IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2026CV01432

BETWEEN	**T.W. METALS LIMITED**	**CLAIMANT**
AND	**FAIR TRADING COMMISSION**	**1ST DEFENDANT**
	ARC MANUFACTURING LIMITED	**INTERESTED PARTY**

Costs – Claim for judicial review struck out – Ex parte order granting leave set aside – Whether rule 56.15(5) or 64.6 applicable – Relevance of the reasonableness of commencing and continuing the claim for judicial review – Duty of Claimant to continuously review whether claim ought to be pursued - Observations on decisions of the Court of Appeal.

Lloyd Barnett, Weiden Daley and Shaydia Sirjue for the Claimant instructed by Hart Muirhead Fatta

Duncan Roye for the Defendant instructed by the Director of State Proceedings

Symone Mayhew KC, Shereece McLeod and Ashley Mair for the Interested Party instructed by MayhewLaw

Gavarrie Ashmead (Judicial Counsel)

Heard: 3rd November 2026

IN CHAMBERS (VIA VIDEOCONFERENCE)

Cor: Batts, J.

INTRODUCTION

[1] At the commencement of the hearing it was agreed that the time would be allocated as follows: The Defendant and the Interested Party would each have half an hour with the Claimant allotted one hour to reply. All parties filed written submissions with authorities. The hearing was completed within the time allocated. I am grateful to all counsel.

[2] This matter concerns the question of costs on a failed application for Judicial Review of administrative action, or as the rules compendiously call it "*administrative*" orders. By a judgment delivered on the 18th September 2026 I set aside the order granting leave to apply for judicial review and struck out the claim for judicial review, see ***T.W. Metals Limited v Fair Trading Commission and ARC Manufacturing Limited [2026] JMCC Comm 26***. I reserved the question of costs for determination after hearing submissions from all counsel. I said then:

> *"[19] Let me be clear that there is no finding that the litigant and/or its attorney at law acted improperly. It was quite reasonable in the circumstances to apply for judicial review whilst at the same time filing a section 49 appeal. This is because, as explained in the affidavit of Christopher Bicknell filed on the 27th March 2026 at paragraphs 52 to 56 (Judges Bundle 4), there was concern that the Commission's decision would be publicised and acted upon to the Claimant's prejudice. The fear proved reasonable as the Interested Party filed a claim on the strength of the Commission's decision, see Claim SU2025CD 00391 filed on 13th November 2025 and amended on 11th March 2026 (Judges Bundle 1(a) pages 562 and 575). There was also a need for instant action to*

prevent the release of the report and/or any further move by the Commission. The need for expedition made an application in each forum reasonable. The paucity of decided cases on the jurisdiction of the judge, hearing an appeal under section 49 of the FC Act, further supports the reasonableness of the Claimant's decision. It was a counsel of prudence to file both claims. The fact that the judge at the ex parte hearing granted permission to proceed with judicial review, although aware of the statutory appeal, further supports my finding of reasonableness. The decision though reasonable has turned out to be erroneous. I bear in mind the Civil Procedure Rules which discourage an award of costs against unsuccessful applicants for judicial review, see Rule 56.15 (5). The Claimant and the Interested party are however commercial entities. Both the Defendant and the Interested Party have been successful in their applications. In the circumstances, and although I am inclined to award costs but not the costs thrown away only the costs of the hearing, I will allow the parties an opportunity to make submissions on costs."

[3] Having had the benefit of the submissions of counsel I am satisfied that, in the circumstances of this case, there ought to be no order as to costs. This is the fair thing to do and my reasons may be shortly stated. I will however first summarise the submission of each party.

DEFENDANT'S SUBMISSION

[4] Mr. Roye, for the Defendant, submitted that in ***Kingsley Chin v Andrews Memorial Hospital [2022] JMCA Civ 26 (*****unreported judgment dated 29th July 2022)**, the Jamaican Court of Appeal made it clear that Rule 56.15, of the Civil Procedure Rules, only applies where an administrative claim has been filed and does not apply when an application for leave to apply is refused. He relied on dictum at paragraph 116 of the judgment of the court delivered by, an esteemed jurist, the Honourable Mr. Justice Evan Brown (JA) (Ag) (as he then was). Mr. Roye urged that although in the case at bar an administrative claim was before the court, I should treat the matter as if we were still at the leave stage because the order for leave was granted "ex parte" and I set it aside. As it is clear, that had there been an inter partes hearing no leave would have been granted, the Defendant is entitled to costs. The Defendant has been put to the effort and expense of an application to set aside the grant of leave. Reliance was placed on rule 64.6(3) and (4). He urged that the Claimant ought to have applied for an urgent injunction at the time the appeal, pursuant to section 49 of the **Fair Competition Act,** was filed rather than making an application for judicial review. There was, submitted Mr. Roye, no substantial reason why the Claimant did not pursue the alternative remedy in the first instance. The Defendant was therefore obliged to request representation from the Director of State Proceedings. He revealed in oral submissions that fees were paid to the attorneys from that department for their service.

INTERESTED PARTY SUBMISSIONS

[5] Mrs. Symone Mayhew KC, for the Interested Party, also relied on written submissions. She submitted that costs should follow the event pursuant to rule 64.6(1). Rule 56.15(6) was, she submitted further, not applicable because the leave granted has now been set aside. The Claimant therefore stands as an unsuccessful applicant for leave. In any event, it was urged, even if Rule 56.15(5) applied the Claimant's persistence with the "*duplicative*" proceedings was unreasonable. The Interested Party should therefore receive the costs of the

proceeding not just of the hearing. All this flows, it was persuasively argued, from the decision of this court: (a) that the section 49 appeal is an adequate alternative remedy offering more than judicial review (b) to reverse the grant of leave (c) to strike out the claim for judicial review and (d) that the claim for judicial review was an abuse of process as the issues in both claims were the same and the risk of inconsistent findings was "*very real*." King's Counsel acknowledged the court's finding that there was no improper conduct by the Claimant and that it was reasonable, when the decision was made, to file both claims. She does not challenge the finding of reasonableness.

[6] She however submitted that rule 64.6(1) is applicable and that therefore the unsuccessful party must be ordered to pay the costs of the successful party. That rule compensates the successful party and discourages unmeritorious claims. ***The Public Service Commission v Dale Austin [2025] JMCA Civ 34*** (unreported judgment delivered 28th November 2025) is cited in this regard. Mrs. Mayhew submitted further that the reasonableness of a decision to litigate does not, without more, deprive the successful party of costs under rule 64.6(1), (3) or (4). In the ***Kingsley Chin*** **case** (cited at paragraph 4 above) the court's sympathy for the "*novel case*" was not a sufficient basis to disturb an award of costs under the general rule, see paragraph 118 of that judgment. King's Counsel relied heavily on dictum of Brown JA (Ag) (as he then was) at paragraph 114. This approach was adopted and applied by the Court of Appeal in ***The Public Service Commission v Dale Austin*** case which confirmed that rule 56.15(5) introduced a restraint on costs orders only at the substantive hearing but that rule 64 applies at the leave application stage. This is because costs at the ex parte stage properly deter frivolous claims. It was submitted that there was no substantive hearing consequent on the grant of leave and the application to dismiss was really an inter partes application for leave.

[7] Kings Counsel also submitted that in proceedings for judicial review the Claimant is under a continuing duty to review whether the claim ought to be pursued, see **Fordham Judicial Review Handbook (6th edition 2012) paragraph 22.1.4**, ***R***

(Bateman) v Legal Services Commission [2001] EWHC Admin 797 at [21], ***R v Horseferry Road Magistrates exp Prophet [1995] Env LR 104 at [112]*** and ***R(N) v North Tyneside Borough Council [2010] EWCA Civ 135 at [18].*** The failure by the Claimant to constantly review, it was submitted, made the decision to continue with the claim unreasonable. This is because the section 49 appeal was in place since 31st March 2026. Electing to pursue both and arguing that they be heard together was unreasonable. In this circumstance an order for costs is appropriate.

[8] It was further urged that as the order for striking out brings the proceedings to an end the costs order should not be confined to the hearing. If limited to the hearing the Interested Party would bear the cost of work on which it succeeded and leave the Claimant better off for persisting rather than correctly reconsidering its position.

[9] Finally, it was submitted on behalf of the Interested Party that rule 56.15(5) protects access to justice for the citizen who challenges the state. The Claimant was not in that category because it is a dominant supplier in the Jamaican rebar steel market and was really litigating a commercial matter with its competitor. There was no public interest and no policy reason to depart from the general rule. A certificate for three counsel was requested as well as an order for the costs of the claim including the costs of the application.

CLAIMANT'S SUBMISSIONS

[10] Dr. Lloyd Barnett in his reply also relied on written submissions. Those submissions seek orders for the Defendant and the Interested Party to pay the Claimant's costs. Rule 56.15(5) is relied upon as providing that no costs should be awarded against *"an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."* There is, it is submitted, no distinction made between individual and corporate applicants. It was submitted that my judgment spoke to the reasonableness of the application for judicial review when regard is had to:

a. The credible risk of publication and action on the report of the FTC
b. The Defendant's actual claim in reliance on the Defendant's decision
c. The need for urgent interim protection
d. The paucity of decided cases about the scope of section 49 appeals

It was urged that the striking out of the claim for judicial review does not retrospectively make its commencement unreasonable.

[11] It was submitted that the decision of this court resolves previously unclear issues about the judge's ability, when hearing a statutory appeal, to consider issues such as natural law and legitimate expectation. The sparsity of authorities on those questions made the making of both claims prudent. Furthermore, Dr. Barnett urged, the court is yet to decide the substantive issue and this victory on procedural matters is not a vindication of the Defendant's report. It was also to be noted that the parallel proceedings were disclosed during the ex parte application and that court allowed them both to proceed.

[12] The Claimant's counsel adverted to the points on which the Defendant and Interested Parties failed. The submissions, that the leave application ought to have been inter partes and that section 49 was an exclusive remedy, failed. The allegation of impropriety was withdrawn on the first day of hearing. It is submitted that the costs of that discrete issue should be identified and allowed on taxation partly as Mr. Michael Hylton KC was instructed to appear to argue the allegation of impropriety. It is submitted further that the Interested Party applied to join the proceedings and this was not opposed. Furthermore, the Defendant's case substantively overlaps the Interested Party's case. Therefore, no order for costs is justified and that costs of the hearing ought not to be ordered as this would penalise a Claimant who acted reasonably when bringing the claim. In his oral submissions Dr. Barnett accused the other side of attempting to reargue the matter of

unreasonableness which the court already decided. The fact that there was at least one court which expressed the view, that on a section 49 appeal the court had no jurisdiction to reverse the decision of the Tribunal, made the application for judicial review reasonable, see ***Supreme Ventures Limited v Prime Sports (Jamaica) Limited and Fair Trading Commission [2023] JMCC COMM 24*** **(unreported judgment delivered 30th May 2023)** and the discussion at paragraph 13 of my judgment (referenced at paragraph 2 above). This and other points were only resolved in the judgment delivered on the 18th September 2026 and hence made it reasonable to continue with the claim for judicial review until then.

[13] In treating with the ***Kingsley Chin*** case (cited at paragraph 4 above) Dr. Barnett argued that the ratio of that decision was not about the distinction between the leave application and the substantive application for judicial review. In the case at bar the claim was reasonable given the important issues to be resolved. Furthermore, he submitted the Claimant from the outset urged that both the claim for judicial review and the appeal be heard together.

ANALYSIS

[14] The discussion should commence with a full quotation of Rule 56.15(4) and (5):

> *"56.15 (4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.*
>
> *(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."*

The decision in **Kingsley Chin** (cited at paragraph 4 above) concerned an appeal against a decision to refuse leave for judicial review. The Court of Appeal found

that the Defendant hospital provided public services, was obliged to conform to certain statutory regulations and standards and therefore was amenable to judicial review. However, the issue concerned the Claimant's contractual engagement with the Defendant and, as that was neither regulated nor established by statute, it was not amenable to judicial review. On the question of costs, the court decided that a distinction was to be drawn between an application for permission to apply for judicial review and an application for an administrative order after leave is granted. The application for leave was refused and no claim for administrative orders was ever filed. The court decided therefore that rule 56.15 did not apply and resorted to Rule 64.6.

[15] The ***Kingsley Chin*** case (cited in paragraph 4 above) is therefore clearly distinguishable from the case at bar where leave was granted at the ex parte application and a claim for administrative orders was in fact filed. My decision to set aside the ex parte order does not and cannot change that reality. That is why it was also necessary for me to strike out the claim. I hold that rule 56.15 considerations apply in this case. It was reasonable, and a counsel of prudence, to file the statutory appeal and at the same time claim judicial review. It is therefore inappropriate to order costs against the unsuccessful applicant. I hold also that the Civil Procedure Rules effectively ended the notion of "*nullity"*. The setting aside of ex parte leave does not mean that the claim was never filed, see per Lord Denning MR in ***Harkness v Bell's Asbestos [1967] 2 QB 729 at page 735G-736B***. Our rule 26.9 effectively does the same thing, as the rule Lord Denning referenced, because the court can now correct almost any error or failure to comply with a rule, practice direction or order. It follows that such an error no longer results in a nullity unless and until a court declares it to have that effect. The claim filed after the grant of leave therefore remained valid. It has now been struck out and the consequences in costs fall to be determined under rule 56.15(5).

[16] The question arises however, whether the Claimant failed to continuously review its position after leave was granted and, after affidavits were filed opposing the claim for judicial review. I accept the submissions of King's Counsel as to the

existence of such a duty. Having considered the material before me, and the several authorities cited, I cannot say that the Claimant unreasonably and/or recklessly opposed the applications to strike out. It is to be borne in mind that the **Fair Competition Act** is not at all clear about the ability of the judge hearing appeals to grant certain remedies available on judicial review. The question, whether the court could rely on a legitimate expectation, or whether it could "*reverse*" rather than "*reserve*" the decision of the Tribunal, remained unanswered until my decision on the application to dismiss the claim.

[17] I bear in mind also that the Defendant and the Interested Party have not succeeded on all points urged. Furthermore, they withdrew on the first day of hearing an assertion, supported by affidavit and written submissions, of improper conduct by the Claimant and its legal representatives. The assertion was only withdrawn after the Claimant went to the expense of retaining silk to appear. He participated no further in the proceedings after the allegations were withdrawn and certain aspects of the evidence voluntarily struck out. The fact also, that another judge of this Supreme Court thought the two claims could comfortably continue, further supports my decision that the continuation of the claim was not unreasonable and ought not to be penalised with an order for costs. In all the circumstances, therefore, there will be no order for costs on the application to dismiss the claim. These considerations apply, and my conclusion follows, whether I apply rule 56.15(5) or rule 64.6. It is relevant also that my decision to set aside the grant of leave was not on the basis that the application for judicial review was frivolous or vexatious. It had to do with the existence of an alternate remedy, and the possibility of inconsistent results and duplicated costs.

[18] I feel compelled to make some observations about the decisions of the Court of Appeal in ***Kingsley Chin*** (cited at paragraph 4 above) and ***The Public Service Commission v Dale Austin*** (cited at paragraph 6 above). Both decisions are of course binding on this court and deserving of respect. However, I invite the Court of Appeal to review, as soon as possible, its interpretation of the relationship between rule 56.15(5) and the application for leave to apply for judicial review. The

rules do not compel a separation of the approach to an award of costs when leave to apply is made and contested from the approach after the substantive matter is heard. Rule 56.1 (2) says "In *this part such applications are referred to generally as applications for an administrative order"*. This on the face of it ought to include applications for leave in rule 56.3 because Part 56 deals with inter alia *"applications for judicial review*". The "*claim*" for judicial review follows the grant of leave.

[19] Furthermore, to differentiate the approaches flies in the face of the clear intent of the framers of the rules that an applicant for judicial review ought not to be discouraged from making an application because of the fear of being asked to pay costs. To allow an award of costs, on the principles in rule 64, at the application for leave stage is to do just that. The person seeking judicial review may be a lowly civil servant or an ordinary citizen seeking remedies against the state, see rule 56.2. It is counterintuitive that the prospect of costs being ordered after an unsuccessful application for leave is as likely as not, and perhaps even more likely, to discourage such an applicant. The rules contemplate ex parte hearings at the leave stage. At least one judge of appeal is of the view that these applications for leave are now more often than not contested, see paragraph 57 of the judgment of The Honourable Mrs. Justice Georgiana Fraser JA (Ag) in **The Public Services Commission v Dale Austin** (cited at paragraph 6 above). It therefore places the question of costs and its discouraging effect in sharp focus. Rule 56 is a discrete part of the Civil Procedure Rules specifically designed for applications for administrative orders. The Court of Appeal's separation of the application for administrative orders from the application for leave to apply for the order may effect more harm than good. Had the drafter of the rule intended such a distinction he would have used in rule 56.15(5) the phrase *"…a Claimant for an administrative order*". The applicant for an administrative order is an applicant when seeking leave and when filing a claim for administrative orders pursuant to leave granted. I commend these observations to my colleagues in the Court of Appeal although, as stated earlier, the issue does not arise on the facts of the case before me.

[20] I make a further observation. The distinction drawn, between the English practice on costs and ours, see paragraph 47 et seq in the judgment of Mrs. G. Fraser JA (Ag) (as she then was) in **The Public Service Commission v Dale Austin** (cited at paragraph 6 above) will impact access to judicial review. This was certainly not the intention of the framers of the rules. In this regard rule 56 makes clear that, as in England, a hearing is not ordinarily required when considering an application for leave to file a claim for judicial review. This is why the court only directs a hearing if minded to refuse the application, or if there is a claim for interim relief, or if in the judge's view a hearing is desirable in the interests of justice, see rule 56.4(2) and (3). Notice of the hearing is only given if the judge so directs, see order 56.4(2) and (4). The "*hearing*" contemplated is therefore not always inter partes, see my observations at paragraphs 6 of the judgment cited at paragraph 2 above:

> *"[6] … Furthermore, it is wrong to assume that the word "hearing" in Rule 56.4 (3) means inter partes hearing because Rule 56.4 (2) states the judge may give leave "without hearing the applicant". The rule gives the judge a discretion whether to direct that the respondent be served, see 56.4(4). Where interim relief is applied for, the judge must not grant such relief without hearing the applicant. This construction allows for exparte injunctive orders where it is appropriate."*

[21] Let me also say that counsel for the Defendant indicated that fees were paid to the attorneys from the Attorney General's office. I do not believe the internal arrangements of two agencies of the state should adversely affect the citizen who seeks judicial review of administrative action. Therefore, had my decision been to award costs to the successful party in this litigation it would have been costs to the Interested Party only. The Defendant was carrying out a public function, the subject of this litigation, and the citizen ought not to be asked to pay such costs when the state has at its disposal attorneys paid from the public purse. The fact that the Claimant and the Interested Party are commercial entities does not, I believe, detract from this principle. In this area of judicial review, and I dare say

constitutional relief, the litigant, whether corporate or personal, is entitled to equality before the law and of course fairness.

[22] In the result my decision is that there will be no order for costs on the Notices of Application to Dismiss filed on the 17th April 2026 and 28th July 2026. This judgment as to costs will form part of my judgment delivered on the 18th September 2026.

David Batts
Puisne Judge.