

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

Civil Appeal No. 93 of 2002  
High Court Action No. 541 of 1996

BETWEEN

RICHARD DEAN

Appellant

AND

MYRA DICK-HUMPHREY

otherwise

MYRA HUMPHREY

NIGEL HUMPHREY

MICHAEL HUMPHREY

REGAN BOXHILL

BANK OF COMMERCE TRINIDAD AND TOBAGO LIMITED

Respondents

**PANEL:**

R. Nelson, J.A.

W. N. Kangaloo, J.A.

A. Mendonca, J.A.

**APPEARANCES:**

Mr. V. Maharaj for the Appellant

Mr. Y. Ahmed, holding for Mr. Gaspard for the Respondents

**DATE DELIVERED:** 9<sup>th</sup> December, 2004

I agree with the judgment of Mendonca J.A. and have nothing to add.

R. Nelson  
Justice of Appeal

I too agree.

W. N. Kangaloo  
Justice of Appeal

1. At the heart of this case is the validity of a Power of Attorney dated April 14, 1992 registered as No. 6232 of 1992 (the Power of Attorney) whereby the Humphreys (Myra Humphrey, Nigel Humphrey and Michael Humphrey) (hereinafter together referred to as the Respondents) are said to have appointed Regan Boxhill (Boxhill) as their lawful attorney, to inter alia, sell and/or mortgage all their interest and shares in lands situate at Eastern Main Road, D'Abadie (the premises).

2. The material facts may be briefly stated. The premises, until the conveyance to the Appellant, to which as I will refer in a moment, were vested in the Respondents. The premises, however, at some point in time came into possession of Boxhill and in January 1994, he granted a lease of part of the premises to the Appellant for, it seems, the purpose of operating a business there. The Appellant proceeded to renovate the premises and opened a tyre shop and auto parts store. In November 1994, Boxhill approached the Appellant with an offer to sell him the premises. After some negotiation the Appellant agreed to buy the premises from Boxhill at an agreed price of \$205,000. A deposit was paid by the Appellant on account of the purchase price and he sought and obtained a loan from The Bank of Commerce Trinidad and Tobago Limited (the Bank) to assist in the completion of the sale. The Appellant knew that Boxhill did not own the premises and was aware that he was purporting to act as attorney for the owners, the Respondents. On January 20, 1995 the sale transaction was completed. On that date Boxhill purporting to act as the duly constituted attorney of the Respondents, executed a deed of conveyance of the premises in favour of the Appellant, who in turn executed a deed of mortgage in favour of the Bank over the premises as security for the loan.

3. Myra Humphrey, one of the Respondents and to whom I shall refer as the First Respondent, is the mother of Boxhill and was residing in the U.S.A. since 1981. She, however, returned to Trinidad from time to time. On a visit to Trinidad in 1987 she had an altercation with Boxhill. He threatened to kill her. She stated that she became "stressed out" and "could not face" Trinidad. As a consequence she stayed in the U.S.A. and did not return to Trinidad between 1991 and 1996 when she returned to Trinidad on a visit. She saw the premises occupied and "something like a tyre shop, and a mechanic shop" operating on the premises. The First Respondent spoke to someone she saw at the premises and later conducted a title search of the premises. As a result of that search, she discovered the Power of Attorney and another deed. She claimed not to have executed the Power of Attorney. On February 15, 1996 the Respondents commenced proceedings against the Appellant, the Bank and Boxhill seeking, inter alia, declarations that the Power of Attorney, and the deed of conveyance to the Appellant and the deed of mortgage to the Bank were null and void, an order for the cancellation of the deeds, and an order for possession of the premises.

4. The matter proceeded to trial and the Trial Judge gave judgment for the Respondents granting the declarations and orders sought. This is the Appellant's appeal from that judgment.

5. It should be noted that Boxhill did not defend the action, and did not appear at the trial. The Bank which defended the action and appeared at the trial did not appeal. This

Court has been informed that it no longer has an interest in the matter as the mortgage loan has since been repaid.

6. The Trial Judge found that the signature on the Power of Attorney purporting to be that of the First Respondent was not in fact her signature. On that basis, the Judge concluded that Boxhill could not pass any title to the Appellant. He stated:

On these facts, it is difficult to see how the Second Defendant (Boxhill) could pass title to the First Defendant (the Appellant), when he himself possessed no interest in the premises which he could pass, and where he had no authority to deal with the interest of the holders of the legal title.

7. From that the Judge concluded that the Appellant acquired no title in the premises which he could pass to the Bank.

8. Before the Trial Judge, both the Appellant and the Bank raised the plea of bona fide purchaser for value without notice. The Judge, however, was of the opinion that that plea did not apply in this case.

9. Before this Court the Appellant argued three grounds of appeal namely:

- (1) the learned Judge erred in finding that the Respondents did not execute the Power of Attorney;
- (2) alternatively even if the Power of Attorney was a forgery it was voidable and not void. Accordingly until it was set aside, it was effective to transfer the Respondents' title in the premises to the Appellant. As a consequence the Judge was wrong to conclude that the Appellant acquired no title and had no title to pass to the Bank;
- (3) The Trial Judge erred in rejecting the Appellant's plea of bona fide purchaser for value without notice.

10. I will first deal with the second and third grounds of appeal. These obviously were argued on the premise that the Power of Attorney is a forgery. Of course if the Power Of Attorney is not a forgery and is valid then clearly the conveyance of the premises by Boxhill would be effectual to pass the Respondents' title in the premises to the Appellant and the mortgage to the Bank would be proper. I will therefore deal with these grounds of appeal on the same basis; that is to say on the assumption that the Power of Attorney is a forgery.

11. With respect to the second ground of appeal, Counsel for the Appellant submitted that even if the Power of Attorney were forged, Boxhill could pass the interests and shares of the Respondents in the premises under the conveyance to the Appellant. This was because, Counsel submitted, that the Power of Attorney was voidable and not void, and accordingly any transaction by the attorney, before the Power of Attorney is set aside

is valid. Counsel in support of the submission referred to the following passage in Kerr, *Fraud and Mistake* (7<sup>th</sup> edition) at p. 7:

But a contract or other transaction induced or tainted by fraud is not void, but only voidable at the election of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded.

12. I agree with that statement of the law, but that does not deal with cases of forgery. None of the cases referred to by Kerr in support of the passage quoted above is a case of forgery. A forged document is not voidable and cannot bind the person whose signature is forged. I think there can be no doubt of that. But if authority is required it is sufficiently illustrated by the case of *Boursot v Savage* [1866] L.R. 2 Eq. 134. In that case Holmer, one of three trustees, executed an assignment of leasehold property held jointly by them to a purchaser and forged the signatures of his two co-trustees namely Boursot and Stone. Sir R. T. Kindersley V. C. stated in his judgment (at p. 140):

.... I cannot hesitate to conclude that quoad, Boursot and Stone, the deed of assignment has no operation whatever. But as Holmer actually executed, I think the effect of this deed of assignment was to vest the legal interest of one third of the household property in the Defendant.

13. I therefore see no merit whatsoever in the second ground of appeal. If the Power of Attorney is a forgery, Boxhill had no authority to act on behalf of the Respondents' and their title and interest in the premises therefore would not have passed under the conveyance to the Appellant. Consequently both the conveyance and the mortgage would be of no effect.

14. Counsel also contended that notwithstanding that the Respondents' interest may not have passed to the Appellant, he is in a position of bona fide purchaser for value without notice and is entitled to the Respondents' interest in the premises. The Judge rejected this submission and I agree with him. I see no merit in it. The plea of bona fide purchaser for value without notice is available to a purchaser who has obtained the legal estate and will usually give him priority over equitable claims which rank before him in point of time (see 16 Halsbury's (4<sup>th</sup> edition) para. 1310). The plea cannot be set up by someone without the legal title to defeat the holder of the legal title. As is stated in Ashburner's *Principles of Equity* (2<sup>nd</sup> edition) at p. 50:

... generally speaking a court of equity will give effect to the plea of Purchaser for Value without notice in favour of a legal owner as against an equitable claimant, but not as between two legal or equitable titles.

15. If it were otherwise it means that a bona fide purchaser could obtain a title from a vendor without a title; "an extension to equity of the principle of sale in market overt for which there is no warrant" (see 16 Halsbury's (4<sup>th</sup> edition) para. 1311, footnote 4).

16. If the Power of Attorney is a forgery, the Appellant would have acquired no title by the conveyance executed by Boxhill. The plea of bona fide purchaser for value without notice is therefore not available to the Appellant to defeat the legal title of the Respondents and to give him a title from Boxhill who had no authority to convey the interest of the Respondents in the premises

17. The plea is also available without the legal title against equities as distinguished from equitable interests (see 16 Halsbury's (4<sup>th</sup> edition) at para. 1310) but that is not this case.

18. This brings us to the first ground of appeal that the judge erred in finding that the Respondents did not execute the Power of Attorney.

19. The first thing that I would like to note is that the Judge did not find that the Respondents did not execute the Power of Attorney. His explicit finding was that the First Respondent did not execute the Power of Attorney. He made no findings whether or not the Power of Attorney was executed by the other two Humphreys, namely Nigel and Michael Humphrey. I will return to that later but with respect to the finding that the First Respondent did not execute the Power of Attorney, I think that the Judge was well entitled to come to that conclusion. To explain the reasons for so saying it is necessary to refer to the evidence before the Judge.

20. The First Respondent gave evidence. She testified that in 1992 she was not in the jurisdiction. She had left the country some years before that and although she returned from time to time she did not return to Trinidad in 1992 when the Power of Attorney was alleged to have been executed. In fact prior to 1996 when she discovered the Power of Attorney, she was not in Trinidad since 1991. She produced her current passport as well as the passport that had expired before the current one and they appeared to support her testimony that she did not return to Trinidad in 1992. Her evidence, which I have mentioned earlier in this judgment, that she did not speak to Boxhill since 1987 after she had an altercation with him and he tried to kill her was also evidence that pointed to the conclusion that it was improbable that she would give him a power of attorney in 1992.

21. As against that evidence the only evidence to the contrary was the affidavit of due execution attached to the Power of Attorney sworn by Zorida Khan-Singh. In it Ms. Khan-Singh attests to being present with the Humphrey and Toney, the attorney who purportedly prepared the Power of Attorney, and that she witnessed the Humphreys execute it. She, however, did not give oral evidence, and the Judge commented on her absence from the witness box, clearly implying that he was not prepared to attach any weight to the affidavit as a consequence. I think he was justified to take that position in the face of what was a statement not tested by cross-examination. The affidavit also did not state what, if any, steps were taken by Ms. Khan-Singh to ensure that the person said to be the First Respondent was in fact her. It therefore did not address the real possibility raised by the First Respondent that the Power of Attorney may have been signed by someone purporting to be her, but not in fact her. The attorney who prepared the Power of Attorney and also witnessed the execution of it was not called to give evidence. There

was therefore no evidence other than the affidavit of Ms. Khan-Singh to challenge the evidence of the First Respondent and the Judge was impressed by the First Respondent. He stated:

I found her to be an honest and forthright witness, whose evidence I had no difficulty in accepting.

22. The Judge carefully considered the evidence. On the evidence before him and the view he took of the First Respondent's evidence, the Judge was well entitled to find as he did that the First Respondent did not execute the Power of Attorney. He did not need the evidence of an expert before he could reach that conclusion. It should be noted also that in coming to the finding that the First Respondent did not sign the Power of Attorney and so her signature was forged, he accepted that the standard of proof was somewhat higher than if fraud were not alleged. He stated:

Having considered the evidence very carefully I find on a balance of probabilities that the First Plaintiff did not execute the Power of Attorney. In doing so, I bear in mind the submissions of ["Counsel for the Appellant and the Bank"] with respect to the standard of proof required in civil cases involving the proof of fraud .... I have found as a fact on a high preponderance of probabilities that the power of attorney, by which, the Second Defendant [Boxhill] sought to execute the conveyance, was not the deed of the First Plaintiff ["the First Respondent"].

23. In the circumstances I see no basis to disturb the Judge's finding that the Power of Attorney was not executed by the First Respondent. But what of the other two Humphreys?

24. The Respondents called Mr. Glen Parmassar, a document examiner, to give evidence. His evidence was that he examined certain specimen signatures purporting to be those of the Respondents and the questioned signatures appearing on the Power of Attorney. He observed a few similarities of a general nature, along with a number of differences in writing characteristics. He prepared a report of the examination he did and of his findings. He concluded that the signatures on the Power of Attorney purporting to be those of the First Respondent and Michael Humphrey were not executed by the same writer of the specimen signatures purporting to be those of the First Respondent and Michael Humphrey. In the case of Nigel Humphrey he concluded that it was highly probable that the signature "Nigel Humphrey" appearing on the Power of Attorney was not written by the writer of the specimens purporting to be those of Nigel Humphrey. The Judge, however, noted that there was no evidence that the specimen signatures against which the questioned signatures on the Power of Attorney were compared were in fact made by the Respondents. On that basis, he attached no weight to the opinion of Mr. Parmassar. I think the Judge was correct to come to that conclusion.

25. The second Respondent gave evidence, but remarkably he gave not one word of testimony that the signature on the Power of Attorney was not his. His evidence- in-chief did not touch on that at all and not surprisingly he was not cross-examined on it either. The Third Respondent did not give evidence and there is no explanation why he was not available at the trial.

26. There was however evidence which touched on whether the Power of Attorney was executed by Nigel and Michael Humphrey. The First Respondent stated that Michael Humphrey was in the U.S.A. since 1985. If that is so he could not have been present when the Power of Attorney was executed in 1992. The First Respondent however also stated that in 1987 when she visited Trinidad she had her children here. Her children would have included Michael. So the First Respondent may not have meant that Michael, if he was living in the U.S. A. since 1985, did not since then return to Trinidad. The Judge however made no finding as to whether Michael was here in 1992 and so could have executed the Power of Attorney and did so.

27. The evidence of the First Respondent is that she never went to the office of Joseph Toney, the attorney who purportedly prepared the Power of Attorney. When that evidence is set against the affidavit of due execution of Zorida Khan-Singh that the First Respondent was present together with Nigel and Michael Humphrey and did execute the deed before her and the said attorney, the possibility emerges that as the Judge found that the First Respondent did not execute the Power of Attorney and so was not present at the execution, nor were Nigel and Michael. That possibility of course assumes greater prominence in view of the evidence that Michael might not have been in Trinidad since 1985. The Judge however did not deal with this.

28. I have already indicated my agreement on certain conclusions reached by the Judge on the basis that the Power of Attorney is a forgery. The conveyance to the Appellant would not have been capable of passing any of the Respondents' interest or title in the premises to him. Different considerations may however apply if the Power of Attorney is in fact executed by any one of the Respondents. The Judge therefore should have carefully assessed the evidence and come to a finding whether the deed was executed by any of the Respondents. This he failed to do and I think that in the interest of justice there should be a new trial on the issue of whether the Power of Attorney is a forgery.

29. This appeal is therefore allowed and the order of the Trial Judge is set aside. The matter is remitted to the High Court with the direction that there be a new trial before another judge of that Court on the issue whether the Power of Attorney is a forgery.

30. On the question of costs, while I have allowed the appeal, it is fair to say that the Appellant has not entirely succeeded. He has failed on two of the three issues argued, and on the issue of forgery he has not persuaded me that the judge was wrong in the finding he did come to and there must now be a retrial. In those circumstances, I think there should be no order as to costs on the appeal. The costs of the High Court action to date including the costs of the former trial shall abide the result of the new trial.

Allan Mendonca  
Justice of Appeal