IN THE HIGH COURT OF NEW ZEALAND **CIV-2023-485-411**
WELLINGTON REGISTRY

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

UNDER	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 COURT APPOINTED COUNSEL FOR CREDITORS ON LIQUIDATORS' APPLICATION FOR DIRECTIONS IN RELATION TO DISTRIBUTION OF CRYPTOCURRENCIES

30 October 2023

Judicial officer: 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 relate to the liquidators' originating application for directions in relation to distribution of cryptocurrencies dated 31 July 2023 (the "**Application**") and are made pursuant to the Court's minute dated 9 August 2023 appointing counsel to represent "all known and potential creditors of Cryptopia, including trade creditors and any party who may have claims against Cryptopia, this group being potentially adversely affected by the Court's decision relating to the cryptocurrency held on trust"[1] (the "**Creditors**").

1.2 As well as trade creditors[2], the Creditors include account holders with potential claims against Cryptopia. This includes those who lost all or part of their cryptocurrency balances following the hack in January 2019 (the "**Hack**").[3]

1.3 For example, holders of Bitcoin ("**BTC**") may have a claim against Cryptopia for applying an excessive haircut to their BTC balances following the Hack.[4]

1.4 In addition, all account holders who suffered losses in the Hack may have claims against Cryptopia to the extent that it was at fault in a way that contributed to their losses in the Hack.[5] This includes gny.io, which issued proceedings against Cryptopia prior to liquidation seeking damages arising from the loss of the entirety of its holding of a coin

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[1] Interlocutory application without notice for orders as to (1) appointment of a representative counsel (2) appointment of an amicus curiae and (3) service, dated 31 July 2023.
[2] Affidavit of David Ian Ruscoe in Support of Interlocutory Application Without Notice for Orders as to (1) Representation, (2) Appointing an Amicus Curiae and (3) Service dated 31 July 2023 (the "**Ruscoe Interlocutory Affidavit**") at Exhibit DIR-IL page 1.
[3] Synopsis of submissions of liquidators dated 13 October 2023 (the "**Liquidators' Submissions**") at [2.2] and [4.16] to [4.20].
[4] Liquidators' Submissions at [4.20].
[5] Liquidators' Submissions at [4.20].

called Lisk Machine Learning ("**LML**") in the Hack. Gny.io's claim in the liquidation has yet to be determined by the liquidators.[6]

1.5 Based on the liquidators' reports, Cryptopia appears to have insufficient non-trust assets available to meet the Creditor claims which have been accepted by the liquidators, let alone to meet the potential claims of account holders.[7]

2. CREDITORS' INTERESTS IN LIQUIDATORS' APPLICATION

2.1 The interests of the Creditors in the Application fall to be considered in light of Gendall J's judgment dated 8 April 2020 which held that the cryptocurrency assets were held by Cryptopia on trust for the benefit of account holders, with a separate trust for each cryptocurrency.[8] Therefore, these assets are not available for distribution to meet the Creditors' claims.[9]

2.2 The method of distribution of the trust assets as between the beneficiaries of each trust therefore does not directly affect the interests of the Creditors (at least in their capacity as Creditors).[10]

2.3 However, as Gendall J also found, Cryptopia itself held accounts on its own platform and is a beneficiary of the trusts for those cryptocurrencies in which it held account balances.[11] The Creditors therefore have an indirect interest in Cryptopia's own beneficial interest in the trust assets.

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[6] Affidavit of David Ian Ruscoe in support of Originating Application for Orders for Directions Regarding the Distribution of Digital Assets (the "**Ruscoe Originating Affidavit**") at DIR1-139 (being the Liquidators' Ninth Report of the State of Affairs of Cryptopia Limited (in liquidation) dated 12 June 2023.
[7] DIR1-139.
[8] *Ruscoe v Cryptopia Ltd (in liq)* [2020] 2 NZLR 809 at [69], [144], [204] and [209].
[9] At [57].
[10] It may affect Creditors who are account holders in their capacity as beneficiaries, but I consider their interests in that capacity fall outside the scope of my appointment.
[11] *Ruscoe v Cryptopia Ltd (in liq)* at [144] and [146].

2.4 The Creditors also have an interest in ensuring the liquidators' costs in relation to the trusts are met from trust assets, rather than company assets, and that those costs in the liquidation attributable to the trusts which have already been met out of Cryptopia's own assets are reimbursed.

2.5 Finally, it appears likely there will be a significant amount of unclaimed trust assets, with a potential surplus even after claims by account holders in respect of their balances as at the liquidation date have been met in full. There is no good reason why any surplus assets (including Unclaimed Holdings and Mistaken Deposits) should be paid to the Crown when Creditors' claims remain outstanding. Therefore, Counsel agrees with the liquidators that the Unclaimed Holdings should be applied to meet claims by the account holders who suffered losses in the Hack but says this should be extended to include all Creditors' claims, in light of the fact the hacked account holder claims rank equally with other unsecured claims. The same approach should also be taken to any unclaimed Mistaken Deposits.

2.6 Accordingly, these submissions are directed to those aspects of the application which affect the Creditors, principally:

(a) apportionment and reimbursement of the liquidators' costs in relation to the trusts;

(b) what should happen to any Unclaimed Holdings; and

(c) what should happen to any unclaimed Mistaken Deposits.

3. APPORTIONMENT AND REIMBURSEMENT OF COSTS

3.1 The liquidators seek orders permitting them to meet future costs and expenses relating to the trusts from trust assets and permitting them to deduct from each trust of realisable value (other than the BTC and Doge

trusts) a quantity of cryptocurrency to reimburse the BTC and Doge trusts and Cryptopia for trust administration costs incurred to date.[12]

3.2 Counsel submits these orders are appropriate and consistent with the interests of the Creditors. As set out in the liquidators' submissions, the liquidators are entitled to be indemnified by the trusts for their costs in relation to the trusts.[13] Actions taken post-liquidation for the benefit of the beneficiaries should not be at the expense of the Creditors. Therefore, any assets of the Company that have already been applied to such costs since the liquidation date should be reimbursed.

3.3 Currently, the precise allocation of costs and amounts to be reimbursed are not finalised and the liquidators have not sought specific orders in this regard. It is understood that the liquidators intend to seek further directions for winding up following the distribution of the trust assets. This should provide an opportunity for any issues over the final allocation and quantum of costs to be reimbursed to be addressed. The Creditors should be given the right to make further submissions on these issues at that time, or earlier if the Court requires.

4. UNCLAIMED TRUST ASSETS

4.1 The liquidators seek an order that any Unclaimed Holdings in each trust be applied, first, to reimburse the costs charged to eligible account holders in that trust, and second, to meet accepted claims by account holders in respect of that trust up to a maximum of 100% of their holdings pre-Hack (taking into account any post Hack transactions).[14]

4.2 It is possible that a surplus may remain in some trusts even after these further distributions. Although orders have not been sought at this

[12] Application para 8.1.
[13] Liquidators' Submissions at [3.25]. While noting that the exact bases and limits of the rights to indemnification remain unsettled, Mr Watts KC in his submissions as amicus does not take issue with the fact there is such a right, nor with the orders sought by the liquidators in this regard (Amicus Submissions at [21] to [29]).
[14] Application at [2.8].

stage, the liquidators state in their submissions that their current intention is to transfer any undistributed trust property to Treasury under s 149 of the Trusts Act 2019 (the "**Trusts Act**").[15]

4.3 Counsel accepts it would be appropriate to apply the Unclaimed Holdings in respect of each trust to reimburse costs to eligible account holders of the same trust. This reflects the fact that the costs have been or otherwise would be deducted from assets to which those account holders are beneficially entitled.

4.4 However, the claims of account holders against Cryptopia arising from the Hack are unsecured claims. Therefore, it is not clear why the Unclaimed Holdings should be distributed to meet these claims but not the claims of other Creditors.

4.5 It is respectfully submitted that it would be fairer, and within the scope of the court's broad jurisdiction over both trusts and liquidations, to allow *all* the Creditors' claims to be met from the Unclaimed Holdings, once all eligible account holders' claims in respect of their balances as at the liquidation date have been met in full and their costs reimbursed. The basis for this approach is discussed below.

Court's jurisdiction

4.6 The court has the power, under its inherent jurisdiction to supervise and administer trusts, to make orders for distribution of trust property on terms that depart from the strict terms of the trust when it is "satisfied it is just and expedient to do so".[16] The liquidators' submissions give the examples of *Re Benjamin*,[17] *Re MF Global* and *Re Instant Cash Loans.*[18] In each of these cases the Court made orders to enable trustees to

[15] Liquidators' Submissions at [8.3.]
[16] *In re MF Global UK Ltd (No 3)* [2013] EWHC 1655 (Ch) at [26]. See also ss 133 to 135 of the Trusts Act 2019.
[17] *Re Benjamin* [1902] 1 Ch 723, [1900-[1903] All ER Ext 1300.
[18] *In re Instant Cash Loans Limited* [2021] EWHC 1164 (Ch).

distribute trust assets according to "practical probabilities" rather than the exact terms required by the trust deed.[19]

4.7 Each of these cases involved the court making directions to enable distributions to be made to certain beneficiaries (e.g. those who had completed a claims process), notwithstanding the existence of other beneficiaries (e.g. those who had not completed a claims process). The orders sought by the liquidators to allow distribution of Unclaimed Holdings to the Hacked account holders (and which the Creditors say should be amended to allow distribution to all Creditors) go further in that they seek directions to enable distribution of trust property to both beneficiaries and non-beneficiaries. This is an extension of the line of authority relied on but is entirely consistent with the underlying reasoning, in counsel's submission.

4.8 In effect, the decisions in *Re Benjamin, Re MF Global* and *Re Instant Cash Loans* enabled the trustees to make distributions without regard to potential unknown beneficiaries or to beneficial claims which were known but where distribution was impractical. In *Re MF Global* the court held that this did not extinguish the beneficial interests of those who claims were to be disregarded, but "merely enables trust property to be distributed according to the practical probabilities".[20]

4.9 However, a different approach was sanctioned by the court in a decision made after *Re MF Global*, in *Re Pritchard Stockbrokers Ltd.*[21] In that case, the court made orders approving the conduct of special administrators of an investment services firm in first seeking, and then acting in accordance with, orders of the Financial Conduct Authority varying a statutory trust over client money to exclude certain beneficiaries. The excluded beneficiaries were those who had failed to

[19] *In re MF Global UK Ltd (No 3)* [2013] EWHC 1655 (Ch) at [26].
[20] At [26].
[21] *Re Pritchard Stockbrokers Ltd* (2019) EWHC 137.

make claims by a certain date and those with claims below a de minimis threshold. The court accepted that extinguishing these beneficial interests was to be preferred over an order that preserved them. This was on the grounds that (after 6 years of the special administration process):[22]

> Many of the outstanding individual claims are so small that the view may properly be taken that the unpursued claims are abandoned. In relation to claims of more substance the view may properly be taken that the need for finality is much greater than the need to preserve hitherto unpursued claims. Those who now receive a final distribution are entitled to regard it as their own (and not exposed to some claim to follow or trace into it by a hitherto unresponsive client). It is undoubtedly time for the book to be closed.

4.10 The same view was taken in *Re Instant Cash Loans*. In that case, the court held that beneficiaries of a trust created by a scheme of arrangement who had shown no intention of claiming their entitlement "could be regarded by the court and the Company as having decided to abandon their claim."[23] Therefore, the court held: [24]

> …there is little advantage in paying the money into court in case the affected creditors might wish later to assert a proprietary claim. Having been unwilling to provide bank details or to cash the cheque, that really must be the most remote of possibilities, and particularly when it is such a small amount of money it would be completely disproportionate for a claim to be asserted at that stage.

4.11 Similarly, in this case, the process adopted to date and the further steps proposed by the liquidators allow ample opportunity for account holders to make their claims. It is unrealistic to anticipate that an account holder will assert a claim following the completion of the

[22] At [29].
[23] At [25].
[24] At [32].

process proposed by the liquidators. It is submitted therefore, that such claims should be treated as abandoned, and the beneficial interest of the relevant account holders extinguished. In those circumstances, and in the absence of any other beneficiary with a claim to the property, it ceases to be the subject of any trust and there can be no objection to it being applied to Creditors' claims.

4.12 As noted above, the liquidators state in their submissions that their current intention is to transfer any undistributed trust property to Treasury under s 149 of the Trusts Act. However, that section does not impose any requirement on a trustee to transfer undistributed trust property to the Crown, nor does it create any right in the Crown over the trust property. Rather, it is a last resort for a trustee who wishes to dispose of trust property and has no other means to do so without incurring the risk of personal liability for breach of trust.[25] However, if the court has made *Re Benjamin* orders for distribution, there is no such risk, whether or not the rights of non-claiming beneficiaries are extinguished. Further, if the rights of non-claiming beneficiaries are treated as extinguished, then no purpose at all would be served by paying the undistributed property to the Crown.

4.13 To the extent that the orders proposed would have the effect of treating assets that were formerly part of a trust as no longer subject to that trust, it is clearly within the scope of the court's inherent jurisdiction to do so and there are a number of examples where this has occurred.

4.14 *Re Phillips New Zealand Ltd* provides an example of the court amending the terms of a trust to allow trust assets to be removed from the trust.[26] In that case, Baragwanath J considered whether a company's superannuation trust deed could be amended to authorise payment or

[25] As noted by the Court in *Re Instant Cash Loans*, above n 17, at [23] payment into court under section 63 of the Trustee Act 1925 "would clearly be a last resort if nothing else were possible, and it is, according to the authorities, to be discouraged."
[26] *Re Philips New Zealand Ltd* [1997] 1 NZLR 93.

reversion of trust assets to the settlor company. All relevant members of the fund had consented to this amendment. His Honour held that the Court "will not willingly construe a deed so as to stultify the ability of trustees, having proper consents, to amend a deed to bring it in line with changing conditions." This was particularly important in the scheme of a pension trust, the terms of which should be construed to give "reasonable and practical effect to the scheme".

4.15 Conversely, in *Re UEB Industries Ltd Pension Plan*, the trust deed could not be amended because the trust's governing documents did not allow for such a change without the consent of all beneficiaries.[27]

4.16 Of course, in this case it is not practicable to seek the consent of all the account holders, especially as it is likely that not all the account holders will engage in the distribution process (and indeed there is no governing documentation that would require such consent). However, given that there is no trust deed and Gendall J found that Cryptopia was, and is, simply acting as bare trustee, the court has greater flexibility to fill in the gaps created by the absence of express provision for this situation.[28]

4.17 Further, there are a number of cases in the liquidation context in which the court has made orders that enable both trust and non-trust assets to be applied to unsecured creditor claims. (It is worth noting the present Application has been made under both 133-135 of the Trusts Act and s 284 of the Companies Act, under which the Court may supervise a liquidation. That section provides the court with wide powers of supervision, including the powers to "give directions in relation to *any* matter arising in connection with the liquidation" (emphasis added)).[29]

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[27] *Re UEB Industries Ltd Pension Plan* [1990] 3 NZLR 347 (HC).
[28] *Ruscoe v Cryptopia Ltd (in liq)*, above n 8, at [183].
[29] Section 284(1)(a).

4.18 *Graham v Arena Capital Ltd (in liq)*[30] provides an example of a case in which the Court stepped outside the acknowledged "orthodox" position to allow distribution of assets in a manner that suited the justice of the situation, instead of the strict requirements of liquidation or the relevant trust.

4.19 In that case, Arena Capital had marketed itself as a foreign exchange trader and received deposits from clients for that purpose.[31] In reality, it did not conduct any investment activity, including foreign exchange trading.[32] It was acknowledged by the liquidators that a statutory trust fell over the funds deposited by the investors.[33]

4.20 The orthodox position in such a situation, as noted by Mander J, would be to have two pools of assets – one of trust assets available to the investors and the other consisting of general, company assets available to creditors.[34] However, creating two classes of assets in that case would have caused "unnecessary cost to the ultimate disadvantage of investors",[35] requiring the liquidators to determine the nature of the assets available for distribution, how to distribute them and to whom, all in the face of significant shortfall.[36]

4.21 Instead, the Court ordered that all recovered assets, after costs, be treated as forming one common pool of assets for distribution available to both general unsecured creditors of Arena and its investors.[37]

4.22 The approach taken in *Graham v Arena Capital* is consistent with the pragmatic approach the Court has frequently taken in cases where there is a need to distribute a deficient mixed fund. As noted by the Court of

[30] [2018] NZHC 2007. See also the Court's prior decision in the same proceedings, [2017] NZHC 973.
[31] At [4].
[32] At [4].
[33] [2016] NZHC 194.
[34] [2017] NZHC 973 at [12].
[35] At [12].
[36] At [13].
[37] [2017] NZHC 973 at [52(a)].

Appeal in *Re Registered Securities Ltd (In liquidation),*[38] in situations where tracing each claimant's individual interest will involve enormous effort and produce an unreliable result, "the Court must give such directions as will do substantial justice between the parties."[39]

4.23 Similarly, Williams J in *Re International Investment Unit Trust*, held that the question to be asked when determining possible methods of distribution is "what is the nearest approach practicable to substantial justice".[40] His Honour turned his mind to "a search for the least unfair result for the investors, bearing in mind that, regrettably, no method of distribution will result in perfect justice for all."[41]

4.24 It is therefore clear that the courts will, where justice, equity and practicality necessitate, stray from the strict requirements of a trust to ensure that the most efficient and equitable outcome is achieved.

4.25 Here, there appears to be a reasonable possibility that most account holders' claims in respect of their holdings at the date of liquidation, (at least above a de minimis threshold), will be met in full but that Creditors will be left unpaid, despite a significant surplus of trust assets. There seems to be no reason why the Creditors, from whom the Company (and possibly the account holders) have benefitted,[42] should not receive payment for their outstanding debts before any residual assets are paid to the Crown.

4.26 Allowing the surplus to benefit the Creditors would do no harm to the account holders (on the contrary, to the extent many are also Creditors it would be in their interests) and would not result in the unjust

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[38] [1991] 1 NZLR 545
[39] At 555.
[40] [2005] 1 NZLR 270 at [49]. See also *McKenzie v Alexander Associates Ltd (No 2)* (1991) 5 NZCLC 67,046 (HC) at 67,065.
[41] At [73].
[42] As an example of the Creditors' pre-liquidation contribution to the trusts, Phoenix NAP, LLC, which is one of the Creditors, stored a significant amount of account holder information and cryptocurrency holdings – see Ruscoe Originating Affidavit at [15] – [16].

enrichment of any Creditor. Further, as already noted, Cryptopia itself was trading on its own exchange as an investor. The effect of this is that the Creditors have an interest in Cryptopia's own beneficial entitlement as beneficiary of the trusts. It is submitted that this gives the Creditors an interest in the surplus trust assets that ought to be given priority over payment to the Crown.

4.27 The circumstances of this case therefore favour an extension of the orders sought to accommodate all the Creditors' claims, not just the account holders affected by the Hack.

5. MISTAKEN DEPOSITS

5.1 While the Application as originally filed sought directions that the liquidators be permitted to treat unclaimed deposits after the commencement of the liquidation as company property,[43] the liquidators now seek an order that unclaimed mistaken deposits (the "**Mistaken Deposits**") be transferred to the Treasury pursuant to s 149 of the Trusts Act.

5.2 This approach assumes that the Mistaken Deposits are held by the liquidators on trust for the depositors. It is accepted that must be correct – there is nothing to suggest that the Mistaken Deposits were a payment to the company in respect of any existing obligation nor that they were a gift. The starting point therefore is that the Mistaken Deposits should, where possible, be returned to the payors.[44]

5.3 However, for the reasons discussed above in relation to the Unclaimed Holdings, it does not follow that any Mistaken Deposits which are unable to be returned to the payors should be paid to the Crown while Creditors' claims remain unpaid. Rather, these deposits should be

[43] Application 9.1.
[44] *Marginness v Tiny Town Projects Ltd (in liq)* [2023] 2 NZLR 828 at [131] and [135] to [136].

applied to meet Creditors' claims in the same way as the Unclaimed Holdings. If there is a surplus after that, then it can be paid to the Crown.

5.4 On that basis, the amended direction 9.1 sought is not appropriate and the court should make orders permitting the Mistaken Deposits to be applied to Creditors' claims. Alternatively, this issue should be deferred until the anticipated third application for directions when it can be considered in light of the further information that will by then be available about the number and quantum of Mistaken Deposits and the shortfall to Creditors.

6. TIMING OF PROPOSED PROCESS FOR DISTRIBUTION

6.1 Cryptopia went into liquidation on 14 May 2019. The proposed timeline envisages that the trusts will be wound up in June 2025.[45] It is unlikely to be possible for the liquidators to make a distribution to Creditors until this is completed as the extent of potential account holder claims and company assets available for distribution will not be known until this time.

6.2 Whilst care must be taken to ensure the distribution of trust assets and assessment of claims in the liquidation is completed appropriately, achieving the resolution and payment of claims in as short a time as is reasonably achievable in the circumstances is plainly in the interests of both the account holders and Creditors.

6.3 The orders sought by the liquidators, particularly the cut-off periods proposed, are a sensible and fair means to balance the interests of all parties and to ensure a relatively efficient and prompt resolution of all claims. That is supported as being in the interests of the Creditors.

[45] Liquidators' Application at [8.2] and schedule 2.

Date: 30 October 2023

Signature: 

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J S Cooper KC
Court appointed counsel for certain accountholders and unsecured creditors