

APPIAH v. BASIL
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
8TH DECEMBER, 1960

**CORAM: LORD KEITH OF AVONHOLM, LORD MORRIS OF BORTH-Y-GEST
AND LORD HODSON**

Mortgage of leasehold land | Indenture | Builder to erect buildings in return for half of land | Lease surrendered | Plot divided between original lessee and builder | Mortgage of lessee's half to builder | Redemption | Whether entire plot still bound by original indenture | Whether clog on equity of redemption.

CASE SUMMARY

Anthony had a lease of a plot of land, No.435, from the Government of Kumasi. In 1927, Basil agreed to erect buildings on the land to the value of £7,000. This agreement was embodied in an indenture in which Anthony was called the mortgagor and Basil the mortgagee. 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 was common ground that this was a notional transaction and that Basil in fact provided all the money. As security for the £3,500 "advanced" by the mortgagee to the mortgagor, there was a mortgage of the entire plot of land. There was a further provision in the indenture that when the mortgagor, Anthony, paid £3,500 to the mortgagee, Basil, then the latter would reconvey half of the land to Anthony, with the building on it.

In 1930, Anthony voluntarily surrendered his lease of plot 435 to the Government of Ashanti to be divided into two plots known as plot 435 and plot 435A respectively. The government then granted two new leases, one of plot 435 to Anthony, and one of plot 435A to Basil. The leases were dated the 4th February, 1931. Anthony with the leave of the government, mortgaged his interest in the new plot 435 to Basil and the lease was deposited by Anthony with Basil. After these new arrangements, Basil continued in possession of the two plots.

Basil, and after his death in 1937, the respondent, collected rents accruing to Anthony from the new 435, and by 1949 the amount standing to Anthony's credit had reached £3,500. An indenture was then prepared and was executed by the respondent, providing, inter alia, that the mortgaged lease of new plot 435 was now "freed and discharged from the hereinbefore recited mortgage." This indenture was not

executed by Anthony but it was handed to his representative. The lease of the new plot 435 was also handed to Anthony's representative.

In 1956, after Anthony's death, his personal representatives, (the appellants) commenced an action against the respondent based on the 1927 indenture. They claimed that the provision in that indenture under which Basil was to retain half the mortgaged property amounted to a clog on Anthony's right of redemption. They further claimed a declaration that notwithstanding that provision, they should be entitled to redeem the whole of old plot 435, the principal sum of £3,500 having already been paid by Anthony.

Held:

(1) The difficulties as to the construction of the 1927 indenture did not present themselves after the surrender of the original lease in 1930;

(2) the events of 1931 pointed inescapably to the conclusion that in 1931 the parties were trying to give effect to what had previously been the plan as revealed by the 1927 indenture, i.e. 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 him half of the land;

(3) Anthony had surrendered his title to new plot 435A and Basil held it direct from the Government of Ashanti, with Anthony's concurrence and unfettered by any equities. *Re Biss* [1903] 2 Ch. 40 distinguished.

Judgment of the West African Court of Appeal affirmed.

CASES REFERRED TO

(1) *Reeve v. Lisle* [1902] A.C. 461; 71 L.J. Ch. 768; 18 T.L.R. 767, H.L.

(2) *Re Biss* [1903] 2 Ch. 40; 72 L.J. Ch. 473; 88 L.T. 403; C.A.

NATURE OF PROCEEDINGS

APPEAL (No. 36 of 1959) from the judgment of the West African Court of Appeal (Coussey P., Korsah, C.J., and Verity, Ag. J.A.) delivered on the 11th February, 1957, which reversed the decision of the Land Court, Kumasi.

JUDGMENT OF LORD MORRIS

Lord Morris delivered the judgment of their Lordships: [He referred to the facts and continued:] 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 one 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 ground 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 re-assigned by him to late Anthony upon the repayment of the mortgage debt of Three thousand five hundred pounds (£3,500) but denies that Plot 435A 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*¹.

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, 1833.²

The defendant appealed to the West African Court of Appeal (Coussey P., Korsah C.J., and 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 made 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."³

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, then 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*⁴ 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, 1835, does not arise for consideration.

DECISION

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.

COUNSEL

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