IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2019-409-544

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 formerly 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**

REPLY SUBMISSIONS OF COUNSEL FOR THE ACCOUNT HOLDERS

Dated: 4 February 2020

Next event:	Hearing
Date:	11–14 February 2020
Judicial officer:	Justice Gendall

Counsel appointed by the Court for certain account holders:
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MAY IT PLEASE THE COURT:

I INTRODUCTION

1. These submissions are filed on behalf of Account Holders by way of reply to the *Submissions for Liquidators on Application for Directions* dated 23 January 2020. It had been agreed between the parties that both appointed Counsel would file a reply to the Liquidators' submissions, in the case of Counsel for the Account Holders by 5 February 2020.

2. These submissions do not make any rejoinder to the reply by Counsel for the Creditors to the main Account Holders' Submissions, as filed in the *Synopsis of Submissions in Reply of Counsel for Creditors* dated 29 January 2020. Counsel will address that reply at the hearing. To the extent, however, that Counsel for the Creditors in those submissions addresses or endorses the Liquidators' Submissions, this reply does respond.

II REPLY TO LIQUIDATORS' SUBMISSIONS

3. Counsel makes no objection to paragraphs 1 to 60 of the Liquidators' Submissions, but expresses reservations, explained below, in relation to the Liquidators' suggestion in paragraph 25 that the vulnerability of some cryptocurrencies to having the protocols for their operation altered is likely *"to be relevant to the Court's determination of whether cryptocurrency is property"*.

4. Similarly, Counsel expresses reservations about paragraphs 61 to 63 of the Liquidators' Submissions to the extent that they may be endorsing academic doubts as to whether bitcoin (or any other cryptocurrency) is property.

5. No objection is taken to the bare quotation in paragraph 67 of the Liquidators' Submissions of s 253 of the Companies Act 1993 as stating a liquidator's principal duty. However, Counsel submits that the expression *"assets, of the company"* in that section does not extend to assets held on trust by a liquidator (see further, paragraph 71 of the main Account Holders' Submissions). A liquidator's rights and duties in relation to assets held on trust by the company are derived from general trust law.

6. In respect of paragraph 68 of the Liquidators' Submissions, it is accepted that the liquidator of a trustee company retains access to such rights of indemnity as the trustee may have, but whether there exists any such rights on particular facts, and the extent of them, are issues that are not before the Court on this Originating Application.

7. Counsel accepts the general accuracy of paragraphs 69 to 82 of the Liquidators' Submissions but makes the following points:

   (a) In respect of paragraph 69, it is accepted that there is no binding authority requiring the Court to hold that the Digital Assets are *"property"* within s 2 of the 1993 Act, but it is submitted that there is a correct answer, and it is that those Assets *are* such property;

   (b) In respect of paragraph 80, the dicta in the majority judgment in *McIntosh v Fisk* [2017] NZSC 78 at [55] as to the breadth of the definition of *"property"* in the 1993 Act, referred to in the Liquidators' Submissions were clearly only obiter dicta. Moreover, insofar as the dictum quoted by the Liquidators suggests that trust property might be property of the company within pt 16 of the 1993 Act, it is respectfully suggested that it is wrong and does not bind Your Honour. The Judges of the Supreme Court made no reference to the long line of pertinent authority finding that trust property is not property of the company within cognate provisions of companies legislation. This line of cases is set out in footnote 90 of the main Account Holders' Submissions.

8. Counsel does not find it necessary to take any points in opposition to paragraphs 83 to 104 of the Liquidators' Submissions.

9. In paragraph 105, the Liquidators raise three characteristics of cryptocurrencies that they submit are at least arguably inconsistent with a finding that the Digital Assets are property within the meaning of s 2 of the 1993 Act, which are then addressed separately in more detail in the following paragraphs of their Submissions. It is submitted that these characteristics, either singly or in combination, are not fatal to an argument that the Digital Assets are property. Each one will be taken in turn. The headings follow those used in the Liquidators' Submissions.

Practical problems with possession of cryptocurrencies

10. In paragraph 106, the Liquidators' Submissions expand on the point (made in paragraph 105(a)) that the control that anonymous third party actors have over cryptocurrency systems creates practical and legal difficulties for holders of currency in establishing the possession and excludability necessary for ownership. Hence it is said that: transactions on a majority consensus system can be reversed; network systems can suffer faults (perhaps inevitable) that result in previously confirmed blocks of data (intended to represent cryptocoins) becoming *"orphaned"*; and other parties may have the ability to change the protocol under which the currency operates. The background to these risks had been explained in paragraphs 21 to 26 of the Liquidators' Submissions.

11. It is submitted that none of these problems is fatal to cryptocurrencies, at least in general, being regarded as items of property. It is not denied that there might not be extreme cases where vulnerability to destruction or change, either deliberate at the hands of third parties or accidental, could lead a court to conclude that what might otherwise be regarded as property is not in fact capable of being regarded as property. In most such cases, the item, by reason of the vulnerabilities, will not have any market value, even without the Court's conclusion. But exposure to the actions of others, or to accidental loss or change, is a common feature of many types of personal property, as will be illustrated below. Those vulnerabilities will be factored into the price that a potential acquirer of the item is likely to pay, but they will not mean that the item is not, in law, property.

12. It is further submitted that a Court could not safely rule on this issue without having regard to the attributes and failings of each type of Digital Asset that is before the Court (of which some 500 were tradeable). The most that could be done in the present Originating Application is for the Court to address specimen types of cryptocurrency, reserving leave for further application. It is, however, submitted that the Court ought to conclude that, without specific evidence of extreme vulnerability, all the Digital Assets should be treated as items of property.

13. It is possible to think of many situations where personal property is vulnerable to change or destruction, even lawfully at the hands of a party

in an existing relationship with the owner. Many types of personal property also have a very precarious existence. In most cases parties with lawful powers to destroy or change property will be known to the owner, but anonymity cannot matter, it is submitted. The following examples are proffered and points made:

(a) The rights attached to shares in a company are usually capable of being changed, and sometimes the shares themselves can be cancelled. Changes are usually at the behest of a specified majority of shareholders but, depending on the terms of issue and the company's constitution, changes can also be at the behest of directors. Even the rights of non-voting shares can be changed, in which case the owner gets no say in the matter. The Courts have developed rules to prevent fraud on the minority in these situations (and in cases of cancellation or compulsory acquisition, supervision is usually greater[1]), but shares are ordinarily regarded as personal property despite these vulnerabilities;

(b) Many assignable contracts are subject to rights of cancellation or change at the behest of the obligor, or as a result of agreement between assignor and obligor. Such choses-in-action would still be regarded as personal property. For example, a concert for which tickets have been sold may be subject to cancellation or change at the election of the promoter, but the ticket would still be an item of property in the hands of the ticket-holder, even, it is submitted, if there were a term that no refunds would be given;

(c) The general position in respect of the ability of an assignor and obligor to alter the terms of a contract notwithstanding that the contract, or the fruits of it, have been assigned is discussed in detail in Tolhurst's text on *The Assignment of Contractual Rights*.[2] The learned author explains that (even in the absence of an express right to alter the terms of an assigned contract, where the position is straightforward) the assignor and obligor can agree to a variation of

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1 See the discussion in *Citco Banking Corp NV v Pusser's Ltd* [2007] UKPC 13, [2007] 2 BCLC 483 at [15]–[20].

2 See G Tolhurst *The Assignment of Contractual Rights* (2nd ed, Hart Publishing, Oxford, 2016) at [8.38]–[8.48].

an assigned contract, but Equity will generally restrain a change of terms where it is unconscionable for the parties to do so given the interests of the assignee. The following is a key passage:[3]

> In short, the principle of transfer dictates that the assignee takes subject to contractual modifications. However, the relationship that exists between the assignee and obligor by virtue of the assignment and which binds the conscience of the obligor upon receipt of notice tempers the ability of the obligor to agree to such variations. It may be added that, although the assignor maintains its power to agree to modifications, in any given case, this may put the assignor in breach of contract with the assignee.

(d) Perishable food that is in the hands of a bailee would remain property of an owner, X, even where the bailee retains the right to turn off refrigeration for the food. The same legal position would obtain were the bailee to point out that its refrigeration system was very old and highly prone to breaking down and that it took no responsibility for its ongoing operation. It would also make no difference if the bailee had in fact grown the food that it had sold to X, the welfare of which was still under its control;

(e) In *State Insurance Ltd v Ruapehu Alpine Lifts Ltd*, snow on a skifield on Mount Ruapehu that had been damaged by volcanic ash was held to be property.[4]

No bundle of legal rights over cryptocurrency

14. In paragraph 107, the Liquidators raise a number of connected points, the essence of which is that cryptocurrencies exist in a jurisdictional vacuum and, more broadly, operate in a lawless world of anonymous actors. A brief response to points of this sort has already been provided in the main Account Holders' Submissions at paragraphs 168 to 170.

15. It is accepted that many, perhaps most, cryptocurrency systems operate internationally and without any obvious home jurisdiction, and that this creates problems for regulators and for courts in determining which countries' laws govern them. These points are addressed in paragraphs

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3 At [8.38].

4 *State Insurance Ltd v Ruapehu Alpine Lifts Ltd* (1998) 10 ANZ Insurance Cases 74,434 (HC) (affirmed on appeal on related issues: *State Insurance Ltd v Ruapehu Alpine Lifts Ltd* (1999) 10 ANZ Insurance Cases 74,946 (CA)).

43 to 45 of the main Account Holders' Submissions. This does not entail, however, that the problems are insoluble, nor that cryptocurrencies should be left beyond the reach of the law. Pending the possible evolution of international treaties to govern cryptocurrencies, the courts of most developed countries will accept to become seised of the issues of the proper law and appropriate forum for determining disputes that will inevitably arise before them. The courts already have done so in relation to cryptocurrencies. Most legal systems have also adapted themselves to having to deal with anonymous parties to court action, as is demonstrated by *AA v Persons Unknown Who Demanded Bitcoin*.[5]

16. The Liquidators' Submissions in paragraph 107 also imply that the very intention of the creators of many cryptocurrency systems that the system operate beyond the control of legal systems suggests that cryptocurrencies should not be treated by the courts as property. The fact is, it is submitted, that the hopes and intentions of those creators in that regard are forlorn.

17. It is almost inevitable, and certainly normal, that the operators of a cryptocurrency system will issue initial cryptocoins for value. Whether or not the parties recognise the fact, that process will normally involve an executed contract (and technically something capable of being a chose-in-action) between issuer and issuee. The express or implied terms of that contract may give to the issuee no right of complaint against the issuer in relation to the quality or other attributes of the currency, but that could be true too of a newly created and sold item of tangible property. Once issued, the founders' aspirations for a system that is self-organising will not prevent or solve the vast range of disputes that human interaction, and indeed the human condition (such as death), give rise to.

18. The following passages from Professor Fox in *Cryptocurrencies in Public and Private Law* are pertinent:[6]

> 6.04 In their technical operation, cryptocurrency systems seem designed to frustrate property law. Systems designed to obscure the claims of strangers to payment transactions, to eliminate the need for adjudication in payment transactions, and to hide the real-world

[5] *AA v Persons Unknown Who Demanded Bitcoin* [2019] EWHC 3556 (Comm). For another recent example, see *Cuadrilla Bowland Ltd v Lawrie* [2020] EWCA Civ 9 involving anonymous existing or potential trespassers to land.

[6] D Fox "Cryptocurrencies in the Common Law of Property" in D Fox and S Green (eds) *Cryptocurrencies in Public and Private Law* (OUP, Oxford, 2019) at [6.04]–[6.05].

> identity of the people behind them are not an easy object for traditional rules of property law. The systems come close to being self-regulating. Transactional outcomes are determined by cryptographic design rather than legal rules.
>
> 6.05 Despite these problems, the view advanced here is that many features of a common law system of property would apply to cryptocurrencies. They do not exist in a property void.

The ability to use cryptocurrency as a store of value is contingent upon third party actors providing exchange services

19. Insofar as one of the factors for testing something as property is the ability to exchange it for what the Liquidators call *"real value"*, the Liquidators in paragraph 109 point out a range of difficulties that holders of cryptocurrency can face in doing so. Again, these difficulties are not enough, it is submitted, to deprive cryptocurrency of its status as property. Many items of personal property can lack any viable market from time to time, or even permanently be deprived of value, for example by reason of technological developments.

20. Moreover, the Liquidators' submission assumes that one should look at the property question from the perspective of a retail investor. Direct holders of cryptocurrency, including miners, are able to trade cryptocoins amongst themselves without relying on an exchange. The existence of an exchange, therefore, is not crucial to cryptocurrencies being regarded as a species of property.

Variation of trust as a result of Amended Terms

21. In paragraph 112 of the Liquidators' Submissions, the Liquidators make a number of related, and with respect complex, submissions as to the effect of the promulgation of the Amended Terms on 7 August 2018 on the legal position of the Account Holders.

22. The import of the Liquidators' Submissions on this issue seems to be as follows:

    (a) If any trust(s) existed in favour of Account Holders (on whatever basis) before the Amended Terms, the Amended Terms purported to effect a variation of trust;

(b) Such a variation could have been effective only if all beneficiaries of the relevant trust had agreed to the variation, or there was a formal trust instrument that contained an express power of variation;

(c) The Liquidators accept (paragraphs 112(e) and 118) that if each Account Holder had its own trust, then the unanimity requirement could be met by showing assent to the change by the Account Holder. But otherwise, there was no way to vary the trust(s) because there was no formal trust instrument under the Historic Terms; and

(d) To the extent that there was a variation power, the Liquidators also submit that it was effective only in favour of Account Holders who actively engaged with Cryptopia's services after the commencement of the Amended Terms. This too, the Liquidators submit (at paragraph 112(e)) would not be workable unless there was a separate trust in favour of each Account Holder.

23. The Liquidators point out that the evidence before the Court shows that some 536,662 Account Holders did not engage with Cryptopia's exchange after 6 August 2018.

24. It is necessary to reply to these submissions in some detail. In summary, the Account Holders' reply is as follows:

(a) No *variation* of trust was involved in the Amended Terms. Those Terms were merely confirming existing trusts, and if that is not the case, the Terms were recognising new trusts, not old trusts varied;

(b) To the extent that the Amended Terms did purport to effect a variation of existing trusts, there was no need for the original trusts to have been constituted by formal instrument and to have contained an express variation clause;

(c) The Amended Terms took immediate effect for all existing Account Holders, and it was therefore not necessary for an Account Holder actively to use the Cryptopia platform in order to get the benefit of the Terms; and

(d) It follows from the foregoing points that at no point of time were there separate sets of trust assets for Account Holders under the Historic

Terms and for Account Holders who had accepted the Amended Terms, nor is it necessary to posit individual trusts for individual Account Holders. At most, the rights of Account Holders on pre-Amended Terms and those of Holders on post-Amended terms may have been different, but the assets of the trusts remained the same. But in fact it is submitted that all Account Holders by currency held their interests on exactly the same terms.

25. The Account Holders adhere to the analyses of the effect of the Amended Terms undertaken in paragraphs 272 to 279 of the main Account Holders' Submissions. Those Submissions (at paragraph 277) posit three analyses of the effect of the Amended Terms, advocated in descending order of preference. All three analyses apply to all Account Holders. The first preference is that the Account Holders were already beneficiaries of trusts of pooled assets, and the Amended Terms effected no significant change in that position. The second preference was that if the Amended Terms did create trusts in favour of the Account Holders, those trusts operated retrospectively in favour of all Account Holders, or Cryptopia has become estopped from arguing to the contrary. The third preference was that if the Amended Terms created a series of trusts (of each cryptocurrency) only prospectively, then those trusts applied in favour of all Account Holders holding the relevant types of currency.

26. This remains the position of the Account Holders. On the Account Holders' first preferred analysis, the issue of variation (and the problem identified in the Liquidators' Submissions) does not arise; the Amended Terms were simply declaratory of the existing position. The second and third of the Account Holders' preferred analyses do assume that the Amended Terms altered the legal position of the Account Holders, but because both of these analyses assume that *new* trusts arose in favour of all Account Holders on 7 August 2018, again no issue of variation of trusts arises. No consent of beneficiaries is needed, because, as submitted in the main Account Holders' Submissions, trusts can be created unilaterally by a settlor without the concurrence of the beneficiaries.

27. It is, in any event, not clear what variations, if any, to the terms of the existing trusts the Amended Terms were intended to, and did, achieve. The Amended Terms were not directed to altering Cryptopia's trust duties or

beneficiaries' trust rights; as already argued the trust terms were confirmatory. There is no indication that a variation was intended.

28. On the assumption, nonetheless, that the Amended Terms *were* purporting to effect a variation of existing trusts, the following response is made to the Liquidators' Submissions:

    (a) The Liquidators' argument that a power of variation must, in law, be created by a formal trust instrument should be rejected by the Court. If an express trust can be created orally and from the circumstances arising between the parties, as is apparent from case law, it would be surprising if variation rules were as rigid as the Liquidators suggest. Indeed, it is submitted that in an appropriate case, powers of variation can be inferred. The more formal a declaration of trust takes, especially when in the form of a trust deed, the more one can expect powers of variation to be spelled out in the instrument. The less formal the relationship, the more appropriate it may be to infer a power of variation. In particular, where the trust arises out of a contractual relationship between trustee and a third party, and a fortiori where the trust arises out of a contract between the trustee and the beneficiary him or herself, it is to be expected that there will be more flexibility in the power to vary the terms of the trust;

    (b) Dicta in cases concerned with trusts of contractual promises have recognised that the contractual parties may retain the ability to vary the contract and hence the beneficiary's rights.[7] An example is given in *Underhill & Hayton's Law Relating to Trusts and Trustees* in relation to a declaration of trust of an insurance policy by the holder of the policy in favour of a third party:[8]

> The fact that rights under the policy can be varied without the consent of the third party does not mean that no trust can exist: after all, a beneficiary can have an interest that is defeasible upon revocation of the trust or upon the exercise of a power of appointment in someone else's favour;

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[7] See *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43 at 67–68; and *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 122.

[8] D Hayton (Ed) *Underhill & Hayton's Law Relating to Trusts and Trustees* (19th ed, LexisNexis, London, 2016) at [9.91].

(c) A series of pension trust cases also confirms the importance of context in construing powers of variation. The following is a leading dictum of Millett J from *Re Courage Group's Pension Schemes*:[9]

> First, there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life. This is particularly the case where the scheme is intended to be for the benefit not of the employees of a single company, but of a group of companies. The composition of the group may constantly change as companies are disposed of and new companies are acquired; and such changes may need to be reflected by modifications to the scheme.

(d) This dictum was approved by the New Zealand Court of Appeal in *Re UEB Industries Ltd Pension Plan*, where Thorp J stated:[10]

> Of all the superannuation trust cases cited these argued most cogently and persuasively the case for a liberal interpretation of powers of amendment in superannuation trust deeds. They emphasise the facts that such trusts subsist alongside and are interrelated with employer/employee relations, that they combine elements of trust, commercial and statute law, and that they commonly operate over a lengthy period and need, if they are to achieve their objectives, to be able to accommodate major changes in the nature and financial condition of the employer settlor and in the identity of the employee beneficiaries.

(e) Although the Historic Terms do not expressly contain a written declaration of trust, it is submitted that in fact the express power of variation contained in those Terms was intended to apply to all aspects of the relationship between Cryptopia and its customers, including the trust relationship created by the context of Cryptopia's trading platform and its communications with its customers. The Historic Terms are part of the factual matrix of the trust, and the opening clause of the Terms states: *"Your use of this site is governed by these terms of use"*;

(f) The Liquidators are also wrong in submitting that any variation also took place only in relation to those Account Holders who accepted the variation by continuing to use the Cryptopia platform after 7

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9 *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 (Ch) at 505–506.
10 *Re UEB Industries Ltd Pension Plan* [1992] 1 NZLR 294 (CA) at 307.

August 2018. The Liquidators' Submissions misconstrue the amendment clause in the Historic Terms, for the following reasons:

i. Contrary to the Liquidators' Submissions, that part of the clause that deems users to have agreed to any amendment (by continuing to use the site after notice of the change) does not expressly say that amendments have no effect *until* that deeming takes place; and

ii. To the extent that an amendment was intended to *improve* the position of users, there was no need for users to have accepted the amendment. After all, acceptance of an amendment was not a *requirement* imposed by Cryptopia, but rather the clause was simply spelling out that acceptance would provide a defence to any argument by a user that he or she had not agreed to an amendment.

(g) Thus, in circumstances where new terms are less favourable to a party, it is only reasonable that persons affected be given the chance to withdraw from the arrangements (in the present case, take their cryptocoins off the platform). There is no reason to apply this approach to terms that are designed to restate or improve the position of a party. That is the position in relation to the Account Holders. A similar approach has been taken to variations of contracts agreed between an assignor of the relevant contract and the obligor; assignees get the benefit of favourable changes without having to show that they assented to the change: see *Royal Exchange Association v Hope*;[11] and

(h) Furthermore, insofar as the Amended Terms (principally in clause 5(e)) recognise that there is a trust relationship between Cryptopia and Account Holders, it is submitted that it cannot have been Cryptopia's intention that the terms not take effect immediately and simultaneously in relation to all Account Holders. Anyone who objected could withdraw their coins. Any other construction would result in Cryptopia's legal position being made inexplicably complex.

[11] *Royal Exchange Association v Hope* [1928] Ch 179 (CA) at 192 and 194.

> The trust position of each Account Holder would turn on what the Holder did to accept the Amended Terms and on what date. That would not necessarily involve a separate trust for each Account Holder (there would be issues of certainty of subject matter if that were the legal result) but it would create different classes of Account Holder with different rights.

29. There is a general principle of the common law that where it is clear that persons intend their actions to have legal effect but the precise import of their intentions is not clear, a court should do its best to construe their communications in a way that is workable. This principle is associated with the Latin maxim: *ut res magis valeat quam pereat*. There are innumerable authorities to this effect, but a good statement of the principle is found in *Rayfield v Hands*, per Vaisey J (himself citing from other cases):[12]

> It has been said that articles of association ought not to be construed too meticulously. See per Wynn-Parry J in *In re Hartley Baird Ltd*, where he said: "In the interpretation of such a commercial document as articles of association, the maxim ut res magis valeat quam pereat should certainly be applied, and I propose to interpret these articles in the light of that maxim." I am not aware that this maxim has ever been put into English, but I suggest that it directs us to "validate if possible." And see also per Jenkins LJ in *Holmes v Keyes*, where he is reported as saying that in his view the "articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy ... in preference to a result which would or might prove unworkable."

30. It is also submitted that the point taken in paragraph 116(a)(iii) of the Liquidators' Submissions as to any variation needing to be for a proper purpose and for the benefit of the beneficiaries of the existing trusts is not significant on the present facts. Insofar as the Amended Terms were varying the existing trusts, there is no reason to think that Cryptopia was acting for an improper purpose and was adversely affecting the trust rights of the Account Holders. Cryptopia was entitled in accordance with the Historic Terms (and within any limits that the law might imply) to vary the terms and conditions of its contract with the Account Holders.

31. For all the foregoing reasons, it is submitted that the better analysis of the legal position is that either no variation of trusts was involved in the Amended Terms, or, if there was a variation, all Account Holders were

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[12] *Rayfield v Hands* [1960] Ch 1 (Ch) at 4 (footnotes omitted).

automatically and simultaneously moved to the Amended Terms. There are strong reasons, and good grounds, for the Court to resist the conclusions argued for by the Liquidators.

Residual possibility: trust only for Account Holders who elected to accept the Amended Terms

32. Neither the Liquidators' Submissions nor the Creditors' Reply[13] address the possibility that the Court might conclude that there were no trusts before the Amended Terms, but the Amended Terms did create trusts albeit ones that operated only in favour of those Account Holders who engaged with Cryptopia's Exchange after the coming into effect of the Amended Terms.

33. The main Account Holders' Submissions do not address this possibility either, for the obvious reason that only a proportion of the members of the class that Counsel has been appointed to represent would benefit from that outcome. For that reason, Counsel does not actively advocate for such an analysis of the legal position, nor, it is submitted, would it be the right conclusion on the current facts.

34. Nonetheless, if the Court were to conclude that that was the correct analysis, it is submitted that such trusts would not necessarily fail for lack of any of the trust certainties. *Re Goldcorp Exchange Ltd* did not rule out such a possibility, and support for a trust over all assets of a relevant type held by a trustee (whether or not the trustee retains a beneficial proportionate interest) can be found in *Lehman Brothers International (Europe) Ltd v CRC Credit Fund Ltd*,[14] and in *Bambury v Jensen*.[15] Similar results are obtained in relation to constructive trusts where a trustee wrongly mixes trust moneys with his or her own.[16]

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[13] At [4.51] of the Creditors' Reply, the possibility of only those who accessed Cryptopia's platform being trust beneficiaries is alluded to but not developed.

[14] *Lehman Brothers International (Europe) Ltd v CRC Credit Fund Ltd* [2012] UKSC 6, [2012] 2 All ER 1 at [194], discussed at [247] of the main Account Holders' Submissions.

[15] *Bambury v Jensen* [2015] NZHC 2384 at [128], discussed at [252] of the main Account Holders' Submissions.

[16] See *Foskett v McKeown* [2001] 1 AC 102 (HL) at 133.

35. But given that Counsel is acting for the Account Holders as a single class, no positive submissions are made on this issue.

Dated this 4th day of February 2020

Peter Watts QC
Counsel appointed by the Court for certain account holders