IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2019-409-544

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 formerly 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 THE ACCOUNT HOLDERS

Dated: 13 January 2020

Next event:	Hearing
Date:	11–14 February 2020
Judicial officer:	Justice Gendall

Counsel appointed by the Court for certain account holders:
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MAY IT PLEASE THE COURT:

I INTRODUCTION AND SUMMARY

1. This application concerns the legal nature and status of cryptocurrencies, and of equitable interests in them, with an approximate value of NZ$170 million, held by Cryptopia Limited (In Liquidation) (**Cryptopia**).

2. Cryptopia operated as a cryptocurrency exchange, based in Christchurch, allowing account holders to buy, sell and otherwise deal with interests in approximately 900 cryptocurrencies. The cryptocurrencies, which were held by Cryptopia in a number of *"hot"* and *"cold"* wallets, are referred to as the **Digital Assets**.

3. Counsel represents the interests of certain account holders of Cryptopia (the **Account Holders**).[1] The contest to the Digital Assets is between the more than 800,000 Account Holders with a positive coin balance, Cryptopia's estimated 37 trade and other creditors (the **Creditors**), and its ninety shareholders.[2] There do not appear to be any employee creditors.[3]

4. The Account Holders' position in relation to the questions before the Court, somewhat simplified, is as follows:

   (a) The Digital Assets are *"property"* within the definition in s 2 of the Companies Act 1993;

   (b) All of the Digital Assets are held on express trust for the Account Holders and are unavailable for distribution in the liquidation of Cryptopia. There are separate express trusts, one for each cryptocurrency held by Cryptopia, the beneficiaries of which are the Account Holders with a holding in that particular cryptocurrency.

   (c) If, contrary to the Account Holders' submissions, the Court finds the Digital Assets are not *"property"*, or are not held on trust, the Digital

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1 As put in the Memorandum of counsel in support of interlocutory application without notice for orders appointing representation and directions as to service (1 October 2019) at [11(a)]: *"Parties that stand to benefit from the Court finding that the Digital Assets are property that is held on trust by the Company for Account Holders"*.

2 See Affidavit of David Ian Ruscoe (17 May 2019) at [12]–[15]; and Ruscoe-8 Nov at [38] and [63] [Ruscoe-8 Nov]. Mr Ruscoe's affidavit of 1 October 2019 stated there were 37 known creditors of the Cryptopia: See Affidavit of David Ian Ruscoe (1 October 2019) at [18(b)] and Exhibit DIR1 at 1 [Ruscoe-1 Oct].

3 See the list in Ruscoe-1 Oct, Exhibit DIR1 at 1.

Assets should be realised and distributed in the liquidation under pt 16 of the Companies Act. Account Holders' claims in the liquidation would rank alongside the claims of unsecured creditors;

(d) For every different type of cryptocurrency which Cryptopia acquired as a result of a dealing with or for an Account Holder, an express trust came into existence upon the first instance of such acquisition. The assets of such trust may have been subsequently varied by subsequent additions and subtractions of cryptocoins of the same currency;

(e) Under the trusts, Cryptopia's principal role was simply to hold the Digital Assets of the relevant type as trustee for the Account Holders of that type as a group, and to let individual Account Holders then increase or reduce their beneficial interest in the relevant trusts in accordance with the system Cryptopia had established for that purpose;

(f) If the Liquidators cannot identify certain Account Holders, then they should deal with the unclaimed trust funds in a way consistent with the Trustee Act 1956; and

(g) If the Liquidators recover stolen Digital Assets, the beneficial ownership of those assets should be allocated pro rata amongst those Account Holders who suffered from the relevant theft.

5. Each of these points is addressed in detail below.

II THE FACTUAL CONTEXT

The rise and fall of Cryptopia

6. Cryptopia was founded in July 2014 as a cryptocurrency exchange.[4] As an exchange, Cryptopia provided registered users — Account Holders — with a platform upon which they could trade a vast range of cryptocurrencies.[5] Cryptopia described itself internally as *"provid[ing] an auction house and*

[4] Ruscoe-8 Nov at [4]. Cryptopia was incorporated on 29 July 2014.
[5] Ruscoe-8 Nov at [4].

marketplace, several stable nodes on the network, and a support framework for each coin accepted on the site."[6]

7. By early 2017, Cryptopia's operations were fairly modest, having attracted some 30,000 users.[7] However, the number of users expanded exponentially from November 2017 as the price of Bitcoin, a popular cryptocurrency, more than trebled.[8]

8. In January 2019, Cryptopia was hacked, and somewhere between 9% and 14% of its cryptocurrency was stolen.[9] Cryptopia temporarily suspended its operations before resuming them in March 2019.[10] Not long afterwards, in May 2019, Cryptopia's shareholders resolved by special resolution to place Cryptopia into liquidation.[11]

9. Despite its unfortunate end, Cryptopia was in some respects remarkably successful:

   (a) In total, Cryptopia had more than 2 million registered accounts.[12] As at 18 October 2019, Cryptopia had 960,143 Account Holders with a positive coin balance. Of that number 104,186 are believed to be account holders with a *"deemed nil value"*,[13] while the balance comprises a substantial number of accounts of only modest value.[14]

   (b) The liquidators have estimated Cryptopia holds cryptocurrency worth NZ$170 million.[15]

   (c) Cryptopia's reach was global. New Zealand had the 26th largest number of account holders (9,475) in Cryptopia, with 230 other countries and territories identified as account holders by reference to IP addresses. There are problems with this method of identification

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6 Ruscoe-8 Nov, Exhibit DIR2 at 60 (Cryptopia Customer Service Analyst Manual v1).
7 Ruscoe-8 Nov at [5].
8 Ruscoe-8 Nov at [5].
9 Ruscoe-8 Nov at [6]. As to the amount of cryptocurrency stolen, compare the First Affidavit of David Ian Ruscoe (28 May 2019) at [23] [Ruscoe-28 May]; and the Affidavit of Timothy James Strahan Brocket (27 November 2019) at [19]–[22] [Brocket-27 Nov].
10 Ruscoe-28 May at [23]. See also Ruscoe-1 Oct at [18(a)].
11 Ruscoe-8 Nov at [6].
12 Ruscoe-8 Nov at [5]. Timothy Brocket, Cryptopia's Director of Finance and Administration, suggests there were *"approximately 2.3 million users"* as at August 2018: Brocket-27 Nov at [5].
13 Ruscoe-8 Nov at [38].
14 Ruscoe-8 Nov at [63]–[64].
15 Ruscoe-8 Nov at [7] and [37]–[38]. An earlier estimate valued the cryptocurrency at NZ$217 million as at 14 May 2019: see Ruscoe-1 Oct at [8].

but, notwithstanding any anomalies, Cryptopia was clearly operating a global business.[16]

(d) Cryptopia enabled Account Holders to trade approximately 900 cryptocoins, more than any other exchange in the world, although some 400 had been de-listed by Cryptopia and could not be traded at the time of liquidation.[17]

Advertising and promotion

10. One might expect, given the substantial increase in users from November 2017, that Cryptopia actively promoted its business. But that is not apparent from the available evidence, at least until it adopted a new marketing strategy in July 2018 (at which point its user numbers had already spiked).[18] The July 2018 marketing strategy is considered in more detail at paragraph 271 below.

11. Mr David Ruscoe, one of the Liquidators of Cryptopia, notes that *"Cryptopia marketed itself through channels like Google and TradeMe ads."*[19] Although Cryptopia appeared to promote itself through banner advertisements on its website, and through some event sponsorship, the majority of its marketing was through online social media channels.[20] It is not clear what contribution, if any, these adverts had on Cryptopia's rapid expansion.

12. Cryptopia's advertising and promotional material, and other communications (including by Twitter, Facebook and other online support) between Cryptopia and Account Holders, together or individually, could be relevant to the trust issues arising on this application. But there is a dearth of available evidence about those communications during Cryptopia's operating history.

13. It is submitted nonetheless that there is before the Court sufficient evidence to support the existence of trusts. But even if the Court were to find (in the absence of such material) that there was no trust, the Court should not

16 Ruscoe-8 Nov at [55]–[56].
17 Ruscoe-1 Oct at [6].
18 Third Affidavit of David Ian Ruscoe (13 January 2020) at [3]–[5] [Ruscoe-13 Jan 2020].
19 Ruscoe-8 Nov at [5].
20 Ruscoe-13 Jan 2020 at [3]–[5].

foreclose the possibility that one or more Account Holders might later produce such material in support of a trust over cryptocurrency.

Cryptopia's operations

14. The affidavits of Mr Ruscoe (sworn 1 October 2019, 8 November 2019, and 13 January 2020) and Timothy Brocket, Cryptopia's Director of Finance and Administration, offer some insight into Cryptopia's operations. Aspects of that evidence are highlighted below.

15. Cryptopia provided an online platform or exchange that allowed Account Holders to trade pairs of cryptocurrencies.[21]

16. Each Account Holder had a password-protected online account with Cryptopia.[22] Once an initial deposit was made to the exchange, the Account Holder's account listed a coin balance equivalent to the deposit.[23] The Account Holder would then be able to use the services offered by the exchange, including selling and buying cryptocurrency.

17. The cryptocurrency deposited with Cryptopia was not *"held"* in an Account Holder's account.[24] Instead, Cryptopia stored all cryptocurrency in digital wallets that it controlled; in effect, the cryptocurrency in the wallets backed the exchange.[25] That also meant Cryptopia was the legal (but not the beneficial) owner of the public and private keys — and that Cryptopia was recorded in the general ledger of ownership — for each coin supported on the exchange.[26]

18. In this way, Cryptopia essentially acted as a nominee company on behalf of the Account Holders, much like a share brokerage might.

19. As noted above, there were two types of wallets: hot and cold. The distinction between the hot and cold wallets turns upon the way in which the data in the wallets was stored:

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21 For how Account Holders would deposit cryptocurrency to the exchange, see Brocket-27 Nov at [8]–[9] and [11]; and Ruscoe-8 Nov at [22]–[23].
22 Ruscoe-8 Nov at [30].
23 Ruscoe-8 Nov at [24].
24 Ruscoe-13 Jan 2020 details the deposit process at [16].
25 Ruscoe-8 Nov at [25] and [31].
26 Ruscoe-8 Nov at [27] and [29]–[30].

(a) Cold wallets were held offline,[27] preventing them from being hacked (at least by outsiders).[28] It appears that 75% of the cryptocurrency held by Cryptopia (by volume) was stored in cold wallets.[29]

(b) Hot wallets were online, hosted on servers physically located in Phoenix, Arizona (and potentially at some point prior also in the Netherlands).[30] The balance of the cryptocurrency held by Cryptopia (i.e. 25% by volume) was located in hot wallets.

20. Whether a wallet was cold or hot (i.e. whether it was stored online or not) was not immutable. A wallet could be made hot by bringing it online, or cold by taking it offline.[31] Coins could also be transferred between wallets. For instance, a new user will have deposited a particular coin to a hot wallet but Cryptopia may have then transferred it to a cold wallet for safe keeping.[32]

21. Although Cryptopia had one hot wallet per cryptocurrency, it may have had multiple cold wallets for the same cryptocurrency.[33] Mr Ruscoe's evidence is that there were *"separate cold wallets for supposed company holdings and customer holdings of the same currency"*.[34] Cold wallets also appeared to serve a residual purpose of topping up hot wallets, depending upon the volume of withdrawal requests for a particular coin.[35]

22. From the Account Holders' perspective, it made no difference if cryptocurrency was held in hot or cold wallets. In fact, they may well have been unaware of this distinction. Each Account Holder was able to transfer cryptocurrency (as reflected in their coin balance) to a privately-held digital wallet, another Cryptopia account, or an account hosted on another exchange.[36]

23. Similarly, from the Account Holders' perspective, it made no difference if trades were made inside or outside Cryptopia's exchange. There was,

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27 Ruscoe-8 Nov at [13].
28 Ruscoe-8 Nov at [15].
29 Ruscoe-8 Nov at [12]–[13].
30 Ruscoe-8 Nov at [12]; and Ruscoe-13 Jan 2020 at [17].
31 Ruscoe-8 Nov at [15].
32 See Ruscoe-8 Nov at [22].
33 Ruscoe-8 Nov at [13]–[14].
34 Ruscoe-8 Nov at [13(b)].
35 Ruscoe-8 Nov at [14].
36 Brocket-27 Nov at [11].

however, a mechanical difference to those trades, resulting from how Cryptopia stored and managed the cryptocurrency traded on its platform:

(a) Trades within the exchange: a transfer of cryptocurrency between Account Holders (i.e. two users of Cryptopia) was effected by corresponding adjustments to the Account Holders' coin balances.[37] As Cryptopia held the underlying cryptocurrency, it did not need to make any changes to the wallets to effect the transaction. The transactions were recorded on Cryptopia's internal SQL database (or internal ledger of transactions).[38]

(b) Trades outside the exchange: as with an internal trade, a transaction to a wallet held outside the exchange involved an adjustment to the Account Holders' coin balance. However, Cryptopia would have to transfer cryptocurrency from a hot wallet to the recipient, who in turn would transfer cryptocurrency to another Cryptopia hot wallet.[39] That transaction would be recorded on the relevant cryptocurrency's public ledger.[40]

24. Cryptopia charged a fee for each trade, and also charged a withdrawal fee.[41] Cryptopia also charged various fees for services such as recovering cryptocurrency that had been accidently transferred to another user on the exchange.[42]

25. Cryptopia's Customer Service Analyst Manual, an internal document, outlined Cryptopia's own perspective on what Account Holders received from Cryptopia. The Manual explained that *"[e]xchange services like Cryptopia manage and maintain Wallets, and provide you with the functionality to send and receive transactions as well as securely hold the balances assigned to your account"*.[43]

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37 Ruscoe-8 Nov at [25]–[26].
38 Ruscoe-8 Nov at [27]–[28].
39 Cryptopia had the public and private keys for the digital wallets: Ruscoe-8 Nov at [30].
40 Ruscoe-8 Nov at [27].
41 Ruscoe-8 Nov at [31]. The liquidators have identified that Cryptopia owned 27 accounts, two of which have large coin balances: Ruscoe-8 Nov at [41]–[42]. See also Brocket-27 Nov at [15]–[16] and [18].
42 Brocket-27 Nov at [17].
43 Ruscoe-8 Nov, Exhibit DIR2 at 76 (Cryptopia Customer Service Analyst Manual v1).

Terms and conditions

26. The relationship between Cryptopia and the Account Holders was not well documented. The relevant documents available to the Court are:

    (a) Terms and Conditions *"up to August 2018"*.[44] There is no evidence about when precisely Cryptopia implemented these Terms and Conditions,[45] nor about how they were made available to users. The Liquidators have identified a cached version of the Terms and Conditions from January 2015 but have been unable to confirm if they existed prior to that point.[46] There is also no evidence about how many Account Holders joined Cryptopia while these Terms and Conditions were in effect.

    (b) Terms and Conditions dated 7 August 2018.[47] Cryptopia took advice from Minter Ellison before updating its earlier terms and conditions; the updated Terms and Conditions were subsequently emailed to its users.[48] The evidence of Timothy Brocket, Cryptopia's Director of Finance and Administration, is that *"there were no material changes to the way the business operated that resulted from the change to the terms and conditions in August 2018"*.[49] Mr Brocket's statement allows the inference to be drawn that the updated Terms and Conditions reflected Cryptopia's business practices at the time.

    (c) Privacy Policy (undated).[50] There is no evidence about when Cryptopia distributed the Privacy Policy to users, or how it did so. It is unclear if there were any earlier versions of the Privacy Policy.

    (d) Cryptopia Risk Statement dated 20 April 2018.[51] There is no evidence about when Cryptopia distributed the Risk Statement to

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44 Ruscoe-1 Oct, Exhibit DIR1 at 18.
45 See Brocket-27 Nov at [4]. Mr Brocket says the Terms and Conditions were in place when he began working for Cryptopia, which was on 1 July 2018 (see [1] of his Affidavit).
46 Ruscoe-13 Jan 2020 at [8]. Prior to January 2015, Cryptopia was operated as a *"hobby"*. The Liquidators do not currently have access to the personal email accounts used to conduct Cryptopia's business, precluding them from confirming whether the Terms and Conditions pre-dated January 2015.
47 Ruscoe-1 Oct, Exhibit DIR1 at 2.
48 Brocket-27 Nov at [4]–[5].
49 Brocket-27 Nov at [5].
50 Ruscoe-8 Nov, Exhibit DIR3 at 1.
51 Ruscoe-8 Nov, Exhibit DIR3 at 8.

users, or how it did so. It is unclear if there were any earlier versions of the Risk Statement.

27. The liquidators have not found any other written documents that they consider to be relevant to the relationship between Cryptopia and the Account Holders.[52]

28. There is no evidence from any of the Account Holders before the Court. However, certain inferences can be drawn from the evidence as to what an Account Holder could reasonably have expected from Cryptopia. At the very least, an Account Holder could have expected Cryptopia to securely store and safeguard cryptocurrency deposited with, and traded on, the exchange.

29. As the documents above have importance to the trust issue, they are addressed in detail below.

III THE APPLICABLE LAW

30. Counsel for the Creditors has observed that the factual matrix touches a number of jurisdictions. Nonetheless, Counsel has submitted that the law applicable to each of the issues in this case is New Zealand law.

31. Counsel for the Account Holders agrees that New Zealand law applies to the relevant legal issues, although not necessarily for the same reasons. Owing to the importance and novelty of this case, these Submissions also address the applicable law.

Analytical approach

32. It is well-established that there is a three-stage process to identify the applicable law:[53]

    (a) First, one must characterise the issue(s) before the Court. The *"issue"* is the precise issue for determination by the Court; it is not

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[52] Ruscoe-8 Nov at [16].

[53] *MacMillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387 (CA) at 391–392 per Staughton LJ, 407 per Auld LJ and 417–418 per Aldous LJ. See also *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825 at [26]–[29] per Mance LJ; and *Schumacher v Summergrove Estates Ltd* [2014] NZCA 412, [2014] 3 NZLR 599 at [32] and [35]–[36].

something more general, such as the cause of action.[54] This stage is essential, as it sets the course of the analysis for the second and third stages.[55]

(b) Second, one must identify the conflict of law rule that provides the connecting factor for the issue in question. The rule will substantially follow from the issue characterised at the first stage of this process.

(c) Third, by applying the appropriate conflict of law rule to the relevant legal issue, one can discern the applicable legal system.

33. Each stage will be determined by the *lex fori* (or law of the forum).[56]

34. The three-stage process should not be applied prescriptively or mechanically. In *MacMillan Inc v Bishopsgate Investment Trust Plc (No 3)*, Staughton LJ explained that *"if at all possible the rules of conflict should be simple and easy to apply"* and that *"[w]e must do our best to arrive at a sensible and practical result."*[57] Similarly, in *Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC*, Mance LJ explained:[58]

> The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the appropriate law. A mechanistic application, without regard to the consequence, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognized accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law.

35. His Lordship's counsel is apposite here. New Zealand's conflict of laws jurisprudence is not well developed and there is also little Commonwealth authority on the property and trust issues in this case. The novelty of cryptocurrency as an asset class adds to these challenges.

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54 *MacMillan*, above n 53, at 399 per Staughton LJ.
55 At 417 per Aldous LJ.
56 At 392 per Staughton LJ and 407 per Auld LJ. It may not always be that the *lex fori* determines each stage but, in the present case, neither the Account Holders nor the Creditors suggest otherwise.
57 At 392 per Staughton LJ.
58 *Five Star Trading LLC*, above n 53, at [27].

Application

36. There are two main issues that require characterisation, flowing from the first two issues arising on this application:

    (a) Whether the Digital Assets have the indicia of property and can form the subject matter of a trust (nature of, and priority to, property); and

    (b) Whether Cryptopia settled a trust over the Digital Assets in favour of the Account Holders (effect and construction of a trust).

37. The Account Holders and the Creditors agree that the first issue concerns property. Although the Creditors appear to suggest the second issue is contractual, the analysis below shows that the trust and contract analyses are the same.

The property issue

38. The conflict of law rule for issues concerning property is the *lex situs*, the legal system of the place where the property is located.[59] Although initially developed for immovable property, the *lex situs* also applies to movable property (both tangible and intangible).[60]

39. For the purposes of the conflict of laws, property is principally classified as either movable or immovable (with movable property further classified as tangible or intangible). Whether something is *"in its nature a movable or an immovable … is manifestly a matter quite independent of any legal rule"*.[61] The distinction is drawn between *"different kinds of things"*.[62] Classifying intangible property — such as a chose in action — in this way is problematic, as it has no physical existence. But, as *Dicey, Morris and Collins* explains, *"it is common practice to classify all things as being movable or immovable … , and to include intangible things in movables,*

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59 See The LawTech Delivery Panel UK Jurisdiction Taskforce *Legal statement on cryptoassets and smart contracts* (November 2019) (available at https://technation.io/news/uk-takes-significant-step-in-legal-certainty-for-smart-contracts-and-cryptocurrencies/) at [92] [*Legal statement on cryptoassets*].

60 *MacMillan*, above n 53, at 410 per Auld LJ.

61 Lord Collins (ed) *Dicey, Morris and Collins on The Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at [22-002]. The common law distinction between realty and personalty is not co-extensive with the distinction between movable and immovable.

62 At [22-006]. The law of the country where the property is situated may provide that something movable by nature is to be treated as immovable for a particular purpose (and vice versa). Dicey, Morris and Collins give the example of a title deed to land, which is plainly movable, but which is treated as real estate and therefore considered to be immovable under English law.

and even to ascribe an artificial situs *to intangible things in order to bring them within the scope of rules of law expressed in terms of* situs.*"*[63] That approach makes it appropriate to treat cryptocurrencies and the rights pertaining to them as movable, even though they are intangible.

40. The *lex situs* rule has two justifications. First, the location of tangible property is easy to identify. Third parties dealing with property might reasonably suppose that the legal system where the asset is located governs issues relating to that property. Second, countries have control over property within their borders and judgments that conflict with local legal systems are usually ineffective.[64]

41. Those justifications are less salient for intangible property, which has no physical place or location.[65] But sometimes complex principles have been developed to ascribe a place to such property. For instance, the *lex situs* of shares is the place of the company's incorporation (or possibly the place of the share register, if these are different).[66] Separate rules exist to determine the *lex situs* of other types of intangible property, such as debts.

42. There is no established conflict of laws rule for issues concerning cryptocurrency. However, there is no trouble classifying cryptocurrency as intangible property.[67] The intangible property in the cryptocurrency is the bundle of rights exercisable in relation to the cryptocurrency, the most important of which is *"a claim or legitimate expectation to be associated with and have the power to engage in transactions in relation to particular units of cryptocurrency within the system"*.[68] In the present case, the issues do not concern users within a cryptocurrency system. Rather, it is about the *"law applicable to the proprietary effects outside a cryptocurrency*

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63 At [22-010].
64 See *Legal statement on cryptoassets*, above n 59, at [93].
65 At [94]; and Financial Markets Law Committee *Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty* (March 2018) at [4.2].
66 *MacMillan*, above n 53, at 405 per Staughton LJ, 411 per Auld LJ and 424 per Alduous LJ.
67 The argument analysed below that there are only two types of property known to law is not relevant to the conflict of laws context, which adopts its own terminology with respect to property. That makes good sense, as an internationalist view ought to be taken to such issues, given the diverse range of property rights that exist across the world's legal systems.
68 Andrew Dickinson "Cryptocurrencies and the Conflict of Laws" in David Fox and Sarah Green (eds) *Cryptocurrencies in Public and Private Law* (Oxford University Press, Oxford, 2010) at [5.100].

system of transactions whose subject matter is, or includes, cryptocurrency".[69]

43. As with other intangible property, the *lex situs* rule appears to be applicable to cryptocurrency.[70] However, meaningfully identifying the *lex situs* of intangible property comprising a decentralised ledger held on a network of computers that has no particular territorial connection is impossible or, at least, involves artifice. Accordingly, cryptocurrency presents challenges for the conflict of laws. Conflicts rules generally seek to identify the territory with which a particular thing has the most real and substantial connection.[71] But, as Professor Dickinson notes, cryptocurrencies present two problems to rules focused upon territory. First, they use *"self-executing protocols and distributed ledger technology"* and depend upon *"non-binding user consensus and self-executing computer algorithms"*; and second, many users of cryptocurrency systems will be anonymous.[72] There is also the additional problem that data, and the infrastructure creating and supporting that data, can be located anywhere in the world. And there need not be any particular reason as to why that location has been chosen.

44. The LawTech Delivery Panel's *"Legal statement on cryptoassets and smart contracts"* opines that normal conflict rules should not apply at all.[73] Their view is that legislation should address this matter. However, they did put forward a number of relevant factors for determining the applicable law (as outlined in the submissions of the Creditors).

45. In March 2018, the Financial Markets Law Committee (a United Kingdom registered charity) published a paper entitled *"Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty"*. Conscious of the difficulties with applying the *lex situs* to cryptocurrencies, the Committee proposed a number of possible connecting factors.[74] Of the

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69 At [5.93].
70 At [5.97].
71 At [5.08].
72 At [5.08].
73 See *Legal statement on cryptoassets*, above n 59, at [97]–[98].
74 Financial Markets Law Committee *Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty* (March 2018) at [6.2] (available at http://fmlc.org/wp-content/uploads/2018/05/dlt_paper.pdf).

available options, the Committee preferred the *"Elective Situs"*,[75] the legal system selected by the system participants.

46. Determining the law applicable to every cryptocurrency held by Cryptopia at the time of the liquidation would involve some 500 inquiries. Moreover, there is no evidence about the characteristics of each cryptocurrency's system. Acquiring this evidence, and scrutinising each system, would be very complex and time consuming.

47. In the circumstances, the best the Court can do is observe that the dispute concerns the proprietary effects of the Digital Assets in relation to a New Zealand company in liquidation. The disputes are not between participants of a particular system; it is in truth between the Account Holders, Creditors and shareholders of a cryptocurrency exchange.

48. In the circumstances, and to achieve a practical and workable solution, it is clear that the connecting factors to the property issues point to the law of New Zealand as the applicable legal system:

    (a) Cryptopia is a New Zealand company, operated from Christchurch since 2014. Its directors and staff were in New Zealand, including its customer support team. Cryptopia managed the cryptocurrencies from New Zealand. It was Cryptopia who managed all enquiries and concerns about cryptocurrency held by it on behalf of Account Holders.

    (b) Cryptopia created and managed the database for the Account Holders in New Zealand, which recorded the coins (and volumes) attributable to each Account Holder.

    (c) Cryptopia had some off-chain assets in New Zealand (fiat currency), which were used to support the NZDT cryptocurrency. That does not imply that *all* cryptocurrencies should be governed by New Zealand law, of course. But it does demonstrate the strength of the connection to New Zealand, as NZDT was a much-used way for an Account Holder to withdraw from or deposit into the exchange.

[75] At [6.4]–[6.8] and [7.3].

(d) Data was stored in New Zealand and the United States (Arizona). The bulk of Cryptopia's cryptocurrency data (by volume) was stored in Christchurch in cold wallets. Cryptopia managed control of the data stored in Arizona from Christchurch. The place where the data was stored does not itself indicate any connection to a particular territory, as that location may be accidental or inconsequential.[76] For instance, no other connection exists with Arizona.

(e) Cryptopia's terms and conditions expressly referred to New Zealand law and jurisdiction. Clause 18.4 of the Terms and Conditions (7 August 2018) provided: *"You agree to use our service in accordance with the law in New Zealand and the applicable law in your jurisdiction."* That clause is unhappily worded but emphasises a connection with New Zealand. The original Terms and Conditions, under the heading *"Jurisdiction and Governing Law"*, provided that: *"These terms of use and any matters or disputes connected with this site will be governed by New Zealand laws and will be dealt with in New Zealand courts."* This clause again emphasises a clear connection to the New Zealand legal system.

49. These connecting factors go to the exchange (Cryptopia), rather than the underlying assets themselves. An exchange will usually have a physical location and staff, and so many of the factors identified above will lead to the law of the place of the exchange being the applicable law. That approach is defensible here. It ensures a single legal system applies to the assets owned by the exchange. The location of the exchange is well-known and easily capable of identification. The exchange will possess the private and public keys that allow it to trade the cryptocurrencies. Important matters, such as enforcement and priority in insolvency, will generally be determined in that place.

50. The only obvious alternative approach would be to use the law of each Account Holder's place of residence or domicile. That would be unwieldy and arbitrary, even if it were possible to identify each Account Holder's residence or domicile.

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[76] Prior to 2018, Cryptopia also had servers located in Amsterdam: Ruscoe-13 Jan 2020 at [17].

51. In conclusion, New Zealand law is applicable to the first issue. It is the system with the closest connection to the proprietary issues that the Court has to consider.

The trust issues

52. The second main issue concerns the existence and terms of the trust between Cryptopia as founding settlor and trustee, and the Account Holders as beneficiaries, over the Digital Assets.

53. The conflict of laws rules relating to trusts are poorly developed and authority is sparse.[77] Many countries, including Australia and the United Kingdom, dealt with this by enacting legislation giving effect to the Hague Convention on the Law Applicable to Trusts and on their Recognition.[78] New Zealand has not done so, and so the common law principles still apply.

54. The conflict of laws rule for trusts is the *"proper law of the trust"*. It is generally accepted that the proper law of the trust is determined in the same way as the proper law of the contract (which has a more developed jurisprudence). *Garrow and Kelly Law of Trusts and Trustees* support that position.[79] As does the High Court of Australia. In *Augustus v Permanent Trustee Co (Canberra) Ltd*, a decision prior to the Hague Convention, Walsh J wrote the following about the law applicable to a voluntary settlement in a trust deed:[80]

> It has not been disputed by any of the parties to the appeal that the general rules established in relation to contracts are applicable in deciding questions of the choice of law in relation to such voluntary settlements as that which is contained in the deed. In my opinion, those rules are applicable. That means that, subject to qualifications to which some reference will be made later herein, it was open to the parties to make their own choice of law. If they have expressed their intention on that matter, effect will be given to it: see *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277, at p 290. If they have not expressed an intention, the law to be applied must be ascertained as "a matter of implication to be derived from all the circumstances of the transaction": see *Bonython v The*

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77 See *Dicey, Morris and Collins*, above n 61, at [29-002].

78 Paul Torremans (ed) *Cheshire, North & Fawcett Private International Law* (15th ed, Oxford University Press, Oxford, 2017) at 1382; and JD Heydon and MJ Leeming *Jacobs' Law of Trusts in Australia* (8th ed, LexisNexis, Chatswood, 2016) at [28.06].

79 Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at 915. See also *Re Pilkington's Will Trusts* [1937] 3 All ER 213 (Ch) at 218.

80 *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245 at 252 per Walsh J.

Commonwealth (1951) AC 201, at p 221.

55. As with identifying the *"proper law of the contract"*,[81] the Court must determine whether the founding settlor intended for a particular legal system to apply.[82] This intention may be express or implied. If the settlor did not make such a choice,[83] the legal system with which the trust has the greatest connection will apply.

56. Applying the same approach means there is no consequence to adopting the proper law of the trust or the proper law of the contract (as Counsel for the Creditors did). Further, identifying the proper law of the trust involves a similar exercise to that required by the Hague Convention and both may lead to the same conclusion.[84]

57. The factors identified above at para 48 lead to the conclusion that the proper law of the trusts is the law of New Zealand.

58. It is unclear if there was an express choice of law. The clauses in the pre-August 2018 Terms and Conditions and the 7 August 2018 Terms and Conditions identify New Zealand law but only as applicable in connection with the use of Cryptopia's site or services. It is unnecessary to consider that point further, as the choice of New Zealand law can be implied from the Terms and Conditions and surrounding circumstances.

59. Second, even if there was no implied choice of law, the factors identified above clearly demonstrate that New Zealand law has the closest connection to the issues concerning the trusts.

60. The other potential candidates — Arizona or the legal systems connected to each Account Holder — can be rejected for the reasons given above. Therefore, New Zealand law applies to each of the issues in this case.

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81 *Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* [1939] AC 277 (PC) at 289–290. See also *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50 (HL) at 60 and 65.

82 *Garrow and Kelly Law of Trusts and Trustees*, above n 79, at 915.

83 *Dicey, Morris and Collins*, above n 61, note that *"[a]lthough there is no express English decision to this effect, there is no doubt that the settlor was able at common law to select the governing law of a trust"* (at [29-018]).

84 *Chellaram v Chellaram (No 2)* [2002] EWHC 632, [2002] 3 All ER 17 at [166]; and *Manoogian v Sonsino* [2002] EWHC 1304 (Ch) at [3].

IV CRYPTOCURRENCIES AS PROPERTY AND/OR THE SUBJECT MATTER OF TRUSTS

A THE QUESTIONS BEFORE THE COURT AND THE BASIC ANSWERS

61. This Section of these submissions addresses the first question posed for the Court in paragraph 1(a) of the Originating Application of 1 October 2019 and part of the second question in paragraph 1(b) of that Application, those questions being:

    (a) Whether any or all of the Digital Assets held by the Liquidators of Cryptopia constitute *"property"*, as defined in s 2 of the Companies Act 1993 (the **1993 Act**); and

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

62. The definition of *"property"* in s 2 of the 1993 Act is 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.

63. In agreement with the Creditors' Submissions (CS at [1.3(a)]), the Account Holders accept that the cryptocurrencies would prima facie be captured by the definition in s 2 of the 1993 Act. It would not follow, however, that the Digital Assets are property *"of the company"* within such provisions as ss 248, 251, and 252 of the 1993 Act, and it is submitted that the Digital Assets are not property of the company within those provisions.

64. Contrary to the Creditors' Submissions (CS at [1.3(b)]), it is also the submission of the Account Holders that, whether or not cryptocurrencies are property within the s 2 definition, the Digital Assets are assets that are suitable subject-matter for a trust. If in fact there is one or more trusts on the facts of this case, it would follow that the Digital Assets would not be available to meet the non-trust related debts and other obligations of Cryptopia. Consideration of the question whether one or more trusts exists on the facts of this case is deferred to Section V of these submissions.

65. The remaining parts of this Section elaborate on the above submissions.

B THE STATUS OF TRUSTS IN INSOLVENCY

66. The Creditors' Submissions do not address the status of trust property in the liquidation of a company-trustee. Those Submissions simply argue that there is no trust. It is necessary, however, for the Account Holders to address the question.

67. The thrust of the submissions for the Account Holders on this point is that while the definition of *"property"* in s 2 of the 1993 Act is very broad and does embrace cryptocurrencies, the superior claim of the Account Holders to the Digital Assets over the unsecured creditors of Cryptopia does not turn on that definition of *"property"*, but on the common law.[85]

68. At common law where a person, be it a natural person or a legal person, holds assets on trust and becomes subject to a formal insolvency procedure, the appointee in insolvency to that person's assets (whether official assignee, liquidator or administrator) must recognise the rights of the beneficiaries of the trust in any trust assets in the control of the appointee. The appointee, not being a bona fide purchaser for value of the trust assets, is in no better position than any other volunteer who attempts to deny the beneficiaries' equitable interest in the trust assets.

69. In relation to insolvency officials, the foregoing has been the general position in the common law since the time of the Bankruptcy Act 1623 (21 James I c19). A good statement of the general position is found in Lord Hardwicke LC's judgment in *Ex parte Dumas*:[86]

> The principal view I do admit under all commissions of bankrupts is, to put creditors as near as may be on a level, but that must be done only with regard to the bankrupt's own estate, for if the matters in question are not relative to his estate in law or equity, especially in equity, the court will be of opinion that the persons who have either the legal interest in anything, or a chose in action, which is an equitable interest, shall be intitled to it, and assignees in these cases must stand exactly in the same situation with the bankrupt himself, or otherwise commissions of bankruptcy would be an intolerable grievance.

70. This became part of New Zealand law on 14 January 1840.[87] In relation to the bankruptcy of individuals, the position has been confirmed by statute

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85 In these submissions *"common law"* refers to the rules of Common Law and of Equity together. Where capitals are used, the separate branches of the common law are intended.
86 *Ex parte Dumas* (1754) 1 Atk 232 at 233–234, 26 ER 149 at 150.
87 See English Laws Act 1858, s 1; now replaced by Imperial Laws Application Act 1988, s 5.

(Insolvency Act 2006, s 104), but in respect of company liquidations the issue is still founded in common law principle.[88] The same position was recently confirmed by the High Court of Australia in *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth*:[89]

> Although a trustee is personally liable to creditors, it has been established for centuries in bankruptcy law that rights held by a bankrupt on trust do not generally form part of the bankrupt's estate that is available for general distribution amongst creditors. In this respect, the common law courts took notice of a trust. Despite Australian bankruptcy legislation having adopted a broad definition of "property", it also expressly adopted this principle by excluding from the property divisible among creditors all property held by the bankrupt on trust for another person.
>
> The Corporations Act contains a similarly broad definition of "property" to the bankruptcy legislation but it does not contain an equivalent express exclusion of property held by a company on trust for another person. However, the same "elementary, and fundamental" principle that generally precludes distribution of trust property from distribution among creditors has been consistently applied in Australia to trustee companies. It has been said that, as a general proposition, it would be "extraordinary, in the context of insolvency law, if 'property of the company' included property of which it was a trustee and in which it had no beneficial interest". Hence, as the Court of Appeal correctly observed, the exclusion of property held on trust from the property of a trustee, while express in bankruptcy, applies "by undisputed analogy in the case of corporations".

71. As a result of the foregoing legal position, it is reiterated that trust property is not property *"of the company"* within provisions such as ss 248, 251, and 252 of the 1993 Act.[90] Because none of these provisions is directly at issue in these proceedings, it is not proposed to elaborate here on this point.

72. Importantly, however, the right of trust beneficiaries to stand outside a bankruptcy or liquidation is subject to any rights of indemnity the trustee may have in respect of debts and other expenses properly incurred by the trustee in administering the trust.[91] The existence and scope of these rights in relation to Cryptopia, including the extent to which the presumptive

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88 For examples of the principle's routine acceptance, see *Levin v Ikiua* [2010] 1 NZLR 400 (HC) at [85] (affirmed on appeal on other points: *Levin v Ikiua* [2010] NZCA 509, [2011] 1 NZLR 678); and *Finnigan v Yuan Fu Capital Markets Ltd (in liq)* [2013] NZHC 2899 at [46].

89 *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20 at [25]–[26] (footnotes omitted).

90 See *Metropolitan Life Assurance Co of NZ Ltd v Essere Print Ltd* [1991] 3 NZLR 170 (CA) at 173 line 6 per Cooke P and lines 42–45 per Hardie Boys J; *Anzani Investments Ltd v Official Assignee* [2008] NZCA 144 at [23]; *Levin v Ikiua* (HC), above n 88, at [86]; *Levin v Ikiua* (CA), above n 88, at [54]; *Wiley v Commonwealth of Australia* (1996) 136 ALR 527 (Full Fed Ct); *Re ELS Ltd* [1995] Ch 11 at 26; *Carter Holt*, above n 89, at [26]. Cf *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 at [55].

91 See *Levin v Ikiua*, above n 88, at [112].

position may have been modified by contract between the parties (it is clear enough that each Account Holder will have given consideration for the services provided by Cryptopia), is not the subject of the present Application. A finding that cryptocurrencies were not property or that the Account Holders were not owed trust obligations by Cryptopia would short-circuit questions as to rights of indemnity, but it is submitted that to make either such finding would be contrary both to the law and facts in the present case.

C THE SCOPE OF THE SUBJECT-MATTER OF TRUSTS AND PROPERTY

Overview

73. This part of Section IV is largely concerned with the ambit of the concept of property and of the subject-matter of trusts at common law.

74. The Creditors have submitted (CS at [5.1]–[5.11]) that cryptocurrencies are not property capable of forming the subject-matter of a trust at common law.

75. Contrary to the Creditors' Submissions, it is submitted that it should be straightforward for the Court to find that cryptocurrencies are in general a species of intangible personal property, and capable of being the subject-matter of a trust.

76. However, given the Creditors' opposition, and the fact that the status of cryptocurrencies as property has attracted a very great deal of attention around the common law world without yet receiving a definitive judicial analysis, full submissions are being made on the issue.

77. There is no doubt that a finding that cryptocurrencies are a form of property will carry wide implications, beyond their status in insolvency. At the same time, the implications need not all be worked out in these proceedings, since the rules that attend something being a form of property are not uniform to all species of property.

78. A finding that cryptocurrencies were *not* property would have equally wide implications. It is submitted that the legal position respecting cryptocurrencies would immediately be very much less clear if established property-law thinking were not available to be drawn upon in answering the

questions that will inevitably arise with such assets. Brief elaboration of this is given in paras 83–88 below.

79. It will be demonstrated in this Section that cryptocurrencies in general meet the standard criteria for recognition as property. It will also be shown that neither the theoretical difficulties that have been raised about their status as property, nor potential public-policy objections, stand in the way of that recognition.

80. The two roadblocks that are most commonly raised as to the property status of cryptocurrencies are: (a) the common law recognises only two classes of personal property, tangibles and choses-in-action, with cryptocurrencies being said to be neither; and (b) information is not generally recognised as a form of property, and cryptocurrencies might be said to be a form of information. The first of these is a red-herring, since the cases perceived to be problematic are not about the limits of what can be recognised as property, but simply about the numbers of categories of property one needs. As to the second, cryptocurrencies are much more than simple pieces of information. More detail on these points is given below (from para 157).

81. The Creditors' Submissions place heavy reliance on a third supposed roadblock, namely that *"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. 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"* (CS at [5.5]–[5.6]). With respect, this too is a red-herring, and can be readily dismissed now.

82. The Creditors' Submissions are not only based on a false assumption, they also confuse the subject-matter of property with the means of realising its value. In particular:

    (a) Cryptocoins are just as transferable in their *unaltered* form as a debt or other chose-in-action is, which is a species of property recognised by the law. At Equity, an ordinary chose-in-action can be assigned orally or by other objective evidence of an intent to assign. Cryptocurrency can be assigned in the same way, at least once the

assignor surrenders to the assignee the details of the existing private key for the relevant currency. Transfer of cryptocurrency by an existing owner to a trustee could be effected similarly. An outright disposition would not be needed; and

(b) The fact that an item of property can cease to exist in the process of its value being realised does not entail that it is not a species of property before that realisation. For example, ordinary choses-in-action are destroyed in their realisation, usually by voluntary payment by the debtor or a court order for payment. Nor is there anything in the fact that a putative item of property, in ceasing to exist, becomes replaced by a substitute. As explained further below, transfers of money through bank accounts result in diminution in one right (the payer's against its bank) and accretion in a different right (the payee's against its bank).[92] It was also expressly held in *Re Celtic Extraction Ltd* that a waste disposal licence was a species of property even where the process of transferring the licence involved the surrender of the existing right and the grant of a replacement exemption in favour of the transferee.[93]

The implications of the Creditors' submission that cryptocurrencies are not a form of property at common law

83. Before proceeding to general principle, it is useful to test with hypotheticals the implications of the Creditors' submissions that cryptocurrencies are not property capable of being the subject-matter of a trust.

84. Assume Alice owns bitcoin with a market value of $100,000. She dies with the bitcoin as her only asset. Her will leaves the bitcoin on trust for her twin nephews in equal shares to vest upon their reaching 20 years of age (they are currently 15). The private keys to this bitcoin are written in a sealed letter left for the executor, Bob.

85. Is this will effective, or does Alice leave an assetless estate, on the Creditors' submission? There is a definition of *"property"* in s 8 of the Wills Act 2007, but it is almost entirely circular and is nothing like as broad in its

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92 The same point applies to tracing misapplied funds through bank accounts.
93 *Re Celtic Extraction Ltd* [2001] Ch 475 (CA) at [33].

express language as the one in s 2 of the 1993 Act. There is no indication that the 2007 Act was intended to broaden the sort of property that can be bequeathed by will at common law. The Wills Act is also not a code of the law of testate succession, so issues of the property status of cryptocurrencies could arise at common law.[94]

86. Is the trust in favour of the nephews a valid trust? If not, is it only fiduciary duties, but not trust law, that might prevent Bob from just cashing in the bitcoins for himself? What if Bob arranges for the bitcoin to be transferred to his spouse, Carol, who is completely ignorant of from where Bob got the coin. She *is* a volunteer, but the common law, in general, has no objection to a gift unless it involves the misappropriation of someone else's *property*.

87. Take another issue, relevant to the present fact pattern. The Creditors are content for cryptocoins to be property for the purposes of the liquidation provisions of the 1993 Act (CS at [4.1]–[4.14]), but what will be the position if the Liquidators wish to pursue the parties that hacked Cryptopia's exchange, and find that at common law they cannot submit that property was misappropriated?

88. Any suggestion that these private law problems, and others, might be addressed with a doctrine of unjust enrichment, should be rejected. It has recently been affirmed that property law is itself a central part of the law of restitution. So, in *Investment Trust Companies v Revenue and Customs Commissioners*, Lord Reed stated:[95]

> Where, on the other hand, the defendant has not received a benefit directly from the claimant, no question of agency arises, and the benefit does not consist of *property* in which the claimant has or can trace an interest, it is generally difficult to maintain that the defendant has been enriched at the claimant's expense.

The general resourcefulness of the law of trusts

89. The case law involving cryptocurrencies that has so far appeared around the Commonwealth has not decisively determined that cryptocoins are property, or an asset that can form the subject-matter of a trust. These issues have arisen, but the status of cryptocoins as property or as the

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94 As to intestate succession, the *"estate"* available comprises only *"real and personal property of every kind, including things in action"*: see the definition in s 2 of the Administration Act 1969.

95 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 at [51] (emphasis added).

subject-matter of trusts has largely been conceded by the parties to the litigation. The relevant cases are discussed below (at paras 113–119).

90. It will also be shown below (at paras 109–110 and 164–167) that there is now authority that supports, in some circumstances, computer data being treated by a Common Law court, and not just Equity, as a species of property. But given that Equity will in any event provide remedies in aid of Common Law ownership rights it is not necessary for the Account Holders to rely on any Common Law cause of action.[96] Furthermore, on the facts, the Account Holders did not invest directly in the Assets but through Cryptopia as trustee, so it is the rules of Equity that are paramount.

91. It is clear, it is submitted, that Equity has taken a very generous approach to determining what can form the subject-matter of a trust. Equity has long recognised a much wider range of assets as *"property"* than the Common Law has.[97] Moreover, to the extent that the concept of *"an asset"* is broader than the concept of *"property"*, it is submitted that the certainty of subject-matter required for a valid trust is met by the trustee holding an asset. This is one explanation[98] for why Equity has recognised that a trust can be created not only over choses-in-action but also over non-assignable choses,[99] which might otherwise not be regarded as *"property"*. To the extent that the Creditors' Submissions imply that transferability is an essential element of property, or at least of an asset capable of being made subject to a trust (see CS at [5.4]), it is respectfully suggested the Submissions are wrong.

92. Equity, unlike the Common Law (outside statute law), has had no difficulty in conceiving of proprietary interests in intangible assets. By *"proprietary"* it is meant rights that bind third parties who might wish to assert inconsistent rights over the assets. One distinguished commentator, Professor Nolan, has referred to *"the immense flexibility of trusts"* and *"the*

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96 See *John v Dodwell & Co Ltd* [1918] AC 563 (PC) at 569–570.

97 See *Yanner v Eaton* [1999] HCA 53, (1999) 201 CLR 351 at [85] per Gummow J: *"Property need not necessarily be susceptible of transfer. A common law debt, albeit not assignable, was nonetheless property. Equity brings particular sophistications to the subject."*

98 See *Zim Properties Ltd v Procter* (1984) 58 Tax Cases 371 (Ch) (*"assets"* a wider concept than *"property"* because embraces non-assignable choses in action).

99 See the examples cited in L Tucker, N Le Poidevin and J Brightwell *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2014) at [2-034]; and *Don King Productions Inc v Warren* [2000] Ch 291; and *Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd* [2002] 1 WLR 1150 (Ch), referred to below.

number and variety of equitable rights that may be created under a trust and have proprietary effect."[100]

93. Novelty is no bar to Equity's ability to recognise something as capable of being the subject of equitable proprietary rights. This was the message of the well-known dictum of Lord Shaw of Dumferline in *Lord Strathcona SS Co Ltd v Dominion Coal Co*, even if the examples his Lordship gave were fairly prosaic:[101]

> The scope of the trusts recognized in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land.

94. As far back as 1770, Lord Mansfield in *Nightingal v Devisme* held that stock in the East India Company was not a type of money, but said of the concept of share stock: *"This is a new species of property, arisen within the compass of a few years"*.[102] His Lordship also recognised that some form of action would be available for its wrongful disposition. The fact that the law must from time to time accord recognition to new examples of property cannot be doubted. That fact is implicit in the decision of the Supreme Court in *Dixon v R* (discussed below),[103] and is explicit in the judgment of the Court of Appeal in that case.[104]

95. Equity has not only been much more inventive than the Common Law in recognising what counts as an asset or property, but it also has been more inventive in the types of right that it recognises can exist in relation to property, whether tangible or intangible. The trust is the most prominent type of equitable right, but others include the concept of the sub-trust (an equitable interest in a trust), a right arising under an assignment of intangible property, the charge, the equitable lien, and mere equities (which vary according to type). These interests, other than some types of mere equity, are calculated to bind liquidators and other insolvency officials.

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[100] R Nolan "Equitable Property" (2006) 122 LQR 232 at 233.
[101] *Lord Strathcona SS Co Ltd v Dominion Coal Co* [1926] AC 108 (HL) at 125.
[102] *Nightingal v Devisme* (1770) 5 Burr 2589 at 2592, 98 ER 361 at 363.
[103] *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678.
[104] *Dixon v R* [2014] NZCA 329, [2014] 3 NZLR 504 at [35]. See also *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279 as cited in the Creditors' Submissions (CS at [4.5]).

96. The leading English textbook on trusts, *Lewin on Trusts*, states the following (text of footnotes omitted):[105]

> The general rule is that all property, real or personal, legal or equitable, may be made the subject of a trust provided that neither the policy of the law nor any statute prevents the settlor from parting with the beneficial interest in favour of the intended beneficiary.

The criteria in *National Provincial Bank Ltd v Ainsworth*

97. While there is no definitive judicially-sanctioned set of criteria for determining whether Equity will recognise a putative asset as capable of forming the subject-matter of a trust, it is common when considering new forms of property to refer to the following dictum of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*:[106]

> Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

98. This remains a powerful, if somewhat elliptical, set of indicators and has been applied by other courts when considering novel candidates for categorisation as property.[107] A terse paraphrase was given by Mummery LJ in *Fairstar Heavy Transport NV v Adkins*, in the context of concluding that it was unnecessary to decide if a principal owned an agent's work-emails, as follows: *"having regard to the criteria of certainty, exclusivity, control and assignability that normally characterise property rights and distinguish them from personal rights."*[108]

99. A few high-level points about each of the four elements of Lord Wilberforce's formula need to be made at this point, each of which will then be addressed in more detail when the submissions turn below to the application of the formula to cryptocurrencies:

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[105] *Lewin on Trusts*, above n 99, at [2-034].
[106] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247–1248.
[107] See *Commonwealth of Australia v Western Mining Corp Ltd* [1996] FCA 1372 at [25], reversed on other points in (1998) 194 CLR 1; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156 at [50]; *B2C2 Ltd v Quione Pte Ltd* [2019] SGHC(I) 03 at [142].
[108] *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 at [47].

(a) As to definable subject-matter, a trust plainly does require an identifiable asset, tangible or intangible.[109] The means and requisite degree of identification will vary with the type of asset;

(b) As to being identifiable by third parties, a key feature of property rights is that there must be an owner (or co-owners) of the asset, and the owner must be entitled to exclude third parties from having access to the asset. Those parties in turn need to know that which they are being excluded from;

(c) The concept of property does then envisage that a third party might nonetheless obtain access to it, either with the owner's consent, or wrongfully without it. It was seen above (at para 91) that the ability consensually to transfer an asset is not absolutely essential to its becoming subject to a trust, but transferability is a strong marker of something being property. It is also a hallmark of property that its owner can bring claims against third parties who without justification assert adverse rights to an asset; and

(d) The final component, a degree of permanence or stability, may not add anything to the need for identifiability. Certainly, some assets can have a very short life but nonetheless be recognised as property, at least by a court of Equity. For instance, a single money payment resulting in a series of transfers through bank accounts created solely to make the transfers will involve a series of choses-in-action, owned in succession by each account holder. If the accounts are immediately closed following each transfer, the lifespan of each account will have been very short. Sir Geoffrey Vos C, extrajudicially, has noted that the existence of some property rights can be very ephemeral, instancing a ticket to a football match.[110]

100. It should also be accepted that Lord Wilberforce's, admittedly abstract, formula has been criticised academically for its circularity (in particular by confounding the results of a conclusion that something is property with the

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[109] See *Fortex Group Ltd v MacIntosh* [1998] 3 NZLR 171 (CA) at 174–175.

[110] G Vos "Cryptoassets as Property: How Can English Law Boost the Confidence of Would-be Parties to Smart Legal Contracts", Paper to Joint Northern Chancery Bar Association and University of Liverpool Lecture (2 May 2019) at [26] (available at https://www.judiciary.uk/announcements/speech-by-sir-geoffrey-vos-chancellor-of-the-high-court-cryptoassets-as-property/).

definition itself).[111] It is submitted that much of that criticism is removed once one allows for the fact that the law of property has developed, at least in respect of intangible property, from a symbiosis between market actors and the law. So, while one can conceive of concepts of ownership and possession of land and chattels without also having to conceive of a legal system, it is difficult to do so with intangible assets. At the same time, the law may not move to recognise something as warranting proprietary consequences if people have not already seen the candidate for legal recognition as property as having economic value.

101. Take, for example, choses-in-action. It was obvious that a personal right to be paid money could be perceived by traders as having an immediate marketable value, discounted by the fact that the money may not be payable for some time and by the prospect that the debtor may not be able to pay when required. Equity then supplied the law of assignment to provide rules that gave a purchaser of the right-to-sue some security of tenure. The demand for proprietary recognition was there, and Equity supplied the solution; if the law had withheld recognition the market would probably have withered. As Professor Fox has stated: *"Experience shows that the law by its own construction can create assets which serve as tradeable repositories of economic value."*[112]

102. So too with cryptocurrencies. Market actors have designed computerised private mechanisms for making payments and storing value, the technological features of which give confidence to traders that it is economically worth joining or participating in the system that has been devised. Such a system cannot avoid disputes of some sort. Nor can they isolate themselves from inheritance law or insolvency law. The law has to step in to address the difficulties that arise, including by recognising as a form of property that which is plainly regarded by participants as a tradable asset.

103. It will be shown below that there is some judicial recognition of the idea that if there is a market in something then the law should follow by recognising

[111] See, for instance, K Gray "Property in Thin Air" [1991] CLJ 252 at 292–293.
[112] D Fox *Property Rights in Money* (OUP, Oxford, 2008) at [1.118].

the thing traded as property, in the absence of strong policy reasons for not doing so.

A survey of the types of asset already recognised as property at Equity

104. In assessing a novel candidate for proprietary recognition, it becomes useful to know what types of proprietary rights the courts have already recognised.

105. The survey that follows starts with the simple chose-in-action as a type of property. However, because the value in cryptocurrencies is not generally seen as resting in a right to sue, it is important to see that there are many other types of intangible assets the practical value of which does not rest in, or solely in, a right to obtain a money judgment. In other words, not all legally-recognised species of intangible property derive their value from the fact that a court-ordered monetary remedy is in sight.

106. Examples of property capable of being the subject of a trust include:

    (a) Any simple chose-in-action: Even an oral contract can be the subject of an orally created trust, with the result that a liquidator of a corporate trustee could not pursue the chose in order to obtain a money judgment for the benefit of unsecured creditors;[113]

    (b) Non-enforceable debt claims: A barrister's claim that fees be paid by the relevant instructing solicitor was recently held in *Gwinnutt v George* to be part of the property belonging to a bankrupt barrister, even though the barrister had no legally enforceable right to the fees, and in fact there was no contract at all between the barrister and solicitor.[114] This case is dealt with in more detail below (at para 111);

    (c) Payments through banking systems: Most money transactions have in modern times ceased to involve tangible coins or banknotes and take the form of bank payments, usually effected electronically. Equity will apply its proprietary tracing rules to payments effected by these means. It is pertinent to note, in the light of the Creditors'

[113] See *Lord Strathcona*, above n 101, at 125, quoted above; and *Re Lehman Brothers International (Europe), Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch) at [241] per Briggs J [*Lehman:Pearson*].
[114] *Gwinnutt v George* [2019] EWCA Civ 656, [2019] 3 WLR 229.

argument that something is only property if upon transfer the recipient holds the *same* asset, that transfers of money from one bank account to another do not involve the transfer of anything in the literal sense from the payer to the payee. They involve a variation downwards of the chose-in-action held by the payer against its bank and a variation upwards of the chose-in-action held by the payee against its bank. It should also be observed that those choses are not identifiable by anything more than the practice of banks giving accounts a unique number (in relation to their own records) and recording figures in those records which then permit payments to be made to and accepted by a third party. As Professor Fox has stated:[115]

> A person's claim to money in his or her account is identifiable by an account name and/or number, and subject to the bank's right to combine accounts, is distinct from any other claim he or she may have against the same bank … . These rules of identification allow the customer's claim to remain exclusive and to be protected against wrongful interference from third parties.

(d) Copyright: Copyright has statutory recognition, but if there are degrees of intangibility to intangible property copyright is a strong example. So, the subject matter of copyright turns merely on combinations of sounds, or shapes in two or three dimensions (including words or drawings) that are sufficiently distinctive to justify the law preventing others from reproducing them.[116] These sounds and shapes can exist in digital form. The resulting intellectual property needs to be identifiable, but in many cases whether there has been an infringement will involve an element of judgement in the tribunal called upon to adjudicate on the associated legal rights. The value in copyright, and for that matter patents and other intellectual property rights, is also not derived solely from the ability to obtain a money judgment. Such rights can be made the subject-matter of a trust;

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[115] Fox, above n 112, at [1.108].

[116] The statutory categories of recognised copyright are found in s 14 of the Copyright Act 1994, and include literary, dramatic, musical, or artistic works; sound recordings; films; communication works; and typographical arrangements of published editions.

(e) Shares: Shares in a company are another type of intangible property which typically has more complicated incidents than merely giving a right to sue. The holder of shares can normally exercise voting rights in relation to the appointment and removal of the directors of the company, and in relation to other important company matters. The right to vote is enforced by a right to sue, but when the right is exercised it has practical effects well beyond attracting the remedies available through court process. Shares are properly regarded as an item of property in Equity even where they are non-transferable, or transferable only to particular persons;[117]

(f) Licences/Exemptions/Quotas: Modern statutory regulation frequently operates on blanket prohibitions coupled with defined exemptions granted to individuals (often to both natural and legal persons) that each individual can then trade. Such exemptions function, and are recognised, as intangible items of property. Their value is not derived from a right to sue but rather the opposite, namely an immunity from prosecution.[118] Prominent examples are export quotas, milk-supply quotas, fishing quotas, petroleum exploration licences, waste disposal licences, and carbon credits. Such tradeable rights can form the subject-matter of a trust, and where that happens the asset falls outside the estate of an insolvent trustee. A large body of case law now confirms that such rights are a type of property, and subject to normal property protections;[119]

(g) A trustee's rights of indemnity: A trustee's rights to be indemnified in respect of trust expenses (both the right of recoupment for expenses already met, and the right of exoneration for expenses not yet met) have been held to confer a proprietary interest in the trust assets even though these rights are realised by self-help remedies rather than recourse to the courts: *Carter Holt Harvey Woodproducts*

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[117] See *Money Markets*, above n 99 (case argued on basis that company share automatically cancelled on holder's insolvency was nonetheless holder's property).

[118] See *Armstrong*, above n 107, at [48].

[119] See *Att-Gen of HK v Nai-Keung* [1987] 1 WLR 1339 at 1342 (export quotas); *Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177 at 1185 (milk quota); *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1 (petroleum exploration licences, not being an interest in land);[119] *Re Celtic Extraction*, above n 93 (waste disposal licences); and *Armstrong*, above n 107 (carbon credits).

Australia Pty Ltd v The Commonwealth.[120] The rights are a species of intangible property, but they are not choses-in-action. The breadth of the sort of interest that can be the subject of a trust is confirmed in the judgment of Bell, Gageler and Nettle JJ:[121]

> To describe [the right of indemnity] as constituting a beneficial interest in the trust assets, and so as property, thus acknowledges the characteristic blending of personal rights and obligations with proprietary interests which is the "genius" of the trust institution. Such a beneficial interest falls naturally and ordinarily within the definition of "property" in s 9 of the Corporations Act.

107. While a number of the cases involving statutory licences and quotas cited above involved the interpretation of broad statutory definitions of the word *"property"*,[122] including in some instances the United Kingdom equivalent of the definition of property found in s 2 of the 1993 Act, it is submitted that the types of interest capable of forming the subject matter of the trust at Equity are no less broad. The same point was made by Stephen Morris QC sitting as a High Court judge in *Armstrong DLW GmbH v Winnington Networks Ltd*:[123]

> Whilst the cited case law concerned the meaning of "property" as specifically defined in various statutes, in my judgment, the reasoning of Morritt LJ [in *Celtic Extraction*] applies equally to the characteristics of property at common law. Indeed, Morritt LJ himself relied upon *National Provincial Bank v Ainsworth*. Moreover the terms used in statutory definitions are themselves derived from common law concepts.

Three recent cases at the boundaries of the legal concept of property

108. In the paragraphs that immediately follow, three recent cases of relevance to determining the boundaries of the legal concept of property are brought to the Court's attention. Because these cases involved contested litigation and the consideration of general principle, they are addressed before introducing the recent Commonwealth cases that have involved cryptocurrencies, where the property issue was largely conceded.

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[120] *Carter Holt*, above n 89, at [32], [80], [83], [133], [137] and [141]. The same conclusion was reached in *Levin v Ikiua* (HC), above n 88, at [112]; and on appeal *Levin v Ikiua* (CA), above n 88, at [53].

[121] *Carter Holt*, above n 89, at [84] (footnotes omitted).

[122] See, for example, *Nai-Keung*, above n 119; *Swift*, above n 119; and *Re Celtic Extraction*, above n 93.

[123] *Armstrong*, above n 107, at [59].

109. *Dixon v R*:[124] More detail about this case can be found in the Creditors' Submissions (CS at [4.9]–[4.14]), where it is relied upon for adopting a broad approach to the concept of property in the 1993 Act. The Supreme Court held that a digital copy of CCTV footage was *"property"* within the broad definition found in s 2 of the Crimes Act 1961. The defendant had downloaded a copy of the footage without the consent of the owner of the computer on which the footage had been recorded. This is a holding that computer data can be property, and that making a copy of it involves a taking, even when the data is not protected by a password. It should be accepted that the actus reus of the relevant offence, found in s 249 of the 1961 Act, was (and is) expressly directed at unauthorised access to a computer system, and hence the drafter must have contemplated the taking of at least some types of data as within the offence. This point was taken by Arnold J (for the Court).[125] However, later in his judgment, Arnold J appears to have endorsed the view that computer data would meet general definitions of property, including that within s 4 of the Property Law Act 2007.[126] His Honour went on to state:[127]

> We consider that interpreting the word "property" as we have is not only required by the statutory purpose and context but is also consistent with the common conception of "property".

110. *Henderson v Walker*:[128] In this case Thomas J was prepared to apply *Dixon v R* in a private law setting, and to extend the tort of conversion to purely personal digital information, including the content of private emails. However, her Honour also concluded that merely making a copy of emails and other personal data would not amount to conversion; refusing access to them or destroying them would be. In some respects, this holding goes further than is necessary for the purposes of this litigation, but the case supports the case for the Account Holders. This case is returned to below on other points (at para 164).

111. *Gwinnutt v George*:[129] Here, the relevant barrister had agreed to act for a client at the behest of an instructing solicitor, but had done so under the old common law regime, namely without a contract or a right to sue for

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[124] *Dixon v R*, above n 103.
[125] At [25] and [35].
[126] At [38].
[127] At [51].
[128] *Henderson v Walker* [2019] NZHC 2184.
[129] *Gwinnutt*, above n 114.

unpaid fees. That regime did not permit barristers to enter into contracts for service or to sue for unpaid fees (both things are now permitted in England and Wales, as explained in the decision, but only if the barrister opts for a contract). The Court of Appeal nonetheless held that the barrister's claim was more than a merely moral claim, and was a species of property, even though there was no chose-in-action. The Court explained that a number of extra-judicial routes were potentially available to a barrister for putting pressure on a non-paying solicitor (including laying a professional complaint). The barrister's claim was, therefore, more than a mere hope or *"spes"*. The Court concluded that the *"right"* was *"property"* within the definition in s 436 of the Insolvency Act 1986 (UK). The leading judgment of Newey LJ quoted from, and adopted the reasoning of Jessel MR in *Re Huggins*.[130] The following passage that Newey LJ quoted from Jessel MR's judgment is relevant in the present context:[131]

> The contract of a government is not enforceable in the courts of another country, because they have no jurisdiction over a foreign government, and no sovereign power would allow itself to be sued in the courts of its own country without its own consent. Still no one would say that the bond of a foreign country is not property. If a man died possessing nothing but French or Italian bonds no one would say that he had died without any property. Such bonds are not choses in action in the ordinary sense, and that cannot be the definition of property. The mere fact that you cannot sue for the thing does not make it not "property".

112. It has to be accepted that the definition of *"property"* in s 436 of the Insolvency Act 1986 (UK) (and its predecessors) is deliberately cast widely but, as submitted above, the concept of property or *"asset"* that Equity regards as capable of becoming subject to a trust is equally wide.

Cases where the issue of cryptocurrencies as property was conceded

113. The only reasoned Commonwealth case so far to consider the nature of cryptocoins is *B2C2 Ltd v Quione Pte Ltd*, a decision of the Singapore International Commercial Court.[132] In that case, both sides accepted that cryptocurrencies were a species of property, a concession accepted as rightly made by the judge, Simon Thorley IJ. Despite its complex facts, it warrants consideration in the present proceedings.

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[130] See *Ex parte Huggins* (1881) 21 ChD 85 (CA) at 90–91.
[131] *Gwinnutt*, above n 114, at [13].
[132] *B2C2*, above n 107.

114. The case concerned a Singapore cryptocurrency trading platform, Quione Pte Ltd, on which cryptocurrencies were traded, as with Cryptopia. B2C2 Ltd was a trader on the platform. Some trading was set up to occur automatically through computers connected to the exchange and pre-programmed. The trades in question resulted from pre-programmed requests to exchange cryptocoins of ethereum for bitcoin. As a result of a lack of foresight in the programming by one or both sides, an unusual set of circumstances resulted in B2C2's computer offering ethereum for bitcoin at the rate of 10 bitcoin for 1 ethereum, and the computer of another trader on that platform accepting that bid; seven such trades taking place. The going rate of ethereum for bitcoin in the market at the time was 1 ethereum for 0.04 of a bitcoin. The effect of the automatic trading was that B2C2 sold ethereum at about 250 times its appropriate price. Quione, becoming aware of the mistake, then reversed the trades, which led to the litigation.

115. B2C2 sued Quoine for breach of the contract between it as a trader and Quoine as the operator of the exchange, and for breach of trust as a result of Quoine's having returned the bitcoin to the counterparty. Quoine's main defence was that any contracts between B2C2 and the counterparty were void or voidable for mistake, and it was therefore entitled to effect restitution. Simon Thorley IJ held that there was no basis for setting aside the trading and that Quoine was accordingly liable to B2C2 for having wrongly reversed the trades. He upheld both B2C2's contract claim and its claim for breach of trust.

116. The breach of trust claim could have succeeded only if the bitcoins in question were an asset that could form the subject-matter of a trust. Quoine was prepared to concede that bitcoin was a species of property,[133] but it did not concede that there was any trust. Simon Thorley IJ considered that the concession on the property point was rightly made. His Honour stated:[134]

> Cryptocurrencies are not legal tender in the sense of being a regulated currency issued by a government but do have the fundamental characteristic of intangible property as being an identifiable thing of value. Quoine drew my attention to the classic definition of a property right in the House of Lords decision of *National*

[133] At [142].
[134] At [142].

Provincial Bank v Ainsworth [1965] 1 AC 1175 at 1248:

> "it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

Cryptocurrencies meet all these requirements. Whilst there may be some academic debate as to the precise nature of the property right, in the light of the fact that Quoine does not seek to dispute that they may be treated as property in a generic sense, I need not consider the question further.

117. It will be necessary to return to the finding of breach of trust in this case, below at para 225.

118. In *Vorotyntseva v Money-4 Ltd*, Birss J granted ex parte a proprietary freezing order over some bitcoin and ethereum currency, stating that the defendant had not suggested that *"cryptocurrency cannot be a form of property"*.[135] There was no further discussion of the point.[136]

119. In *Shair.Com Global Digital Services Ltd v Arnold*,[137] Skolrood J of the British Columbia Supreme Court granted an ex parte preservation order to the plaintiff company against its former chief operating officer in respect of any digital currencies that may still be in the possession of the defendant. The Court without providing any reasoning, accepted that cryptocurrencies could be property within the rules for preservation orders, noting that in the correspondence between the parties that had been filed for the proceeding the defendant had not denied that the plaintiff had an interest to pursue.[138]

D THE APPLICATION OF THE FOREGOING PRINCIPLES TO CRYPTOCURRENCIES

120. It is now proposed to return to Lord Wilberforce's criteria in *National Provincial Bank Ltd v Ainsworth* for recognising property interests and apply them to cryptocurrencies. It is submitted that the criteria are clearly met. While it is proposed to address each component in order, the components operate together and it is necessary to cross-refer to them as one addresses them. It is proposed first to make a prima facie case, and then to return to arguments made in opposition to that case.

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135 *Vorotyntseva v Money-4 Ltd* [2018] EWHC 2596 (Ch) at [13].
136 A similar case, and as inconclusive, is *Samara v Dan* [2019] HKCFI 2718.
137 *Shair.Com Global Digital Services Ltd v Arnold* 2018 BCSC 1512.
138 At [15].

121. A similar approach to determining whether cryptocurrencies are property was adopted in the United Kingdom by the LawTech Delivery Panel in its November 2019 report, *Legal Statement on Cryptoassets and Smart Contracts*,[139] filed with the submissions for the Creditors.

Identifiable subject-matter

122. The first requirement is that the asset in question be definable. The putative asset must be capable of being isolated from other assets, whether of the same type or of other types, and thereby identified. It is, however, possible for there to be co-ownership (either at Law or in Equity) of a definable share of an identified bulk of like assets. The present situation is one of this sort and the issues raised by it are addressed below (from para 192).

123. There can be little doubt that computer-readable strings of characters recorded on networks of computers established for the purpose of recording those strings can be given sufficient distinctiveness to be capable of then being allocated uniquely to an account holder on that network. In the context of cryptocurrencies, the allocation is made by what is called *"a public key"*; the data allocated to one public key will not be confused with another. This is so even though the identical data is held on every computer attached to the network, the so-called *"distributed ledger"*. Indeed, the distribution of the data across a large network of computers, when combined with cryptography that prevents individual network members from altering historic data over the network, assists in giving the data stability. These features provide a raison d'être for the existence of cryptocurrencies.

124. The identifiability provided by data recorded in a distributed ledger is no less than that resulting from a large and trusted bank that records balances in a numbered bank account held with it. As seen, Equity regards such recorded balances as a type of property owned by the party in whose favour the balance is recorded. The initial promoter of the idea of cryptocurrencies, the pseudonymous Satoshi Nakamoto, argued that *"an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without*

[139] *Legal statement on cryptoassets*, above n 59.

the need for a trusted third party" would provide superior stability and reliability compared to a traditional banking system.[140]

125. The public key so allocated to an account can also be argued to be more readily identifiable than some asserted rights to copyright, where issues of originality may be at play.

Identifiable by third parties

126. The second of Lord Wilberforce's components, that the thing be identifiable by third parties, is elliptical. It is submitted that the element alludes to the thing identified having to have an owner, capable of being recognised as such by third parties. The degree of control over a type of asset that a person has to have before the law recognises it as capable of being owned involves an element of judgement. Again, it is submitted that cryptocurrencies clearly meet this criterion.

127. Property-lawyers tend to consider the power of a putative owner to *exclude* others from an asset is a more important indicator of ownership than the power actively to use or benefit from the asset. This is no less true of the proprietary rights that arise under a trust. The following passages are taken from the article of Professor Nolan, already referred to:[141]

> In short, a beneficiary's core proprietary rights under a trust consist in the beneficiary's primary, negative, right to exclude non-beneficiaries from the enjoyment of trust assets. Infringement of this primary right will generate secondary rights by which a beneficiary may also prevent (or at least restrict) access to assets by non-beneficiaries. By contrast, a beneficiary's positive claims to access benefits from trust assets, which will exist in conjunction with his negative, exclusionary rights, may or may not themselves be regarded as proprietary by reason of their utility rather than their enforceability … .
>
> Interestingly, some very different approaches to the cases seem to lead to much common ground, namely that the ability to exclude others from some defined enjoyment of an asset, whether or not they have consented to such exclusion, is the key feature of "property" and interests termed "proprietary".

128. The unique strings of data recording the creation and dealings with cryptocoins on a cryptocurrency system are always allocated, via the public

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[140] Satoshi Nakamoto (October 2008) "Bitcoin: A Peer-to-Peer Electronic Cash System" at https://bitcoin.org/bitcoin.pdf.

[141] Nolan, above n 100, at 233.

key, to a particular account-holder connected to the system. But that allocation by itself is unlikely to be recognised as creating an item of property if there is no element of *"excludability"*. So, if that account-holder's personal connection to the data via the public key could be lost through any person connected with the network being able to re-allocate the defined data to any other colleague on the network without the consent of the account-holder it would be doubtful whether the law would conclude that the account-holder *owned* the key. An analogy can be made with the wild bird which may be identifiable but which no one has enough control over for the law to conclude that it is owned.[142]

129. The degree of control necessary for ownership, namely the power to exclude others, is achieved for cryptocurrencies by the computer software allocating to each public key a second set of data made available only to the holder of the account (*"the private key"*[143]), and requiring the combination of the two sets of data in order to record a transfer of the data attached to the public key from one account to another. A varied public key and a new private key for it are generated after each transfer. Anyone who learns of the private key attached to a public key can transfer the public key but the private key having been used once in respect of the public key it cannot be used again. The private key is like a PIN but is immutable even by the holder.

130. This feature of cryptocurrencies inhibits two potential practices. First, the existence of the private key inhibits the possibility of involuntary transfers; it gives the power to exclude third parties from access. Secondly, the creation of a new private key after each disposition inhibits a holder from purporting to transfer the data twice.

Capable of assumption by third parties—the position of third parties

131. The third of Lord Wilberforce's criteria, namely that the right or interest in question must be capable of assumption by third parties, is, like the second, elliptical. It is submitted that there are two aspects to this criterion:

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[142] For judicial discussion of the position of wild animals in the law of property, see *Yanner*, above n 97, at [24].

[143] Some cryptocurrency systems, including bitcoin, permit there to be more than one private key, all of which have to be used together in order to deal with the currency. For the use of *"multisig wallets"*: see https://www.binance.vision/security/what-is-a-multisig-wallet

(a) The criterion is the corollary of the one that the asset be identifiable by third parties, namely that third parties must respect the rights of the owner in that property and will be subject to actions expressly devised by the law to give effect to proprietary rights if they assert their own claim to ownership without justification. It has been pithily stated that *"property is by nature concerned with legal rights that affect strangers to bilateral transactions"*.[144] As seen, such third parties will usually include the insolvency officials of an insolvent trustee; and

(b) Normally, but not always,[145] an asset recognised by the law as an item of property will be potentially desirable to third parties, such that they would *want* themselves to obtain ownership of it.[146]

132. Both aspects of this component of Lord Wilberforce's test are reflected in the following dictum of Lord Bridge of Harwich for the Privy Council in *Att-Gen of HK v Nai-Keung*, a case concerned with a charge of theft of an export quota, brought under the Theft Ordinance of Hong Kong:[147]

> It would be strange indeed if something which is freely bought and sold and which may clearly be the subject of dishonest dealing which deprives the owner of the benefit it confers were not capable of being stolen. Their Lordships have no hesitation in concluding that export quotas in Hong Kong although not "choses in action" are a form of "other intangible property".

133. It is submitted that cryptocurrencies meet both aspects of the assumption-by-third-parties criterion. It cannot be doubted that cryptocurrencies can be, and many are, the subject of an active market. However, in order to explain why there is a market for voluntary transfers, it is necessary to say more about a feature of the way cryptocurrencies work that has only been touched upon so far.

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[144] See D Fox "Cryptocurrencies in the Common Law of Property" in D Fox and S Green (eds) *Cryptocurrencies in Public and Private Law* (OUP, Oxford, 2019) at [6.10]. But note that a seller who passes title in goods to a buyer and then wrongly re-sells them will be liable to the first buyer both in contract and conversion.

[145] See the instances where it is possible to declare a trust of a non-assignable asset, above n 99.

[146] It may not matter that an asset has no current market value if there has been a market for the asset in the past: e.g. polluted land with clean-up costs may be worthless but will still be regarded as property: see *Re Celtic Extraction*, above n 93.

[147] *Nai-Keung*, above n 119, at 1342. See too *New Era Printers and Publishers Ltd v Commissioner of Stamp Duties* [1927] NZLR 438 (SC) at 444 (plea that trade secrets were property): *"it seems to me to be a contradiction in terms to assert that anything which is owned by one person and can be sold and transferred to another is not property, both within the legal and the popular understanding of that term."*

134. The way in which public keys are allocated by a cryptocurrency system to an account, and how the associated private keys prevent unwanted third parties being able to become registered as owners of the public key, have already been outlined. These features explain why the law-of-property requirements of identification and the right to exclude others can be met. They do not explain why someone would want to become a transferee of the public key.

135. In order to create demand for a cryptocurrency the public key on the system has to have embedded in it data recording a unit of currency and the number of units the public key is associated with. That unit of currency must be common to all participants in the system, thereby assuring equality of treatment amongst participants buying and selling units or *"coins"* at any instant of time. The equality of value of the coins embedded in the data creates a market for the coins as a medium of exchange, even if the value itself goes up and down markedly (one reason for which variation may be an inability to assess how much external value has previously been paid in exchange for coins). Unlike with many assets, but as with fiat currencies that exist physically only as items of cloth-paper, plastic or metal not valuable in themselves, a cryptocoin derives its value from that very fungibility or interchangeability.

136. The creators of the system then in practice enhance demand for the coins by not allowing rapid alteration, up or down, of the total number of coins recognised by the system. A cryptocurrency can be popular even though the value of the unit of currency varies markedly in the market, but it will not be popular if the system does not constrain variation in the aggregate number of coins that it recognises.

137. Most cryptocurrencies constrain the growth in the number of coins by allocating new coins only to *"miners"*. Miners are the owners of those computers attached to the system that engage in the complex chain of calculations needed to solve the cryptographic puzzles that protect the integrity of transactions on the system. Further constraint can be imposed by increasing over time the number of successful transactions a miner must complete in order to generate a new coin. The Bitcoin system, for example, not only strictly constrains the rate of growth in its coins but it has a finite number of units that can be created. The ultimate supply of bitcoins

will be a fraction under 21 million, a number not expected to be reached until the year 2140.[148] At the time of the currency's launch in 2009, some 2.625 million bitcoin were made available, being 12.5% of that total supply.[149] When first publicly traded, apparently one US dollar was exchanged for 1309.03 bitcoins.[150]

138. In the context of the present litigation, it can be noted that in one respect cryptocurrencies offer the prospect of greater proprietary efficacy in relation to third parties than fiat currency. While one bitcoin, or other cryptocurrency, is calculated to have the same value as another and therefore to be fungible, the distributed ledger technology contains the ability to trace exactly what has happened to every coin. If a person obtains unauthorised access to the private key and transfers a bitcoin, the owner of the private key will have little difficulty proving that it was his or her coin that the transferee received. When coins are stolen it can be much more difficult and perhaps impossible to show that the defendant received any of the coins that were stolen. Bank notes have serial numbers, but few owners write down the numbers, meaning they too are nearly impossible to trace into the hands of a rogue.

Some degree of permanence or stability

139. The last of Lord Wilberforce's criteria for determining whether something is capable of attracting proprietary status is that the thing have some degree of permanence or stability. As submitted above, this criterion does not add much to the other three criteria. An example of instability as a reason for denying ownership can be found in the example of the wild bird. On the other hand, some assets will have little permanence yet undoubtedly be property, such as the example of the ticket to a football match referred to above (at para 99(d)).

140. Also unproblematic will be those cases where the short life of an asset is the result of the deliberate process of transferring the value inherent in the asset, so that one asset becomes replaced by another. Cryptocurrencies work in this manner, but as mentioned above, bank payments use a similar

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148 See https://en.bitcoin.it/wiki/Controlled_supply.
149 Ibid.
150 See Reuters Factbox: Ten years of bitcoin, available https://www.reuters.com/article/us-crypto-currencies-bitcoin-factbox/factbox-ten-years-of-bitcoin-idUSKCN1N50GE.

process.[151] Such a process is simply native to the type of property in question, and is not inimical to the asset's status as property. For this reason, it is submitted that the Creditors' Submissions on this issue (CS at [5.5]–[5.6]) should be rejected.

141. It is further submitted that there is nothing in the Creditors' submission (CS at [5.7]) that the process for transferring cryptocurrencies entails that any trust of the currency would fail for being a trust of future property. The trust would be over the existing cryptocoin.

142. Otherwise, it can be noted that the blockchain methodology which cryptocurrency systems deploy greatly assists in giving stability to cryptocoins. The entire life history of a cryptocoin is available in the public record-keeping of the blockchain. A particular cryptocoin stays fully recognised, in existence and stable unless and until it is *"spent"* through the use of the private key, which may never happen. Standard cryptocurrency systems do not provide for the arbitrary cancellation of coins.[152] The fact that the market value of some cryptocurrencies can be unstable is something that can also affect fiat currencies.

143. While it is possible for the coins to be wrongfully interfered with by someone gaining unauthorised access to the private key or by someone hacking the address to which an owner intends to send a coin, these risks are not markedly greater than those borne by an owner of tangible property, or a person relying on the integrity of a bank account record (with or without the use of a PIN). The failure of individual nodes on the relevant computer network is unlikely to be a problem.

144. For the same reasons, it is submitted that reliance in the Creditors' Submissions (CS at [5.8]) on the fact that the blockchain technology is not altogether foolproof as a reason to deny that cryptocoins are stable is unconvincing. Ordinary bank computer systems are prone to similar risks, yet positive bank balances are a recognised form of property. Customers of banks are also exposed to the possibility of the bank going into insolvent administration, as the *Lehman* cases, discussed below, and the collapse

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[151] See Fox, above n 144, at [6.18]–[6.19].

[152] Contrast the Minister's ability to cancel a grazing licence without reason resulting in a conclusion in *R v Toohey, ex parte Meneling Station Pty Ltd* [1982] HCA 69, (1982) 158 CLR 327 that the licences were not proprietary in nature.

of the Bank of Credit and Commerce International (BCCI) before Lehman, attest.

Short conclusion to this point

145. It is submitted that cryptocurrencies readily meet the standard criteria to be considered a species of property. They obtain their status as a type of intangible property as a result of the combination of three interdependent features. Hence, they obtain their definition as a result of the public key recording a unit of currency. The control and stability necessary to ownership and for creating a market in the coins are provided by the other two features: the private key attached to the corresponding private key; and the generation of a fresh private key upon a transfer of the relevant coins.

146. The same point is made in the *Legal Statement on Cryptoassets*, where it is said that a cryptoasset is *"a conglomeration of public data, private key and system rules"*.[153]

E ARGUMENTS MADE AGAINST CRYPTOCURRENCY BEING PROPERTY

147. These submissions now return to consider the two most commonly-raised objections to cryptocurrencies being a species of property: first, cryptocoins are neither tangible property nor a chose-in-action; and second, cryptocoins are just a type of information and information is not property. The first of these objections is not relied upon in the Creditors' submissions, but out of caution should be addressed. The second objection is alluded to in the Creditors' Submissions (CS at [2.3]–[2.4]).

Cryptocurrency neither property in possession nor chose in action

148. One suggestion against cryptocurrencies being considered as property is that they would fall foul of the well-known dictum of Fry LJ in *Colonial Bank v Whinney* that all personal property must either be a chose in possession or a chose-in-action;[154] the argument being that cryptocurrencies are neither a chose in possession nor a chose-in-action (participants in a cryptocurrency system do not usually undertake legal obligations to each

[153] *Legal statement on cryptoassets*, above n 59, at [65].
[154] *Colonial Bank v Whinney* (1885) 30 ChD 261 (CA) at 285.

other in relation to operations on the system).[155] Fry LJ's dictum is as follows:[156]

> This leads to the consideration of some very elementary points in English law. According to my view of that law, all personal things are either in possession or in action. The law knows no *tertium quid*.

149. Fry LJ's dictum appeared in a dissenting judgment, but his Lordship's conclusion was upheld by the House of Lords.[157] There is high authority that to be a thing in possession the thing must have a physical presence: see *OBG Ltd v Allan*.[158] But the House of Lords in that case was solely concerned with the scope of the tort of conversion and did not in terms address Fry LJ's dictum.

150. It is respectfully suggested that Fry LJ's dictum is a red herring in the present context, for a number of related reasons:

    (a) The dictum was uttered in the context of a case where what was at issue was the wording of the reputed-ownership provisions in the then English Bankruptcy Act 1883. The statute appeared to create a dichotomy between *"goods"*, albeit broadly defined, which would be subject to the reputed-ownership provisions, and *"things in action"*, which would not. Given that the statute itself created a dichotomy, the question was into which category shares in a company should be put? Fry LJ put them into the category of choses-in-action, a conclusion upheld on appeal;

    (b) The whole thrust of Fry LJ's judgment was to argue that the concept of *"chose in action"* had long been given a broad meaning to encompass any personal property of which possession could not be taken. So, under Fry LJ's reasoning, the conclusion would not be that cryptocoins are not property. They could, under his Lordship's scheme, be choses-in-action;

    (c) When *Colonial Bank v Whinney* went on appeal to the House of Lords, the Law Lords agreed with Fry LJ's construction of the statute

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[155] This argument was made in *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41 at [26] in respect of data forming a database, discussed below. See too Fox, above n 144, at [6.32], where however the author goes on to reject the argument.
[156] *Colonial Bank*, above n 154, at 285.
[157] *Colonial Bank v Whinney* (1886) 11 App Cas 426 (HL).
[158] *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at [101].

but did not in terms endorse his dictum as to the common law. Lord Blackburn pointed out that the only important question in the law of personal property was whether an asset was capable of being physically possessed or not. Until the arrival of the Bankruptcy Act 1869 it was not important to know what was encompassed by the concept of chose-in-action, nor by implication was it necessary to take a dichotomous approach to the concept of personal property, once one had separated out tangible property. These conclusions are amply justified by the following passages in Lord Blackburn's judgment:[159]

> There always was a difference between personal property, such as to be capable of being stolen, taken, and carried away, and so to be the subject of larceny at common law... and other kinds of personal property.[160] … And when new kinds of property, like stock in the funds, or in more modern times shares in companies, were created, questions arose as to whether they were within the principle of being in possession or not; but till the phrase was used in the Act of 1869 it never became important to inquire whether they were to be called things in action or not … . And I think it was hardly disputed that, in modern times, lawyers have accurately or inaccurately used the phrase "choses in action" as including all personal chattels that are not in possession.

(d) In *Dempsey v Traders' Finance Corp Ltd*, Smith J (with whom Reed J concurred) made the same points.[161] His Honour endorsed the view expressed in *Salmond on Jurisprudence* (8th edition) that the phrase *"chose in action"* had come to have a wider meaning than its literal meaning (*Salmond* suggesting that had the history been different, shares might have been classified as chose in possession rather than chose in action). His Honour expressed scepticism about Fry LJ's dictum, stating: *"But the true construction of the phrase 'chose in action' must depend in any particular case upon the circumstances of the case"*.[162]

151. The essential point again is that Fry LJ was not taking a narrow view of what can be classified as property. He was simply wanting to push all examples of property into one of two categories. There is nothing in Fry LJ's dictum that would lead a court to conclude that cryptocurrencies are

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[159] *Colonial Bank*, above n 157, at 439–440.
[160] Note the reference to the plural *"other kinds of personal property"*.
[161] *Dempsey v Traders' Finance Corp Ltd* [1933] NZLR 1258 (CA) at 1296.
[162] At 1297.

not property. The most that can be said is that cryptocoins might have to be classified as choses-in-action. Indeed, it would be ironic that something that might be said to have more proprietary features than a simple debt is deemed not to be property at all, when a simple debt qualifies.

152. At the same time, Fry LJ's dictum does not have the status of law, not in England let alone New Zealand. It remains open to courts to conclude, as indeed one can infer from Lord Blackburn's judgment above, that there are at least three types of personal property: things in possession, things in action, and other intangible personal property. Different types of intangible property have different features, and need not be shoe-horned into the single category *"chose-in-action"*, where there is not statutory pressure to do so.

153. There would be several candidates for placing in the other-intangible-property category. So, shares generally come with use rights, namely the right to participate in decision-making, which distinguishes them from a simple debt claim where the only things that can be done with it, whilst it is unpaid, is to sue for it or to assign it. In that respect, shares have something in common with chattels which often have a practical use. Quotas and permits generally also have use rights, and are not primarily intended to lead to a right to sue. Cryptocurrencies too fit with the category *"other intangible property"*. They do not have use rights, but they are also not designed to involve a right to sue as their raison d'être. The combination of public and private key gives cryptocoins a possessory quality, even though, unlike with chattels, there is no ready right of recaption if they are wrongly taken.[163]

154. Some case law now supports the approach just outlined. In *Armstrong DLW GmbH v Winnington Networks Ltd*, Stephen Morris QC, following the lead of *Halsbury's Laws of England*, concluded that carbon credits were *"intangible property other than choses in action."*[164] The Judge had already noted that carbon credits share some of the features of choses in

[163] As to recaption, see *Re Ware, ex parte Drake* (1877) 5 ChD 866 (CA) at 871.
[164] *Armstrong*, above n 107, at [46].

possession, but not others, in a dictum that is equally applicable to cryptocoins:[165]

> Furthermore, each EUA is unique and specifically identifiable, by a specific number. For my part, I can see arguments why they might be regarded as similar to, or a modern version of, a chose in possession.

155. In *Att-Gen of HK v Nai-Keung*,[166] the Privy Council had already concluded that there was a residual category of *"other intangible property"*, which category included the export quotas the subject matter of the case. Admittedly, in that case the relevant statutory provision expressly included the residual category.

156. Against those cases, it should be noted that in *Your Response Ltd v Datateam Business Media Ltd* Moore-Bick LJ implied that Fry LJ's dictum had been approved by the House of Lords when *Colonial Bank v Whinney* went on appeal.[167] For the reasons given above, it is respectfully suggested that the judgments on appeal in *Colonial Bank* did not go as far Moore-Bick LJ suggests. More is said about *Your Response* in the next Section of these submissions.

Information is not property

157. The other argument that has been made is that neither the Common Law nor Equity recognises property in information, and cryptocurrencies are merely digitally-recorded information (see CS at [2.3]–[2.4]). Support for this argument can be found in *Your Response Ltd v Datateam Business Media Ltd* (noted above).

158. This argument is too simplistic to be determinative in the present context. A number of things are wrong with it as an answer to the conclusion that testing cryptocurrencies against Lord Wilberforce's criteria in the *National Provincial* case prima facie results in currencies being a species of property. But first it is proposed to address the merits of the *Your Response* case itself.

159. *Your Response* is authority that a party contracted by a client to maintain and update a database of the client's customers has no common law lien

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[165] At [51].
[166] *Nai-Keung*, above n 119, at 1342.
[167] *Your Response*, above n 155, at [26].

over the database for the fees owed it. In terms, the case does not go much further than that.

160. There are a number of features of *Your Response* that, it is submitted, make it an inconclusive precedent on its own facts, let alone on the status of cryptocurrencies:[168]

(a) Insofar as the Court of Appeal held that there could be no property in a database, it then becomes unclear as to the basis on which the client could ask the compiler of the database to hand it over. The raw data may have been fed to the database-compiler by the client in confidence, but the client's complaint was not that the database-compiler was proposing to disclose the database to others, but that the client did not itself have access to the data;

(b) Moore-Bick LJ did advert to the fact that on the Court's own reasoning the client would not have been able to sue the database-compiler in a property-based claim had the latter refused to hand the database over (assuming for that purpose that there were no fees and charges outstanding).[169] This led his Lordship to conclude that there was an implied term in the contract that when the contract came to an end the database-compiler would hand over a copy. But if that is so, it might also have been implicit in the contract that the client could not just thumb its nose at the database-compiler and demand possession when there were uncontested fees outstanding, leaving the database-compiler to an expensive debt-collection proceeding;

(c) The Court of Appeal in *Your Response* based its reasoning on the decision of the House of Lords in *OBG Ltd v Allan*.[170] But that case was solely concerned with the common law tort of conversion, where the Court held that that tort could not be brought for hindering someone from pursuing debt actions against third parties. The case said nothing about computer data. Nor did the case address proprietary causes of action other than conversion. In the result, *Your Response* gave no consideration to whether an equitable lien might

[168] In *Lloyd v Google Inc* [2019] EWCA Civ 1599 at [46] Vos C indicated that at some point the holding that computer data could not be property may need to be *"revisited"*.
[169] *Your Response*, above n 155, at [23].
[170] *OBG Ltd*, above n 158.

not have been available in relation to databases. It has been said that the class of situations where Equity can recognise rights of lien (possessory or non-possessory) is not closed.[171]

(d) Davis and Floyd LJJ, who each gave concurring judgments in *Your Response*, were influenced in not recognising any proprietary interest in a database by the fact that doing so would give the lien-holder an advantage over other creditors in an insolvency.[172] While the impact in insolvency of a recognition of property rights may not be an irrelevant consideration, the fact is that the ability to obtain a proprietary interest before insolvency that then prevails in insolvency is a widespread and unobjectionable feature of the common law.[173] In *Colonial Bank v Whinney*, Lord Blackburn confirmed the longstanding principle that *"the general rule in bankruptcy was that the assignee took the property of the bankrupt subject to the equities which affected it in his hands."*[174] This principle is undoubtedly part of New Zealand insolvency law.[175]

161. Davis and Floyd LJJ's concerns about insolvency also fail to take account of the fact that even non-proprietary rights to information will bind insolvency administrators once they become aware of their existence. An official assignee can no more exploit another's confidential information found amongst the bankrupt's papers or on the bankrupt's computer (once they know of the confidentiality) than anyone else.[176] So, if a bankrupt's computer included information such as trade secrets or customer lists belonging to a claimant, it would not, it is submitted, be lawful for the official assignee to sell those trade secrets or a copy of a customer list, or to demand money for them from the claimant.[177] Equally, if an official

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[171] See *Hewett v Court* (1983) 149 CLR 630 at 646 per Gibbs J. There is a useful discussion of the equitable lien in R Fenton *Garrow & Fenton's Law of Personal Property in New Zealand* (7th ed, Butterworths, Wellington, 2010) at [9.011].

[172] *Your Response*, above n 155, at [39] and [41].

[173] In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250, the UK Supreme Court upheld a constructive trust claim over secret commissions even though the relevant moneys had never belonged to the claimant and there was no evidence that the claimant had suffered any loss from the agent's actions. Insolvency was said to make no difference: see at [43].

[174] *Colonial Bank,* above n 157, at 434. For discussion of the scope of the subject-to-equities principle in the context of liquidations, see K van Zwieten *Goode's Principles of Corporate Insolvency Law* (5th ed, Sweet & Maxwell, London, 2017) at [3–02]–[3–05]. The principle was recently recognised in *Boensch v Pascoe* [2019] HCA 49 at [88].

[175] See *Re Universal Management Ltd* [1983] NZLR 462 (CA) at 472.

[176] See *Hunt v A* [2007] NZCA 332, [2008] 1 NZLR 368 at [77]–[89].

[177] Note too that in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230

assignee learns from the relevant bankrupt, a director, about a corporate opportunity *"belonging"* to the director's former company, the assignee could not sell that information to a competing company and apply the proceeds to paying unsecured creditors.[178] It would be no answer to say that corporate opportunities are not property.

162. The key point that is being made here is that even non-proprietary rights to information can remain effective in the insolvency of a duty-holder. It is unsafe, therefore, to make insolvency a driving factor in determining whether something is property.

163. It is submitted that, in any event, it is wrong to regard cryptocurrencies as mere information for the following reasons:

    (a) The whole purpose of cryptocurrencies is to create an item of tradable value, not simply to record (or impart in confidence) knowledge or information. Cryptocoins are not backed by the promise of a bank, but otherwise the combination of data that records their existence and affords them exclusivity is comparable to the electronic records of a bank, and the use of the private key provides a method of transferring that value which operates like a PIN on an electronic bank account;

    (b) More generally, cryptocoins are no more mere information than the words of a contract are. What allows a contract to be capable of being an item of property is not the words nor even the binding promise (which is only a personal obligation), but the fact that Equity recognises that there is a unique relationship between the parties created by the words and then supplies a system for transferring the contractual rights. A similar unique relationship and system of transfer exist in respect of the relevant data on the blockchain that make up a cryptocoin;

    (c) A locus classicus of the view that information is not property is the judgment of Lord Upjohn in *Boardman v Phipps*, where his Lordship

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CLR 89 the High Court of Australia at [118] stated that while not all confidential information can be regarded as property, trade secrets *"may be transferred, held in trust and charged"*.

[178] See *Consul Developments Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; and *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652 (CA).

stated: *"In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear."*[179] This statement appears to give as the principal reason for not regarding information as property the fact that it is infinitely duplicable.[180] Again, this is not true of cryptocoins where every public key recording the data constituting the coin is unique on the system where it is recorded and is protected by the associated private key from being transferred without consent. That combination of data on the system cannot be transferred or exploited more than once; a transfer generates new unique public and private keys;

(d) The foregoing point demonstrates that cryptocurrency systems provide a more secure method of transfer than a mere assignment of a chose-in-action (although, as seen above, it is also possible to assign cryptocoins). So, it is possible in Equity for the holder of a chose-in-action to assign it multiple times. Only one assignment will be effective to bind the debtor, but the winner may not be the first assignee in time, but rather the first assignee to notify the debtor, under what is called the rule in *Dearle v Hall*. A cryptocoin, in contrast, not only can be assigned in that way, but it can also be *sold* only once.

Henderson v Walker—exclusion from personal data constitutes conversion

164. At this point it is appropriate to return to *Henderson v Walker*.[181] The facts are complex but only the key ones are needed here. Mr Walker, in his capacity as liquidator of subsidiary companies of Property Ventures Ltd (**PVL**) came into possession of a laptop belonging to PVL and of a tape-drive that was a back-up of PVL's servers. On these devices were a lot of personal, non-company, emails sent by and to Mr Henderson, and some personal photographs.[182] Mr Walker distributed at least some of these, or allowed them to be distributed, to parties to whom he had no business sending them, or allowing them to be distributed. Mr Henderson sued Mr

[179] *Boardman v Phipps* [1967] 2 AC 46 (HL) at 127.
[180] Public policy implications involving freedom of speech and the dissemination of ideas are also inapplicable to cryptocoins: see *Legal statement on cryptoassets*, above n 59, at [63].
[181] *Henderson v Walker*, above n 128.
[182] See at [41].

Walker, pleading some seven causes of action, including breach of confidence, invasion of privacy, and conversion.

165. Thomas J held that, in principle, the common law action in conversion was available in respect of certain types of action involving computer data. Her Honour pointed out that New Zealand courts were not bound by either the *Your Response* case, or the decision of the House of Lords in *OBG v Allan*, stating that much of the reasoning in the cases was specific to the United Kingdom context.[183] Her Honour, however, concluded that merely making an unauthorised copy of computer data would not constitute a conversion, only action that involved excluding the creator from having access to the data (including by destroying it) would.[184] Since the laptop with all the personal information had been returned to Mr Henderson, and only copies retained, his claim for conversion failed.

166. It is not difficult to see that the reasoning of Thomas J could be extended to wrongful interferences with cryptocoins. Any person who gained unauthorised access to the private key attached to cryptocoins and used it would permanently deprive the proper possessor of the cryptocoins of the coins and their value.

167. It is submitted that it is not necessary for the purposes of vindicating the right of the Account Holders of the Digital Assets to stand outside the liquidation of Cryptopia for the Account Holders to establish that at Common Law an action in conversion would be available to Cryptopia in relation to any party who misappropriated cryptocoins. However, to the extent that the Court concludes that such a finding is a necessary feature of the Digital Assets being accorded the status of property, then it is submitted that the Digital Assets are property capable of being converted.

Concerns about downstream purchasers

168. Another concern that has been expressed about recognising cryptocoins as property is that innocent third parties might find that cryptocoins they thought they had bought still belonged to Alice, whose private key had

[183] At [254]. There may be room to doubt this conclusion, but aspects of the property torts have been modified in the United Kingdom by the Torts (Interference with Goods) Act 1977, and provision has been for civil claims for unauthorised copying of databases in the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032).
[184] At [266], [273] and [275].

been *"stolen"* (i.e. inappropriately accessed) by Bob. This has been part of a more general argument that participants in cryptocurrency systems would prefer to stay outside all legal regimes.[185] There are hints of the more general argument in the Creditors' Submissions (CS at [2.3], [2.4] and [5.9]).

169. The immediate concern that a purchaser might be exposed to a claim that cryptocoins it acquired were in fact stolen can be adequately met by recognising a bona fide purchase defence, in the way that has occurred with money and with payments through the banking system (see *Lipkin Gorman (a firm) v Karpnale Ltd*).[186] This issue is also addressed in the *Legal Statement on Cryptoassets and Smart Contracts*.[187] That report takes the view that because any transfer of cryptocoins will result in both a new (or modified) public key and a new private key, the title of a good faith purchaser will be prima facie protected.

170. The wider argument that participants in cryptocurrency markets would prefer to take their chances outside the legal system is a claim that cannot be universally true and is not one that any of the people this counsel has been appointed to represent have so far made to him. The argument assumes that in relation to ownership of cryptocurrencies, owners are content to be the victims of fraud, and of theft (whether by computer hacking or theft of papers containing private-key data or otherwise), and to have no recourse when mistakes occur of a sort where the law normally gives a mistaken party recourse to the law.[188] The argument also assumes that such participants were not interested in being able to leave cryptocurrency in their will or make them subject to a trust. Participants in cryptocurrency markets would also expect to be able to sue were those with the ability to change the architecture of an existing cryptocurrency actually to do so.

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[185] See, for discussion, T Cutts and D Goldstone "Bitcoin Ownership and its Impact on Fungibility", online publication available at https://www.coindesk.com/bitcoin-ownership-impact-fungibility
[186] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL) at 572 and 576.
[187] *Legal statement on cryptoassets*, above n 59, at [120]–[124].
[188] See Fox, above n 144, at [6.05]–[6.07].

Public policy

171. It is well known that at least some types of cryptocurrency are used by criminals for the transmission of funds across borders in order to pursue criminal activity, and as a means of money-laundering the proceeds of past criminal activity.[189] However, cryptocurrencies have also become popular with honest people as a method of effecting payments and of investing. The traditional banking sector is itself widely reported to be already using blockchain technology and to be planning to create trading platforms for cryptocurrencies.[190] Failure by the general law to recognise cryptocurrencies as property is not likely markedly to reduce criminal activity, and may in fact hinder legal responses to it. Honest commercial developments will be hindered by a failure of the law to recognise cryptocurrencies as property.

172. There may also be a need for more general economic and social regulation of cryptocurrencies, but again it is submitted that this should not inhibit the courts, and this Court in particular, from recognising them as a type of property. The *Legal Statement on Cryptoassets and Smart Contracts* has also advocated dealing with the status of cryptocurrencies unencumbered by other legal issues, including the need for regulation.[191] It is also noteworthy that in the cases where the status of cryptocurrencies as property has been assumed or conceded (see above paras 113–119), no court felt obliged to take a public policy objection.

173. It is noted that the Creditors' Submissions have not raised these public policy arguments.

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[189] See, for instance, the training programmes run by the Basel Institute of Governance: https://www.baselgovernance.org/asset-recovery/training-programmes/money-laundering-using-bitcoin.

[190] See, for instance, the Royal Bank of Canada: see https://business.financialpost.com/technology/blockchain/rbc-exploring-cryptocurrency-trading-platform-for-investments-and-online-purchases.

[191] *Legal statement on cryptoassets*, above n 59, at [10]–[11].

V WHY THERE ARE TRUSTS FOR ACCOUNT HOLDERS—LAW AND FACTS

A INTRODUCTION

174. On the assumption that cryptocurrencies are capable of being the subject-matter of a trust, it is submitted that the evidence filed in these proceedings, when the relevant law is applied to it, leads to a conclusion that all the cryptocurrencies held by Cryptopia are held on express trust for the Account Holders.

175. It is therefore formally submitted that the basic order that the Court should make in answering Question (b) in paragraph 1 of the Originating Application of 1 October 2019 is that: **All the Digital Assets are held on express trust for the Account Holders.**

176. It is also submitted that, in fact, there are a series or group of trusts. It makes no difference to the position of the Account Holders that Cryptopia was itself a beneficiary of some of these trusts.

177. Exchanges of the sort Cryptopia operated are simply a variant of the unit trust, the trustees of which charge fees for following the directions of its unit-holders. There is less documentation attending the trusts' creation than ideal, but that does not undermine the correct conclusion, which is that trusts of the relevant currencies were intended and created.[192]

178. As to the law, the Creditors' Submissions place great reliance on *Re Goldcorp Exchange Ltd (in rec)* [1994] 3 NZLR 385 (PC).[193] Indeed, the Creditors submit that *Re Goldcorp "effectively precludes a trust in these circumstances"* (CS at [6.31]). Contrary to that submission, it will be submitted and demonstrated below that:

    (a) The *principles* that *Goldcorp* upholds on the law of express trusts are not inconsistent with a finding of such trusts on the present facts, and in some respects the case supports such findings;

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[192] It is accepted that Cryptopia's exchange is not a *"managed investment scheme"* within the definition in s 9 of the Financial Markets Conducts Act 2013. Its exchange, however could well have been a *"contributory scheme"* under the predecessor legislation, the Securities Act 1978, s 2 (now repealed).

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

(b) In its *application* of those principles to the facts, *Goldcorp* is simply a case on its own facts. That the case is properly treated as nothing more than that is supported, indeed required, by long-established legal principles as to the construction of obligations based on intention. Amongst other things, it was a feature of the facts in *Goldcorp* that the company had more than one business, the parts of which it did not keep separate; and

(c) Other more recent cases applying the principles of trust law to situations where parties have contributed as investors to amassing a pool of assets demonstrate the great flexibility of the law of trusts in this field. These cases can be regarded as in the same line as *Goldcorp*, which did not purport to lay down specifically local rules for New Zealand. These cases will be addressed before returning to *Goldcorp* itself.

179. As to the facts, the Creditors' Submissions argue that even once the *"Terms and Conditions Updated 7 August 2018"* (the **Amended Terms**) were issued, there was insufficient evidence manifesting an intention in Cryptopia to create a trust over the cryptocoins on its platform (CS at [6.2]). Accordingly, the Creditors' Submissions do not attempt to address whether any trusts arose before 7 August 2018.

180. In contrast, it is argued in these submissions that trusts in favour of the Account Holders arose well before 7 August 2018, and probably from the beginning of the operation of Cryptopia's exchange platform.

181. The whole thrust of the Creditors' analysis on the trusts issue is directed to considering only two alternative scenarios (CS at [6.11]): first, whether there was a separate trust in favour of each Account Holder in relation to particular cryptocurrency; and second, whether there was a single trust for all Account Holders in relation to Cryptopia's entire holding of cryptocurrency. Only in a footnote to those submissions (fn 60) do the Creditors *"imagine"* that there might be a separate trust over each *type* of cryptocurrency in favour of all holders of that type of currency.

182. While it is accepted here that the questions posed for the Court in paragraph 1(d) of the Originating Application embrace both scenarios

addressed by the Creditors, Question 1(d)(iii)(3) expressly asks the Court also to address the possibility of there being multiple trusts for specific groups. This alternative is by far the most realistic analysis, but it is not meaningfully addressed in the Creditors' Submissions.

183. By focusing only on two unworkable and unrealistic alternatives, the Creditors' Submissions on the trust issue divert the Court's inquiry from the obvious candidate for consideration. The first alternative — individual trusts of specific cryptocoins for each investor — manufactures an inconsistency between what is being tested with what actually happened. There is no inconsistency in fact. The second alternative of one trust, global both as to beneficiaries and as to currencies, is also not credible. That would defeat the purpose of allowing investors to choose the cryptocurrencies in which they were investing.

184. It is obvious, it is submitted, that in the present case the relevant trusts group investors in each particular currency with the currency in which they co-invested. On the evidence, there is no reason to think that it matters whether one concludes that there was one declaration of trust with multiple trusts underneath (one for each currency, applying to present and future cryptocoin acquisitions), or separate declarations of trust for each cryptocurrency and its relevant group of co-beneficiaries.

B THE TRUST CERTAINTIES NEEDED FOR RECOGNITION OF AN EXPRESS TRUST

185. The Account Holders accept that the Creditors' Submissions (CS at [6.5]) are correct to assert that the so-called three certainties must be met before an express trust can come into existence: certainty of intention; certainty of subject-matter; and certainty of objects.

186. These elements need to be addressed separately, but before doing so the Court's attention is drawn to an important general point made by Briggs J (now Lord Briggs) in *Re Lehman Brothers International (Europe), Pearson v Lehman Brothers Finance SA* (***Lehman:Pearson***), more detail of which is provided below.[194] His Lordship stated:[195]

> The law does not lightly allow contracting parties' purposes and

[194] *Lehman:Pearson*, above n 113, at [245].
[195] At [245].

> intentions to be defeated by supposed uncertainty, and there is in my judgment no reason why the law should do so any more readily than normal merely because the issue is as to the validity of an intended trust. On the contrary, the law commonly recognises the creation of a trust as a necessary consequence of an intention that parties should share property beneficially, in circumstances where the parties themselves have given no thought at all to the terms of the consequential trust, if indeed they even recognised its existence. In all such cases the law fills the consequential gaps by implication, and by importation of generally applicable principles.

Certainty of subject-matter

187. It is convenient to start with certainty of subject-matter. It is submitted that there is sufficient certainty of subject-matter for the Court to uphold the existence of trusts over the Digital Assets.

188. The ability *in law* of cryptocurrencies to form the subject of a trust has already been dealt with. It is now a question whether we know *in fact* which cryptocurrencies are subject to what trusts.

189. The principal evidence relied upon is found in the Affidavit of David Ian Ruscoe dated 1 October 2019 and its annexures (**Ruscoe-1 Oct**), the Second Affidavit of David Ian Ruscoe dated 8 November 2019 and its annexures (**Ruscoe-8 Nov**), and the Affidavit of Timothy James Strahan Brocket dated 27 November 2019 (**Brocket-27 Nov**). It is clear from these Affidavits that there remain some uncertainties in the evidence, which may require the Court to make rulings in principle to be confirmed or varied in accordance with such further evidence as is filed up to the point that the Court considers it appropriate to make final rulings.

190. As a cryptocurrency exchange, Cryptopia maintained its own database of the Account Holders and Digital Assets that it controlled, called *"the SQL database"* (see Ruscoe-8 Nov at [7], [27]–[28] and [33]–[34]). The Liquidators are still in the process of finalising just how many Digital Assets are under Cryptopia's control and then reconciling those holdings with the SQL database (see Ruscoe-8 Nov at [11]). The Liquidators have created a separate database detailing the types of Digital Asset that Cryptopia holds (see Ruscoe-8 Nov at [10]).

191. The Liquidators have stated that their understanding is that Cryptopia maintained for most currencies a *"hot wallet"* and one or more *"cold wallets"*

(see Ruscoe-8 Nov at [13]).[196] Some of the cold wallets are said to have been appropriated to Cryptopia itself (ibid). However, it is submitted that the sole legal effect of that was to define Cryptopia's own beneficial share as a beneficiary of the relevant trust, because it is stated in Ruscoe-8 Nov (at [31]) that *"[t]he actual cryptocurrency associated with Cryptopia's [own] account holdings on the exchange was held in Cryptopia's digital wallets and pooled along with user holdings".* In these circumstances, it would appear that all cryptocurrency holdings were held on trust by Cryptopia, but that Cryptopia was itself one of the beneficiaries of some trusts.

192. It is submitted that there was a single trust created for each relevant cryptocurrency,[197] with beneficial co-ownership of the relevant currency shared by relevant Account Holders in proportion to the numbers of relevant cryptocoins that had been contributed by each Account Holder (either initially contributed when new coins were acquired or as a result of trades between Account Holders).

193. As explained above, Cryptopia will be a beneficiary of some of those trusts.

194. It is further submitted that the beneficial co-ownership of the trust assets applied in the same proportions to the coins held in both the relevant hot and cold wallets for each currency. In other words, each beneficiaries' interest (as a proportion of the whole of the trust) will be the same for the coins stored in the hot and the cold wallets.

195. The trust assets will include both the hot and cold wallets for each cryptocurrency. The evidence is that there was no appropriation of cryptocoins in hot wallets to particular Account Holders, whether or not the Account Holder was responsible for depositing cryptocoins into the hot wallet. Deposited coins might be transferred to a cold wallet or left in the hot wallet for the next sale which could be by a different Account Holder to the one who initially contributed the coin: see Ruscoe-8 Nov at [22].

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[196] Hot wallets retain the private key data associated with the relevant public key on a computer that is connected to the internet. Cold wallets remove the private key data from an internet-connected machine and store it on a computer not connected to the internet (or record the data if the private key is written down on paper). One way to make the data more secure still is to put the private key data on a USB stick or proprietary piece of plug-in hardware (such as a Trezor T or Ledger Nano *"hardware wallet"*).

[197] It appears that there were some 900 types of cryptocoin traded on Cryptopia's exchange, of which some 400 have been delisted: see Ruscoe-1 Oct at [6].

196. If, contrary to the foregoing submission, there were separate trusts for hot and cold wallets, it is submitted that the beneficiaries of each were the same, sharing in the same proportions.

197. Because Cryptopia alone kept and stored the private keys associated with acquisitions of each cryptocurrency, so that Account Holders did not know the private key associated with any coin (see Ruscoe-8 Nov at [29]–[30]), it is submitted that there was no intention that Cryptopia be a *"bailee"* of any currency for any one or more Account Holders, or indeed for all Account Holders as co-owners. In other words, to the extent that the Common Law, as opposed to Equity, might recognise legal title in cryptocoins, the evidence suggests that only a trust was intended. If private keys had been allocated to Account Holders (either individually or collectively), and Cryptopia also knew the content of the private key as safe-keepers, an argument that there was a type of bailment might have been available.

Certainty of objects

198. On the basis that there is a separate trust for each cryptocurrency, and on the basis of the affidavits filed by Mr Ruscoe, and in particular Ruscoe-8 Nov, it is submitted that there is, as a matter of principle, no degree of uncertainty as to who the beneficiaries of the relevant trusts are. The beneficiaries can be taken to be those with positive coin balances of the respective currencies in the SQL database (see Ruscoe-8 Nov at [33]–[34]), subject to such adjustments as may be needed as all the remaining evidence comes in (see Ruscoe-8 Nov at [34]).

199. In *B2C2 Ltd v Quione Pte Ltd*, the main facts of which are given above (from para 113), Simon Thorley IJ concluded on the facts of that case that the beneficiaries of the single trust of cryptocurrency at issue in that case were sufficiently certain: they *"are identifiable from the individual accounts of each of the Members"*.[198]

200. If the foregoing submissions are wrong and there were separate trusts for hot and cold wallets with different beneficiaries, then further inquiry is likely

[198] *B2C2*, above n 107, at [143].

to be needed to see whether both the relevant subject matter and the relevant beneficiaries can be identified and matched.

201. Insofar as the Liquidators may have some difficulties finding out the true identities of some Account Holders and making contact with them, some evidential uncertainty may arise. In particular, it seems that it is not possible to establish the names of many Account Holders from the Username and e-mail address they used to become an Account Holder (see Ruscoe-8 Nov at [56]–[58]). This evidential uncertainty, or difficulty in ascertaining the identity of who a beneficiary actually was, may mean that particular beneficial interest claims may not be established. However, it is submitted that this would not invalidate the trust for those whose precise identities can be shown. Evidential uncertainty does not defeat a trust.[199] What happens to the beneficial interests of unidentified persons is addressed below.

202. It should be observed that if any putative trust fails for lack of certainty, whether of objects or subject-matter, but not for lack of *intention* to create a trust, the normal solution of Equity would be that any property interests would result to those parties who were the source of the property i.e. to the settlors.[200] In the present case, that would not be a clean solution and it is submitted that this provides a reason for the Court to uphold the validity of the intended trusts, assuming the relevant intention is established.

Certainty of intention

Overview

203. The last of the requirements for a valid trust is an intention in the settlor or settlors to create a trust, objectively assessed. Amongst the questions that arise on the present facts are: (a) whose intention counts for the purpose of establishing the trust?; (b) how was that intention manifested?; and (c) when was that intention manifested?

204. As to whose intention counts, it is submitted that it is only necessary for the Account Holders to show that Cryptopia intended to hold the Digital Assets on trust, although such an intention was probably held also by the Account

[199] See *Re Baden's Deed Trusts (No 2)* [1973] Ch 9 (CA) at 19–20.
[200] See *Laws of New Zealand* "Trusts" at [55].

Holders when transferring coin to Cryptopia. It is further submitted that such intention *was* sufficiently manifested by Cryptopia, and to the extent necessary, by the Account Holders.

205. As to *how* the intent to create a trust was manifested, it is submitted that Cryptopia manifested its intent through its conduct in creating the exchange without allocating to Account Holders public and private keys for the Digital Assets it commenced to hold for them. The SQL database that Cryptopia created manifested that the company was a custodian and trustee of the Digital Assets.

206. Cryptopia did not intend to, and did not, trade in the Digital Assets in its own right, except to the extent that it too was a beneficiary of the trust. Cryptopia added to these manifestations of intent with each addition to the exchange of holdings of new cryptocurrencies to be held for Account Holders. This conduct was supplemented by documentation, most clearly in due course in the Amended Terms.

207. As to *when* the intent to create trust was manifested, it is submitted that a series of trusts exists, one for each type of cryptocurrency held by Cryptopia for Account Holders, and that a trust came into existence as soon as Cryptopia came each time to hold a new currency for Account Holders. It is not practicable on the evidence before the Court to be certain of the date on which each trust was created. But it is submitted that the Court ought confidently to be able to find that trusts in respect of each currency that Cryptopia held could and did arise before 7 August 2018, without needing to rely on the Amended Terms.

208. It is further submitted that if the foregoing submission is not accepted by the Court, the Court should hold that a series of trusts arose following the introduction of the Amended Terms and that such trusts were expected to operate retrospectively.

209. It should be noted that the lack of documentation attending the exchange platform of Cryptopia is by no means unique. Professors Sarra and Gullifer

in a recent legal article have surveyed the terms of a number of cryptocurrency exchanges and concluded as follows:[201]

> In fact, most agreements for custodial wallet services (whether or not as part of a wider exchange agreement) only contain broad statements regarding the nature of the relationship between the customer and the exchange … . None of these contracts contain express characterization of the relationship between the intermediary and the customer in relation to the bitcoin held in the custodial wallets.

210. It is now proposed to make some points as to the law of express trusts particularly germane to the present case, followed by a discussion of some of the key case law, including the *Goldcorp* case, before returning to the facts of the present case.

Some pertinent points of trust law

211. To the extent that, before the Property Law Act 2007 came into force on 1 January 2008, there were statutory writing requirements for some types of express trusts over personal property, those requirements ceased to apply with that Act.[202] All events relevant to the present proceedings took place after that date.

212. At common law, express trusts of personal property can come into existence, and be evidenced, orally, or as a result of conduct, including simply by force of the circumstances as between the relevant parties.[203]

    (a) *Levin v Ikiua* [2010] NZCA 509, [2011] 1 NZLR 678 at [21], [26], [30], [43] and [46] (affirming on this point the holding of Heath J at first instance: [2010] 1 NZLR 400 at [79]–[80] (HC)).

    (b) *Lehman:Pearson* [2010] EWHC 2914 (Ch) at [225] and [245] (passage cited at para 186, above).

    (c) *B2C2 Ltd v Quione Pte Ltd* [2019] SGHC(I) 03 at [144]–[145].

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[201] J Sarra and L Gullifer "Crypto-Claimants and Bitcoin Bankruptcy: Challenges for Recognition and Realization" (2019) 28 International Insolvency Review 233 at 263.

[202] It is doubtful, in any event, whether trusts of cryptocoins would have needed to have been in writing under s 49A of the Property Law Act 1952. Section 49A of the 1952 was repealed by the 2007 Act, and was not replaced.

[203] See too *Re Harvard Securities Ltd* [1997] EWHC Comm 371, [1998] BCC 567 at [5] and [53] cited in the Creditors' Submissions (CS at [6.48]–[6.51]).

(d) *Bieber v Teathers Ltd* [2012] EWCA Civ 1466, [2013] 1 BCLC 2 at [14].

213. It is not necessary, even in a commercial context, that the settlor or other parties involved in the relationship understand what a trust is, if the conduct, including the arrangements between the parties, objectively suggest that a trust was the appropriate legal consequence.

(a) *Lehman:Pearson* [2010] EWHC 2914 (Ch) at [245].

(b) *Bieber v Teathers Ltd* [2012] EWCA Civ 1466, [2013] 1 BCLC 2 at [14].

214. An express trust, even in a commercial setting, can arise as a result of the settlor's unilateral act without the beneficiaries themselves being direct parties to the declaration.

(a) *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 at [14] and [17].

215. It is not a significant indicator against a trust that the fungible property of one party is mixed with the fungible property of another in a single pool, nor that the content of that pool and the identity of the beneficiaries is constantly changing.

(a) *Re Lehman Brothers International (Europe), Lomas v RAB Market Cycles (Master) Fund Ltd* [2009] EWHC 2545 (Ch) at [54] and [56] (***Lehman:Lomas***).

(b) *Lehman:Pearson* [2010] EWHC 2914 (Ch) at [225] and [233].

216. Where the trust is of pooled fungible assets and there are different species of those assets, there will usually be separate trust obligations for each species.

(a) *Lehman:Pearson* [2010] EWHC 2914 (Ch) at [237] and [239].

217. It is not inconsistent with a trust of pooled assets that a trustee is entitled to, or does, pay out a member of the pool using assets of a like kind that are not extracted from the pool. The point made in the Creditors'

Submissions on this issue (CS at [6.34]) is, accordingly, not a strong one. There is no evidence of this occurring in any event.

(a) *Lehman:Lomas* [2009] EWHC 2545 (Ch) at [57]–[58].

218. There can be no objection to the trustee being one of the beneficiaries of a trust, including one of the beneficiaries in a pool of fungible assets.

(a) *Lehman:Pearson* [2010] EWHC 2914 (Ch) at [225] and [232]–[233].

(b) *Re Goldcorp Exchange Ltd* [1994] 3 NZLR 385 (PC) at 394.

219. It is not always fatal to a trust that the trustee is not required to separate trust assets from personal assets, so long as it is clear that the trust applies to an identifiable whole and the trustee is not free to reduce the whole below the level needed to meet trust obligations. Again, there is no evidence that there was in fact any mixing of trust and non-trust assets by Cryptopia.

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

(b) *Bambury v Jensen* [2015] NZHC 2384 at [128].

(c) *Lehman Brothers International (Europe) Ltd v CRC Credit Fund Ltd* [2012] UKSC 6, [2012] 2 All ER 1 at [194].

220. It is not always fatal to a trust that the trustee is permitted by the terms of the trust or relevant contract with the beneficiary to extract assets from the trust and use them for personal ends, at least where the trustee has an obligation to return or replace the items. Once more, there is no evidence that this in fact occurred with Cryptopia.

(a) *Lehman:Lomas* [2009] EWHC 2545 (Ch) at [52] and [63].

(b) *Lehman:Pearson* [2010] EWHC 2914 (Ch) at [239]–[240].

221. It is otherwise not fatal to the existence of a trust that many of the basic duties of a trustee and controls on powers are contracted out from by the terms of the trust or by contract with the beneficiaries.

(a) *Armitage v Nurse* [1998] Ch 241 (CA) at 251–254.

(b) *Lehman:Pearson* [2010] EWHC 2914 (Ch) at [225].

222. The last point is made because the Creditors' Submissions argue at length (CS at [6.26]) that the powers purportedly given to Cryptopia in the Amended Terms to suspend individual Account Holders' access to the platform, close their accounts, and to forfeit access, are inconsistent with there being a trust. These powers, it is submitted, do not come near to imperilling the existence of a trust. It would be ironic and unjust if the existence of these powers and exemptions were found also to nullify an express promise to hold assets on trust. In any event, it is not clear that these clauses would all be enforceable, and it can be anticipated that some of the powers would be governed by Equity's rules against forfeiture.

223. None of the other provisions in the Amended Terms said to be objectionable in the Creditors' Submissions (CS at [6.26] and [6.56]–[6.59]), including the power to delist coins and the limitations on Cryptopia's liability (many of which are hardly surprising in a trust-based trading platform), provides a credible foundation for attacking Cryptopia's status as trustee. Additionally, the Creditors' argument directed to Cryptopia's response to the hack that occurred in January 2019 (CS at [6.28]) does not have any bearing on Cryptopia's status as trustee. Cryptopia may or may not have acted in breach of trust.

<u>Some of the key cases in more detail</u>

Levin v Ikiua

224. In *Levin v Ikiua*,[204] the Court of Appeal expressly rejected the defendants' argument that there had been an oral declaration of trust,[205] but nonetheless upheld the defendants' alternative argument that a trust arose on the basis of the parties' conduct.[206] The relevant conduct included the fact that the alleged trustee, while continuing to own the assets used in the relevant business, commenced not to file tax returns in its own right, and the beneficiaries commenced to file tax returns instead.[207] The beneficiaries' financial statements showed it as effective owner of the

[204] *Levin v Ikiua* (CA), above n 88, at [21], [26], [30], [43] and [46] (affirming on this point the holding of Heath J at first instance: *Levin v Ikiua* (HC), above n 88, at [79]–[80] (HC)).
[205] *Levin v Ikiua* (CA), above n 88, at [28].
[206] See at [30] and [43].
[207] See at [10].

assets. In the present case, the SQL database is likewise intended to operate as an ownership register and is not just a book-keeping exercise.

B2C2 Ltd v Quione Pte Ltd

225. The main facts of *B2C2 Ltd v Quione Pte Ltd* are given above.[208] While the issue whether cryptocurrency was property was not contested in that case, the defendant did not concede that it was in fact a trustee for its customers.[209] The relevant contractual documentation had no express provision about trusts. But relatively late in the piece (as in the present case) a Risk Disclosure Statement was issued, which stated that *"Member's [sic] assets would be managed separately from Quoine's assets"*.[210] A document filed for the purposes of the litigation stated that *"all funds deposited by traders were stored in a single cryptocurrency wallet which was owned and maintained by Quione"*, and records were maintained for each customer's holdings.[211] On these facts, Simon Thorley IJ concluded that the defendant was a trustee of the cryptocurrency. His Honour stated:[212]

> The dispute arises on the first certainty, certainty of intention to create a trust. In ascertaining the requisite intention, it is not necessary for express words to that effect to be used. The Court must have regard to the conduct of the alleged settlor, the words used in any relevant documents and all the surrounding circumstances: Guy Neale at [52]–[58].
>
> In the present case there are no express words in the Agreement creating a trust. The necessary intention is thus to be determined from the wording of the document as a whole and from Quoine's conduct when handling the assets. That practice has not changed since the Platform began to operate. More specifically, its practice did not alter when the Risk Disclosure Statement was uploaded onto the website in March 2017. 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.

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[208] *B2C2*, above n 107.
[209] At [138].
[210] At [139].
[211] At [139].
[212] At [144]–145] (emphasis added).

The Lehman Brothers cases

226. The collapse of the Lehman Brothers Group in 2008 led to a large number of court proceedings where the Court had to wrestle with discrete legal and factual issues. Two of the decisions of Briggs J at first instance have become leading cases on the status, as trustee or otherwise, of intermediaries holding assets pooled for investors. A third case that went to the United Kingdom Supreme Court is also of relevance.

227. On the first fact pattern, Briggs J held that the intermediary was a trustee of mixed assets for the investors, but on the second he did not. His Lordship's expositions of the law in each case were consistent, and when the second decision went on appeal to the Court of Appeal that Court upheld Briggs J's analysis of the law.

228. The two decisions of Briggs J are: *Lehman:Lomas* [2009] EWHC 2545 (Ch); and *Lehman:Pearson* [2010] EWHC 2914 (Ch). The decision of the Court of Appeal in *Lehman:Pearson* has the citation [2011] EWCA Civ 1544, [2012] 2 BCLC 151.

229. In *Lehman:Lomas*, what was at issue was the status of certain moneys received by Lehman Brothers International (Europe) (**LBIE**) after its financial collapse in respect of a wide range of equity and debt securities held for *"customers"* under a brokerage agreement. The moneys had been received by LBIE as a result of sales of the securities, redemptions of the securities by the issuers, incidental payments after rights issues of shares, and dividends and interest payments made by the issuers of the securities. If the underlying securities were held on trust, then so too, it was argued, were the moneys. The brokerage documentation was unclear on the status of both the underlying securities and the proceeds upon a sale.

230. The following aspects of the brokerage agreement were relevant to LBIE's status:

    (a) LBIE was referred to as *"an agent"* of its customers in acquiring or selling securities. Clause 10 gave LBIE a charge over securities for various amounts that might become payable by customers to it;

(b) Clause 11 authorised LBIE without notice to its customers *"to borrow, lend, charge, hypothecate, dispose of or otherwise use for its own purposes any securities"* subject to the customer's right to recall for replacement securities. If there were a trust, this clause was authorising the trustee to appropriate the trust property for personal purposes from time to time, subject to an obligation to reinstate the assets at later times;

(c) Clause 17 called LBIE a *"custodian"*, and referred to Schedule 2 which provided under the heading *"Segregation of Assets"* that LBIE was to identify in its books that the securities *"belonged"* to the customer;

(d) Paragraph 9 of Schedule 2 authorised LBIE to hold securities in *"fungible accounts"* for the customer along with its other customers. This important clause provided for pooling of assets of the same type; and

(e) Paragraph 10 of Schedule 2, somewhat more obscure, appeared to allow LBIE to itself hold securities in its own right in the same fungible accounts as its customers.

231. Pausing there, it will be obvious to the Court that in *Lehman:Lomas* there was more relevant documentation than there was before 7 August 2018 in the present case. But the Amended Terms in the present case were more explicit about the proprietary position than that in *Lehman:Lomas*.

232. Importantly too, in the present case, there is no evidence that Cryptopia was entitled to appropriate to itself the Digital Assets, let alone without giving notice, as in *Lehman:Lomas*. Moreover, there is no evidence that Cryptopia in fact so appropriated any coins. In *Lehman:Lomas*, Briggs J accepted that a power in a trustee to appropriate trust property to personal use was *"most unusual"*, but he concluded it need not be fatal to the existence of a trust if there were enough indicators of a trust otherwise present.[213]

[213] *Lehman:Lomas* [2009] EWHC 2545 (Ch) at [52].

233. In concluding that there was a trust of the pooled securities, Briggs J relied on:

(a) The use of the words *"custodian"*, and *"belong"* (at [53]);

(b) Paragraph 2 of the Schedule referring to the *"segregation of assets"* from LBIE's own (at [55]); and

(c) The fact that LBIE's right under clause 10 to a charge in respect of moneys owed it by customers implied that the customers owned the property that was being charged (at [71]).

234. The following points from Briggs J's judgment are of considerable relevance to the present proceedings, some of which are direct quotations from the judgment:

(a) *"[T]he existence of a right in B to mix the fungible property of one beneficiary with the fungible property of another beneficiary in a single fund has never been a powerful contra-indication against the existence of a relationship of trustee and beneficiary between B and A. An obvious example of such a relationship is that between solicitor and client, in relation to client money held by the solicitor in a client bank account"*;[214]

(b) *"There is in my judgment nothing incompatible with the recognition of a proprietary Counterparty interest in securities in the provisions whereby they may be held in omnibus fungible accounts with equivalent securities of other Counterparties. While it may be that the consequence is that the proprietary interest of any particular Counterparty is to a rateable share in the fungible account rather than in particular securities in that account, there is no reason in my judgment why that interest should not be recognised as proprietary, or that the obligations of the account holder (be it as custodian or sub-custodian) are those of a trustee"*;[215]

(c) It was not problematic that upon a beneficiary's request to extract its interest from the pool, the putative trustee could meet that request,

[214] At [54].
[215] At [56].

even by using equivalent securities that were not sourced from the pool;[216] and

(d) LBIE's right to appropriate the securities to its own use was a *"powerful contra-indication to the recognition of a trustee/beneficiary relationship"* but not fatal when in essence LBIE remained under a duty to return or *"swap"* equivalents.[217]

235. One can now turn to the *Lehman:Pearson* case.

236. The facts of this case are much more complex than those of *Lehman:Lomas*. Different documentation was at issue. Whereas *Lehman:Lomas* was concerned with the status of the relationship of LBIE with its investing customers, *Lehman:Pearson* was concerned with the status of LBIE's relationship with other companies in the Lehman Group. Under the arrangements, LBIE bought and sold equity and debt securities on European markets on the instructions of its affiliate companies. There was no allocation to particular affiliates of particular securities while they were held by LBIE; securities were pooled.

237. The Court was asked to rule on LBIE's alleged status as trustee based both on the period when there was very little documentation, and on the period after relatively detailed documentation had been adopted. The detailed documentation arose out of what was called the *"Rascals process"* (*"Rascals"* being an acronym), an internal process that responded in the mid-1990s to regulatory concerns. The documentation that was used was not the same for every affiliate company, which meant that the Judge had to consider the position of each company separately. But most of the companies faced the problem that the documents were quite explicit that, in relation to securities that LBIE held at the date the documents came into force, LBIE was to be treated as beneficial owner and hence there was no trust. The documents went on to provide that when LBIE bought *new* securities for affiliates it was to hold them on trust but that was only the starting point. From then on there was a complex process put in place where beneficial ownership was deemed to go back in forth on certain

[216] At [57]–[58].
[217] At [63].

events. Briggs J held that by the time of the collapse it was clear that the position had reverted to there being no trust in favour of the affiliates.

238. Although unravelling the details and consequences of the Rascals process took up most of Briggs J's judgment, the real interest in *Lehman:Pearson* for present purposes lies almost entirely in his Lordship's holdings relating to the period before the Rascals documentation came into effect, where LBIE's status was less clear.

239. There are two lessons to be drawn from this part of Briggs J's judgment for the present case. First, it is instructive to focus on why his Lordship found that there was no trust, reaching a different conclusion on the trust point from that which he had reached in *Lehman:Lomas*. Secondly, Briggs J, most usefully, set out at some length what he saw as the relevant factors in determining whether there might be a trust of pooled assets in the hands of a custodial intermediary.

240. The key reasons why Briggs J concluded there was no trust as between LBIE and its affiliate companies in the initial period are to be found at [275]–[279].[218] They include the following:

    (a) Under the pre-Rascals arrangements, LBIE was not only permitted to charge the securities for personal borrowing, as LBIE was entitled to do with its customers in the *Lehman:Lomas* case, but it could actually sell them and use the proceeds in its business, leaving potential short positions in its holdings of particular securities. Indeed it regularly did this, using the funds for cashflow purposes. Earlier in his judgment, Briggs J had noted that LBIE was so often self-dealing with the securities that at times it held no securities at all of certain types that supposedly were to be accounted for to its affiliates.[219] The main passage of Briggs J's judgment on this point is as follows:[220]

> Thus LBIE was free to mix the securities with its own, to dispose of them by way of street lending on terms which permitted LBIE to enjoy the consequential funding benefits of the cash received in lieu, without accounting to the affiliates, and to use the securities of one affiliate to make good short positions both for other affiliates and for LBIE itself. In short,

[218] *Lehman:Pearson*, above n 113, at [293] Briggs J expressly explained why he had reached a different conclusion to that which he had reached in *Lehman:Lomas*, above n 213.
[219] *Lehman:Pearson*, above n 113, at [234].
[220] At [275].

> LBIE was free to use securities held in its house depot accounts generally for the purposes of its cash flow and more generally for its business, albeit that its business included agency and brokerage activities for its affiliates. LBIE was under no obligation to maintain sufficient securities in its house depot accounts to match the aggregate of its affiliates' book entitlements. On the contrary, it simply managed its house depot accounts so as to be able to settle disposals of securities held for its affiliates' books, as and when instructed to do so. In all those respects, LBIE's permitted conduct in relation to its house depot accounts much more closely resembles that of a banker in relation to customers' deposits than a trustee in relation to its beneficiaries' property.

(b) The commercial objectives of the parties were economic, and those purposes could be achieved without the affiliates having any property rights;[221]

(c) The parties were all affiliates in the same group which meant they did not have cause to rely on a proprietary interest as "they might have had if choosing a wholly independent broker or settlement agent for their dealings in securities". LBIE's freedom to use the securities was anyway an indicator that insolvency was not a focus of the arrangements;[222]

(d) There was no evidence that the Rascals documentation, in having as its starting point that the beneficial ownership of the securities was with LBIE not the affiliates, was intended to alter the pre-Rascals position, but rather was intended to shore up regulatory questions as to LBIE's status.[223]

241. Earlier in his judgment, Briggs J had set out ten general principles for determining whether there is a trust in contested situations, including where there are putative trusts of pooled assets for classes of investors.[224] The principles are pertinent to the present proceedings and are as follows, verbatim:

> The Principles
>
> i) The recognition of a proprietary interest of B in property where A has the legal or superior title necessarily assumes the existence of a trust as between A and B.

[221] At [276]–[277].
[222] At [278].
[223] At [279].
[224] At [225].

ii) There can be no such proprietary interest if the necessary trust would fail for uncertainty.

iii) A trust of part of a fungible mass without the appropriation of any specific part of it for the beneficiary does not fail for uncertainty of subject matter, provided that the mass itself is sufficiently identified and provided also that the beneficiary's proportionate share of it is not itself uncertain.

iv) A trust does not fail for want of certainty merely because its subject matter is at present uncertain, if the terms of the trust are sufficient to identify its subject matter in the future.

v) Subject to the issue of certainty, the question whether B has a proprietary interest in the property acquired by A for B's account depends upon their mutual intention, to be ascertained by an objective assessment of the terms of the agreement or relationship between A and B with reference to that property.

vi) The words used by the parties such as "trust", "custody", "belonging", "ownership", "title", may be persuasive, but they are not conclusive in favour of the recognition of B's proprietary interest in the property, if the terms of the agreement or relationship, viewed objectively, compel a different conclusion.

vii) The identification of a relationship in which A is B's agent or broker is not conclusive of a conclusion that A is, in relation to the property, B's trustee, although it may be a pointer towards that conclusion.

viii) A relationship which absolves A from one or more of the basic duties of trusteeship towards B is not thereby rendered incapable of being a trustee beneficiary relationship, but may be a pointer towards a conclusion that it is not.

ix) Special care is needed in a business or commercial context. Thus:

(a) The law should not confine the recognition and operation of a trust to circumstances which resemble a traditional family trust, where the fulfilment of the parties' commercial objective calls for the recognition of a proprietary interest in B.

(b) The law should not unthinkingly impose a trust where purely personal rights between A and B sufficiently achieve their commercial objective.

x) There is, at least at the margin, an element of policy. For example, what appears to be A's property should not lightly be made unavailable for distribution to its unsecured creditors in its insolvency, by the recognition of a proprietary interest in favour of B. Conversely, the clients of intermediaries which acquire property for them should be appropriately protected from the intermediary's insolvency.

242. In the succeeding paragraphs of his judgment Briggs J added some commentary on those ten principles. Again, this part of his Lordship's judgment is highly relevant to the present litigation and is commended to

the Court, especially for its discussion of *Hunter v Moss*,[225] a case criticised in the present case in the Creditors' Submissions (CS at [6.46]). In *Hunter*, the England and Wales Court of Appeal upheld a trust of *"5% of the company's issued share capital"*. Briggs J considered that the interest of the parties in such a situation is one of beneficial co-ownership.[226]

243. Briggs J confirmed that it is no objection to there being a trust for a class of persons on a co-ownership basis that the trustee itself is one of the beneficiaries. Nor does it matter that the membership of the class constantly changes. His Lordship stated:[227]

> Thus it is no objection that the fund is beneficially shared with the trustee, as in *Hunter v Moss* itself and in *White v Shortall*. Nor is it an objection that a segregated fund (i.e. one in which the trustee does not share) is a constantly changing fund beneficially co-owned by a constantly changing class of the clients of the trustee: as in *CA Pacific Finance Limited*.

244. Briggs J also addressed the position where beneficiaries of pooled trusts have interests in different pooled securities, such as where some beneficiaries asked the intermediary to buy ICI shares and others BP shares.[228] The question there must be addressed by reference to the particular brand of security, even if the trustee purports to record all the transactions in a single account. It is reasonably clear from [237] (and also from [239]) that his Lordship meant that in law there is a trust for every species of asset held. It is worth setting out the entire passage in the judgment:[229]

> The starting point is that it is misleading to think of LBIE's house depot accounts as if they were simply one big omnibus account into which all its holdings of securities of any type were deposited, like some single bank account used for all its payments and receipts of cash. However they were recorded, the reality is that LBIE held a great multiplicity of positions on house depot accounts, one position for each type of security, by which I mean not one for equities and one for fixed income, but one for ICI ordinary shares, one for BP ordinary shares, separate positions for any different class of shares of the same issuer, and further separate positions for different classes of fixed income securities, again, separately for each issuer. The question of certainty must be addressed by looking, conceptually at

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[225] *Hunter v Moss* [1994] 1 WLR 452 (CA).
[226] *Lehman:Pearson*, above n 113, at [232]. See too *SL Claimants v Tesco Plc* [2019] EWHC 2858 (Ch) at [17], explaining that custodians under the CREST system used for retail investing in the shares of listed UK companies operates by way of trust with the shares of each listed company being held by the relevant trustee in a pool for all investors in those shares.
[227] *Lehman:Pearson*, above n 113, at [233].
[228] At [237].
[229] At [237].

> least, at each position individually, even if they were all recorded in one account. LBIE's depot account position for ICI ordinary shares is a convenient (if now purely historical) example. It would consist at any given moment in time of a chose in action against LBIE's depository in relation to a specified number of ordinary shares, and would consist of a beneficial co-ownership interest in the depository's total holding of shares of that type.

245. Briggs J also adverted to the position when securities in the pool are lawfully disposed of by the trustee for personal reasons but subject to an obligation to return equivalent securities. Those rights to get substitute securities are themselves held on trust.[230] His Lordship then addressed the position where there occurred a shortfall in the numbers of particular securities the trustee was supposed to be holding. He considered that any losses should ordinarily be shared pari passu.[231]

246. It is not necessary to say much about the decision of the Court of Appeal in *Lehman:Pearson*. This is because there was no appeal from Briggs J's conclusion that there was no trust before the Rascals process came into effect. The appeal was all concerned with the effect of the Rascals documentation. It is of interest, however, that LBIE cross-appealed Briggs J's finding that there had been some circumstances under the Rascals process when LBIE did hold some securities on trust albeit briefly. LBIE argued that arrangements between the parties were inconsistent with there ever having been a trust. The Court of Appeal rejected this argument,[232] impliedly endorsing Briggs J's conclusions about the flexibility of the trust institution, and Briggs J's own endorsement of *Hunter v Moss*.[233]

247. The third Lehman case, *Lehman Brothers International (Europe) Ltd v CRC Credit Fund Ltd*, is a yet different fact pattern.[234] It was concerned only with client moneys received before any investing took place. Under relevant investor-protection legislation, LBIE should have kept these moneys in a trust account, but had failed to do so. The Supreme Court, by majority, upheld a shared trust for Lehman clients over LBIE's unsegregated bank accounts. The Court did so on the basis of the statutory wording. However,

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230 At [239]–[240].
231 At [244].
232 At [77].
233 At [69]–[71].
234 *Lehman Brothers International (Europe) Ltd v CRC Credit Fund Ltd* [2012] UKSC 6, [2012] 2 All ER 1.

Lord Collins of Mapesbury accepted that it was sometimes possible at common law for a trust to arise over mixed assets even where the trustee had not kept the funds separate from its own. The key dictum is as follows:[235]

> There is no doubt that money in a mixed fund may be held on trust, and that a trust of money can be created without an obligation to keep it in a separate account: *In Re Kayford Ltd* [1975] 1 WLR 279, 282, per Megarry J.

Three Quistclose cases

248. The *Quistclose* trust that arises where a provider of funds (or other property) stipulates that the recipient is to retain the funds until they are ready to be used for a designated purpose has routinely been upheld even though there has been no express declaration of trust and the word *"trust"* or similar is not used.

249. In *Barclays Bank Ltd v Quistclose Investments Ltd* itself, the terse documentation principally relied upon came not from the payer/lender but the payee/borrower.[236] The payee sent to its bank a cheque it had received from the payer, with a covering letter that did nothing more than ask the bank to open a separate account to receive the proceeds of the cheque, noting that the purpose of the account was to enable it to pay a dividend to its shareholders. The only written evidence from the payer itself was a board resolution that recorded a proposed loan to the payee *"for the purpose of that company paying the final dividend"*. No words of trust appeared. The payee's letter had, however, been sent to the payer before going to the bank, in order for the payer to put the cheque in the same envelope. On these slender facts, the House of Lords upheld the existence of a trust over the moneys in favour of the payer.

250. In *Twinsectra Ltd v Yardley*, another leading Commonwealth authority on the *Quistclose* trust, it was again the payee that was responsible for the documentation that created the trust in favour of the payer.[237] The payee was a solicitor that unilaterally gave a written undertaking to the payer that the relevant loan funds would be used *"solely for the acquisition of*

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[235] At [194].
[236] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) at 578–579.
[237] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

property" by its client. Again a trust was held to be created, even though there was an express finding that the payer itself intended no trust and no words referring to a trust were used.[238]

251. In *Bieber v Teathers Ltd*,[239] the claimants were investors who had individually responded to an information memorandum inviting investment in a proposed television and film venture. The form of venture was to be a tax partnership. As the investment funds came in, the defendant placed them in its client account at a bank. The defendant then moved the funds to the *"partnership account"*. The England and Wales Court of Appeal upheld Norris J's findings at first instance that a shared *Quistclose* trust in favour of the claimants did exist in relation to the moneys while they were in the client account but that that trust ceased once the funds were moved to the partnership account; the purpose-trust was complete at that point. Patten LJ also endorsed Norris J's summary of how the *Quistclose* trust works.[240] Norris J had accepted that a trust could arise without express words and simply from the context of the parties' relationship and their conduct. The relevant passages again are found in Patten LJ's judgment at [14]:[241]

> So, thirdly, it must be clear from the express terms of the transaction (properly construed) or must be objectively ascertained *from the circumstances of the transaction* that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient but should be used exclusively to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer. …
>
> Sixth, the subjective intentions of payer and recipient as to the creation of a trust are irrelevant. If the properly construed terms upon which (*or the objectively ascertained circumstances in which*) payer and recipient enter into an arrangement have the effect of creating a trust, then it is not necessary that either payer or recipient should intend to create a trust: it is sufficient that they intend to enter into the relevant arrangement.

Bambury v Jensen

252. In *Bambury v Jensen*, Fogarty J held that the defendant-owner of an art gallery was a trustee of the proceeds of sale of the plaintiff-artist's paintings

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238 At [14] and [17].
239 *Bieber v Teathers Ltd* [2012] EWCA Civ 1466, [2013] 1 BCLC 248.
240 At [14].
241 (Emphasis added).

which the defendant had sold for the plaintiff.[242] Although there was undoubtedly an agency relationship between the parties, no express words of trust had been used in respect of the defendant's duties to account for the proceeds of paintings, net of commission. The Judge also accepted that the arrangements between the parties did not require the agent to maintain a separate bank account for the proceeds of sale. The Judge relied for his holding of a trust on the evidence of the history of the conduct of the relationship and on evidence as to industry practice in the art world. His Honour held that a trust could be found even where the trustee was permitted to bank the proceeds into the trustee's personal bank account, so long as there was an express or implied undertaking not to take the moneys out for personal use. The absence of an obligation to keep the trust assets separate was an indicator against a trust being intended, but it was not fatal.

Re Goldcorp Exchange — no bar to a finding of trusts on present facts

253. Returning now to the *Goldcorp* case, it is reiterated that while the propositions of law to be found in the decision of the Privy Council naturally bind this Court, the Privy Council's application of those principles in construing the relevant contracts in that case have no binding effect in the present case.

254. The construction of what has been agreed between the parties, even in relation to a contract in the same market, is a task for the tribunal in the particular case (at least where the contract being construed is not a standard form). The law on this point is correctly stated in *Rees v Peters*,[243] and by Lord Wright in *Luxor (Eastbourne) Ltd v Cooper*:[244]

> To some extent decisions on one contract may help by way of analogy and illustration in the decision of another contract. But however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made.

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[242] *Bambury v Jensen* [2015] NZHC 2384 at [128].

[243] *Rees v Peters* [2011] EWCA Civ 836, [2011] 2 P & CR 18 at [29]–[30] per Sedley LJ . See too *Galcif Pty Ltd v Dudley's Corner Pty Ltd* (1995) 6 BPR 97,548 (NSWCA) at 4 by Kirby P: *"The court is not controlled by the meaning given to words, even the same words in earlier cases. This is because no two cases are ever precisely the same."* For a New Zealand example, see *Re McFetridge (deceased)* [1950] NZLR 176 (SC) at 178.

[244] *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 (HL) at 130.

255. In any event, the facts and reasoning applied to the so-called *"non-allocated claimants"* in *Goldcorp* are readily distinguishable from the present case for two principal reasons:

(a) Even if *an intention to create a trust* had been found on the facts in *Goldcorp*, it would have failed for lack of certainty of subject-matter. Whatever the scope of its promises, the company in that case had never set aside a bulk of gold for the unallocated claimants, which led to an express finding by the Privy Council that there was no certainty of subject-matter.[245] The company had only a general stock of gold from which it had made no attempt to appropriate stock to the non-allocated claimants. It used the same stock to supply outright buyers of gold who bought on different contractual terms. For the reasons given above, there *is* certainty of subject-matter in the present case;

(b) By the time of the Privy Council hearing at least, the non-allocated claimants had conceded that the relevant contracts were ones for the sale of unascertained goods, but maintained that there were trust terms collateral thereto.[246] Moreover, the Court recorded that the parties had agreed that the contract of sale was not one *"ex-bulk"* and it followed therefore that the company was contractually entitled (and indeed obliged if its stock of gold had disappeared) to meet delivery from any source once a customer called for gold.[247] These findings are very different to the position in the present case, where, as explained below (at para 266), Cryptopia was not in the business of selling coins to Account Holders (with the exception of the NZDT coin), but rather just the provider of a platform to store coins and from which Account Holders could trade with one another.

256. It is not inaccurate to submit, therefore, that *Goldcorp* is not an especially important case on express trusts in the present context. The claimants in that case never stood a chance once it was evident that the company had multiple parts to its business and was generally trading in its stock of gold without allocating any assets to any particular class of its customers. The

[245] *Re Goldcorp* (PC), above n 193, at 394 lines 16 to 30; and 395 line 55.
[246] *Re Goldcorp* (PC), above n 193, at 392 line 52.
[247] At 394 line 32.

case's import on issues of constructive trusts is greater, but the thrust of the Account Holders' argument in this application is on the law of express trusts. The Privy Council in *Goldcorp* largely relied on English cases, and on basic principles the law in our respective jurisdictions remains similar. The subsequent English cases, particularly the *Lehman* cases, provide better guides to the solution of the present case.

257. In any event, in at least two respects the *Goldcorp* litigation is in fact helpful to the Account Holders in the present case:

(a) Lord Mustill recognised in the two passages below that it was legally possible to have a trust over a bulk of goods. It was just not achieved on the facts:[248]

> 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. …
>
> The only remaining alternative, consistently with the scheme being designed to give the customer any title at all before delivery, is that the company through the medium of the collateral promises had declared itself a trustee of the constantly changing undifferentiated bulk of 40 bullion which should have been set aside to back the customers' contracts. Such a trust might well be feasible in theory, but Their Lordships find it hard to reconcile with the practicalities of the scheme.

(b) As noted in the Creditors' Submissions, at first instance in the *Goldcorp* case, Thorp J upheld a trust in gold and silver in favour of the so-called *"Walker & Hall claimants"*.[249] The validity of this finding was not challenged on appeal, and the ruling expressly survived the decision of the Privy Council.[250] The factual basis for a finding of a trust, and his Honour's conclusion that a trust in a changing bulk could in law be available, are set out in the following passages from his judgment. It will be observed that Thorp J upheld a trust simply from the way in which Walker & Hall conducted its business:[251]

> But while the metal was not individually boxed or pidgeon-holed, what was done, and meticulously done, was the setting aside of appropriate quantities and types of metal daily to

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[248] *Re Goldcorp* (PC), above n 193, at 394 line 20; and 398 line 37. See too Lord Mustill's citation from *Re Wait* at 394 lines 5 to 10.
[249] *Re Goldcorp Exchange Ltd* (HC Auckland, M1450/88, 17 October 1990).
[250] *Re Goldcorp* (PC), above n 193, at 409 line 30.
[251] *Re Goldcorp* (HC), above n 249, at 72, 104 and 105.

> ensure that the bullion held was of the precise types and amounts brought in for safe custody or purchased and left with the Company for custody by it. So that at any time if all the customers had attended and claimed the bullion to which their contracts related, that bullion would have been immediately available in the form specified in those contracts, the form and nature of which need consideration. …
>
> If the view that the completion of the bullion storage contracts amounted to a notional appropriation and ascertainment for the purpose of Section 18 and the passing of title at common law be wrong, I would in any event support Mr Knight's alternative claim, namely that the actions of Walker and Hall amounted to a declaration that the mass of bullion held by it for its customers was held by it as a trustee for them in the proportions declared in the bullion storage contracts. …
>
> As Mr Knight pointed out, there are a multitude of cases in which trusts have been found in mixed funds of currency, as e.g. *Re Nanwa Goldmines Limited* [1955] 3 All ER 219 and *Re Kayford Limited* [1975] 1 All ER 604. Purely as a matter of principle I am unable to see why a trust should arise in respect of monies but not in relation to other property which is equally of such a nature that the trustee can in practice apportion the fund between the beneficial owners so as to give to each his or her proper share.

258. Thorp J in *Goldcorp* relied in part on the decision of the Court of Appeal in *Coleman v Harvey*.[252] *Coleman* is a case where the Court upheld co-ownership at Common Law in a mixture of refined silver, made up of silver coins supplied by a customer of the relevant refining company and the company's own silver. Again, the evidence of the arrangement between the parties was exiguous, the agreement being oral.

259. Many of the points made by the Creditors in their Submissions, attempting to draw analogies between the present case and the *Goldcorp* facts (CS at [6.36]–[6.43]), are either wrong or not compelling. In particular:

    (a) The evidence before the Court does not suggest (contrary to CS at [6.36(a)] and [6.43]) that Cryptopia had maintained a *"general stock"* of cryptocurrency separate from the SQL database; let alone, if it did, that it failed to keep the Account Holders' stock separate from that general stock, or failed to keep enough coins in the SQL database to meet all the rights of Account Holders (prior to the January 2019 hack). The mere fact that Cryptopia was also entitled to a share in

[252] *Coleman v Harvey* [1989] 1 NZLR 723 (CA) as discussed by Thorp J at 40–44.

the coins recorded on the SQL database merely reflects the fact that trustees are often one of the beneficiaries of the trust;

(b) The fact that Cryptopia might have been able to pay out an Account Holder with coins of the same type that were not in the pool (CS at [6.36(a)]), merely goes to the fact that an Account Holder would suffer no loss if Cryptopia did that. There is no evidence that it was one of the terms of the contract between Cryptopia and Account Holders that that would or could happen, nor indeed that it did happen; and

(c) Equally, there is no evidence (contrary to CS at [6.36(b)]) that Cryptopia promised that it would deliver to an Account Holder the number of coins allocated to it, even where for some reason, not connected to Cryptopia's own fault, there was a shortfall in the pool of coins. The January 2019 hack is a case in point. Each Account Holder was indeed entitled to a *"shifting proportion of a shifting bulk"*.

260. There is also no evidence in the present case that Cryptopia either claimed the right to use the pooled Digital Assets for its own purposes, or actually did use any of the pooled Digital Assets for its own purposes (beyond drawing on its own beneficial interest in that pool). It derived its income from charging transaction fees.[253] The evidence is that Cryptopia paid the salaries of its staff and its other costs of business out of the bank accounts it maintained (including those with the Nelson Building Society listed in Cryptopia's Balance Sheet as at 8 August 2018).[254]

261. In the leading case for the proposition that an ordinary bank is not a trustee of its customers' deposited funds, *Foley v Hill*,[255] the decisive factor for the Law Lords was the right of the banker to use deposited funds for its personal business and to profit thereby. To reiterate, that is not a feature of the present case. The statement of Lord Cottenham LC in the judgment,

[253] See Ruscoe-8 Nov at [31]; and Brocket-27 Nov at [13]–[18].
[254] See Ruscoe-13 Jan 2020 at [10]–[15]. Cryptopia's balance sheet is included in Ruscoe-8 Nov, Exhibit DIR3 at 14–15.
[255] *Foley v Hill* (1848) 2 HLC 28, 9 ER 1002.

explaining why there is no trust, is illuminating.[256] There is a similar passage in the judgment of Lord Brougham:[257]

> The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

262. A bank will also usually offer its customers interest as payment for the right to use the money deposited by them. No counter-consideration for any use of cryptocurrency was offered to the Account Holders by Cryptopia, for the very good reason that it was only a custodian and not a user of the Digital Assets. The absence of consideration for any right to use assets recently assisted Associate Judge Lester in *Bethell v Papanui Properties Ltd* to reach a conclusion that an agent was a trustee and not just in a contractual relationship with its principal despite the absence of express words creating a trust:[258]

> Could it have been intended that the PMCM Clients [i.e. the principal] would be making what would amount to an interest free loan of the funds to Arrow [i.e. the agent] for it to use as it saw fit? The liquidators' position would require it to be accepted that it was the mutual intention of the parties that the PMCM Clients were prepared to risk their funds on an unsecured no return basis.

C APPLICATION OF THE LAW TO THE FACTS OF THE PRESENT CASE

Evidence before the Amended Terms, 7 August 2018

263. It is proposed first to address the evidential position before the introduction of the Amended Terms, which terms are nonetheless argued to apply retrospectively.

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256 At 1005–1006.
257 At 1008.
258 *Bethell v Papanui Properties Ltd* [2019] NZHC 3169 at [41].

264. There is little evidence before the Court as to how Cryptopia managed to attract some two million Account Holders to its platform across the nearly five years of its operations, including what was, or may have been, said orally or in writing by the staff of the company to those people (collectively or individually). The evidence before the Court shows Cryptopia invited and engaged in email correspondence, on-line correspondence through *"Cryptopia Support"* (using a *"ticket"* system) and Twitter, Facebook and Linked-In, and its Privacy Policy referred to the company's marketing.[259] However, the content of these communications is not in evidence.

265. It is nonetheless submitted that there is sufficient evidence before the Court for it to conclude that in the course of Cryptopia's operations a series of trusts in favour of Account Holders arose in respect of the Digital Assets. The key details of the trusts, and of their changing subject-matter and membership, were held in the SQL database maintained by Cryptopia.[260] At the date of these Submissions, the date of first creation of the SQL database (or any predecessor) is not available. The earliest version currently available is as at 3 January 2018.[261]

266. The whole purpose of the cryptocurrency exchange established by Cryptopia was to provide a platform to enable Account Holders to store their cryptocurrency, from which they could trade in coins amongst themselves should they so wish. Other than for a period in relation to the cryptocurrency *"NZDT"* (a *"stable currency"* pegged to the New Zealand dollar), it appears that Cryptopia was not in the business of selling cryptocurrency, but was rather just an exchange that charged fees for a service. So, except for sales of NZDT which it appears Cryptopia engaged in from about May 2017 until about 9 February 2018, customers brought their own cryptocurrency onto Cryptopia's exchange.[262]

267. Cryptopia's web-based instruction pages and live customer-interfaces (together, the **Webpages**) stated and implied that Account Holders would be depositing, buying, selling and owning cryptocurrency (see, for

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[259] See Ruscoe 8-Nov, Exhibit DIR3 at 1, 52, 64, 67, 80, 81, 100, 102, 123-125, 157-161, 175, 181, 184–188, 201; and Ruscoe 13-Jan 2020 at [4]–[5]. The gaps in the evidence are similar to that in *Harvard Securities*, above n 203, at [5] and [53], where trusts of pooled shares were upheld.

[260] See Ruscoe 8-Nov at [27]–[28].

[261] See Ruscoe 13-Jan 2020 at [6].

[262] See Brocket–27 Nov at [8]–[10]).

example, the reference to *"your cryptocurrency coins"* in the material for withdrawing coins).[263] It is not clear when the Webpages first went live, but they were operating by April 2016.[264]

268. The Webpages may have misled Account Holders into thinking that they were directly owning cryptocurrency, rather than being only the beneficiaries of trusts. But those pages certainly did not suggest that Account Holders were to have nothing more than a contract under which they would be unsecured creditors of Cryptopia, with Cryptopia having the power to dispose of the currency (some NZ$170 million of it as at 8 November 2019) without Account Holders' consent. This was currency that Cryptopia had acquired only by virtue of the trust which Account Holders had placed in it to act as custodian for them.

269. It should be recalled that case law supports the view that beneficiaries of a trust need not recognise the existence of a trust, and that a trust can be created by the recipient of property and not just by the transferor of it (see paras 213–214). This is not formally to admit that the trusts that arose from the relationship between Cryptopia and the Account Holders were created wholly unilaterally by Cryptopia, nor that no consideration was provided by the Account Holders for their beneficial interests. A contractual analysis is still possible, but it is not formally necessary.

270. The *"Cryptopia Risk Statement"* also spoke of customers *"owning"* their own coins (see clauses 3, 17 and 18). It also warned customers of the many risks of owning cryptocurrencies and of using Cryptopia's platform. But in no way did it suggest that one of the risks to be run was that Cryptopia would *own* the coins legally and beneficially, let alone that that would be the position if Cryptopia were to go into liquidation. In addition:

    (a) Clause 28 of the Risk Statement informed customers that Cryptopia may hold its own digital currencies on the platform. It did not suggest that in fact it beneficially owned *all* the digital currency on the platform; and

[263] See Ruscoe 8-Nov, Exhibit DIR3 at 45.
[264] See Ruscoe 13-Jan 2020 at [7].

(b) Clause 29 of the Risk Statement addressed fees payable for using the platform. It did not suggest that any capital gains in the cryptocoins would enure to Cryptopia, which would have been the normal position had Cryptopia been the legal and beneficial owner of them.

271. The "*Marketing Strategy*" of July 2018 promoted that Cryptopia was providing a *"trading platform for global cryptocurrency investors who want to trade safely"* and that the company was *"dedicated to ensuring you can deposit, trade and withdraw your cryptocurrency coins securely whilst offering world class service."*[265] Customers were referred to as *"users"*, not buyers. The Strategy also referred to the company's *"High level security"*, stating: *"Rest easy: knowing your crypto investments are securely protected."*[266] The accompanying fact sheet contained the following statements: *"Our mission is to enable the widespread adoption of digital currencies to give people control back of their money through faster, cheaper, and more efficient financial services."*[267]

The Amended Terms and their effect

272. The Amended Terms, particularly clauses 5(d) and 5(e), and clauses 6(e), 6(f), 6(g) and 6(k) in respect of *"fiat pegged tokens"*, contain express recognition that the cryptocoins held by Cryptopia for Account Holders are held on trust for those Holders. The terms are still not ideally expansive about the number of trusts that are needed properly to give effect to the arrangements but it is submitted that the Court is in a position, and ought in law, to fill in the gaps.

273. The Creditors' Submissions have no real answer, it is respectfully submitted, to the express declaration of trust found in the Amended Terms. As pointed out above, those Submissions set up a straw figure in the individual Account Holder and then demonstrate how there cannot have been a trust of particular cryptocoins for that individual (CS at [6.14]–[6.18]). That is an unrealistic analysis, and it is not what the Account Holders are arguing for.

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[265] See Ruscoe-13 Jan 2020, Exhibit DIR4 at 13.
[266] Exhibit DIR4 at 16.
[267] Exhibit DIR4 at 17.

274. The Creditors' Submissions (CS at [6.23]) appear to accept that there was a trust of the *"Fiat Pegged Tokens"* as a result of clause 6(e) of the Amended Terms. This is correct, but it was still not a trust of individual tokens held for individual Account Holders. Rather, as with the other Digital Assets, the trust was one for all the holders of such tokens from time to time. There is, contrary to the Creditors' Submissions, nothing in the point that the terms of clause 6(e) are more expansive than the trust provisions for other cryptocoins in clause 5.

275. The arguments made by the Creditors for why, in the alternative, there was not a global trust of all currencies for all Account Holders (CS at [6.36]) have already been addressed in para 183 above. They are equally unconvincing. In particular, they posit terms in the arrangements which do not exist.

276. Because the Creditors have argued that the Amended Terms are ineffective to create a trust of any sort (at least in relation to currencies that are not fiat-pegged), the Creditors' Submissions do not address the questions that arise out of the fact that most Account Holders will have opened their accounts with Cryptopia before the Amended Terms came into effect on 7 August 2018. Mr Ruscoe's affidavit of 8 November 2019 states that Cryptopia had some 30,000 Account Holders in January 2017 and that the majority of Account Holders joined the platform between November 2017 and January 2018.[268]

277. From the perspective of the Account Holders, there are three possible alternative answers to this timing problem, which are advocated here in the order below:

    (a) As already submitted, trusts in favour of the Account Holders already existed, and the Amended Terms simply put the existing position in more express terms. It is noteworthy that Mr Brocket has sworn that:[269]

> From an operational perspective, there were no material changes to the way the business operated that resulted from the change to the terms and conditions in August 2018;

[268] See Ruscoe-8 Nov at [5].
[269] Brocket-27 Nov at [5].

(b) The Amended Terms were intended to apply retrospectively to all Account Holders, in order to remove any doubts about the previous position. To the extent that the Court rules that there were no trusts before 7 August 2018, nonetheless the Amended Terms create an agreement (a contractual variation), or at least an estoppel, that those terms are to apply retrospectively. Such an agreement or estoppel might not bind any third parties who had before 7 August 2018 obtained competing interests in the cryptocoins, but such an agreement or estoppel would bind the Liquidators who take the assets subject to equities;[270]

(c) The third alternative is that the Amended Terms applied to all existing Account Holders and their existing holdings as at 7 August 2018, but only prospectively from that date. In that event, it is then submitted that that makes no difference to the legal position as regards Cryptopia, the Liquidators, and the unsecured creditors. The evidence is that Cryptopia was solvent as at 7 August 2018,[271] which means that none of the avoidance provisions in Part 16 (*"Liquidations"*) of the 1993 Act is applicable. The declaration of trust arising out of what was a contractual variation is, it is submitted, fully effective and binding on the Liquidators of Cryptopia.

278. It must be noted that the intituled document *"Cryptopia terms and conditions up to August 2018"* (the **Original Terms**; inception date unknown) foresaw that the terms could be amended in the future.[272] The following relevant clause appears under the heading *"Amendments"*:

> We may amend these terms of use from time to time, so you should check and read these terms of use regularly. By continuing to use this site after any such amendment, you are deemed to have agreed to the amended terms of use.

279. In these circumstances, the Amended Terms both bound and benefited the existing Account Holders as at 7 August 2018.

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[270] *Knights v Wiffen* (1870) LR 5 QB 660 at 665–666; and *Bay of Plenty Electricity Ltd v Natural Gas Corp Energy Ltd* [2002] 1 NZLR 173 at [45]–[48]. The *Knights* decision was discussed in *Re Goldcorp* (PC), above n 193, at 395–396.

[271] See Ruscoe-8 Nov at [17].

[272] Ruscoe-13 Jan 2020 at [8] states that the earliest version currently available to the Liquidators is January 2015.

Quistclose and constructive trusts?

280. The foregoing submissions have been premised on an argument that the trusts that exist in favour of Account Holders are a series of express trusts and that all Account Holders (at least those with positive balances) are in the same general position.

281. It is submitted that the principles of express trusts are flexible enough not to require recourse on the present facts by the Account Holders to the law of constructive trusts, either institutional or remedial. As already submitted, a possible lack of alignment between the understanding of the Account Holders and Cryptopia as to the relationship between them would not be fatal to the recognition of an express trust relationship. If, however, the Court were minded to use a restitutionary solution to finding a trust, it is submitted that, notwithstanding *Goldcorp Exchange*, New Zealand law has the tools to assist the Court to find that solution.[273]

282. In addition, it is also conceivable that the very last Account Holders to join Cryptopia's platform who can show that their contributions to the platform are still in the hot wallets (or otherwise trace what happened to those contributions) could argue that a constructive trust (or perhaps a resulting trust on the *Quistclose* model) arose in their favour, and that they should not have to suffer from any shortfall that may affect other Account Holders, including as a result of the hack.

283. Such parties might place reliance on *Neste Oy v Lloyd's Bank Plc, The Tiiskeri*.[274] This case has been cited with approval in New Zealand,[275] but it was recently overruled in the United Kingdom in *Angove's Pty Ltd v Bailey*.[276]

284. While this issue is here brought to the Court's attention, this Counsel would be in a position of conflicting interests were he to promote these arguments to the Court, since he has been appointed to represent Account Holders

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[273] New Zealand law has not closed off the remedial constructive trust as part of its legal armoury (including in insolvency), in the way that the law of England and Wales has. See, for instance, *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 (CA) at 186–187; *Commonwealth Reserves v Chodar* [2001] 2 NZLR 374 (HC). The Creditors' Submissions (CR 6.71–6.72) take too narrow a view of the current New Zealand position.

[274] *Neste Oy v Lloyd's Bank Plc, The Tiiskeri* [1983] 2 Lloyd's Rep 658 (Ch).

[275] See *Hongkong & Shanghai Banking Corp v Fortex Group Ltd* (1995) 5 NZBLC 103,869.

[276] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179.

as a whole, not particular Account Holders who may have different interests.

285. Unless the Court directs the Liquidators to take steps to contact latecomer Account Holders, it is submitted that it should be left to individual Account Holders who wish to argue for individual trust interests to make their claims to the Liquidators, and for the Liquidators to assess, in the light of the evidence that they possess, what steps they might need to take in anticipation that such claims might emerge.

VI THE REMAINING QUESTIONS BEFORE THE COURT

286. It is now necessary to turn to the remaining questions in paragraph 1 of the Originating Application of 1 October 2019.

A WHAT HAPPENS IF THERE IS NO TRUST OR CRYPTOCOINS ARE NOT PROPERTY? (QUESTION (C))

287. Question (c) of paragraph 1 is as follows:

> 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.

288. The Account Holders submit that this question does not arise because of the answers they have given to Questions (a) and (b).

289. However, it is submitted that even if the Court were to find that the Digital Assets were not *"property"* within s 2 of the 1993 Act, and were not held on trust for the Account Holders, then the Digital Assets are still an *"asset"*, as that word is used in ss 253 and 313 of the 1993 Act. In those circumstances, the assets should be realised and the proceeds distributed in the ordinary way under pt 16 of the 1993 Act. In that event, Account Holders' claims would rank with ordinary unsecured creditors of Cryptopia. Albeit that this is considered by the Account Holders to be an unlikely

outcome, in that eventuality it would be appropriate to follow the process outlined in the Creditors' Submissions (CS at [7.2]–[7.6]).

B WHEN DID THE TRUST(S) COME INTO EXISTENCE, AND ON WHAT TERMS? (QUESTION (D))

290. Question (d) of paragraph 1 of the Originating Application contains a number of sub-questions. The Account Holders' answers to these have largely been given in the course or answering Question (b). But each is addressed formally in turn here.

Question (d)(i): When did the trust(s) come into existence?

291. It is submitted that an express trust came into existence for every different type of cryptocurrency which Cryptopia acquired as a result of a dealing with an Account Holder. The precise dates on which this occurred are not, at the date of these Submissions, in the evidence before the Court.

292. Once such a trust came into existence, the trust applied to any currency of the relevant type subsequently acquired by Cryptopia as part of the running of its cryptocurrency platform, whether or not that currency was in hot wallets or cold wallets.

293. In most cases the trusts will have pre-dated the Amended Terms, but to the extent that the Court finds that that is not the case, trusts arose in respect of all existing Digital Assets on the date of the Amended Terms. Any new kinds of cryptocurrencies acquired by Cryptopia from Account Holders after the Amended Terms will, from the time of acquisition, have become subject to trusts on the same basis.

Question (d)(ii): What are the terms of the trust or trusts?

294. It is submitted that it is not practicable at this point comprehensively to list all the terms that might govern the trusts. To repeat the passage from Briggs J's judgment in *Lehman:Pearson*:[277]

> [T]he parties themselves have given no thought at all to the terms of the consequential trust, if indeed they even recognised its existence. In all such cases the law fills the consequential gaps by implication,

[277] *Lehman:Pearson*, above n 113, at [245].

and by importation of generally applicable principles.

295. While the expression *"bare trustee"* is not a term of art,[278] it is accepted that it would not be inappropriate to apply that label to Cryptopia in relation to the Account Holders. Hence, Cryptopia's trust duties were confined. Its principal role was to hold the Digital Assets as trustee for the Account Holders and to let individual Account Holders then increase or reduce their beneficial interest in the relevant trusts in accordance with the system Cryptopia had established for that purpose.

Question (d)(iii): Separate trust for each Account Holder?/One trust for all Account Holders?/Multiple Trusts for specific groups?

296. As stated above, it is submitted that Cryptopia is a trustee of separate trusts, one for each cryptocurrency, with the beneficiaries being all Account Holders holding currency of the relevant type.

297. It follows that alternatives (1) and (2) in Question (d)(iii) should be rejected by the Court, and alternative (3) upheld.

C INABILITY TO IDENTIFY INDIVIDUAL ACCOUNT HOLDERS (QUESTION (E))

298. Question (e) of paragraph 1 of the Originating Application contains alternative sub-questions, addressed to the inability of the Liquidators precisely to identify all individual Account Holders. The first alternative is for the Liquidators to: *"close any such Accounts and retain any Digital Assets as assets of the Company"* (Question (e)(i)). The second alternative is that *"such Digital Assets fall to be dealt with pursuant to the Trustee Act 1956"* (Question (e)(ii)). A third option of other solutions is left open.

299. It is submitted that the appropriate course of action where the Liquidators find themselves unable to identify particular Account Holders is alternative (ii), namely for the Digital Assets that would otherwise fall to be allocated to that Account Holder to be dealt with in accordance with the Trustee Act 1956, in particular s 76.

[278] See *Burns v Steel* [2006] 1 NZLR 559 (HC) at [62]; *Commerce Commission v Harmoney Ltd* [2018] NZHC 1107, [2019] 2 NZLR 81 at [43] (this case may be appealed: [2019] NZCA 355).

300. It follows that alternative (i), retaining the Digital Assets as assets of Cryptopia, would not be appropriate, contrary to the Creditors' Submissions (CS at [9.2]). It is accepted, however, that if the Court were to hold, contrary to these Submissions, that the Account Holders are not the beneficial owners of the Digital Assets then the process suggested in the Creditors' Submissions should be followed.

D RECOVERY OF STOLEN DIGITAL ASSETS (QUESTION (F))

301. Question (f) of paragraph 1 of the Originating Application contains alternative sub-questions, addressed to what is to happen should the Liquidators recover stolen Digital Assets. The first alternative is to deal with the recovered Digital Assets in accordance with the Court's conclusions reached on Questions (a) to (e) (alternative (i)). The second alternative is to deal with the recovered Digital Assets *"pro rata according to the amounts recovered assessed against amounts stolen"* (alternative (ii)). The third alternative is to deal with the recovered Digital Assets as *"assets of the Company"* (alternative (iii)).

302. It is submitted that it is not obvious that alternatives (i) and (ii) are true alternatives, and therefore aspects of both may be appropriate. Alternative (iii) is inappropriate. It is submitted that, subject to the potentially important question whether Cryptopia was legally culpable for permitting the thefts to occur, dealt with below, the appropriate course of action is as follows.

303. If the Court accepts, as it is submitted it should, that there are separate trusts for each type of cryptocurrency held by Cryptopia, it would follow that only those Account Holders who held types of cryptocurrency that were stolen would have suffered a loss as a result of that misappropriation. Those losses should be borne pari passu by those Account Holders.[279] It ought to follow that any recoveries of misappropriated cryptocurrency should enure to the benefit of those same Account Holders.

304. Determining the position as between the Account Holders who are beneficiaries of the relevant trusts is more difficult. It is submitted that the following is the appropriate process:

[279] See *Lehman:Pearson*, above n 113, at [244].

(a) The Liquidators should determine as at the date of the theft the Account Holders and their relative shares in any trust of Digital Assets subjected to a theft, and apply the loss from the theft pro rata to those existing holdings. It should not be necessary for the Liquidators otherwise to discriminate amongst those Account Holders; the default position would be pari passu distribution of the loss;[280]

(b) To the extent that subsequent to the theft any Account Holder acquired Digital Assets of the type that suffered the theft and those Assets were added to the relevant trust assets, no reduction for the theft should be applied to that Account Holder's share in the trust assets; and

(c) Any recoveries of cryptocurrency lost as a result of the theft, should be applied pro rata to make up the loss suffered by such Account Holders as were affected by it under the above principles.

Potential relevance of fault of Cryptopia

305. The Court has not been asked to address the relevance to the questions before the Court of the fact that Cryptopia may be legally culpable for lost Digital Assets. This issue arises if the Digital Assets were held on trust (in accordance with the Submissions above), and Cryptopia is now holding fewer Digital Assets than were transferred to it by Account Holders and not withdrawn by them. The losses may have occurred from the hack and theft referred to in Ruscoe-8 Nov at [6], but there may be other causes of a shortfall.

306. It is submitted that, in principle, where a trustee is one of the beneficiaries of the trust and there is a shortfall in the trust assets, the trustee cannot share in any distribution of assets among beneficiaries, where the trustee is legally culpable in respect of that shortfall, to the extent of the shortfall.[281]

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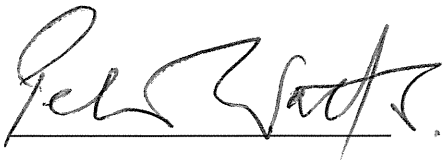
[280] See *Finnigan*, above n 88, at [48]–[52] and [68], applying *Re Registered Securities Ltd (in liq)* [1991] 1 NZLR 545 (CA).

[281] See *Finnigan*, above n 88, at [46]; *Russell-Cooke Trust v Prentis* [2003] EWHC 1206 (Ch). See, generally, J Heydon, M Leeming and P Turner *Meagher Gummow & Lehane's Equity* (5th ed, LexisNexis, Australia, 2015) at [39-110]–[39-155].

307. Given that the issue of trustee-fault is not strictly before the Court, it is accepted that no rulings on the facts can be made on it by the Court at this point.

Dated this 13th day of January 2020



Peter Watts QC
Counsel appointed by the Court for certain account holders

APPENDIX — REFERENCES TO CREDITORS' SUBMISSIONS

The Account Holders' Submissions are structured differently to the Creditors' Submissions. The purpose of this Appendix is to outline which portions of the respective submissions address which topics, so that they can be compared more readily.

Topic-by-topic comparison

Topics	Creditors' Submissions	Account Holders' Submissions
Introduction	Paras 1.1–1.3	Paras 1–5
Factual background	Paras 2.1–2.14	Paras 6–29
Applicable law	Paras 3.1–3.13	Paras 30–60
Cryptocurrency as property for the purposes of the Companies Act	Paras 4.1–4.14	Paras 61–72
Cryptocurrency as capable of being the subject of a trust	Paras 5.1–5.11	Paras 73–173
Whether Digital Assets are held on trust	Paras 6.1–6.79	Paras 174–285
Conversion of cryptocurrency to fiat currency	Paras 7.1–7.6	Paras 287–289
Terms of the trust(s)	Para 8.1	Paras 290–297
Inability to identify Account Holders	Paras 9.1–9.4	Paras 298–300
Treatment of recovered stolen Digital Assets	Paras 10.1–10.2	Paras 301–307

Instances where specific paragraphs of the Creditors' Submissions are referenced in the Account Holders' Submissions

Creditors' Submissions	Reference in Account Holders' Submissions
Para 1.3(a)	Para 63
Para 1.3(b)	Para 64
Paras 2.3–2.4	Paras 147, 157, 168
Paras 4.1–4.14	Paras 87
Paras 4.9–4.14	Para 109
Paras 5.1–5.11	Paras 74–75
Para 5.4	Para 91

Paras 5.5–5.6	Para 81, 140
Para 5.7	Para 141
Para 5.8	Para 144
Para 5.9	Para 168
Para 6.2	Para 179
Para 6.5	Para 185
Para 6.11	Para 181
Paras 6.14–6.18	Para 273
Para 6.23	Para 274
Para 6.26, 6.28 and 6.56–6.59	Paras 222–223
Para 6.31	Para 178
Para 6.34	Para 217
Paras 6.36–6.43	Paras 259, 275
Para 6.46	Para 242
Paras 6.48–6.51	Para 212
Paras 7.2–7.6	Para 289
Para 9.2	Para 300