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	**Part 19 of the High Court Rules 2016, 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, liquidators of Cryptopia Limited**
	Applicants

SYNOPSIS OF SUBMISSIONS OF PETER WATTS KC, AMICUS CURIAE IN RESPECT OF APPLICATIONS FOR DIRECTIONS IN RELATION TO DISTRIBUTION OF CRYPTOCURRENCIES

DATED: 27 OCTOBER 2023

THESE submissions are prepared by PETER WATTS KC, amicus curiae appointed by the High Court recorded in Minute of Palmer J dated 9 August 2023: Bankside Chambers, Auckland, peter@peterwattskc.com; 021491531.

MAY IT PLEASE THE COURT:

Introduction

1. As recorded in a minute of His Honour dated 9 August 2023, I was appointed amicus curiae in respect of the Originating Application dated 31 July 2023 (**the Application**) for a series of directions brought by the liquidators of Cryptopia Ltd (in liq) (**the Company**) in relation to the distribution of cryptocurrencies held by the Company as trustee for account holders as beneficiaries.

2. The said minute records that my appointment is to assist the Court in providing arguments for and against the liquidators' preferred approach as to the Application and issues arising from that. My brief is to provide advice to the Court from the perspective of the interests of account holders.

3. It is important to recognise that I am appointed as amicus curiae and not to *represent* all account holders, since in relation to at least some aspects of the directions sought by the Applicants there is a potential conflict of interest amongst account holders. In particular, insofar as the application seeks in Direction 5.1 the Court's permission not to make any distribution to account holders whose holdings are of low or "de minimis" value, being a value less than the costs of distribution, the position of account holders in that category might be said to conflict with those not in the category. There may be other conflicts too, such as between the position of victims of hacks and that of non-victims.

4. I have endeavoured to approach the Application, and the supporting affidavits and submissions, with a view to the generality of account holders, or the hypothetical account holder (i.e. one without idiosyncratic issues), but recognising that where there is a clear division between classes of account holder I should consider the position from each point of view while not being

inhibited from advising the Court on what I believe is the correct, or optimal, solution.

5. It is not proposed in these submissions to address all aspects of the Application and the accompanying submissions and affidavits. On most issues, in fact, I found no reason to disagree with what the Applicants propose and their reasoning therefor. Except where I think there is benefit to account holders in my reinforcing any aspect of the Applicants' proposals, I will confine these submissions to points on which I consider that there is something fresh to be said. The Court, therefore, can assume that I have at this point agreed with the directions being sought, and the reasons provided for them, except as otherwise explained in these submissions. However, I would reserve the right to change my mind or otherwise participate on an issue if in the course of this proceeding something causes me to do so. In that regard, I note that I have had possession of the Applicants' submissions, and the second affidavit of Mr Ruscoe, only since 13 October 2023.

6. I have not religiously followed the order in which the various sub-applications have been made since some topics are from my perspective better dealt with together.

In specie distribution, and power of sale for parties in Restricted Jurisdictions

7. Amongst the directions sought, in direction 2.1 in the Application, is a proposal that the Company, subject to limited exceptions, distribute cryptocurrency in specie to account holders.

8. I agree with this proposal, and would reinforce the Applicants' submissions (at paras 3.12, 3.13 and 6.12) that the Company's prima facie duty as bare trustee for account holders is to distribute cryptocurrency in specie. I have reviewed the documentation issued by the Company to account holders in the period of its trading existence and so far as I can see there was no power of sale given

the Company in the written terms and conditions that the Company issued across that period.[1]

9. As to account holders' prima facie right to an in specie distribution, and the absence of any implied power in trustees of a bare trust to sell trust property (save for any indemnity to which the trustee may be entitled), the Applicants cite *Lewin on Trusts* at para 3.13 of their submissions. Australian and New Zealand authority supports (in some instances implicitly) this position.[2]

10. It is submitted that nothing changes solely by reason of the fact that the trustee has gone into liquidation. The liquidation of a corporate trustee would provide a good ground for a trustee to be removed by the party having a power of removal (see s 105 of the Trusts Act 2019, (**2019 Act**) or by the Court (see s 112 of the 2019 Act), but would not give the trustee greater powers than it had before liquidation. This was confirmed in comparable Australian law in *Re Stansfield DIY Wealth Pty Ltd (in liq)* [2014] NSWSC 1484, (2014) 103 ACSR 401 at [40], holding that the Court's powers to give directions to liquidators did not authorise conferring a power of sale over trust property held by the company as trustee where there was no power of sale in the trust instrument.

11. It will, however, often be possible for a court under legislation applying generally to trustees to authorise a sale in appropriate circumstances. In New Zealand the relevant provisions are found in s 130 of the 2019 Act.

12. In my submission, a Court would not lightly confer a power of sale on a bare trustee under s 130 of the 2019 Act (or under any inherent or other jurisdiction) over the opposition of a beneficiary. Case law under the comparable, but admittedly differently worded, provision in the Trustee Act 1956 (**the 1956**

[1] The documents relied upon are: (1) *Cryptopia terms and conditions up to August 2018*; (2) *Terms and Conditions Updated 7 August 2018*; and (3) *Cryptopia Risk Statement of 20 April 2018*. Documents (1) and (2) are exhibited to Mr Ruscoe's affidavit dated 1 October 2019 in CIV-2019-409-544 at DIR1-2 and DIR1-18. Document (3) is exhibit DIR1-69 to Mr Ruscoe's affidavit dated 28 May 2019 in CIV-2019-409-286.

[2] See *Burns v Steel* [2006] 1 NZLR 559 at [35]; *Yang v Chen (No 2)* [2010] NZHC 1947, [2011] NZCCLR 13 at [260]–[261]; *Re Montpac Pty Ltd* [2020] NSWSC 1237, (2020) 149 ACSR 138 at [28]; and *Re Deppeler (as joint and several liquidators of Total Truss Systems Pty Ltd)* [2021] VSC 205, (2021) 152 ACSR 323 at [60].

Act), s 64, supports the view that where the identity or type of trust asset is important to the trust settled by the settlor or to a beneficiary a Court will not lightly order a sale.[3]

13. The Applicants are proposing to sell cryptocurrency only in respect of account holders who are based in jurisdictions where it would be illegal, either according to New Zealand law or to local law, to distribute cryptocurrency (see paras 37 to 48 of the Affidavit of Mr Ruscoe dated 13 October 2023 (**the Second Affidavit**). The actual application before the Court, in direction 2.10 of the Application, seeks an order not to distribute cryptocurrency at all where "it would constitute a criminal offence to transfer cryptocurrency to that country or territory". The Applicants are now proposing in such circumstances, and where practical, to convert the relevant cryptocurrency to fiat currency outside the relevant jurisdiction and then distribute that (see the Second Affidavit, above).

14. In my view the Applicants' proposals in relation to the distribution of trust assets for parties in Restricted Jurisdictions are sensible, and could be approved under s 130, or perhaps under the Court's inherent jurisdiction. The situation is close to one of necessity and, whatever difficulties might attend the expression "management and administration" of a trust in s 130 in relation to a trust that did not contemplate being wound up, they (the difficulties) would not seem to apply to a bare trust where distribution of the trust assets (even if by default, in specie) is a contemplated and routine event. Necessity has been a powerful factor in case law under comparable provisions where Court approval to a sale has been sought.[4]

15. It is conceivable that individual account holders in a Restricted Jurisdiction might have some other solution for in specie distribution but I am not sure that the Court should require the Applicants to have multiple methods for dealing

[3] See *Re Smith* [1975] 1 NZLR 495 (HC); *Re Nichols (dec'd)* HC Dunedin M104/96, 18 March 1999.
[4] See, for example, *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] VSCA 162, (2007) 18 VR 469 at [184].

with the problem. It may be that the Court should reserve leave for individual account holders to apply so long as the reasonable costs of the Applicants and the Company are met by that account holder. I cannot see any reasonable basis on which other account holders could object to what the Applicants propose for parties in Restricted Jurisdictions. It would be difficult to justify account holders receiving any windfall at the expense of account holders in Restricted Jurisdictions.

Claims process: cut-off dates, steps required of account holders, and review process

16. I recognise that the steps that the Applicants have already put in place for receiving claims to cryptocurrency from account holders and for verifying the entitlements and the lawfulness of distributing to account holders have been the subject of objection from some account holders. This is evidenced in some of the affidavit evidence filed in proceeding CIV-2023-485-431.

17. However, on such information as has been available to me, I cannot advise the Court that what is proposed by the Applicants, both by way of cut-off dates and the process going forward, is unreasonable or unfair. Considerable effort seems to me to have been expended by the Applicants to be fair and reasonable, and they make the point that such parties as have engaged with the process and met it should not be held out of their entitlements by other parties unless there is compelling reason. There is an understandable degree of impatience among account holders who have registered with the Applicants already.

18. It will be noted from para 26 of the Second Affidavit that I had by correspondence with the solicitors for the Applicants queried whether a deceased account holder risked losing his or her share of the cryptocurrency where the account holder's estate or heirs were unaware of the deceased's holding or had not seen any correspondence from the Company or the Applicants that had been sent to the deceased's nominated email account. The

Applicants advised that indeed such persons would be subject to the proposed cut-off dates, and their reasons appear in paras 27 to 31 of the Second Affidavit. I now accept the difficulties that the Company and the Applicants face in respect of such persons.

19. For the same reasons, I cannot see any objections to the processes that the Applicants are proposing for independent review of their decision-making in individual cases, as set out in section 3 of the Application.

Trustee costs, expenses (including agents' remuneration)

20. The Applicants outline in directions 6 and 7 of the Application their proposals for meeting the costs of the administration of the trusts by the Applicants (implicitly including their remuneration) and for allocating those costs, including projected future costs. In short, the proposals broadly allocate costs associated with particular trusts (or presumably groups of trusts that share the relevant characteristics) to those trusts, and costs relevant to all trusts across those trusts by numbers of account holders within the trusts. Each account holder within a trust is, prima facie at least, allocated the same share of costs whatever the size of their holding.

21. At paras 3.25 to 3.33 of the Applicants' submissions, an extensive legal justification is made as to the Applicant's and the Company's rights of indemnity and remuneration. I do not disagree with the gist of those submissions. However, I do want to make some points of clarification.

22. It is apparent, I believe, that the Applicants have not included, and are not proposing to include, any costs incurred by the Company before its liquidation. In case there were any doubt on the issue, it is my submission that there would be no, or at least an insufficient, basis for any indemnity for the Company in relation to costs it incurred before liquidation.

23. At least in relation to the general costs of administering the trusts while the Company's cryptocurrency exchange was operating the Company had no rights of recourse against account holders because the contractual arrangements between the Company and account holders provided for the company to charge set fees when transactions occurred. The Company cannot have been entitled to both fees *and* the costs it incurred with third parties in operating the exchange. Having said that, the Terms and Conditions dated 7 August 2018[5] contained in clause 12.2 a right of indemnity, but it is submitted that that was confined to indemnifying the company for losses and costs caused by the account holder, implicitly referring to idiosyncratic costs.

24. It is submitted that the foregoing position was not and is not affected by the existence of the trustee indemnity provisions in the 1956 Act (s 38(2), which does not anyway extend to trustee remuneration, unless court ordered) or in the 2019 Act (s 81). In particular, s 38 of the 1956 Act has always given way to the terms of the trust (see s 2(5)), and s 81 of the 2019 Act is subject in the present case to clauses 4(2) and 4(3) of Schedule 3 of the 2019 Act. More specifically, it is submitted that the trusts in the present case are "specified commercial trusts" as defined in Schedule 3, with the effect that s 81 does not apply to trusts created before the commencement of the Schedule (30 January 2021[6]). All of the trusts in respect of which the Company is trustee were created before that commencement date.

25. In such circumstances, s 38 of the 1956 Act might still apply but again only to the extent not inconsistent with the terms of the trust. To the extent that any of the Company's trusts were created after the commencement date, which seems unlikely, s 81 applies only to the extent that the section is consistent with the terms of the trust (see clause 4(3) of Schedule 3).

---

[5] Item (2) in footnote 1, above.

[6] The Schedules incepted at the same date as the main provisions of the 2019 Act, namely 18 months after the enactment date, which was 30 July 2019.

26. None of the foregoing is to deny that the position did not change going forward following the liquidation of the Company. Upon liquidation, it is probable that the Company as trustee, and the liquidators as agents of the Company, could not have been required to continue to abide by the contractual terms between the account holders and the Company (whatever entitlement to compensation account holders might be entitled to as a result). Account holders could have applied to have the trustee removed and replaced, but no replacement trustee would have accepted office except upon adequate indemnification and remuneration. It also made sense that the Company remain as trustee given its infrastructure (limited as it may have been) and the expertise still available to it. It too could not be expected to continue as trustee except upon appropriate indemnification, including remuneration for its employees and other agents.

27. It is, however, not absolutely clear what the exact basis of this right to indemnification is in the present case. It is not clear that s 38 of the 1956 Act suddenly started to apply, so it seems probable that the basis of the Company's entitlements lies in implied contract or restitution or otherwise in the Court's inherent equitable jurisdiction (albeit that that jurisdiction is probably at least guided by general principles of the law of implied contract and restitution).[7] It is submitted that the Applicants' entitlements, as liquidators, are dependent on the Company's entitlements as trustee and do not arise directly out of s 278 of the Companies Act 1993 (**the 1993 Act**) or Schedule 7 of that Act.[8]

28. I have surveyed the case law cited by the Applicants in paras 3.30 to 3.32 of their submissions and the very useful article by Ms Victoria Stace therein referred to. It seems to me that the cases that the Applicants cite largely support their position, although I reiterate that the exact bases and limits of

[7] See *Finnigan v Yuan Fu Capital Markets Ltd (in liq)* [2013] NZHC 2899 at [70a].

[8] For comparable Australian law on "property of the company", see *Re Stansfield DIY Wealth Pty Ltd (in liq)* [2014] NSWSC 1484, (2014) 103 ACSR 401 at [16]; *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20, (2019) 268 CLR 524 at [26]. Cf In relation to a different liquidation provision *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 at [55], but cf at [59].

the rights to indemnification remain unsettled or at least in a state of ongoing development.

29. In *Re Secureland Mortgage Investments Ltd (in liq) No 2* (1988) 4 NZCLC 64,266 (HC), a right to indemnification in the company for services administering the trust post-liquidation was recognised even though, as in the present situation, before liquidation the company had been paid by investors for its services in the form of fees. The same was true of *Finnigan v Yuan Fu Capital Markets Ltd (in liq)* [2013] NZHC 2899.

30. In paragraph 13(r) of the Application, backed by paras 6.44 and 7.30 of the Applicants' submissions, the Applicants propose that if, as seems likely, there are substantial amounts of unclaimed cryptocurrency after the Final Cut-off Date for distributions (**Unclaimed Holdings**), then, if the Court endorses the cut-offs, the Applicants propose to use as much of this unclaimed cryptocurrency as is needed to meet the costs incurred in returning assets to account holders.

31. Subject to a point I make below about de minimis holdings, I would endorse this step, given that these costs were never anticipated by account holders when they made their investments on the exchange, and given that they had paid fees for service (and to the extent that fees on a realisation of their investment had not been paid, those are likely to be much less than the costs actually incurred in the period since the exchange ceased to operate).

Cryptocurrency lost in the hack

32. At para 4.5 of the Applicants' submissions reference is made to cryptocurrency that was lost in the January 2019 hack, and an assumption is made that the Company has an obligation to attempt to recover and restore lost trust property. In the Affidavit of Mr Ruscoe dated 31 July 2023 (**the First Affidavit**) at paras 13 and 14 the Court is informed that some steps have been taken by the Applicants and recovery applications are under way in a number of

jurisdictions. One infers that no recoveries have yet been secured from these steps, but it appears that the United States FBI has recovered some cryptocurrency belonging to the Company.

33. While I do not doubt that in principle a trustee who has lost trust property through fault on the trustee's part has an obligation to recover it, it seems to me that any such duty is apt to be of limited value where the trustee is a company in liquidation. The victims of any such breach of duty would have claims as unsecured creditors of the trustee, but with no more right to seek to have the company's remaining property devoted by the trustee (or anyone else) to rectifying the breach than any other creditor would have such a claim.

34. Where, however, the relevant trust that has suffered a loss of property still has trust assets and all beneficiaries have had to bear the loss then it may be good trusteeship to invest at least some of the remaining trust assets in an attempt to recover the lost assets from third parties. There may also be a case for engaging with external funders on a contingency basis to seek recovery of the assets, where it is lawful to do so. It may also be appropriate if there is unclaimed cryptocurrency to use that, or some of it, in justifiable recovery processes. I will return to that possibility shortly.

35. What would not seem to me to be justifiable is to expend in recovery processes some of the assets of any trust that has not suffered a hack or suffered a different hack to the one where recovery action is being taken, nor would it be justifiable to attribute part of the costs of such recovery actions to such other trusts. It is difficult to see how beneficiaries of trusts that have been unaffected could be expected to cross-subsidise steps being taken on behalf of the beneficiaries of different trusts. I raise this issue because at this point I am not clear how the Applicants have been funding recovery steps.

36. The possibility of using unclaimed cryptocurrency to rectify losses suffered by parties who were victims of a hack, is raised briefly at paras 6.45 and 7.30 of the Applicants' submissions. In para 6.45 it appears that the Applicants are only

"considering" taking that step, and at paras 88(b) and 96 of the First Affidavit Mr Ruscoe signals that the Applicants would return for further directions in that event. The Applicants have, nonetheless, sought in para 2.8(b) of the Application express permission from the Court to use unclaimed cryptocurrency to cure the hacks, supported by para 7.30 of the Applicants' submissions.

37. Some explanation for what, with respect, seems to be uncertainty as to what is proposed may be that the Applicants consider that even if some of the unclaimed assets are used to cure the hacks any residue would fall to be dealt with under ss 149 to 152 of the 2019 Act, namely transferred to the Crown and dealt with in accordance with those provisions. But s 149 itself is not clear what is to happen if the trust assets are not "money" or "financial products" (as defined in s 9 of the 2019 Act). It seems such assets must first be converted to money or financial products, and leave may be needed from the Court to do that for the reasons discussed above.

38. In all events, the question arises whether using such unclaimed assets to cure the hack would be legitimate. It is not straightforward to answer this question. Section 151(2)(a) of the 2019 Act makes it plain that the Crown must deal with funds it receives under s 149 in accordance with any order that the Court makes. But no guidance is given in the provisions as to the scope of the Court's powers to make orders relating to unclaimed trust property. In the absence of any order from the Court and any valid claim on the assets by a beneficiary, after 6 years the assets are transferred to the Crown Bank Account.

39. If the effect of the *Benjamin* and *Instant Cash Loans* orders that the Applicants are seeking in their Application is to deem the beneficial interests affected not to exist for the purposes of the orders sought, then it may be that it would be legitimate for the Court to order that the unclaimed assets be used to cure the hacks. That would not preclude the original beneficiaries claiming any residue left over after the hacks were cured, if they made a claim within the 6-year period before the assets, or their proceeds, are transferred to the Crown Bank

Account (see the explanation as to the effect of *Benjamin* and *Instance Cash Loans* orders in paras 3.17 to 3.24 of the Applicants' submissions).

De minimis holdings

40. I now come to the question whether it is appropriate for the Court to condone the Company (and the Applicants as its agents) not distributing cryptocurrency to account holders where, on the bases on which the Applicants propose to allocate the costs of administering and distributing the trust assets, their holdings are valued at less than those costs, or projected costs (see paras 5.1 and 6.2 of the Application and paras 7.27–7.28 of the Applicants' submissions). Such holdings are referred to as de minimis holdings.

41. I note that no precise figure has been settled upon as a de minimis holding for these purposes. I note also that the Applicants have not invited account holders whose holdings are valued at less than US$20 to complete the identity verification process.[9] However the reason for this latter step is not that that value is regarded as the de minimis value but rather at that figure the Applicants have concluded that it is worth the risk of their distributing assets to the wrong person.[10]

42. I have given serious consideration to the issue of the de minimis account holders. Save on one point of uncertainty, I have concluded at this stage that the methods for allocating costs proposed by the Applicants are basically just and probably optimal. It almost follows that if after that allocation an account holder has no balance it would not be right to then require other account holders to give up some of their balance in order to ensure that the de minimis holders obtained something. That at least would, I consider, be the outcome from a corrective justice viewpoint.

[9] See Applicants' Submissions, paras 4.28.
[10] See First Affidavit, para 54.

43. Only a stance which viewed those with large holdings as rich enough to surrender part of that wealth to those with smaller holdings would support the former subsidising the latter; an approach that might be said to be founded in distributive justice. I submit, however, that such an approach would not usually be one adopted by the common law, which tends to treat individuals the same whatever their personal wealth. Moreover, some account holders with very small holdings of cryptocurrency may be very wealthy in their other assets.

44. It should be noted that the market value of many, if not all, cryptocurrencies is very variable and a de minimis holding one day may be very valuable the next. However, the Applicants have not ignored this fact, and are regularly testing the value against the costs allocatable to the holding up until the Final Cut-off (see para 7.27 of the Applicants' submissions).

45. The point on which I have a reservation arises if, as seems likely, there are substantial amounts of Unclaimed Holdings. In that event, the Applicants propose that those Holdings would be used to reimburse the costs deducted from account holders who participated in the distribution process (see para 6.44 of the Applicants' submissions). I was not certain whether the de minimis account holders would get to share in the windfall from the Unclaimed Holdings pari passu with the ordinary account holders, or only after the costs of the latter had been met, and perhaps even after the losses from the hacks had been rectified (see para 7.28 of the Applicants' submissions). However, I infer from para 49 of the Second Affidavit that it is indeed intended that the de minimis account holders who have registered would be treated alike with other registered account holders.

46. On the principle that, had the Company traded successfully and not gone into liquidation, the de minimis account holders would have been entitled to realise their holdings on payment of any fees due, they should receive a distribution after liquidation if their share of the costs of the realisation process can be met from the Unclaimed Holdings. Their entitlement would, I think, be stronger than that of the victims of the hack.

Mistaken deposits

47. For the avoidance of doubt, I agree with the steps that the Applicants propose to take with persons who deposited cryptocurrency onto the Company's exchange after the exchange had closed (see paras 9.3 and 9.4 of the Applicants' submissions and paras 34 to 36 of the Second Affidavit). They should not be treated as assets of the Company.

Peter Watts KC

Amicus Curiae

27 October 2023