[2026] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2022CV00119

BETWEEN	**KEITH FRANCIS**	**APPELLANT**
AND	**XAVIER DONIETO MARKLYN CHEVANNES**	**1ST RESPONDENT**
AND	**JOSEPH STERLING**	**2ND RESPONDENT**

Written submissions filed by Lambie Thomas & Co for the appellant

No submissions filed by or on behalf of the respondents

25 June 2026

Civil Procedure – Application by defendants for summary judgment – Improper commencement of proceedings by claim form instead of fixed date claim form — Whether summary judgment available in proceedings improperly constituted – Whether learned judge erred in granting summary judgment in such circumstances — Proper procedural framework under the Civil Procedure Rules — Overriding objective – Civil Procedure Rules, 2002, rules 10.3, 15.2, 15.3, 26 and 27.2

Appeal – No written submissions in opposition filed by respondents – Court entitled to proceed in respondents' absence – Court of Appeal Rules, 2002, rules 1.8, 1.11, 1.15 and 2.4(2)

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules, 2002)

FOSTER-PUSEY JA

[1] I have read the judgment of my learned sister and agree that this appeal should be allowed.

[2] S Orr J (Ag) (as she then was) ('the learned judge') correctly ordered that the claim form be replaced by a fixed date claim form ('FDCF'), as mandated by the Civil Procedure Rules, 2002 ('CPR'), since it is a probate proceeding (see rule 68.55(1) of the CPR). The CPR clearly states that matters initiated by a FDCF and probate proceedings are not subject to the summary judgment procedure (see 15.3(c) and (f) of the CPR).

[3] As my learned sister has opined in her judgment, the appropriate course of action in all the circumstances was to refuse the application for summary judgment. The matter would then proceed in accordance with the relevant procedure for FDCFs.

[4] Even if it was appropriate for the summary judgment application to have been heard, there were clearly issues that required further exploration which would have prevented the grant of the application on the documents before the court. While the respondents claimed to be *bona fide* purchasers for value without notice, documents on the record also reflected that the property transfers had been made by deed of gift. If the fraud as alleged against the 1st and 2nd defendants (in the court below) were successfully proved, then any transfers by deed of gift to the respondents would be liable to be set aside. It is, in short, for these reasons that I agreed to allow the appeal.

D FRASER JA

[5] I, too, have read the draft judgment of G Fraser JA (Ag) and agree with her reasoning and conclusions. There is nothing that I wish to add.

G FRASER JA (AG)

Introduction

[6] This procedural appeal arises from the decision of the learned judge, delivered on 1 July 2022, by which summary judgment was granted in favour of the 1st and 2nd respondents, Mr Xavier Donieto Marklyn Chevannes and Mr Joseph Sterling ('the respondents'). The respondents were the 3rd and 4th defendants in the proceedings below. The substantive claim brought by Mr Keith Francis ('the appellant') concerned the validity of a will purportedly executed by the deceased, Jonathan Francis, on 2 May 2007, and

the transfer of certain real property to the respondents, which the appellant alleged formed part of the deceased's estate. The appellant sought to move the court below to make a number of declarations, including the following:

> "1. A **Declaration** that the purported Will of Jonathan Francis dated the 2nd day of May 2007 be declared invalid and therefore that the Grant of Probate given to the 1st and 2nd Defendant (who are not parties to this appeal) be revoked as at the time of his proposed execution Jonathan Francis did not have the mental capacity to create a Will.
>
> 2. A **Declaration** as to the validity of the Will of Hilda Linda McLeary.
>
> 3. A **Declaration** that the Transfer of Property formerly comprised in Certificate of Title registered at Volume 256 Folio 91 and now comprised in Certificate of Title registered at Volume 489 Folio 58 by way of gift to the [1st respondent] be deemed invalid.
>
> 4. A **Declaration** that the Transfer of Property formerly comprised in Certificate of Title registered at Volume 928 Folio 39 and now comprised in Certificate of Title registered at Volume 1490 Folio 179 by way of gift to the [2nd respondent] to be deemed invalid.
>
> 5. …
>
> 6. **A Declaration** that the [appellant] has a beneficial interest in the property formerly comprised in Certificate of Title registered at Volume 928 Folio 39 and now comprised in Certificate of Title registered at Volume 1490 Folio 179.
>
> 7. **A Determination** as to the interest of the [appellant] in the said land formerly comprised in Certificate of Title registered at Volume 256 Folio 91 and now comprised in Certificate of Title registered at Volume 489 Folio 58.
>
> …"

[7] In addition to these declarations, the appellant sought consequential relief aimed at restoring the *status quo ante* with respect to the grant of probate and preserving, as he alleged, a beneficial interest in the properties in dispute. The appellant, however,

initiated proceedings by way of a claim form rather than by FDCF, which is the prescribed mode of commencement for probate proceedings under the CPR.

[8] The respondents were served with the claim on 24 August 2019 (the 2nd respondent) and 12 November 2019 (the 1st respondent). An acknowledgement of service was filed on 21 November 2019, on behalf of the 1st respondent. However, the record discloses no acknowledgement filed by the 2nd respondent. In any event, neither respondent filed a defence to the claim within the time prescribed by rule 10.3 of the CPR.

[9] On 8 November 2021, more than two years after service of the claim, the respondents, notwithstanding their failure to file any defence within the time prescribed, filed a notice of application seeking orders to strike out the appellant's statement of case. Alternatively, they sought summary judgment in their favour, on the basis that they were *bona fide* purchasers for value without notice of any fraud. As a further alternative, they sought an extension of time to file a defence within 14 days of the determination of their application.

[10] Counsel for the appellant contended that, by the time this application was filed, the appellant had already applied for default judgment against the respondents, and that the application remained pending and undetermined at the relevant time. Whilst no formal evidence was placed before this court to substantiate that assertion, the submissions of the appellant's counsel lend some support to it. Had a default judgment application indeed been filed and remained outstanding, a prior question would have arisen as to whether the respondents were procedurally entitled to have their application heard at all before the court disposed of the default judgment application. That question cannot be definitively resolved on the material before this court. However, the procedural chronology is a matter to which the court below will need to attend upon the remission of the proceedings.

[11] The appellant erroneously instituted proceedings by filing an ordinary claim form in the Supreme Court on 28 May 2019. Notwithstanding that procedural irregularity, the learned judge entertained the respondents' application and granted summary judgment in their favour. Although no written reasons were supplied, the material before this court, coupled with the terms of the orders subsequently made by the learned judge, suggests that the decision was premised on the basis that the respondents were *bona fide* purchasers for value without notice and that no triable issues arose in relation to their position. The learned judge accordingly made the following orders:

> "1. The [appellant's] claim form is to be replaced by a Fixed Date Claim Form which is to be filed and served by July 14, 2022.
>
> 2. The [1st and 2nd respondents] are granted summary judgment against the [appellant].
>
> 3. Costs are awarded to the [1st and 2nd respondents] on the application for summary judgment.
>
> 4. [Appellant's] Attorney-at-Law to prepare, file, and serve Orders herein.
>
> 5. Leave to appeal is refused."

[12] Leave to appeal was subsequently granted by this court on 7 November 2022. The appellant thereafter filed the notice of appeal on 17 November 2022, thereby invoking the appellate jurisdiction of this court.

The appeal

[13] The appellant now challenges the learned judge's decision, contending that she erred in granting the orders sought by the respondents, and accordingly filed 10 grounds of appeal as follows:

> "(1) The learned judge erred in permitting the Respondents to make their application for summary judgment when summary judgment cannot be granted on claims which are brought by way of Fixed Date Claim Form and the learned judge had accepted the Respondents' submissions that the claim ought to have begun by way of Fixed Date Claim Form.

(2) the learned judge erred in permitting the 1st & 2nd Respondents to make their application for summary judgment when the 1st & 2nd Respondents had failed to file a Defence to the claim, the time for filing their Defence had expired and the respondents were relying on a defence that they were bona fide purchasers when there was no such defence before the court.

(3) the learned judge erred in finding that there is no requirement that the 1st & 2nd Respondents first file a Defence before their application for summary judgment could be heard.

(4) The learned judge erred in permitting the 1st & 2nd Respondents to rely in their summary judgment application on a defence that they were bona fide purchasers when the Respondents had no Defence before the Court and the time for filing their Defence had expired.

(5) The learned judge erred in finding as a fact that the 1st & 2nd Respondents were bona fide purchasers.

(6) The learned judge erred in finding that the 1st & 2nd Respondents' assertions that they were bona fide purchasers were unchallenged by the appellant.

(7) The learned judge erred in finding that the Appellant failed to have alleged in his pleadings that the 1st & 2nd Respondents were not bona fide purchasers and ought to have done so.

(8) The learned judge erred in finding that once no fraud had been alleged against the 1st & 2nd Respondents, the Applicant could not succeed in his claim against them.

(9) The learned judge erred in granting summary judgment in circumstances where there were triable issues between the parties if the defence of bona fide purchasers could be relied on.

(10) The learned judge failed to properly direct herself as to the applicable legal principles.

4. Orders sought:

(a) THAT the order made by the Honourable Miss Justice S. Orr (Ag) in granting the respondents' Application for summary judgment filed on November 8, 2021 is set aside.

> (b) THAT the Order made by the Honourable Miss Justice S. Orr (Ag) in granting costs to the respondents on their Application for summary judgment filed on November 8, [sic] is set aside.
>
> (c) Costs of the Appeal and in the court below to the Appellant to be agreed or taxed.…"

[14] These grounds, upon careful examination, reveal a substantial degree of overlap and interrelationship among them, both in substance and in the complaints advanced against the learned judge's reasoning. Properly analysed, the appeal challenges the judgment on both procedural and substantive bases. In broad outline, the appellant contends, first, that the learned judge erred in entertaining and determining an application for summary judgment in proceedings which, on the respondents' own contention and on the learned judge's eventual acceptance, ought properly to have been commenced by way of FDCF. Secondly, the appellant complains that the respondents were permitted to pursue that application notwithstanding their failure to file a defence within the time prescribed by the CPR. Thirdly, the appellant challenges a series of factual and legal conclusions reached by the learned judge, including findings concerning the respondents' alleged status as *bona fide* purchasers for value without notice and the absence of fraud, on the basis that such determinations were not properly open to the court within the confines of a summary judgment application and in the absence of a full trial.

Applicable appellate principles

[15] As this appeal arises from an interlocutory application, it engages the well-established principle of appellate restraint articulated in **Hadmor Productions Ltd and Others v Hamilton and Another** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, namely, that an appellate court ought not to interfere with the exercise of a judge's discretion unless it is shown to be based on an error of law or misunderstanding of the evidence. Morrison JA (as he then was) in the latter case observed at para. [20] that:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[16] Before addressing the substantive grounds of appeal, it is necessary to say something about the absence of reasons for the decision under challenge. Especially since several of the grounds advanced (grounds 3, 5, 6, 7, and 8) purport to challenge findings of fact said to have been made by the learned judge.

[17] The present case is complicated by the absence of any articulated or written reasons from the learned judge placed before this court. As a consequence, this court is unable to ascertain with precision any factual findings made, if any, the legal conclusions, and/or any evaluative considerations that informed the learned judge's exercise of jurisdiction.

[18] It is a fundamental aspect of the judicial function that a judge provide clear and intelligible reasons for the decision reached. The duty to give reasons serves several important purposes: it demonstrates that the issues raised by the parties have been conscientiously considered, enables the parties to understand why they have succeeded or failed, promotes public confidence in the administration of justice, and ensures that the decision is susceptible to meaningful appellate scrutiny. As the court observed in **English v Emery Reimbold & Strick Ltd**; **DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd**; and **Verrechia t/a Freightmaster Commercials v Commissioner of Police for the Metropolis** [2002] EWCA Civ 605, the giving of adequate reasons is an indispensable component of a fair adjudicative process.

[19] The importance of reasoned decision-making is particularly acute in the appellate context. An appellate court can properly perform its reviewing function only where the

basis of the impugned decision is apparent from the judgment. Where reasons are absent, inadequate, or obscure, the appellate court is left to speculate as to the process of reasoning by which the judge arrived at the conclusion reached. It was in recognition of these considerations that Griffiths LJ observed in **Eagil Trust Co Ltd v Pigott-Brown and another** [1985] 3 All ER 119 at 122, the following:

> "The next general observation I want to make is as to the judge's duty to give reasons for his decisions… in the case of discretionary exercise, as in other decisions of facts or law, the judge should set out his reasons, but the particularity with which he is required to set them out must depend on the circumstances of the case before him and the nature of the decision he is giving."

[20] In this case, it cannot, therefore, confidently be asserted that all of the findings as alleged by the appellant were in fact made. In appellate review, particularly where the court below has provided no reasons or only limited reasons for its decision, the appellate court must proceed with circumspection and avoid attributing to the judge conclusions that cannot be reliably discerned from the record. In the circumstances, it would be speculative to proceed on the footing that the learned judge arrived at particular factual conclusions.

[21] Accordingly, the absence of reasons materially attenuates the basis upon which appellate deference might otherwise be justified. In the circumstances, it falls to this court to conduct its own assessment of the evidential record and the applicable principles governing summary judgment in order to determine whether the order made below was properly available on the material before the learned judge. This court must therefore proceed with particular care, confining itself to what may properly be inferred from the record and the orders made, while recognising that the absence of reasons limits the extent to which deference can meaningfully be accorded.

[22] In the circumstances, it is more appropriate to focus on those grounds that can reasonably be inferred or distilled from the orders made by the learned judge and the procedural context in which they were granted.

The issues

[23] To promote analytical clarity and procedural economy, and to avoid unnecessary duplication, the court considers it appropriate to recast the numerous grounds of appeal into a set of consolidated questions for determination. This approach allows the substance of the appellant's complaints to be addressed in a coherent and structured manner, without becoming entangled in the repetition and fragmentation evident in the individual grounds.

[24] The issues so formulated are as follows:

I. Whether the learned judge erred in permitting the respondents to pursue an application for summary judgment in circumstances where the claim ought to have been brought by way of FDCF (Grounds 1 – 4 and 10).

II. Whether the learned judge adequately applied her mind to the legal and evidential implications of the respondents' claimed status as *bona fide* purchasers, and whether her failure to grapple with the resulting factual and evidential conflicts rendered the grant of summary judgment unsustainable (Grounds 5 – 9).

The court will, therefore, consider the appeal by reference to these issues rather than the individual grounds, which are subsumed within them.

Non-participation of the respondents in the appeal

[25] Pursuant to rule 1.8 of the Court of Appeal Rules, 2002 ('the CAR'), after the appellant sought and was granted permission by this court to appeal the decision and consequential orders of the learned judge, the record reflects that, in accordance with the procedural requirements of rules 1.11 and 1.15 of the CAR, on 17 November 2022, the appellant duly served on the respondents' attorneys-at-law the order granting permission to appeal, as well as the notice of appeal and the accompanying grounds of

appeal. A copy of the said notice of appeal was filed in this court with service endorsed thereon.

[26] The appellant subsequently applied for, and on 5 January 2023 was granted, an extension of time within which to file his written submissions in support of the appeal. In accordance with the usual procedural requirements, the application was supported by affidavit evidence, which was served on the respondents' attorneys-at-law, proof of such service being a necessary precondition to the court's consideration of the application. The record reflects that the application and supporting affidavit were served on 9 December 2022, as evidenced by the endorsed acknowledgement of service on the filed copy. The written submissions were likewise served and acknowledged by the respondents; however, the endorsement bears a receipt date of 8 December 2022, which predates the service of the application. Nothing turns on this discrepancy for present purposes.

[27] Notwithstanding such service, there is nothing on the record to indicate that the respondents filed and served "on the appellant any written submissions in opposition to the appeal or in support of any cross appeal" within the time stipulated by rule 2.4(2) of the CAR. Nor did the respondents seek an extension of time to do so, or otherwise express an intention to participate in the appeal. A relevant notice was dispatched by the Deputy Registrar of this court, on 4 February 2025, advising the parties that "this procedural appeal will be laid before the Court during the week commencing on **14th day of July 2025** and, subject to any order or directions the Court may make, **will be considered by the Court on paper**" (emphasis as in the original). The said notice also urged the parties to file their bundles of documents, including any "submissions" being relied on, "**no later** than four (4) working days before" the hearing date scheduled. Despite this notification, the respondents have taken no action.

[28] In those circumstances, the court cannot be held hostage by the decision of a party who, having been duly served and afforded a full opportunity to participate, elects not to engage in the appellate process. Once the requirements of procedural fairness have been satisfied, the court remains obliged to discharge its adjudicative function and

determine the appeal on its merits. To hold otherwise would permit a non-participating party, by inaction alone, to impede the orderly administration of justice.

[29] Such an approach accords with the overriding objective of the Court of Appeal Rules, which requires the court to deal with cases justly, expeditiously, and proportionately. The efficient and timely disposition of appeals should not be frustrated by a party's failure or refusal to participate in the proceedings. At the same time, the requirements of fairness are preserved since the party has been given notice of the appeal and a reasonable opportunity to be heard.

[30] There being no procedural impediment to the continuation of the appeal, the court will proceed to consider and determine this procedural appeal solely on the basis of the appellant's filings and submissions.

Issue 1: Whether the learned judge erred in permitting the respondents to pursue an application for summary judgment in circumstances where the claim ought to have been brought by way of FDCF (Grounds 1 – 4 and 10).

[32] This issue concerns the proper procedural course available to the learned judge when faced, on the one hand, with proceedings commenced by ordinary claim form rather than by FDCF, as required for probate matters under rule 68.55(1) of the CPR, and, on the other, with applications by the respondents seeking principally to strike out the claim pursuant to rule 26.3(1)(a) of the CPR, and alternatively, summary judgment under Part 15 of the CPR, together with an extension of time to file a defence.

[33] The determination of the respondent's applications required careful consideration of the procedural framework governing probate proceedings and, in particular, the interaction among Parts 8, 15, 26, 27, and 68 of the CPR, considered against the background of the overriding objective. It further required examination of the procedural consequences arising from the use of an incorrect mode of commencement, the scope of the court's powers to regularise such an irregularity, and whether the summary judgment jurisdiction under Part 15 was procedurally available in those circumstances.

[34] There is no real dispute that the proceedings were probate proceedings within the meaning of rule 68.54 (1) and (3) of the CPR, which govern probate claims and define probate claims as follows:

> "68.54 (1) This Section contains rules about –
>
> (a) probate claims
>
> (b) claims and applications to
>
> (i) …
>
> (ii) …
>
> which in this Part are referred to as 'probate proceedings'.
>
> (2) …
>
> (3) In this Section –
>
> …
>
> '**probate claim**' means a claim for -
>
> (i) the grant of probate of the will in solemn form, or letters of administration of the estate of a deceased person;
>
> (ii) the revocation or amendment of such a grant;
>
> (iii) for a decree pronouncing for or against the validity of an alleged will, not being a claim which is non-contentious or common form probate business;
>
> …" (Emphasis as in the original)

The appellant's claim, which sought the revocation of the grant of probate, a declaration as to the invalidity of the will, and consequential relief in respect of property forming part of the estate, plainly falls within that definition.

[35] Probate proceedings engage the court's supervisory jurisdiction over the administration of estates and are governed by the specialised regime set out in Part 68

of the CPR. Rule 68.55(1) of the CPR stipulates in clear and imperative terms that probate proceedings "must be begun by issuing a fixed date claim form in form 2". The language of the provision admits of no discretion as to the prescribed method of commencement. The specialised nature of probate proceedings is further underscored by rule 68.60, which specifically regulates the content of statements of case in probate claims, and by the structured regime of Part 68 as a whole, which is plainly designed to accommodate the distinctive nature of probate litigation and the supervisory jurisdiction exercised by the court over the administration of estates.

[36] The appellant's use of an ordinary claim form, therefore, constituted a procedural irregularity. The issue was not merely one of form but of adherence to a procedural code specifically tailored to regulate probate litigation, and the respondents were accordingly correct to raise it.

[37] Turning to the availability of summary judgment, rule 15.2 of the CPR provides that the court may give summary judgment where it is satisfied that a claimant has no real prospect of succeeding on the claim, or that a defendant has no real prospect of successfully defending it. That jurisdiction is important and carefully circumscribed. Its purpose is to facilitate the efficient disposal of claims or defences that are plainly unsustainable, while ensuring that parties are not deprived of a trial where genuine disputes of fact or law exist. The power must be exercised consistently with the procedural framework within which it is invoked and with the overarching demands of fairness and justice.

[38] A critical question is whether the Part 15 jurisdiction was available on the procedural facts of this case. That question requires analysis of three distinct but interrelated matters: the structural relationship between Part 15 and the FDCF regime; the effect of rule 15.3(c) of the CPR; and the consequences of the learned judge's own acceptance that the proceedings ought to have been commenced under the FDCF regime.

[39] As to the structural relationship, the summary judgment jurisdiction under Part 15 is designed to operate within proceedings commenced by ordinary claim form, where the procedural framework contemplates the exchange of statements of case through which the issues are defined and crystallised. It is against that pleaded framework, the particulars of claim, the defence, and any reply, that the court assesses whether a party has a real prospect of succeeding on the claim or defence. The jurisdiction therefore presupposes a level of procedural clarity and issue crystallisation that the statement of case regime is designed to provide.

[40] By contrast, proceedings commenced by FDCF are governed by the distinct regime established by Part 27 of the CPR, which contemplates an affidavit-driven process, supported by an early direction hearing at which the court assumes an active case management role to identify the issues and give directions for their determination. Critically, Part 15 is not among the provisions of the CPR applied by rule 27.2 to FDCF proceedings. That omission is deliberate and textually significant. The drafters of the CPR chose to identify with specificity which Parts of the CPR apply to FDCF proceedings, and Part 15 is absent from that list. The inference to be drawn is that the summary judgment procedure is not ordinarily available in FDCF proceedings, save where the CPR expressly provides otherwise.

[41] The express provision of such an exception in rule 68.66(1), which imports the summary judgment procedure into probate proceedings, but only for the limited purpose of applications to pronounce a will in solemn form, reinforces that inference. The exception is narrowly drawn, and the present proceedings did not fall within it. The absence of any comparable express provision permitting the use of Part 15 summary judgment in FDCF proceedings generally demonstrates, by negative implication, that no such general permission exists.

[42] The position is further resolved by the express language of rule 15.3(c) of the CPR, which provides that the court may not grant summary judgment in "proceedings by way of fixed date claim". The rule reflects a deliberate procedural demarcation within the CPR

and operates as a positive prohibition on the use of summary judgment in such proceedings. Its terms are unambiguous and do not require construction. Where proceedings are by way of FDCF, the summary judgment jurisdiction is simply unavailable.

[43] The application of rule 15.3(c) to the present proceedings requires a further step of reasoning. The proceedings were not, in fact, commenced by FDCF; they were commenced by an ordinary claim form. However, the respondents themselves contended that the proceedings ought properly to have been commenced by FDCF, and the learned judge accepted that contention. The question therefore arises whether the prohibition in rule 15.3(c) applies to proceedings that ought to have been, but were not, commenced by FDCF.

[44] In my judgment, it does. To hold otherwise would be to permit a party to circumvent the prohibition by the simple expedient of commencing proceedings in the wrong form. A claimant who ought to have proceeded by FDCF but chose instead to use an ordinary claim form cannot thereby expose a defendant to a summary judgment application that would have been unavailable had the correct form been used. That conclusion is reinforced by the terms of the learned judge's order, which directed that the ordinary claim form be replaced with an FDCF. Once that direction was given, or, more precisely, once the court accepted that the proceedings were in substance FDCF proceedings, the prohibition in rule 15.3(c) applied with full force. The grant of summary judgment was therefore procedurally impermissible.

[45] The respondents' position also conflates the separate question of the court's jurisdiction to regularise a procedural irregularity in the mode of commencement with the question of what substantive orders may properly be made within the regularised proceedings. Rule 26.9 of the CPR empowers the court to remedy a failure to comply with the rules and to give such directions as may be necessary to ensure that the matter is placed on its proper procedural footing. That power is both broad and facilitative, and an

error in the mode of commencement is typical of the type of irregularity it is designed to cure.

[46] The appropriate course, once the procedural irregularity was identified, was therefore to invoke the court's case management and remedial powers under Parts 26 and 27 of the CPR to regularise the proceedings, for example, by directing that the existing claim form and particulars of claim stand as a FDCF and requiring the subsequent filing of affidavit evidence, and to give such further directions as were necessary to place the matter on its proper procedural footing. It was not open to the learned judge to proceed in the reverse sequence, to entertain and grant summary judgment under a jurisdiction that was unavailable once the proceedings were properly characterised, and only thereafter to regularise the proceedings by ordering that a FDCF be filed. That sequence produced a result that was both procedurally incongruous and inconsistent with the structured scheme of the CPR.

[47] This principle emerges clearly from the authorities. In **Petroleum Company of Jamaica Limited v Hasheba Development Company Limited and Others** [2024] JMCA Civ 19, this court recognised that the procedural track on which a claim is placed determines the juridical framework within which the litigation proceeds and is not merely a matter of technical classification. The Privy Council in **Texan Management Limited and others v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 cautioned that the overriding objective is not a licence to disregard or remodel the procedural architecture deliberately established by the CPR. Likewise, in **The Attorney General v Keron Matthews** [2011] UKPC 38, at paras. 12–20, the Board reaffirmed that although the overriding objective informs the interpretation and application of the rules, it does not authorise the court to depart from or undermine the procedural scheme prescribed by them. And in **Div Deep Limited et al v Tewani Limited** [2010] JMCA Civ 10, at paras. [14]–[17], [32]–[37], [39]–[41] and [50]–[54], this court specifically cautioned that interlocutory mechanisms designed for ordinary claim form proceedings, including summary judgment under Part 15, do not readily apply to FDCF proceedings.

[48] Those authorities collectively underscore that the CPR establishes a series of distinct procedural regimes, each carefully designed to accommodate the nature, complexity, and subject matter of particular categories of litigation. Those regimes are not mere procedural formalities; each carries its own procedural requirements case management structure, and mechanisms for the fair and efficient resolution of disputes. The indiscriminate importation of mechanisms from one regime into another, absent a clear juridical basis within the rules themselves, risks not only inconsistency with the CPR but also the erosion of the safeguards, procedural discipline, and fairness inherent in each distinct framework.

[49] By reversing the proper sequence, granting summary judgment before regularising the proceedings, the learned judge exercised a jurisdiction that was excluded by CPR rule 15.3(c) in the circumstances of this case. That constituted an error of principle that went to the competence of the court to grant the relief sought in the manner adopted. The order granting summary judgment was therefore fundamentally flawed and cannot be permitted to stand.

[50] Grounds 1–4 and 10 accordingly succeed.

Issue 2: Whether the learned judge adequately applied her mind to the legal and evidential implications of the respondents' claimed status as *bona fide* purchasers, and whether her failure to grapple with the resulting factual and evidential conflicts rendered the grant of summary judgment unsustainable.

[51] For completeness, this court will address whether, even if the summary judgment procedure had been procedurally available, the case was an appropriate one for its exercise.

[52] Rule 15.2 of the CPR confines the summary judgment jurisdiction to circumstances where the court is satisfied that a claimant has no real prospect of succeeding on the claim, or that a defendant has no real prospect of successfully defending it. The jurisdiction is intended to dispose of claims or defences which are plainly unsustainable and does not authorise the court to conduct a mini-trial or to resolve substantial disputes

of fact or law on affidavit evidence alone. As Lord Woolf MR explained in **Swain v Hillman** [2001] 1 All ER 91, the words "no real prospect of succeeding" direct attention to whether the case carries "some degree of conviction" and is realistic rather than fanciful.

[53] The principles governing summary judgment require courts to exercise caution and restraint. As explained in Commonwealth Caribbean Civil Procedure, 3rd edition, at page 64, an applicant is required to ensure that:

> "…(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.
>
> (b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.
>
> (c) There must be no real prospect of oral evidence affecting the court's assessment of the facts."

The jurisdiction, therefore, proceeds on the footing that the material facts are clear, complete, and incapable of generating a triable controversy.

[54] The authorities likewise emphasise that summary judgment is not a substitute for the ordinary trial process. In **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12, Lord Briggs observed that:

> "There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."

[55] Of equal importance is the principle that where the resolution of the matter depends upon disputed facts, competing inferences, or issues of credibility, matters most

appropriately evaluated through examination and cross-examination, the summary procedure is unsuitable. In such cases, the forensic safeguards inherent in a full trial are indispensable to the just determination of the issues. As Sinclair-Haynes JA stated, in **Barbican Heights Limited v Seafood and Ting International Limited** [2019] JMCA Civ 1 at para. [79], only cases which are truly hopeless ought to be terminated summarily; where a defence discloses a real prospect of success, the matter must proceed to trial.

[56] The present case was plainly not one amenable to summary disposal. The proceedings raised substantial questions concerning the validity and effect of testamentary documents, the circumstances surrounding their execution, competing claims relating to the administration of the estate and entitlement to property. Those issues were neither straightforward nor uncontested. They involved matters of mixed fact and law which plainly required careful examination within the procedural framework contemplated by Part 68. Furthermore, the resolution of those disputes would likely have required evaluating the evidence, assessing credibility, and a fuller exploration of the surrounding circumstances. Such matters are ordinarily ill-suited to summary determination.

[57] The appellant's remaining grounds challenge the learned judge's treatment of the respondents' assertion that they were *bona fide* purchasers for value without notice. The respondents had placed affidavit evidence before the learned judge asserting that they acquired their interests for value and without notice of any prior equitable claim, and that in the absence of any pleaded allegation of fraud or collusion against them, the appellant had no realistic prospect of succeeding. To the extent that the learned judge’s reasoning can be inferred from the record, she appears to have accepted that position and treated the respondents' assertion as uncontroverted and dispositive of the claim.

[58] That approach was unsustainable for a number of reasons.

[59] First, the question of whether a purchaser qualifies as a *bona fide* purchaser for value without notice is quintessentially fact-sensitive. It requires a careful evaluation of

all the surrounding circumstances, including the purchaser's actual state of knowledge, the manner in which the transaction was conducted, and whether such inquiries were made as a reasonable and prudent purchaser would have undertaken. In **Pilcher v Rawlins** (1872) LR 7 Ch App 259, at 268–269, James LJ articulated the classic formulation that the equitable defence is available only to a purchaser who acquires the legal estate for value, in good faith, and without notice of any prior equitable interest. The Privy Council in **Alan Frederic Frazer v Douglas Hamilton Walker and another** [1967] 1 AC 569 and **Assets Company Limited v Mere Roihi and Others** [1905] AC 176 reaffirmed that the inquiry into good faith and notice is grounded in the realities of the transaction, and that questions of actual, constructive, or imputed notice depend upon what the purchaser knew or ought reasonably to have known and whether the circumstances were such as to put the purchaser on inquiry. Such matters are inherently evaluative and frequently turn on the credibility of witnesses and the weight to be attached to competing assertions of facts and inferences from those facts. They are, in the ordinary case, ill-suited to summary disposal.

[60] Second, the respondents' assertion of *bona fides* was by no means uncontroverted on the record. The appellant's affidavit evidence raised a number of matters directly bearing on the question of notice and good faith, including: the circumstances surrounding the transfer of the disputed properties, including the relationship between the respondents and the 1st and 2nd defendants who were alleged to have procured the impugned interests in the estate; the fact that the transfers were described on the face of the registered titles as gifts rather than sales for value, a matter which the respondents then contradicted by asserting that valuable consideration had been paid; and discrepancies between the alleged monetary consideration claimed by the respondents and the documentary record. Those matters were directly relevant to whether the respondents were purchasers for value at all, and whether their knowledge of the surrounding circumstances was such as to put them on inquiry. The learned judge's apparent characterisation of the respondents' assertion as unchallenged was therefore not borne out by the material before the court.

[61] Third, the description of the transfers as gifts rather than purchases in the certificate of titles for the properties raises an important threshold question going to the very foundation of the *bona fide* purchaser defence. That defence is available only to a purchaser for value; a donee who takes by way of gift is not a purchaser and cannot invoke the protection of the doctrine. If, as the transfers on their face suggested, the respondents received the properties by way of gift, the defence of *bona fide* purchaser for value without notice would not have been available to them at all, irrespective of their state of knowledge. The respondents' assertion that they in fact paid valuable consideration was itself a matter of factual controversy that could not properly be resolved on affidavit evidence alone.

[62] Fourth, the learned judge appears to have treated the absence of any pleaded allegation of fraud against the respondents as determinative. Notably, fraud was specifically alleged against the 1st and 2nd defendants, who were said to have procured the impugned interests in the estate and thereafter transferred the properties to the respondents by way of deeds of gift. That conclusion also rested on a fundamental mischaracterisation of the statutory framework governing indefeasibility of title under the Registration of Titles Act and of the nature of the case advanced by the appellant.

[63] Section 161(d) of the Act operates as a general bar to any action, suit or proceeding for the recovery of land as against a person registered as proprietor. However, that bar is subject to express statutory exceptions, among them the case of a person deprived of land by fraud, not only as against the person registered as proprietor through fraud, but also as against any person deriving title through such a fraudulently registered proprietor, save where that person is a transferee who acquired title *bona fide* for value. The critical point is that the fraud exception under section 161(d) attaches by reason of the manner in which title was originally obtained, and not by reason of any personal misconduct on the part of the subsequent holder. It follows that if fraud is established against those who procured the impugned interests in the estate and thereafter conveyed the properties to the respondents by way of deeds of gift, no allegation of fraud against

the respondents themselves is either necessary or required to bring them within the scope of that exception.

[64] This conclusion is reinforced by section 163 of the Act, which provides that a registered proprietor who takes otherwise than as a purchaser for valuable consideration takes subject to any unregistered interests to which the person from whom they derive title was subject. Where title is acquired otherwise than for value, the registered proprietor is not entitled to the indefeasibility protection ordinarily available to a *bona fide* purchaser. Their registration as proprietors confers no greater interest than that which their transferors held, and they stand in no better position than those through whom they claim. In the circumstances, the absence of any allegation of fraud against the respondents was therefore neither surprising nor determinative of the issues arising on the claim.

[65] Read together, sections 161(d) and 163 make plain that the appellant was not required to plead or prove fraud on the part of the respondents. The respondents' vulnerability to the appellant's claim arises not from any fraud personal to them, but from the alleged tainted root of title through which they acquired, and from failure on their part to satisfy the requirement of having taken for valuable consideration without notice. The learned judge's approach to this aspect of the case was therefore in error, and the absence of any such allegation against the respondents was neither surprising nor fatal to the claim.

[66] Fifth, the respondents were the parties who advanced the positive assertion that valuable consideration had been paid and that they were therefore purchasers for value without notice. That assertion constituted a substantive defence that they sought to advance, not a response to any allegation of wrongdoing made by the appellant. No obligation arose on the appellant to plead or particularise fraud against persons whom he did not allege had acted fraudulently. A party cannot be required to particularise an allegation which he has not made, and to treat the absence of such a pleading as

dispositive would have imposed an unwarranted burden on the appellant and diverted attention from the substance of the dispute.

[67] Sixth, the appellant further complains that the respondents failed to file a defence. While that omission cannot, without more, be taken to mean that the respondents had advanced no positive case before the learned judge, particularly if, as was contended, the matter was one more appropriately suited for determination by way of fixed date claim form supported by affidavit evidence, it nevertheless gives rise to a significant procedural concern. In the absence of a defence, there was no formally articulated statement of case identifying the issues in dispute or delineating with precision the factual and legal basis upon which the respondents relied, including the parameters of their *bona fide* purchaser defence.

[68] Rather than challenging an inherent deficiency apparent on the face of the appellant's pleaded case, as is ordinarily contemplated in a summary judgment application, the respondents sought to advance a substantive defence through affidavit evidence, notwithstanding that the defence had not previously been formulated within the structured pleading framework envisaged by the CPR.

[69] The appellant was, therefore, required to meet a case whose full contours had not been properly particularised, thereby depriving him of the benefit of a clearly defined pleading to which he could meaningfully respond. This procedural posture was inimical to the principled evaluation of the defence and underscored the unsuitability of the summary judgment procedure for determining issues of such factual and legal complexity.

[70] The determination of this defence plainly required forensic examination at trial; the court needed to assess the credibility of the respondents' evidence concerning the consideration said to have been paid, to evaluate the significance of the facial description of the transfers as gifts, to consider the nature and extent of the respondents' relationship with the other defendants, and to assess whether the circumstances of the transactions were such as to put the respondents on inquiry as to the existence of prior claims. None

of those matters could properly be resolved within the confines of a summary judgment application on the affidavit evidence before the court. The threshold for the exercise of the summary judgment jurisdiction was plainly not met.

[71] There is also a wider concern that should be noted. At the time summary judgment was granted, two additional defendants remained before the court, and the issues arising as against all defendants were closely connected and materially interdependent. The fragmentation of the proceedings at that stage posed a real risk of inconsistent determinations and inefficient use of judicial resources. By granting summary judgment against the appellant in favour of the respondents, the learned judge effectively truncated the appellant's claim against those parties and reshaped the course of the litigation in a way that risked placing the appellant at a procedural and forensic disadvantage in pursuing his case against the remaining defendants.

[72] Grounds 5–9 accordingly succeed.

Conclusion

[73] The order granting summary judgment cannot be sustained. It was made within a procedural framework that had already been acknowledged as defective. The learned judge herself accepted that the proceedings ought to have been commenced by FDCF, and, therefore, under a jurisdiction excluded by rule 15.3(c) of the CPR once the proceedings were properly characterised as fixed-date claim proceedings. The appropriate course, upon identification of the procedural irregularity, was to invoke the court's remedial and case management powers under Part 26 of the CPR to regularise the proceedings and, thereafter, to manage them within the framework prescribed by Parts 27 and 68 of the CPR. Instead, summary judgment was granted before the proceedings had been placed on their proper footing, and the regularisation of the proceedings was ordered only after substantive relief had already been granted. That sequence was procedurally impermissible and constituted an error of principle.

[74] Independent of that procedural deficiency, the case was not one suitable for summary disposal. The proceedings raised substantial and genuinely contested questions concerning the validity of the will, the entitlement to property within the estate, the respondents' claimed status as *bona fide* purchasers for value without notice, and the effect of transfers described on the face of the registered titles as gifts. The respondents' assertion of *bona fides* was by no means uncontroverted; the appellant's affidavit evidence raised material factual disputes that required forensic examination.

[75] Viewed cumulatively, these shortcomings disclose an impermissible compression of the procedural safeguards inherent in the CPR and a misapplication of the threshold under rule 15.2. The discretion to enter summary judgment was therefore wrongly exercised, and the resulting order cannot stand.

[76] The consequence is that the matter must be returned to the Supreme Court for case management, so that the issues may be properly defined and resolved within the structured framework contemplated by Parts 27 and 68 of the CPR.

Costs

[77] The appellant has succeeded on all issues. The order for costs made in favour of the respondents in the court below was consequential upon the grant of summary judgment and falls with that order. The appellant is entitled to recover the costs of the summary judgment application below and the costs of this appeal. In accordance with the general principle that costs follow the event, as confirmed by this court in **Capital & Credit Merchant Bank Ltd v Real Estate Board** [2013] JMCA Civ 48, where Morrison JA (as he then was) affirmed that the question of costs is a matter entrusted to the court's discretion having regard to all the circumstances, this is not a case in which any departure from that general principle is warranted. The appellant has succeeded fully on both issues raised in the appeal, and the respondents, though duly served and afforded every opportunity to participate, chose not to engage with the appellate process.

Disposition

[78] Accordingly, I propose that the appropriate order be that the appeal be allowed; the summary judgment entered in favour of the 1st and 2nd respondents with costs be set aside and an order refusing the application with costs to the appellant be made in its stead; the matter be remitted to the Supreme Court for case management and the making of any consequential orders that may be necessary, in accordance with the reasons set out in this judgment. In the interests of justice and to avoid any perception of prejudgment, the matter shall be assigned to a judge other than Orr J for all further case management and trial proceedings. The appellant shall have his costs of the appeal and of the summary judgment proceedings below, such costs to be taxed if not agreed.

FOSTER-PUSEY JA

ORDER

1. The appeal is allowed.

2. The order made by S Orr J (Ag), on 1 July 2022, granting the respondents' application for summary judgment filed on 8 November 2021, is set aside.

3. The order made by S Orr J (Ag), on 1 July 2022, granting costs to the respondents on their application for summary judgment filed on 8 November 2021, is set aside.

4. Substituted for orders 2 and 3 of the orders of S Orr J (Ag) made on 1 July 2022 are the following orders:

> "2. The 2nd and 3rd defendants' application for summary judgment is refused.
>
> 3. Costs of the summary judgment application are awarded to the claimant to be agreed or taxed."

5. The matter is remitted to the Supreme Court for case management at the earliest available date, before a judge other than S Orr J (Ag), to be managed and, thereafter, determined in accordance with the procedural framework applicable to fixed date claim proceedings under Parts 27 and 68 of the CPR.

6. Costs of the appeal to the appellant, to be taxed if not agreed.