



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 288

BETWEEN:

(1) **RICHIE LAI**
(2) **WILLIAM SHIHARA**
(3) **RAMI KAWACH**
(4) **OLIVER LINCH**
(5) **JASON PARK**
(6) **DENIS PITCHER**

Plaintiffs

-AND-

(1) **BERMUDA MONETARY AUTHORITY**
(2) **MINISTER OF FINANCE**

Defendants

JUDGMENT

Application for declaratory relief (i) that certain provisions of the Digital Asset Business Act 2018 (“the Act”) are unconstitutional because they do not comply with the requirements of section 6 (8) of the Bermuda Constitution and (ii) for an Order that a Decision Notice made under the Act by the Bermuda Monetary Authority is unconstitutional and should be set aside because the plaintiffs were not afforded a right to challenge the making of the Decision Notice and do not have an independent right of appeal from it to an independent Tribunal and/or to the Court on a point of law under the Act.

Date of Hearing: 5 May 2025

Date of Judgment: 14 May 2025

Appearances: *Kyle Masters and Siobhan Boys of Carey Olsen Bermuda Limited for the plaintiffs*

Ben Adamson and Conor Doyle of Conyers Dill & Pearman Limited for the Bermuda Monetary Authority

Shakira Dill-Francois Solicitor General and Lauren Sadler-Best of the Attorney General's Chambers for the Minister of Finance

JUDGMENT of Martin J

Introduction

1. This judgment relates to an application made for relief under section 15 of the Schedule to the Bermuda Constitution Order 1968 (“the Constitution”) by way of an Originating Summons issued by the ultimate beneficial owners and former directors of Bittrex Global (Bermuda) Ltd (referred to as “Bittrex” or “the Company”) which is a Bermuda as “DABA”) to carry on business from Bermuda as a digital asset business. exempted company licensed under the Digital Asset Business Act 2018 (hereafter referred to
2. The Originating Summons seeks (i) an Order declaring that certain provisions of DABA are unconstitutional and ought to be struck down because the provisions do not afford “*persons adversely affected*” by a Decision Notice issued by the Bermuda Monetary Authority (the “BMA”) an opportunity to challenge it or to appeal from it and accordingly those provisions fail to provide those persons the right to a fair trial guaranteed by section 6 (8) of the Constitution and (ii) a separate declaration that the Decision Notice dated 18 July 2024 (the “Decision Notice”) that was issued by the BMA to Bittrex is unlawful and is liable to be set aside on the grounds that the procedure followed by the BMA did not afford the ultimate beneficial owners and the former directors of Bittrex the opportunity to challenge the BMA's conclusions and thereby also failed to comply with the requirements of section 6 (8) of the Constitution.
3. The first to third plaintiffs are the ultimate beneficial owners (the “UBOs”) of the shares in Bittrex¹. The fourth to sixth plaintiffs are the former directors of Bittrex (“the former

¹ In point of fact, the shares of Bittrex are wholly owned by a parent company, Bittrex Global Inc., and the first to third plaintiffs are shareholders in the parent entity.

directors”). The first and second defendants are the BMA and the Minister of Finance respectively.

Summary and Disposition

4. For the reasons more fully explained in this judgment, the Court has refused the application and has declined to grant the relief sought. This is primarily on the grounds that the Decision Notice was issued to Bittrex which has a separate corporate identity and existence from its shareholders and its former directors.
5. Bittrex was afforded the right to respond to the Warning Notice before the Decision Notice was issued to it and has exercised its right of appeal to a Tribunal under DABA in respect of the subsequent Decision Notice which imposed a substantial civil penalty on it *inter alia* for breaches of the DABA Code of Conduct to which it was subject. Accordingly, no complaint can be made under section 15 of the Constitution that the party legally affected by the Decision Notice has not had an opportunity to challenge the Warning Notice nor that it has not been given a right of appeal from the Decision Notice.
6. The legal interests of the UBOs have not been infringed because they have no legal interest in the assets of Bittrex under ordinary principles of company law, and so no civil right of theirs has been affected by either the Warning Notice or the Decision Notice. The UBOs cannot in law complain that they have not had a fair hearing in respect of a Decision Notice that was issued to the Company. Nor can they complain that their financial interests have been affected by the imposition of a penalty which has the effect of reducing the Company’s assets.
7. The former directors likewise cannot complain that any civil right of theirs has been engaged by the BMA’s conclusion that Bittrex was in breach of the DABA Code of Conduct, even though a number of the breaches cited by the BMA as being serious involved failures by the board and senior management to ensure that Bittrex complied with the Code.
8. The former directors were the legal agents of the corporate entity, and while they had the responsibility to manage the Company’s affairs, the former directors were not

personally subject to the Decision Notice and their legal or civil rights have not been affected by it. Therefore, they have no legal basis on which to assert that they have either the right to be heard in respect of the Decision Notice nor to exercise an appeal from the Decision Notice independently from the Company. No constitutional right of the former directors to “due process” in relation to the Decision Notice has been breached.

9. The alleged civil right to a reputation has not been infringed in relation to the UBOs or the former directors by reason of the matters set out in the Decision Notice because (a) the BMA is not an adjudicating authority for the purposes of section 6 (8) of the Constitution (b) the BMA did not determine their respective civil rights to a good reputation (or any other civil right) and (c) the matters set out in the Decision Notice do not direct any particular criticism for Bittrex’s failures at any individual director.

Background summary

10. Bittrex was incorporated and registered as an exempted company in Bermuda and was granted a Class F license under section 12 of DABA on 30 September 2020. In essence Bittrex carried on business as a digital asset and digital-asset derivative exchange as well as providing “custodial wallet” services.
11. Following its commencement of operations, in March 2021 Bittrex was subject to on-site inspections by the BMA regarding its compliance with anti-money laundering procedures. Following a second on-site inspection in December 2022, in May 2023 an inspection report was provided by the BMA to the board and management of Bittrex identifying a number of breaches of the BMA’s Digital Asset Business Code of Practice and the Digital Asset Business (Client Disclosure) Rules 2018 (the “DABA Rules”) as well as DABA and the BMA’s Code of Conduct issued in respect of DABA licensed entities (the “DABA Code of Conduct”).
12. In September 2023 the BMA appointed an independent Investigator under section 61 of DABA to conduct an investigation which was completed in November 2023. The Inspector’s report raised further concerns relating to the Company’s operations and its liquidity and the robustness of its custodial arrangements.

13. The specific details of the various matters raised by the BMA are not relevant to the issues raised in these proceedings and are subject to a pending appeal by the joint liquidators of Bittrex to a Tribunal appointed under DABA. Until Bittrex's appeal has been determined by the Tribunal, in the Court's view it would be inappropriate (and unnecessary) to go into any more detail about the specific criticisms that were made at this stage than is required to explain the Court's reasoning for its decision in this case.
14. In November 2023 Bittrex informed the BMA that it intended to cease operations and place itself into a solvent liquidation proceeding. On 15 March 2024 the Court appointed joint provisional liquidators on the application of Bittrex, which then entered formal liquidation on 28 March 2024.
15. On 20 March 2024 (after the appointment of the joint provisional liquidators but before the winding up Order) the BMA served a Warning Notice on Bittrex under section 40 (1) of DABA identifying a number of issues which represented breaches of the DABA Code of Conduct and the DABA Rules and indicating that the BMA was satisfied that it was appropriate to impose a substantial civil penalty on Bittrex in respect of those breaches.
16. The Schedule to the Warning Notice set out the grounds on which the BMA had reached its conclusions. These grounds referred to a failure to establish and maintain a sound corporate governance framework which provides for appropriate oversight and protects the interests of clients. It was noted that the responsibility for prudent governance and oversight lies with the board and senior management. A number of specific criticisms were made which were attributed to the failure of the board to ensure compliance with the requirements laid out in the DABA Rules and DABA Code of Conduct.
17. Pursuant to the provisions of section 53 of DABA, the joint provisional liquidators of Bittrex were invited to make representations to the BMA in response to the various matters that had been raised in the Warning Notice.

18. A detailed response to the Warning Notice was compiled by the joint provisional liquidators, with input from the former directors, and on 16 May 2024 a comprehensive submission of detailed representations was made to the BMA on behalf of Bittrex.
19. On 18 July 2024 the BMA issued a Decision Notice under section 40 (2) of DABA which stated that the BMA had taken into account the representations made, and considered that it was nonetheless appropriate to impose the civil penalty that had been indicated in the Warning Notice. The BMA also indicated in the Warning Notice that it intended to publish a public censure under section 41 of DABA.
20. The BMA's decision letter gave notice of the right of appeal available to Bittrex under section 48 of DABA, and as already stated, Bittrex has exercised its right of appeal to an appeal Tribunal. No publication of the censure is permitted until the conclusion of that appeal.
21. Although some concerns were expressed about its liquidity, it should be noted that Bittrex is solvent on a balance sheet basis and the liquidation is therefore expected to be conducted on the footing that all creditor claims will be met in full out of the assets of the Company which are under the control of the (now) joint liquidators.

The present application

22. The UBOs and the former directors wish to make their own independent representations in respect of the Decision Notice because they say they are each persons "*adversely affected*" by the matters set out in both the Warning Notice and the Decision Notice. They point to the fact that they are named in the Warning Notice and the Decision Notice, and that a number of the most important aspects of the criticisms made by the BMA which give rise to the imposition of the civil penalty relate to the alleged failures of the board and senior management to ensure compliance with DABA and the DABA Rules and DABA Code of Conduct.
23. The UBOs and former directors complain² that they are investors in the digital asset business sector and that in order to be approved as owners of a business in the financial business sector or in order to be approved as a director of a business in this sector, or

² Paragraph 17 of second affidavit of R Lai and paragraphs 26-31 of third affidavit of R Lai.

any regulated financial business, they may have to disclose the fact that a business in which they have had an interest, or served on the board as a director, has been the subject of a civil penalty after regulatory enforcement proceedings have been taken against that business. They say that this may affect their ability to be licensed or approved as owners or controllers or directors of such a business in Bermuda or elsewhere. They say that they are entitled to defend against the enforcement action because of the impact the publication of the censure may have on their personal and professional reputations.

24. It is important to register that the BMA has not taken direct enforcement action against any of the individuals who are directors or former directors, senior management or UBOs of Bittrex. Although the BMA has the power to take such action, and may impose prohibitions on individuals from being licensed under DABA, it has not done so. The only action that has been taken has been against the Company, i.e. Bittrex.

The Constitutional right to a fair hearing

25. Section 6 (8) of the Constitution guarantees all persons the right to a fair hearing before an impartial tribunal and within a reasonable time. It provides:

“Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

26. Although the plaintiffs made combined submissions, the first to third plaintiffs and the fourth to sixth plaintiffs put their respective applications on distinct legal bases which need to be considered separately because they engage different principles of law.

The UBOs

27. The UBOs say that they have a right to be heard in respect of the Decision Notice independently from the corporate entity Bittrex because the effect of the civil penalty will be to reduce the assets of Bittrex in which they have a financial stake. The argument is that the property rights of the UBOs are affected by the Decision Notice and accordingly they had a right to be heard in respect of the matters raised in the Warning Notice before the Decision Notice was issued.

28. They say that as a result of not having had a right to a hearing before their property rights were negatively impacted by the Decision Notice, their rights under section 6 (8) of the Constitution have been denied³. They have therefore applied for an Order striking down or setting aside the Decision Notice.
29. The UBOs say that the sections in DABA dealing with Decision Notices and appeals are unconstitutional in that the relevant provisions fail to provide the UBOs a right to be heard on the potential imposition of a civil penalty which affects their property interests (i.e. a civil right) and they fail to grant an independent right of appeal from the Decision Notice itself⁴. They therefore seek a declaration that (in these respects at least) DABA does not comply with the Constitution.
30. The UBOs also complain that their respective reputations have been adversely affected by the Decision Notice, and that because they will likely need to disclose the Decision Notice in any subsequent application they may make to establish a regulated business in Bermuda or elsewhere, this may lead to a denial of permission to establish another regulated business. They therefore allege that their individual civil rights to reputation have been denied because they have not been afforded the personal right to challenge the Decision Notice before it was issued or appeal from it to the appeal Tribunal.

The former directors

31. The former directors rely upon the principle that a person is entitled to a hearing before a civil right they enjoy as a private citizen is removed, restricted or adversely affected. They say that the necessary consequence of the negative findings of the BMA in relation to the governance failures of Bittrex is that they are being held responsible for those breaches as directors. If it is possible that these findings may impact their ability to be approved as owners or controllers or directors of licensed businesses in the future, the former directors say their rights to earn a living will or may be adversely affected. They rely upon case law decided under the European Convention on Human Rights 1950 (which has the force of law in Bermuda) in which the European Court of Justice has held that such an infringement is protected by the right to a fair hearing.

³ See Paragraphs 43-45 of the plaintiffs' submissions.

⁴ See paragraphs 51-2 of the plaintiffs' submissions.

32. Accordingly, they say they had an independent right to be heard before the Decision Notice was issued, and seek an Order striking down the Decision Notice or setting it aside. They make the same complaint as the UBOs that they ought also to have an independent right of appeal and they make the same claims for declaratory relief that DABA does not comply with the Constitution.

Legal analysis

The UBOs

33. The primary argument made by the UBOs may be dealt with summarily because it proceeds on an entirely misconceived legal foundation. To the extent that there is a claim that the property rights of the UBOs have been affected by the imposition of a civil penalty, this is simply wrong in law. It is fundamental to the legal concept of independent corporate personality that shareholders do not own the assets of the company in which they hold shares⁵. It follows that a civil penalty imposed on a company does not affect the property rights of the shareholders of that company. Therefore, no claim can be made that the imposition of a civil penalty on Bittrex engages any right to a fair trial as far as the UBOs' property rights are concerned.
34. The secondary point as to reputational damage to the UBOs is considered below alongside the similar claim made by the former directors.

The former directors

35. The former directors put their claims on the basis that the BMA is an adjudicating authority for the purposes of section 6 (8) of the Constitution⁶. They say that the BMA has made “*findings*” against them which they have not had the opportunity to challenge or respond to. They say the fact that they had input into the response made by the joint provisional liquidators on behalf of Bittrex is insufficient to discharge the obligation to give them a chance to speak in their own defence⁷.

⁵ See for example **Foss v Harbottle** (1843) 2 Hare 461; **Salomon v Salomon & Co** [1897] AC 22; and **Prest v Petrodel Resources Ltd** [2013] UKSC 34.

⁶ Paragraph 31 of the plaintiffs' submissions.

⁷ The plaintiffs rely upon **Ferguson (Herbert) v Attorney General** [1999] 57 WIR 403, 407 “...there is no question of asking whether it would have made a difference if the person had been heard...”

No findings of fact against the former directors

36. It was urged upon the Court that the effect of the “*findings*” is to undermine their professional reputations and may affect their ability to work in their chosen field of professional endeavour because the BMA and other regulators may take into account the imposition of the civil penalty on Bittrex, especially because the reasons for the imposition of the penalty related to failures of the board to ensure compliance with the DABA Rules and DABA Code of Conduct⁸.
37. Although the plaintiffs relied upon jurisprudence⁹ decided by the European Court of Justice for the proposition that where a government authority keeps a database of information and puts the name of a citizen on a “*stop list*” which in effect removes the citizen’s right to work in his chosen profession, in the Court’s judgment, these decisions are simply not applicable to the factual situation that arises in this case.
38. On the facts of this case, the BMA has not taken any action against the individual directors, and has not individually named them as bearing individual personal responsibility for any particular failings of the Company or imposed any sanction upon them. There is no evidence that the criticisms the BMA has made about the board’s failure to ensure compliance with the DABA regime will have any impact on the ability of any of the former directors to engage in gainful employment in their chosen profession as a result of the Decision Notice.

No civil right of the former directors has been determined

39. In order for the right to a fair hearing to be engaged in respect of the former directors, they must show that the Decision Notice affects their personal civil rights and that the decision will or may directly determine the right in question¹⁰. In **Regner v Czech Republic** it was held that:

“*For article 6 (1) [of the European Convention on Human Rights which equates to section 6 (8) of the Constitution] to be applicable under its civil*

⁸ See paragraph 48 of the plaintiffs’ submissions.

⁹ **Pocius v Lithuania** (Application no 35601/04) and **Regner v Czech Republic** (Application no 35289/11)

¹⁰ At paragraph 99.

limb, there must be a ‘dispute’ regarding a ‘right’ which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the [Convention]. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring article 6 (1) into play.”

40. The BMA has not made a decisive determination of any civil right (or the manner of its exercise) in respect of the former directors. The effect of the Decision Notice was not to bring the former directors’ employment to an end, nor to prohibit or restrict them in pursuing their professional careers. The Decision Notice has had no legal effect upon the former directors as individuals¹¹.

The BMA is not an adjudicating authority under the Bermuda Constitution

41. As a matter of legal analysis, the BMA is a regulatory body and is not an “*adjudicating authority*” within the meaning of section 6 (8) of the Constitution¹². The BMA does not adjudicate on the rights of those it regulates. It does not determine civil rights or obligations and does not sit in a quasi-judicial capacity¹³. Although the analogy is not exact, the BMA is no more an adjudicating authority than is the Bermuda Police Service, which investigates alleged breaches of the law and prosecutes alleged infractions. The adjudicating authority for the purposes of DABA is the appeal Tribunal, which determines whether the civil penalty imposed by the BMA is valid and appropriate and based upon proper evidence, from which there is an ultimate appeal to the Court on a point of law.

¹¹ The BMA has power under DABA to impose restrictions on the UBOs from being controllers of another digital asset business and to prohibit the former directors from being appointed directors of another digital asset business under DABA, but the BMA did not impose any such restrictions.

¹² See **Christou v Haringey LBC** [2014] 131.

¹³ This is to be contrasted with the disciplinary bodies established under the Bermuda Practitioners Act 1950: see **Fay and Payne v HE Governor and the Bermuda Dental Board** [2006] Bda LR 65 applying **Preiss v General Dental Council** [2001] 1 WLR 1926 : “*Any disciplinary proceeding under the 1950 Act and Regulations affects the right to practice the profession of the persons concerned, and may accordingly be said to affect their “civil rights and obligations” under section 6 (8) of the Bermuda Constitution.*” at paragraph 32 per Kawaley J (as he then was) (emphasis added).

42. In order for the BMA to be characterized as an “*adjudicating authority*” for the purposes of section 6 (8) of the Constitution, the BMA would have to exercise the power to make a binding and determinative finding as to the plaintiffs’ civil rights or obligations in proceedings¹⁴. The BMA plainly has not done so. The BMA has issued a Decision Notice in respect of Bittrex alone, and not the directors (nor the UBOs).
43. Further, in the Court’s assessment, the criticisms that have been made by the BMA about the failure of the directors to ensure compliance with the DABA Rules and DABA Code of Conduct are not “*findings of fact*” against the individual directors in the legal sense because there has been no quasi-judicial enquiry by the BMA which has resulted in an evidential assessment of the personal responsibility of a particular director for a particular failing, or to impose any penalty or restriction on any of the former directors for any alleged breaches of the DABA regime.
44. To the extent that there is a dispute as to whether the BMA was justified in making the criticisms set out in the Decision Notice, or that the level of the civil penalty was not justified or was excessive, these will be the subject of Bittrex’s appeal to the Tribunal which will make a binding determination of those issues as the relevant “*adjudicating authority*”. Thereafter, if Bittrex is dissatisfied with the Tribunal’s decision, Bittrex will be entitled to exercise a right of appeal to the Court on a point of law.

No determination of the civil right to personal or professional reputation of the directors or the UBOs

45. The former directors assert that their association with a company that has been penalized by the BMA may affect their personal or professional reputation. However, the courts have declined to recognize that potential damage to reputation resulting from a report does not amount to the determination of a civil right. In **R (G) v Governors of X School**¹⁵ the English Supreme Court expressed their opinion in these terms:

¹⁴ See **Regner** quoted above and **Christou** “*In my judgment it is wrong to describe the exercise of disciplinary power by the employer as a form of adjudication. The purpose of the procedure is not “a determination of any issue which establishes the existence of a legal right”...nor is it properly regarded as determining a dispute.*” per Elias LJ at page 142 H (emphasis added).

¹⁵ [2012] 1 AC 167, 186 at G to 187F per Lord Dyson JSC.

“The applicants complained that, in violation of article 6 (1), the inspectors had in their report determined their civil rights to honour and reputation (protected as part of their right to respect for private life under article 8) and had denied them effective access to a court to have those rights determined....It was contended by the applicants that the result of the investigation was decisive of their article 8 rights and that the inspectors’ report effectively “determined” them without respecting any of the procedural guarantees of article 6 (1).

The court accepted that the published findings of the inspectors undoubtedly damaged the applicants’ reputations, but that was not sufficient to lead to the conclusion that the inspectors had determined their civil rights. The court said, at paras 61-2

“....the object of the proceedings before the inspectors was not to resolve any dispute (contestation) between Lonrho and the applicants...In short it cannot be said that the inspectors’ inquiry ‘determined’ the applicants’ civil right to a good reputation for the purposes of article 6 (1), or that the result was directly decisive for that right...”

Thus it can be seen that the court accepted that there was a close connection between the findings of the inspectors and the determination of the civil right which was to be the subject of the libel proceedings, but that was not enough.”

46. Applying that analysis to the facts of the present case, the BMA’s object in conducting their investigation, issuing the Warning Notice and then issuing the Decision Notice was not to determine the former directors’ respective rights to a good reputation (or any other civil right) and therefore the regulatory process under DABA does not engage the right of the former directors to a separate fair hearing (i.e. one that is independent from the rights afforded to Bittrex itself) that is protected by section 6 (8) of the Constitution.
47. The statements of principle quoted above apply equally to the UBOs who also complain that their respective reputations may have been damaged by the Decision Notice. The object of the regulatory process under DABA is likewise not to determine the civil rights of the UBOs as to their reputation (or any other civil right) and accordingly the

regulatory process under DABA does not attract the protection of section 6 (8) of the Constitution to a separate right to a fair hearing in respect of the Decision Notice.

48. As the *legally* affected party, Bittrex has been afforded both the right to respond to the Warning Notice and to appeal against the Decision Notice, and this reflects the rights to a fair hearing and due process guaranteed by the Constitution. The Constitution does not confer an independent right to a fair hearing to anyone who might be “*adversely affected*”¹⁶ by the consequences of regulatory enforcement proceedings.

Conclusions

49. Applying the legal principles summarized above to the facts of this case, the Court has reached the conclusions set out below.
50. First, neither the Warning Notice nor the Decision Notice was a process which had the purpose or effect of determining any civil right of either the UBOs or the former directors.
51. Second, the BMA does not qualify as an “*adjudicating authority*” for the purposes of section 6 (8) of the Constitution, because the BMA does not sit in a quasi-judicial function, nor does it hear or determine legal or civil rights or obligations.
52. Third, the effect of the Decision Notice was not to determine any civil rights or obligations enjoyed by the UBOs or the former directors. Accordingly, the Decision Notice is valid and is not liable to be set aside as failing to comply with section 6 (6) of the Constitution.
53. Fourth, the UBOs and the former directors have not been deprived of any right to a fair hearing (or due process) under the Constitution in respect of the issuance of the Decision Notice to Bittrex.

¹⁶ This expression is used by the plaintiffs in their submissions to describe the alleged impact of the Decision Notice on them, but this is not a legal test or definition that relates to the protection of civil rights under the Bermuda Constitution.

54. Fifth, the relevant provisions of DABA do not contravene the Constitution by failing to provide the UBOs and the former directors an independent right to be heard in respect of the Warning Notice or the Decision Notice or to provide them with a personal right of appeal to the Tribunal from the Decision Notice.
55. The Court therefore refuses the relief sought and dismisses the plaintiffs' applications and awards the costs of the proceedings to the defendants.
56. It is right to note that the appeal Tribunal appointed under DABA in respect of the Bittrex appeal is in control of those appeal proceedings. That Tribunal may (if it thinks appropriate) permit any party which it thinks has an interest in the proceedings, and from whom it considers it will derive assistance in determining the appeal, to make submissions either in writing or in person. But that is a matter that falls within the discretion of the appeal Tribunal alone.

Dated this 14th May 2025



THE HON. JUSTICE MR. ANDREW MARTIN
PUISNE JUDGE