IN THE HIGH COURT OF NEW ZEALAND **CIV-2025-485-487**
WELLINGTON REGISTRY

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

UNDER	Part 19 of the High Court Rules, Part 16 of the Companies Act 1993 and Part 7 of the Trusts Act 2019
IN THE MATTER OF	An application concerning **CRYPTOPIA LIMITED (IN LIQUIDATION)** and **CRYPTOPIA NZDT LIMITED (IN LIQUIDATION)**
AND	
IN THE MATTER OF	An application by **DAVID IAN RUSCOE** and **MALCOLM RUSSELL MOORE** as liquidators of Cryptopia Limited (in liquidation) and Cryptopia NZDT Limited (in liquidation)
	Applicants

SYNOPSIS OF SUBMISSIONS OF COURT-APPOINTED COUNSEL FOR CREDITORS

13 May 2026

Judicial officer: Justice Isac
Next event: Substantive hearing commencing Monday 25 May 2026
Case officer: Anihaka Marino

Court appointed counsel for creditors:
J S Cooper KC/JAR Barrow
Shortland Chambers/Britomart Chambers
PO Box 4338
Shortland Street
Auckland 1140
Telephone: (09) 354-1408
Email: jcooper@shortlandchambers.co.nz/
jane@janebarrow.co.nz

May it please the Court:

Introduction

1. These submissions are made by Court-appointed counsel for the creditors of Cryptopia Ltd (in liq) (**Cryptopia** or the **Company**) in relation to the liquidators' amended originating application for directions as to the treatment of unclaimed trust assets dated 23 April 2026 (the **Application**).

2. Counsel were appointed by orders of your Honour dated 9 September 2025 to act as "representative counsel for the creditors of" Cryptopia.

3. Paragraph 32(c) of your Honour's judgment of 9 September 2025 further directed that:[1]

   (a) the role of court-appointed counsel for the creditors is to assist the Court in respect of this proceeding in the interests of unsecured creditors as a class;

   (b) it is not the role of court-appointed counsel for the creditors to represent the interests of account holders (including hack victims) as a class except to the extent they are in the same position as other unsecured creditors who are not account holders;

   (c) it is not the role of court-appointed counsel to represent the interests of any individual party, whether they are a creditor or an account holder or have some other interest in the liquidation;

   (d) the duties of court-appointed counsel are owed to the Court, not to any individual party, creditor or account holder.

4. The orders as set out at paragraph 3(b) above reflect that some account holders of Cryptopia (for example, hack victims) may have unsecured claims in the liquidation in addition to their beneficial interests in the assets held

---

1 *Re Cryptopia* [2025] NZHC 2627.

by Cryptopia as trustee. However, the interests of account holders as potential unsecured creditors are not the same as those of unsecured creditors who are not account holders (for example, trade creditors and the IRD).[2] That is because:

(a) account holders may also have claims as beneficiaries of assets held by Cryptopia as trustee whereas other creditors do not; and

(b) if recognised, further unsecured claims by account holders that have not already been admitted would reduce and/or dilute the assets available for distribution to those unsecured creditors whose claims have been admitted in the liquidation.

5. These differences mean there is conflict between the interests of account holders as potential unsecured creditors and the interests of non-account holder unsecured creditors in relation to many of the issues raised by the Application. Accordingly, counsel for the creditors have taken the view that their role is to make submissions in favour of the unsecured creditors who are *not* account holders (referred to in these submissions simply as the **Creditors** or, where necessary to avoid confusion, the **non-account holder Creditors**), except in relation to the winding up of the trusts in which the position of the account holders and the non-account holder Creditors are the same.

6. As a consequence of this approach, these submissions are focused on the following matters, being those in which the Creditors have the most significant interest:

(a) Whether account holders have claims against Cryptopia that fall outside the exclusion and limitation of liability clauses of Cryptopia's

---

[2] For a list of the non-account holder creditors see the affidavit of David Ian Ruscoe dated 1 October 2019 at DIR1 [[101.0001 at 101.0018]]. The aggregate amount owing to those creditors may be found in the liquidators' reports. The most recent report in evidence is the Thirteenth Liquidators' report on the state of affairs of Cryptopia, dated 12 June 2025, a copy of which may be found in the Affidavit of David Ian Ruscoe dated 31 July 2025 at DIR1-56 [[303.1421 at 303.1429]].

terms and conditions (i.e. claims for breach of a fiduciary duty of honesty and good faith or statutory claims).[3]

(b) Whether Cryptopia is entitled to participate in a distribution of Bitcoin and, if so, in what amount.[4]

(c) Whether Cryptopia is entitled to participate in a distribution of NZDT and, if so, in what amount.[5]

(d) Whether Cryptopia and/or its Creditors have any rights of indemnity against trust assets.[6]

(e) Whether, following the distribution of assets to all eligible account holders, the trusts should be wound up and/or what should happen to trust assets that are unable to be distributed.[7]

(f) Whether the final cutoff date should be extended to allow applications by account holders made after that date.[8]

7. The positions adopted by counsel on behalf of the Creditors in relation to the other matters set out in the Application are summarised in the table attached at the **Appendix**. Counsel would be happy to expand on these points in oral submissions if that would assist the Court.

Whether account holders have unsecured claims against Cryptopia falling outside the exclusion/limitation clauses

8. Counsel for the Creditors support the directions sought by the liquidators at paragraphs 1.1 to 1.3 of the Application to the effect that clause 12 of

---

3 Paragraphs 2.3 to 2.6 of the Application.
4 Part 3 of the Application.
5 Part 6 of the Application.
6 Not pleaded in the Application but relevant for the completion of distribution and the winding up of the trusts.
7 Part 8 of the Application.
8 Pursuant to the liquidators' interlocutory application of 23 April 2026.

Cryptopia's terms and conditions excludes and/or limits Cryptopia's liability to account holders except in relation to:

(a) certain statutory claims; and

(b) breach of trust that amounts to or results from dishonesty or bad faith.

9. In light of this, it is not necessary to discuss potential claims against Cryptopia that do not fall within these exceptions. Whether account holders have claims that fall within the exceptions (and therefore are not precluded by the terms and conditions) is addressed below in the order these issues are addressed in the Application.

Breach of fiduciary duty of honesty and good faith

10. Paragraph 2.3 of the Application seeks directions on whether Cryptopia breached its fiduciary duty of honesty and good faith to account holders in relation to any of the Hack Losses.

11. Leaving aside the positions in relation to Bitcoin and NZDT, which are addressed separately below, counsel for the Creditors submit that the answer to this question is *no.*

12. To establish claims against Cryptopia for breach of fiduciary duty account holders would have to show that:[9]

(a) Cryptopia owed the account holders a fiduciary duty.

(b) Cryptopia breached that duty.

(c) The account holders suffered a loss arising out of the circumstances to which the breach was material.

---

9 *Everist v McEvedy* [1963] 3 NZLR 348 (HC) at 355, confirmed by the Court of Appeal in *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 535.

13. As a bare trustee, the obligations owed by Cryptopia were limited. Further, as the liquidators point out in their submissions, not all duties owed by a trustee are fiduciary in nature.[10] However, the Supreme Court has endorsed as a general principle that a trustee's "irreducible core obligation" is to perform the trusts honestly and in good faith for the benefit of the beneficiaries.[11] Therefore, counsel agree with the liquidators' submission that Cryptopia must have owed a duty to account holders to act honestly and in good faith and that such a duty is of a fiduciary nature.[12]

14. However, it is not enough to show that Cryptopia owed such a duty. Account holders would need to show that Cryptopia had breached this duty *and* that its breach was material to the Hack Losses. Having regard to the affidavit evidence, counsel agree with the liquidators' submission that the evidence does not support a finding that Cryptopia failed to act honestly or in good faith in the interests of the hack victims.[13] Nor is there any evidence to suggest that any act or omission by Cryptopia was material to the Hack Losses. Rather, the evidence supports the conclusion that Cryptopia was not responsible for the hack and that the Hack Losses occurred for reasons outside Cryptopia's control.[14]

15. In short, there is no evidence on which the Court could reach a finding that Cryptopia is liable to account holders for losses arising from the hack due to a breach of trust amounting to or resulting from dishonesty or bad faith.

16. In light of this, it is not necessary for counsel for the Creditors to address paragraphs 2.4 to 2.6 of the Application in detail, except to note that, even if Cryptopia were liable to account holders for breach of trust arising from dishonesty or bad faith, such claims would be unsecured claims against Cryptopia's assets (i.e. the non-trust assets, subject to any orders the Court

---

10 Liquidators' submissions at paragraphs 3.8 to 3.10 and 8.215 to 8.219.
11 *Cooper v Pinney* [2024] NZSC 181 at [118], citing *Armitage v Nurse* [1998] Ch 241 (CA) at 253-254.
12 Liquidators' submissions at paragraph 8.215.
13 Ibid at paragraph 8.231.
14 Ibid at paragraph 8.167.

may make in respect of distribution of the surplus assets).[15] In other words, the claims of hack victims would not have priority over other creditors' claims on Cryptopia's assets.

17. However, it is accepted that Cryptopia's own beneficial interests in the trust assets may be affected if account holders were held to have claims for breach of trust. This is due to the clear accounts rule, also known as the rule in *Cherry v Boultbee*, that a person entitled to share in a fund who also owes a debt to the fund cannot participate in a distribution of the fund until they have paid the debt.[16] (To similar effect, the rule in *Re Hallett's Estate* provides that if a trustee has a share in a trust fund and withdraws funds, it is assumed the funds withdrawn consist of the trustee's own funds first.[17])

18. Counsel accept that, if Cryptopia were found to be liable to account holders for a shortfall in trust assets, then it would be required to make good the shortfall before receiving any distribution from the relevant trust. Accordingly, in those circumstances, account holders' claims would have a form of priority over other creditors in relation to Cryptopia's beneficial interests in trust assets (this is discussed further below in relation to the Bitcoin and NZDT trusts and is subject to any rights of indemnity, also discussed further below).

19. In light of the above, counsel submit the answer to paragraph 2.7 of the Application depends on whether Cryptopia is liable to account holders for the shortfall in trust assets (having regard to all the circumstances and the exclusion/limitation of liability in the terms and conditions). Cryptopia's own claim to trust assets is only subordinated to the beneficial claims of

---

15 See for example *Intext Coatings Ltd (in liq) v Deo* [2017] NZAR 47 at [90], citing *Foskett v McKeown* [2000] UKHL 29, [2001] 1 AC 102 at 130 - 132.

16 *Cherry v Boultbee* (1839) 4 My & CR 442 41 ER 171, also *Re Dacre* [1915] 2 Ch 480. See also HAJ Ford '*Trading Trusts and Creditors' Rights'* Melbourne University Law Review [Vol 13 June 1981] and P Jha '*A "Clearer' Accounts Rule: Challenging the Inflexible Nature of the Clear Accounts Rule'* Melbourne University Law Review [Vol 47(3): 635 2024].

17 *Re Hallett's Estate* (1880) 13 Ch D 696, discussed in Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Thomson Reuters, London, 2019) at [44-069].

account holders *if* it is liable to make up the shortfall. For the reasons set out above in relation to breach of trust and in the next section below in relation to statutory claims, counsel submit that Cryptopia is *not* liable to make up the shortfall in relation to the Hack Losses (consistent with the position taken by the liquidators and counsel assisting the Court).

Statutory claims

20. The Application at paragraphs 2.8 and 2.9 seeks directions on Cryptopia's liability under 13 of the Fair Trading Act, s 22 of the Financial Markets Conduct Act and s 28 of the Consumer Guarantees Act and whether, to succeed in such claims, account holders would need to first prove to the liquidators' satisfaction that they suffered loss by reason of the allegedly misleading statements.

21. Counsel for the Creditors support the liquidators' submissions on these issues as they are set out in relation to the GNY claim, to the extent they apply equivalently to all account holders.[18]

22. Equally, counsel for the Creditors support a direction that, to the extent that account holders were found to have potential claims for breach of s 13 of the Fair Trading Act or s 22 of the Financial Markets Conduct Act, they would first need to prove reliance on a particular misleading statement and that they had suffered loss as a consequence, as required by the orthodox tests for breach under those sections.[19] No evidence has been provided to indicate a relevant misleading statement and it is submitted that it is unlikely that an account holder would be able to show reliance to the standard required to support such a claim.

23. In addition, while there is a question as to whether limitation periods apply to claims against a company in liquidation (as discussed in the submissions

---

18 See in paragraphs 8.68 to 8.187 of the liquidators' submissions.

19 See for example *Houghton v Saunders* [2009] NZCCLR 13 at [120] and *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611 at [29].

of counsel assisting the Court),[20] counsel for the Creditors submit that it is nevertheless relevant that over 6 years have passed since the claims arose with no such claims other than GNY's having been made.

Whether Cryptopia is entitled to participate in a distribution of Bitcoin and, if so, in what amount

24. Part 3 of the Application seeks a determination as to whether Cryptopia's use of Bitcoin (**BTC**) from the Bitcoin trust to meet business expenses prior to liquidation was a breach of its fiduciary duty of honesty and good faith to account holders in the Bitcoin trust.

25. Counsel for the Creditors submits that there is insufficient evidence to support a finding of any breach by Cryptopia of its fiduciary duty of honesty and good faith in this regard.

26. First, the liquidators have been unable to conclusively determine whether the 600 BTC that Cryptopia was in possession of after the hack belonged to the Company or to the account holders. In his affidavits, Mr Ruscoe has used equivocal language to explain that the liquidators remain uncertain as to whether the 600 BTC is account holder property.[21] For example in his affidavit of 31 July 2025, Mr Ruscoe said (emphasis added):

    (a) "…*it appears to us* that Cryptopia management overestimated the losses suffered by the BTC trust".[22]

    (b) "Our reconciliation process *indicates* that the loss to the BTC trust was overstated, which *suggests to us* that the additional 600 BTC leftover is a by-product of that overestimation."[23]

---

20 Submissions of counsel assisting the Court at paragraph 3.52.
21 Affidavit of David Ian Ruscoe dated 31 July 2025 (**Ruscoe July 2025 Affidavit**) at [123] [[201.0023 at page 201.0056]].
22 Ibid at [121] [[201.0023 at page 201.0055]].
23 Ibid at [121] [[201.0023 at page 201.0055]].

(c) "*Although it is not certain*, we *think it is more likely than not* that the 600 BTC is account holder property and was treated by Cryptopia as Company property in breach of trust."[24]

(d) "The 256 BTC *may or may not* have been spent by the Company in breach of trust…"[25]

27. In his updating affidavit of 23 April 2026, Mr Ruscoe further explains that the liquidators think the remaining BTC "may" belong to account holders because the differences resulted from "orphaned deposits".[26] Essentially, Mr Ruscoe explains that when the CLM was calculated, Cryptopia did not remove unconfirmed transfers (so, it is inferred, this 600 BTC may be the result of unconfirmed transfers). However, this is simply an inference: the liquidators have not identified or undertaken "any detailed or robust accounting or reconciliation of these figures or of any orphaned deposits".[27]

28. It is also unclear from Mr Ruscoe's evidence if the liquidators have been able to determine the exact amount of cryptocurrency stolen. In his July 2025 affidavit, Mr Ruscoe explained that the liquidators were "unable to determine with certainty how much of each cryptocurrency was actually stolen in the Hack".[28] Mr Ruscoe's updating affidavit of 23 April 2026 explains that the liquidators have been able to identify and trace certain cryptocurrency amounts into wallets but have been unable to recover those amounts for various reasons.[29] It is unclear from Mr Ruscoe's updating affidavit if the liquidators have been able to determine if those amounts are the full amounts that were stolen, or if there is still a question over whether additional amounts have been stolen.

---

24 Ibid at [123] [[201.0023 at page 201.0055]].
25 Ruscoe July 2025 Affidavit at [123] [[201.0023 at page 201.0056]].
26 Affidavit of David Ian Ruscoe dated 23 April 2026 (**Ruscoe April 2026 Affidavit**) at [25] [[401.0025 at pages 401.0033 to 401.0034]].
27 Ibid at [25] [[401.0025 at pages 401.0033 to 401.0034]].
28 Ruscoe July 2025 Affidavit at [119] [[201.0023 at page 201.0055]].
29 Ruscoe April 2026 Affidavit at [13] to [16] [[401.0025 at page 401.0031]].

29. It is acknowledged that this uncertainty arises from, in Mr Ruscoe's view, the fact that Cryptopia did not undertake a reconciliation prior to the Hack.[30] But there is no evidence to suggest Cryptopia was required to do so, or that the lack of reconciliation was in and of itself a breach of Cryptopia's fiduciary duties.

30. Importantly, the majority of the evidence addresses what happened after the liquidators were appointed. Mr Ruscoe's evidence about what occurred prior to that time is limited to "general terms" and does not contain any specifics.[31] However, those general steps taken by Cryptopia seem reasonable: first, Cryptopia assessed the loss of the hacked cryptocurrencies and then used the amount of hacked cryptocurrencies to determine a percentage loss of the total holding.[32]

31. The evidence as to the directors' knowledge and states of mind at the time is also limited.

32. Former Cryptopia employee Timothy Brocket says that Cryptopia's directors told him that "the variance wasn't to do with the haircut but was uncompleted transfers and orphan transactions" and that the directors "assured [him] that the 14% reduction was correct".[33] The evidence provided (from either Mr Ruscoe or Mr Brocket) does not explain how the directors calculated that reduction. Mr Ruscoe also confirms in his updating affidavit that Cryptopia management told the liquidators that the "14% estimate of losses was accurate".[34]

33. These statements suggest that, even if all or some of the 600 BTC did come from assets that were held on trust for account holders, any incorrect

---

30 Ruscoe July 2025 Affidavit at [119] [[201.0023 at page 201.0055]].
31 Ruscoe July 2025 Affidavit at [33].
32 Affidavit of David Ian Ruscoe dated 31 July 2023 at [34] [[201.0021 at 201.0028]]. See also Ruscoe July 2025 Affidavit at [116] [[201.0023 at 201.0054]].
33 Affidavit of Timothy James Strahan Brocket dated 27 November 2019 at [21] [[102.0361 at 102.0366]].
34 Ruscoe April 2026 Affidavit at [25] [[401.0025 at pages 401.0033 to 401.0034]].

attribution to the Company's own account came about through negligence or innocent error rather than through dishonesty or bad faith.

34. It is therefore submitted that there is no adequate evidential basis to support a finding of a breach of fiduciary duty of honesty and good faith.

35. In the absence of Cryptopia having breached any fiduciary duty of honesty and good faith (or any relevant statutory obligation, as discussed above) account holders in the Bitcoin trust who suffered a shortfall following the hack do not have any unsecured claims against Cryptopia for the Hack Losses (a claim in negligence, for example, would be precluded by the exclusion clause in the terms and conditions).[35]

36. Nevertheless, if the Court determines that the BTC taken by Cryptopia came from account holders, the beneficial claims of BTC account holders may take priority over Cryptopia's own beneficial interest in the BTC trust as a consequence of the rule in *Re Hallett's Estate*.[36] As touched on in the previous section above, this rule provides that, where withdrawals by a trustee from a mixed account can be attributed to its own money, the trustee cannot say they were attributable to the beneficiaries' money. The effect is that the beneficiaries have a first claim in respect of the remaining trust fund, and the trustee has only a subsequent claim in respect of his or her own money. The rule does not depend on a finding of breach of trust or breach of fiduciary duty.

37. As set out above, the evidence as to whether the BTC came from or belonged to the account holders is limited. While there is inferential information to suggest that it may have done so, no formal accounting has occurred (either by Cryptopia itself or the liquidators) which would support that.

---

35 Such claims would also be outside the limitation period, to the extent that applied despite the fact Cryptopia is in liquidation, as discussed above.

36 *Re Hallett's Estate* (1880) 13 Ch D 696, discussed in *Lewin on Trusts*, above n 17, at 44-069.

38. For these reasons, counsel for the Creditors submit that Cryptopia should be entitled to a distribution of its interest in the BTC trust and that this should be available to meet unsecured creditors' claims.

Whether Cryptopia is entitled to participate in a distribution of NZDT and, if so, in what amount

39. Part 6 of the Application seeks directions on the distribution of NZDT.

40. The liquidators' evidence is that Cryptopia's beneficial entitlement in NZDT was $187,682.[37] Its two identified withdrawals, $85,000 on 4 February 2019 and $95,000 on 11 February 2019, totalled $180,000.[38]

41. Based on this evidence, it appears to be a reasonable conclusion that Cryptopia only took funds that it was entitled to in line with its beneficial entitlement. While there is an unexplained shortfall in the remaining NZDT as compared to the Company records, the evidence is insufficient to show that Cryptopia withdrew funds it was not entitled to and is also insufficient to amount to a finding of a breach of trust.

42. The liquidators submit that Cryptopia's withdrawals are a breach of trust because the August 2018 terms and conditions say that Cryptopia would not use the NZDT funds for any purpose or place any encumbrance or charge over them.[39] There can be no breach of trust, however, if Cryptopia has taken only its beneficial entitlement. However, even if it is accepted that Cryptopia did take more than its beneficial entitlement, two points are made in response to this.

43. First, it is not clear if the August 2018 terms and conditions applied to NZDT. Those terms and conditions came into effect after Cryptopia had stopped offering NZDT and had told its relevant account holders to withdraw their holdings. Although Cryptopia attempted to reinstate its NZDT offerings, this

---

37 Ruscoe July 2025 Affidavit at [101] [[201.0023 at 201.0050]].
38 Ibid at [99] [[201.0023 at 201.0050]].
39 Liquidators' submissions at paragraph 7.9.

was not successful and it did not do so again after March 2018.[40] So arguably these terms did not apply.

44. Secondly, in his July 2025 affidavit Mr Ruscoe says that Cryptopia's actions may be a breach of its duties to act honestly and in good faith[41] and the liquidators submit that it is possible that Cryptopia's withdrawal of funds was intended to benefit Cryptopia rather than the beneficiaries or with knowledge that to do so would be inconsistent with the August 2018 terms and conditions.[42] This is effectively a submission that Cryptopia's management knowingly misappropriated NZDT. There is no evidence to suggest that Cryptopia and/or its management acted dishonestly (there is no evidence about the directors' state of mind on this particular point) and the accounting does not adequately support a finding that Cryptopia took more than it was entitled to.

45. For completeness, the liquidators have not been able to establish why there are shortfalls in Cryptopia's NZDT holdings.[43] While it is accepted that these kind of accounting uncertainties may mean that the Court cannot be certain that Cryptopia has only taken its beneficial entitlement, the existence of the shortall alone is insufficient to amount to a finding of breach of trust, or dishonesty or bad faith.

46. On that basis, it is submitted that it is consistent with *Re Hallett's Estate* (as set out above) that the liquidators should apply Cryptopia's known withdrawals against its share of NZDT, after which Cryptopia should be entitled to share in distribution of the available NZDT pro rata up to the full amount of its remaining interest, regardless of whether there are unclaimed funds.

---

40 Ruscoe July 2025 Affidavit at [96(d) and (e)] and [102] [[201.0023 at 201.0049 and 201.0050]].

41 Ruscoe July 2025 Affidavit at [106] [[201.0023 at 201.0052]].

42 Liquidators' submissions at paragraph 7.11.

43 Ruscoe July 2025 Affidavit at [98] and [100] [[201.0023 at 201.0050]]. See also the liquidators' submissions at paragraphs 7.6 and 7.8.

Whether Cryptopia and/or Creditors have rights of indemnity against trust assets

47. A trustee's right of indemnity has priority over beneficiaries' rights to trust assets. Logically therefore, the extent to which the Creditors' claims may be able to be met through a right of indemnity is a separate and prior question to whether there is any basis for the Creditors' claims to be met from unclaimed trust assets. The question of whether the Creditors may be able to benefit from any rights of indemnity in this case is therefore addressed first, before coming to the issue of winding up the trusts and what should happen to the surplus assets.

General principles

48. It is one of the "fundamental rights of an honest express trustee that costs and expenses properly incurred in the administration of the trust are compensable out of the assets of the trust".[44] Trustees are not required to carry out and administer a trust at their own expense; the beneficiary "who gets all the benefit of the property should bear its burdens unless he can shew some good reason why his trustee should bear them himself".[45]

49. However, unless specified in the trust deed or ordered by the High Court, the indemnity does not include the payment of fees or remuneration for the trustee's services because trustees are not ordinarily entitled to any reward for fulfilling their role.[46] It is therefore important to distinguish between "costs and expenses" incurred by the trustee and "fees or remuneration" for the trustee's own services.

---

44 *Butterfield v Public Trust* [2017] NZCA 367 at [20]. The indemnity is also available to constructive trustees, acting reasonably and in good faith, who incur expenditure in administrating a trust on a de facto basis, and to failed appointees to an express trust – *Butterfield* at [21] and [22].

45 *Hardoon v Belilios* [1901] AC 118 (PC) at 123, cited in *Hong v Kinnon* [2025] NZCA 117 at [32].

46 *Spencer v Spencer* [2014] 2 NZLR 190 at [90] to [93].

50. The general principles of a trustee's right of indemnity were set out by the High Court in *S and S Ltd v XYZ Ltd* and approved by the Court of Appeal in *Hong v Kinnon*:[47]

(a) As against a third party a trustee is personally liable for debts and liabilities incurred as a trustee.

(b) The trustee has a right of indemnity out of the trust assets for expenses or liabilities incurred by the trustee by recoupment of expenditure and exoneration of liability.

(c) The right of indemnity is secured by an equitable lien over the trust assets, which arises by operation of law, confers a proprietary interest by way of security in the trust assets, and takes priority over the claims of beneficiaries.

(d) The lien extends to all the trust assets, except for those specifically excluded by the trust deed.

(e) As the lien is equitable, the trustee can enforce it only by judicial sale or appointment of a receiver, not by sale out of court.

(f) The right of indemnity accrues at the time the obligation is incurred.

(g) Upon bankruptcy or liquidation of the trustee, the right of indemnity vests in the Official Assignee or liquidator.

(h) If the trust property is transferred to a new trustee, the lien survives and the new trustee takes control subject to the lien of the old trustee – except in the case of a bona fide purchaser for value.

(i) A trustee is entitled to retain possession of trust property against a beneficiary until its indemnity is exercised.

---

47 *Hong v Kinnon*, above n 45, at [38], citing *S and S Ltd v XYZ Ltd* [2016] NZHC 26.

51. The trustee's right of indemnity is a right in equity now recognised in statute.[48] The statutory form of the right "essentially reflects the trustee's right of indemnity as set out in the case law and does not derogate from it".[49] The right was given statutory form in s 38(2) of the Trustee Act 1956 (the **Trustee Act**), now repealed. The current statutory form of the right is set out in s 81 of the Trusts Act 2019 (the **Trusts Act**).[50]

Subrogation

52. Where a trustee has insufficient assets to satisfy an unsecured creditor's claim, the unsecured creditor may, through the right of subrogation, attempt to use the trustee's indemnity (and the trust assets) to satisfy its debt. The purpose of subrogation is to avoid the injustice of a beneficiary receiving a windfall from credit given to the trustee where the creditor has not been repaid.[51] For that reason, the creditor's claim has priority over that of the beneficiary.[52]

53. Ordinarily, to enforce its right of subrogation, a creditor would bring a proceeding seeking a declaration of entitlement to subrogate and of the existence of an equitable lien, but the need to subrogate only arises if the trustee is not prepared to exercise its right of indemnity.[53]

54. The liquidators note at paragraph 10.100 of their submissions that "none of the Company's creditors have raised with the liquidators the issue of subrogation or applied to the Court for subrogation". However, there is no need for the Creditors to do so where a liquidator has been appointed to a corporate trustee. In such circumstances the liquidator, as the person

---

48 See Trusts Act, s 5(8).

49 Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) (***Equity and Trusts in New Zealand***) at 444.

50 As discussed further below, the liquidators and counsel assisting the Court have submitted that s 81 of the Trusts Act does not apply to Cryptopia by virtue of schedule 3, clauses 4(3) and 4(4)) of that Act. While it is submitted that schedule 3 does not apply to Cryptopia, it is nevertheless doubtful whether s 81 applies in the context of these proceedings by virtue of the presumption against retrospectivity.

51 *Levin v Ikiua* [2010] 1 NZLR 400 at [119].

52 *Re Johnson* (1880) 15 Ch 548 at 552.

53 *Levin v Ikiua*, above n 51, at [123] to [124].

controlling the trustee's actions, is able to realise the trust assets through the indemnity and distribute the proceeds among creditors.[54]

Limitations on the right of indemnity

55. The trustee's right of indemnity applies "to *all* trust expenses and liabilities" (emphasis added).[55] It has been described as "a violent exercise of the Court's discretion to deprive a trustee of his charges and expenses".[56]

56. However, it is only available where those expenses and liabilities are "properly incurred".[57] This will depend on the facts of the case at hand and may require the trustee to demonstrate the expenses arose out of an act within the scope of their trusteeship: "it was something their obligations required them to undertake and the expense was in all the circumstances reasonable".[58]

57. The trustee may also lose their indemnity where they lacked capacity or authority to enter into the liability, or they committed a breach of duty in incurring the liability.[59]

58. The Trusts Act now also recognises that the indemnity cannot be relied on where the trustee has been dishonest, grossly negligent or has wilfully misconducted themselves.[60] As discussed above, there is no evidence to suggest this is the case here.

The terms and conditions do not exclude the indemnity

59. The current statutory form of the trustee's indemnity provided by s 81 of the Trusts Act does not apply to "specified commercial trusts" created

---

54 *Levin v Ikiua*, above n 51, at [124].
55 *Equity and Trusts in New Zealand*, above n 49, at 442.
56 *In Re Chennell* (1878) 8 Ch D 492 at 502, as cited in H A J Ford *Trading Trusts and Creditors' Rights*, above n 16, at 16.
57 *New Zealand Māori Council v Foulkes* [2015] NZHC 489 at [31], cited with approval by the Court of Appeal in *Butterfield v Public Trust*, above n 44, at [21].
58 *Re O'Donoghue* [1998] 1 NZLR 116 at 121.
59 *Equity and Trusts in New Zealand*, above n 49, at 449.
60 Trusts Act, s 41.

before the section came into force.[61] The liquidators and counsel assisting the Court submit that Cryptopia is a specified commercial trust to which s 81 does not apply.[62] GNY disagrees; it refers to the definitions of "specified commercial trust", "commercial transaction" and "trade" set out in Schedule 1 of the Trusts Act which together have the effect of excluding from the definition of "specified commercial trust" any trust which has at least one beneficiary who has entered into the transaction the trust is intended to facilitate on a personal basis rather than in trade. GNY says it is highly unlikely that all the beneficiaries of each trust were acting in trade.[63] Counsel for the Creditors agree and submit that Cryptopia is *not* a specified commercial trust for the purposes of Schedule 3 of the Trusts Act. Nevertheless, there remains a question mark as to whether s 81 of the Trusts Act applies in a situation where the trustee's right of indemnity arose before that section came into force, having regard to the presumption against retrospectivity (notwithstanding schedule 2, clause 1 of the Trusts Act which says that the Act applies – unless specified – to all express trusts whether created before, on or after the commencement date).

60. Proceeding on the basis that s 81 does not apply, the liquidators suggest in their submissions that Cryptopia may nevertheless have an indemnity under s 38 of the Trustee Act if it is not inconsistent with the terms of the trusts.[64] It is submitted that is correct.

61. Although the Trustee Act has been repealed, s 38 of that Act remains applicable to Cryptopia's position by virtue of s 18 of the Interpretation Act 1999 (now s 33 of the Legislation Act 2019) which says that an enactment's repeal does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity or duty and the repealed enactment continues to have effect for

---

61 Trusts Act, Schedule 3 clauses 1 and 4(2).
62 As discussed in the Liquidators' submissions at paragraphs 10.100 to 10.103; submissions for counsel assisting the Court at paragraph 3.97.
63 GNY's submissions at paragraphs 574 to 580.
64 Liquidators' submissions at paragraph 10.104.

those purposes.[65] Therefore, to the extent Cryptopia was entitled to an indemnity pursuant to s 38 of the Trustee Act at the time of the repeal of that section (which post-dated the date of Cryptopia's liquidation) it remains so entitled. In light of this, it is submitted that s 38 is the relevant section that applies to the question of whether Cryptopia is entitled to an indemnity, not s 81 of the Trusts Act.

62. Under s 38(2) of the Trustee Act, a trustee was permitted to "reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers", but was not allowed the costs of any professional services performed by him unless the contrary was expressly declared by the trust instrument, subject to the proviso that "the court may on the application of the trustee allow such costs as in the circumstances seem just".

63. As noted above, this statutory right reflected the common law position. The question then arises whether this right was limited by the terms of the trusts (as set out in Cryptopia's terms and conditions). There are two aspects to this question: first, is the right of indemnity capable of being limited by the terms of the trusts and, if so, was it in fact limited by those terms?

64. On the first point, there is some uncertainty whether, in New Zealand, a trust instrument can exclude or limit the trustee's indemnity.[66]

65. Section 2(5) of the Trustee Act relevantly provided that: "The powers conferred by or under this Act…(b) apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument".[67]

---

65 See also schedule 1, clause 8(b), which says the Trusts Act does not affect the application of s 18 of the Interpretation Act 1999 in relation to the effect of the repeal of the repealed enactments.

66 *Equity and Trusts in New Zealand*, above n 49, at 455.

67 Trustee Act, ss 2(4), 2(5). See also *Re Hayward Trustee Services Ltd* [2022] NZHC 2217 at [35].

66. As noted by Bell AJ in *Bainbridge v Menzies*, whether s 2(5) affects the right of indemnity under s 38 turns on whether the right of indemnity is a "power".[68]

67. In considering this issue his Honour noted two Australian cases that expressed the right of indemnity as a power (although one of those cases was decided in Victoria, where the equivalent section and Act expressly referred to indemnities), and a third Australian case in which the judge had held that "the right of indemnity is inseparable from a trusteeship and for that reason was probably incapable of being excluded". His Honour also cited a 2002 Law Commission Report which "favoured the view that the right cannot be excluded or limited".[69]

68. Ultimately, his Honour was not required to make a finding on this point because the words of the relevant trust deed in issue before him did not contain words "expressly excluding the right of indemnity".[70]

69. Again in obiter, Peters J noted in *Jordan v First City Trust No 2 Ltd (in liq)* that there was a "wider issue as to whether a clause in a trust deed which purports to exclude a trustee's indemnity can ever be effective, particularly as against a creditor who seeks to subrogate to the trustee's right of indemnity". However, the issue did not need to be decided in that case.[71]

70. Writing extrajudicially, Heath J, as he then was, noted two competing arguments. First, because s 38(2) expressly authorises reimbursement out of trust property, there must be a power that authorises the trustee to do so. Alternatively, the right of indemnity is "an incident of the office of

---

68 *The Official Assignee in Bankruptcy in the Property of Keith James Bainbridge v Menzies and Palmer as Trustees* HC Auckland CIV-2010-404-005457 at [45] to [46]. Noting that case considered s 2(4) of the Trustee Act, which is equivalent to s 2(5) for non-corporation trustees.

69 *Bainbridge v Menzies* at [46].

70 Ibid at [46].

71 *Jordan v First City Trust No 2 Ltd (in liq)* HC Auckland CIV-2008-404-176 at [28].

trustee and inseparable from it" and is therefore not dependent upon any power conferred on the trustee by statute or the trust instrument.[72]

71. Heath J favoured the view that the indemnity is a right, not a power, because the opening words of s 38(2):[73]

> refer to a qualified ability to reimburse or to pay or discharge expenses "in or about the execution of the trusts or powers", the legislature must have intended to draw a distinction between the right to an indemnity and the exercise of powers to which it may relate.

72. A similar view is taken by the learned authors of *Equity and Trusts in New Zealand* who say that while the trustee's right of exoneration may be a power, the right of recoupment is not a power, but a right.[74]

73. On this basis, the potential qualification of the right in s 38(2) by s 2(5) would not apply and the right would not be able to be limited by the trust instrument.

74. Some support for this conclusion is found in comments by the Law Commission in its 2013 *Review of the Law of Trusts* that submissions it had received on whether the law should expressly provide that the indemnity cannot be limited or excluded in the trust instrument "agreed this was likely to be the case already, since it was central to the office of trustee, but that it required clarification".[75]

75. For completeness, this is contrary to some Australian statute and case law which recognises that the indemnity can be excluded entirely, reflecting the

---

72 Justice Paul Heath *Bringing Trading Trusts into the Company Line* [2010] NZ L Rev 519 at 528 to 529.

73 Ibid at 529.

74 *Equity and Trusts in New Zealand*, above n 49,at 456.

75 Law Commission: Review of the Law of Trusts, Report 130, August 2013 at [16.39].

view that the settlor should be free to make the rules applying to the trust and the trustee to accept the trusteeship on those terms.[76]

76. However, the authors of *Equity and Trusts in New Zealand* disagree with this view. The better view, they say is that the indemnity can be limited "to some extent", but not excluded entirely.[77] There are practical reasons for this: a trustee will need to incur liabilities in the course of managing and administering the trust and an inability to pay or recoup those liabilities from trust assets will prevent the trustee from properly exercising its discretions for the beneficiaries of the trust. In the case of a corporate trustee, the trust assets will have a direct bearing on whether the trustee is solvent and able to trade.[78]

77. In conclusion, it is submitted that under the Trustee Act a trust instrument – in this case, Cryptopia's terms and conditions – is not capable of limiting or excluding the trustee's right of indemnity.

78. That is not to say that the trustee's right of indemnity is unlimited; rather it only applies to expenses reasonably incurred in execution of the trusts.

The indemnity is not in any event excluded or limited by the terms and conditions

79. Even if, contrary to the submission above, the Court finds that the right of indemnity can in principle be excluded or limited by the terms of the trust instrument, it is submitted that Cryptopia's terms and conditions do not do so.

80. Trust instruments are to be read in accordance with the principles of contract interpretation:[79] context is a "necessary element of the

---

76 *Equity and Trusts in New Zealand* at 455, citing *RWG Management Limited v Commissioner for Corporate Affairs* [1985] VR 385.

77 *Equity and Trusts in New Zealand* at 455.

78 Ibid at 456. This view is also supported by Heath J, as he then was, in *Bringing Trading Trusts into the Company Line*, above n 72, at 527 (there relying on the extrajudicial writings of Australian justice of the Supreme Court of Queensland McPherson J) and at 530.

79 *Holland (as trustees of the Tauranga Energy Consumer Trust) v Jonkers* [2021] NZHC 3469 at [109(a)]; *Halliday v Hannah* [2024] NZHC 1747 at [73].

interpretative process and the focus is on interpreting the document rather than the particular words, but the text remains centrally important". The terms of the trust "will always be construed so as to give effect to a trust's purpose."[80]

81. The relevant clauses of Cryptopia's terms and conditions are:[81]

(a) clause 12.2, which provided Cryptopia an indemnity in relation to its liability to account holders;

(b) clause 13.1, through which the account holders agreed to pay "all fees and expenses associated with or incurred by you in relation to your use of our Services or Platform, which are published on our Platform";

(c) clause 13.2(a), which allows Cryptopia to "change, modify or increase fees and expenses associated with our Services and Platform, from time to time"; and

(d) clause 13.2(b), which deemed account holders to accept and agree updates to "the fees or expenses as published" if they used the Services or Platforms following such update.

82. The liquidators submit that this is an express contractual arrangement between Cryptopia and the account holders and there was "no other basis" on which Cryptopia could meet company expenses.[82] Essentially the liquidators say that the collection of the contractually permitted fees was the only way that Cryptopia could meet its liabilities to creditors.

83. The liquidators' submissions and evidence make it clear that the fees charged to account holders became company assets and that these were used to pay company expenses. This was plainly the normal way in which

---

80 *Halliday v Hannah* at [74].

81 Affidavit of David Ian Ruscoe dated 31 July 2023, exhibit DIR1-80, [[302.0577 at 302.0587]].

82 Liquidators' submissions at paragraph 10.113.

Cryptopia, while solvent, met its expenses. However, there is nothing to suggest that this was the only way that Cryptopia could pay those expenses or that it could not have recourse to trust resources if necessary to maintain the business of the trusts, for example, in an insolvency situation.

84. The fact that Cryptopia's means of meeting its expenses as trustee were not fixed is supported by clause 13.2 which allows Cryptopia to change, modify or increase its fees and expenses "associated with our Services and Platform". Clause 13.2(b) suggests that the fees and expenses will be published on Cryptopia's platform. However, there is no evidence that those fees and expenses were in fact published on Cryptopia's website - it appears from screenshots that the fees were calculated and made visible to users each time they entered into a transaction but there does not appear to have been a published list of fees or expenses.[83]

85. It is submitted that, rather than acting as a limitation or an ouster of Cryptopia's right to indemnity, clause 13.1 acted as a remuneration clause which permitted Cryptopia to seek and receive remuneration for its professional services. Without such a clause, s 38 of the Trustee Act (and general principles of trusteeships) would have prevented Cryptopia from doing so.

86. In conclusion, Cryptopia's terms and conditions do not expressly exclude the right to an indemnity. Nor do they unambiguously show an intention to exclude the right of indemnity in all circumstances. In these circumstances, it is submitted that the terms and conditions do not in fact exclude the indemnity under s 38(2) of the Trustee Act, even if they were in principle capable of doing so as a matter of law.

---

83 Affidavit of Timothy James Strahan Brocket dated 27 November 2019 at exhibit TJSB1/49-50 [[102.0361 at pages 102.0416 to 102.0417]].

Creditors' claims are for expenses reasonably incurred in execution of the trusts

87. The liquidators have submitted that, while some of the Creditors' claims are directly connected to Cryptopia's operation of the exchange,[84] others are connected more "indirectly". Counsel for the Creditors accept this but agree with the liquidators' further submission that all of these goods and services were acquired "in order to support Cryptopia's core function".[85]

88. This has to be correct. The only business operated by Cryptopia was that of a cryptocurrency exchange and its activities were all connected with acting as trustee for account holders, including: receiving deposits of account holders' cryptocurrency, holding and maintaining those deposits, and executing transactions and withdrawals on the instructions of account holders.

89. In addition, it is submitted that the broad wording of s 38(2) – which allows for reimbursement for expenses *incurred in or about the execution of the trusts or powers* – necessarily captures those indirect expenses relating to Cryptopia's business. It makes it clear that the indemnity is not limited to expenses directly relating to *trust property* but also includes those expenses required to *execute* the trust.

90. Further, s 38(2) gives the court a discretion to permit the trustee "such costs as in the circumstances seem just". While this discretion appears to be intended to apply only to costs and not to expenses, it would be perverse if Parliament intended the court to have a discretion to permit costs (which are otherwise not allowed unless expressly permitted by the trust instrument) to be recovered but no discretion to permit expenses (which are generally allowed) to be recovered where it is just to do so in the circumstances.

---

84 Liquidators' submissions at paragraph 10.107.
85 Ibid at paragraph 10.108.

91. It is submitted that while such a discretion is not expressly recognised by s 38(2), the section does not affect the position at common law and equity under which the Court will allow creditors to be reimbursed from trust assets to the extent that the trust has derived a benefit at the creditors' expense. This was established by *Devaynes v Robinson* in which the Court ordered repayment of a creditor from trust assets even though the debt was incurred in breach of trust.[86]

92. The rationale for this has been described as the need to avoid the "injustice of a beneficiary getting the benefit of assets earned as the result of credit given to the trustee by the creditor".[87]

93. In this respect, it is worth noting that s 86 of the Trusts Act gives a trustee's creditors the right to be indemnified from trust property even if the trustee's right to an indemnity is impaired, provided the creditor has given value, the trust has received a benefit from the transaction and the creditor has acted in good faith. There is no reason to doubt that these criteria would be met in respect of the Creditors' claims.

94. Unlike ss 82 to 84 of the Trusts Act, s 86 is not excluded from application to specified commercial trusts, but there is nothing to suggest that the section was intended to apply retrospectively. Therefore, it is unlikely to apply to Creditors' claims against Cryptopia, which pre-date the Trusts Act coming into force. Nevertheless, as discussed above, the section reflects the position at common law and equity as it stood prior to its introduction.

95. Therefore, even if it were held that Cryptopia was not entitled to an indemnity for its expenses, either because of the contractual terms with account holders or because it had acted in breach of trust, those creditors

---

86 *Devaynes v Robinson* (1857) 24 Beav.93.

87 *Camray Farms Ltd (in liq) v BL (Nature Sunshine) Trustee Ltd* [2019] NZHC 2536 at [64].

who conferred a benefit on the trusts for which they have not been paid should nevertheless be entitled to be reimbursed from trust assets.

96. Especially in the context of a corporate trustee such as Cryptopia, there is no good reason to deny the Creditors the ability to obtain reimbursement from trust assets.[88] This is all the more so in circumstances where there is certain to be a surplus of assets available following distribution[89] and there can be no prejudice to account holders if the Creditors' claims are paid.

97. The liquidators are able to exercise the right of indemnity without the need for creditors to seek subrogation, and to distribute the proceeds on a pari passu basis among those creditors whose claims are held to fall within the scope of the indemnity.

Winding up the trusts/treatment of unclaimed assets

98. Counsel for the Creditors support the winding up of the trusts but oppose the liquidators' proposal for the assets remaining following completion of distribution to eligible account holders to be converted into New Zealand currency and transferred to the Treasury under s 149 of the Trusts Act. That approach would see the Crown receive a windfall while the creditors of Cryptopia are left with a substantial shortfall.

99. Instead, to the extent the non-account holder Creditors cannot be paid pursuant to the trustee's indemnity, as discussed in the previous section, the remaining assets should be used to pay their claims, as well as any admitted unsecured claims by account holders (together, the **unsecured creditor claims**), before the final residue is transferred to Treasury or otherwise disposed of.

---

88 The potential unfairness of creditors of a trading trust with a corporate trustee not having access to trust assets to meet their claims is discussed in HAJ Ford *Trading Trusts and Creditors' Rights'*, above n 16, P Jha '*A "Clearer' Accounts Rule: Challenging the Inflexible Nature of the Clear Accounts Rule'*, above n 16, and UK Trust Law Committee Rights of Creditors Against Trustees and Trust Funds (Tolley Publishing, London, 1997).

89 Ruscoe April 2026 Affidavit at [11(b)] [[401.0026 at 401.0030]].

100. Counsel submit there are three ways in which the trust assets remaining after all eligible account holder claims have been met could be used to satisfy the unsecured creditor claims:

(a) First, the Court may use a combination of ss 121, 122, 125 and/or s 136 of the Trusts Act to terminate, vary or resettle the trusts on terms that enable the unclaimed trust assets to be applied to the unsecured creditors' claims.

(b) Secondly, the Court may use its inherent jurisdiction to supervise trusts to direct the liquidators to apply the unclaimed trust assets to the unsecured creditors' claims before transferring the remaining assets to the Crown, on the basis that would be the most just and equitable outcome.

(c) Thirdly, in the alternative to the above, the Court may make an order under s 151(2) of the Trusts Act directing the Secretary to the Treasury to use the funds transferred by liquidators to the Crown under s 149 to meet the unsecured creditors' claims.

101. Each of these is discussed in more detail below. First, however, it is necessary to address the distribution orders made by Palmer J as there is disagreement about the effect of these on the interests of non-eligible account holders.

The distribution orders by Palmer J deem the interests of non-eligible account holders to have been abandoned

102. Having heard submissions on the Court's inherent jurisdiction to make orders for distribution that allow the beneficial interests of certain beneficiaries to be disregarded either on the basis they are not extinguished

(as in *Re Benjamin*[90]) or on the basis that they are extinguished (as in *Re Instant Cash Loans*[91]), Palmer J made orders that:[92]

> The Liquidators are permitted, and shall procure Cryptopia, to make a distribution of cryptocurrency which is held by Cryptopia… on the basis that those account holders who have not registered their claim with the Liquidators prior to a given date… are not in existence, even when that account holder is shown in Cryptopia's records as having a beneficial entitlement…
>
> … If any account holder who has taken any step in, but has not fully completed, the process in the Cryptopia Claims Portal, including providing valid payment details by 31 December 2024 (Final Cut-off Date), then ***the Liquidators are permitted, and shall procure Cryptopia, to treat any such account holder as having abandoned their claim with consequent loss of entitlement to receive a distribution (non-eligible account holder).*** (Emphasis added)

103. It appears to be common ground that these orders enable trust assets that would otherwise be due to the non-eligible account holders to be used to "top-up" the claims of eligible account holders (and Cryptopia, where it also has a beneficial interest) to 100% of their beneficial interests in the trust assets.

104. However, there is disagreement about the effect of the orders beyond this. The liquidators and counsel assisting the Court take the view that the orders do not have the effect of extinguishing the non-eligible account holders' beneficial interests. They rely in particular on the statement at paragraph [30(g)] of Palmer J's judgment that "The Orders sought would not extinguish any account holder's beneficial entitlement".

---

90 *Re Benjamin* [1902] 1 Ch 723, [1900]-[1903] All ER Ext 1300.

91 *In re Instant Cash Loans Limited* [2021] EWHC 1164 (Ch).

92 *Ruscoe v Houchens* [2024] NZHC 419 at [58] – orders 2.2 and 2.5. The relevant authorities are discussed more fully below.

105. Counsel for the Creditors disagree with this interpretation of Palmer J's judgment and the orders. The statement at [30(g)] of the judgment is simply a summary of the liquidators' proposal and is outweighed by the words of the orders themselves, including the words emphasised above.

106. Further, it is clear from other passages of the judgment that Palmer J was alive to the difference between orders that allow the beneficial interests of certain beneficiaries to be disregarded but not extinguished and those that treat them as having been extinguished. If his Honour had intended only to make *Re Benjamin* type orders that allowed for distribution to eligible account holders while preserving the beneficial interests of the non-eligible account holders he would have said so and would not have included the words of the orders emphasised above.

107. The issue which Palmer J intended to leave open to be determined by this application was not whether the non-eligible account holders' interests are extinguished, but what should occur with any surplus assets. Namely, whether these should be applied to meet unsecured claims of both account holders and Creditors. That is clear from paragraphs 49 to 50 and 54 to 57 of his Honour's judgment.

108. Accordingly, counsel for the Creditors submit that the issue of whether the non-eligible beneficiaries' interests are extinguished on the basis of deemed abandonment has already been determined.

109. However, to the extent this Court finds otherwise, or finds it is nevertheless open to re-assess the issue on the basis of the leave reserved by Palmer J, counsel submit that the such orders should be made and/or upheld and confirmed for the reasons discussed in the next section below (the issue of an extension of final cut-off date is discussed separately further below).

Court's inherent jurisdiction to extinguish beneficial interests

110. The Court's inherent jurisdiction to supervise and administer trusts extends to making orders for distribution of trust property "on particular bases" when the Court is "satisfied it is just and expedient to do so".[93] This power is now partly reflected in s 136 of the Trusts Act.

111. Counsel submits that this jurisdiction permits the Court to order that, once all eligible account holders' claims have been met in full, the remaining unclaimed trust assets should be applied to meet the Creditors' claims before the residual unclaimed assets are disposed of, whether by transfer to the Crown or some other means.

112. Counsel for the Creditors previously made submissions to this effect in relation to the liquidators' application for directions in relation to distribution (see paragraphs 4.6 to 4.27 of counsel's submissions dated 30 October 2023).[94] For convenience, the following submissions incorporate and expand upon counsels' earlier submissions.

113. The leading case establishing the court's jurisdiction to make orders permitting distribution of trust assets on an assumed factual basis is *Re Benjamin.* That case concerned a deceased estate which was to be distributed between the children of the testator. One of the testator's sons had been missing since before the testator's death and it could not be proven whether he was still alive or, if deceased, whether he had outlived the testator. The Court made orders permitting the trustees to distribute the estate on the basis that the missing son had not survived the testator. However, the orders did not rule out the possibility of a representative of the missing son making a claim on the estate if evidence contradicting that assumption was later found – in other words, they did not extinguish the

---

93 *In re MF Global UK Ltd (No 3)* [2013] EWHC 1655 (Ch) at [26].

94 Submissions of counsel for the Creditors dated 30 October 2023 [[201.0440 at 201.0445 to 201.0452]].

beneficial interest of the missing son in the event he was later found to be alive or to have outlived his father.

114. *Re Benjamin*-type orders have subsequently been made in a variety of cases, including more recently in relation to commercial trusts with very large numbers of beneficiaries where some beneficiaries are unable to be identified or do not respond, or it is uneconomic to make distributions to them. A number of these cases have made orders going beyond those in *Re Benjamin*.

115. The first example of this is *In Re MF Global UK Ltd.*[95] In that case the administrators of an investment bank held client money subject to a regulatory trust under the Client Assets Sourcebook (referred to as the **CASS Rules**) issued by the UK's Financial Services Authority pursuant to s 138A of the Financial Services and Markets Act 2000 (**FSMA**). The CASS Rules provide that, in the event of insolvency, client money held by a firm must be pooled and distributed to clients on a pro rata basis with any residue going to the firm.[96]

116. The administrators of MF Global sought orders that, after giving notice of intention to make a distribution, they should be at liberty to proceed with the distribution of the client money on the basis, first, that the only persons with a claim were those who had lodged a claim by the date specified in the notice of distribution and, secondly, that any claim which the administrators had rejected was not to be treated as a valid claim, unless the claimant had given notice of application to the Court to vary or reverse the rejection. The order sought did not purport to vary the beneficial interests of any claimants and was without prejudice to their right to participate in any subsequent distribution, if they were to eventually establish their claim.[97]

---

95 *In re MF Global UK Ltd (No 3)*, above n 93.
96 Ibid at 5 to 6. See CASS Rule 7.17.2 and CASS Rule 7A.2.6A.
97 *In re MF Global UK Ltd (No 3)* at 21.

117. The Court made the orders sought, noting "The fact that the proposed order does not in this respect neatly fit within the *Re Benjamin* line of cases does not mean that it falls outside the proper scope of the inherent jurisdiction of the court."[98] The Court explained its reasoning for making the orders as follows:[99]

> The purpose of the court's inherent jurisdiction is to enable practical effect to be given to a trust. As earlier mentioned, the purpose of the client money trust established by the CASS rules and the purpose of the client money distribution rules in CASS 7A is to protect the position of clients and to facilitate the timely return of client money in the event of the failure of the firm. These purposes are not well-served by long delays while at considerable expense claims, which have been made but not pursued, are finally determined through court proceedings. If those persons who have made claims are seriously concerned to pursue them, it will be open to them under the administrators' proposals to lodge an application with the court, in which event full provision will be made for their claims while they are litigated. In my judgment, these proposals properly balance both the interests of established clients to a timely return of their money and the interests of persons with serious but unresolved claims to be treated as clients.

118. This reasoning supports the view that the Court's inherent jurisdiction is flexible and allows for different approaches depending on what is just and practical in the circumstances.

119. A second example of the extension of the *Re Benjamin* jurisdiction is *Re Pritchard Stockbrokers Ltd*.[100] Like *MF Global*, this case related to a trust imposed by the CASS Rules on client money held by an investment firm in administration. Following a claim resolution process by the administrators, in addition to clients with agreed claims, there were 2,463 clients remaining

---

98 Ibid at 30.
99 Ibid at 32
100 *Re Pritchard Stockbrokers Ltd* (2019) EWHC 137.

with potential claims totalling GBP 810,862 who had not agreed their claims or taken any steps to resolve them (the "non-claiming beneficiaries").

120. The administrators had sought and obtained a direction from the Financial Conduct Authority (the **FCA**) under s 138A of the FSMA permitting a departure from the CASS Rules and allowing them to make a final distribution according to the known claims above a certain threshold.[101] The FCA direction expressly provided that the non-claiming beneficiaries would cease to have an interest in the client money upon the final distribution.

121. As the Court noted, the administrators were required to act according to the FCA's direction and did not need the Court's permission to do so. However, they sought the Court's direction as a means of securing its approval of them having sought a modification of the statutory trust and for protection from liability in relation to its implementation.[102]

122. The Court expressly considered "why the extinguishment of beneficial interests is to be preferred over a distribution on a particular footing which preserves those beneficial interests". It concluded that extinguishment was consistent with the objectives of the administration process because the individual claims were small and, after 6 years, the need for finality was greater than "the need to preserve hitherto unpursued claims".[103]

123. The Court also referred to previous orders to similar effect made in *Re Alpari* (the judgment of which does not appear to be available).[104] In *Re Alpari* the Court had apparently ordered that those beneficiaries who were non-responsive by a bar date and those whose entitlement did not meet a

---

101 FSMA ,s 138A allows the FCA to direct that all or any CASS Rules do not apply or apply as modified where it is satisfied that compliance by the person with the Rules, or with the Rules as unmodified, would be unduly burdensome or would not achieve the purpose for which the Rules were made, and that the direction would not adversely affect the advancement of any of the FCA's objectives.

102 *Re Pritchard Stockbrokers Ltd*, above n 100, at [19].

103 Ibid at [29].

104 Ibid at [18].

minimum threshold would "cease to have an interest" in the trust upon the final distribution of its assets.

124. For the above reasons and in reliance on *Re Alpari*, the Court made the orders sought in *Re Pritchard*.

125. Counsel assisting the Court have suggested in their submissions that the effect of the orders made in *Re Pritchard* did not permanently destroy the unclaimed interests because at the end of the process unclaimed moneys were to be paid into the Insolvency Services Unclaimed Dividends Account.[105] However, based on the summary of the FCA's direction included in the judgment, that part of the direction related only to agreed but uncollected claims, not the non-claiming beneficiaries' interests. Other parts of the direction cited in the judgment make it explicit that the non-claiming beneficiaries would cease to have an interest on final distribution (as the judgment expressly recognises and endorses). The consequence of this for any residual funds is not explicitly addressed in the judgment. However, the waterfall of priorities set out in CASS Rule 7.17.2 would presumably apply, so that, after all valid claims and costs had been met, the residual client money would belong to the firm itself.

126. The liquidators' submissions suggest that both *Re Alpari* and *Re Pritchard* may be distinguishable from the present case on the basis they involved the application of the CASS Rules.[106] However, the CASS Rules do not deal with the problem of how to treat the interests of non-claiming beneficiaries – hence the need for resort to the inherent jurisdiction. Further, there is no material difference between the underlying objectives of the relevant CASS Rules, namely, to protect the position of clients and to facilitate the timely return of client money in the event of a failure of a firm, and the objective

105 Submissions for counsel assisting the Court at paragraph 3.45.
106 Liquidators' submissions at paragraph 10.75.

of the trusts founds by Gendall J to apply to the cryptocurrency assets held by Cryptopia.

127. Further, similar orders to those made in *Re Alpari* and *Re Pritchard* have also been made in cases which did *not* involve trusts under the CASS Rules. For example, *Re Instant Cash Loans* involved a trust created by a scheme of arrangement.[107] The terms of the scheme required all payments to beneficiaries to be paid by electronic transfer. However, the company did not seek beneficiaries' bank account details when they submitted their claims and a significant number failed to respond when these were requested. The company therefore sought orders allowing payments to such beneficiaries to be made by cheque and, if the cheques were not cashed within six months, for their share of the funds to be distributed to other beneficiaries or, alternatively, paid into court.

128. The Court considered both *Re Benjamin* and *Re MF Global* and noted that, while this situation was different, it did not fall outside the scope of the court's inherent jurisdiction:[108]

> In our situation, the fact that these are accepted claims which will not ultimately be paid is a material difference, but in my view does not make it fall outside the perhaps wide scope that David Richards J referred to [in *Re MF Global*] as being included within the inherent jurisdiction of the court to enable practical difficulties to be overcome in the administration of this trust.

129. The Court did not favour the money being paid into court, referring to this as a "last resort".[109] Rather, it held that beneficiaries who had shown no intention of claiming their entitlement "could be regarded by the court and the Company as having decided to abandon their claim".[110] The Court relied on the fact that the beneficiaries had been "unwilling to provide bank details

---

107 *In re Instant Cash Loans Limited*, above n 91.
108 Ibid at [22].
109 Ibid at [23].
110 Ibid at [25].

or to cash the cheque" to support its finding that there was "little advantage in paying the money into court in case the affected creditors might wish later to assert a proprietary claim".[111] It was estimated that adding the unclaimed amount to the distributions to other creditors would add only one pence in the pound to their dividend, but "Even so, it is better than nothing, and it is quite clearly in the interests of those other creditors for that to be paid and it will enable the scheme to close."[112] The Court accordingly made the orders sought.

130. It is submitted that these cases provide authority for the view that the court has the power, within its inherent jurisdiction, to direct the liquidators to proceed on the basis that non-eligible account holders no longer have any beneficial interest in the trust assets. Such a power is also consistent with and permitted by s 136 of the Trusts Act under which the court may make an order permitting a trustee to distribute trust property as if a potential beneficiary or class of potential beneficiaries does not exist, including in circumstances where there are known to be potential beneficiaries in existence but the court is satisfied their claims may be disregarded in the circumstances.

131. It is submitted such orders are appropriate in this case for the reasons identified in the authorities discussed above:

(a) there is a need for finality;

(b) the non-eligible account holders have had ample notice and opportunity to make claims;

(c) it is clearly in the interests of eligible account holders to make such orders as it will increase the assets available to meet their claims; and

---

111 *In re Instant Cash Loans Limited* at [32].
112 Ibid at [30].

(d) there is no real purpose to be served in keeping assets available to meet claims which the non-eligible account holders have shown no interest in making.

Surplus assets should be available to meet unsecured creditors' claims

132. Separate to the question of whether the non-eligible account holders' claims are deemed abandoned, there is the further question as to what should occur with the remaining assets after all eligible account holders' claims and trustee's costs have been paid in full.

133. The liquidators propose that the appropriate course is for the unclaimed holdings to be converted to fiat currency and transferred (if Treasury agrees) to Treasury under s 149 of the Trusts Act.[113] However, that section does not impose any requirement on a trustee to transfer undistributed trust property to the Crown, nor does it create any right in the Crown over the trust property. Instead, it is a "last resort" for a trustee who wishes to dispose of trust property[114] and has no other means to do without incurring the risk of personal liability for breach of trust. But, as the liquidators submit, the liquidators are already protected from liability by the distribution orders.[115]

134. Further, if all claims by eligible account holders have been met in full, and if the rights of non-eligible beneficiaries are deemed to have been abandoned, as counsel submits is or should be the case, then the obligations of the liquidators as trustee will have been completed - there will be no remaining beneficial interest to which the unclaimed assets are subject. In these circumstances, no purpose would be served by paying the entirety of the surplus assets to Treasury. Rather, it is submitted that the more logical and just outcome would be to make orders recognising that the unclaimed assets

113 Paragraphs 8.3 and 8.5 of the Application.
114 *In re Instant Cash Loans Limited*, above n 91, at [23].
115 Liquidators' submissions at paragraphs 3.28 and 10.2.

are no longer subject to any trust and that they can therefore be applied to meet the unsecured creditors' claims.

135. Such orders would not cut across the objectives of the trusts or any hypothetical intention of the settlors (which must have been simply to receive back the assets they placed into trust when they sought to withdraw them or to give them up if they failed to do so). Further, they would be consistent with the purpose of the court's inherent jurisdiction which is to enable practical effect to be given to a trust, including in circumstances which have not been anticipated or provided for in the terms of the trust.

136. While counsel is not aware of any previous case in which precisely equivalent orders have been made, there are cases that provide assistance by way of analogy.

137. First, cases relating to the court's jurisdiction to amend or vary trusts show that the court will take a pragmatic approach in relation to commercial trusts to achieve a fair outcome. For example, in *Re Phillips New Zealand Ltd*, the Court amended the terms of a trust to allow surplus assets in a superannuation fund to be removed from the trust and returned to the company which had established the trust.[116] In doing so, Baragwanath J held that the Court "will not willingly construe a deed so as to stultify the ability of trustees, having proper consents, to amend a deed to bring it in line with changing conditions". This was particularly important in the scheme of a pension trust, the terms of which should be construed to give "reasonable and practical effect to the scheme".[117]

138. Notably in that case, all the members of the scheme had consented to the amendment. By contrast, in *Re UEB Industries Ltd Pension Plan*, the Court held the trust deed could not be amended because the trust's governing

---

116 *Re Philips New Zealand Ltd* [1997] 1 NZLR 93.
117 Ibid at 99.

documents did not allow for such a change without the consent of all beneficiaries.[118]

139. As the liquidators acknowledge in their submissions, in this case it would not be possible to obtain the consent of all account holders to a variation or termination of the trusts.[119] However, as discussed further below, ss 121, 122 and 125 of the Trusts Act enable the court to terminate or vary the trusts without requiring beneficiary consent.

140. In this case there is no reason to think that any beneficiaries would oppose the surplus assets being used to meet the unsecured creditors' claims in circumstances where all eligible account holders will be repaid in full, any eligible account holders who also have unsecured claims would stand to benefit, and non-eligible account holders have had ample opportunity to advance their claims but have failed to do so.

141. Secondly, there are several cases where directions have been made under the Companies Act 1993 permitting the pooling of trust and non-trust assets and the equal treatment of beneficiary investors and general creditors.

142. For example, in *Graham v Arena Capital Ltd (in liq)*, the Court stepped outside the acknowledged "orthodox" position to allow distribution of assets in a manner that suited the justice of the situation, instead of the strict requirements of liquidation or the relevant trust.[120]

143. In that case, Arena Capital had marketed itself as a foreign exchange trader and received deposits from clients for that purpose. In reality, it did not conduct any investment activity, including foreign exchange trading.[121] It was acknowledged by the liquidators that a statutory trust fell over the funds deposited by the investors.[122]

---

118 *Re UEB Industries Ltd Pension Plan* [1990] 3 NZLR 347 (HC).
119 Liquidators' submissions at paragraph 10.65.
120 *Graham v Arena Capital Ltd (in liq)* [2017] NZHC 973.
121 Ibid at [4].
122 *Graham v Arena Capital Ltd (in liq)* [2016] NZHC 194.

144. The orthodox position in such a situation, as noted by Mander J, would be to have two pools of assets – one of trust assets available to the investors and the other consisting of company assets available to creditors. However, creating two classes of assets in that case would have caused "unnecessary cost to the ultimate disadvantage of investors", requiring the liquidators to determine the nature of the assets available for distribution, how to distribute them and to whom, all in the face of a significant shortfall.[123]

145. Instead, the Court ordered that all recovered assets, after costs, be treated as forming one common pool of assets for distribution to both unsecured creditors of Arena and its investors. While the liquidators in that case accepted that some investors may have been able to make proprietary claims over the proceeds of sale of the largest asset, the Court concluded that "a pro rata, pari passu distribution would provide the most cost-effective, timely and efficient method of distribution, and is one which would result in the fairest outcome." Accordingly, the Court directed that "a common pool of assets be distributed on a pro rata, pari passu basis amongst the general unsecured creditors and investors in Arena."[124]

146. A similar approach was taken by the Court in *Re Fisk*, which also related to an insolvent Ponzi scheme with both unsecured creditors and investors.[125] The liquidators proposed to treat both groups alike on the grounds that it would not be economic to separate the two given the relative insignificance of the unsecured creditors' claims. In the absence of any objection from the two investors represented or the amici curiae the Court adopted this as the pragmatic course.[126] The Court also determined that the company assets and trust assets should be distributed on the same basis, with the claims of general unsecured creditors and investors in respect of their investments

123 *Graham v Arena Capital Ltd (in liq)*, above n 120, at [12].
124 Ibid at [29]
125 *Re Fisk* [2018] NZHC 2007.
126 Ibid at [42].

having priority so that other claims – for example, damages claims by investors – would only be considered once they had been paid in full.[127]

147. These cases demonstrate the willingness of the court, when presented with an insufficient mixed fund, to make directions for distribution based on an assessment of "the nearest approach practicable to substantial justice".[128] There is no reason why, in a case in which all eligible account holders' claims can be met in full, the search for substantial justice should exclude the interests of third party creditors and hack victims.

148. The liquidators suggest that *Arena Capital* and *Fisk* are different to the present case because they were Ponzi schemes and because it was impractical in those cases to separate the trust and non-trust assets.[129] The fact they were Ponzi schemes is not a relevant point of distinction but the fact it was considered uneconomic to treat the trust and non-trust assets separately is relevant. Nevertheless, these cases demonstrate that the court can and does make orders that depart from the orthodox position in relation to distribution of trust assets where circumstances make it appropriate to do so.

Termination or variation under the Trusts Act

149. Section 125 of the Trusts Act enables the court to terminate or vary the trusts without requiring beneficiary consent. Whether s 125 is available depends on whether the Cryptopia trusts are specified commercial trusts, because s 125 is an extension of the Court's powers under ss 121 and 122 which do apply to specified commercial trusts created before the relevant provisions came into force by reason of clause 4(2) of Schedule 3 of the Trusts Act. As discussed above, counsel submit that the Cryptopia trusts are not specified commercial trusts. Nor is there any issue of retrospectivity

---

127 Ibid at [86].

128 As held by Williams J in *Re International Investment Unit Trust* [2005] 1 NZLR 270 at [49].

129 Liquidators' submissions at paragraphs 10.58 and 10.62.

in relation to the application of these sections – the question of whether the trusts should be terminated or varied falls to be determined on the basis of the facts as they stand now and does not depend on or cut across any cause of action that has already accrued.

150. The purpose of s 125 is similar to the purpose of *Re Benjamin* (now partially codified in s 136) namely: to "ensure beneficiaries with negligible or remote interests would not stand in the way of other beneficiaries with more significant interests".[130] It is "essentially an enabling or mechanical provision that allows a court to do no more than dispense with all or any of the consents that are required…"[131]

151. In making an order for waiver of consent, the court must consider:[132]

(a) the nature of any person's interest in the trust property and the effect of the proposed order on that interest:

(b) the benefit or detriment that may result to any person with an interest in the trust property if the court makes or refuses to make the proposed order:

(c) the intentions of the settlor of the trust in settling the trust, if it is practicable to ascertain those intentions.

152. As discussed further below, these factors all point in favour of variation to enable distributions to unsecured creditors.

153. Section 125(4) provides that the court must not make an order of waiver of consent if its effect would be to reduce or remove any vested interest in the trust property. However, it is submitted that is not an obstacle in the current circumstances where the Court has already deemed that non-eligible account holders' interests have been abandoned (or, to the extent that

130 *Re Davies* [2024] NZHC 2998 at [50].
131 *Sherwin v JKA Holdings Ltd* [2024] NZHC 920 at [55].
132 Trusts Act, s 125(3).

Palmer J's orders are not held to have had that effect, where such orders are made either prior to or alongside orders under s 125).

154. In *Trustees Executors Ltd v Nichols*, Osborne J found that "the more remote the beneficiary's interest, the more likely a court will grant a waiver.[133]

155. In regards to Cryptopia, the Court has already ordered that the non-eligible account holders' interests should be treated as abandoned and it is submitted that this must be the case in the context of an extensive campaign by the liquidators to contact and enable the account holders to secure their interests. So there can be very little prospect of any detriment to those non-eligible account holders in waiving their consent but the benefit to the unsecured creditors will be significant.

156. It is not possible to determine the settlors' (i.e. the account holders') intentions in this regard (especially given that the trusts were imposed by the Court following the liquidation) but there is no reason to infer that account holders would oppose a variation of the trusts that enabled surplus funds to be used to meet the claims of unsecured creditors. It is submitted that it would be consistent with the objectives of the trusts and with the interests of beneficiaries for the unsecured creditors to receive distributions from funds that would otherwise be paid to the Crown.[134]

157. Finally, while not expressly permitted by s 136 of the Trusts Act, it is submitted that is within the scope of that section, for orders for distribution to be made that provide for the unsecured creditors' claims to be met from the assets made available by disregarding the claims of non-eligible beneficiaries- whether in the context of orders for variation or termination of the trust or otherwise.

---

133 *Trustees Executors Ltd v Nichols* [2023] NZHC 43 at [22].

134 Noting that to the extent it applies s 4(a) of the Trusts Act makes it mandatory that "a trust should be administered in a way that is consistent with its terms and objectives."

Inherent jurisdiction remains available

158. Even if the powers under ss 121, 122 and 125 are not available in this circumstance (for example, if it is held that the Cryptopia trusts are in fact "specified commercial trusts"), it is submitted that it is within the Court's inherent jurisdiction to terminate or vary the trusts to enable distribution to the unsecured creditors. As noted by the Court of Appeal in *Clarke v Karaitana*, "The Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute, so long as it can do so without contravening any statutory provision."[135]

159. In addition, as your Honour commented in *Re Setter* regarding s 130 of the Trusts Act:[136]

> Implicit in Parliament's approach [in enacting s 130] is a rejection of the underlying premise in *Chapman v Chapman*, that is, that a court cannot vary a trust where it would be beneficial to do so. If the inherent jurisdiction takes its lead from the Court's statutory jurisdiction, it seems a more coherent approach under the 2019 Act may be to avoid strained constructions of the statutory language regarding variations to trusts and to look to the inherent jurisdiction in appropriate cases to fill any gaps left by Parliament (to the extent any such evolution of the inherent jurisdiction is consistent with the statute).

160. It is submitted that it is therefore available to the Court to vary the trusts to allow the unsecured creditors' claims to be satisfied by varying Cryptopia's beneficial interest to absorb the unsecured creditors' claims, or resettling the trusts to give effect to that interest.

161. Accordingly, it is submitted that the inherent jurisdiction provides an alternative basis for the orders sought by counsel for the Creditors and that

---

135 *Clarke v Karaitiana* [2011] NZCA 154 at [38].
136 *Re Setter* [2021] NZHC 1603 at [36(b)].

making such orders would be consistent with the underlying equitable nature and purpose of the jurisdiction:[137]

> Every unjust decision is a reproach to the law or to the judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law.

162. Here, where the liquidators accept that there will be a surplus after distribution and where every possible attempt has been made to contact the beneficiaries, equity requires that the claims of unsecured creditors be satisfied through the surplus.

Order under s 151 of the Trusts Act

163. To the extent that the Court rejects the approach proposed above of varying the trusts and/or making directions for the distribution of the surplus assets to meet the unsecured creditors' claims prior to any order under s 149 of the Trusts Act to transfer the surplus trust property to the Treasury, it is submitted that it would be appropriate for the Court to make an additional order under s 151(2) of that Act directing the Treasury to pay the unsecured creditors' claims from the assets it receives.[138]

164. Section 151(2) says that the Secretary to the Treasury must deal with trust property transferred to the Crown "if the court makes an order in relation to the transferred property, in accordance with that order."[139]

165. It is submitted that, to the extent that the trusts are wound up and s 149 extinguishes an account holder's beneficial entitlement in the surplus funds, the Court is empowered by s 151 to make such an order.

Application by the liquidators to extend the cut-off date

---

137 *Re Vandervell Trustees (No 2) Ltd* [1974] EWCA Civ 7.

138 Sections 149 and 151 are not sections that are excluded by schedule 3 of the Trusts Act.

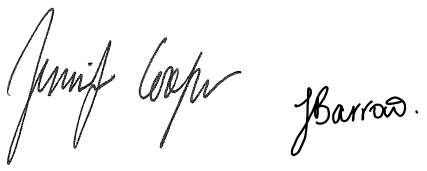
139 Previously s 78(3) of the Trustee Act 1956.

166. By way of interlocutory application dated 23 April 2026 (the **Amendment Application**), the liquidators seek amendments to the distribution orders dated 1 March 2024 and varied on 23 April 2025 (the **Distribution Orders**).

167. Counsel for Creditors will abide by the Court's decision on the Amendment Application in so far as the amendments sought are directed to allowing the liquidators to accept claims received after the existing Final Cut-off Date that have already been received.

168. However, Counsel wish to raise with the Court that the orders sought by the Amendment Application appear to leave open the point at which the liquidators will cease accepting or processing new or incomplete claims. This creates continued uncertainty for the final resolution of this liquidation which, despite paragraph 2(f) of the Amendment Application, may prejudice Cryptopia's creditors. Therefore, counsel submit that if the Court grants the application, the amended orders should enable the liquidators to accept only those claims that have already been received at the date on which the amended orders are made, or those that are received by a revised Final Cut-off Date (which should be in the near future).

Dated 13 May 2026



_____

J S Cooper KC/JAR Barrow
Court appointed counsel for creditors

Appendix

Creditors' Positions on Liquidators' Originating Application

OA Para Ref	Issue	Creditors' Position	Submissions Para Ref (if applicable)
Exclusion and Limitation of liability			
1	Exclusion and limitation of liability for creditor claims by Hack Victims pursuant to Cryptopia's terms and conditions save for statutory claims and dishonest breach of trust	Support.	Paragraphs 8 to 9.
Company liability for Hack Losses			
2.1(a) and (b)	Unsecured creditor claim required save for agreed claims submitted via Portal	Agree that creditor claims are required for account holders who do not have agreed claims via the Portal, and for account holders who wish to make claims requiring them to show reliance. Neutral on whether separate claims should otherwise be required for account holders who have agreed claims via the Portal.	
2.1(c)	Liquidators are permitted to make distributions of Company property to account holders (for the purposes of any	Neutral.	

OA Para Ref	Issue	Creditors' Position	Submissions Para Ref (if applicable)
	unsecured creditor claim) in stablecoin at their discretion.		
2.2	Valuation of Hack Losses	Support liquidators' submissions on this point.	
2.3	Did company breach its fiduciary duties of honesty and good faith in relation to Hack Losses?	Submit answer is no, based on available evidence.	Paragraphs 10 to 15.
2.4(a)	If dishonest breach of FD, is company disentitled to distributions from relevant hacked trusts unless all eligible account holders paid in full?	Submit this question does not arise by reason of answer to 2.3 but accept that if a dishonest breach of FD is found then the company is disentitled to distributions from the relevant hacked trust unless all eligible account holders of that trust have been paid in full.	Paragraphs 16 to 18.
2.4(b)	If dishonest breach of FD, Hack Victims have unsecured creditor claim for full hack losses	Agree (but again do not accept premise per 2.3 above).	Paragraphs 16 to 18.
2.5	If dishonest breach of FD, company required to pay from own assets (in addition to being disentitled to hacked trust assets to relevant Hack victims of that trust)	Agree that company would be liable to meet such claims from its own assets to the extent they were not able to be met assets of the relevant trust (not assets of other trusts) but do	Paragraphs 16 to 18.

OA Para Ref	Issue	Creditors' Position	Submissions Para Ref (if applicable)
		not agree that these claims would have priority over other unsecured claims.	
2.6	If answer to 2.5 is yes, does the obligation to replace hacked currency apply only to company holdings within a deficient trust, or does it apply to all property held by company?	See answer to 2.5.	Paragraphs 16 to 18.
2.7	Subordination of company claim to trust assets for non hack related losses leading to shortfall in a trust (e.g due to negligence or breach of contract) until eligible holders paid in full	Accept that subordination applies if the company is held to be liable for the shortfall. If not, there is no basis for subordination.	Paragraph 19.
2.8	Is company liable under statute (FTA, FMCA, CGA)	Submit company is not liable – support liquidators' submissions on this point.	Paragraphs 20 to 23.
2.9	If yes, hack victims must prove reliance on misleading statements	Submit that this would be required – support liquidators' submissions on this point.	Paragraph 22.
GNY Specific Issues			
2.10			

OA Para Ref	Issue	Creditors' Position	Submissions Para Ref (if applicable)
(a)	If directions 1.1 and 1.3 do not apply, are the liquidators bound to admit GNY claims if it was not named account holder but proves beneficial ownership?	Do not take a specific position on GNY's claims but support liquidators' submissions as they apply to potential claims more widely.	
(b)	Was there a breach of contract including to use reasonable care (8(1)) T&Cs)	(as above)	
(c)	What loss occurred	(as above)	
(d)	Did the company breach terms of trust by failing to exercise skill and care	(as above)	
(e)	If so was loss caused?	(as above)	
(f)	If so what loss is quantified/proved?	(as above)	
Company beneficial interest in Bitcoin			
3.1	Whether company's use of Bitcoin from Bitcoin trust for business expenses was a breach of fiduciary duty	Oppose on the basis that there are insufficient facts to support this claim.	Paragraphs 24 to 38.
3.2	If shortfall in Bitcoin trust for eligible account holders, does that become an unsecured claim?	Support it being an unsecured claim but oppose non-application of exclusion and limitation of liability clauses.	Paragraphs 24 to 38.

OA Para Ref	Issue	Creditors' Position	Submissions Para Ref (if applicable)
Assignment - prohibition			
4.1	Prohibition on assignments to be upheld (18.2(b) T&Cs)	Neutral/adopt liquidators' position.	
Top up for Hack Losses			
5.1	Calculation of Unclaimed Holdings, Costs and shortfall to account holders as at Final Cut Off Date	Support, subject to clarification of Final Cut Off Date.	
5.2	Top up applied to Unclaimed Holdings in any trust to make distributions to eligible account holders net of costs up to 100%	Oppose because this would mean the hack victims' unsecured claims are given priority over the claims of other unsecured creditors.	
5.3	If shortfall in Unclaimed Holdings to pay 100%, pari passu distribution intra-trust	Oppose on same grounds as 5.2 above	
NZDT			
6.1	Whether company use of monies held for benefit of NZDT was breach of fiduciary duty as trustee	Submit that evidence does not support finding of breach of fiduciary duty as company was entitled to use its own NZDT.	Paragraphs 39 to 46.
6.2(a)	Company not entitled to NZDT beneficial interest if shortfall	Submit that company should be entitled to NZDT beneficial interest unless it was liable for shortfall.	

OA Para Ref	Issue	Creditors' Position	Submissions Para Ref (if applicable)
6.2(b)	Company entitled to distribution of unclaimed holdings as at cut off	Support.	Paragraph 46.
6.2(c)	NZDT account holders can make unsecured claims for breach of trust	Support it being an unsecured claim but oppose non-application of exclusion and limitation of liability clauses.	
6.3	Company to top up eligible NZDT account holders following NZDT cut off date	Support subject to clarification of Final Cut Off date and on basis top up is to max of 100% of entitlement.	Paragraph 46.
6.4	Orders 6.1 to 6.3 of May 2025 apply (i.e. costs allocated to NZDT), except that the allocation of trust administration costs to the NZDT trust is to be reduced by 50%.	Neutral.	
6.5	Pari Passu distribution to eligible NZTD holders	Neutral.	
Trusts with Surpluses over recorded entitlements			
7.1	Trusts with surpluses – trusts holding more than 100% of account holders' recorded entitlements – should claims be scaled up or limited to their total holdings	Oppose scaled up entitlement.	

OA Para Ref	Issue	Creditors' Position	Submissions Para Ref (if applicable)
7.2	If distributions based on admitted claims, whether surplus is company property	Neutral on whether the surplus is company property but should be made available to meet unsecured claims whether or not it is treated as company property.	
Winding up trusts			
8.1 and 8.2	Whether trusts should be extinguished by court order after all eligible account holders paid and currencies converted to NZD and funds applied in the ordinary way under Part 16 net of costs	Support winding up of trusts and use of surplus assets to pay unsecured creditors, neutral as to whether funds should be applied under Part 16.	Paragraphs 98 to 162.
8.3	If not, whether currencies can be sold into NZD for transfer to a new trustee under section 149 of the Trusts Act 2019 or otherwise, with entitlements fixed in NZD	Neutral except to the extent that this should be an option of last resort and would support only if unsecured claims had already been met or orders were made requiring a new trustee to meet such claims or, if applicable, orders made under s 151 of the Trusts Act 2019 requiring payment to Creditors before transfer to Treasury.	Paragraphs 163 to 165.

OA Para Ref	Issue	Creditors' Position	Submissions Para Ref (if applicable)
8.4	If yes, whether account holder entitlement is assessed in NZD at date of liquidation or some other date	As above.	
8.5	If yes, whether additional costs of establishing new trust are payable rateably	As above.	
8.6	Liquidators may pay any non eligible account holders in NZD if eligibility established	As above.	
Low/No Value trusts			
9.1	The liquidators are permitted to place low value trust currencies in inaccessible wallet (essentially extinguished)	Neutral	