

ON APPEAL
FROM THE WEST AFRICAN COURT OF APPEAL
GOLD COAST SESSION

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

59007

B E T W E E N :

- 1. JOE APPIAH
- 2. J.W.K. APPIAH
- 3. MABEL OTCHERE
- 4. VICTORIA BANDO
As Executors to the Will
of Yaw Anthony (deceased)
(Plaintiffs) Appellants

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- and -

BASIL NOAH BASIL
Successors to Noah Basil Basil
(Defendant) Respondent

CASE FOR THE APPELLANTS

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| | | <u>Record</u> |
| | 1. This is an Appeal, by leave of that Court, from a Judgment of the West African Court of Appeal of the 11th day of February 1957 allowing an appeal by the Respondent from a Judgment of the Supreme Court of the Gold Coast of the 3rd day of July 1956 in an action commenced by the Appellants as personal representatives of one Yaw Anthony deceased against the Respondent as the successor in title to one Noah Basil Basil deceased for a declaration that as such personal representatives as aforesaid they were entitled to redeem certain property mortgaged by their deceased. | p.45, 1.41
pp.40 to 44
pp.22 to 24
pp. 3 to 4 |
| 20 | | |
| 30 | 2. The questions for determination in this appeal are whether, in all the circumstances of the case, certain provisions of an Indenture of Mortgage of the 11th day of November 1927 (hereinafter called "the Indenture") which it is common ground constituted a clog or fetter on the equity of redemption | pp.46 to 48
p.18, 11.38-42. |

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in the mortgaged premises between 1927 and 1931 ceased to be such a clog or fetter as aforesaid as the result of a certain subsequent agreement, or transaction; and if, as the Appellants contend, they did not so cease, whether the Appellants are debarred by the provisions of the Real Property Limitation Act, 1833 from maintaining the present action.

- p.50, 11.18-28. 3. The property in question forms part of Plot No. 435 Old Town Section B, Kumasi (hereinafter called "the said plot"). The said plot was originally held by the said Yaw Anthony under a Lease from the Government of Ashanti dated the 16th day of February 1923 for a term of 50 years from the 1st day of January 1923, and this Lease was mortgaged by him to the said Noah Basil Basil by the Indenture. 10
- p.46, 11.18-24. 4. After reciting the fact that the Mortgagor was the lessee of the said plot as aforesaid, the Indenture recited as follows:- 20
- "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 (£7,000) more or less on the Mortgagor giving security for the repayment of half of that amount to be expended on the said buildings....."
- p.46, 1.28.
p.47, 1.8. 5. Thereafter by the Indenture, in consideration of the sum of £3,500 stated to be advanced by the Mortgagee to the Mortgagor for the purpose of erecting a building with stores and outbuildings on the said plot, the Mortgagor conveyed all his interest in the said plot with the buildings then erecting on the same to the Mortgagee with a proviso that, if the Mortgagor should pay to the Mortgagee the sum of £3,500, then the Mortgagee would 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 or as he should direct. 30
- p.47, 11.8-12. 6. The Indenture further contained a covenant by the Mortgagor to pay the said sum of £3,500 "as provided for in the aforesaid agreement", and 40

- further contained a power of sale exercisable only if default had been made in payment of the said sum of £3,500 on demand and also for the space of three calendar months next after a notice in writing requiring such payment should have been given. And it was further agreed and declared that if the said power of sale was exercised the Mortgagee should out of the proceeds of the sale first pay and satisfy the monies which should then be owing on the same security and should pay the balance (if any) to the Mortgageor.
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- Record
p.47, 1.12.
- p.47, 1.35.
7. In the year 1931 the said Yaw Anthony surrendered his lease of the said plot to the Government of Ashanti. The said plot was thereupon divided into two plots, known thereafter as Plots 435 and 435A, which were leased by two leases both dated the 4th day of February 1931 by the Government of Ashanti, to the said Yaw Anthony and the said Noah Basil Basil respectively for a term of 42 years from the 1st day of January 1930. The lease to the said Noah Basil Basil was made at the written request of the said Yaw Anthony dated the 24th day of June 1930.
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- p.23, 11.15-23.
- W.A.C.A."Z"
8. The said Yaw Anthony obtained the leave of the Government of Ashanti to mortgage his interest in the new Plot No. 435 to the said Noah Basil Basil, but no formal mortgage thereof was ever made. His said lease of the new Plot No. 435 was however deposited with the said Noah Basil Basil.
- p.49
- p.41, 11.10-18.
9. The said Noah Basil Basil went into possession of the whole of the said plot in 1927, and collected the entirety of the rents and profits thereof. In 1938 one John William Mead became the steward of the said Noah Basil Basil in respect of the said plot, and he deposed that there was an agreed figure at the beginning of his stewardship as to the amount credited to Yaw Anthony.
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- p.15, 11.28-30.
10. The said Noah Basil Basil died on the 21st day of March 1937. His widow Marone Noah Basil became his sole Executrix, and on the 6th December 1943 she assented to a bequest to the Respondent of the deceased's right title interest and claim in and to the Indenture.
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- p.51, 1.39.
p.52, 11.1-9.
11. The method of accounting adopted by the said Mead was that he credited half the net profits which arose from the two new plots Nos. 435 and 435A
- p.15, 11.36-37.

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p.16, 11.6-7.

against each plot. By 1949, there had been credited to the said Yaw Anthony in respect of the new Plot No. 435 a sum of £3,500. No payment or demand for payment of the said sum of £3,500 or any part thereof had been made in the meantime.

pp.50 to 52.

12. On the 25th day of November 1949, the Respondent executed an Indenture prepared by the said Mead expressed to be made between himself as Mortgagee of the one part and the said Yaw Anthony as Mortgagor of the other part whereby it was witnessed that in consideration of the principal sum of £3,500 having been paid (the receipt whereof was thereby acknowledged) the Mortgagee assigned to the Mortgagor "ALL THAT the hereditaments and premises comprised in and demised by the Lease "of the new Plot No. 435" and now vested in the Mortgagee TO HOLD the same unto the Mortgagor from the 1st day of June 1949 for all the residue of the term now subsisting therein freed and discharged from the provisions of the hereinbefore recited mortgage".

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p.16, 11.16-17.

13. The said Indenture of 1949 was not executed by the said Yaw Anthony, but it appears to have been handed over to a Mr. Hinterman for him together with the said Lease of the new Plot No. 435 at or about the time of its execution.

14. The said Indenture of 1949 contains a recital in the following terms:-

p.50, 1.41 to
p.51, 1.15.

"By the mutual consent and agreement of the Mortgagor and the said Noah Basil Basil the Mortgagor surrendered unto the Government of Ashanti the hereditaments and premises comprised in the hereinbefore recited Indenture of Lease and the Government of Ashanti divided the said hereditaments and premises known as Plot No. 435 into two separate plots thenceforth to be known as Plots No. 435 and No. 435A respectively".

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p.13, 11.14-15.

15. The said Yaw Anthony died in December 1952 and the Appellants are his personal representatives.

p.1.

16. The Appellants commenced the present action against the Respondent on the 2nd day of February 1956 claiming that the provision in the Indenture whereunder the said Noah Basil Basil was in any event to retain one half of the mortgaged property

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pp. 3 to 4.

was a clog on the right of redemption of the said Plot and was not capable of being enforced against them; and that the surrender of the Lease of the said Plot by the said Yaw Anthony in 1931 and its division into two moieties was a step in obvious fulfillment of the said provisions in the Indenture, and in consequence claiming a declaration that they were entitled to redeem the plot known as Plot No. 435A.

- 10 17. The Respondent in his amended Defence alleged that the said Yaw Anthony by agreement recited in the Indenture agreed that the said Noah Basil Basil should build for himself on half of the plot then known as Plot No. 435; that the Indenture became null and void and of no effect in consequence of the dealings with the said plot in 1931; and that the Respondent had been mortgagee in possession since 1927, and that the Appellant was barred from any
20 remedy by the operation of the Real Property Limitation Act, 1833. pp. 5 to 7.
p.10, 11.19-34.
18. The Supreme Court of the Gold Coast (Smith, Ag. J.) by its Judgment of the 3rd day of July 1956, decided in favour of the Appellants. The learned Judge was not disposed to give credence to the main witnesses for either the Appellants or the Respondent, and stated that the result depended on what one read, or might legitimately read, into the Indenture and the subsequent matters culminating in the Re-Assignment of 1949. pp. 22 to 24.
- 30 19. The learned Judge held that the provision in the Indenture whereunder the said Noah Basil Basil was in any event to retain half of the said plot was a clog on the equity of redemption, and stated that this was in fact conceded, the Respondent's argument being that this clog only persisted between 1927 and 1931. He however thought the 1931 transactions were equivocal, being consistent either with the implementation of the provisions of a fresh agreement or the provisions of the Indenture, and that
40 therefore he could not draw the inference therefrom which the Respondent invited him to draw.
20. The learned Judge accordingly made a declaration to the effect that the Appellants were entitled to redeem; he did not make an Order for reconveyance as he had not seen the Accounts nor was there other sufficient evidence to justify him making an Order for conveyance at that stage. p.24, 11.28-33.

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p.25, 1.28 to
p.26, 1.15.

21. From this Judgment the Respondent appealed to the West African Court of Appeal, alleging that the learned Trial Judge was wrong:-

- (a) In holding that there was insufficient evidence of another Agreement than the Indenture
- (b) In holding that the Indenture could only be affected by an Agreement subsequent thereto
- (c) In holding that the Indenture persisted after the transactions and equitable mortgage in 1931 10
- (d) In holding that the events of 1931 were in consequence of the Indenture
- (e) In holding that equity would interfere after the events of 1931
- (f) In underestimating the value as evidence of the Re-Assignment of 1949
- (g) In not considering the effect of the Real Property Limitation Act, 1833. 20

pp. 40 to 44.

22. The West African Court of Appeal Gold Coast Session (Coussey P., Korsah C.J., Verity Ag.J.A.) delivered Judgment on the 11th day of February 1957. The leading Judgment, with which the other two members of the Court concurred, was delivered by Korsah, C.J. In the course of such Judgment the learned Chief Justice remarked:-

p.42, 11.11-36.

"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 30 40

10 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."

and finally concluded -

20 "This was not an ordinary mortgage transaction. It was in fact, as the conduct of the parties show 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."

p.43, 11.42-48.

23. In accordance with this reasoning, the West African Court of Appeal allowed the appeal of the Respondent from the Supreme Court of the Gold Coast. They did not, accordingly, find it necessary to express any opinion as to the effect of the Real Property Limitation Act, 1833.

p.44, 1.8.

30 24. From the Judgment of the West African Court of Appeal this Appeal is now preferred, final leave so to do having been granted by the said Court of Appeal on the 24th day of June 1957.

p.45.

40 25. It is submitted on behalf of the Appellants that the inferences which were drawn by the West African Court of Appeal as to the intentions of the said Yaw Anthony and Noah Basil Basil entering into "a separate and collateral contract independent of the mortgage" ought not to be drawn; alternatively that if any additional agreement between the parties is to be inferred, the only agreement which could be inferred would be a simple agreement "to erect a building with stores and outbuildings on the said plot"; and that in any event there are no sufficient materials upon which any agreement between the

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parties subsequent to the date of the Indenture can properly be inferred; and that no agreement between the parties made contemporaneously with the Indenture could have the effect of causing the provisions thereof to which the Appellants take objection to be other than a clog or fetter upon the equity of redemption of the said plot. And they rely upon Exhibit "W.A.C.A.Z" as showing that the 1931 transaction took place in accordance with the provisions of the Indenture and not otherwise.

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26. The Appellants further submit that they are not debarred from bringing the present action by reason of the provisions of the Real Property Limitation Act, 1833, in that although the Mortgagee, the said Noah Basil Basil and his successor in title the Defendant, have been in possession of the said new Plot No. 435A since 1927, the right to redeem the same only arose in 1949 when repayment of the said sum of £3,500 (which had not previously been demanded) was paid; or alternatively because time could not commence to run against the said Yaw Anthony in respect of the said new Plot 435A before 1931, when he acquired a separate title thereto, or alternatively because the title of the said Yaw Anthony and his successors in title to redeem was acknowledged.

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(a) By the said Mead the agent of the said Noah Basil Basil in 1938; and

(b) By the Respondent himself by the execution of the Indenture of the 25th day of November 1949.

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27. The Appellants therefore humbly submit that this Appeal should be allowed and the Judgment of the Supreme Court of the Gold Coast restored for the following among other

R E A S O N S

(1) BECAUSE the provisions contained in the Indenture whereunder the Mortgagee Noah Basil Basil was to be entitled to retain one half of the said plot was a clog upon the Mortgagor Yaw Anthony's equity of redemption therein.

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(2) BECAUSE even if there was a further contemporaneous Agreement between the parties to the

Indenture relating to the said plot, the existence of such agreement did not have the effect of causing the said provisions to cease to be such a clog as aforesaid.

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- (3) BECAUSE the transactions with the said plot in 1931 were all effected in pursuance of the said prior provision contained in the Indenture and not in pursuance of any subsequent agreement.
- 10 (4) BECAUSE neither was there any direct evidence nor is it a fair inference from the admitted facts that the transactions with the said plot in 1931 were effected in pursuance of an agreement either subsequent to or independent of the provisions of the Indenture.
- (5) BECAUSE the inference drawn by the West African Court of Appeal that the transactions with the said plot in 1931 were in pursuance of a separate and collateral contract is not one which should properly be drawn.
- 20 (6) BECAUSE the lease of Plot No. 435A granted to the said Mortgagee Noah Basil Basil formed part of the mortgaged premises for the purposes of redemption.
- (7) BECAUSE the transaction enshrined in the Indenture (apart from the said clog) was an ordinary mortgage transaction and was not of any other nature.
- 30 (8) BECAUSE the title of the Mortgagor Yaw Anthony to redeem did not arise until 1949 and was in any event acknowledged on behalf of the Mortgagee in 1938 and again in 1949.
- (9) BECAUSE in any event time could not commence to run against the said Yaw Anthony prior to 1931.
- (10) BECAUSE for the reasons therein given the Judgment of the Supreme Court of the Gold Coast was correct and ought to be affirmed.
- (11) BECAUSE the Judgment of the West African Court of Appeal is wrong and ought to be set aside.

RAYMOND WALTON.

No. 36 of 1959

IN THE PRIVY COUNCIL

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL GOLD COAST
SESSION

JOE APPIAH and Others

- v -

BASIL NOAH BASIL

CASE FOR THE APPELLANTS

A.L. BRYDEN & WILLIAMS,
53 Victoria Street,
London, S.W.1.

Solicitors and Agents for
Appellants.