IN THE HIGH COURT OF NEW ZEALAND **CIV-2019-409-544**
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

UNDER	Part 19 of the High Court Rules and Part 16 of the Companies Act 1993
IN THE MATTER OF	An application concerning **CRYPTOPIA LIMITED (IN LIQUIDATION)**, a company having its registered office at Level 15, Grant Thornton House, 215 Lambton Quay, Wellington, 6143 and carrying on business as a cryptocurrency exchange
AND	
IN THE MATTER OF	An application by **DAVID IAN RUSCOE** and **MALCOLM RUSSELL MOORE** of **GRANT THORNTON NEW ZEALAND LIMITED**, insolvency practitioners of Wellington and Auckland respectively
	Applicants

SYNOPSIS OF SUBMISSIONS OF COUNSEL FOR CREDITORS

4 December 2019

Judicial officer: Justice Gendall
Next event: Hearing on 3-4 February 2020

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

1. INTRODUCTION

1.1 Cryptopia Ltd (in liquidation) ("**Cryptopia**" or "**the Company**") is a New Zealand registered company which, up until the time it was put into liquidation, operated as a cryptocurrency exchange. The liquidation raises novel issues of law as to the legal nature of the cryptocurrency ("**Digital Assets**") controlled by the Company and the ownership of those assets. The liquidators seek directions on these issues, which have not previously been determined in New Zealand or, for the most part, anywhere in the world.

1.2 These submissions are made by court-appointed counsel on behalf of "those parties who stand to benefit from a finding that the Digital Assets are property, but not held on trust, being all known and potential creditors of the Company, other than the Potential Trust Beneficiaries [i.e. those individual Account Holders with a positive coin balance of realisable value] and including trade creditors and any party who might have claims against Cryptopia ("**Creditors**")".[1]

1.3 In summary, the Creditors' position on each of the questions on which directions are sought is as follows:

(a) The Digital Assets are "property" for the purposes of the Companies Act 1993 and therefore fall within the liquidation regime in Part 16 of the Act, subject to issues of ownership;

(b) The Digital Assets are not held on trust for any Account Holders and therefore constitute assets of the Company;

(c) As such, the liquidators should use the Digital Assets to satisfy claims of both Account Holders (being in the same position as

[1] Orders as to representation and directions as to service dated 14 October 2019.

other unsecured creditors) and Creditors by converting them into fiat currency and distributing the proceeds in accordance with Part 16 of the Act, i.e. on a pari passu basis;

(d) The questions in (d) as to the form of any trust do not arise, in light of the answers above;

(e) Likewise, the questions in (e) do not arise as the Digital Assets are assets of the Company in any event and the Trustee Act 1956 does not apply; and

(f) Any stolen Digital Assets recovered by the liquidators are likewise assets of the Company and should be treated in the same way as the other Digital Assets.

2. CRYPTOCURRENCY AND CRYPTOPIA

2.1 Cryptopia was incorporated in July 2014.[2] It operated as a cryptocurrency exchange. Users could open an account and then trade between themselves various types of cryptocurrency on the exchange. The business grew rapidly following the dramatic increase in the price of Bitcoin from November 2017.[3] There are currently over 2 million registered accounts with Cryptopia.[4]

2.2 The most helpful descriptions of cryptocurrency are found in:

(a) Christopher Watson's affidavit dated 28 May 2019 at [8]-[14]. Mr Watson also exhibits to his affidavit a Reserve Bank of New Zealand report on cryptocurrency (marked CW1). At pages 6-20, the authors of the report provide a more detailed and technical description.

[2] Affidavit of David Ian Ruscoe dated 8 November 2019 at [4].
[3] At [5].
[4] At [5].

(b) A report for the LawTech Delivery Panel UK Jurisdiction Taskforce entitled, "Legal Statement on Cryptoassets and Smart Contracts" dated November 2019 (the "**UK Legal Statement**"). The report is provided with these submissions. It was authored by four barristers and considers, broadly, whether the law treats cryptocurrency as property. At paragraphs [24]-[34], the authors provide a useful and non-technical summary of cryptocurrency.

Application of the law to cryptocurrency

2.3 Cryptocurrency's unique features make it difficult to place within conventional legal categories. As explained in more detail in the two sources referred to above, "cryptocurrency" may be thought of as a combination of a private key (like a password), controlled by the "owner", a public key, accessible to everyone, and possibly also the rules of the system of the relevant cryptocurrency. It exists in no single place, and the public key and the rules of the system are controlled by no single authority. It is, at least on one view, purely data / information existing solely in the digital world.

2.4 The courts have generally been reluctant to treat information as property.[5] While some forms of intangible property or choses in action, such as debts or intellectual property rights, are recognised as property, these are created by and enforceable within an existing legal framework. In contrast, cryptocurrencies by their very nature do not rely on an extraneous legal framework or any central authority but instead rely on the consensus between users and encryption methods which make transactions irreversible.[6]

2.5 It is these features that have given rise to some of the legal issues addressed in these submissions, including whether cryptocurrency

[5] See *OBG Ltd v Allan* [2008] AC 1, and compare *Dixon v R* [2015] NZSC 147; [2016] 1 NZLR 678.
[6] See UK Legal Statement at [41].

qualifies as property for the purposes of the Companies Act 1993 and, separately, the law of trusts.

How Cryptopia operated

2.6 In his affidavit dated 8 November 2019, David Ruscoe at [4]-[53] describes how Cryptopia operated. He has also exhibited to his affidavit a helpful explanation from Cryptopia staff of the process that was followed for making a deposit, withdrawal, trade and transfer of cryptocurrency on the exchange: see at [18] of the affidavit and at pages 16-56 of the exhibits.

2.7 The most important evidence on the operation of the exchange for present purposes is at [22]-[31] of Mr Ruscoe's affidavit. In summary:

(a) In order to trade cryptocurrencies on Cryptopia's exchange, a user was first required to register with Cryptopia to open an account and to make a deposit or purchase in one of the 5 'base currencies'.

(b) The customer's deposit would be made into a 'hot wallet' (i.e. a wallet connected to the internet) for the cryptocurrency in question. Once deposited the currency could be left in the hot wallet to meet withdrawal requests from other users or be transferred to a 'cold wallet' (i.e. a wallet not connected to the internet) at Cryptopia's discretion.

(c) Once the registration process was complete, the user's account would show a positive coin balance in an equivalent amount to the customer's deposit. Once the user had a positive coin balance, the user could transfer, trade or withdraw that coin balance (in whole or in part).

(d) All cryptocurrency on the exchange was stored in digital (hot or cold) wallets exclusively controlled by Cryptopia. A user's account only contained a statement of the user's coin balance.

(e) When a trade occurred between two users on the exchange the users' respective coin balances on the Company's internal ledger would change to reflect the trade, but the balances in the Company's digital wallets did not change. For example, if trader A sold 2 BTC to trader B in return for 1000 Pandacoin, the users' coin balances would update to reflect the transaction, but the amount of cryptocurrency held in the Company's digital wallets would remain the same.

(f) The trades and transfers that took place on the exchange did not affect the blockchains, i.e. the general ledger of ownership that exist for each coin outside of the exchange. This is because at all times the coins remained held in the Company's digital wallets.

(g) The internal ledger was able to be controlled by Cryptopia, and if any transactions were made in error, Cryptopia had the ability to reverse the transactions and update account holders' coin balances. This did not apply to cryptocurrency transactions outside of the exchange.

(h) Unlike the transactions on the exchange, which did not move coins between wallets, all cryptocurrency transactions that move coins from one wallet (or address) to another require a private and public key.

(i) The public key is essentially the digital wallet address, and the private key is similar to a password, that is known only to the user. A new private key is generated each time cryptocurrency is transferred on the blockchain.

(j) Cryptopia exclusively held the private keys to its digital wallets that contained the cryptocurrencies traded on the exchange. Account Holders did not have access to the private keys.

(k) Cryptopia charged a fee for each trade, and a withdrawal fee. Cryptopia had its own accounts on the exchange, so that when a trade took place the trade fee would be paid into Cryptopia's account for collecting trade fees.

(l) The amount of cryptocurrency associated with Cryptopia's own account holdings on the exchange was held in Cryptopia's digital wallets and pooled along with user holdings.

2.8 On 14 January 2019, Cryptopia was hacked and a significant amount of cryptocurrency was stolen.[7] Cryptopia appears to have initially concluded that the hackers stole 14% of the total value of Bitcoin held on the exchange.[8] The current working figure, based on what a director has told Mr Ruscoe, is closer to 9%.[9] In any case, a significant percentage of cryptocurrency was stolen. Mr Ruscoe has estimated the value of the stolen cryptocurrency to be more than $16 million.[10]

2.9 Following the hack, Cryptopia suspended the operation of the exchange.[11] It was temporarily re-opened in March 2019.[12] The Company appears to have applied a 14% reduction to all Bitcoin account holders' coin balances in order to spread the loss across account holders.[13]

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[7] See Affidavit of David Ian Ruscoe dated 28 May 2019 at [23] and also Affidavit of David Ian Ruscoe dated 8 November at [32], clarifying that the hack affected not just Bitcoin but also other cryptocurrencies.
[8] Affidavit of David Ian Ruscoe dated 28 May 2019 at [23].
[9] At [26]. Timothy Brocket, a former employee of Cryptopia, has also given evidence that his investigation at the time indicated that "approximately 9% of the Company's Bitcoin holding had been taken": Affidavit of Timothy James Strahan Brocket dated 27 November 2019 at [19].
[10] Affidavit of David Ian Ruscoe dated 17 May 2019 at [9].
[11] Affidavit of David Ian Ruscoe dated 28 May 2019 at [23].
[12] At [23].
[13] At [24]. Mr Ruscoe's affidavit of 28 May 2019 refers to a 14% reduction being applied to all "BTC [Bitcoin] account holders' coin balances", which he said "effectively spread the loss of the currency across all account

2.10 On 14 May 2019, the shareholders placed the Company into liquidation.[14] The liquidators have estimated the total value of the cryptocurrency held by the Company to be approximately $170 million.[15]

2.11 The terms of service applicable as at the date of the liquidation were introduced in August 2018.[16] They are discussed in more detail where relevant below. They provide, among other things, that by accessing the platform or services of the Company, "[users] are agreeing to be bound by these Terms" (clause 1E).

2.12 It appears users were asked to confirm their agreement to the applicable terms of service at the time they opened an account.[17]

2.13 In addition, the evidence of Timothy Brocket, Cryptopia's former Director of Finance and Administration, is that an email was sent to all existing users on 8 August 2018 to advise them of the updated terms and conditions and stating that by continuing to trade on the exchange, they were accepting the revised terms.[18] There is no evidence as to what proportion of Account Holders who had opened accounts before 8 August 2018 traded on the exchange following receipt of that email.

2.14 The previous terms are barely two pages long.[19] They provide, among other things, that "we may amend these terms from time to time, so you should check and read these terms of use regularly. By continuing to use the site after any such amendment, you are deemed to have agreed to the amended terms of use."

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holders". See also Affidavit of Timothy James Strahan Brocket dated 27 November 2019 at [20], referring to a 14% reduction in customer Bitcoin account balances.

[14] Affidavit of David Ian Ruscoe dated 17 May 2019 at [5].

[15] Affidavit of David Ian Ruscoe dated 8 November 2019 at [7].

[16] Affidavit of David Ian Ruscoe dated 1 October 2019 at page 2 of the annex marked "DIR1".

[17] See page 6 of the Cryptopia Customer Service Analyst Manual, found at page 63 of DIR3, an annex to David Ruscoe's Affidavit dated 8 November 2019.

[18] Affidavit of Timothy James Strahan Brocket dated 27 November 2019 at [5].

[19] Affidavit of David Ian Ruscoe dated 1 October 2019 at page 18 of annex marked "DIR1".

3. WHAT IS THE APPLICABLE LAW TO DETERMINE THE MATTERS IN ISSUE?

3.1 Before addressing the questions set out in the application for directions it is appropriate to consider which law applies to the issues raised, due to the fact that there are number of international elements to the proceeding, e.g.:

(a) A large number of the Account Holders are resident in other jurisdictions;

(b) At the time of liquidation, the data relating to Account Holders' coin balances in their accounts was stored on servers belonging to PNAP in Phoenix, Arizona, in the United States of America (this data has since been moved to servers in New Zealand);[20]

(c) The PNAP servers also held approximately 25% of the Company's Digital Assets by number (again, these have been moved to New Zealand post-liquidation).[21]

3.2 The first step in determining the applicable law is to characterise the issue.[22] Characterisation of the issue is generally a matter for the law of the forum, here, New Zealand law.

3.3 In this case, characterisation of the issue requires the Court to determine whether the matters in issue concern title to property or are simply matters of contractual interpretation. This obviously overlaps with the first issue on which directions are sought, namely, whether the Digital Assets are property or not. That is a question for New Zealand law.

3.4 If the Court determines that the Digital Assets are property (according to New Zealand law), there is then a further question as to which law

[20] Affidavit of David Ian Ruscoe dated 28 May 2019 at [9].
[21] At [9].
[22] Marcus Pawson *Laws of New Zealand* Conflicts of Laws: Choice of Laws (online ed, LexisNexis) at [5].

applies to determine issues of title. Under common law conflict of laws principles, immovable property and real personal property are generally subject to the law of the place where the property is situated.[23] Intangible property is generally governed by the law under which it was created or of the place where it is capable of being enforced.[24]

3.5 Alternatively, if the issue is characterised as a matter of contract, then the "proper law" of the contract will apply.[25] This is either the law expressly chosen by the parties in the contract or, if they have not specified an applicable law, the law which has the closest connection with the transaction.[26]

3.6 Cryptopia's pre-August 2018 terms and conditions stated that any matters or disputes connected with the site would be governed by New Zealand law.[27] The terms and conditions that applied from August 2018 onwards do not contain the same provision and simply state: "You agree to use our service in accordance with the law in New Zealand and the applicable law in your jurisdiction."[28] That provides no definitive indication of which law the parties intended to apply to determine their respective rights. However, it is submitted that the court should apply New Zealand law to any contract issues between the Account Holders and Cryptopia as that is clearly the law that has the closest connection with the transaction.

3.7 Accordingly, it is submitted that New Zealand law applies to determine:

(a) whether the Digital Assets are property or not; and

(b) the parties' contractual rights and obligations.

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[23] Marcus Pawson *Laws of New Zealand* Conflicts of Laws: Choice of Laws, above n 22, at [182] and [189].
[24] At [194].
[25] At [126].
[26] See [116] and [117].
[27] Page 3.
[28] Clause 18.4(a).

3.8 The position would become more problematic in the event that the Court determines that the Digital Assets are property and is then required to determine which law applies to the question of who holds legal and beneficial title to the Digital Assets. To do so, the Court would need to determine what kind of property the Digital Assets are. Clearly, they are not real or tangible property. But, as discussed above, they are also unlike any recognised forms of intangible property. Cryptocurrencies are not created under any law, nor are they enforceable in any particular jurisdiction. Application of a choice of law rule based on characterisation of the issue as a property issue is therefore problematic.

3.9 The question of how to determine the law applicable to cryptocurrencies is briefly considered in the UK Legal Statement. Observing that these "complex issues" are best resolved by legislation, the Statement "tentatively" offers factors that can be used to determine whether a particular state's law governs the proprietary aspects of dealing in cryptoassets.[29] Adopting these factors to Cryptopia's Digital Assets, they are:[30]

(a) whether there is any relevant off-chain asset (e.g. currency reserves supporting a currency-backed coin such as NZDT) located in New Zealand;

(b) whether there is any centralised control in New Zealand;

(c) whether a particular Digital Asset is controlled by a particular participant in New Zealand (because, for example, a private key is stored there);

[29] LawTech Delivery Panel United Kingdom Jurisdiction Taskforce, "Legal Statement on Cryptoassets and Smart Contracts" dated November 2019 at [99].
[30] At [99].

(d) whether the law applicable to the relevant transfer (perhaps by reason of the parties' choice) is New Zealand law.

3.10 Applying those principles to the Digital Assets held by Cryptopia tends to support the conclusion that New Zealand law should apply:

(a) The only cryptocurrency held by Cryptopia which is backed by off-chain assets is the NZDT, which is supported by New Zealand dollar funds held in a New Zealand bank account – that supports the view that the NZDT assets should be subject to New Zealand law;[31]

(b) Although data was stored in both New Zealand and Arizona, there was centralised control in New Zealand, as that is where Cryptopia's operations and management were situated;

(c) The majority of Digital Assets and private keys were stored in New Zealand before liquidation and all are now stored in New Zealand;

(d) The terms and conditions of use of Cryptopia are subject to New Zealand law (if not exclusively).

3.11 Reasoning by analogy with other rights also points to New Zealand law being the applicable law. For example, a debt is deemed to be situated in the place where it is recoverable by action, generally being the place where the debtor resides. Similarly, if a trust creates a right of action against the trustees, that is deemed to be located in the place where it can be enforced, again, being the place where the trustees reside.[32] By analogy, it would be logical for the Digital Assets in Cryptopia's control to be deemed to be situated in New Zealand.

3.12 A further reason to apply New Zealand law is the fact that there is no real argument for any other approach. The former location of the data

[31] Affidavit of David Ian Ruscoe dated 28 May 2019 at [29] – [30].
[32] Marcus Pawson *Laws of New Zealand* Conflicts of Laws: Choice of Laws, above n 23, at [164], [168].

relating to Account Holders' accounts and some Digital Assets in Arizona might create some scope to argue that the law of Arizona should apply, at least to those Digital Assets which were stored there at the time of liquidation. However, the location of those assets in Arizona appears to have been purely arbitrary and there is no other connection with that jurisdiction.

3.13 In conclusion, while there is no clear authority on the issue of the law applicable to cryptocurrencies, common sense points to the finding that New Zealand law is the applicable law to determine all the matters in issue in this application.

4. QUESTION 1: WHETHER CRYPTOCURRENCY IS PROPERTY FOR THE PURPOSES OF THE COMPANIES ACT 1993

4.1 The first question is:

> Whether any or all of the various cryptocurrencies (Digital Assets) held by the liquidators of Cryptopia constitute 'property', as defined in section 2 of the Companies Act 1993.

4.2 "Property" is defined in s 2 of the Companies Act as follows:

> **property** means property of every kind whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise

4.3 The definition is circular: property means "property" of every kind, and rights, interests and claims in relation to "property". That said, the breadth of the language suggests the intention was to capture the widest possible range of interests. In *Erceg v Erceg* [2015] NZAR 1239 (HC), the Court described the identical definition found in the Insolvency Act 2006 as "very wide and clearly intended to have the broadest reach

possible, capturing all interests in and rights broadly connected with property".[33]

4.4 The word "property" is not capable of precise definition; rather, its meaning depends on the context in which it is used. See *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678 at [25]:

> "The meaning of the word 'property' varies with context. As Gummow and Hayne JJ put it in *Kennon v Spry*: 'the term "property" is not a term of art with one specific and precise meaning. It is always necessary to pay close attention to any statutory context in which the term is used'."

4.5 See, to similar effect*, Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279:

> "the concept of 'property' is fluid and has extended over the years to include interests which might not earlier have been covered by it. Its meaning and scope must also be affected by the statutory and wider context in which it is used."

4.6 The term property is used in various contexts in the Companies Act but most frequently in the context of companies in administration and liquidation. Some of the relevant provisions include:

(a) Section 248, which prevents parties from commencing or continuing proceedings in relation to a company's "property" when that company is in liquidation;

(b) Section 269, providing to liquidators the power to disclaim onerous "property" ("onerous property" is defined to mean an unprofitable contract, a litigation right, and "property" of the company that is unsaleable etc.);

[33] At [15].

(c) Section 273, which prohibits people from concealing or removing "property" of the company with the intention or preventing or delaying the liquidator taking custody or control of it;

(d) Section 274, which provides that present and former directors and employees of a company in liquidation must "give the liquidator details of property of the company" in their possession or control, and commit an offence on their failure to do so;

(e) Section 292, providing that insolvent transactions are voidable, with transactions defined to mean, among other things, "conveying or transferring the company's property" (none of the other steps defined as "transactions" would appear to capture the conveyance or transfer of cryptocurrency out of the company);

(f) Section 301, empowering the Court to order certain persons (directors, managers, etc.) to, among other things, "restore" "property" that the person has "retained, or become liable or accountable for";

(g) Section 324, providing that undistributed or non-disclaimed "property" of the company vests in the Crown once the company has been removed from the register;

(h) Section 378, which makes it an offence for directors, employees or shareholders of a company to fraudulently take or apply "property" of the company for their own benefit, etc.; and

(i) Section 380, which makes it an offence for directors of a company to, with intent to defraud creditors, cause "property" to be transferred to any person.

4.7 Enactments are to be applied to circumstances as they arise.[34] Interpreting "property" in the Companies Act so as to include cryptocurrency would be consistent with the evident purpose of the above provisions. If cryptocurrency was not "property", then those purposes would be frustrated. For example:

(a) Parties could commence or continue proceedings in relation to the cryptocurrency owned by a company in administration or liquidation (ss 239ABE, 239ABG and 248);

(b) Liquidators could not disclaim cryptocurrency that was unsaleable as onerous property (s 269);

(c) A person could conceal or remove the company's cryptocurrency with the intention of preventing the liquidator from taking control of it without committing an offence under s 273;

(d) A person could decline to provide the liquidator with details of cryptocurrency in their possession owned by the company without committing an offence under s 274;

(e) A transfer of the company's cryptocurrency to a third party while the company was unable to pay its debts, or that enabled the third party to receive more towards satisfaction of a debt than the person would receive in the liquidation, would not be an insolvent transaction under s 292 that could be avoided by the liquidator;

(f) Undistributed cryptocurrency held by the company would not vest in the Crown once it is removed from the register (it would not be clear in whom it would vest, if anyone);

[34] Interpretation Act 1999, s 6.

(g) Directors, employees or shareholders could fraudulently take cryptocurrency owned by the company and not commit an offence under s 378; and

(h) Directors of a company that caused the company's cryptocurrency to be transferred outside the company with the intent to defraud creditors would not commit an offence under s 380.

4.8 There is also Supreme Court authority in favour of the proposition that electronic records or data may be regarded as property for the purposes of a statutory definition.

4.9 *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678 was a criminal appeal from a conviction for accessing a computer and dishonestly obtaining "property" under s 249 of the Crimes Act 1961. The appellant had downloaded digital files to a USB stick comprising a compilation of images from a bar's CCTV system (of Mike Tindall socialising and leaving the bar with someone during the 2011 Rugby World Cup).[35]

4.10 Property is defined in s 2 of the Crimes Act as follows:[36]

> **property** includes real and personal property, and any estate or interest in any real or personal property, money, electricity, and any debt, and any thing in action, and any other right or interest

4.11 In the Court of Appeal, it had been held that the digital files at issue were "pure information" and so could not be "property".[37] The Supreme Court reserved its position on what it called that "orthodox view" of property.[38] Instead, it accepted a submission that "digital files were not simply information but were properly regarded as things which could be

[35] At [1]-[2].
[36] This definition is arguably wider than the one found in the Companies Act, given it includes "any other right or interest". However, the Court in *Dixon* did not rest its decision on that part of the definition. Rather, digital files were held to be "property": see, for example, at [50].
[37] At [23].
[38] At [18].

owned and dealt with".[39] It held that, in the context of s 239 of the Crimes Act and the definition of property in s 2 of that Act:[40]

> "we have no doubt that the digital files at issue are property and not simply information. In summary, we consider that the digital files can be identified, have a value and are capable of being transferred to others. They also have a physical presence, albeit one that cannot be detected by means of the unaided senses. Whether they are classified as tangible or intangible, the digital files are nevertheless property for the purposes of s 249(1)(a)."

4.12 The particular statutory context was important in *Dixon*. As noted, the section on which the Court was focused criminalised the act of accessing a computer system for a dishonest purpose. However, that is not a reason for distinguishing the case here. As discussed above, the statutory context and purpose of the relevant provisions of the Companies Act also strongly suggest that property should be interpreted as extending to cryptocurrency.

4.13 If the digital files at issue in *Dixon* (a compilation of images stored in digital form) are property within the statutory definition in the Crimes Act, then there would seem to be no reason why the digital files here (the private key and public key data which comprise the cryptocurrency) should not be regarded as falling within the definition in the Companies Act. Both share features highlighted by the Court in *Dixon*:

(a) the files can be "identified";

(b) the files "have a value". It is true that, in the case of cryptocurrency, their value is not inherent but only in what it permits the person who controls it to do. However, digital files containing images are not meaningfully different: those digital

[39] At [24], referring to the Crown's submissions.
[40] At [25].

files contain data that, when accessed through certain software, and only when so accessed, present images. They only have value in what they permit the person who possesses them to do; and

(c) the files have a "physical presence, albeit one that cannot be detected by means of the unaided senses".[41]

4.14 As discussed in the next section, it is not accepted for the Creditors that the Digital Assets are property for all purposes. However, they must be regarded as property for the purpose of the Companies Act to avoid defeating the purposes of the Act. On this basis, and having regard to the Supreme Court's determination in *Dixon* that electronic data can be property, there cannot be any real doubt that the Digital Assets are "property" under the definition in s 2 of the Companies Act.

5. IS CRYPTOCURRENCY CAPABLE OF BEING THE SUBJECT OF A TRUST?

5.1 The fact that the Digital Assets fall within the broad definition of "property" under the Companies Act does not mean that they are also property capable of forming the subject of a trust.

5.2 This issue was considered in a recent decision of the International Commercial Court of Singapore, *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03. In that case the Judge accepted that cryptocurrency assets met the definition of a property right and were capable of being the subject of a trust.[42] However, there was no argument to the contrary and the issue is not discussed in great detail in the judgment. The Creditors' position is that the decision is wrong and should not be followed.

[41] See at [25].
[42] At [142].

5.3 The general position is that trust property can comprise "any proprietary interest that a person can, at law or in equity, transfer or assign", including both tangible and intangible assets.[43] This accords with the classic definition of property set out by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 as "definable, identifiable by third parties, capable in its nature of assumption by third parties, and [having] some degree of permanence or stability".[44] In that case, the House of Lords found that the right of a wife to occupation of her husband's property was not "property", being too imprecise, unstable, and incapable of transfer.

5.4 Lord Wilberforce's classic definition, whether taken as a list of requirements or merely as one of relevant criteria, is significantly more prescriptive than the statutory definitions considered above. In particular, the requirements for transferability and stability are not components of the Companies Act definition. The Digital Assets do not meet these more stringent requirements/criteria and, therefore, are not capable of forming the subject matter of a trust.

5.5 First, while it is possible to transfer the value associated with the Digital Assets, it is not possible to transfer the coins themselves, being the things that comprise the Digital Assets. As referred to above, a new private key for the relevant Digital Asset is generated with each transaction that moves the Digital Asset from one wallet to another.[45] The public key is also changed with each transaction by the addition of new information to the blockchain.[46]

5.6 This is a fundamental difference between cryptocurrency and other forms of property or exchange, such as money. Whereas money remains exactly the same whenever it changes hands, the Digital Assets

[43] Andrew Butler (ed.) *Equity and Trusts in New Zealand* (online ed, Thomson Reuters) at [62.3.1].
[44] At 1247-1248.
[45] Affidavit of David Ian Ruscoe dated 8 November 2019 at [29].
[46] Affidavit of Christopher Kirk Watson dated 8 November 2019 at [14].

are not capable of being transferred in their existing form. In effect, each time a Digital Asset is transferred from one person's wallet to another, the Digital Asset is destroyed and a new Digital Asset is created.[47]

5.7 This conundrum is not resolved by making the subject matter of the trust the yet to be created future Digital Asset that will arise upon transfer. Future property not yet in existence is not capable of being the subject of a trust, even if it is certain that the property will come into existence (see *Williams v CIR* [1965] NZLR 395 (CA) at 401). It may be the subject of an agreement that it will be subject to a trust as soon as it comes into existence, but unless and until that occurs, no trust exists and the agreement is enforceable only as a contract.

5.8 Similarly, the Digital Assets lack the degree of permanence or stability that is normally associated with the common law conception of "property". In addition to the fact that a new asset is generated with each transaction, the transaction is subject to instability as a consequence of the decentralised consensus system used to effect a transaction.[48] This causes a time delay in transactions being recognised by the system and may result in some transactions being cancelled due to a competing addition to the blockchain being recognised.[49] Moreover, there may be a change in the consensus rules of the system which is not universally adopted. This leads to a fork in which different users recognise different transactions and the currency splits.[50] A cryptocurrency owner has no control over any aspect of the system and no right of redress in the event that an error or a change in the system causes him or her loss.

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[47] See generally Affidavit of Timothy James Strahan Brocket dated 27 November 2019, exhibit marked "TJSB1" at 87 to 89.
[48] See generally Affidavit of Timothy James Strahan Brocket dated 27 November 2019, exhibit marked "TJSB1" at 86 to 89.
[49] Affidavit of David Ian Ruscoe dated 8 November 2019, exhibit "DIR3" at 9.
[50] Affidavit of David Ian Ruscoe dated 8 November 2019, exhibit "DIR3" at 150.

5.9 These issues were not argued in B2C2. Nor did that case consider the wider issue of whether it is helpful, from a practical point of view, for the law to recognise cryptocurrency assets as capable of being the subject of a trust. Attempting to engraft notions of legal and beneficial title and fiduciary obligations onto a completely new form of storing and exchanging value is not helpful, nor necessary. Indeed, it is in many ways inimical to the whole purpose of cryptocurrency, which is designed to provide certainty to users "based on cryptographic proof instead of trust".[51]

5.10 For completeness, it should also be noted that, as well as not being capable of forming the subject matter of a trust, cryptocurrency is also not capable of forming the subject of a bailment. Transfer of possession is a necessary element of a bailment and it is not possible to transfer possession of an intangible object, as noted in *Your Response Ltd v Datateam* [2014] EWCA Civ 281 at [16]:

> "Although it is now possible by virtue of statutory provisions to transfer the legal title to choses in action, it is not possible to transfer possession of them in any physical sense. (I ignore for these purposes negotiable instruments and other documentary securities which take a physical form and are thus capable of being converted, their value being treated as the value of the obligation which they embody.) Indeed, I do not think that the concept of possession in the hitherto accepted sense has any meaning in relation to intangible property."

5.11 Similarly, the courts have held that the tort of conversion does not apply to choses in action or intangible property.[52]

[51] Discussed in the UK Legal Statement at [55].
[52] See *OBG Ltd v Allan*, above n 5.

6. QUESTION 2: WHETHER THE DIGITAL ASSETS ARE HELD ON TRUST

6.1 The second question is:

> Whether any or all of the Digital Assets are held on trust for any or all Account Holders (whether by way of express, implied, resulting, constructive, Quistclose trust or otherwise).

6.2 For the reasons that follow, even if it is accepted that, as a matter of principle, cryptocurrency is capable of being the subject property of a trust, the Digital Assets held by the liquidators are not held on trust. Rather, the Account Holders are unsecured creditors. Their claims in the liquidation are based on a contractual right to require the Company to transfer to them the amount and type of cryptocurrency reflected in their respective accounts.

6.3 These submissions first consider whether there was an express trust before addressing the other forms of trust referred to in the Question.

The legal requirements for a trust

6.4 Trusts can only exist in respect of property or interests in relation to property.[53] While it is not conceded that cryptocurrency is property for the purposes of a trust (see section 5 above), the following discussion proceeds on the hypothetical assumption that it is.

6.5 For an express trust to exist, there must be certainty of intention, subject matter and object.[54]

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[53] See, for example, Greg Kelly and Chris Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th edition, LexisNexis, Wellington, 2013) at 64 and Tucker, Le Poidevin, Brithwell, Fletcher and Lloyd *Lewin on Trusts* (19th ed, Sweet & Maxwell, London 2015) at 2-034.

[54] See, e.g., *Knight v Knight* (1840) 3 Beav 148; 49 ER 58 (Ch).

6.6 With respect to certainty of intention: an express trust requires language or (exceptionally) conduct sufficient to demonstrate a "clear" intention to create it.[55] See, for example, *Thexton v Thexton* [2001] 1 NZLR 237 (HC) at 247:

> "[I]t is a question of construction whether the words used, taking into account the surrounding circumstances, amount to a clear declaration of trust. What is needed is the manifestation of an intention to declare a trust… Where no words exhibiting the necessary trust are used it may in exceptional cases be possible to infer a declaration of trust from acts showing that a person constituted themselves as trustee, i.e. from conduct evincing an intent to deal with his property so that someone else to his own exclusion acquires the beneficial interest in his property."

6.7 The "surrounding circumstances" relevant to determining whether a trust was intended include subsequent events and acts.[56]

6.8 With respect to certainty of subject matter: the property that is the subject of the potential trust must either be identified or identifiable.[57] The application of this requirement to assets that are part of a larger mass or bulk of relevantly identical assets has given rise to a number of cases. These are addressed further below when the possible trusts that might exist here are considered.

6.9 With respect to certainty of object: the beneficiaries of the trust must be expressly designated or defined in a way that means they are capable of being identified.[58]

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[55] *Solicitor-General v Wanganui Borough* [1919] NZLR 763.
[56] *Shephard v Cartwright* [1955] AC 431.
[57] See generally Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees*, above n 53, at 64-65.
[58] *Sprang v Barnard* (1789) 2 Bro CC 585 at 587 and 588 and *McPhail v Doulton* [1971] AC 424; [1970] 2 All ER 228.

6.10 If an alleged trust is uncertain in a particular respect, that fact may suggest it is uncertain in another respect also. For instance, the greater the difficulty one has in identifying the subject matter of a potential trust, the greater doubt this must throw on whether a trust was intended at all.[59]

Two main possibilities

6.11 There are a number of possible configurations of express trusts that one might conceive; it is submitted, however, that there are two main possibilities worth considering here. The first is a trust in favour of each Account Holder in respect of particular cryptocurrency held on their behalf. The second is a trust for the benefit of all Account Holders in respect of the Company's entire holding of cryptocurrency.[60]

6.12 Each possibility is addressed below.

First possibility: individual trusts in favour of each Account Holder over specific cryptocurrency

6.13 This first possibility may be described broadly as follows:

(a) The Company held each Account Holder's specific units of cryptocurrency on trust for that particular Account Holder. That trust was created from the moment that particular cryptocurrency was first deposited by the user. If Account Holders subsequently exchanged their cryptocurrency for other cryptocurrency on the exchange, they obtained equitable title

[59] See, e.g., Tucker (et al) *Lewin on Trusts*, above n 53, at 105, in relation to precatory words ("If the subject-matter of the gift is uncertain, that may have a reflex action upon the precatory words and throw doubt on the testator's intention to create a trust").

[60] There are variations to this second possibility that one might imagine, for instance one trust in respect of each type of cryptocurrency in favour of all users holding that cryptocurrency, or perhaps individual trusts over the entire cryptocurrency holding of the Company in favour of each user, with each user's beneficial entitlement qualified by reference to every other user's entitlement. However, these would be variations on the same theme – that is, a trust or trusts over a fluctuating mass of cryptocurrency – and may be rejected for the same reasons, covered below.

to that other cryptocurrency and relinquished such title to the currency exchanged.

(b) For instance, if X had 2 Bitcoin and 30 Ethereum on the exchange, this meant that X was entitled to require the Company to transfer to him or her that particular 2 Bitcoin and 30 Ethereum on demand (minus a transaction fee, to be deducted from the cryptocurrency withdrawn). If X exchanged 1 Bitcoin for 500 Pandacoin, X relinquished their equitable title to the 1 Bitcoin and obtained title to the 500 Pandacoin.

(c) Similarly, those users who had obtained cryptocurrency by "paying" for it with Fiat Pegged Tokens obtained the beneficial title to that cryptocurrency, and so on in relation to cryptocurrency subsequently obtained by way of exchange.

6.14 The existence of a trust of this nature can be dismissed on the basis that it cannot have been intended. It is inconsistent with:

(a) The way the exchange operated;

(b) The terms of service; and

(c) The way the Company reacted to the hack in January 2019.

6.15 While each user's account showed that they had a specified type and quantity of cryptocurrency, that cryptocurrency was not held by the Company in a separate "wallet" or account for the user.[61] Rather, the cryptocurrency holdings of the Company (or, more specifically, the private keys necessary to utilise that cryptocurrency) were pooled together.[62] Each type of cryptocurrency was pooled in a separate "digital wallet"; some cryptocurrencies like Bitcoin were pooled

[61] Affidavit of David Ian Ruscoe dated 8 November 2019 at [25].
[62] At [25] and [31].

across multiple wallets.[63] Some of the Company's own cryptocurrency was also stored in these same wallets.[64]

6.16 It follows that no particular unit of cryptocurrency was held or otherwise earmarked for any particular user – e.g., no specific Bitcoin unit / private key was held for any particular user, including the user that may have initially deposited that Bitcoin with the Company.

6.17 Instead, the type and amount of cryptocurrency nominally held by each user through their Account was simply reflected in an entry on an accounting ledger maintained by the Company.[65] When a user made a transaction with another user on the exchange – e.g., 1 Bitcoin for 45 Ethereum – the Company updated the entries of the two users on its ledger.[66] No actual "exchange" or transfer took place.[67] The Company did not, say, move 1 Bitcoin from wallet X into wallet Y and move 45 Ethereum from wallet Y to wallet X. Again, the only thing that changed was the ledger and the type/amount of cryptocurrency that each user could see reflected in their Account.[68]

6.18 If a user decided to withdraw "their" cryptocurrency from the exchange, the Company was not contractually obliged to return to that user any specific unit of cryptocurrency.[69] The Company was not required, for instance, to return to a user the specific units of Bitcoin that they had earlier deposited with the exchange – or, more accurately, as returning the same private key would not be possible, the Company was not obliged to transfer Bitcoin to that user by using the private key that had been created as a result of that user initially

[63] Affidavit of David Ian Ruscoe dated 28 May 2019 at [17].
[64] Affidavit of David Ian Ruscoe dated 8 November 2019 at [31].
[65] At [25].
[66] Affidavit of David Ian Ruscoe dated 28 May 2019 at [17].
[67] At [17].
[68] Affidavit of David Ian Ruscoe dated 8 November 2019 at [26].
[69] There is nothing in the terms of service or in any other document that suggests any such obligation or practice.

transferring Bitcoin to the Company.[70]

6.19 None of the above features of the exchange – that cryptocurrency was pooled together, that exchanges occurred simply on a ledger, and that users were not entitled to "withdraw" any particular unit of cryptocurrency – would make sense if the intention had been to hold particular cryptocurrency on trust for particular Account Holders.

6.20 The terms of service are also inconsistent with an intention to create individual trusts in favour of each user. In fact, they are inconsistent with an intention to create any trust relationship at all.

6.21 With respect to the terms applicable from August 2018, clause 5, entitled "Your Coin Balances", is most relevant. It provides:

> "5. Your Coin Balances
>
> (a) Your Coin Balances form part of your Account, and allow you to send, receive and store supported Coins (see clause 9), in accordance with instructions provided by you through the Platform.
>
> (b) You must not attempt to send, receive or store unsupported Coins in your Account. Any such actions may result in the loss of the unsupported Coins, or. [sic]
>
> (c) You must not send Coins to a wallet address for a different Coin than the currency you are sending. This is commonly known as cross-chain deposit. In recoverable instances, an appropriate recovery fee will be charged for Cryptopia executing a cross-chain recovery.
>
> (d) Your Coin Balances are operated by us, and represent

[70] When Bitcoin and other cryptocurrencies are transferred using a private key, a new private key is created for the transferee. The old private key becomes useless. See Affidavit of David Ian Ruscoe dated 8 November 2019 at [29].

entries in your name on the general ledger of ownership of Coins maintained and held by us. This means the Coins in your deposit wallets may be pooled in our internal accounts with other Users' Coins at any time.

(e) Each User's entry in the general ledger of ownership of Coins is held by us, on trust, for that User."

6.22 Neither clause 5, nor any other term, indicates that the Company was agreeing to or otherwise intending to hold cryptocurrency associated with each Account on trust for each Account Holder. Instead, the only thing referred to as being held "on trust" is each user's "entry in the general ledger": see clause 5(e) above. Whatever this was intended to mean, it is certainly not a clear statement of intent to hold the coins themselves on trust.

6.23 Clause 5(e) may be contrasted with clause 6(e), dealing with Fiat Pegged Tokens. Clause 6(e) provides that Cryptopia will hold fiat currency deposited by users in order to purchase Fiat Pegged Tokens "on trust": "you hold the beneficial interest in those fiat dollars and can instruct us as trustee to deliver them to you at any time, subject to these terms". That wording is quite clear. If Cryptopia had intended to make itself a trustee of the Digital Assets in users' accounts, it would have used similarly explicit language in clause 5(e).

6.24 Further, and returning to clause 5, a user's "Coin Balances" are defined to mean, not a user's cryptocurrency but rather "any <u>record</u> of Cryptopia holding funds on the Cryptopia platform on your behalf" (emphasis added). Clause 5(d) is to the same effect: "Your Coin Balances…<u>represent entries in your name on the general ledger</u> of ownership of Coins maintained and held by us" (emphasis added). These clauses also tell against any intention that users would enjoy beneficial ownership of cryptocurrency itself.

6.25 The August 2018 terms are also clear that the Company would be entitled to pool together cryptocurrency holdings: see clause 5(d). As covered above, the pooling of cryptocurrency is inconsistent with an intention to create individual trusts in respect of particular units of cryptocurrency.

6.26 There are other clauses in the August 2018 terms of service that individually and collectively also tell against an intention to create a trust relationship between users and the Company:

(a) Under clause 4.3, Cryptopia may "suspend, limit or restrict access to" any Account, its platform or any service at any time, without notice, if, for example, (i) users fail to pay any amounts due; (ii) the Company receives a "serious complaint or multiple complaints" about the user; (iii) "in our sole discretion", the Company considers that the user's conduct "may bring the Platform, [the Company] or any other person into disrepute", or (iv) "we suspect that you have breached, or your continued access might result in a breach, of these Terms". The suspension "will come to an end only when we are reasonably satisfied that the reason for the suspension no longer applies".

In a similar vein, under clause 4.4, Cryptopia can close an Account if, for example, (i) users fail to pay any amount owing, (ii) "we reasonably believe that you have acted, or acting, unlawfully, or (iii) "we reasonably believe that you have been aggressive or threatening to our staff". If the Company closes the account, and "subject to any Applicable Law":

> "we may at our discretion provide you with access to the Platform solely to the extent necessary to access to your Account for a period of 90 days to allow you to transfer your Coins to a different digital wallet or to redeem any

> Fiat Pegged Tokens. For the avoidance of doubt, you will not be able to receive the Services or access any other component of the Platform during this period. You acknowledge that after this 90 day period, you may no longer have access to the Platform to access your Coins and we will not have any liability to you for any loss, cost, damage or expense that results from your failure to exercise your right of access during such 90 day period."

The above two clauses are inconsistent with an intention that users enjoy beneficial title to the cryptocurrency, given the rights that would typically be expected to confer on them in relation to the trust property. The first clause gives wide latitude to the Company – the purported trustee – to limit a user's access to the Platform and therefore the cryptocurrency associated with their Account. The second goes even further, providing that the Company enjoyed the power, to be exercised at its discretion, to effectively appropriate the cryptocurrency holding of an errant user.

(b) Under clause 7.2, the Company has "the right to refuse to process, or to cancel or reverse, any submitted Transaction for any reason, including… where we reasonably consider the Transaction has the potential to bring into disrepute us, the Platform or any User."

It would be unusual for a trustee to have the power to refuse to follow the instruction of a beneficiary in respect of their property on the basis that the trustee considers the transaction would bring the trustee or indeed a third party into disrepute. Ordinarily a trustee would be bound to follow such instructions and its own interests and those of third parties would be irrelevant.

(c) Under clause 9.3, the Company can, for any reason, "delist" a particular type of cryptocurrency. If that happens, "generally", users will be able to "withdraw [their] balance of the Coin from the platform" within 30 days, but if they do not, they "may lose the balance of the Coin at the time it is removed".

Again, the power to effectively appropriate the cryptocurrency holding of a user does not sit easily with an intention to confer beneficial title on that user.

(d) Under clause 12 the Company tightly limits its liability. See, for example, clause 12.1: "to the maximum extent permitted by all Applicable Laws, we are not, under any circumstances, liable in any way for any loss or damage, whether direct, indirect, consequential or incidental, whether in tort, contract or otherwise arising out of use of our Platform or Services."

The words of clause 12, if applied, would limit the Company's liabilities in a way that would be inconsistent with the obligations a trustee would normally assume in respect of trust property and the rights a beneficiary would ordinarily enjoy.

(e) Under clause 18.1, the Company reserves "the right to add, vary or withdraw any term of these Terms (including to increase, reduce or vary any fees or charges payable in respect of any Service or Platform) at any time."

The Company's apparent right to change, at its discretion, the terms on which Account Holders accessed the site and, in turn, the cryptocurrency associated with their Account would mean, on the hypothesis that the Company was a trustee, that the trustee had the power unilaterally to vary the rights of beneficiaries in respect of the trust property.

It is doubtful that a trust relationship is consistent with such a power. However, even if it is, it would be highly unusual for such a trust to be intended. One would expect to see particularly clear language, which is absent here.

6.27 The terms of service applying prior to August 2018 did not indicate cryptocurrency was to be held for users, and certainly not on trust. Those terms did not mention cryptocurrency or otherwise seek to address the nature of the user's rights in respect of the cryptocurrency associated with their account.

6.28 Finally on this first possibility, the response of the Company to the hack in January 2019 is also inconsistent with an intention that users enjoy equitable title to particular cryptocurrency. In particular, the Company appears to have applied a 14% discount to all users' holdings in Bitcoin in response to the hack.[71] It did not attempt to identify which user's cryptocurrency had been stolen (and it is not clear that was possible).

Second possibility – one trust in favour of all Account Holders over all cryptocurrency

6.29 The second possibility is one trust for the benefit of all Account Holders. The subject matter of such a trust might be said to be *all* the cryptocurrency held by the Company at any particular time, with each user beneficially entitled to that part and proportion of the trust property necessary to reflect the type and amount of cryptocurrency associated with their Account.

6.30 There are strong reasons to reject this possibility also. First, it is also inconsistent with the terms of service. The points made above at 6.26 apply equally.

[71] See above at 2.9.

6.31 Second, there is Privy Council authority, namely *Re Goldcorp Exchange Ltd (in rec)* [1994] 3 NZLR 385 (PC), which effectively precludes a trust in these circumstances. The case is significant for this Court's decision and so is discussed in some detail below.

Re Goldcorp Exchange Ltd (in rec) [1994] 3 NZLR 385 (PC)

6.32 In *Goldcorp,* the company in receivership was a gold dealer. Three categories of customer argued, among other things, that the company held gold on trust for them:

(a) Customers who had purchased "non-allocated" gold and received a "certificate of ownership" stating that the company would store and insure the gold for the customer. Customers were referred to as the "owner" and "registered holder" of the gold they had purchased. Brochures and oral statements from the company indicated that the customers' gold would be stored in a large bulk, which would be audited monthly "to ensure there are sufficient stocks to meet all commitments".

(b) L, who had purchased 52 gold coins for physical delivery, which he sighted, but then changed his mind and left them with the company. He also purchased 1000 more gold coins on a non-allocated basis.

(c) Customers of Walker and Hall Commodities Ltd, a separate company, which had also stored customers' bullion in bulk, but in the quantities purchased and stored separately from its own stock. Walker and Hall's contracts had stated that their customers had title to the bullion purchased. Goldcorp had purchased Walker and Hall and then pooled the Walker and Hall customers' bullion with its own stock.

6.33 With respect to the non-allocated customers, the Board held that no trust existed. It drew a distinction between two species of "unascertained goods", i.e., goods forming part of a larger bulk that are not specifically identified:[72]

(a) "Generic goods": "These are sold on terms which preserve the seller's freedom to decide for himself how and from what source he will obtain goods answering the contractual description."

(b) "Goods ex bulk": "By this expression Their Lordships denote goods which are by express stipulation to be supplied from a fixed and a predetermined source, from within which the seller may make his own choice (unless the contract requires it to be made in some other way) but outside which he may not go. For example, 'I sell you 60 of the 100 sheep now on my farm.'"

6.34 The Account Holders may be most closely compared to those with contracts for the purchase of "generic goods": Account Holders were contractually entitled to require Cryptopia to transfer to them the precise type and quantity reflected in their Account. Cryptopia was free, however, to supply that type and quantity of cryptocurrency from any source. For example, there could have been no complaint if, on a withdrawal request for 100 Bitcoin from an Account Holder, Cryptopia had sourced 100 Bitcoin from outside the exchange and then transferred that to the Account Holder.

6.35 Returning to *Goldcorp*, after noting that no title, legal or equitable, could have passed to the customers merely on the basis of the contract of sale (given it was for unascertained, generic goods), the Board went on to consider whether the collateral promises found in brochures and oral statements were effective to create a trust in

[72] At 392-393.

favour of the customers:

> "The question then immediately arises - What was the subject-matter of the trust? The only possible answer, so far as concerns an immediate transfer of title on sale, is that the trust related to the Company's current stock of bullion answering the contractual description: for there was no other bullion to which the trust could relate. Their Lordships do not doubt that the vendor of goods sold ex-bulk can effectively declare himself trustee of the bulk in favour of the buyer, so as to confer pro tanto an equitable title. But the present transaction was not of this type. The Company cannot have intended to create an interest in its general stock of gold which would have inhibited any dealings with it otherwise than for the purpose of delivery under the non-allocated sale contracts. Conversely the customer, who is presumed to have intended that somewhere in the bullion held by or on behalf of the Company there would be stored a quantity representing 'his' bullion, cannot have contemplated that his rights would be fixed by reference to a combination of the quantity of bullion of the relevant description which the Company happened to have in stock at the relevant time and the number of purchasers who happened to have open contracts at that time for goods of that description. To understand the transaction in this way would be to make it a sale of bullion ex-bulk, which on the documents and findings of fact it plainly was not."

6.36 That same analysis applies to defeat any argument that the Company, whether through its terms of service or otherwise, intended to create a trust in favour of Account Holders in relation to the cryptocurrency held by it at any particular time:

(a) Cryptopia "cannot have intended to create an interest in its general stock of [cryptocurrency] which would have inhibited any dealings with it otherwise than for the purpose of [meeting the withdrawal requests of users]." We know that because (i) the Company pooled cryptocurrency with its own stock, (ii) the Company was free to satisfy Account Holders' withdrawal demands for cryptocurrency from any source it wished, as opposed to the stock of cryptocurrency it happened to hold at any particular time; and (iii) there is no evidence that the Company promised to or did ensure it held enough cryptocurrency at any one time to satisfy the simultaneous demand of every Account Holder to withdraw their holdings.

(b) Conversely, the Account Holder "cannot have intended that his rights would be fixed by reference to a combination of the quantity of [cryptocurrency] of the relevant description which the Company happened to have in stock at the relevant time and the number of [other Account Holders with the right to require Cryptopia to transfer them the amount and type of cryptocurrency reflected in their own Accounts]."

In other words, Account Holders cannot have intended that their rights would be to a "shifting proportion of a shifting bulk": their entitlement, rather, was to require Cryptopia to transfer to them on demand the precise type and amount of cryptocurrency reflected in their Account. There was no entitlement to require Cryptopia to supply that cryptocurrency from any particular source.

6.37 For similar reasons, the Board also held that no trust operated in favour of L. It did not matter that L was shown the 52 coins he initially purchased, which a lower court had found was enough "ascertainment and appropriation to pass the property". This

distinction made no difference, as the fact remained that he was party to "an agreement for the purchase of generic goods".[73]

6.38 In the course of its judgment, the Privy Council relied on and strongly endorsed the judgment of Oliver J in *Re London Wine Co (Shippers) Ltd* [1986] PCC 121.[74] There, a company stored wine across various warehouses. Most of these stocks had been sold to customers, who had received from the company a "certificate of title" that described the customer as the "sole and beneficial owner" of the wine for which they had paid. There was no appropriation from the bulk of any wine to answer any particular contracts. When receivers were appointed, the company had sufficient stocks of wine to answer all customers' claims.

6.39 Oliver J held that the company did not hold any of the wine on trust – including in the case of customers who had purchased the company's total stock of a particular wine. Oliver J explained as follows:

> "I cannot see how, for instance, a farmer who declares himself to be a trustee of two sheep (without identifying them) can be said to have created a perfect and complete trust whatever rights he may confer by such declaration as a matter of contract. And it would seem to me to be immaterial that at the time he has a flock of sheep but of which he could satisfy the interest. Of course, he could by appropriate words, declare himself to be a trustee of the specified proportion of his whole flock and thus create an equitable tenancy in common between himself and the named beneficiary ... But the *mere* declaration

[73] At 406."Whatever Mr Liggett may have thought, and whatever the special features of the transaction, the fact remains that it was an agreement for the purchase of generic goods. For the reasons already given such contract even when accompanied by the collateral promises could not create a proprietary interest of any kind."
[74] At 401: "Their Lordships are greatly fortified in their opinion by the close analysis of the authorities and the principles by Oliver J, and in other circumstances Their Lordships would have been content to do little more than summarise it and express their entire agreement."

> that a given number of animals would be held upon trust could not ... without very clear words pointing to such an intention, result in the creation of an interest ... at the time of the declaration. And where the mass from which the numerical interest is to take effect is not ascertainable at the date of the declaration such conclusion becomes impossible."

6.40 Again, that analysis applies here also. There was no declaration of trust of a specified proportion of the cryptocurrency held by the Company such as to "create an equitable tenancy in common between [the Company] and the named beneficiary". Even if there was, however, "the mass from which the numerical interest is to take effect [was] not ascertainable as at the date of the declaration", and so a trust is "impossible".

6.41 Returning to *Goldcorp,* the Board did not need to reach any conclusion as to whether gold had been held on trust for the Walker and Hall customers as there was no appeal on that issue.[75] In the High Court, Thorp J had found that there had been a sufficient ascertainment and appropriation of the goods purchased to transfer title and that thereafter the Walker and Hall customers, as a whole, had a shared proprietary interest in the pooled bullion held on their behalf.[76] The Board explained that the following features of the Walker and Hall's customers' claims had led Thorp J to that conclusion:[77]

> "It appears that until about 1983 the bullion purchased by customers of the predecessor of Walker & Hall was stored and recorded separately. Thereafter, the bullion representing purchases by customers was stored en masse, but it was still kept separate from the vendor's own stock. Furthermore, the

[75] See 406.
[76] See at 407 of the Privy Council's decision, summarising Thorp J's decision.
[77] At 406-407.

> quantity of each kind of bullion kept in this pooled mass was precisely equal to the amount of Walker & Hall's exposure to the relevant categories of bullion and of its open contracts with customers. The documentation was also different from that received by the customers who later became the non-allocated claimants. The documents handed to the customer need not be quoted at length, but their general effect was that the vendor did not claim title in the bullion described in the document and that the title to that bullion, and the risk in respect of it, was with the customer. The document also stated that the vendor held the bullion as custodian for the customer in safe storage."

6.42 The Court of Appeal had not needed to decide whether Thorp J was correct either, as this aspect of Thorp J's decision was not appealed.[78]

6.43 In any event, the Walker and Hall customers' situation is very different from the present. Here, the amount of cryptocurrency associated with each Account Holder was not stored separately; Account Holders' holdings were not kept separate from the Company's own holdings; the quantity of each kind of cryptocurrency in the "pooled mass" was not precisely equal to the "amount of [the Company's] exposure"; and, for the reasons covered above, the terms of service were not consistent with the Account Holders having beneficial title to the cryptocurrency.

Other cases

6.44 There are several other relevant cases worth briefly considering.

[78] At 407.

Hunter v Moss [1994] 1 WLR 452 (CA).

6.45 The first is *Hunter v Moss* [1994] 1 WLR 452 (CA). The defendant held 950 shares in a company with issued shared capital of 1000 shares. The defendant had agreed to "hold five percent of the [issued shares in the company] either for, or in trust for, the plaintiff".[79] The Court of Appeal held that the defendant had declared a valid trust over 50 of the 950 shares he held – even though the particular 50 shares were not ascertained as at the time of the declaration. That fact did not in the circumstances prevent there being certainty of subject matter.

6.46 It is not clear that *Hunter v Moss* is consistent with *Re Goldcorp*. To the extent that the decisions are inconsistent, *Goldcorp* takes precedence in this Court as the superior and binding authority. However, to the extent that *Hunter v Moss* can be squared with *Goldcorp*, it is distinguishable. In *Hunter v Moss*, the bulk or mass out of which the beneficiary's interest was to be satisfied was clear and certain: the 950 shares held by the defendant. The beneficiary's proportionate interest in that bulk was certain: 50 of those 950 shares. It was, in the *Re Goldcorp* classification, an "ex bulk" case: the beneficiary's entitlement to the shares was to be satisfied "from a fixed and a predetermined source, from within which [the trustee] may make his own choice".

6.47 As covered above, none of those things is true here.

6.48 *Hunter v Moss* was followed in *Re Harvard Securities* [1997] EWHC 371, a decision of Neuberger J. In that case, the company in liquidation, Harvard Securities, a broker, had purchased blocks of Australian and US shares for on-sale to clients. Harvard Securities did not register the shares in the names of the relevant client, however; rather, for convenience and cost reasons, they were held in the name

[79] At 456D.

of a nominee entity. It was therefore not possible to identify any particular share with any particular client. Rather, each client's interest was simply recorded internally.

6.49 The Court held that English law applied to determine the property interests in the US shares. Neuberger J, with apparent reluctance, applied *Hunter v Moss* and held that the mere fact particular shares were not held for particular clients did not prevent the beneficial interest in the shares vesting in the clients:[80]

> "In light of the decision and reasoning in *Hunter,* and the above discussion, I do not consider that it is open to me to hold that that aspect prevents Harvard's former clients having a beneficial interest in the shares, so far as English law is concerned."

6.50 The judge had earlier emphasised that *Hunter v Moss*, unlike *Re Goldcorp*, was binding on him.[81] He appeared to doubt whether *Hunter v Moss* was actually consistent with *Re Goldcorp* and *Re London Wine*, but concluded that the most arguable distinction was that *Hunter v Moss* was concerned with shares and the latter cases with chattels.[82]

6.51 That distinction is unconvincing: it is difficult to see any meaningful difference between wine, gold, shares and (if it is accepted that cryptocurrency is capable of being the subject of a trust) cryptocurrency for this purpose. *Re Harvard Securities* is, in any event, readily distinguishable from the present case:

(a) The Court was bound to follow *Hunter v Moss*; this Court is not.

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[80] At 578.
[81] At 576.
[82] At 578A-C ("in all the circumstances, therefore, it seems to me that the correct way for me, at first instance, to explain the difference between the result in *Hunter*, and that in *Wait, London Wine* and *Goldcorp*, is on the ground that *Hunter* was concerned with shares, as opposed to chattels").

(b) The mass or bulk from which Harvard Securities as trustee was required to satisfy the client's beneficial interest was certain, namely the shares held by the nominee entity on behalf of the relevant clients. Here, for the reasons covered above, the mass or bulk is uncertain.

(c) The sole basis for claiming there was not a trust in *Re Harvard Securities* was that the precise shares were not identified, i.e., a lack of certainty of subject matter.[83] All of the evidence pointed towards an clear intention to confer equitable title on the clients that had paid for the shares.[84]

Here, for the reasons covered above, the evidence is not so clear; in fact, it is inconsistent with an intention to create a trust.

B2C2 Ltd v Quoine Pty Ltd [2019] SGHC(I) 03

6.52 As already discussed above, *B2C2 Ltd v Quoine Pty Ltd* is a recent decision of the Singapore International Commercial Court. The defendant was a company that operated a cryptocurrency exchange platform.

6.53 The Court held that Quoine held the claimant's cryptocurrency on trust: see at [138]-[146]. The reasoning is short; the judgment does not consider, for example, any of the case law referred to above. The case is, in any event, distinguishable. There, the cryptocurrency deposited by users was stored separately from the company's own holdings. That was the "decisive factor" that led the judge to conclude that there had been the requisite intention to create a trust:[85]

[83] See 578D-E.
[84] See the evidence described at 568E-569C.
[85] At [145].

> "To my mind, the decisive factor is that the assets are held separately as Member's assets rather than as part of Quoine's trading assets. This is a clear indication, not surprisingly, that Quoine claims no title to those assets and acknowledges that it is holding them to the order of the Member who can demand withdrawal at any time. This is sufficiently clear evidence that Quoine intended to hold the assets on trust for the individual Member. What will be the effect of such an arrangement were Quoine to go 'bankrupt' is not a matter for me to decide."

6.54 Whatever the merit of that reasoning, that "decisive factor" is not present here, as the cryptocurrency deposited by users was pooled together with the company's own holdings.

A trust is not necessary to give effect to the right of Account Holders to withdraw cryptocurrency

6.55 As noted above, clause 12 of the current terms of service appears to limit tightly what claims may be made by Account Holders against the Company. In particular:

(a) Clause 12.1(a) purports to exclude all liability for "any loss or damage", subject to clause 12.1(c) (which confirms that a user's rights under the Fair Trading Act 1986 and Consumer Guarantees Act 1993 are unaffected); and

(b) Clause 12.1(d) provides that, notwithstanding clause 12.1(a), 12.1(b) and 12.1(c), "if we are found to be liable for any loss, cost, damage or expense, our maximum aggregate liability to you will be limited to $5,000".

6.56 These provisions raise the question whether the Company could by operation of these clauses either avoid any liability for failure to meet its obligation to transfer to users on demand the amount and type of

cryptocurrency appearing in their Accounts, or have its liability capped at $5,000 per user – and therefore whether Account Holders must have been intended to hold the equitable title to cryptocurrency in order to avoid that result.

6.57 That cannot be the result of the clauses, however, and so it is not necessary to find that a trust exists in order to avoid it. Clause 12 must be read as impliedly subject to a user's contractual right to require the Company to return the full amount and type of cryptocurrency appearing in their Account (subject to relevant terms of the agreement, e.g., those providing for matters like withdrawal fees and technical suspensions). While the terms of service do not expressly confer such a right, a term to that effect must be implied either to give business efficacy to the agreement or because it is so obvious as to go without saying.

6.58 In addition, the exclusion does not purport to exclude claims under the Fair Trading Act or Consumer Guarantees Act.

6.59 However, even if the exclusion and/or cap on liability were held to limit Cryptopia's liability in the event that it failed to meet its liability to Account Holders, that would not indicate an intention to create a trust. On the contrary, it would indicate that Cryptopia was concerned to limit its liability to the greatest extent possible and that Account Holders were willing to transact with it on that basis. That is not consistent with a mutual intention to create a trust.

Other types of trust

6.60 The above discussion is focused on whether there is any express trust. However, the obstacles to the existence of an express trust also largely rule out the existence of a Quistclose trust, resulting trust, or constructive trust.

6.61 First, the absence of certainty over the trust property is fatal to the existence of any form of trust, other than perhaps a constructive trust of the type that may be imposed on a person who dishonestly assists in a breach of trust.[86] There is no question of any such trust arising here. In any case, however, even if the trust property could be identified, the remaining criteria for these other forms of trust are not met.

Quistclose trust

6.62 A Quistclose trust can arise where A transfers property, typically money, to B for a clearly defined and specific purpose, for example to pay a dividend, as in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 itself. If the purpose fails, A has an equitable right to return of the property. For a Quistclose trust to arise, the purpose for which the property is transferred must be clear and specific.[87] Further, a Quistclose trust will not arise unless the transferor intended to create a trust.[88]

6.63 As to the first requirement, there is no evidence that Account Holders transferred cryptocurrency to the Company on the basis that it could be used for specific and limited purposes only.[89] To the extent the terms of service applying at the relevant time may be taken as indirect evidence of the basis on which users transferred cryptocurrency:

(a) The pre-August 2018 terms of service do not refer to cryptocurrency or otherwise address the basis on which

[86] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL), per Lord Browne-Wilkinson, at 705. Although in *Fortex Group Limited v Macintosh* [1998] 3 NZLR 171 the Court of Appeal held lack of subject matter was also fatal to a remedial constructive trust.
[87] See generally Butler (ed.) *Equity and Trusts in New Zealand*, above n 43 at [39.3.3], referring to *Zhong v Wang* (2006) 7 NZCRP 488 (CA).
[88] See generally Butler (ed.) *Equity and Trusts in New Zealand* at [39.3].
[89] In contrast to *Re Courtenay House Capital Trading Group Pty Ltd* [2018] NSWSC 404 where funds had been paid for the specific purpose of investment in a scheme but were not invested.

cryptocurrency is transferred or held.

(b) The August 2018 terms of service are, as discussed above, more detailed but also do not suggest any limits on the use to which the Company may put cryptocurrency transferred to it by Account Holders.

6.64 Even if the Digital Assets could be said to have been deposited for a specific purpose, e.g. to enable trading on the exchange, there was no failure of that purpose prior to liquidation and, accordingly, no Quistclose trust was capable of arising.

6.65 As to the second requirement, there is also no evidence to suggest Account Holders intended to create a trust when transferring cryptocurrency to the Company. To the extent that the terms of service may serve as indirect evidence of Account Holders' intentions when transferring cryptocurrency:

(a) As noted, the pre-August 2018 terms of service do not address the basis on which cryptocurrency is transferred or held.

(b) For the reasons at 6.26, the August 2018 terms of service do not suggest that the cryptocurrency transferred by users would be held on trust for them.

Resulting trust

6.66 A resulting trust arises in two situations:[90]

(a) Where A makes a voluntary payment to B or pays (wholly or in part) for property which is vested in B alone or in the joint names of A and B, there will be a presumption that A did not intend to make a gift to B and so the money or property is held

[90] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 86, per Lord Browne-Wilkinson, at 708.

on trust for A (if A is the sole provider of the money) or in the case of a joint purchase by A and B, in shares proportionate to their contributions. That presumption can be rebutted.

(b) Where A transfers property to B on the basis of an express trust, but the trust declared does not exhaust the whole beneficial interest, e.g., a settlor intends to create a trust by transferring property but there is insufficient certainty, or some other problem, meaning that the intended trust cannot be created. B then holds the property, or the relevant part of it, on trust for A.

6.67 The first situation does not apply. There has been no voluntary payment or vesting of property: users transferred cryptocurrency to the Company in consideration of the Company providing services in return.

6.68 The second situation does not apply because, as submitted above, there is no evidence of an intention on the part of Account Holders to create a trust when transferring cryptocurrency to the Company.

Constructive trust

6.69 There is no basis for a constructive trust over the Digital Assets. First, the situation does not fall within any of the recognised categories of so-called "institutional" constructive trusts, which are deemed to arise as a matter of law from the date of the events giving rise to the trust.[91] For example, where a fiduciary has profited from a breach of trust, or where property has been obtained by fraud.

6.70 Cryptopia has not unjustly enriched itself by mixing the cryptocurrency balances of Account Holders together with its own balances – it merely did what it was contractually entitled to do. Nor

[91] See Andrew Butler (ed) *A-Z of New Zealand Law: Trusts* (online ed, Thomson Reuters) at [62.13.2].

is there any basis on which it can be said that the conscience of the Creditors is affected so as to make it just that the Account Holders' claims should be given priority over other Creditors' claims.[92]

6.71 Secondly, there is no basis for a "remedial" constructive trust, which is a trust declared by the Court on a remedial basis where no trust otherwise exists. First, the ability of the Court to impose a remedial trust is contentious. It was described by Lord Browne-Wilkinson in *Westdeutsche* at 716 as follows:

> "The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue."

6.72 Secondly, and decisively, a remedial constructive trust is not available in an insolvency situation. In *Re Polly Peck International (No.2)* [1998] 3 All ER 812 (CA), Mummery LJ cogently explained why such a trust was not arguable:

> "In my judgment, the intervening insolvency of PPI means that under English law there is no seriously arguable case for granting the applicants a remedial constructive trust on the basis of the allegations in the draft statement of claim. PPI is a massively insolvent company subject to an administration

[92] The position is, again, analagous to *Goldcorp* in which the Privy Council rejected the argument of a remedial constructive trust over the bullion, at p400 and 404-405. See also *Fortex Group Limted v Macintosh*, above n 86

> order. The administrators are bound to distribute the assets of PPI among the creditors on the basis of insolvency. Parliament has, in such an eventuality, sanctioned a scheme for pari passu distribution of assets designed to achieve a fair distribution of the insolvent company's property among the unsecured creditors….
>
> ….If it is established in a dispute that it is not an asset of the company then it never becomes subject of the statutory insolvency scheme…. If, on the other hand, the asset is the absolute beneficial property of the company there is no general power in the liquidator, the administrators or the court to amend or modify the statutory scheme so as to transfer that asset or to declare it to be held for the benefit of another person. To do that would be to give a preference to another person who enjoys no preference under the statutory scheme."

6.73 Likewise, in this case, if the Digital Assets form part of the Company's assets, they are required to be dealt with according to Part 16 of the Companies Act, and the Court has no discretion to recognise a remedial constructive trust.

Statutory trust obligation?

6.74 Although not explicitly referred to in the application for directions, a further possibility mentioned here for completeness, but that can be easily dismissed, is whether the Digital Assets were subject to any statutory obligation that they be held on trust, such as that imposed on client property held by a broker under the Financial Advisers Act 2008 (**FAA**).

6.75 Section 77P of the FAA provides that a broker who receives "client money" or "client property" in its capacity as a broker must hold the client money or property on trust and must hold it separate from

money or property held by or for the broker. Breach of this requirement is an offence.

6.76 A broker under the FAA is a person who carries on a business of providing broking services, which are defined under s 77B as including the receipt of client money or client property by a person and the holding, payment, or transfer of that client money or client property.

6.77 Cryptopia did not receive client money, except in relation to the purchase of NZDT tokens, and those funds were held separately and on trust.[93] The relevant question to the application of s 77P to the Digital Assets is whether the Digital Assets are "client property". To be client property, the Assets would have to be a "financial product", an interest in a financial product, or received in connection with a financial product.

6.78 Section 5 of the FAA contains an extensive definition of "financial product" by reference to "category 1 products" and "category 2 products", which in turn refer to the definitions of various types of financial products in the Financial Markets Conduct Act 2013 (**FMCA**). The Digital Assets are not within any of the types of products listed. In particular, they are not debt securities as they do not create "a right to be repaid money or paid interest on money that is, or is to be, deposited with, lent to, or otherwise owing by, any person" (FMCA s8(1)). Nor do they fall within the definitions in the FMCA of equity securities, managed investment products, or derivatives.

6.79 Accordingly, the requirement in s 77P of the FAA to keep the property separate and on trust does not apply, and so it is not necessary to consider the question of what the consequence would be if such an obligation had applied.

[93] See paragraph 6.23 above.

7. QUESTION 3: WHETHER THE LIQUIDATORS SHOULD SATISFY CLAIMS OF ACCOUNT HOLDERS AND CREDITORS BY CONVERTING DIGITAL ASSETS INTO FIAT CURRENCY AND PAYING THEM IN ACCORDANCE WITH PART 16 OF THE COMPANIES ACT 1993

7.1 The third question is:

> If the answer to question (a) is no, then to the extent that such Digital Assets are not 'property' whether the Applicant liquidators should satisfy claims of:
>
> (i) Any account holder of the Company (**Account Holder**) for the return of his/her/its Digital Assets; and
>
> (ii) Unsecured creditors,
>
> by conversion of such Digital Assets into fiat currency and paying such in accordance with Part 16 of the Companies Act 1993.

7.2 Strictly, this question does not arise, as the answer to the first question (whether the Digital Assets are property within the meaning of s 2 of the Companies Act) is yes. On this basis, and in accordance with the argument made above that the Digital Assets are not held on trust and are therefore assets of the Company, the Digital Assets are available for distribution to creditors. Accordingly, it is submitted that the Applicant liquidators should convert the Digital Assets into fiat currency and use the funds to pay the claims of the Account Holders and Creditors in accordance with Part 16 of the Companies Act 1993.

Liquidators' principal obligation to deal with assets of company

7.3 Section 253 of the Companies Act provides that the "principal duty" of a liquidator is:

> (a) to take possession of, protect, realise, and distribute the assets,

or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and

(b) if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with s 313(4) —

in a reasonable and efficient manner.

7.4 The Companies Act does not define the term "assets", but Digital Assets must fall within the scope of that term for the same reason they must fall within the s 2 definition of "property" – any other approach would defeat the intention of the Act.

Approach to converting the Digital Assets to fiat currency

7.5 Section 306 of the Companies Act provides:

(1) The amount of a claim must be ascertained as at the date and time of commencement of the liquidation.

(2) The amount of a claim based on a debt or liability denominated in a currency other than New Zealand currency must be converted into New Zealand currency at the rate of exchange on the date of commencement of the liquidation, or, if there is more than 1 rate of exchange on that date, at the average of those rates.

7.6 The Account Holders' claims to the Digital Assets (other than the NZDT tokens) are not denominated in New Zealand currency. Indeed, it is arguable whether they are denominated in any "currency" at all. However, it is clearly the intention of ss 253 and 306(2) of the Act that the assets of a company in liquidation should be realised and, where applicable, converted into New Zealand currency for the purpose of distribution. There is no reason why this requirement should not also

apply to the Digital Assets. Accordingly, it is submitted that the liquidators should convert the Digital Assets to New Zealand currency.

8. QUESTION 4: IF THE ANSWER TO QUESTION 2 IS YES, WHAT ARE THE TERMS OF THE TRUST(S)?

8.1 For the reasons set out above, it is submitted that no trust arises. Accordingly, counsel does not intend to make submissions on this question.

9. QUESTION 5: WHAT IS THE CONSEQUENCE OF THE LIQUIDATORS BEING UNABLE TO IDENTIFY ANY ACCOUNT HOLDER?

9.1 The fifth question is:

What is the consequence of the Applicant liquidators being unable to ascertain the identity of any Account Holder, and what consequences flow in relation to any Digital Assets associated with that Account:

specifically;

(i) Can the Applicant liquidators close any such Accounts and retain any Digital Assets as assets of the Company; or

(ii) Do any such Digital Assets fall to be dealt with pursuant to the Trustee Act 1956, or otherwise.

9.2 For the reasons set out above, the Digital Assets are assets of the Company. Accordingly, the liquidators are free to close accounts and retain the Digital Assets as assets of the Company, whether or not they can ascertain the identity of Account Holders, and the Trustee Act 1956 does not apply.

9.3 In the usual way, the liquidators may issue a notice fixing a certain date by which creditors of the company in liquidation must make

their claims.[94] Creditors who fail to make their claim by the date fixed in the notice may not benefit from any distribution made before their claim is made, unless the liquidator admits a late claim pursuant to s 304(3) of the Companies Act.[95]

9.4 Any surplus assets remaining following the satisfaction of creditor claims are able to be distributed to shareholders as surplus assets.[96] Consequently, in cases where the liquidators are unable to ascertain the identity of the Account Holders, it is submitted that the proceeds of any remaining Digital Assets must be:

(a) First distributed to any unsatisfied creditors; and then

(b) To the shareholders.

10. QUESTION 6: IF THE LIQUIDATORS RECOVER STOLEN DIGITAL ASSETS, HOW ARE THEY TO BE DEALT WITH?

10.1 The sixth question is:

If and to the extent that the Applicant liquidators recover stolen Digital Assets, then are such to be dealt with by the Applicant liquidators:

(i) in accordance with the determinations sought above;

(ii) pro rata according to the amounts recovered assessed against amounts stolen; or

(iii) as assets of the Company.

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[94] Companies Act 1993 Liquidation Regulations 1994, r 12(1).
[95] Regulation 13.
[96] Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand* (Thomson Reuters, Wellington, 2016) at 778, citing *Butler v Broadhead* [1975] Ch 97 (Ch) at 111.

10.2 By logical extension of the submissions made above, the Digital Assets that were stolen were assets of the Company and would remain assets of the Company if they were recovered. Accordingly, they should be dealt with by converting them into fiat currency and distributing them to creditors in the manner set out above.

Date: 4 December 2019

Signature:

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