IN THE HIGH COURT OF NEW ZEALAND **CIV-2019-409-544**
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

UNDER	Part 19 of the High Court Rules and Part 16 of the Companies Act 1993
IN THE MATTER OF	An application concerning **CRYPTOPIA LIMITED (IN LIQUIDATION)**, a company having its registered office at Level 15, Grant Thornton House, 215 Lambton Quay, Wellington, 6143 and carrying on business as a cryptocurrency exchange
AND	
IN THE MATTER OF	An application by **DAVID IAN RUSCOE** and **MALCOLM RUSSELL MOORE** of **GRANT THORNTON NEW ZEALAND LIMITED**, insolvency practitioners of Wellington and Auckland respectively
	Applicants

SYNOPSIS OF SUBMISSIONS IN REPLY OF COUNSEL FOR CREDITORS

29 January 2020

Judicial officer: Justice Gendall
Next event: Hearing on 11-14 February 2020

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May it please the Court:

1. INTRODUCTION

1.1 This Reply:

(a) summarises the areas of agreement and disagreement between appointed counsel; and

(b) responds to points made in the submissions of counsel for the Account Holders (**Account Holders' Submissions**) and the Liquidators (**Liquidators' Submissions**).

2. APPLICABLE LAW

2.1 It is agreed that New Zealand law should be applied in determining all matters in issue on this Application. The Creditors do not take any issue with the Account Holders' Submissions on this topic.

3. QUESTION (A): WHETHER THE DIGITAL ASSETS ARE PROPERTY UNDER SECTION 2 OF THE COMPANIES ACT 1993

3.1 It was accepted in the submissions filed by both court-appointed counsel that the Digital Assets are "property" for the purposes of s 2 of the Companies Act 1993 (the **Act**).[1]

3.2 However, the Liquidators have submitted that it would be open to the Court to find that the Digital Assets are not "property" but are "assets" for the purposes of the Act.[2] Counsel for the Account Holders has also submitted that even if the Digital Assets are not "property" within s 2, they would still be "assets" as that word is used in ss 253 and 313 of the Act, and so would still be subject to realisation and distribution by the Liquidators (assuming the assets are not held on trust).[3] Counsel

[1] See [1.3(a)] of the Submissions of counsel for the Creditors (**Creditors' Submissions**) and [63] of the Account Holders' Submissions.
[2] At [72] of the Liquidators' Submissions.
[3] Account Holders' Submissions at [289].

for the Creditors agrees that such an interpretation and approach are available to the Court, and adopts the arguments made at [73] – [109] of the Liquidators' Submissions.

3.3 In particular, the Creditors rely on the following points, helpfully made by the Liquidators:

(a) the definition of "property" in s 2 of the Act is not an inclusive definition, in contrast to the definition in s 2 of the Crimes Act 1961 nor is it as broad as the Crimes Act definition, which includes "any other right or interest" without any qualification or limitation. Accordingly, there are good grounds to distinguish the Supreme Court's decision in *Dixon v R* [2015] NZSC 147, which concerned the Crimes Act definition (contrary to the submission made at [4.13] of the Creditors' Submissions); and

(b) while a finding that the Digital Assets are not "property" would mean that certain sections of the Act did not apply (as discussed in counsel's previous submissions),[4] if they were held to be "assets" they would still be subject to the core provisions of the Part 16 of the Act: s 248 (which provides that the effect of commencement of liquidation is that the liquidator has custody and control of the company's assets) and s 253 (which provides that the principal duty of the liquidator is to take possession of, protect, realise and distribute the assets of the company). They would therefore fall within the control of the liquidators and be available for distribution to creditors (if they were assets "of the company" and not subject to any trust). Accordingly, such an approach would not defeat the purpose of Part 16 of the Act.

3.4 Having considered these points, counsel for the Creditors respectfully submits that Court should adopt the approach identified by the

[4] At [4.7].

Liquidators in preference to that proposed in the Creditors' Submissions as it avoids the need to interpret the Act's definition of "property" in a manner that is inconsistent with the ordinary and accepted meaning of that term.

3.5 For the reasons set out in the Creditors' Submissions and in the Liquidators' Submissions, the Digital Assets do not fall within any existing recognised category of property. In addition, cryptocurrencies raise unique problems for regulators and significant policy issues, as noted by counsel for the Account Holders.[5] These issues have been recognised by regulators around the world, including the Inland Revenue and the Financial Markets Authority; both agencies have released issues papers about the status of cryptocurrency.[6] Accordingly, there is a strong argument that any decision on whether, or in what circumstances, cryptocurrencies should be recognised as "property" should be made by Parliament.

3.6 In contrast, the ordinary meaning of the term "asset" is simply something of value. There is nothing in the Act to suggest that the ordinary meaning does not apply (indeed, it is not a defined term in the Act except for the definition in s 129 which is specific to that section). Accordingly, to the extent that they have value (which at least some of them clearly do), the Digital Assets can be held to be "assets" without placing any strain on the common meaning of that term, or the language of the Act, and without creating any wider precedent than is necessary to address the matters which are currently in issue in this liquidation.

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[5] At [171] – [172].

[6] Inland Revenue *Cryptocurrency and tax* https://www.classic.ird.govt.nz/campaigns/2019/crypto/cryptocurrency.html, Financial Markets Authority *Cryptocurrency* https://fma.govt.nz/compliance/cryptocurrencies/.

4. QUESTION (B): WHETHER THE DIGITAL ASSETS ARE HELD ON TRUST

4.1 As a preliminary point, it is accepted that assets held by a company on trust for a third party do not form part of the assets of the company available for distribution to creditors (as set out in the Account Holders' Submissions at [66] – [72]).

4.2 There is disagreement between appointed counsel on (a) whether cryptocurrency can in principle form the subject of a trust; and (b) whether the Digital Assets held by Cryptopia are in fact held on trust.

4.3 Before addressing the key points of difference, it is worth noting that, if the Court finds that the Digital Assets are not held on trust (for reasons other than the fact that they are not inherently capable of forming the subject matter of a trust) then it would not be necessary for the Court to determine the issue of whether cryptocurrency can in principle form the subject of a trust. This would neither be required to answer the specific questions posed by this Application, nor to enable the liquidators to make decisions regarding the realization and distribution of the Digital Assets.

Whether cryptocurrency can form the subject of a trust

4.4 Irrespective of whether the Digital Assets are held to be "property" for the purposes of the statutory definition in the Act, the Creditors say that they are not "property" for the purpose of forming the subject matter of a trust. The Account Holders disagree.

4.5 Both court-appointed counsel rely on the classic definition given by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*:[7]

> Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be

[7] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247 – 1248.

definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

4.6 For the reasons given in previous submissions, the Creditors submit that the Digital Assets do not meet this definition.

4.7 The Account Holders' Submissions cite the dictum of Fry LJ in *Colonial Bank v Whinney*[8] to the effect that all personal property must be either a chose in possession (i.e. something of which it is possible to take physical possession) or a chose in action (i.e. something which can be claimed or enforced by action).[9]

4.8 To support their argument that these categories are not exhaustive, at least as far as equity is concerned, the Account Holders give examples of diverse types of interest that have been recognised as capable of forming the subject of a trust, e.g.:[10]

(a) Simple choses in action – plainly, these fall within the "chose in action" category;

(b) Non-enforceable debt claims – these are also, in essence, choses in action, even if there are limits on enforceability;

(c) Payments through banking systems – these are also choses in action;

(d) Copyright – the right to hold and enforce copyright is dependent on the existence of a statutory regime. The ability to create a trust over such rights is therefore simply a product of Parliament's decision to create a legal construct meeting the requirements of Lord Wilberforce's definition of property;

[8] *Colonial Bank v Whinney* (1885) 30 ChD 261 (CA).
[9] At [148] of the Account Holders' Submissions.
[10] At [106].

(e) Shares – it is accepted that shares are more complex than ordinary choses in action but they nevertheless carry rights enforceable by action, as well as being a form of collective ownership of the underlying property of a company. In addition, shares have statutory recognition under the Act;

(f) Licences/Exemptions/Quotas – most of these are simply choses in action or analogous to choses. Once a right of action is recognised as a form of property, it is a small step to give the same recognition to a right of immunity from action. In addition, they are generally creations of statute. This is also true of tradeable emissions units;

(g) Trustees' rights of indemnity – it is difficult to see why these would not be categorised as choses in action, but even if they are not, they are plainly analogous to choses in a way that the Digital Assets are not.

4.9 In summary, each of the examples given by the Account Holders is either a chose in action, analogous to a chose in action, or based on statute. The Digital Assets are none of those things. While it is acknowledged that equity is flexible and has adapted to accommodate new forms of property, the degree to which cryptocurrencies share or depart from the attributes of existing recognised forms of property is clearly relevant. The law has evolved thus far on the basis that property possesses certain features which Digital Assets do not share (as demonstrated by the difficulty in applying the conflict of laws rules for property to cryptocurrencies).

4.10 As noted by the Account Holders, legal recognition of Digital Assets as property would be a very significant step and raises public policy issues, particularly in relation to the ability of states to control unlawful

movement of funds.[11] It is submitted that it would be a greater leap into the unknown than recognition of any of the examples of property discussed above. Arguably, it is a step too far (at least on this Application) and should await statutory intervention.

Whether the Digital Assets are held on trust

4.11 Even if the Digital Assets are held to be property and in principle capable of being held on trust, no such trust exists in this case.

4.12 The Application raises three possibilities as to the trust(s) that might exist:[12]

(a) individual trusts for the benefit of each Account Holder in respect of particular cryptocurrency;

(b) one trust for the benefit of all Account Holders, with the result that all Account Holders are co-beneficiaries of the same trust; and

(c) multiple trusts for the benefit of specific groups of Account Holders, with the result that Account Holders within a specific group are co-beneficiaries of the same trust.

4.13 In the Account Holders' Submissions, the first two possibilities are described as "unworkable", "unrealistic", and "not credible".[13] That is agreed.

4.14 Counsel for the Account Holders advocates the third possibility.[14] It is said, in summary, that:[15]

[11] At [77] and [171].
[12] Originating Application dated 1 October 2019 at 1(d)(iii).
[13] Account Holders' Submissions at [183].
[14] The Creditors' Submissions discuss this third possibility at [6.20] – [6.27] (arguments addressed to whether any type of trust was intended) and at [6.29] – [6.59] (arguments addressed to the second possibility and any variation of that possibility, i.e., a trust or trusts over a fluctuating mass of cryptocurrency).
[15] See Account Holders' Submissions at [184], [191] – [196], [204], [207] – [208], and [291] – [295].

(a) There was a trust for each of the 900+ cryptocurrencies traded at one point or another on the exchange.

(b) With respect to each trust, "beneficial co-ownership of the relevant currency [was] shared by relevant Account Holders in proportion to the numbers of relevant cryptocoins that had been contributed by each Account Holder (either initially contributed when new coins were acquired or as a result of trades between Account Holders)."

(c) The beneficial interest of each Account Holder was not to the type and amount of cryptocurrency appearing in their Account but was instead to a "shifting proportion of a shifting bulk". While not spelt out in exact terms, this means that if Cryptopia held, for example, 100 Bitcoin as at 1 January 2018 across different hot and cold wallets, and Account Holder X had "contributed" 10 Bitcoin since the commencement of the trust to that point, with all other Account Holders in total contributing 90 Bitcoin in the same period, Account Holder X's beneficial entitlement would be to 10% of the Bitcoin held by Cryptopia in each wallet, or a total of 10 Bitcoin. It follows that if Cryptopia held only 99 Bitcoin as at 1 January 2018, Account Holder X's beneficial entitlement would be 9.9 Bitcoin – being 10% of 99 – rather than the 10 Bitcoin contributed.

(d) The SQL database maintained by the Company, which listed the Account Holders and their coin balances, contained the details of each beneficiary and their interest. (On this point it is worth noting that it is not yet known whether the SQL database matches the coin balances held by the Company in its various wallets. In view of the hack and the uncertainty over what was stolen, it appears likely that the reconciliation process will show discrepancies).

(e) The trust property comprised the relevant cryptocurrency held in both the hot and cold wallets maintained by the Company.[16]

(f) Cryptopia, as the Account Holder of certain cryptocurrencies in its own name, was one of the beneficiaries of the trusts.

(g) Each trust came into existence as soon as Cryptopia acquired a new type of cryptocurrency "as a result of dealing with an Account Holder".[17] Once the trust came into existence, "the trust applied to any currency of the relevant type subsequently acquired by Cryptopia as part of the running of its cryptocurrency platform".[18] The position of those cryptocurrencies issued by Cryptopia is not addressed. Presumably they would become subject to a trust as soon as they entered the account of an Account Holder in the SQL database.

(h) The 7 August 2018 terms and conditions (**Amended Terms**) "simply put the existing position in more express terms"; i.e., the trusts already existed.[19]

(i) Alternatively, the Amended Terms "were intended to apply retrospectively to all Account Holders, to remove any doubts about the previous position".[20]

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[16] See Account Holders' Submissions at [195] – [196]: "The trust assets will include both the hot and cold wallets for each cryptocurrency. The evidence is that there was no appropriation of cryptocoins in hot wallets to particular Account Holders, whether or not the Account Holder was responsible for depositing cryptocoins into the hot wallet. Deposited coins might be transferred to a cold wallet or left in the hot wallet for the next sale which could be by a different Account Holder to the one who initially contributed the coin: see Ruscoe-8 Nov at [22]. It is further said that, alternatively, there were separate trusts for hot and cold wallets, in which case the beneficiaries of each were the same, sharing in the same proportions.

[17] At [291].

[18] At [292].

[19] At [277].

[20] At [277].

(j) Alternatively, the Amended Terms applied to all Account Holders and their existing holders "as at 7 August 2018, but only prospectively from that date."[21]

4.15 It is common ground that, for a trust to exist, there must be certainty of object, subject matter and intention. It is accepted that, in principle, there is adequate certainty of object. The points in issue are whether the two remaining requirements are met.

Certainty of subject matter

4.16 The subject matter of the putative trusts is *not* sufficiently certain because, as at the time the trusts were allegedly created, the property from which the beneficial interests of the Account Holders were to be satisfied was not ascertained or ascertainable. When they made a deposit, Account Holders acquired a (conditional) right to have the same number of coins of the same type of cryptocurrency (minus fees) returned to them. There is nothing in the documentation to suggest that they had a right to have the same coins returned to them, nor that they had a right be provided with coins from any particular stock or source, nor that they were acquiring a proportionate interest in a fluctuating mass of coins rather than a contractual right to the precise number of coins shown in their accounts.

4.17 Likewise, when Account Holders traded coins via Cryptopia, they gave up their rights in respect of the traded currency and acquired new rights to trade or receive on withdrawal a certain number of coins of a certain type of currency. They did not acquire rights to any particular coins of that currency from any particular source.

4.18 Accordingly, as set out in the Creditors' Submissions, Account Holders are in the same position as the non-allocated gold purchasers in *Re*

[21] At [277].

Goldcorp Exchange Ltd (in rec) [1994] 3 NZLR 385 (PC), the purchasers of wine in *Re London Wine Co (Shippers) Ltd* [1986] PCC 121, and the intended beneficiary of the two sheep in Oliver J's hypothetical in the same case. As in those cases, the putative trustee was free to satisfy the putative beneficiary's interest from any source. The Account Holders were, in the language of *Re Goldcorp*, purchasers of "generic goods", not goods "ex-bulk". The Privy Council held that an agreement for purchase of generic goods cannot create a proprietary interest of any kind, on the grounds that there is no identifiable mass to form the subject of the trust from which the beneficial interest is to be satisfied.[22]

4.19 *Re Goldcorp* is binding on this Court. The reasoning in *Re London Wine* also effectively forms a part of *Re Goldcorp*, given the express endorsement of and reliance on that reasoning by the Board.

4.20 Counsel for the Account Holders says the Privy Council's application of principles to the facts of *Re Goldcorp* are not binding on this Court. However, that proposition only assists if there is some cogent basis on which the facts are distinguishable, which is not the case for the reasons above and those given in the Creditors' Submissions.[23]

4.21 It is therefore not open to this Court to accept the Account Holders' submission that there *is* sufficient certainty of the mass because the trust applies to all the coins of a particular cryptocurrency held by Cryptopia at any given time. The Pricy Council rejected the same proposition in *Re Goldcorp* on the basis that the customers cannot have intended their rights to be fixed by reference to the quantity of gold in stock and the number of purchasers at the relevant time.[24] Equally, there is no basis to believe that, despite all appearances to the contrary, the Account Holders in fact held proportionate shares in

[22] *Re Goldcorp Exchange Ltd (in rec)* [1994] 3 NZLR 385 (PC) at 397.
[23] See Creditors' Submissions at [6.36] – [6.43].
[24] *Re Goldcorp*, above n 22, at 394.

Cryptopia's holdings, rather than having contractual rights to the precise amounts of cryptocurrencies shown in their accounts in the SQL database.

4.22 This issue cannot be dismissed as merely theoretical given the likelihood that a full reconciliation will establish that Cryptopia does not hold sufficient Digital Assets to meet all claims by Account Holders.

4.23 Counsel for the Account Holders further says that the fact Cryptopia "might have been able to pay out an Account Holder with coins of the same type that were not in the pool…merely goes to the fact that an Account Holder would suffer no loss if Cryptopia did that."[25]

4.24 If that were an answer here, it would also have been an answer in *Re Goldcorp* and *Re London Wine*.

4.25 In any case, it is not a good answer in principle: if the putative trustee is *entitled* to satisfy the putative beneficiary's interest from any source, then it would be no breach of trust for it do so (and so no question of loss arises). And if the putative trustee is indeed free to do that, there is no certainty of subject matter because the trust property cannot be identified. Here, there is no evidence of any obligation on the part of the Company to satisfy the withdrawal requests of users from the pool of cryptocurrency it happened to have in its possession at the particular time. Rather, it was free to satisfy that interest, whatever its proper legal description, from any source.

4.26 To the extent that the *Lehman* cases relied on by the Account Holders suggest a more lenient approach to the issue of certainty of subject matter, it should be noted they make little mention of *Re Goldcorp* (which of course is not binding on the English courts) and are also

[25] Account Holders' Submissions at [259(b)].

heavily influenced by the particular facts of those cases, including the extensive contractual documentation between the parties.[26]

Certainty of intention

4.27 Even if, contrary to the above, the trusts claimed here could exist in theory, it is submitted that the evidence does not support the conclusion that any such trusts were intended. It is further submitted that, in fact, the evidence is strongly against that conclusion.

4.28 The Account Holders' Submissions address the evidence at [263] – [279]. The situation under the pre-7 August 2018 terms (**Original Terms**) and that following the introduction of the Amended Terms is addressed separately. It is accepted in the submissions for the Account Holders that "the relationship between Cryptopia and the Account Holders was not well documented".[27]

4.29 As to the situation under the Original Terms, four matters are relied on by counsel for the Account Holders:

(a) what is claimed to be the "whole purpose" of the exchange, being to provide a platform to store cryptocurrency, which users could then use to trade;[28]

(b) the "web-based instruction pages and live customer interfaces";[29]

(c) the Cryptopia Risk Statement dated April 2018;[30] and

(d) the Cryptopia Marketing Strategy of July 2018.[31]

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[26] The *Lehman* cases are *Re Lehman Brothers International (Europe), Lomas v RAB Market Cycles (Master) Fund Ltd* [2009] EWHC 2545 (***Lehman: Lomas***) and *Re Lehman Brothers International (Europe), Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch) (***Lehman: Pearson***).
[27] Account Holders' Submissions at [26].
[28] Account Holders' Submissions at [266].
[29] At [267].
[30] At [270].
[31] At [271].

4.30 **Purpose of the relationship / the exchange:** it is accepted that at least part of what was being sold by the Company was the ability to "store" and trade cryptocurrency, and so be exposed to the economic risks and returns of this market. However, there did not need to be a trust for those purposes to be fulfilled so they do not require or suggest the conclusion that a trust was intended.[32]

4.31 **Web pages, the Risk Statement and the Marketing Strategy:** none of these documents say Cryptopia was to hold cryptocurrency on trust; that word does not appear. Those documents do incorporate phrases suggestive of legal ownership, such as "your coins", and refer to the ability to "buy or sell" cryptocurrency. However, this type of language is not a strong indicator in favour of an intention to create a trust:

(a) Similar language is used by banks and bank customers when referring to money appearing in customers' accounts. But it is well established that customers enjoy no beneficial interest in the money appearing in an ordinary bank account but instead merely a personal right to require that money to be provided to them by the bank (subject to withdrawal fees, etc.).[33]

(b) Similar but stronger language was used in *Re Goldcorp*, where it was found that no trust was intended (e.g., customers were referred to as the "owner" and "registered holder" of purchased gold).

4.32 It is noteworthy that no reliance is placed by the Account Holders on the Original Terms. If a trust had been intended, it is to be expected that some hint of it would be found in the document intended to record the rights of users of the platform. There is none.

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[32] See the similar reasoning in *Lehman: Pearson*, above n 26, at [276] – [277].

[33] See for example Alan Tyree and others *Tyree's Banking Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2014) at [3.2.1], citing *Foley v Hill* (1848) 2 HL Cas 28.

4.33 With respect to the situation from 7 August 2018 (when the Amended Terms came into effect), counsel for the Account Holders relies on clauses 5(d) and (e), and clauses 6(e), (f), (g) and (k) of those Terms; it is said these clauses "contain express recognition that the cryptocoins held by Cryptopia for Account Holders are held on trust for those Holders" (albeit that they are not "ideally expansive about the number of trusts that are needed properly to give effect to the arrangements").

4.34 Clauses 5 and 6 are addressed at [6.21] – [6.25] of the Creditors' Submissions. It is accepted that clause 6(e) evidences an express intention to create a "beneficial interest" in the fiat dollars (not the Fiat Pegged Tokens) held in the "Custodial Account" maintained by the Company. This express language, however, may be contrasted with the absence of such in clause 5, which addresses cryptocurrency generally.

4.35 In short, there is no evidence to support the conclusion that trusts of the claimed type were intended.

4.36 Much clearer language was used in *Lehman: Lomas*, relied on in the submissions filed by the Account Holders. There, the contractual terms provided that the claimed trustee would hold securities provided to it by customers "as custodian"; that it would "identify in its books and records that the securities belong to the [customer]"; and that the securities "do not belong to" the broker.[34] Additionally, the terms gave the broker the ability to take a security interest in the securities, which necessarily implied an intention that they were owned beneficially by the clients.[35] In that case, the claimed trustee was also expressly obliged under the contractual terms to keep the customers' securities separate from its own, except in exceptional circumstances due to the particular law or market practice of an

[34] *Lehman: Lomas*, above n 26, at [44].
[35] At [80].

overseas jurisdiction. Briggs J held that this was a powerful indicator of a trust.[36] It was clearly a decisive factor in his judgment that a trust existed, despite the presence of other features not usually consistent with a trust.

4.37 In contrast, in *Lehman: Pearson* the securities in issue were not segregated but were held in house accounts by the claimed trustee, LBIE, and used in all respects by LBIE as if they were its own assets. Briggs J held that this would not defeat the finding of a trust, on the basis that there could be a trust over the entire accounts of LBIE, with LBIE sharing a co-beneficiary interest with its affiliates.[37] However, he noted that such a trust could only exist if there was sufficient certainty as to proportionate share of the alleged beneficiaries, including the terms upon which any shortfall would be borne.[38] His Honour suggested that, on the assumption there was a common intention and consent by all parties to the accounts being operated in such a way that shortfalls would be created, shortfalls should be shared pari passu.[39]

4.38 In the event however, this issue did not need to be determined in *Lehman: Pearson* as there was no trust. In reaching the conclusion that no trust existed, Briggs J considered the position both before and after an agreement between the parties to a complex set of procedures called Rascals, which was specifically designed to avoid the existence of any trust. The primary reasons for His Honour's finding that no trust existed before Rascals was agreed were:

(a) The contractual arrangements did not impose the characteristic obligations of a trustee on LBIE but on the contrary disapplied

[36] At [54] – [55].
[37] *Lehman: Pearson* at [225].
[38] At [225] and [243].
[39] At [244].

them – in particular, LBIE was free to mix the securities with its own and use them for its own purposes generally; and[40]

(b) Conferral of a proprietary interest on the affiliates was not necessary for achievement of the parties' commercial objectives – the affiliates could enjoy the economic fruits of ownership as a result of LBIE's personal obligation to account.[41]

4.39 After the introduction of Rascals, Briggs J found that the necessary certainty of intention to create a trust did exist at the point securities were acquired, on the basis that the parties considered it necessary to implement the Rascals process to avoid the affiliates holding beneficial title. However, this finding had no practical consequence as he held that no trust existed *after* the implementation of the Rascals process.[42] These findings were upheld on appeal.[43]

4.40 In this case, there is no evidence of an intention to create a trust. The evidence is, to the contrary, strongly against that conclusion.

4.41 First, there was no agreement or requirement for Cryptopia to hold Account Holders' Digital Assets separately from its own.[44] This was a key factor in the *Lehman* cases and in *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03. The absence of such a requirement points strongly against any intention to create a trust.[45]

4.42 Secondly, as noted above, the claim is that the Account Holders' beneficial interest was to a *proportion* of the relevant type of cryptocurrency, calculated by reference to their contribution of such

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[40] At [275].
[41] At [276].
[42] At [295].
[43] *In Re Lehman Brothers International (Europe) (in admin), Pearson v Lehman Brothers Finance SA* [2011] EWCA Civ 1544.
[44] See David Ruscoe's Affidavit dated 8 November 2019 at [31], which explains how the assets were pooled.
[45] See *Lehman: Lomas* at [54]: "it is well established, in particular in commercial relationships, that the presence or absence of an obligation on B (the recipient) to keep the property separate from its own property is a powerful indicator of the presence or absence of a relationship of trustee and beneficiary between B and A".

currency since the relevant trust was created – as opposed to the type and quantity of cryptocurrency appearing in their account.[46]

4.43 However, all of the evidence – from the web pages seen by Account Holders, to the description of the content of the SQL database (which referred to the absolute number of coins associated with each Account Holder rather than a proportion / percentage-based interest), to the conduct of the exchange in practice from its inception (allowing users to require the withdrawal of the precise type and quantity of cryptocurrency appearing in their accounts, subject to withdrawal fees), suggests that users were intended to be entitled *not* to a proportion of whatever cryptocurrency happened to be held by the Company, but instead to the absolute amount appearing in their accounts.

4.44 The fact that Cryptopia applied a fixed percentage reduction to the holdings of all Account Holders who held Bitcoin following the January 2019 hack is not strong evidence of the Account Holders having a proportionate interest in the Company's holdings of those currencies. It is entirely possible that Cryptopia's action was a breach of the Account Holders' rights. In addition, there is no evidence of what, if any, adjustments Cryptopia made to the accounts of holders of other currencies affected by the hack (Ethereum, Litecoin, Bitcoin Cash and ERC20).[47]

4.45 It is also worth noting that, to the extent that some Account Holders affected by the hack may no longer have positive coin balances, but may have potential claims against Cryptopia in contract or tort, their interests are aligned with other Creditors.

[46] See Account Holders' Submissions at [192].
[47] See David Ruscoe's Affidavit dated 8 November 2019 at [32].

4.46 Third, the Amended Terms tell against a trust having been intended (at any time) for the reasons given in the Creditors' Submissions at [6.20] – [6.26].[48]

4.47 Fourth, for the reasons given by the Liquidators, a finding that all Account Holders holding a certain cryptocurreny are co-beneficiaries of the same trust is "unworkable", in view of the fact that the Amended Terms do not apply to a significant number of Account Holders.[49]

4.48 Cryptopia is highly unlikely to have intended, by its introduction of the Amended Terms, to have created two classes of beneficiary Account Holders, with access to the site on or after 7 August 2018 being determinative of which class one fell into.

4.49 An alternative hypothetical scenario is that the alteration of terms for some Account Holders, but not others, created two trusts. However, the transfer of any assets of the existing trust to the new trust would have been a breach of trust, while the fact that no such transfer occurred creates a problem of identifying which part of the currency held was within which trust; the necessary certainty of both subject matter and intention is absent.

4.50 It is also doubtful whether distribution of the Amended Terms was adequate to alter the terms of the existing trust for any of the Account Holders, again, for the reasons set out in the Liquidators' Submissions.[50]

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[48] See *Lehman: Pearson* at [260]: "while there are no hard and fast rules whereby the consensual disapplication of some basic trustee duty precludes the recognition of a trustee beneficiary relationship between the parties, nonetheless the greater the extent to which those duties are disapplied, the harder it will be for the court to conclude, taking all relevant matters into account, that the parties objectively intended to create such a relationship between them."

[49] Liquidators' Submissions at [112(d)].

[50] Liquidators' Submissions at [115] – [116].

4.51 Fifth, there are a host of uncertainties attending the claimed trusts that are not addressed in the contemporaneous documentation or other evidence. These include, for example, when the suggested trusts were intended to come into effect; the property to which they were intended to apply (e.g., all cryptocurrency held by the Company at any particular time, or only that amount of cryptocurrency sufficient to satisfy the withdrawal requests of users, or only that cryptocurrency appearing in particular digital wallets); what the Amended Terms achieved (e.g., create new trust arrangements, confirm ongoing trust arrangements, or retrospectively create a trust relationship); what the position was intended to be with respect to users who did not access the platform post the introduction of the Amended Terms (e.g., did they have merely personal rights; did they enjoy greater or different or lesser rights than users who accessed the platform on or after 7 August 2018); whether the Amended Terms applied to Cryptopia as a co-beneficiary; and what was intended to happen should there be a shortfall in the cryptocurrency available to satisfy withdrawal requests (e.g., should all holders of the particular cryptocurrency for which there is a shortfall share any loss equally, or should they share it in a way proportionate to their holding, or should all holders of all cryptocurrencies share in the loss, and should Cryptopia's beneficial interest be determined in the same manner as the Account Holders).

4.52 Whatever the effect of those various uncertainties on the requirement for certainty of subject matter, individually and together they throw considerable doubt on whether the trusts claimed could have been intended. (The last-mentioned uncertainty at least is likely destructive of the necessary certainty of subject matter, based on *Lehman: Pearson*).

5. REMAINING QUESTIONS

Question (c)

5.1 Appointed counsel agree that question (c) does not arise in the event the Court concludes the Digital Assets are "property" under s 2 of the Act.[51]

5.2 As discussed above, Counsel for the Account Holders has submitted that even if the Digital Assets are not "property" within s 2 of the Act, they would still be an "asset" for the purposes of ss 253 and 313 of the Act, rendering them subject to realisation and distribution (assuming they are not held on trust) by the liquidators. That is agreed by counsel for the Creditors.[52]

5.3 Appointed counsel also agree that, should this Court find that the Digital Assets are not trust property, the Liquidators should convert them to fiat currency for the purposes of paying claims of the Account Holders and other creditors in accordance with Part 16 of the Act.[53]

Question (d)

5.4 Question (d) concerns the material details of the trusts, i.e. when they came into existence, their terms and their contents.

5.5 The Creditors take the position that the Digital Assets are not held on trust and so these questions do not arise.[54] The Account Holders have submitted that:

(a) An express trust came into existence when Cryptopia first acquired each different type of cryptocurrency (although those dates are not currently available in evidence).[55] These trusts

[51] See Section 7 of the Creditors' Submissions and [288] of the Account Holders' Submissions.
[52] Account Holders' Submissions at [289].
[53] At [7.6] of the Creditors' Submissions and [289] of the Account Holders' Submissions.
[54] At [8.1] of the Creditors' Submissions.
[55] At [291] of the Account Holders' Submissions.

predated (in most cases) the Amended Terms but new trusts based on new kinds of cryptocurrencies will come into existence in the same way even if they were settled after the adoption of the Amended Terms.[56]

(b) It is not currently practicable to determine the terms of the trust, but it may be appropriate to consider Cryptopia a bare trustee.[57]

5.6 The Creditors submit that the construction of trusts proposed by the Account Holders is unworkable (leaving aside the issue of certainty of subject matter) because:

(a) As discussed above, each trust may have beneficiaries subject to differing terms of trust; and

(b) Treating Cryptopia as a bare trustee does not resolve the issue of how to deal with a shortfall in the assets of the trust and there is insufficient evidence upon which to imply such terms.

Question (e)

5.7 Question (e) concerns how the liquidators should treat any Digital Assets associated with an Account Holder that they cannot identify.

5.8 If the Court holds that the Digital Assets are not held on trust, appointed counsel agree on how they should be treated.[58]

5.9 If the Court holds the Digital Assets are held on trust, it is also agreed that any such assets should be dealt with in accordance with s 76 of the Trustee Act 1956.[59]

[56] At [293].
[57] At [294] – [295].
[58] See Creditors' Submissions at [9] and Account Holders' Submissions at [300].
[59] See Account Holders' Submissions at [299].

Question (f)

5.10 Question (f) concerns how the liquidators should deal with any stolen assets that are recovered.

5.11 The Account Holders submit that any recovered stolen assets should be distributed to the beneficiaries of the trusts.[60] This is of course dependent on the Court finding that the Digital Assets were held on trust and that the terms of the trust(s) provide a method of distribution. Counsel for the Creditors submits that the Digital Assets would remain assets of Cryptopia if recovered and should be converted to fiat currency and dealt with accordingly.[61]

5.12 As a practical point, in the event that the Court were to hold that the stolen assets were subject to a trust or trusts and that any recovered assets should therefore be distributed solely to the beneficiaries, the Liquidators would not be under any duty to pursue their recovery, unless the Company's own interest as a co-beneficiary of the trust(s) was sufficiently material to make the costs of pursuing recovery worthwhile in the interests of Creditors.[62]

5.13 In other words, while it is plainly in the interests of all Account Holders for the Liquidators to pursue recovery of the stolen assets on their behalf, this should not be undertaken at the expense of the general Creditors, unless the Creditors also stand to benefit in proportion to the costs incurred from the assets of the Company.

Date: 29 January 2020

[60] At [304].
[61] Creditors' Submissions at [10.2].
[62] See s 254(a) of the Act.

Signature: 

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Court appointed counsel for certain accountholders and unsecured creditors