**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**ŌTAUTAHI ROHE**

**CIV-2019-409-544**

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| **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)** |
| **AND** | |
| **IN THE MATTER OF** | An application by **DAVID IAN RUSCOE** and **MALCOLM RUSSELL MOORE** |
| | **Applicants** |

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**SUBMISSIONS OF COUNSEL FOR THE ACCOUNT HOLDERS ON *QUOINE PTE LTD V B2C2 LTD* [2020] SGCA(I) 02**

Dated: 4 March 2020

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Judicial officer: Justice Gendall

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**MAY IT PLEASE THE COURT:**

## Introduction

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, and respond to the submissions on that case filed by Counsel for the Creditors dated 2 March 2020.

2. The decision of the Singapore Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02, and the cases on which the Court relied, are distinguishable from the present facts for the reasons given below.

3. However, it is also submitted that the Court of Appeal's judgment is open to criticism in a number of respects. For those reasons too, the decision should not be followed by Your Honour.

4. The Court of Appeal's reasoning on the trust issue (at [137] to [149]) was relatively brief, as had been that of Simon Thorley IJ at first instance. The following were the main steps in the Court of Appeal's reasoning:

    4.1 An intention to create a trust is not to be inferred *"simply because a court thinks it is an appropriate means of protecting or creating and interest"* ([144]);

    4.2 The mere fact that assets are segregated by a putative trustee from other assets held by the trustee does not lead to a conclusion that there was a trust ([145]);

    4.3 There was in fact no segregation, since the evidence was that the amount of currency recorded in the database did not necessarily match what the company held in its wallets ([146]–[147]); and

    4.4 A term in the company's Risk Disclosure Statement provided that if the company went bankrupt it would *"not be able to return customer assets, and customers may suffer losses"*, which was not consistent with the normal position of a trustee who becomes insolvent ([148]).

**Facts distinguishable**

*Database consciously not backed by currency in* Quoine

5. The last two steps in the foregoing reasoning are based on factual findings that are not established in relation to, or do not apply to the position of, Cryptopia. For these reasons *Quoine*, and its reasoning on the trust issue in particular, are distinguishable. Each step is taken in turn.

6. For access to the facts, it is necessary to refer both to the judgment of the Singapore International Commercial Court (SGHC; Tab 4 of the Core Bundle of Authorities) and the majority judgment in the Singapore Court of Appeal (SGCA).

7. The fact that the amount of cryptocurrency in Quoine's wallets did not match the database was not just incidental. It appears that Quoine operated its platform in a different, and much more active, way than is in evidence in relation to Cryptopia. Quoine was a major *"market-maker"* on its platform, which entailed that it was *"actively placing buy and sell orders"* on the system (SGCA [1] and [10]). Indeed, Quoine was the principal market-maker, and was estimated to be responsible for around 98% of the market-making trades on the Platform (SGCA [10]).

8. More significantly still, Quoine lent funds, including cryptocurrency, to other market-makers (SGCA [12]). In so acting, it appears that Quoine did not attempt to ensure that there was actual cryptocurrency in its wallets that matched the loans being made and the positions that were then entered into on the platform using those loan assets (SGCA [146], SGHC [16]). Quoine had, on the facts, agreed to lend Ethereum currency to the counterparty to the exchange-contracts that were the subject of the case (SGCA [14]). It appears that the result of the loans and transactions in question was that the relevant buyers contracted to deliver to B2C2 more than 3000 bitcoins when they had only 13.52 bitcoins in their account with Quoine (SGHC [76]–[77]).

9. Another feature of market-making on the platform was that it was automated in accordance with rules set up by Quoine. A party which had borrowed funds (including cryptocurrency, as on the facts) from Quoine could find that in certain events Quoine's platform automatically committed

the borrower to enter into a trading transaction on the platform in order to close out the borrowing risk (SGHC [25]). The borrowing party had to that extent surrendered its autonomy to Quoine's rule system.

10. It is significant too that, at the time the facts occurred, Quoine was also engaging in futures trading (SGHC [15]), which necessarily was trading not matched by actual currency.

11. In these circumstances, the conclusion of the Singapore Court of Appeal that the account balances of users *"did not necessarily match the amount in the cold storage wallet"* (SGCA [147]) was something of an understatement, at least in relation to the actual transactions before the Court. Quoine could be said to be a banker (SGCA [147]) in a way that could not be said, on the evidence, about Cryptopia.

*Other key parties were also market-makers*

12. Not only was Quoine a market-maker and lender to its customers, but B2C2 and its counter-parties in respect of the transactions in question were also market-makers, not investors. The Court of Appeal did not make anything of this fact, but it is arguable that such market-makers did not expect to obtain a proprietary interest. It would not follow that participants who were not market-makers, but ordinary investors, could not have been promised and given a trust interest in relation to such actual currency as was sufficiently identified with the database.

*Users not subjected to Cryptopia's insolvency risk*

13. In marked contrast to the position in *Quoine*, there was no provision in the terms of trade of Cryptopia that attempted to make users subject to the risk of Cryptopia becoming insolvent and going into liquidation. There is no such provision in the terms and conditions (original or amended) and nor do the iterations of the risk statements make any mention of it.

*Other evidence in* Cryptopia

14. The Account Holders reiterate the point made in their main submissions (at [253] and [254]), and orally at the hearing, that the construction of contractual and trust arrangements between parties is always a matter for the tribunal in question. *Quoine* should be read in that light.

15. While, in contrast to *Quoine*, there was no express separation clause in the documentation in the present case, there were a number of other factors pointing to Cryptopia being a trustee for its users' cryptocoins that were not present in *Quoine*. Most prominent were the express trust provisions in clauses 5 and 6 of the Amended Terms. Other indicators of a trust existing before the Amended Terms, or reinforcing the existence of a trust after the Amended Terms, were set out in the Account Holders' main submissions (see, for instance, at [6] and [263]–[279]).

16. Further indicators of a trust relationship were the subject of oral submissions, including: the fact that Cryptopia's internal accounts and GST returns demonstrated that it did not assert any ownership in the cryptocurrency, beyond its beneficial interest in the pools of assets; the agency clause, clause 7.3, in the Amended Terms; the material in the Customer Service Manuals (Vol 2, Tab 20, 302.00103); and the Minter Ellison legal opinions (Vol 2 Tab 21).

17. The Account Holders also make the following points in response to the factual matters addressed in the Creditors' Submissions on *Quoine*:

    17.1 The point made by the Creditors at para 5.1(b) that *"Cryptopia did not segregate its own coins from those that are alleged to be held on trust for the Account Holders"* is misleading. The evidence is that Cryptopia did not have any coins of its own.[1] It was merely one of the beneficiaries of the trust as well as trustee, and to that extent was an *"account holder"*. It appears that Quoine did have cryptocoins separate from those of its customers, and indeed lent coins to those customers;

    17.2 The point made by the Creditors at para 5.1(c), by reference to the Affidavit of Mr Ruscoe dated 8 November 2019 (**Ruscoe-8 Nov)**, that *"the amounts shown in Cryptopia's customer database did not necessarily reflect the reality of the assets held by Cryptopia"* is also misleading. Paragraph 11 of Ruscoe-8 Nov, referring to a reconciliation of actual holdings against the SQL database balances, is consistent with Cryptopia's having suffered a hack of its wallets in

[1] See Ruscoe-13 Jan 2020 at [9] (201.00073); Ruscoe-7 Feb 2020 at [11].

January 2019, as referred to in paragraph 6 of Ruscoe-8 Nov. The other paragraphs to which the Creditors refer ([25] and [26]) also do not support the Creditors' submissions. Those paragraphs simply point out that some transactions were off-exchange (necessitating the use of currency in hot wallets) and some on-exchange.

17.3 The point made by the Creditors at para 5.1(d), by reference to Ruscoe-8 Nov [14], that Cryptopia *"was not required to have the coins required to meet its obligations to account holders in its wallets at any given time"* is again misleading. The paragraph in Ruscoe-8 Nov relied upon by the Creditors is simply referring to the fact that Cryptopia had hot and cold wallets of the same currency, and may have needed from time to time to move currency from a cold wallet to a hot wallet. The evidence does not support an entitlement by Cryptopia to create a deficit in its wallets against coins provided by the Account Holders. It is also submitted that the contents of all the wallets were held on trust at all relevant times.

**Cases relied on in *Quoine* distinguishable**

18. The Court of Appeal in *Quoine* cited only two cases for its conclusion on the trusts issue, *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 and *Vintage Bullion DMCC v Chay Fook Yuen* [2016] 4 SLR 1248, both of which are also distinguishable from the facts of the present case.

19. *Korda* was concerned with investments relating to a pine plantation. The documentation contained no provision for investors to have any interest in the relevant land or trees, or in timber cut from the plantation. However, there was provision for the proceeds of sales of timber, after certain steps had been taken, to be paid by the manager of the scheme to a trustee for the investors. The principal issue in the case was whether the Court should imply a provision that the proceeds of sale should be subject to a trust in the manager's hands *before* being handed over to the trustee. The High Court of Australia held that it would not be appropriate to imply a trust when the documents had their own express trust provisions (see at [19]). The facts are evidently different in the present case.

20. *Vintage Bullion* concerned a complicated scheme of investment in

leveraged foreign exchange and leveraged commodity transactions. The company running the scheme (MF Global) kept funds in designated bank accounts, separate from its trading funds, made up of three amounts: first, the proceeds of realisation of investments made on customers' instructions; secondly, sums paid in by MF Global to cover fixed profits of investors who had closed out their positions; and thirdly, fluctuating sums kept in the accounts by MF Global to cover unrealised or potential profits by investors. The Singapore Court of Appeal held that there was a statutory trust over the designated bank accounts to the extent of the first two categories, but neither a statutory trust nor a voluntary express trust over the sums representing the unrealised profits. The statute did not require MF Global to do what it had done in relation to unrealised profits. It was also found that the investors had no expectation of an interest in relation to those profits until they had chosen to close out their investments. The Court held that MF Global was to that extent itself a beneficial owner of the sums in the designated bank accounts (a co-beneficiary with the investors). This case is again readily distinguishable.

**Criticisms of *Quoine* on the trust issue**

21. While each of the first two steps in the Court of Appeal's reasoning set out in paragraph 4 above are not in themselves objectionable, the Court fails to recognise that in many Commonwealth jurisdictions, including New Zealand, there are many cases where the context of the arrangements between the parties has alone been sufficient for courts to infer the existence of an express trust. Leading examples from several commercial contexts were set out in the Account Holders' main submissions and traversed in oral submissions.

22. The Court of Appeal failed to consider any of these cases, including the series of *Lehman* cases from England and Wales. In particular, the common law has been alive to the vulnerabilities of members of the public when invited to invest in intangible assets, no less than legislatures that have provided for statutory trusts in favour of investors. In general, investors rarely set the terms of their arrangements, and are usually parting with their assets for an indefinite period. In that respect, they tend as a group to be more homogenous than ordinary contracting parties, many of whom will have had the bargaining power to set terms, including terms for

prompt payment.

23. In *Cryptopia*, it is almost counter-intuitive that the investors, most of whom brought their own cryptocurrency to the platform, were intending to surrender beneficial ownership of it to the platform-operator simply in order to be able to trade with one another. Importantly, Cryptopia never asserted any such ownership.

24. While the *Korda* case can be accepted as rightly decided, the tenor of French CJ's judgment in that case (French IJ was also a member of the panel in *Quione*) sits uneasily with the earlier jurisprudence from the High Court of Australia in *Bahr v Nicolay (No 2)* (1987) 164 CLR 604, and before that *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43, both relied upon in the Account Holders' oral submissions. *Bahr*, and the concept of inferring a trust from the circumstances of a transaction, remains unquestioned in the latest edition of *Jacobs' Law of Trusts in Australia*, also cited in oral submissions. It is submitted that *Korda* does not erase the persuasiveness of those earlier authorities, and should be treated as a decision on its facts.

Dated this 4th day of March 2020

**Peter Watts QC**

Counsel appointed by the Court for certain account holders