

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 550 of 2021

BETWEEN

ELSA MCQUARRIE

CLAIMANT

AND

**ASCENDANCY BELIZE LIMITED
DORIAN ALPUCHE
NOLVA ALPUCHE**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT**

Before the Honourable Madam Justice Geneviève Chabot

Dates of Trial: November 14th and 15th, 2022

Date of Closing Submissions: December 12th and 16th, 2022

Appearances

Darrell Bradley, for the Claimant

Yogini Lochan Cave, for the First Defendant

Jose M. Alpuche, for the Second and Third Defendants

JUDGMENT

Introduction

1. Elsa McQuarrie (the “Claimant”) alleges that the First Defendant, Ascendancy Belize Limited (“Ascendancy”), sold her property despite her overriding interest. The Claimant alleges that she has an equitable interest in the property, and that her interest overrides Ascendancy’s interest based on her actual occupation of the property. The property was sold to the 2nd and 3rd Defendants, Dorian Alpuche and Nolva Alpuche (the “Alpuches”). The Claimant remains in occupation of the property.

2. For the reasons that follow, I find that the Claimant's equitable interest in the property is subordinate to Ascendancy's interest. The Claimant was not in actual occupation of the property at the time of registration of the original security interest. The Claimant knew and consented to further charges on the property. Ascendancy properly exercised its power of sale. The Alpuches are entitled to possession of the property, and to mesne rent.

Background

3. The Claimant is married to Robert McQuarrie. The Claimant and Mr. McQuarrie acquired property located at No. 8 School Master Drive, San Marcos Area, San Pedro Town, Ambergris Caye, Belize District, Belize, otherwise described as Parcel 2183, Block 7 in the San Pedro Registration Section ("Parcel 2183") and built a dwelling thereon in the 1990's. Legal title for Parcel 2183 was placed in the name of Mr. McQuarrie. The Claimant alleges that she is an equitable and beneficial owner of Parcel 2183 by virtue of a statutory declaration and her financial contributions towards Parcel 2183. She seeks a declaration to that effect, as well as a permanent injunction restraining the Defendants from taking possession and dealing with Parcel 2183.
4. Parcel 2183 was originally mortgaged to the Saint James Building Society. The proceeds from the mortgage were used to construct the building on the property. On November 22nd, 2005, the mortgage was transferred to Scotiabank (Belize) Limited ("Scotiabank"). Mr. McQuarrie obtained further loans from Scotiabank. Mr. McQuarrie signed a Promissory Note and Commitment Letter for \$150,000 dated May 10th, 2010, a Promissory Note and Commitment Letter for \$58,000 dated June 23rd, 2011, and a Personal line of credit dated December 9th, 2008. These loans included student loans for the Claimant's and Mr. McQuarrie's daughter, who was a co-borrower on one of the loans. None of the loan facilities or mortgage documents for Parcel 2183 were signed by the Claimant.
5. Mr. McQuarrie made payments towards the loans, but his credit facilities fell into arrears.
6. On or about April 10th, 2019, Scotiabank sold and assigned the mortgage to Ascendancy. Ascendancy exercised its power of sale and sold Parcel 2183 to the Alpuches. The Alpuches are now the Registered Proprietors of Parcel 2183.
7. The Claimant alleges that she did not consent to any loan agreement, promissory note, or other loan document, or any mortgage, charge, or assignment. The Claimant argues that the mortgage and subsequent sale cannot prejudice her equitable interest and right to Parcel 2183.
8. Ascendancy contends that the loan facilities and mortgage documents are valid, lawful, and subsisting. Ascendancy asserts that it duly exercised its power of sale in respect of Parcel 2183 owing to the non-payment of the mortgage. According to Ascendancy, at all times the

Claimant acknowledged, affirmed, and acquiesced to the existence of the loans and the Charge on Parcel 2183, from which she benefitted. If the Claimant has any interest in Parcel 2183, Ascendancy argues that that interest would be subject to Ascendancy's interest.

9. The Alpuches agree with Ascendancy's position, and add that they are bona fide purchasers for value without notice. Pursuant to section 78(4) of the *Registered Land Act*,¹ the Alpuches say that the Claimant's purported interest does not override their interest in the property. The Alpuches filed a Counterclaim in which they seek a declaration that they are entitled to possession of Parcel 2183, a permanent injunction against the Claimant, an order that the Claimant immediately vacate the property, and mesne rent from August 27th, 2021 up to the date the property is delivered to them.

Issues for Determination

10. The parties agree that the following issues must be determined by this Court:
 - (a) Does the Claimant have an equitable interest in Parcel 2183?
 - (b) If the Claimant does have an equitable interest in Parcel 2183, what is the effect of the First Defendant's security interest on Parcel 2183 and does that security interest bind the Claimant or have priority over the Claimant's interest in Parcel 2183?
 - (c) If the Claimant does have an equitable interest in Parcel 2183, what is the effect of the Second and Third Defendants' title and interest in Parcel 2183 and do the Second and Third Defendants' title and interest have priority over the Claimant's interest in Parcel 2183?
 - (d) Are the Second and Third Defendants bona fide purchasers for value without notice?
 - (e) Are the Second and Third Defendants entitled to possession of the property and mesne rent?

Analysis

Does the Claimant have an equitable interest in Parcel 2183?

11. I find that the Claimant has an equitable interest in Parcel 2183. There is ample evidence of the Claimant's and Mr. McQuarrie's intention that the Claimant would have an equal share in the ownership of Parcel 2183 and the house built thereupon. Chief among that evidence is a statutory declaration dated May 6th, 1999, in which Mr. McQuarrie declares as follows:

¹ Cap. 194, Rev. Ed. 2020.

Mrs. Elsa Acevedo McQuarrie is my lawful wife and as such owns 50% of the parcel of land #2183 of Block 7 in San Pedro Town, Belize C.A. and may use such property as she sees fit.²

12. In addition, the Claimant alleges that she contributed financially to the payment of the purchase price of Parcel 2183 and made various other financial contributions towards the development and maintenance of the property over the years, including paying property taxes, purchasing equipment and materials, and paying for renovations after hurricane Keith hit San Pedro.
13. Mr. McQuarrie testified at trial. In his witness statement, he confirmed that he and the Claimant considered Parcel 2183 as “theirs”, and that he always recognized that the Claimant had an ownership interest in Parcel 2183. The statutory declaration was done as proof that the Claimant owned an interest in the property. Mr. McQuarrie confirmed that the Claimant made payments towards the purchase price, paid for some of the finishing works, and contributed equally towards renovating the house after hurricane Keith. The Claimant was also primarily responsible for maintaining the house.
14. The Defendants do not dispute the Claimant’s equitable interest in Parcel 2183. The Defendants’ position is that whether or not the Claimant has an interest in Parcel 2183, the Claimant, by her conduct, conveyed her intention that her interest be subject to the charge in favour of the Saint James Building Society, which was subsequently transferred to Ascendancy. I now turn to that question.

If the Claimant does have an equitable interest in Parcel 2183, what is the effect of the First Defendant’s security interest on Parcel 2183 and does that security interest bind the Claimant or have priority over Claimant’s interest in Parcel 2183?

15. I find that, although the Claimant has proven an equitable interest in Parcel 2183, that interest does not override Ascendancy’s interest. The Claimant was not in actual occupation of Parcel 2183 at the time of registration of the mortgage in favour of Saint James Building Society, and she knew and consented to the subsequent loans and Charge on Parcel 2183.
16. The Claimant’s position is that her equitable interest in Parcel 2183 overrides any security interest of Ascendancy, and any title interest in the Alpuches, because of her occupation of Parcel 2183 prior to any mortgage interest being created in favour of the Saint James Building Society or Scotiabank. The Claimant relies on *Abbey National Building Society v Cann and Others*³ and *Williams & Glyn’s Bank v Boland*⁴ in support of her contention.

² Witness Statement of Elsa McQuarrie, Exhibit EM-1.

³ [1990] UKHL 3 (“*Cann*”).

⁴ [1980] UKHL 4 (“*Boland*”).

17. Both *Cann* and *Boland* stand for the principle that actual occupation may create an overriding interest in a property. In *Cann*, the learned Lords held that the relevant date for determining the existence of an overriding interest by actual occupation is the date of completion of the transaction giving rise to the right to be registered.
18. In Belize, this principle is codified in section 31(1)(g) of the *Registered Land Act*, which provides as follows:

31.-(1) Subject to sub-section (2), unless the contrary is expressed in the register, all registered land shall be subject to such of the following over-riding interests as may for the time being subsist and affect it, without their being noted on the register—

[...]

(g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof except where inquiry is made of such person and the rights are not disclosed [emphasis added].

19. The evidence does not establish that the Claimant was in actual occupation of Parcel 2183 at the date of registration of the mortgage in favour of Saint James Building Society. I note that section 31(1)(g) of the *Registered Land Act*, as well as *Cann*, refer to “actual occupation”, as opposed to “possession” or mere “occupation”. The use of “actual occupation” denotes that the overriding interest is created to protect an actual occupant from being physically displaced from a property on which a charge was created.
20. The evidence from both the Claimant and Mr. McQuarrie is that Parcel 2183 was purchased in December 1994. At the time, the land was bare of any dwelling, and therefore presumably incapable of being actually occupied. Both the Claimant and Mr. McQuarrie testified that “in or about the late 1990’s”, they started building a house on Parcel 2183. No specific beginning or end date for the construction of the house was provided to the Court. The Claimant admits that the construction cost of the house was paid mainly by the Saint James Building Society’s loan, which is dated November 3rd, 1999. While the Court is unable to determine the date of actual occupation of Parcel 2183, it is more likely than not that actual occupation of Parcel 2183 began after November 3rd, 1999, once the construction of the house was completed with the assistance of the funds from the Saint James Building Society.
21. The Claimant therefore has no overriding interest over the Saint James Building Society’s mortgage, which was subsequently transferred to Scotiabank on November 22nd, 2005.

22. It is not disputed that the Claimant was in actual occupation when Mr. McQuarrie obtained further loans from Scotiabank, namely a Promissory Note and Commitment Letter for \$150,000 dated May 10th, 2010, a Promissory Note and Commitment Letter for \$58,000 dated June 23rd, 2011, and a Personal line of credit dated December 9th, 2008.
23. While the Claimant relies on *Cann* in support of her contention that actual possession creates an overriding interest, *Cann* also stands for the principle that knowledge and consent trumps actual occupation. In *Cann*, the Lords found that the Respondent, Mrs. Cann, was not in actual possession of the property at issue at the time of the completion of the registration of the charge, and thus that she was unable to establish an overriding interest over the property. This finding made it unnecessary for the Lords to consider the other issue arising in the appeal, namely whether Mrs. Cann had knowledge and consented to the charge. Nevertheless, Lord Oliver of Aylmerton offered the following observations:

The view that I have formed renders it strictly unnecessary to consider the ground upon which Mrs. Cann's claim failed in the Court of Appeal. What was said was that, despite her initial evidence (in her affidavit) that she did not know of her son's intention to raise any of the money required for the purchase on mortgage, nevertheless her oral evidence before the judge disclosed that she was well aware that there was a shortfall which would have to be met from somewhere. [...]

There was no finding to this effect by the judge, but I think, for my part, that it is a necessary conclusion once it is accepted, as it has to be, that she knew that there was a shortfall of some £4,000 apart from conveyancing costs, that George Cann was going to raise it, and that he was in financial difficulties. It is said that there was no evidence that he was going to raise it on the security of this property. There might, for instance, be other property available to him. He might obtain an unsecured loan. In the circumstances of his known lack of resources, however, this is fanciful and in my judgment the court was entitled to draw the inference that it did draw. If that is right, it follows that George Cann was permitted by her to raise money on the security of the property without any limitation on his authority being communicated to the society. She is not, therefore, in a position to complain, as against the lender, that too much was raised and even if, contrary to the view which I have formed, she had been able to establish an interest in the property which would otherwise prevail against the society, the circumstances to which I have alluded would preclude her from relying upon it as prevailing over the society's interest for the reasons given in the judgment of Dillon L.J. in the Court of Appeal. For all these reasons, I would accordingly dismiss the appeal [emphasis added].⁵

⁵ *Cann, supra.*

24. Ascendancy's main defence to the Claim is grounded in the Claimant's alleged knowledge and consent to the Charge over Parcel 2183. Ascendancy says that even if the Claimant has an equitable or beneficial interest over Parcel 2183, such interest would be subject to Ascendancy's interest in Parcel 2183 because the Claimant had knowledge and consented to the Charge on Parcel 2183. The Alpuches adopt a similar position. The Defendants rely on *Bristol and West Building Society v Henning and another*⁶ in support of their position.
25. In *Henning*, the defendants were not married but lived together as husband and wife. They agreed to purchase a property, which was placed in the husband's name alone. They eventually separated, and the wife obtained a declaration that she had a one-half beneficial interest in the property. After the husband defaulted on the mortgage payments, the building society that financed the purchase sought to enforce its mortgage and started proceedings for possession. On appeal of a judgment in favour of the wife, the English Court of Appeal held that it could impute from the conduct of the parties a common intention that the husband mortgaged the property to the building society, whose interest would take precedence over the wife's beneficial interest in the property:

Mrs Henning knew of and supported the proposal to raise the purchase price of the Devon house on mortgage. In those circumstances, it is in my judgment impossible to impute to them any common intention other than that she authorised Mr Henning to raise the money by mortgage to the society. In more technical terms, it was the common intention that Mr. Henning as trustee should have power to grant the mortgage to the society. Such power to mortgage must have extended to granting to the society a mortgage having priority to any beneficial interests in the property. [...]

This evidence shows that, although she had no actual relevant intention at the time, it would be wrong to impute to the parties any intention other than that the society was to have a charge in priority to the parties' beneficial interests. [...]

Since the nature of Mrs Henning's interest has to be found in the imputed intention of the parties and the imputed intention of the parties must have been that her interest was to be subject to that of the society, it is impossible for Mrs Henning to establish that she is entitled to some form of equitable interest which gives her rights in priority to the rights of the society. I would therefore hold that, even on the assumption that Mrs Henning has some equitable interest or right in the Devon house, such interest or right is subject to the society's charge and provides no defence to the society's claim for possession.⁷

⁶ [1985] 2 ALL ER 606 ("*Henning*").

⁷ *Henning*, *supra* at 608-610. See also *The Paddington Building Society v Malcolm Leslie Mendlesohn* [1985] EWCA Civ 17.

26. It follows from *Cann* and *Henning* that, if I find that the Claimant knew and consented to the Charge on Parcel 2183, her equitable interest over Parcel 2183 is subject to Ascendancy's interest as Chargee. Based on the evidence before this Court, I so find.
27. On May 10th, 2010, Mr. McQuarrie obtained a loan from Scotiabank for \$150,000, secured by a Promissory Note and Commitment Letter. The Commitment Letter is signed by Mr. McQuarrie alone.⁸ According to the witness for Ascendancy, Lisa Salazar, the purpose of that loan was to consolidate the existing loan facilities with Scotiabank, including the mortgage that had been transferred from the Saint James Building Society, for the purpose of acquiring funds in the sum of \$24,956.28 for the education of the Claimant's and Mr. McQuarrie's daughter, Jessica McQuarrie. Payment of the loan was secured by the Charge registered on Parcel 2183 in favour of Scotiabank. On June 23rd, 2011, Mr. McQuarrie, together with Jessica McQuarrie, obtained a loan from Scotiabank in the amount of \$58,000 for the education of Jessica. That loan was also secured by the Charge on Parcel 2183.
28. Although she denies any knowledge or consent in her Statement of Claim and witness statement, the evidence is that the Claimant knew and consented to the loan and the Charge in favour of the Saint James Building Society. The Claimant testified that the construction cost for the house on Parcel 2183 was paid for mainly by that loan. Under cross-examination, the Claimant squarely admitted knowing about the loan and the Charge in favour of the Saint James Building Society, and consenting to it. Further, the Claimant admitted to knowing that the Saint James Building Society went bankrupt and that the loan and Charge were transferred to Scotiabank. These admissions stand in complete reversal of the Claimant's assertions in her Claim, and seriously put into question the Claimant's credibility.
29. I find that the Claimant also knew about the consolidation of the original loan, and the subsequent loan for the education of Jessica. In cross-examination, the Claimant acknowledged that it was her intention that Jessica study in Canada, and that she did. The Claimant admitted knowing that there was a loan, but denied knowing or consenting to the loan being secured "in the house". Yet, in cross-examination, Mr. McQuarrie, who was testifying on behalf of his wife, agreed to the suggestion that he and the Claimant were in a joint partnership, and that nothing was done without his wife's knowledge. This was echoed in the Claimant's own witness statement, in which she states that "Robert and I at all material times had an integral and equal partnership in our marriage and we conducted all affairs with the land and house together". Mr. McQuarrie admitted to knowing that the loan for the education of Jessica was secured by a Charge on Parcel 2183. It strains credulity that Mr. McQuarrie would not have shared that information with his wife.

⁸ Witness statement of Lisa Salazar, Exhibit LS-3.

30. In addition to testifying that nothing was done without his wife's knowledge, Mr. McQuarrie also testified that all of the documents related to the loans and the mortgage were received and kept in the house on Parcel 2183, which was at all times occupied by the Claimant. Since Mr. McQuarrie permanently relocated to Canada in 2012, the Claimant would have been aware of these documents as she was the one who received them.
31. Finally, it is noteworthy that it is only after Parcel 2183 was sold that the Claimant raised her equitable interest with Ascendancy. Up until that point, the evidence is that the Claimant paid some of the loans, but did not raise her equitable interest with either Scotiabank or Ascendancy. The Claimant did not lodge a caution with the Registrar of Land, which would have protected her interest. The Claimant was represented by an attorney around 2014-2015, when she made some payments towards Mr. McQuarrie's debts. That the attorney never took steps to protect the Claimant's equitable interest is only further proof that the Claimant recognized that her interest was subordinate to that of Scotiabank.
32. Based on the evidence before me, I find that the Claimant knew, consented, and benefited from the loans secured on Parcel 2183. She knew and consented to the Charge on Parcel 2183. Her equitable interest is therefore subordinate to Ascendancy's interest.
33. It is not disputed that Mr. McQuarrie and Jessica McQuarrie fell into default of the loans. Scotiabank and, subsequently, Ascendancy, made several demands for payment between 2014 and 2021. The Claimant made some payments towards the debt, but these payments were insufficient to liquidate the entire debt. In June 2021, Ascendancy properly exercised its power of sale. The Claim against Ascendancy is dismissed.

If the Claimant does have an equitable interest in Parcel 2183, what is the effect of the Second and Third Defendants' title and interest in Parcel 2183 and do the Second and Third Defendants' title and interest have priority over the Claimant's interest in Parcel 2183?

34. Because Ascendancy's interest has priority over the Claimant's equitable interest, and Ascendancy properly exercised its power of sale, it flows that the Alpuches have acquired good title on Parcel 2183. The Claim against the Alpuches is dismissed.

Are the Second and Third Defendants bona fide purchasers for value without notice?

35. Given my findings on the previous two issues, it is unnecessary to consider this issue. I do note for the record that no evidence has been presented to this Court showing that the Claimant at any point in time notified Saint James Building Society, Scotiabank, or Ascendancy of her equitable interest in Parcel 2183. In addition, she never lodged a caution with the Registrar of Land to preserve her interest. Section 41(1)(a) of the *Registered Land*

Act entitled the Alpuches, as bona fide purchasers for value, to rely on the Register to correctly identify the priority of legal interests. I have no difficulty finding that the Alpuches were bona fide purchasers for value without notice.

Are the Second and Third Defendants entitled to possession of the property and mesne rent?

36. The Alpuches are entitled to possession of Parcel 2183. The Claimant must vacate Parcel 2183 within 14 days of the date of this Judgment.
37. The Alpuches are entitled to mesne rent from August 27th, 2021 up to the date Parcel 2183 is delivered to them. The Court will remain seized of this matter for the purpose of determining the amount of mesne rent owed to the Alpuches.

IT IS HEREBY ORDERED THAT

- (1) The Claim is dismissed.
- (2) Judgment is entered on the Counterclaim.
- (3) The Second and Third Defendants are entitled to recover possession of Parcel 2183.
- (4) The Claimant shall vacate and remove all of her belongings from Parcel 2183 within 14 days of this Judgment.
- (5) At the expiration of 14 days from this Judgment, the Claimant, her servants and agents are restrained from entering upon Parcel 2183.
- (6) The Second and Third Defendants are entitled to mesne rent from August 27th, 2021 up to the date Parcel 2183 is delivered to them.
- (7) The Court remains seized of this matter for the purpose of determining the amount of mesne rent owed to the Second and Third Defendants.
- (8) Prescribed costs are awarded to the Defendants.

Dated March 2nd, 2023

Geneviève Chabot
Justice of the High Court