

Privy Council Appeal No. 36 of 1959

Joe Appiah and others - - - - - *Appellants*

v.

Basil Noah Basil - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 8TH DECEMBER 1960**

Present at the Hearing:

LORD KEITH OF AVONHOLM
LORD MORRIS OF BORTH-Y-GEST
LORD HODSON

[Delivered by LORD MORRIS OF BORTH-Y-GEST]

The appellants as the personal representatives of one Yaw Anthony, who may be referred to as Anthony, brought an action in the Supreme Court of the Gold Coast in which they claimed a declaration that they were entitled to redeem certain land which they asserted formed part of a mortgage security. The action was brought against the respondent as the successor in title to one Noah Basil Basil who may be referred to as Basil. Anthony and Basil were parties to an Indenture (made on the 11th November, 1927) the terms and effect of which call for consideration. The action succeeded but on appeal to the West African Court of Appeal it was held that the appellants were not entitled to the declaration that they sought. The appellants now appeal (by leave of that Court) from the judgment of the West African Court of Appeal.

Anthony held a plot of land under a lease from the Government of Ashanti. The plot was No. 435 Old Town, Section B, Kumasi. The lease was dated the 16th February, 1923, and was for a term of fifty years from the 1st January, 1923. On the 11th November, 1927, Anthony and Basil set their hands and seals to an Indenture in which the former was called the mortgagor and the latter the mortgagee. The above-mentioned lease was recited and a further recital was in these terms: "And whereas the mortgagor has requested the mortgagee and the mortgagee has agreed to erect a building with stores and outbuildings on the said plot No. 435 Old Town Section "B" to the value of Seven Thousand Pounds (£7000) more or less on the mortgagor giving security for the repayment of half of the amount to be expended on the said buildings namely the sum of Three Thousand Five Hundred Pounds (£3500) and the mortgagor has agreed to execute this mortgage for that purpose on an agreement made between them." The Indenture then witnessed "that in consideration of the said sum of Three Thousand Five Hundred Pounds (£3500) to be advanced by the mortgagee to the mortgagor for the purpose of erecting the said building with stores and outbuildings on the said plot No. 435 Old Town Section "B" he the mortgagor doth hereby grant and convey to the said mortgagee his heirs executors administrators and assigns All his interests in the said plot No. 435 Old Town Section "B" with the building now erecting on the land . . . To hold the same unto and to

the use of the mortgagee his heirs executors administrators and assigns." There then followed a provision in these terms: "that if the mortgagor shall pay to the mortgagee the sum of Three Thousand Five Hundred Pounds (£3500) then the mortgagee will at any time thereafter upon the request and at the cost of the mortgagor reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid unto the mortgagor his heirs executors administrators or assigns or as he or they shall direct and the mortgagor doth hereby covenant with the mortgagee that he the mortgagor will pay the mortgagee the said sum of Three Thousand Five Hundred Pounds (£3,500) as provided for in the aforesaid agreement".

It is not clear whether the reference to "the aforesaid agreement" was to the earlier stipulation in the Indenture or whether it was to some separately recorded agreement. The land forming plot No. 435 was Government land and Government consent to a mortgage of it was obtained. In this connection Basil had written a letter to the appropriate Government officer dated the 1st December, 1927, in which he stated: "I have the honour to forward you herewith a Deed of Mortgage and a Deed of Agreement between Mr. Yaw Anthony and myself". This was on the one hand said to denote that there were two separate Deeds the second of which was not before the Court: on the other hand it was said that the reference was merely to the Indenture of the 11th November, 1927. There is no way of resolving the issue raised by these competing submissions. The only document before the Court is the Indenture of the 11th November, 1927 and if the words of Basil's letter were thought to denote that he regarded the Indenture as embodying both a "mortgage" and an "agreement" it is manifest from a consideration of the document that it contained terms in addition to those of the mortgage transaction itself.

There was a further provision in the Indenture that if the £3,500 or any part of it was not paid then (subject to certain conditions) the mortgagee could (with Government permission) sell "the messuages hereditaments and premises hereby granted and conveyed" and out of the proceeds of sale first satisfy the monies owing on the security and then pay any balance to the mortgagor. There was no provision for the payment of any interest on any sum of money said to be "advanced" by the mortgagee to the mortgagor and no date was fixed for repayment of the "advance" and accordingly there was no provision which would have prevented the mortgagor from paying £3,500 to the mortgagee as soon as the building was erected by the mortgagee.

It would appear to be beyond controversy that Anthony had a lease of plot 435 and that Basil agreed to erect a building (with stores and out-buildings) on the land. The building was to be of the value of approximately £7,000. There is no doubt that Basil had to provide the cost of the building. Though the Indenture referred to a sum of £3,500 "to be advanced by the mortgagee to the mortgagor for the purpose of erecting the said building" it is common ground that no money actually passed from the mortgagee to the mortgagor. Notionally the transaction might thus have been stated by the mortgagee:—"Out of my own money I will erect a building to the value of £7,000 and subject to my being paid £3,500 I will hand back half the security." As security for the £3,500 "advanced" by the mortgagee to the mortgagor there was a mortgage of the land. There was the further provision that when the mortgagor paid £3,500 to the mortgagee then the latter would reconvey half of the land with the building on it. Their Lordships think that there is great force in the view expressed by Korsah C.J. in his judgment in the West African Court of Appeal that "this was not an ordinary mortgage transaction". The Chief Justice considered that it was in fact a building agreement whereby in consideration of a speculator building upon an entire plot of land one party, the owner, should take half of the property and the other party, the speculating builder, should take the other half of the property.

It is said however by the appellants that the Indenture refers to an advance of £3,500 and that the security for the payment of this amount was effected by mortgaging all the mortgagor's interests in the land: it is further said that the provision that upon payment by the mortgagor of £3,500 the mortgagee should reconvey half of the messuages hereditaments and premises with the building thereon would result in imposing a clog on the equity of redemption. It is said therefore that such clog should be ignored with the result that upon payment of £3,500 the mortgagor was entitled to have all the land and all the building. On that basis Basil was under obligation to erect a building to the value of £7,000 upon Anthony's land and Anthony would be entitled as soon as the building was completed and upon payment of £3,500 to have the land and the new building. It would be a strange commentary if anyone could invoke an equitable doctrine to produce so inequitable a result. The mortgagee was under an obligation to improve the character of the security, he was to add approximately £7,000 to its value. If therefore there was an "advance" of £3,500 and if the lease of a plot of land was the security, the contractual arrangements for the erecting by the mortgagee of a building of the value of £7,000 would bring it about that the mortgagor by paying £3,500 would not merely be able to redeem his security but would be able to recover the mortgage property enhanced in value by the existence upon it of a £7,000 building.

Had there been no further arrangements the question would have called for decision as to whether the mortgagor could assert that his "equity" of redemption could not be impeded and that he could, greatly to his advantage, be treated as not bound by his agreement to take half the land but could claim the whole. Furthermore, had there been no further arrangements, remembering that what the Indenture conveyed was the mortgagor's interest in a lease it would have had to be considered how, assuming that there were no clog on the equity of redemption, the provision in the Indenture that upon payment to him of £3,500 the mortgagee would "reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid" could be operated and made effective. The effect and meaning of the power of sale would also have called for consideration. It would have been necessary to decide whether there was merely a mortgage agreement or whether there was a mortgage agreement and also a collateral agreement.

These questions would have required examination in the light of the principles laid down in such cases as *Noakes & Co. Ltd. v. Rice* [1902] A.C. 24, *Samuel v. Jarrah Timber and Wood Paving Corporation Ltd.* [1904] A.C. 323 and *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.* [1914] A.C. 25.

Certain further arrangements were however made and these now call for mention. In 1930 Anthony wrote a letter to the Commissioner of Lands in these terms: "In accordance to Indenture Number 5922/27 dated 11th November, 1927 between myself and N. B. Basil of Ashanti on plot 435 I hereby give under my hand that Mr. Basil's name be inserted on the list of the new layout with equal half share of the said plot from date. Dated at Accra this 24th day of January 1930". Anthony later surrendered his lease of the land (plot 435) to the Government of Ashanti. The plot was then divided into two. Thereafter one plot was known as plot 435 and the other as plot 435A. The Government then granted two leases: one, of plot 435, was to Anthony: the other, of 435A, was to Basil. Each lease was dated the 4th February, 1931 and each was for a term of forty-two years from the 1st January, 1930. It is to be noted that the original lease was for a term of fifty years from the 1st January, 1923.

Anthony obtained the leave of the Government of Ashanti to mortgage his interest in the new plot No. 435 to Basil. No formal mortgage was executed but the new lease of the new plot 435 was deposited by Anthony with Basil.

Basil had gone into possession of the whole of the plot formerly called plot 435 in 1927 and after the making of the new arrangements he was in possession of the new plot No. 435 and of plot No. 435A which was leased

to him. Basil died in 1937. His widow became his sole executrix and in 1943 she assented to a bequest to Basil Noah Basil of the deceased's right title interest and claim in and to the Indenture of the 11th November, 1927. Basil Noah Basil was the defendant in the proceedings which were subsequently brought and is the respondent to this appeal. Basil, and after his death the respondent, was permitted to collect rents accruing from the portion of the building on the new plot 435 which is separated by partition wall from the portion of the building on plot 435A. From 1938 both the plots were managed by one Mead. He received the rents from the buildings and credited to each plot one half of the net proceeds resulting from the two. By 1949 the amount standing to Anthony's credit had reached the sum of £3,500. What happened then was that Mead (who was a legal practitioner) prepared an Indenture which was expressed to be made between the respondent and Anthony. The Indenture, dated the 25th November, 1949, was executed by the respondent—though not by Anthony. After reciting the lease to Anthony of the 16th February, 1923 it recited that by the Indenture of the 11th November, 1927 Anthony had assigned by way of mortgage to Basil "the hereditaments and premises comprised in and demised by the hereinbefore recited Indenture of lease to secure the payment of the sum of Three Thousand Five Hundred Pounds (£3,500)". There followed a recital that by the mutual consent and agreement of Anthony and of Basil, Anthony had surrendered to the Government the hereditaments and premises comprised in the lease of the 16th February, 1923 and that the Government had divided "the said hereditaments and premises known as Plot Number 435 into two separate plots thenceforth to be known as Plots Number 435 and Number 435A respectively". The new lease to Anthony of the 4th February, 1931 was then mentioned as also was a form of consent of the 11th March, 1931 permitting Anthony to assign to Basil by way of mortgage the hereditaments and premises comprised in and demised by the lease. It was further recited that no formal mortgage "other than the hereinbefore recited Indenture of Mortgage" was executed but that the documents of title of the new plot Number 435 had been deposited with Basil by way of equitable mortgage. Basil's death in 1937 and the succession of the respondent to Basil's rights in reference to the Indenture of the 11th November, 1927 were also recited. Finally it was recited that:—"The principal sum of Three Thousand Five Hundred Pounds (£3,500) secured by the hereinbefore recited Indenture of Mortgage has been paid to the mortgagee". The respondent having acknowledged the receipt of the £3,500 the Indenture witnessed that the respondent assigned to Anthony "All that the hereditaments and premises comprised in and demised by the lease and now vested in the mortgagee To Hold the same unto the mortgagor from the first day of June One Thousand nine hundred and forty-nine for all the residue of the term now subsisting therein freed and discharged from the hereinbefore recited mortgage or by any means now charged and from all moneys secured thereby and all claims and demands in respect thereof". The lease referred to is the new lease of 1931 granted by the Government to the mortgagor of the plot known as Number 435.

Though that Indenture was not executed by Anthony it appears to have been handed over at about the time of its execution to a Mr. Hinterman who was acting for Anthony. Anthony was said to have been at that time both old and ill. Also the lease of the new Plot 435 was then handed to Mr. Hinterman. No demand in respect of the Lease to Basil of Plot No. 435A appears to have been made nor is there any record of any objection having been raised by Anthony or Hinterman to the transaction or to the recitals in the Indenture.

Anthony died in December 1952. Down to that date no claim appears to have been made but some years later i.e. on the 2nd February, 1956 the personal representatives of Anthony (who are the present appellants) commenced an action against the respondent. They claimed that the provision in the Indenture of the 11th November, 1927 under which Basil was to retain half of the mortgaged property amounted to a clog on Anthony's right of redemption. They contended that the surrender by Anthony in

1931 of the Lease of the original Plot 435 and its division into two moieties was a step in the fulfilment of the provisions of the 1927 Indenture. The statement of claim contained the following paragraphs:—

“5. In pursuance of the said mortgage agreement, the Mortgagor surrendered unto the Government of Ashanti Plot No. 435 Old Town Section “B” and the Government of Ashanti divided the Plot 435 Old Town Section “B” into two separate Plots thenceforth known as Plots Nos. 435 and 435A and the Mortgagee took possession of both and erected buildings thereon.

6. In 1949 the present defendant as successor and beneficiary to Noah Basil Basil assigned Plot No. 435 to Yaw Anthony, the sum of £3,500 having been paid to the Mortgagee but retained Plot No. 435A which is the other half of the original Plot No. 435 which was divided into two in pursuance of the Mortgage Agreement of 1927.

7. The plaintiffs say that the provision in the mortgage agreement of 1927 “that if the mortgagor shall pay the mortgagee the sum of £3,500, the Mortgagee will at any time thereafter upon the request and at the cost of the mortgagor reconvey half of the said messuages hereditaments and premises with the building thereon as set forth in the agreement aforesaid unto the mortgagor his heirs executors administrators or assigns or as he or they shall direct” . . . if and in so far as it prevents the plaintiffs from redeeming the whole mortgage property upon proper payment of the principal is illegal and void as a clog on the plaintiffs’ right to redeem and is not capable of being enforced against plaintiffs.”

The claim of the plaintiffs was for a declaration as follows:—

“8. Wherefore plaintiffs claim declaration that notwithstanding the provision in a deed of mortgage dated 11th November, 1927 between Yaw Anthony (deceased) and Noah Basil Basil (deceased) that on the said Yaw Anthony Mortgagor paying £3,500 to Noah Basil Basil the Mortgagee the said Basil will reconvey only half of the premises on Plot No. 435 Old Town Section ‘B’ the said Plot having been since divided into two and described as Plots 435 Old Town Section ‘B’ and Plot No. 435A Old Town Section ‘B’ they may also redeem the said Plot and premises on 435A Old Town Section ‘B’ the principal sum of £3,500 having been already paid by the said Yaw Anthony.”

By the amended statement of defence it was stated that Anthony did not contribute to the sum of £7,000 but that “by agreement recited in” the Indenture of the 11th November, 1927, Anthony agreed that Basil should build for himself on half of the original Plot 435. Included in the contentions of the defendant (the present respondent) were those contained in the following paragraphs:—

“8. The defendant says that it was agreed between late Anthony and Basil that the amount of £3,500 so lent in erecting Anthony’s portion of the building on his Plot 435, was to be repaid by late Basil collecting the rents from the property less payments made for grounds rents, Town and Water rates, repairs and management expenses thereof, until the amount was finally settled and that law (*sic*) Yaw Anthony had the right at any time to pay off the balance of the principal remaining due and to redeem the Mortgage.

9. The defendant admits that Plot No. 435 was in 1949 reassigned by him to late Anthony upon the repayment of the mortgage debt of Three thousand five hundred pounds (£3,500) but denies that Plot 435 ‘A’ formed part of the mortgage transaction as herein explained or that it belongs to late Anthony.

12. The defendant says that the said mortgage of 11th November 1927 became null and of no effect upon the execution of the said further transactions in 1931.

13. Alternatively, if, which is denied, the said mortgage is deemed to have present effect the defendant says that he has been a mortgagee in possession since 1927 and that the plaintiff is barred from his remedy by the operation of the Real Property Limitation Act 1833.”

The case was heard in the Land Court at Kumasi, a Court of the then Supreme Court of the Gold Coast, and the claim of the plaintiffs was successful. The learned Judge accepted the view that the Indenture of 1927 was a mortgage which contained a provision which constituted a clog on the equity of redemption. In regard to the events of the year 1931 the learned Judge said that it was argued by the plaintiffs that they were in pursuance of the Mortgage of 1927 and by the defendant that they were in implementation of the wider agreement whereby one half of Anthony's land was to go to Basil. The learned Judge thought that the events of 1931 were consistent with either of these views but he concluded that there was not sufficient evidence from the mere fact of the surrender of his lease by Anthony in 1931 to warrant his holding that the mortgage of 1927 came to an end in 1931: he found no evidence of an agreement subsequent to the mortgage such as was made in *Reeve v. Lisle* [1902] A.C. 461. The learned Judge made a declaration that the plaintiffs were entitled to redeem the Plot and Premises No. 435A. He limited his judgment to making a declaration that the appellants were entitled to redeem: he did not make an order for conveyance and no accounts were before him. He did not deal with the alternative defence (which, on the view that he formed, came in issue) that the plaintiffs were barred by the operation of the Real Property Limitation Act 1833.

The defendant appealed to the West African Court of Appeal (Coussey P., Korsah C.J., Verity Ag.J.A.) and the appeal was allowed. The leading judgment with which the other two members of the Court concurred was delivered by Korsah C.J. In the course of his judgment the learned Judge said:--

"It is clear from evidence that the subsequent transaction after execution of the mortgage of 1927 both in form and substance cannot be said to be harsh or unconscionable. Looking at all the circumstances and not by mere reliance on some abstract principle, it will be observed that it was the intention of the original parties to enter into a separate and collateral contract independent of the mortgage upon which plaintiffs rely. This view is amply supported by the fact that Yaw Anthony surrendered to the Government the lease of the original plot, and the Government subsequently divided it into two plots and demised No. 435 to Yaw Anthony and 435A direct to Noah Basil Basil in 1931, the Government's consent granted to Yaw Anthony to demise his new plot 435 to Noah Basil Basil and the subsequent deposit of the title deeds with Noah Basil Basil by Yaw Anthony, the re-assignment in 1949 of the building on Yaw Anthony's new plot 435 by the defendant after cost thereof was paid are circumstances from which may be inferred that the parties acted upon a separate and independent agreement which cannot be described as a clog on the equity of redemption under the mortgage of 1927. *G. & C. Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd.*, 1914 A.C. p. 25.

If the clause in the original mortgage of 1927 were deemed to be a clog on the equity of redemption and thus make the agreement void as contended by plaintiffs, the result would be that the mortgagee has spent £7,000 in erecting buildings on the original plot under the mortgage in which no date was fixed for repayment of the capital and no interest charged. The mortgagor would be the beneficiary of the whole building and stores on both plots Nos. 435 and 435A without any outlay by him. It would mean that the surrender to the Government of the original lease and the subsequent division of the original plot into two, and the demise by Government of one plot to Yaw Anthony and the other to Noah Basil Basil would have no legal effect whatsoever."

The learned Judge proceeded to point out that the mortgage of 1927 was all in favour of the mortgagor: he was the lessee of the bare land in 1927 and the mortgagee spent his money in erecting the buildings. In regard to the new plot 435A the learned Judge concluded (a) that there was no agreement by Basil to reconvey it, (b) that Anthony had surrendered his title to it, and (c) that Basil held it by direct demise from the Government unfettered by any equities.

If the events of 1931 had not occurred difficult questions as to the construction and effect of the 1927 transaction would have arisen. But in their Lordships' view the events of 1931 fully warrant the result reached by the West African Court of Appeal. The Indenture of 1927 shows that it was the intention of the parties that Basil should erect buildings to the value of £7,000 upon Anthony's land and that Anthony was not to find any part of the £7,000. There was however to be the notional loan of £3,500 from Basil to Anthony. As security for the £3,500 notionally advanced by Basil to Anthony there was the mortgage of the land by Anthony to Basil with the stipulation that when Anthony paid £3,500 to Basil he (Anthony) was to have a reconveyance to him of half the land. There was also the stipulation that if Anthony did not pay the £3,500 then Basil could exercise a power of sale over all the land but after recouping himself to the extent of £3,500 would have to pay the balance to Anthony. Whatever be the complications that the parties may have created for themselves by these strange provisions the issues raised in the litigation must be decided by taking the later history into account. It is said by the appellants that the transactions of 1931 took place "in pursuance of" the mortgage indenture of 1927 and reflected a continuance of what was said to have been a previously created clog on the equity of redemption.

In their Lordships' view the facts point irresistibly to the conclusion that in 1931 the parties were seeking to give effect to what had previously been the plan as revealed by the Indenture of 1927: shortly stated it was that Basil should spend £7,000 of his own in erecting buildings on Anthony's land in return for Anthony paying him £3,500 and assigning to him half of the land. Even if that view is not correct the effect of the 1931 transactions was that Anthony and Basil both agreed that the Lease of the 16th February, 1923, was to be surrendered. The difficulties which might have confronted the parties in regard to the construction and effect of the 1927 Agreement had the original lease remained in being do not therefore present themselves after the surrender of that lease. There could thereafter be no question of a mortgage of that lease by Anthony to Basil. Any mortgage applying to that lease ceased to exist or to operate when that lease by mutual assent came to an end. The new lease of the new Plot 435A was, with Anthony's concurrence, granted by the Government to Basil direct. If there had been any intention that Anthony should have any rights of any kind over the land demised to Basil direct, the Anthony would never have concurred in the new arrangements. There are no indications that in 1931 Anthony was deceived or overborne or wrongly persuaded: nor were the arrangements unfair to Anthony or oppressive or unconscionable. He himself received a new lease of the new Plot called Plot 435 and it seems quite clear that the parties intended that his deposit by way of equitable mortgage of his new lease was as security for the payment by him of the £3,500 notionally advanced to him. The handing back of that lease in 1949 after the receipt by Basil and his successor of moneys which in total were £3,500 was in accord with and reflects such intention. The handing back of the lease coupled with the handing over of the Indenture of 1949 signed by Basil's successor were not met by any assertion of any rights in respect of the new Plot 435A.

The fact that the new lease to Basil direct of the new Plot 435A was consequential upon the surrender by Anthony of his lease of the former Plot 435 and was made with the consent of both mortgagor and mortgagee, takes the case outside the scope of the dictum of Romer L.J. in *In re Biss* [1903] 2 Ch. 40. which was relied on by the appellants.

For these reasons their Lordships consider that the Court of Appeal came to the correct result. On this view of the case the alternative defence raised in the action based upon the provisions of the Real Property Limitation Act, 1833, does not arise for consideration.

Their Lordships will therefore report to the President of Ghana as their opinion that the appeal ought to be dismissed and that the appellants ought to pay the respondent's costs of the appeal.

In the Privy Council

JOE APPIAH AND OTHERS

v.

BASIL NOAH BASIL

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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