the accessory. If the principal object was the 1985 BMW, then Khan was entitled to the return of the car.

The Court considered two tests for determining the identity of principal and accessory objects. The Court first considered whether it was right to say that the principal thing is the thing of greater bulk or value. The Court ultimately rejected this test in favour of the "basic character" test. On this test, the thing that gives the whole its basic character is the principal thing. The Court held –

"*. . . the decision really is an application of common sense. One must view the thing that was ultimately formed, and decide what is the identity of that thing, and the component that gives the ultimate thing its identity will be the principal thing, while the other will have acceded to it."*

This seems a little question begging, but in Khan, it was quite clear that it was the 1988 BMW which gave the reconstructed car its character, because Khan wanted the car to look like a 1988 BMW. The application was dismissed.

Whatever its difficulties, the "ultimate character" test seems to be the preferred test to determine the identity of the principal object in cases of accession. The Court in Khan makes clear that the bulk and value tests may be used where the ultimate character test yields uncertain results.

The basic test for accession

Most of the controversy in the cases revolves around accession of movables to immovables. Although, in this case, it is clear which is the principal object and which the accessory, how do we know when accession has taken place?

The starting point is the decision of the Appellate Division in **Macdonald v Radin**. It is a prescribed case and is important because it is relied upon in every prescribed case dealing with accession. Whether an accessory object has acceded to a principal object is determined by considering three questions. These are –

1. Is the movable in principle capable of acceding to the immovable?
2. Has there been an "effective attachment" of the movable to the immovable?
3. Is it intended that the movable be permanently attached to the immovable?

The relationship between these three questions, and how they are applied to decide whether accession has taken place has been developed through the cases.

Standard Vacuum Refining Co of SA (Pty) Ltd v Durban City Council

Standard Vacuum (SVR) operated a refinery in Durban. On its land, it had a series of large tanks used in the refining process. The Durban City Council took the value of the tanks into account when it assessed SVR's land for rates. SVR objected, stating that the tanks did not form part of the land and so should not be assessed as enhancing the value of the land. The matter worked its way through the Valuation Appeal Board, and the local division of the Supreme Court, before SVR finally appealed to the Appellate Division.

The Appellate Division held that the overriding question was whether it was intended that the tanks would be permanently attached to the land (question 3 above). This is an objective question. Where direct evidence of intention is not available, it must be deduced by reference to the nature of the tanks (question 1 above) and whether they could be removed without doing substantial damage either to the tanks or the land (in essence, was there "effective attachment"? – question 2 above).

In considering the nature of the tanks, the court observed that by their sheer weight, the tanks were capable of adhering to the land, that they had never existed anywhere else but on the land, and could only be moved by being cut up and/or "floated" to another location.

The court decided that, on the basis of the evidence relating to the nature of the tanks and the difficulty involved in moving them, there must have been both an "effective attachment" to the land, and that there must have been an intention that the attachment would be permanent.

There was some very limited evidence of SVR's intention when it placed the tanks on the land. One of the company's witnesses had admitted that "if you put a tank down, you want to leave it there".

Accordingly, the Appellate Division decided that the tanks had acceded to the land and could be taken into account for valuation purposes.

Although there was no change in ownership in this case (it appears that SVR owned both the tanks and the land), the Standard Vacuum case is illustrative of the fact that it is the intention with which an accessory object is attached to a principal object which is ultimately decisive of whether or not accession has taken place.

Theatre Investments Ltd v Butcher Brothers

The test was further developed in the Theatre Investments case. In that matter, Theatre Investments leased land from the Butcher Brothers for a 50 year period. It was a condition of the lease that Theatre Investments would build a theatre on the land and that, once the lease came to an end, all the buildings and improvements to the property would accrue to Butcher Brothers, who would become owner of them.

The lease came to an end. Theatre Investments claimed ownership of some audience seating, emergency lighting equipment and a projection room dimmer board. Butcher Brothers took the view that these items were part of the buildings and improvements to the land. Butcher Brothers obtained an interdict from the High Court restraining Theatre Investments from removing those items from the property. Theatre Investments appealed.

The Appellate Division applied the test developed in Standard Vacuum above, but was faced with no direct evidence of the intention with which the items claimed were brought onto the property.

The court found that all the items in issue were permanently bolted into the fabric of the building and could not be removed without causing some damage. They were all items capable of acceding to the building. While suggestive, however, these factors were not decisive. What was decisive, in the Court's view, was the history and purpose of the use of the property. It was clear that the items claimed were essential to the operation of a theatre. The intention of the parties was clearly for ownership of an operational theatre in a good state of repair to revert to the lessor upon the lease coming to an end.

It could fairly be inferred, therefore, that the intention was for the disputed items to become part of the building. They had therefore acceded to the building and ownership of them passed to Butcher Brothers with the building. Accordingly, the appeal was dismissed.

Melcorp v Joint Municipal Pension Fund

The test developed in Macdonald was applied again in Melcorp. McEwan J stated the test as requiring consideration of –

1. The nature of the article
2. The degree and manner of its annexation
3. The intention of the person annexing it.

In Melcorp, the Joint Municipal Pension Fund (JMPF) purchased a property into which a lift had already been installed by Melcorp. Melcorp's contract with JMPF's predecessor in title specified that Melcorp would remain owner of the lift and the articles installed to work it until the full purchase price for the lift had been paid. Melcorp had not been fully paid and so it claimed the lift back from JMPF.

JMPF claimed that the lift had acceded to the building, and so Melcorp could not claim the lift back as owner.

The Court decided in Melcorp's favour. While the Court accepted that the objective considerations all pointed in favour of accession (the lift was part of the very fabric of the building) the reservation clause in the contract clearly demonstrated that Melcorp had not intended the property to accede to the building, and reserved the right to take the lift back on non-payment. This evidence of Melcorp's intention, the Court held, overrode all considerations to the contrary. Because Melcorp had not intended it, the lift had not acceded to the building.

The outcome in Melcorp is difficult to justify. It overstates the intention of the annexor in deciding whether accession has taken place and elevates it to a status which overrides clear, common sense objective factors to the contrary. Whether or not

accession has taken place cannot depend entirely on the intention of the annexor – especially where it is clear that an accessory thing has become very firmly physically attached to a principal thing.

As van der Walt points out in the Casebook (6 ed), it also makes a nonsense of the classification of accession as a form of original acquisition. As we have discussed, original acquisition of ownership takes place independently of the will of a thing's predecessor-in-title. To suggest that an annexor can simply express an intention – no matter what the objective circumstances – that accession not take place, and thereby defeat it, corrodes the basic characteristics of accession as a mode of acquisition. Where the annexor is the owner of the accessory thing, he will not doubt routinely reserve ownership where it is convenient to do so – no matter how destructive, impractical and inconvenient to others this turns out to be (as in Melcorp).

Konstanz Properties v WM Spilhaus

Notwithstanding these difficulties, the principle developed in Melcorp was confirmed in Konstanz Properties. In that matter, Konstanz commissioned a contractor to install an irrigation system on its farm. The contractor bought the pipes, pumps and other equipment for the farm from Splilhaus, which reserved ownership of the equipment pending the payment of the purchase price in full. Konstanz paid the contractor, but the contractor did not pay Spilhaus. Splihaus claimed the irrigation system back from Konstanz Properties. Konstanz claimed that the irrigation system had acceded to the land. Most of the system was buried underground, and the pumps were housed in permanent brick structures on Konstanz's land.

The Appellate Division held that the intention of the annexor was indeed the paramount consideration, and that had been the effect of its decision in Macdonald. Accordingly, Spilhaus' reservation of ownership was enough to indicate that it never intended the equipment which made up the irrigation systems to accede to Konstanz's land. The irrigation system had not, therefore, actually acceded to the land. The Court expressed some concern that Macdonald might have to be revisited, but held that issue over for another day.

However, the Court held that Spilhaus was estopped from claiming the irrigation system back, because by selling the equipment in the full knowledge that it would be sold in, it represented to any client of the contractor that the equipment was fully alienable. Since Konstanz properties had relied on this representation to its detriment, Spilhaus was estopped from claiming the irrigation system back from it.

Gore NO v Parvatas

Yet another case in which the intention of the annexor has been held to be paramount is Gore v Parvatas. In that matter, Gore was the trustee of a company in liquidation known as FIH. FIH was in the horticulture trade. It leased land from Parvatas, planted bulbs on the land for harvesting of flowers for sale. The lease came to an end and Parvatas claimed that the bulbs had acceded to the land.

Relying on fairly obscure authority, Farlam AJ held that, ordinarily, a plant that takes root on land accedes to it. However, the intention with which a bulb or shrub is planted can change this. In the present case, there could have been no intention on the part of FIH that Parvatas would become owner of the bulbs after the end of the lease, because they formed part of his business concern. Accordingly, possession of the bulbs was given to FIH's trustee, Gore.