



[2026] JMCC Comm 26

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	DEFENDANT
	ARC Manufacturing Limited	INTERESTED PARTY

*Judicial Review - Claim for Judicial Review – Decision of Fair Trading Commission-
Leave granted ex parte – Statutory right of appeal - Whether adequate alternate
remedy – Whether absolute or discretionary bar - Whether grant of leave to be set
aside- Whether claim an abuse of process - Costs.*

Michael Hylton KC, Dr. Lloyd Barnett, Wieiden Daley, Shaydia Sirjue and Karessian Gray instructed by Hart Muirhead & Fatta for Claimant

Faith Hall and Duncan Roye instructed by The Director of State Proceedings for the Defendant

Ransford Braham KC, Symone Mayhew KC, Nigel Pagan, Ashly Mair and Sheriene McLeod instructed by Mayhew Law for the Interested Party

Heard: 29th July 2026 and 18th September 2026

In Chambers (by Zoom)

Cor: Batts J.

INTRODUCTION

[1] On the first morning of hearing, this matter was listed alongside **Suit SU2020CD 00115 T. W. Metals Ltd v Fair Trading Commission and ARC Manufacturing Limited**. That Fixed Date Claim is an appeal, pursuant to section 49 of the Fair Competition Act (hereinafter referred to as the FC Act), against a decision of the Defendant. It concerns the same decision, facts and circumstances of the instant claim for judicial review.

[2] At the commencement of the hearing Mr. Michael Hylton KC indicated he was only present to argue grounds which allege improper conduct by the Claimant (T. W. Metals Limited) and its attorneys at law. The attorneys for the Defendant (Fair Trading Commission) indicated that, having seen the Claimant's affidavits, they would no longer pursue those allegations. In consequence, and by consent, I made the following orders:

- i) In the Notice of Application filed by the Defendant on the 17th April 2026 paragraph 6 in the grounds of the application is withdrawn.*
- ii) In the written submission filed on the 1st June 2026 by the Defendant paragraphs 23 to 26 are withdrawn.*
- iii) In the affidavit of Mr. David Miller, filed on the 17th April 2026, paragraphs 8 and 9 are expunged.*

Mr. Hylton KC thereafter took no active part in these proceedings.

[3] There were four applications before me:

- i) A Notice of Application filed on the 28th May 2026 by TW Metals Ltd, in claim number SU2026 CD 00115, to appoint an expert witness and for orders relating to confidentiality.

- ii) A Notice of Application filed on the 13th April 2026 by TW Metals Ltd for a transfer of SU2026CV01432 to the Commercial Division and for the hearing of the two claims at the same time.
 - iii) A Notice of Application filed by the FairTrading Commission on the 17th April 2026 for an order setting aside the order for leave in, and to strike out, claim number SU2026CV01432 as being an abuse of the process of the court
 - iv) An Amended Notice of Application filed on the 28th July 2026 by ARC Manufacturing Ltd to be added as an Interested Party, to set aside the order granting leave and, to strike out the statements of case in SU2026CV01432.
- [4] The Claimant's counsel indicated there was no objection to ARC Manufacturing Ltd's application to be added as an Interested Party to Claim 2026CV01432 (the judicial review proceeding). I therefore made an order adding ARC Manufacturing Ltd as an Interested Party to these proceedings. It was agreed that the applications to strike out would be heard and determined before the other applications. Each applicant was allowed 45 minutes for oral submissions. The respondent to the application was allowed one hour. At the close of submissions, I reserved my decision to the 18th September 2026. The other applications were adjourned to that date.

THE SUBMISSIONS

- [5] All parties filed detailed written submissions with authorities attached. The oral submissions were supplemental but provided an opportunity to respond to the written submissions of the others. I am indebted to all counsel for the industry displayed and the efficient manner of presentation. I will, in the interest of brevity, only summarise the points made and will reference authorities cited only to the extent necessary to explain my decision. The well prepared judge's bundles were numbered 1 to 4.
- [6] Mr. Braham KC representing the Interested Party, ARC Manufacturing Ltd, was the first to make submissions. He referenced the Amended Notice of Application,

filed 28th July 2026, which added a ground (n) as a basis to set aside the grant of leave to apply for Judicial Review. Kings Counsel argued that as the application for leave to apply for Judicial Review included an application for an interim junction the respondent, to that application, ought to have been served, see Rule 56.4 (3) (b). The grant of leave and interim relief without notice meant that the grant of leave must be set aside. No authority was cited in support of the submission. Counsel rested on the words of the relevant rule which states:

“56.4 (3) However, if-

(a).....

*(b) the application includes a claim for
immediate interim relief;*

*(c)....., the judge must direct that a hearing
be fixed.*

*(4) The judge may direct that notice of the hearing be
given to the respondent or the Attorney General “*

It seems to me that to construe the rule in the manner urged is not in keeping with the overriding objective of the Civil Procedure Rules, see Rule 1.1, and with the duty of the court to give effect to that overriding objective, see Rule 1.2. Rule 56.4(3) (b) does not say that if an order for leave and interim relief is made, without service on the intended respondent, or without hearing from the respondent, the application for leave must be dismissed. King’s Counsel’s submission would mean that a party, with a perfect case for judicial review, would lose the right to apply for review because he or she failed to serve the application for leave, or because the judge failed to direct that an inter partes hearing be held. It is my view that Interim relief granted, without a hearing, may be set aside but not the application for leave or the grant of leave. 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 ex parte injunctive orders where it is appropriate.

- [7] It may be timely to remind the profession, and my judicial colleagues, that litigation is not a “*game of snap*”, and the rules of civil procedure should not be so interpreted, see **Stuart Sime “A Practical Approach to Civil Procedure” page 209**. The Civil Procedure Rules do not exist to facilitate dismissal of claims or the reduction of backlog by providing easy avenues to strike out cases where a party trips up. The rules are designed to facilitate efficient and fair trials and resolution of disputes. Litigants ought not to be driven from the seat of judgment unless a breach of the rule is contumelious or has or will cause prejudice which cannot be remedied. Any other approach may result in a contravention of constitutional rights. Treating the rules as an immutable, rigid and unforgiving code runs counter to the overriding objective. Although some rules are differently worded, our courts of justice should bear in mind the attitude and approach of the English judges (particularly because it is on theirs that we patterned our rules), per Brooks LJ in **Walsh v Misseldine [2000] All ER (D) 261**:

“ 51. The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case. As I read the judgments of Lord Lloyd of Berwick and Ward U in [UCB Corporate Services Ltd v Halifax (SW)Ltd], they are saying nothing different from this. As Ward U said in the UCB case, Lord Woolf MR in Biguzzi was not saying that the underlying thought processes of previous decisions should be completely thrown overboard. It is clear, in my view, that what Lord Woolf was saying was that reference to authorities under the former

rules is generally no longer relevant. All that is it necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective. “

- [8] The more substantive submission by Kings Counsel was that the Claimant also appealed pursuant to section 49 of the FC Act. This statutory appeal is to a judge of the Supreme Court of Judicature of Jamaica. It was argued that the Claimant, by also applying for judicial review, has abused the process of the court. This claim for judicial review should therefore be struck out. Alternatively, it is submitted that the appeal by virtue of section 49 is an adequate alternative remedy and this court should exercise its discretion and set aside the grant of leave to apply for judicial review. In written submissions the Interested Party put forward a comparative chart, see paragraph 13 of the written submissions. It demonstrates that the appeal and the application for judicial review are quite similar in the grounds and in the relief sought. It was also argued that the appeal pursuant to section 49 is an exclusive remedy which prevents any other claim. The appeal it is submitted offers more in terms of possible relief than does judicial review. Mrs. Mayhew KC, also for the Interested Party, made brief submissions and pointed, as a further reason for dismissal of this claim, to the possibility of inconsistent findings if both claims are allowed to proceed.
- [9] Ms. Faith Hall for the Defendant, Fair Trading Commission, presented written and oral submissions similar to those of the Interested Party. There was, she urged, nothing to indicate that judicial review was more appropriate than the section 49 appeal. Further, as this was the first inter partes hearing, it is the first opportunity to challenge the grant of leave.
- [10] Dr. Lloyd Barnett, for the Claimant, T.W. Metals Limited, submitted that the applicants had misstated the law. There was, he submitted, no absolute rule barring judicial review if an alternate remedy exists. The matter is always one for the exercise of the court's discretion. In this case, he stated, the Claimant was relying in part on legitimate expectation. This was available in proceedings for

judicial review but might not be in a section 49 appeal. Also, in judicial review the Defendant's claim might be set aside on procedural grounds without regard to the merits. This may not be possible in the appellate procedure. Dr. Barnett urged me not to set aside the grant of leave as the judge already exercised her discretion although aware of the section 49 proceedings. She had, he submitted, not exercised that discretion wrongly. Dr. Barnett urged that the application for judicial review and the section 49 appeal be heard together.

THE ISSUE

[11] The matter concerns the Jamaican market for rebar steel. The Claimant has been a dominant supplier in the market for many years. The Interested Party made a report to the Defendant alleging abuse of dominance by the Claimant. It was alleged that the Claimant is selling below cost so as to prevent competition. This is the third such complaint against the Claimant but the two prior investigations found no evidence to support the allegations, see paragraph 8 of the affidavit of Christopher Bicknell filed on the 27th March 2026. In this case, after an investigation, the Defendant adopted a report which found an abuse of dominance but has taken no step by way of enforcement, see paragraphs 46 and 48 of the affidavit of David Miller filed on the 22nd July 2026. On the 27th March 2026 the Claimant filed an application for leave to apply for judicial review seeking several remedies. An order, granting leave and an interim remedy, was made on the 5th April 2026, see page 844 of Judge's Bundle 2. The claim for judicial review was filed on the 13th April 2026, see Judge's Bundle 1 page 10. An appeal, pursuant to section 49 of the F C Act, was filed by Fixed Date Claim on the 31st March 2026, see exhibit CH 1 to the affidavit of Charlotte Hayles filed on the 17th April 2026 (page 6 Judge's Bundle 4). The issue before me is whether both claims can or should be allowed to continue.

ANALYSIS

[12] I accept the submission of Dr. Lloyd Barnett that there is no rule of law precluding judicial review where an alternate remedy exists. The matter is always one for the discretion of the court. The discretion must of course be exercised judicially and in

accordance with the law. It is clear on the authorities that where an adequate alternative remedy exists, unless there are exceptional circumstances, permission to claim judicial review will be refused, see **Robert Ivey v Firearm Licensing Authority [2021] JMCA 26 (unreported judgment dated 19th November 2021)** per Lord President Brooks at paragraphs 57 to 64.

[13] Section 49 of the F C Act provides:

“49 (1) Any person who is aggrieved by a finding of the Commission may within fifteen days after the date of that finding, appeal to a Judge in Chambers.

(2) The Judge may-

(a) confirm, modify or reserve the findings of the Commission or any part thereof; or

(b) direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates,

(3) In giving any direction under this section, the Judge shall-

(a) advise the Commissioner of his reasons for doing so; and

(b) give to the Commission such directions as he thinks just concerning the reconsideration or otherwise the whole or any part of the matter that is referred back for reconsideration.

(4) In reconsideration of the matter, the Commission shall have regard to the Judge’s reasons for giving a direction under subsection (1) and the Judge’s direction under subsection (3)”

I note the submission by Mr Braham KC that the word “reserve” is the printer’s devil at work. I agree that “reverse” is the word intended and the section is to be read as such. I therefore respectfully depart from my sister, Justice Stephane Jackson-Haisley, in **Supreme Ventures Limited v Prime Sports (Jamaica) Limited and Fair Trading Commission [2023] JMCC COMM 24 (unreported Judgment delivered 30th May 2023)**, who at paragraph 37 opined

that it was for the legislature to make the correction. On appeal, the Court of Appeal expressed misgivings but declined to decide on its meaning, see **Supreme Ventures Limited and Prime Sports (Jamaica) Limited v Fair Trading Commission [2026] JMCA Civ 32 (unreported Judgment 31st July 2026)**. The section is reduced to an absurdity if the judge hearing the appeal is going to “reserve” the findings of the Commission or any part thereof. Moreso because in the following sub-paragraph, section 49 (2) (b), the judge is given power to:

“direct the Commission to reconsider, either generally or in respect of any specified matters”.

What then is the relevance of an order to “reserve the findings of the Commission or any part thereof.” Whether one adopts the mischief rule of construction or the rule in **Hayden’s Case**, it is apparent that the statute is to be read as saying that the judge may, “confirm, modify or reverse the findings of the Commission or any part thereof.”

- [14] In any event, and whatever interpretation is placed on the word “reserve” in section 49, there exists an adequate alternate remedy to the claim for judicial review. The judge hearing a section 49 appeal is empowered to confirm, modify or direct the Commission to reconsider, and by section 49 (3) (b), give directions concerning, such reconsideration. Proceedings for judicial review offer no more by way of relief. Judicial review of administrative action is concerned primarily with procedure and process. A court hearing an application for judicial review only overturns substantive findings on merit if there has been an error of law or if the finding is so unreasonable that no tribunal in that position could have come to that conclusion. Judicial review is otherwise concerned to ensure fairness and procedural correctness, see generally **CCSU v Minister for the Civil Service [1985] AC 374**. The court pays due deference to decisions of specialist tribunals established by Parliament, see **General Electric Co Ltd v Prices Commission [1975] ICR 1**. It seems to me that section 49 offers more avenues for relief than are available on an application for judicial review.

- [15] I do not agree that the FC Act provides an exclusive remedy and impliedly bars any other action at law or in equity. If that were the intention Parliament should have said so. The FC Act concerns commerce and its regulation. The circumstances in which industry participants may find themselves affected by acts of the Commission are many, varied and unpredictable. So too are the occasions and circumstances in which an approach to the court may be advisable. An action at law, for breach of statutory duty for example, may be advisable if relief by way of appeal under section 49 is either inapplicable or offers no adequate remedy. Considering the multi-faceted facts and circumstances that may arise in the law of competition a court should be reluctant to imply any law or rule which bars an approach to the ordinary court for relief. I have read the decision of **Century National Bank and Trust Co. Ltd et al v Davies et al [1998] AC 628** but do not agree that a decision on the Banking Act, concerned only with a challenge to the appointment of a Temporary Manager, is binding or relevant to the construction of the FC Act. The urgent need for certainty and finality, in the context of the appointment of a temporary manager for a bank, is not immediately apparent when one is considering the decision of a Fair Trading Commission. In my view therefore, whether the proceedings for judicial review are allowed to continue is a matter for the exercise of a discretion.
- [16] There is, on the facts of this case, no reason to permit the pursuit of the parallel remedy. The appeal, pursuant to section 49, is to a judge of the Supreme Court. Nothing in the Act reduces or circumscribes the inherent power of the judge hearing an appeal pursuant to section 49. He or she is entitled, when carrying out that duty, to apply such legal and equitable principles as may be relevant to the appeal. This necessarily includes the power of judicial review of administrative and/or executive action. In other words when hearing an appeal and deciding whether to confirm, modify reserve/reverse or, whether to give directions to the Commission, the judge should have regard to the principles of natural justice, consider issues related to illegality, unreasonableness and, if necessary, legitimate expectation. Nothing in the FC Act suggests that the puisne judge of the Supreme

Court operates bereft of that jurisdiction when hearing a section 49 appeal. Indeed, it is precisely because a judge of the Supreme Court has such inherent power why this statutory right of appeal is appropriate. A right of appeal to any other body would mean that a disgruntled party's only recourse would be by judicial review. It is to be remembered that the process we now call judicial review was developed by judges to afford a remedy to the citizen for governmental excess. The judges developed the remedy in the absence of a written constitution and in circumstances where Parliament was sovereign. There was often no statutory right of appeal against executive decisions. The jurisdiction was exercised even when Parliament tried by express provision to exclude judicial review, see **Anisminic v Foreign Compensation Commission [1969] 2 AC 147**. Concepts were implied and principles adopted by the court to ensure fairness and do justice between citizen and state. In the case at bar the legislature has, by section 49, given the court the power to consider and review decisions of the Commission. There is no need to creatively imply a jurisdiction. The judge by law can review what has been done and the way it was done and if necessary, set aside the decision. The judge may also give such directions to the Commission as may be appropriate.

CONCLUSION AND ORDERS

- [17] Therefore, unless there is some exceptional circumstance, the permission to proceed with judicial review granted ex parte ought to be set aside. The learned judge who made the order did not have the benefit of full submissions. At this inter partes hearing it is appropriate to reconsider the question. In that regard I do not see an exceptional circumstance. The Claimant has, in its grounds of appeal, raised the issue of legitimate expectation, see grounds 31, 42, 43, 47 and 56 (page 33 et seq of Judges Bundle 1 (b)). It is also possible to apply to amend the grounds and thereby raise any question relevant to a review of the Commission's decision. I will therefore exercise my discretion and reverse the grant of leave to apply for Judicial Review and strike out this claim.

[18] In the event I am wrong, and there is no power to reverse the leave granted ex parte, I go on to consider whether the claim should be struck out as an abuse of the process of the court. I agree that such a step is extreme and to be rarely exercised, **West Indies Petroleum Limited v Courtney Wilkinson and John Levy [2023] JMCA Civ 2 (unreported judgment dated 20th January 2023)** at paragraphs 29 to 39. In this case the factual and legal issues, in the claim for judicial review and in the section 49 appeal, are the same. The risk of inconsistent findings is very real and is one very good reason not to allow both claims to proceed. It would not do justice to stay one claim and allow the other to go ahead because that would expose the parties to a potential duplication of costs. It would encourage, or at the very least set the stage for, further litigation. Furthermore, I cannot foresee a circumstance where the section 49 appeal will not engage and determine any issue that might have arisen in the proceedings for judicial review. I therefore decide that the judicial review proceedings should be struck out as being an abuse of the court's process.

[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.

[20] My orders therefore are:

1. The ex parte order granting permission to claim judicial review is set aside and Claim number SU2026CV1432 is struck out.
2. The question of costs is reserved for further submissions.

David Batts
Puisne Judge.