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The Role of the Lessor's Tacit Hypothec and Accession as Common
Law Protection Measures for Landowners in Solar Energy Power
Purchase Agreements

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(Faculty of Engineering and the Built Environment) in partial fulfilment of the requirements
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Abstract

The demand for renewable solar energy in private businesses is becoming a key component in everyday operations given today's energy climate in South Africa. A hurdle in integrating solar energy into a private business is the capital outlay required by the landowner to install the necessary solar infrastructure. The renewable energy industry provides an alternative to private landowners, making the benefits of solar energy available without requiring any capital outlay to fund solar installations. These opportunities for private landowners are typically governed by Power Purchase Agreements (PPAs) between the landowner and the Independent Power Producer (IPP).

The PPA provides the contractual relationship between the landowner and the IPP for the buying and selling of solar energy, respectively. The PPA also outlines the parameters between the landowner and the IPP specific to the site as well as the performance obligations of each party. Problems may arise if the IPP fails to comply with its performance obligations. This dissertation investigates the possibility of applying common law protection measures against the IPP, should the latter fail in specific performance obligations set out in the PPA. The study focuses specifically on two common law protection measures, namely the lessor's tacit hypothec and the law of accession. The study has the following objectives:

1. Determine the legal criteria to rely on the lessor's tacit hypothec and accession respectively;
2. Investigate how the principles of the lessor's tacit hypothec can be utilised as a protection measure for landowners against non-performing IPPs in the context of a PPA; and
3. Investigate to what extent landowners can rely on the law of accession as an alternative protection measure against non-performing IPPs where the lessor's tacit hypothec is not a viable legal option.

Following a multiple case-study approach, PPAs provided by participating IPPs are reviewed to determine to what extent the PPAs address issues relevant to the application of the lessor's tacit hypothec and accession. Furthermore, research participants are interviewed to collect data on the technicalities regarding the method of attachment of the solar infrastructure to the landowner's property as well as the general life span of these solar systems in relation to the PPAs signed by both parties. The study also identifies the challenges in the application of the two protection measures in the context of a PPA. The findings illustrate that the provisions of each PPA must be considered when determining the possibility of applying these protection measures against

the non-performing IPP. Each PPA is project-specific, creating subtle nuances to the PPA. These subtle differences may support or exclude the application of the two protection measures. The dissertation makes recommendations regarding issues that should be addressed in a PPA. It also highlights aspects for future research in this context.

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List of Abbreviations

IPP(s)	Independent Power Producer(s)
PPA(s)	Power Purchase Agreement(s)
kWh	Kilowatt Hour
SMPA	Security by Means of Movable Property Act 57 of 1993

Chapter 1: Introduction

1.1 Introduction

The increased pressure to develop measures to reduce the impact on the environment from anthropogenic causes has sparked rapid growth and development of renewable energy technologies globally.¹ South Africa has enabled the adoption of these technologies by way of legislative changes, which allow for the production of renewable energy by Independent Power Producers (IPPs) in the private sector.² Coupled with the on-going load shedding events and the uncertainty around the future electricity provision from Eskom, landowners have shown increased appetite for renewable energy generation from private suppliers.³ Dealing with private energy supply brings additional considerations for the landowner. The key consideration for landowners to understand is the agreement centred around buying and selling of electricity with the IPP. These agreements are known as Power Purchase Agreements (PPAs). These agreements set out the obligations of the IPP and landowner. The obligations of each party are discussed in more detail in Chapter 2. The importance of these agreements, which forms the focus of this study, is the protection measures created for the landowner. These protection measures fall within the ambit of Property and Common Law. These protection measures are bounded by the principles of accession and the lessor's tacit hypothec, respectively. The focus of the study is to review the contractual relationship between the landowner and the IPP and examine whether either accession or the lessor's tacit hypothec are plausible protection mechanisms against the non-performing IPP. Reference to a non-performing IPP in the context of this study refers to the obligation of the IPP to pay the agreed rental amount to the landowner in turns of the signed lease agreement and associated PPA for the solar infrastructure installed on the landowners property.

There are two general approaches that landowners can adopt to implement embedded solar energy generation. The first approach requires that the landowner provides the necessary capital for the design, construction, and commissioning of the solar infrastructure within a particular area on its premises. With this approach, the landowner owns the solar infrastructure outright.⁴

¹Horowitz, C.A., 2016. Paris agreement. *International Legal Materials*, 55(4), pp.740-755.

²Oberholzer, L. & Pailman, K. 2021. *Energy Laws & Regulations 2022*, Global Legal Insights <<https://www.globallegalinsights.com/practice-areas/energy-laws-and-regulations/south-africa>> (accessed 15-01-2022).

³Beard, J, 2021 "Legislative Leniency toward private power production but at what cost?" *Fluxmans Attorneys* (accessed 12-03-2022).

⁴Baker, L., Burton, J. and Godinho, C., 2015. *The political economy of decarbonisation: Exploring the dynamics of South Africa's electricity sector*. Western Cape Government, 2017. *Understanding the Different Options when Procuring Rooftop Solar PV*

The second approach available to landowners relies on the IPP to provide the working capital to establish the solar infrastructure for embedded generation on the landowner's premises.⁵ It entails the landowner providing space on its premises for an IPP to install solar infrastructure for embedded generation, and to purchase the generated electricity from the IPP. This approach is typically based on two interdependent components or agreements, namely a lease agreement (in terms whereof the landowner rents out a portion of its premises to the IPP) and a Power Purchase Agreement or PPA⁶ (for the landowner to purchase the generated electricity from the IPP). The rationale for opting for this second approach is predominantly due to the landowner not having sufficient liquidity to finance such a project.⁷ The PPA provides a legal basis to structure this partnership and to create a platform of opportunity for landowners to integrate solar infrastructure on their premises without working capital as the key hurdle.⁸ Under such an approach, the IPP recoups the capital by an agreement stipulating that the landowner will purchase the energy generated by the solar infrastructure as payment for the capital investment by the IPP.⁹ The PPA in this regard sets out the particular conditions of the contract between the two parties as well as the predetermined tariffs for the purchasing of the energy over the duration of the contract term.¹⁰

In the PPA, the obligations of each party to the contract are specified. In general, the key obligation of the IPP is to provide the pre-agreed allocation of solar energy stipulated in the PPA to the landowner.¹¹ The landowner in turn is obligated to provide payment for the agreed capacity of solar energy provided by the IPP.¹² The commitment to the PPA from both parties reinforces specific performances that must be realised to fulfil their respective obligations. The PPA therefore stipulates particular conditions and procedures relating to the landowner's and IPP's "event of default" in the case of non-performances with respect to the buying and selling of

<<https://www.westerncape.gov.za/energy-security-game-changer/news/understanding-different-options-when-procuring-rooftop-solar-pv>> (accessed 27-04-2022).

⁵Anonymous, 2021. "Solar Power Purchase Agreements" *Sustainable Capital Finance* <<https://scf.com/solar-ppas/>> (accessed 15-01-2022)

⁶Louw, L. and Bhengu, N., 2012. Navigating Power Purchase Agreements for the African Continent. *Africa Legal Brief Series*.

⁷Cox, M.E, Andican, R., 2021. Understanding the Polar of Solar PPAs <<https://www.facilitiesnet.com/green/article/Understanding-the-Power-of-Solar-PPAs--19295>> (accessed 18-01-2022).

⁸Anonymous, 2022. Sun Power Understanding commercial solar financing options: Power purchase agreement (PPA) <<https://us.sunpower.com/understanding-commercial-solar-financing-options-power-purchase-agreement-ppa>> (accessed 03-02-2022).

⁹National Renewable Energy Laboratory, 2016 *Using Power Purchase Agreements for Solar Deployment in Universities* NREL/BR-6A20-65567.

¹⁰Louw, L. & Bhengu, N. 2021 "Navigating Power Purchase Agreements for the African Continent" (2012) *African Legal Brief Series*; Y Ghiassi-Farokhfal, Y., Ketter, W., Collins, J. "Making green power purchase agreements more predictable and reliable for companies" Elsevier 144.

¹¹Ghiassi-Farokhfal, Y., Ketter, W., Collins, J. 2021 "Making green power purchase agreements more predictable and reliable for companies" Elsevier 144.

¹²Ghiassi-Farokhfal, Y., Ketter, W, Collins, J. 2021 "Making green power purchase agreements more predictable and reliable for companies" Elsevier 144.

energy created by the solar infrastructure.¹³ Under these circumstances when obligations in terms of the PPA are not met, conditions for recourse to deal with these non-performances by either party with specific reference to energy provision and payment thereof by the IPP and landowner, respectively, are detailed in the PPA document.¹⁴

In addition to the energy supply and payment obligations set out in the PPA within the context of embedded generation, one also needs to deliberate on the space required for installation and operation of the solar infrastructure. This is an important element in the dealings between the IPP and the landowner. This element is dealt with under a contract of lease between the landowner and the IPP or provided for in the PPA. The conditions stipulated in the lease provide the foundation for governing the required space needed for the IPP's solar infrastructure and the associated payment thereof.¹⁵ The importance of the lease agreement is to ensure that the area required for the solar infrastructure is clearly stated and the associated rent for this area is also agreed upon. The lease agreement also explicitly states the obligations as well as terms of breach should the respective obligations by both parties not be met.¹⁶ The remedies for breach, as provided for in the lease agreement, is governed by the principles of the Law of Contract.

In addition to breach remedies specifically stated in the contract, the landowner may be able to rely on other legal mechanisms outside of the Law of Contract in the case of non-performance of certain obligations by the IPP. One important protection mechanism relevant to the context of this study is the common law remedy of the lessor's tacit hypothec. This remedy is dealt with in the ambit of Property Law principles and provides the platform to invoke a real security right.

Another principle of the Law of Property (and associated remedies) of interest to this study is accession as an original method of acquisition of ownership. This principle and the application thereof may be determined by the nature and method of the physical installation of the solar infrastructure onto the landowner's property.¹⁷

¹³Draft Power Purchase Agreement between Thezi Langa Proprietary Ltd and Buffalo City Metropolitan Municipality <<https://buffalocity.gov.za/CM/uploads/documents/20201207071594572802PPADraftCopy.pdf>> (accessed 05-02-2022).

¹⁴Draft Power Purchase Agreement between Thezi Langa Proprietary Ltd and Buffalo City Metropolitan Municipality <<https://buffalocity.gov.za/CM/uploads/documents/20201207071594572802PPADraftCopy.pdf>> (accessed 05-02-2022) 53.

¹⁵Bradfield, G., Kahn, E. and Lehmann, K., 2013. *Principles of the law of Sale & Lease*. Juta and Company Ltd. 137.

¹⁶Bradfield, G., Kahn, E. and Lehmann, K., 2013. *Principles of the law of Sale & Lease*. Juta and Company Ltd. 185.

¹⁷Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 171.

The legal mechanisms of the lessor's tacit hypothec, as well as accession of the solar infrastructure to the landowner's property, are governed by the principles of South African Common Law, specifically Property Law. Given the increased activity in renewable solar energy, it is important from the perspective of the landowner to understand whether these two legal mechanisms remain applicable under the circumstance of a PPA with an IPP. The PPA is governed by Contract Law principles, not those of Property Law. This project therefore investigates the application of the lessor's tacit hypothec as a possible protection mechanism for the landowner in the context of the lease terms of the PPA. Should the hypothec not be an available option, the study also investigates the possibility of applying the law of accession in the context of PPAs.

1.2 Background

The following section provides insight into the principles of the PPA with specific emphasis on the respective obligations of the IPP and landowner. This section also explores the obligations of the IPP and the landowner in the context of the PPA with the Common Law principle of the lessor's tacit hypothec and the law of accession. This section is concluded with a discussion of the relationship between these two Common Law principles in the context of the PPA.

1.2.1 Principles of the PPA

The PPA deals with two components. The first component is the supply of energy from the IPP and the payment thereof by the landowner, as illustrated in Table 1 below. The second component deals with the space required to house the solar infrastructure. This space requirement is formalised in terms of a contract of lease between the IPP and the landowner.¹⁸ This contract of lease forms part of the PPA contract document between the landowner and the IPP. In many instances (but not always), this leased space is the rooftop area of the property in question where the energy supply is needed. Much like the PPA terms that details the obligation of the landowner to pay the IPP for the energy generated, the terms of the lease specify additional obligations of the IPP and landowner. In the case of the space required to house the solar system, as illustrated in Table 1 below, the IPP's obligation is to pay a rental amount to the landowner for the required space to accommodate the solar infrastructure and in-turn the landowner is required to grant the IPP uninterrupted use of this space for the rental term.¹⁹

¹⁸ Bradfield, G., Kahn, E. and Lehmann, K., 2013. *Principles of the law of Sale & Lease*. Juta and Company Ltd. 137.

¹⁹ Bradfield, G., Kahn, E. and Lehmann, K., 2013. *Principles of the law of Sale & Lease*. Juta and Company Ltd. 143.

The lease is of particular importance for the landowner as it stipulates elements pertaining to the IPP's right of use, the specific area to be leased, the period of the lease and the rental amount.²⁰ Ancillary conditions such as use restrictions, breach, maintenance, insurance, method of payment and alterations are also important aspects included in the lease.²¹ In the context of the lease agreement and the PPA mentioned above, particular non-performances and the associated remedies available for breaching the terms of the contracts are addressed in terms of the law of contract, which is dealt with within the ambit of the law of obligation.²² However, it is the principles of the Law of Property, with particular reference to the lessor's tacit hypothec and the creation a real security right within the property law framework that is of relevance in the context of this study.

The table below is a summary of the key performance requirements as mentioned above of the IPP and landowner in terms of the PPA and the Agreement of Lease.

Agreement Component	Main obligation of IPP	Main obligation of landowner
PPA	Generate / provide electricity to the landowner	Purchase the IPP's generated electricity
Lease	Pay rental	Provide rented space to the IPP for the solar installation

Table 1: Summary of Key Obligations of the IPP and Landowner in terms of the PPA and Lease Agreement

1.2.2 Real Security: Lessor's Tacit Hypothec

Real security rights, specifically the lessor's tacit hypothec, are realised within the broad property law framework of real and limited real rights.²³ The purpose of this hypothec is to secure the performance of the tenant's obligation to pay the rental amount.²⁴ Should the IPP (as tenant) fail to pay the rental amount to the landowner in terms of the lease, the landowner has a preferential claim to the IPP's corporeal movable property that is present at the leased premises. In this context, such corporeal movable property takes the form of the individual components making

²⁰ Bradfield, G., Kahn, E. and Lehmann, K., 2013. *Principles of the law of Sale & Lease*. Juta and Company Ltd. 137.

²¹ Bradfield, G., Kahn, E. and Lehmann, K., 2013. *Principles of the law of Sale & Lease*. Juta and Company Ltd. 137.

²² Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 8.

²³ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 3.

²⁴ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 4.

up the solar installation. The real security right is said to be accessory in nature.²⁵ One of the key features of real security is the existence of an “accessory relationship between the property right and the underlying obligation”.²⁶ What this means is that a real security right will only come into existence if there is an associated outstanding monetary debt.²⁷ In the circumstance of the lease terms in the PPA, if the IPP meets its rental payment obligation, the real security right over the solar infrastructure (movable property) is automatically terminated.²⁸ In the context of this study, the word lessor and lessee are replaced by landowner and IPP, respectively when applying the lessor’s tacit hypothec as a common law remedy.

The method to create a real security right through applying the lessor’s tacit hypothec as a legal remedy, is achieved through the operation of law.²⁹ The hypothec is implicit in nature as it does not exist as a result of an express agreement between the two parties.³⁰ The hypothec originates as a consequence of the contractual relationship between the IPP and the landowner.³¹ In the context of the lease terms of the PPA, this form of real security right comes into effect as an operation of the Common Law as soon as there is a non-performance of the contractual obligation of the IPP to pay rent for the leased space.³² The importance of the common law hypothec in the context of the PPA is that it has the potential to provide a remedy for the landowner under the operation of law to ensure the IPP complies with their contractual obligation to pay rent. A supporting point to the hypothec is that it cannot be contractually excluded from the agreement.³³

Should the IPP go insolvent while owing outstanding rent to the landowner, the landowner has a preferential claim to the proceeds of the sale of the solar components. The landowner can also strengthen its position in circumstances where rental is outstanding while the IPP is not insolvent. This process is referred to as “perfecting the hypothec” and establishes the real security right in favour of the landowner. It is done by obtaining a court order for the attachment and sale in

²⁵ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 429.

²⁶ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 1.

²⁷ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 314.

²⁸ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman’s the Law of Property* 6 ed (LexisNexis South Africa 2019) 427-429.

²⁹ Brits, R., 2016. *Real Security Law*: Jutas Property Law Library. 350.

³⁰ Brits, R., 2016. *Real Security Law*: Jutas Property Law Library. 436.

³¹ Brits, R., 2016. *Real Security Law*: Jutas Property Law Library. 436.

³² Brits, R., 2016. *Real Security Law*: Jutas Property Law Library. 436.

³³ Brits, R., 2016. *Real Security Law*: Jutas Property Law Library. 436.

execution of the IPPs solar components. The landowner will be entitled to the proceeds of this sale.³⁴

1.2.3 Accession

Another important principle of property law to explore is the legal principle of accession. Accession constitutes an original method of acquisition of ownership.³⁵ Accession is the term given to the process whereby two independent objects are combined for one of the objects to annex to the other, and create a single entity or thing.³⁶ The principle of accession in the context of the PPA between the IPP and the landowner is the attachment of the IPP's solar infrastructure (movable thing), to the building or property of the landowner (immovable object).³⁷ This type of accession is known as *inaedificatio* (building).³⁸ This Property Law principle is an important element to consider in the context of this study. It may provide another avenue for the landowner should the remedy of the lessor's tacit hypothec not be available.

To determine whether accession has taken place in a specific case, certain objective and subjective legal criteria must be considered.³⁹ In the context of the PPA, if these criteria are met and accession has taken place, the solar infrastructure would permanently attach to the immovable property of the landowner. In such as case, the IPP would lose title over the equipment and the solar infrastructure.⁴⁰ These components would then belong to the landowner. The solar infrastructure would therefore lose its independent identity through attachment to the property of the landowner and the attachment would thus enhance the principal object (building). In contrast, under circumstances where the objective and subjective criteria for accession are not met, the solar infrastructure remains movable and the IPP retains ownership thereof. The solar infrastructure would therefore retain its individual title and identity.

³⁴ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 338.

³⁵ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 167.

³⁶ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 170.

³⁷ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 171-175.

³⁸ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 174.

³⁹ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 166.

⁴⁰ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 166.

1.2.4 The Relationship between Lessor’s Tacit Hypothec and Accession

There are several elements within the PPA structure to be investigated before one can determine if the Common Law principles of the lessor’s tacit hypothec or accession are applicable to the relationship between the IPP and the landowner. Coupled with a detailed understanding of the PPA structure, investigating the possibility of applying these mechanisms to the PPA forms the basis for this research project. Furthermore, understanding the relationship between the two Common Law principles is also a critical aspect as the lessor's tacit hypothec and the law of accession are mutually exclusive Common Law principles.

This is important to note as the landowner cannot rely on the use of both principles in the same circumstance as a means of protection against the IPP. The landowner must assess each PPA and associated lease agreement to determine what the appropriate recourse is. The key element to assess in each circumstance is whether the solar infrastructure remains movable or not. Under circumstances where the solar infrastructure is attached in such a way that it is determined to be immovable, accession has occurred, and the lessor’s tacit hypothec is nullified. The invalidity of the lessor’s tacit hypothec is because one (in this case, the landowner) cannot hold a real right of security over their own property.⁴¹ However, under the circumstance where the solar infrastructure is attached in such a way that it is still deemed to be movable, accession has not taken place and the lessor’s tacit hypothec can be used against the IPP to attach the solar infrastructure until the arrear rental is settled.

1.3 Problem Statement

Solar energy embedded generation provided by IPPs is a popular energy provision alternative to the national provider of energy, Eskom. The IPPs offer a particular arrangement that affords landowners the opportunity to integrate solar infrastructure on their property without having to provide the necessary capital outlay. The contractual relationship between the IPP and the landowner is dealt with under a PPA. The general terms of reference within the context of a PPA are that the IPP provides the required energy demand, and the landowner provides the necessary payment for that supply of energy.

⁴¹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 46.

At first glance, the PPA appears to be a simple agreement relating to the supply and purchasing of energy. However, one should consider the associated terms of the PPA relating to the lease of the necessary space (typically belonging to the landowner) to install the solar infrastructure. It raises the question as to the recourse provided by the PPA against the IPP in terms of non-performance of their obligations to pay rent for the leased space. Within the context of the PPA, actions to deal with non-performances are detailed in the agreement, however, these measures fall within the ambit of the Law of Contract. This research examines the protection mechanisms provided by Property Law principles.

The Property Law principles in question are the common law principles of the lessor's tacit hypothec and the law of accession, respectively. These protection measures, created by the operation of law, may provide the landowner with an additional protection mechanism outside of the scope of the PPA. However, there are strict requirements that must be met for these principles to apply to a specific scenario. These protection measures would not be available as a matter of course to all landowners who conclude PPAs with IPPs. Furthermore, these protection measures are mutually exclusive. Where the requirements are met for the landowner to rely on one of these protection measures, reliance on the other would, by implication, be impossible. To consider the hypothec and the law of accession as mechanisms of protection, conditions that trigger the common law remedies must be considered within the parameters of the PPA documentation.

1.4 Research Question

The following research question forms the rationale for undertaking the study:

How can the Common Law principles of the lessor's tacit hypothec and accession be utilised as a protection measure for landowners in the context of a PPA with IPPs?

The main research question is supported by two sub-questions that must be considered in the context of the Common Law mechanisms mentioned above. These questions are as follows:

- a) What are the legal requirements to rely on the lessor's tacit hypothec?
- b) What are the considerations and legal requirements for the landlord to rely on the application of the law of accession?

1.5 Hypothesis

The Common Law remedy of the lessor's tacit hypothec can be used as a means of protection in favour of the landowner within the context of a PPA when the IPP fails to perform the obligation to pay rent with respect to the leased area accommodating the solar infrastructure. Under the circumstance where the landowner cannot apply the lessor's tacit hypothec, the Common Law principles of the law of accession as an original method of acquisition of ownership can be used as an alternative protection measure against the IPP.

1.6 Aims & Objectives

The central research aim is to determine whether landowners can rely on the principles of the lessor's tacit hypothec or the law of accession as mechanisms of protection against a non-performing IPP within the context of a PPA. To achieve the central aim of the research, the study has three specific objectives:

1. Determine the legal criteria to rely on the lessor's tacit hypothec and accession respectively;
2. Investigate how the principles of the lessor's tacit hypothec can be utilised as a protection measure for landowners against non-performing IPPs in the context of a PPA; and
3. Investigate to what extent landowners can rely on the law of accession as an alternative protection measure against non-performing IPPs where the lessor's tacit hypothec is not a viable legal option.

1.7 Research Methodology

The research adopts a qualitative approach. The research design is that of a case study, specifically the multiple-case study variant.⁴² Doing a multiple-case study provides the opportunity to highlight the impacts on landowners (single issue of concern) over multiple case studies to illustrate the application of the relevant legal principles.⁴³

The epistemological approach that is most fitting for the research project is the interpretivist approach. This approach intends to understand meaning and context and the relevant processes

⁴² Creswell, J.W., Hanson, W.E., Clark Plano, V.L. and Morales, A., 2007. Qualitative research designs: Selection and implementation. *The counselling psychologist*, 35(2), 236-264.

⁴³ Creswell, J.W., Hanson, W.E., Clark Plano, V.L. and Morales, A., 2007. Qualitative research designs: Selection and implementation. *The counselling psychologist*, 35(2), 236-264.

from all perspectives and not merely one sided.⁴⁴ Therefore, to understand whether the landowner can rely on the two common law protection mechanisms, one needs to provide context from a legal perspective as to the rationale and possible application of these two protection mechanisms.

The study employs the following research methods:

- a) The first step in the research project is to contextualise the area of study and review applicable sources of law. This is achieved by providing an overview of the South African legal framework pertaining to the law of real security. A key focus area within this legal context is the legal principle of the lessor's tacit hypothec, which creates a real security right for the landowner. Furthermore, the principles of the law of accession as an original method of acquisition of ownership is examined. These common law principles are investigated as potential protection measures for landowners in the context of PPAs. Sources of law are consulted, including legislation, judicial precedent, legal journals, and books. Contract documentation used in PPAs between landlords and IPPs also provide valuable information regarding the practical application of the above-mentioned legal principles.
- b) The second step of the research project investigates the contract (PPA), which establishes the conditions of agreement between the landowner and the IPP. Data is collected through the adoption of a collective case study approach as mentioned above. The nature of the data relates to the clauses within the PPA which supports or undermines the application of the lessor's tacit hypothec and the law of accession. The data is collected through:
 - (i) An examination of the PPA contract documentation relating to the agreement between the landowner and the IPP.
- c) The PPA is analysed to determine whether the IPP considers the application of the lessor's tacit hypothec and/or accession, and whether they take specific steps to negate the application of these protection measures for the landowner.
- d) Conclusions are drawn as to the landowner's ability to rely on the above-mentioned protection measures when considering the applicable legal criteria. Finally, recommendations are made.

⁴⁴ Crowe, S., Cresswell, K., Robertson, A., Huby, G., Avery, A. and Sheikh, A., 2011. The case study approach. *BMC medical research methodology*, 11(1) 1-9.

1.8 Research Scope and Limitations

The research focuses on solar PPAs in the context of embedded generation only – it does not investigate PPAs that relate to other renewable energy projects. Furthermore, the project focuses on PPAs in which the IPP provides the working capital to develop the solar infrastructure on the landowner's property. The sole purpose of this infrastructure is to provide power for the needs of the business within the boundaries of the property in question. This investigation does not include projects established on private land that aims to export or feed power into the national grid.

The research scope is further limited to South African solar energy projects. This limitation is based on the reality that different legal principles apply to different legal jurisdictions. No additional geographical constraints are relevant to this study. The PPAs can therefore be based in any province of South Africa and located in either an urban and/or rural setting.

The limiting factors in the context of the study is the willingness of the IPPs to provide the PPAs as these documents are confidential. The second limitation of the study is the limited number of PPAs obtained that can cause overgeneralisation of the research findings. Again, the number of PPAs the IPPs are willing to provide to this research investigation are limited given the confidentiality issues.

1.9 Structure of the Dissertation

The dissertation consists of five chapters. Chapter 1 introduces the central aim of the research investigation. The introduction explains the context to the research topic by providing background information on the relationship between IPPs and landowners in PPAs. The Chapter sets out the problem statement and associated research question, aims and objectives. It provides a brief discussion of the research methodology, an aspect that will be explained in more detail in Chapter 3. The scope and limitations of the research are also highlighted in Chapter 1.

Chapter 2 consists of a literature review to provide a theoretical and legal framework for the research topic. This review highlights the research undertaken to date and the reason why this research topic is of importance in today's context. The review covers the South African property law principles of the lessor's tacit hypothec and the law of accession. These principles and potential application are explored in the context of PPAs.

Chapter 3 details and substantiates the chosen methodological approach and design. This chapter also explains the process of data collection and analysis.

Chapter 4 focuses on the qualitative analysis and interpretation of the relevant data. It presents the findings as to whether the lessor's tacit hypothec and accession are potential protection measures for landowners against non-performing IPPs within the context of PPAs.

Chapter 5 highlights the central research aim and determines whether the research hypotheses were proven or not in the investigation. The chapter details the final outcomes and provides an overall summary and proposed way forward in respect of the two common law protection measures in the context of PPAs identified in the study. The dissertation concludes with recommendations for future study.

Chapter 2: Literature Review

2.1 Introduction

As mentioned in chapter 1, the PPA between the landowner and IPP deals with three key aspects, namely the solar infrastructure, the space required for the installation of the solar infrastructure and the supply of energy. This study only focuses on the first two aspects relating to the solar infrastructure and the area which houses the solar infrastructure. Under certain conditions, these two aspects can trigger the application of two Common Law protection measures, available to the landowner, which exist outside the provisions of the PPA. These protection measures are the lessor's tacit hypothec and the law of accession. The aim of this study is to therefore investigate the plausibility of applying both Common Law protection measures in the context of Property Law Principles to PPAs. This study determines which protection measure is available to the landowner when there is non-performance of obligations by the IPP in terms of the PPA between both parties.

This chapter starts with a brief discussion of PPAs. It explains the framework and practical use of PPAs in the South African market. The discussion also highlights the specific context within which the PPA is analysed in this study. Before dealing with the two common law protection measures, a discussion around the details of the PPA is needed to ensure the associated conditions are understood in the context of the study.

Thereafter, the chapter deals with the development of the lessor's tacit hypothec and the security the Common Law creates for the landowner when following due process under circumstances of non-performance by the IPP. A section within the chapter discusses the aspect of debt which is a key component to applying the hypothec. The chapter provides further clarity on the application of the hypothec to third party property which is a likely element to deal with in the context of PPAs. The final consideration discussed is the operation of the hypothec and procedural method to secure the common law over the IPPs movable property.

The final part to this chapter focuses on the law of accession as an alternative method of protection for the landowner. It provides a discussion of the implications the two protection measures have on one another and the fact that there is mutual exclusivity. The chapter further explains the requirements for accession to take place and the relevant judicial precedent around the Common Law protection measure available to the landowner. An important aspect included is a discussion around the implications of accession for the installation of the solar infrastructure.

Thus, understanding the history of the lessor's tacit hypothec in the context of creating a security right over movable corporeal property of the IPP (tenant), is important for landowners operating in the renewable energy environment. Similarly, grasping the application of the law of accession will guide the landowner in knowing the available protection measure. The chapter concludes by highlighting the key aspects of each Common Law protection measure available to the landowner in the context of PPAs.

2.2 Power Purchase Agreements

PPAs govern a significant amount of private renewable energy projects today given the developments in technology and ever decreasing costs of the renewable energy infrastructure.⁴⁵ Although there is a decrease in costs, the capital outlay on renewable energy projects is significant, so much so that more than 60% of commercial solar projects are financed through the PPA mechanism.⁴⁶ IPPs not only provide energy to the national power utility Eskom,⁴⁷ but also have the scope to provide energy to the private sector in the form of wheeling or embedded generation.⁴⁸ Wheeling refers to the utilisation of the national grid to transmit energy from an energy production facility to the end-user.⁴⁹ Embedded generation differs to wheeling in that the generation of energy is produced onsite for the purpose of providing that specific site with definitive energy requirements.⁵⁰ The embedded generation option by IPPs has sparked increased attention in the private sector with specific emphasis on solar energy infrastructure provision in the business context.⁵¹ Embedded generation with the focus on rooftop solar PPAs forms the area of interest in this study.

A Power Purchase Agreement is a form of contract used by any entity (this study deals with landowners) which allows them to construct a formal agreement with renewable energy producing companies (IPPs).⁵² The PPA comprises two primary parties, namely the off-taker

⁴⁵ Jain, S., 2022. *Exploring structures of power purchase agreements towards supplying 24x7 variable renewable electricity*. Energy, 244, p.122609.

⁴⁶ Park, R., 2009. The power purchase agreement (PPA for solar). *Energy Project Financing: Resources and Strategies for Success*, 93; Davidson, C., Steinberg, D. and Margolis, R., 2015. Exploring the market for third party-owned residential photovoltaic systems: insights from lease and power-purchase agreement contract structures and costs in California. *Environmental Research Letters*, 10(2), p.024006.

⁴⁷ Jain, S. and Jain, P.K., 2017. The rise of renewable energy implementation in South Africa. *Energy Procedia*, 143, pp.721-726; Nel, D., 2015. Risks and barriers in renewable energy development in South Africa through independent power production.

⁴⁸ Baker, L., Burton, J. and Godinho, C., 2015. The political economy of decarbonisation: Exploring the dynamics of South Africa's electricity sector.

⁴⁹ Baker, L., Burton, J. and Godinho, C., 2015. The political economy of decarbonisation: Exploring the dynamics of South Africa's electricity sector. 42.

⁵⁰ Baker, L., Burton, J. and Godinho, C., 2015. The political economy of decarbonisation: Exploring the dynamics of South Africa's electricity sector. 33.

⁵¹ Beard, J., 2021. Legislative leniency toward private power production but at what cost? Fluxmans Attorneys. <<https://www.golegal.co.za/legislative-power-production/>> (accessed 19-01-2022).

⁵² Leung, J. and Bailey, A., 2018. How cities benefit from power purchase agreements. Center for Climate and Energy Solutions. Retrieved from <https://www.c2es.org/site/assets/uploads/2018/09/how-cities-benefit-from-ppas> (accessed 21-01-2022).

(landowner) and the IPP. The PPA is governed by the principles of the Law of Contract. Each PPA creates legally binding obligations for the landowner as well as the IPP. Three key aspects are covered by a PPA, namely the volume of electricity required (demand), the price for the electricity provided to the landowner and lastly the duration of the contract.⁵³ The landowner and IPP negotiate these terms as well as the remaining conditions of the contract.⁵⁴

The key driving factor for landowners to explore the PPA avenue is because there is no capital outlay required at any point in time over the PPA.⁵⁵ Further benefits for the landowner include knowing exactly what the electricity tariff (i.e. the kWh cost for energy generated by the system)⁵⁶ will be over the duration of the PPA (15 to 20 years) and knowing that the operational and maintenance component of the solar system is managed solely by the IPP.⁵⁷ In summary, when contracting with an IPP using a PPA, the landowner provides no upfront capital, takes no risk on the performance⁵⁸ of the system and whether it generates the agreed demand or not, requires no expertise in solar renewable energy and the maintenance thereof, and lastly does not need to purchase the system at any point in time.⁵⁹

The above discussion provides the necessary background and context to explore the application of the principles of the lessor's tacit hypothec and accession to the relationship between the landowner and the IPP. This exploration starts with a discussion of the historical development of real security, in general, and the hypothec specifically.

2.3 Historical Development of Real Security and the Hypothec

The idea of real security was developed in the time of ancient Rome as a result of the multiple relationships based on fidelity or trustworthiness.⁶⁰ A large number of transactions were based on credit as a derivative of the loyal nature of persons during this time. These deals were usually concluded verbally by "*stipulatio*".⁶¹ *Stipulatio* is a form of contract dealing with a simple question and answer format⁶² and meant that the verbal contract between the parties pledged the

⁵³ Leung, J. and Bailey, A., 2018. How cities benefit from power purchase agreements. Center for Climate and Energy Solutions. Retrieved from <https://www.c2es.org/site/assets/uploads/2018/09/how-cities-benefit-from-ppas>.

⁵⁴ Leung, J. and Bailey, A., 2018. How cities benefit from power purchase agreements. Center for Climate and Energy Solutions. Retrieved from <https://www.c2es.org/site/assets/uploads/2018/09/how-cities-benefit-from-ppas>.

⁵⁵ Park, R., 2009. The power purchase agreement (PC for solar). *Energy Project Financing: Resources and Strategies for Success*, 93.

⁵⁶ Davidson, C., Steinberg, D. and Margolis, R., 2015. Exploring the market for third party-owned residential photovoltaic systems: insights from lease and power-purchase agreement contract structures and costs in California. *Environmental Research Letters*, 10(2), p.024006.

⁵⁷ Park, R., 2009. The power purchase agreement (PC for solar). *Energy Project Financing: Resources and Strategies for Success*, 93.

⁵⁸ Prapanukool, C. and Chaitusaney, S., 2020. Designing solar power purchase agreement of rooftop pvs with battery energy storage systems under the behind-the-meter scheme. *Energies*, 13(17), 4438.

⁵⁹ Park, R., 2009. The power purchase agreement (PC for solar). *Energy Project Financing: Resources and Strategies for Success*, 94.

⁶⁰ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp.155-167.

⁶¹ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp.155-167.

⁶² Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 155 -167.

guarantor to fulfil the debtor's agreement to the creditor if this could not be fulfilled by the debtor himself.⁶³ Three forms of known security existed in ancient Rome. These are *fiducia*, *pignus* and *hypotheca*,⁶⁴ some of which are similar in nature to the real securities in the South African legal system today. *Fiducia* was a form of security upon which ownership of the thing was transferred to the creditor, while *Pignus* was a form of security much like express security in today's legal system, where possession is passed to the creditor but ownership remains with the debtor.⁶⁵ The last form of security was that of *hypotheca*, which allows the creditor to take possession of the thing, but the object is not physically handed over to the creditor.⁶⁶ This form of security is the focus of this study and forms the basis of the discussion moving forward.

The first appearance of the hypothec and the changes in the scope of securities which advocated the hypothec was observed when society required a right to an object without possession or ownership passing to the security holder.⁶⁷ The circumstance in which this developed was at the time when owners of land looked to lease land to a tenant for agricultural purposes. The owner required a performance from the tenant in the form of rent for the land, but this rent could only be paid once the harvest was completed and the rent paid from the proceeds received from crop sales.⁶⁸ The landowner therefore required security from the tenant until the proceeds of the harvest are received and the debt can be paid. This security came in the form of cattle, slaves, and farming implements. In this circumstance, a means of security in the form of *Fiducia* and *Pignus* mentioned above would not be suitable as it would leave the farmer with no means to farm the land. This particular circumstance led to the introduction of the rural hypothec.⁶⁹ This hypothec was determined by special agreement between the two parties, which allowed the landowner to take the pledged movable property of the tenant (farmer) along with the harvest if the tenant failed to pay rent.⁷⁰ This created a scenario that allowed the landowner to acquire a right in the property of the tenant. This form of agreement meant that the pledge would come into existence sometime in the future if the obligation to pay rent for the land was not fulfilled.⁷¹

The principle of the pledge, once accepted under these circumstances, was later extended to the urban context in which the tenant's corporeal movable property and/or goods brought onto the

⁶³ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 155 -167.

⁶⁴ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 155.

⁶⁵ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 156.

⁶⁶ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 156.

⁶⁷ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 157.

⁶⁸ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 157.

⁶⁹ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 157.

⁷⁰ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 157.

⁷¹ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 157.

leased premises (*invecta et illata*) would form the subject matter of security.⁷² The security therefore relates to movable property brought onto the leased premises only. This aspect is discussed in more detail in section 2.4.2 below.

Similar to the rural context, the hypothec in the urban context was also created by agreement and nothing tacit in nature existed at this time. After many years of continual inclusion of the lessor's right in the movable property of another (*ius in re aliena*) in the agreements in the rural setting and the tenant's movable property brought into a premises (*invecta et illata*) in the urban context, the security objects in both cases had become so common that it was said to be tacitly included in agreements.⁷³ In the second and third century AD it was determined that the landowner's right in respect of the hypothec no longer arose by agreement, but rather by operation of law.⁷⁴ The only tacit hypothec in existence under today's Common Law is the lessor's tacit hypothec.⁷⁵ The lessor's tacit hypothec stemmed from Roman law; where it was further developed in Roman-Dutch law and then accepted into the modern South African legal system.⁷⁶

In today's South African legal system, the lessor's tacit hypothec is governed by principles of Property Law. Applying this Common Law remedy creates the opportunity where the landowner has a preferential claim over the movable property of another while there is an outstanding monetary debt. Creating the preferential claim over the movable property of another creates the real security right in favour of the landowner. This real security right allows the landowner to sell the movable property and use the proceeds to settle outstanding debt.⁷⁷ One of the key features of real securities is the existence of an "accessory relationship between the property right and the underlying debt".⁷⁸ The purpose of a real security is realised within the broad property law framework of real and limited real rights.⁷⁹ Real security rights are similar to other limited real rights from the perspective that they constitute rights in the property of another (*iura in re aliena*).⁸⁰ The benefit of the real security right in the property of the debtor from the creditor's view is that the right is enforceable against the whole world and prevents the debtor from

⁷² Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 158.

⁷³ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 159.

⁷⁴ Van den Bergh, R., 2009. The development of the lessor's hypothec. *Fundamina: A Journal of Legal History*, 15(1), pp. 159.

⁷⁵ Brits, R. Real Security Law: Jutas Property Law Library, 2016, 435.

⁷⁶ Brits, R. Real Security Law: Jutas Property Law Library, 2016, 436.

⁷⁷ Brits, R. Real Security Law: Jutas Property Law Library, 2016, 1.

⁷⁸ Brits, R. Real Security Law: Jutas Property Law Library, 2016, 1.

⁷⁹ Brits, R. Real Security Law: Jutas Property Law Library, 2016, 3.

⁸⁰ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 313.

alienating the asset without the consent of the creditor.⁸¹ A key element of the real security right which differs from the traditional limited real rights in property is that the right is said to be accessory in nature.⁸² This means that the real security right in the property of the debtor only endures if the existence of the underlying principle debt is still valid.⁸³

Real security rights are divided into three categories, namely, express real securities, tacit real securities and judicial securities.⁸⁴ The primary difference between each of the categories of real security rights is the method by which they are created. This research focuses on the second category – tacit real security rights. As explained above⁸⁵, these rights are created by operation of law and not by explicit agreement between the debtor and creditor. The lessor's tacit hypothec is an example of a tacit real security right.⁸⁶

2.4 The Lessor's Tacit Hypothec

The lessor's tacit hypothec is a common law remedy available to the landowner in the context of lease.⁸⁷ This remedy relates specifically to the tenant's movable property that is brought onto the landowner's premises by the lessee.⁸⁸ The hypothec originates directly from the contractual relationship between the landowner and the tenant.⁸⁹ However, the lessor's hypothec is implicit in nature, as it does not exist as a result of an express term in the agreement between the landowner and tenant.⁹⁰ The hypothec as a form of security is triggered implicitly as soon as the tenant of the leased premises defaults on their obligation to pay rent to the landowner.⁹¹ The landowner's rights in terms of the hypothec is terminated as soon as the tenant's debt obligation is fulfilled.⁹² When the hypothec comes into existence (i.e. when the tenant fails to pay the rental timeously), it does not yet constitute a real security right. At this stage, the hypothec only provides a preferential claim to the landowner should the tenant be declared insolvent. For the

⁸¹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 3.

⁸² Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 314; Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Real Security Silberberg and Schoemans the Law of Property* 6 ed (LexisNexis South Africa 2019) 429

⁸³ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 314

⁸⁴ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 427.

⁸⁵ Section 2.3 of Chapter 2.

⁸⁶ Brits, R. *Real Security Law: Jutas Property Law Library*, 2016, 350.

⁸⁷ Section 2.4 of Chapter 2.

⁸⁸ Brits, R. *Real Security Law: Jutas Property Law Library*, 2016, 436.

⁸⁹ Brits, R. *Real Security Law: Jutas Property Law Library*, 2016, 436.

⁹⁰ Brits, R. *Real Security Law: Jutas Property Law Library*, 2016, 436.

⁹¹ Brits, R. *Real Security Law: Jutas Property Law Library*, 2016, 436.

⁹² Brits, R. *Real Security Law: Jutas Property Law Library*, 2016, 436.

real security right to be created, the landowner must perfect the hypothec. This is achieved by obtaining a court order. The court order allows the landowner to attach the movable property of the tenant that is present at the rented premises and prevents the tenant from removing such movables from the premises to escape the hypothec.⁹³

Part of this study examines the common law remedy of the lessor's tacit hypothec in the context of a lease agreement concluded as part of a PPA. To determine whether the lessor's tacit hypothec is a potential mechanism to be used in favour of the landowner against the non-performance of the lessee to pay rent in the context of a PPA, further investigations are necessary. Before the operation of the hypothec can be discussed, two relevant issues must be examined, namely, the debt and the property that is subject to the hypothec.

2.4.1 The Debt

The main function of the hypothec is to secure payment of the outstanding debt obligation from the tenant with respect to the agreed rental amount to the landowner. As a principle of real securities, the hypothec only remains in existence while the debt is outstanding. The key element is that the hypothec covers the tenant's obligation to fulfil a performance, namely, to pay the outstanding rental amount, as stipulated in the lease agreement.⁹⁴

There has been much debate regarding whether the hypothec secures obligations other than the payment of rent.⁹⁵ Judicial outcomes in certain cases have included obligations outside of the tenant's rental obligation under the scope of the hypothec.⁹⁶ These obligations were still monetary obligations in terms of the contract.

In the case of *Isaacs v Hart & Henochsberg*,⁹⁷ it was maintained that the hypothec extends to obligations over and above the payment of rent. In this particular case, the hypothec extended to the obligation to pay the municipal rates of the leased premises⁹⁸ as well as compensation for damages incurred by the tenant during the lease term. The implementation of the hypothec in this particular instance was valid as the tenant contractually bound himself to pay the respective

⁹³ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 338.

⁹⁴ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 437.

⁹⁵ Brits, R. and Boraine, A., 2022. *The nature and extent of the landlord's tacit hypothec in insolvency law as differentiated from the position under common law*. *Journal for Juridical Science*, 47(1), 27-51.

⁹⁶ *Isaacs v Hart & Henochsberg* (1887) 8 NLR 18.

⁹⁷ *Isaacs v Hart & Henochsberg* (1887) 8 NLR 18.

⁹⁸ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 438.

amounts.⁹⁹ Obligations outside of the contractual requirement to pay rent under the application of the lessor's tacit hypothec are not investigated in this study.

However, not all judicial proceedings matched the outcome of *Isaacs v Hart & Henochsberg*.¹⁰⁰ In the case of *Woodrow & Co v Rothman*¹⁰¹ it was concluded that the hypothec would not extend any further than the obligation to pay rent.¹⁰² This judicial outcome was supported in *New Life Communal Property Association v Draigri Boerdery Bpk*,¹⁰³ where the court also found the hypothec to secure only the amount of rental in arrears.¹⁰⁴ The outcome of these judgements is supported by the legal authors of Wille and Cooper¹⁰⁵, who both confirmed that the hypothec only covers that of rental amounts in arrears.¹⁰⁶ The two authors also mentioned that as a result of the continual disuse of the hypothec in South Africa, any obligation between the landowner and tenant outside of the obligation to pay rent with respect to a lease agreement has been repealed.¹⁰⁷ To further conclude the scope of the hypothec, the Insolvency Act also provides no reparation other than the cover of rent,¹⁰⁸ while the Magistrates Court Act 32 of 1994 also only provides cover for claims over rent.¹⁰⁹

This view on the scope of the hypothec is challenged by Kerr who argues that the hypothec should extend to further obligations other than just the payment of rent if the lessee has contracted such responsibilities.¹¹⁰ In *Solgas (Pty) Ltd v Tang Delta Properties CC*,¹¹¹ the court considered previous court outcomes on the scope of the hypothec. Instead of continuing with the status quo, the court agreed with the view of Kerr and ruled that the hypothec covers more than the obligation to pay rent.¹¹² Given the lack of consensus on whether or not the hypothec covers more than the obligation to pay rent, the most reliable assessment to consider in this regard would be that the hypothec covers all obligations stipulated in the lease agreement between the lessor (landowner) and lessee (tenant).¹¹³ The obligations, however, need to be of a kind that can be reduced to a

⁹⁹ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 438.

¹⁰⁰ *Isaacs v Hart & Henochsberg* (1887) 8 NLR 18.

¹⁰¹ *Woodrow & Co v Rothman* (1884) 4 EDC 9.

¹⁰² Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 438.

¹⁰³ *New Life Communal Property Association v Draigri Boerdery Bpk* (1616/2007) [2007] ZAECHC 101.

¹⁰⁴ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library 439.

¹⁰⁵ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 521.

¹⁰⁶ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library 438.

¹⁰⁷ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library; Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM, *Limited Real Rights Flowing From Leases Silberberg and Schoemans the Law of Property 6 ed* (LexisNexis South Africa 2022) 521.

¹⁰⁸ Section 85(2) of the Insolvency Act 24 of 1936.

¹⁰⁹ Section 31 & 32 of the Magistrates Court Act 32 of 1994.

¹¹⁰ Kerr, A.J., 2004. *The law of sale and lease*. 3rd ed (LexisNexis Butterworths) 390-392.

¹¹¹ *Solgas (Pty) Ltd v Tang Delta Properties CC* (11388/2015) [2016] ZAGPJHC 158 (20 April 2016).

¹¹² Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 439.

¹¹³ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 439.

monetary value in order for the hypothec to be triggered in the event of an outstanding monetary debt.¹¹⁴

Considering the commentary above, it can be argued that monetary obligations of the lessee (tenant) outside of the obligation to pay rent in terms of the lease agreement with the landowner can be subject to the scope of the lessor's tacit hypothec. These terms must, however, be able to be reduced to a monetary value. Therefore, the hypothec does not cover the performance obligation of the IPP to supply energy in terms of the PPA.

2.4.2 Property subject to the Hypothec

The next point of discussion is to determine which property can be legally hypothecated. As mentioned earlier, the hypothec covers all the objects and things brought onto the leased premises.¹¹⁵ This only extends to corporeal movable objects as these objects are physically brought onto the premises.¹¹⁶ Corporeal objects refer to objects that are tangible and can be perceived by the human senses, which are not limited to furniture, appliances etc.¹¹⁷ Corporeal objects also include the fruits of the property which the lessee is entitled to as well as potential improvements that the lessee would be entitled to remove.¹¹⁸ The key requirement for property to be subject to the hypothec is that the objects must have been brought onto the leased property with the intent to remain there permanently or at least be there for an indefinite period of time for the use and enjoyment of the tenant.¹¹⁹

In the case of the PPA, the IPP's corporeal movable objects that can potentially be legally hypothecated are the solar panels, inverters, cabling, walkways, etc. These are the tangible objects that are physically brought onto the premises by the IPP with the intention to leave these movable objects on the premises for the duration of the PPA.

The application of the hypothec to property belonging to third parties should also be examined. In principle, the application of the lessor's tacit hypothec can extend to movable property of third parties which are found on the premises of the lessor (landowner). However, certain statutory and common law principles must be considered to determine the application of the hypothec to

¹¹⁴ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 440.

¹¹⁵ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 441.

¹¹⁶ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 338.

¹¹⁷ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 34.

¹¹⁸ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 521.

¹¹⁹ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 442.

third-party movable property. This is of relevance to the research investigation as instances exist where the solar infrastructure is not owned outright by the IPP. There are instances where the IPP acquires third-party finance to fund the capital outlay. Only when the loan amount is paid back in full to the third-party funder, will the IPP be the owner of the infrastructure. Until such a time, ownership of the solar infrastructure will vest in the funder.

One needs to consider the effect of the Security by Means of Movable Property Act¹²⁰ (SMPA) when determining the preference of hypothec under specific circumstances. The SMPA¹²¹ provides for the exclusion of certain third-party property from the application of the hypothec. The first exclusion category relates to movable property that is subject to a special notarial bond. The second exclusion category refers to movable property that was purchased under an instalment sale agreement,¹²² as defined in the Credit Agreements Act.¹²³ The Insolvency Act¹²⁴ notes that property subject to an instalment agreement is protected by an instalment-agreement hypothec. This particular aspect is relevant in terms of applying the lessor's tacit hypothec over the tenant's corporeal movable property. If certain components of the solar system are subject to a credit-instalment agreement between the IPP and the wholesaler, then the lessor's tacit hypothec cannot be applied over this piece of equipment. In the case that none of the equipment is subject to a credit-instalment agreement, then the IPP's movable property can be subject to the attachment in terms of the hypothec.

Third-party movable property that is not excluded by the abovementioned legislation may be subject to the lessor's tacit hypothec if it meets the requirements set out in Common Law. Under Common Law, the application of the lessor's tacit hypothec is based on two grounds, namely implied consent, or the doctrine of estoppel.¹²⁵ However, the application of the hypothec to third-party property is only permitted if the lessee's movable property is insufficient to secure the lessor's (landowner) claim of rental in arrears.¹²⁶ The grounds for implied consent and the doctrine of estoppel are discussed below.

¹²⁰ Act 57 of 1993.

¹²¹ Act 57 of 1993, s 2(1).

¹²² Act 57 of 1993, s 2(1)(b).

¹²³ Act 75 of 1980.

¹²⁴ Act 24 of 1936, s 84.

¹²⁵ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546.

¹²⁶ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546.

2.4.2.1 Implied Consent of a Third-Party Owner

The application of the lessor's tacit hypothec to third-party property was accepted in the South African legal context in the case of *Bloemfontein Municipality v Jacksons Ltd*.¹²⁷ The decision to extend the hypothec to third-party property and the validity to do so must be in light of the following context, as stated in the judgment:

*“When goods belonging to a third party are brought onto the leased premises with the knowledge and consent, express or implied, of the owner of the goods, and with the intention that they shall remain there indefinitely for the use of the tenant, and the owner, being in a position to give notice of his ownership to the landowner fails to do so, and the landowner is unaware that the goods do not belong to the tenant, the owner will thereby be taken to have consented to the goods being subject to the lessor's tacit hypothec and liable to attachment.”*¹²⁸

This extension of the hypothec to third-party property is explicit in that if the third party is fully aware that their objects or items are on leased premises and fail to notify the landowner of their ownership of these items before the judicial attachment, the objects are subject to the application of the hypothec.¹²⁹ In the case of *TR Services (Pty) Ltd v Poynton's Corner Ltd*,¹³⁰ the judge used the judicial precedent of *Bloemfontein Municipality v Jackson Ltd*¹³¹ and set out four requirements to determine the validity of implied consent by the third party in the context of hypothecs.¹³² The four requirements are:

- i. The third party's movable property is present on the leased premises with this party's knowledge and consent;
- ii. Before judicial attachment takes place, the lessor (landowner) is unaware that the third-party movable property belongs to someone other than the lessee (tenant);
- iii. The third party's movable property is present on the leased premises with some degree of permanence, i.e. not a mere temporary presence; and
- iv. The said movable property is intended for use by the lessee (tenant).¹³³

¹²⁷ *Bloemfontein Municipality v Jacksons* 1929 AD 266 at 271, Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546.

¹²⁸ *Bloemfontein Municipality v Jackson Ltd* 1929 AD 266 at 271. Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 456; Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 521.

¹²⁹ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546.

¹³⁰ *TR Services (Pty) Ltd v Poynton's Corner Ltd* 9 1961 (1) SA773 (N).

¹³¹ *Bloemfontein Municipality v Jackson Ltd* 1929 AD 266 at 271.

¹³² Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 521.

¹³³ *Bloemfontein Municipality v Jackson Ltd* 1929 AD 266 at 271; Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 521.

With respect to the first requirement mentioned above, prior to the judgment in *Bloemfontein Municipality v Jackson Ltd*,¹³⁴ the courts held that the tacit hypothec could only extend to the movable property of third parties if the third party had prior knowledge that their property was being housed on leased land.¹³⁵ This approach was followed in *Heugh's Trustee v Heydenrych*.¹³⁶ In this case, the tenant moved furniture to a new premises and the owner of the furniture was not aware of the move. The judge reasoned that this furniture could not be under the scope of the hypothec because the third-party owner of the furniture was unaware of the removal from the existing premises to a new premises and, therefore, could not give notice of ownership to the new lessor.¹³⁷ It was held that the original notification to the existing landowner was sufficient evidence to note that there was no consent from the owner of the movable property.¹³⁸

The requirement stipulated above in this case is to prove that the third-party owner of the solar equipment brought onto the premises by the IPP, was fully aware the area housing the solar infrastructure is leased area. If the third-party owner is aware and willingly allowed the IPP to continue placing the equipment on the leased area, the movable corporeal property is open to the application of the hypothec. The challenge at this particular stage is finding coherent evidence that the third-party owner has knowledge of the leased property.

Contrary to the outcome in *Heugh's Trustee v Heydenrych*,¹³⁹ in the case of *Fresh Meat Supply Co v Standard Trading Co*,¹⁴⁰ the judge concluded that the third-party property (electric appliances) was subject to the lessor's tacit hypothec. The case related to electrical appliances that were bought from a retailer under an instalment sale agreement. This instalment sale agreement stated that the particulars of any new address of the purchaser must be disclosed if the purchaser decides to move from their current premises. The agreement however failed to state whether the purchaser was living on rental land or not. The court deduced that the respondent (the seller of the electric appliances) had not taken reasonable measures to ensure the protection of their property and, therefore, their movable property was subjected to the hypothec.¹⁴¹ Even though the respondent's instalment sale agreement required the purchaser to disclose their new address when moving, this was seen as insufficient measures from the respondent, thereby

¹³⁴ *Bloemfontein Municipality v Jackson Ltd* 1929 AD 266 at 271.

¹³⁵ Van Derwalt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546.

¹³⁶ *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 at 320.

¹³⁷ *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 at 320; Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 463.

¹³⁸ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library. 463.

¹³⁹ *Heugh's Trustee v Heydenrych* (1895) 12 SC 318 at 320.

¹⁴⁰ *Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd* 1933 CPD 550 567.

¹⁴¹ *Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd* 1933 CPD 550-567.

creating the impression that they have implicitly consented to the property being subject to the lessor's tacit hypothec.¹⁴²

The key point to consider is whether the movable property under an instalment agreement is housed on leased land or not. If on leased land, the purchaser is a tenant on the property and therefore permits the landowner to apply the hypothec over the tenant's movable property if rental payments are in arrears. This is applicable in the case of PPAs. The IPP may have select equipment subject to an instalment sale agreement where the seller of this equipment has not taken reasonable measures to ascertain where the equipment is being installed. Under these circumstances, and according to the judicial outcome in *Fresh Meat Supply Co v Standard Trading Co*,¹⁴³ the landowner can apply the hypothec.

The second requirement (point *ii*) mentioned above was utilised as the basis for the case in *Eight Kaya Sands v Valley Irrigation Equipment* to prove the hypothecation of third-party property did not occur.¹⁴⁴ In this case, it was held that the landowner was aware that movable property hypothecated, belonged to a third party and not to the lessee. On these grounds, the court instructed the landowner to release the goods since the landowner had knowledge of the third-party ownership prior to the attachment of the movable property.¹⁴⁵ The requirements as set out in *Bloemfontein Municipality vs Jackson Ltd* were not met in their entirety to warrant hypothecation of third-party property.

In the case of the PPA, if the landowner has prior knowledge that the solar equipment, or part thereof, brought onto the premises by the IPP, is not owned by the IPP, but rather a third party, the landowner cannot apply the hypothec over this movable property. The landowner can apply the hypothec over the third-party movable property if the IPP does not notify the landowner of any third-party ownership prior to the judicial attachment occurring. The key element is having knowledge of the ownership of the solar equipment which determines whether the hypothec can be applied or not.

The application of the above-mentioned second requirement was also relevant in *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*.¹⁴⁶ In this case, the landowner did not have actual knowledge that the movable property belonged to a third party. However, the landowner

¹⁴² Van Derwalt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.526.

¹⁴³ *Fresh Meat Supply Co v Standard Trading Co (Pty) Ltd* 1933 CPD 550-567.

¹⁴⁴ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA945 (T).

¹⁴⁵ Mohamed, S.I., 2015. Owner Has Right to Attach Goods—Third Party's Belongings Can Be Seized. *Daily News*, May 5.

¹⁴⁶ *Paradise Lost Properties (Pty) Ltd v Standard Bank of South Africa Ltd* 1989 (4) SA 1030.

was provided with a copy of the instalment sale agreement between the third party and the tenant relating to the movable property in question. Therefore, it was found that the landowner ought to have known about the ownership rights of the third party, which excluded the movable property from the application of the lessor's tacit hypothec.¹⁴⁷ The same principle was applied in *Holderness NO & Others v Maxwell & Others* in that if the landowner is aware of third-party ownership over property in the hands of the lessee before the attachment thereof, the lessor's tacit hypothec cannot extend to include this movable property.¹⁴⁸

The judicial outcome in *Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd*¹⁴⁹ and *Holderness NO & Others v Maxwell & Others*¹⁵⁰ demonstrates that there is no specific method whereby the IPP must inform the landowner of any third-party ownership of the movable property brought onto the premises. The landowner must be mindful of the documentation the IPP provides to ensure no disclosure of third-party ownership of movable property is reflected in the PPA. If third-party ownership is detailed in the PPA or any associated documentation, the landowner cannot apply the hypothec over this movable property. This is favourable to the IPP as there is no specific method to follow in notifying the landowner of third-party ownership. The IPP must only ensure that it is presented in the PPA or any associated documentation.

The third requirement to extend the application of the lessor's tacit hypothec over the movable property of third parties is the degree of permanence of the objects brought onto the leased premises.¹⁵¹ There has been much debate with respect to what determines permanence. In *Lazarus v Dose*, it was noted that the requirement of permanence is not met if the movable property is leased to the lessee on a monthly basis and only a few months have passed.¹⁵² In *TR Services (Pty) Ltd v Poynton's Corner Ltd*,¹⁵³ it was noted that the length of time under the requirement of permanence is an unknown but if the third-party property is on the leased premises for a period of fifteen years, the requirement of permanence is met.¹⁵⁴ Judicial precedence setting the legal basis for the requirement of permanence was established in two cases, namely, *Mangold Bros Ltd v Hirschman Bros*¹⁵⁵ and *The Standard and Digger's News*

¹⁴⁷ *Paradise Lost Properties (Pty) Ltd v Standard Bank of South Africa Ltd* 1989 (4) SA 1030.

¹⁴⁸ *Holderness NO and Others v Maxwell and Others* (6518/11) 2012 ZAKZPHC (1).

¹⁴⁹ *Paradise Lost Properties (Pty) Ltd v Standard Bank of South Africa Ltd* 1989 (4) SA 1030.

¹⁵⁰ *Holderness NO and Others v Maxwell and Others* (6518/11) 2012 ZAKZPHC (1).

¹⁵¹ *Bloemfontein Municipality v Jackson Ltd* 1929 AD 266 at 271.

¹⁵² *Lazarus v Dose* (1884) 3 SC 43; Brits, R., 2016. *Real Security Law*. Juta. 463.

¹⁵³ *TR Services (Pty) Ltd v Poynton's Corner Ltd* 9 1961 (1) SA773 (N).

¹⁵⁴ Van Derwalt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 529.

¹⁵⁵ *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187 189.

Company v Esterhuizen.¹⁵⁶ In *Mangold Bros Ltd v Hirschman Bros*, the court held that a vehicle supplied by the company to the employee cannot be subject to the reach of the lessor's tacit hypothec as the "element of permanence" is absent as the employer can request the return of the vehicle at any point in time.¹⁵⁷ In contrast, in *The Standard and Digger's News Company v Esterhuizen*, in which the sale of a piano under the conditions of an instalment sale agreement was held to be on the property for an indefinite period of time and for the use of the tenant.¹⁵⁸ In this case, it was determined that the movable property was subject to the lessor's tacit hypothec.

The contractual period of PPAs is generally between 15 and 25 years. At installation of the movable property (solar equipment), the intention of the IPP is that the equipment will remain in place until the PPA contract is concluded, or until such a time where the equipment requires replacing. Considering the lifespan of the movable property (solar equipment) can be terminated while held on the property for the period of the PPA, this timeframe suggests a degree of permanence is met, and the hypothec can be applied.

The final requirement to include third-party property within the reach of the lessor's tacit hypothec is to prove that the movable property brought onto the premises is for the purpose and use of the lessee only.¹⁵⁹ This requirement was relevant in *Crowley v Domony*.¹⁶⁰ In this case, the lessee's wife claimed that the furniture brought onto the premises was not for the use of the lessee and therefore not within the scope of the lessor's tacit hypothec.¹⁶¹ The court held that this was not the case and the furniture was for the use of both the lessee and his wife and therefore subject to the extension of the hypothec.¹⁶² The courts have maintained the requirement of use by the lessee in subsequent court proceedings.¹⁶³

The final requirement to apply the lessor's tacit hypothec over third-party property is plausible. The obligation of the IPP is to provide solar energy to the landowner at the required demand as set out in the PPA. To perform their obligations, the IPP must have a complete solar system installed on the landowner's premises. The solar system installed on the premises is purely for the IPP's purpose and used to fulfil their obligation to provide solar energy to the landowner,

¹⁵⁶ Van Derwalt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546.

¹⁵⁷ Van Derwalt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.529. *Mangold Bros Ltd v Hirschman Bros* 1917 TPD 187 at 189.

¹⁵⁸ Van Derwalt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.529. *The Standard and Digger's News Company v Esterhuizen* 1893 H 22.

¹⁵⁹ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 521.

¹⁶⁰ *Crowley v Domony* 1869 Buch Rep 205.

¹⁶¹ Van Derwalt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 529.

¹⁶² *Crowley v Domony* 1869 Buch Rep 205.

¹⁶³ *Reinhold & Co v van Oudtshoorn* 1931 TPD 382 383; *Van der Bergh, Melamed & Nathan v Polliack & Co* 1940 TPD 237 238.

irrespective if the solar system or a part thereof is owned by a third party. Thus, there is no reason why the hypothec cannot be applied over third-party property where the use and purpose are for the IPP in terms of the PPA.

2.4.2.2 Doctrine of Estoppel

The second Common Law basis for the application of the lessor's tacit hypothec to third-party movable property is by way of the doctrine of estoppel.¹⁶⁴ Estoppel is a defence that the landowner can raise against the third-party owner's remedy of the *rei vindicatio* over the movable object.¹⁶⁵

The *rei vindicatio* can briefly be explained as a legal remedy used by an owner of movable or immovable property to reclaim their property from someone who is exercising unlawful physical control over that property.¹⁶⁶ For purposes of the current discussion, the third-party owner of the movable property may try to invoke the *rei vindicatio* to reclaim their property attached in terms of the lessor's tacit hypothec. The landowner may be able to use the defence of estoppel against such *rei vindicatio* remedy because the third-party owner of the movable property placed such property in the possession and physical control of the IPP.¹⁶⁷ This circumstance creates the impression with outsiders that the IPP, through the fault of the third-party owner of the movable property, is the actual owner of said property and, therefore, has the authority to alienate and/or dispose of thereof.¹⁶⁸

Several requirements must be met to extend the lessor's tacit hypothec over the respective movables using the doctrine of estoppel. These requirements include '*misrepresentation, reliance by the estoppel asserter on the misrepresentation, prejudice, causation and fault.*'¹⁶⁹ In the context of the lessor's tacit hypothec, there is strong support for the inclusion of the "*fault*" requirement in that the doctrine limits the third party's *rei vindicatio* in favour of the lessor (landowner).¹⁷⁰ Thus the inclusion of the "*fault*" requirement strengthens the protection of the owner of the movable object.¹⁷¹ Therefore, the key element in the context of the doctrine of

¹⁶⁴ Van der Merwe, CG., *LAWSA Vol 27 2ed* (2014) 257 - This doctrine has been accepted into South African law on Roman-Dutch legal principles but has also been influenced at the same time by the English law doctrine of "*estoppel by representation*".

¹⁶⁵ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 230.

¹⁶⁶ Boggenpoel, ZT., *Property Remedies* (Juta 2017) 38-83.

¹⁶⁷ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 231.

¹⁶⁸ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 231.

¹⁶⁹ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 531.

¹⁷⁰ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 531.

¹⁷¹ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 531.

estoppel, which subjects third-party property to the lessor's tacit hypothec is that of culpable misrepresentation of the third party.¹⁷² The lessor's tacit hypothec in the context of estoppel can only be implemented if the third party had the ability and were in the position to inform the lessor of their ownership of the relevant movable property.¹⁷³

Applying the hypothec over third-party property in the possession of the IPP using the doctrine of implied consent is not a failsafe process for the landowner. Even though the requirements for implied consent are met, the third-party owner of the movable property brought onto the landowner's premises can challenge the hypothec through *rei vindicatio*. The landowner has estoppel as a counter remedy. The key implication for the landowner in exercising estoppel against the third-party *rei vindicatio* is the third-party's ability to inform the landowner of their ownership. If the third-party was not made aware by the IPP that the movable property is to be installed on third-party premises, the owner of the movable property would not have the opportunity to notify the landowner. Under this circumstance, the landowner would not be able to apply the doctrine of estoppel, and the *rei vindicatio* would protect the third-party owner.

However, if the third-party owner of the movable property was aware that the IPP would be installing the solar equipment onto third-party owned property and fails to notify the landowner of their ownership rights, estoppel will be the favoured outcome. The third-party owner of the movable property in this case is guilty of culpable misrepresentation. The impression perceived by the landowner is that the IPP is the sole owner of any movable property brought onto the premises and therefore creates the impression to the landowner that the IPP has the authority to sell or dispose of the solar equipment.

There has been much debate in the legal community over the aptness of both the doctrine of implied consent and the doctrine of estoppel being used as mechanisms for extending the lessor's tacit hypothec to cover the property of third parties. This has created much scrutiny and is argued to be unjust when dealing with all situations pertaining to the lessor's tacit hypothec.¹⁷⁴ Authors such as McLennan¹⁷⁵, Stevens¹⁷⁶ and Smith¹⁷⁷ all argue that the lessor's tacit hypothec should

¹⁷² Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 533.

¹⁷³ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 533.

¹⁷⁴ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 532.

¹⁷⁵ McLennan, JS. "A lessor's hypothec over the goods of third parties – anomaly and anachronism" (2004) 16 SA Merc LJ 121-125 125.

¹⁷⁶ Steven, AJM. "Landowner's hypothec in comparative perspective" (2008) 12 EJCL 1-18 14.

¹⁷⁷ Smith, D. "The constitutionality of the lessor's hypothec: Attachment of a third party's goods" (2011) 27 SAJHR 308-330 310.

not extend to third-party property on the basis that there is no contractual relationship between the landowner and the third party.¹⁷⁸

In addition to the justness of applying the lessor's tacit hypothec to third-party property, there is also much debate around the applicability of the two doctrines mentioned above. Judicial proceedings have placed more emphasis on implied consent as the default option¹⁷⁹ when determining if the tacit hypothec is valid or not under particular circumstances. Legal comment on judicial outcomes have concluded that the doctrine of estoppel in the context of the lessor's tacit hypothec was observed to be a better approach in certain contexts and that the approach has not been used with consistency to date.¹⁸⁰ The majority of academic authors do however support the view that estoppel is the better justification for extending the hypothec to third-party property as opposed to implied consent, which has been the accepted method in judicial proceedings to date.¹⁸¹ Given the uncertainty regarding which approach is the better justification for extending the lessor's tacit hypothec to third-party property, it has been noted that a dualistic approach should be the most suitable way in applying both the doctrine of implied consent and doctrine of estoppel.¹⁸² Adopting this application would avoid the confusion from claiming to apply one approach while in fact relying on the other method as justification.

The question as to whether the hypothec extends to third-party property is critical in the context of PPAs. To a large degree, the capital outlay is such that the majority of the solar equipment utilised is, at some point in the PPA period, owned by a third-party. If the hypothec was not to extend to third-party property at all, the potential exposure to the landowner is much higher. Should the IPP default in their obligation to pay rent, there will be little to no movable property to hypothecate. The potential impact on the IPP in not performing on their obligation in terms of the PPA, is significantly less. It is therefore necessary to extend the hypothec to third-party property as the intention of applying the hypothec to force the performance obligation of the IPP to pay arrear rental would become moot. A caveat one must consider is the repayment structure of the capital to the third-party. If the repayment is handled in terms of an instalment sale agreement, the Security by Means of Movable Property Act¹⁸³ exempts the movable property

¹⁷⁸ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 533.

¹⁷⁹ *Bloemfontein Municipality v Jackson Ltd* 1929 AD 266 at 271.

¹⁸⁰ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 533.

¹⁸¹ Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 533.

¹⁸² Van Der Walt, A.J. and Siphuma, N.S., 2015. Extending the lessor's tacit hypothec to third parties' property. *South African Law Journal*, 132(3), pp.518-546. 535.

¹⁸³ Act 57 of 1993, s 2.

from being subject to the tacit hypothec. However, adopting a blended approach of the two doctrines is also favourable in that every point is taken into consideration from both the landowner and the relevant third-party when applying the hypothec.

2.4.3 Operation of the Lessor's Tacit Hypothec

As mentioned above¹⁸⁴, the lessor's tacit hypothec comes into existence by operation of law. The movable property of the lessee does not need to come under the physical control of the landowner like in the case of express agreements for the tacit hypothec to exist. The creation of the hypothec because of the contractual breach by the lessee to pay rent does not automatically prevent any interference from third party claims. The landowner must “*perfect*” the hypothec to reap the full benefit of the real security right. If the hypothec is not perfected, there is no guarantee that the movable property will remain on the leased premises.

Legal principles determine that the lessor's tacit hypothec's impact on the whole world (*erga omnes*) would only be applicable if the movable property on the leased premises have been “attached” or the removal from the premises has been “interdicted”.¹⁸⁵ This procedure forms part of perfecting the lessor's tacit hypothec and is especially important as the claim over the movable property on the leased premises will be lost and no recourse available in the event that the movables are no longer on the premises or in-transit to the new destination. The perfection serves only as a means to prevent the removal of the property from the premises. This does not mean that the movable property cannot be subjected to third party claims where movable property does not belong to the lessee.

Three methods exist in which the landowner can perfect the lessor's tacit hypothec. The first method for the landowner is to take physical control of the movable within the leased premises by way of “attachment”. The attachment of the movable property is achieved through the Magistrates Court Act.¹⁸⁶ The relevant provision of the Act titled “*Attachment of property in security of rent*” requires the landowner or a representative of the landowner to submit an affidavit to the court to attach movables which are subject to the particular lessor's tacit hypothec. The landowner submits an affidavit to the court which details the rental amount in arrears as well as the rental still due in terms of the lease agreement with the IPP. During this process, the landowner needs to be cognisant of the amount stipulated in the affidavit as this amount cannot

¹⁸⁴ Section 2.4 of Chapter 2.

¹⁸⁵ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020). 85

¹⁸⁶ Magistrates Court Act 32 of 1944, s 32.

exceed the jurisdiction of the court where the landowner has applied. Part of the process is showing proof that the landowner has demanded payment for the rental in arrears from the IPP for a minimum of seven days or more. The letter of demand for the rental in arrears is waived if the landowner believes that the IPP is attempting to remove the solar equipment from the premises to evade future rental as well as the rental in arrears. If the court accepts that the requirements have been met in the affidavit, an order is granted in favour of the landowner. A messenger of the court will then attach the solar equipment to a value that is proportional to the outstanding rental amount and any costs incurred by the landowner in the application process and acquiring the rental payment.

Although the landowner has achieved the attachment of a proportion of the movable property to the value of the arrear rental and associated costs, attachment of the movable property is not sufficient to demand payment from the IPP for rental in arrears. The landowner must obtain a court order for the payment of the outstanding rental amount. The IPP may at this stage admit that the movable property is subject to the lessor's tacit hypothec and that their property, to a specified amount, be sold to realise the outstanding rental in arrears and associated costs. Under this circumstance, the IPP's consent is deemed to be equivalent to the landowner obtaining a judgement order from the court. Even though a judgement order is required for payment in arrears, the attachment of the movables to the premises is seen as a "perfected" lessor's tacit hypothec because the court order has attached the movable property to the premises and the physical control of the solar equipment is in the hands of the landowner. The physical control over the movable property prevents anyone from removing the objects from the leased premises and creates a preferential claim in favour of the landowner over the proceeds of the movable objects should they be sold in execution.

The potential admission from the IPP noting that their movable property is subject to the hypothec and can be sold to realise the outstanding debt and associated costs owed to the landowner is positive from a theoretical standpoint. However, this is not a practical and rationale solution when considering PPAs. The solar system when installed is a single system providing a guaranteed amount of energy to the landowner in terms of the PPA. Selling a portion of the solar system as repayment for the monies owed in the form of rental in arrears, will negatively impact the landowner and any associated activities on the premises which rely on solar generated electricity. This is also an unlikely solution for the IPP to settle any rental in arrears as it would prevent the IPP from performing on their key obligation to provide energy in terms of the PPA.

The second method of approach to “perfecting” the lessor’s tacit hypothec is by way of a rent interdict. This procedure is also undertaken in accordance with the Magistrates Court Act.¹⁸⁷ Under this procedure, the landowner issues a summons to the IPP for rental in arrears and includes in the summons that any movable property subject to the hypothec cannot be removed from the premises. The prevention of removal of movable objects subject to the lessor’s tacit hypothec will remain in place until an order from the court relating to the payment of rental in arrears has been issued. An important condition to note in this process, is that it is the responsibility of the landowner to ensure that any third party has knowledge of the fact that there is a rental interdict in place and therefore any movables are to remain on the premises.

The summons issued to the IPP at the time when rental is in arrears provides the same function as the court order mentioned above in the first method. The benefit of the interdict method is that one does not have to wait for the court order to be issued. The summons necessitates the movables remain in the rental premises. However, to obtain a court interdict, the landowner needs to provide some basis that the tenant intends to remove the movable objects from the premises. Given that the movable property (solar system) is the only security for the landowner against the IPP, granting the interdict is not observed to be an onerous process. Little motivation is required by the landowner to the court in this regard, to be seen as sufficient grounds to grant the order.

Although the method of obtaining the interdict is more expeditious than the court order, the IPP is unlikely to remove the solar equipment when rental is in arrears. Removing the solar equipment would create further breach in their obligations in terms of the PPA as mentioned above.

The final method of securing preference in the movable objects of the IPP is through insolvency. This final approach requires no action from the landowner to obtain physical control over the movable property of the lessee on the premises. The Insolvency Act¹⁸⁸ grants the landowner automatic preference over the movable assets of the tenant on the premises. Therefore, should there be an underlying debt with respect to rental in arrears, the landowner will have a preferential claim to the proceeds when the trustee of the insolvent estate sells the goods in execution.

The tacit hypothec is thus a very important Common Law principle still active in the South African legal framework. It provides a necessary protection mechanism for the landowner in

¹⁸⁷ Magistrates Court Act 32 of 1944, s 31.

¹⁸⁸ Insolvency Act 24 of 1936, s 85(2).

both the residential and commercial space to enforce payment of outstanding rent. There has been much debate as to when the lessor's tacit hypothec becomes a real security right. It has however been generally accepted that only when the hypothec has been "perfected", will it then become a limited real right.

The importance of the common law lessor's tacit hypothec in the context of the PPA is that it has the potential to provide a remedy for the landowner under the operation of law to ensure the IPP performs in their obligations as per the contractual agreement to pay rent for the leased space. A supporting point to the lessor's tacit hypothec is that it cannot be contractually excluded from the agreement¹⁸⁹ whereas in terms of express real securities this is not the case.

To ensure that the lessor's tacit hypothec is a potential remedy for the landowner in the context of the PPAs, one needs to take cognisance of the conditions to be met to apply the remedy and the procedure to follow should the lessor's tacit hypothec need to be perfected in the case the IPP fails to pay the rental in arrears. The key element to consider when trying to apply the lessor's tacit hypothec to the solar infrastructure is the ownership of the system and the disclosure thereof. These solar systems are in most cases funded by third party private equity funds or banks which can pose an issue to attaching the movable property if the third-party funders have been disclosed in the PPA or if the solar system is subject to a credit instalment agreement. In these circumstances, one would need to consider other remedies that may be available to the landowner. The key issue in perfecting the hypothec and selling the IPPs movable property to settling the arrear rental, is the practicality of the approach. Selling the movable property is not a rational solution for both the IPP or the landowner.

The rationale in signing a PPA with an IPP, is largely due to the landowner's requirement for a solar supply to the relevant property. If the landowner were to invoke the hypothec and sell the solar equipment proportional to the rental in arrears, the loss of the solar equipment because of the sale would undermine the landowner's motive for signing the PPA in the first instance. The sale of the solar equipment is also detrimental to the IPP as the contractual performance obligation in supplying electricity to the landowner is compromised. These circumstances raise key considerations when the hypothec can be applied. Alternative measures such as reducing the selling rate per kilowatt hour to the landowner can be a preferred alternative to be included in the agreement.

¹⁸⁹ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library 439.

Should utilising the lessor's tacit hypothec as a Common Law remedy against the IPP not be a possible remedy, the second option is to investigate the legal principle of accession as an original method of acquisition. This legal principle provides an alternative to the lessor's tacit hypothec, as the implementation of the hypothec is not possible if accession of the movable property (components of the solar installation) to the immovable property (the land and buildings) occurs.¹⁹⁰ As mentioned previously, the two cannot co-exist, but rather provides the landowner with two different protection measures against the IPP. As such, the examination of the principles and application of the law of accession is required.

2.5 Implications of Accession for the Application of the Lessor's Tacit Hypothec

The significant legal principle to be taken into consideration within the context of the lessor's tacit hypothec is that of accession. From the above discussion, it is clear that only movable assets of the tenant can form the subject of the hypothec. Therefore, it is critical to establish whether the solar infrastructure remains movable, or whether it attaches to the land (or buildings) upon installation. The legal principles of accession will determine whether attachment has taken place.

For purposes of this research, it is important to consider the implications for the lessor's tacit hypothec that may arise from the permanent attachment of the solar infrastructure to the landowner's land or buildings by way of accession through building (*inaedificatio*).¹⁹¹ If the legal requirements for accession of the solar infrastructure are met, the lessor's tacit hypothec is irrelevant as a potential protection mechanism for the landowner. Due to the requirements of each, the lessor's tacit hypothec on the one hand and accession on the other hand are mutually exclusive.

As is explained in more detail below, once accession takes place, the landowner becomes the owner of the previously movable solar components by operation of law. It is one of the foundational principles of real security law that one cannot hold a real security right over one's own property.¹⁹² As such, the investigation must determine the likelihood of accession through *inaedificatio* taking place by exploring judicial precedence.

¹⁹⁰ Brits, R., 2016. *Real Security Law*. Jutas Property Law Library 46.

¹⁹¹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 174.

¹⁹² Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 521.

2.6 Accession through Building (*Inaedificatio*)

An examination of the legal principles of accession must start with a clear definition and understanding of the meaning of accession. Simply put, accession occurs when two separate objects are combined artificially to enhance one of the objects, or for one of the objects to annex to the second object.¹⁹³ Accession of objects can be applied to movable or immovable objects.¹⁹⁴ The type of accession important in the context of the PPA is that of accession through building (*inaedificatio*), which focuses on the annexation of movables to immovable property.¹⁹⁵ This considers the possible attachment of the solar infrastructure to the land or buildings placed on the landowner's property upon installation. The law of accession is a Common Law principle adopted in the rules of South African law. It determines that buildings or structures that have been established on a piece of land, accede to that land, and therefore become the property of the owner of the land.¹⁹⁶

A result of the accession is that the movable objects loses its independent title through the annexation to the immovable object, and due to the loss of title, ownership is lost.¹⁹⁷ Accession is an original method of acquisition of ownership in that the ownership of the accessory along with the object itself physically accedes to the owner of the principle object without deriving a transfer of ownership from any previous owner of the accessory.¹⁹⁸ This implies that ownership of the solar infrastructure along with the solar infrastructure itself becomes a part of the principle immovable object, which is the land and/or the building upon which the solar infrastructure is affixed. Even though the intention of the owner of the movable property may not have been to transfer ownership of the object, the ownership is lost by operation of law as the movable property would become part of the immovable.¹⁹⁹ Once accession has taken place, the owner of the accessory cannot take back ownership. However, compensation for unjustified enrichment may be payable.²⁰⁰

¹⁹³Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 170.

¹⁹⁴Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 171-175.

¹⁹⁵Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 174.

¹⁹⁶Knobel, I., "Accession of movables to land, South African law and Dutch law" (2012) 45 *The Comparative and International Law Journal of Southern Africa (CILJ SA)* 77.

¹⁹⁷Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 170.

¹⁹⁸Muller, G., Brits, R., Boggenpoel, Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 161.

¹⁹⁹Nhlanhla, L.S., *Development of the law regarding inaedificatio: A constitutional analysis* Master of Law Thesis Stellenbosch University (2014) 10-11.

²⁰⁰Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 170.

In light of the PPA between the IPP and the landowner, the solar infrastructure owned by the IPP in terms of the principle of accession through building (*inaedificatio*) would be the accessory and the building of the landowner would be the principal immovable object as it has already acceded to the land upon which it was built.²⁰¹ The solar infrastructure would thus accede to the building and the landowner would become the owner of the solar infrastructure in principle.²⁰²

However, one cannot apply a blanket approach to accession based on the Common Law principle mentioned above. There must be due consideration of the circumstances of each case to determine whether accession has taken place.²⁰³ The next section provides a discussion of selected case law where disputes regarding accession through building (*inaedificatio*) were considered by the courts.

2.7 Judicial Consideration of the Principles of Accession

Judicial precedent²⁰⁴ within the South African legal system has developed a set criteria which must be considered when evaluating case-specific circumstances with respect to disputes over accession. There are three points to consider when determining whether permanent annexation has taken place or not. The first point to consider is to determine the “nature and purpose of the accessory”²⁰⁵. The focus is to deduce whether the nature of the object is such that it is at all possible to attach to an immovable object and to serve that immovable object on a permanent basis.²⁰⁶ The second point to consider is the manner and degree of the attachment of the movable to the immovable object.²⁰⁷ The manner of attachment determines whether the identity of the movable object is preserved during the attachment and can be restored should the movable be separated from the immovable object.²⁰⁸ The third consideration is the subjective intention of the owner of the accessory or movable object.²⁰⁹ This point considers whether the professed intention

²⁰¹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 175.

²⁰² Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 175.

²⁰³ Muller, G., Brits, R., Boggendoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 174; Knobel (2012) *CILJ SA* 79; *Olivier and Others v Haarhof & Co.* (1906), T.S.

²⁰⁴ *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (SCA).

²⁰⁵ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 175; *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 460.

²⁰⁶ Muller, G., Brits, R., Boggendoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 166.

²⁰⁷ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 175; *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 460.

²⁰⁸ Muller, G., Brits, R., Boggendoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 166.

²⁰⁹ A Pope et al. *Law of Property* (2020) SA OUP 6ed 175; *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 460.

of the owner of the movable object is capable of being realised in the event that the object is to be fixed permanently or temporarily.²¹⁰

Over time, the courts have developed different approaches in their application and interpretation of the above-mentioned three considerations.²¹¹ These approaches can broadly be categorised into the “traditional approach” and the “new approach”.²¹² The following sections examine these approaches in more detail.

2.7.1 “Traditional Approach” by the Courts

An initial approach to determining accession of movables to an immovable by the courts was to scrutinise the factual evidence pertaining to the case,²¹³ namely, the nature and purpose of the accessory and the manner and degree of the attachment.²¹⁴ The logic in this approach was that these objective criteria would conclude an objective intention based on the factual evidence of the case.²¹⁵ Van der Merwe²¹⁶ highlights two tests which conclude the objective intention as to the manner and degree of attachment. He notes that the degree and manner of attachment is decisive if the attached article loses its identity and also if it becomes an integral part of the immovable object.²¹⁷ The second test notes that the attachment is decisive if in the event detachment of the object, serious damage would occur to the immovable object as well as the accessory.²¹⁸ If the objective criteria are not conclusive as to whether accession has taken place, the subjective intention of the owner of the movable would be considered in the decision.²¹⁹ This approach is highlighted in the case of *Macdonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd*.²²⁰ The way in which the movable was attached to the land was of such a fixed and permanent nature that the implied intention through the objective criteria was of

²¹⁰ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 166.

²¹¹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 175.

²¹² Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 166.

²¹³ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 175.

²¹⁴ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 175; *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 175.

²¹⁵ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 167.

²¹⁶ Van der Merwe, LAWSA vol. 27, 2nd Edition, para. 184.; Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 166.

²¹⁷ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 167.

²¹⁸ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 167.

²¹⁹ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 166.

²²⁰ *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

permanency.²²¹ However, separation of the accessory from the principle object would not result in substantial damage if removed.²²² Due to inconclusive evidence based on the objective criteria leading to contradictory outcomes, the subjective intention of the owner was taken into consideration.²²³ The subjective intention was thus highlighted through the terms of the agreement between the owner of the movable and the landowner. In this case, the terms of the agreement stipulated that the owner of the movable would retain ownership until the final instalment of the purchase price has been paid. This resulted in the court's finding that the movable did not accede to the land²²⁴. The objective criteria was further debated in the case of *Mpisi v Trebble*.²²⁵ The unauthorised erection of a dwelling on a piece of land was said to have not been a case of accession based on the objective criteria as the attachment did not invoke permanency through the method of attachment and the nature of the movable.²²⁶ The intention of the owner of the movable inferred through the objective criteria was assessed as being of a temporary nature.²²⁷ *Standard Vacuum Refining CO of SA (Pty) Ltd v Durban City Council*²²⁸ also adopts the traditional approach through *inaedificatio*. The decision regarding whether fuel tanks acceded to the land or not was under judicial consideration. The court's decision to confirm accession was because of the intended permanency through the method of attachment (in situ welding and bund formation) and that the removal would also amount to substantial damage an injury to the land and accessory.²²⁹

*New Castle Collieries v Borough of New Castle*²³⁰ further substantiates court proceedings based on the 'traditional approach'²³¹ in the manner of the dispute over the railway line acceding to the land subject to a lease cancellation. Taking into consideration the method upon which the railway was placed onto the land including the construction of culverts and bridges, confirms that the intention from the lessee's perspective based on the objective factors, implied permanency and

²²¹ *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

²²² *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

²²³ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 169.

²²⁴ *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 467.

²²⁵ *Mpisi v Trebble* 1994 2 All SA 142 (A).

²²⁶ *Mpisi v Trebble* 1994 2 All SA 142 (A).

²²⁷ *Mpisi v Trebble* 1994 2 All SA 142 (A); Nhlanhla, LS. *Development of the law regarding inaedificatio: A constitutional analysis* Master of Law Thesis Stellenbosch University (2014) 25-26.

²²⁸ *Standard Vacuum Refining CO of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A).

²²⁹ *Standard Vacuum Refining CO of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A) 677.

²³⁰ *New Castle Collieries v Borough of New Castle* 1916 AD 561 at 564-566.

²³¹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 175.

accession had thus occurred.²³² Accession was further substantiated by the fact that removing of the railway line would result in damage and loss of identity of the railway line.²³³

The traditional approach first seeks to determine accession from the two objective criteria through the nature and purpose of the accessory and the manner and degree of the attachment. However if no conclusive decision can be made from a case's facts, the subjective intention of the owner of the movable is considered to make a determination as to whether accession has taken place.²³⁴ The intention of the owner of the movable is not independent of the objective criteria, but rather the intention of the owner is inferred from the factual evidence of the annexation.²³⁵ If the objective criteria are inconclusive, the subjective intention of the owner is then considered.²³⁶

2.7.2 “New Approach” by the Courts

Subsequent to the conventional approach, a new method has been introduced and endorsed by the Supreme Court of Appeal through the judicial precedent set in the case of *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)*.²³⁷ The new approach places far more emphasis on the subjective intention of the owner of the movable (*ipse dixit*) than previously undertaken under the traditional approach.²³⁸ The courts would therefore examine the subjective intention of the owner of the movable and the associated evidence as the main focus while the objective criteria should substantiate the subjective intention to arrive at an overall intention.²³⁹ This new approach places a significant amount of weight on the subjective intention which can lead to illogical outcomes.²⁴⁰ An example of an illogical outcome can be observed in the case of *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)*²⁴¹ in which lifts in a multi-storey building were determined to remain movable (i.e. unattached to the building) even after the installation. The court's decision that accession has not taken place was based on the intention of the owner of the

²³² *New Castle Collieries v Borough of New Castle* 1916 AD 561 at 566.

²³³ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 167.

²³⁴ Knobel, I. “Accession of movables to land, South African law and Dutch law” (2012) (*CILJ SA*) 80.

²³⁵ Nhlanhla, L.S., *Development of the law regarding inaedificatio: A constitutional analysis* Master of Law Thesis Stellenbosch University (2014) 27.

²³⁶ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 168.

²³⁷ *Melcorp SA (Proprietary Limited) v Joint Municipal Pension Fund (TVL)* [1980] 1 All SA 498 (W); Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 175; Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 168.

²³⁸ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 169.

²³⁹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 175-178.

²⁴⁰ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 169.

²⁴¹ 1980 2 All SA 214 W at 215.

movable, even though the objective evidence would intend otherwise.²⁴² Under the traditional approach, the objective evidence would deduce the intention of the installation of the lift to be of a permanent annexation, however, a contractual clause in the instalment sale agreement between the parties clearly stated the lift would remain movable until fully paid for.²⁴³ This clause highlights the subjective intention of the owner of the movable in that ownership will only accede to the building once paid in full.²⁴⁴

Further judicial precedence regarding subjective intention as the primary factor can be observed in the case of *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd*²⁴⁵. In this case, the terms of the lease agreement between the two parties stated that the building itself as well as the additions and equipment would become the property of the building owner on lapsing or termination of the lease.²⁴⁶ Even though the additions and equipment were easily removable without significant loss or damage to the building, the intention at the time of installation was of a permanent nature given the building's purpose.²⁴⁷ Furthermore, the fact that the additions and equipment installed were designed in a way to complement the building serves the principle of accession²⁴⁸ and the length of the lease agreement cements further subjective intent of permanency.²⁴⁹ This judicial approach has been adopted in other cases such as *Simmer and Jack Mines Ltd v GF Industrial Property Co (Pty) Ltd*²⁵⁰, *De Beers Consolidated Mines Ltd v Ataqu Mining (Pty) Ltd*²⁵¹ and *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk.*²⁵² However, this approach has led to illogical findings in some instances and general confusion.²⁵³

The traditional and new approaches detailed above, can be summarised as follows. The traditional approach seeks to focus more on the objective factors of the case to arrive at a decision, however, the actual intention of the owner of the movable would be considered if the objective criterion is inconclusive.²⁵⁴ The new approach differed in the sense that the intention

²⁴² Muller, G., Brits, R., Boggendoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 169.

²⁴³ *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 2 All SA 214 W.

²⁴⁴ 1980 2 All SA 214 W at 224.

²⁴⁵ 1978 (4) All SA 260 (A).

²⁴⁶ *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (4) All SA 260 (A) 262.

²⁴⁷ *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (4) All SA 260 (A) 268.

²⁴⁸ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 175.

²⁴⁹ *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (4) All SA 260 (A) 267.

²⁵⁰ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 176; 1975 (2) SA 654 (W)

²⁵¹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 176; 1980 (2) SA 214 (W)

²⁵² 1996 (3) SA 273 (A)

²⁵³ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 176

²⁵⁴ Nhlanhla, L.S., *Development of the law regarding inaedificatio: A constitutional analysis* Master of Law Thesis Stellenbosch University (2014) 89.

of the owner of the movable and the related evidence (*ipse dixit*) were considered as the most significant factor.²⁵⁵ The rationale behind the change was to avoid depriving the owner of their movable property without consent.²⁵⁶

Taking into consideration the progression of approaches when dealing with accession through *inaedificatio*, judicial precedent from the court proceedings have adopted a general approach to each case of accession.²⁵⁷ However, when there is no conclusive factual evidence in terms of the attachment, a decision is made by the judge to either embrace the new identity of the principal object, or to safeguard the identity of movable and thus the owner.²⁵⁸

However, there has been significant criticism for the weight placed upon the subjective intention in the new approach to determine accession. Placing emphasis on the subjective intention of the owner, undermines the law of accession as an original method of acquisition of ownership.²⁵⁹ The basis for the acquisition of ownership in accession is by operation of law – it does not stem from requiring consent from the owner of the movable property.²⁶⁰ The over-emphasis on the intention of the owner has provided sub-standard outcomes and not in line with the basis of the common law principle of accession in the case of building (*inaedificatio*).²⁶¹ The shift in judicial precedent has created an environment in which the principles of the law of contract overshadows property law principles in determining accession by building (*inaedificatio*).²⁶² Placing further emphasis on the subjective intention of the owner of the movable property detracts from the core focus of the common law principle of whether transfer of ownership has occurred and not whether the intention was to transfer ownership or not.²⁶³

2.8 Implications of Accession for Solar Infrastructure Installation

The first step in determining accession in the context of the solar infrastructure is to consider the contractual terms of the PPA between the property owner and the IPP. The IPP proposes to

²⁵⁵ Nhlanhla, L.S., *Development of the law regarding inaedificatio: A constitutional analysis* Master of Law Thesis Stellenbosch University (2014) 91.

²⁵⁶ Nhlanhla, L.S., *Development of the law regarding inaedificatio: A constitutional analysis* Master of Law Thesis Stellenbosch University (2014) 92.

²⁵⁷ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 180.

²⁵⁸ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 180.

²⁵⁹ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 168.) 71-72.

²⁶⁰ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 72.

²⁶¹ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M., *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 72.

²⁶² Freedman, W., "The test for inaedificatio: What role should the element of subjective intention play?" (2000) 117 *SALJ* 667-676 674.

²⁶³ Pope, A., "Inaedificatio revisited: Looking backwards in search of clarity" (2011) 128 *SALJ* 123-146 143.

provide a supply of renewable energy to the owner of the building by installing solar infrastructure on the building and/or property of the landowner. The key contractual obligation of the IPP is to provide a supply of renewable energy to the landowner using the solar system installed on the landowner's property. The landowner pays the IPP for the renewable energy generated by the solar system. The duration of these PPAs vary within the market, however, it is generally accepted that a standard term is between 15 and 25 years.²⁶⁴ The PPAs considered in this study are within this duration. After the contractual period has expired, the two parties either renew the contract or not. It should be noted that the duration of the contract mentioned above can vary between PPAs in the market space. One would need to consider each PPA term length when applying accession. Judicial precedent in court proceedings mentioned earlier in the chapter must be explored in the context of the PPA to provide justification and substantiate the solar system acceding to the building. The following points need to be considered to ensure ownership of the solar system through the application of the Common Law does not lead to unjustified enrichment in favour of the landowner.²⁶⁵

Firstly, the traditional judicial approach to accession, the nature and purpose of the movables (i.e. the solar infrastructure) and the physical attachment thereof are considered.²⁶⁶ The landowner and the IPP agree for the latter to provide solar infrastructure for the generation of electricity on the landowner's property. Thus, the nature and purpose of the solar infrastructure is to serve the land or building upon which it has been erected.²⁶⁷ The attachment of the solar system would therefore enhance²⁶⁸ the land and building as the purpose of the solar infrastructure is to provide an effective and reliable energy source. The manner in which the solar infrastructure is attached is also an important factor to consider.²⁶⁹ If the attachment is done in such a way that removal of the solar infrastructure would result in substantial damage and injury to the building and/or land as well as the solar infrastructure, accession would likely be confirmed as the attachment implies permanency.²⁷⁰ However, if these objective criteria are inconclusive, the intention of the IPP is considered in the court's decision.²⁷¹ With reference to *Macdonald Ltd v*

²⁶⁴ <https://solagroup.co.za/the-definitive-guide-to-solar-ppas/> (accessed 15-03-2023).

²⁶⁵ Muller, G., Brits, R., Boggenpoel, Z.Z., & Pienaar, J.M. *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 161.

²⁶⁶ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 175.

²⁶⁷ There are PPAs which deal with different structures in the market. As such, there will be instances in which this statement is not correct. One needs to consider the circumstance in which they are in and adapt accordingly.

²⁶⁸ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa 2 ed* (South African Oxford University Press 2020) 170.

²⁶⁹ *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD; *Standard Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A).

²⁷⁰ *New Castle Collieries v Borough of New Castle* 1916 AD 561; *Sumatie (Edms) Bpk v Venter NNO* 1990 (1) SA 173 (T).

²⁷¹ *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

Radin NO and Potchefstroom Dairies & Industries Co Ltd,²⁷² the intention of the IPP is thus likely to retain ownership as the length of the contract term is finite and the moneys paid by the landowner is not a payment in terms of a lease to own, but rather a payment for the energy the solar infrastructure produces. However, the contractual period of the PPAs within the context of this study will not agree with the subjective intention of the IPP mentioned above. The fact that the solar system is designed to complement the building displays a degree of permanency and thus supports accession.²⁷³

Secondly, in light of the new approach in accession through building (*inaedificatio*), the courts would consider the intention of the IPP at the time of attachment as decisive in determining if the solar infrastructure acceded to the land or not.²⁷⁴ The objective criteria are factors which should support the subjective intention of the IPP.²⁷⁵ The objective criteria are no different to that discussed in the traditional approach above, however, the subjective intention of the IPP is known when concluding the business arrangement. Therefore, at the time the landowner and IPP concluded the PPA, the landowner should understand the intention of the IPP was that the solar system will not accede to the land or building under any circumstances. If the intention of the IPP from the onset was that the solar infrastructure was not to accede to the land, the court would determine that accession did not occur, much like in the case of *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk*²⁷⁶ and *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)*.²⁷⁷

It is important for the IPP to retain ownership of the solar system for multiple reasons. The key factor is that the solar system provides the means for the IPP to fulfil their obligations in terms of supplying the landowner with renewable energy in terms of the PPA. Should the solar system accede to the land, the IPP and the associated performance obligation to supply power within the PPA is unenforceable. The landowner thus supplies renewable energy using his/her solar system affixed to that land. The second element to consider is the IPPs liabilities. The capital repayments to third-party funders will be compromised should the solar system accede to the land. The IPP

²⁷² *Macdonald Ltd v Radin NO and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

²⁷³ *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 (4) All SA 260 (A) 268.

²⁷⁴ *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); Nhlanhla, LS. *Development of the law regarding inaedificatio: A constitutional analysis* Master of Law Thesis Stellenbosch University (2014) 93.

²⁷⁵ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 175-178.

²⁷⁶ *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A).

²⁷⁷ *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 2 All SA 214 W at 215.

would not be able to sell power to the landowner for the electricity generated and thus not be able to repay debt.²⁷⁸

The benefit to the landowner should accession take place is twofold. Firstly, the landowner acquires an asset without having to pay for the solar system. This asset adds significant value to the building and/or land where it is installed. Secondly, the transfer of ownership of the solar system makes specific performance obligations of the IPP in the PPA unenforceable. Because the ownership of the solar system now lies with the landowner, the IPP is unable to perform in their obligation to provide power to the landowner as they are no longer owners of the system. Thus, the obligation of the landowner to provide payment for electricity which is being derived from their own system is questionable. Irrespective of the monetary benefit to the landowner through accession, the solar system is an integral part of the building and thus cannot be removed by the IPP under these circumstances.²⁷⁹

If accession has taken place, the IPP can lodge an appeal for unjustified enrichment through an enrichment claim. The relevant process of proving unjustified enrichment in the context of PPAs is not considered within the scope of this study. However, should the IPP wish to appeal to the courts on the basis of unjustified enrichment in favour of the landowner, the IPP will need to provide substantive evidence on the following four criteria, namely, enrichment, impoverishment, without legal cause, and causality at the cost of someone else.²⁸⁰

2.9 Chapter Summary

The relevant jurisprudence and judicial outcomes mentioned in this chapter provide sufficient evidence to warrant the application of the lessor's tacit hypothec or the law of accession against the IPP when dealing with PPAs in the context of this study. The landowner needs to consider the key elements when applying the two protection measures in the context of PPAs.

The remedy of the lessor's tacit hypothec is available to the landowner when there is a lease agreement with the IPP. If no lease agreement exists between the landowner and the IPP for the area that houses the solar system, and there is no associated payment for this rental area, the hypothec is not an available option. Should a lease exist, the hypothec is an available remedy. The second consideration when applying the hypothec is that it is accessory in nature. There

²⁷⁸ The rationale is that if the solar system were to accede to the land, why then would the landowner continue to pay for power from a system that is now his/her property.

²⁷⁹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 175-178.

²⁸⁰ Khumalo, P. *Uncapping the Requirements for Unjustified Enrichment*, Schoeman Law Inc 2019.

should always be an underlying debt in the form of arrear rentals to apply the hypothec. If the IPP is up to date with rental payments for the leased area housing the solar system, there is no basis for the landowner to apply the hypothec. The hypothec is nullified when arrear rental is paid. The third consideration is the degree of permanence. To invoke the hypothec, the solar system would have to be placed on the landowner's property with the intent from the IPP to remain there permanently, and to be for the use and enjoyment of the IPP. To confirm this requirement, understanding the term length of PPAs is important as well as the purpose of the solar system to the IPP.

Extending the hypothec to third-party movable property is also available to the landowner when rental is in arrears. The key consideration in this instance is proving negligence from the third party in failing to notify the landowner of their ownership interests in the solar system brought onto the premises by the IPP. In the case that culpable misrepresentation is proven, the landowner can extend the hypothec to third party movable property. The hypothec will only extend to third party property if the IPP's movable property onsite is of insufficient value to cover the rental in arrears. The landowner also needs to be cognisant of the implications to third party movable property governed by a credit instalment agreement. The Security by Means of Movable Property Act prevents the hypothec from being applied in these instances where a credit instalment agreement is in place.

Should the landowner explore the application of the hypothec and the Common Law remedy is not plausible, the landowner has the option of exploring the law of accession as an alternative protection measure. Accession does not require a lease agreement to be in place, but rather occurs as an operation of law. Judicial precedent has outlined specific conditions to be considered when proving accession has taken place. Firstly, proving that the solar system attaches to the landowner's building, one must consider the relevant circumstances of each PPA. Under each PPA, the landowner must give due consideration to the nature and purpose of the solar system to determine the possibility of attachment,²⁸¹ and whether the solar system will serve the building on a permanent basis. The degree and manner of attachment is the second consideration. If the solar system is attached in such a way that removal of the system will cause severe damage to the land and the solar system, then accession has taken place. If the solar system can be removed with little to no damage to the building and solar system, then accession is likely to not have occurred.

²⁸¹ Bradfield, G., Kahn, E. and Lehmann, K., 2013. *Principles of the law of Sale & Lease*. Juta and Company Ltd 139.

The landowner thus needs to consider each individual PPA to determine the plausibility of the two protection measures. Once establishing whether both or one are available options, the landowner must follow the respective process to prove and apply these protection measures against the IPP. Landowners must be cognisant of the potential nuances between different PPAs as each agreement will not have the same circumstance.

Chapter 3: Methodology

3.1 Introduction

The aim of the research investigation is to review solar Power Purchase Agreements (PPAs) to identify whether the two common law principles, namely the law of accession, and the lessor's tacit hypothec can apply to the relationships created by these agreements. These two common law protection measures are critical as they provide a means of protection under certain conditions for the landowner against the non-performing Independent Power Producer (IPP) in respect of the PPA between the two parties. This investigation focuses only on solar PPAs in which the agreement is directly between the landowner and the IPP. Instances where an area of the landowner's property are subject to a sublet agreement between the IPP and the tenant is not considered in this research investigation.

This chapter first sets out the design of this research project. It includes discussions pertaining to research philosophy, research type, research strategy, sampling strategy, data collection and analysis methods applicable to this investigation. These aspects are important as they provide details as to how the data is gathered, analysed, and used under the chosen research philosophy, which supports the research question. The research methodology also states any methodological limitations identified during the data-capturing phase and any relevant ethical considerations.

3.2 The Research Design

The epistemological approach identified for this research project is the interpretivism paradigm. This approach is suitable because it intends on understanding the meaning and context, as well as the relevant processes from all perspectives of the study and not merely one-sided.²⁸² Thus, on the one hand, understanding the relevance of the two common law protection measures available to the landowner is critical. On the other hand, one also needs to understand the rationale as to why the IPP would exclude such common law protection measures in the contract documentation.

The interpretivist approach undertaken in this research project is that of the case study methodology. Case studies are adopted to describe or investigate events or facts in the everyday

²⁸² Crowe, S., Cresswell, K., Robertson, A., Huby, G., Avery, A. and Sheikh, A., 2011. The case study approach. *BMC medical research methodology*, 11(1) 1-9.

setting in which it occurs.²⁸³ This approach allows the researcher to establish an in-depth understanding of a complex and variable environment within a real-life context.²⁸⁴ This methodology is a type of design in the qualitative research field, and a logic of inquiry.²⁸⁵ In this project, the case study approach draws on the contractual information detailed in the PPA, to construct an in-depth, contextual understanding of the position of the landowner with respect to utilising the two common law protection measures of the law of accession and the lessor's tacit hypothec against the IPP.²⁸⁶ This case study methodology is appropriate for the research project as the aim is to understand and interpret whether the two common law remedies are available to the landowner against the IPP within the context of a bounded system (i.e. the PPA) or not.²⁸⁷

Different variants within the case study methodology exist in terms of intent. These variations are the single instrumental case study, the collective or multiple-case study and the intrinsic case study.²⁸⁸ This investigation adopts the multiple-case study approach as it provides the opportunity to determine the status of the two common law protection measures available to the landowner (single issue of concern) over multiple PPAs. Assessing multiple PPAs solidifies the preferred approach adopted by IPPs in the current market attitude towards solar agreements.²⁸⁹ Applying the collective case study method negates the issue of generalisation and improves representativeness in the research findings.²⁹⁰ The collective case study approach is also an appropriate method of inquiry as this type of approach intends to study multiple cases simultaneously in order to establish a comprehensive appreciation of a particular issue which supports the objective of the research project.²⁹¹

The next step in the research methodology is to determine whether the application of the two common law protection measures are excluded by the PPA contract documents or not. Determining the inclusion or exclusion of the remedies is critical as it establishes the legal position of the landowner in respect of remedies of recourse against the IPP. Recourse can either

²⁸³ Crowe, S., Cresswell, K., Robertson, A., Huby, G., Avery, A. and Sheikh, A., 2011. The case study approach. *BMC medical research methodology*, 11(1) 1-9.

²⁸⁴ Crowe, S., Cresswell, K., Robertson, A., Huby, G., Avery, A. and Sheikh, A., 2011. The case study approach. *BMC medical research methodology*, 11(1) 1-9.

²⁸⁵ Creswell, J.W., Hanson, W.E., Clark Plano, V.L. and Morales, A., 2007. Qualitative research designs: Selection and implementation. *The counseling psychologist*, 35(2) 236-264.

²⁸⁶ Yin, R.K., 2009. *Case study research: Design and methods* (Vol. 5). Sage.

²⁸⁷ Creswell, J.W., Hanson, W.E., Clark Plano, V.L. and Morales, A., 2007. Qualitative research designs: Selection and implementation. *The counseling psychologist*, 35(2) 236-264.

²⁸⁸ Creswell, J.W., Hanson, W.E., Clark Plano, V.L. and Morales, A., 2007. Qualitative research designs: Selection and implementation. *The counseling psychologist*, 35(2) 236-264.

²⁸⁹ Creswell, J.W., Hanson, W.E., Clark Plano, V.L. and Morales, A., 2007. Qualitative research designs: Selection and implementation. *The counseling psychologist*, 35(2) 236-264.

²⁹⁰ Creswell, J.W., Hanson, W.E., Clark Plano, V.L. and Morales, A., 2007. Qualitative research designs: Selection and implementation. *The counseling psychologist*, 35(2) 236-264.

²⁹¹ Crowe, S., Cresswell, K., Robertson, A., Huby, G., Avery, A. and Sheikh, A., 2011. The case study approach. *BMC medical research methodology*, 11(1) 1-9.

be through the two Common Law protection measures, or if stated to be excluded from the PPA, via remedies in respect of the Law of Contract.²⁹² This research investigation does not consider potential remedies to the landowner in respect of the law of contract. This research only explores the two specific common law protection measures. Through the adoption of the collective case study approach mentioned above, the review and scrutiny of the PPAs identify any clauses or conditions which may rescind the applicability and thus the execution of the law of accession and the lessor's tacit hypothec as common law protection measures available to the landowner.

An understanding of why the two common law protection measures is important in the context of PPAs and how the two differentiate from one another is also critical for landowners to comprehend. If the application of the Common Law protection measures is not rescinded from the PPAs, landowners need to be cognisant of the method of application of the two protection measures and what measure will be most suitable within the specific context. Providing the landowner with background to the basis upon which the law of accession has been developed and what the current judicial precedent is, is key in promulgating this protection measure in respect of the physical solar infrastructure. In addition, a holistic understanding of the lessor's tacit hypothec as an alternative form of protection for the landowner is also important. One needs to understand the protection measures scope, and how the hypothec is perfected to retain possession of the movable object (solar infrastructure) in the event of rental in arrears from the IPP. Differentiating the two options available to the landowner is key as both Common Law protection measures cannot be used simultaneously, but rather as alternatives.

3.3 Data Collection

A qualitative data collection approach has been adopted for this investigation. The qualitative collection method is applicable as the study reviews and analyses the legal construct of the PPAs to determine information pertaining to the two common law remedies of the law of accession and the lessor's tacit hypothec.

The data collection was undertaken by examining the jurisprudence and relevant literature relating to the two Common Law protection measures of the lessor's tacit hypothec and accession in relation to the documentary evidence (PPAs) provided.

²⁹² Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 222.

There were two possible groups of participants that were able to provide the information necessary to undertake this research study, namely IPPs and landowners. It was evident that landowners as a participant group posed some difficulties. Landowners are not a single homogenous group, making it difficult to pinpoint the appropriate representative.

In the context of commercial renewable energy developments, there are different role players which require inclusion in the data collection process. These role players include the property management company, the asset management company, and the landowners. The owners can either be in the form of a private company that owns the property, and comprises single or multiple shareholders, or in a co-ownership structure where multiple owners have an undivided share in the property (for example, in the case of a sectional title development). Each of the role players have different functions to fulfil in the context of the property upon which the solar infrastructure is affixed. Should a property management company be appointed by the owners of the property, the former deals with the day-to-day operational component, ensuring the property functions optimally, and that up-keep and maintenance are regularly undertaken. If an asset management company is appointed by the landowners, the role of the former is to ensure the property provides the necessary financial returns for shareholders or owners and that the financial records of the property are current and correct from an accounting perspective. The asset management company also ensures that the property management company are functioning optimally and utilising the operational budget in the most practical and feasible manner. There may be instances where a single company can fulfil both the property management and asset management roles.

The property management company representatives are the starting point from a data collection standpoint. These are the representatives stationed at the property daily and are a known entity which one can engage with at the outset of the data collection process. The property management company can also identify other entities who may have the relevant information required for this study. The property management company, although appointed to oversee the operational aspect of the building, are in most instances, unaware and not equipped with the information related to the specifics of the rooftop solar infrastructure and the provisions of any PPA. In this instance, engagement with the asset management company, as the second step in the data collection investigation, is required. The asset management company are privy to any respective agreements between any service providers and the owners of the property. The asset manager would therefore have the necessary information to determine if the solar infrastructure on the rooftop was purchased in full or if there is a standing PPA with an IPP.

Although the asset management company can provide this information, obtaining approval from the owners of the property is first required. The approval process from the owners would form the third step in the data collection process. Obtaining approvals from the owners of the property is challenging given the different ownership structures one may encounter at the properties housing solar infrastructure. Taking into consideration the 3-month duration of the data collection period, tailoring the request for information for this investigation would have taken considerable effort for the different type of landowners. This avenue would therefore threaten the project timeline and was therefore not pursued. Furthermore, it was possible to obtain the required information from the other participant category (IPPs), which represented a much more homogenous group.

The data collection process consisted of different phases. These phases consisted of Phase 1: the initial request for participation; Phase 2: the request for information; and lastly Phase 3: review and interpretation of information.

The initial requests for participation addressed to the renewable energy companies were to determine whether there was potential interest in participating in the research investigation. Phase one provided the renewable energy companies with an overview of the project and why their participation was a critical component in researching such a topic. As part of phase one, renewable energy companies with a core focus in dealing with solar systems in an embedded generation scenario where a PPA exists with the landowner, were identified. The identification was undertaken via a web-based search for the leading IPPs in South Africa. Further review was undertaken on each companies' website to understand the projects each company has undertaken to date, and that their business scope could align with the research aim of the project. These companies were all renewable energy companies and experienced in the field of solar generation. Nine companies were identified after concluding the web-based investigation. These nine companies were approached in phase 1. Part of the request for participation was providing the nine companies with an outline of the research investigation and what the investigation aimed to achieve. Six of the nine companies declined the opportunity to partake in the investigation. These IPPs explained that this study is not aligned with their core business model (e.g. focused on the rural PPA environment and not the urban context). One of the remaining three companies who agreed to participate also had to be excluded from the research. It transpired that their business focus was on a national scale with PPAs dealing with energy produced to feed the South African national energy distribution grid and not for private consumption on private land. Therefore, of

the nine companies approached to participate in the investigation, two met the research criteria and agreed to participate in principle.

The second phase of the research investigation was the request for information. This phase detailed the documentation required from the renewable energy companies to undertake the investigation. The documentation required included any contract data relating to PPAs. Phase 2, therefore, focussed on information specific to PPAs required from the two companies to undertake the study. In-person discussions and online-conference calls were held with senior representatives (managing director and head of solar development) of each company to provide further detail of the research investigation. Participants were also briefed on the specific content of the PPAs that is of interest to achieve the central aim of the investigation. Given the sensitivity towards confidential information detailed in the PPAs, one of the two participating companies were only willing to provide two template versions of the PPA which are utilised in their business activities. The template versions do not capture subtle nuances to each deal, but it does provide a sufficient base to understand the agreements in respect of the two common law protection measures. The second company willing to participate in the study provided PPAs which were representative of actual agreements drafted for commercial buildings. Given the confidential nature of these documents, neither of the participating companies were willing to share any supplementary documentation that define the technicalities and financial aspects of the specific agreements. These aspects are not relevant to the focus of this study and the unavailability thereof did not affect the research results.

The third and final phase of the investigation entailed the reviewing of PPAs received from the participating renewable energy companies. The review process focused on any clauses and information within the PPAs relevant to the application of the lessor's tacit hypothec and the law of accession.

A critical issue identified as part of the data collection process is the potential exposure of confidential information contained within the PPAs. This aspect is addressed in more detail in section 3.7 (Ethical Considerations) below.

3.4 Data Reliability and Validity

The data received from the two companies participating in the study is deemed to be reliable. The rationale is that each of the agreements have been compiled in line with the principles of South African Law of Contract. The premise upon which the landowner and IPP engage in a

transactional relationship is by way of an agreement (i.e., the transaction is the rental payment space to house solar infrastructure). The agreement, created within the ambit of the law of contract, is created with the intention to create legally binding obligations for each party.²⁹³ As such, each of the documents set out the parameters of the agreement as well as the respective obligations from each party privy to the agreement in the context of renewable solar energy. Although there are slight nuances to each of the agreements received, these are deemed to be consistent with each other as the terms of reference and the outcome are aligned. In addition to the consistency between each of the PPAs, the data is also consistent over time. These agreements are contractually valid between 15 and 25 years each depending on the individual PPA. These PPAs can however be terminated under certain conditions. As such, there may be slight amendments to new agreements in the future, which may be subject to any change in the legislation governing the subject of renewable energy. The terms of the agreement are however deemed to be consistent for the full period of time stipulated in the contract data.

On assessment of the PPAs received from the renewable energy companies, one can confirm that the data is sufficiently valid. The validity was observed on review of the PPAs whereby the concepts under investigation are highlighted in these agreements. The data further provides evidence which can be assessed to review the specific criteria for each common law protection measure, to determine if one or the other option is a valid remedy for the landowner. The agreements provide sufficient information to warrant the investigation of the lessor's tacit hypothec and the law of accession. A consideration which may reduce the validity of the information is the fact that the information received is incomplete due to confidentiality concerns.

3.5 Data Analysis

As mentioned previously,²⁹⁴ the key consideration in this research investigation is to determine whether the two common law protection measures, namely the law of accession and the lessor's tacit hypothec are available to the landowner against non-performing IPPs in the context of solar PPAs.

The analysis adopts a review approach as part of the case study methodology. To determine if these common law protection measures are available to the landowner, a careful review of the

²⁹³ Van Huyssteen, L.F. and Maxwell, C.J., 2021. *Contract Law in South Africa*. Kluwer Law International BV. Ch 1, Para III, no. 31.

²⁹⁴Section 1.6 of Chapter 1.

PPA contract data is required using a cross-case qualitative analysis method. The cross-case qualitative method will highlight the relevant themes and similarities across the different PPAs using the specific criteria for applying each Common Law protection measure against the IPP. The cross-case analysis technique facilitates the comparison and differences in each of the PPAs using the relevant criteria applicable to reviewing the lessor's tacit hypothec and accession.²⁹⁵ To understand whether the two Common Law protection measures are available to the landowner, the first point of departure is to investigate the two protection measures individually. To investigate the plausibility of applying the lessor's tacit hypothec, the following five aspects need to be identified throughout the PPAs using the cross-case analysis. The first aspect to be explored is the contractual obligation to pay a rental sum of money for the space the solar system occupies. The second aspect is the ownership of the solar infrastructure. It must be determined whether the PPA contains any clause which provides clarity on where the ownership of the system vests. The third aspect to be examined is that of credit instalment agreements. It must be established whether there is a credit instalment agreement attached to the solar system or not. The fourth aspect to be considered in the data analysis are any clauses relating to the movable nature of the solar infrastructure. The fifth and final aspect to be examined in the PPAs is the third-party interest in the solar infrastructure. Identifying and reviewing the clauses pertaining to these five aspects will determine if the lessor's tacit hypothec can be applied or not.

The investigation of the law of accession also uses the cross-case analysis technique, however, the criteria to be reviewed are not as clear-cut as the lessor's tacit hypothec. Elements of thematic analysis are adopted in the review as one identifies patterns within the PPAs to infer whether a specific criterion has been identified. For example, understanding the duration of the PPA between the landowner and the IPP can infer the intention of either party. If the PPA is five years in length, this could infer a temporary relationship between the building and the solar infrastructure, but if the PPA is twenty-five years, this infers a more permanent connection. The specific criteria to examine the plausibility of applying accession to the solar system is three-fold. Firstly, the nature and purpose of the accessory (solar system) must be explored in the context of the property upon which it is fixed, followed by the degree and manner of attachment, and lastly the subjective intention of the IPP.

In addition to the above, the review also seeks to identify any clauses which expressly exclude accession and the lessor's tacit hypothec as potential protection measures from the contract

²⁹⁵ Khan, S. and VanWynsberghe, R., 2008, January. Cultivating the under-mined: Cross-case analysis as knowledge mobilization. In *Forum: qualitative social research* (Vol. 9, No. 1, p. 34). Institut für Qualitative Forschung.

document. The review also seeks to identify any conditions within the PPA which nullify the conditions set through judicial precedent to apply each of the two Common Law protection measures.

The unit of analysis for this research investigation are the PPAs provided by the two renewable energy companies participating in this study. These documents provide the framework for determining whether the two Common Law protection measures are available to the landowner or not. As mentioned previously²⁹⁶, the investigation considers only PPAs where the landowner purchases power generated by the solar system and the IPP pays rent to the landowner for the area required to house the solar infrastructure. This area can either be on the physical undeveloped land, or areas such as rooftop space or parking areas.

For the purposes of this investigation, one cannot determine a specific discipline within the built environment as select PPAs provided by the IPPs as part of the data collection process are generic in nature and do specifically speak to a certain environment. One should therefore be cognisant of specific nuisances (physical environment and deal structure) in certain cases which need to be considered over and above the standard assessment criteria reviewed in Chapter 4.

3.6 Data Limitations

The limitations observed during the data collection period was the unwillingness of renewable energy companies to disclose the content of PPAs. The reason for this is related to the confidential information and client-privy information within these agreements which the companies were not willing to reveal as this would result in a breach of contract. During the data collection period, several companies were approached and requested to take part in this research investigation. Of these, only two were willing to participate in the study. The permission granted from the participating IPPs in respect of this study was to only review the PPAs in respect of the research aim and to report from a general standpoint and not specific to each IPP's PPA and the identity thereof. The identity of these companies, as well as that of their contracting counterparts must remain confidential. Furthermore, the specific projects where their respective PPAs were used cannot be revealed in the research report. The participants also insisted that the PPAs under analysis could not be included as an annexure to this research report.

²⁹⁶ Section 1.2 of Chapter 1.

The second element which could be viewed as a potential limitation to the investigation is the template PPA provided by the participating IPPs. Due to the confidential nature of active PPAs, certain IPPs were only willing to share their template PPA. This document is still confidential from an IPP standpoint but allows the IPP to provide the investigation with information that does not breach or compromise existing contractual relationships. The template PPA is considered a potential limiting factor as it does not provide project-specific information. Project specific information may or may not warrant the inclusion of clauses omitting or reconsider the two common law protection measures available to the landowner considered in this investigation.

The third element is generalisation in the data which may skew the outcome of the research investigation. The low number of IPPs willing to partake in the investigation results in the reduction in the catchment area of PPAs circulating within the market. By not capturing the majority of IPPs operating in the renewable energy space, one is therefore deducing a research outcome from a very limited sample in the data pool, and therefore may be making a generalised interpretation of the status quo with respect to the PPA agreements between IPPs and landowners.

Contrary to the limitation with respect to the data pool mentioned above, the PPA templates provided by the IPPs are not representative of a single project only, but rather represent multiple PPA projects which are currently active under that specific IPP. Therefore, this reduces the extent of generalisation with respect to the limited number of participants in the data pool. Therefore, one must deduce an outcome representative of the status quo in the PPA market dealing with PPAs in the context of this research investigation.

3.7 Ethical Considerations

Ethics approval from the Faculty of Engineering and the Build Environment Ethics in Research Committee was granted prior to commencing with the data collection from the relevant study subjects for this research project. This ethics approval is detailed in Annexure A. As part of the study, the participants were requested to provide their formal consent in the form of an informed consent letter. The letter described the relevant process of the study and the respective requirements and responsibilities expected of each participant during the study. The detail of this letter is provided in Annexure B. No remuneration was provided to any participant involved in the study as the study is undertaken to provide a holistic understanding of the application of the two Common Law protection measures (lessor's tacit hypothec and accession) in the context of

PPAs between private landowners and IPPs. All information received from the participants is confidential.

The research project requires the interpretation of privileged information. This information is the content of the PPAs between IPPs and landowners. These PPAs are legally binding contracts between the two parties which disclose company information as well as the financial structure of the electricity agreement between the parties. These documents may also contain private information of the landowner and IPP which is not for public disclosure.

Participating in this study involves the following.

a. Access to Documents

The participant provides the investigator with all documentation used to conclude a PPA in the context of solar embedded generation. These documents include annexures to the PPA as well as ancillary documents such as lease agreements. The documents were submitted electronically via personal emails.

The primary consideration from an ethical standpoint within these PPAs is each parties' private information which can be in the form of banking details, financials, privileged company information and the physical address of the company which the PPA refers to notwithstanding any addendums to the agreement which could also be sensitive information.

Guaranteeing confidentiality and implementing anonymising techniques to protect the identity of both parties in the PPA is one way the ethical consideration of private information can be dealt with. Concealing names of both parties as well as any private, personal or company information which an association can be determined, and which does not form part of the primary research focus would not impact the outcome of the project. To maintain confidentiality of information detailed in the PPAs, the following was agreed with the participants (IPPs). Firstly, it was agreed a reference to specific information within a specific PPA of a specific IPP was not permitted. Non-permittance of this action creates an anonymising technique to each IPP and their respective PPAs.²⁹⁷ The second ethical consideration is naming of the participants involved in the research investigation. To create anonymity, it was agreed that no IPP and the contracting party contained within the PPAs are to be disclosed in this research report.

²⁹⁷ Section 4.1 of Chapter 4.

The third ethical element is the disclosure of site-specific information within each of the PPAs. Disclosing site-specific information provides an opportunity to identify the particulars of the site and potentially deduce who the IPP and contracting parties are. It was therefore agreed to not disclose any site-specific information. The final anonymising technique implemented in this investigation relates to the PPAs. The actual agreements provided by the IPPs are not allowed to be included as annexures to the research report. Including these as annexures undermines all the anonymising techniques mentioned and discloses the IPPs intellectual property to individuals outside of the agreement and this research investigation.

Additional approaches to maintaining the privacy of information within these documents is an agreement between the entity and the researcher in which any documents disclosed are either destroyed or permission is given to archive the information without reuse of the documents without prior review and consent from the IPP and/or landowner. The participants did not require the PPAs to be destroyed, but rather confirmed that these documents are not to be disseminated without prior written approval from the relevant entity.

Taking the ethical requirements mentioned above into consideration, the outcome of implementing the anonymising techniques provides only for the review of the contract documents provided by the IPPs and allows the investigation to provide a summary of the findings from each of the PPAs and not specific to the PPAs.

It was noted during the discussions with the participants that disclosure of client-specific information within the PPA documents would breach confidentiality clauses and expose information of both parties privy to the PPA. It was therefore agreed that client specific information is not of interest in this investigation and taking into consideration the investigation is only concerned with the legal construct of the contract data, it was agreed that any client specific information in PPAs provided by the IPPs will remain anonymous. It was further agreed that the IPP's PPA template used in solar projects can also be provided as a source of data.

3.8 Chapter Summary

Overall, the methodological approach and data gathered during this process was appropriate in providing sufficient information to understand the potential implications for the lessor's tacit hypothec and accession in the context of these PPAs between landowners and IPPs. Although the data provided are template PPAs, the legal construct remains relevant to the investigation.

This legal construct provided enough information to understand each aspect relevant to applying the common law remedies of the lessor's tacit hypothec and accession in the context of PPAs.

The multiple case study qualitative review approach is the suitable research methodology to investigate the objectives of the research project. The data gathered for the investigation provided sufficient information to understand the legal construct of the PPAs irrespective of the confidentiality issues around disclosure of client information. One could argue that obtaining additional PPAs from additional sources is always advantageous to bolster the findings and further diminish potential generalisation in the research.

Chapter 4: Data Presentation and Analysis

4.1 Introduction

This chapter presents the analysis of the PPAs, as well as the findings regarding the contents of these agreements in relation to the two Common Law protection measures, namely, the lessor's tacit hypothec and the law of accession. The findings provide context as to how these Common Law protection measures are considered within the PPAs, and whether the landowner has the option to apply these protection measures in a particular case or not.

The findings and discussion section of the chapter reviews the PPAs to determine the relevance of the conditions which trigger the application of each of the two Common Law protection measures. The chapter interprets the findings within the PPAs in the context of the literature and judicial precedent discussed in Chapter 2, to ascertain whether the findings provide an opportunity to apply the Common Law protection measures against the IPP or not. The chapter also discusses potential limitations of the findings.

As explained in Chapter 3,²⁹⁸ several companies were approached during the data collection phase of the project, with only two companies agreeing to partake in the investigation. Feedback from the companies which were not willing to partake in the investigation was firstly based on confidentiality issues and secondly on the notion that the investigation was not aligned with their core business focus and the findings would not be of any material value.²⁹⁹

Initially, this was regarded as problematic given the limited size of the data pool and that generalization in respect of the information within PPAs would skew the results. However, after consultation with the IPPs willing to partake, and the notion that these PPAs represent multiple projects throughout South Africa, it was observed that the pool is large enough to be representative of the industry so far as to view the data as reliable and a true representation of the market. For information purposes, each IPP provided two PPA agreement templates for this investigation. These PPAs reflect cases reaching a total energy generation capacity of approximately 50MW. It is also acknowledged that data from additional IPPs would bolster the findings of the investigation in one way or another.

²⁹⁸ Section 3.3 of Chapter 3.

²⁹⁹ Section 3.3 of Chapter 3.

For the purposes of the analysis, the table below represents each PPA provided by the two IPPs. For identification purposes as part of this investigation and to maintain anonymity, the IPP and PPA are identified by the number and letter detailed in the table below, respectively.

IPP ID	PPA ID	
A	1	2
B	3	4

Table 2: PPA & IPP Identification Method

4.2 Findings and Discussion

In this analysis section, the two Common Law protection measures are dealt with under individual subheadings. Under each subheading, the required conditions to be fulfilled to apply each protection measure are discussed individually across all four PPA documents.

4.2.1 Lessor's Tacit Hypothec

Given the tacit nature of the lessor's hypothec, this Common Law principle would apply automatically by operation of law if the requirements as stated below are met. The landowner and IPP can however agree to nullify the lessor's tacit hypothec by expressly stating (in the form of writing within the PAA) that this Common Law remedy is excluded as well as the associated rental relationship between the landowner and IPP.

As mentioned in Chapter 3,³⁰⁰ certain conditions must be fulfilled to apply the lessor's tacit hypothec as a Common Law remedy against non-performing IPPs in the context of PPAs. The first condition to trigger the application of the lessor's hypothec is the existence of a lease agreement between the landowner and the IPP, where there is an obligation to pay rent.³⁰¹ The second condition to assess is the ownership of the solar infrastructure. The lessor's tacit hypothec cannot be applied in certain circumstances if the ownership of the solar infrastructure does not fall with the IPP, but rather a third party.³⁰² The ownership consideration is split between third party interests and IPP ownership in the summary below. The third consideration as part of the analysis is to determine whether the solar infrastructure is subject to a credit-installment agreement or not. If the IPP explicitly states in the PPA that the solar infrastructure is subject to a credit-installment agreement with a third party, the application of the lessor's tacit hypothec is

³⁰⁰ Chapter 3, Section 3.5 Data Analysis paragraph 3.

³⁰¹ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM. *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 521.

³⁰² Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM. *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 521.

then problematic.³⁰³ The fourth and final consideration to be assessed is determining whether the solar infrastructure remains movable property or accedes to the land or buildings of the landowner. This is important as the landowner cannot apply the lessor's tacit hypothec if the solar infrastructure is annexed to the building or land.³⁰⁴

The table below represents the findings from the analysis of the four PPAs with respect to the relevant issues to consider applying the lessor's tacit hypothec against the non-performing IPP.

³⁰³ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 341.

³⁰⁴ Brits, R. 2016, *Real Security Law*. Jutas Property Law Library. 436.

	PPA 1	PPA 2	PPA 3	PPA 4
Lease with Obligation to Pay Rent	The agreement confirms that both parties acknowledge and accept that there is an obligation from the IPP to pay a sum of money to the landowner for the area required to install the solar infrastructure. In the definitions clause, as well as other clauses in the agreement, it is stipulated that a lease will exist between the IPP and landowner, and that payment will be due to the landowner for the solar system's area throughout the duration of the lease term.	No mention of any lease agreement between the IPP and Landowner was observed in PPA 2, or any obligation to pay a rental amount for the space required to accommodate the solar infrastructure. The PPA only refers to the obligation of the "buyer" being the landowner to pay a monthly sum of money for the energy generated by the solar infrastructure. The obligation of the IPP in this agreement is only to generate the agreed monthly yield of solar energy to support the business operations.	It is clear from the contract document between the landowner and IPP that a lease agreement is in place confirming the rental of the rooftop space for a monthly sum of money to be paid by the IPP to the landowner. This monthly rental fee is only determined once the area occupied by the solar infrastructure is concluded.	The agreement provides clear evidence that a land lease for the area which accommodates the solar infrastructure forms part of the contract documents. The agreement also refers to the obligation of a sum of monies to be paid by the IPP to the landowner in respect of the signed PPA.
Ownership of Solar Infrastructure	The agreement stipulates that ownership of the solar infrastructure will remain with the IPP for the full PPA term. The only available option to transfer ownership is if the landowner opts to purchase the solar infrastructure from the IPP. The PPA also refers to the landowner waiving his/her right to any lien or hypothec over the "facility".	This PPA outlines a clause which deals with ownership. This is specific in nature as it states that ownership will always remain with the seller (IPP) during the term length. It also states the security interests of the lender (third-party financier) in respect of the solar infrastructure. The clause further states that the solar infrastructure of the IPP may not be subject to the lessor's tacit hypothec for rental payable to the landowner.	Similar to PPA 2, this agreement states that ownership will vest with the IPP for the full duration of the agreed term, while also stating the security interests of a third-party lender in respect of the solar infrastructure. The PPA furthermore stipulates explicitly that the solar infrastructure cannot be subject to the lessor's tacit hypothec for rental payable to the landowner.	This PPA includes a clause covering ownership. This clause states that ownership of the solar infrastructure will remain with the IPP for the full term of the agreement.
Credit Instalment Agreement	PPAs 1, 2, 3 and 4 do not provide any clause or provision within the agreements which refer to the solar infrastructure being subject to a credit instalment agreement. As mentioned above, the only third party mentioned is the security interest of the lenders, where applicable.			
Movable Nature of Solar Infrastructure	This agreement does not explicitly state that the solar infrastructure will always remain movable during the agreement term.	The agreement does not stipulate a clause within the document which explicitly states that the solar infrastructure will remain movable property throughout the duration of the term.	This agreement explicitly states that the solar infrastructure installed onto the premises will always remain movable during the installation operations as well as during the PPA term.	There is no clause within the agreement which clearly states that the solar infrastructure is to remain as movable property throughout the term length.
Third-Party Interest	The PPA does not state that third-party interests are acknowledged from an ownership standpoint.	The PPA states clearly that third-party interests over the solar infrastructure are noted.	The PPA states clearly that third-party interests over the solar infrastructure are noted.	The PPA does not state anything relating to a third-party security interest in respect of the solar infrastructure.

Table 3: Review of the Lessor's Tacit Hypothec Considerations in the PPAs

The table below provides a summary of the findings in respect of the five conditions required to apply the lessor’s tacit hypothec in the event that the IPP’s rental payments are in arrears.

	PPA 1	PPA 2	PPA 3	PPA 4
Lease with Obligation to Pay Rent	Yes	No	Yes	Yes
Ownership of Solar Infrastructure	Yes	Yes	Yes	Yes
Credit Instalment Agreement	No	No	No	No
Movable Nature of Solar Infrastructure	Not Stated	Not Stated	Yes	Not Stated
Third-Party Interest	No	Yes	Yes	No

Table 4: Summary of Requirements in Respect of the Lessor’s Tacit Hypothec

The interpretation of the results indicated in Tables 3 and 4 above are discussed in 4.3.1 below. The alternative Common Law protection measure to review in respect of the PPAs is the law of accession, should the lessor’s tacit hypothec not be a possible remedy for the landowner.

4.2.2 Law of Accession

The requirements for the confirmation of accession via building is explained in Chapter 2.³⁰⁵ As discussed, judicial precedent defines the first requirement to be the nature and purpose of the movable property – in this case, the solar infrastructure.³⁰⁶ The second requirement refers to the manner and degree of attachment of the solar infrastructure to the land or building and the potential damage caused if the infrastructure components were to be removed.³⁰⁷ The final consideration is the subjective intention of the IPP at the time of attachment of the infrastructure to the land or building.³⁰⁸ Evidence of these conditions are stipulated for each of the PPA’s in the table below.

³⁰⁵ Section 2.6 of Chapter 2

³⁰⁶ Section 2.6 of Chapter 2

³⁰⁷ Section 2.6 of Chapter 2

³⁰⁸ Section 2.6 of Chapter 2

	PPA 1	PPA 2	PPA 3	PPA 4
Nature & Purpose of Solar Infrastructure	The nature of the solar system is such that it can attach to land and/or buildings of the respective landowners. This is not explicitly stated in the agreements, but rather forms the basis for all PPAs dealing with embedded generation. The essence of the PPA in the context of embedded generation is that the solar infrastructure is placed on that property and produces energy for that property. That is the purpose of the infrastructure – to serve the land.			
Degree & Manner of Attachment	PPA 1 does not provide any details as to the degree and manner of attachment or the degree of potential damage that may be caused if the solar infrastructure were to be removed from the premises. An annexure to the agreement refers to a “ <i>Rooftop Installation and Construction Agreement</i> ”. It is assumed that the technical details regarding the degree and manner of attachment are stipulated in this agreement and that one can therefore deduce from this agreement whether the first two conditions are met or not. The said document was however not accessible for the purposes of this study.	The PPA does not state any provision that refers to the degree of damage should the solar infrastructure be removed from the premises. There are no further provisions relating to the manner and degree of attachment stipulated in PPA 2.	PPA 3 contains a clause entitled “ <i>Removal of Solar System After Termination</i> ”. This clause speaks to the termination of the agreement and the obligation of the IPP to remove the solar system on confirmation of the termination. The clause refers to restoring the premises to the condition prior to the installation of the solar system, considering normal wear and tear. As the agreement makes no provision for the method of attachment, one can assume when considering the termination clause, the solar system can be removed from the premises without causing irreparable damage to the land or buildings.	PPA 4 does not contain any clause indicating the degree and manner of attachment of the solar infrastructure to the land or buildings. There is also no clause which provides information pertaining to removal of the solar infrastructure and the potential damage it may cause if removed.
Subjective Intention of the IPP	There is no clause in the agreement which explicitly states the professed intention of the IPP. However, there is an annexure to the agreement titled “ <i>Agreement Data</i> ”. Given that the PPA is a template version, the duration of the agreement will be detailed in this annexure. Understanding the term length in the PPA may provide evidence of the intention of the IPP in respect of permanence.	PPA 2 clearly stipulates that the solar system is to remain the property of the IPP even though the solar infrastructure may be of a fixed or permanent nature. This implies the professed intention of the IPP. The PPA also provides a specific clause on the term of the agreement between the landowner and IPP. The duration stipulated in the agreement is 20 years.	Detailed under the ownership clause of the PPA, the agreement states that the solar system installed on the premises will remain the property of the IPP, irrespective of the fact that the installation of the solar system, or any aspect thereof may be of a fixed and permanent nature. The PPA provides for an agreed term of 25 years in which the landowner will purchase the energy sold from the solar system by the IPP.	There is no clause in the agreement which explicitly states the professed intention of the IPP. The PPA provides for an agreed term of 15 years in which the landowner will purchase the energy sold from the solar system by the IPP. A further clause within the PPA allows this term length to be extended should the 15-year term length come to an end.

Table 5: Review of the Law of Accession Criteria in the PPAs

The table below provides a summary of each of the conditions met within the PPA documents required to consider the application of the law of accession. The interpretation of the results is set out in section 4.3.2 below.

CRITERIA	PPA 1	PPA 2	PPA 3	PPA 4
Nature & Purpose of Accessory	Yes	Yes	Yes	Yes
Degree & Manner of Attachment	No	No	Yes	No
Subjective Intention of the IPP	No	Yes	Yes	Yes

Table 6: Summary of Law of Accession Criteria Findings

4.3 Interpretation of Results

This section reviews and interprets the data identified in the PPA with the relevant criteria of each protection measure to deduce whether the application of the hypothec and accession are plausible or not. The hypothec and accession are dealt with separately. The limitations of the results and conclusion of the findings are also discussed in this chapter.

4.3.1 Lessor's Tacit Hypothec

Firstly, to consider the application of the lessor's hypothec, one needs to understand the relationship between the landowner and the IPP. It is through this relationship that the lessor's tacit hypothec arises or not.³⁰⁹ The rationale for reviewing the PPAs is thus to determine how these relationships between the landowner and IPP are structured, and whether the application of this common law remedy can be applied against the IPP in the instance where the IPP has failed in their obligation to pay rent.³¹⁰ Thus, the first point of interest in the PPAs was to determine if any lease agreement and/or obligation to pay rental for space existed. The analysis concludes that three of the four PPAs meet the first criteria of the obligation to pay rent. This condition within the PPA therefore creates an environment where a tacit hypothec can be applied if the IPP brings their solar equipment onto the premises.³¹¹ This circumstance creates the opportunity for the landowner to attach the movable property until such time as the arrear rental (if any) is settled.³¹² PPA 2 indicates inconsistency with the PPA document. There is no definitive

³⁰⁹ Pope, A., Du Plessis, E., Badenhorst, P., Freedman, W., Mostert, H., Pienaar, J. & Van Wyk, J. *The Principles of the Law of Property in South Africa* 2 ed (South African Oxford University Press 2020) 338.

³¹⁰ Section 2.4 of Chapter 2

³¹¹ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM. *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 475.

³¹² Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM. *Silberberg and Schoeman's the Law of Property* 6 ed (LexisNexis South Africa 2019) 476.

clause in the agreement which specifically refers to an obligation from the IPP to pay rental for the area housed by the solar infrastructure. The document further states that the solar infrastructure cannot be subject to the lessor's tacit hypothec and sold in execution under any processes of law. This inconsistency in the agreement is odd as the application of the hypothec in favour of the landlord is only an option when there is an obligation from the IPP to pay a rental sum of money and that rental is in arrears. This inconsistency raises the question whether there are supporting documentation that refers to an agreement of lease which is not referenced in PPA 2.

The second consideration is ownership. The PPAs all state that the IPP is the owner of the solar infrastructure for the full duration of the PPA term. PPA 2 and 3 also specifically protect the interests of third parties in relation to the solar infrastructure. These provisions create difficulty if one were to attach the solar infrastructure if rent is unpaid. Judicial precedent set out in the case of *Bloemfontein v Jacksons Ltd*³¹³ provides specific requirements to determine whether third-party property is subject to the lessor's tacit hypothec or not. One of the requirements which needs to be satisfied to attach the movable property is "*the lessor must be unaware of the fact that the goods belong to a third party*".³¹⁴ Under the circumstance created in PPA 2 and 3, third-party interest is disclosed. Therefore, the landowner cannot argue that it was unaware of third-party interests and believed that the IPP is the sole owner of the solar infrastructure. Consequently, the landowner cannot rely on the tacit hypothec over the solar infrastructure as a remedy should the IPP rental payments be in arrears in the case of PPA 2 and 3.³¹⁵ PPA 1 makes mention of the option for the landowner to purchase the solar infrastructure from the IPP. In the event of this happening, the PPA would likely become null and void as ownership would vest with the landowner and the IPP would receive a sum of money for the purchase of the infrastructure by the landowner.

The third consideration is credit instalment agreements, and particularly whether the solar infrastructure is subject to a credit-instalment agreement in the PPAs. On review of the agreements, no evidence of any credit-instalment agreements over the solar infrastructure was identified. This is an important finding as the Security by Means of Movable Property Act

³¹³ *Bloemfontein v Jacksons* 1929 AD 266.

³¹⁴ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM. *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 477.

³¹⁵ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM. *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 478.

prevents any property from being subject to the application of the lessor's tacit hypothec if an instalment agreement, as defined in the National Credit Act, is in place over that movable property.³¹⁶ The fact that none of the PPAs stipulate that the solar infrastructure is subject to a credit instalment agreement³¹⁷ means that the third condition is satisfied in respect of applying the common law remedy of the lessor's tacit hypothec.

The fourth consideration in respect of the PPAs is whether the solar infrastructure remains movable or not during the term of the agreement. Results indicate that only one of the PPA documents (i.e. PPA 3) stipulates explicitly that the solar infrastructure is to remain movable throughout the duration of the agreement. This condition is an important factor in applying the lessor's tacit hypothec, as the basis of this remedy is to attach the IPP's movable property.³¹⁸ If the means of attachment of the solar infrastructure is such that it is no longer movable property, one cannot apply the lessor's tacit hypothec as a Common Law remedy against arrear rental by the IPP.³¹⁹ As the method of attachment is not explicitly stipulated in the PPAs, one cannot conclusively confirm that the solar infrastructure remains movable or not. One can however adopt the view that the solar infrastructure remains movable since all the PPAs include a clause providing for the decommissioning of the solar infrastructure. These decommissioning clauses provide an opportunity for the IPP to remove the solar infrastructure should the agreement be cancelled under whatever circumstance. By virtue of this provision in the agreement, one can infer that the solar infrastructure remains the movable property of the IPP and the application of the lessor's tacit hypothec as a common law remedy against the IPP is still potentially valid.

The PPAs under review do not all explicitly state every requirement needed to be fulfilled for the landowner to apply the lessor's tacit hypothec against the IPP. In some cases, select PPAs (PPA 1, 2 & 3) include general clauses which refer specifically to the lessor's tacit hypothec and not necessarily to the conditions required for the application of the Common Law remedy.

PPA 4 speaks to the term "encumber". This word is specifically defined in the PPA and refers to "*liens, security interests, conferring security by contract or operation of law, any arrangement*

³¹⁶ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM. *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 522.

³¹⁷ A note can be included in the PPA by the IPP to ensure this condition has been disclosed to prevent fulfilling all conditions to invoke application of the hypothec.

³¹⁸ LAWSA (436).

³¹⁹ Section 2.5 of Chapter 2.

*under which claims for monies are made... ”.*³²⁰ The PPA stipulates that the landowner cannot “encumber” the solar system without prior consent of the IPP. One can therefore take the view that the IPP infers that the landowner cannot utilise the solar infrastructure as a security object to obtain additional finance. However, the specific wording in the PPA which refers to “*conferring security by operation of law*” can create the (perhaps unintended) impression that the hypothec is expressly excluded from the PPA. Thus, the availability of the Common Law remedy of the lessor’s tacit hypothec in PPA 4 is uncertain, but not impossible.

PPA 1 includes a specific Waiver of Lien and Hypothec clause. This clause refers to the landowner waving any rights with respect to a “*hypothec over the facility and any right it may have in law to bring any claim whatsoever for compensation*”.³²¹ On the one hand, one could conclude that this clause revokes the opportunity to apply the lessor’s tacit hypothec. On the other hand, one can take the view that the clause refers specifically to compensation. The Oxford Legal Dictionary defines compensation as “Monetary payment to compensate for loss or damage.”³²² Taking into consideration that PPA 1 does not define the word compensation specific to the contract, the general legal definition must be applied.³²³ Thus, in the case of PPA 1, the landowner does not seek compensation, but rather the obligation of the IPP to pay rent for the space the solar infrastructure occupies. Thus, the Common Law remedy of the lessor’s tacit hypothec may be applied in the event of default of an obligation to pay rent from the IPP, and not because of payment for work performed, salary or wages, suffering or injury.

In summary, the evidence illustrates that PPAs 1 and 4 provide sufficient evidence to apply the lessor’s tacit hypothec as a Common Law remedy against the IPP in the case of arrear rentals. The rationale is that in both instances, the solar infrastructure is not held as a security interest in favour of a third party, nor is it subject to a credit instalment agreement. Both of these agreements further indicate that there is a rental agreement in place in which an obligation exists to pay the landowner for that rental space required to house the solar infrastructure. The two PPAs also do not explicitly state that the solar infrastructure becomes an immovable object when installed. Finally, there are no clauses in these two agreements that explicitly exclude the application of the lessor’s tacit hypothec. One should keep in mind that every PPA will have contractual

³²⁰ Extract from PPA 4.

³²¹ Extract from PPA 1.

³²² <https://www.oxfordreference.com/display/10.1093/acref/9780192897497.001.0001/acref-9780192897497-e-747?rskey=DZuVN1&result=821> (accessed 18-05-2024).

³²³ <https://legalvision.com.au/what-are-defined-terms-in-contracts/> (accessed 17-08-2023).

differences, thus ensuring all criteria is considered including any express clauses within the contract is key.

In the instance where the solar infrastructure is fixed in such a way that it is perceived to have formed part of the principal immovable property (land or building), the landowner cannot rely on the lessor's tacit hypothec as a remedy against the IPP as one cannot hold a security right over one's own property.³²⁴ One would therefore have to investigate the applicability of the second protection measure, namely the law of accession as an original method of acquisition of ownership.

4.3.2 Law of Accession

As Chapter 2 explains,³²⁵ there are generally three elements to consider when determining whether permanent annexation through building has taken place. These are the nature and purpose of the accessory, the manner and degree of the attachment, and the subjective intention of the owner of the accessory or movable object.³²⁶

When considering the nature and purpose of the accessory within the PPA documentation under review in this research study (PPA 1-4), there is clear evidence of the IPP and landowner arrangement. The IPP, using the solar infrastructure, is to provide energy to the property, and in exchange, the landowner compensates the IPP in the form of monies for the energy provided. Furthermore, the nature of the solar infrastructure is such that it must be attached to the land and/or building to fulfil the purpose of providing energy in respect of embedded generation. One can therefore conclude that the nature and purpose of the solar infrastructure are to serve the building and/or land upon which it is fixed, by providing energy to that building and/or land. The solar system is a system that exists through a requirement of the land and/or building to want renewable energy as a power source. The solar system is not individualistic in nature, but rather contingent upon a demand for energy from the land and/or building. One can go as far as stating that the solar infrastructure is configured and designed specifically for every locality upon which it is fixed, thus further reiterating the nature and purpose of the system in serving that land and/or building. One can therefore deduce that from the solar system's very nature, the movable objects are capable of being affixed to the land and/or building, and by its nature and purpose to provide

³²⁴ Section 2.5 of Chapter 2.

³²⁵ Section 2.7 of Chapter 2.

³²⁶ Section 2.7.1 of Chapter 2.

energy, it enhances the immovable property when annexed.³²⁷ Thus, taking the above into consideration, it is evident that the solar system is to serve the property on a permanent basis and thus fulfils the first criterion to confirm accession can take place.³²⁸

The loss of identity of the solar infrastructure, should it accede to the land and/or building, is also a consideration. The manner and degree of attachment is the second objective criterion when considering accession. It must be assessed whether the solar infrastructure loses its identity and becomes an integral part of the land and/or building. Furthermore, it must be determined whether the removal of the solar infrastructure would result in considerable damage to the land and/or building as well as the solar system (accessory). On review of the four PPAs, there is no indication within the documentation which specifically provide information or confirmation of the degree and manner of attachment of the solar infrastructure to the land and/or building. The PPAs also provide no conclusive evidence on the detachment of the movable property and whether removal of the solar system from the land and/or building would result in serious damage to the immovable property and/or the solar equipment.

The first port of call when considering if the removal of the solar infrastructure will result in serious damage or not, is determining the adopted method of attachment for each specific circumstance. The fixing of the solar equipment is a site-specific aspect, as each building has its own nuisances. Determining the fixing methodology would provide context to the extent of potential damage to the land and/or building should the solar infrastructure be removed at a point in time. The review of the four PPAs revealed clauses relating to the decommissioning, removal and dismantling of the solar infrastructure. The mere fact that these specific clauses are included in the majority of the PPAs provides an indication that the solar infrastructure is capable of being removed from the land and/or building. The recourse with respect to the degree of remedial works required to the individual infrastructure components and the immovable property is an aspect which would need to be considered on a case-by-case basis.

The subjective intention of the IPP privy to the agreement is the final element to consider when determining the possibility of accession in the context of these PPAs. As mentioned in chapter 2,³²⁹ judicial precedent views the subjective intention of the owner of the movable property (solar

³²⁷ Muller, G., Brits, R., Boggenpoel, ZZ., & Pienaar, JM. *Silberberg and Schoeman's the Law of Property 6 ed* (LexisNexis South Africa 2019) 166.

³²⁸ Section 2.7 of Chapter 2.

³²⁹ Section 2.7.2 of Chapter 2.

infrastructure) as a deciding factor in determining if accession took place or not. On assessment of the four PPAs, three of the four include clauses stating that the solar infrastructure is to always remain movable during the PPA term and to not accede to the immovable property. At face value, this is conclusive evidence that accession is not a possibility given the intention of the owner of the solar infrastructure (movable property) is expressly stated. However, it is believed that the statement above referring to the IPPs solar system, which is deemed to remain removable, can be assessed from more than one angle.

Firstly, the fact that the annexation of the solar infrastructure in the PPA 2 document is stated as having a “*degree of permanence*”³³⁰ indicates that the intention of the owner is to ensure the solar infrastructure remains in place for the duration of the PPA term or until such a time as the agreement is terminated or concluded. The term of the PPAs identified in the agreements is in place between fifteen (PPA 4) and twenty-five years (PPA 3). The representative of IPP A indicated through follow-up interview that the timeframe mentioned above is roughly the lifespan of certain parts of the solar infrastructure. Thus, one could deduce that although the solar infrastructure is fixed in such a manner that it is to remain movable, this may not necessarily be the intention of the owner of the solar infrastructure (IPP) when comparing the lifespan of the solar equipment to the length of the PPA terms. Taking into consideration that the PPA terms are predominantly over a fifteen to twenty-five-year period, and that the solar systems are purposefully designed on a case-by-case basis, the intention of the IPP at the time of attachment is for the solar system to remain in place and reap the financial benefits in line with the financial analysis undertaken at the inception phase of the PPA.

In summary, the option to implement the application of the law of accession as an original method of acquisition of ownership by the landowner in the context of PPAs is plausible. One would however need to investigate this on an individual basis to understand the nuances of each agreement. When considering the three criteria to prove the plausibility that accession can take place, the nature and purpose of the solar system is easily proven in an embedded generation context. As mentioned previously, the system is there to serve the property upon which it is fixed. The second objective criteria which refers to how the solar infrastructure is fixed to the property is more complicated. One needs to consider the site-specific requirements when assessing this as each property and/or building is different, thus requiring specific installation methods. These

³³⁰ Extract from PPA 2.

different methods may infer a different degree of attachment depending on which is used in the installation of the solar infrastructure. The different methods would allow one to assess the potential degree of damage caused to the solar system and property should it be removed. The final consideration is the subjective intention of the IPP. The PPAs may state that the solar infrastructure is to remain movable at all times, but the term length of the PPA provides a key factor in determining permanency and in turn, the intention of the IPP at the time of attachment. The following table highlights the three elements to identify in the PPA to support the plausibility of accession.

CRITERIA	KEY ELEMENTS
Nature & Purpose of Accessory	Identify whether the PPA only governs the supply of energy to the property upon which the solar infrastructure is installed.
Degree & Manner of Attachment	Identify the specific installation methodology within the PPA or the supporting documents to determine how the solar system is physically attached to the land or building.
Subjective Intention of the IPP	Identify the term length of the PPA. The term length allows one to determine whether the solar systems lifespan is aligned with the PPA.

Table 7: Summary of key factors in PPAs which assist in determining accession.

4.4 Conclusions

In summary, the PPA documentation reviewed revealed that each PPA (PPA 1-4) is unique. There is no blanket approach from IPPs when compiling a PPA in an embedded generation context. The PPAs in this study stated clauses which referred directly to criteria governing the application of the two protection measures considered in this research study, and other PPAs did not.

The findings did however reveal that the lessor's tacit hypothec can be applied as potential remedy for the landowner against the IPP when rental is in arrears. PPAs 1 and 4 both provide evidence based on a review of the criteria mentioned in Table 3 above, that the hypothec can be applied. This is not the case in PPAs 2 and 3. The governing criteria in this instance for both these PPAs is that third-party interests over the solar system have been disclosed in the PPA, thus making the option of the hypothec moot. In addition to the third-party interests being noted in PPAs 2 & 3, PPA 3 further expressly states that the solar system will not be subject to the lessor's tacit hypothec.

The same circumstance was observed with respect to proving the plausibility of accession as an alternative protection measure for the landowner against the IPP. The review reveals that

accession is likely to occur in all scenarios. The nature and purpose of the solar system as an objective criterion is met in all four cases, however, it is the degree and manner of attachment which is the determining factor from an objective point of view that is lacking in the review. The PPAs do not explicitly state the method of physical attachment which skews the outcome. This lack of information is seen as a limitation in the study as the manner of attachment is a key consideration from an objective point of view in proving accession has taken place. The only PPA where a clause to the attachment of the solar infrastructure is noted in PPA 3. This clause infers permanence where one can assume the attachment is such that it may result in damage to both the solar system and building if the two (solar system and building) were to separate. The final consideration is the subjective intention of the IPP. The PPAs do not explicitly state this, but it is clearly inferred through the duration of the PPAs. PPA 2-4 all provided terms of more than 15 years which is reasonable to deduce that the intention of the IPP at the time of attachment is for the solar system to remain permanently.

The review, analysis and findings within the PPA documentation provides evidence that the lessor's tacit hypothec and the law of accession are possible protection measures the landowner can apply in the context of PPAs. The evidence suggests that applying these Common Law protection measures cannot be a blanket approach to all PPAs but would require careful consideration under each particular circumstance.

One would need to understand the specific PPA and determine the better and more apt option in each case. As mentioned above, if there is a lack of information, one would need to obtain this and review it to determine the appropriate option. This is important as the two protection measures are mutually exclusive. By not having all the information, the outcome may indicate that both are plausible within a single scenario as disclosed above.

Given the specific criteria to be met in the case of the lessor's tacit hypothec, this remedy may be the simpler of the two to apply. The rationale is that the PPA generally provides the information the landowner requires to determine the plausibility of applying the Common Law remedy against the specific criteria. When considering information provided in the PPAs, the law of accession may be a more complicated protection measure for the landowner to apply. The manner of attachment and the subjective intention of the IPP at the time of attachment are criteria open for debate. However, the fact that the term lengths (15-25 years) provided in the PPAs align with the life span of the solar system, points to the IPPs intention that the solar system should remain permanently.

Chapter 5: Conclusion and Recommendations

5.1 Introduction

The study investigates the possibility of utilising the Common Law principles of the lessor's tacit hypothec and the law of accession as protection measures for landowners in the context of PPAs with IPPs. To understand the potential application of these protection measures, PPAs in an embedded solar generation context were collected and reviewed to determine whether the hypothec and accession are available protection measures. The review process assessed the PPAs and focused on the specific criteria³³¹ to be met to apply the hypothec or accession respectively as a protection mechanism against the non-performing IPP.

This chapter reflects on the aims and objectives of the study as detailed in chapter 1 and whether these have been achieved based on the review of the data collected as part of the research investigation. The chapter provides recommendations regarding aspects that the landowner can consider when negotiating the terms of a PPA with an IPP. The chapter further considers the limitations of the study and the generalisability of the research findings. The chapter concludes with final comments and potential avenues for further research.

5.2 Addressing the Research Questions and Objectives

As described in chapter 1,³³² the central aim of the study is to ascertain whether the lessor's tacit hypothec and the law of accession are possible Common Law protection measures for the landowner against a non-performing IPP in the context of PPAs. Aligned with this aim, the study had three research objectives:

1. Determine the legal criteria to rely on the lessor's tacit hypothec and accession respectively;
2. Investigate how the principles of the lessor's tacit hypothec can be utilised as a protection measure for landowners against non-performing IPPs in the context of a PPA; and
3. Investigate to what extent landowners can rely on the law of accession as an alternative protection measure against non-performing IPPs where the lessor's tacit hypothec is not a viable legal option.

³³¹ Section 2.4 of Chapter 2, Section 2.7 of Chapter 2.

³³² Section 1.6 of Chapter 1.

To achieve these objectives, the study set out to answer the following main research question:

How can the Common Law principles of the lessor's tacit hypothec and accession be utilised as a protection measure for landowners in the context of a PPA with IPPs?

Two sub-questions support the main research question:

- a) What are the legal requirements to rely on the lessor's tacit hypothec?
- b) What are the considerations and legal requirements for the landlord to rely on the application of the law of accession?

The discussion below summarises the findings of the study and illustrates how the sub-questions and ultimately the main research question was answered and addressed in this project.

5.2.1 Requirements of the Lessor's Tacit Hypothec

The PPAs were reviewed against the specific criteria³³³ established through judicial precedent to determine whether the hypothec can be used by the landowner as a legal protection measure against the IPP. The protection measure is specific to the IPPs performance obligation to pay rent for the area the solar infrastructure is housed in. Therefore, this Common Law protection measure only exists if there is a Contract of Lease between the parties with an associated rental obligation.³³⁴

The specific criteria to apply the hypothec and the associated information extracted from the PPAs which relate to each criterion are detailed in Table 3 of Chapter 4.³³⁵ The review of the PPAs confirmed that the lessor's tacit hypothec is a possible protection measure available to the landowner should the IPP fail in their obligation to pay rent. However, the results in chapter 4 show that not all PPAs are the same. Each PPA needs to be considered independently to determine an outcome.

Not all PPAs reviewed in the study suggest that the hypothec is an available protection measure as not all criteria to apply the hypothec were fulfilled. The aspect which causes the nullification of the hypothec in the case of the PPAs reviewed is the security interest of third parties over the solar infrastructure. It is not the third-party interest itself that prevents the application of the hypothec, but rather the fact that third-party interests have been disclosed to the landowner in

³³³ Section 2.4 of Chapter 2.

³³⁴ Section 2.4.1 of Chapter 2.

³³⁵ Section 4.2.1 of Chapter 4.

the documentation which nullify the Common Law remedy.³³⁶ Third-party interest is also observed as an element which is likely to occur in a number of PPAs given the capital outlay required to implement these projects.³³⁷ The review and analysis of the PPAs in conjunction with the relevant literature undertaken in this study, has proven that in principle the lessor's tacit hypothec is an available protection measure to the landowner against the IPP. As such, the first objective in respect of the legal criteria for the lessor's tacit is applicable to the research investigation and the second objective has been met.

5.2.2 Considerations and Requirements of Accession

The PPAs were reviewed to determine if accession is a viable alternative protection measure for landowners against non-performing IPPs. Similar to the lessor's tacit hypothec, the application of accession is also governed by a set of criteria.³³⁸ These criteria are provided in Table 5 of chapter 4. The review of the PPAs confirmed that accession of the solar system infrastructure to the property is plausible,³³⁹ however, the lack of information regarding the method of attachment does not provide concise clarity on this particular objective criteria. Furthermore, the fact that the PPAs make provision for a decommissioning clause also creates the impression that the solar infrastructure is easily removable and thus does not meet the objective criteria of permanent attachment. There are different installation methodologies of solar systems when dealing with installations on land or buildings. As such, this information is key in determining the degree of attachment.

Although the review of the PPAs identified a lack of information as to the manner and degree of attachment as an objective criterion, judicial precedent places a large emphasis on the subjective intention of the IPP at the time of attachment.³⁴⁰

The PPAs reviewed indicate contractual term lengths of between fifteen and twenty-five years. As mentioned in chapter 4, the time frame is equivalent to that of the life span of the solar system equipment and the financial analysis calculated over this period.³⁴¹ Thus, the intention of the IPP is for the equipment to remain in place until the conclusion of the agreement and not intended to be removed before such a time. When considering these elements, the review of the PPAs provides sufficient evidence that accession of the solar system is technically possible. However,

³³⁶ Section 2.4.2 of Chapter 2.

³³⁷ Section 1.2.1 of Chapter 1.

³³⁸ Section 2.7 of Chapter 2.

³³⁹ Section 4.3.2 of Chapter 4.

³⁴⁰ Section 2.7.2 of Chapter 2.

³⁴¹ Section 4.3.2 of Chapter 4.

each case must be considered on its own facts to determine whether accession can be applied in that instance. As such, the first objective relating to the legal criteria of accession and the third objective of the research investigation has been met.

5.2.3 Applying the Hypothec and Accession in the PPA Context

The fact that the evidence from the review of the PPAs suggest the two Common Law protection measures are potentially available to the landowner is significant as it provides an opportunity of recourse against the IPP outside of the Law of Obligations. This allows the landowner to rely on other forms of protection when entering into a PPA. It should however be reiterated that each agreement should be reviewed in isolation to understand the particulars as not all PPAs are alike. One must always be cognisant of the fact that the two common law remedies are mutually exclusive. Thus, a careful review of the legal construct in the PPA will provide clarity on which of the two is the most appropriate to apply should the IPP be defaulting on their obligations.

5.3 Recommendations

There are several key aspects for the landowner to consider when engaging with an IPP under a PPA scenario. The landowner must take the following recommendations into consideration should they want the option of relying on the hypothec or accession as alternative protection measures in a PPA with an IPP.

The first recommendation is to ensure that the PPA does not expressly exclude the lessor's tacit hypothec and the law of accession in the contract document. If these two protection measures are expressly excluded in the PPA, the landowner will not be able to apply these Common Laws principles as measures of protection against the non-performing IPP.

Secondly, regarding the hypothec, the landowner must insist on a lease agreement with the IPP for the area that houses the solar infrastructure with an associated rental amount to be paid for the area. If there is no lease agreement in place, the hypothec cannot apply.³⁴²

The final consideration with respect to the hypothec are third-party interests. Taking into consideration the capital outlay required to implement a solar system, a third-party is likely to be involved in providing the capital for the IPP to fund the project. Consequently, the third-party tends to note their security interests over the solar equipment.³⁴³ When this is observed in a PPA,

³⁴² Section 2.4 of Chapter 2.

³⁴³ Section 4.3.1 of Chapter 4.

the landowner needs to understand that the hypothec cannot be applied over the solar equipment subject to the third-party security interests.³⁴⁴ In this scenario, the landowner would need to focus on the criteria for accession as an alternative protection measure.

The landowner needs to be cognisant of the key aspects of applying accession. The two key aspects which are of concern in the context of a PPA are the objective criteria of the manner and degree of attachment of the solar system, and the subjective intention of the IPP at the time of attachment of the solar infrastructure.³⁴⁵ The manner and degree of attachment will guide the landowner in deducing from an objective point of view of how the solar system is fixed to the land or building. If the solar system is fixed in such a way that it will damage the building and the solar system itself if separated, it will bolster the point of accession taking place. If this is not the case, and the system is easily removed, it will indicate that accession has not taken place and the solar infrastructure remains the movable property of the IPP. Under those circumstances, the landowner cannot rely on accession, however, the landowner's position in light of the hypothec will be bolstered.

The subjective intention of the IPP as to whether accession would take place may not be explicitly stated in the PPA. However, the subjective intention can be demonstrated through other terms in the PPA. One such term relates to the contract period stipulated in the PPA. This determines the length of time that the solar system infrastructure should remain in place on site.³⁴⁶ To assist the landowner in proving that accession has taken place, it is important to know the subjective intention of the IPP at the time the solar system is installed on site.

Remembering that the two protection measures are mutually exclusive,³⁴⁷ the landowner needs to review the PPA document thoroughly, taking into consideration the applicable criteria to be met for each of the respective protection measures. This will aid the landowner in understanding which protection measure can be applied against the non-performing IPP.

5.4 Generalisability of the Research

The research study investigated the PPAs which deal with the embedded generation in the renewable energy environment, with a specific focus on the solar energy sector.³⁴⁸ The research did not investigate PPAs which focus on energy generation for off-site consumption by

³⁴⁴ Section 2.4.2 of Chapter 2.

³⁴⁵ Section 2.7.1 and 2.7.2 of Chapter 2.

³⁴⁶ Section 4.3.1 of Chapter 4.

³⁴⁷ Section 1.2.4 of Chapter 1.

³⁴⁸ Section 1.1 of Chapter 1.

customers located elsewhere via wheeling arrangements. The data collection process focused on obtaining PPAs from IPPs instead of landowners. The motivation to focus on IPPs instead of landowners was a factor of time constraints in the data collection period of the research study. The fact that the IPPs represented a homogenous group allowed the data collection to be undertaken within the three-month time frame.³⁴⁹ The landowners represented a non-homogenous group which prevented the data collection process to be complete timeously.

The PPAs provided by the IPPs were not all specific to a particular contractual relationship. Due to confidentiality issues, select participating IPPs provided template PPAs.³⁵⁰ As such, site-specific information which could impact the application of the hypothec and accession is not disclosed. This element could contribute to generalisability of the findings. In addition to the above, the limitation on the number of IPPs willing to partake in the research study is also viewed as a potentially limiting element in the data used in the project.³⁵¹ Even though the data provided by the IPPs represent a fair and reasonable number of cases in the market, a larger data pool provided with the site-specific information to each of the PPAs would provide further clarity as to whether the application of the two Common Law protection measures are further bolstered or not.

Information regarding the method of physical installation of the solar system infrastructure to the building could not be accessed in this study. This element is critical to provide certainty on which Common Law protection measures criterion are fulfilled or not. The method of fixing is more important for the hypothec. In the case of accession, judicial precedent indicates that more emphasis is placed on the subjective intention of the IPP, rather than the method of fixing. The data analysed as part of this investigation is however applicable to the study and provided key insight into the structure of PPAs with landowners and IPPs in the context of renewable energy systems. The study also provided sufficient evidence to confirm that the relevant circumstance required to apply either protection measure is plausible.

5.5 Concluding Comments and Further Research

The study reveals that the lessor's tacit hypothec and the law of accession are plausible protection measures available to the landowner when dealing with IPPs in the embedded generation PPA context. It is important for the landowner to be cognisant of the information required to apply

³⁴⁹ Section 3.3 of Chapter 3.

³⁵⁰ Section 3.3 of Chapter 3.

³⁵¹ Section 3.3 of Chapter 3.

these protection measures. Each protection measure has a very specific criterion which are to be met, thus a detailed understanding of each clause in the agreement as well as the supporting documentation is required. Knowing the criteria to apply each Common Law protection measure as well as a detailed understanding of the PPA will guide the landowner in making informed decisions on which protection measure may be applicable. This is critical under each PPA as the two protection measures are mutually exclusive.

The lack of information provided on the physical fixing methodology of the solar system to the property is an element that requires further investigation. This information is not part of the PPA but is critical in determining whether the lessor's tacit hypothec or accession is the more plausible option, respectively. This element would require investigation into the technical aspect of the installation design which should provide a definitive outcome on which installation methods define the lessor's tacit hypothec or accession as the option available to the landowner when dealing with a non-performing IPP in PPA relationship.

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Annexure A – Ethics Clearance

ETHICS APPLICATION FORM


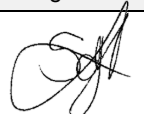
Please Note:

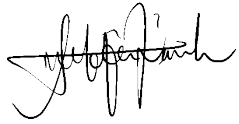
Any person planning to undertake research in the Faculty of Engineering and the Built Environment (EBE) at the University of Cape Town is required to complete this form **before** collecting or analysing data. The objective of submitting this application *prior* to embarking on research is to ensure that the highest ethical standards in research, conducted under the auspices of the EBE Faculty, are met. Please ensure that you have read, and understood the **EBE Ethics in Research Handbook** (available from the UCT EBE, Research Ethics website) prior to completing this application form: <http://www.ebe.uct.ac.za/ebe/research/ethics1>

APPLICANT'S DETAILS		
Name of principal researcher, student or external applicant	Peter Scott Watermeyer	
Department	Department of Construction Economics & Management	
Preferred email address of applicant:	scott.watermeyer9@gmail.com	
If Student	Your Degree: e.g., MSc, PhD, etc.	MSc Property Studies
	Credit Value of Research: e.g., 60/120/180/360 etc.	60 credits
	Name of Supervisor (if supervised):	Dr Catherine Louie van Schalkwyk
If this is a researchcontract, indicate the source of funding/sponsorship	N/A	
Project Title	The role of the Lessor's Tacit Hypothec as a Protection Mechanism for Landowners in Solar Energy Power Purchase Agreements	

I hereby undertake to carry out my research in such a way that:

- there is no apparent legal objection to the nature or the method of research; and
- the research will not compromise staff or students or the other responsibilities of the University;
- the stated objective will be achieved, and the findings will have a high degree of validity;
- limitations and alternative interpretations will be considered;
- the findings could be subject to peer review and publicly available; and
- I will comply with the conventions of copyright and avoid any practice that would constitute plagiarism.

APPLICATION BY	Full name	Signature	Date
Principal Researcher/ Student/External applicant	Peter Scott Watermeyer		09-06-2022
SUPPORTED BY	Full name	Signature	Date
Supervisor (where applicable)	Dr Catherine Louie van Schalkwyk		09.06.2022

APPROVED BY	Full name	Signature	Date
HOD (or delegated nominee) Final authority for all applicants who have answered NO to all questions in Section 1; and for all Undergraduate research (Including Honours).	Dr. Frank K. Ametefe		2022/06/14
Chair: Faculty EIR Committee For applicants other than undergraduate students who have answered YES to any of the questions in Section 1.			

Annexure B – Informed Consent Letter



CONSENT TO PARTICIPATE IN RESEARCH

The Role of the Lessor's Tacit Hypothec as a Protection Mechanism for Landowners in Solar Energy Power Purchase Agreements

You are asked to participate in a research study conducted by Peter Scott Watermeyer (MSc Property Studies), from the Department of Construction Economics and Management at the University of Cape Town. The information gathered through your participation in the investigation will be contributing to the research thesis. You were selected as a possible participant in this study because your entity specializes in the business of providing renewable energy supply solutions to the business sector in the form of solar embedded generation and/or you are a property owner who has entered into a Power Purchase Agreement (PPA) with an Independent Power Producer (IPP).

1. PURPOSE OF THE STUDY

The purpose of the study is to analyze PPAs and associated documents to determine if a specific property law principle known as the lessor's tacit hypothec can act as a mechanism of protection in favour of the landowner in the context of a PPA. In order to do so, the study requires access to PPAs and associated documents that are specific to solar energy supply in the context of embedded generation. The study requires an assessment of these documents to understand the implications of the contractual terms for the creation of a real security right in the form of the lessor's tacit hypothec.

The lessor's tacit hypothec is a principle in property law that allows the landowner to have a preferential claim over the movable corporeal property of the IPP that has been brought onto the leased premises. This preferential claim only exists if the IPP is in arrears with rental payments in respect to the leased space that accommodates the solar infrastructure. If the rental debt is settled, the preferential claim over the movable property is immediately terminated.

2. PROCEDURES

The research will be conducted in two phases. During the first phase, the content of the PPA and associated documents between the IPP and the landowner will be assessed. The second phase will comprise interviews with the relevant parties to gather further information.

If you agree to participate in this study, you will be involved in both phases of the research as follows:

a. Access to Documents

You are requested to provide the investigator with all documentation used in the conclusion of a PPA in the context of solar embedded generation. These documents would include the annexures to the PPA as well as any ancillary documents such as lease agreements or anything relating to access to the landowner's premises. The documents can either be submitted electronically via a secured platform or received in hard copy.

b. Interview

After examining and analysing the above-mentioned PPA documentation, the investigator may require a follow-up interview with you. The purpose of the interview is to obtain additional information, as required, and to clarify any issues that may arise when analysing the contractual documentation. The interview can be conducted telephonically, in-person or via Zoom/MS Teams. A copy of the information gathered during the telephonic and/or Zoom/MS Teams interview can be sent via email for confirmation and approval. The interview will be recorded for record-keeping purpose and to ensure accurate reporting at the write-up stage of the research investigation.

The investigator understands that certain aspects of the PPA documentation may be confidential. The investigator does not require the personal information pertaining to the parties in any of the above-mentioned PPA documents. The investigator is only interested in the structure and terms of reference of the PPA and associated documents. Furthermore, the investigator does not require any information pertaining to the financial structure of the PPA. The financial structure is not the focus of the investigation and, if necessary, this information may be redacted or removed from the documentation supplied to the investigator.

The investigator would like to acknowledge your involvement and participation in the study in the final research report. If you would like to remain anonymous, you are welcome to indicate this when agreeing to participate in the study. A copy of the completed research investigation would also be available to any of the participants on request.

3. POTENTIAL RISKS AND DISCOMFORTS

There are no foreseeable risks to participating in the study. As indicated above, any sensitive or confidential information contained in the PPA documentation may be redacted before making it available for analysis.

4. POTENTIAL BENEFITS TO SUBJECTS AND/OR TO SOCIETY

The study relates directly to the contractual relationship between the IPP and the landowner. The aim of the research investigation is to study the documents creating this relationship to determine if the scope exists to exercise the real security right of the lessor's tacit hypothec against the IPP in the context of the PPA.

Clarity regarding the application of this remedy is beneficial to the participants as it may have a direct impact on your contractual relationships in respect of the PPA. The research would also allow you to gain further understanding of the legal mechanism of the lessor's tacit hypothec and thus ensure the right procedures are undertaken to mitigate any potential risks in current and future dealings.

5. PAYMENT FOR PARTICIPATION

You will not receive any remuneration for the participation in this study.

6. CONFIDENTIALITY

No personal information will be published in the research report. Any information that is obtained in connection with this study and that can be identified with you will remain confidential and will be disclosed only with your permission or as required by law.

To ensure the security of the gathered information, all documentation will be stored electronically on a password-protected device, accessible only to the investigator and the research supervisor. With your consent, data gathered during this study will be stored securely on the University's electronic database upon completion of this research project for future research. All stored data will be anonymized by removing any identifying information.

7. PARTICIPATION AND WITHDRAWAL

You can choose whether to participate in this study or not. If you volunteer to participate, you may withdraw at any time without consequences of any kind. You may also refuse to answer any questions you do not want to answer. The investigator may withdraw you from this research if circumstances arise which warrant doing so.

8. USEFUL CONTACTS

If you have any questions or concerns about the research, please feel free to contact Scott Watermeyer (student investigator) on 072 7612514 or via email at WTRPET001@myuct.ac.za. The research supervisor, Dr Louie van Schalkwyk, can be copied into any correspondence via email at louie.vanschalkwyk@uct.ac.za.

SIGNATURE OF RESEARCH SUBJECT OR LEGAL REPRESENTATIVE
--

The information above was described to me by Scott Watermeyer. I was given the opportunity to ask questions and these questions were answered to my satisfaction. I hereby consent voluntarily to participate in this study. Furthermore, I consent to the recording of the interviews, as explained above. I confirm that I have received a copy of this form.

Signature of Participant

Date

SIGNATURE OF INVESTIGATOR

I declare that I explained the information given in this document to _____.
The participant was encouraged and given ample time to ask me any questions.

Signature of Investigator

Date