

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

CIV 2023-485-411

Under the Part 19 of the High Court Rules, Part 16 of the Companies Act 1993 and Part 7 of the Trusts Act 2019

In the matter of **CRYPTOPIA LIMITED (IN LIQUIDATION)**

And

In the matter of an application for directions by **DAVID IAN RUSCOE** and **MALCOLM RUSSELL MOORE** of **GRANT THORNTON NEW ZEALAND LIMITED**

Applicants

**SYNOPSIS OF SUBMISSIONS OF THE LIQUIDATORS IN RESPECT OF
ORIGINATING APPLICATION FOR DIRECTIONS IN RESPECT OF
DISTRIBUTION OF CRYPTOCURRENCIES**

Dated: 13 October 2023

Judicial officer assigned: Justice Palmer

Next event: 3 day hearing starting 13 November 2023

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MAY IT PLEASE THE COURT:

1. INTRODUCTION

- 1.1 These submissions are filed in support of the originating application for directions dated 31 July 2023 filed by the liquidators (Messrs Ruscoe and Moore) of Cryptopia Limited (in liquidation) (**Cryptopia** or the **Company**).
- 1.2 The liquidators seek the Court's direction on the issues set out in the originating application in order to distribute the cryptocurrencies held on bare trust to those beneficially entitled to them (the account holders of Cryptopia) in accordance with Cryptopia's legal obligations. The directions sought address:
- (a) the method of distribution;
 - (b) *Re Benjamin* and *Re Instant Cash Loans* directions to enable the liquidators to distribute the cryptocurrencies on a particular factual footing;
 - (c) the method by which trust administration costs should be allocated to trusts and to account holders; and
 - (d) related ancillary orders.
- 1.3 This is the second substantive application for directions, following an application in 2019 for directions as to the status of cryptocurrency.¹ Once the cryptocurrencies have been distributed to account holders, the liquidators anticipate a third application for directions to enable them to wind up the trusts (and the liquidation of Cryptopia).
- 1.4 These submissions are structured as follows:
- (a) Section 2: Background to the application.
 - (b) Section 3: Trust law principles.
 - (c) Section 4: Trust administration steps to date.
 - (d) Section 5: Proposed Review process.
 - (e) Section 6: Proposed distribution of cryptocurrencies held on trust.

¹ *Ruscoe v Cryptopia Limited (in liquidation)* [2020] NZHC 728, [2020] 2 NZLR 809.

- (f) Section 7: Proposed allocation of trust administration costs.
- (g) Section 8: Next steps in winding up the trusts.
- (h) Section 9: Mistaken / post-appointment deposits.
- (i) Section 10: Application of Anti Money Laundering legislation.

2. BACKGROUND TO APPLICATION

- 2.1 Much of the relevant background to this application, particularly as it relates to the period prior to the appointment of liquidators, has been summarised by Gendall J in his judgment of 8 April 2020 in *Ruscoe v Cryptopia Limited (in liquidation)* [2020] 2 NZLR 809 and in Mr Ruscoe's 31 July 2023 affidavit. Where possible, that background will not be repeated, save where it is relevant to an issue before the Court in this proceeding.
- 2.2 For the purposes of these submissions, it is sufficient to say that Cryptopia was a New Zealand cryptocurrency exchange based in Christchurch. In January 2019 Cryptopia was hacked, and a significant amount of cryptocurrency was stolen from it (**Hack**).² On 14 May 2019, Russell Moore and David Ruscoe were appointed liquidators of Cryptopia by special resolution of the shareholders. At the date of liquidation, it had over 2.2 million registered account holders in more than 180 countries. Of those 960,000 had a positive account balance.

3. TRUST LAW PRINCIPLES

- 3.1 By judgment dated 8 April 2020, Gendall J held that Cryptopia held cryptocurrencies on trust for the benefit of account holders (ie, that Cryptopia was a corporate trustee). His Honour found that a separate trust was created for each cryptocurrency held by Cryptopia.³
- 3.2 Gendall J held that Cryptopia was bare trustee:⁴

I find that Cryptopia's principal duty under each of these respective trusts was to hold the relevant pool of currency, in many cases which the accountholders had brought onto the platform, on behalf of those accountholders...As part of

² Approximately NZD30 million, valued at the time of the Hack. See affidavit of David Ian Ruscoe, 31 July 2023 at [12].

³ *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [192].

⁴ *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [184] and [196].

this Cryptopia as trustee was required to deal with each accountholder member's share in the pool as directed by the member.

...

As I see it here, Cryptopia essentially fulfilled the role of a bare trustee in relation to the accountholders. Cryptopia's trust duties therefore were somewhat confined. Its principal role was to hold each group of digital assets as trustee for the accountholders, to follow their instructions, and to let individual accountholders then increase or reduce their beneficial interest in the relevant trusts in accordance with the system Cryptopia had created for that purpose.

3.3 A bare trustee is defined as follows:⁵

A bare trustee is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so.

- 3.4 It has been said that a useful way of ascertaining a trustee's duties is to consider whether the duties are active or merely passive, having regard to the nature and extent of the trustee's obligations in the terms of the trust, the relevant surrounding circumstances, and the obligations imposed on trustees by law.⁶
- 3.5 Part of the difficulty produced by Cryptopia's liquidation is that there is not a trust deed by which Cryptopia's obligations can be determined. Accordingly, the content of Cryptopia's trustee obligations is sourced from the rules of equity, statute, and its terms and conditions.⁷
- 3.6 The overriding obligation of a trustee, at equity, is to preserve and safeguard the trust property. In exercising their powers and duties, trustees have a general duty to exercise care, except to the extent that they are excused by the terms of the trust or by statute.⁸ Trustees must manage trust property with the same degree of diligence and care that a person of ordinary prudence would exercise in the management of his own affairs.⁹ If the

⁵ *Halsbury's Laws of England* (4th ed, Butterworth) at [650]; *Laws of New Zealand* at [120].

⁶ *Burns v Steel* [2006] 1 NZLR 559 (HC at [42] and [62]).

⁷ Exhibit DIR-2 to affidavit of David Ian Ruscoe, 1 October 2019 in CIV-2019-409-544.

⁸ Fletcher (ed) *Lewin on Trusts* (online looseleaf 20th ed, Thomson Reuters, 2020) at [34-001] (**Lewin on Trusts**).

⁹ *Lewin on Trusts* at [34-002] citing *Speight v Gaunt* (1883) 9 App Cas 1 (HL) at 19 per Lord Blackburn. See also *Brean v Williams* (1996) 186 CLR 71 at 137 per Gummow J.

trustee is a professional, they would be expected to exercise any special knowledge or expertise reasonably expected from a person acting in that profession.¹⁰

- 3.7 In accordance with the general duty of care, trustees have duties to:¹¹
- (a) Take active steps to place trust property under their own control.
 - (b) Ensure the safe custody of trust property. Trustees must avoid intermingling trust property with the trustee's own property, or to use it for the trustee's own benefit. The duty of safe custody may include a duty to insure depending on the duty of care owed in the circumstances and the nature of the trust property.
 - (c) Preserve and manage the trust property for the benefit of the beneficiaries.
- 3.8 Those duties overlap with, but are distinguished from, the fiduciary duties of a trustee (being the duty of loyalty; duty to avoid conflicts of interest; and the rule against unauthorised profits).¹²
- 3.9 Many of the duties outlined above correspond with the mandatory and default duties codified in the Trusts Act 2019.¹³
- 3.10 As far as counsel is aware, there is limited case law in New Zealand in respect of corporate trustees. For guidance on some of the issues relevant to corporate trustees, counsel refers to authorities from other jurisdictions such as Australia, England and Wales and the Cayman Islands, where issues relating to corporate trustees are more commonly determined by the courts.
- 3.11 When a corporate trustee is put into liquidation, no legal title in the business or trust assets passes to the liquidator, but the liquidator is in control of the company for the purposes of distribution. The liquidator also has the power and duty to take control of and administer the trust assets.¹⁴ The liquidator's primary obligation is to act in a responsible way in the administration of the trust in the name of the company,¹⁵ namely by:

¹⁰ See s 29(b) of the Trusts Act 2019, which reflects the common law position.

¹¹ *Lewin on Trusts* at [34-015]–[34-099].

¹² *Lewin on Trusts* at [34-001].

¹³ Trusts Act 2019, ss 22–38.

¹⁴ Heath and Whale (eds) *Heath and Whale on Insolvency* (online ed, LexisNexis NZ Limited, 2022) at [46.8©(ii)] (**Heath and Whale**).

¹⁵ *Heath and Whale* at [46.8(c)(ii)], citing *Re French Caledonia Travel Service Pty Ltd (in liq)* (2002) 42 ACSR 524 at [12]–[13].

- (a) Identifying the trust duties / trust deed.
- (b) Assessing the nature and value of the trust assets and liabilities.
- (c) Investigating the financial relationship between the trustee and trust.
- (d) Identifying trust creditors and beneficiaries.
- (e) Determining the appropriate action to be taken on behalf of the trustee, including action to preserve and protect assets or to wind up the trust.¹⁶

Distribution of trust property

3.12 As set out above, the core obligation of a bare trustee is to convey or transfer the trust property to the persons entitled to hold it. That is consistent with the purpose of a trust generally:¹⁷

A consequence of a trust is that, for most trusts, there will ultimately be a transfer of legal title to the property subject to the trust to its beneficiaries. If that occurs in the way provided for under the trust instrument the trustees' obligations in relation to that property are discharged and the trust ends.

3.13 In respect of a bare trust when a beneficiary is absolutely entitled, a beneficiary can call for a distribution of the portion of their entitlement. That right applies to trust property such as cash, money at the bank, unsecured loans, stock exchange securities and the like.¹⁸ The cryptocurrencies held on trust by Cryptopia might be compared to a trust whereby shares are held for the beneficiaries. In such trusts, it is settled law that a beneficiary absolutely entitled to a part of a trust shareholding is entitled to a proportionate number of the shares and can call for a distribution of that entitlement.¹⁹ Typically, the beneficiary's entitlement is to their share of the trust property itself and the obligation is to convey the trust property in specie, although that will depend on whether the trustee has a power of sale or duty to sell, or to manage and invest the trust property actively for the benefit of beneficiaries.²⁰

¹⁶ *Heath and Whale* at [46.8(c)(ii)], citing *Irvine v Australian Share Trading Underwriting Ltd (in liq)* (1996) 22 ACSR 765 and *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674, (1991) 5 ACSE 673.

¹⁷ Andrew Butler (ed) *Equity & Trusts – A to Z of New Zealand Law* (online looseleaf ed, Thomson Reuters) at [26.5.3.3(6)] (**Butler on Equity & Trusts**).

¹⁸ *Lewin on Trusts* at [22-006] to [22-009].

¹⁹ *Lewin on Trusts* at [22-009].

²⁰ *Lewin on Trusts* at [22-008].

3.14 In circumstances where a trustee does have a power of sale, the general obligation is that:²¹

... trustees must obtain the highest possible price and must not do anything that would prejudice the sale. So, trustees were not allowed to do anything which would unnecessarily reduce the value of the property in the eyes of possible purchasers.

3.15 A trustee must be satisfied beyond doubt as to the parties legally and equitably entitled to the property before undertaking distribution.²² A trustee is personally liable for distributing to the wrong hand, for such a payment is no discharge.²³ If a trustee is uncertain whether they have identified all beneficiaries, then the courses of action reasonably open to the trustee are to:²⁴

- (a) Make inquiries to trace beneficiaries and protect himself from liability by advertising.²⁵
- (b) Retain sufficient assets to accommodate for potential beneficiaries, if it is possible to estimate the fund required. The trustee cannot fully wind up the trust in this situation until some other step is taken.
- (c) In some cases, a trustee may be able to take out insurance and distribute only to the known beneficiaries.
- (d) If they have the power to exclude beneficiaries pursuant to the trust deed, it may be a proper exercise of the power to do so.
- (e) Seek *Re Benjamin* orders (see [3.16] below).
- (f) As a last resort, a trustee may pay the fund into court.

The *Re Benjamin* jurisdiction

3.16 A *Re Benjamin* order²⁶ permits trustees to proceed with a distribution on a particular factual footing on the basis that the true facts, despite the trustee's efforts, are impossible or impracticable to ascertain.²⁷ For example, a trustee

²¹ Garrow and Kelly *Law of Trusts and Trustees* (8th ed, 2022) at [23.39] (**Garrow and Kelly**).

²² *Lewin on Trusts* [26-004].

²³ *Lewin on Trusts* [26-005] citing *Re Hulkes* (1886) 33 Ch D 552 at 557. For an example of a distribution to a person not entitled with the same name as the person actually entitled, see *Fea v Roberts* [2005] EWHC 286 (Ch), [2005] WTLR 255.

²⁴ *Lewin on Trusts* [26-005].

²⁵ Relevantly, s 136 of the Trusts Act 2019 (and its predecessor, s 76 of the Trustee Act 1956) gives some indication on what is appropriate advertising: see [3.18] of submissions below.

²⁶ So named for the case in which they were first exercised in the Court's inherent jurisdiction: *Re Benjamin* [1902] 1 Ch 723, [1900-1903] All ER Ext 1300.

²⁷ *Lewin on Trusts* at [39-033].

might seek a direction that it can distribute trust assets on the footing that the beneficiaries currently identified are the only beneficiaries. Such an order protects the trustee from liability if it is later established that there are further beneficiaries.²⁸

3.17 An order made under the *Re Benjamin* jurisdiction does not vary or extinguish any interest or claim that a third party might have, but simply enables the trust or estate to be distributed by the trustees according to the practical probabilities.²⁹ Any person beneficially entitled may still make a claim for the trust property and may follow the trust property if he later appears.³⁰ This is so (ie, the beneficiary can trace) even if the distribution relates to a deficient fund.³¹

3.18 The *Re Benjamin* jurisdiction has been partly codified in s 136 of the Trusts Act 2019:³²

(1) The court may, on application by a trustee, make an order authorising the trustee to distribute trust property—

(a) as if a potential beneficiary or a class of potential beneficiaries does not exist or never existed or has died before a date or an event specified; and

(b) if, because of the order, it is not possible or practicable to determine whether any condition or requirement affecting a beneficial interest in the property or any part of it has been complied with or fulfilled, as if that condition or requirement had been or had not been complied with or fulfilled.

(2) The court may make an order only if it is satisfied that—

(a) reasonable measures have been taken to bring to the notice of the potential beneficiary or beneficiaries their potential beneficial interest or interests; and

(b) at least 60 days have passed since the last of those measures was taken; and

²⁸ *Lewin on Trusts* [39-031]; *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874 (**Re MF Global**).

²⁹ *Lewin on Trusts* at [39-031]. See also *Re Greens Will Trusts* [1985] 3 All ER 455 at 462.

³⁰ *Lewin on Trusts* [39-031]; *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874 (**Re MF Global**).

³¹ *Lewin on Trusts* at [44-096] and [39-031] to [39-035].

³² *Re Holland* [2023] NZHC 464. See also the earlier s 76 of the Trustee Act 1956.

(c) no potential beneficiary with respect to whom an order is sought has come to the attention of the trustee as a result of those measures, or the claim of any such beneficiary may be disregarded in the circumstances.

3.19 *Re Benjamin* orders are made in the exercise of the Court's inherent jurisdiction to supervise the administration of trusts, and it is not necessary for a *Re Benjamin* order to be bolstered through resort to the statutory jurisdiction.³³ The terms of the section are nevertheless useful as a statutory guideline as to what reasonable notice to potential beneficiaries of a trust will be.³⁴

3.20 *Re Benjamin* orders may not be apt in situations when trustees are faced with a claim to a beneficial interest that the claimant fails to pursue.³⁵ If a claim has been made, then it is in principle possible to decide it.³⁶ However, the court's inherent jurisdiction is broad-ranging, and the courts are pragmatic in their approach. A Court may still make an order for the pragmatic distribution of trust assets even when the *Re Benjamin* jurisdiction is not apt. For example, in *Re MF Global*, David Richards J (as he then was) held that:³⁷

That part of the proposed order which would permit the administrators to distribute the client money held by them, without providing for those claims which are rejected in whole or in part but in respect of which no appeal to the court is made, would not simply be an application of the decision in In re Benjamin [1902] 1 Ch 723 and the subsequent similar cases. Those cases permit the trustee to act on a presumed fact in circumstances where it is impossible or impracticable to establish the fact one way or the other. In the case of rejected claims, there is no doubt that the claimant exists and that they have asserted claims which have not been finally determined by agreement, withdrawal or decision of the court. The basis of the proposed order is that the administrator should be permitted to proceed with the distribution of client money on a presumption that the only good or potentially good claims are those which have been agreed and those whose rejection is the subject of an appeal to the court.

The fact that the proposed order does not in this respect neatly fit within the In re Benjamin line of cases does not mean that it falls outside the proper scope of the inherent jurisdiction of the court. In the context of third party claims to trust property, it is stated in Lewin on Trusts, 18th ed (2008), para 27.34:

³³ See *Re Triple A Trustees Limited* [2020] NZHC 1314. In this case, the Court was satisfied that orders could be made in its inherent jurisdiction and did not require bolstering through resort to a "blessing order" under s 66 of the Trustee Act 1956 as well. The orders were explicitly made in the exercise of the Court's jurisdiction and in reliance on *Re Benjamin*.

³⁴ *FPP Trustee (NZ) Ltd v Low* [2021] NZHC 3507 at [65].

³⁵ *Lewin on Trusts* at [39-033]; *Re MF Global* at [10].

³⁶ *Lewin on Trusts* at [39-033].

³⁷ *Re MF Global* at [29]–[32].

It is the practice of the court not generally to permit a trustee to distribute without notice to a claimant. But the court has jurisdiction to permit or direct a trustee to distribute notwithstanding the existence of claims or potential claims from third parties. That will not have the effect of destroying a proprietary right of third parties, but may afford protection against personal claims against the trustees by third parties.

If such orders can be made in the context of third party claims to the trust property, I can see no reason in principle why such orders cannot also be made in the context of rejected claims to a beneficial interest.

Re Instant Cash Loans

3.21 In *Re Instant Cash Loans Limited*,³⁸ the High Court of England and Wales went further in the exercise of its inherent jurisdiction by permitting the trustee to proceed on the factual footing that beneficiaries who had started the claims process but had not completed it by providing bank account details, after further payment attempts were made by the trustees, had abandoned their claims. The Court made an order that the remaining trust assets could be distributed to beneficiaries who had completed the claims process.

3.22 In *Re Instant Cash Loans*, the Company operated as a provider of loans. It incurred high numbers of redress liabilities to borrowers because of unaffordable lending. When the Company went into voluntary liquidation it entered into a scheme of arrangement whereby it held a sum of money on trust for redress creditors. Claimants were required to lodge claims and the Company would accept or decline them. However, the Company did not request bank account details at the same time as claims were submitted. Accordingly, there were several creditors who had not provided bank details but had lodged a claim. The Company sought a direction that it could pay those redress creditors by cheque. If the cheques were not cashed within six months, the Company would distribute the remaining funds to the creditors for whom they did have bank details or would pay the surplus into court.

3.23 The Court observed that (similarly to a *Re Benjamin* order) "*this would of course amount to distributing funds that are otherwise agreed to be due to those creditors under the scheme.*" At [25] the Court held that:

I was concerned in reading the papers that the proposal does actually overturn a beneficial entitlement of theirs, but it seems to me that given that they have

³⁸ *Re Instant Cash Loans Limited* [2021] EWHC 1164 (Ch) (***Re Instant Cash Loans***). See also the case review by Dan Butler and Conor McLaughlin "*Re Instant Cash Loans Limited (in members' voluntary liquidation)* [2021] EWHC 1164 (Ch)" (2021) 18(6) ICR 432.

no intention of claiming their entitlement, they could be regarded by the court and the Company as having decided to abandon their claim. In other words, the court can proceed on the footing that those who have not provided their details and do not wish to cash their cheque have decided to abandon or waive their entitlement to receive their pro rata share.

3.24 It appears that one of the reasons the Court was comfortable making such an order was that the Company had taken steps to ensure beneficiaries were provided with a reasonable opportunity to complete the claims process before the order was implemented, and because it would be in the interest of the creditors who had participated and would allow the scheme to be completed.³⁹ The Court also observed that paying the surplus into court, to enable those beneficiaries to claim title to it later, would not be useful if it was clear that they had abandoned their claims. The Court found that the claims could be treated as having been abandoned because:⁴⁰

- (a) The purpose of the scheme was to pay creditors' claims (after costs). This proposal sought to achieve that.
- (b) There had been extensive attempts to communicate to obtain bank details so that payment could be made, and that was successful to some degree.
- (c) The Company was taking further steps to attempt to complete payment by sending cheques and providing a further opportunity to provide bank details.
- (d) The redress process began in October 2019, claims were required by April 2020, and creditors had until October 2021 to cash their cheques. If they did not do so, the practical probability was that they have abandoned their claim.

Trustee costs and expenses

3.25 Trustees are entitled to be indemnified out of the trust property for liabilities, costs and expenses properly incurred in connection with the reasonable performance of their duties as trustee.⁴¹ The indemnity operates as a first charge or lien on the trust fund: the trustee has an equitable interest in the trust fund that takes priority over the claims of the beneficiaries and third

³⁹ Dan Butler and Conor McLaughlin "Re Instant Cash Loans Limited (in members' voluntary liquidation) [2021] EWHC 1164 (Ch)" (2021) 18(6) ICR 432 at 434.

⁴⁰ At [26]–[29].

⁴¹ Trustee Act 1956, s 38(2) and Trusts Act 2019, s 81. Both sections confirm the position in equity: *Lewin on Trusts* at [19-003]; *Butterfield v Public Trust* [2017] NZCA 367, [2017] NZAR 1439.

parties.⁴² To that end, a beneficiary (even one that is absolutely entitled) cannot require a trustee to transfer trust property to them until the trustee's indemnity has been met.⁴³ The trustee's lien extends over the whole trust fund.⁴⁴

3.26 The right of indemnity comprises the following rights:⁴⁵

- (a) Reimbursement for liabilities or expenses incurred in administration of the trust.
- (b) Exoneration from the trust. A trustee may discharge or pay a liability directly from the trust property.
- (c) Retention of trust assets or income until the trustee has been indemnified, both in respect of present liabilities and contingent or future liabilities to the extent required to meet the 'worst case' scenario on the basis of reasonable assumptions.
- (d) Realisation of trust property in order to meet the trustee's proper expenses.

3.27 The right of indemnity applies to future and already accrued costs:⁴⁶

A trustee's indemnity for expenses goes to reimbursement, exoneration, retention and realisation. A trustee who incurs a liability may discharge it out of his own pocket and then reimburse himself from the trust fund. Alternatively, he may discharge the liability by paying directly from the trust fund to exonerate himself. The trustee may retain the trust fund until he has been indemnified for present liabilities and contingent or future liabilities, and a trustee may realise trust assets to meet his expenses and liabilities.

3.28 When there are distinct funds held on separate trusts, a trustee is not generally entitled to indemnify himself against liabilities incurred in respect of one fund from another fund held on a separate trust.⁴⁷ However, if it is not possible or pragmatic to estimate the costs and expenses incurred in respect of each trust fund, then costs may be allocated on a *pari passu* basis:⁴⁸

⁴² *Lewin on Trusts* at [19-044].

⁴³ *Lewin on Trusts* at [19-044].

⁴⁴ *Lewin on Trusts* at [19-045].

⁴⁵ *Lewin on Trusts* at [19-044].

⁴⁶ *LSF Trustees Ltd v Footsteps Trustee Company Ltd (in liq)* [2017] NZHC 2619 at [16]. *Garrow and Kelly* at [24.95].

⁴⁷ *Lewin on Trusts* at [19-045], citing *Hardoon v Belilios* [1901] AC 118 (PC) and *Fraser v Murdoch* (1881) 6 App Cas 855 (HL).

⁴⁸ *Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liquidation)* (1999) 30 ACSR 377 (FCA) at 386.

*The liquidator is not entitled to charge the beneficiaries of one trust with the costs and expenses incurred in relation to the other trust. **Accordingly, it will be necessary for the liquidator to estimate the costs and expenses incurred insofar as they relate to each trust and only charge those costs to the trust on whose behalf the work was performed. If that estimate is not possible then a pari passu distribution of the costs and expenses will be in order** as was envisaged by King CJ in Suco Gold, supra. The second difficulty is the possibility that the liquidator has performed work on behalf of investors for whom no property is held on trust. If that is the case the liquidator could not look to the existing trust assets for the costs and expenses of that work unless, in accordance with the foregoing principles, the liquidator is entitled to charge those assets with a proportionate share of the costs. That would be so if the costs and expenses are not divisible. The accounts that the liquidator prepares should deal with these issues.*

(emphasis added)

3.29 In some circumstances, a trustee's right to indemnity might be lost or impaired. For example, a trustee's indemnity will only apply if the trust expense or liability was incurred in the proper administration of the trust. A trustee may not have incurred an expense or liability in the proper administration of the trust if:⁴⁹

- (a) The trustee lacked authority to incur that expense or liability (ie, the trustee does not have the power to incur that expense or liability, or the trustee did not have exercised the power in accordance with the required procedure under the trust deed).
- (b) The trustee breached a duty in entering into the liability.

Trustee's remuneration

3.30 Schedule 7 and s 278 of the Companies Act 1993 entitle liquidators to apply "assets of the company" to the liquidators' costs, expenses and remuneration properly incurred by the liquidator in carrying out liquidator's duties and exercising the power of the liquidator, and the remuneration of the liquidators, as a matter of priority.

3.31 The assets of the company include the trustee's right to indemnity and equitable lien over trust property in respect of any liability incurred as trustee in the administration of trust property.⁵⁰ Case law recognises that liquidators who are required to deal with assets held on trust by the insolvent company

⁴⁹ *Butler on Equity & Trusts* at [16.6.8].

⁵⁰ *Ranolf Company Ltd (in liq) v Bhana* [2017] NZHC 1183 at [35]; *Commissioner of Inland Revenue v Robertson* at [29(b)]; and *Butler on Equity & Trusts* at [16.6.12].

have a right to be paid their remuneration out of the assets held on trust by the company.⁵¹ The liquidators' reasonable costs in enforcing the indemnity are covered by the indemnity, and ought to be met by the trust assets.⁵² That is because the liquidators are performing the duties of the trustee and, without the liquidator doing so, the beneficiaries would not be in a position to receive a distribution.⁵³

3.32 Alternatively, the Court has an inherent jurisdiction to allow a liquidator to apply trust property to the remuneration, fees and expenses of the liquidation.⁵⁴

3.33 Apportionment between work related to the trust assets, and work related to the liquidation of the company assets should be made.⁵⁵ Trust administration work will include identifying, recovering, realising, protecting and distributing trust assets, but the position can be more complicated when it comes to general liquidation work (emphasis added):⁵⁶

*[The] position is a little more involved as regards work done and expenses incurred in what may be described as general liquidation matters. If that work is unrelated to the beneficiaries in their claims it is difficult to see how the costs could be charged against their assets. **In the case of a company that has carried on the business of trustee it might be that much of the work involved in the liquidation is chargeable against trust assets if it can be shown that the liquidation is necessary for the proper administration of the trust.** But it is unlikely that this will be so where the company did not act solely as trustee or at least did not act in the capacity to a significant extent. In that event, **the liquidator will be required to estimate those of his costs***

⁵¹ *Finnegan v Yuan Fu Capital Markets Ltd* [2013] NZHC 2899 at [70] (citing the extensive case law at footnote 24); *Ranolf Company Ltd (in liq) v Bhana* [2017] NZHC 1183. For a fulsome discussion on a liquidator's recourse to the trustee's indemnity in the context of multiple trusts (and a trust creditor's right of subrogation to the trustee's indemnity), see *Re Suco Gold* (1983) 7 ACLR 873. As recorded at 883: "It is part of the duty of the trustee company to incur debts for the purposes of the trust businesses and, of course, to pay those debts. Upon winding up, those debts can only be paid in accordance with the provisions of the Companies Act. This requires necessarily that there be a liquidator and that he incur costs and expenses and be paid remuneration...As the company's obligation as trustee to pay the debts incurred in carrying out the trust cannot be performed unless the liquidation proceeds, it seems to me to be reasonable to regard the expenses...as debts of the company incurred in discharging the duties imposed by the trust and as covered by the trustee's right of indemnity". *Re Suco* was endorsed by the High Court of Australia in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth (Re Amerind)* [2019] HCA 20 at [41]–[44] and [58] per Gordon J, and in *Mawhinney v Official Assignee* [2016] NZHC 2487 at [31], and cited in James Allsop "The intersection of companies and trusts" (2020) 43(3) MULR 1128 at 1141.

⁵² *Ranolf Company Ltd (in liq) v Bhana* [2017] NZHC 1183 at [36].

⁵³ *Heath and Whale* at [46.9(c)]; *Re Newsmakers International Ltd (in liq)* HC Napier M 153/86, 24 February 1994.

⁵⁴ *Re Secureland Mortgage Investments Ltd (in liq) (No 2)* (1988) 4 NZCLC 64,266; *Re Newsmakers International Ltd (in liq)* HC Napier M 153/86, 24 February 1994; *Heath and Whale* at [46.9(c)]. See also Victoria Stace "Recovering the liquidator's costs on the winding up of a corporate trustee" (2019) 50 VUWLR 711.

⁵⁵ *Finnegan v Yuan Fu Capital Markets Ltd* [2013] NZHC 2899 at [70(d)]. The High Court directed that remuneration of the liquidators there should be split as between the trust-related work and the company liquidation work on the basis of the face value of the trust creditor and other company creditor claims (at [73]).

⁵⁶ *Heath and Whale* at [46.9(c)], citing *13 Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liquidation)* (1999) 30 ACSR 377 (FCA) at 385. A similar conclusion was reached in *Re Suco Gold* (1983) 7 ACLR 873, albeit the Court said that "where no apportionment is possible, the maxim that equality is equity should provide the solution to the problem" (at 883). See footnote 51 above for subsequent treatment of *Re Suco Gold*.

that are attributable to the administration of trust property and only those costs will be charged against trust assets.

(emphasis added)

4. TRUST ADMINISTRATION STEPS TO DATE

4.1 The liquidators have taken several steps in administration of the trust assets:

- (a) Reconciling Cryptopia's databases with the cryptocurrencies actually held.
- (b) Preserving the cryptocurrencies by moving them to a secure environment following the Hack.
- (c) Designing and building a claims portal in order to identify the beneficiaries of each trust and verify Cryptopia's holdings.
- (d) Taking steps to recover hacked cryptocurrency.
- (e) Designing a distribution process and a cost allocation model.

4.2 Many of those workstreams were undertaken concurrently. This section of submissions sets out each of the steps taken in administration of the trusts generally, rather than in chronological order. These steps are set out in significant detail at [15]–[108] of Mr Ruscoe's affidavit dated 31 July 2023.

Gaining custody of trust assets

4.3 Cryptopia itself did not have physical custody of all of the private keys of the cryptocurrency it held on trust. Nor did it hold all of the relevant trust information. Phoenix NAP, LLC (**PNAP**), a datacentre in Arizona, USA, stored a significant amount of that data, being:⁵⁷

- (a) contact email addresses for each account holder;
- (b) the information held on Cryptopia's Structured Query Language database (**SQL database**) which included the cryptocurrency balances of each customer wallet stored on the exchange; and

⁵⁷ Affidavit of Mr Ruscoe dated 31 July 2023 at [15]–[16]. Affidavit of Mr Ruscoe dated 28 May 2019 in CIV-2019-409-286 at [3]–[13].

- (c) the total cryptocurrency holdings for several specific wallets. At the date of liquidation, PNAP held approximately 25% by volume of all of Cryptopia's cryptocurrency holdings.
- 4.4 In accordance with a trustee's obligation to take active steps to place trust property under their own control (see [3.7(a)]), and the duty of a liquidator of an insolvent corporate trustee to take control of and administer the trust assets (see [3.11]), the liquidators took steps to gain access to and custody of that information.⁵⁸ PNAP threatened not to preserve the data and servers it held unless the liquidators caused Cryptopia to pay to it a sum equivalent to the entire remaining contract value (~USD1.9 million). In accordance with a trustee's obligation to safeguard and preserve trust property (see [3.7]), the liquidators instructed US counsel to gain recognition as foreign liquidators in the US and to obtain court orders to preserve Cryptopia's data.⁵⁹ Upon being served with that proceeding, the parties resolved all matters and PNAP agreed to preserve and recover all data.
- 4.5 Trustees who may be in breach of trust (in this situation, possibly because of security risks on the Cryptopia exchange platform or storage in "hot" wallets, or for not utilising some mechanism to insure the trust property) have an obligation to attempt to recover and restore lost trust property.⁶⁰ The liquidators have therefore taken steps to recover the cryptocurrency that was stolen in the January 2019 hack (ie, Ethereum, Ethereum Classic and related ERC20 tokens, Bitcoin, Litecoin and Bitcoin Cash). That process has involved using several tracing tools to trace the stolen cryptocurrency to several large exchanges and commencing recovery action in several jurisdictions (Southern District of New York, USA; Malaysia; Singapore; and the Seychelles).⁶¹

Identifying beneficiaries

- 4.6 As explained at [3.3], the core obligation of a bare trustee is to convey or transfer the trust property to the persons entitled to hold it.
- 4.7 Liquidators of an insolvent corporate trustee are required to act in a responsible way in the administration of the trust and are generally expected to identify the beneficiaries of the trust and assess the nature and value of the trust assets (see [3.11]). The liquidators are required to be satisfied

⁵⁸ Affidavit of Mr Ruscoe dated 31 July 2023 at [17].

⁵⁹ At [17].

⁶⁰ *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 213 (CA) at 250.

⁶¹ Affidavit of Mr Ruscoe dated 31 July 2023 at [13], liquidators ninth report at DIR1-137 to DIR1-138.

beyond doubt as to the beneficiaries entitled to the trust property before they undertake distribution, and Cryptopia faces liability as a trustee for distributing to the wrong hand (see [3.12]).

- 4.8 Part of the difficulty the liquidators faced in identifying the beneficiaries was that an email address was the only contact information that Cryptopia required for an account to be established, and the Company did not generally hold any other identifying information about its account holders.⁶² Further, there were more than two million account holders registered with Cryptopia at the time of its liquidation⁶³ (although the liquidators have since determined that only ~960,000 had a positive account balance at that date).
- 4.9 Accordingly, the liquidators established a claims portal in order to process claimants and their claims efficiently so as to ensure that the persons beneficially entitled to receive a distribution of the cryptocurrencies held by Cryptopia could do so. The liquidators designed a claims portal that would:
- (a) Be linked to each account holder's Cryptopia registered email address.
 - (b) Require claimants to prove ownership of the relevant Cryptopia account.
 - (c) Collect identifying information and verify each beneficiary's identity (modelled on identity verification processes under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**AML Act**)).
- 4.10 The claims portal itself is discussed further below at [4.25]

Assessing the nature and value of the trust assets

- 4.11 The liquidator of a corporate trustee is required to identify the trust assets and assess the nature and value of them and, in particular, accurately to ascertain each beneficiary's entitlement before distributing (see [3.11] and [3.15]).
- 4.12 The liquidators faced significant challenges in undertaking this exercise, for several reasons. First, cryptocurrencies were pooled: all deposits made to an account holder's deposit address were swept and pooled in the exchange's own wallets. Those wallets held all of the cryptocurrency that Cryptopia held for itself, and the cryptocurrency that Cryptopia held on trust

⁶² Affidavit of Mr Ruscoe dated 17 May 2019 in CIV-2019-409-247 at [13].

⁶³ Affidavit of Mr Ruscoe dated 17 May 2019 in CIV-2019-409-247 at [12].

for account holders. Account holders' trades were recorded on Cryptopia's internal ledgers, but the change in beneficial ownership was not recorded by a transaction on the blockchain. Accordingly, it was impossible to determine individual ownership using only the private keys in the wallets.⁶⁴

- 4.13 Second, Cryptopia had never undertaken any detailed reconciliation process between the cryptocurrencies recorded in the SQL database and the cryptocurrencies actually held in its wallets.⁶⁵ That meant that the liquidators could not be certain about what cryptocurrencies were held for which account holder and could not be confident that Cryptopia's databases were accurate.
- 4.14 In order to ascertain the cryptocurrencies actually held by Cryptopia on trust, the liquidators commenced a reconciliation process. That was a very complex process that involved a significant amount of data discovery, not least because Cryptopia held more than 850 cryptocurrencies for more than two million account holders; about 400 of those cryptocurrencies were "live" at the date of liquidation; and the average account holder held between 2.61 and 6.54 cryptocurrencies (account holders with higher account values tended to have several cryptocurrency holdings).⁶⁶ The reconciliation was initially conducted internally but, because of security concerns (addressed at [4.22]-[4.23] below), the liquidators engaged a third party to design a toolset to carry out the reconciliation process. The reconciliation process was carried out concurrently with the re-keying process discussed below and was 90% complete by December 2022.⁶⁷
- 4.15 In order to ascertain each account holder's beneficial entitlement and to verify that the liquidators' reconciliation process is correct, the liquidators have added a step in the claims portal called 'balance acceptance', whereby account holders are invited to review their account balance and either accept it as accurate, or dispute it (while providing supporting evidence). This process is explained further at [4.29] below.

Haircut

- 4.16 The fact that a detailed reconciliation had never been undertaken pre-liquidation became a particular issue following the hack. Cryptopia management (pre-liquidation) could only estimate the amounts of

⁶⁴ Affidavit of Mr Ruscoe dated 31 July 2023 at [18].

⁶⁵ Affidavit of Mr Ruscoe dated 31 July 2023 at [18].

⁶⁶ Affidavit of Mr Ruscoe dated 31 July 2023 at [26] and Schedule 1, pages 2-3.

⁶⁷ Affidavit of Mr Ruscoe dated 31 July 2023 at [15]-[27].

cryptocurrency that had been stolen, and the amounts stolen could not be attributed to any specific account holders.

- 4.17 As a result, Cryptopia management (pre-liquidation) reviewed the cryptocurrency balances remaining in the company wallets and compared those to the amounts recorded in the company database.⁶⁸ It assessed the amount of cryptocurrency that had been stolen to determine a percentage loss of the total holding. It then issued a coin called "Cryptopia Loss Marker" (**CLM**) to account holders of the hacked trusts.⁶⁹ The CLM was based on the percentage assessment of losses. Account holders' balances were amended in the SQL database to reflect that percentage loss.⁷⁰
- 4.18 To put that into context, Cryptopia estimated that around 14% of BTC had been stolen in the Hack. Account holders in the BTC trust received a CLM of 14% of their BTC holding, and their BTC balances were reduced by 14% on the SQL database. If an account holder had a BTC holding valued at NZD500 on the date of the hack, their CLM would have been 70.445 and their BTC balance would have been reduced by the same percentage.⁷¹
- 4.19 That has caused significant difficulty because the liquidators cannot determine with certainty how much of each cryptocurrency was actually stolen in the hack.⁷² For many of the hacked cryptocurrency trusts, that did not result in any issue: the amount actually held in the company's wallets reflected the company's estimated losses and database records. In the case of the BTC trust, however, there was some difficulty. After applying the 14% haircut, an additional 600 BTC remained in the Company's BTC wallet.⁷³ Management treated that as company property. Based on the liquidators' reconciliation process, it appears that the BTC loss may have been overstated and only around 9% of BTC had actually been stolen.⁷⁴ On that basis, the 600 BTC would belong to account holders in the BTC trust, and not the company. 256 of that BTC was liquidated and spent by Cryptopia pre-liquidation, and the remaining 344 BTC was realised by the liquidators to fund trust administration costs pursuant to Gendall J's orders in CIV-2019-409-286.⁷⁵

⁶⁸ Affidavit of Mr Ruscoe dated 31 July 2023 at [33].

⁶⁹ Affidavit of Mr Ruscoe dated 31 July 2023 at [34]–[35].

⁷⁰ Affidavit of Mr Ruscoe dated 31 July 2023 at [35].

⁷¹ Affidavit of Mr Ruscoe dated 31 July 2023 at [33]–[40].

⁷² Affidavit of Mr Ruscoe dated 31 July 2023 at [37].

⁷³ Affidavit of Mr Ruscoe dated 31 July 2023 at [36].

⁷⁴ Affidavit of Mr Ruscoe dated 31 July 2023 at [37].

⁷⁵ Affidavit of Mr Ruscoe dated 28 May 2019 in CIV-2019-409-286 at [23]–[28]; affidavit of Mr Ruscoe dated 31 July 2023 at [38]–[40].

4.20 The liquidators intend to treat the 344 BTC realised from the Company wallet as having been realised from the BTC trust, leaving open the question of whether account holders in the BTC trust have a claim against the Company for the 256 BTC spent pre-liquidation.⁷⁶

Preservation and safe custody of trust assets

4.21 As set out at [3.6], the overriding obligation of a trustee, at equity, is to preserve and safeguard the trust property: trustees must take active steps to place trust property under their control and ensure its safe custody.

4.22 In January 2019 Cryptopia's exchange was hacked and a significant amount of trust property stolen. Immediately after the hack, Cryptopia management took the exchange offline and, after it went live again in March 2019, required account holders to generate new deposit addresses for security reasons.⁷⁷ At the time of the liquidators' appointment, the company was still in the process of recovering the cryptocurrencies from the compromised environment due to concerns that there may be malicious code left over from the hack.⁷⁸ The liquidators continued that process to prevent any malicious code from compromising the preservation and distribution of trust assets.⁷⁹

4.23 Following a theft of cryptocurrency by an ex-employee of Cryptopia, the liquidators engaged a third party to review Cryptopia's controls and security.⁸⁰ That review identified several security issues, and the liquidators engaged the third party to design a toolset to remedy those issues and move Cryptopia's holdings to a new, secure wallet environment (to prevent any risk of further theft).⁸¹

4.24 The third party designed a re-keying process that generated new, secure cryptocurrency keys for each holding.⁸² Concurrently with the re-keying process, audit logs were generated for reconciliation purposes. That process began from November 2020 and in December 2022, was 90% complete.⁸³

⁷⁶ Affidavit of Mr Ruscoe, dated 31 July 2023 at [40].

⁷⁷ Affidavit of Mr Ruscoe dated 31 July 2023 at [29], first liquidation report, exhibit DIR1-3.

⁷⁸ Affidavit of Mr Ruscoe dated 31 July 2023 at [29], first liquidation report, exhibit DIR1-9.

⁷⁹ Affidavit of Mr Ruscoe dated 31 July 2023 at [21]; first liquidation report, exhibit DIR1-9.

⁸⁰ Affidavit of Mr Ruscoe dated 31 July 2023 at [22]–[25].

⁸¹ Affidavit of Mr Ruscoe dated 31 July 2023 at [22]–[25]. See also [4.1] above.

⁸² Affidavit of Mr Ruscoe dated 31 July 2023 at [25].

⁸³ Affidavit of Mr Ruscoe dated 31 July 2023 at [27].

Claims portal

4.25 As referred to above ([4.9] and [4.15]), the claims portal was designed to collect sufficient information for the liquidators to be confident that they had:

- (a) identified the beneficiaries of Cryptopia and verified their account ownership; and
- (b) assessed each account holder's beneficial entitlement;

despite the fact that Cryptopia had very limited information (because it did not collect any identifying information beyond an email address; each cryptocurrency type held by Cryptopia was held in one pooled wallet and there was no way to identify individual ownership of the cryptocurrencies held; and a detailed reconciliation of Cryptopia's holdings had never been undertaken). This was all the more important noting that spreadsheets of Cryptopia's account holder database were disclosed early in the liquidation process⁸⁴ and there is a concern that someone with access to that information could attempt to gain access to a Cryptopia account that is not theirs.

4.26 The claims portal to date has consisted of three steps: registration, identity verification and balance acceptance or dispute. These are explained in detail at [49]-[66] of Mr Ruscoe's affidavit dated 31 July 2023. It will also, at the point of distribution, include provision of valid payment details.

Registration

4.27 The liquidators emailed each account holder with a positive account balance (960,190 account holders), using their registered Cryptopia email address, to invite them to register.⁸⁵ Account holders were asked to set up an account in the liquidators' claims portal, which included accepting a privacy policy (see **DIR1-149**), entering their Cryptopia email address, Cryptopia username, and current residential address (see **DIR1-150**); creating a password for their claims portal account (see **DIR1-151**), setting up two-factor authentication (see **DIR1-151**), and verifying their account ownership (see **DIR1-153**). Account ownership could be verified by providing relevant account information for two types of account activity. There were eight available options such as (by way of example):

⁸⁴ Affidavit of Mr Ruscoe dated 31 July 2023 at [22].

⁸⁵ Affidavit of Mr Ruscoe dated 31 July 2023 at [47]-[66] and [73], DIR1-147 and DIR1-233.

- (a) providing the date of registration and approximate IP address of registration;
- (b) naming a cryptocurrency and balance of that cryptocurrency in the account at the date of liquidation; or
- (c) providing details of a deposit / withdrawal / trade (ie, date, transaction ID and cryptocurrency type).

Identity verification

4.28 Once registered, account holders with a balance of more than USD20 were invited to identity verification.⁸⁶ This stage was rolled out on a country-by-country basis and was modelled on the requirements in the AML Act.⁸⁷ After logging in to the claims portal using two-factor authorisation, account holders were asked to (see **DIR1-159** to **DIR1-163**):

- (a) Provide their country of residence and country of origin.
- (b) Upload a copy of an ID document and take a live photograph using a device camera.
- (c) Upload proof of residence.
- (d) Agree to a database check against their provided details.

Balance acceptance or dispute

4.29 Once identity verification was completed, account holders were asked to proceed to balance acceptance (**DIR1-165** to **DIR1-175**). Account holders were asked to read and acknowledge a disclaimer (see **DIR1-176**) and then check a box accepting the disclaimer. The account holder is then shown their account balances based on the liquidators' reconciliation process and Cryptopia's databases as at the date of liquidation (14 May 2019).⁸⁸ Account holders were asked to accept or dispute the balances displayed.

4.30 If an account holder disputes their balance, they are asked to read the frequently asked questions (see **DIR1-177**) before opening a case in the liquidators' customer service portal and providing supporting evidence for

⁸⁶ Affidavit of Mr Ruscoe dated 31 July 2023 at [53].

⁸⁷ Affidavit of Mr Ruscoe dated 31 July 2023 at [53]–[55].

⁸⁸ Affidavit of Mr Ruscoe dated 31 July 2023 at [60].

their dispute. An account holder is required to pursue and substantiate that dispute within 20 working days of commencing the dispute.⁸⁹

- 4.31 If the dispute is substantiated and accepted by the liquidators, the account holder's balance is updated in the claims portal. If it is rejected, the liquidators provide a written statement of reasons.⁹⁰ If a dispute is not pursued or substantiated within 20 working days of dispute, the liquidators propose that the account holder is deemed to have accepted their balance, although the liquidators would retain a discretion to extend the time for an account holder to dispute their balance or to provide substantiating evidence (Direction 3.5).⁹¹
- 4.32 A flowchart of the claims process is set out at **Schedule 1** to these submissions. A document explaining each stage of the claims portal process, the information required at each stage and the information displayed (with screenshots of each step) is set out at exhibit **DIR1-147** to Mr Ruscoe's affidavit dated 31 July 2023.
- 4.33 Account holders with a positive account balance were invited to register in the portal in early December 2020. As of the date of these submissions, 81% of account holders (based on a February 2023 valuation of Cryptopia's portfolio) had registered in the portal.⁹²

5. PROPOSED REVIEW PROCESS.

- 5.1 The liquidators have proposed a review process whereby account holders can apply for an independent barrister with experience in commercial disputes and / or trust law to review the liquidators' decision to reject a disputed balance, in whole or in part (Direction 3.1) (**Review**). That is, in the liquidators' submission, consistent with the obligation to identify a beneficiary's entitlement accurately (see [3.11] and [3.15] above). The proposed Review process is set out in Mr Ruscoe's affidavit dated 31 July 2023 from [67] to [72]. The proposed rules of the Review process are set out at Schedule 2 to the originating application for directions dated 31 July 2023.
- 5.2 In summary, the proposed Review process follows directly on from the dispute process set out above at [4.29] (Directions 3.1 to 3.3):⁹³

⁸⁹ Affidavit of Mr Ruscoe dated 31 July 2023 at [61].

⁹⁰ Affidavit of Mr Ruscoe dated 31 July 2023 at [69(a)].

⁹¹ Affidavit of Mr Ruscoe dated 31 July 2023 at [65]–[66].

⁹² Affidavit of Mr Ruscoe dated 31 July 2023 at [5]–[6].

⁹³ Affidavit of Mr Ruscoe dated 31 July 2023 at [69]–[70].

- (a) The Court will approve the appointment of appropriately qualified barristers with more than 7 years' experience in commercial disputes and / or trust law. The liquidators currently propose that Ms Pinny and Mr Chisnall be approved now, with any further reviewers to be approved by the Court as and when required (**Reviewer**).
- (b) Account holders will have 20 days to make an application for Review in the claims portal. For those who received a written statement of reasons prior to directions being made on this application the 20 day timeframe will run from the date that the orders are made. For account holders who dispute their balance and / or receive a written statement of reasons after directions are made on this application, time would run from receipt of a written statement of reasons. In the application, account holders should select a Reviewer and include any further substantive documentation or submissions to support their review. The account holder will also need to pay to a solicitor's trust account NZD750 to account for the Reviewer's initial costs.
- (c) Once that information is uploaded and NZD750 is received, the application would be referred to the selected Reviewer. If that Reviewer is unable to act, it would be referred to another Reviewer.
- (d) The Reviewer would be required to make a determination within 28 days of receipt of the application for Review. The account holder would be invoiced for the Reviewer's costs and the Reviewer may withhold a determination until their fees are paid in full by the account holder.⁹⁴ The Reviewer will have the power to direct that the costs of review be reimbursed from the relevant trust if the account holder's review is successful.

5.3 The Review process is akin to an expert determination process, although it would be a matter of court order rather than contract. As is conventionally accepted with expert determinations, the Reviewer's determination would, in the absence of a manifest error, be final and binding on the liquidators and the claimant account holder.⁹⁵

⁹⁴ If those costs are not met by the account holder, then the liquidators seek a direction that they are authorised to reimburse themselves for the reviewer's fees from the account holder's cryptocurrency (affidavit of Mr Ruscoe dated 31 July 2023 at [71]).

⁹⁵ *Waterfront Properties (2009) Ltd v Lighter Quay Residents' Society Inc* [2015] NZCA 62 at [29], cited and endorsed in *Smalley v Williamson* [2023] NZCA 174 at [40].

[T]he conventional approach is that where an expert determination clause provides (as it does in this case) that any determination by the expert shall be “final and binding”, those words without any qualification mean there are only very limited grounds on which the determination may be challenged. More particularly, the decisions state that the courts may intervene only where the expert has departed from his mandate in a material respect and failed to do what he was appointed to do. It is not enough to show the expert has made a mistake, was negligent or even patently wrong.

- 5.4 The liquidators submit that it is appropriate that account holders, at least initially, bear the cost of Review. That is for both principled and pragmatic reasons. First, it will avoid unduly burdening all account holders with the expense of the disputes process, which is consistent with a trustee's obligation of impartiality.⁹⁶ Second, it will avoid an influx of frivolous Review applications.
- 5.5 A similar process was undertaken in *Re Instant Cash Loans*⁹⁷ (albeit pursuant to the statutory scheme in place) and in *Re MF Global*⁹⁸ where the Court made directions prescribing a procedure for claimants to submit claims or make an application to the court in respect of rejected claims by particular deadlines. The dispute process in that case was by application to the Court (where the claimant would, logically, bear the cost of that application), although the number of potential claimants was much smaller: statements had been sent to 4,637 clients, representing 99.8% of known claimants.⁹⁹ Here, the liquidators are dealing with 960,000 account holders with a positive balance, in more than 180 countries.¹⁰⁰ It would not be practical or pragmatic for the only opportunity for independent oversight over the dispute process to be by recourse to the courts. The cost of that process may also be prohibitive, particularly if an account holder's cryptocurrency holding is modest, as is the case with hundreds of thousands of account holders.

6. PROPOSED DISTRIBUTION

- 6.1 As explained above, the Hack resulted in significant losses to many trusts. Following the Hack Cryptopia management generated new deposit addresses for account holders and began the process of moving Cryptopia's holdings out of the compromised environment. After their appointment, the

⁹⁶ Codified in the Trusts Act 2019, s 35.

⁹⁷ At [4]–[6].

⁹⁸ At [19]–[21].

⁹⁹ *Re MF Global* at [10].

¹⁰⁰ Affidavit of Mr Ruscoe dated 31 July 2023 at [8(b)].

liquidators continued that process and moved the company's cryptocurrency holdings to secure cold storage where available.¹⁰¹ Cryptopia's holdings needed to be reconciled to determine the losses from the hack and re-keyed to manage the security risks of leftover malware from the hack. Accordingly, it was not possible for the exchange to be reopened: it was necessarily taken offline.

- 6.2 In any event, a claims portal was necessary in order to identify the beneficiaries actually entitled to the cryptocurrency held by Cryptopia and to verify that Cryptopia's records were accurate (noting that a detailed reconciliation had never taken place pre-liquidation). The liquidators have accordingly had to design an appropriate distribution process for the cryptocurrencies held on trust by Cryptopia.
- 6.3 In *Re Fisk*, the High Court was asked to consider an appropriate distribution model for a Ponzi scheme in which 80% of the assets were company assets and 20% were trust assets. The Court considered that the essential enquiry was as to the most appropriate, equitable and fair basis for distributing the trust funds.¹⁰² And in *Graham v Arena Capital Limited (in liq)*, the High Court considered whether trust assets in a mixed trust fund ought to be distributed on a pro rata, net contribution basis, holding that:¹⁰³

Where it is not practical to trace investors' moneys or when such an exercise will involve enormous effort unlikely to produce a reliable result, the application of the rule should be rejected. As noted in Eaton v LDC Finance Ltd (in rec), the correct approach in equity is to select the rules which will achieve equity as between the beneficiaries depending on the context.

As between innocent beneficiaries a division of assets based on the contribution of each investor is to be viewed as the only "rational mode of distribution" in order to achieve substantial justice between the parties.

- 6.4 In deficient mixed funds, the aim is to develop a pragmatic and fair way to share a common misfortune (the common misfortune being the deficiency in the fund).¹⁰⁴
- 6.5 The liquidators respectfully submit that the distribution model they have proposed, as outlined below, is a pragmatic, equitable and fair mechanism by

¹⁰¹ Affidavit of Mr Ruscoe dated 31 July 2023, first liquidation report at DIR1-9.

¹⁰² *Re Fisk* [2018] NZHC 2007 at [141]

¹⁰³ *Graham v Arena Capital Limited (in liq)* [2017] NZHC 973 at [17] (footnotes excluded). See also *Re Waipawa Finance Co Ltd (in liq)* [2011] NZCCLR 14 (HC).

¹⁰⁴ *Priest v Ross Asset Management (in liq)* [2016] NZHC 1803 at [107].

which to distribute the cryptocurrencies held on trust. The distribution model is intended to achieve the fairest outcome for all account holders by ensuring that:

- (a) account holders' entitlements are determined at a common date that will not disadvantage one group of account holders over another, and provide an opportunity for account holders to dispute or review that determination;
- (b) account holders who have not yet participated in the claims portal have a reasonable opportunity to do so, but account holders who have assiduously participated to date are also able to receive a distribution of their assets as soon as possible; and
- (c) the method of distribution is accessible to account holders, is not overly complicated, and is not unduly expensive.

Assessing account holder's entitlements

6.6 The liquidators propose that any account holder who has completed the claims process (or has been deemed to have completed the process by virtue of Direction 3.5) is an eligible account holder to receive a distribution (Direction 2.6), on the basis that the liquidators have, through the claims portal, been able to identify them as a beneficiary and ascertain their beneficial entitlement. An account holder will have completed the claims process once they have provided valid payment details to enable a distribution.

6.7 Because the exchange was taken offline once the liquidators were appointed, the liquidators submit that the appropriate date at which to assess each account holder's beneficial entitlement is 14 May 2019, the date of liquidation (Direction 1.1).

6.8 The liquidators have undertaken a detailed reconciliation of the cryptocurrencies held by Cryptopia as against Cryptopia's databases. The liquidators have also designed and implemented a thorough balance acceptance and review process to determine that Cryptopia's records are accurate. The balance displayed to account holders is the balance in Cryptopia's database, as at 14 May 2019.

6.9 Accordingly, the liquidators propose that account holders' entitlements be determined with reference to the claims database (Direction 2.4). The

beneficial entitlement of each account holder will be determined as follows
(Finalised Claim):

- (a) If an account holder accepts their balance, that balance is finalised in the claims database.
- (b) If an account holder disputes their balance and the liquidators reject the dispute, then the balance originally displayed in the claims database is finalised.
- (c) If an account holder disputes their balance and the liquidators are provided sufficient evidence, that balance is amended in the claims database.
- (d) If an account holder applies for a review of their balance and amends the liquidators' decision, then the balance is amended in the claims database.

Method of distribution

6.10 As explained above at [3.12] to [3.14], any distribution must be in the way provided for under the trust instrument. Cryptopia does not have a trust deed, and the content of its trustee obligations are to be determined by reference to Cryptopia's terms and conditions, equity, and statute.

6.11 There is nothing in the terms and conditions that contemplates that Cryptopia has to power to convert or change the nature of trust property without instruction by an account holder.¹⁰⁵ Rather, Cryptopia's obligations are to hold cryptocurrencies on behalf of account holders and execute the transactions directed by them. The terms and conditions contemplated only transactions in supported cryptocurrencies. For example, see clause 1(B) of the terms and conditions:

These Terms, the Platform and the Services allow you to:

- i. buy, sell and exchange supported Coins through the Platform;*
- ii. use Fiat Pegged Tokens, when available; and*
- iii. store supported Coins in our hosted Wallets.*

¹⁰⁵ The terms and conditions as at 7 August 2018 are exhibited at DIR-2 of Mr Ruscoe's 1 October 2019 affidavit filed in CIV-2019-409-544.

- 6.12 Even when Cryptopia closed an account holder's account, it was expected that the account holder would (sometimes at Cryptopia's discretion) be provided an opportunity to remove their cryptocurrency from the exchange platform (see clause 4.4). As such, the liquidators consider that an in specie distribution of the cryptocurrency is the most consistent with Cryptopia's obligations as bare trustee and with its terms and conditions.
- 6.13 There are three ways that the liquidators considered that cryptocurrency could be transferred to account holders in specie:¹⁰⁶
- (a) Partnering with a cryptocurrency exchange to provide account holders and transfer each account holder's cryptocurrency to that platform (**Exchange**).
 - (b) Requesting a wallet address from account holders and directly transferring cryptocurrency to that account holder over the relevant blockchain (**Direct Transfer**).
 - (c) Creating a pre-populated wallet for each account holder and sending an encrypted file containing the private key information to each account holder by email (**Pre-Populated Wallet**).
- 6.14 The liquidators also considered alternative methods of distribution, namely:¹⁰⁷
- (a) Converting the cryptocurrencies to fiat and paying to the account holder's bank account (**Fiat**).
 - (b) Converting the cryptocurrencies to one stablecoin (a type of cryptocurrency pegged to or backed by other assets, such as USD) and distributing over the relevant blockchain (**Stablecoin**).
- 6.15 Ultimately, many of the distribution methods considered presented pragmatic issues. For one, Cryptopia holds approximately 125 live cryptocurrencies, approximately 72 of which have notional value.¹⁰⁸ There were not many exchanges that could support a significant enough number of the distributable cryptocurrencies held by Cryptopia, and no exchange partners in New Zealand or Australia that supported users in the United States (who make up 25% of the account holders who are currently eligible for a distribution).¹⁰⁹ The liquidators would need to partner with an offshore

¹⁰⁶ Affidavit of Mr Ruscoe dated 31 July 2023 at [97]–[98] and Sch 1.

¹⁰⁷ Affidavit of Mr Ruscoe dated 31 July 2023 at [97]–[98] and Sch 1.

¹⁰⁸ Affidavit of Mr Ruscoe dated 31 July 2023 at [45].

¹⁰⁹ Affidavit of Mr Ruscoe dated 31 July 2023 at Sch 1.

exchange, which would present regulatory and enforcement difficulties. It was also unlikely that any large, centralised exchange would be able to satisfy the liquidators' expectations as to security, management of personal information and insurance, particularly considering the fact that the liquidators have taken action against several exchanges in respect of the January 2019 hack.¹¹⁰

- 6.16 Pre-Populated Wallet was determined to be too time-consuming (as it would involve a similar process to the re-keying process, which commenced in November 2020 and was 90% completed by December 2022¹¹¹) and presented security risks – any person with access to the encryption key, sent by email, could access the private keys of the distributed cryptocurrency.¹¹² There would also be no way for the liquidators to verify that a distribution had been received by an account holder, because the transaction would not occur over the blockchain. Put another way, there would be no way to confirm that a distribution had been effected and Cryptopia's obligations discharged.
- 6.17 Stablecoin was expensive and time consuming: based on enquiries with potential third parties, it was clear that the conversion process would take several months (plus the time required for distribution) and the majority of the cost would be borne by commission from higher-value trusts such as BTC and DOGE.¹¹³
- 6.18 Similarly, Fiat would require conversion of all cryptocurrencies and present similar issues to stablecoin. Payments to account holders would also result in significant transaction costs (likely, at a minimum, NZD50 per transaction), as account holders are located in more than 200 jurisdictions.¹¹⁴
- 6.19 Direct Transfer was ultimately the preferred option. It was an in specie distribution (consistent with bare trustee's obligations), cost effective and administratively workable.¹¹⁵ Distribution would be effected as follows (Direction 2.1):¹¹⁶
- (a) Account holders would be asked to provide a wallet address in the claims portal. To do so, account holders could open an account with

¹¹⁰ Affidavit of Mr Ruscoe dated 31 July 2023 at Sch 1.

¹¹¹ See [4.24].

¹¹² Affidavit of Mr Ruscoe dated 31 July 2023 at Sch 1.

¹¹³ Affidavit of Mr Ruscoe dated 31 July 2023 at Sch 1.

¹¹⁴ Affidavit of Mr Ruscoe dated 31 July 2023 at Sch 1.

¹¹⁵ Affidavit of Mr Ruscoe dated 31 July 2023 at [100] and Sch 1.

¹¹⁶ Affidavit of Mr Ruscoe dated 31 July 2023 at [101]

another exchange, establish their own core wallet (which requires some technical expertise), or open an account with a custodial wallet service. By way of example, Coinomi and Exodus provide custodial wallet services for at least 55 of the 72 cryptocurrencies with notional value.¹¹⁷ If required, the liquidators would also provide customer support service to assist account holders to create and open a core wallet.¹¹⁸

- (b) The wallet address would be screened to identify whether there are any risks associated with the address (ie, any money laundering / terrorist financing risks).
- (c) The liquidators would create one transaction per cryptocurrency to be transferred to each account holder. The transaction is signed, broadcast and confirmed by the blockchain.
- (d) Transaction fees (which are set by the blockchain) are automatically deducted.
- (e) A receipt would be uploaded to the claims portal.

6.20 The liquidators' proposed distribution model is set out at [100]-[108] of Mr Ruscoe's affidavit dated 31 July 2023. A table summarising the liquidators' analysis of the different distribution models considered is set out at [97]-[99] and at Schedule 1 of Mr Ruscoe's affidavit dated 31 July 2023.

Countries where it is illegal to transfer cryptocurrency

6.21 There are several countries where a transfer of cryptocurrency might constitute a criminal offence (**Restricted Jurisdiction**).¹¹⁹ The liquidators are understandably concerned that they may face serious personal consequences for distributing cryptocurrency to account holders in Restricted Jurisdictions. Of note, Cryptopia's terms and conditions provide that account holders in any Restricted Jurisdiction would not be eligible to use Cryptopia's services, and that Cryptopia could close those account holders' accounts.¹²⁰

6.22 However, it appears that many of the Restricted Jurisdictions introduced those laws after the appointment of liquidators, when account holders would

¹¹⁷ Affidavit of Mr Ruscoe dated 31 July 2023 at [104], exhibits DIR-242 and DIR-245.

¹¹⁸ Affidavit of Mr Ruscoe dated 31 July 2023 at [105].

¹¹⁹ Affidavit of Mr Ruscoe dated 13 October 2023 at [37].

¹²⁰ Cryptopia terms and conditions as at 7 August 2018, exhibit DIR-2 to Mr Ruscoe's 1 October 2019 affidavit in CIV-2019-409-544.

not have had any opportunity to withdraw their cryptocurrency from the exchange prior to those laws being introduced.

- 6.23 Accordingly, the liquidators propose that an alternative distribution method be utilised for account holders located in Restricted Jurisdictions, and seek directions that they are not required to distribute cryptocurrency to account holders in Restricted Jurisdictions (Direction 2.10), and are instead permitted to convert those account holders' holdings to a fiat currency reasonably available in that jurisdiction, using an over the counter (**OTC**) trader, and transfer that currency to a bank account provided by the account holder.
- 6.24 Instead of being asked to provide a wallet address in the next stage of the claims portal, account holders in Restricted Jurisdictions would be asked to provide a bank account (and may be required to meet additional AML Act requirements).
- 6.25 The liquidators propose that the transaction costs of converting the cryptocurrency to fiat and wire transfer fees (estimated to be ~NZD50) are borne by the account holder, much like the cryptocurrency transaction fees will be. That is to avoid those costs being unduly borne by other account holders.
- 6.26 The only amendments to the orders sought, for account holders in Restricted Jurisdictions, would be the method of distribution (Direction 2.1). All other directions ought to apply, with any necessary amendments to ensure they are workable for a fiat distribution.

Re Benjamin orders

- 6.27 This sub-section of submissions addresses the basis for the *Re Benjamin* and *Re Instant Cash Loans* orders sought by the liquidators. The next sub-section addresses the timing of those orders and how the phased distribution process is proposed to work.
- 6.28 As at the date of these submissions:¹²¹
- (a) 13.87% of total users had registered in the claims portal;
 - (b) 61.12% of account holders invited to identity verification had completed that stage; and

¹²¹ Affidavit of Mr Ruscoe dated 31 July 2023 at [52], [57] and [64].

- (c) 81.02% of account holders invited to balance acceptance had completed this stage;

noting that 81% of account holders by value (based on a February 2023 valuation of Cryptopia's portfolio, or 84.7% based on an October 2020 valuation) had interacted with the claims process in some way.¹²²

- 6.29 In a Hong Kong cryptocurrency exchange collapse the liquidators recently had a similar experience with low creditor response to a call for claims:¹²³

"The Liquidators have contacted over 102,600 creditors but only 1,132 of them have lodged proofs of debt ("PODs"). This represents 75% of the amount owed to the creditors as recorded in Gatecoin's books and records, which stood at HK\$249,905,111 (as at 13 March 2019)."

- 6.30 As the High Court of England and Wales observed in *Re MF Global* at [9]:

In dealing with the client money trust, the administrators of MFG UK face precisely the types of problems which liquidators and administrators habitually face when dealing with the claims of a large number of unsecured creditors. In particular, there are claims which have been submitted but rejected in whole or in part. Moreover, there may be potential claimants with good claims who are unknown to the administrators, because their claims are not disclosed by the records kept by MFG UK and they have not submitted claims.

- 6.31 There is no way to know why account holders have not registered in the claims portal or have registered but have not progressed. There are several potential reasons. For one, it is clear from articles and social media posts online that some account holders believe that the liquidation is an 'exit scam' and will not receive any distribution of their assets from the liquidators.¹²⁴

- 6.32 Because cryptocurrency transfers are irreversible, anonymous (in the sense that transactions are recorded on the blockchain but are not traceable to an identifiable individual) and are not typically subject to the centralised oversight that other financial assets are, cryptocurrency may be used for various nefarious purposes such as money laundering or fraud.¹²⁵ It is possible that accounts at Cryptopia were set up to obfuscate the flow of funds, particularly considering that the only contact information required to

¹²² Affidavit of Mr Ruscoe dated 13 October 2023 at [5]-[7] and Sch 1.

¹²³ *Re Gatecoin Ltd (in Liquidation)* [2023] HKCFI 914

¹²⁴ Affidavit of Mr Ruscoe dated 31 July 2023, exhibits DIR1-217, DIR1-221, DIR1-227, DIR1-228, DIR1-229, DIR1-230, DIR1-231, DIR1-232.

¹²⁵ See the useful discussion of this issue in Lloyd Brown "Cryptocurrencies and trustees: What are the risks?" (2023) 29 *Trusts & Trustees* 186.

set up an account was an email address.¹²⁶ Cryptopia has approximately 44,000 "legacy" customers in this category. Others still may be uncomfortable waiving anonymity in order to complete identity verification. Some may be nervous about providing personal information against the risk of a hack, as occurred with the insolvency firm administering FTX and two other crypto collapses.¹²⁷

6.33 It could reasonably be assumed that many account holders will have chosen not to register because the value of their cryptocurrency holding is not, in their opinion, worth the effort of the claims portal (noting that 84.7% of account holders, by October 2020 portfolio value, had interacted with the claims process in some way¹²⁸). That may particularly be the case if the amount of fiat initially invested to purchase cryptocurrency was modest, even if the value of an account holder's holding may have increased since (DOGE at one point had increased in value by ~6000% since the date of liquidation).¹²⁹ Many account holders may have simply forgotten their username or lost access to their email address. Others may now be deceased.¹³⁰

6.34 The liquidators have emailed account holders in respect of each stage in the claims process using the email address associated with their Cryptopia accounts (see exhibit **DIR1-233**).¹³¹ There have been an extensive number of emails and reminder emails in relation to each stage of the claims process. By way of illustrative example, regarding registration:

- (a) All account holders were emailed between 1 and 7 November 2019 advising of the directions hearing in CIV-2019-409-544 (**DIR1-234**).
- (b) All account holders with a positive account balance at the date of liquidation were emailed between 7 and 8 December 2020 inviting them to register their claim (**DIR1-235**).
- (c) Account holders with an account balance of more than NZD50 who had not interacted with the claims portal in any way were sent a further invitation to register between 30 April 2021 and 15 September 2021 (**DIR1-236 to DIR1-237**). That email was staggered by value (ie,

¹²⁶ Affidavit of Mr Ruscoe dated 16 May 2019 filed in CIV-2019-409-247 at [13].

¹²⁷ "FTX, BlockFi, Genesis Customer Data Compromised in Kroll Hack" (25 August 2023) *CoinDesk* <www.coindesk.com/policy/2023/08/25/ftx-blockfis-customer-data-compromised-in-kroll-hack/>

¹²⁸ Affidavit of Mr Ruscoe dated 13 October 2023 at [5].

¹²⁹ Affidavit of Mr Ruscoe dated 1 January 2022 in CIV-2022-485-47 at [18].

¹³⁰ See affidavit of Mr Ruscoe dated 13 October 2023 at [26]-[31] regarding the liquidators' approach to deceased account holders.

¹³¹ Affidavit of Mr Ruscoe dated 31 July 2023 at [74].

account balances of over NZD1000 first, then NZD500 to NZD1000, and so on).

- (d) Further emails were sent to account holders who had not interacted with the claims portal in any way on 15 February 2022 (**DIR1-239**) and 25 October 2022 (**DIR1-240**).
- (e) Account holders who had started but not completed the registration process were sent a reminder email on 6 August 2021 (**DIR1-238**).

6.35 That is particularly relevant in the context of Cryptopia's terms and conditions.¹³² Clause 17.1 provides that all account holders consent to receive electronically all communications, documents, and disclosures that Cryptopia may or must provide and will be taken to have received any notice published on the exchange platform or sent to the most recent contact address (including email address) that Cryptopia has on file for each account.

6.36 In addition to email communications, the liquidators have to date provide regular updates to account holders on the Grant Thornton website page for Cryptopia on:¹³³

- (a) 15 May 2019, advising of the appointment of liquidators.¹³⁴
- (b) 27 May 2019 advising of an application for interim relief in the Southern District of New York to obtain Cryptopia information held by PNAP.¹³⁵
- (c) 3 July 2019¹³⁶ and 21 August 2019¹³⁷ updating account holders on progress in securing assets and determining customer holdings.
- (d) 25 October 2019,¹³⁸ 10 February 2020¹³⁹ and 9 April 2020¹⁴⁰ in respect of the directions application in CIV-2019-409-544.
- (e) 18 September 2020¹⁴¹ and 13 November 2020¹⁴² advising that progress had been made on establishing a claims portal, what that would likely require from account holders, and that it would likely be launched late in 2020.

¹³² Affidavit of Mr Ruscoe dated 1 October 2019 in CIV-2019-409-544, exhibit DIR-2.

¹³³ Affidavit of Mr Ruscoe dated 31 July 2023 at [73].

¹³⁴ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-179.

¹³⁵ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-181.

¹³⁶ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-183.

¹³⁷ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-185.

¹³⁸ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-188.

¹³⁹ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-191.

¹⁴⁰ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-193.

¹⁴¹ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-195.

¹⁴² Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-199

- (f) 16 December 2020 advising that the claims portal had been launched and account holders should have received a registration email.¹⁴³
- (g) 17 March 2021 advising that over 57% of account holders (by value) had interacted with the claims portal in some way, providing further information regarding registration, and advising that the identity verification stage would be launched shortly.¹⁴⁴
- (h) 10 June 2021 advising that more than 71% of account holders by value had interacted with the claims portal in some way and providing further information regarding the claims process.¹⁴⁵
- (i) 10 December 2021 advising that more than 78% of account holders by value had interacted with the claims portal in some way and that identity verification had been launched to qualifying account holders and was being rolled out on a country-by-country basis.¹⁴⁶
- (j) 28 March 2022 advising that more than 82.3% of account holders by value had interacted with the claims portal, providing an update on identity verification and advising that balance acceptance would be launched once the liquidators had seen more account holders participated in registration and identity verification.¹⁴⁷
- (k) 11 November 2022 advising that the balance acceptance stage had been launched in the claims portal.¹⁴⁸
- (l) 17 August 2023 serving account holders with this application and providing an update on the claims portal and next steps.¹⁴⁹

Links to the liquidators' statutory reports and to documents filed in court proceedings were included in those updates. Those updates were also shared to social media (Twitter/X and Facebook).¹⁵⁰

6.37 In the light of the extensive efforts outlined in the paragraphs above, there is little else that the liquidators can reasonably or pragmatically do to identify beneficiaries considering the limited contact information available to them.

¹⁴³ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-201.

¹⁴⁴ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-204.

¹⁴⁵ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-206.

¹⁴⁶ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-207.

¹⁴⁷ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-211.

¹⁴⁸ Affidavit of Mr Ruscoe dated 31 July 2023, exhibit DIR1-215.

¹⁴⁹ Affidavit of Mr Ruscoe dated 13 October 2023, exhibit DIR2-1.

¹⁵⁰ Affidavit of Mr Ruscoe dated 31 July 2023 at [73]. Noting that the liquidators became aware that they had lost access to the Cryptopia Twitter/X account in June 2023 and are attempting to regain access: affidavit of Mr Ruscoe dated 31 July 2023 in support of the interlocutory application in this proceeding at [22].

There is no principled reason in the meantime for account holders who have assiduously participated in the claims process to be prevented from receiving a distribution of their beneficial entitlement. *Re Benjamin* orders are sought for that purpose (Direction 2.2).

- 6.38 The effect of those orders would be that, after a specified date (**Soft Cut-off Date**) which is proposed to be 90 days after any court order, and more than 60 days after notice of the cut-off date is given (in line with the partial codification of *Re Benjamin* orders in s 136 of the Trusts Act 2019), the liquidators can proceed as if the only beneficiaries of the trusts are those who have registered a claim in the portal. The proposed notice to account holders is at Schedule 1 of the originating application dated 31 July 2023.
- 6.39 The order is sought on the basis that those are the only beneficiaries that the liquidators are able to identify based on the account information Cryptopia holds, advertising the portal on the Grant Thornton website, Facebook and Twitter, and emailing all account holders several times. Further, by the time of the Soft Cut-off Date (estimated to be approximately 30 June 2024, see **Schedule 2**) it will have been three and a half years since the claims portal launched in December 2020. That is, in the liquidators' submission, a more than reasonable timeframe in which to expect any account holders of Cryptopia to come forward.
- 6.40 To address concerns that the liquidation is an exit scam, the liquidators will undertake an interim distribution ahead of any *Re Benjamin* orders coming into effect, to encourage more account holders to register their claims.¹⁵¹ It is hoped that this will have the effect of encouraging greater participation among those account holders who have not yet registered with the claims portal: after notifying account holders of the directions application in August, the claims portal saw 1,065 new registrations.¹⁵²
- 6.41 In accordance with the Court's broad-ranging inherent jurisdiction to supervise the administration of the trusts,¹⁵³ the liquidators also seek an order that after a second date (**Final Cut-off Date**) the liquidators can proceed on the factual footing that any account holder who has engaged with the claims portal but has not completed it (ie, has not provided payment details) has abandoned their claim (Direction 2.5). To avoid any undue disadvantage to account holders who have been able to be identified, the

¹⁵¹ Affidavit of Mr Ruscoe dated 31 July 2023 at [86]–[87].

¹⁵² Affidavit of Mr Ruscoe dated 13 October 2023 at [4].

¹⁵³ See the broad ranging *Re Benjamin* type orders made in *Re MF Global* and *Re Instant Cash Loans*.

liquidators seek a direction that any account holder who has been invited to (but has not completed) balance acceptance by two months before the Final Cut-off Date will be deemed to have accepted their balance and have the opportunity to provide their payment details (Direction 3.5).

- 6.42 The liquidators submit that such orders are justified because, by the time of the proposed Final Cut-off Date (31 December 2024) it will have been four years since the claims portal was launched in December 2020 and nine months since account holders were given notice of the Final Cut-off Date and its effect (estimated to be approximately 31 March 2024, see **Schedule 2**). The liquidators submit that this is a more than adequate period of time in which to expect account holders who have registered in the portal to complete the claims process.
- 6.43 Finally, the *Re Benjamin* and *Re Instant Cash Loans* orders would not, the liquidators submit, have the effect of extinguishing any account holder's beneficial entitlement (Direction 2.3). Rather, they would permit the liquidators to proceed with distribution without retaining assets to accommodate those interests. That will allow the liquidators to distribute to account holders who *have* completed the process and proceed with winding up the trusts and, ultimately, the liquidation of Cryptopia, without risk of the liquidators or Cryptopia being liable for doing so (Direction 3.6).
- 6.44 The specific effect of proceeding on the basis that (i) account holders who have not registered; and (ii) account holders who have not completed the process; do not exist is on the allocation of trust administration costs. If the liquidators can proceed on the factual footing that those account holders do not exist or are not beneficially entitled, then their beneficial entitlement will not need to be taken into account when allocating trust administration costs. Trust allocation costs would be borne by the "unclaimed" holdings (ie, the holdings that the liquidators can distribute without regard to, pursuant to Directions 2.2 and 2.5). This process is explained at paragraphs [89] to [96] of Mr Ruscoe's 31 July 2023 affidavit and can be summarised by two phases of distribution:
- (a) **Phase One:** after the Soft Cut-off Date, trust administration costs would be allocated to trusts. The holdings of account holders who have not registered in the claims portal will be treated as "unclaimed holdings" on the basis that the liquidators can proceed as if those account holders do not exist (**Unclaimed Holdings**). Trust

administration costs would first be allocated to those unclaimed holdings in each trust, and the remainder allocated among eligible account holders in each trust. Eligible account holders would receive a distribution of their Finalised Claim, less their allocation of trust administration costs.

- (b) **Phase Two:** after the Final Cut-off Date, the holdings of account holders who have not completed the claims process would be treated as "abandoned holdings" (and considered to be part of the pool of Unclaimed Holdings). The liquidators would undertake a 'reallocation' exercise in respect of trust administration costs. That will take account of any additional assets available by way of abandoned holdings, and any reimbursement owing to the trusts resulting from the trustee's retention of trust assets to meet its right of indemnity. The liquidators will recalculate the costs to be allocated to each account holder considering the final number of eligible account holders, and, if an account holder is entitled to receive more cryptocurrency than they received in the Phase One distribution, will receive a 'top up' distribution (up to a maximum of 100% of their Finalised Claim) from the pool of Unclaimed Holdings.

6.45 At that stage, if there were Unclaimed Holdings remaining in trusts that suffered losses in the hack, the liquidators would consider distributing a 'top up' to eligible account holders in those trusts up to a maximum of 100% of their account balance as at 14 January 2019 (prior to the hack). If there are insufficient holdings to make good all losses suffered by eligible account holders, then the liquidators would distribute the remaining cryptocurrency on a *pari passu* basis (proportionally based on value).¹⁵⁴

6.46 An indicative timeframe of the Cut-off Dates and distributions are set out in **Schedule 2** to these submissions.

7. COST ALLOCATION

Trust administration costs

7.1 The costs to date and projected costs in relation to the administration of the trusts are set out at [110]-[122] of Mr Ruscoe's affidavit dated 31 July 2023.

¹⁵⁴ Affidavit of Mr Ruscoe dated 31 July 2023 at [96].

7.2 **Costs to date:** Since the liquidators' appointment in May 2019 to the end of September 2023, a total of NZD22.85 million is attributable to the administration of the trusts.¹⁵⁵ The costs to date have been realised from the following sources:¹⁵⁶

- (a) BTC Trust.
- (b) DOGE Trust.
- (c) Company funds.

7.3 **Projected costs:** The liquidators' projected costs from approximately August 2023 to June 2024 are estimated to be ~NZD5 million,¹⁵⁷ with a further ~NZD3.5 million of estimated costs up to the Final Cut-off Date.¹⁵⁸

Allocation of trust administration costs

7.4 The liquidators' proposed distribution model is set out at [123]-[139] of Mr Ruscoe's affidavit dated 31 July 2023. A table summarising the liquidators' analysis of the different distribution models considered is set out at [130] and at Schedule 2 of Mr Ruscoe's affidavit dated 31 July 2023. The below section outlines the:

- (a) Use of one model to allocate the costs across all of the trusts.
- (b) Allowance to take projected costs from the trusts.
- (c) Reimbursement of the BTC trust, DOGE trust, and the Company.
- (d) Options for cost allocation.
- (e) Preferred model - By trust, by holding, and why.
- (f) Approach for low or no value trusts, and low value account holders
- (g) Effect of the Re Benjamin and Re Instant Cash Loans orders

One model to allocate the costs across all of the trusts

7.5 As explained at [3.28] above, a trustee may allocate costs across multiple separate trusts when it is not possible or practicable to estimate the actual costs incurred in respect of each trust.

¹⁵⁵ Affidavit of Mr Ruscoe dated 13 October 2023 at [20].

¹⁵⁶ Affidavit of Mr Ruscoe dated 31 July 2023 at [116]-[118]; affidavit of Mr Ruscoe dated 13 October 2023 at [21].

¹⁵⁷ Affidavit of Mr Ruscoe dated 31 July 2023 in at [120].

¹⁵⁸ Affidavit of Mr Ruscoe dated 31 July 2023 at [122].

- 7.6 Mr Ruscoe's 31 July affidavit at [123]-[127] sets out why it is not practicable for the liquidators to calculate accurately or to estimate the actual costs incurred in respect of each trust. The majority of the steps that the liquidators have taken are for the benefit of all of the trusts. It is impossible to divide the time spent on each of these steps accurately across all of the trusts.
- 7.7 *Re Caledonian Securities Limited (in liq)*,¹⁵⁹ a decision of the Grand Court of the Cayman Islands, shows the difficulties with applying a cost allocation model to the costs of administering and distributing the custodial assets managed by a large insolvent trustee. In that case, the liquidators identified several apportionment methods to allocate their fees and expenses to beneficiaries, but acknowledged that none of them were precise due to many costs not able to be directly attributable to a particular beneficiary or class of beneficiary.¹⁶⁰ A 'perfect' cost allocation method – by charging only each beneficiary the costs strictly attributable to them – "*could only be achieved following an enormous amount of reconstructive work and at enormous cost.*"¹⁶¹ The accepted allocation method was for each beneficiary to bear a proportionate share of total costs by reference to the total value of all trust assets (ie, *pari passu* or by value) subject to a cash to securities adjustment of 30:70, which reflected the increased costs of dealing with securities compared to cash.
- 7.8 The Court further noted that a strict apportionment exercise would be inequitable as it would require further "*onerous and expensive*" work, and place the liquidators at risk of not recovering the costs for that work.¹⁶² As long as the allocation method was "*within the bounds of what is fair and reasonable*", the Court accepted that a beneficiary's cost contribution would be "*imprecise*" and there would be "*some element of cross-subsidy*" between beneficiaries.¹⁶³

Allowance to take projected costs from the trusts

- 7.9 As explained at [3.25] above, a trustee is entitled to be indemnified out of the trust property for costs and expense properly incurred in connection with the performance of their duties as trustee. This includes the ability to retain trust assets until the trustee has been indemnified, to pay for actual and

¹⁵⁹ *In re Caledonian Securities Limited (in Official Liquidation)* [2016] 1 CILR 309.

¹⁶⁰ At [24].

¹⁶¹ At [24].

¹⁶² At [65]–[66].

¹⁶³ At [67]–[69].

contingent or future liabilities to the extent required to meet the 'worst case' scenario on the basis of reasonable assumptions.

- 7.10 The liquidators seek a direction permitting them to realise some of the trust assets so that future trust liabilities can be paid directly out of the trust assets. In other words, the liquidators are seeking to exercise Cryptopia's right of exoneration. Direction 7 is a straightforward application of that principle.
- 7.11 Because the indemnity operates as a lien over the trust property that takes priority over the claims of beneficiaries, the liquidators are entitled to (and, in accordance with trust law principles, should) reimburse themselves for expenses incurred in the administration of the trusts prior to distributing trust assets to the beneficiaries.
- 7.12 Due to the inherent volatility of cryptocurrency, it is prudent for the liquidators to take out projected costs in advance of incurring them. This approach protects against the possibility that (a) all account holders seek the return of their cryptocurrency (despite this being inherently improbable) and/or (b) there is a collapse in value of cryptocurrencies, increasing the costs that would need to be borne by other trusts.¹⁶⁴ If actual costs are less than the amount retained by the liquidators in respect of anticipated future costs, the liquidators would reimburse the trusts in the relevant cryptocurrency of the relevant trust (include reference to DR affidavit) (see 'top up' distribution below at [7.29]).

Reimbursement of the BTC trust, DOGE trust, and the Company

- 7.13 The BTC and DOGE trusts have borne many of the trust administration costs to date. Company assets have also been spent on trust administration and need to be reimbursed from the trusts back to the Company.
- 7.14 Direction 8 seeks orders that, after cost allocation has been calculated:
- (a) If the costs allocated to the BTC and DOGE trusts are less than the costs that have already been borne from those trusts, each other trust will reimburse the BTC and DOGE trusts for their share of costs.
 - (b) The Company will be reimbursed for funds applied to trust administration.

¹⁶⁴ Affidavit of Mr Ruscoe dated 31 July 2023 at [121].

Options for cost allocation

7.15 The liquidators designed a cost allocation model that accounts, in the first instance, for the possibility that all account holders will make themselves eligible for distribution. However, it seems likely that not all account holders will participate based on the participation of account holders in the claims process to date.¹⁶⁵ Costs are therefore likely to reduce, and possibly be partly or wholly paid by applying Unclaimed Holdings (Directions 4.3, 5.1, 6.2 and 7.1).

7.16 The liquidators considered various options for how costs should be allocated:

- (a) **By value:** Costs are allocated to each account holder in proportion to the value of their holding.
- (b) **By trust, by value:** Costs are divided evenly by the number of trusts, and then allocated to account holders within each trust in proportion to the value of their holding in that trust.
- (c) **Separate trusts:** Costs are allocated to each trust, but only to those trusts with sufficient Cryptocurrency to bear their costs. Low-value trusts are not used to fund trust administration costs.
- (d) **By account holder:** Trust administration costs are allocated evenly to each account holder, irrespective of the number of holdings.
- (e) **By trust, by holding:** Costs are allocated to each trust in proportion to the number of individual holdings in that trust. Within the trust, costs are allocated evenly to each account holder in that trust.

7.17 Various factors were considered in coming to a preferred option:

- (a) Justice Gendall's finding that the cryptocurrencies were held on separate trusts, one per coin type (see [3.1] above).
- (b) That the most significant driver of costs was and continues to be the number of beneficiaries in a trust, or in other words the number of total holdings.
- (c) The model should be robust to valuation volatility, as cryptocurrencies constantly fluctuate in value.

¹⁶⁵ Affidavit of Mr Ruscoe dated 31 July 2023 at [79].

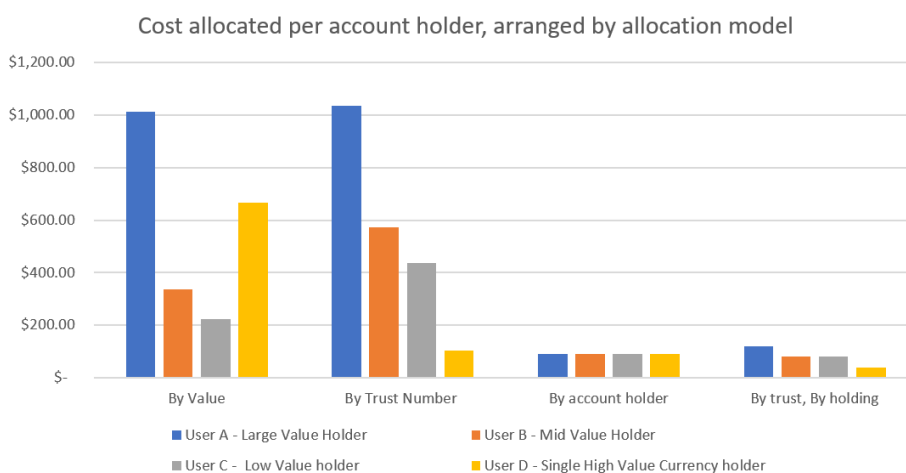
- (d) The model must be administratively simple and future proof, designed as if all account holders participate in the claims process and are eligible for a distribution.
- (e) Maximising the number of beneficiaries and trusts to which cryptocurrency could be distributed, within the bounds of Justice Gendall's judgment and Cryptopia's trustee duties.

7.18 A summary table comparing options and a fulsome table analysing each option are set out in Mr Ruscoe's affidavit dated 31 July 2023 at [130] and Schedule 2, respectively. It is replicated below for ease of reference:

Criteria	Fiat	Exchange	Direct transfer Preferred option	Pre-populated wallet	Stablecoin
In specie	No	Yes	Yes	Yes	Still crypto, but converted
Minimal action required by account holder	Minimal	Minimal	Moderate	Considerable	Moderate
Transaction costs	High	Medium	Medium	Medium	Medium
Customer support costs	Low	Low	Medium	High	Low
Security assurance	High	Medium	High	Low	High
Providers with required capability	Yes	No	Mostly	N/A	Mostly
Time	Medium	Low	Low	High	Medium
Liquidators' control over process, personal information	High	Medium	High	High	Medium

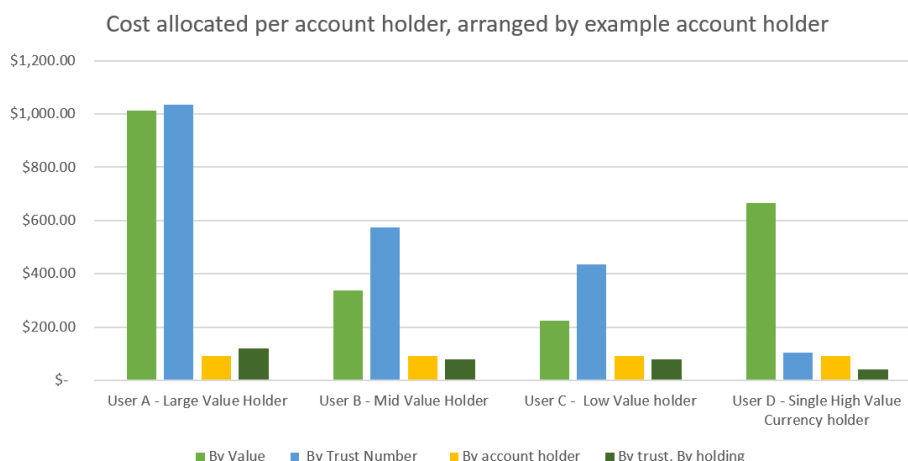
7.19 To assist the Court, the liquidators have modelled the different cost allocation options using example trusts and account holders to preserve confidentiality.¹⁶⁶ The two charts from Mr Ruscoe's affidavit dated 13 October 2023 are replicated below, to illustrate the reasoning outlined above:

Chart 1: Cost allocated per account holder, arranged by allocation model



¹⁶⁶ Affidavit of Mr Ruscoe dated 13 July 2023 at [22].

Chart 2: Cost allocated per account holder, arranged by example account holder



Preferred model - By trust, by holding.

7.20 In the liquidators' submission, the most principled, fair and pragmatic cost allocation model is **by trust, by holding** (Direction 6).

- (a) Trust administration costs (to date, and projected) would be allocated to each trust in proportion to the number of account holders in that trust.
- (b) The Cryptocurrency equivalent of the dollar value would be removed from the trust in accordance with the liquidators' trustee indemnity.
- (c) Within each trust, the cost allocation would be allocated to account holders evenly.

7.21 That cost allocation would be calculated as at the date of any distribution (ie, after the Soft Cut-off Date) and recalculated after the Final Cut-off Date (Direction 4.2).

7.22 The allocation and payment of costs may result in all of the realisable value of cryptocurrency in a trust being applied towards the costs allocation and no cryptocurrency is then available for distribution from that trust to account holders (Direction 6.2).

7.23 The other options considered were discounted because, in summary:¹⁶⁷

- (a) 'By value' and 'by account holder' do not accord with the separate trusts holding by Gendall J as they treat all cryptocurrencies as one pool. High-value account holders would contribute more to costs than low-

¹⁶⁷ See Affidavit of Mr Ruscoe dated 31 July 2023 at Schedule 2 for a fulsome analysis.

value account holders despite costs being substantially driven by the number of holdings. In effect, some account holders would cross-subsidise others, within trusts and across trusts.

- (b) Value-based models are not robust to valuation fluctuations. The value of cryptocurrency will continue to move significantly until and between the various distribution dates.
- (c) 'By account holder' is administratively difficult. For account holders with multiple holdings, there is no principled basis on which the liquidators can decide which holdings are used for cost allocation purposes.
- (d) Only 'separate trusts' and 'by trust, by holding' reflect the fact that actual costs are substantially driven by the number of individual holdings. However, 'separate trusts, by holding' only allocated costs to those trusts with sufficient value to bear it, low-value trusts are not used to fund trust administration costs. Only a small number of high-value trusts will be able to be distributed to under this model.

7.24 'By trust, by holding' is the most principled, fair and pragmatic cost allocation model because it:

- (a) accords with Gendall J's separate trust holding,
- (b) allocates costs in line with how actual costs are generated (i.e., by number of individual holdings),
- (c) is robust to valuation fluctuations, and
- (d) is administratively simple to administer.
- (e) will distribute to a large number of account holders (128,226) and trusts (60), based on earlier indicative modelling which assumes that all account holders claim.

7.25 The number of holdings in total is the most significant driver of costs. For example, all holdings had to be rekeyed, reconciled, and securely stored.¹⁶⁸ Account holders, on average, hold multiple coins. On average, account holders with an account value of:¹⁶⁹

- (a) less than USD20 held 2.61 currencies;

¹⁶⁸ Affidavit of Mr Ruscoe dated 31 July 2023 at [128(b)].

¹⁶⁹ Affidavit of Mr Ruscoe dated 31 July 2023 at Schedule 1.

- (b) between USD20 and USD120 held 4.56 currencies; and
- (c) more than USD120 held 6.54 currencies.

Approach for low or no value trusts, and for low account balances

7.26 Costs will be allocated to each trust based on the number of holdings (by trust, by holding). Within each trust, costs will be divided equally by holding.

7.27 Trusts with no realisable value will not be able to bear their costs of trust administration. Other trusts with lower realisable values may not be able to bear the entirety of their cost allocation or may have little value available to be distributed after its allocation of costs is applied. Directions 4.1 and 6.2 propose that the liquidators take no action in respect of trusts with no realisable value, either to begin with, or after being exhausted by trust administration costs. The liquidators will periodically reassess the realisable value of the cryptocurrencies to prevent any undue disadvantage arising from one singular valuation date (particularly in light of the value volatility of cryptocurrency).¹⁷⁰

7.28 Direction 5.1 proposes that account holders who have an account balance equivalent to or less than the costs of trust administration as having no right to participate in distribution. For ease of reference, this is referred to as a 'de minimis' value, but in reality it is determined by the allocation of trust administration costs and will accordingly vary across the trusts. Some account holders who are at or below the initial de minimis value threshold for distribution may later receive a distribution if not all account holders claim resulting in:

- (a) Projected costs being lower than currently estimated;
- (b) Unclaimed Holdings may be applied to partly or wholly reimbursing costs; and / or
- (c) Unclaimed Holdings may be applied to partly or wholly satisfying a shortfall claim for losses arising from the Hack.

Effect of the Re Benjamin and Re Instant Cash Loans orders

7.29 Directions 2.2 and 2.5 seek a *Re Benjamin* order after the Soft Cut-off Date and a *Re Instant Cash Loans* order after the Final Cut-off Date, respectively.

¹⁷⁰ Affidavit of Mr Ruscoe dated 31 July 2023 at [46].

As explained at [3.16] and [3.21] above, these orders allow the liquidators to proceed with distributions on a particular factual footing, based on an account holder's progress through the claims portal.

7.30 Direction 2.8 seeks, in relation to any trust for which there is an Unclaimed Holding (resulting from the application of the Soft Cut-off Date and Final Cut-off Date), that the liquidators may apply any Unclaimed Holding in a trust (to the extent available, in the following order):

- (a) Evenly to reimburse the difference between projected and actual costs;
- (b) Evenly to reimburse actual costs (ie, up to 100% of their accepted holding as at 14 May 2019);
- (c) Parri passu to account for losses arising for the Hack, if any (ie, up a maximum of 100% of their accepted holding pre-Hack, taking into account any post-Hack transactions).

7.31 For avoidance of doubt, reimbursement of costs is done in accordance with the 'by trust, by holding' allocation model. In other words, reimbursement of costs from Unclaimed Holdings are conducted on a flat 'per holding' basis. Application of Unclaimed Holdings to satisfy accepted holdings due to a shortfall from the Hack will be done on by value, pari passu basis. (Direction 2.9)

7.32 The ultimate intent of the proposed directions is to distribute to eligible account holders up to 100% of their finalised claim. The extent to which an account holder has their costs and Hacked losses paid for, depends on the quantum of Unclaimed Holdings in a particular trust.

8. WINDING UP THE TRUSTS

8.1 The liquidators are not yet in a position to wind up the trusts. Part of the reason for seeking *Re Benjamin* and *Re Instant Cash Loans* orders is to begin the distribution process and progress to the point where the trusts, and the liquidation of Cryptopia, can be wound up.

8.2 It is difficult to estimate when the liquidators will be in a position to wind up the trusts, as that is entirely dependent on the number of account holders who complete the claims process. The liquidators anticipate that they may be in a position to wind up the trusts and seek relevant directions from the Court in around June 2025 (see **Schedule 2**), which is approximately six

years after liquidators were appointed; four and a half years after the claims portal was launched; and one year after the proposed commencement of Phase One distributions.

- 8.3 The current planned course of action to wind up the trusts (which is subject to change) is to transfer the undistributed trust property to the Treasury pursuant to s 149 of the Trusts Act 2019. That course of action is only available for money or financial products, which cryptocurrency is not.¹⁷¹ It would accordingly be necessary to seek directions permitting the liquidators to convert all cryptocurrency holdings to fiat to enable that transfer and possibly 'blessing orders' under s 136 of the Trusts Act 2019.

9. MISTAKEN DEPOSITS

- 9.1 Mr Ruscoe explains at [28] to [32] of his 31 July 2023 affidavit the deposit tracker issue faced by the liquidators. In summary, Cryptopia management took the exchange offline following the January 2019 hack. In an effort to reduce the risk of lingering malware, Cryptopia management introduced security protocols whereby it generated new deposit addresses for account holders and, when the exchange was reopened, it instructed account holders not to send cryptocurrency to any deposit addresses that existed at the time of the hack. It had no way of preventing people from doing so, however, or rejecting deposits made to old deposit addresses.
- 9.2 The exchange was again taken offline when the liquidators were appointed on 14 May 2019 and account holders were instructed not to deposit any cryptocurrency. Despite that, there have been several deposits post-liquidation, totalling an estimated NZD850,000.¹⁷² Because the deposit tracker had been switched off when the exchange went live, none of those deposits were ever recorded in Cryptopia's databases or swept from deposit addresses and pooled with the trust property held in Cryptopia's wallets. As a result, the mistaken deposits were not included in the liquidators' reconciliation process. Identifying the intended recipients and the amounts deposited requires some type of reconciliation process using blockchain forensics.
- 9.3 The mistaken deposits do not form part of the pooled trust assets and the starting point is to return the deposits to the intended recipient. Accordingly,

¹⁷¹ See the definition of "financial product" in s 7 of the Financial Markets Conduct Act 2013.

¹⁷² Affidavit of Mr Ruscoe, 13 October 2023 at [33].

the liquidators propose that, upon receipt of proof of the deposit transaction from an account holder (which can be submitted through the liquidators' customer service platform for Cryptopia), they will verify the deposit and return it to the intended recipient. The liquidators intend to put account holders on notice of the fact that mistaken deposits were received after the date of liquidation and that proof of the transaction can be provided to customer service. The proposal is to include that notice in the (proposed) 31 March 2024 notice of *Re Benjamin* orders.¹⁷³

- 9.4 The current direction sought is that, unless claimed by the relevant account holder before the Soft Cut-off Date, mistaken deposits are to be treated as company property (Direction 9.1). The liquidators now propose treating unclaimed mistaken deposits in the same way as unclaimed holdings in the trusts (ie, conversion to fiat and transferring it to the Treasury as non-distributable trust property under s 149 of the Trusts Act 2019).
- 9.5 After the Final Cut-off Date, the liquidators will consider whether more targeted communications are necessary, depending on the deposits that remain unclaimed. It may be necessary at that stage to undertake some type of reconciliation process in order to provide the necessary information under s 149(2).¹⁷⁴

10. APPLICATION OF THE AML ACT

- 10.1 The liquidators have sought a direction confirming that the AML Act does not apply to the transfer of cryptocurrency assets to account holders via a wallet-to-wallet transfer by a financial institution in liquidation.¹⁷⁵ Such transfers from Cryptopia to beneficiaries are not subject to the requirements of the AML Act as Cryptopia ceased to be a reporting entity upon entering liquidation on 14 May 2019 pursuant to Regulation 22 of the AML/CFT (Definitions) Regulations 2011.
- 10.2 The liquidators have nonetheless designed their identity verification process in line with the standards required by the AML Act.¹⁷⁶ The liquidators have previously engaged with the Department of Internal Affairs (DIA); its position at that time was a transfer of cryptocurrency by a financial institution in

¹⁷³ Affidavit of Mr Ruscoe, 13 October 2023 at [35]; originating application for directions in respect of distribution of cryptocurrencies dated 31 July 2023 at Schedule 1.

¹⁷⁴ Affidavit of Mr Ruscoe, 13 October 2023 at [36].

¹⁷⁵ The liquidators accept that any fiat (cash) transfer to account holders in Restricted Jurisdictions are subject to AML Act requirements.

¹⁷⁶ Affidavit of Mr Ruscoe dated 31 July 2023 at [141]–[142].

liquidation does not engage the AML Act. This application has been served on DIA who may file a notice of appearance to join the proceedings as an interested party, if it wishes to be heard on the issue.

11. CONCLUSION

11.1 The liquidators respectfully request that the Court grant the orders sought.

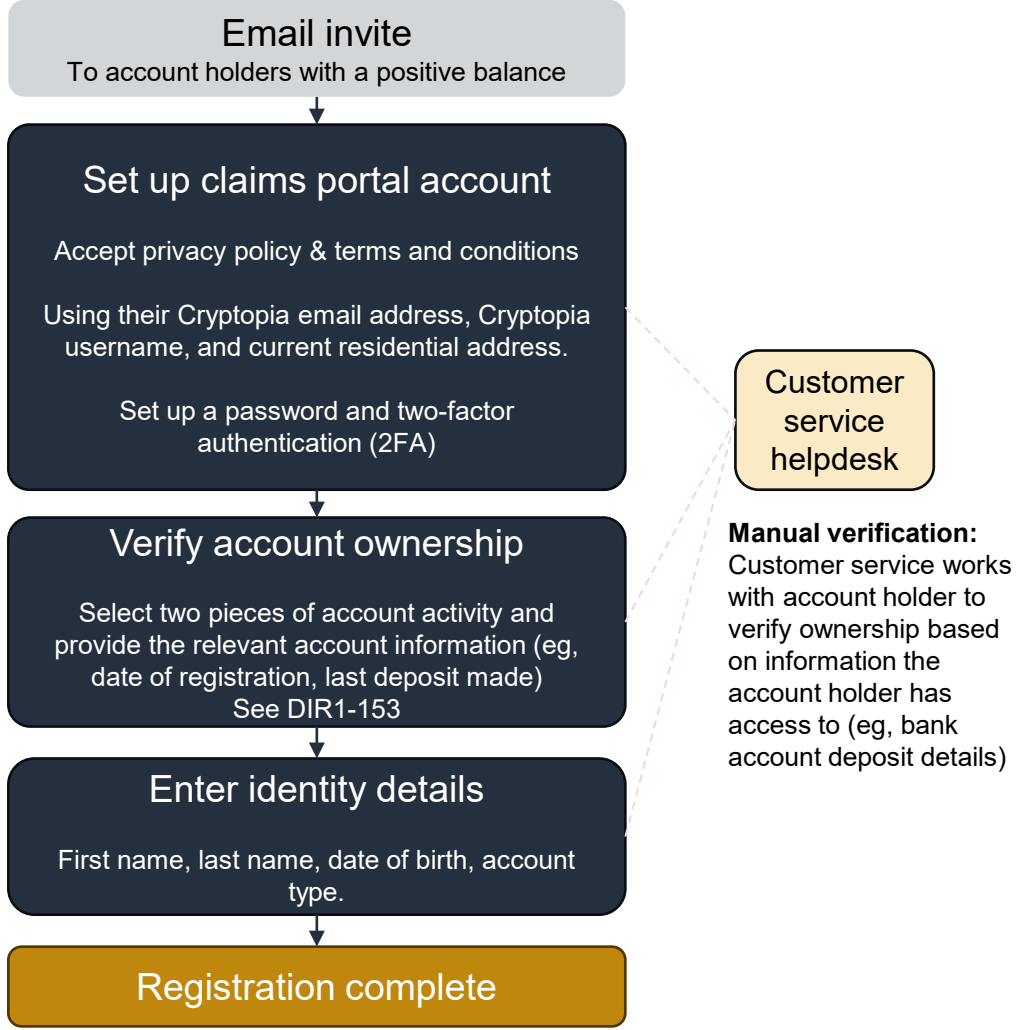
Dated: 13 October 2023



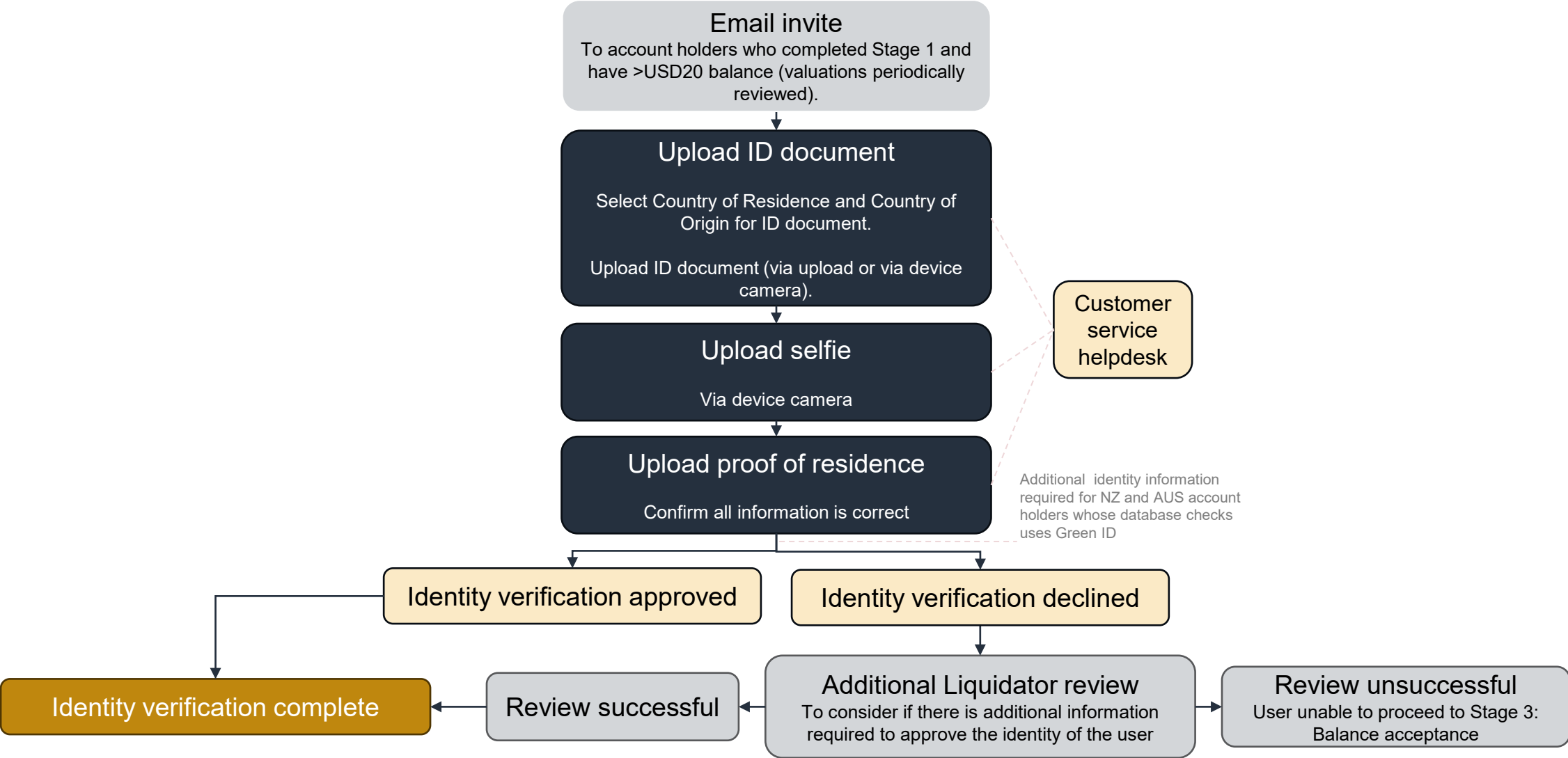
S A Barker / B R McKinnon / B E Marriner
Solicitor for the applicants

Schedule 1: Claims portal flowchart

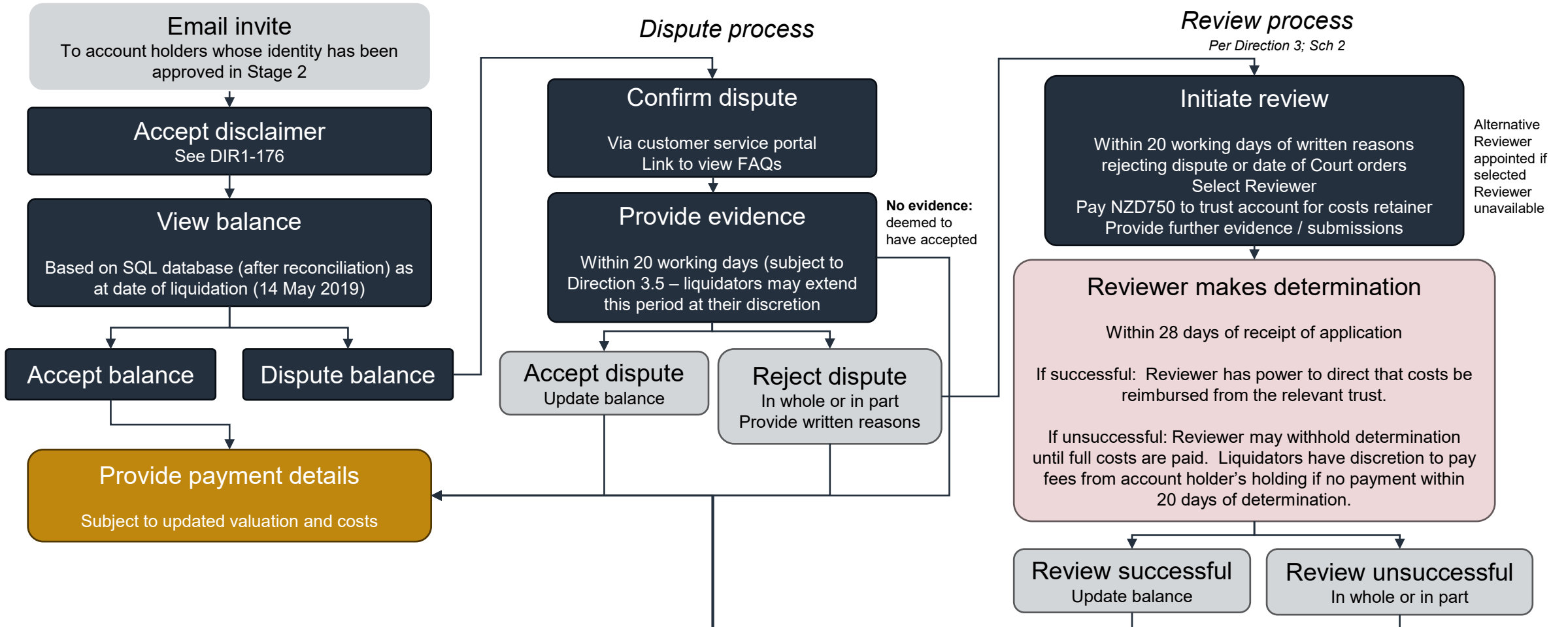
Stage 1: Registration



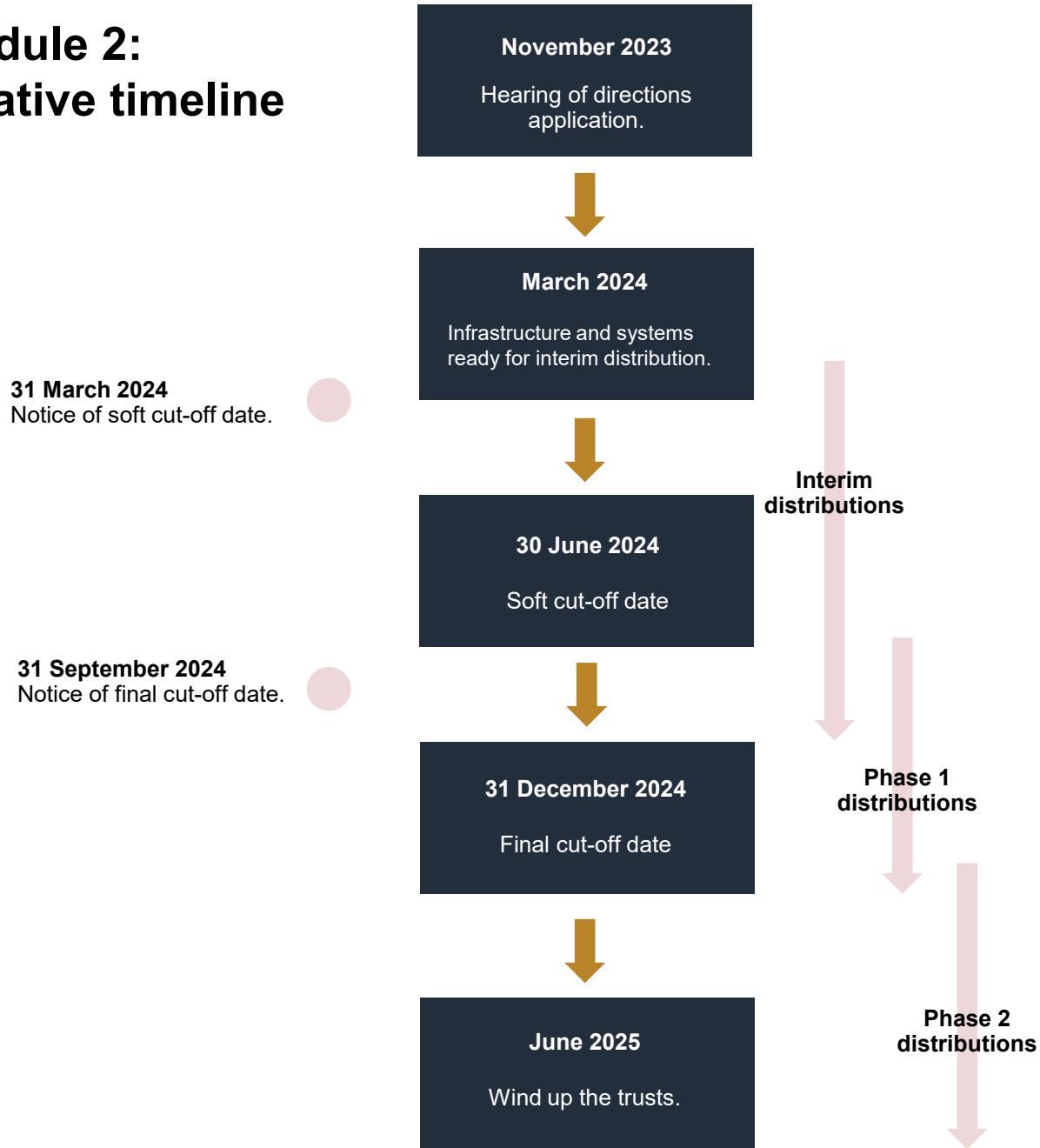
Stage 2: Identity verification



Stage 3: Balance acceptance



Schedule 2: Indicative timeline



SCHEDULE 3: COST ALLOCATION, UNCLAIMED HOLDINGS, AND REIMBURSEMENT:

WORKED EXAMPLES

For simplicity, the following examples use dollar values, but the actual distributions will be in cryptocurrency. Transaction costs are ignored.

2,000 account holders have a holding in **Example Coin**. The total value of Example Coin is \$200,000.

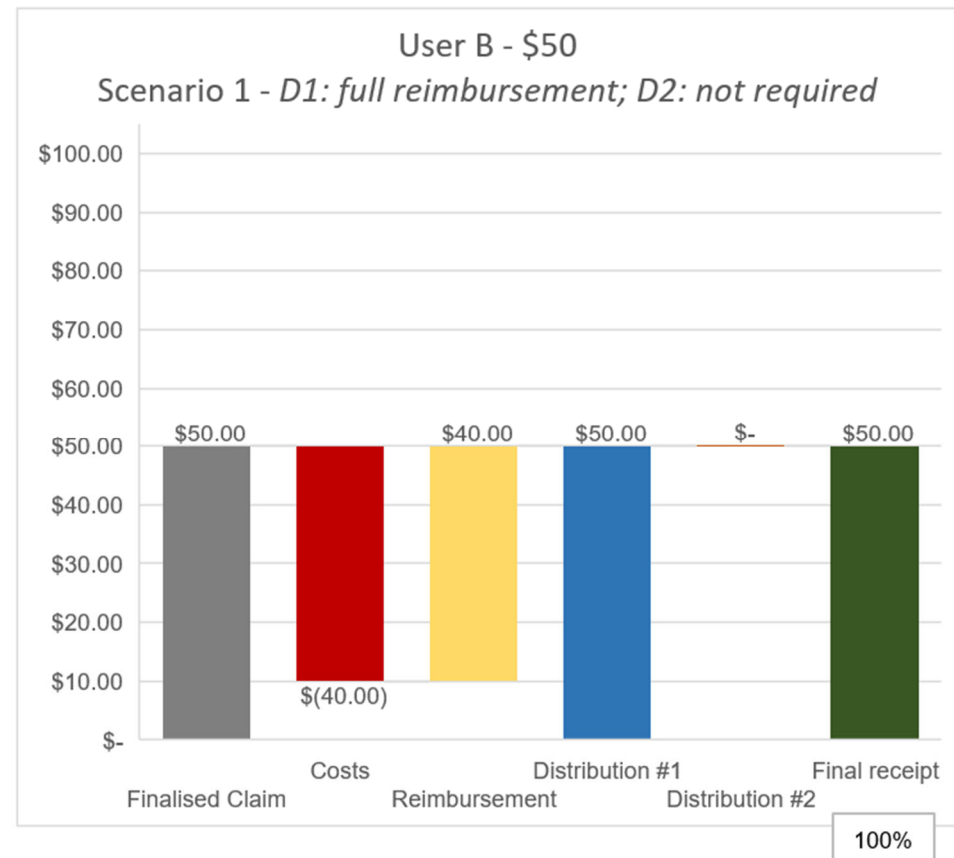
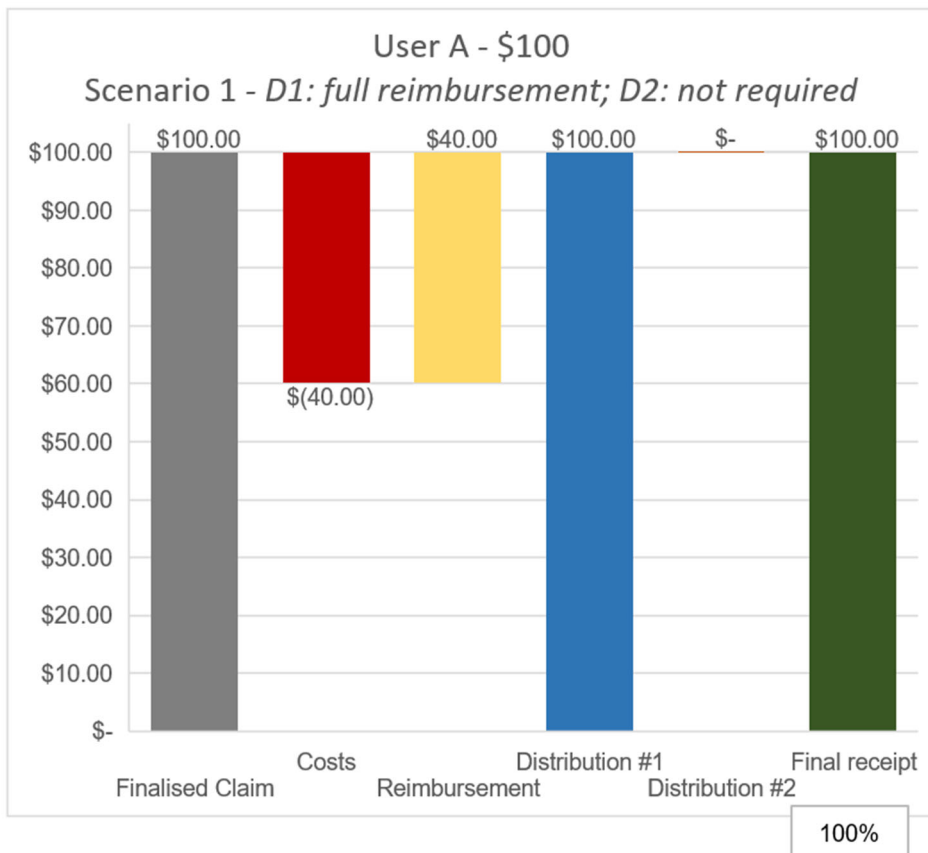
User A and **User B** have only one cryptocurrency holding with Cryptopia. Accordingly, **User A's** Finalised Claim is \$100 in Example Coin. **User B's** Finalised Claim is \$50 in Example Coin.

The following scenarios are shown below.

- Scenario 1: significant amount of Unclaimed Holdings.
- Scenario 2, large amount of Unclaimed Holdings.
- Scenario 2A, 'top up' distribution for Hack losses.
- Scenario 3, moderate amount of Unclaimed Holdings.
- Scenario 4, no Unclaimed Holdings.

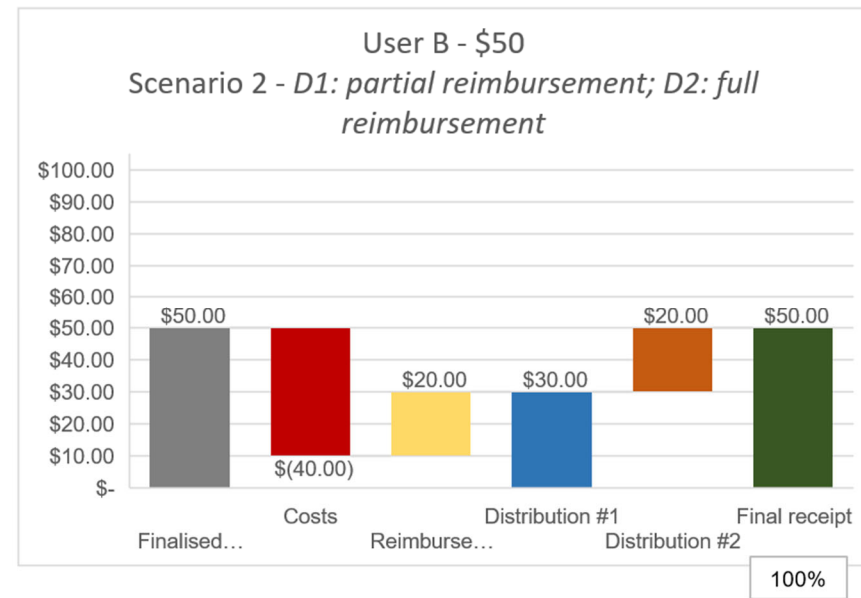
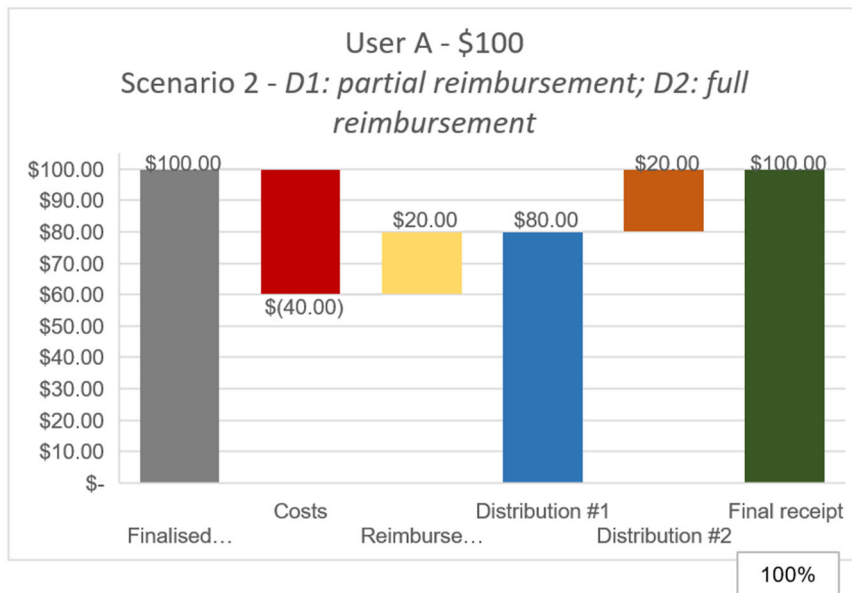
SCENARIO 1: SIGNIFICANT AMOUNT OF UNCLAIMED HOLDINGS: Full cost reimbursement; no Phase 2 distribution required.

1. The actual and projected trust administration costs across all trusts is \$40 per holding (on the assumption that all registered account holders in all trusts will complete the claims process by the Final Cut-off Date). Example Coin has 2,000 account holders and is allocated \$80,000 of costs.
2. After the Soft Cut-off Date, only 1,000 account holders (half) in Example Coin are registered in the claims portal. The Unclaimed Holdings from non-eligible account holders is \$90,000. All of Example Coin's trust administration costs are able to be borne by the Unclaimed Holdings.
3. Account holders stand to be distributed 100% of their Finalised Claim. No Phase 2 distribution is required. \$10,000 of Unclaimed Holdings remain in Example Coin for distribution to account holders who register after the Soft Cut-off Date.



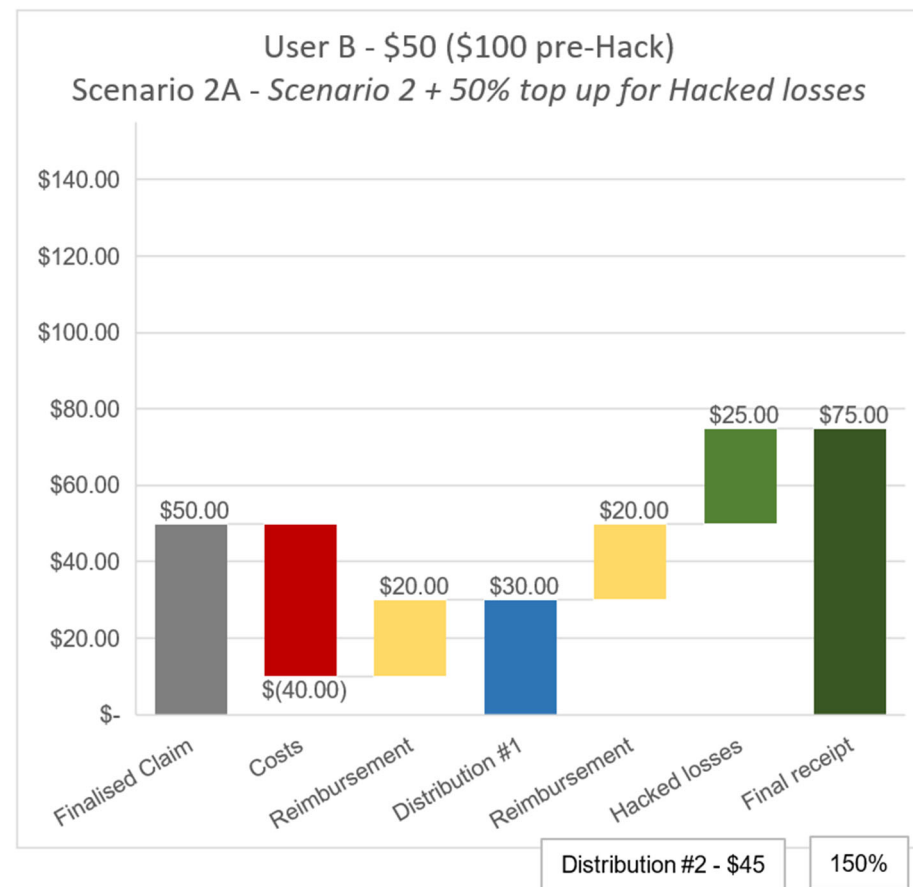
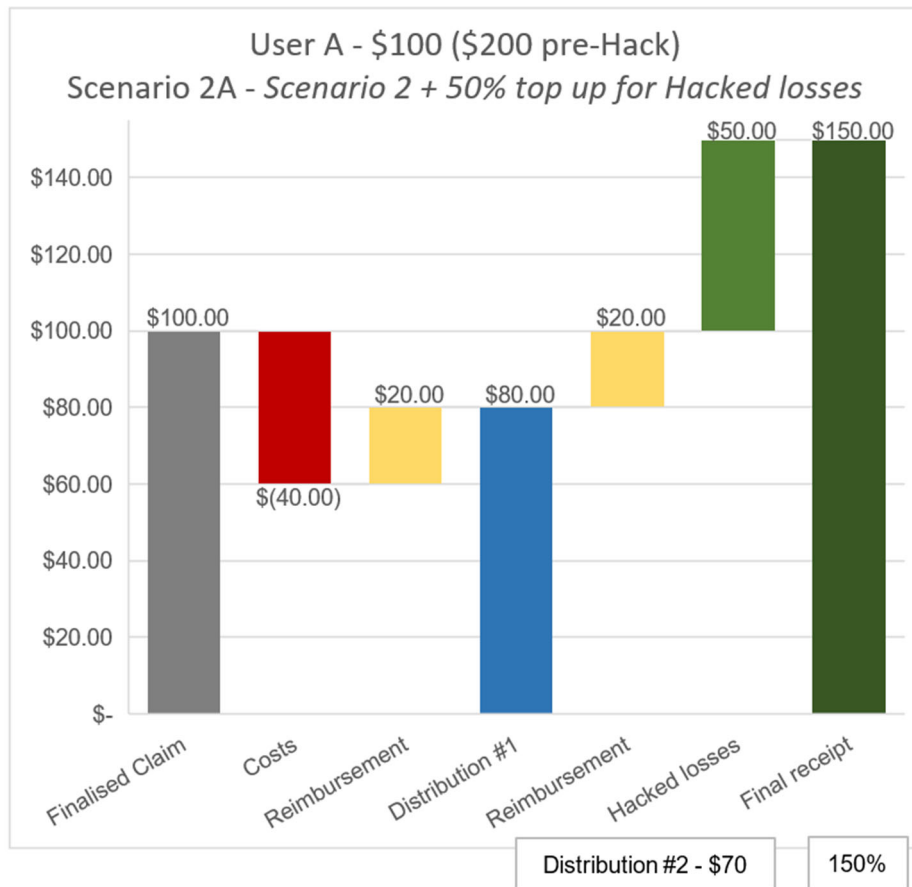
SCENARIO 2: LARGE AMOUNT OF UNCLAIMED HOLDINGS: Partial cost reimbursement; full cost reimbursement after second distribution

4. As in Scenario 1, the actual and projected trust administration costs across all trusts is \$40 per holding (on the assumption that all registered account holders in all trusts will complete the claims process by the Final Cut-off Date). Example Coin has 2,000 account holders and is allocated \$80,000 of costs.
5. After the Soft Cut-off Date, only 1,000 account holders (half) are registered in Example Coin. The Unclaimed Holdings from non-eligible account holders is \$40,000. All of the Unclaimed Holdings are used to fund Example Coin's trust administration costs. \$40,000 in trust administration costs remains to be allocated to eligible account holders in Example Coin.
6. User A and User B are each allocated \$20 in trust administration costs. In the Phase 1 distribution, User A is distributed \$80 of Example Coin and User B is distributed \$30 of Example Coin (their Finalised Claims less \$20 of Example Coin).
7. After the Final Cut-off Date, only 500 account holders in Example Coin have completed the claims process. Unclaimed Holdings from non-eligible account holders is now \$80,000 (the \$40,000 from after the Soft Cut-off Date, which has been exhausted already, and an additional \$40,000 in "abandoned holdings"). Further, actual trust administration costs are lower than projected. They are now \$35 per holding rather than \$40 per holding.
8. Example Coin's cost allocation is recalculated. It has 2,000 account holders and is allocated \$70,000 of costs. All of Example Coin's trust administration costs are able to be borne by the Unclaimed Holdings. User A and User B both a Phase 2 distribution up to 100% of their Finalised Claim (\$20 of Example Coin each). \$10,000 of Unclaimed Holdings remain in Example Coin for distribution to account holders who register after the Soft Cut-off Date.



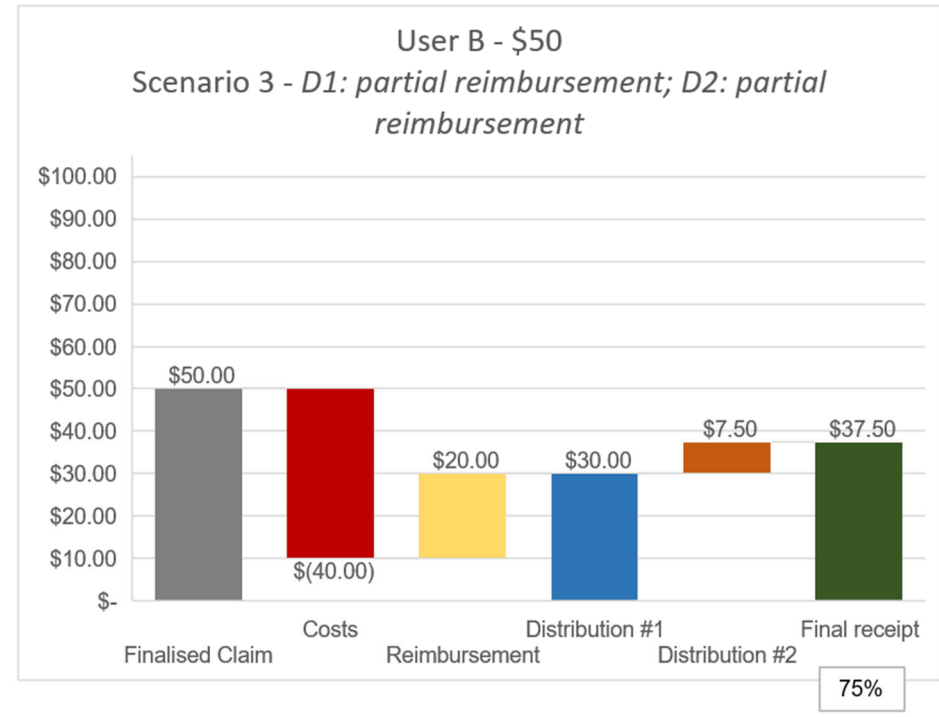
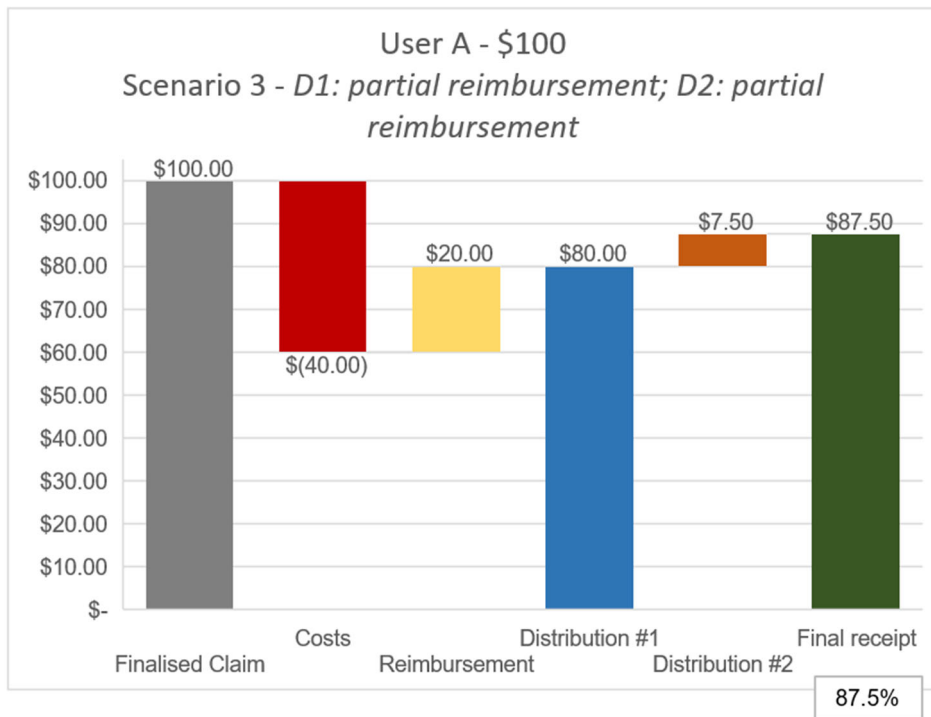
SCENARIO 2A, HACKED LOSSES: Scenario 2 + Hack losses top-up

9. This is a variation on Scenario 2. In this variation, Example Trust suffered losses in the Hack. Half of Cryptopia's holdings in Example Coin were stolen. The \$10,000 of Unclaimed Holdings remaining after the Final Cut-off Date is applied pari passu to reimburse Hacked losses but it is only sufficient to cover 50% of total Hack losses in Example Coin.
10. As at 1 January 2019, User A had \$200 of Example Coin (\$100 in Hack losses) and User B had \$100 (\$50 in Hack losses). Neither user withdrew any Example Coin between 1 January 2019 and 14 May 2019.
11. User A receives an additional \$50 in Example Coin and User B receives an additional \$25 in Example Coin. Accordingly, User A receives \$70 in Example Coin in the Phase 2 distribution and User B receives \$45 in Example Coin.



SCENARIO 3: MODERATE UNCLAIMED HOLDING: partial cost reimbursement; further partial cost reimbursement in Phase 2 distribution

12. This scenario is modelled on the same Phase 1 distribution as Scenario 2 (Example Coin is allocated \$80,000 in trust administration costs, only 1,000 account holders are registered, \$40,000 in Unclaimed Holdings are used to fund trust administration costs, and \$20 is allocated to User A and User B. User A receives a Phase 1 distribution of \$80 and User B receives \$30).
13. After the Final Cut-off Date, 800 registered account holders have completed the claims process. Unclaimed Holdings from non-eligible account holders is now \$60,000 (the \$40,000 from after the Soft Cut-off Date and an additional \$20,000 in "abandoned holdings"). Further, actual trust administration costs are lower than projected. They are now \$35 per holding rather than \$40 per holding.
14. Example Coin's cost allocation is recalculated. It has 2,000 account holders and is allocated \$70,000 of costs. All of the Unclaimed Holdings are used to fund Example Coin's trust administration costs. \$10,000 in trust administration costs remains to be allocated to eligible account holders in Example Coin. Each eligible account holder in Example Coin is allocated \$12.50 in trust administration costs. User A should have received a total distribution of \$87.50 Example Coin and User B should have received a total of \$37.5. Both User A and User B receive a Phase 2 distribution of \$7.50 Example Coin. That brings User A to 87.5% of their Finalised Claim and User B to 75% of their Finalised Claim.



SCENARIO 4: no reimbursement (no Unclaimed Holdings)

15. This scenario is modelled on the same Phase 1 distribution as Scenario 2 (Example Coin is allocated \$80,000 in trust administration costs, only 1,000 account holders are registered, \$40,000 in Unclaimed Holdings are used to fund trust administration costs, and \$20 is allocated to User A and User B. User A receives a Phase 1 distribution of \$80 and User B receives \$30).
16. All registered account holders complete the claims process. Actual trust administration costs are as projected and there are no additional Unclaimed Holdings in "abandoned holdings". The Phase 1 distribution is the only distribution of Example Coin.

