Neutral Citation Number: [2026] CA (Bda) 1 Civ

Civil Appeal No. 17 of 2025

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS COMPANIES WINDING-UP JURISDICTION**
**BEFORE THE HON. JUSTICE ANDREW MARTIN**
**CASE NUMBER 2024: No. 52**

**IN THE MATTER OF BITTREX GLOBAL (BERMUDA) LTD (IN LIQUIDATION) AND IN THE MATTER OR THE COMPANIES ACT 1981**

Appeal heard remotely

**Before:**

**THE HON IAN KAWALEY, THE PRESIDENT**

**THE RT HON SIR GARY HICKINBOTTOM, JUSTICE OF APPEAL**

**and**

**THE RT HON SIR JULIAN FLAUX, JUSTICE OF APPEAL**

**- - - - - - - - - - - - - - - - - - - -**

**Between:**

**BITTREX GLOBAL INC**

**Appellant**

**- and -**

**(1) ANDREW HOWIE, CARMEL KING AND MARGOT MACINNES**
**as joint liquidators of Bittrex Global (Bermuda) Ltd (in liquidation)**

**(2) THE BERMUDA MONETARY AUTHORITY**

**Respondents**

**Appearances:**

**Edward Cumming KC of counsel and Kyle Masters** of **Carey Olsen Bermuda Limited**
appeared on behalf of the Appellant
**Steven White, John McSweeney and Hannah Tildesley** of **Walkers (Bermuda) Limited**
appeared on behalf of the First Respondent
**Adam Cloherty KC of counsel and Conor Doyle** of **Conyers Dill & Pearman Limited**
appeared on behalf of the Second Respondent

**Hearing date(s)**: 19 and 20 January 2026
**Draft Judgment circulated:** 25 February 2026
**Date of Judgment:** 10 March 2026

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*Winding-up of cryptocurrency company-insolvency-shareholder seeking distribution of 'surplus' assets-whether assets held by company in digital 'hosted wallets' form part of general assets of company or are held for benefit of customers- whether unclaimed assets must paid into Consolidated Fund- Digital Asset Business Act 2018, sections 2, 6,,10, 12, 13, 17, 18-Companies Act 1981, sections 175 (2) (h), 192, 257*

**JUDGMENT**

**SIR JULIAN FLAUX JA:**

## Introduction

1. The present applications for permission to appeal are brought by the appellant Bittrex Global Inc (to which I will refer as "BGI") against a series of Orders made by the Hon Justice Andrew Martin ("the judge") in the liquidation of Bittrex Global (Bermuda) Limited (hereafter "the company" or "Bittrex") which was part of a cryptocurrency group which operated in multiple jurisdictions under the brand "Bittrex". BGI is the company's sole shareholder. The Bittrex group is ultimately beneficially owned by three individuals ("the UBOs").

2. The company operated a Bermuda-based digital assets exchange as part of a global platform. Its customers deposited digital tokens in their Bittrex "wallet" and could then buy or sell tokens in trades with other Bittrex customers on the platform. At the date of its winding-up in 2024, the company had almost a quarter of a million account holder customers, many of them with small balances on their accounts.

3. The first respondents are the joint liquidators of the company ("JLs") and the second respondent, the Bermuda Monetary Authority ("the BMA"), is the statutory regulator of the digital assets industry in Bermuda under the Digital Asset Business Act 2018 ("DABA").

4. The customer creditors comprise the vast majority of the company's creditors. There is however no creditors' committee in the liquidation, but only an ad hoc committee ("AHC") convened by the JLs, consisting of BGI as sole shareholder and the UBOs. The majority of the customers who filed proofs of debt have had their accounts paid out by an *in specie* transfer of the tokens which were deposited in the wallets. However, those customers who have not filed proofs of debt have not been paid out and some U.S. $63 million remains unclaimed and/or undistributed. It is the

unclaimed assets which are the subject of the present proceedings.

5. The JLs issued the so-called sanction application on 12 March 2025, which was expressly supported by the AHC. This sought the sanction of the Court to make an interim distribution of these unclaimed assets to BGI as "surplus" in what was said to be a solvent liquidation. That application was made under section 175(2)(h) of the Companies Act 1981. It was heard by the judge on 17 and 18 June 2025. He also heard a cross-application by the BMA for a declaration that under DABA all the digital assets held in the name of Bittrex are subject to a trust for the benefit of the custodial wallet customers. At the hearing, the BMA did not pursue the trust argument but pursued other arguments to the effect that the unclaimed customer assets held by Bittrex do not fall within the surplus available for distribution to BGI.

6. The judge provided his Ruling and Consequential Orders and Directions to the JLs and the BMA in draft on 11 July 2025. I will set out an analysis of that judgment later, but in summary the judge concluded first that the JLs' sanction application fell at the first hurdle because section 175(2)(h) of the Companies Act 1981 does not give a liquidator power to seek the sanction of the Court to make a distribution of a surplus to a shareholder. He followed and applied the decision of Wynn-Parry J in *Re Phoenix Oil and Transport Ltd (in liquidation) No. 2* [1958] Ch 565 under the equivalent provision of the English Companies Act 1948 that only the Court could order such a distribution. He also concluded that, even if the Court could give the sanction he would decline to do so because he did not consider that Bittrex could claim ownership of the assets transferred to it under its 2023 Terms and Conditions. Those terms and conditions provided that the digital assets were held in accordance with DABA and the BMA Digital Asset Custody Code of Practice (2019) and he concluded that, on a proper construction of DABA and the Code of Practice, the digital assets were to be held in a separate account against the claims of customers for the repayment of their contractual claims.

7. He also held that, by virtue of section 225 of the Companies Act 1981, the JLs cannot distribute any of the assets of the company to the sole shareholder until all its liabilities have been satisfied or provided for, applying the decision of Jenkins J in *Re Armstrong Whitworth Securities Co Ltd* [1947] 1 Ch 673 at 689. The bar date set by a previous Order in the proceedings of the Chief Justice did not have the effect of extinguishing the liabilities of Bittrex to its customers to repay their digital assets or their proceeds in fiat. The bar date simply enabled the JLs to exclude those customers who had not proved their claims from participating in the interim distribution to creditors. Until all the creditors had been paid in full, the Court would not be prepared to exercise its power under section 192 of the Companies Act 1981 to direct that the unclaimed digital assets held by Bittrex are to be distributed to BGI as a "surplus".

8. Even if the Court had considered it had the power to grant a sanction under section 175(2)(h), it would have declined to do so because the distribution of the unclaimed assets to the sole shareholder as a surplus would be in breach of the clear requirements of DABA to ensure that those assets are not mixed with the assets of Bittrex. The judge concluded that the proposed course of action would be improper. Only the Court and not the JLs had a power to declare a surplus under section 192. He considered it would not be just to do so.

9. In relation to the BMA application the judge was prepared to exercise the Court's powers under Rule 64(1) of the Companies (Winding-Up) Rules 1982 ("the Winding Up Rules") and direct the JLs to admit the claims of the remaining customers who had not filed proofs of debt and who had positive balances shown in Bittrex's ledgers, accounts and records without the need for further proof.

10. BGI was not a party to the proceedings before the judge and he refused its application, made after his 11 July ruling, to be joined as a party. One of the issues which arises before this Court is BGI's standing to pursue the appeal. We heard full argument from all the parties *de bene esse* in a rolled-up hearing on 19 and 20 January 2026. We have determined that BGI does have standing to pursue the appeals but, for the reasons set out hereafter, that the appeal should be dismissed.

## Factual background

11. Although, as the judge said, the factual background is lengthy and involved, it is not necessary to set out all of it for the purposes of the appeal. In large measure I will reiterate the relevant sections of the judge's judgment running from [2] to [73] with a few additional facts to which the parties alluded in the hearing of the appeal.

12. Bittrex was incorporated in Bermuda on 22 May 2020. It was licensed as a digital asset business under DABA on 20 September 2020 with a Class F licence (as defined in section 12 of DABA set out at [35] below) to provide custodial wallet services and operate as a digital asset derivative exchange provider, which was subsequently extended to include permission to act as a digital asset exchange. In support of its application for a licence, Bittrex submitted a Business Plan to the BMA. [1.2] of that Business Plan provided that the company was providing "custodial wallet services under [DABA]". The conditions of the licence included that the company was licensed to operate a Digital Asset Business in accordance with the Business Plan presented to the BMA.

13. Bittrex operated its digital asset exchange via the Bittrex Global Platform, an electronic database through which customers who wished to invest in or trade in digital assets deposited those assets or traded them for other digital assets or sold them in return for conventional currency, which is termed "fiat" in the industry. Latterly, the Bittrex Global Platform was

accessed by the company under licence from another company in the Bittrex group, Andromeda Technologies LLC ("Andromeda").

14. As the judge set out at [19] of his judgment, the Business Plan provided:

> "Custody Overview
>
> (a) The Bittrex Global Platform Custody solution allows customers to store digital assets securely in the Bittrex Global Platform wallet infrastructure for approximately 100+ unique blockchains. Customer digital assets are deposited, stored and can be withdrawn within the same underlying technology infrastructure utilized by the Bittrex Global Platform….
> (b) The Bittrex Global Platform custody provides customers the ability to separate digital asset holdings by company, and by its customers. Each customer is assigned an account with deposit and withdrawal addresses and transaction data per every supported digital asset. These digital wallets can be controlled on a per company or per customer level, while digital assets are managed via an API interface.
>
> Customer Funds
>
> The Bittrex Global Platform will provide custody of customer funds. When a Bittrex Global Platform customer creates a derivatives sub-account, they will have access to trading on other execution venues for derivatives and securities. Partner Exchanges such as FTX will enable trading using credits from the Bittrex Global Platform custody account. BG Bermuda [Bittrex] has determined it is an unacceptable risk to allow a third party to lose the (sic) No customer funds will be deposited on a Partner Exchange.
>
> Trading Losses
>
> When a customer makes or loses money in their Derivatives sub-account, the balance is adjusted based on the trading activity. In the case of trading losses, the maximum a customer can lose is the total balance of the trading account."

15. To trade on the exchange, customers deposited their tokens in their accounts. [3.7] of the Business Plan made clear that the tokens constituted "customer principal capital" and [18.1], in a section headed "Digital Assets Custody", made clear that the tokens were the customer's digital assets which were "deposited", "stored" and able to be "withdrawn" from the wallet.

16. The original Terms and Conditions on which Bittrex contracted with its customers provided, *inter alia*, as follows:

> "Account Funding: Transfers

> In order to engage in a Trade (as defined below) you must first transfer Tokens that are supported by the Services to your Bittrex Global Account. The Services associated with your Bittrex Global Account include a wallet service provided by Bittrex ("Hosted Wallet"). The Hosted Wallet will permit you to generate one or more addresses to which Tokens may be transferred from an account, wallet or address not hosted or controlled by Bittrex ("External Account").
>
> Token Deposits
>
> You may periodically at your discretion transfer from an Approved External Account to your Hosted Wallet any Tokens that are supported for transfer and storage using the Services. If you transfer to your Hosted Wallet any Tokens that are not supported by the Services, such Tokens may be permanently lost….
>
> Token Withdrawals
>
> You are required to retain in your Hosted Wallet a sufficient quantity of Tokens necessary to satisfy any open orders (and applicable Bittrex Global fees)…Otherwise you may periodically at your discretion withdraw Tokens by transferring Tokens from your Hosted Wallet to an address not controlled by Bittrex Global…You hereby authorize Bittrex Global to use your Hosted Wallet to send to any External Address specified by you using the Services, the number of Tokens specified by you using the Services. Bittrex Global is not able to reverse any transfers and will not have any responsibility or liability…
>
> Order Matching and Trade Execution
>
> Upon placement of an Order, your Bittrex Global Account will be updated to reflect the open Order and your Order will be included in Bittrex Global's order book for matching with corresponding Orders….For purposes of effectuating a Trade, you authorize Bittrex Global to take temporary control of the Tokens you are disposing of in the Trade."

17. In February 2023, the companies in the Bittrex group, including the company, ceased taking on customers. At about the same time, Bittrex amended its terms and conditions and introduced new terms providing for two distinct types of account, a Standard Hosted Wallet and an Enhanced Hosted Wallet. As the judge said at [22] of his judgment, this was apparently done to facilitate the transfer of accounts from Bittrex Global GmbH (the Liechtenstein company in the group which traded on similar terms) to Bermuda.

18. As the judge said at [23] and [24] of his judgment, the essential characteristics of the Standard Hosted Wallet was that, upon deposit of

the digital asset in the account, the customer agreed that he or she was transferring legal title to the property in the wallet to Bittrex whereas in the case of the Enhanced Hosted Wallet, upon deposit the customer retains legal title to the specific digital asset transferred into the account. In any event, none of the customers opted for the Enhanced Hosted Wallet.

19. The two provisions of the 2023 Terms and Conditions upon which BGI placed particular reliance in the appeal were clauses 4.2 and 6.2, which provided as follows:

> "4.2
> In the case of a standard Hosted Wallet (as defined below), you do not have a claim in rem to the Token (s) in that Hosted Wallet. You transfer your right of disposal of the Tokens (sic) to [Bittrex]. Such Tokens are in the inventory of [Bittrex] at the point of transfer, and [Bittrex] can freely dispose of them. You only have a contractual right to receive the same number of Tokens of the same quality and grade. Therefore, there is a risk in case of bankruptcy of [Bittrex] you do not have a claim for separation or segregation of your Token, but only a contractual claim, which you must register in a liquidation or bankruptcy proceeding and will probably receive only a fraction of the value of your Token. Tokens are held by [Bittrex] in accordance with the requirements of DABA, and applicable ancillary regulations, statements of principle, codes of conduct and guidance notes promulgated by the Bermuda Monetary Authority.
>
> "Custody
>
> 6.2
>
> Bittrex Global offers two options for the Hosted Wallet: standard and enhanced. Unless you apply, are qualified, and are approved to make use of an Enhanced Hosted Wallet, your Tokens will be held in a standard Hosted Wallet. Once placed into a standard Hosted Wallet, the legal title to your Tokens transfers to [Bittrex] in consideration for a contractual right to receive the same number of Tokens of the same type, quality and grade (subject to your own trading activities). Tokens are held by [Bittrex] in accordance with the requirements of Bermuda's Digital Asset Business Act 2018, as amended ("DABA") and applicable ancillary regulations, statement of principles, codes of conduct and guidance notes promulgated by the Bermuda Monetary Authority.
>
> (a) Standard Hosted Wallets
>
> In the case of a standard Hosted Wallet, you transfer legal title of the Token to Bittrex in consideration for a contractual right to receive the same number of Tokens of the same type, quality and grade (subject to your own trading activities). [Bittrex] therefore legally becomes the owner of the Token and issues a contractual claim for the Token transferred to [Bittrex] by you. This claim will be displayed in your

> [Bittrex] account. Tokens are held by [Bittrex] in accordance with the requirements of DABA, and applicable ancillary regulations, statements of principles, codes of conduct and guidance notes promulgated by the Bermuda Monetary Authority. [Bittrex] is obliged to release/issue the equivalent number of Tokens of the same type, quality and grade (subject to your own trading activity) to you upon your request (i.e. to return the Token to you when you make a withdrawal request). However, as you do not have a claim in rem for a specific Token, [Bittrex] may issue any Token of the same quantity and quality to you (e.g. if you have transferred 1 BTC to [Bittrex] you have a contractual claim against [Bittrex] for 1 BTC, and not necessarily the specific 1 BTC you transferred).
>
> (b) Enhanced Hosted Wallets
>
> In the case of an enhanced Hosted Wallet, you transfer the Token, but not the ownership (including the right of disposal) of the Token to [Bittrex]. [Bittrex] becomes therefore legally not the owner, but a custodian of the Token. You have a claim in rem for this specific Token (eg if you have transferred 1 BTC to [Bittrex], you have a claim in rem against Bittrex for this specific 1 BTC in your hosted wallet, and not any other BTC of the same quality and quantity. Tokens held in enhanced Hosted Wallets are subject to the Bermuda Monetary Authority Digital Asset Code of Practice (May 2019) (as the same may be amended or replaced by the Bermuda Monetary Authority from time to time). [Bittrex] may, at its discretion, charge a fee, payable in fiat, for the provision of enhanced Hosted Wallets. A schedule of any such fees will be published by [Bittrex] on the Site."

20. Following on-site inspections by the BMA in 2022, the BMA expressed concerns over Bittrex's compliance with DABA and the Code of Practice. Because those concerns were not allayed, in August 2023 the BMA appointed Teneo FA to conduct an investigation under section 61 of DABA and the Code of Practice to determine whether Bittrex was compliant in relation to the segregation of digital assets within the "Andromeda Omnibus Wallet", the provision of the digital wallet services having been outsourced to Andromeda pursuant to a Service Level Agreement ("the SLA") between it and the company dated 30 March 2023.

21. As part of an on-site inspection by the BMA in May 2023, Bittrex was required to devise a wind-down plan of its operations in Bermuda. The board and senior management prepared such a plan, the intention being that the company would cease operations in an orderly manner. The principal reason for the decision was that it was not commercially feasible to continue the business on the current basis and BGI was not prepared to continue to support the operations which were loss-making.

22. As the judge said at [31] of the judgment:

> "The directors approached the Wind-Down Plan on the basis that all the customers were subject to the revised 2023 Terms and Conditions, and that they had a contractual claim for the value of the Tokens reflected in their accounts. The board considered that the priority was to ensure that the assets in those accounts were "returned" to them in as orderly a manner as possible. The Wind-Down Plan contemplated an initial trade out period, in which customers could trade their Tokens for other Tokens rather than convert them into fiat. This was to be followed by a "withdrawal only" period in which the customers' contractual relationship was cancelled but customers could "withdraw" the Tokens or corresponding fiat. This was to be followed by a members' voluntary liquidation under the supervision of the court".

23. On 4 December 2023, Bittrex ceased trading and encouraged customers to withdraw their balances from that date. At the instruction of Bittrex, PwC Bermuda prepared a proposed liquidation plan which was shared with the BMA. One of its terms was provision for the AHC. Also in December 2023, Teneo FA produced a report which raised, *inter alia*, concerns about customers being exposed to risks by the operational structure and, in particular, the mixing of their assets on the Andromeda platform. The BMA issued a Direction under sections 28 and 29 of DABA instructing Bittrex to cease accepting deposits and not to proceed with the wind-down plan without the express authority of the BMA.

24. On 11 March 2024, the directors of the company presented a petition to wind up the company on the grounds that the purpose for which it was formed had come to an end, that the business was unprofitable and that it was in the best interests of the company and its customers for it to be wound up under the supervision of the Court. On 15 March 2024, the first respondents were appointed provisional liquidators. On 28 March 2024 a winding-up Order was made and, on 25 August 2024, the first respondents were confirmed as permanent liquidators.

25. On 20 March 2024 the BMA had served a Warning Notice on Bittrex under section 40(1) of DABA in respect of matters representing breaches of the DABA Code of Conduct and Rules. In essence the grounds were a failure to maintain a sound corporate governance framework with appropriate oversight and protection for clients. Notwithstanding a detailed response to the Warning Notice from the JLs, the BMA issued a Decision Notice under section 40(2) of DABA imposing a substantial civil penalty on the company. The JLs have appealed that decision to an Appeal Tribunal constituted under DABA and that appeal is pending. The relevance of the Decision Notice to these proceedings is that the JLs have reserved what they estimate is an amount to pay the civil penalty and costs if the appeal is unsuccessful.

26. By a summons dated 8 April 2024, the JLs sought declarations and orders that, *inter alia*, the fiat and digital assets transferred to and held by Bittrex in the Standard Hosted Wallets are the property of Bittrex's estate and that the creditors of Bittrex have a contractual claim for the value of the assets held in the Standard Hosted Wallet accounts. This is called "the Title Application". The affidavit evidence in support of the Title Application is set out at [48] to [54] of the judge's judgment. For present purposes, it is only necessary to note that the holding of assets was governed by a Joint Ownership Agreement between members of the Bittrex group, the effect of which was that Bittrex retained the tokens held in the Omnibus Wallet controlled by Andromeda, not in segregated wallets for each customer. The BMA filed an affidavit of Ms Burgess which expressed concern that these arrangements were contrary to the underlying structure of the DABA regime, which was based upon the customers' retention of their ownership rights in the digital assets that were held in the custody of the digital asset exchange.

27. The Title Application came on for hearing before Justice Subair Williams on 31 May 2024. The JLs maintained their view that the Terms and Conditions governed the relationship between the customers and the company, so that title to the assets vested in the company upon "deposit". Accordingly, the assets fell within the Bittrex estate and any unclaimed assets would belong to Bittrex. The BMA's position was that the DABA regime required that the assets deposited with the company by customers be kept separate from the company's assets. The BMA submitted that, rather than make the declaration sought, the Court should adopt a pragmatic approach and defer determination of the application, whilst directing that the matter proceed on the basis that so long as Bittrex was solvent and so able to meet all customer claims, the assets held by Bittrex belonged to Bittrex and that, if the position changed, the JLs could return to Court for further directions.

28. Justice Subair Williams reserved her decision. On 18 June 2024, the JLs wrote to the Court proposing that the judge should not issue her judgment but should adjourn determination of the declaratory relief generally and give the direction proposed by the BMA. She issued an Order in the terms proposed on 12 July 2024, by which the Title Application was adjourned generally and she ordered that the JLs were: "…authorized and directed to treat fiat and digital assets transferred to and held in Standard Wallets as forming part of the assets of the Company in liquidation, with liberty to apply granted to any person claiming a proprietary interest in the Standard Wallets or any part thereof."

29. On 23 August 2024, the JLs obtained a further Order from the Chief Justice permitting them to modify the proof of debt procedure and authorising and directing them to set a bar date for the submission of claims by creditors. The modification to the proof of debt procedure enabled the JLs to use the Bittrex Global Platform to send proofs of debt electronically to customers with open balances on their account as recorded in Bittrex's records,

allowing them to confirm that they agreed that the amount recorded was the value of the claim or, if they disputed the records, to notify the JLs who would handle it in the usual way under the Winding Up Rules.

30. The Order permitted the JLs to fix a bar date requiring all creditors to file a proof of debt under that modified procedure within eight weeks of notification on the Platform. The effect of failing to file a proof of debt in that time frame was that a potential creditor would be excluded from the distribution of assets made by the JLs pursuant to that procedure. It is important to note at this stage that failure to file a proof of debt within the time frame did not mean that the company's liability to the particular creditor was extinguished.

31. The bar date was set and then subsequently extended to 17 December 2024. At the behest of the BMA, the JLs made a last call for creditors on Bittrex's Twitter account. In the event 31,602 proofs of debt (representing 56.3% of the total number of known customer creditors or 60.5% of value) were submitted pursuant to the modified procedure. The total value of these claims was in excess of US$72 million. The BMA also put in a claim in respect of its civil penalty and was admitted as a contingent creditor. It has willingly offered to subordinate its claim in favour of customers.

32. In response to a repeat by the BMA of its concerns that the contractual analysis being relied upon by the JLs was contrary to the requirements of the DABA for segregation of customer assets, the JLs stated that the 12 July Order permitted them to proceed on the footing that the assets were the beneficial property of Bittrex, the legal result of which was that the assets fell to be distributed in accordance with the "statutory waterfall", a distribution to the sole shareholder following payment of liquidation expenses, priority creditors and settlement of creditors' claims admitted to proof. This is how matters stood between the parties when the sanction application came before the judge in June 2025.

## The relevant statutory provisions

33. The pertinent provisions of the Companies Act 1981 are as follows:

> "Powers of liquidator
>
> 175…
>
> (2)(h) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.
>
> **Exercise and control of liquidator's powers**
>
> 176…

(5) If any person is dissatisfied by any act, omission or decision of the liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and may give such directions and make such order in the premises as it thinks just.

**Adjustment of rights of contributories**

192. The Court shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.

**Unclaimed assets to be paid into Consolidated Fund**

257(1). If, where a company is being wound up, it appears either from any statement sent to the Registrar under section 256 or otherwise that a liquidator has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt or any money held by the company in trust in respect of dividends or other sums due to any person as a member of the company, the liquidator shall forthwith pay the said money to the Accountant General who shall pay it into the Consolidated Fund and the liquidator shall be entitled to a receipt for the money so paid which shall be an effectual discharge to him in respect thereof.

(2)Any person claiming to be entitled to any money paid into the Consolidated Fund in pursuance of this section may apply to the Accountant General for payment thereof, and the Accountant General, on receipt of a certificate by the liquidator that the person claiming is entitled, may make an order for the payment to that person of the sum due.

(3) Any person dissatisfied with the decision of the liquidator or the Accountant General in respect of a claim made under this section may appeal to the Court.

34. So far as the DABA is concerned the preamble makes clear the purpose of the statute:

"WHEREAS it is expedient to make provision for the [BMA] to regulate persons carrying on digital asset business and for the protection of the interests of clients or potential clients of persons carrying on digital asset business; and for purposes connected with those matters"

35. The provisions of the statute of particular relevance are as follows:

"**Interpretation**

2(1) In this Act, unless the context requires otherwise—

"custodial wallet provider" means provision of the services of storing or maintaining digital assets or a virtual wallet on behalf of a client;
…
"digital asset business" has the meaning given in subsection (2);
…
"wallet" means a software program that stores private and public keys and interacts with distributed ledger technology to enable users to send, receive and monitor their digital assets;
(2) In this Act, "digital asset business" means the business of providing any or all of the following digital asset business activities to the general public—
…
(c) operating as a digital asset exchange;
(d) providing custodial wallet services;
(da) operating as a digital asset derivative exchange provider;

**Codes of practice**

6(1) The Authority may issue codes of practice in connection with the manner by which licensed undertakings shall carry on digital asset business.

**Restriction on carrying digital asset business without a licence**

10(1) Subject to section 11, a person shall not carry on digital asset business in or from within Bermuda unless that person is for the time being a licensed undertaking in one of the classes specified in section 12(3).

**Digital asset business licence**

12 (1) An application for a digital asset business licence may be made to the Authority.
(2) An application shall state the class of digital asset business licence required.
(3) The classes of digital asset business licences referred to in subsection (2) which may be applied for under this Act are a-
(a) class F licence, under which a person shall be licensed to provide any or all of the digital asset business activities under the definition of digital asset business;
(6) an application shall be made in such manner as the Authority may direct and shall be accompanied by—
(a) a business plan setting out the nature and scale of the digital asset business activity which is to be carried on by the applicant;…

**Grant and refusal of applications**

13(1). A licence issued under this section may be subject to such limitations or conditions on the scope of the digital asset business activity or the manner of operating the digital asset business as the Authority may determine to be appropriate having regard to the nature and scale of the proposed business.

**Separate accounts**

17. A licensed undertaking holding client assets shall keep its accounts in respect of such assets separate from any accounts kept in respect of any other business.

**Custody and protection of client assets**

18 (1) A licensed undertaking holding client assets shall maintain a surety bond or trust account, or indemnity insurance for the benefit of its client in such form and amount as is acceptable to the Authority for the protection of its clients or such other arrangements as the Authority may approve.
(2) To the extent that a licensed undertaking maintains a trust account in accordance with this section, such trust account must be maintained with a qualified custodian appropriate for the type of asset held.
(3) A licensed undertaking that has custody of one or more digital assets for one or more clients must maintain in its custody a sufficient amount of each type of digital asset in order to meet its obligations to clients.
(4) For the purposes of this section, the digital asset referred to is that which is—
(a) held by the licensed undertaking for the client entitled to the digital assets;
(b) not property or digital assets of the licensed undertaking; and
(c) not subject to the claims of creditors of the licensed undertaking."

**Relevant provisions of the 2023 Terms and Conditions**

36. In addition to clauses 4.2 and 6.2 quoted above, the following provisions are of particular relevance in the appeal:

"6.4 Withdrawals

…you may periodically at your discretion withdraw Tokens from your Hosted Wallet to an address not hosted or controlled by [Bittrex]…You hereby authorise [Bittrex] to use your hosted wallet to send to any external address specified by you the number of tokens specified by you using the service…
10.8 Unclaimed Property

Governmental entities may require [Bittrex] to liquidate Tokens in your Bittrex Global Account into fiat currency and turn over the proceeds

> pursuant to subpoena, receivership, court order or other government order…
>
> 13.3 Effect of Termination
>
> …In the event of discontinuation or termination of all services… [the company] will use commercially reasonable efforts…to provide you with a period of ninety days to remove the affected Tokens from your Hosted Wallet. Any Tokens not removed within any applicable time period may be permanently lost and not recoverable by you and [the company] may, at its discretion, charge a fee, payable in the Token(s) stored, for storing your Tokens."

## The judgment below

37. Having summarised the applications before the Court and his conclusions, and set out the factual background, the judge turned to the sanction application at [74]. He noted the submission of Mr White for the JLs that nothing further could realistically be done to encourage customers to come forward and that further time and effort will only incur disproportionate costs and delay the conclusion of the winding up.

38. The judge noted at [75] that, although the JLs were seeking an in principle sanction for an interim distribution to the sole shareholder, in reality it would be a final distribution, as only a small percentage of the present surplus would be left even if the appeal against the BMA civil penalty were successful. The JLs were satisfied that the risk of a customer presenting a claim after all their efforts to encourage submission of proof was a small one, outweighed by their duty to proceed with the winding up. Ms King, in her seventh affidavit, says that the principal reasons for them to progress the liquidation are the high ongoing cost of maintaining the Bittrex Global Platform so the digital assets can be stored and accessed and the need to draw the liquidation to a close.

39. At [79] the judge said that it was striking that the JLs had not put in any evidence of the potential value of the unclaimed assets they proposed to distribute to the sole shareholder as a surplus or exhibited a current statement of the company's financial position. The judge regarded this as very surprising.

40. At [81] the judge noted the position of the BMA that the unclaimed digital assets do not represent the beneficial assets of Bittrex and should not be available for distribution to BGI as a windfall profit. This result would be contrary to the legal structure of the DABA regime and in breach of the mandatory provisions of sections 17 and 18 of DABA and the Code of Practice. The BMA objected to the reliance by the JLs on the direction of Mrs Justice Subair Williams since the direction was proposed by it and adopted by the JLs on the footing that all creditor claims would be paid in

full, not on the basis that the unclaimed residue would be distributed to BGI as a profit.

41. The judge said at [89] that the central legal issue was the proper treatment of the remainder of the unclaimed assets in the customer accounts. From [95] to [106], he set out the JL's main submissions noting that they relied on clauses 4.2 and 6.2 of the 2023 Terms and Conditions to justify their claim that any unclaimed assets fall within the surplus available to Bittrex on a winding up. The judge said at [99] that the transfer of legal title to Bittrex [under clause 4.2] had the obvious advantage of enabling Bittrex to move the digital assets around on the Platform for trading purposes without needing customer consent and because the digital asset is fungible, no particular asset has an individual identity that needs to be tracked or described.

42. At [100], the judge recorded the JLs' argument that the provisions of DABA and the Code of Practice requiring the segregation of customer assets do not apply to assets in Standard Hosted Wallets because they were not assets held on behalf of a customer under section 18(3) and not assets held in a designated trust account under section 18(4). The only assets subject to these provisions were those held in Enhanced Hosted Wallets of which there was none. The judge noted at [101] that the effect of the argument was that Standard Hosted Wallets stood outside the regulatory regime and were unregulated altogether. In support of that submission, the JLs sought to construe the word "custodial" as meaning a trust account in which the customer retained legal title to the assets and, because title had been transferred to Bittrex under clause 6, they contended that assets held in Standard Hosted Wallets were not "custodial assets". As the judge said at [102], one of the main strands of this argument depends on the notion that formal trust obligations are implied by the word "custodial" and that is why section 18(1) refers to a "trust account". The submission was that a "custodial wallet" was one where the beneficial interest in the property is retained by the customer, not one where the legal and beneficial ownership has passed to the licensed undertaking as had occurred under the 2023 Terms and Conditions.

43. At [103], the judge recorded the JLs' submission that the only claims that need to be taken into account before a distribution to BGI are those supported by a proof of debt submitted before the Bar Date and accepted by the JLs. They submitted that they could obtain the sanction of the Court under section 175(2)(h) to make that distribution applying the "type 2" criteria set out in the decision of Snowden J in *Re Nortel Networks UK Ltd* [2017] 2 BCLC 572 which the judge then set out.

44. At [107] to [113], the judge set out the submissions of the BMA on this principal legal issue. He recorded at [108] its submission that the word "custody" in section 18 of DABA must be given a wider meaning that connotes control or safekeeping rather than formal trust, an interpretation derived from and informed by section 17 which requires segregation of the

assets of the licensed undertaking from those of the customer, however the contractual framework is expressed. The BMA submitted that Bittrex had a duty to maintain reserve assets in a separate fund to meet the claims of customers and those assets were not available to be distributed to BGI as a "surplus".

45. At [110], the judge recorded the submission of the BMA that section 175(2)(h) of the Companies Act does not cover the declaration of a surplus, which falls within the Court's power under section 192 to adjust the rights of contributories *inter se*, and so falls outside the bounds of the JLs' ability to seek a sanction to exercise the power under section 175(2)(h), which was a "mopping up" power. Established authority (*Re Phoenix Oil and Transport*) explained that the subsection did not authorise the liquidator to make a distribution of surplus. It was submitted that the appropriate course was to direct that the claims of customers who had not already proved should be admitted without the need for further proof in the exercise of the court's powers under Rule 64(1) of the Winding Up Rules.

46. The judge then set out his analysis of the 2023 Terms and Conditions which, as he said at [114], was the starting point in the analysis. He then quoted the relevant provisions of clauses 4.2 and 6.2, noting at [116] that the JLs had made no mention in their evidence or submissions of the words at the conclusion of each provision:

> "Tokens are held by [Bittrex] in accordance with the requirements of Bermuda's Digital Asset Business Act 2018, as amended ("DABA") and applicable ancillary regulations, statement of principle, codes of conduct and guidance notes promulgated by the Bermuda Monetary Authority."

47. He emphasised the words "are held" and "in accordance with". He said at [117] that meaning must be given to this part of the provision which explained the basis on which Bittrex held the digital assets, namely in accordance with sections 17 and 18 of DABA and the Code of Practice. He cited at [119] the approach to the interpretation of contractual terms set out in the judgment of Lord Neuberger in *Marley v Rawlings* [2015] AC 129:

> "When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed and (v) common sense by (b) ignoring subjective evidence of any party's intentions."

48. At [120], he said that, taking that as a guide, he considered that the ordinary and natural meaning of the words "in accordance with" DABA was that the assets transferred to Bittrex were to be held in the manner provided by the regulatory requirements including the restrictions in sections 17 and 18 and the requirements of clause 1.38 of the Code of Practice. At [122], he said

that, in his view, it was not possible to give any meaning to the words "in accordance with" DABA other than that Bittrex was contractually required to meet the requirements laid down in DABA and the Code of Practice. At [124], he said that it would be an absurd conclusion to interpret the contractual provisions as meaning that assets held by customers in Standard Hosted Wallets were not subject to any regulation at all because legal title had been transferred to Bittrex.

49. The judge then turned to consider what the expression "in accordance with" DABA means in the context of the contractual provisions in the 2023 Terms and Conditions. At [126], he set out the relevant provisions of DABA and quoted clause 1.38 of the Code of Practice:

> "1.38 Account Segregation
>
> While keeping client assets separate from its own, DABs may comingle client assets in order to benefit clients: however, proper accounting must be in place to accurately allocate each holding to the respective client. Where the DAB commingles client assets, it must document and implement measures to demonstrate that the level of security achieved is commensurate with an arrangement where every client has a one-to-one relationship with a given address."

50. At [129], he referred to section 17 of DABA. He recorded that JLs' lawyers interpreted it as meaning that the company only had to keep a separate accounts ledger or financial records for customer assets. However, in his view, the words read in context meant that the accounts in which customers' assets are held must be separate from the accounts in which the licensed undertaking's assets are held (i.e. in respect of its own operations or business activities). He considered that this was because of the opening words: "…holding client assets shall keep its accounts in respect of such assets separate…" Any other interpretation would be directly contrary to the provisions which follow in section 18 and the two provisions must be read in conjunction with each other. The judge also noted at [130] that under section 18(4), the account established in which the assets are kept must be held by the licensed undertaking for the client, must not be the property of the licensed undertaking and must not be subject to claims by the creditors of the licensed undertaking.

51. At [131], he noted that, under section 6 of DABA, the BMA: "may issue codes of practice in connection with the manner in which licensed undertakings shall carry on digital business". The Code of Practice was therefore mandatory. He then quoted clause 1.38 again. At [133], he said that because digital assets are fungible, to function as an exchange it was necessary for the licensed undertaking to be able to provide a similar quantity of digital assets of like quality and value, in order to meet its obligations to the customer. Accordingly, he found it was permissible to comingle a customer's assets in a pool of similar assets, provided there was proper accounting and allocation of equivalent digital assets, so that there

would never be a shortfall of assets in the comingled pool, such that there was no risk of there being an insufficient number of assets available to meet customer withdrawals or trades. At [134], the judge said that it was clear that the one thing the BMA did not allow a licensed undertaking to do is to comingle its own assets with the assets deposited by customers in digital wallets.

52. The judge reached his conclusion in relation to the statutory requirements at [135]:

> "In the Court's judgment, the necessary and inescapable result of the application of those statutory requirements is that digital (or other) assets which are held by the licensed undertaking in its capacity as a custodial digital wallet service or as a digital asset exchange must not be mixed with the assets of the licensed undertaking. Therefore, it must follow that the digital (or other) assets deposited with or transferred to the licensed undertaking by customers and held in customers' digital wallets may not be made available to meet the general claims of the creditors of the licensed undertaking."

53. He said at [136] that these were the requirements that Bittrex contracted to comply with when it provided in the 2023 Terms and Conditions that Bittrex held the digital assets "in accordance with" DABA. It followed that assets deposited with or transferred to Bittrex held in Standard Hosted Wallets do not fall within the assets available for distribution to the sole shareholder as a surplus either when Bittrex was operational or by way of a return of capital to the shareholder upon a solvent winding up.

54. The judge then dealt with the legal effect of clause 4.2 of the 2023 Terms and Conditions. At [139], he stated:

> "Because digital assets are fungible, and exist only in electronic non-tangible form, it is not really appropriate to refer to a right in rem in relation to a digital asset. There is no specific digital asset to which such a right could attach, rather like money which is represented as an electronic credit in a bank account. A customer cannot have a right in rem in the electronic digits in the account which represent the amount that the bank owes the customer. It is also not explained how the property right in the digital asset in an Enhanced Hosted Wallet is "retained' by the customer when the digital asset is deposited in the account. In the Court's view, the purported distinction is illusory."

55. At [140], the judge said that the express terms stating that there was no segregation of the customer's assets were clearly contrary to the requirements of DABA. At [142], he concluded that the effect of the provisions of DABA and the Code of Practice was that the pool of assets against which customers could make claims stood apart from the assets of Bittrex, at least in a solvent liquidation. This result was not inconsistent with clause 4.2, which provides that in the case of insolvency customers may not

recover from Bittrex in full. He also noted the concluding words of the clause, set out at [46] above, stating that this express term should be given the same meaning and effect as he had discussed earlier (i.e. in relation to clause 6.2), namely that the assets held by Bittrex relating to its contractual obligation to customers must be held separately in an account or accounts segregated from the assets of Bittrex. He concluded that these assets do not fall within Bittrex's assets available to the liquidator for distribution.

56. The judge noted at [146] that the JLs contended for a narrow construction of "custody" as only including accounts held by Bittrex in respect of which it does not hold legal title, in other words only Enhanced Hosted Wallets. Although there were no accounts established on this basis, this was the type of account to which sections 17 and 18 of DABA would apply. Because legal title to assets in Standard Hosted Wallets was transferred to Bittrex, it did not hold the assets for the customers and therefore did not have custody of the assets, which meant they did not have to be held in a trust account and fell within the assets available to Bittrex and thus available for distribution to BGI.

57. The judge rejected this argument as placing an insupportable weight on a narrow construction of the word "custody" or "custodial" and "trust account" in those sections of DABA. He reached that conclusion for a number of reasons. He set out at [149] the definition of custodian in the Code of Practice: "a financial institution or a DAB which is charged with the custody of digital asset keys on behalf of clients. The custodian may have sole or partial control over the digital asset keys." Custody was defined as: "the protective care or guardianship of digital assets that are held or are being transacted". This arrangement need not involve a formal trust relationship, though that would be included.

58. The digital keys to the assets reflected in the customers' accounts were controlled by Bittrex group affiliates under the Joint Ownership Agreement which was consistent with custodianship as defined in the Code of Practice, but did not amount to a formal trust relationship. The judge considered that this undermined the submission that custody in the context of DABA means assets held in a trust account.

59. At [152], the judge noted that section 18(3) used "custody" in two distinct ways:

> "In the first phrase the word 'custody' is used to describe the assets a licensed undertaking holds for its customers. In the second phrase, 'custody' is used to mean the fund of digital assets of like kind that the licensed undertaking must hold to meet the claims of customers. This is because a digital asset is fungible: it does not matter which particular asset is used to repay the obligation. In neither sense does it mean that the asset is held in trust. It is difficult to see how the exchange could work at all unless Bittrex could exercise control over the allocation of the digital assets it holds to meet its obligations to customers."

> He considered that it was clear that the draftsman used the term "custody" as a descriptive term for assets held by the licensed undertaking in respect of which it owes obligations to its customer. It was not used as a definitive term for the ownership or contractual relationship under which the asset is held.

60. He noted at [154] that the terms of the licence used "custodial wallet services" to describe the activity Bittrex was licensed to undertake. There was no reference to non-custodial wallet services. He considered the JLs' interpretation inconsistent with commercial reality. Bittrex earned its revenue by charging commission on the sale or transfer of digital assets, not by trading them on its own account. It did in fact keep the customers' assets separate from its own. Their interpretation of section 18(3) and (4) would mean anyone offering digital asset services could bypass DABA-regulation by simply providing in its contractual documents that title passed to the recipient in return for a contractual claim for the return of a digital asset of equivalent value. The judge considered that would be an absurd interpretation and no-one reading the provision would conclude that the very activity which DABA was passed to regulate could be defeated by contracting out.

61. The judge considered that the reference to "trust account" in section 18(1) was also inconclusive. It could mean a formal account subject to trust obligations or it could refer to a segregated account in which assets are kept to distinguish them from assets beneficially owned by the person in control of the account. A lawyer's "trust account" might be a common example. As he put it at [159]:

> "A "trust account" is the shorthand term used to refer to a separate account in which assets are held on someone else's behalf or for a purpose to be carried out on that person's behalf, but it connotes that the assets that are held in the account do not belong to the account holder beneficially."

62. At [161], he held that Bittrex held customer assets in Standard Hosted Wallets within the meaning of section 18(1) and had custody of those assets for its customers within the meaning of sections 18(3) and (4). Those assets were required to be kept separate from the assets of Bittrex's other business under (4)(b) and are not available to meet claims of general creditors under (4)(c).

63. He went on to hold at [162] that, in a statute intended to give customers protection, the terms used in DABA must be given a "purposive" construction to give effect to that protection. He said at [164] that the primary purpose of DABA is "to license and regulate the operation of licensed undertakings and provide a framework for the protection of customers and to provide an effective scheme for the enforcement of its rules and regulations." He held at [165] that the obvious purpose of section

17 (reflected in 1.38 of the Code of Practice) is to ensure that the assets of the licensed undertaking are held separately from assets transferred by customers. The obvious and only intelligible purpose of section 18 is to provide a framework within which all licensed undertakings must hold assets held for customers in a separate account not available to meet the claims of general creditors. If there is ambiguity in the terms of the sections, they must be read in the light of the purpose of the statutory provisions and the Court should give the provisions a construction that does not lead to absurd results. If there was ambiguity he considered "custody" should be construed in the context of DABA as meaning "control over the digital assets held by a licensed undertaking in respect of which the licensed undertaking owes obligations to customers or clients".

64. The judge then referred to the company's audited financial statements for 2020, 2021 and 2022 and its unaudited financial statements for January to November 2023, all prepared by its accounting team and approved by management, including its directors. They showed that at no time were customer assets shown as belonging to Bittrex. He considered that if there had been a transfer of full legal ownership to Bittrex, that would have been reflected as an asset on the balance sheet, with a corresponding liability to the customer at an equivalent value. The judge then set out the detail of what was in the financial statements, which is not necessary to repeat here. At [180], the judge concluded that Bittrex always operated on the basis that it was not entitled to a beneficial interest in the assets deposited by customers and this was reflected in the financial statements.

65. At [182], the judge turned to consider the JLs' sanction application. He reiterated that, applying *Re Phoenix Oil and Transport*, the liquidator has no power to seek the sanction of the court to make a distribution of a surplus to a shareholder. Strictly speaking, this put an end to the application but if the Court was wrong about that, on the assumption it could give the sanction to the distribution of the surplus, it would decline to do so. He reached that conclusion for several reasons. First, that Bittrex cannot claim ownership of the assets for the reasons he had given earlier in the judgment. He referred at [190] to the submission of Mr White for the JLs that the Court was constrained to apply the statutory waterfall applicable in an insolvent liquidation and, following payment of the proofs of debt up to the bar date, the law required the remaining assets to be distributed to the sole shareholder. The judge noted that this was not an insolvent liquidation but a solvent one under which there was no restriction on the types of claim that may be proved.

66. He also referred to section 225 of the Companies Act 1981, applicable to all types of winding up, which provides:

> "Subject to this Act as to preferential payment the property of the company shall, on its winding up, <u>be applied in satisfaction of its liabilities pari passu</u>, and, <u>subject to such application</u>, unless the bye laws

> otherwise provide, be distributed among the members according to their rights and interests in the company."
>
> He emphasised the underlined words. The provision meant that the JLs could not distribute any of the assets of the company to the shareholder until all its liabilities were satisfied or provided for. The Order setting the bar date did not extinguish those liabilities to the former customers to repay the digital assets (or their proceeds in fiat) but simply enabled the JLs to exclude the customers who have not proved their claim from participating in the interim distribution.

67. The judge recorded at [195] that the remaining customers who have not made claims are known both as to identity and as to amount and the liabilities are recorded in the ledger records of Bittrex. He concluded at [197] that until such time as all creditors have been paid or provision has been made to meet the claims in full, the Court would not be prepared to exercise its power under section 192 of the Companies Act 1981 or otherwise to direct that the unclaimed digital assets are to be distributed to BGI as a "surplus".

68. He noted at [199] that Bittrex had made a loss in each year of its operations and was saved from insolvency by shareholder loans which were later capitalised. It would be an incongruous result if the effect of the application was to enable the JLs to distribute over US$70 million to the sole shareholder as a surplus when not a penny was made in profit and all its operations were funded by contributions of working capital.

69. He concluded at [200] that, even if the Court had power to grant a sanction under section 175(2)(h), it would not do so since distribution of the unclaimed assets as a surplus to the sole shareholder would be a breach of the clear requirements of DABA to ensure that the assets held in the customers' Standard Hosted Wallets were not mixed with the assets of Bittrex. At [203] the judge reiterated that the JLs have no power to declare a surplus, a power reserved to the Court under section 192. It followed from what he had said above that he would not consider it just to order a distribution of the unclaimed assets, which relate to the liabilities in the Standard Hosted Wallets, to the sole shareholder as a surplus on the assumption that those assets qualify for treatment as such. He followed the approach of Sir Robert Megarry V-C in *R-R Realizations Ltd* [1980] 1 WLR holding that the court should take special care to ensure that all creditors are paid before distributions are made to the shareholders.

70. In the circumstances, the judge said at [206] that it was not necessary to deal in great detail with the BMA's application. Since the statutory trust argument was not pursued, the judge made no finding about it. Whilst there might be circumstances in which it was necessary to impress a trust obligation, it was not necessary here, because there was a pool of assets in a solvent fund against which the remaining customer claims can be met. The Court accepted the BMA's submissions that the position of the JLs was

wrong in principle and in law and that the Court should not treat the unclaimed assets as falling within the assets available to the JLs to distribute to the sole shareholder as a surplus.

71. At [208], the judge rejected the JLs' objection to the BMA's standing, holding that it had a sufficient interest to apply to the Court under section 176(4) of the Companies Act. The BMA had standing to object to the grant of a sanction on the basis that Bittrex was and remained a regulated entity. He held at [209] that there was no basis for objecting to the BMA's submissions regarding the admission of the customers' claims without the need for further proof under Rule 64(1) of the Winding Up Rules, given the public interest in protecting the interests of customers.

72. If he were wrong about that he would of his own motion exercise the power under Rule 64(1) to direct the JLs to admit the claims of all customers who had not submitted proofs of debt without the need for further proof, such claims to be admitted in the amounts reflected in the accounts kept by Bittrex reflecting the balances recorded for each customer. He made that Order because the liabilities to customers are known and quantified and there is no dispute as to their existence and validity. The JLs had already prepopulated the proofs of debt and Bittrex's own financial statements made it clear these assets do not form part of Bittrex's own assets. There was no reason why an email from the customer confirming these balances would hold any greater evidential value than Bittrex's own records. At [214], the judge said that admission of known and identified customers without further proof would ensure that the general creditors of the company did not participate in the assets available for the satisfaction of those known liabilities in accordance with section 18 of DABA.

73. The Court gave the JLs and the BMA liberty to seek further directions and set a hearing date for further directions for the efficient administration of the remaining steps in the liquidation.

## The judge's further Orders and directions

74. Following the delivery of the judge's judgment of 11 July 2025 in draft, but before it was made available to BGI and the public generally, BGI applied by summons dated 29 July 2025 to be added as a party, so that it could appeal against that decision if necessary. By an *ex tempore* ruling dated 8 August 2025 the judge refused that application. He held that, if BGI had wished to make submissions and participate in the proceedings, it had the opportunity to do so and chose not to do so. It was too late for it to come along now and apply to be joined as a party when the only purpose of the application was to be able to exercise a right of appeal.

75. The judge also held that to the extent the jurisdiction existed at all, it was governed by the Court of Appeal regime and if BGI wished to intervene in an appeal, it may apply to do so to the Court of Appeal. The application could not be made to the judge.

76. BGI then applied for leave to appeal both the decision of the judge of 11 July 2025 dismissing the sanction application and his refusal of the joinder application. The application was initially made *ex parte* but by a ruling dated 5 September 2025, the Court adjourned the application to an *inter partes* hearing.

77. At a hearing on 23 and 24 September 2025, the JLs sought further directions for the conduct of the liquidation. These were essentially agreed between the JLs and the BMA, but resisted by BGI. So far as relevant to this appeal, the judge made the following orders:

    (1) The JLs are authorised and directed forthwith to convert, in such tranches as may be reasonably required, all remaining digital assets in standard wallets into USDC/USDT in a form to be agreed with the BMA ("the conversion direction");

    (2) All outstanding customer claims in relation to the digital assets held in standard wallet accounts shall be automatically admitted as debts of the Company pursuant to rule 64 (1) of the Companies (Winding Up) Rules 1982 and without the need for further proof ("the automatic admission direction");

    (3) The automatically admitted claims shall be admitted and valued as at the date of this order using the following formula: a. The number of digital assets by type and quantity in each customer standard wallet art the date of the winding up of the Company on 28 March 2024 multiplied by b. The price obtainable for each type of digital asset at the date of this order with reference to the prevailing values for each type of digital asset assessed by reference to the prices for close of day on Coingecko ("the valuation direction");

78. On 30 September 2025, the judge gave written Reasons for the Orders he had made. At [7], he referred to a mini report prepared by the JLs filed on 8 September 2025. This concluded that when account was taken of the liabilities to customers which had been extinguished by the application of storage fees, the admission of all customers' claims without proof and the liabilities to pay storage fees under the SLA to maintain Bittrex's ability to use the Platform to make distribution to customers, Bittrex was hopelessly insolvent.

79. The JLs maintained that their treatment of the storage fees as "income" and the extinction of the liabilities to customers was authorised by the Order of the Chief Justice dated 24 August 2024. The BMA's position was that the storage fees could only be recorded as the realisation of an asset and that the liability to the customer could not be extinguished except by a distribution in the liquidation as a matter of law and that the Chief Justice's Order must be construed accordingly. At [9], the judge noted that the parties did not ask the Court to make a ruling on that issue for the purposes of

determining the directions for the conduct of the liquidation, on most of which they were agreed. Later in his Ruling at [31], the judge said, in relation to the storage fees issue, that he considered it necessary to determine the correct interpretation of the authority given by the Chief Justice in his Order and that he was going to schedule a hearing for the presentation of full argument on the storage fees issue. That hearing has yet to take place.

80. At [10], he said that BGI sought to object to the directions but the point had been raised as to whether it had standing and it was now clear that the company was insolvent, so BGI no longer had any "tangible interest" in the liquidation because there would be insufficient assets to meet the claims of creditors and so there was no prospect of a return to shareholders. He emphasised a passage in the mini report which said that after factoring accrued liquidation costs (including for storage fees): "there is essentially no scenario under which the Company will remain solvent".

81. At [12], the judge noted that, at the hearing, the JLs had confirmed that negotiations to reduce or vary the monthly fees under the SLA and/or the 6-month notice period had been unsuccessful. This obligation was a liability of US$1.5 million a month for a minimum period of 6 months. The JLs had approximately US$5.5 million in free funds and the judge concluded that there was no basis on which the company was solvent (either on a cash flow or a balance sheet basis) in light of the obligations under the SLA, quite independently of any dispute over the appropriate accounting treatment of storage fees. Accordingly, the judge concluded BGI no longer had any tangible interest in the liquidation and formally refused it permission to address the Court, although the judge heard submissions *de bene esse* in case its appeal against the 11 July decision proceeded.

82. All outstanding customer claims in relation to digital assets held in Standard Hosted Wallets were to be automatically admitted as debts of the company pursuant to Rule 64(1) of the Winding Up Rules without the need for further proof.

83. The JLs were authorised and directed to convert all remaining digital assets in Standard Hosted Wallets into stablecoin which could be given a fixed present value. At [18], of his Reasons, the judge noted that the process of conversion required timing and an exercise of judgment to avoid a drop in price as a result of putting the digital assets on the market all at once. In order to achieve a *pari passu* treatment of all creditors it was necessary to convert into stablecoin which can be given a present value. Then all admitted claims can be allocated a value which can be used for calculating the dividend to each customer. He said that conversion into stablecoin at the current date allowed customers to obtain the current value of the conversion of the token (including any increases in value). It also allowed the JLs to avoid the expense of a conversion into fiat currency. He considered that this gave tangible and important benefits to customers and most importantly, in real terms, there were no other practical options.

84. The automatically admitted claims were to be admitted and valued as at the date of the Order pursuant to a formula agreed between the JLs and the BMA. At [19] of his Reasons, the judge noted that the JLs were required to admit the claims based on their estimation of the value at the present date. It was impossible in practical terms to estimate what someone might have paid for a particular digital asset on 28 March 2024, the date of the winding up Order.

85. At [20]-[21] the judge said:

> "20. The English courts and the Singapore courts have grappled with the knotty problem of giving a value to an intangible asset which has no intrinsic value in itself. In *Southgate v Adams* [2025] 4 WLR 30 (Ch) at [45]-[54], Trower J held that damages for breach of contract are usually assessed at the date of breach, the court may depart from that rule where it would lead to injustice. In *Fantom Foundation Ltd v Multichain Foundation Ltd* [2024] SGHC 173 at [18] and [37]-[40], Faisal CJ held that valuation of a cryptocurrency must depend on the evidence presented because there is no objective measure of value at any one point in time. In simple terms, a digital asset is only worth (as the saying goes) what someone is willing to pay for it on a given day.
>
> 21. On the contractual analysis Bittrex agreed to exchange the digital asset for a contractual claim for the repayment of another like digital asset in terms of quality and quantity. Bittrex is in liquidation, and it is not possible to give a remedy of specific performance of this contractual obligation. This is partly for legal reasons (such a claim could not be enforced by a customer) and partly for practical reasons (Bittrex has insufficient funds to maintain indefinite access to the platform). Any claim by a customer must therefore be measured as a contingent claim for breach of contract to return the equivalent number of tokens, so any claim for breach has to be valued by reference to a "just estimate" [section 234 of the companies Act] of the value of the claim, which the JLs can only realistically assess by reference to the actual price that is obtained upon sale [referring to [27]-[33] of *Wight v Eckhart Marine GmbH* [2003] UKPC 37]."

86. The judge said at [22] that he therefore concluded that the proposed valuation methodology is the best way of making a just estimate of the value of the customer claims. He went on to give a direction for price smoothing to avoid values being affected by spikes in trading on a particular day.

87. There was a subsequent hearing of BGI's application for leave to appeal (including an application for leave to appeal against the Order for directions dated 24 September 2025) on 27 October 2025. By his ruling dated 3 November 2025, the judge refused the application which he concluded had no realistic prospect of success for a number of reasons. For the purposes of the present appeal, it is only necessary to highlight his reasons for

refusing leave to appeal against the directions he had given on 24 September 2025.

88. He dealt first with BGI's application for leave to appeal against the Court's finding that Bittrex was insolvent. At [77], he noted that the Court had relied upon the evidence of the JLs: "which stated in terms that there is no scenario in which Bittrex is solvent when the liabilities to the standard wallet holders are admitted and the expenses of the liquidation are taken into account."

89. The judge repeated at [78] his conclusion that, on both a cash flow and balance sheet basis, Bittrex's insolvency is plain. At [79], he noted that BGI challenged this conclusion, claiming that the storage fees are a legitimate basis on which to extinguish the creditors' claims and that the unclaimed digital assets represent a surplus of US$45 million. At [80], the judge said that the automatic admission of the standard wallet holders' claims without the need for further proof removed any basis upon which BGI could claim that the unclaimed digital assets are available for distribution to BGI as a surplus. Any appeal against the finding that Bittrex was insolvent had no realistic prospect of success. It is to be noted that BGI has not sought leave to appeal to this Court against this finding of insolvency.

90. BGI's second ground of appeal against the Order for directions was that the application of storage fees reduced Bittrex's liabilities to the standard wallet holders and that the effect of the Order of the Chief Justice of 23 August 2024 was to permit this, which meant Bittrex's liabilities were thereby reduced. The judge said at [81] that this misapprehends the Chief Justice's Order. At [82], he said that the JLs accepted that that Order allowed the JLs to realise the value of the digital assets to pay the expenses of the liquidation by applying storage fees to the digital assets stored in the standard wallet holders' accounts. However, as the judge noted, there was no Order permitting the JLs to extinguish Bittrex's liabilities to the standard wallet holders and this had not been addressed in the fifth affidavit of Ms King in support of the application which led to the Order of the Chief Justice. This ground of appeal had no realistic prospect of success.

91. The third ground of appeal against the Order for directions was against the direction to admit the standard wallet holders' claims on the basis that to do so was irrational because the disapplication of the storage fees *"reverses one fundamental element of the liquidation plan"* and that reversing the disapplication affected only one half of the standard wallet holders. This was because storage fees had been applied against the assets already distributed by the JLs, reducing those claims accordingly, but the direction does not apply the storage fees to reduce the liabilities to the remaining wallet holders.

92. The judge considered this ground had no realistic prospect of success for two reasons. First, the application of storage fees was not part of the liquidation plan approved by the Court: it was a measure sought by the JLs to realise assets to pay for the expenses of the liquidation. Second, the

payment out to the wallet holders to whom assets had already been distributed less the storage fees was before the JLs' sanction application and the Court's Ruling dated 11 July 2025. There was nothing irrational about the JLs following the Court's Ruling. The judge noted that there was to be a further hearing in relation to the effect of the deduction of storage fees in due course.

93. The fourth ground contended that the Court's direction to the JLs to convert into stablecoin was irrational or contrary to legal principle. The judge said this ground was not understood, in that no legal principle was cited to support the notion that the Court did not have authority to so direct as part of its jurisdiction to supervise a Court ordered liquidation, nor why it was irrational. It was a direction sought by the JLs to give effect to the Court's 11 July Ruling.

94. It was also contended by BGI that the Court failed to take account of the customers' choice of investment, crypto assets. The judge said this was also not understood. The Court was supervising an insolvent liquidation and the JLs had insufficient assets to meet the costs of running the liquidation. The direction to convert the assets into stablecoin was a rational and proportionate costs saving measure and allowed for the efficient progress of the liquidation. The judge considered this ground of appeal also had no realistic prospect of success.

**The grounds of appeal**

95. BGI's grounds of appeal to this Court can be summarised as follows:

(1) In finding that, on a proper interpretation of the 2023 Terms and Conditions and of DABA, the company held assets transferred to it by customers and held in Standard Hosted Wallets beneficially for the customers, such that the assets had not become the property of the company, the judge erred in law and otherwise misdirected himself.

(2) In ordering and directing under Rule 64(1) of the Winding Up Rules 1982 that customers with positive balances in the Standard Hosted Wallets be automatically admitted as creditors without further proof, the judge made an error of law and/or fact or otherwise misdirected himself.

(3) In declining to sanction the distribution sought by the JLs' application the judge made an error of law and/or fact or otherwise misdirected himself. This ground must stand or fall with the first ground.

(4) In finding that the BMA had a sufficient interest to apply to the Court under section 176(4) of the Companies Act 1981 or to object to the sanction the judge made an error of law and/or fact or otherwise misdirected himself. This ground can be ignored because BGI did not press it but accepted in its skeleton that the BMA had standing to participate in the proceedings.

(5) In finding that there was no jurisdiction to permit the joinder of BGI, the judge made an error of law or otherwise misdirected himself.

(6) In finding that customers should be automatically admitted as creditors without the application of storage fees when determining the value of their claims, the judge erred in law and was irrational.

(7) In directing that the automatically admitted claims be valued at a price obtainable at the date of his order, the judge erred in law and was irrational.

(8) In directing that the JLs convert all remaining assets held in Standard Hosted Wallets into stablecoin in a form to be agreed with the BMA, the judge erred in law and was irrational.

## Summary of the submissions

96. In summarising the submissions made by counsel, where they referred the Court to authorities, I will set out the relevant citations in this section of the judgment and avoid repetition in the Discussion section.

97. On behalf of BGI, Mr Edward Cumming KC submitted that at the heart of the appeal was the question: on what basis did the company hold the digital assets transferred to it by customers held in Standard Hosted Wallets. He submitted that this was a straightforward question of interpreting the contractual arrangements between the company and the customers. His case, in summary, was that all rights to the assets were transferred to the company and that sections 17 and 18 of DABA simply did not apply to those assets.

98. He placed particular emphasis on what was said by Ms King in her seventh affidavit in support of the sanction application, to the effect that the JLs sought the sanction of the Court to make an interim distribution to BGI, which was prepared to enter into an appropriate indemnity. She said that if the Court sanctioned the distribution as a matter of principle, the JLs would need to do further work as to the appropriate scope of the indemnity and whether any security was required. Mr Cumming KC pointed out that this indemnity would mean that if customers came forward who had not proved in the liquidation, they could call on the indemnity to ensure that they were not out of pocket, which gave the lie to some of the hostile submissions made on the appeal by the BMA. This was not a "smash and grab raid" by the sole shareholder, which was not the "bad guy" that the BMA made it out to be.

99. Later in his submissions, he referred to what Ms King said about the proposed indemnity in more detail at [78] of her seventh affidavit. She said

that the proposed indemnity would include fully indemnifying the JLs for all liabilities and claims arising from the proposed interim distribution to BGI up to the value of the distribution and an obligation to refund the liquidation estate up until such time as the liquidation closes. She also said that the JLs would not proceed with an interim distribution without what they consider an appropriate indemnity in place from a party with assets. Mr Cumming KC submitted that this proposed arrangement would be more accessible for the customers with unclaimed assets than having to access the Accountant-General and the Consolidated Fund if, pursuant to the judge's directions, the unclaimed assets were paid into that Fund.

100. Mr Cumming KC took the Court through the history of the liquidation as summarised in that affidavit. He emphasised the arrangements for customers to file proofs of debt on the online Platform including updating KYC and anti-money laundering documentation. He stressed the considerable lengths the JLs had gone to in order to give customers notice to participate in the proof of debt process. Later in his submissions, he submitted that the automatic admission of debts directed by the judge was inconsistent with those arrangements applicable to customers who had filed proofs of debt.

101. He took the Court to the letter of 27 January 2025 from Conyers, Dill & Pearman ("Conyers") on behalf of the BMA which was the origin of the current disagreement. They made clear that the BMA would not condone the use of unclaimed assets either to fund the company's unsecured liabilities or to pay a surplus to the sole shareholder, which would be an unmerited windfall. That letter asserted that the unclaimed assets were held by the company on statutory trust, which was the BMA's original case, not pursued before the judge or on appeal.

102. Mr Cumming KC challenged the BMA's assertion that the company had been insolvent at the time of the June hearing before the judge. He referred to a table in Ms King's ninth affidavit dated 18 August 2025 which showed that, as at 30 June 2025, the company was balance sheet solvent and its total net assets were about US$1,5 million. She went on to explain that at the date of her affidavit there had been an improvement of almost US$4 million, so that the company was about US$5 million net solvent. Mr Cumming KC acknowledged that this financial position depended on the company being entitled to charge storage fees on the unclaimed assets.

103. Mr Cumming KC relied upon an email exchange between the company and the BMA in June 2022 as demonstrating that the BMA had been informed that, under the irregular custody model (i.e. what became Standard Hosted Wallets), the sums transferred by customers were not held in custody, so sections 17 and 18 of DABA did not apply, that those sums belonged legally to the company and the company was then seeking permission to lend those sums, in other words, he submitted, the company was saying it could use the assets for its own purposes. The same point was made in a letter from Carey Olsen, the solicitors for the company, dated 2

September 2023, which stated that although the company did offer custody services to customers, to date no customers had availed themselves of this Enhanced Hosted Wallet service and all assets deposited with the company by customers had been deposited on a non-custodial basis.

104. Having set out the background in detail, Mr Cumming KC turned to make submissions about the 2023 Terms and Conditions and DABA. In relation to the basic principles of statutory interpretation, he referred to what Lord Hodge said in *R(O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 at [31] (cited with approval by the Privy Council in *Al Thani v Al Thani* [2024] UKPC 35 at [28]):

> "Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered."

105. As Lord Nicholls explained in *R (Spath Holme Ltd) v Secretary of State for the Environment* [2001] AC 349 at 398:

> "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly."

106. Mr Cumming KC also relied upon what Lord Hoffmann said in *R (Morgan Grenfell Ltd) v Special Commissioners of Income Tax* [2003] 1 AC 563 at [8]:

> "…the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication."

107. He submitted that freedom of contract was just such a basic principle of the common law, citing Lord Collins in *Belmont Park Investments v BNY Corporate Trustee Services* [2011] UKSC 38; [2012] 1 AC 383 at [103]:

> "Despite statutory inroads, party autonomy is at the heart of English commercial law. …it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed. And there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal."

108. Mr Cumming KC submitted that it would need clear and express language to restrict the parties' freedom of contract and to interfere with the usual approach to assets during a liquidation and to amend the statutory waterfall which would otherwise exist. A good example of the sort of language that would be necessary was provided by section 25(1) of the Segregated Accounts Companies Act 2000 which provides:

> "Notwithstanding any statutory provision or rule of law to the contrary, in the winding up of a segregated accounts company the liquidator shall deal with the assets and liabilities which are linked to each segregated account only in accordance with this Act and accordingly the liquidator shall ensure that the assets linked to one segregated account are not applied to the liabilities linked to any other segregated account or to the general account, unless an asset or liability is linked to more than one segregated account, in which case the liquidator shall deal with the asset or liability in accordance with the terms of any relevant governing instrument or contract."

Mr Cumming KC submitted that, strikingly, such wording was not included in DABA. He took the Court to the relevant provisions of DABA which I have set out at [35] above.

109. His essential submission was that sections 17 and 18 of DABA simply do not apply to Standard Hosted Wallets. The judge had erred in accepting the BMA's case that those sections mandate that assets transferred to the company cannot form part of the asset base of the company. The judge ignored the actual language of those sections and treated them as if they contained very similar express language to section 25(1) of the Segregated Accounts Companies Act 2000, which they do not.

110. In relation to the interpretation of the Terms and Conditions, he referred the Court to the familiar passages from the judgment of Lord Neuberger PSC in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at [15] to [21]. He placed particular emphasis on [21] where Lord Neuberger said:

> "The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties."

Mr Cumming KC submitted that the judge had ignored this principle and wrongly had regard to matters which post-dated the Terms and Conditions. He submitted that the BMA made the same in its appeal skeleton, having regard to the company's accounts which cannot bear on the proper interpretation of the Terms and Conditions.

111. In relation to both clauses 4.2 and 6.2 he described the closing words of each: "Tokens are held by [Bittrex] in accordance with the requirements of DABA, and applicable ancillary regulations, statements of principle, codes of conduct and guidance notes promulgated by the Bermuda Monetary Authority" as boilerplate language. They were not tantamount to saying that the company would treat sections 17 and 18 as applying to Standard Hosted Wallets notwithstanding that, on their plain face, they do not apply to the contractual relationship.

112. Mr Cumming KC submitted that the words of clause 6.2(a) were as plain as a pikestaff. In the case of a Standard Hosted Wallet the customer has no proprietary right once the tokens are transferred to the company and the beneficial interest is transferred to the company. The customer just has a contractual claim consistent with other provisions such as clause 6.4 which talks about withdrawing the balance that appears in the wallet and clause 7.4(a). This deals with trading in the case of a standard wallet. The reference to novation made it clear that where the customer trades the token, he receives a new contractual claim against the company.

113. Mr Cumming KC emphasised clause 13.3 of the 2023 Terms and Conditions headed "Effect of Termination" and, in particular, the passage set out at [36] above. He submitted that in relation to those customers who had not withdrawn their tokens after notice of termination was given pre-liquidation, the company could have said you have not withdrawn them within the ninety-day period so you are no longer a creditor, but it had not done that.

114. Mr Cumming KC submitted that the directions the judge gave, including as to automatic admission, all stood or fell with his conclusion in relation to that issue of the proper interpretation of the 2023 Terms and Conditions and DABA. He submitted that if BGI were right on the first issue of interpretation, the matter should be remitted to another judge to assess what directions should be given for the ongoing conduct of the liquidation.

115. The only real premise for the directions the judge had given was that the customers retained some ill-defined interest in particular assets, such that they were not the assets of the company for the purposes of the liquidation. He submitted that the judge's reason for allowing automatic admission at [214] of the judgment (referred to in [71] above) was a capricious use of the power of automatic admission, which did not allow the judge to rewrite the statutory waterfall.

116. In relation to automatic admission, Mr Cumming KC referred to what was said by Ms Davis-Crockwell of the BMA in an affidavit dated 28 August 2025, after the judgment, that there was now only a fraction of the number of positive balance wallet accounts compared with the commencement of the liquidation and that it may be doubted whether a significant number of the customers who had not claimed their assets, even once automatically admitted, would come forward to claim a token distribution. He described this as a damning condemnation of the value and purpose of auto-admission.

117. Mr Cumming KC relied on the well-established principle derived from the judgment of James LJ in *Re General Rolling Stock Company* (1872) 7 Ch App 646 that the status of creditors in a liquidation crystallises at the date of presentation of a winding up petition. If the customers had a proprietary interest, then they were not creditors and could not be

automatically admitted as such. If that was wrong and they were creditors then their claim was valued at the date of the winding up order and any increase in the value of the tokens since was a true surplus to be distributed to BGI or if the customers could benefit from that increase in value, they should bear the costs of the process, including the payment of storage fees.

118. He also submitted that the effect of the order of the Chief Justice of 23 August 2024 stipulating the bar date was that it was too late as a matter of law for directions such as the judge gave for automatic admission. Those directions in substance rescinded or varied the order of the Chief Justice. The judge had no jurisdiction to do this. There is no power for a judge in corporate insolvency proceedings in Bermuda to set aside or vary orders previously made, no statutory power equivalent to rule 12.59 of the Insolvency Rules in England. Furthermore, there had been no material change of circumstances since the date of the earlier order such as would justify the exercise of any inherent jurisdiction to vary the earlier order.

119. Mr Cumming KC submitted that, even if the judge had had jurisdiction to vary the earlier order of the Chief Justice, it was not open to him to exercise it in circumstances where the BMA had participated in the proceedings which led to that order, such that it was an abuse of process for the BMA to argue for the directions the judge made and they were estopped from doing so. He relied upon the decision of the majority of the English Court of Appeal in *Koza Ltd & Anor v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018 at [42] which found that the principles of issue estoppel and abuse of process apply to interlocutory hearings as much as to final hearings.

120. Mr Cumming KC referred to the evidence from Ms King before the Chief Justice about the opportunity to avoid storage fees having the effect of maximising the number of creditors who submitted proofs of debt. As an incentive, the JLs were proposing a storage fee waiver for creditors who submitted a proof of debt within 14 days. This evidence was shared with the BMA which engaged in the hearing before the Chief Justice and acquiesced in the JLs' approach and the approach of the Chief Justice. It was estopped from going back on that now when there had been no material change of circumstances.

121. Mr Cumming KC dealt briefly with BGI's standing to pursue the appeal at the end of his submissions, relying on section 12 of the Court of Appeal Act 1964 which says that any person aggrieved by a judgment of the Supreme Court may appeal to the Court of Appeal. He submitted that the sole shareholder was clearly a person aggrieved by the judge's judgment and directions. He cited what Lord Denning said about the width of the expression "a person aggrieved" in *Attorney-General of the Gambia v N'Jie* [1961] AC 617 at 634:

> "The words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a

> mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

He submitted that the BMA did not really challenge that the expression was of wide import but sought to add a gloss to section 12 by arguing that there is an element of discretion in determining whether someone is a person aggrieved, namely the reasonableness of the person not having been a party to the proceedings below. This is inconsistent with the section and, in any event, there can be no proper criticism of BGI for leaving the JLs to fight the case below.

122. On behalf of the JLs, Mr Steven White made short submissions, saying they adopt a neutral position on the issues under appeal. They referred in their skeleton to the fact that the effect of the bar date was not to be an absolute bar on claims, but that under rule 73(1) of the Winding up Rules a late proving creditor may be excluded from the benefit of any distribution made before such debts are proved, or, as the case may be, from objecting to such distribution.

123. Mr Adam Cloherty KC, on behalf of the BMA, stressed at the outset of his submissions that its concern throughout had been about assets attributed in the company's attribution table to as yet unresponsive customers being applied to the payment of other creditors or distributed to BGI. He dealt with the proposed indemnity on which a lot of store was placed by BGI. [78(2)] of Ms King's seventh affidavit gave no details of who was going to provide the indemnity and how it was going to be enforced, in the context of the whole Bittrex group being in one way or another liquidated. What was being offered was extremely limited for a number of reasons. First, it was limited to a proprietary claim in circumstances where BGI's whole case is that no customer has a proprietary claim. Second, it was an indemnity to the JLs which, once they were discharged and the company dissolved, would be pretty pointless because unless the JLs were in breach of duty, there would not be a claim that a creditor could bring against them. The indemnity was time limited to the end of the liquidation which, on BGI's case, should occur very quickly. What was not being offered was, as in *Re Armstrong Whitworth Securities* a fund of relevant assets remaining available to meet creditor claims in the future.

124. In relation to the standing of BGI on the appeal, he noted that section 12(1) of the Court of Appeal Act says an aggrieved person "may appeal". He submitted that the word "may" imported a discretion and that it was relevant that BGI deliberately chose not to appear below whereas if it had done, the judge would have been able to explore the scope of the indemnity on which Mr Cumming KC now placed so much emphasis.

125. Mr Cloherty KC pointed out that the judge's core finding was that the JLs did not have the power to make an interim distribution under section 175(2)(h) of the Companies Act so that the sanction application fell at the

first hurdle. He submitted that there was no attempt by BGI to say why that conclusion was wrong. He submitted that the power to make an interim distribution rested only with the Court under section 192. That section does not enable the Court to give the JLs power to make an interim distribution. There was nothing irrational about the judge's refusal to exercise the Court's power under section 192 for the simple reason that the sanction application did not invoke the power under that section. He later submitted that it would be an unprecedented use of this power for the court to pay an alleged surplus to the shareholder whilst the liquidation was still ongoing and there remained a number of known but undischarged liabilities of the company.

126. He baulked at the suggestion in BGI's skeleton, criticising the judge's direction for automatic admission, that there was no real prospect of any payment ever being made to the creditors who had not filed proofs of debt. He noted that creditors were still coming forward, some 411 claims having been filed since the bar date. He also referred to the JLs' report to the Court in September 2025 which contained a breakdown of the composition of the class of unresponsive creditors. Some 94% comprise creditors with claims of under US$1,000 but in terms of overall value, they accounted for only US$6.6 million of a total claim in excess of US$63 million, or 2.8%. However, a small number of creditors have huge potential claims, three with claims for over US$1 million accounting for US$ 11.2 million. If there were an interim distribution, it would only take a few of these creditors with large claims to come along for there to be insufficient assets to meet the liabilities.

127. Mr Cloherty KC referred the Court to the decision of Sir Robert Megarry V-C in *Re R-R Realisations Ltd* [1980] 1 WLR 805 arising in the voluntary liquidation of Rolls-Royce. It concerned fatal accident claims arising out of an accident at Bombay airport in October 1976, in which a Caravelle aircraft powered by Rolls-Royce engines was destroyed, with the loss of the lives of the 95 persons on board. The liquidators sought an order that they should be given liberty to distribute the remaining assets of the company without regard to any claims arising out of the disaster on the basis that the claims made to date were general, unparticularised and unlikely to succeed. Mr Cloherty KC drew attention to what the judge held at 812, that there was no duty on creditors to make their claims with all reasonable diligence. The judge rejected the application to make a distribution to the shareholders, summarising his conclusions at 813-814:

> "In the result, I would summarise my conclusions as follows.
> (1) In deciding whether to make an order under section 307 authorising liquidators of a company in a voluntary liquidation to distribute the assets of a company among the company's members, notwithstanding a last-minute claim by persons who contend that they are creditors, the test to be applied is whether in all the circumstances of the case it is just to make such an order. There is no rule that the claimants must establish that they have been guilty of no wilful default and no want of due diligence,

> although the presence or absence of any such default or lack of diligence will of course be a factor, and normally an important factor, in determining what is just. (2) On making such an order the court may impose such terms and conditions as in all the circumstances of the case it considers fitting, or may make such other order as it thinks just. Where the court is asked to refuse or suspend such an order, any contention that this should be done only on terms that the claimants should bear the expenses thrown away by their tardiness in asserting their claims should itself be subject to the test of what is fitting and just. (3) Where the order is sought in order to facilitate a distribution among members, the court will be more reluctant to grant it than if the distribution is to be made to creditors."

128. Mr Cloherty KC submitted that these principles should be applied in the present case, which was a stronger one since, whereas there the claims were all contingent future potential claims and had not been established, here there are liquidated, present undisputed claims. He agreed with the point put to him in argument by the President that, under section 257 of the Companies Act 1981, irrespective of whether the customers had a proprietary interest in the assets, these were unclaimed and undistributed assets in respect of identifiable, undisputed claims and as such should be paid into the Consolidated Fund. He submitted that this was supported by clause 10.8 of the 2023 Terms and Conditions dealing with unclaimed property.

129. Mr Cloherty KC submitted that it was only in January 2025 that it became apparent to the BMA that there were a number of customers unresponsive to the proof of debt process who had about US$70 million of claims and that the JLs were considering transferring those assets to the sole shareholder by way of interim distribution. He submitted that the fact that the BMA had acquiesced in the order of the Chief Justice did not preclude it from objecting to this proposal, irrespective of whether there was a material change of circumstances because the Court has a duty as part of its supervision of the liquidation to ensure that its officers observe the standards of conduct that society expects of the court itself: see per David Richards LJ in *Lehman Bros Australia Ltd v MacNamara* [2020] EWCA Civ 321; [2021] Ch 1 at [36]-[38] applying the principle in *Ex p James* (1874) LR 9 Ch App 609. In any event, he submitted that there was a material change of circumstances from the position at the time of the order of the Chief Justice with which the BMA acquiesced. The BMA objected in accordance with its statutory mandate reflected in the preamble to DABA.

130. Furthermore, at the time that the sanction application was issued, the JLs issued their own cross-application as they were entitled to do under section 176(5) of the Companies Act which asked the Court to do something in the future: make declarations as to the ownership of the digital assets under DABA. This might well involve revisiting earlier orders.

131. Mr Cloherty KC submitted that the judge's decision to order automatic admission was the exercise of a judicial discretion and a multifactorial evaluative judgment which BGI could only overturn if this Court were satisfied that no reasonable judge could have reached that decision or the decision was irrational. This was a heavy burden which BGI could not discharge. The judge's decision was plainly right. As noted in the Teneo report, the company used an online platform with a customer attribution table maintained by Andromeda to track individual customer holdings, which was dynamically updated as trades occur.

132. He submitted that this meant that the company in fact always complied with section 18(3) of DABA and the Code of Practice. It recorded in its ledgers the precise number of tokens attributed to customer deposits at any given time. In answer to Mr Cumming KC's rhetorical question as to what the BMA's case was as to what was held for customers, he said the answer was quite simple. What was held are the assets that were attributed to each customer in the attribution table and in turn recorded in the deposit balances on the wallet accounts. He submitted that the company was doing all this because it recognised the need to comply with sections 17 and 18 of DABA and because it also recognised that under the Terms and Conditions the customers had the right to withdraw the tokens in their wallet accounts at any time.

133. Mr Cloherty KC submitted that the liability to the customers remains a liability notwithstanding the winding up. He referred to the decision of the Privy Council in *Wight v Eckhardt Marine GmbH* [2003] UKPC 37; [2004] 1 AC 147 in the judgment of Lord Hoffmann at [21] to [27] to the effect that unproved claims are liabilities of the company and remain so in the liquidation. In determining whether the company is solvent or insolvent account is taken of all the liabilities of the company at the date of the winding up. In other words, if the customers with outstanding claims came along tomorrow and said we want our tokens, as the JLs now rightly accept, the JLs would be obliged to meet those claims and there was nothing in the bar date order to prevent that. He referred to the decision of Jenkins J in *Re Armstrong Whitworth Securities Ltd* [1947] Ch 673 at 689-690:

> "It was submitted that so soon as a liquidator, having become entitled to distribute amongst the shareholders, has declared a distribution of so much per share and has partly effected it by making the appropriate payments to some of the shareholders, the assets remaining in his hands, to the extent necessary to complete the distribution thus commenced, become fixed with a trust in favour of the shareholders who have not yet received their proportion of the distribution, so as to oust the claim of a creditor coming in between the commencement of the distribution and its completion.
>
> … I cannot accept this contention. It seems to me to ignore the cardinal principle that in a winding-up shareholders are not entitled to anything until all debts have been paid. If it was right, it would have equal

> application if the creditor's claim came in after the liquidator had paid away to shareholders only a minute fraction of the amount of the declared distribution. Indeed, one form in which the argument was put to me actually was that the amount of a declared distribution ought to be treated as having been actually paid away by the liquidator on the date of declaration, which would defeat a creditor afterwards coming in, even though the whole of the assets intended to be distributed then actually remained in the liquidator's hands. No case has been cited to me in which it has been held that r. 104 has the effect as between creditors and shareholders of a company of defeating the claim of a creditor put in after a partial distribution amongst the shareholders, so far as regards the assets remaining undistributed at the date when the claim is received. No doubt admission of the creditor's claim produces the result that some of the shareholders will have been overpaid at the expense of others. But the remedy (if any) of the latter must, in my judgment, be in the nature of a claim for contribution against the former, and is not to be found in exclusion of the creditor, who claims against any undistributed assets by title paramount."

134. Mr Cloherty KC submitted that the most comprehensive treatment of admission of debts was in the judgment of the President (sitting as Kawaley J in the Grand Court in the Cayman Islands) in *Re Herald Fund SPC (in official liquidation)* [2018] **(**2) CILR 162 at [79] to [86]. He emphasised the following passages from that judgment:

> "82…A fundamental goal of the statutory code, as noted above, is to minimize the costs of the liquidation process and maximize the returns to creditors and (if possible) shareholders as well. There is in substance no difference between an "admitted" debt and a "proved" debt. Although authority should not be needed for this proposition, the point is illustrated quite clearly by the language used by David Richards, J. (as he then was) in *Re Lehman Bros. Intl. (Europe) (In Administration),* …([2015] EWHC 2269 (Ch), at para. 207): "The purpose of rule 2.88(7), as earlier discussed in this judgment, is to provide for interest to be paid to all creditors, irrespective of whether they had any entitlement to interest apart from the administration. What they are being compensated for by the payment of interest under rule 2.88(7) is the delay since the commencement of the administration in the payment of their *admitted 'debts', as ascertained or estimated in accordance with the legislation*." [Emphasis added.]
>
> 84…A debt may be proved or admitted (or indeed established) in a variety of ways, only one of which is through a formal proof of debt. Another way is through litigation resulting in a judgment or a compromise, if the litigation stay is lifted (typically likely only in relation to proprietary claims). Yet another way is where it is clear on the face of the company's own records that valid claims exist which cannot sensibly be disputed and which accordingly require no formal proof.

> 86…"Proved" essentially means established through whatever legally recognized process the liquidator (subject to this court's supervision in doubtful cases) deems appropriate having regard to the nature and merits of the relevant claim, not forgetting the interests of the liquidation as a whole."

135. Mr Cloherty KC submitted that there were six reasons why the judge was plainly right to automatically admit the claims. First, it is common ground that all customers have an absolute right on demand to withdraw the balances on their accounts. This was confirmed by the company in a letter dated 13 November 2023 to the BMA which assured the BMA that: "all assets held by the company are safe and secure and are available, subject to applicable law and the Terms of Service, for full and complete settlement of customer withdrawal requests at any time." He submitted that this was a reference to clauses 6.4 and 13.3 of the Terms and Conditions. This explained why as the judge said it was not really necessary to get into the precise characterisation of the nature of the rights under DABA. Even if BGI was right that the only rights are contractual, these provisions gave a cast iron contractual right to the return of the balances on the accounts as shown in the attribution table.

136. Second, the liabilities can be precisely quantified from the company's books and records, an obvious analogy with what was said in *Re Herald Fund*. Third, all the debts are undisputed and admitted, again an obvious analogy with *Re Herald Fund.* Fourth, there is a multitude of low value claims. By analogy with English insolvency rules, where low value claims benefit from automatic admission, it could hardly be described as irrational to order automatic admission in the present circumstances. Fifth, the Terms and Conditions contained the Unclaimed Property provision at 10.8. Mr Cloherty KC submitted that it was difficult to see what this could be other than the assets deposited by the customers. The provision recognised that the unclaimed property would be dealt with pursuant to court order. Sixth, he submitted that for reasons he gave later, the assets are or should be treated as ring-fenced for the customer claims.

137. Mr Cloherty KC turned to make submissions as to why the assets did not belong to the company. He pointed out that, if the Court was with the BMA on automatic admission, then this issue was effectively academic because the assets are all there to be paid to customers. He submitted that when, in [210] to [215] of the judgment, the judge explained why he would have ordered automatic admission of his own motion, his reasoning was not predicated upon the customers having a proprietary interest in the assets. The customers were entitled to automatic admission even if their claims were only contractual. As the President put to him, the assets must be available to the customers applying the fundamental principle that the shareholder does not get anything until the creditors' claims have been met in full.

138. Mr Cloherty KC submitted that the way the business worked was that customers deposited their tokens which were held in an omnibus way by the exchange. When trades were executed between customers (who had to have an account with the company to trade) the ledger entries and customer attribution table and the balance on the respective accounts were updated to reflect the trade, which happened every 30 seconds. He submitted that there was no doubt that the assets were in the custody of the company. Furthermore, this was confirmed by 27.4(a) of the Business Plan which provided under the heading "Customer Funds": "the Bittrex Global Platform will provide custody of customer funds". It is abundantly clear that the company was a custodial wallet provider within the meaning of DABA.

139. He submitted that the distinction which BGI sought to draw between custodial and non-custodial wallets boiled down to whether there was a trust on the one hand and some non-trust arrangement on the other. However, this is at odds with the conventional understanding of the difference between the terms custodial and non-custodial which in the industry is the difference between when the firm controls the wallet (custodial) and when the client retains control over the wallet (non-custodial, sometimes called "self-custody"). He submitted that in the present case custody was how a centralised exchange like Bittrex worked. It controlled an omnibus wallet representing all deposits.

140. Mr Cloherty KC referred to *Goode & Gullifer: Legal Problems of Credit and Security* (7th ed. 2023) at [6-32]: Methods of Holding Digital Assets which states:

> "An owner may have control using hardware or software (even online software) provided by another party. Software of this nature is sometimes called a "wallet". However, as long as the owner controls the digital asset, this arrangement does not amount to custody. Thus, the owner remains the (legal) owner of the digital asset, and any duties owed to it by the other party are contractual or, possibly, tortious.
>
> However, in many contexts, owners of digital assets prefer a holding structure whereby another party controls their digital assets. Such a structure may be expressly called a custody arrangement, or the other party may be called an "exchange" and will usually control its clients' digital assets in order to facilitate trading. Where such arrangements are governed by English law, there are two possible analyses. Which one applies will depend on the terms of the agreement between the parties. One analysis is that ownership of the digital assets passes to the other party, and all the client has is a personal claim against that party for transfer of the assets on demand. This analysis is similar to that applied to a bank account. The benefits of this structure are likely to be that the other party can pool the assets deposited with it, and use these assets in loans or other transactions to generate income. The income can be used to reduce the cost of the services provided by the other party, or can even

> be passed on to the client, making this structure economically attractive. The disadvantage from the point of view of the client is that the assets held by the other party will form part of its insolvency estate for distribution to creditors, since the client has no proprietary interest in the assets.
>
> The other analysis is likely to apply where the agreement between the client and the other party is expressly stated to be one of custody and also, even in the absence of such an express statement, where the other party does not have an unrestricted right of use of the assets, and where it is clear that the other party owes the client some safe-keeping duties. This analysis is that the other party holds the digital assets on trust for the client. On the basis that digital assets can be "property" under English law, there seems to be no problem with them being held on trust in this way providing that the requirements of a valid trust are fulfilled. In this situation, the client will have a proprietary interest and the digital assets will not form part of the custodian's insolvency estate."

141. He submitted that it was important to stand back and think about what the business was here. The company did not acquire rights to take all the customer's assets and use them in its own proprietary trading to generate income for itself. It was a pure exchange. This pointed clearly towards the beneficial ownership being with the customer. The distinction which BGI seeks to draw between Standard Hosted Wallets and Enhanced Hosted Wallets does not have anything to do with the distinction between custodial and non-custodial. Both types of wallet are custodial hence their being "Hosted".

142. In relation to the applicable legal principles, he emphasised first the need for a purposive construction of legislation and reminded the Court that the preamble to DABA made clear that its purpose was protecting the interests of clients and potential clients. He referred to the decision of the UK Supreme Court in *Lehman Brothers International (Europe) (in administration) v CRC Credit Fund Ltd and others* (*"Lehmans"*) [2012] UKSC 6; [2012] Bus LR 667 where the need to construe the legislation in accordance with that protective purpose was stressed by Lord Dyson JSC at [138] and [147]:

> "138 The important point, however, is that the judge rightly acknowledged the principle that it is necessary to construe CASS 7 in a manner which promotes the purpose of providing a high level of protection for clients as required by the Directives.
> …
>
> 147 As I have said, the resolution of this question depends on the true construction of the relevant provisions of CASS 7. But in approaching this question of construction, it is necessary to bear in mind that (i) all client money is subject to the statutory trust and, (ii) where there is a choice of possible interpretations, the court should adopt the one which

> affords a high degree of protection for all clients who have client money with the firm and to safeguard their interests, thereby furthering the purposes of the Directives. It is not the purpose of the Directives to provide a level of protection only for those clients who are recorded in the firm's ledger as clients with client money entitlements when the firm calculated the net amount to segregate at the last reconciliation."

143. Mr Cloherty KC challenged the submission by Mr Cumming KC that legislation should be construed to give effect to freedom of contract as somehow a fundamental principle of the common law. *Morgan Grenfell*, on which BGI had relied, was concerned with a fundamental principle of legal privilege. The whole point of legislation whose express purpose is to regulate firms so as to protect clients' interests, with a general prohibition on conducting business without a licence with which the firm complies, was to restrict the firm's ability freely to contract.

144. The second general principle on which he relied was that, if the DABA provisions apply, it is not possible to contract out of them in the way BGI contends. He relied on *Lehmans*. The principal issue there concerned the application and interpretation of Chapter 7 of the Client Assets Sourcebook ("CASS 7") issued by the Financial Services Authority for the safeguarding and distribution of client money in implementation of the Markets in Financial Instruments Directive 2004/39/EC ("MiFID"). As Lord Hope of Craighead said at [1] of his judgment in the UK Supreme Court: "The central feature of the client money rules is the requirement that CASS 7 imposes on MiFID firms to segregate money that they receive from or hold for or on behalf of their clients in the course of MiFID business by placing it into a client money account so that it is kept apart from the firm's own money."

145. In that case, the firm had not segregated all the client money as they should have done. The Courts held that all the clients participated in the pool of assets whether or not the firm had complied with the duty to segregate because the regulatory requirements applied to the assets and did not depend on what the firm in fact did. He referred the Court to a number of passages in the judgments in the UK Supreme Court. At [191]-[192] Lord Collins said:

> "191. That conclusion [that a firm which receives client money is under an immediate fiduciary duty] is also inevitable in the light of the requirement in article 13(8) of MiFID, which obliges member states to require an investment firm "when holding funds belonging to clients" to "prevent the use of client funds for its own account". CASS 7 must be construed in order to comply with that requirement. It is also supported by articles 16(1) and 16(2) of the Implementing Directive, and by CASS 7.3. Article 16(1) of the Implementing Directive provides that client funds are to be held in accounts separate from the firm's funds, and that firms must introduce adequate organisational arrangements to minimise the risk of loss or diminution of client assets, as a result of (inter alia) the

misuse of assets. Most important, if because of insolvency law the arrangements are not sufficient to safeguard clients' rights, member states have to prescribe the measures that investment firms must take in order to comply with those obligations: article 16(2). CASS 7.3.1R provides that the firm must prevent the use of client money for its own account.

192. I accept the respondents' argument that if the trust did not arise until segregation, then whether or not clients are protected by the CASS rules would become arbitrary and dependent on the firm's own practices: the greater the level of incompetence (or misconduct) on the part of the failed firm, the lesser the protection for clients."

146. Lord Clarke said at [112], agreeing with Lord Collins:

"112. In particular I agree with Lord Collins' conclusion at para 192 that, if the trust does not arise until segregation, then whether or not clients are protected by CASS 7 would become arbitrary and dependent upon the firm's own practices; and the greater the level of incompetence or misconduct on the part of the firm, the less the protection for the clients. This consideration seems to me to support the conclusion that CASS 7 is intended to protect all clients who provided money and have contractual claims."

147. Mr Cloherty KC's third general principle was that it was not necessary to get hung up about finding that there was a trust. He referred to the decision of the English Court of Appeal in *Re Ipagoo LLP* [2022] EWCA Civ 302; [2022] Bus LR 311. That concerned the status under the Electronic Money Regulations 2011 of funds received by an electronic money institution from electronic money holders in the event of its insolvency. Regulation 24(a) provided that "where there is an insolvency event … — (a) the claims of electronic money holders are to be paid from the asset pool in priority to all other creditors." The Court held that although no statutory trust was created, the regulation created a secured interest in the asset pool which applied before the statutory waterfall.

148. Mr Cloherty KC also relied upon what Lord Collins said in *Lehmans* at [189]:

"189. A statutory trust does not necessarily bear all the indicia of a trust as would be recognised by a Court of Chancery. Thus in *Ayerst v C&K (Construction) Ltd* [1976] AC 167, 180, Lord Diplock said (in the context of a trust arising on insolvency) that all that might be meant by the use of the word "trust" was giving property the essential characteristic which distinguishes trust property from other property; namely, it cannot be used or disposed of by the legal owner for his own benefit but must be used or disposed of for the benefit of others. Thus CASS 7.7.1G provides that the statutory trust creates a relationship under which client money is in the legal ownership of the firm "but remains in the beneficial

ownership of the client". Consequently, it does not follow that, when the word "trust" is used, that brings with it the full range of trust indicia associated with a traditional private law trust, particularly so when the trust is imposed by statute and is in the context of the exercise of a public function: cf *In re Ahmed & Co* [2006] EWHC 480 (Ch); 8 ITELR 779.

149. Mr Cloherty KC submitted that both these cases demonstrate that one can discard the label "trust" and look at the substance of the matter: do the customers have a proprietary interest or a secured interest in the assets or are the assets ring-fenced.

150. In relation to the 2023 Terms and Conditions, Mr Cloherty KC relied upon the fact that clause 6.2 was headed "Custody", from which it followed that both types of Hosted Wallet were custodial. He noted that under clause 6.4, the customers were freely able to withdraw their tokens at any time and asked rhetorically if the customers had no proprietary interest in the tokens why do they need to authorise Bittrex to make transfers from their hosted wallet under that clause. Likewise, under clause 7.4 dealing with trades, why does the customer need to authorise Bittrex to take temporary control of the tokens being disposed of in the trade if they belong completely to Bittrex.

151. He submitted that the fact that the company could charge storage fees for storing tokens supported the case that the tokens belong to the customer. The company could hardly charge the customer for storing its own tokens nor would the provision in clause 12.5 that authorised the company to remove tokens from the wallet in respect of such fees be necessary. The charging of storage fees is a paradigm of a custodial arrangement. He agreed with the point I made in argument that this was like the storage of goods in a warehouse and the arrangement with a warehouseman. He pointed out that bailment was an instructive analogy because the customer had to part with legal title in the goods when they are deposited in the warehouse but was not parting with its ownership rights.

152. Mr Cloherty KC submitted that, although Mr Cumming KC had submitted that the provision at the end of clauses 4.2 and 6.2: "Tokens are held by [Bittrex] in accordance with the requirements of DABA, and applicable ancillary regulations, statements of principle, codes of conduct and guidance notes promulgated by the Bermuda Monetary Authority" was a "boilerplate" provision, it was talking about the statutory requirements in relation to the holding of assets. The only provisions of DABA which contain requirements as to the holding of assets are sections 17 and 18. He submitted that this provision was an undertaking to apply sections 17 and 18.

153. In answer to my question about the meaning of the second and third sentences of clause 4.2: "You transfer your right of disposal of the Tokens (sic) to [Bittrex]. Such Tokens are in the inventory of [Bittrex] at the point of transfer, and [Bittrex] can freely dispose of them" Mr Cloherty KC

submitted that they could not be viewed in isolation from the remainder of the Terms and Conditions. They made it clear that Bittrex was only authorised to use customers' tokens to settle trades and to deduct fees. In any event, even viewed in isolation, the provision did not defeat his argument. Even if the tokens transferred to Bittrex became at their free disposal, that has nothing to do with whether by the other provisions of the contract, Bittrex was recognising that the customers have a proprietary interest in the balance shown in their account from time to time.

154. He referred the Court to the judgment of Briggs J (as he then was) in *Lomas v Rab Market Cycles (Master) Fund Limited* [2009] EWHC 2545 (Ch), a decision in the Lehmans administration concerned with the prime brokerage relationship. Mr Cloherty referred to [53]-[54] and [56]-[57] of that judgment and asked the Court to note that, even though the prime broker had a right to use the securities and a right of rehypothecation, the Court held that the counterparties to securities had a proprietary or beneficial interest in them. He emphasised [70] where Briggs J found that a telling indicator in favour of a proprietary interest was the express right of redemption conferred on a counterparty by the agreement. Similarly, in the present case, the Terms and Conditions in several places gave the customer the absolute right to withdraw the tokens. Mr Cloherty KC submitted that, if anything, this case was stronger, since unlike in *Rab Market Cycles*, the company could not use the customers' tokens to trade on its own account. The holding of securities in omnibus fungible accounts was directly comparable with the present case, except it was tokens not securities in the accounts. Similarly, the obligation on the prime broker there was only to deliver to the client equivalent securities. None of this precluded the client in *Rab Market Cycles* from having a proprietary interest.

155. Mr Cloherty KC then made submissions about sections 17 and 18 of DABA. Section 17 was about segregation of assets, which Bittrex had in fact done; hence the attribution table. He submitted that the phrase "holding client assets" in the section should not be construed extremely narrowly in the way Mr Cumming KC adopted. It should be interpreted in the context of Bittrex undoubtedly being a custodial wallet provider. By definition, a custodial wallet provider is holding client assets. It does not matter that the client might not have an absolute beneficial interest. The whole point of segregation is that to ensure that the assets will be available to meet client claims in the event of insolvency.

156. He submitted that the obligation in section 18(3) to "maintain in its custody a sufficient amount of each type of digital asset in order to meet its obligations to clients" patently applied to Bittrex. The obvious reason why the legislature is imposing that obligation is to ensure that, in the event of insolvency, there are sufficient assets to meet all the customer claims. This is what Bittrex in fact did.

157. In relation to section 18(4), he noted that Mr Cumming KC submitted that this was purely definitional, so that if you are not in the kind of

arrangement described, none of section 18 applies. Mr Cloherty KC submitted that this was wrong. The whole point of section 18(4) was to declare as a matter of general law what the effect of holding assets is and provide complete bankruptcy remoteness of the assets. The inspiration for the subsection was section 502(c) of the U.S. Uniform Regulation of Virtual Currency Business Act which provides:

> "(c) The virtual currency referred to in this section is: (1) held for the persons entitled to the virtual currency; (2) not property of the licensee or registrant; and (3) not subject to the claims of creditors of the licensee or registrant."

158. The Comment accompanying that section makes clear that the effect of the provision as a matter of general law is bankruptcy remoteness. What has happened in section 18(4) of DABA is the unfortunate verbiage of "that which is". If those words were not there, it would be absolutely clear that the subsection is declaring what the effect of the arrangement is as a matter of general law. However, the provision should still be interpreted in that way despite the verbiage. If, as Mr Cumming KC submitted, it was purely definitional, it would be completely pointless.

159. Mr Cloherty KC dealt finally in his submissions with the storage fees issues. He pointed out that, on first principles, once the winding up occurred, the customers' claims were crystallised as at the date of the winding up. The existing contracts between the company and its creditors would not continue unless adopted by the liquidators which was not suggested here. Properly understood, the costs of storing the assets are costs and expenses of the liquidation. However, what happened with the storage fees here, albeit that this was endorsed by the Court in the bar date order, is that they were charged directly to the creditors, the effect of which was to wipe out the liabilities in the cases of customers with small balances on their accounts. This gave the company the artificial appearance of solvency.

160. He demonstrated this by reference to Ms King's ninth affidavit in the tables to which Mr Cumming KC had referred. However, footnote 20 made clear that the figures for the company's liabilities assume that the estate can recoup the costs of the liquidation (i.e. the storage fees) direct from the digital assets. However, if one adds back in the liabilities said to have been wiped out, the company is plainly insolvent, as the liabilities would shoot up and certainly exceed the US$5 million assets. Ms King rightly recognises this in [55] of that affidavit where she acknowledges that the ability to collect the storage fees to meet the costs of the liquidation is absolutely essential to the solvency of the company. Furthermore, the cost of the storage fees became an even more pressing cost of the liquidation from 30 April 2025 when the JLs were forced to enter into the new SLA in relation to storage which charged a monthly fee of US$1.5 million and a termination fee of US$9 million.

161. Mr Cloherty KC accepted that the judge was going to look at this issue of storage fees more closely at a forthcoming hearing so that this Court might say that, whilst we followed the rival contentions, we hold off doing anything ourselves until the judge had gone through that process. However, there is no real answer to his points about the artificiality of all this and so he invited this Court to make that clear.

162. Mr White, on behalf of the JLs, made short submissions in reply. For present purposes it is only necessary to note his submission about the JLs' sanction application, that before the judge his position was that the JLs were essentially agnostic as to whether this was dealt with under section 175(2)(h) or section 192 of the Companies Act 1981. It was not proposed that the JLs exercise any power without a Court order. Because of the change of position by the BMA in January 2025, the application contemplated two stages: first, that the Court consider whether a distribution to the shareholder could be made in principle and second, if it could, what should be the quantum of that distribution.

163. In his reply submissions, Mr Cumming KC submitted that the BMA was wrong to say that whether the customers had some proprietary right to the assets in their accounts was academic. Furthermore, the judge's decision to automatically admit their claims was dependent on his conclusion that they had a proprietary interest. He submitted that, if this was right, they are not capable of automatic admission as creditors because they are third parties with a proprietary interest, not creditors.

164. He submitted that the BMA remained vague as to the nature of this right. Was it in the nature of an appropriation or charge? Ring-fencing is not a term set out in the statute and without more, is meaningless. It was worth remembering that this all began with the Conyers letter of 27 January 2025 (referred to at [87] above) where it was put on the basis of a statutory trust.

165. In relation to the BMA's reliance on the decision of the UK Supreme Court in *Lehmans*, he submitted that it was dealing with different terms in a different scheme in a different context.

166. He submitted in relation to the US legislation that DABA was not simply a read across. The US legislation used the concept of "control", but DABA adopted the concept of "holding client assets". It was inappropriate to simply say that section 18(4) replicated section 502(c) of the U.S. Act apart from some unfortunate verbiage. Section 25 of the Segregated Assets Companies Act represented what the legislature did when it wanted to give the customer a proprietary interest.

167. In relation to the passage from *Goode & Gullifer* set out at [126] above, he submitted there were three alternatives as to how tokens could be held. First, the person holds the token and the key for themselves, so they are the legal absolute owner. The second is that the person enters a contract for a custodial wallet and transfers the token and key to the custodian, keeping a

proprietary interest in it even though they do not possess it. That is a trust, whatever tag you put on it. The third is that the person gives away the token and key completely to an entity such as Bittrex which becomes the absolute owner of the asset, but the customer has a contractual right to an equivalent amount of tokens. That is a non-custodial wallet and is the present case.

168. In relation to Mr Cloherty KC's criticisms of the scope of the proposed indemnity, the complete answer was the point Mr White had made about this being a two-stage process. The scope of the actual indemnity and its provisions could be scrutinised by the Court at the second stage. There would be no point in spending time and money negotiating an indemnity if the Court refused the application in principle at the first stage.

**Discussion**

169. Logically, the first question which needs to be considered is whether BGI has standing to pursue the appeal. As already indicated at [10] above, I consider that it does. As is made clear by Lord Denning's judgment in *Attorney-General of the Gambia* quoted at [107] above, the words "person aggrieved" in the Court of Appeal Act 1964 are of wide import and include anyone "who has a genuine grievance because an order has been made which prejudicially affects his interests". BGI clearly falls into that category. It is no answer to say that BGI had the opportunity to be fully represented and make submissions before the judge. It sensibly left to the JLs the pursuit of the sanction application, which the JLs had issued and I suspect that any submissions BGI would have made would have been duplicative.

170. Another preliminary issue to be considered before turning to the substantive grounds of appeal is the BMA's argument that the judge found that the JLs did not have the power to make an interim distribution under section 175(2(h) of the Companies Act 1981, on the basis of the authority of *Re Phoenix Oil and Transport Ltd (in liquidation) No. 2*, so that the sanction application failed at the first hurdle and that there was no appeal against that finding. Attractively though that argument was presented, I consider that it is a technical point which, on analysis, does not avail the BMA. The judge was well aware that the power to make an interim distribution was only given to the Court, not the liquidator. At [197] of the judgment, he said that he would not have been prepared to exercise the power under section 192, from which it is apparent that the Court was being asked to consider exercising that power. This was confirmed by Mr White for the JLs in his reply submissions, as set out at [162] above. The JLs had not been proposing to exercise any power without a Court order and, as he put it, he had been agnostic as to whether the Court proceeded by way of section 175(2)(h) or section 192.

171. I turn to consider in relation to each ground of appeal whether BGI should be given leave to appeal and, if so, whether that ground succeeds.

172. Despite the ingenuity of the submissions advanced by Mr Cumming KC on the first ground of appeal, I am firmly of the view that the judge was correct to conclude that digital assets transferred by customers to Bittrex and held in Standard Hosted Wallets were held beneficially for customers who had a proprietary interest in those assets, which had not become the assets of Bittrex. I have reached that conclusion for a number of reasons.

173. First, immediately prior to transfer and at the moment when a digital asset was transferred to Bittrex, it was clearly owned legally and beneficially by the customer. Thus, at the start of the relationship between Bittrex and its customer, it was holding customer's assets. This brought into play sections 17 and 18 of DABA, which regulate the holding of client assets. Section 17 requires client assets to be held in separate accounts from the accounts for any other business of the company. As Mr Cloherty KC said, this was in fact done by Bittrex.

174. Section 18(1) requires the maintenance of a surety bond or trust account or indemnity insurance or such other arrangement as the BMA approved. The concept of a trust account should be given a wide meaning in this context as the judge said at [159] of his judgment:

> "A "trust account" is the shorthand term used to refer to a separate account in which assets are held on someone else's behalf or for a purpose to be carried out on that person's behalf, but it connotes that the assets that are held in the account do not belong to the account holder beneficially."

175. In my judgment, the legislative purpose of the subsection (as also reflected in the preamble set out at [34] above) was to ensure full protection for a customer's assets by their separation from the company's own assets and to ensure bankruptcy remoteness. Although there was nothing connoted as a trust account, that purpose was achieved by the assets held in Standard Hosted Wallets being held separately from the company's own assets and, as expressly provided in clause 6.4 and 13.3, available for withdrawal at any time. Furthermore, the assets were attributed to each customer in the attribution table and in turn recorded in the deposit balances on the wallet accounts in accordance with the legislative purpose.

176. Section 18(3) requires a licensed undertaking which has custody of assets for multiple customers to maintain in its custody a sufficient amount of each type of digital asset in order to meet its obligations to clients. Again, it appears that this was done by Bittrex.

177. Whilst the opening line of subsection (4) is somewhat awkwardly phrased, I consider that the meaning of the provision is clear. It is describing the legal effect of the section in relation to client assets held by the licensed undertaking, namely that the asset is held for the client who is "entitled to" the asset, that it is not the property of the licensed undertaking and that it is not subject to claims of the creditors of the licensed undertaking. This

construction of section 18(4) is consistent with the legislative purpose of protecting client assets and ensuring bankruptcy remoteness. The words "entitled to" convey that the customer is intended to have some proprietary interest in the digital asset. I agree with Mr Cloherty KC that if the provision were purely "definitional" as Mr Cumming KC submitted, it would serve no purpose.

178. Second, as a licensed undertaking, Bittrex was required to comply with the provisions of DABA and the Code of Practice. Nothing in the statute permits the sort of arrangement for which BGI contends, the non-custodial wallet of assets transferred by the customer which have then become the absolute property of the licensed undertaking, so that the customer has no protection against the insolvency of the licensed undertaking. This is inimical to the protection which DABA and, in particular, sections 17 and 18 are intended to provide and would drive a coach and horses through that protection and defeat the legislative purpose reflected in the preamble to the statute.

179. If clauses 4.2 and 6.2 have the meaning for which Bittrex contends, that it has become the absolute owner of the digital assets to which the customer has no claim other than a contractual one and the customer therefore is not protected in the event of the company's insolvency, then it will have purported to contract out of the statute. Contrary to what Mr Cumming KC submitted, freedom of contract is not some fundamental principle of English law against which legislation must be construed. It is very different from the fundamental human right of legal professional privilege which Lord Hoffmann was talking about in *Morgan Grenfell*.

180. Bittrex was prohibited from conducting business without a licence with which it complied. The conditions of the licence included compliance with the Business Plan submitted to the BMA. The Business Plan required Bittrex to provide custody of customer assets under the Bittrex Global Platform. In my judgment, Mr Cloherty KC was correct when he said that the whole point of legislation whose express purpose is to regulate firms so as to protect clients' interests, with a general prohibition on conducting business without a licence with which the firm complies, was to restrict the firm's ability to freely contract.

181. This inability to contract out of the statute is, as Mr Cloherty KC submitted, supported by the passages in the judgments in the UK Supreme Court in *Lehmans* cited at [145]-[146] above. It is no answer to say, as Mr Cumming KC sought to do, that that was a different statute in a different context. Although the statutory provisions under consideration there were different, the legislative purpose was the same, the protection of client assets or money and their segregation from other assets of the firm or undertaking.

182. Third, not only is BGI's case contrary to the statutory protection, but it is contrary to its own contractual commitment in the closing words of both clause 4.2 and clause 6.2 of the 2023 Terms and Conditions:

> "Tokens are held by [Bittrex] in accordance with the requirements of Bermuda's Digital Asset Business Act 2018, as amended ("DABA") and applicable ancillary regulations, statement of principle, codes of conduct and guidance notes promulgated by the Bermuda Monetary Authority."

Although Mr Cumming KC repeatedly described those closing words as "boilerplate", the fact of the matter is that those words contained a contractual commitment by Bittrex that tokens transferred to Bittrex by customers are "held in accordance with the requirements of [DABA]". Despite Mr Cumming KC's efforts to suggest that this may have been referring to other provisions of DABA, the reality is that the only provisions which set out any "requirements" as regards holding customers' assets are sections 17 and 18.

183. Fourth, clauses 4.2 and 6.2, upon which BGI places so much emphasis, cannot be considered in isolation. The 2023 Terms and Conditions have to be considered as a whole. Both clauses 4.2 and 6.2 themselves talk in terms about the company holding "your tokens" and the provision in clause 6.2 is headed "Custody". I agree with Mr Cloherty KC that this demonstrates that both types of hosted wallet are custodial. I also agree with him that there are other provisions of the 2023 Terms and Conditions which are consistent with the customer retaining a proprietary interest in the digital assets. If customers did not have some proprietary interest, it would hardly be necessary for them to authorise the company to make transfers from the hosted wallet under clause 6.4, or to take temporary control of tokens being disposed of in a trade under clause 7.4 or to remove tokens from the wallet for payment of storage fees under clause 12.5. If Bittrex had become absolute owners of the digital assets both legally and beneficially there would be no need to seek the customer's authorisation in that way. Furthermore, as Mr Cloherty KC pointed out, both clause 6.4 and clause 13.3 entitle the customer to request a full withdrawal of his or her tokens at any time, an entitlement that is not dependent upon whether the customer has a proprietary interest in the tokens.

184. Although clause 4.2 refers to Bittrex being able to freely dispose of the customer's tokens, I agree with Mr Cloherty KC that it is important to have in mind the nature of the company's business. It did not acquire rights to take all the customer's assets and use them in its own proprietary trading to generate income for itself. It was an exchange and the Terms and Conditions as a whole made clear that Bittrex was only authorised to use the customer's tokens to settle trades or to deduct storage fees. As Mr Cloherty KC submitted, there was an analogy between the present case and *Rab Market Cycles* and, if anything, this case was stronger because, unlike Lehmans in that case, Bittrex could not use the customer's tokens to trade on its own account.

185. Fifth, although Mr Cumming KC was critical of the BMA's case as to how the proprietary interest was characterised, it is important not to become fixated with labels rather than focusing on the substance. The fact that the BMA no longer pursues a case of statutory trust does not mean that it is not correct in its overall argument that the customers retained a proprietary interest in the digital assets. A "trust account" is only one of the means of ensuring the segregation of the customer's assets as required by section 18(1) of DABA. The essential point that that subsection is conveying is that the assets should be ring-fenced in some way to keep them separate from the company's own assets and to ensure bankruptcy remoteness.

186. In this context, the analysis of Electronic Money Regulations by Asplin LJ in *Re Ipagoo LLP* (referred to at [147] above) is instructive. At [93] to [95] she said:

> "93. Ms Toube also says that regulation 24 cannot affect the order of priorities on an insolvency because that would entail an amendment to the Insolvency Act 1986 (the "1986 Act") which the EMRs do not purport to effect. Accordingly, she submits that the regulation should not be construed to be any more than an administrative provision in support of a statutory trust of the relevant funds. I have already decided that a statutory trust does not arise. I also take a different view about the nature and status of the regulation.
>
> 94. As Mr Watson stated in the additional written submissions which we requested from the parties after the hearing, regulation 24 creates a bespoke statutory regime in relation to the asset pool. The electronic money holders are granted rights over that pool in priority to other creditors by virtue of the express wording of regulation 24(1)(a). Those rights might best be analysed as a secured interest over the asset pool once it is interpreted in the light of the EMD. Further, in my judgment, that secured interest, like any other, applies before the waterfall under section 175 of the 1986 Act and stands outside it. There was no need to amend the 1986 Act, therefore, or for the EMRs to make express reference to it. The statutory regime under the 1986 Act applies after distribution has taken place under regulation 24.
>
> 95. It seems to me that regulation 24(2) is consistent with that analysis. It makes clear that the asset pool is intended to stand apart from the normal insolvency regime and should only bear the costs associated with distributing it (and as I have explained, if necessary, the costs of reconstituting it). The electronic money holders' claims are not to be subject to the priority of expenses of an insolvency proceeding."

187. In that case, as in the present one, the purpose of the statutory provisions was to protect the customers' assets from being caught by the statutory waterfall and to ensure that, as Asplin LJ said, they stood apart from the insolvency regime. It was not necessary for there to be a statutory trust for

that ring-fencing of assets to be achieved and what label is deployed for reflecting the customers' proprietary interest does not matter.

188. In any event, even if it were not correct that the customers retain a proprietary interest in the digital assets held in the Standard Hosted Wallets and their only claim was a contractual one as BGI contends, the judge was correct to refuse to make an order, even in principle, for the distribution of those assets as surplus to the sole shareholder. This is because, as the President said in the course of argument, irrespective of whether the customers had a proprietary interest, these are unclaimed and undistributed assets in respect of identifiable, undisputed claims and as such they should not be distributed as surplus but paid over to the customers through the process of automatic admission or, if they remain unclaimed and undistributed after that process, into the Consolidated Fund under section 257 of the Companies Act 1981. That this is the correct approach in relation to unclaimed assets is confirmed by clause 10.8 of the Terms and Conditions relating to "Unclaimed Property", of which the obvious example is unclaimed digital assets in the Standard Hosted Wallets.

189. In other words, applying the principles set out by Jenkins J in *Re Armstrong Whitworth Securities* quoted at [120] above, the claims of the customers whose assets remain in the Standard Hosted Wallets are claims of creditors which must take priority over any distribution to the shareholder. The fact that none of these customers has filed a proof of debt does not preclude the application of these principles as is clear from the judgment of Sir Robert Megarry V-C in *Re R-R Realisations* cited at [127] above. The bar date order does not prevent the application of those principles. As the judge correctly held, that order simply enabled the JLs to exclude the customers who had not proved their claim from participating in the interim distribution. It did not extinguish the claims of the customers who had not filed proofs of debt.

190. At first blush, there was some force in Mr Cumming KC's submission that the offer of an indemnity backed by appropriate security, as set out in Ms King's seventh affidavit, should have persuaded the judge to allow the first stage of the sanction application, a determination that there should be a distribution to the sole shareholder in principle. However, on closer analysis, I consider that there is nothing in the indemnity point. The offer was in somewhat vague terms as Mr Cloherty KC submitted. It was not clear who was going to provide the indemnity or the security to back it, in circumstances where many of the entities in the Bittrex Group were in liquidation or otherwise in financial difficulties. The indemnity being offered by BGI was time limited until the end of the liquidation so it was unclear whether it would continue to provide adequate protection for customers. In any event, even if the indemnity were adequate, I consider that its availability cannot be used in effect to subvert the legal principle to which I have referred, that the claims of the customers must be satisfied before any question of a distribution to the shareholder arises. To the extent

that there are practical difficulties because customers have not come forward to claim the value of their assets, the correct course is for the assets to be converted into stablecoin and transferred to the Consolidated Fund.

191. I will consider the question of automatic admission under my conclusions in relation to the second ground of appeal below, but what should be emphasised finally in relation to the first ground of appeal is that, on the basis that, even if the customers did not have a proprietary interest in the assets, the judge was correct to refuse to order any distribution to the shareholder before the claims of the customers had been satisfied. Therefore, in a very real sense, the first ground of appeal is academic because the judge's decision was the right one, irrespective of whether the customers had a proprietary interest in the digital assets. Notwithstanding that it is academic, it was sufficiently arguable for leave to appeal to be given, though for the reasons I have given, I am firmly of the view that the first ground should be dismissed.

192. The second ground of appeal seeks to criticise the judge's order for automatic admission of customers with positive balances as creditors without further proof under Rule 64(1) of the Winding Up Rules 1982. That provides:

> "In a winding-up any creditor shall prove his debt unless in any particular winding-up the Court shall give directions that any creditors or class of creditors shall be admitted without proof."

193. The Rule clearly gives the Court a discretion to admit the customers' claims without proof. This Court could only overturn the judge's exercise of his discretion if we were satisfied that no reasonable judge could have reached that decision or the decision was irrational. As Mr Cloherty KC submitted, that is a heavy burden and BGI cannot begin to discharge it.

194. As the President explained in his judgment in *Re Herald Fund* (the relevant passages from which are cited at [134] above), there is in substance no difference between an admitted debt and a proved debt, and "proved" means no more than established through whatever legally recognised process the JLs (under the supervision of the Court) deem appropriate. In the present case, the liabilities can be precisely quantified from Bittrex's books and records, and the debts are undisputed, factors which, as [84] of the judgment in *Re Herald Fund* makes clear, will establish the relevant debts without formal proof.

195. In any event, as Mr Cloherty KC pointed out, there is a multitude of low value claims. Under the English insolvency rules such low value claims would be entitled to automatic admission and the application of the same approach by the Supreme Court in Bermuda by analogy cannot be open to serious criticism. Furthermore, as he submitted and as I have already noted, the Unclaimed Property provision in clause 10.8 which is obviously

applicable to the unclaimed assets under consideration expressly contemplates that this would be dealt with by Court order.

196. Mr Cumming KC sought to argue that if, as I have found, the customers have a proprietary interest in the digital assets, then it would be wrong for them to prove in the liquidation and wrong for the judge to give the directions for automatic admission of their claims, since the assets were not the property of the company and accordingly did not fall into the liquidation. The logical consequence of that argument is that all the customers' claims (including those of customers who filed proofs of debt and who have been reimbursed) fell outside the liquidation and the JLs should never have engaged in the proof of debt process which has been approved by the Court. This is obviously not correct and the argument overlooks the fact that the customers' claims can be and are both proprietary and contractual. The finding of a proprietary interest does not exclude their contractual claims in relation to which they are creditors of the company.

197. The argument advanced by Mr Cumming KC, that it was not open to the judge to make the direction for automatic admission because, in effect, it varied or rescinded the bar date order of the Chief Justice which the judge had no jurisdiction to do, is misconceived. The Chief Justice's Order of 23 August 2024 simply did not deal with what would or might happen in relation to unclaimed assets in the Standard Hosted Wallets after the proof of debt process was concluded, nor did Ms King's fifth affidavit address that issue because it was yet to arise. The sanction application was not then contemplated or before the Court. In those circumstances, it was open to the JLs and the BMA to seek automatic admission in the light of the Court's refusal of the sanction application. Furthermore, there had been a material change of circumstances since the bar date Order. The BMA only became aware of the substantial pool of assets of customers who had not filed proofs of debt and that it was proposed to distribute this as a surplus to the sole shareholder in January 2025, after the Order of the Chief Justice.

198. The fact that the issue of automatic admission was not before the Chief Justice and that there had been a material change of circumstances is also a complete answer to Mr Cumming KC's submission that there is an issue estoppel. In any event, as Mr Cloherty KC correctly submitted, the fact that the BMA had acquiesced in the order of the Chief Justice did not preclude it from objecting to the proposal to make a distribution of the surplus to the shareholder, irrespective of whether there was a material change of circumstances, because of the duty of the Court and its officers in relation to the supervision of the liquidation as described at [129] above.

199. In the circumstances, there is no arguable basis for challenging the judge's exercise of his discretion under Rule 64(1) to order automatic admission. How that order is put into effect in practice will be for the judge at a further hearing.

200. The third ground of appeal falls away in the light of my conclusion on the first ground of appeal and, as I have already indicated, the fourth ground can be ignored because BGI accepted that the BMA had standing to participate in the appeal.

201. In the light of my conclusion that BGI has standing to pursue the appeal, the answer to the fifth ground of appeal, that the judge erred in refusing the joinder application, must be that this ground succeeds. The judge was wrong to refuse the joinder application. However, this is again academic, given my conclusion that the other grounds of appeal must be dismissed.

202. Turning to the sixth to eighth grounds of appeal which criticise the judge's directions given after the hearing on 24 September 2025, the sixth ground concerns the disapplication of storage fees to the claims which are now the subject of automatic admission. As already noted at [79] above, in his written Reasons the judge indicated that he would schedule a hearing for the presentation of full written and oral argument on the storage fees issue. That hearing has yet to take place. Nonetheless, Mr Cloherty KC urged this Court, if we agreed, to find that BGI's approach was an artificial one. I would decline to make any finding about the storage fees issue, which in the first instance should be left to the judge at the forthcoming hearing without any premature intervention by this Court.

203. The seventh and eighth ground really do no more than reiterate the objections BGI raised at the hearing on 24 September 2025, in the face of effective agreement between the JLs and the BMA as to the directions which should be made by the judge to progress the liquidation. On the basis that the Order for automatic admission was appropriately made and cannot be impugned, the further directions for conversion into stablecoin to be carried out at the date of the directions are well within the judge's discretion in relation to the conduct of the liquidation. The judge's reasons for ordering conversion into stablecoin at that date are set out at [84]-[85] above. They are clearly sensible and designed to ensure the smooth progress of the liquidation. Furthermore, as the judge said in refusing the BGI application for leave to appeal in relation to these grounds (as set out at [93] and [94] above) it is not explained why the judge's sensible approach is irrational. Furthermore, no error of law is identified. The judge's use of the date of his Order rather than the date of the winding up Order as the date of conversion was clearly a practical solution to the knotty problem he identified and was justified by the authorities he referred to at [20] of his Reasons.

204. In the circumstances, the sixth ground is premature and the seventh and eighth grounds are not arguable. I would refuse permission to appeal on all those grounds.

205. In conclusion, in my judgment, BGI's appeal falls to be dismissed.

206. Unless either party applies within 14 days of the date of delivery of this Judgment, I would direct that BGI pay the BMA's costs of the application for leave to appeal, but make no order as to the JLs' costs.

**Sir Gary Hickinbottom JA**

207. For the reasons given by Flaux JA in [169]-[204] above, with which I agree, I agree with the disposal set out by the President in [207] below.

**Ian Kawaley P**

208. I agree that:

(a) the appeal against the 11 July 2025 Ruling should be dismissed even though leave should be granted in respect of the relevant grounds of appeal;

(b) the appeal against the 8 August 2025 Ruling which decided that BGI lacked standing to apply for joinder should be allowed but that this conclusion is entirely academic;

(c) leave to appeal should be refused in relation to the directions ordered on 24 September 2025 (reasons for which were delivered on 30 September 2025); and

(d) that it is difficult to see why, as between BGI and the BMA, costs should not follow the event.

209. As regards each of these conclusions, I gratefully endorse the cogent reasoning of Flaux JA set out above. However, I would like to add some brief observations of my own on two issues arising out of the challenge to the substantive 11 July 2025 Ruling.

210. Firstly, the interpretation of sections 17 and 18 of DABA. This case appears to be the first occasion upon which Bermuda's courts have been required to interpret statutory provisions which are central to the policy objectives of the 2018 Act. The fact that BGI's counsel was able to formulate an arguable ground of appeal flows primarily from the unhappily worded section 18 (4). The words "that which is" in the prefatory words appear to be redundant having regard to the provision from which subsection (4) appears to be derived. Be that as it may, section 18 (4) provides:

"(4) For the purposes of this section, the digital asset referred to is that which is—

(a) held by the licensed undertaking for the client entitled to the digital assets;

(b) not property or digital assets of the licensed undertaking;

(c) not subject to the claims of creditors of the licensed undertaking.

211. Mr Cumming KC submitted that the effect of section 18 (4) was to limit the operation of section 18 to commercial arrangements which reflected these characteristics. BGI's counsel further contended that if the Legislature had intended to impose a blanket segregated property regime, it would have done so as explicitly as the Segregated Accounts Companies Act 2000, section 25 of which makes explicit provision for liquidators to have regarded to segregated accounts when liquidating a segregated account company. Accepting these arguments required reading the relevant statutory provisions in a way which would radically recast an ultimately straightforward construction of the initially unfamiliar statutory regime. DABA's Preamble firstly reads as follows:

> "WHEREAS it is expedient to make provision for the Bermuda Monetary Authority to regulate persons carrying on digital asset business and for the protection of the interests of clients or potential clients of persons carrying on digital asset business; and for purposes connected with those matters…"

212. Section 17 provides, without qualification, that a "*licensed undertaking holding client assets shall keep its accounts in respect of such assets separate from any accounts kept in respect of any other business*". Section 18 (1)-(3) next impose a variety of safeguarding obligations on a licensed undertaking "*holding client assets*" (ss (1)), that "*maintains a trust account pursuant to this section*" (ss (2)) and "*has custody of*" digital assets (ss (2)). Section 18, read in a composite way, appears designed to supplement section 17, rather than to limit it. It was not contended that section 18 (4) was intended to qualify the general requirement in section 17 that every licensed undertaking holding client assets should maintain separate accounts for them. The essential argument being made was that, in effect, DABA permitted two types of licensed undertaking: (1) a licensed undertaking required to keep client assets in separate accounts and safeguard them and (2) a licensed undertaking which was entitled to receive client assets on terms that they became the undertaking's property and not subject to the protections imposed by, *inter alia*, sections 17 and 18. However, there being no express provision in the Act supporting such a duality of wallet service provision models, it is impossible applying any recognised canons of construction to conclude that a non-custodial licensed undertaking must be read into the statutory regime by necessary implication. Section 2 (2) defines "*digital asset business*" as consisting of (as regards wallet services) only one type, "*custodial wallet services*". The same applies to the Authority's licensing power, which as regards wallet services only extends to licensing "*providing custodial wallet services*" (section 10 (2) (d)).

213.Read in a holistic way in its wider context in section 18 and DABA as

a whole, it is ultimately clear that section 18 (4) was intended to have declaratory effect as to the terms on which client assets are held for the reasons set out by Flaux JA above at [177]-[178]. The legislative intention to adopt a precautionary protective approach was clearly expressed. It is ultimately impossible to justify reading into this legislative scheme a mandate to carry on an effectively unregulated non-custodial wallet service business. The scheme for regulating digital asset business is therefore to be contrasted with the statutory scheme for regulating banks and deposit companies where the term "deposit" is defined (Banks and Deposit Companies Act 1999, section 3 (1)-not referred to in argument) in a way which makes it clear that customers depositing money enter into a debtor and creditor relationship only with the regulated entity.

214. Secondly, BGI's counsel advanced the interesting but ultimately untenable argument that undistributed assets could be distributed to the shareholder rather than paid as unclaimed assets into the Consolidated Fund. This would not prejudice any late claiming creditors, because a suitable guarantee would be provided. Section 257 of the Companies Act 1981 is set out at [33] above.

215. Statutory provisions dealing with winding-up are perhaps more amenable than most to being construed in a flexible and pragmatic way with a view to giving effect to one of the main overarching goals of the statutory regime: maximising returns to eligible stakeholders. This provision advances that goal by requiring the Crown to safeguard unclaimed assets and avoiding private expense. The time-limit of six months is, in my experience, more honoured in the breach. There might be circumstances where for a defined short period of time, a liquidator might obtain Court approval for holding unclaimed assets for an identified creditor who was known to be likely to make a claim shortly after the closure of the liquidation. However, what Mr Cumming KC beguilingly proposed amounted to opting out of the legislative scheme altogether. This brings to mind Lord Collins' strong objections to the notions of applying statutory provisions by analogy to circumstances in which they did not apply ("*not only wrong in principle, but also profoundly contrary to the established relationship between the judiciary and the legislature*": *Singularis Holdings Limited-v-PricewaterhouseCoopers* [2014] UKPC 36 at [83]). These objections to applying statutory provisions in circumstances to which they did not apply would in my judgment apply with even greater force to disapplying statutory provisions in circumstances to which the legislation did apply.