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

SUBMISSIONS OF COUNSEL FOR CREDITORS CONCERNING *QUOINE PTE LTD V B2C2 LTD* [2020] SGCA(I) 02

2 March 2020

Judicial officer: Justice Gendall

Court appointed counsel for certain accountholders and unsecured creditors:
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May it please the Court:

1. INTRODUCTION

1.1 In accordance with the Minute of Gendall J dated 26 February 2020, these submissions address the recent judgment of the Court of Appeal of the Republic of Singapore in *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02 (**Appeal Judgment**).

1.2 Counsel for the Creditors submits that the Appeal Judgment provides further authority in support of the view that the Digital Assets held by Cryptopia Limited (**Cryptopia**) are *not* held on trust for the Account Holders.

2. THE FACTS IN *QUOINE PTE LTD V B2C2 LTD*

2.1 Quoine Pte Ltd (**Quoine**) operated a cryptocurrency exchange platform whereby it:

(a) operated a platform that provided its customers with a facility to trade cryptocurrencies; [1]

(b) operated a real-time price chart for cryptocurrency pairs on the platform and other cryptocurrency exchanges through a "Quoter Program";[2]

(c) acted as a market maker by generating buy and sell orders through its Quoter Program, and extending credit to some margin traders.[3]

2.2 One of the traders on the platform was B2C2 Ltd (**B2C2**), which utilised a software programme to buy and sell cryptocurrencies automatically.

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[1] *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02, per Mance LJ, at [154(a)].
[2] At [154(a)].
[3] At [154(b) and (c)].

2.3 Quoine made changes to the platform but omitted to make corresponding changes to the Quoter Program. This led to certain trades (defined in the Appeal Judgment as the "Disputed Trades") whereby B2C2 sold Ethereum for Bitcoin at 250 times the going rate in the market.[4] When Quoine became aware of the Disputed Trades, it reversed the transactions.

3. HIGH COURT DECISION

3.1 B2C2 alleged that Quoine's reversal of the Disputed Trades was in breach of contract and breach of trust. On the trust point, there were no express words in Quoine's terms and conditions indicating an intention to create a trust.[5] However, B2C2 argued in the High Court that Quoine had shown an intention to create a trust by holding traders' cryptocurrency assets in separate digital wallets from Quoine's own assets.[6] Against that, Quoine submitted that its Risk Disclosure Statement notified customers that assets were not deposited in a trust account so they may lose their assets in the case that Quoine was to go bankrupt.[7]

3.2 At first instance, the High Court allowed the claims in both breach of contract and breach of trust. In finding there was a trust the Judge held that the "decisive factor" was that the assets were held separately as members' assets rather than as part of Quoine's trading assets, stating: "This is sufficiently clear evidence that Quoine intended to hold the assets on trust for the individual Member."[8]

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[4] At [2] and [159].
[5] *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 at [145].
[6] At [139] and [140].
[7] At [138].
[8] At [145].

4. APPEAL JUDGMENT

4.1 On appeal, the majority upheld the High Court's decision on breach of contract but overturned the decision on breach of trust. On the breach of trust claim the majority, (with whom Mance LJ concurred on this issue), found there was no trust due to lack of certainty of intention to create a trust.[9]

4.2 Sundaresh Menon CJ, delivering the judgment for the majority, rejected the High Court Judge's view that it was a "decisive factor" that the assets were held separately rather than as part of Quoine's trading assets, instead noting that "the mere fact that Quoine's assets were segregated from its customers' cannot in and of itself lead to the conclusion that there was a trust."[10]

4.3 His Honour continued that:[11]

> "In any event, the manner in which BTC was *actually* stored by Quoine in the cold storage wallet suggests that there was *in fact, no* segregation, which militates against the inference that it was being held on trust." (emphasis original)

4.4 This finding was based on the evidence of Quoine's Chief Technical Officer, Mr Lozada, who explained that the assets contained in the cold wallet did not necessarily match the balances showing in the customer database, and who likened Quoine to a bank.[12]

4.5 The Court took this one step further, holding:[13]

> "Given that the amount that was reflected in the account balance of a user of the Platform as it appeared on Quoine's database did

[9] Appeal Judgment at [144].
[10] At [145].
[11] At [146].
[12] At [146].
[13] At [147].

> not necessarily match the amount in the cold storage wallet, it could not be said that Quoine was holding the amount stated in the user's account balance on trust. From Mr Lozada's explanation, it appears that the only amount which a user was concerned with was what was reflected on Quoine's database. The actual amount in the cold storage wallet did not matter because if there were insufficient assets to meet the account balance reflected in the database, Quoine would simply purchase the required amount from other sources to make up the shortfall. We find this arrangement to be more akin to deposits being made with a bank (as Mr Lozada suggested at the trial). The account balance that was stated in Quoine's database was the amount Quoine owed a user, and it was up to Quoine to take steps to ensure that it could repay that debt as and when the user called on it."

4.6 Additionally, the majority noted that the Risk Statement notified customers that, in an insolvency event, they may lose their "assets", which contradicted the suggestion of a trust.[14]

4.7 The Court of Appeal did not expressly consider whether Quoine's policies and practices around storage of cryptocurrencies meant that there was no sufficient certainty of subject matter to create a trust. This was presumably because their finding that there was no certainty of intention to create a trust made it unnecessary to do so.

4.8 The Court also declined to decide whether Bitcoin, as the cryptocurrency in question, was property capable of forming the subject matter of a trust, despite receiving analysis on this issue from Prof Goh Yihan as amicus curiae.[15] The majority decision comments:

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[14] At [148], as relied on by Quoine in its submissions in the High Court.
[15] Appeal Judgment at [6] – [7].

> "There may be much to commend the view that cryptocurrencies should be capable of assimilation into the general concepts of property. There are, however, difficult questions as to the type of property that is involved. It is not necessary for us to come to a final position on this question in the present case."[16]

5. APPLICATION TO CRYPTOPIA

5.1 Counsel acknowledges that the Appeal Judgment is based on the particular facts of the B2C2 case, particularly Quoine's terms and conditions and the manner in which it held cryptocurrency assets. However, there are a number of close parallels with Cryptopia:

(a) Like Quoine, Cryptopia also operated a system whereby it had a database showing coins allocated to individual customer accounts but held the digital assets in unsegregated wallets;[17]

(b) Like Quoine, Cryptopia did not segregate any of its coins in a manner that was identifiable to each customer. Indeed, Cryptopia did not segregate its own coins from those that are alleged to be held on trust for the Account Holders;[18]

(c) Like Quoine, the amounts shown in Crytopia's customer database did not necessarily reflect the reality of the assets held by Cryptopia;[19]

(d) In practice, if a customer wanted to purchase a coin, Quoine would have to procure it.[20] Similarly, Cryptopia could also obtain coins from its own chosen sources; it was not required to have

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[16] At [144].
[17] Affidavit of David Ian Ruscoe, dated 8 November 2019, at [25] (**November DIR Affidavit**) and Affidavit of David Ian Ruscoe dated 13 January 2020 at [9].
[18] Affidavit of David Ian Ruscoe, dated 13 January 2020, at [9].
[19] November DIR Affidavit, above n 17, at [11], [25] and [26].
[20] Appeal Judgment at [147].

the coins required to meet its obligations to account holders in its wallets at any given time;[21]

(e) Just like Quoine's database system, the best analogy for Cryptopia's ledger system is a bank account.

5.2 Accordingly, the reasons for the Court of Appeal's finding that Quoine's manner of operation did not show an intention to create a trust apply with equal or greater force to Crytopia.

5.3 It is acknowledged that there is difference between Quoine's terms and conditions and those which Cryptopia introduced in August 2018. Until that time, like Quoine, Cryptopia's terms and conditions did not refer to a trust. The updated terms and conditions make reference to Cryptopia holding account holders' "entry in the general ledger of ownership of Coins" on trust for each user.[22] However, as previously submitted, this is not sufficient to establish an intention to create a trust, nor is it a basis to distinguish the case from Quoine. Leaving aside the issue of whether and how the updated terms became effective, the wording is unclear and is not sufficient to provide certainty of intention to create a trust for the reasons set out in detail in previous submissions.[23] Nor is it capable of overcoming the problem of lack of certainty of subject matter, also discussed in detail in previous submissions.

6. CONCLUSION

6.1 While it is not binding, Counsel for the Creditors submits that the Appeal Judgment is persuasive authority for a finding that there was no trust over the coins held in Cryptopia's wallets and that those coins

[21] November DIR Affidavit at [14].
[22] Annexed as DIR1 to Affidavit of David Ian Ruscoe dated 1 October 2019.
[23] See Creditors' Submissions dated 4 December 2019 at 6.11 – 6.43.

should form part of the Company's assets available for distribution to creditors.

Date: 2 March 2020

Signature: 

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Jenny Cooper QC
Court appointed counsel for certain accountholders and unsecured creditors