

Accession of Movables to Immovables: A Critical Analysis of *USS Graphics (Pty) Ltd v Urban Print Factory (Pty) Ltd* (30921/2019) [2023] ZAGPJHC 1119 (14 February 2023)



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Abstract

This note critically analyses *USS Graphics (Pty) Ltd v Urban Print Factory (Pty) Ltd* (30921/2019) [2023] ZAGPJHC 1119 (14 February 2023). In this case the court had to determine whether a large Mitsubishi printing machine was permanently attached to the building it was housed in. The court held that the machine was not permanently attached to the building even though its removal required the destruction and subsequent reconstruction of at least one wall of the building.

It is argued in this note that the fact that the removal of the machine necessitated the destruction and subsequent reconstruction of the building arguably implies that the machine was permanently attached to the building. However, upon closer critical analysis of this decision and the factors that the court considered to arrive at its decision, it becomes apparent that the court was justified in deciding that the machine was not permanently attached to the building.

The fact that a wall had to be demolished and reconstructed to remove the machine was not an indication of accession but to create an exit space for the machine. The court's decision did not contradict the three factors for determining accession. I conclude in this note that the court was correct in its decision to consider the machine movable.

Keywords

Accession; inaedificatio; movables; immovables; ownership.

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1 Introduction

In *USS Graphics (Pty) Ltd v Urban Print Factory (Pty) Ltd*¹ (hereafter *USS Graphics*) the court held that a large Mitsubishi printing machine was not permanently attached to the building in which it was housed, even though its removal would require the destruction and subsequent reconstruction of at least one wall. This decision seems to contradict accession through *inaedificatio*. According to *inaedificatio*, building materials, pumps, equipment or other movable objects and structures become part of the land if they are permanently attached to it.² Therefore, movable structures that have been permanently attached to land cease to exist as independent things and become part of the immovable object to which they are attached.

Three factors are considered to determine whether an attachment has taken place: the nature of the movable property, the manner of attachment and the intention of the annexor/owner.³ The first two factors are objective factors, while the intention of the annexor is referred to as the subjective factor. If the objective factors indicate that an attachment is inconclusive, the annexor's intention is considered decisive.⁴ For instance, in a case where a movable is built and incorporated into the building to the extent that it cannot be separated without damage to the building or the movable itself, it is an indication that the attachment of the movable to the building was intended to be permanent.

Given the factors above, one could argue that the fact that at least one wall of the building had to be destroyed and reconstructed to move the machine in *USS Graphics* is an indication that the machine was intended to be permanently attached to the building. Hence, one could argue that to decide that the machine was not permanently attached to the building even though its removal would require the destruction and subsequent reconstruction of at least one building wall seems to contradict the principles briefly explained above. For this reason, it is necessary to critically analyse the decision to determine whether the court was justified in deciding that the machine was

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¹ *USS Graphics (Pty) Ltd v Urban Print Factory (Pty) Ltd* (30921/2019) [2023] ZAGPJHC 1119 (14 February 2023) (hereafter *USS Graphics*).

² Muller *et al Silberberg and Schoeman's Law of Property* 166.

³ *Olivier v Haarhof & Company* 1906 TS 497 500.

⁴ *Standard-Vacuum Refining Co v Durban City Council* 1961 2 SA 669 (A) 678 (hereafter *Standard-Vacuum*).

not permanently attached through accession to the building in which it was housed.

2 Facts

The applicants were USS Graphics (USS), Frantic Visual Communication (Pty) Ltd and Omega Art 2000 (Pty) Ltd (Omega) under the directorship of Mr Burger. The respondents were Urban Print Factory (Pty) Ltd (Urban), Ralph Byron Spykerman, and Spykerman Investment Holdings (Pty) Ltd (Holdings).⁵ Urban and Holdings were under the directorship of Mr Spyker. (For clarity I will sometimes refer to both USS and Omega as the applicants and to the respondents as Urban and Holdings.) Omega entered into a written agreement with Holdings to purchase a Mitsubishi printing machine. The acquisition of the machine was to be financed by Absa, but Absa did not consider Omega's credit history to be suitable. As a result, USS stepped in as a purchaser of the machine.⁶ USS paid the necessary monthly instalments to Absa, which fully financed the machine. Absa issued a letter for confirmation that the account had been paid for in full and authorised the licensing authorities to register USS as the title holder. The letter stated that Absa would retain ownership of the machine only if USS failed to pay, and the payment was returned unpaid. Therefore, as USS had purchased the machine and had a letter from Absa authorising any licensing authorities to register USS as a title holder, it claimed ownership of the machine.⁷

After the relationship between USS and Urban broke down, the latter continued to conduct business from the Denver premises owned by Holdings, under a lease agreement. The machine was located at the Denver premises.⁸ USS averred that Urban was using its equipment, which amongst other things included the Mitsubishi machine, for its financial gain.⁹ Urban claimed that the machine had acceded to the immovable property upon which it was situated (the Denver premises). The respondents (Urban and Holdings) further argued that USS had failed to establish that it was the owner of the machine.¹⁰

3 Decision

The court had to address two major issues in its decision regarding the machine. First it had to establish whether USS was the rightful owner of the machine that it had bought on an instalment sale agreement.¹¹ Second it

⁵ *USS Graphics* para 3.

⁶ *USS Graphics* para 7.

⁷ *USS Graphics* para 7.

⁸ *USS Graphics* para 8.

⁹ *USS Graphics* para 8.

¹⁰ *USS Graphics* paras 3, 13.

¹¹ *USS Graphics* paras 9-16.

had to determine whether the machine had become a permanent part of the immovable property on which it was situated. Each of these issues is discussed in turn below.

3.1 Ownership

USS alleged that it was the owner of the machine. It based its action on *rei vindicatio*.¹² Therefore, to recover the machine from Holdings, which retained possession of the machine without USS's consent, USS had to prove the requirements for *rei vindicatio*. In the action based on *rei vindicatio*, the plaintiff had to prove that: it was the owner of the property, the property was in the possession of Holdings, and the property was still in existence and clearly identifiable.¹³ To prove that it was the owner of the machine in question, USS provided the court with a written agreement that it had entered into (in place of Omega) with Holdings to purchase the machine.¹⁴ The purchase had been financed by Absa. Moreover, Absa confirmed that it had financed the acquisition of the Mitsubishi by USS and that all payments had been made in full.¹⁵ It had issued a letter authorising any licensing authority to register USS as a title holder. According to the court, Absa's confirmation letter was sufficient to establish a case for ownership. The respondent's denial that USS was the owner could not succeed.¹⁶ Therefore, since USS was the owner of the Mitsubishi machine, this proved the first requirement for an action based on *rei vindicatio*, namely that the owner must prove ownership. The court did not deal with the last two requirements for *rei vindicatio*, namely that the property was in the possession of Holdings and that it was still in existence and clearly identifiable. These requirements were not in issue, probably because Holdings was still in possession and the machine was still in existence. Nonetheless, the respondents contended that USS was the owner of the machine primarily because it had become the property of Holdings through accession.¹⁷ Accordingly, the court had to decide next whether the Mitsubishi machine had acceded to the Denver premises through accession as argued by the respondents.

3.2 Accession

3.2.1 The objective factors

The court indicated that the *superficies solo cedit* principle applied in this case. According to this principle, where a structure (being movable in

¹² USS Graphics para 9.

¹³ USS Graphics para 10. Also see Muller *et al Silberberg and Schoeman's Law of Property* 269.

¹⁴ USS Graphics para 15.

¹⁵ USS Graphics para 15.

¹⁶ USS Graphics para 16.

¹⁷ USS Graphics para 11.

nature) is permanently attached to land, it accedes to that land and therefore the owner of such land becomes the owner of the structure.¹⁸ If a movable accedes to an immovable, it loses its independent identity and becomes an integral part of the immovable. This results in the owner of the immovable acquiring ownership of the movable through accession.¹⁹ This would therefore mean that Holdings would acquire ownership of the machine if it were found to have acceded to its building. The court also confirmed that three factors are considered when determining whether a movable is attached permanently to land to the extent that it is a part of such land. First, the nature of the thing must be considered. Second, the manner of its attachment should be taken into account and third, the intention of the owner of the movable at the time of its annexation should be examined.²⁰ The first two factors have become known as the objective factors and the third is the subjective factor.²¹

According to the court, the third requirement, namely the intention of the owner of the movable at the time of annexation, is often described as being the most important of the three.²² This requirement is said to be the determining factor if the first two objective factors are inconclusive. The court indicated that these requirements are in fact linked and the significance of the objective factors should not be ignored. Moreover, the objective factors point to what may be called the objective intention and if there is a clear inference of intention from these objective factors, there is no need to consider evidence pointing to a contrary subjective intention.²³

To determine whether the machine was part of the building, the court seems to have relied heavily on the expert opinions of the witnesses called by the applicants and respondents.²⁴ This should be welcomed, since the expert opinions were based mostly on the assessment of the objective factors. According to the court, although this was not a case where the first two requirements pointed unequivocally to a definitive result, the parties agreed that the machine in question was a large and heavy piece of equipment as per expert evidence. Moreover, while it was not easily capable of removal, it was possible to remove the machine.²⁵ As per the expert opinion, it seems that the building had to be altered to accommodate the machine and that the removal of the machine required the destruction and subsequent reconstruction of at least one wall of the building. In fact, the machine would

¹⁸ *USS Graphics* para 17.

¹⁹ *USS Graphics* para 17.

²⁰ *USS Graphics* para 18.

²¹ Van der Walt and Sono 2016 *THRHR* 196.

²² *USS Graphics* para 19. Also see *Standard-Vacuum* 678; Lewis 1979 *SALJ* 98.

²³ *USS Graphics* para 19.

²⁴ *USS Graphics* paras 20.1-20.7, 21.1-21.6.

²⁵ *USS Graphics* para 22.

have to be decommissioned and recommissioned in its new location.²⁶ Moving the machine would involve heavy-duty equipment, including a heavy-duty crane. It seems that all of this would require substantial time and would be expensive but not impossible. Therefore, the evidence before the court was that, even though the Mitsubishi machine was a heavy and large piece of equipment, it could still be removed from the building in which it was currently housed. Moreover, although it could be removed from the building, the removal would require the destruction and subsequent reconstruction of at least one wall of the building.²⁷ As I argued earlier, the fact that the removal of this machine would require the destruction and reconstruction of at least one wall seems to contradict the accession principle (I will turn to this in the commentary section point below).

To help it further determine whether the objective factors pointed to accession, the context of the industry in which the machine was used was considered important by the court.²⁸ The view was that large-format lithographic printers are by nature big, heavy and complex, and they are not treated as immovables in the industry.²⁹ It was not uncommon in the printing industry to move machines such as these and restore buildings, and doing this was considered a standard procedure. Moreover, it was stated that the Mitsubishi machine was not an essential part of the building, but rather an important asset to the business. It appears from this that machines such as the Mitsubishi are not considered permanent fixtures in the context of the printing industry mainly because they are capable of removal.³⁰ It is striking that the court considered the context of the industry instead of focussing on the investigation of the first two objective factors. Arguably, an investigation of whether accession through *inaedificatio* had taken place should not have been dependent on the context of the industry. Courts should rely on the three factors mentioned earlier to determine whether accession through *inaedificatio* has occurred.

Nonetheless, the respondents argued that their expert's report made it clear that the nature of the Mitsubishi and the manner and degree of its attachment indicated that it was not a movable item but had become an integral part of the building.³¹ The court rejected this argument and stated that it did not take sufficient account of the specialised nature of the machine and of the industry in which it was used as per both parties' expert opinions.³² For instance, it was a common practice in the printing industry

²⁶ *USS Graphics* para 22.

²⁷ *USS Graphics* para 22.

²⁸ *USS Graphics* para 23.

²⁹ *USS Graphics* paras 21.4, 23.

³⁰ *USS Graphics* para 23.

³¹ *USS Graphics* para 24.

³² *USS Graphics* para 24.

to decommission machines, remove them and then recommission them, even if this required structural restoration to the buildings in which they were housed.³³ According to the court, it was not significant that structural restoration would be necessary after the machine had been removed. Therefore, despite the Mitsubishi's weight and the effort necessary to move it, the court held that this did not "point unequivocally" to its having acceded to the building.³⁴ This necessitated the consideration of the subjective intention of the annexor.

3.2.2 *The intention of the annexor*

The court indicated that the intention of the annexor of the movable at the time of annexation is often described as the most important of the three.³⁵ According to the court, the intention requirement is the determining factor if the first two objective factors do not point conclusively to accession. The court looked at the intention of Holdings during the installation of the machine. According to the court, Holdings did not indicate what its intention was at the time of the installation of the machine.³⁶ Since Holdings did not indicate what its intention was, it seems - on closer inspection - that the court determined Holding's intention from the intended sale agreement between Omega and Holdings.³⁷

According to the court, an intended sale agreement between Holdings and Omega showed that the former had not intended the machine to become permanently affixed to the building. This was because Holdings was the owner of the building in which the machine was housed. Therefore, if it had been the intention for the Mitsubishi to become a permanent part of the building, Holdings could not have sold it as a separate item.³⁸ A purchaser would have had to acquire the whole building to acquire the Mitsubishi. Moreover, because USS had proved earlier that it had acquired ownership after a sale agreement with Holdings, the court concluded that it never could have been the intention of Holdings to affix the machine permanently to the Denver premises.³⁹

To consider an initial intended sale agreement between Holdings and Omega and the subsequent sale agreement between USS and Holdings to determine the intention of the annexor seems to contradict the court's earlier indication that the objective factors should not be ignored when determining the intention of the annexor. The court indicated that objective factors point

³³ *USS Graphics* para 24.

³⁴ *USS Graphics* para 24.

³⁵ *USS Graphics* para 19.

³⁶ *USS Graphics* para 25.

³⁷ *USS Graphics* para 25.

³⁸ *USS Graphics* para 25.

³⁹ *USS Graphics* para 26.

to what may be called objective intention and if there is a clear inference of intention from these objective factors, there is no need to consider evidence pointing to a contrary subjective intention.⁴⁰ It is interesting that the court did the contrary and did not determine the intention of the annexor from the objective factors. Arguably, determining the intention of the annexor from the sale agreement contract seems prevalent in cases that concern the attachment of movables purchased under a sale agreement containing a reservation of ownership clause. I will deal with this issue in the commentary below.

On the topic of intention, it is interesting that the court considered it "apt" to note the view expressed in *Opperman v Stanley*.⁴¹ In that case the court indicated that matters of accession should be decided with "a liberal sprinkling of common sense, fairness and practicality".⁴² Referring to *Opperman v Stanley*, the court indicated that its application of the principle (presumably of accession) aligned with common sense, fairness and practicality. According to the court, it could not "genuinely" be disputed that USS paid over R4 million to Holdings for the Mitsubishi. Moreover, while Holdings would be affected by the removal of the Mitsubishi, USS has tendered the reasonable costs of removal and restoration.⁴³

The reference to *Opperman* by the court also seems to be part of a continuing trend in cases involving the attachment of movables sold under a sale agreement contract. In these cases courts have always considered policy and fairness to decide that accession has not occurred, particularly where the movables in question can still be removed and if transfer of ownership was subject to full payment under an instalment agreement. Although the courts sometimes consider the issue of policy and fairness and emphasise intention as the most important factor, the objective factors did not point conclusively to accession in those cases.⁴⁴ I will discuss this point further in the commentary below.

4 Commentary

4.1 Ownership

USS argued that it was the owner of the machine and that its claim for relief was vindicatory in nature. An owner may institute the *rei vindicatio* to

⁴⁰ *USS Graphics* para 19.

⁴¹ *Opperman v Stanley* [2010] ZAGPPHC 221 (9 December 2010) (hereafter *Opperman*).

⁴² *USS Graphics* para 29.

⁴³ *USS Graphics* para 29.

⁴⁴ *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 2 SA 986 (T) (hereafter *Unimark Distributors*); *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 3 SA 273 (A) (hereafter *Konstanz Properties*); *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 2 SA 214 (W) (hereafter *Melcorp*).

recover her property from any person who retains possession of such property without the consent of the owner.⁴⁵ This action can be successful only if certain requirements are met, namely that the claimant is the owner of such property, that the property is still in existence, and that the property can be identified clearly.⁴⁶ Therefore, as per the first requirement, it is crucial that the person who institutes the *rei vindicatio* proves on a balance of probabilities that she is indeed the owner.⁴⁷ The nature of the proof depends on the kind of property being claimed. A title deed would serve as *prima facie* proof of ownership if the property in question is immovable.⁴⁸ If the property in question is movable, as was the case here, proof of purchase or an invoice of purchase can serve as proof of title. In the current case, USS had in its possession a letter from Absa, which stated that Absa had financed USS's acquisition of the Mitsubishi and that all payments had been completed in full.⁴⁹ The letter also authorised any licensing authority to register USS as the title holder. This letter was therefore correctly considered sufficient proof of ownership by the court.⁵⁰

According to the court, fulfilment of the requirements that the property must be still in existence and that it should be clearly identified were not in dispute.⁵¹ The Mitsubishi was still in existence and could clearly be identified in this case. The *rei vindicatio* will not be the appropriate remedy if the property no longer exists. If the property in question no longer exists due to damage or destruction, an appropriate claim could be a delictual remedy to compensate the owner for her patrimonial loss.⁵² Further, if the property has become part of a building or land through accession, the owner would lose ownership, and consequently, this would exclude *rei vindicatio*. The reason for this is that, when accession takes place, the owner of the movable loses ownership while the owner of the land becomes the owner of such movable that is permanently attached to her land. Therefore, if accession had occurred in this case, an action based on *rei vindicatio* would fail.

4.2 Accession

4.2.1 The three factors for determining accession

Because it was contended by the respondents that the machine was permanently attached to the building through accession, the court had to determine whether accession had indeed occurred. As indicated above,

⁴⁵ Muller *et al Silberberg and Schoeman's Law of Property* 269.

⁴⁶ Muller *et al Silberberg and Schoeman's Law of Property* 270.

⁴⁷ Pope *et al Principles of the Law of Property* 225.

⁴⁸ Pope *et al Principles of the Law of Property* 225.

⁴⁹ *USS Graphics* para 15.

⁵⁰ *USS Graphics* para 16.

⁵¹ *USS Graphics* para 10.

⁵² Pope *et al Principles of the Law of Property* 222.

there are three factors relevant to the inquiry for determining the accession of movables to immovables. The first two factors point to "objective intention" and when a clear inference can be drawn from them there is no need to consider evidence pointing to a contrary subjective intention.⁵³ This means that in certain instances the objective factors may be conclusive of the intention of the annexor of the movable.⁵⁴ However, as I have indicated above, a closer analysis shows that the court did not determine the intention of the owner of the movable from the objective factors. The court seems to have considered an initially intended sale agreement between Omega and Holdings, and later a sale agreement between USS and Holdings, to determine the intention of the annexor/owner of the movable.⁵⁵ To determine the intention of the annexor in this manner seems to contradict the court's earlier indication that the objective factors should not be ignored when determining the intention of the annexor. However, although the court did not consider the objective intention, it is doubtful if intention as inferred from the objective factors could have indicated otherwise. As I argued earlier, the objective factors do not confirm accession because the machine could still be removed. This is also supported by the expert evidence that the Mitsubishi is a "large and heavy piece of equipment and that while it is not easily capable of removal, this is possible".⁵⁶

Nonetheless, the need to demolish one wall and restore the building where the machine was located raises the question of whether these kinds of machines are considered permanent fixtures of the building in which they are housed. For instance, it was indicated that this machine weighed 98 tons. Considering the machine's weight, one may ask how this decision differs from the *Standard-Vacuum* decision, where the court held that certain tanks were immovable because of their great size and weight upon the land where they were located? Because of such weight and size, it was impossible in the *Standard-Vacuum* case to move the said tanks from their location without their being cut up. The court indicated that cutting up the tanks would have resulted in the loss of their identity. In the present case, it seemed, however, that it was possible to remove the Mitsubishi machine despite its weight and size, although it could not be done with ease.⁵⁷ The removal of the machine would not result in the loss of its identity by being cut apart, as was the case with the tanks in *Standard-Vacuum*. Only the wall needed to be demolished and reconstructed to create an exit space for the

⁵³ *Melcorp 223; Konstanz Properties 276.*

⁵⁴ *Sono Development of the Law Regarding Inaedificatio 59.*

⁵⁵ *USS Graphics paras 25, 26.*

⁵⁶ *USS Graphics para 22.*

⁵⁷ *USS Graphics para 22.*

machine. Moreover, USS also tendered the reasonable costs of the removal and restoration of the said wall.⁵⁸

Therefore, in my view, the objective factors in this case seem to indicate that the machine was not in any way permanently attached to the building. It was, amongst other things, capable of being dismantled and moved despite its weight. In fact, the machine appears to have been only housed inside the building that belonged to Holdings and was not permanently attached to it. Moreover, it was not held down by any bolts.⁵⁹ Uplifting the machine from its location required decommissioning and dismantling it.⁶⁰ As stated by the court, it appeared that a machine of this nature could be "deconstructed, moved and re-built elsewhere".⁶¹ For movable objects to become permanently attached to land through accession, they should cease to exist independently and become part of the immovable object to which they are attached.⁶² The movable objects no longer exist as independent things and therefore are no longer susceptible to ownership independent of ownership of the land.⁶³ This seems not to have been the case regarding the Mitsubishi machine. The machine still existed as a separate entity from the building. Arguably, considering that the machine was still capable of being removed, the fact that at least one wall had to be demolished and reconstructed could not be seen as an indication of accession. The fact that the machine was still capable of being removed necessitated the creation of an exit space by demolishing at least one wall and reconstructing it afterwards.

Therefore, the court's determination of the intention of the owner of the machine from the sale agreement between the parties does not seem to conflict with the objective factors, because neither pointed to accession. In fact, it seems that determining the intention of the owner/annexor from the contract of sale is a continued trend evidenced in earlier case law where movables attached to land were the subject of a sale agreement.⁶⁴ In these cases, the intention of the owner who sold his movables subject to a reservation of ownership clause is deemed most important. Moreover, in these cases courts usually decide that there was no accession to protect

⁵⁸ *USS Graphics* para 29.

⁵⁹ *USS Graphics* para 20.4.

⁶⁰ *USS Graphics* para 20.5.

⁶¹ *USS Graphics* para 21.3.

⁶² Van der Walt and Sono 2016 *THRHR* 198.

⁶³ Van der Merwe "Things" 212; Muller *et al Silberberg and Schoeman's Law of Property* 166.

⁶⁴ *Konstanz Properties; Unimark Distributors; De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd* [2007] ZAFSHC 74 (13 December 2007); *Opperman; Melcorp*.

the interest of the owner of the movables who reserved ownership as security for the full payment of the purchase price.

The cases that emphasise the subjective intention of the owner of the movable have been criticised.⁶⁵ For instance, Freedman argues that emphasis that is placed on the intention of the owner of the movable confuses the rules of property with those of contract.⁶⁶ He argues that emphasising the role of intention undermines the principles of property law because it permits elements of contract law to play an unwarranted role in *inaedificatio* as this has nothing to do with the consensual transfer of property.⁶⁷ According to Carey Miller, it seems that to emphasise intention when determining whether the accession of a movable to an immovable has occurred allows a contractual undertaking to take precedence over proprietary rights that were acquired by the operation of law.⁶⁸ Although the emphasis on intention is criticised, Van der Walt and Sono argue that cases that emphasise the subjective intention of the owner are not necessarily in conflict with the basic principles of property law.⁶⁹ This is because the objective factors were not conclusive of accession in those cases.

Van der Walt and Sono argue that sometimes the courts conclude very easily that the objective factors are inconclusive of accession and emphasise the intention of the owner of the movable. They argue that in cases such as *Melcorp* the manner and degree of the attachment of the lifts in issue might not have been decisive of accession, but their nature and object indicate (objectively) that they were destined to be a permanent part of the building since lifts are an integral part of a building.⁷⁰ According to Van der Walt and Sono, it is in this kind of case that the subjective intention of the owner should not too easily be considered decisive, since the nature and object of the lifts indicate the objective intention to attach the lifts permanently to the building.⁷¹ Nevertheless, in the present case, although the court may have determined the intention of the owner of the machine from the initially intended sale agreement between Omega and Holdings, and later a sale agreement between USS and Holdings, the nature and object of the machine did not indicate that it was intended to be attached permanently to the building. In fact, the nature and object of the machine did not indicate (objectively) that it had become part of the building. Further, as has been indicated above, expert evidence confirmed that this machine

⁶⁵ Knobel 2012 *CILSA* 81; Van Vliet 2002 *Edin LR* 209-212; Freedman 2000 *SALJ* 667-676; Van der Merwe and Pienaar 1999 *ASSAL* 290-293; Maripe 1998 *SALJ* 544-552; Breitenbach 1985 *THRHR* 462-465; Carey Miller 1984 *SALJ* 205-211.

⁶⁶ Freedman 2000 *SALJ* 674.

⁶⁷ Freedman 2000 *SALJ* 674.

⁶⁸ Carey Miller 1984 *SALJ* 207.

⁶⁹ Van der Walt and Sono 2016 *THRHR* 205.

⁷⁰ Van der Walt and Sono 2016 *THRHR* 205, 206.

⁷¹ Van der Walt and Sono 2016 *THRHR* 206.

was not an integral part of the building. Therefore, based on the objective assessment and the intention of the annexure (be it inferred or stated), one could argue that the machine was not permanently attached to the building.

4.2.2 *Consideration of common sense, fairness and practicality*

The court's consideration of the views expressed in *Opperman v Stanley*, that the application of accession principles should align with common sense, fairness, and practicality may seem to be problematic. This is because the consideration of common sense, fairness and practicality seems to be an addition to the three factors used to determine accession. In fact, it seems that the consideration of common sense, fairness and practicality contradict accession through *inaedificatio* as an original mode of acquisition of ownership. The ownership of everything that is attached to the land is acquired by the landowner through attachment, and not on the basis of common sense, fairness and practicality. Attachment to land will for instance often take place without the co-operation of the owner of the movable and common sense, fairness and practicality. The owner of the land should lose ownership of the movable that is permanently attached to the land by operation of law. While the consideration of common sense, fairness and practicality by the court in *USS Graphics* may seem to contradict the principle of accession through *inaedificatio*, it is arguable that the court was justified to consider these factors since there was no accession in this case. Accordingly, this did not conflict with the principles of accession through *inaedificatio* because the machine in question was still removable and did not lose its separate identity. Therefore it is arguable that the court considered common sense, fairness and practicality just to protect the interests of the owner of the machine.

As I have indicated above, the consideration of common sense, fairness and practicality seems to be part of a continuing trend in cases involving the attachment of movables sold under a sale agreement contract.⁷² In these cases, where movables attached to land were subject to a sale agreement, courts usually decide that there was no accession for policy reasons and fairness to protect the interests of the owner of the movables who sold them to the owner of the land. Interestingly, the movables at issue in these cases were still removable from the land as is the case with the machine in issue in *USS Graphics*.

5 Conclusion

In this case note I analyse whether the court was correct in deciding that a large Mitsubishi printing machine was movable although its removal required the destruction and subsequent reconstruction of at least one wall.

⁷² See para 3.2.2 above.

When determining whether the machine was permanently attached to the building through accession, the court correctly considered the three factors that are relied upon to determine whether accession had occurred. The factors are the nature of the thing, the manner of its attachment, and the intention of the owner of the movable at the time of its annexation. The court through expert evidence correctly found that the first two factors (objective factors) did not indicate that the machine was permanently attached to the building. It has been questioned in this note whether the removal of the machine, which required the demolition and subsequent reconstruction of a wall, was an indication of accession according to the first two factors. A closer analysis of this decision indicates that although the machine required demolishing and reconstructing one wall of the building to make it possible to dismantle and move it, this was not an indication that accession had taken place. The wall had to be demolished and reconstructed to create an exit space for the machine, but not to detach it from the building. Therefore, the machine had not been permanently attached to the building according to the objective factors.

Regarding the third factor, which is the intention of the owner of the movable, the court appears to have followed a previous trend in a certain line of case law, which involves determining the intention of the owner of the movable through the intended sale agreement between the parties. Although the court determined the intention of the owner of the machine from the initially intended sale agreement between the parties, the objective factors did not indicate that the machine had been intended to be attached permanently to the building.

In determining whether accession had occurred, the court further considered common sense, fairness and practicality, which as I have argued above, seem to contradict the accession principle.⁷³ Nonetheless, the consideration of common sense, fairness and practicality seems to be part of a continuing trend in cases involving the attachment of movables subject to a sale agreement contract. In these cases courts usually decide that there was no accession for policy reasons and fairness, to protect the interests of the owner of the movables who sold them to the owner of the land. Therefore, as I argue above, the court was justified to consider these factors since no accession had occurred.

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⁷³ See para 4.2.2 above.

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List of Abbreviations

ASSAL	Annual Survey of South African Law
CILSA	Comparative and International Law Journal of Southern Africa
Edin LR	Edinburgh Law Review
SALJ	South African Law Journal
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg