In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 52

IN THE MATTER OF BITTREX GLOBAL (BERMUDA) LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF AN EX PARTE APPLICATION FOR LEAVE TO APPEAL BY BITTREX GLOAL INC. (BGI)

RULING

(In Chambers)

Preliminary Ruling on application for leave to appeal by a non-party;Undue hardship under Rules of the Court of Appeal 1965 Order II Rule 3(1) (c)

Date of Hearing: **5 September 2025**

Date of Ruling: **5 September 2025**

Appearances: *Kyle Masters* of Carey Olsen Bermuda Limited for the Applicant

Ruling of Martin, J

Introduction

1. This is an application for leave to appeal in respect of two interlocutory decisions made by this Court in these liquidation proceedings. The application is made by

Bittrex Global Inc., which is the sole shareholder of Bittrex Global (Bermuda) Ltd (in liquidation) ("the Company").

2. The first application is an application for leave to appeal against the decision of this Court dated 11 July 2025 by which the Court refused an application for the sanction of the proposed exercise of the joint liquidators' powers under section 175 (2) (h) to make a distribution of the remaining unclaimed residue of assets to the sole shareholder as a surplus by way of distribution or dividend in the liquidation.

3. The Court declined to grant the sanction on the grounds that the proposed exercise of the power claimed by the Joint Liquidators did not fall within section 175(2) (h). In short, the Court had no jurisdiction to grant the sanction sought (based on the well-established and uncontested authority of **Re Phoenix Oil and Transport Ltd (in liquidation) (No 2)** [1958] Ch 565).

4. The Court also decided that it would not order the payment of the distribution as a surplus within the Court's own power under section 192 of the Companies Act 1981. This was primarily because on the proper construction of the contractual terms and conditions and sections 17 and 18 of the Digital Asset Business Act 2018, the remaining unclaimed assets did not fall within the assets of the Company which are available for distribution to the sole shareholder as a 'surplus'.

5. The Court went on of its own motion to direct the Joint Liquidators to admit the liabilities of the Company's remaining customer creditors who have not filed a proof of debt without requiring a proof of debt pursuant to the power of the Court under Rule 64 (1) of the Winding Up Rules 1982.

6. The second decision was that on 8 August 2025 the Court refused the application made by BGI to be added as a party to the proceedings under RSC Order 15 rule 6 so that BGI could be bound by the decision, in order for BGI to be able to exercise a right of appeal against the decision of 11 July 2025.

7. The Court refused the joinder application on two grounds in an *ex-tempore* ruling on 8 August 2025. Those grounds were that (i) BGI had the opportunity to participate as a party in the proceedings and make its own submissions but declined the opportunity to do so and did not participate in the hearing at all. The Court decided that it was too late for them to come along *after* the hearing and *after* the Court had issued its ruling and seek to be joined as a party so as to be able to exercise a right of appeal and (ii) The Court had no power to grant leave to appeal to a non-party.

8. Although the second ground of the decision is now criticised as having gone beyond the scope of the application before the Court, the Court addressed the issue because the premise underlying the joinder application urged by BGI was that the Court

possessed an inherent jurisdiction to grant leave to a non-party under the 'old Chancery practice' going back to the 1880s.

9. BGI has put in two affidavits in support of these applications for leave to appeal. The Fourth affidavit of Mr Linch is in support of the application for leave to appeal against the decision of 11 July 2025. The Fifth affidavit of Mr Linch is in support of the application for leave to appeal against the refusal to add BGI as a party to the Joint Liquidators' application for directions.

Rules of the Court of Appeal 1965 (RCA)

10. RCA Order II rule 3 (1) (c) requires the Court to adjourn an application for leave to appeal to an *inter partes* hearing unless the Court refuses leave on the *ex parte* hearing.

11. The Court indicated at the outset of the *ex parte* hearing (after the matter had been formally introduced) that, in normal circumstances, the Court would adjourn the application to an *inter partes* hearing without requiring BGI's counsel to make the full application until the *inter partes* hearing, so that BGI's counsel did not have to present the same argument in detail twice.

12. The Court indicated that it would usually only be in circumstances that the Court had reservations about the arguability of the application on its face that the Court would proceed to hear the *ex parte* leave to appeal application fully. In those circumstances, if satisfied that the appeal was not obviously ultimately 'doomed to fail' then the Court would adjourn the application to an *inter partes* hearing; if the Court concluded that the appeal had no reasonable prospect of success, the Court would dismiss the application at the ex parte stage.

13. The Court indicated that the application by a non-party for leave to appeal (and the refusal of joinder after the Court hearing and issue of its ruling) were novel points that have not been determined before in the Bermuda courts, and that it would be an application in respect of which the Court would benefit from an *inter partes* hearing at which both sides could present argument.

14. However, BGI's counsel submitted that the Court had power to proceed to determine the application for leave on an *ex parte* basis if the Court considered that it would cause undue hardship to adjourn the application to an *inter partes* hearing (under the proviso in Rule 3 (1) (c) of the Rules of the Court of Appeal 1965). Therefore, BGI's counsel sought to advance an argument that the adjournment of the application to an *inter partes* hearing would cause undue hardship, both to BGI and the other parties.

15. This submission was based upon the fact that this Court has scheduled a further hearing (following the determination of the Joint Liquidators' unsuccessful directions

application) to determine (among other things) whether the Joint Liquidators have properly applied storage fees to customer accounts as a way of funding the liquidation and to consider what impact that may have on the solvency of the Company and whether this issue will affect the directions that the Joint Liquidators now propose to seek to progress the liquidation.

16. It is right to mention that another substantive issue to be considered at the next hearing (scheduled for 23 and 24 September 2025) is the ability of the Joint Liquidators to continue to use the Bittrex Global Platform as a medium to make distributions. This issue arises because the Joint Liquidators have recently agreed to enter into a new Service Level Agreement at an increased monthly cost of USD1.5 million a month (increased from about USD660,000 a month) with a minimum notice of termination of 6 months. If the Joint Liquidators were to give that notice now, the liability would be USD9 million. The Company has assets of about USD5 million remaining and will run out of money in (less than) 3 months if the terms of the Service Level Agreement are not varied. It is also relevant to note that the party to whom the increased fee is payable is a party related to BGI in terms of ultimate ownership.

17. BGI submits that the undue hardship that will be caused to BGI and the other parties is the potential delay and continued cost of the liquidation which will be incurred pending the appeal, and it is the intention of BGI to seek a stay of the Court's directions to the Joint Liquidators on the hearing of 23 and 24 September 2025 pending the Applicant's application for leave to appeal and (if leave is granted) pending the appeal itself.

18. Reliance was placed on the decision in **Bank St Petersburg OJSC and Anor v Arkhangelsky and Another** [2014] 1 WLR 4630. In that case, the English Court of Appeal said that "undue" simply means excessive or greater hardship than the circumstances warrant. No definition of "hardship" was given, but the impecuniosity of the applicant and the consequent lack of a level playing field caused thereby was held to be sufficient hardship. That case concerned a worldwide anti-enforcement injunction and the application of section 2 of the Foreign Limitation Periods Act 1984, in which it is provided reliance on a foreign limitation period may not be justified where it would cause "undue hardship" to the party affected by it. It was not a routine application for leave to appeal.

19. Applying those general principles to the present, it was said on behalf of the BGI that the additional time and costs that will be occasioned by the delay of setting an *inter partes* hearing for leave amounted to undue hardship. Reliance was placed solely on one sentence in paragraph 18 of Mr Linch's Fourth affidavit for the submission that there was evidence of undue hardship.

20. The relevant sentence says: "*In the event BGI's appeal is successful and the decision concerning the automatic admission of former customers is overturned, there is a significant risk that proceeding with the liquidation in the manner contemplated in the Ruling will result in the liquidation being progressed in a costly and wasteful manner in the meantime that stands to be of substantial prejudice to BGI.*"

21. There was no other evidence of hardship in Mr Linch's 5th affidavit.

22. In addition, Mr. Masters submitted that the Court can take into account the fact that the BMA did not present its argument at the hearing on the footing that had been proposed in its cross application for directions. Mr. Masters eventually had to accept that there is no evidence that BGI decided not to participate in the proceedings on the basis that BGI thought that the BMA was going to advance an argument based on a statutory trust.

23. In any event, the logic of this point is a little difficult to follow, since it is not understood how the BMA's decision not to pursue the statutory trust argument at the hearing would have impacted upon BGI's decision not to participate in the proceedings. But it is not a point which is supported by any evidence from BGI.

24. Mr. Masters also accepted that the Court must balance the undue hardship asserted by his client (i.e. the cost and delay associated with an inter partes hearing) against the effect on the other parties if the Court proceeded to determine the leave to appeal application without allowing the other parties to appear and present their own arguments. The question is whether the undue hardship alleged justifies the Court allowing BGI to leapfrog over the *inter partes* stage of the leave to appeal application.

25. Mr. Masters submitted that the Court should look at the hardship to all parties concerned and pointed to the desire of the Joint Liquidators to get on with the liquidation and the wish of the BMA to protect the interests of the customer creditors.

26. Mr. Masters says that it would be unfair (and a breach of natural justice) to adjourn the matter to an *inter partes* hearing that may not be held until after the hearing on 23 and 24 September 2025 at which further directions may be given which will affect the conduct of the liquidation.

27. Mr. Masters submitted that BGI will also seek a stay of the order for directions pending appeal so that BGI has the ability to challenge the Court's 11 July Ruling in the Court of Appeal.

28. Mr. Masters suggested that the Court could proceed with the 23 and 24 September hearing but either make no directions at that hearing or stay those directions until after BGI's leave application has been determined (as a matter of case management).

Undue Hardship

29. While the hardship caused to all parties may be relevant to take into account when assessing the application against the whole of the background facts, in my view the Court must be satisfied that there is or will be undue hardship caused *to the applicant* by adjourning the matter to an *inter partes* hearing.

30. In the Court's view, the evidence presented by Mr Linch only goes to the merits of a stay pending appeal, not to any supposed hardship that an adjournment of the application for leave to an *inter partes* hearing might entail. He talks only about the impact of the Ruling on the conduct of the liquidation. The central issue in the appeal is whether the Joint Liquidators are required to treat the unclaimed customer assets in the liquidation as a surplus available for distribution to BGI.

31. It is said that the delay and the continuing expense that will be incurred by the Company between now and the hearing of the application for leave to appeal will cause hardship to BGI. This submission appears to be based on the premise that the delay in hearing the application will mean that further expenses will be incurred in the liquidation which will potentially reduce any (potential) surplus available to be distributed to the sole shareholder at the end of the liquidation. This is curious submission, since the payment of the Service Level Agreement fees represent the largest ongoing expense and liability of the liquidation, and those fees are being paid to parties directly related to BGI[1].

32. In reality, in the Court's view, there is no hardship caused *to the applicant* financially or otherwise by the adjournment of the application to an *inter partes* hearing. The real concern is that if the leave to appeal application is not determined before the next hearing in the liquidation proceedings in just over two weeks' time, there is a risk that the Court may make further directions for the ongoing conduct of the liquidation which BGI may not like or agree with, and/or which may impact BGI's position pending its intended appeal.

33. That is plainly a matter to be considered on another occasion, namely on an application for a stay of any directions that may be given as a result of the next hearing, pending BGI's intended appeal, assuming that leave to appeal is obtained either from this Court or from the Court of Appeal.

34. Mr. Masters accepted that no application for a stay pending appeal is being made today nor can it realistically be made until the application for leave to appeal has been heard.

[1] The counterparty to the Service Level Agreement is Andromeda Technologies LLC which is owned by RBR Holdings Inc which is in turn owned by Aquila Holdings Inc. Aquila Holdings Inc. is the ultimate parent of Bittrex Global Inc. which is the sole shareholder of the Company.

35. The proposition that this Court should proceed with the next hearing on the basis that no directions will in fact be given after the hearing, or if they are given, they should be stayed until after the application for leave to appeal has been determined is entirely impracticable and would be wrong in principle. The submission is also based on the assumption that BGI will succeed in (a) obtaining leave to appeal and (b) obtaining a stay. Mr Masters accepted that there is no guarantee that even if leave is granted that a stay will also be granted.

36. Furthermore, the hardship (if it existed) would have to be undue, namely greater than is warranted by the circumstances. In the Court's view, any hardship to BGI would not be undue in that sense at all. It is an ordinary risk of commercial litigation that a party has to follow the rules of procedure and will have to wait until the application can be presented on an *inter partes* basis, unless there are clear circumstances which would interfere with the due administration of justice. There are no such circumstances in this case.

37. There is nothing undue or "unwarranted" about following the ordinary rules of procedure that govern these types of applications. Indeed, applying the logic of the **Bank St Petersburg** case, it would *create* an uneven playing field if the Court were to by-pass the *inter partes* hearing stage, rather than *preserving* an even playing field.

38. Against this, the Court must consider the implications for the other parties, who are busily engaged in preparing for the next hearing in 2 weeks' time.

39. It is important to remember that **no** directions for the future conduct of the liquidation have yet been given. It is not known what those directions will be. At present, the Joint Liquidators have made certain proposals for directions and the BMA has made counter proposals. The purpose of the next hearing is to sort out what the factual and legal position is in relation to several key matters **before** the Court makes any further directions.

40. The scope of the next hearing (as BGI well knows because it had an observer attending on a watching brief at the last hearing) will be to consider issues that include (i) the Joint Liquidators' right to charge storage fees to customers to preserve cash and maintain solvency (ii) the Joint Liquidators' right to extinguish customers' claims in the liquidation by the application of those storage fees against the credit balances of customer assets (iii) the net asset position of the Company now that the Joint Liquidators have renewed the Service Level Agreement at a minimum cost of USD9 million when the Company only has USD5 million in free assets.

41. These issues go directly to the solvency of the Company. The Joint Liquidators (and BGI) have repeatedly represented to the Court that the Company is solvent, but the true position is now very much less than clear. It is obviously vital that these matters

are heard without delay and (as BGI well knows) before the next instalment of storage fees is levied and the next payment under the Service Level Agreement falls due. That is why the expedited directions for the hearing were given and an early hearing date was set for 23 and 24 September 2025.

42. It is not known what the conclusion of the next hearing will be nor what directions will be given or when. It is entirely premature for BGI to say that it must have its application for leave determined before the 23-4 September hearing so that it can seek a stay of the directions to be made at that hearing pending appeal.

43. In addition, the situation that BGI finds itself in is one of its own making. BGI (or those who hold the ultimate beneficial ownership interests in BGI) were invited to participate in the Joint Liquidators' application for directions, but chose not to do so, were not represented and made no submissions. Therefore, to the extent that participation in the hearing might have afforded BGI the ability to launch an appeal in its own right (about which the Court expresses no opinion at this stage), the positive decision was taken by BGI (with the benefit of legal advice) not to participate in them as a party of interest. BGI must accept the consequences of that strategic decision. In the Court's judgment BGI cannot now complain about 'unfairness' or a lack of 'natural justice' simply because BGI has to follow the ordinary rules of procedure to seek leave to appeal.

44. The Court has already observed that there is no evidence that BGI would have made any different decision had they appreciated that the BMA was not going to pursue the statutory trust arguments, nor that BGI was in any way misled.

45. Moreover, as the Court has already observed, the basis on which the BMA's change of tack might have prompted BGI to participate in the proceedings (if it had been the case) is entirely obscure. On the contrary, logic suggests that, if anything, it would seem much less likely that BGI would feel a need to participate if BGI had known that the BMA was not going to pursue the statutory trust argument.

46. The Court therefore concludes that there is no proper basis on which the Court could or should proceed to hear these two applications for leave to appeal without adjourning the matter to an *inter partes* hearing as required by the Rules of the Court of Appeal. There is no hardship to BGI, still less undue hardship.

47. On the contrary, to proceed without hearing the other parties would work an injustice and deprive the Court of the benefit of full argument. The Court is not persuaded that it would be satisfactory to proceed on the basis that BGI will present the potential arguments both for and against the grant of leave in a dispassionate and balanced way.

48. The Court has indicated that if arrangements can be made to set a hearing date for the *inter partes* hearing before 23 and 24 September 2025, the Court will do its utmost to accommodate that hearing. It is notable that BGI did not put the other parties on notice of the present applications nor did BGI canvass mutually convenient dates for an *inter partes* hearing before appearing today.

49. The result is that BGI's applications for leave to appeal will be restored for *ex parte* hearing by BGI's attorneys. If BGI's attorneys are (in the meantime) able to arrange with the other parties a mutually convenient time for an *inter partes* hearing, the matter can proceed on an *inter partes* basis.

Dated this 5th September 2025

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THE HON. MR. ANDREW MARTIN

PUISNE JUDGE