IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2025-485-487

Under the	**PART 19 OF THE HIGH COURT RULES, PART 16 OF THE COMPANIES ACT 1993, PART 7 OF THE TRUSTS ACT 2019 AND THE COURT'S INHERENT JURISDICTION TO SUPERVISE TRUSTS**
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** of **GRANT THORNTON NEW ZEALAND LIMITED**
	Applicants
AND	**GNY.IO LIMITED**
	Respondent

SUBMISSIONS FOR LIQUIDATORS IN SUPPORT OF ORIGINATING APPLICATION FOR DIRECTIONS WINDING UP THE TRUSTS

Dated: 23 April 2026

Judicial officer assigned: Isac J
Next event: 7-day hearing starting 25 May 2026

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MAY IT PLEASE THE COURT:

1. INTRODUCTION

1.1 These submissions are filed in support of the originating application for directions dated 31 July 2025 filed by Messrs Ruscoe and Moore (**liquidators**), liquidators of Cryptopia Limited (in liquidation) (**Cryptopia** or the **Company**), and amended on 23 April 2026.[1]

1.2 This is the third substantive application for directions, following an application in 2019 for directions as to the status of cryptocurrency[2] (**Trust Application**) and an application in 2023 for directions as to the distribution of cryptocurrency held by Cryptopia on bare trust for the benefit of its account holders[3] (**Distribution Application**).

1.3 The liquidators seek the Court's direction on the issues set out in the originating application in order to conclude the liquidation of Cryptopia. The directions sought address:

(a) Section 2 sets out a brief summary of the factual background relevant to this application.

(b) Sections 3 and 4 set out summaries of trust law and insolvency law relevant to the application.

(c) Section 5 and Schedule 2 address the Court's jurisdiction to make the orders sought by the liquidators.

(d) Section 6 addresses Cryptopia's terms and conditions: namely, whether they remain binding on Cryptopia and its account holders, and the consequences of that for trust administration and the liquidation.

(e) Section 7 addresses the directions necessary finally to determine both account holders' final entitlements and what Company assets will be available to creditors, including:

(i) Whether Cryptopia is entitled to receive a distribution of its beneficial interests in the cryptocurrency trusts.

[1] Amended originating application, 23 April 2026, 401.0001.
[2] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809.
[3] *Ruscoe v Houchens (Distribution)* [2024] NZHC 419.

(ii) Whether account holders are prohibited from assigning their beneficial interests in the cryptocurrency trusts.

(iii) Whether account holders in trusts that suffered losses in the Hack can receive a top-up distribution to account for those losses (provided there are sufficient assets to do so).

(iv) Directions for the distribution of NZD funds held for the benefit of account holders in the NZDT trust.

(v) Whether holdings in the cryptocurrency trusts that exceed the amounts recorded on Cryptopia's database are to be treated as trust or Company property.

(vi) Whether the liquidators are permitted permanently to remove from circulation cryptocurrencies that have low or no realisable value, such that they cannot contribute to trust administration costs.

(f) Sections 8 and 9 address account holders' unsecured creditor claims against Cryptopia. Section 8 addresses the unsecured creditor claim by GNY.io Limited (**GNY**) and Cryptopia's liability for losses suffered in the January 2019 hack. If Cryptopia is liable to GNY for such losses, then other account holders who suffered losses in the Hack will likely have unsecured creditor claims against the Company as well. Section 9 addresses other account holders' unsecured creditor claims, including directions as to submission of those claims (which the liquidators propose should be deemed as submitted based on completion of the claims portal established for account holders) and distribution of Company assets to meet those claims (which the liquidators propose should be in a stablecoin cryptocurrency).

(g) Section 10 of these submissions addresses the directions necessary for the liquidation of Cryptopia to be concluded. In particular, it is likely that a significant amount of cryptocurrency will remain unclaimed and therefore not distributed to account holders. The liquidation of the Company cannot be completed while it remains trustee of the cryptocurrency trusts. The liquidators seek directions that will bring an end to this arrangement.

(h) The conclusion is at section 11.

1.4 This application raises a wide range of issues. To assist counsel and the Court, the liquidators have prepared a flowchart of these issues to demonstrate where in the winding-up process each issue arises (**Schedule 1**).

2. FACTUAL BACKGROUND TO APPLICATION

2.1 Gendall and Palmer JJ have set out useful factual backgrounds in the judgments for the Trust Application[4] and Distribution Application.[5] Further background is set out in Mr Ruscoe's affidavits in the Distribution Application[6] and in this proceeding.[7] That background is not repeated in detail here. It is sufficient to say that Cryptopia was incorporated in 2014. Its primary activity was to operate a cryptocurrency exchange (i.e., an online platform) that permitted users to purchase, deposit and trade pairs of a range of cryptocurrencies between themselves. Cryptopia generated income by charging transaction fees on trades, deposits and withdrawals.

2.2 In January 2019, Cryptopia was hacked and a significant amount of cryptocurrency was stolen (**Hack**). On 14 May 2019, Messrs Moore and Ruscoe were appointed liquidators by special resolution of the voting shareholders. As at the date of liquidation, Cryptopia:

(a) Had more than 2.2 million registered account holders[8] in more than 180 countries.[9] Of those, 960,000 had a positive account balance.[10]

(b) Held approximately 900 different types of cryptocurrencies on behalf of its account holders.[11]

2.3 Further background on particular issues relevant to this application is set out below.

The Hack

2.4 The Hack occurred on 14 January 2019 NZT. When Cryptopia management detected the Hack, it took the exchange offline and reported the theft to the

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[4] *Ruscoe v Cryptopia (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [1]–[13].
[5] *Ruscoe v Houchens (Distribution)* [2024] NZHC 419 at [1]–[3].
[6] Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application (Tab 16 to the previous Cryptopia proceedings bundle) and Mr Ruscoe's 13 October 2023 affidavit in the Distribution Application (Tab 18 to the previous Cryptopia proceedings bundle).
[7] Ruscoe first affidavit, 31 July 2025, 201.0023; Ruscoe second affidavit, 4 November 2025, 201.0117; and Ruscoe updating affidavit, 23 April 2026, 401.0026.
[8] Ruscoe first affidavit, 31 July 2025 at [6], 201.0025.
[9] Ruscoe first affidavit, 31 July 2025 at [15(c)], 201.0027.
[10] Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application at [5] (Tab 16 to the previous Cryptopia proceedings bundle).
[11] Ruscoe first affidavit, 31 July 2025 at [7], 201.0025.

New Zealand Police (**Police**).[12] The Police provided a report to the liquidators in July 2025 summarising the information they had about the Hack.[13] Regrettably, very little is known about the Hack as it is currently the subject of an active Police investigation. The liquidators do not have much information related to the Hack, as it predated the liquidation by four months, and all available information was handed over to the Police.

2.5 Several cryptocurrencies were stolen, including Bitcoin (**BTC**), Litecoin (**LTC**), Ethereum (**ETH**), Bitcoin Cash, Ethereum Classic, and more than 80 different ERC20 tokens, including the LML token issued by GNY.[14]

Cryptopia Loss Marker

2.6 After the Hack, Cryptopia management carried out an assessment of the Company's losses by reviewing the amounts of cryptocurrency left in Company wallets and comparing that against its internal database to determine the percentage lost.[15] The percentages assessed were 100% for ETH, 14.0489% for BTC, and 43.1986% for LTC. [16]

2.7 Cryptopia management then issued what it referred to as a Cryptopia Loss Marker (**CLM**) to account holders in the BTC, LTC and ETH trusts. It did this by:

(a) Effecting an internal withdrawal of account holders' balances in the BTC, LTC and ETH trusts equivalent to the percentage assessed to have been stolen. [17] (I.e., an account holder with 10 of each currency would have had an internal withdrawal of 10 ETH, 1.40489 BTC, and 4.31986 LTC.[18])

(b) Assessing the amount of the internal withdrawal as a NZD conversion of that cryptocurrency value as at the date of the Hack and issuing CLM to reflect that loss.[19] (I.e., an account holder with 10 of each currency would have received CLM equating to the NZD value of 10 ETH, 1.40489 BTC, and 4.31986 LTC as at the date of the Hack.)

[12] Ruscoe first affidavit, 31 July 2025 at [89], 201.0048.
[13] Exhibit DIR1-384 to Ruscoe first affidavit, 31 July 2025 at 303.1407.
[14] Ruscoe first affidavit, 31 July 2025 at [115], 201.0054. The volumes stolen are summarised in Mr Ruscoe's updating affidavit, 23 April 2026 at [14]-[16], 401.0030 – 401.0031.
[15] Ruscoe first affidavit, 31 July 2025 at [116], 201.0054.
[16] Ruscoe first affidavit, 31 July 2025 at [117], 201.0054.
[17] Ruscoe first affidavit, 31 July 2025 at [117], 201.0054.
[18] Ruscoe first affidavit, 31 July 2025 at [118], 201.0055.
[19] Ruscoe first affidavit, 31 July 2025 at [117], 201.0054.

2.8 The exchange went live again from March 2019.[20] Cryptopia management required account holders to generate new deposit addresses to manage the risk of a further theft and restricted trading to a limited set of cryptocurrencies.[21] The Company also began setting up a new wallet environment and began recovering cryptocurrencies from the compromised environment.

The liquidation

2.9 The liquidators were appointed on 14 May 2019 by way of shareholder resolution.[22]

2.10 The steps taken by the liquidators in administration of the trusts are set out in Mr Ruscoe's 31 July 2025 affidavit in support of this application.[23]

2.11 That process was difficult because Cryptopia had never undertaken a full reconciliation of its holdings against the balances recorded in its databases prior to the appointment of liquidators.[24] Further, in many circumstances the only identifying information Cryptopia held about its account holders was an email address.[25] That meant it would be difficult to identify who the beneficiaries of each cryptocurrency trust were.

2.12 As a result of that, the liquidators were unable to determine with certainty:

(a) What each account holder's beneficial entitlement is.

(b) How much of each cryptocurrency was actually stolen in the Hack.[26]

2.13 The liquidators undertook a full reconciliation of Cryptopia's holdings, including:[27]

(a) Obtaining the Company data stored at the Phoenix NAP, LLC (**PNAP**) datacentre in Arizona, United States of America. That data included contact details for each account holder, the SQL database which

[20] Ruscoe first affidavit, 31 July 2025 at [90], 201.0048.
[21] Ruscoe first affidavit, 31 July 2025 at [90], 201.0048.
[22] Exhibit DIR1-1 to Ruscoe first affidavit, 31 July 2025, 302.0931.
[23] Ruscoe first affidavit, 31 July 2025 at [14]–[18], 201.0027–201.0029. Trust administration steps included reconciling Cryptopia's cryptocurrency holdings; building a new, secure wallet environment and re-keying the cryptocurrencies; building a claims portal to identify account holders and confirm their entitlements; designing a distribution and cost allocation model; and distributing cryptocurrency to account holders who have completed the claims portal.
[24] Ruscoe first affidavit, 31 July 2025 at [15], 201.0027 and [119], 201.0055.
[25] Ruscoe first affidavit, 31 July 2025 at [42], 201.0036.
[26] Ruscoe first affidavit, 31 July 2025 at [119], 201.0055.
[27] Ruscoe first affidavit, 31 July 2025 at [15], 201.0027.

contained the cryptocurrency transactions and balances of each customer wallet, and the holdings of some cryptocurrency wallets.

(b) Reconciling the balances recorded in the SQL database and Cryptopia's databases against Cryptopia's cryptocurrency holdings.

2.14 The liquidators then built a claims portal in which account holders could register, prove ownership of their account, undertake identity verification, and accept or dispute their cryptocurrency balances.[28] That process allowed the liquidators to identify the beneficiaries of each of the trusts and to confirm the accuracy of Cryptopia's customer balance records (or to amend them where account holders could provide proof that the balance records were incorrect). It was this distribution process that was approved by Palmer J in the Distribution Application.

2.15 The liquidators have now made a large number of distributions to account holders. Distributions are phased as the liquidators develop distribution capability for different cryptocurrencies. The liquidators have distributed to account holders in the Bitcoin, Dogecoin, Cardono, Tether, Tron and Litecoin trusts.[29]

Unsecured creditor claims

2.16 The liquidators have received:[30]

(a) 34 preferential claims for employees totalling $312,992 and paid on 1 November 2019.

(b) 27 unsecured creditor claims totalling $22.263 million. One of these creditors is the Inland Revenue Department (**IRD**) for $19,224,246.26.

(c) One contingent creditor claim (GNY).

2.17 GNY submitted an unsecured creditor claim form on 10 July 2019.[31] GNY's unsecured creditor claim is based on its statement of claim against Cryptopia, filed on 11 April 2019[32] alleging breach of contract, breach of s 13 of the Fair Trading Act 1986 (**FTA**) and / or s 22 of the Financial Markets Conduct Act 2013 (**FMCA**), and breach of s 28 of the Consumer Guarantees Act (**CGA**). GNY further raised a claim in breach of fiduciary duty in

[28] Ruscoe first affidavit, 31 July 2025 at [15], 201.0027.
[29] Ruscoe updating affidavit, 23 April 2025 at [4], 401.0027.
[30] Ruscoe first affidavit, 31 July 2025 at [9], 201.0025.
[31] Exhibit [redacted]51 to [redacted] first affidavit, 30 March 2025, 302.0949.
[32] Exhibit [redacted]8 to [redacted] first affidavit, 30 March 2025, 302.0912.

correspondence on 12 May 2020.[33] The loss claimed is the amount of the Lisk Machine Learning token (**LML**) stored on Cryptopia's platform and stolen in the Hack as well as loss in market capitalisation.

2.18 The liquidators have not admitted or rejected GNY's claim because they have been unable to determine whether Cryptopia is liable to GNY (in particular, because there is insufficiently clear evidence for them to decide) and if it is, for what quantum.[34] That is an issue on which the liquidators seek the Court's direction in this application.

2.19 The liquidators expect that there may be more unsecured creditor claims:

(a) From account holders who suffered losses in the Hack. (If Cryptopia is liable to GNY, then other account holders who suffered losses in the Hack would have, or would likely have, unsecured creditor claims arising from the same subject matter.)

(b) From coin developers who paid a listing fee to Cryptopia for their coins to be listed on the platform but which were never listed (two coin developers have submitted an unsecured creditor claim).[35]

Directions applications

2.20 Much of the relevant background to this application, particularly as it relates to the period prior to the appointment of liquidators, has been summarised by Gendall and Palmer JJ in their judgments of 8 April 2020 and 1 March 2024 respectively.[36] The further applicable background is set out in Mr Ruscoe's 31 July 2025 affidavit. Where possible, that background will not be repeated, save where it is relevant to an issue before the Court in this proceeding.

2.21 The liquidators first applied for substantive directions from the Court in 2019 in the Trust Application. This application sought directions as to whether the cryptocurrencies held by Cryptopia were held on trust for the benefit of account holders. Gendall J held that they were.

2.22 In 2023, the liquidators filed the Distribution Application seeking directions as to the distribution of the cryptocurrencies to account holders and as to the

[33] Letter from GNY to liquidators, 12 May 2020, exhibit [redacted] 84 to [redacted] first affidavit, 30 March 2025, 303.1012 at 303.1014.
[34] Ruscoe first affidavit, 31 July 2025 at [11]–[12], 201.0026.
[35] Ruscoe first affidavit, 31 July 2025 at [13], 201.0027.
[36] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 and *Ruscoe v Houchens (Distribution)* [2024] NZHC 419.

allocation of trust administration costs. Palmer J made the orders sought, including (among other directions) the following:[37]

(a) Directions permitting the liquidators to distribute cryptocurrency to account holders who had completed the claims process on the basis that any account holders who had not registered their claim prior to a given date (90 days' notice of which was to be given) (**Soft Cut-Off Date**) do not exist.

(b) Directions permitting the liquidators to treat any account holder who has taken a step in, but not fully completed, the claims process by 31 December 2024 (**Final Cut-Off Date**) as having abandoned their claim, with consequential loss of entitlement to receive a distribution.

(c) Directions that any account holder who had completed the claims process by the Final Cut-Off Date was an **eligible account holder**.

(d) Directions approving the liquidators' proposed cost allocation model, including that any unclaimed holdings in a trust could be used to meet trust administration costs, and costs already deducted from eligible account holders could be reimbursed (either in full, or on a *pari passu* basis depending on the quantum of the unclaimed holdings in that trust).

(e) Directions that neither the liquidators nor the Company would be liable in respect of any distribution made to an account holder in accordance with the Court's directions.

(f) Directions approving a process for account holders to dispute the liquidators' decisions on their claims and for that dispute to be determined by senior barristers approved by the Court.

(g) Directions confirming that the liquidators are not required to take any steps in relation to the distribution of any cryptocurrency that has no or low realisable value (and thus no basis for contribution to the costs of distribution).

[37] Orders of Palmer J in respect of distribution of cryptocurrencies, 1 March 2024 in CIV-2023-485-411.

2.23 The Soft Cut-Off Date was on 31 March 2025. The Final Cut-Off Date was on 30 September 2025. Notice of both dates was given on 23 December 2024.[38]

2.24 However, there are a large number of account holders who had registered in the claims portal before, but did not complete the claims process until *after*, the Final Cut-Off Date (3,800 in total, with a further 6,700 account holders who had registered prior to the Final Cut-Off Date but have not yet completed the process).[39]

2.25 The liquidators have filed an application to vary the orders in the Distribution Application.[40] The variation would make clear that the liquidators have a discretion to distribute cryptocurrency to account holders who have either registered in or completed the claims portal after the Final Cut-Off Date, provided that it would not, in the liquidators' opinion, prejudice the administration of the trusts or the liquidation of Cryptopia. As set out in Mr Ruscoe's 31 July 2025 affidavit (which predated the Final Cut-Off Date):[41]

> With the Soft Cut-Off Date now having passed, and the Final Cut-Off Date *nearing, the liquidators are conscious that the liquidation of the Company needs to progress so that Cryptopia's creditors can be paid out and the liquidation completed. At the same time, the liquidators want to ensure that as much of the cryptocurrency can be distributed to account holder beneficiaries as possible.*

If those directions are granted, then if the liquidators exercised their discretion to distribute to an account holder who had registered in or completed the claims portal after the Final Cut-Off Date, such account holders would also be deemed eligible account holders.

2.26 In addition to the applications referred to at [2.21] and [2.22], the liquidators have made several applications for directions permitting them to liquidate some of the cryptocurrencies held on trust to meet trust administration costs.[42]

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[38] Ruscoe first affidavit, 31 July 2025 at [18], 201.0028 and exhibit DIR1-74 to Ruscoe first affidavit, 31 July 2025, 303.1345. On 23 April 2025, the Final Cut-Off Date was varied by court order from 31 December 2024 to 30 September 2025.
[39] These account holders reflect a significant value. See Ruscoe updating affidavit, 23 April 2025 at [5], 401.0027.
[40] Interlocutory application to vary orders, 23 April 2026 in CIV-2023-485-411, 401.0161. See also the accompanying memorandum of counsel, 23 April 2026, at 401.0164, and a copy of the updated draft orders showing the amendments as tracked changes at 401.0169.
[41] Ruscoe first affidavit, 31 July 2025 at [19], 201.0029.
[42] CIV-2019-409-286: Directions permitting the liquidators to convert 344 BTC to NZD to meet the costs of trust administration. CIV-2021-409-33: application for directions permitting the liquidators to convert 80 BTC into NZD to meet the costs of trust administration. CIV-2022-485-47: application for directions permitting the liquidators to

3. TRUST LAW

3.1 This section provides an overview of trust law applicable to the issues in this application, namely: trustee duties, the nature of beneficial interests, breach of trust, and the *Re Benjamin* jurisdiction.

Trustee duties

3.2 By judgment dated 8 April 2020, Gendall J held that Cryptopia held cryptocurrencies on trust for the benefit of account holders (i.e., that Cryptopia was a corporate trustee). His Honour found that a separate trust was created for each cryptocurrency held by Cryptopia.[43]

3.3 Gendall J held that Cryptopia was bare trustee:[44]

> I find that Cryptopia's principal duty under each of these respective trusts was to hold the relevant pool of currency, in many cases which the accountholders had brought onto the platform, on behalf of those accountholders...As part of this Cryptopia as trustee was required to deal with each accountholder member's share in the pool as directed by the member.
>
> …
>
> As I see it here, Cryptopia essentially fulfilled the role of a bare trustee in relation to the accountholders. Cryptopia's trust duties therefore were somewhat confined. Its principal role was to hold each group of digital assets as trustee for the accountholders, to follow their instructions, and to let individual accountholders then increase or reduce their beneficial interest in the relevant trusts in accordance with the system Cryptopia had created for that purpose.

3.4 A bare trustee is defined in *Halsbury's Laws of England* as follows:[45]

> A bare trustee is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so.

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realise NZD5 million from the Dogecoin trust to meet the costs of trust administration. CIV-2023-485-375: application for directions permitting the liquidators to realise NZD5 million from the BTC and Dogecoin trusts to meet the costs of trust administration.

[43] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [192].

[44] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [184] and [196].

[45] *Halsbury's Laws of England* (4th ed, 2001) at [650]; *Laws of New Zealand* Trustees (online ed) at [120].

3.5 Similarly, a bare trustee is defined in a New Zealand context by the learned authors of *Garrow and Kelly* as follows:[46]

> A bare trust *(or simple trust), that is, one in which the trustee has no active duties to perform apart from the transfer of the property to the beneficiaries when required to do so. In that case the trustee is called a* passive trustee *or* bare trustee*;*

3.6 These definitions are consistent with Gendall J's description of Cryptopia's trustee role (see [3.3]).

3.7 Part of the difficulty produced by Cryptopia's liquidation is that there is not a trust deed by which Cryptopia's obligations can be determined. Accordingly, the content of Cryptopia's trustee obligations is sourced from the rules of equity and statute. Added to this is that the trust finding was post hoc. Hence neither Cryptopia nor account holders likely conducted themselves with a trustee / beneficiary relationship in mind.

3.8 The overriding obligation of a trustee, at equity, is to preserve and safeguard the trust property. In exercising their powers and duties, trustees have a general duty to exercise care, except to the extent that they are excused by the terms of the trust or by statute.[47] Trustees must manage trust property with the same degree of diligence and care that a person of ordinary prudence would exercise in the management of his own affairs.[48] If the trustee is a professional, they would be expected to exercise any special knowledge or expertise reasonably expected from a person acting in that profession.[49]

3.9 In accordance with the general duty of care, trustees have duties to:[50]

(a) Take active steps to place trust property under their own control.

(b) Ensure the safe custody of trust property. Trustees must avoid intermingling trust property with the trustee's own property, or to use it for the trustee's own benefit. The duty of safe custody may include a

[46] Garrow and Kelly *Law of Trusts and Trustees* (8th ed, LexisNexis, Wellington, 2022) at [2.16] (***Law of Trusts and Trustees***).
[47] Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (online looseleaf ed, Thomson Reuters) at [34-001] (***Lewin on Trusts***).
[48] *Lewin on Trusts* at [34-002], citing *Speight v Gaunt* (1883) 9 App Cas 1 (HL) at 19 per Lord Blackburn. See also *Brean v Williams* (1996) 186 CLR 71 at 137 per Gummow J.
[49] See Trusts Act 2019, s29(b), which reflects the common law position.
[50] *Lewin on Trusts* at [34-015]–[34-099].

duty to insure depending on the duty of care owed in the circumstances and the nature of the trust property.

(c) Preserve and manage the trust property for the benefit of the beneficiaries.

3.10 Those duties overlap with, but are distinguished from, the fiduciary duties of a trustee (being the duty of loyalty; duty to avoid conflicts of interest; and the rule against unauthorised profits).[51]

3.11 Many of the duties outlined above correspond with the mandatory and default duties codified in the Trusts Act 2019, including:[52]

(a) Duty to act in accordance with the terms of the trust (s 24);

(b) Duty to act for the benefit of beneficiaries or to further the permitted purpose of the trust (s 26);

(c) Duty to exercise powers for a proper purpose (s 27);

(d) General duty of care (s 29);

(e) Duty to consider exercise of power (s 32);

(f) Duty of impartiality (s 35).

3.12 It is well-established that a trustee cannot limit its duties to perform the trust honestly and in good faith for the benefit of beneficiaries.[53] Beyond that, however, other duties (such as the duties of skill, care, prudence and diligence) can be limited or excluded.[54] Such a limitation or exclusion would require clear and specific words.[55] In summary:[56]

> *Obviously there is a limit beyond which the abridgement of trustees' duties cannot go. If the terms of the trust instrument sought wholly to negate the trustees' duties, then there would be no trust at all. The terms of a trust could not negate the duty of trustees to act in good faith, but a duty of care can be excluded altogether, so as to excuse negligence, even gross negligence. It is enough, as a minimum, for the trustees to be left under a duty to perform the trust honestly and in good faith for the benefit of the beneficiaries. Beyond*

[51] *Lewin on Trusts* at [34-001].
[52] Trusts Act 2019, ss 22–38.
[53] *Armitage v Nurse* [1998] Ch. 241 (CA) at 253–254. *Armitage v Nurse* was applied in New Zealand in *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [120]–[124].
[54] *Lee v Torrey* [2015] NZHC 2135 at [126].
[55] *Cooper v Pinney* [2024] NZSC 181, [2024] 1 NZLR 935 at [120].
[56] *Lewin on Trusts* at [41-130]; *Armitage v Nurse* [1998] Ch. 241 (CA) at 253–254.

this, the irreducible core of obligations does not operate to override the express terms of the trust or to impose any other duty on a trustee and provides a touchstone for deciding whether the minimum requirements for constituting a trust have been met.

3.13 The position now under the Trusts Act 2019 is that the terms of a trust must not limit or exclude a trustee's liability for a breach of trust arising from dishonesty, wilful misconduct or gross negligence (except that a specified commercial trust can exclude liability for gross negligence).[57] The Trusts Act 2019 was not in force when Cryptopia went into liquidation (14 May 2019) and is therefore of little assistance in determining what duties Cryptopia held before liquidators were appointed, but is a useful codification of the common law position.

3.14 As the Supreme Court held recently:[58]

> We accept that there is force in Millett LJ's description in Armitage v Nurse *of the trustee duty to perform the trust honestly and in good faith for the benefit of the beneficiaries as an "irreducible core of obligations" owed by a trustee and fundamental to the concept of a trust… we think it sound as a general principle, for two reasons. First, it has support from recent decisions of this Court (in* Clayton*) and the Judicial Committee of the Privy Council. Secondly… "irreducible core" has gained subsequent support from enactment of the mandatory trustee duties in the 2019 Act, particularly s 26.*
>
> *We also accept, however, that the precise extent of the fiduciary obligations applicable to a trustee will depend on the express terms of the trust deed and may be varied by those terms or by necessary implication from context, including the evident intent of the settlor of the trust.*

3.15 The liquidators submit that Cryptopia's terms and conditions are also terms of the trusts.[59] This is addressed further in section 4 below.

The beneficial interest

3.16 A beneficiary's interest in trust property can be categorised in many ways. For example:

(a) A trust may be a fixed trust or a discretionary trust. Under a fixed trust, a trustee has no real choice about to whom they must pay the trust

[57] For example, see Andrew Butler *Equity and Trusts in New Zealand* (online looseleaf ed, Thomson Reuters) at [11.3.9] (***Equity and Trusts in New Zealand***).
[58] *Cooper v Pinney* [2024] NZSC 181, [2024] 1 NZLR 935 at [118]–[119].
[59] Exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577.

fund, whereas a discretionary trust permits a trustee to make a discretionary decision about which beneficiaries receive a distribution of the trust fund and what that distribution is.[60] A discretionary beneficiary is commonly described as having no specific or identifiable interest in the trust beyond ensuring the trustee's compliance with its duties and the terms of the trust.[61] In contrast, a beneficiary's interest in a fixed trust is definable. Typically, a definable interest is to a proportion of trust property, but presumably it can equally be to a fixed amount of the trust property.

(b) A beneficial interest may be vested,[62] meaning that a beneficiary is not at present entitled to a definable portion but may be in the future, or contingent,[63] meaning that the beneficiary's entitlement depends on some other event occurring.

3.17 The nature of the beneficial interest is determined by reference to the terms of the trust or, failing that, to the settlor's intention (or presumed intention).

3.18 In line with Cryptopia's role as bare trustee (see [3.2]-[3.6] above), Cryptopia's account holders had a fixed and definable beneficial interest, being the amount of cryptocurrency (or fiat) they had brought onto Cryptopia's exchange platform, less any cryptocurrency (or fiat) withdrawn, traded, or reduced by reason of fees (as opposed to a proportion or percentage share of cryptocurrency). Their beneficial interests were not discretionary or contingent on any particular event occurring.

Breach of trust

3.19 When trust property is transferred in breach of trust, the beneficial interest persists unless it is transferred to a bona fide purchaser without notice of the beneficial interest.[64] As long as the beneficial interest persists, the beneficiary will have available a proprietary remedy to recover the trust property.[65] In order to utilise that proprietary remedy, a beneficiary must be able to trace the trust property. Evidential difficulties in doing so may arise:

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[60] *Law of Trusts and Trustees* at [2.28].
[61] *Law of Trusts and Trustees* at [25.80].
[62] See *Lewin on Trusts* at [1-048].
[63] See *Lewin on Trusts* at [1-055].
[64] *Lewin on Trusts* at [44-013].
[65] *Lewin on Trusts* at [44-013], though no personal remedy unless a claim can be brought in dishonest assistance or knowing receipt.

for example, it can be difficult to trace trust money through various bank accounts, particularly when bank records are incomplete or unavailable.[66]

3.20 If trust property applied in breach of trust cannot be effectively followed (because it has passed into the hands of a bona fide purchaser without notice, there ceases to be any property representing the trust property, or the property cannot be traced) then the proprietary remedy will fail.[67] That can occur when, for example, trust money is used to pay debts.[68]

3.21 If the proprietary remedy is not available, then the beneficiary will have a personal claim against the trustee for breach of trust. If trust property has been misapplied, the trustee is under a strict liability obligation to restore it without any obligation to prove causation of loss.[69] The basic rule is that a trustee must restore or pay to the trust either the assets which have been lost by reason of breach of trust or failure to account properly for the trust fund, or compensation for such loss.[70] The trustee's liability continues even after the termination of the trust. Trustees cannot mitigate or alter the quantum of their liability by bringing the trust to an end or by requiring the beneficiary to prove that they have suffered loss. This reasoning applies equally to commercial trusts, although care should be taken when translating the concepts of traditional trusts to a commercial context.

3.22 When a beneficiary has a personal claim against an insolvent corporate trustee for breach of trust:

(a) A liability for breach of trust is capable of proof in a liquidation, and it is unnecessary first to establish the breach of trust by ordinary proceedings.[71]

(b) When a trustee is liable for a breach of trust and has a beneficial interest under that same trust, that interest can be made available to satisfy the trustee's liability: the beneficiaries who have a claim to that interest are secured creditors (to the extent of the trustee's beneficial

[66] *Lewin on Trusts* at [44-025].
[67] *Lewin on Trusts* at [44-111].
[68] *Lewin on Trusts* at [44-112].
[69] *Lewin on Trusts* at [41-004].
[70] *Lewin on Trusts* at [41-010], citing *Target Holdings Ltd v Redferns* [1996] AC 421 (HL). The rule as to the measure of loss was affirmed by the UK Supreme Court in *AIB Group (UK) Plc v Mark Redler & Co. Solicitors* [2014] UKSC 58, [2015] AC 1503.
[71] *Lewin on Trusts* at [27-063].

interest) and would have claims as unsecured creditors for any outstanding balance.[72]

3.23 A trustee's liability for breach of trust may be limited or excluded by an express provision in the trust deed. Such a provision can prevent a trustee from having personal liability to pay compensation for breach of trust.[73] It does not prevent beneficiaries from seeking to prevent trustees from acting in an unauthorised manner, prevent a proprietary remedy, or permit a trustee to retain unauthorised profits or unauthorised remuneration.[74]

3.24 The general rule is that an exemption clause can exclude liability for everything except the trustee's own fraud,[75] meaning dishonesty, in bad faith, or (at minimum) an intention to pursue a particular course of action, either knowing that it is contrary to the interests of beneficiaries or being recklessly indifferent as to whether or not it is contrary to those interests.[76] This includes wilful misconduct (i.e., intention as to the *mis*conduct, rather than to the conduct),[77] such as when a trustee deliberately decides to take an action which it must know is not permitted.

3.25 An exemption clause is to be restrictively construed, and anything that is not clearly written in should be treated as falling outside it.[78] Liability can only be excluded by clear and unanimous words.[79]

3.26 The position now, under the Trusts Act 2019, is that a trust deed must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence.[80] Any term that does so will be invalid.[81]

Re Benjamin **orders**

3.27 Gendall J's initial view was that if the liquidators were unable to ascertain the identity of any account holder, then the appropriate course of action would be

[72] *Lewin on Trusts* at [27-070].
[73] *Lewin on Trusts* at [41-131].
[74] *Lewin on Trusts* at [41-131].
[75] *Armitage v Nurse* [1998] Ch. 241 (CA) at 253–254.
[76] *Lewin on Trusts* at [41-132].
[77] *Spread Trustee Co v Hutcheson* [2011] UKPC 13, upholding *Armitage v Nurse* [1998] Ch. 241 (CA) at 253–254.
[78] *Lewin on Trusts* at [41-141].
[79] *Equity and Trusts in New Zealand* at [11.3.11], citing *Bonham v Blake Lapthorn Linell* [2006] EWHC 2513 (Ch) at [177].
[80] Trusts Act 2019, s 40.
[81] Trusts Act 2019, s 42.

to apply for directions pursuant to s 76 of the Trustee Act 1956 (i.e., *Re Benjamin* orders).[82]

3.28 Accordingly, in the Distribution Application, Palmer J made *Re Benjamin* orders sought by the liquidators (as summarised at [2.22(a)] and [2.22(b)]). A *Re Benjamin* order[83] permits trustees to proceed with a distribution on a particular factual footing on the basis that the true facts, despite the trustee's efforts, are impossible or impracticable to ascertain.[84] Such an order protects the trustee from liability if it is later established that there are further beneficiaries.[85]

3.29 An order made under the *Re Benjamin* jurisdiction does not vary or extinguish any interest or claim that a third party might have, but simply enables the trust or estate to be distributed by the trustees according to the practical probabilities.[86] Any person beneficially entitled may still make a claim for the trust property and may follow the trust property if he later appears.[87] This is so (i.e., the beneficiary can trace) even if the distribution relates to a deficient fund.[88]

3.30 *Re Benjamin* orders are made in the exercise of the Court's inherent jurisdiction to supervise the administration of trusts, and it is not necessary for a *Re Benjamin* order to be bolstered through resort to the statutory jurisdiction.[89]

3.31 The court's inherent jurisdiction is broad-ranging, and the courts are pragmatic in their approach. A Court may still make an order for the pragmatic distribution of trust assets even when the *Re Benjamin* jurisdiction is not apt. For example, in *Re MF Global*, David Richards J (as he then was) held that (emphasis added):[90]

> **That part of the proposed order which would permit the administrators to distribute the client money held by them, without providing for those claims which are rejected in whole or in part but in respect of which no**

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[82] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [199]–[202].
[83] So named for the case in which they were first exercised in the Court's inherent jurisdiction: *Re Benjamin* [1902] 1 Ch 723 (***Re Benjamin***). The *Re Benjamin* jurisdiction has been partly codified in s 136 of the Trusts Act 2019.
[84] *Lewin on Trusts* at [39-033].
[85] *Lewin on Trusts* [39-031]; *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874 (***Re MF Global***).
[86] *Lewin on Trusts* at [39-031]. See also *Re Greens Will Trusts* [1985] 3 All ER 455 at 462.
[87] *Lewin on Trusts* [39-031]; *Re MF Global.*
[88] *Lewin on Trusts* at [44-096] and [39-031]–[39-035].
[89] See *Re Triple A Trustees Limited* [2020] NZHC 1314. In this case, the Court was satisfied that orders could be made in its inherent jurisdiction and did not require bolstering through resort to a "*blessing order*" under s 66 of the Trustee Act 1956 as well. The orders were explicitly made in the exercise of the Court's jurisdiction and in reliance on *Re Benjamin*.
[90] *Re MF Global* at [29]–[32]. See also *Lewin on Trusts* at [24-033(3)].

appeal to the court is made, would not simply be an application of the decision in In re Benjamin [1902] 1 Ch 723 and the subsequent similar cases. Those cases permit the trustee to act on a presumed fact in circumstances where it is impossible or impracticable to establish the fact one way or the other. In the case of rejected claims, there is no doubt that the claimant exists and that they have asserted claims which have not been finally determined by agreement, withdrawal or decision of the court. **The basis of the proposed order is that the administrator should be permitted to proceed with the distribution of client money on a presumption that the only good or potentially good claims are those which have been agreed and those whose rejection is the subject of an appeal to the court.**

The fact that the proposed order does not in this respect neatly fit within the In re Benjamin line of cases does not mean that it falls outside the proper scope of the inherent jurisdiction of the court. In the context of third party claims to trust property, it is stated in Lewin on Trusts, 18th ed (2008), para 27.34:

> It is the practice of the court not generally to permit a trustee to distribute without notice to a claimant. **But the court has jurisdiction to permit or direct a trustee to distribute notwithstanding the existence of claims or potential claims from third parties. That will not have the effect of destroying a proprietary right of third parties, but may afford protection against personal claims against the trustees by third parties**.
>
> **If such orders can be made in the context of third party claims to the trust property, I can see no reason in principle why such orders cannot also be made in the context of rejected claims to a beneficial interest.**

3.32 In *Re Instant Cash Loans Limited*,[91] the High Court of England and Wales went further in the exercise of its inherent jurisdiction by permitting the trustee to proceed on the factual footing that beneficiaries who had started the claims process but had not completed it by providing bank account details, after further payment attempts were made by the trustees, had abandoned their claims. The Court made an order that the remaining trust assets could be distributed to beneficiaries who had completed the claims process.

[91] *Re Instant Cash Loans Limited* [2021] EWHC 1164 (Ch) (***Re Instant Cash Loans***). See also the case review by Dan Butler and Conor McLaughlin "Re Instant Cash Loans Limited (in members' voluntary liquidation) [2021] EWHC 1164 (Ch)" (2021) 18(6) ICR 432.

3.33 The Court observed that (similarly to a Re Benjamin order) "this would of course amount to distributing funds that are otherwise agreed to be due to those creditors under the scheme." At [25] the Court held that (emphasis added):

> I was concerned in reading the papers that the proposal does actually overturn a beneficial entitlement of theirs, but it seems to me that given that they have no intention of claiming their entitlement, they could be regarded by the court and the Company as having decided to abandon their claim. ***In other words, the court can proceed on the footing that those who have not provided their details and do not wish to cash their cheque have decided to abandon or waive their entitlement to receive their pro rata share***.

4. INSOLVENCY LAW

4.1 This section provides a very brief overview of insolvency law applicable to this application.

4.2 Pursuant to s 303 of the Companies Act 1993, "a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation". A claim by an unsecured creditor must be made in a prescribed form,[92] must contain full particulars of the claim, and must identify any documents that evidence or substantiate the claim.[93] The burden is on an unsecured creditor to prove that its claim is provable in a liquidation (rather than on the liquidators to establish that it is not provable).[94]

4.3 The liquidator must, as soon as practicable, either admit or reject a claim in whole or in part.[95]

4.4 The amount of a creditor's claim must be ascertained "*as at the date and time of commencement of the liquidation*".[96] The amount of a claim denominated in a currency other than New Zealand currency must be converted into New Zealand currency at the rate of exchange on the date of commencement of the liquidation.[97] A creditor making his or her claim is required to deduct all trade discounts which would have otherwise been

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[92] The prescribed form is Form 2 of the Schedule to the Companies Act 1993 Liquidation Regulations 1994 (**Liquidation Regulations**), per reg 6 of the Regulations.
[93] Companies Act 1993, s 304(1).
[94] *Inland Revenue v Duncan* [2007] 3 NZLR 360 (CA) at [26].
[95] Companies Act 1993, s 304(3).
[96] Companies Act 1993, s 306(1).
[97] Companies Act 1993, s 306(2).

given if the company had not gone into liquidation.[98] The amount of a claim made by a creditor in a liquidation may include interest up to the date of commencement of liquidation.[99]

4.5 If a claim is for damages (or if the amount of the claim is not certain), the liquidator may make an estimate of the amount of the claim or refer the matter to the court for a decision on the amount of the claim.[100] The court "*shall determine the amount of the claim as it sees fit*".[101]

5. JURISDICTION

5.1 This section addresses the Court's jurisdiction to make the orders sought in this application.

5.2 The directions sought in this application are sought pursuant to ss 130 and 133 of the Trusts Act 2019, the court's inherent jurisdiction, and ss 306–307 and 284 of the Companies Act 1993. The directions sought are set out at **Schedule 2** to these submissions, and each direction is marked with the jurisdictional basis argued by the liquidators.

5.3 Section 133 of the Trusts Act 2019 provides:

> (1) A trustee may apply to the court for directions about—
>
> (a) the trust property; or
>
> (b) the exercise of any power or performance of any function by the trustee.
>
> (2) The application must be served, in accordance with the rules of court, on each person interested in the application or any of them as the court thinks fit.
>
> (3) On an application under this section, the court may give any direction it thinks fit.
>
> (4) This section does not restrict the availability of alternative proceedings within the court's jurisdiction, including a declaration interpreting the terms of the trust.

[98] *Heath and Whale on Insolvency* (online looseleaf ed, Lexis Nexis) at [20.43]; Liquidation Regulations, reg 9.
[99] Companies Act 1993, s 311(1).
[100] Companies Act 1993, s 307(1).
[101] Companies Act 1993, s 307(2).

5.4 A trustee acting under the direction of the court is treated as having discharged the trustee's duties in relation to the direction, unless the trustee has acted in bad faith in getting the direction or acquiescing in the court making the order.[102]

5.5 Section 133 replaces s 66 of the Trustee Act 1956. Under that statute, the courts developed parameters for when the section should be used:[103]

(a) The first category is where the issue is whether a proposed action is within the trustees' powers. This is a question of construction of the trust instrument or statute or both.

(b) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' power. In this category, there is no real doubt that the proposed action is within the trustees' power but the trustees wish to obtain the court's blessing because the decision is 'particularly momentous'.

(c) The third category is where the trustees surrender their discretion to the court because, for example, the trustees are deadlocked or disabled due to a conflict of interest.

(d) The fourth category is where the trustees have already taken action and seek the court's directions as to whether the action was a proper exercise of their powers.

5.6 In its review of the Law of Trusts, the Law Commission made the following observations, following which s 130 was enacted (emphasis added):[104]

> The section is intended to assist trustees facing a choice between two or more courses of action, either of which might expose the trust to risk. Further, section 66 should only be used in the following circumstances: when the facts *are clear, agreed upon and fully disclosed to the court; when no breach of trust is alleged or questions of law or interpretation are at issue; and when the issue cannot be simply resolved through legal advice or the independent exercise of discretion. It is also established that the court should not go further than answering the questions posed. The courts have developed such parameters to prevent section 66 being used by overly-cautious trustees who should be*

[102] Trusts Act 2019, s 134.
[103] *Equity and Trusts in New Zealand* at [45.3.3], citing *Public Trustee v Cooper* [2011] WTLR 90 (Ch) at 922–924.
[104] Law Commission *Review of the law of trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 181.

exercising their discretion or seeking legal advice, or where alternative proceedings, such as breach of trust, would be more appropriate.

.... we consider that the provision should include more detail about the types of circumstances for which directions may be sought and clarification about the availability of alternative proceedings. ***We do not think the revised section should go as far as detailing the case law principles that have been developed because it is desirable to have a relatively broad power of direction and for the courts to retain some discretion as to whether section 66 applies to the circumstances.***

...

Finally, we consider that it would also be helpful for the new provision to note the court's ability under its supervisory jurisdiction over trusts to make a declaration on the interpretation of a trust deed. It should also state that the court may refuse to provide directions if alternative proceedings would be better.

5.7 The Court has confirmed that the case law under s 66 continues to inform the interpretation of s 133.[105] Nevertheless, it is clear that the Court retains discretion about whether an application falls within the scope of s 133.

5.8 The learned authors of *Lewin on Trusts* also suggest that the Court would have the power to make directions as to the administration of a trust.[106] The inherent jurisdiction of the court is not affected by the Act, except to the extent that the Act provides otherwise (and the court must have regard to the purpose and principles of the Act when exercising its inherent jurisdiction).[107]

5.9 In addition to that, s 284 of the Companies Act 1993 provides the court with jurisdiction, on the application of a liquidator, to "*give directions in relation to any matter arising in connection with the liquidation".* A liquidator who has obtained a direction of the court and acted in accordance with it is entitled to rely on having so acted as a defence to the claim, unless otherwise ordered by the court.[108]

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[105] *Equity and Trusts in New Zealand* at [45.3.3]. For example, see *Re Darlow* [2022] NZHC 1763 at [20]; *Adams v Adams* [2024] NZHC 1713 at [86].
[106] *Lewin on Trusts* at [39-011]: when referring to administration orders in England and Wales where the Court can determine any question arising in the execution of a trust or for an order for the execution of a trust to be carried out under the direction of the Court, the authors suggest that "*It is not, however, necessary to include a formal application for an administration order because the court may exercise its inherent jurisdiction even without such an application."*
[107] Trusts Act 2019, s 8.
[108] Companies Act 1993, ss 284(3) and 284(4).

5.10 The scope of the Court's powers under s 284 of the Companies Act 1993 was recently considered by Campbell J.[109] His Honour noted that:[110]

> There are two aspects to the issue regarding the scope of the directions that can be made under s 284(1)(a). One is procedural, the other substantive.[…]
>
> Directions that affect the rights of third parties should, of course, be made only if the parties affected have had a proper opportunity to be heard. In most cases, a summary procedure (such as the originating application procedure used in Dalton v Mackley*)* will not provide a proper opportunity to be heard. But there may be some rare instances in which a summary procedure is sufficient.

5.11 As regards the substantive aspect, his Honour did not consider that s284(1)(a) conferred jurisdiction on the Court to determine substantive rights that the liquidators had against third parties when such rights "*must be determined by applying the applicable substantive rules (such as of the law of contract and the law of knowing receipt).*"[111]

5.12 In relation to the Court's jurisdiction under s284(1)(b) his Honour went on to note, seemingly with some reluctance that:[112]

> s 284(1)(b) can be used in a way that affects the rights of third parties. The court has a discretion whether to make an order under s 284(1)(b), indicated by the “may” in the opening words. That a reversal would affect the rights of third parties will be a relevant consideration in determining whether to exercise the discretion. Further, the discretion will in any event only be exercised in cases of fraud, a lack of good faith or where the liquidator has acted unreasonably.

5.13 For completeness, s 307 of the Companies Act 1993 provides:

> **307 Claim not of an ascertained amount**
>
> (1) If a claim is subject to a contingency, or is for damages, or, if for some other reason, the amount of the claim is not certain, the liquidator may—
>
> (a) make an estimate of the amount of the claim; or
>
> (b) refer the matter to the court for a decision on the amount of the claim.

[109] *100 Investments Ltd v Walker* [2025] NZHC 3486 at [629]–[651].
[110] *100 Investments Ltd v Walker* [2025] NZHC 3486 at [640]–[641].
[111] *100 Investments Ltd v Walker* [2025] NZHC 3486 at [645].
[112] *100 Investments Ltd v Walker* [2025] NZHC 3486 at [651].

(2) On the application of the liquidator, or of a claimant who is aggrieved by an estimate made by the liquidator, the court shall determine the amount of the claim as it sees fit.

5.14 Generally speaking, liquidators are allowed a wide latitude in objecting to claims in order that the rights of creditors may be fully protected.[113] A liquidator is entitled to go behind the claimant's documents in support of a claim (including a judgment) and require satisfactory evidence, before admitting the proof, that the claim for costs represented a genuine debt.[114]

6. APPLICATION OF CRYPTOPIA'S TERMS AND CONDITIONS

6.1 The terms and conditions in place as at the date of liquidation were the terms and conditions effective from August 2018, exhibited to Mr Ruscoe's 31 July 2025 affidavit at **DIR1-80 (Terms and Conditions**). The terms and conditions in place prior to August 2018 are exhibited to Mr Ruscoe's 31 July 2025 affidavit at DIR1-96 (**Earlier Terms and Conditions**).

6.2 Several of the Terms and Conditions are relevant to the issues in this proceeding, and the liquidators seek the Court's direction that these Terms and Conditions are effective. In particular, cls 12.1 and 18.2 provide (respectively) a limitation and exclusion of Cryptopia's liability and a prohibition on assignment:[115]

> 12.1 Our Liability
>
> (a) Subject to clause 12.1(c), to the maximum extent permitted by all Applicable Laws, we are not, under any circumstances, liable in any way for any loss or damage, whether direct, indirect, consequential or incidental, whether in tort, contract or otherwise arising out of use of our Platform or Services. This includes:
>
> i. any losses arising as result of us acting in accordance with these Terms or any other applicable terms and conditions;
>
> ii. losses caused by you, or anyone acting on your behalf (including any Anticipated Person), providing incorrect information;
>
> iii. corruption or loss of data or any information;

[113] *Re Aynek Syndicate Limited* [1936] 1 All ER 406; cited in *Heath and Whale on Insolvency* (online looseleaf ed, Lexis Nexis) at [20.43].
[114] *In Re Van Laun, Ex Parte Chatterton* [1907] 1 KB 155 (KB) at 155.
[115] Exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0587–302.0588 and 302.0590.

iv. malware or any other damage that may be caused to your computer or system as a result of use of the Platform or transmission of any information from us or any other person to you;

v. interruptions, suspensions, delays or discontinuance of the Platform or any Services;

vi. the tax liability of you or any other User, nor for collecting, reporting, withholding or remitting any taxes arising from any use of our Services or Platform;

vii. losses caused by any User error by you or anyone acting on your behalf;

viii. losses arising out of unauthorised access or fraud in relation to your accounts or Services committed by you, your employee, officer or agent;

ix. losses caused by circumstances beyond our control, including any machine or system failure;

x. losses arising from your use or inability to access our platform at any time, inaccurate content or information in any service we provide; or

xi. losses arising from faults in, or malfunction of, any equipment (including telecommunication equipment) which supports our website; and

xii. any loss relating to the content or omission of content from our site.

(b) Subject to clause 12.1(c), we give no express warranties and disclaim and exclude all implied conditions or warranties, as to the Platform and the Services. Without limiting the foregoing, we do not:

i. guarantee that the content is reliable, accurate or complete; and

ii. warrant that any of the functions in our site will be uninterrupted or error free.

(c) Nothing in these Terms is intended to limit any rights or remedies a User may have under the Fair Trading Act 1986 or the Consumer Guarantees Act 1993.

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

…

18.2 Assignment, Transfer and Subcontract

…

(b) You may not assign, transfer and/or subcontract any of your rights or obligations under these Terms.

6.3 These terms have a direct bearing on this application. If the limitation and exclusion of liability apply, then account holders' unsecured creditor claims (including GNY's contingent creditor's claim) in the liquidation may be excluded or limited to $5,000. If the prohibition on assignment applies, then the liquidators would decline all requests from account holders to assign their beneficial interest in the cryptocurrencies. This section discusses the application of the terms and conditions generally. If the terms and conditions do apply, then the specific application of the exclusion and limitation of liability is addressed below at [8.48]-[8.67] and the assignment of account holders' claims is addressed at [7.32-[7.42].

6.4 Gendall J held that the Terms and Conditions took immediate effect for all existing account holders, and it was not necessary for any account holder to use the platform after August 2018 in order to benefit from those terms – the amended terms applied automatically.[116] The amendment did not result in any variation of trust: the Terms and Conditions merely confirmed what were the existing trusts in operation.[117] His Honour also held that the powers and immunities granted to Cryptopia in the Terms and Conditions were proper provisions in trusts of this type.[118]

6.5 This judgment was not appealed, and as such, His Honour's findings in relation to the application of the Terms and Conditions remain binding. The liquidators accordingly seek directions in this application applying those terms to the conduct of the liquidation and trust administration.

6.6 However, Gendall J did not expressly consider those parts of the Terms and Conditions that the liquidators consider relevant to this application (noting

[116] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [197].
[117] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [181].
[118] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [185] and [27].

that the Terms and Conditions contain at cl 18.5 a provision that if any clause or part of the Terms and Conditions is invalid, it does not affect the validity or enforceability of the remaining clauses).[119] His Honour's consideration of the Terms and Conditions was primarily for the purpose of determining whether the cryptocurrencies were held on trust. If the Court disagrees that this issue has been finally determined, the liquidators respectfully make further submissions as to the applicability of the Terms and Conditions to all account holders.

6.7 First, to register an account with Cryptopia, account holders were required to select a box indicating their agreement to Cryptopia's terms and conditions.[120] All account holders would have expressly accepted either the Earlier Terms and Conditions (if they registered an account prior to August 2018) or the Terms and Conditions (if they registered an account after August 2018).

6.8 One of the provisions of the Earlier Terms and Conditions was a term permitting Cryptopia to amend its terms and conditions from time to time, with reference to the necessity for account holders to check and read the terms regularly, and that continuing to use Cryptopia's site after any amendment would be deemed acceptance of the amended terms.[121] This provision was accepted by each account holder who held an account prior to August 2018.

6.9 There are accordingly three classes of account holders:

(a) Those who registered an account with Cryptopia before August 2018, accepted the Earlier Terms and Conditions, and continued to use Cryptopia's platform after August 2018 (thereby deemed to have accepted the Terms and Conditions).

(b) Those who registered an account with Cryptopia after August 2018 and accepted the Terms and Conditions.

(c) Those who registered an account with Cryptopia before August 2018, accepted the Earlier Terms and Conditions, and did not use Cryptopia's platform after August 2018. Approximately 536,662 account holders (of 2.3 million total, or 960,000 with a positive account balance as at the

[119] Exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0590.
[120] Ruscoe first affidavit, 31 July 2025 at [28], 201.0033.
[121] Exhibit DIR1-96 to Ruscoe first affidavit, 31 July 2025, 301.0002 at 301.0003.

date of liquidation) did not log in to Cryptopia's site after the Terms and Conditions were advised.[122]

6.10 A similar issue arose in Hong Kong relating to a cryptocurrency exchange called *Gatecoin*.[123] Gatecoin had three iterations of terms and conditions in force at different times:

(a) The 2016 T&C. Cryptocurrencies were not held on trust. Gatecoin reserved the right to modify the terms without prior notice, and users' access to and use of the website constituted acceptance.

(b) The Trust T&C. Cryptocurrencies were held on trust. Gatecoin reserved the right to modify its terms on prior notice of any material change, which would require agreement from users.

(c) The 2018 T&C: Cryptocurrencies were not held on trust. Any claim against the company is contractual only.

6.11 The Hong Kong court primarily considered the 2018 amendment. Ultimately, the court held that there were different terms in place for different users, depending on whether they had used the platform after the 2018 T&C came into effect (noting that agreement was required before the platform could be used – a fact that distinguishes *Gatecoin* from Cryptopia). The issue had obvious significance because, in addition to the Trust T&C themselves requiring agreement to any material amendment, the 2018 T&C would have the effect of terminating a trust relationship – something which would necessarily require a beneficiary's consent. The Court directed Gatecoin to ask any users who had not consented to the 2018 T&C to come forward and provide evidence that they did not consent. Ultimately, only 141 customers did so.[124] That is not a factor in this application either and the *Gatecoin* judgment can be distinguished on that basis.

6.12 In contrast, Gatecoin and the Hong Kong court proceeded on the basis that *either* the Trust T&C or the 2018 T&C applied. There was no real issue about whether the Trust T&C were effective and binding – presumably because Gatecoin reserved a similar right to amend terms as Cryptopia had, with use of the platform constituting deemed acceptance.

[122] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [180].
[123] *Re Gatecoin Ltd (in liq)* [2023] 2 HKLRD 1079.
[124] *Re Gatecoin Ltd (in liq)* [2025] 1 HKLRD 1054.

6.13 There may remain an argument that the 536,662 account holders who did not log in to Cryptopia's website after August 2018 did not accept the Terms and Conditions, to the extent that they differ from the Earlier Terms and Conditions.

6.14 The Terms and Conditions define the "Platform" as "*the Cryptopia website and associated applications"* and state that:[125]

> These Terms, the Platform and the Services allow you to:
>
> Buy, sell and exchange supported Coins through the Platform;
>
> Use Fiat Pegged Tokens, when available; and
>
> Store supported Coins in our hosted Wallets.

6.15 Clause 1E provided:

> Please read these Terms carefully. By accessing our Platform and/or Services and/or creating an Account with us, you are agreeing to be bound by these Terms. If you do not agree to these Terms, you must immediately stop using the Platform or any Service.

6.16 It is clear that account holders were deemed to have accepted the Terms and Conditions by using any of the Services – including by continuing to store cryptocurrency in the Company's wallets. As such, once the Terms and Conditions came into place, they ought to apply automatically – the obligation being on account holders to inform themselves of the applicable terms and to cease holding an account with Cryptopia if they disagreed with the terms.

6.17 Admittedly, the Earlier Terms and Conditions referred to an account holder's continued use of the "site" constituting deemed acceptance of any amended terms. Site was not defined any further than "website".[126] However, Cryptopia provided more services than simply a website (its core function was to provide a cryptocurrency exchange that allowed account holders to deposit, withdraw and trade cryptocurrencies), and the right for Cryptopia to amend those terms must have meant that continuing to use any of Cryptopia's services following an amendment of the terms would constitute agreement to be bound by the new terms.

[125] Clauses 1A and 1B, exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0577.
[126] Exhibit DIR1-96 to Ruscoe first affidavit, 31 July 2025, 301.0002 at 301.0002.

6.18 Finally, the Earlier Terms and Conditions contained no reference to cryptocurrencies being held on trust. The Terms and Conditions did. Although Gendall J held that the trusts on which Cryptopia holds cryptocurrencies came into existence prior to the Terms and Conditions, His Honour also relied on the express trust provisions in the Terms and Conditions to support that conclusion. In Cryptopia's particular circumstances, the evidence is that the Terms and Conditions were updated in order to reflect accurately the ways in which Cryptopia was *already* operating – the amendment did not reflect any variation of that.[127]

6.19 It must follow that the Terms and Conditions apply in full to all account holders – both the benefit of the trust relationship recorded in them, and the terms that apply to that trust relationship.

7. DETERMINING ACCOUNT HOLDERS' FINAL ENTITLEMENTS TO TRUST PROPERTY

7.1 This section addresses the directions necessary finally to determine both account holders' final entitlements and what Company assets will be available to creditors, including:

(a) Directions for the distribution of NZD funds held for the benefit of account holders in the NZDT trust.

(b) Whether account holders are prohibited from assigning their beneficial interests in the cryptocurrency trusts.

(c) Whether account holders in trusts that suffered losses in the Hack can receive a top-up distribution to account for those losses (provided there are sufficient assets to do so).

(d) Whether Cryptopia is entitled to receive a distribution of its beneficial interests in the cryptocurrency trusts.

(e) Whether holdings in the cryptocurrency trusts that exceed the amounts recorded on Cryptopia's database are to be treated as trust or Company property.

[127] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [181]. See also the Ruscoe first affidavit, 31 July 2025 at [29], 201.0033; Affidavit of Timothy James Strahan Brocket, 27 November 2019 in CIV-2019-409-544 at [5].

(f) Whether the liquidators are permitted to permanently remove from circulation cryptocurrencies which have low or no realisable value, such that they cannot contribute to trust administration costs.

NZDT

7.2 The directions made in the Distribution Application applied only to cryptocurrencies held by Cryptopia. In addition to cryptocurrencies, Cryptopia also issued a fiat-pegged token called NZDT. A 'fiat-pegged token' is a crypto token that is completely backed by an equivalent fiat (government-issued) currency. Because the value of a fiat-pegged token is pegged to the value of the asset it relates to (in this case, fiat currency), it is a stablecoin.[128] The NZDT issued by Cryptopia represented NZD held in a bank account for the benefit of NZDT account holders. One NZDT was equivalent to one NZD.

7.3 The liquidators seek directions as to the treatment of the NZD funds held for the benefit of NZDT account holders because, as set out in further detail below:

(a) The orders made in the Distribution Application apply only to cryptocurrencies, not to fiat currency. The liquidators seek directions permitting them to distribute the NZD associated with NZDT (**NZDT funds**) held by Cryptopia to NZDT account holders and for allocation of trust administration costs.

(b) It appears that Cryptopia may have used part of the NZDT funds in breach of trust. If that is the case, various issues arise as to the consequences of that breach, including whether:

(i) Cryptopia's own holdings of NZDT should be made available for distribution to account holders in the NZDT trust.

(ii) Cryptopia should nevertheless receive a distribution of its NZDT entitlement if all eligible account holders in the NZDT trust have received a distribution of their full beneficial entitlement.

Background

[128] Ruscoe first affidavit, 31 July 2025 at [95], 201.0049.

7.4 The background to NZDT is as follows:[129]

(a) Cryptopia launched NZDT in May 2017. Account holders could pay NZD on the Cryptopia platform and receive an equivalent amount in NZDT.

(b) The NZD backing the NZDT was held separately from Cryptopia's other funds in a bank account at ASB.

(c) In early 2018, ASB advised that it would no longer support NZDT due to concerns about its compliance with the AML / CFT regime.

(d) On 30 January 2018, Cryptopia notified NZDT account holders that NZDT deposits were being immediately halted and advised that it would continue to send withdrawals until 9 February 2018.

(e) The NZDT account with ASB was closed on 1 February 2018.

(f) On 3 March 2018, Cryptopia notified NZDT account holders that:

(i) The last opportunity for NZDT withdrawals would be 29 March 2018.

(ii) NZDT markets would be closed, but Cryptopia would maintain a Bitcoin market for NZDT (i.e., after the closure, account holders could continue to purchase Bitcoin with NZDT).

(iii) It intended to bring an NZDT market back in the future but had no indication on timeframe.

(g) Shortly thereafter, NZDT was delisted on the exchange (i.e., made unavailable).

(h) Not all account holders withdrew their NZDT or NZD.

(i) On 25 May 2018, the remaining NZD holdings associated with NZDT ($571,174.91) were transferred to an account at Nelson Building Society (**NBS**).

(j) In late 2018 and early 2019, Cryptopia attempted to relaunch NZDT. It incorporated Cryptopia NZDT Limited on 11 December 2018 (which is

[129] Ruscoe first affidavit, 31 July 2025 at [96]–[103], 201.0049–201.0051.

also in liquidation, with Messrs Ruscoe and Moore as liquidators). NZDT was never relaunched.

(k) There is no value in NZDT – only in the NZD backing it.

7.5 The liquidators respectfully submit that the assets held on trust for NZDT holders is the NZD held in the NBS account, rather than NZDT itself. The Terms and Conditions contained specific terms for fiat-pegged tokens issued by Cryptopia (i.e., NZDT).[130] Those terms expressly provided that:

> Fiat Pegged Tokens are not financial products in themselves and do not give you any rights or carry any obligations. They are a digital representation of fiat dollars held on trust for you in the Custodial Account. Under these Terms, you hold the beneficial interest in those fiat dollars and can instruct us as trustee to deliver them to you at any time, subject to these Terms (including the risks set out in the Cryptopia Risk Statement). We do not promise to pay you any amount in relation to Fiat Pegged Tokens out of our own funds.

Breach of trust and Cryptopia's entitlement to NZDT

7.6 Cryptopia's database records indicate that the NZD balance held for NZDT should be $606,848.0369, with 15,086 account holders.[131] The amount transferred to the NBS account was deficient by $35,673.1269. The liquidators have not identified why there was a shortfall in NZD holdings at that time.

7.7 In addition to that, the liquidators have identified that Cryptopia made at least two withdrawals from the NBS account to Cryptopia's main chequing account, both in February 2019. Those withdrawals totalled $180,000.[132] At least one of those withdrawals was for the purpose of paying wages to staff.[133]

7.8 At the date of liquidation, only $379,349.71 was held in the NBS account: a shortfall of $227,498.33.[134] However, even accounting for the withdrawals of $180,000, that leaves a shortfall of $16,825.20 from the $571,174.91 deposited in the NBS account (in addition to the initial shortfall of $35,673.13 when the funds were deposited in the NBS account).

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[130] Clause 6(e), exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0582; Ruscoe first affidavit, 31 July 2025 at [104], 201.0051.
[131] Ruscoe first affidavit, 31 July 2025 at [100], 201.0050.
[132] Ruscoe first affidavit, 31 July 2025 at [99], 201.0050.
[133] Ruscoe first affidavit, 31 July 2025 at [99], 201.0050.
[134] Ruscoe first affidavit, 31 July 2025 at [100], 201.0050.

7.9 To the extent that Cryptopia has withdrawn NZD from the NBS account for its own purposes, that appears to be a breach of the express terms of the trust on which it was held. The Terms and Conditions provide that:[135]

> We will not use the fiat dollars held on trust in the Custodial Account for any purpose other than to meet our obligations to you in respect of your Fiat Pegged Tokens, nor can we charge or otherwise encumber them.

7.10 The Terms and Conditions contain an exclusion and limitation of liability (see [6.2] above). It may also be arguable that the Terms and Conditions for fiat-pegged tokens are effective to limit Cryptopia's liability to NZDT account holders: as set out at [7.5], although account holders can direct Cryptopia to deliver the NZD held on trust to them at any time, "[Cryptopia does] *not promise to pay you any amount in relation to Fiat Pegged Tokens out of our own funds*."

7.11 However, it seems likely that Cryptopia's use of trust funds for its own purposes (such as paying wages) is a breach of the 'irreducible core' of trustee obligations such that the exclusion and limitation clauses would not apply (see [3.12] and [3.23]-[3.26] above). It is difficult to see how Cryptopia's withdrawal of funds from the NZDT account could have been for the benefit of NZDT beneficiaries. Accordingly, it is possible that Cryptopia's withdrawal of funds was executed with the intention of benefitting the Company rather than beneficiaries, or at least with the knowledge that doing so would be inconsistent with the Terms and Conditions. The liquidators seek the Court's direction on this point.

7.12 If the beneficiaries of the NZDT trust have a claim against Cryptopia for breach of trust that is not precluded by its exclusion and limitation of liability clauses, the next issue that arises is how that claim ought to be managed in the liquidation process.

7.13 As summarised above at [3.19]-[3.22], when the trust fund is misappropriated by a trustee, the beneficiaries will have a proprietary remedy in relation to that fund. If the fund cannot be traced, then the beneficiaries will have a personal claim against the trustee. As set out above:

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[135] Clause 6(k), exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0582; Ruscoe first affidavit, 31 July 2025 at [104], 201.0051.

(a) The liquidators have identified that in February 2019, Cryptopia transferred at least $180,000 to its main chequing account, and at least part of that was used to pay employee wages.

(b) The liquidators are unable to identify where the remaining shortfall has gone.

7.14 Cryptopia itself is a beneficiary of the NZDT trust, with a holding of $187,682.[136] Accordingly, the liquidators submit that Cryptopia's own holdings in the NZDT trust should be used to make good the shortfall in the NZDT trust on the basis that account holders in the NZDT trust are secured creditors in relation to that holding in the manner summarised at [3.22(b)]. Eliminating Cryptopia's beneficial entitlement from the total in Cryptopia's database records (see [7.6]) leaves beneficial interests totalling $419,166.04: a shortfall of $39,816.33 against the NBS account balance of $379,349.71.

7.15 In relation to that shortfall:

(a) The ordinary position is that a deficient trust fund ought to be divisible rateably between the contributors, with any loss or profit to be borne rateably.[137]

(b) As set out at [3.22(b)], account holders in the NZDT trust who do not receive a distribution of their full entitlement will have an unsecured creditor's claim against Cryptopia for breach of trust. (Account holders' unsecured creditors' claims are further discussed in Section 9 below).

7.16 The liquidators acknowledge that there may be an argument that this would be to the detriment of unsecured creditors of the Company who could expect to receive a distribution from Cryptopia's beneficial holdings. On that basis, the liquidators seek the Court's direction on this point.

7.17 Finally, the liquidators seek the Court's direction on whether Cryptopia should receive a distribution from the NZDT funds after all eligible account holders have received a distribution of their full entitlement.

7.18 Although the NZDT funds are deficient to meet all account holders' entitlements (according to Cryptopia's database), it is possible, if not likely,

[136] Ruscoe first affidavit, 31 July 2025 at [101], 201.0050.
[137] *Lewin on Trusts* at [44-096]. See also *Priest v Ross Asset Management (in liq)* [2016] NZHC 1803 at [107].

that not all account holders in the NZDT trust will submit claims in the liquidators' claims portal because:

(a) NZDT has not been listed on the Cryptopia exchange since well before liquidation (likely since March 2018 – see [7.4(f)] and [7.4(g)]).

(b) Account holders had a reasonable opportunity to withdraw the fiat held on their behalf before NZDT was delisted (see [7.4(d)]-[7.4(g)]).

(c) Some account holders may not wish to go through the identity verification process. A large percentage of NZDT funds remain unclaimed, with one significant holder (36%) indicating that they are 95% sure they will not claim.[138]

7.19 The liquidators also seek *Re Benjamin* orders in relation to the NZDT funds, as discussed in the next sub-section of these submissions from [7.21]. The liquidators seek orders permitting Cryptopia to distribute trust funds to beneficiaries on the factual footing that the only beneficiaries are those who have completed the claims portal by a specified cut-off date. As summarised above at [3.27]-[3.33], the effect of *Re Benjamin* orders would be to preclude any claim for breach of trust arising out of the distributions made on that permitted factual footing. The orders reflect those made in the Distribution Application in relation to the cryptocurrencies.[139]

7.20 On that basis, if all eligible account holders in the NZDT trust received a distribution of their full beneficial entitlement, the liquidators could proceed on the factual footing that there were no further beneficiaries entitled to the remaining NZDT funds. In those circumstances, the remaining options for Cryptopia as trustee would be to manage the NZDT funds as undistributable trust property, or to distribute Cryptopia's entitlement to the Company for the purpose of distributing it to the Company's unsecured creditors. The liquidators respectfully seek the Court's direction on this point.

Distribution

7.21 As summarised above (see [2.22), Palmer J made directions as to the distribution of cryptocurrencies in the Distribution Application. Those

[138] Ruscoe updating affidavit, 23 April 2026 at [32], 401.0035.
[139] Sealed orders in Distribution Application (varied), 23 April 2025 (Tab 60 to the previous Cryptopia proceedings bundle).

directions do not apply to fiat funds. The liquidators accordingly seek directions as to the distribution of the NZDT funds held in the NBS account.

7.22 The liquidators have included NZDT in the claims portal, meaning that account holders who have registered and completed identity verification have had or will have the opportunity to accept or dispute their NZDT balance.

7.23 The issues for determination are: how are costs allocated, how are account holders' entitlements determined, and on what basis can Cryptopia distribute?

7.24 The liquidators seek directions to distribute the NZD from the NBS account to NZDT account holders, as opposed to the NZDT held by Cryptopia which is now defunct, and which was never intended to be held on trust. The directions sought are on the same terms as the directions made in the Distribution Application in relation to cryptocurrencies (see directions 6.1 to 6.3),[140] except that the liquidators consider that only 50% of trust administration costs should be allocated to the NZDT trust.[141]

7.25 That is because:

(a) NZDT has not been listed on Cryptopia's exchange since around March 2018. Account holders had a reasonable opportunity to withdraw the NZD held on their behalf before NZDT was delisted, and before Cryptopia went into liquidation in May 2019.

(b) The cost allocation model approved in the Distribution Application shares all trust administration costs equally among all trusts in proportion to the number of account holders in each trust.[142] That includes costs associated with: reconciling Cryptopia's databases and cryptocurrency holdings; the claims portal developed by the liquidators; providing customer service assistance for the claims portal; securing and re-keying the cryptocurrencies and moving them into a new secure environment to ensure that no malicious code leftover from the Hack could corrupt them; and building distribution software to distribute the cryptocurrencies to account holders.[143] Although NZDT is a

[140] Sealed orders in Distribution Application (varied), 23 April 2025 (Tab 60 to the previous Cryptopia proceedings bundle at [6.1]-[6.2]).
[141] Ruscoe updating affidavit, 23 April 2026 at [30]-[31], 401.0034.
[142] Orders of Palmer J in respect of distribution of cryptocurrencies, 1 March 2024 in CIV-2023-485-411 at [6] and [7.2].
[143] These steps are described in Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application (Tab 16 to the previous Cryptopia proceedings bundle); and summarised more briefly in Ruscoe first affidavit, 31 July 2025 at [15], 201.0027–201.0028.

cryptocurrency, the assets held on trust are fiat currency. The costs associated with cryptocurrencies (reconciling, re-keying and securing the cryptocurrencies and building distribution software) accordingly do not apply to the NZDT trust.

7.26 The ordinary starting point is, of course, that the costs incurred in relation to each trust would be charged only to that trust.[144] However, if it is not possible or pragmatic to estimate the costs and expenses incurred in respect of each trust fund, then costs may be allocated on a *pari passu* basis:[145]

> The liquidator is not entitled to charge the beneficiaries of one trust with the costs and expenses incurred in relation to the other trust**. Accordingly, it will be necessary for the liquidator to estimate the costs and expenses incurred insofar as they relate to each trust and only charge those costs to the trust on whose behalf the work was performed. If that estimate is not possible then a pari passu distribution of the costs and expenses will be in order** as was envisaged by King CJ in Suco Gold, supra. The second difficulty is the possibility that the liquidator has performed work on behalf of investors for whom no property is held on trust. If that is the case the liquidator could not look to the existing trust assets for the costs and expenses of that work unless, in accordance with the foregoing principles, the liquidator is entitled to charge those assets with a proportionate share of the costs. That would be so if the costs and expenses are not divisible. The accounts that the liquidator prepares should deal with these issues.
>
> (emphasis added)

7.27 *Re Caledonian Securities Limited (in liq)*,[146] a decision of the Grand Court of the Cayman Islands, shows the difficulties with applying a cost allocation model to the costs of administering and distributing the custodial assets managed by a large insolvent trustee.

(a) The liquidators identified several apportionment methods to allocate their fees and expenses to beneficiaries, but acknowledged that none of them were precise due to many costs not being able to be directly attributable to a particular beneficiary or class of beneficiary.[147] A 'perfect' cost allocation method – by charging only each beneficiary the costs strictly attributable to them – "*could only be achieved following an*

[144] *Lewin on Trusts* at [19-045].
[145] *Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liquidation)* (1999) 30 ACSR 377 (FCA) at 386.
[146] *In re Caledonian Securities Limited (in official liquidation)* [2016] 1 CILR 309. This case was relied on in the Distribution Application and cited by Palmer J in *Ruscoe v Houchens (Distribution)* [2024] NZHC 419 at [36].
[147] *In re Caledonian Securities Limited (in official liquidation)* [2016] 1 CILR 309 at [24].

enormous amount of reconstructive work and at enormous cost."[148] The accepted allocation method was for each beneficiary to bear a proportionate share of total costs by reference to the total value of all trust assets (i.e., *pari passu* or by value) subject to a cash to securities adjustment of 30:70, which reflected the increased costs of dealing with securities compared to cash.

(b) The Court noted that a strict apportionment exercise would be inequitable as it would require further "*onerous and expensive*" work, and place the liquidators at risk of not recovering the costs for that work.[149] As long as the allocation method was "*within the bounds of what is fair and reasonable*", the Court accepted that a beneficiary's cost contribution would be "*imprecise*" and there would be "*some element of cross-subsidy*" between beneficiaries.[150]

7.28 Similarly, Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application set out at [123]-[127][151] why it is not practicable for the liquidators to calculate accurately or to estimate the actual costs incurred in respect of each trust and it is on that basis that the cost allocation model in the Distribution Application was approved. Here, however, it is clear that a large proportion of trust administration costs do not apply to the NZDT trust at all. Although the *majority* of the steps that the liquidators have taken are for the benefit of all of the trusts, some of the steps are not applicable to all trusts. For example, costs incurred to date in tracing and attempting to recover the cryptocurrencies stolen in the Hack are only allocated to those trusts that suffered losses in the Hack. The same approach ought to be taken for the NZDT trust.

7.29 It is impossible to divide the time spent on each trust administration step accurately across all of the trusts.[152] The liquidators' best estimate is that 50% of trust administration costs related to cryptocurrency-specific steps, and the remaining 50% to steps required for the benefit of all trusts, including NZDT.[153]

7.30 Finally, the NZDT fund is a deficient trust fund. As such, the aim of any distribution model is to develop a pragmatic and fair way to share a common

[148] *In re Caledonian Securities Limited (in official liquidation)* [2016] 1 CILR 309 at [24].
[149] *In re Caledonian Securities Limited (in official liquidation)* [2016] 1 CILR 309 at [65]–[66].
[150] *In re Caledonian Securities Limited (in official liquidation)* [2016] 1 CILR 309 at [67]–[69].
[151] Tab 16 to the previous Cryptopia proceedings bundle at [123]-[127].
[152] Ruscoe updating affidavit, 23 April 2026 at [31], 401.0035.
[153] Ruscoe updating affidavit, 23 April 2026 at [31], 401.0035.

misfortune (i.e., the deficiency of the fund).[154] If the NZDT Fund is insufficient to meet all eligible account holders' claims, then the liquidators submit that any shortfall should be shared proportionately (i.e., on a *pari passu* basis).

7.31 The liquidators submit that:

(a) The liquidators accordingly seek an order that directions 6.1 and 6.2 of the Distribution Application apply to the NZDT funds, except that only 50% of total trust administration costs will be applied against the NZDT trust.

(b) After trust administration costs have been deducted pursuant to Cryptopia's trustee indemnity, account holders in the NZDT trust will receive a pari passu share of the remaining funds.

Assignment of account holders' claims

7.32 As referred to above (see [6.2] and [6.3]), the Terms and Conditions contain a prohibition on an account holder's assignment of any benefit or obligation.

7.33 The liquidators have received a significant number of requests for account holders to assign their beneficial entitlements to a third party:

(a) Epic Trust Ltd (now Chill Education Limited) (Epic), a €1 Montenegrin company, claims that at least 2,289 account holders have assigned their beneficial entitlement to cryptocurrency held by Cryptopia to it.155

(b) One account holder sought to assign their beneficial entitlement to 507 Capital LCC,156 and two account holders have granted powers of attorney over their claims to 117 Partners LLC.157

7.34 The liquidators accordingly seek the Court's direction on whether the assignment of account holders' beneficial entitlements is prohibited.

7.35 The liquidators' position to date has been that the assignments are prohibited by the Terms and Conditions (which remain effective – see section 6 above). There is no good policy reason that would prevent application of the prohibition in the Terms and Conditions: it is well-established that although rights and benefits are generally assignable, a contract can itself prohibit assignment. A clause prohibiting such an assignment is not contrary to

[154] *Priest v Ross Asset Management (in liq)* [2016] NZHC 1803 at [107].
[155] As at January 2024 (see *Epic Trust Ltd v Ruscoe (Joinder)* [2024] NZHC 21 at [6]).
[156] Ruscoe first affidavit, 31 July 2025 at [49], 201.0037.
[157] Ruscoe updating affidavit, 23 April 2026 at [34], 401.0035.

public policy and will generally be enforceable.[158] The consequence of an assignment in breach of a prohibition clause is (emphasis added):[159]

> When B assigns the contract to C in a breach of a prohibition on assignment, C may well acquire rights including proprietary rights, but it can acquire no contractual rights against A. **C cannot… seek to enforce the beneficial terms of that contract.**

7.36 The liquidators respectfully submit that permitting assignment would also be unworkable.

7.37 The liquidators established a claims portal for account holder beneficiaries, requiring account holders to undertake account registration (i.e., proving ownership of a Cryptopia account), identity verification, and a balance acceptance / dispute process. The purpose of this portal (which was approved by Palmer J in the Distribution Application) was both to identify the beneficiaries of each trust and to confirm each account holder's beneficial entitlement. This step was required because in many cases, the only identifying information Cryptopia required from an account holder was an email address,[160] and because Cryptopia had never undertaken a detailed reconciliation of its database as against the Company's cryptocurrency holdings.[161] Correctly identifying the beneficiaries of the trusts is crucial because:

(a) The core obligation of a bare trustee is to convey or transfer the trust property to the persons entitled to hold it (see [3.4] above). A trustee must be satisfied beyond doubt as to the parties legally and equitable entitled to the property before undertaking distribution.162 "The obligation is absolute and universal; trustees need not show they had particular concern in that regard in order for the duty to arise."163 A trustee is personally liable for distributing to the wrong hand, for such payment is no discharge.164

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[158] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL), applied in New Zealand in *FTG Securities Limited v Bank of New Zealand* [2019] NZCA 16, [2019] 3 NZLR 607 and *Hellaby Resource Services Ltd v Body Corporate 197281* [2019] NZHC 2641.
[159] *FTG Securities Ltd v Bank of New Zealand* [2019] NZCA 16 at [16], although the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL) considered that an assignment in breach of a prohibition clause would be ineffective to vest the rights in the assignee.
[160] Ruscoe first affidavit, 17 May 2019 in CIV-2019-409-247 at [13].
[161] Ruscoe first affidavit, 31 July 2025 at [52], 201.0038.
[162] *Lewin on Trusts* at [26-004].
[163] *Kekwick v Kekwick & Anor* [2022] EWHC 2563 (Ch) at [63].
[164] *Lewin on Trusts* at [26-005], citing *Re Hulkes* (1886) 33 Ch D 552 at 557. For an example of a distribution to a person not entitled with the same name as the person actually entitled, see *Fea v Roberts* [2005] EWHC 286 (Ch), [2005] WTLR 255.

(b) Liquidators of an insolvent corporate trustee are required to act responsibly in the administration of the trust in the name of the company, including by identifying the beneficiaries of the trust.[165]

7.38 As such, even if assignments of account holders' beneficial interests were permitted, the liquidators would require the account holder to complete the claims portal process (account ownership, identity verification and balance acceptance) in order to confirm that the account holder is a beneficiary of the trusts and to ascertain that account holder's beneficial interest.

7.39 In addition to that:

(a) The liquidators would require proof of a valid assignment, to avoid any risk that they or Cryptopia could be liable for distributing a beneficiary's entitlement to the wrong hands.

(b) The assignee would be required to establish a profile on the claims portal, complete identity verification, and provide payment details.

7.40 Processing an assignment would be a manual process and would necessarily increase the costs of trust administration.[166] Those costs would only be incurred in relation to beneficiaries who wanted to assign their claims, and the liquidators respectfully submit that it would not be fair for those costs to be shared by all account holder beneficiaries, or by all trusts.

7.41 Further, because account holders would still be required to complete the claims portal (and because the Final Cut-Off Date has already passed), there is no administrative advantage or benefit to assignment for account holders. At the stage when the claims portal has already been completed, it would be administratively simpler for the beneficiaries to provide their payment details and receive a distribution of trust property (at which point the beneficiary can transfer to any person they would like to). That would also be consistent with the Terms and Conditions.

7.42 For the reasons set out in this section, the liquidators respectfully request that:

(a) The Court confirms that assignments of account holders' beneficial interests are prohibited by cl 18.2 of the Terms and Conditions.

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[165] *Heath and Whale on Insolvency* (online looseleaf ed, Lexis Nexis) at [46.8(c)(ii)], citing *Re French Caledonia Travel Service Pty Ltd (in liq)* (2002) 42 ACSR 524 at [12]–[13].
[166] Ruscoe first affidavit, 31 July 2025 at [53]–[54], 201.0038–201.0039.

(b) If the Court is minded to permit assignments, then any costs associated with assignment are to be charged to any account holder seeking to assign their claim, and that the liquidators and Cryptopia are not obligated to take any steps to process an assignment request until those costs are paid to Cryptopia.

Trusts with more than 100%

7.43 As explained above at [2.9]-[2.14], prior to the liquidators' appointment, Cryptopia had never undertaken a full reconciliation of its holdings and the balances in its databases. The liquidators undertook such a reconciliation following their appointment. That reconciliation has identified some discrepancies between Cryptopia's database and its actual holdings. Some cryptocurrency holdings exceed the amounts recorded in the Company database (i.e., more than 100%).[167] In other words, the assets exceed the beneficial interests recorded for the trust.

7.44 It is not clear why that is the case, and it is not clear whether the surplus cryptocurrencies are trust or Company property.

(a) It may have been that deposits by account holders were simply not being recorded in the database. For example, after the Hack, Cryptopia took the exchange offline and turned off its deposit tracker.[168] When the exchange reopened, account holders were asked to create new deposit addresses and not to use their previous deposit addresses. The liquidators understand that any deposits made to old deposit addresses were not recognised in Cryptopia's database and were not "swept" into Cryptopia's main exchange wallets.[169] The liquidators have undertaken a deposit tracker reconciliation for some cryptocurrencies and, by way of example, even after rectifying all deposit tracker errors, the USDT trust still held 1% more cryptocurrency than Cryptopia's database recorded it held.[170] Hypothetically, it may be possible that the deposit tracker was switched off previously and

[167] Ruscoe first affidavit, 31 July 2025 at [119], 201.0055. Cardano holds 101.08%; Monero holds 106.81%; Tether holds 101.08%; Ravencoin holds 104.81%' and Dash holds 102.31%. Each will have a significant amount of cryptocurrency unclaimed, based on present claims (Ruscoe updating affidavit, 23 April 2026 at [8], 401.0028 and [18], 401.0031.
[168] Ruscoe first affidavit, 31 July 2025 at [120], 201.0055.
[169] Ruscoe first affidavit, 31 July 2025 at [120], 201.0055.
[170] Ruscoe updating affidavit, 23 April 2026 at [19], 401.0032.

account holder deposits were not identified (but that cannot be confirmed).[171]

(b) Alternatively, the surplus could be Company property: Cryptopia collected transaction fees for all trades on the exchange platform in the form of a percentage of the currency traded.[172] It may be that some of those transaction fees were simply not recorded correctly (again, this cannot be confirmed). [173]

7.45 There is no way to verify why some cryptocurrency holdings exceed what is reflected in Cryptopia's customer records.

7.46 However, the claims portal was designed to provide account holders with the opportunity to correct their balances (on provision of substantiating evidence) if they were incorrect. A total of 1,446 account holders have disputed their balances.[174] Of those, four have been amended. One of those was an account holder who was not recorded as having a positive balance because Cryptopia had not recognised their deposit in December 2018.

7.47 The liquidators respectfully submit that as account holders' beneficial entitlements are fixed, definable interests corresponding with the amount of cryptocurrency brought onto Cryptopia's platform (see [3.18), account holders have no entitlement to receive a distribution of cryptocurrency that exceeds their account balance (as determined by the claims portal). The surplus should not, therefore, be distributed to eligible account holders.

7.48 On that basis, the surplus cryptocurrency is either unclaimed trust property (at this stage) or is Company property. In the absence of evidence that the surplus cryptocurrency is intended to be held for the benefit of an identifiable account holder, the liquidators submit that a pragmatic way forward may be for the surplus to be treated as Company property and made available to unsecured creditors in the liquidation unless an account holder is able to prove that any surplus is trust property (i.e., that they have brought it onto the exchange platform – which has not occurred yet). Given the inability to verify the origin of the cryptocurrency, the liquidators respectfully seek the Court's direction on this.

[171] Ruscoe updating affidavit, 23 April 2026 at [20], 401.0032.
[172] Ruscoe first affidavit, 31 July 2025 at [141], 201.0061.
[173] Ruscoe updating affidavit, 23 April 2026 at [20], 401.0032.
[174] Ruscoe updating affidavit, 23 April 2026 at [20(a)], 401.0032.

Low/no value trusts

7.49 Pursuant to directions made by Palmer J in the Distribution Application, the liquidators and Cryptopia are not required to take any steps to distribute cryptocurrency that has no or low realisable value. That direction was made on the basis that cryptocurrencies with low or no value would not be able to bear the costs of trust administration, which were to be allocated across each trust and then to account holders within each trust. It would be inconsistent with a trustee's duty of impartiality[175] for other trusts to bear higher trust administration costs to allow for lower-value trusts to be distributed.

7.50 In early 2023, the liquidators engaged a third-party cryptocurrency market maker to provide a market liquidity analysis of the cryptocurrencies. Their advice was that 72 of the 125 live cryptocurrencies had a notional value, meaning that there was realisable value in them.[176]

7.51 At this stage, the liquidators have taken no steps in relation to the 53 cryptocurrency trusts with no notional value. Now that the Final Cut-Off Date has passed, the liquidators are preparing to make final distributions to account holders. That will include reimbursing account holders for their contributions to trust administration costs in each trust if there are sufficient unclaimed holdings in that trust to do so. It may also include a 'hack top-up', as discussed below from [7.54]. In order to make final distributions, it will be necessary to finalise the costs allocated to each trust and to make a final decision about whether the low value trusts have sufficient notional value to contribute to trust administration costs. The liquidators intend to reassess realisable value before they do so, in the hopes that they can distribute as much cryptocurrency as possible.[177] If, at that stage, a trust has sufficient realisable value to be able to contribute to trust administration, then the liquidators will realise those assets and use the proceeds towards trust administration costs.

7.52 In order to finalise cost allocation, the liquidators seek directions that if a trust has insufficient value to contribute to trust administration (either because it has no value, or because the realisable value does not exceed the costs of realising the value), then the liquidators are permitted to remove those cryptocurrencies from circulation (i.e., to keep them in an inaccessible wallet

[175] Codified in the Trusts Act 2019, s 35.
[176] Ruscoe first affidavit, 31 July 2025 at [163], 201.0065.
[177] Ruscoe first affidavit, 31 July 2025 at [164], 201.0065.

and take no steps in relation to them). That decision would have permanent effect, and the liquidators would not make any further assessments as to realisable value: trust administration costs would have already been allocated to other trusts. It would be unfair for account holders in low-value trusts to receive a distribution (if the value of the cryptocurrency increased) without contributing to trust administration costs. It is for this reason that the liquidators seek the Court's approval.

7.53 The liquidators respectfully submit that this is the only realistic option. Taking any further steps in relation to trusts with low or no value would require cross-subsidisation from trusts that do have sufficient value. That would be inconsistent with Gendall J's finding that a separate trust was created for each cryptocurrency held by Cryptopia,[178] inconsistent with a trustee's duty of impartiality,[179] and inconsistent with the general position that "*the liquidator* [of a corporate trustee] *is not entitled to charge the beneficiaries of one trust with the costs and expenses incurred in relation to the other trust.*"[180]

Hack top-up

7.54 The Hack resulted in significant losses to many trusts (see [2.5]). Following the Hack, account holders' account balances in some of the trusts were reduced by the amount of cryptocurrency estimated to have been lost in the Hack (see [2.6]-[2.7]). However, the liquidators' submission is that account holders' beneficial entitlements are a fixed, definable interest corresponding with the amount of cryptocurrency brought onto Cryptopia's platform (see [3.18]). On that basis, an account holder's beneficial interest includes the cryptocurrency that was stolen in the Hack: it is simply that the trusts are deficient so cannot meet all beneficiaries' claims.

7.55 The liquidators accordingly seek directions permitting them to distribute a 'top-up' to eligible account holders in hacked trusts, up to a maximum of 100% of their account balance as at 14 January 2019 (prior to the Hack), taking into account later transactions. For clarification, this direction primarily affects account holders who were issued CLM (i.e., in the BTC, LTC and ETH trusts): account holders in other trusts that suffered losses in the Hack were never issued CLM, and their balances in the claims portal reflect their entire beneficial interest without accounting for stolen cryptocurrencies.[181]

[178] *Ruscoe v Cryptopia Limited (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [192].
[179] Codified in the Trusts Act 2019, s 35.
[180] *Coromandel Place Pty Ltd v C L Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377 (FCA) at 386.
[181] Ruscoe first affidavit, 31 July 2025 at [116]-[128], 201.0054 - 201.0057.

There are 440,762 account holders in total who were issued CLM, and 80,500 of the total number of account holders registered in the claims portal (which is approximately 138,000).[182] If there are insufficient unclaimed holdings to make good all losses suffered by eligible account holders within a hacked trust, then the liquidators propose distributing the remaining cryptocurrency on a *pari passu* basis (proportionally based on value).

7.56 The effect of the *Re Benjamin* orders granted in the Distribution Application (summarised at [2.22(a)] and [2.22(b)]) is that:

(a) The liquidators can distribute to eligible account holders on the factual footing that account holders who have not registered in the claims portal do not exist, and account holders who have registered but not completed the claims process have abandoned their claims (together, **ineligible account holders**). In other words, the liquidators can proceed with distribution without retaining assets to accommodate those interests.

(b) Trust administration costs can first be met by any unclaimed holdings (i.e., cryptocurrency belonging to ineligible account holders) before being deducted from eligible account holders' entitlements.

7.57 The liquidators respectfully submit that this direction is a straightforward operation of the *Re Benjamin* orders made in the Distribution Application in accordance with the usual operation of such orders (see [3.27]-[3.32]):

(a) Account holders did not have demarcated coins or holdings within the cryptocurrency trusts held by Cryptopia: each cryptocurrency trust is a single pooled fund, and in the case of hacked trusts, a deficient trust fund. The coins within each cryptocurrency are also fungible.

(b) The extent of each account holder's beneficial interest is defined by the quantity of cryptocurrency held by Cryptopia on trust for them (see [3.18]).

(c) The hacked cryptocurrency comprises part of that beneficial interest and if, by operation of the *Re* Benjamin orders, there is sufficient value within a trust to meet all costs and all beneficiaries' entitlements, there is no reason why account holders in a hacked trust should not receive a distribution of their full beneficial interest. If there is not, then account

[182] Ruscoe updating affidavit, 23 April 2026 at [35], 401.0036.

holders should share in that shortfall equally, as is the usual principle in deficient trust funds.[183]

7.58 The top-up would apply within each trust: if a trust has lost all of its holdings in the hack, then no account holder in that trust will receive a distribution. Whether those account holders have a claim against Cryptopia as an unsecured creditor is another matter addressed in these submissions (at sections 8 and 9). If a trust has lost most of its holdings, then account holders may stand to receive a small top-up, subject to the trust meeting its share of trust administration costs and depending on the number of eligible account holders in that trust.

7.59 Practically, the liquidators propose that the top-up would work as follows:[184]

(a) After final trust administration costs have been allocated and final distributions to account holders calculated, the liquidators would assess the number of unclaimed and abandoned holdings remaining in each cryptocurrency trust that suffered losses in the Hack (**Hacked Trusts**). Each Hacked Trust would be assessed individually (and each account holder's holding within that).

(b) For Hacked Trusts with CLM applied: The liquidators would add to each eligible account holder's balance the amount of cryptocurrency removed by way of internal withdrawal for the purposes of CLM (**Hack Top-Up**) (see [2.6]-[2.7]). If there were sufficient holdings in the Hacked Trust, account holders in that trust would receive a distribution of 100% of their Hack Top-Up. If there were insufficient holdings in the Hacked Trust to distribute 100% of all eligible account holders' Hack Top-Up, then the liquidators would distribute the remaining cryptocurrency in that trust on a *pari passu* basis (i.e., proportionally based on the value of each account holder's Hack Top-Up).

(c) For Hacked Trusts to which CLM was not applied: these account holders' balances already reflect their full beneficial entitlement with no deduction for hack losses. The trusts are deficient and Cryptopia has insufficient assets to distribute 100% of account holders' beneficial entitlements if all beneficiaries claimed. In these circumstances, assets

[183] *Priest v Ross Asset Management (in liq)* [2016] NZHC 1803 at [107]; *Re Fisk* [2018] NZHC 2007 at [141]; *Graham v Arena Capital Limited (in liq)* [2017] NZHC 973 at [17] (footnotes excluded). See also *Re Waipawa Finance Co Ltd (in liq)* [2011] NZCCLR 14 (HC).
[184] Ruscoe first affidavit, 31 July 2025 at [129]–[130], 201.0057–201.0058.

would be distributed on a *pari passu* basis (less trust administration costs).

Cryptopia's beneficial entitlements

7.60 Cryptopia is a beneficiary in all of the trusts, because it collected transaction fees for all trades on the exchange platform in the form of a percentage of the currency traded.[185] Its largest holdings are in the following trusts:[186]

(a) Dogecoin (**DOGE**): 3,002,560.81.

(b) Bitcoin (**BTC**): 7.47.

(c) Tether (**USDT**): 364,927.76.

(d) Litecoin (**LTC**): 1,023.07.

(e) TRON (**TRX**): 17,179.32.

(f) $187,682.05 of the NZDT funds.

7.61 The liquidators have proposed that (see [7.11]-[7.20]) Cryptopia's beneficial entitlement in the NZDT funds should be made available to account holders in the NZDT trust. If, however, there remain unclaimed holdings after the Final Cut-Off Date for NZDT, then Cryptopia should receive a distribution of its interest in the NZDT funds in order to meet unsecured creditor's claims.

7.62 The liquidators seek the Court's direction as to whether the same approach should be taken for:

(a) The Bitcoin trust; and / or

(b) Trusts that have suffered losses in the Hack (if the Court concludes that Cryptopia is liable to account holders for those losses, which is addressed further in parts 8 and 9 below).

Bitcoin

7.63 Following the Hack, account holders' BTC balances were reduced by the amount of cryptocurrency that Cryptopia management estimated to have

[185] Ruscoe first affidavit, 31 July 2025 at [141], 201.0061.
[186] Ruscoe first affidavit, 31 July 2025 at [141], 201.0061. Its remaining holdings are set out in Ruscoe updating affidavit, 23 April 2026 at [12], 401.0030.

been stolen in the Hack (see [2.6]-[2.7]). Cryptopia management estimated that 14.0489% of its total holdings of BTC was stolen.

7.64 The liquidators' reconciliation indicates that the BTC loss was overstated.[187] Cryptopia management does not appear to have undertaken any robust reconciliation to arrive at the percentages estimated to have been taken.[188] That is reinforced by the fact that, after applying the internal withdrawals (14.089% of the total balance), approximately 600 BTC remained unaccounted for in the Company's BTC wallet.[189] Mr Brocket's (Director of Finance and Administration at Cryptopia from 1 July 2018 to liquidation) evidence in the Trust Application was that he had been told by management that the variance (i.e., the additional 600 BTC) was because of "*uncompleted transfers and orphan transactions"* which were not removed from the database.[190] The liquidators have not identified any detailed or robust accounting or reconciliation of orphaned deposits.[191] It is therefore uncertain whether that 600 BTC was Company property or was trust property, for the same reasons described at [7.43]-[7.45], but in the circumstances, it appears likely that the 600 BTC remaining was account holder property.

7.65 Cryptopia treated that 600 BTC as Company property and stored it in the Company BTC wallet. Management used 256 BTC prior to the liquidators' appointment to meet its liabilities.[192] If the BTC was account holder property, then that likely amounts to an unauthorised use of trust assets in breach of the terms of the trust. The liquidators seek the Court's direction on that point. If that use was a breach of trust, then:

(a) The liquidators propose that the same approach should be taken to the BTC trust as the NZDT trust: Cryptopia's beneficial entitlement should be made available to account holders in the NZDT trust. If, however, there remain unclaimed holdings after the Final Cut-Off Date for NZDT,

[187] Ruscoe first affidavit, 31 July 2025 at [121], 201.0055–201.0056. See also Brocket affidavit, 27 November 2019 at [19]-[22] in the Trust Application (Tab 5 to the previous Cryptopia proceedings bundle).
[188] See also Brocket affidavit, 27 November 2019 at [19]-[22] in the Trust Application (Tab 5 to the previous Cryptopia proceedings bundle): "*I have not conducted a full reconciliation of how much of which currencies were stolen in the January 2019 hack."*
[189] Ruscoe first affidavit, 31 July 2025 at [121], 201.0055–201.0056. See also Brocket affidavit, 27 November 2019 at [19]-[22] in the Trust Application (Tab 5 to the previous Cryptopia proceedings bundle).
[190] Brocket affidavit, 27 November 2019 at [19]-[22] in the Trust Application (Tab 5 to the previous Cryptopia proceedings bundle).. See also Ruscoe updating affidavit, 23 April 2026 at [23]-[25], 401.0033.
[191] Ruscoe updating affidavit, 23 April 2026 at [25], 401.0033.
[192] Ruscoe first affidavit, 31 July 2025 at [121], 201.0055–201.0056. See also Brocket affidavit, 27 November 2019 at [19]-[22] in the Trust Application (Tab 5 to the previous Cryptopia proceedings bundle):"*The directors liquidated some of that Bitcoin to pay trade creditors, including large sums to Phoenix NAP in Arizona, which was hosting the Company's data."*

then Cryptopia should receive a distribution of its interest in the NZDT funds in order to meet unsecured creditor's claims (see [7.11]-[7.20]).

(b) To the extent that account holders in the BTC trust do not receive a distribution of their full beneficial entitlement, they will have an unsecured creditor's claim against the Company (addressed below at section 9).

7.66 The remaining 344 BTC was, with the court's permission and on notice of the possibility that the BTC was trust property, used by the liquidators to fund various steps taken in the administration of the trusts.[193] The liquidators propose that this be treated as trust property belonging to the BTC trust: in that way, it will be washed up when final trust administration costs are allocated to each trust.[194] The trusts that have borne trust administration costs to date (BTC and DOGE) will be reimbursed by other trusts (and by the Company to the extent that funds from that 344 BTC have been used in the liquidation).[195]

Hack losses

7.67 The position is slightly different for Hack losses. Cryptopia's obligation to replace trust property is a proprietary remedy arising from a misappropriation of trust property (see [3.19]-[3.22(b)]). The losses arising from the Hack do not arise from a proprietary claim, but a personal damages claim for breach of contract, breach of the terms of the trust, negligence or a statutory claim. Those would be dealt with as unsecured creditor claims against the Company (see [3.22(b)]). Account holders' unsecured creditor claims are addressed further in sections 8 and 9 below.

Conclusion

7.68 If the Court agrees with the liquidators' submissions, the effect would be that:

(a) Cryptopia would be entitled to receive a distribution of all of its holdings except for BTC and the NZDT funds.

(b) In relation to BTC and NZDT funds, Cryptopia would only receive a distribution if there remain unclaimed holdings.

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[193] Originating application for directions in respect of realisation of digital assets, 28 May 2019 in CIV-2019-409-286 at [2(f)]; Orders of Gendall J concerning digital assets, 29 May 2019 in CIV-2019-409-286 at [3(a)].
[194] Ruscoe first affidavit, 31 July 2025 at [123], 201.0056.
[195] Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application Tab 16 in the previous Cryptopia proceedings bundle at [117] and [133]-[134].

8. GNY'S UNSECURED CREDITOR CLAIM

8.1 On 10 July 2019, GNY submitted an unsecured creditor form claiming the following losses:[196]

(a) 15,409,316.7196351 LML tokens which were stolen in the Hack (GNY valued this at 490.18961407 BTC, or NZD6,545,774.10);

(b) NZD18,315,796.90 of lost market capitalisation,

totalling NZD24,861,571.

8.2 The unsecured creditor claim was on behalf of GNY, although GNY says that its accounts were held in the names of [redacted] and [redacted].[197]

8.3 The unsecured creditor's claim followed GNY filing a High Court proceeding against Cryptopia on 11 April 2019,[198] which was stayed following the liquidators' appointment on 14 May 2019. The High Court claim alleged:

(a) Breach of contract, by virtue of breach of the Terms and Conditions (and more specifically, that in breach of the Terms and Conditions Cryptopia failed to manage the platform and provide services with reasonable care by failing to safely store tokens; have adequate safeguards to prevent the Hack; and respond with reasonable care to the Hack).

(b) Breach of s 13 of the Fair Trading Act 1986 and s 22 of the Financial Markets Conduct Act 2013, by virtue of representations made by Cryptopia regarding the safety and security of the exchange.

(c) Breach of s 28 of the Consumer Guarantees Act.

(d) The total value of the ~15.4 million LML tokens stolen was NZD2,880,000.[199]

8.4 On 16 July 2019, the liquidators requested further information from GNY in relation to its unsecured creditor's claim, including (among other things):[200]

[196] Unsecured creditor claim form, exhibit [redacted]51 to [redacted] first affidavit, 30 March 2025, 302.0949 at 302.0955.
[197] Letter from Chapman Tripp to Buddle Findlay re GNY's unsecured creditor's claim at [3], Appendix D – unsecured creditor claim form, exhibit [redacted]51 to [redacted] first affidavit, 30 March 2025, 302.0949 at 302.0955.
[198] Exhibit [redacted]8 to [redacted] first affidavit, 30 March 2025, 302.0912.
[199] Statement of claim at [16], exhibit [redacted]8 to [redacted] first affidavit, 30 March 2025, 302.0912 at 302.0915.
[200] Exhibit [redacted]67 to [redacted] first affidavit, 30 March 2025, 302.0957 at 302.0957.

(a) any evidence that Mr [redacted] and Mr [redacted] accounts belonged to GNY and GNY's rationale for that assertion;

(b) copies of all communications between Mr [redacted] and Mr [redacted] relating to the trading of cryptocurrencies on Cryptopia's exchange, including between themselves;

(c) copies of emails received by Mr [redacted] and Mr [redacted] regarding the Terms and Conditions (August 2018) and an explanation as to how the limitations of liability in the Terms and Conditions and Risk Statement applied to GNY's claim;

(d) documents evidencing the claimed holdings of LML and loss of such, and requesting an explanation of: the basis for pegging the claim for lost LML tokens to the value of BTC; the use of 4 July 2019 as the date for assessment of loss, as opposed to 14 May 2019 at 1.20pm; and how it is that GNY suffered a separate and recoverable loss arising from a drop in market capitalisation of LML tokens;

(e) the efforts taken by Mr [redacted] Mr [redacted] and GNY to recover the stolen LML tokens.

8.5 GNY provided a response on 25 September 2019.[201] It advised that GNY's ability to reply to the liquidators' requests was constrained by the absence of a statement of defence, discovery, evidence, interrogatories and other litigation-related steps. It did however set out GNY's position in relation to the points raised by the liquidators, summarised as follows:

(a) The limitations of liability in the Terms and Conditions did not apply to GNY's claims and the Risk Statement was irrelevant.

(b) The loss of market capitalisation was a direct loss arising from the Hack (because it was a natural and reasonably foreseeable consequence of that event).

(c) GNY held two accounts with Cryptopia in the names of Mr [redacted] and Mr [redacted] and Cryptopia "fully understood" that those accounts were being used for GNY.

[201] Letter from GNY to liquidators 25 September 2019, exhibit [redacted]67 to [redacted] first affidavit 30 March 2025, 302.0959.

(d) A date of assessment for loss of 4 July 2019 reflected the ongoing nature of GNY's loss, but 14 May 2019 would provide a "similar and acceptable" assessment of loss.

(e) BTC was a convenient currency to use to compare token values, and reflected consistency with the LML pairing on the Cryptopia exchange.

8.6 On 12 May 2020, following Gendall J's judgment that the cryptocurrencies were held on trust for the benefit of account holders, GNY alleged a further cause of action in breach of fiduciary duty (breach of duty to act with reasonable skill and care).[202]

8.7 On 31 July 2020, following further correspondence between the parties, the liquidators requested further information from GNY, including:[203]

(a) Market data (trading volume and price) for LML listed by exchange, from the date LML was first listed until present day.

(b) An explanation as to how GNY relied upon the alleged representations as to the safety and security of Cryptopia's platform.

(c) How the hack of Cryptopia's platform caused reputational loss to the LML tokens.

(d) How the stolen LML tokens have eroded and continue to erode the price of all LML tokens.

(e) The liquidators also advised that, without prejudice to the final decision, their preliminary assessment is that GNY is a creditor of Cryptopia, but that it is working through issues associated with the quantum of the claim to be admitted.[204]

8.8 GNY responded on 6 October 2020, providing much the same material as had previously been provided.[205]

[202] Letter from GNY to liquidators, 12 May 2020, exhibit [redacted]84 to [redacted] first affidavit, 30 March 2025, 303.1012 at 303.1014.
[203] Letter from liquidators to GNY, 31 July 2020, exhibit [redacted]104 to [redacted] first affidavit, 30 March 2025, 303.1034 at 303.1034.
[204] Letter from liquidators to GNY, 31 July 2020 at [3], exhibit [redacted]104 to [redacted] first affidavit, 30 March 2025, 303.1034 at 303.1034.
[205] Letter from GNY to liquidators, 6 October 2020, exhibit [redacted]112 to [redacted] first affidavit, 30 March 2025, 303.1042.

8.9 GNY appeared in the Distribution Application and made submissions endorsing and agreeing with the submissions made by Ms Cooper KC as representative counsel for creditors.

8.10 On 18 December 2024, GNY wrote to the liquidators alleging that its loss amounted to 491.24901703 BTC (being the alleged value of the ~15.4 million stolen LML tokens) plus 3,008.40 BTC in lost market capitalisation and 6.16627 BTC for the listing fees that GNY paid Cryptopia in order to list LML.[206]

8.11 On 30 January 2025, the liquidators responded that they were actively considering GNY's claim against Cryptopia and that they expected to request further information regarding the claim.[207] On 28 March 2025, the liquidators requested further information, including:[208]

(a) all available trading data (trading volume and price) that GNY can provide for LML on Bitbay, for the entire period it was listed on Bitbay;

(b) confirmation of the total number of LML tokens in circulation on 13 January 2019 (the day before the Hack); and

(c) confirmation of GNY's proportion of the ownership of all LML tokens on 13 January 2019.

8.12 On 31 March 2025 GNY filed a notice for the liquidators to admit its claim in the High Court by way of interlocutory application in the Distribution Application proceeding. The parties agreed that GNY's claim could be resolved in this proceeding. GNY also provided a written response to the liquidators' 30 January 2025 letter on 3 April 2025.[209]

8.13 The liquidators seek the Court's direction as to whether GNY's claim should be admitted or rejected. Despite the liquidators' investigations, they do not consider that there is sufficiently clear evidence to decide either way.[210] Given that GNY is a party to this proceeding and will be arguing for their

[206] Letter from GNY to liquidators, 18 December 2025 at [20.2], exhibit [redacted]121 to [redacted] first affidavit, 30 March 2025, 303.1351 at 303.1354–303.1355.
[207] Letter from liquidators to GNY, 30 January 2025, exhibit [redacted]154 to [redacted] first affidavit, 30 March 2025, 303.1401 at 303.1401.
[208] Email from liquidators to GNY, 28 March 2025, exhibit [redacted]394 to [redacted] first affidavit, 30 March 2025, 303.1403.
[209] Letter from GNY to liquidators, 3 April 2025, exhibit PJS2-1 to Sibenik second affidavit, 24 February 2026, 303.1404.
[210] Ruscoe first affidavit, 31 July 2025 at [12], 201.0027.

position, the liquidators set out in these submissions the arguments in favour of Cryptopia, although they do not formally take a position.

8.14 In summary, the uncertainties the liquidators have about GNY's claim requiring resolution include:

(a) Whether the exclusion and limitation of liability clauses in the Terms and Conditions exclude or limit Cryptopia's liability to GNY.

(b) Whether GNY has an unsecured creditor claim against Cryptopia, considering that GNY was not and is not an account holder, and the accounts referred to in its claim are in the names of Mr [redacted] and Mr [redacted] individually.

(c) There appears to be insufficient information to determine whether Cryptopia is liable to GNY, including insufficient information as to:

(i) Whether GNY relied on the alleged representations as to the safety and security of Cryptopia's exchange.

(ii) Whether Cryptopia's failure to have appropriate security processes (if that is established) caused GNY's alleged loss.

(d) If Cryptopia is liable, what is the appropriate valuation of GNY's loss?

8.15 This section of submissions is divided up into the following sub-headings:

(a) Background to LML at [8.16]-[8.24].

(b) Whether GNY is an account holder at [8.25]- [8.43]

(c) Issues arising from Terms and Conditions (including limitation and exclusion of liability and holding multiple accounts on Cryptopia's exchange) at [8.44]-[8.67].

(d) FTA at [8.68]-[8.168].

(e) FMCA at [8.169]-[8.171].

(f) CGA [8.172]-[8.187].

(g) Breach of contract at [8.188]-[8.202].

(h) Breach of fiduciary duty at [8.203]-[8.232].

(i) Quantifying loss at [8.233]-[8.341].

Background to LML

8.16 GNY was founded in 2018 by Mr [redacted] and Mr [redacted][211] GNY developed two ERC-20 tokens: LML and the GNY token.[212] ERC-20 is a technical standard for tokens on the Ethereum network or blockchain describing how the token should be created, issued and deployed (in other words, an ERC-20 token is a token that operates on the Ethereum network, but that is not Ethereum).[213]

8.17 Both the LML and GNY tokens are utility tokens, meaning that they let you use a product or service in a specific blockchain system.[214] As Mr [redacted] describes:[215]

> The GNY token is the main token, used to drive the machine learning and artificial intelligence engine; LML was the "oracle", or data-gathering, token.

8.18 400 million LML tokens were generated on 14 November 2018:[216]

(a) 200 million LML tokens were "treasury" tokens and were not intended to be sold.

(b) 200 million LML tokens were in circulating supply and (theoretically) available for trading.

8.19 The initial coin offering (**ICO**) for the GNY token appears to have taken place in 2018. An ICO is similar to an initial public offering of shares: an ICO is effectively a crowdfunding method used by blockchain startups to raise capital by selling new tokens to early investors.[217] Mr [redacted] evidence is that the LML tokens were not included in the ICO offering.[218]

8.20 Rather, approximately 1 million LML tokens were airdropped to participants in the ICO.[219] An "airdrop" is a distribution of cryptocurrency coins or tokens for

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[211] [redacted] first affidavit, 30 March 2025 at [7], 201.0003.
[212] [redacted] first affidavit, 30 March 2025 at [8], 201.0003; [redacted] affidavit, 30 March 2025 at [10], 201.0014.
[213] "What Are ERC-20 Tokens? All About Ethereum's Most Important Token Standard" (16 May 2024) <crypto.com>: What Are ERC-20 Tokens? All About Ethereum's Most Important Token Standard.
[214] "Utility tokens vs. security tokens: what are the differences?" <www.coinbase.com>: Utility tokens vs. security tokens: what are the differences? | Coinbase.
[215] [redacted] first affidavit, 30 March 2025 at [8], 201.0003.
[216] Letter from GNY to the liquidators 3 April 2025 at [7], exhibit PJS2-1 to Sibenik second affidavit, 24 February 2026, 303.1404 at 303.1405. See also GNY listing application for Cryptopia, exhibit PJS1-8 to Sibenik first affidavit, 1 August 2025 at 302.0721.
[217] Investopedia "ICO Explained: What It Is and Successful Examples" (6 August 2025) <www.investopedia.com>: ICO Explained: What It Is and Successful Examples.
[218] [redacted] affidavit, 30 March 2025 at [10], 201.0014.
[219] Letter from GNY to the liquidators 3 April 2025 at [9], exhibit PJS2-1 to Sibenik second affidavit, 24 February 2026, 303.1404 at 303.1405.

free, delivered directly to a wallet address.[220] Airdrops are typically used for marketing purposes to raise awareness of a token offering, but recipients do not pay anything to receive the tokens.[221]

8.21 GNY requested to list LML on Cryptopia on 18 October 2018.[222] The listing application stated that the LML token would be created on 14 November 2018.[223] In contrast to Mr [redacted] evidence that LML was not included in the ICO offering, in the listing application Mr [redacted] stated that:[224]

(a) USD 1.5 million was raised during the ICO, which ended on 10 November 2018.

(b) The duration of the ICO was 10 weeks.

(c) 450 people participated in the ICO.

8.22 The LML token was listed on Cryptopia on 26 November 2018 (with trade markets and withdraws being opened on 27 November, being 24 hours after listing, at which time the token could be traded / withdrawn)[225] and on Bitbay, a Polish / Maltese cryptocurrency exchange, in December 2018.[226] The trading data available for LML is limited:

(a) GNY does not have access to Bitbay trading data (GNY says that "*following withdrawal of the LML token in 2023 GNY no longer has access to Bitbay's trading data*",[227] although its statement of claim against Cryptopia was filed in the High Court on 11 April 2019).[228]

(b) All of the LML tokens on Cryptopia's exchange were stolen in the January 2019 hack. Accordingly, the only trading data available for the LML token is between 27 November 2018 and 13 January 2019, a period of 47 days.

8.23 15,444,570.6267408 LML were stolen from Cryptopia's exchange, being 100% of the LML held on the exchange at the time of the hack (13 January

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[220] Investopedia "Guide to Cryptocurrency Airdrops: How They Work and What to Expect" (10 August 2025) <www.investopedia.com>: Guide to Cryptocurrency Airdrops: How They Work and What to Expect.
[221] Sibenik second affidavit, 24 February 2026 at [48]–[50], 201.0270–201.0271.
[222] Exhibit PJS1-8 to Sibenik first affidavit, 1 August 2025, 302.0719.
[223] GNY listing application for Cryptopia, exhibit PJS1-8 to Sibenik first affidavit, 1 August 2025, 302.0719 at 302.
[224] GNY listing application for Cryptopia, exhibit PJS1-8 to Sibenik first affidavit, 1 August 2025, 302.0719 at 302.0721–302.0722.
[225] Email from Cryptopia to GNY, exhibit PJS1-50 to Sibenik first affidavit, 1 August 2025, 302.0770 at 302.0770.
[226] [redacted] first affidavit, 30 March 2025 at [13], 201.0003.
[227] Letter from GNY to the liquidators, 3 April 2025 at [3], exhibit PJS2-1 to Sibenik second affidavit, 24 February 2026, 303.1404.
[228] Chapman Tripp letter, 28 January 2026, exhibit PJS2-6 to Sibenik second affidavit, 24 February 2026, 304.1576 at 304.1577.

2019).[229] The amount held by Mr [redacted] and Mr [redacted] collectively, comprised 99.7% of that total (15,409,316.7196351 LML), meaning that only 0.03%, or 35,253.907106 LML, was held by other users.

8.24 GNY is unable to provide any specific detail about what its LML holdings were as at the date of the Hack, but it estimates that it held approximately 99% of the circulating supply of LML tokens at that time.[230] One per cent of the 200 million circulating supply would amount to 2 million LML tokens. Presumably, 1 million of that amount comprised the tokens airdropped to participants in the GNY token ICO, unless repurchased by Messrs [redacted] / [redacted] The remaining 1 million (less the 35,000 LML held by other users on Cryptopia) were presumably being traded on Bitbay. GNY has provided records of its deposits and withdrawals on Bitbay from November 2018–June 2021[231] but no trading data.

Is GNY an account holder?

8.25 GNY has submitted an unsecured creditor claim in its own name. However, there is no Cryptopia account in GNY's name: the two accounts named in GNY's unsecured creditor claim are "[redacted] and "[redacted] held by Mr [redacted] and Mr [redacted] respectively (the **Accounts**). Mr [redacted] and Mr [redacted] have both completed the liquidators' claims portal in their own names.[232] There are accordingly three possible outcomes, in relation to which the liquidators seek the Court's direction:

(a) The Accounts belonged to GNY but were operated by Mr [redacted] and Mr [redacted] on its behalf; or

(b) The Accounts belonged to Mr [redacted] and Mr [redacted] but were operated for GNY; or

(c) The Accounts belonged to Mr [redacted] and Mr [redacted] personally, not to GNY.

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[229] Email from Kabyn Walley (Cryptopia) to GNY, 8 March 2019, exhibit [redacted]32 to [redacted] first affidavit, 30 March 2025, 302.0868 at 302.0869.
[230] Letter from GNY to the liquidators, 3 April 2025 at [10], exhibit PJS2-1 to Sibenik second affidavit, 24 February 2026, 303.1404 at 303.1405.
[231] Letter from GNY to the liquidators, 3 April 2025 at [4], exhibit PJS2-1 to Sibenik second affidavit, 24 February 2026, 303.1404.
[232] [redacted] Claim Acceptance Confirmation Details, exhibit [redacted]4 to [redacted] first affidavit, 3 March 2025, 303.1138; [redacted] Claim Acceptance Confirmation Details, exhibit [redacted]5 to [redacted] first affidavit, 3 March 2025, 303.1172.

8.26 GNY appears to take the first position.[233] However, on the face of it, the Accounts belong to Mr [redacted] and Mr [redacted] rather than GNY:

(a) Mr [redacted] account ([redacted]) was created in September 2017,[234] which predates GNY's incorporation in 2018[235] and the LML token being listed on Cryptopia on 26 November 2018[236] (see [8.22] above). GNY acknowledges that Mr [redacted] account was created for personal use.[237] Importantly, Mr [redacted] appears to have first used his account for a different cryptocurrency project known as 'Helium'.[238]

(b) Both of the Accounts are registered to personal email addresses: [redacted] (Mr [redacted]) and [redacted] (Mr [redacted]). Neither are GNY addresses.

(c) The usernames used '[redacted]' (Mr [redacted]) and '[redacted]' (Mr [redacted]) appear to be personal usernames. Neither are related to or refer to GNY.

(d) An account could have been created in GNY's name: companies were expressly permitted to create accounts on Cryptopia.[239] Mr [redacted] also provide Cryptopia with Mr [redacted] GNY email address in the listing application.[240]

8.27 Shortly after GNY submitted its unsecured creditor claim, the liquidators asked for any document evidencing that the Accounts belonged to GNY rather than to Mr [redacted] and Mr [redacted][241] No such document was provided. GNY instead explained that "*from a practical perspective, given the requirement for an individual person's details to create an account, it was considered appropriate for GNY's two founders to each create an account on behalf of GNY.*" The individual person's details referred to were an individual

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[233] GNY has consistently asserted that it is an account holder. See, for example, GNY's notice of opposition, 15 August 2025, particularly at [3.2], [3.9(a)] and [3.14], 101.0019, 101.0020–101.0021 and 101.0023. See also GNY's letter to the liquidators, 10 July 2019 at [3], exhibit [redacted]51 to [redacted] first affidavit, 30 March 2025, 302.0949 at 302.0949: "*GNY held two accounts with Cryptopia. Those accounts were held in the names of [redacted] and [redacted]*"

[234] At [53.1], exhibit [redacted]69 to [redacted] first affidavit, 30 March 2025, 302.0959 at 302.0967.

[235] [redacted] second affidavit, 19 December 2025 at [36], 201.0148.

[236] Email from Cryptopia to GNY, exhibit PJS1-50 to Sibenik first affidavit, 1 August 2025, 302.0770 at 302.0770.

[237] [redacted] second affidavit,19 December 2025 at [54], 201.0151.

[238] When Mr [redacted] approached Cryptopia about listing LML on the exchange, he identified to Cryptopia that he was involved in another cryptocurrency project called Helium which had just launched for trading on Cryptopia: "*I have been in contact with Nader today about Helium being listed, you know me as [redacted] from the helium team*" (Email from Mr [redacted] to Cryptopia, 15 October 2018, exhibit PJS1-15 to Sibenik first affidavit, 1 August 2025,302.0718).

[239] See cl 3(c) of the Terms and Conditions, exhibit DIR1-81 to Ruscoe first affidavit, 302.0577 at 302.0578.

[240] Exhibit PJS1-8 to Sibenik first affidavit, 1 August 2025, 302.0719 at 302.0721.

[241] Email from the liquidators to GNY, 16 July 2019, exhibit [redacted]67 to [redacted] first affidavit at 302.0957.

username, email address and password – information that could well have been created for GNY.[242]

8.28 Aside from that, the liquidators submit that there are difficulties with GNY's position that it owned the Accounts.

8.29 The first difficulty is that Mr [redacted] and Mr [redacted] have each completed the liquidators' claims portal process for each of the Accounts in their own names, proving their ownership over the Accounts and verifying their identities in connection with the Accounts: in other words, they have claimed that they personally are account holders at two separate stages in the claims process.[243] For the purposes of trust law, Mr [redacted] and Mr [redacted] are the beneficiaries of the cryptocurrency trusts held by Cryptopia. Notwithstanding that, it is GNY that brings a claim alleging breach of fiduciary duty. It is unclear how Mr [redacted] and Mr [redacted] can both claim to be account holders and beneficiaries (having successfully completed the claims process) while simultaneously asserting that GNY is the account holder. The same argument can be made in relation to its breach of contract claim (i.e., that GNY is not a party to the contract between Cryptopia and Mr [redacted] or between Cryptopia and Mr [redacted]

[redacted]

8.31 Second, the Terms and Conditions prohibit the combination of two accounts to be treated as one account in the name of a third party. Clause 7.1 provides that a person must only use the Platform and perform transactions on their own behalf.[245] Clause 18.2 prohibits assignment, transfer or subcontract of an account holder's rights or obligations.[246]

8.32 If the Accounts *were* operated by Mr [redacted] and Mr [redacted] on behalf of GNY, then that is a breach of the Terms and Conditions. The consequence, had Cryptopia known about the breach (which is addressed further at [8.34]

[242] Letter from GNY to the liquidators, 25 September 2019, exhibit [redacted]69 to [redacted] first affidavit, 30 March 2025, 302.0959 at 302.0971.
[243] Ruscoe first affidavit, 31 July 2025 at [56], 201.0039; [redacted] Claim Acceptance Confirmation Details, exhibit [redacted]4 to [redacted] first affidavit, 3 March 2025, 303.1138; [redacted] Claim Acceptance Confirmation Details, exhibit [redacted]5 to [redacted] first affidavit, 3 March 2025, 303.1172.
[244] Companies Act 1993, ss 304(6) and 373(4)(a).
[245] Ruscoe first affidavit, 31 July 2025 at [11] and [22]–[23], 201.0026 and 201.0031–201.0032; Terms and Conditions at cl 7.1, exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0583.
[246] Terms and Conditions at cl 18.2, exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0589–302.0590.

below), is that then it could have suspended Mr [redacted] and Mr [redacted] accounts until it was reasonably satisfied that Mr [redacted] and Mr [redacted] were no longer using their accounts on behalf of GNY.[247] Cryptopia may have been able to close Mr [redacted] and Mr [redacted] accounts if it considered it necessary or prudent to do so, on the basis that they had provided materially inaccurate information.[248]

8.33 The combination of that breach of the Terms and Conditions (which Mr [redacted] and Mr [redacted] must be taken to have read and accepted) and the fact that the Accounts were created in the names of Mr [redacted] and Mr [redacted] personally (see [8.26 above) support an argument that the Accounts do not belong to GNY.

8.34 Mr [redacted] evidence is that Mr [redacted] account was a personal account, later taken over as a GNY corporate account.[249] There is no evidence of GNY informing Cryptopia that Mr [redacted] and Mr [redacted] accounts had become corporate accounts, and the account details were never updated to refer to GNY (and in any event, assignment is prohibited by cl 18.2 of the Terms and Conditions).[250] Nor has GNY produced any internal GNY documentation recording this asserted account takeover. GNY instead says that Cryptopia was well aware that Mr [redacted] and Mr [redacted] operated their accounts on behalf of GNY. No evidence of that has been provided: rather, GNY appears to rely on Cryptopia's engagement with Mr [redacted] regarding the LML token being listed on the exchange.[251]

8.35 It is important to note that the listing agreement does not form a part of GNY's unsecured creditor claim, *except* to the extent that it is relevant to whether GNY was an account holder. The listing application for the LML token was submitted on 18 October 2018:[252]

(a) Mr [redacted] first contacted Cryptopia's listing team from his GNY email address on 15 October 2018 saying "*just sending through the first contact for our project https://www.gny.io/*" and providing some

[247] Terms and Conditions at cl 4.3, exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0579–302.0580.
[248] Terms and Conditions at cl 4.4, exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0580–302.0581.
[249] [redacted] second affidavit, 19 December 2025 at [54], 201.0151.
[250] Terms and Conditions at cl 18.2, exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0589–302.0590.
[251] [redacted] first affidavit, 30 March 2025, at [9]–[10], 201.0003.
[252] Listing application, exhibit PJS1-8 to Sibenik first affidavit, 1 August 2025, 302.0719.

background to "*GNY my main project*".[253] He submitted the application to Cryptopia's listing team from his GNY email address.

(b) Mr [redacted] identified that he was involved in another cryptocurrency project called Helium, which had just launched for trading on Cryptopia (and introduced himself to Cryptopia on 15 October 2018 as "*I have been in contact with Nader today about Helium being listed, you know me as* [redacted] *from the helium team*"[254]).

(c) Mr [redacted] listed himself as the Coin Developer and contract person for the listing application. Under the question "Do you have a registered Cryptopia account?" Mr [redacted] responded "Yes" and identified his account as being [redacted] (rather than, for example, an account with his GNY email).[255]

(d) Mr [redacted] listed Mr [redacted] as a team member to participate in the listing, noting that Mr [redacted] did not presently have an account with Cryptopia.

(e) Mr [redacted] identified GNY as the legal entity overseeing the project and as the company issuing the LML tokens.

8.36 Cryptopia and Mr [redacted] engaged in a series of email communications throughout October and November in relation to the listing.[256] The terms of the listing recorded in Cryptopia's listing quote (which was issued to the "Lisk Machine Learning Team" in relation to the "Lisk Machine Learning" project) included that:[257]

(a) Payment of the listing fee was to be made by a Cryptopia account that had completed Level 2 verification before the project could progress beyond the Project Review stage.[258]

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[253] Email from Mr [redacted] to Cryptopia, 15 October 2018, exhibit PJS1-15 to Sibenik first affidavit, 1 August 2025, 302.0718.
[254] Email from Mr [redacted] to Cryptopia, 15 October 2018, exhibit PJS1-15 to Sibenik first affidavit, 1 August 2025, 302.0718.
[255] Listing application, exhibit PJS1-8 to Sibenik first affidavit, 1 August 2025, 302.0719.
[256] Copies of this correspondence are exhibited to the affidavit of Mr Sibenik at PJS1-15 (302.0718), PJS1-16 (302.0737), PJS1-20 (302.0732), PJS1-25 (302.0745), PJS1-38 (302.0758), PJS1-50 (302.0770), PJS1-66 (302.0786) and PJS-79 (302.0799).
[257] Exhibit [redacted]1 to [redacted] first affidavit, 30 March 2025, 302.0731; Exhibit PJS1-20 to Sibenik first affidavit, 1 August 2025, 302.0732.
[258] Cryptopia communicated to Mr [redacted] its requirement that "*a key contact from your team is registered on our exchange, is Level 2 Verified and that they have made the listing payment via our Coin Listings page*": see exhibit PJS1-20 to Sibenik first affidavit, 1 August 2025, 302.0732 at 302.0733.

(b) The project team agreed to Cryptopia's delisting policy and would keep Cryptopia updated of any planned updates, forks or maintenance required to maintain the network.

(c) If the project was declined during the listing process, the listing fee would be refunded to the Cryptopia account that made the payment.

(d) The project team could select either a base exchange listing for 3,300,000 Dotcoin (**DOT**,) or a combo listing (including additional marketing) for 3,500,000 DOT.

(e) The market pairings for the token would be BTC, LTC and DOGE.

8.37 On 5 November 2018, Mr [redacted] accepted the quote for a base exchange listing[259] and Cryptopia confirmed that Mr [redacted] had already completed level 2 verification in 2017.[260] Cryptopia then carried out a project review (assessing the LML project) and code review before accepting the LML token for listing.[261] On 5 November 2018 Cryptopia notified Mr [redacted] that "*your project has passed our Project Review and is ready to progress*"[262] and on 19 November 2018, that "*LML has made it through our Code Review process*".[263]

8.38 The listing contract was performed and the token listed on 26 November 2018.[264]

8.39 The liquidators respectfully submit that the listing agreement (formed by the listing quote, which was accepted by Mr [redacted] was an entirely separate agreement to the agreements Cryptopia had between it and account holders. Accordingly, analysing the listing agreement and associated correspondence does not assist in determining whether GNY or Mr [redacted] / Mr [redacted] owned the Accounts:

(a) The conditions of the listing fee and the process undertaken by Cryptopia focused on the LML project itself, with Mr [redacted] as the 'key contact' and GNY as the issuer of the token. It was focused on

[259] Exhibit PJS1-25 to Sibenik first affidavit, 1 August 2025, 302.0745 at 302.0748.
[260] Exhibit PJS1-16 to Sibenik first affidavit, 1 August 2025, 302.0737 at 302.0738.
[261] Exhibit PJS1-20 to Sibenik first affidavit, 1 August 2025, 302.0732; Exhibit PJS1-25 to Sibenik first affidavit, 1 August 2025, 302.0745.
[262] Exhibit PJS1-25 to Sibenik first affidavit, 1 August 2025, 302.0745 at 302.0749.
[263] Exhibit PJS1-25 to Sibenik first affidavit, 1 August 2025, 302.0745 at 302.0745.
[264] Email from Cryptopia to GNY, exhibit PJS1-50 to Sibenik first affidavit, 1 August 2025, 302.0770 at 302.0770.

whether the LML token could be listed on the exchange at all and had no focus or attention on how the Accounts were to be used.

(b) The only connection between the Accounts and GNY was that Mr [redacted] (as the key contact for the listing) used his account to pay the listing fee. Cryptopia's correspondence with Mr [redacted] indicated a distinction between a listing arrangement and an account, noting that payment of the listing fee could be made by *any* Cryptopia account that had achieved Level 2 verification (see [8.35]-[8.37] above).

8.40 On that basis, the liquidators respectfully submit that the Accounts appear to belong to Mr [redacted] and Mr [redacted] personally: they were created in their names and with their details, and although they assert that they became corporate accounts, that was never communicated to Cryptopia, and the account details were never changed. If the Accounts were used for corporate purposes, that would have been a breach of the Terms and Conditions, and had Cryptopia known that it could have suspended Mr [redacted] and Mr [redacted] accounts until they ceased doing so. There is no evidence to support the argument that the Accounts became GNY's because Cryptopia acquiesced to that. However, given the uncertainty of the arrangement, they seek the Court's direction on this point.

8.41 If the Court agrees that the Accounts belong to Mr [redacted] and Mr [redacted] personally, then:

(a) For breach of fiduciary duty: If any fiduciary duty were owed, then none is owed to GNY as it is not an account holder or beneficiary. Duties could only be owed to, and enforced by, Mr [redacted] and Mr [redacted] personally.

(b) For breach of the FTA / FMCA: GNY was not the party that relied on any representations. If it was, then it could only claim for losses GNY had suffered, not losses that Mr [redacted] and Mr [redacted] suffered.

(c) For breach of the CGA: GNY is not a consumer, and it acquired no relevant services from Cryptopia. Any relevant services were provided only to Mr [redacted] and Mr [redacted] personally.

(d) For breach of contract: There is no contract between GNY and Cryptopia (except for the listing contract which forms no part of these proceedings and, in any case, was performed).

8.42 GNY says that if its claims are not admitted in its name then they ought to be admitted in the names of Messrs [redacted] and [redacted][265] If that were to occur, the liquidators would require unsecured creditor claims to be submitted in Mr [redacted] and Mr [redacted] names. That has not occurred in the seven years since Cryptopia went into liquidation, despite concerns about this position being raised by the liquidators as early as July 2019.[266]

8.43 The claims would necessarily be different in nature (particularly in relation to the reliance that is alleged to have been placed on the pleaded representations, and loss could only be recoverable for losses suffered by Mr [redacted] and Mr [redacted] personally, which would not include any claim for loss of market capitalisation – if it exists). Whether or not they were admitted would be mostly determined by the Court's findings on the claims referred to in GNY's unsecured claim, addressed below.

Limitation and exclusion of liability

8.44 As summarised above at [8.14] and [8.15], issues arise as to whether GNY's claim, or any part of it, is precluded or limited by exclusion and limitation of liability clauses.

8.45 For the reasons set out at section 6 the liquidators submit that the Terms and Conditions are operative and effective. If that is correct, then the next question for determination is whether those clauses apply in the circumstances of GNY's claim.

8.46 As above at [8.25], the liquidators submit that the Accounts belong to Mr [redacted] and Mr [redacted] personally. As such, it is Mr [redacted] and Mr [redacted] who are parties to the Terms and Conditions, and it was Mr [redacted] and Mr [redacted] who accepted the Terms and Conditions in November 2018 and September 2017 respectively when they created the Accounts. (Noting that Mr [redacted] accepting the Terms and Conditions was a prerequisite to creating an account,[267] and that Mr [redacted] is deemed to have accepted the Terms and Conditions by his continued use of the Platform after August 2018.[268])

8.47 This section considers the application of the Terms and Conditions as if GNY were an account holder, as that is the position advanced by GNY.

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[265] GNY notice of opposition, 15 August 2025 at [3.15], 101.0023.
[266] Exhibit [redacted]67 to [redacted] first affidavit, 30 March 2025, 302.0957 at 302.0957.
[267] See above at [6.7], and Ruscoe first affidavit, 31 July 2025 at [28], 201.0033.
[268] See above at [6.8]-[6.16].

Application of the Terms and Conditions generally to GNY

8.48 The Terms and Conditions contain a broad and comprehensive limitation clause (see above at [6.2]).[269]

8.49 The question for the Court is how should these clauses be construed, and do GNY's claims fall within their scope? The principles relevant to interpreting an exclusion clause are:

(a) The starting point is freedom of contract: parties (particularly commercial parties) are free to make their own bargains and to allocate risks as they see fit.[270] If an exclusion or limitation clause is broadly constructed, it is assumed that the parties both intended that broad limitation as they both contracted freely.[271]

(b) If there is any doubt as to the meaning and scope of an exclusion or limitation clause, the ambiguity will be resolved against the party who had inserted it and is now relying on it: the parties are not likely taken to have cut down the remedies that the law provides.[272] That does not mean that a strained interpretation is to be adopted: the overall objective is to ascertain the true intention of the parties.[273] In other words, "*it will be assumed that a party will not have intended to limit liability unless clear and unambiguous language is used.*"[274]

(c) If an exclusion or limitation of liability clause is particularly onerous or unusual, a higher degree of notice (of the clause) may be required before it will be binding on the parties, particularly in the context of non-commercial consumers.[275] The requirement for notice is less stringent in a commercial context.[276]

8.50 Clause 12.1(a) provides that Cryptopia's liability is excluded to the maximum extent permitted by law and under any circumstances, for any "*loss or*

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[269] As noted above at [6.1], the Earlier Terms and Conditions (301.0002) were replaced by the Terms and Conditions (302.0577). However, for completeness, the Earlier Terms and Conditions contained a similarly broad, though less detailed exclusion provision at 301.0003: "*We will not be liable for any damages, losses or expenses, or indirect losses or consequential damages of any kind, suffered or incurred by you in connection with your access to or use of this site or the content on or accessed through it*."
[270] See *CBL Insurance Limited (in liquidation) v Harris* [2021] NZHC 1393 at [117], for example.
[271] *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29, [2021] AC 1148 at [108]–[109], citing Lord Diplock in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689 at 717H.
[272] Burrows, Finn and Todd *Law of Contract in New Zealand* (online looseleaf ed, LexisNexis) at [7.3.1].
[273] Burrows, Finn and Todd *Law of Contract in New Zealand* (online looseleaf ed, LexisNexis) at [7.3.1].
[274] *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226 at [32]–[33].
[275] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, [1988] 1 All ER 348.
[276] *Jardboranir hf t/a Iceland Drilling v Summit Hydraulic Solutions Ltd* [2016] NZHC 490 at [41].

damage, whether direct, indirect, consequential or incidental, whether in tort, contract or otherwise arising out of use of our Platform or Services".[277]

8.51 Clause 12.1(a) is subject to cl 12.1(c), which provides that the Terms and Conditions are not intended to limit any rights or remedies an account holder may have under the FTA or CGA. On an ordinary reading of the clause, GNY's claims under those statutes are not precluded. Its claims for breach of contract and breach of fiduciary duty may be precluded, provided that those exclusions are permitted by law.

8.52 Clause 12.1(a) lists 12 examples of situations in which liability is excluded:

> i. any losses arising as result of us acting in accordance with these Terms or any other applicable terms and conditions;
>
> ii. losses caused by you, or anyone acting on your behalf (including any Anticipated Person), providing incorrect information;
>
> iii. corruption or loss of data or any information;
>
> iv. malware or any other damage that may be caused to your computer or system as a result of use of the Platform or transmission of any information from us or any other person to you;
>
> v. interruptions, suspensions, delays or discontinuance of the Platform or any Services;
>
> vi. the tax liability of you or any other User, nor for collecting, reporting, withholding or remitting any taxes arising from any use of our Services or Platform;
>
> vii. losses caused by any User error by you or anyone acting on your behalf;
>
> viii. losses arising out of unauthorised access or fraud in relation to your accounts or Services committed by you, your employee, officer or agent;
>
> ix. losses caused by circumstances beyond our control, including any machine or system failure;
>
> x. losses arising from your use or inability to access our platform at any time, inaccurate content or information in any service we provide; or
>
> xi. losses arising from faults in, or malfunction of, any equipment (including telecommunication equipment) which supports our website; and

[277] Terms and Conditions at cl 12.1(a), exhibit DIR1-80 to Ruscoe affidavit 31 July 2023, 302.0577 at 302.0587.

xii. any loss relating to the content or omission of content from our site.

8.53 In addition to cl 12.1(a), cl 12.1(d) provides that "*notwithstanding clause 12.1(a), (b) and (c)*", if Cryptopia is found to be liable for any loss, cost, damage or expense, its maximum aggregate liability will be limited to $5,000. In other words, cl 12.1(c) is subject to cl 12.1(d): the limitation of liability is intended to apply to statutory claims under the FTA and CGA. That is addressed further below at [8.74].

8.54 Clause 12.1(a) is broad and comprehensive: it excludes liability for any loss "*whether in tort, contract or otherwise*". The clause expressly excludes liability for negligence (tort) and contract. "*Or otherwise"* is common phrasing in exclusion clauses[278] and read with the preceding phrase "*any loss or damage, whether direct, indirect, consequential or incidental*", must equally include claims for breach of trust or fiduciary duty, provided that is permitted by law. The intention of the clause is clear from its phrasing: Cryptopia is not liable for any losses arising out of any claims made against it whatsoever, unless it is not permitted to exclude liability, or unless the claim falls within the carve-out in cl 12.1(c). GNY's claims (except its statutory claims) would be excluded.

8.55 However, cl 12.1(a) must be read in its entirety. Following the clear and unambiguous wording interpreted above at [8.54], the clause provides a list of 12 circumstances in which liability will be excluded. There are two possible interpretations:

(a) The list is non-exhaustive and simply provides examples of situations that may arise and would be excluded. The broad wording of clause 12.1(a) is not limited in any way by these 12 examples.

(b) Clause 12.1(a) is to be read down by the 12 examples provided, and liability is only excluded for claims that fall within one of the 12 circumstances listed.

8.56 This is significant because none of the 12 circumstances listed refers to losses due to a hack or generally to a breach of duty or contract by Cryptopia. The 12 circumstances include losses arising through the fault of an account holder, and the following circumstances (drawn from the list at [8.52]) which would be the fault of Cryptopia: losses arising as a result of

[278] *Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies Plc* [2023] EWHC 2506.

Cryptopia acting in accordance with these Terms or any other applicable terms and conditions; corruption or loss of data; malware; interruptions or delays to the platform; circumstances beyond Cryptopia's control; inability to access the Platform or inaccurate content; faults in equipment; and content or omission of content from the website.

8.57 Theft from a hack, or an alleged failure to enact reasonable security measures do not easily fit within any of the 12 examples. Arguably, theft from a hack would fall within "*losses caused by circumstances beyond our control*", but that example would not include losses caused by a failure to have reasonable security measures in place.

8.58 However, limiting the scope of cl 12.1 to the examples listed would result in a strained interpretation. The wording is clear and unambiguous that all losses "*whether in tort, contract or otherwise*" are excluded: to say that losses in tort or contract are *not* excluded because they do not appear in the listed examples would mean that the wording in cl 12.1 is entirely meaningless except for that list. The ordinary meaning of cl 12.1 cannot support that. As the Court of Appeal reasoned in *BNZ v Christian Church Community Trust*, clear and express language providing that examples "do not limit" a general contractual power must be given effect: the courts cannot read down such language under the guise of interpretation.[279] Although cl 12.1 does not expressly say "*including, but not limited to*", the ordinary interpretation of "including" is that examples are to be provided for illustration, not that the preceding words are to be rewritten in light of the examples to follow.

8.59 The Terms and Conditions at cl 2 provided: [280]

> **Understanding Your Risks**
>
> Trading in Coins is speculative and high risk. You may lose some or all of any money or Coins that you hold or transact using the Platform. You should not trade Coins unless you can afford to lose your investment without hardship. Please read the Cryptopia Risk Statement carefully for a summary of some of the risks that you must understand before you use the Platform or Services.
>
> See clause 12 below for an explanation of how our liability is limited in some cases.

[279] *Bank of New Zealand v Christian Church Community Trust* [2024] NZCA 645 at [101]–[103].
[280] Exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0578.

8.60 The Risk Statement[281] drew account holders' attention to various risks, particularly drawing account holders' attention to the risk that cryptocurrencies were highly speculative and high risk, that the value of cryptocurrency was volatile, that projects could fail, that networks and software could be subject to weaknesses, that hackers were sophisticated, and that transmission of information over the internet was not secure and error-free: security breaches or system failures could occur. Key passages from the Risk Statement are reproduced below (emphasis added):[282]

> [1] **Buying and selling Coins is highly speculative and carries high risk. You may lose some or all of the money or Coins placed on the Platform. You use the Platform at your own risk.**
>
> [8] The value of Coins can be affected by many other factors including (but not limited to) future sales or further issues (e.g. airdrops), negative publicity involving the Coin issuer or project**, failure to deliver projects or failure of projects to meet expectations, failure of or material damage to the underlying network (including through cyber attack**), fraud or theft by or affecting the Coin issuer or project, competition in the issuer's market, technical failures or setbacks, or general global and economic conditions and sentiments. You must research Coins that you are interested in carefully. Their whitepapers or other offer materials may list further risks which are relevant to holding them.
>
> [11] All Coins, including transactions involving those Coins, rely on the operation of underlying networks and software. As this is developing technology**, the networks and software may be subject to technical weaknesses, bugs, system failures, and hacks by external parties**. **These failures may affect the Platform network and software itself** or may relate to a Coin's underlying network and software (including, but not limited to, a weakness in the underlying blockchain). You should understand the operation of the technology underlying a digital currency and the Platform to understand these risks.
>
> [13] **Hackers are sophisticated, and you may also be targeted by 'phishing' attacks or other scams.** Phishing includes where third parties masquerade as a legitimate Cryptopia site, social media account, telephone support number or App in order to steal your credentials. You should only access the Cryptopia Web site through its official website (Cryptopia.co.nz). Never click on a link or download an App from a third party. We strongly

[281] Risk Statement, exhibit DIR1-104 to Ruscoe first affidavit, 31 July 2025, 301.0413.
[282] Risk Statement, exhibit DIR1-104 to Ruscoe first affidavit, 31 July 2025, 301.0413.

recommend that you enable two factor authentication for all transactions to prevent unauthorised account use. Your Cryptopia passwords should be unique to Cryptopia and should never be stored insecurely on any personal device. If you are a victim of such an attack or scam, the hacker may be able to get you to send them money or Coins inadvertently or they may steal money or Coins.

[20] **The transmission of information over the internet (including to or from the Platform) is not completely secure or error free. You should stop transacting when it is clear there has been a breach of security or a system failure that poses a risk to security exists (such as malware, ransomware or phishing).**

8.61 Interpreted against that background, cl 12.1 could not be read as narrowly as to only exclude liability for the examples listed, *a fortiori*, when hacks are expressly referred to in the Risk Statement.

8.62 In its letter dated 25 September 2019, GNY advanced the position that exclusion clauses are unusual and onerous, and that Cryptopia was therefore required to bring them to GNY's attention.[283] GNY also said that Cryptopia cannot exclude liability for fraud, including equitable fraud (although GNY has not advanced any such claims).[284]

8.63 Clause 12.1 is not onerous or unusual. The terms and conditions for other cryptocurrency exchanges (Binance, Coinbase, Kraken, Plus500, Uphold, Gatecoin) all contain broad exclusion and limitation of liability clauses which are more onerous than Cryptopia's.[285]

(a) Plus500's terms and conditions dated 2018 limited its liability to USD 100.[286]

(b) Uphold's terms and conditions as at January 2020 included similarly broad limitations and exclusions. It excluded liability for all

[283] GNY letter to liquidators, 25 September 2019 at [49], exhibit [redacted]69 to [redacted] affidavit, 31 March 2025, 302.0959 at 302.0967, referring to *Owens Cool Air Services Ltd v Veri Kiwi Cool Stores Ltd* [1997] DCR 273 and *Wynne v New Zealand Insurance Ltd* [2002] DCR 217 at [19]–[22].
[284] Letter from GNY to liquidators 25 September 2019 at [16] and [20], exhibit [redacted]67 to [redacted] first affidavit, 30 March 2025, 302.0961 to 302.0962.
[285] Binance New Zealand "Terms of use" (July 2019) at clause 8, exhibit DIR3-1 (401.0039) to Ruscoe updating affidavit, 23 April 2026 at 401.0042; Coinbase "Coinbase User Agreement" (October 2018) at clause 8.3, exhibit DIR3-7 (401.0045) to Ruscoe updating affidavit, 23 April 2026 at 401.0053; Kraken "Terms of Service" (October 2018), exhibit DIR3-30 (401.0068) to Ruscoe updating affidavit, 23 April 2026 at 401.0080; Plus500 "Website Terms of Use" (2018) at clause 10, exhibit DIR3-47 (401.0085) to Ruscoe updating affidavit, 23 April 2026 at 401.0088; Uphold "General Terms and Conditions" (January 2020) at clause 12, exhibit DIR3-54 (401.0092) to Ruscoe updating affidavit, 23 April 2026 at 401.0111 – 401.0112; and Gatecoin "Terms of Use" (March 2019) at clause 20, exhibit DIR3-77 (401.0115) to Ruscoe updating affidavit, 23 April 2026 at 401.0120.
[286] Plus500 "Website Terms of Use" (2018) at clause 10.7, exhibit DIR3-47 (401.0085) to Ruscoe updating affidavit, 23 April 2026, at 401.0089.

consequential, special, indirect, or incidental damages and capped its aggregate liability at the greater of fees paid in the preceding three months or USD100.[287]

8.64 The limitation and exclusion clauses were not so unusual as to require Cryptopia expressly to draw them to account holders' attention.[288] As discussed above at [6.7]-[6.19]:

(a) All account holders were expressly required to select a box indicating their agreement to Cryptopia's terms and conditions, which Mr [redacted] and Mr [redacted] both did.

(b) The Earlier Terms and Conditions put account holders on notice that they may change and it was necessary to check them regularly.[289]

(c) Clause 1E required account holders to read the Terms and Conditions carefully and that account holders were bound by the terms. The clause further provided that if an account holder disagreed with any of the terms, they were to stop using the Platform and Services immediately.

8.65 GNY must have been aware of and accepted the clauses or is at least deemed to have done so: when Mr [redacted] created his account in November 2018, the Terms and Conditions were already effective (see [6.1]). Mr [redacted] had accepted the Earlier Terms and Conditions but is deemed to have accepted the Terms and Conditions when they were changed (see [6.16]). Nevertheless, Cryptopia did provide notice:

(a) Changes to the terms and conditions from the Earlier Terms and Conditions[290] were brought to account holders' attention by an email dated 7 August.[291] The email stated that Cryptopia had made a number of important changes and included a hyperlink to a full version of the Terms and Conditions. The email also informed account holders that by continuing to trade on Cryptopia's exchange they accepted those changes.

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[287] Uphold "General Terms and Conditions" (January 2020) at clause 12.4, exhibit DIR3-54 (401.0092) to Ruscoe updating affidavit, 23 April 2026, at 401.0112.
[288] For example, in *Spiteri v RCR Infrastructure (New Zealand) Ltd* [2017] NZHC 438, it was relevant that a limitation clause was in incredibly small font.
[289] See exhibit DIR1-96 to Ruscoe first affidavit, 31 July 2025, 301.0002 at 301.0003. As discussed above at [6.8] and [6.13]–[6.19].
[290] Though noting that the extent of the exclusion and limitation clauses was similarly broad in both versions.
[291] An example of the email that was sent to account holders is exhibited at DIR1-99 to Ruscoe first affidavit, 31 July 2025, 302.0606 at 302.0607.

(b) Specific attention was drawn to the exclusion and limitation clauses in the beginning section (cl 2) of the Terms and Conditions (excerpt at [8.59]).[292] Clause 12 was hyperlinked there. Account holders were not required to read the entirety of the Terms and Conditions to find the clause.

8.66 In any event, the Earlier Terms and Conditions (which Mr [redacted] accepted when he registered his first account with Cryptopia) provided a similar exclusion clause:[293]

> We will not be liable for any damages, losses or expenses, or indirect losses or consequential damages of any kind, suffered or incurred by you in connection with your access to or use of this site or the content on or accessed through it.

8.67 On that basis, the exclusion clause should not be invalid because of insufficient notice of that clause.

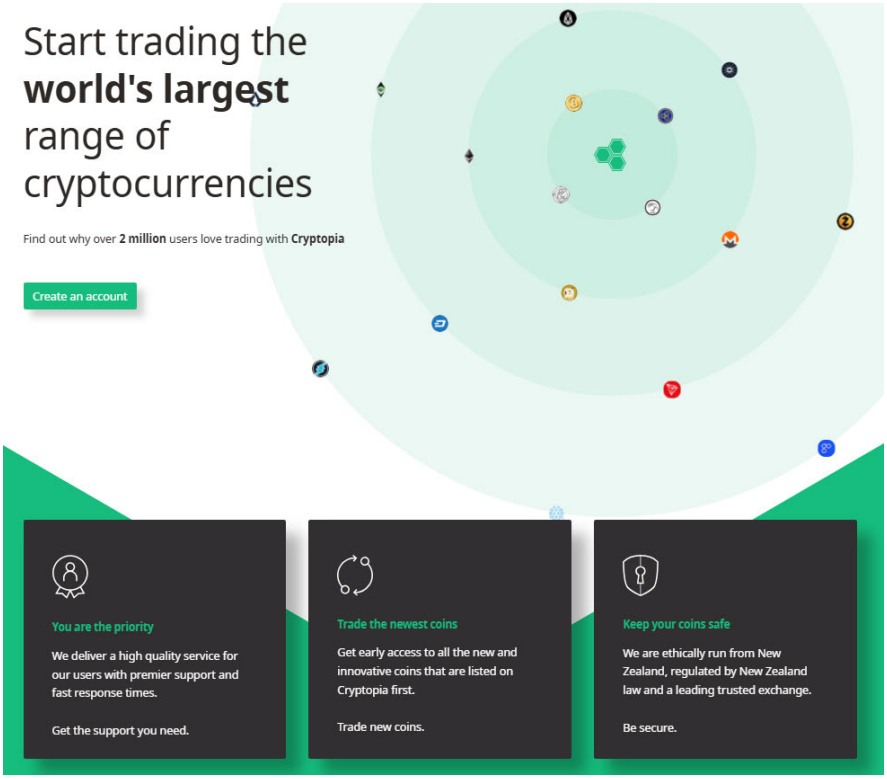
FTA

8.68 GNY alleges that Cryptopia made false or misleading representations in breach of s 13 of the FTA about the safety and security of Cryptopia's Platform and services[294] and claims compensation for its alleged losses.

8.69 GNY refers to representations on Cryptopia's website. Screenshots of the representations (the **Representations**) as they appeared on Cryptopia's homepage on 7 October 2018 (and exhibited to Mr [redacted] affidavit) are reproduced below:[295]

[292] Exhibit DIR1-81 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0578.
[293] Exhibit DIR1-96 to Ruscoe first affidavit, 31 July 2025, 301.0002 at 301.0003.
[294] GNY statement of claim, 11 April 2019 at [4], exhibit [redacted]8 to [redacted] first affidavit, 30 March 2025, 302.0912 at 302.0913.
[295] GNY statement of claim, 11 April 2019 at [4], exhibit [redacted]8 to [redacted] first affidavit, 30 March 2025, 302.0912 at 302.0913.

8.70 In their context on the website, these statements appeared under a heading related to account creation as shown below:[296]



8.71 This section addresses liability only, and is divided into the following sub-sections: whether the FTA claim is excluded by cl 12.1 (at [8.73]); legal principles under s 13 of the FTA (at [8.84]); what meaning the Representations conveyed (at [8.93]); whether that meaning was false or misleading (at [8.107]); whether GNY relied on the Representations and was

[296] Exhibit DIR3-88 to Ruscoe updating affidavit, 23 April 2026, 401.0126.

misled (at [8.143]); and whether GNY's reliance on the Representations caused any loss (at [8.152]). Loss is addressed in more detail for all causes of action alleged by GNY from [8.233].

8.72 Although the liquidators' position is that GNY is not an account holder of Cryptopia, that does not necessarily preclude it from bringing a claim under the FTA. These submissions proceed on the basis of GNY's unsecured creditor claim, which asserts that GNY has a claim under the FTA rather than Mr [redacted] and Mr [redacted]

Is the FTA claim excluded by cl 12.1?

8.73 If GNY is an account holder (as GNY argues), then there is a question about whether Cryptopia's liability would be limited by the Terms and Conditions. If it is not, then the limitation clause does not apply to GNY at all.

8.74 The exclusion in cl 12.1(a) does not apply to statutory claims under the FTA or CGA by virtue of cl 12.1(c). However, cl 12.1(d) caps Cryptopia's liability at $5,000 notwithstanding cl 12.1(c): it is intended to apply to liability under the FTA or CGA. The question is whether that is permitted by law.

8.75 The general rule contained in s 5C of the FTA is that the FTA and the CGA cannot be contracted out of except in prescribed circumstances, including if the parties to the agreement are in trade and agree to contract out.

8.76 Case law suggests that limitations of liability are an agreement to contract out of the FTA because ordinarily liability would not be limited.[297] Clause 12.1(d) will therefore only limit a claim under the FTA if the clause falls within the exception to the no contracting out rule in s 5D. Section 5D(3) requires: the parties to be in trade and for the services to be supplied and acquired in trade; the parties to agree to contract out of s 13; and that it is fair and reasonable that the parties are bound by the provision.

8.77 There is no issue that the parties were in trade and the services were supplied and acquired in trade.[298] There is also no issue that cl 12.1(d) reflects an agreement to contract out (see [8.53] above).

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[297] *Tauranga City Council v Harrison Grierson Holdings Ltd* [2024] NZHC 714 at [332]; *Tadd Management Ltd v Weine (as trustees of the Ruth Weine Family Trust)* [2023] NZHC 764, (2023) 24 NZCPR 1 at [359].

[298] GNY's statement of claim records that it "carries on business as a software development company" and "trades in cryptocurrency through its two tokens, GNY Tokens and Lisk Machine Learning tokens (LML tokens)." See GNY statement of claim, 11 April 2019 at [7]–[9], exhibit [redacted]8 to [redacted] first affidavit, 30 March 2025, 302.0912 at 302.0914.

8.78 In considering whether an exclusion clause is fair and reasonable, the Court must take account of all the circumstances of the agreement, including the matters specified at s 5D(4)(a)–(e):

(a) the subject matter of the agreement; and

(b) the value of the goods, services, or interest in land; and

(c) the respective bargaining power of the parties, including—

(i) the extent to which a party was able to negotiate the terms of the agreement; and

(ii) whether a party was required to either accept or reject the agreement on the terms and conditions presented by the other party; and

(d) whether the party seeking to rely on the effectiveness of a provision of the kind referred to in subsection (1) knew that a representation made in connection with the agreement would, but for that provision, have breached section 12A, 13, or 14(1); and

(e) whether all or any of the parties received advice from, or were represented by, a lawyer, either at the time of the negotiations leading to the agreement or at any other relevant time.

8.79 As to whether the clause was fair and reasonable, the Terms and Conditions were presented on a take-it-or-leave-it basis: account holders had no ability to negotiate the terms and were required either to accept or reject them in their entirety (s 5D(4)(c)(i) and (ii)).[299]

8.80 That said, GNY was not a vulnerable consumer but a sophisticated commercial party that voluntarily chose to use the Platform. It had plenty of options among other cryptocurrency exchanges operating at the time. Further, when GNY was engaging with Cryptopia in the listing process, GNY communicated that it was legally represented by international law firm Carey Olsen:[300] with the benefit of legal representation, it is reasonable to say that GNY was capable of obtaining advice on the Terms and Conditions before using the Platform.

[299] See *Bank of New Zealand v Christian Church Community Trust* [2024] NZCA 645, [2024] 3 NZLR 856 at [95].
[300] Email from GNY to Cryptopia re new project listing, exhibit PJS1-15 to Sibenik first affidavit, 1 August 2025, 302.0718.

8.81 The use of a cryptocurrency exchange involves a speculative and inherently risky activity, as the Risk Statement made clear.[301] GNY was a commercial entity that chose to participate in that market and under the conditions stipulated.

8.82 There is no evidence that Cryptopia knew that a representation it had made would, but for cl 12, have breached the FTA. The Representations were general promotional statements, and Cryptopia had engaged external cybersecurity experts and invested significantly in security measures (see below at [8.111]-[8.113]), which is inconsistent with any suggestion that it knowingly made false representations.

8.83 In all the circumstances, if GNY is an account holder then it is fair and reasonable for it to be bound by the Terms and Conditions that it agreed to. GNY was a commercial party operating in a speculative market, was on notice of the risks through the Risk Statement and the Terms and Conditions, and had the means and opportunity to assess those risks before electing to use the Platform. The clause should therefore be effective to limit Cryptopia's liability under the FTA to $5,000.

Legal principles – s 13 of the FTA

8.84 In full, s 13 of the FTA provides:[302]

> **False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—
>
> (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
>
> (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular

[301] Risk Statement, exhibit DIR1-104 to Ruscoe first affidavit, 31 July 2025, 301.0413 at 301.0413, discussed above at [8.60]
[302] Fair Trading Act 1986, s 13.

trade, qualification, or skill, or by a person who has other particular characteristics; or

(c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or

(d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or

(e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or

(f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or

(g) make a false or misleading representation with respect to the price of any goods or services; or

(h) make a false or misleading representation concerning the need for any goods or services; or

(i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993; or

(j) make a false or misleading representation concerning the place of origin of goods or services.

8.85 GNY has not articulated which subsection(s) it considers have been breached. It appears that the Representations most closely align with representations as to the particular "*kind, standard, [or] quality*" of services in s 13(b).[303]

[303] Performance characteristic in s 13(e) is likely not relevant as that section appears to relate to representations that a service or good will achieve a particular outcome. For example, criminal charges brought under s 13(e) in relation to representations that Zenith's "Body Enhancer" product would assist with a number of health measures, including weight loss, liver detoxification, and strengthening joints (see *Zenith Corporation Ltd v Commerce Commission* HC Auckland CRI-2006-404-245, 27 May 2008).

8.86 There are four elements that must be established for a breach of s 13:[304]

(a) The defendant made a representation in the course of trade;

(b) The representation was made in connection with the supply or possible supply of goods and services or with the promotion by any means of the supply or use of goods and services;

(c) The representation related to a matter listed in s 13 (e.g. kind, standard, or quality); and

(d) The representation was false or misleading.

8.87 There is no dispute that the content on the website amounted to a representation;[305] that Cryptopia was in trade when the Representations were made; or that the Representations were in connection with the supply of services (being a cryptocurrency exchange).

8.88 The material issues for determination are what the Representations are taken to mean and whether they were false or misleading. That is an objective inquiry to be determined with reference to the typical New Zealand consumer.[306]

8.89 The typical New Zealand consumer:

(a) Encompasses all consumers in the class targeted by the allegedly misleading representations, excluding outliers who are "*unusually stupid or ill equipped, or those whose reactions are extreme or fanciful*".[307]

(b) Understands a representation more by impression than by a high degree of analytical sophistication.[308]

(c) Will look out for their own interests and exercise a reasonable degree of care for a consumer with the characteristics of the target group, including their level of knowledge, acumen, and ability.[309] This may require the consumer to make further inquiries to rectify any

[304] *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 505.
[305] While "representation" is not defined in the FTA, the ordinary and natural meaning of "representation" involves a communication of a statement of fact by the representor to the representee, either directly or by clear and necessary implication (*Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 506, with reference to the definition in of "representation" in 31 *Halsbury's Laws of England* (4th ed, reissue, 1998, online ed) vol 31 at [1005] and [1019]–[1022], and the Australian case of *Given v Pryor* (1979) 24 ALR 442 at 446.
[306] *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611.
[307] *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611 at [20].
[308] *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 507.
[309] *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28] (***Red Eagle***).

misunderstanding about the standard or quality of a product or service.[310]

(d) Will exercise a degree of robust realism – the fact that a particular consumer's expectations are not met does not itself mean that there has been a misrepresentation. If a product or service does what it is claimed, albeit badly, the claim is not misleading.[311]

8.90 The context of the representation is important in determining both the target class of the representation and its meaning.[312] This includes the characteristics of the persons likely to be affected and the target class of the representation.[313]

8.91 The correct approach is to ask:[314]

(a) whether the typical consumer would understand the material in question as conveying the particular meaning alleged; and

(b) whether such a consumer would derive from it a message that is in fact misleading.

8.92 'Standard' and 'quality' are not defined in the FTA, but are defined in the dictionary as follows:[315]

(a) 'Standard', in the relevant sense means "a required or specified level of excellence, attainment, wealth, etc." or "a thing serving as a recognised example or principle to which others conform or should conform or by which the accuracy or quality of others is judged."[316]

(b) 'Quality' means "an attribute, property, special feature, or characteristic" or "the nature or kind of something. Now, the relative nature or standard of something; the degree of excellence etc. possessed by a

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[310] *Tasman Insulation New Zealand Ltd v Knauf Insulation Ltd* [2015] NZCA 602, [2016] 3 NZLR 145 at [256].
[311] *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187 at 193.
[312] *Geddes v New Zealand Dairy Board* CA180/03, 20 June 2005 (CA) at [78]; *Energizer NZ Ltd v Panasonic New Zealand Ltd* HC Auckland CIV-2009-404-4087, 16 November 2009 at [64].
[313] *Tasman Insulation New Zealand Ltd v Knauf Insulation Ltd* [2015] NZCA 602, [2016] 3 NZLR 145 at [256], citing *Red Eagle* at [28].
[314] *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 507 and 508; *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611.
[315] See *Commerce Commission v Bepeay Services Ltd* (1990) 3 TCLR 626 (DC), citing *Ducret v Chaudhary's Oriental Carpet Palace Pty Ltd* (1987) ATPR 40-804 (FC) and *Given v CV Holland (Holdings) Ply Ltd* (1977) ATPR 40-029 (FC). Gaskell J looked to Australian case law and ordinary dictionary definitions for guidance.
[316] *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, 2007). The definition from a previous version of the Shorter Oxford English Dictionary was referred to in *Ducret v Chaudhary's Oriental Carpet Palace Pty Ltd* (1987) ATPR 40-804 (FC), as cited in *Commerce Commission v Bepeay Services Ltd* (1990) 3 TCLR 626 (DC) at 641–642, as follows "*a definite level of excellence, attainment, wealth or the like, or a definite degree of any quality, viewed as a prescribed object of endeavour or as the measure of what is adequate for some purpose*."

thing; a particular class or grade of something as determined by this."[317]

What meaning did the Representations convey?

8.93 Under a heading saying "*Keep your coins safe*", the Representations state "*Be Secure*" and that Cryptopia's exchange is "*ethically run*", "*regulated by New Zealand law*" and "*a leading trusted exchange*". Under a heading saying "*System overview",* the Representations state that Cryptopia's exchange is "*simple to use, fast and secure*" (see [8.69]).

8.94 GNY's claim focuses on allegations that Cryptopia failed to have reasonable security measures to prevent the Hack. Presumably, it is the use of the words "safe" and "secure" that is in issue.

8.95 First, it is not clear from the Representations what exactly is represented as being "safe" or "secure". To name only a few, the Representations could apply to:

(a) the Cryptopia website and web application;

(b) account access;

(c) account holder information and data; or

(d) Cryptopia's wallets.

8.96 In its context, the representation "*Keep your coins safe*" and "*Be secure*" appears alongside representations that Cryptopia is located and operated in New Zealand and subject to New Zealand regulation. Seemingly, "*safe*" refers to regulatory risk. Similarly, the representation that the exchange is "*simple to use, fast and secure*" is in a section headed "*System overview"* and would appear to relate to use of the exchange (i.e., creating an account and making trades).

8.97 Second, it is not clear what "safe" or "secure" means. The Representations are vague as to the level, extent, or method of security measures employed by Cryptopia.[318] They do not refer to any particular standard (for example, the "ACSC Essential Eight" or the NZISM[319]), nor do they specify what is

[317] *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, 2007). This definition was referred to in *Given v CV Holland (Holdings) Ply Ltd* (1977) ATPR 40-029 (FC), as cited in *Commerce Commission v Bepeay Services Ltd* (1990) 3 TCLR 626 (DC) at 641–642.
[318] See for example screenshots from the Bitbay website from September 2017 and February 2019, exhibit DIR3-85 to Ruscoe updating affidavit, 23 April 2026, 401.0123.
[319] Watson first affidavit, 31 July 2025 at [26], 201.0079; Dicks affidavit, 18 December 2025 at [22]–[23], 201.0163.

being represented as safe or secure. In the absence of any identifiable content, the Representations are incapable of conveying a representation as to the kind, standard, or quality of Cryptopia's services within the meaning of s 13(b). Tellingly, counsel is not aware of any cases that considered similarly indeterminate and vague representations about safety or security. Some assistance may be gained from cases such as *Commerce Commission v Eco-Pal Ltd,* where a general claim that something was "*safe for the environment*" could be dismissed as puffery. In doing so, the Court accepted expert evidence that specific claims tend to be relied upon by consumers more, even if they do not understand them.[320] By analogy, general statements of "safety" and "security" - without reference to any particular measure, standard, or benchmark - may similarly constitute mere puffery, conveying no meaningful representation as to kind, quality, or standard. That is particularly so in the context of a cryptocurrency exchange, where the inherent risks of the activity are well known and where the Risk Statement expressly drew attention to those risks.

8.98 The Concise Oxford English Dictionary defines "secure" as "certain to remain safe and unthreatened" and "protected against attack or other criminal activity".[321] It defines "safe" as "protected from or not exposed to danger or risk; not likely to be harmed or lost" and "(of a place) affording security or protection".[322]

8.99 These definitions convey a high and unqualified standard of certainty as to security with no exposure to danger or risk. It is unlikely that the typical cryptocurrency investor would take the Representations to mean something so stringent because they would:

(a) Be familiar with digital assets, blockchain technology, and the inherent risks of cryptocurrency trading. They would understand that cryptocurrency and the associated trading platforms are relatively new and unregulated forms of financial assets, with less developed security regulation and practices than, for example, a bank.

[320] *Commerce Commission v Eco-Pal Ltd* DC Auckland CRI-2010-063-4397, 21 June 2013 at [64] and [102].
[321] *Concise Oxford English Dictionary* (12th ed, Oxford University Press, 2011).
[322] *Concise Oxford English Dictionary* (12th ed, Oxford University Press, 2011).

(b) Have an awareness of the general risks in the digital age of hacks (as Mr [redacted] appears to have had, based on his knowledge of hacks and security breaches at other exchanges prior to the Hack.[323])

(c) Not have the analytical sophistication of a cybersecurity professional and would be unlikely to read the word "secure" as a reference to any specific level or standard of security.

8.100 The Representations, in their context as promotional statements on the Cryptopia website, appeared alongside qualifying representations as to the inherent risk in cryptocurrency trading. These are contained in both the Terms and Conditions and the Risk Statement.

8.101 The relevant principles for qualifying representations include that the overall impression conveyed by all representations must be assessed, with regard to whether any qualifying information is sufficiently prominent, proximate, and instructive to dispel any misleading dominant message that might otherwise entice consumers into the 'marketing web'.[324]

8.102 The Risk Statement was accessible via a hyperlink at the bottom of Cryptopia's home page from at least 29 April 2018.[325] It was also accessible from at least 15 August 2018 via hyperlinks in the Terms and Conditions (which account holders were required to accept prior to creating an account, or for existing account holders, were required to read before continuing to use Cryptopia's platform (see above at [6.7]).[326] Clause 2 of the Terms and Conditions refers to Cryptopia's Risk Statement and limitation of liability (excerpt at [8.59]).[327]

8.103 Although GNY asserts that it was unaware of the Risk Statement, one would expect the typical consumer taking reasonable care of their own interests to have read and considered it. If GNY chose not to read the Risk Statement then presumably that is because it was (already) cognisant of, or agnostic about, the risks of using this or any cryptocurrency exchange.

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[323] [redacted] first affidavit, 30 March 2025 at [38], 201.0021.
[324] These principles are set out in *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611 at [59] (citations omitted). Counsel note that while the present situation does not entirely map onto the headline and qualifying representation situation contemplated in *Godfrey*, these principles are nevertheless helpful.
[325] Ruscoe first affidavit, 31 July 2025 at [34], 201.0034. An archived version of Cryptopia's website, which shows a hyperlink to the Risk Statement, is exhibited at DIR1-108 to Ruscoe first affidavit, 31 July 2025, 301.0425 at 301.0427.
[326] Ruscoe first affidavit, 31 July 2025 at [35], 201.0034.
[327] Exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0578.

8.104 The Risk Statement (see above at [8.60]) outlines various risks involved with cryptocurrency generally, and with the Cryptopia exchange specifically. It includes subheadings such as "*Market risks", "Processing of transactions", "System risks", "Security of private keys and wallets", "Cyber security generally", "Consumer protection"* and *"Regulatory risks".*

8.105 On that basis, the Representations, properly construed in their context, do not convey any actionable meaning as to the standard or quality of Cryptopia's cybersecurity measures. They are vague promotional statements that, read alongside the extensive and clear caveats in the Risk Statement and Terms and Conditions relating specifically to the inherent risks in cryptocurrency exchanges and the possibility of hacks, would not lead the typical consumer to understand that Cryptopia was guaranteeing any particular level of security. The typical consumer would not read the Representations as a guarantee that the exchange was "*certain to remain safe and unthreatened"* or *"protected against attack or other criminal activity".* It is unlikely that the typical consumer would read the Representations as meaning anything in particular at all.

8.106 In the alternative, if the Representations are taken to convey any meaning, the highest they could reasonably be read is as a representation that some security measures were in place. Even a reading that reasonable security measures were in place may be going too far considering the vagueness of the Representations and the extensive qualifications in the Risk Statement.

Were the Representations false or misleading?

8.107 Neither 'false' nor 'misleading' is defined in the FTA. A commonsense approach is taken, and the words are typically taken to mean “wrong” or “incorrect”.[328] The question is whether a statement is “apt to mislead” the typical consumer in the shoes of the claimant,[329] not whether the claimant has *been* misled (although reliance is required to establish loss).

8.108 This must also be assessed at the time that the representations were complete.[330] The act of representing is complete "once the subject matter is irrevocably set forth or disseminated upon the course which is intended to

[328] *Commerce Commission v A & W Hamilton Ltd* (1989) 3 TCLR 398 (DC).
[329] *Commerce Commission v Budget Loans Ltd* [2016] NZDC 9294 at [24], citing *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 (HC) at 507.
[330] *Commerce Commission v Mega Vitamin Laboratories (NZ) Ltd* (1994) 6 TCLR 95 (DC) at 124. "*In my view, for the prosecution to establish that the representations made by making the brochure available to the public on 29 July 1992 it must prove that on that date the representations were false.*"

lead to the intended representee or representees".[331] For the purposes of submissions, the date at which the Representations must be assessed is presumably 7 October 2018, the date of the website screenshots exhibited by Mr [redacted] (see [8.69] above)).

8.109 In any case, it is difficult to assess whether the Representations were false or misleading because as noted above at [8.95], it is simply not clear what was represented.

8.110 As to the specific Representations that Cryptopia was "*regulated by New Zealand law*" (led by a heading saying "*Keep your coins safe*"); a "*leading trusted exchange*" and "*simple to use, fast and secure*" (led by a heading saying "*System overview"*):

(a) Cryptopia was registered under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 as a financial service provider operating a money or value transfer[332] and was supervised by the FMA.[333] It also had obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, regulated by the Department of Internal Affairs. Any representation that Cryptopia was regulated by New Zealand law was evidently true.

(b) GNY acknowledges that Cryptopia was well-known.[334] It was the fourth largest cryptocurrency exchange in the world with over 2.2 million registered users[335] and it had a total of 851 different cryptocurrencies listed on its exchange, understood to be one of the largest number of cryptocurrencies listed on any exchange at the time.[336] Representations that Cryptopia was a leading and trusted exchange also appear to be true.

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[331] *Thompson v Riley McKay Pty Ltd (No 2)* (1980) 29 ALR 267 at 276–277, cited in *Budget Loans Ltd v Commerce Commission* [2017] NZHC 695, [2017] NZCCLR 22 at [89].
[332] The Risk Statement (exhibit DIR1-104 to Ruscoe first affidavit, 31 July 2025, 301.0413 at 301.0413) records that "*Cryptopia is a registered as a financial service provider to operate a money or value transfer service (FSP580928). Cryptopia is not required to hold any licence or other registration in order to provide the Platform in New Zealand*".
[333] For example, see the FMA's correspondence with Cryptopia exhibited at DIR2-345, DIR2-348 and DIR2-226 to Ruscoe second affidavit, 4 November 2025, 301.0367, 301.0443 and 302.0849. The liquidators engaged with the FMA early in the liquidation. The FMA "advised that Cryptopia was at its regulatory perimeter and therefore a low priority.": Letter to GNY's solicitors, 24 June 2020, exhibit [redacted]90 to [redacted] first affidavit, 30 March 2025, 303.1020 at 303.1021.
[334] [redacted] first affidavit, 30 March 2025 at [10], 201.0003.
[335] As recorded in the liquidators eight report, exhibit [redacted]156 to [redacted] first affidavit, 30 March 2025, 303.1141 at 303.1144. This was also referred to in a letter from GNY's solicitors, exhibit [redacted]69 to [redacted] first affidavit, 30 March 2025, 302.0959 at 302.0966.
[336] Ruscoe affidavit in CIV-2023-485-411, 31 July 2023 at [42].

(c) It was simple and fast to create an account with Cryptopia. The process is set out in the Cryptopia FAQs.[337] It required a user to create a username, to nominate and then verify their email address, and to create a password for their account. An account holder could then begin trading.

(d) Cryptopia did have security features related to account creation and usage, including:[338]

(i) Minimum requirements for passwords, which Cryptopia staff were unable to access.

(ii) Increased account requirements for higher daily transaction limits. Level 2 accounts required identity verification, with more stringent identity verification and two-factor authentication required for Level 3.

(iii) reCAPTCHA, which required a person to select a tickbox saying "I am not a robot", and protected the website from spam, abuse, and other malicious software.

8.111 As to general representations that the exchange was safe and secure, it is necessary to consider the security measures Cryptopia had in place at the time of the Hack.

8.112 In response to a rapidly growing user base, and likely because there were no recognised security standards, Cryptopia engaged external cybersecurity experts. In November 2017, it engaged Pulse Security (**Pulse**) to conduct penetration testing, and then to provide recommendations on security upgrades.[339] For November 2017 to October 2018, Pulse provided 15 reports on security (at an expense of at least $410,000 incl GST).[340] Following these reports, Cryptopia implemented several security measures and improvements, including:

[337] Exhibit DIR2-103 to Ruscoe second affidavit, 8 November 2019 in CIV-2019-409-544 (Tab 4 to the previous Cryptopia proceedings bundle).
[338] See the Cryptopia Customer Service Analyst Manual, exhibit DIR3-93 to Ruscoe second affidavit, 8 November 2019 in the Trust Application (Tab 4 to the previous Cryptopia proceedings bundle) at pages DIR3-106–109 and DIR3-112. (
[339] Ruscoe first affidavit, 31 July 2025 at [70], 201.0042.
[340] Copies of Pulse statements of work located by the liquidators are at exhibit DIR2-65 to Ruscoe second affidavit, 4 November 2025 at 301.0130, 301.0146, 301.0228, 301.0235, 301.0274, 301.0275, 301.0322, 301.0384, 301.0394, 301.0387, 301.0488, 302.0565, 302.0566, 302.0571, 301.0172. These may be incomplete, as a draft Infrastructure and Security Department Plan dated 17 May 2018 (5 months before Pulse's final report in October 2018) records that Cryptopia had paid fees totalling $378,407.42 excluding disbursements: see exhibit DIR1-351 to first Ruscoe affidavit, 31 July 2025, 301.0490 at 301.0498.

(a) Password security measures and protection of Cryptopia's domains;[341]

(b) Began implementing the "Essential Eight" controls;[342]

(c) From July 2018, Adrian Hayes of Pulse provided virtual Chief Information Security Officer services to Cryptopia.[343]

8.113 In its last report in October 2018, Pulse observed that "the current state of cybersecurity within Cryptopia is higher than it was 6 months ago and will be higher again as planned changes are implemented" and that "Vulnerability management has greatly improved within Cryptopia in the previous few months."[344] Although Cryptopia remained "far from the level of security maturity required for a cryptocurrency exchange", it had implemented around 50% of the "ACSC Essential Eight" information security controls.[345]

8.114 Cryptopia also had several other security measures in place at the time of the hack, including:

(a) From 29 June 2017, Cryptopia paid for dedicated denial of service (**DDOS**) protection software from Incapsula. DDOS attacks are attacks that disrupt the service or network, making it unavailable to its users.[346]

(b) On 28 August 2018, Cryptopia entered into a second DDOS protection service contract with Cloudflare for US$32,000 per month, totalling approximately $1 million per year in DDOS protection alone.

(c) Cryptopia engaged Datacom TSS to perform a review of its security measures for $35,000.[347] It appears that Datacom TSS never completed that assessment.[348]

(d) Cryptopia engaged Red Rabbit Tech, an IT support company based in Wellington, from 29 November 2017 until 16 January 2018. Red Rabbit was contracted to design and build a more secure scalable

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[341] Ruscoe first affidavit, 31 July 2025 at [76], 201.0044.
[342] Watson first affidavit, 31 July 2025 at [24], 201.0078, referring to Pulse Report, exhibited at DIR1-345 to Ruscoe first affidavit, 31 July 2025, 302.0729 at 302.0729.
[343] Ruscoe first affidavit, 31 July 2025 at [70], 201.0042. Reports are exhibited at DIR1-111 (301.0137), DIR1-120 (301.0147), DIR1-142 (301.0173), DIR1-182 (301.0282), DIR1-214 (301.0314), DIR1-222 (301.0325), DIR1-253 (301.0363), DIR1-255 (301.0370), DIR1-265 (301.0428), DIR1-280 (301.0452), DIR1-288 (301.0465), DIR1-307 (301.0116), DIR1-315 (302.0593), DIR1-324 (302.0610) and DIR1-345 (302.0729).
[344] Pulse Virtual CISO Summary, 24 October 2018, exhibit DIR1-345 to Ruscoe affidavit, 31 July 2025, 302.0729.
[345] Pulse Virtual CISO Summary, 24 October 2018, exhibit DIR1-345 to Ruscoe affidavit, 31 July 2025, 302.0729.
[346] Ruscoe first affidavit, 31 July 2025 at [62], 201.0040–201.0041.
[347] Ruscoe first affidavit, 31 July 2025 at [74], 201.0043–201.0044; Correspondence with Datacom TSS, exhibit DIR1-347 to Ruscoe first affidavit, 31 July 2025, 301.0359.
[348] Datacom advised in June 2018 that "*To be fully transparent with you; the timing for when we commenced the engagement was far from ideal. Whilst we had capacity to start this in December last year, the delays pushed this into a very busy time for us*" (Exhibit DIR2-278 to Ruscoe second affidavit, 4 November 2025, 302.0671 at 302.0671).

environment that had additional operating system layers.[349] For reasons that are not known to the liquidators, this contract came to an end without the project being completed, after Cryptopia had paid for building rental, hardware, office equipment and a 20% margin on its rental costs.[350]

(e) Cryptopia engaged Inde Technology Limited to provide IT infrastructure consulting services.[351]

(f) Cryptopia had drafted an IT security policy and appears to have been working on rolling it out, but it is unclear if this eventuated.[352]

(g) A tandem hot and cold wallet system (discussed below at [8.119].

8.115 If the Representations would convey to the typical consumer that Cryptopia had some security measures in place, then that would plainly be true. In order to establish liability under the FTA, the typical consumer would need to take the Representation to mean, at minimum, that Cryptopia had *reasonable* security measures in place. If the Court finds that the Representations would convey such a meaning (denied – see above at [8.105]-[8.106]), these submissions accordingly address whether Cryptopia had reasonable security measures in place.

8.116 Neither the liquidators' nor GNY's expert has identified an industry or regulatory standard of cybersecurity expected of a cryptocurrency change in 2018 or early 2019.[353] In contrast, the large majority of cases under the FTA related to "*standard*", "*kind*" or "*quality*" tend to refer to a specific industry or regulatory standard.[354] Cryptopia was operating in a largely unregulated environment (and one that remains largely unregulated in New Zealand in 2026).[355]

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[349] Ruscoe second affidavit, 4 November 2025 at [13], 201.0120. Statements of work and an extension of work are at exhibit DIR2-1 to Ruscoe second affidavit, 4 November 2025, 302.0213 and 302.0686. For completeness, Mr Nicholson said in a s 261 interview that Red Rabbit was engaged from 29 November 2017, which seems to be mostly consistent with the statement of work which was signed on 20 December 2017, at 201.0120.
[350] Ruscoe second affidavit, 4 November 2025 at [13], 201.0120. Mr Nicholson said in a s 261 interview that Cryptopia's financial team reconsidered the expenditure in around January 2018 and the project then terminated, at 201.0120.
[351] Ruscoe second affidavit, 4 November 2025 at [14], 201.0120–201.0121.
[352] Ruscoe second affidavit, 4 November 2025 at [23], 201.0123–201.0124. A number of other security measures are also listed at [23] of Mr Ruscoe's affidavit.
[353] Watson first affidavit, 31 July 2025 at [9]–[10], 201.0075; Dicks affidavit, 18 December 2025 at [22]–[23], 201.0163.
[354] See for example, *Commerce Commission v Steel & Tube Holdings Ltd* [2020] NZCA 549, (2020) 15 TCLR 743.
[355] The FMA advised, for example, "that Cryptopia was at its regulatory perimeter and therefore a low priority.": Letter to GNY's solicitors, 24 June 2020, exhibit [redacted]90 to [redacted] first affidavit, 30 March 2025, 303.1020 at 303.1021.

8.117 Although both experts point to various established standards and frameworks that related generally to information security and cybersecurity, they were neither binding nor enforceable:[356]

(a) the International Standard ISO27000 (which provided information standards against which organisations could choose to certify);

(b) the National Institute of Standards and Technology Cybersecurity frameworks as formal frameworks for information and cybersecurity;

(c) the Australian Cyber Security Centre (**ACSC**) "*Essential Eight*"; and

(d) Mr Dicks for GNY also points to the general principles of confidentiality, integrity, and availability (the CIA triad), and four principles which he says were important features of any effective cyber-security model in 2018. These are:[357]

(i) the least privilege principle;

(ii) the network segregation principle;

(iii) the patching systems requirement; and

(iv) the depth in defence principle.

8.118 While these standards and frameworks may be of general relevance to cybersecurity, they are not specific to cryptocurrency or to online exchanges of such. As Mr Watson says, "*it should be noted that these were generally adopted by larger and / or regulated entities rather than smaller unregulated businesses, such as Cryptopia.*"[358] There are important features of Cryptopia's exchange that these frameworks do not easily map on to.

8.119 For example, Cryptopia held some of its cryptocurrency in hot wallets, and some in cold wallets. A cold wallet is not connected to the internet and is therefore more difficult (though not impossible) to hack.[359] Conversely, hot wallets are connected to the internet, but they allowed Cryptopia to process account holders' deposits and withdrawals quickly. It appears that Cryptopia typically held one hot wallet per cryptocurrency, and then pooled Cryptopia and account holder assets in cold wallets.[360] Cryptopia operated this tandem

[356] Watson first affidavit, 31 July 2025 at [11], 201.0075; Dicks affidavit, 18 December 2025 at [25], 201.0163–201.0164.
[357] Dicks affidavit, 18 December 2025 at [19], 201.0160–201.0162.
[358] Watson first affidavit, 31 July 2025 at [11], 201.0075.
[359] Ruscoe first affidavit, 31 July 2025 at [64]–[65], 201.0041.
[360] Ruscoe second affidavit, 4 November 2025 at [36], 201.0127.

hot-cold wallet system, in part, to manage security risks associated with hot wallets.[361] While not certain, it is likely that the hot wallets were more heavily affected by the Hack.[362] Presumably, such practices would be expected of any cryptocurrency exchange.

8.120 The reason that there is no one standard is because, as is clear from the above-mentioned example, each business has different needs and risk profiles and cyber-security solutions are too fluid to be captured in fixed rules – technology and cyber solutions are constantly changing and updating and are necessarily tailored to the specific needs of each business.[363]

8.121 Experts for both the liquidators and GNY agree that Cryptopia's risk profile was high by virtue of it being a high-profile cryptocurrency exchange.[364] As Mr Dicks observes, the risks of a hack were well publicised as a result of a series of high-profile hacks, including:[365]

(a) Mt Gox in 2014 (approximately USD 460 million of BTC stolen).

(b) Coincheck in January 2018 (approximately USD 534 million of tokens stolen).

(c) Coinrail in June 2018 (approximately USD 40 million of tokens stolen).[366]

8.122 In addition to that:

(a) In March 2018, the National Cyber Security Centre (**NCSC**) arranged a meeting with Cryptopia management and informed them that the Company was on a target list for state-sponsored hackers.[367]

(b) Mr Booth (Cryptopia's Chief Executive Officer from approximately February 2018 to October 2018)[368] in an interview conducted under oath pursuant to s 261 of the Companies Act 1993 (of which the liquidators have no personal knowledge) told the liquidators that the

[361] Ruscoe first affidavit, 31 July 2025 at [65]–[67], 201.0041.
[362] Ruscoe first affidavit, 31 July 2025 at [68], 201.0041–201.0042.
[363] Dicks affidavit, 18 December 2025 at [22]–[23], 201.0163.
[364] Mr Watson describes Cryptopia as providing "*a high-risk service in a high-risk sector*" (Watson first affidavit at [28], 201.0079) and Mr Dicks says "*I agree with Mr Watson's assessment that Cryptopia was in the high-risk category for a cyber-attack due to the nature of its business*" (Dicks affidavit, 18 December 2025 at [34], 201.0165).
[365] Dicks affidavit, 18 December 2025 at [33], 201.0165.
[366] The Coinrail hack also appears at 303.1275 of the United Nations Security Council report of hacks suspected to be carried out by the Democratic People's Republic of Korea, discussed below at [8.155]. The report is exhibited CKW1-42 to Watson first affidavit, 31 July 2025, 303.1227.
[367] Ruscoe first affidavit, 31 July 2025 at [73], 201.0043 and exhibit DIR1-347 at 301.0361.
[368] Ruscoe second affidavit, 4 November 2025 at [8(c)], 201.0119.

Cryptopia exchange platform was "*pinged multiple thousands of times a day*" and its security system was effectively repelling those penetration attempts.[369]

8.123 Considering that risk profile, both experts agree that there were issues with Cryptopia's security and that Cryptopia could have done more considering its risk profile. Those issues included poor network segregation, a lack of security governance within Cryptopia and / or lack of a dedicated cyber-security team, issues with password and credential security, a lack of immutable logging, and vulnerabilities with its website.[370] It is also clear that Cryptopia did not have a cohesive approach to security: its implementation of security measures was ad hoc and followed an approach of implementing the easiest fixes first.[371]

8.124 However, it is also relevant what Cryptopia did try to do. In addition to the security measures it had in place (see [8.111]-[8.113]) it is clear from the evidence that Cryptopia attempted to engage external providers to improve its security systems and capabilities.

(a) As discussed above [8.112]-[8.113], Pulse provided 15 penetration testing reports between November 2017 and October 2018 (referred to as 'red team' services).

(b) Cryptopia also considered engaging Aura, Insomnia, PwC or Datacom TSS to provide security infrastructure services.[372]

(c) Following penetration testing, Cryptopia sought to engage Pulse to upgrade its security systems and practices (referred to as 'blue team' services, in contrast to the 'red team' services which conducted penetration testing). In February 2018, Pulse proposed a contractual arrangement whereby it would hire, manage and develop a dedicated security operations team to fulfil Cryptopia's requirements.[373] The quoted cost was $4,994,200 for the first year, and $1,689,400 for each year thereafter (that price included a $3 million non-refundable

[369] Ruscoe second affidavit, 4 November 2025 at [21], 201.0123.
[370] See Dicks affidavit, 18 December 2025 at [53], 201.0172–201.0173; Watson first affidavit, 31 July 2025 at [22], 201.0078 [27], 201.0079, [51] and [53], 201.0084.
[371] Ruscoe first affidavit, 31 July 2025 at [76], 201.0044.
[372] Exhibit DIR2-284 to Ruscoe second affidavit, 4 November 2025, 301.0124; Exhibit DIR1-347 to Ruscoe first affidavit, 31 July 2025, 301.0359.
[373] Pulse Security Operations Services Statement of Work, exhibit DIR2-191 to Ruscoe second affidavit, 4 November 2025, 301.0259.

management fee and a ~$300,000 contingency fee).[374] This price was notably high, as Pulse did not at the time have the capabilities to provide the required services: to perform blue team services, it would need to hire staff, locate secure premises, establish the necessary services (internet, phone, video), build a virtual platform, and would be building its own team and capabilities as it went.[375] It also included a management fee provision to account for the risk to the Pulse Security team's reputation and redundancy in the event of a "*catastrophic issue being realised*".[376] At the time (March 2018), Cryptopia had approximately $1.8 million in its bank accounts, although it also had cryptocurrency holdings in each of the trust.[377] By June it had approximately $3.28 million.[378] Plainly, that would have been insufficient to pay Pulse's fees even if Cryptopia had no other business expenses. Cryptopia management was understandably reluctant to pay those fees without examining other options and seeking quotes from other providers.[379]

(d) In its meeting with Cryptopia, the NCSC advised that Cryptopia should engage an established, 24/7 security operation centre rather than build its own or engage Pulse to build one.[380] The NCSC advised that Datacom TSS was credible, but that it was not sure if Pulse or PwC could provide the necessary services.[381] It also recommended that Cryptopia implement host-based monitoring.[382] In an interview conducted under oath pursuant to s 261 of the Companies Act 1993, Mr Sanders advised the liquidators that Pulse later advised that there was no point in introducing host-based protection or 24/7 monitoring because that could be managed in other ways.[383]

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[374] Pulse Security Operations Services Statement of Work, exhibit DIR2-191 to Ruscoe second affidavit, 4 November 2025, 301.0264.
[375] Pulse Security "Discussion Document", exhibit DIR2-198 to Ruscoe second affidavit, 4 November 2025, 301.0323.
[376] Pulse Security "Discussion Document", exhibit DIR2-198 to Ruscoe second affidavit, 4 November 2025, 301.0324.
[377] Cryptopia balance sheet as at 31 March 2018, exhibit DIR1-368 to Ruscoe first affidavit, 31 July 2025, 301.0385.
[378] Cryptopia balance sheet as at 30 June 2018, exhibit DIR1-370 to Ruscoe first affidavit, 31 July 2025, 301.0542.
[379] Exhibit DIR2-292 to Ruscoe second affidavit, 4 November 2025, 301.0266.
[380] Mr Sanders' notes from NCSC meeting, exhibit DIR2-200 to Ruscoe second affidavit, 4 November 2025, 301.0072.
[381] Mr Sanders' notes from NCSC meeting, exhibit DIR2-200 to Ruscoe second affidavit, 4 November 2025, 301.0072 at 301.0073.
[382] Mr Sanders' notes from NCSC meeting, exhibit DIR2-200 to Ruscoe second affidavit, 4 November 2025, 301.0072.
[383] Ruscoe second affidavit, 4 November 2025 at [29], 201.0125.

(e) After the NCSC notified Cryptopia that it was on a target list for state-sponsored hackers in March 2018, Cryptopia engaged with Datacom TSS. In an email to Datacom TSS, Mr Sanders (general manager of Cryptopia[384]) said that Cryptopia had been engaging with PwC about providing "blue team" services (i.e., building and developing Cryptopia's security infrastructure) and had been considering engaging Pulse (who would be "*basically creating a new branch of their company, going out and* hiring *new staff to create a Blue team at massive cost")*.[385] Datacom TSS advised that they did not consider Pulse or PwC to have the capability to deliver the security systems required and recommended that Cryptopia first undertake a full cybersecurity resilience assessment and said that "*Our approach is different to the main stream approach, as these have failed for more* [sic] *two decades and will continue to fail because most consultants lack the knowledge necessary to combat contemporary threats.*" [386] In April 2018, Cryptopia approved a proposal from Datacom TSS to carry out that assessment.[387] It appears that Datacom TSS never completed that assessment.[388]

8.125 The question is what Cryptopia ought reasonably to have done in the circumstances. Plainly, Cryptopia received conflicting advice, and there did not appear to have been viable options available to Cryptopia for a full-scale security review, despite its efforts. That was necessary for Cryptopia to develop a security plan.

8.126 Mr Watson's expert opinion is that after a plan had been designed, it could take three to six months to fully implement, test and remediate a programme of works to upgrade Cryptopia's security infrastructure, although that timeframe would commonly be longer if a company was relying on external providers (as Cryptopia was).[389] Mr Watson also estimates that this could cost a minimum of $200,000 - $400,000 to implement.[390] On that basis, if Cryptopia had developed a plan immediately after Pulse provided its final

[384] Ruscoe second affidavit, 4 November 2025 at [8(f)], 201.0119.
[385] Ruscoe first affidavit, 31 July 2025 at [73], 201.0043; exhibit DIR1-347 to Ruscoe first affidavit, 31 July 2025, 301.0360.
[386] Ruscoe affidavit 31 July 2025 at [73], 201.0043 and exhibit DIR1-347, 301.0359.
[387] Exhibit DIR2-262 to Ruscoe second affidavit, 4 November 2025, 301.0397.
[388] Datacom advised in June 2018 that "*To be fully transparent with you; the timing for when we commenced the engagement was far from ideal. Whilst we had capacity to start this in December last year, the delays pushed this into a very busy time for us"* (Exhibit DIR2-278 to Ruscoe second affidavit, 4 November 2025, 302.0671).
[389] Second Watson affidavit at [5]–[8], 201.0253.
[390] Second Watson affidavit at [5] –[8], 201.0253.

report on 24 October 2018, it could have been implemented between January 2019 - April 2019 at earliest.

8.127 If Cryptopia had the funds to pay the $5 million in fees requested by Pulse in February / March 2018 and work began immediately, work may have been completed between June 2018 - September 2018, although that does not account for any time to develop a plan or for Pulse to build its security team, acquire the resources it needed, or to develop its capabilities (which could reasonably take several months).

8.128 Cryptopia's circumstances should also be taken into account. For one, Cryptopia was a relatively young company that was experiencing enormous and rapid growth. It was operating in an emerging and developing industry, in which there were no industry standards or regulations to guide appropriate practice. For another, several key Cryptopia staff members left during this time including both its founding directors and its chief executive officer, and there were ongoing tensions between Cryptopia management and Intranel.[391] Cryptopia was also working through various teething issues, which included a loss of banking services, and reviewing its AML / CFT processes.

8.129 While experts for both the liquidators and GNY agree that there were issues with Cryptopia's security and that Cryptopia could have done more, that does not necessarily mean the Representations are false or misleading.[392] Mr Dicks for example, was assessing Cryptopia's security against what he considered to be "appropriate" or "best practice" cyber-security for a cryptocurrency exchange,[393] rather than what might be *reasonable* (which is the highest the Representations can be read).[394] Nor does Mr Dicks consider the context of cryptocurrency exchanges at the time (or Cryptopia's specific circumstances).[395]

8.130 Crucially, whether Cryptopia's measures fell short of what Mr Dicks considers appropriate with the benefit of hindsight and cybersecurity expertise, which Cryptopia did not have, does not automatically mean that the meaning

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[391] Ruscoe first affidavit, 31 July 2025 at [80(a)], 201.0045. Intranel was a software development company based in Christchurch. In early to mid-2017, Intranel obtained a 25% shareholding in Cryptopia and many Intranel staff worked full-time for Cryptopia and took care of recruitment and administration for the Company (See Ruscoe first affidavit, 31 July 2025 at [61] and [80(b)], 201.0040 and 201.0045).
[392] Watson second affidavit, 28 January 2026 at [9], 201.0254.
[393] See, for example Dicks affidavit, 18 December 2025 at [9.1], 201.0157, [17], 201.0160, [26], 201.0164, [56], 201.0174, and [98], 201.0186.
[394] For completeness, we note that while Mr Dicks does make several references to 'reasonable' measures, he seems to use this term interchangeably with 'appropriate' and 'adequate'. It is not clear, therefore, that Mr Dicks' assessment is properly an assessment of what was reasonable in the circumstances of cryptocurrency exchanges at the time, and what was reasonable with regards to Cryptopia's specific circumstances.
[395] Dicks affidavit, 18 December 2025 at [9.1], 201.0157.

conveyed by the Representations at the time was false or misleading to the typical consumer.

8.131 Cryptopia had various security measures in place ([8.111]-[8.114]) and it is evident that Cryptopia had given thought to security, was actively investing in and seeking expert advice ([8.124]) and was improving its security ([8.113]). That is to be considered in its context, where the Risk Statement and Terms and Conditions made clear that risk remained with the account holder; when the Representations did not purport to guarantee any particular level of security (in fact, there was no recognised standard of security); and in an emerging and unregulated environment where the Company was operating with significant management turnover and in a constrained financial situation. In those circumstances, Cryptopia's security measures may have been reasonable (if that is the meaning the typical consumer would have taken from the Representations, which is denied – see [8.105]-[8.106]). The liquidators respectfully seek the court's direction on this.

ETH

8.132 As discussed above, Cryptopia held some of its cryptocurrency holdings in cold wallets and some in hot wallets.[396] Put simply, cold wallets are not connected to the internet and are therefore more difficult (but not impossible) to hack.[397] Because cold wallets lack connectivity, Cryptopia operated hot wallets to deal with high volumes of deposits and withdrawals in order to deliver its services to account holders quickly.[398]

8.133 The liquidators have no knowledge about the extent or frequency of cold wallet transfers at Cryptopia at the time of the Hack, or which wallets were hot or cold at any time prior to their appointment.[399]

8.134 Cryptopia management advised in interviews conducted under oath pursuant to s 261 of the Companies Act 1993 that:

(a) Cryptopia typically kept one hot wallet per currency, and each currency would have a proportion of cryptocurrency stored in hot wallets to enable them to be available for withdrawals from the exchange (unless there was no corresponding cold wallet for that cryptocurrency).[400]

[396] Ruscoe first affidavit, 31 July 2025 at [64], 201.0041.
[397] Ruscoe first affidavit, 31 July 2025 at [65], 201.0041.
[398] Ruscoe first affidavit, 31 July 2025 at [65], 201.0041.
[399] Ruscoe second affidavit, 4 November 2025 at [19], 201.0122.
[400] Ruscoe second affidavit, 4 November 2025 at [36], 201.0127.

(b) Mr Dawson (founder) managed hot and cold wallets until he ceased working at Cryptopia in July 2018[401] (he returned in November 2018) and attempted to keep the proportion of funds in hot wallets at around 10% of total value, but that depended on the number of transactions occurring each day for each particular currency: the more transactions, the larger the 'float' required in hot wallets.[402]

(c) Cold wallet practices were implemented for cryptocurrencies with the highest value first, and there were some lower value cryptocurrencies for which no cold wallet was established. [403]

(d) At some stage, Cryptopia was setting up 'trezor' wallets.[404] Trezor wallets are hardware wallets that interface with a wallet connected to the internet, and not all cryptocurrencies can be held in a trezor wallet. The trezor wallets were managed by four Cryptopia personnel and required a combination of two authorised personnel to access them.

(e) At various stages, Cryptopia was developing code to automate the cold wallet practices for higher-value cryptocurrencies (including LTC, DOT and BTC), but that the process was very complex. Apparently, a scheme had been developed but not quite implemented by October 2018.[405] It may have been implemented after that: the liquidators have no way to know.

8.135 Mr Dawson also told the liquidators that a cold wallet system was never implemented for ETH: he had decided to delist the currency at some stage, and when it was relisted a wallet was never established.[406] (If Cryptopia never had a cold wallet for ETH, then all tokens on the ERC-20 blockchain would have been in hot wallets – including LML.) Cryptopia's Ethereum wallet maintained a positive balance from June 2017 to the date of the Hack, so if it was delisted, it must have been prior to that date – the liquidators cannot verify whether that occurred.[407] Mr Dawson was the only person in Cryptopia management who said this. Mr Dawson left Cryptopia in April 2018 and returned in November 2018, but he says that he only managed some cold wallets after November 2018 and did not have access to the 'new

[401] Ruscoe second affidavit, 4 November 2025 at [34], 201.0126.
[402] Ruscoe second affidavit, 4 November 2025 at [16], 201.0121.
[403] Ruscoe second affidavit, 4 November 2025 at [16], 201.0121.
[404] Ruscoe second affidavit, 4 November 2025 at [35], 201.0126.
[405] Ruscoe second affidavit, 4 November 2025 at [17], 201.0122.
[406] Ruscoe second affidavit, 4 November 2025 at [16], 201.0121.
[407] Ruscoe second affidavit, 4 November 2025 at [16], 201.0121.

servers' (being those at Phoenix, Arizona). He also said that it was the new server that was hacked.[408]

8.136 The liquidators have been unable to verify whether that is correct, and the matter is complicated by the fact that there were significant changes to Cryptopia's management throughout 2018:[409] the lack of continuity makes it difficult to ascertain what was in place. It is possible that Cryptopia had a cold wallet in place for ETH. However, based on analysis of transaction volumes and deposit wallets, it is clear that ETH and ERC-20 deposits were swept from deposit addresses into one ETH wallet, rather than portions being segregated into an intermediary or separate wallet.[410] Most likely, that wallet was hot to allow for withdrawals.

8.137 As at the time of the Hack:[411]

(a) All of, or many of, Cryptopia's ETH holdings were stored in a hot wallet (and were accordingly mostly stolen – Cryptopia still holds around 290 ETH.[412] It is not clear whether this is from the compromised wallet or elsewhere).

(b) Only some of Cryptopia's BTC, Bitcoin Cash and LTC holdings were stored in hot wallets, and the remainder in cold wallets.

8.138 If Cryptopia *did not* have consistent cold wallet practices in place, then that may have been a failure to take reasonable steps to protect the cryptocurrencies from the Hack. That would apply only to cryptocurrencies for which there was no cold wallet, which cannot be identified with certainty.

8.139 It is also unclear *why* those cryptocurrencies were in hot wallets: it may be because of inconsistent cold wallet practices, because a cold wallet did not exist, or because the volume of withdrawals was so high that a larger float was required to deliver services.

8.140 The liquidators accordingly seek the Court's direction on this point.

Reliance and causal nexus

8.141 If the Representations were false and misleading under s 13 (denied), GNY must then establish causation to entitle it to damages under s 43. It must

[408] Ruscoe second affidavit, 4 November 2025 at [15], 201.0121 and [34], 201.0126.
[409] Ruscoe first affidavit, 31 July 2025 at [80]–[85], 201.0045.
[410] Ruscoe updating affidavit, 23 April 2026 at [27], 401.0034.
[411] Ruscoe first affidavit, 31 July 2025 at [68], 201.0041.
[412] Ruscoe updating affidavit, 23 April 2026 at [28], 401.0034.

prove that it relied on the Representations and was actually misled, and it must prove that the misrepresentation was an operative or effective cause of its loss.[413]

8.142 This section addresses reliance and factual causation – whether the specific loss claimed was, in fact, caused by the Representations is addressed at [8.233].

Reliance

8.143 There is no evidence that suggests GNY did rely on the Representations. Mr [redacted] says he reviewed the Cryptopia website before deciding to list the LML token,[414] and that he believed the Cryptopia exchange to be *"well-known, fairly large, and thought by us to be successful and secure*" and that these things were important to GNY.[415] In correspondence (rather than evidence), GNY also says that:[416]

> safety and security of Cryptopia were paramount considerations for gny in determining the appropriate platform to list LML. Negative news involving security breaches in particular can increase a cryptocurrency's market volatility. The resulting future value uncertainty has a negative effect on a cryptocurrency's value as against fiat currency. An example is the notorious 2014 hack of cryptocurrency exchange Mt. Gox, which destabilised the Bitcoin market and caused a reduction in Bitcoin value of 20%. Any security issues with a platform would inevitably impact the reputation and, therefore, the value of the LML token.

8.144 GNY has not produced any contemporaneous documentation to support its assertion that it relied on the Representations. The only reliance evidence before the Court is an *ex post facto* explanation by Mr [redacted] with the benefit of hindsight and knowledge of the claims GNY has alleged, and even that is thin.

8.145 There were plenty of reasons why GNY would have wanted to list LML on Cryptopia that have nothing to do with security. Although Mr [redacted] evidence is that GNY never would have listed with Cryptopia had it not assured GNY that the exchange was safe and secure, he also refers to the fact that Cryptopia was "*well-known*", "*fairly large*" and "*successful*".

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[413] *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [29].
[414] [redacted] second affidavit, 19 December 2025 at [63], 201.0153.
[415] [redacted] first affidavit, 30 March 2025 at [10], 201.0003.
[416] At [8], exhibit [redacted]112 to [redacted] first affidavit, 303.1042 at 303.1043.

8.146 LML was a young project and only launched on 14 November 2018 when it was listed on Cryptopia (i.e., it was mid-launch).[417] Following its efforts to get its "*business off the ground*"[418] GNY would have been eager to enter the market and list its token wherever it could. Cryptopia was a good option, as it was:

(a) One of the largest exchange platforms at the time (the fourth largest exchange in the world with over 2.2 million users – see [8.110(b)]).

(b) Very accessible for developers, because Cryptopia was willing to list any cryptocurrency provided the listing fee was paid.[419]

(c) Committed to providing account holders access (by listing) to new and innovative coins, meaning the listing process was relatively easy.[420]

8.147 Cryptopia provided a large user base for GNY to market LML and increase trading. Presumably that would have been the primary focus: to create demand for the LML token (which it sought to do through its marketing and promotional work, including airdrops of coins), increase the value of LML, and allow GNY to make a profit when it sold its substantial LML token holdings.[421] Further, GNY describes its LML token as a "data-gathering token".[422] Cryptopia, as one of the largest exchange platforms, gave GNY access to a significant data source.[423]

8.148 Presumably, it was those factors that weighed heavily in GNY's decision to list on Cryptopia rather than any reference to 'safety' or 'security'. Despite having engaged extensively with Cryptopia prior to listing, there is no evidence that GNY made inquiries of Cryptopia as to its security or safety measures. If it *were* of paramount importance to GNY that Cryptopia had specific security and safety measures, then given the vagueness of the Representations, one would expect a reasonable consumer looking out for its

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[417] [redacted] second affidavit, 23 December 2025 at [6]–[8], 201.0142.
[418] [redacted] second affidavit, 23 December 2025, at [38], 201.0148.
[419] Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application at [43] (Tab 16 to the previous Cryptopia proceedings bundle).
[420] See also Mr Ruscoe's 7 February 2020 affidavit in the Trust Application at [7(a)] (Tab 12 to the previous Cryptopia proceedings bundle). This was appears to be a well-known fact amongst cryptocurrency developers, see, for example: "Cryptopia Exchange: 2019 Hack, Collapse & Modern Security Lessons" (18 March 2026) Bitget <www.bitget.com>: Cryptopia Exchange: 2019 Hack, Collapse & Modern Security Lessons; and Michellerhey "Why Cryptopia Is My New Exchange Of Choice" (2017) <www.steemit.com>: Why Cryptopia Is My New Exchange Of Choice — Steemit.
[421] The factors that affect the market price of cryptocurrency tokens are set out in more detail in Sibenik's second affidavit, 24 February 2026 at [9], 201.0260.
[422] [redacted] first affidavit, 30 March 2025 at [8], 201.0003.
[423] A Reddit post from the GNY Lisk team refers to GNY seeking access to one of the largest exchange platforms, exhibit DIR3-90 to Ruscoe updating affidavit, 23 April 2026, 401.0128.

own interests[424] to have made such inquiries. It is inherently unlikely that in the circumstances, GNY relied upon the words "secure" and "safe" on the Cryptopia website without making any further inquiries. That is particularly so when Mr [redacted] holds himself out as having significant experience and expertise in the cryptocurrency industry, and knowledge of the security risks inherent in that industry.[425]

8.149 That begs the question: what would GNY have done differently if Cryptopia's website had said nothing about security whatsoever? For the reasons explained above, GNY may well have listed on Cryptopia anyway, given its large user base, accessibility for developers, and relatively easy listing process. GNY also listed LML on Bitbay, and there is no evidence that GNY conducted any inquiry into Bitbay's security measures before doing so. The pattern of conduct suggests that GNY's primary concern was to list LML on as many exchanges as possible to maximise exposure and trading volume, rather than to select exchanges on the basis of their security credentials. There is insufficient evidence to conclude that GNY relied on and was misled by the Representations and accordingly it cannot recover loss by virtue of them.

Causal nexus

8.150 Principles of causation and remoteness apply to damages assessed under the FTA, as is clear from the leading case of *Red Eagle*. The Court of Appeal recently summarised the causation test in *Red Eagle* as follows:[426]

(a) The language in the remedy section of the FTA (s 43) requires a practical or common-sense concept of causation.

(b) The court needs to ask whether the defendant's conduct in breach of s 13 was an operating cause of the claimant's loss or damage. It need not be the sole cause, but it must be an effective cause.

(c) There must be a clear nexus between the conduct and the loss or damage.

(d) A claimant's own conduct may be an operating cause.

[424] See [8.89] above. See also *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611 at [51]; *Red Eagle* at [28].
[425] [redacted] affidavit, 30 March 2025 at [7]–[8], 201.0014 and [38], 201.0021–201.0022.
[426] *Shiu v Luo* [2024] NZCA 48 at [108], upheld by the Supreme Court in *Luo v Shiu* [2024] NZSC 79.

8.151 This requires a sufficiently clear nexus between the conduct and the loss or damage. It cannot merely be something which was, in the end, immaterial to the suffering of the loss or damage.[427] As Tipping J described:[428]

> there must be a sufficient relationship between the impugned conduct and the loss or damage to make it reasonable to say that the loss or damage is the consequence of the conduct.

8.152 The issue requiring determination is whether the Representations (assuming that the Representations conveyed the highest-level meaning that Cryptopia had reasonable security measures in place) were an operative and effective cause of GNY's hack losses (assuming the losses *are* GNY's).

8.153 The difficulty of this causation analysis is that the Hack was perpetuated by a third party, not by Cryptopia, and therefore could constitute a break in the chain of causation. For example, if an earthquake damaged Cryptopia's servers and the private keys to the cryptocurrencies were lost forever, it could be said that the loss would not have occurred but for the Representations, but there would be no nexus between the Representations and the loss. For the same reasons, if the Hack was *unpreventable*, or not reasonably preventable, then it cannot be said that the alleged loss flows from Cryptopia's Representations about security: the loss flows from a theft carried out by a third party. A helpful way to analyse this may be to ask: if the Representations were true and Cryptopia did have reasonable[429] safety and security measures, would GNY still have suffered loss?

8.154 Part of the challenge is that there is little information available to either GNY or to the liquidators about the Hack itself. The likely vector of the Hack was an employee clicking on a malicious link in an email which redirected them to a malicious site. From there, a file containing malware was downloaded and executed on Cryptopia's system, causing it to be compromised.[430] There is evidence suggesting that the Hack was an Advanced Persistent Threat (**APT**) attack by a state-sponsored hacker. As the name suggests, an APT is generally a highly focused, targeted, lengthy, and sophisticated attack, typically characterised by their relentless and enduring nature.[431] While its

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[427] *Red Eagle* at [29], citing *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 38 per Tipping J: "*there must be a sufficient relationship between the impugned conduct and the loss or damage to make it reasonable to say that the loss or damage is the consequence of the conduct*."
[428] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 38.
[429] This is premised on the analysis above that the Representations can only convey a meaning of 'reasonable' security measures and nothing more. Certainly, the Representations cannot convey the meaning that the exchange was completely hackproof. See above at [8.106].
[430] Watson first affidavit, 31 July 2025 at [44], 201.0082.
[431] Watson first affidavit, 31 July 2025 at [34], 201.0080.

investigation is ongoing, the New Zealand Police High Tech Crime Unit (**NZHTCU**) have provided a summary report recording that:[432]

(a) The delivery mechanism was sophisticated;

(b) Anti-forensic techniques were heavily utilised;

(c) Lateral movement exists, however it was difficult to identify details; and[433]

(d) The same delivery method was observed in three other instances four months prior to the January breach.

8.155 The report also suggests that a particular APT Group was responsible for the Hack, though the name of the suspected actor has been redacted.[434] Mr Watson considers that a correlation can be made to a cyber group known as Lazarus, sponsored by the Democratic People's Republic of Korea (**DPRK**).[435] Notably a United Nation Security Council report records that its panel of experts was:[436]

> investigating 58 suspected cyberattacks by the Democratic People's Republic of Korea on cryptocurrency-related companies between 2017 and 2023, valued at approximately $3 billion, which reportedly help to fund the country's development of weapons of mass destruction.

The Hack is listed in the report as a suspected North Korean cyberattack.[437]

8.156 That would be consistent with the NCSC's advice in March 2018 that Cryptopia was on a target list of state-sponsored hackers and that hacks were being carried out by the DPRK,[438] and with Mr Booth's explanation in s 261 interviews (of which the liquidators have no personal knowledge) that the Cryptopia exchange platform successfully repelled "multiple thousand"

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[432] NZHTCU Summary report, exhibit DIR1-386 to Ruscoe first affidavit, 31 July 2025, 301.0069.
[433] Lateral movement is described in Dicks' affidavit, 18 December 2025 at [82.3], 201.0181 as meaning "*that the attackers were able to move through Cryptopia's network and servers once they had penetrated Cryptopia's first layer of security*."
[434] Watson first affidavit, 31 July 2025 at [45], 201.0082; NZHTCU Summary report exhibit DIR1-386 to Ruscoe first affidavit, 31 July 2025, 301.0069.
[435] As described in Watson's first affidavit, 31 July 2025 at [47]–[48], 201.0083, the Lazarus Group "*is an umbrella term for an unknown number of individuals who are believed to be aligned to and backed by the North Korean government. Active since at least 2009, the group has been implicated in a range of cyber operations across the globe, including espionage, sabotage, data theft, and financial crime*." The Lazarus Group have been attributed with the 2014 breach of Sony Pictures, and the 2016 breach of the payment system SWIFT.
[436] United Nations Security Council report, exhibit CKW1-42 to Watson first affidavit, 31 July 2025, 303.1227 at 303.1230.
[437] United Nations Security Council report, exhibit CKW1-42 to Watson first affidavit, 31 July 2025, 303.1227 at 303.1275.
[438] Ruscoe second affidavit, 4 November 2025 at [28], 201.0125. The NCSC's initial contact with Cryptopia is exhibited at DIR1-347 to Mr Ruscoe's first affidavit, 31 July 2025, 301.0359 at 301.0361.

penetration attempts a day.[439] Mr Dicks acknowledges that it "*may well be the case*" that the hack was an APT type hack by DPRK state-sponsored hackers.[440]

8.157 That might well suggest that the Hack was sophisticated, advanced and exceptional. If the Hack was indeed perpetrated by a state-sponsored actor with the resources and capabilities of the DPRK, it would be exceedingly difficult, if not impossible, to repel, regardless of the security measures in place. The breadth and scale of those DPRK-related attacks, with target entities of varying sizes and security profiles, underscores the exceptional nature of the threat.

8.158 Unfortunately, it is impossible to definitively state whether improved cybersecurity could have prevented the Hack (that analysis being relevant to whether there is a break in the chain of causation):[441]

8.159 Mr Dicks opines that the Hack does not appear to have been sophisticated, and it would be unreasonable to assume that the Hack was so sophisticated it could not have been prevented.[442] In brief, Mr Dicks says that:

(a) The delivery method of the Hack is a common delivery technique and questions whether it is sophisticated, as the NZHTCU report suggests.[443]

(b) The anti-forensic techniques referred to in the NZHTCU report likely refers to the hacker taking steps to delete Cryptopia's logs, which would remove record of the attacker's presence and make it much harder to identify. This would not have required a high degree of skill or persistence as Cryptopia did not appear to have had 'immutable logs', which are specifically designed to override and prevent such deletion.[444]

(c) Lateral movement was always likely to occur as Cryptopia did not deploy any effective network segregation.[445] As it appears Cryptopia had not appropriately segregated its network, the attacker would not

[439] Ruscoe second affidavit, 4 November 2025 at [21], 201.0123. See also Mr Sanders' handwritten notes from the meeting with the NCSC (exhibit DIR2-200 to Ruscoe second affidavit, 4 November 2025, 301.0072).
[440] Dicks affidavit, 18 December 2025 at [76]–[77], 201.0180.
[441] Watson second affidavit, 28 January 2026 at [10], 201.0254.
[442] Dicks affidavit, 18 December 2025 at [80]–[85], 201.0180–201.0183.
[443] Dicks affidavit, 18 December 2025 at [82.1], 201.0181.
[444] Dicks affidavit, 18 December 2025 at [82.2], 201.0181.
[445] Dicks affidavit, 18 December 2025 at [82.3], 201.0181.

have needed custom tools to attempt to overpower or disable network firewalls.[446]

(d) The reference to the same delivery method being observed on three occasions four months prior to the Hack does not indicate a relentless or overwhelming or unpreventable method of attack. Rather, it simply indicates that three other Cryptopia staff received the same malicious email a few months earlier.

8.160 As to sophistication: there is no way to know for certain that Hack was *not* sophisticated. Mr Dicks suggests that it was not, yet the Police report records that there were "sophisticated delivery mechanisms". The Police were clearly not prepared to provide further evidence of those mechanisms. There is simply not enough evidence to definitively conclude whether the Police or Mr Dicks are correct.[447] The Police, having investigated the entirety of the Hack, are best placed to form a view and the liquidators respectfully submit that the Police report should be taken at face value.[448]

8.161 As to anti-forensic techniques, the basis for Mr Dicks' inference that this referred to Cryptopia's logs is unclear and it appears to be an assumption. Mr Watson refers to efforts by the attackers to clear event logs, alter the configuration of Windows Defender, and use legitimate system utilities (such as WSMAN.COM, a Windows operating tool allowing for remote management of systems) to obfuscate activity and to blend in with usual administrative activity.[449]

8.162 As to network segregation, all parties agree that good network segregation is an effective control to limit an attacker's movement, and that poor network segregation was a consistent issue for Cryptopia.[450] However, it is impossible to know what the state of network segregation was at the time of the attack (acknowledging that Cryptopia was continuously improving its security profile, see above at [8.124]), or what effect network segregation would have had on preventing or limiting lateral movement across it.[451]

8.163 Mr Dicks' view that the same delivery method being observed previously simply refers to other staff receiving the same malicious email previously may

[446] Dicks affidavit, 18 December 2025 at [84], 201.0182.
[447] Watson second affidavit, 28 January 2026 at [13]–[15], 201.0255.
[448] Watson second affidavit, 28 January 2026 at [13]–[14], 201.0255.
[449] Watson first affidavit, 31 July 2025 at [40]–[43], 201.0081–201.0082.
[450] Watson first affidavit, 31 July 2025 at [53], 201.0084; Watson second affidavit, 28 January 2026 at [9], 201.0254.
[451] Watson first affidavit, 31 July 2025 at [53], 201.0084.

or may not be true. It may be a reference to the malware rather than the entry point. In any event, it should be noted that Cryptopia had developed an IT security policy in April 2018 which included security training as a further action, with a plan for rollout, although it is unclear whether that eventuated.[452]

8.164 Mr Dicks also says that "APT attacks can be sophisticated and relentless. However, most APT threats can be and are detected or prevented (or at the very least contained without major losses) by effective security systems in a range of scenarios."[453] To support that point, Mr Dicks points to the way that banks are able to operate safely in an online environment. Presumably, Mr Dicks is not suggesting that banks are entirely hack-proof: as is clear from the UN Report (see above at [8.155]-[8.157]) the Lazarus group is prolific in its hacks and has successfully penetrated multiple cryptocurrency exchanges, as well as more traditional targets including the Bangladesh Central Bank's account at the US Federal Reserve Bank, from which it took $81m.[454]

8.165 It is no doubt true that "most" APT attacks can be repelled, reinforced by the fact that Cryptopia had repelled attacks in the past, including by the same delivery method that ultimately resulted in the Hack ([(d)]). However, acknowledging that *most* threats can be detected or prevented ultimately acknowledges that *some* cannot. There is simply no way to know whether the Hack falls into the camp of "*most*" or "*some*".

8.166 There have been several successful cyberattacks on cryptocurrency exchanges, including (prior to Cryptopia) the 2014 Mt Gox hack (approximately USD460 million stolen at the time), the 2017 BitGrail CEX hack, the 2018 Coinrail hack (approximately USD40m stolen) and the 2018 Coincheck hack (approximately USD534 million stolen).[455] Closer to home, the Bitcoinica NZ exchange was hacked twice in 2012 before being placed into liquidation.[456] ByBit was hacked by the Lazarus group in early 2025, with

[452] Ruscoe second affidavit, 4 November 2025 at [23(d)], 201.0123 and exhibits DIR2-139, 301.0417 and DIR2-140, 301.0462.
[453] Dicks affidavit, 18 December 2025 at [83], 201.0182.
[454] "Lazarus Group – The APT with countless lives", exhibit CKW1-130 to Watson first affidavit, 31 July 2025, 303.1211 at 303.1221.
[455] Dicks affidavit, 18 December 2025 at [33], 201.0165.
[456] See, for example, " Bitcoinica, twice hacked in 2012, is being sued" (16 August 2012) Infosecurity Magazine < www.infosecurity-magazine.com>: Bitcoinica, twice hacked in 2012, is being sued - Infosecurity Magazine. See also the Bitcoinica liquidation reports at < www.mvp.co.nz/cases-reports/b/bitcoinica-consultancy-limited-in-liquidation >: Bitcoinica Consultancy Limited (In Liquidation) - McDonald Vague Insolvency.

losses of USD1.5 billion, little of which has been recovered.[457] These examples demonstrate that even prominent and well-resourced exchanges have been unable to prevent determined cyberattacks, even more recently. It is evident that no exchange, regardless of the security measures it employs, can entirely eliminate the risk of a successful hack, particularly when the threat actor is sophisticated and persistent.

8.167 For these reasons, it is arguable that the Hack was an abnormal and exceptional event, intervening between the breach and the loss such that it cannot rightly be said that any breach by Cryptopia caused the loss. Even if Cryptopia had implemented all of the security measures that Mr Dicks considers appropriate, there is no evidence that those measures would have prevented a state-sponsored attack of this nature. The successful hacking of prominent and well-resourced exchanges — including the USD 1.5 billion ByBit hack by the Lazarus group in 2025 — demonstrates that no exchange, regardless of the security measures it employs, can entirely eliminate the risk of a successful hack by a sophisticated and persistent threat actor. There is simply insufficient evidence to form a clear view on whether the Hack was or was not preventable, and the liquidators respectfully seek the Court's direction on this point.

Conclusion

8.168 In summary, the liquidators submit that GNY's claim under s 13 of the FTA faces the following difficulties:

(a) First, if GNY is an account holder, then the limitation in cl 12.1(d) of the Terms and Conditions is effective (per s 5D of the FTA) to limit Cryptopia's aggregate liability to $5,000, and the liquidators submit that it is fair and reasonable for GNY to be bound by that limitation given that it was a sophisticated commercial party operating in a speculative market with the benefit of legal representation.

(b) Second, the Representations are vague promotional statements that do not convey any actionable meaning as to the standard or quality of Cryptopia's cybersecurity measures. They do not refer to any particular standard of security and, read in the context of the Risk Statement and Terms and Conditions, are incapable of being understood as a

[457] Joe Tidy "North Korean hackers cash out hundreds of millions from $1.5bn ByBit hack" (10 March 2025) BBC <www.bbc.com>: North Korean hackers cash out hundreds of millions from $1.5bn ByBit hack. See also [redacted] affidavit, 30 March 2025 at [38.4], 201.0022.

guarantee of any particular level of security. At their highest, the Representations could be read as conveying that reasonable security measures were in place, but even that reading may be going too far given the extensive qualifications in the Risk Statement.

(c) Third, even if the Representations are taken to convey a meaning as to the standard of Cryptopia's security, they were not necessarily false or misleading: Cryptopia did take various security measures, including engaging external cybersecurity experts, conducting penetration testing, and investing significantly in security infrastructure, and there was no recognised industry or regulatory standard against which to assess the adequacy of those measures.

(d) Fourth, there is insufficient evidence that GNY relied on the Representations when it decided to list LML on Cryptopia's exchange. Rather, the evidence suggests that GNY was motivated by Cryptopia's large user base and accessibility for developers, and there is no evidence that GNY made any inquiry of Cryptopia as to its specific security measures.

(e) Fifth, even if reliance were established, the Hack was likely perpetrated by a state-sponsored actor, and there is insufficient evidence to conclude that improved cybersecurity measures would have prevented it. The Hack may therefore constitute an intervening event that breaks the chain of causation between any breach and GNY's loss.

FMCA

8.169 GNY alleges that the Representations are also false or misleading representations in breach of s 22 of the FMCA.[458] A financial services provider cannot contract out of the FMCA.[459] Accordingly, the limitation and exclusion clauses do not apply.

8.170 Section 22 of the FMCA largely repeats the terms of s 13 of the FTA, applying them specifically to financial products and services. It prohibits a person, in trade, in connection with the supply or possible supply of financial

[458] For completeness, the liquidators note that breach of the FMCA was not advanced by GNY in its notice of opposition. It is unclear why this was not advanced, particularly when breach of the FTA and the CGA were. In any case, GNY did advance its claim on the basis of breach of the FMCA in its Draft Amended Statement of Claim, April 2025, attached to its notice of opposition (101.0016 at 101.0038) and its Statement of Claim, 11 April 2019, exhibit [redacted]8 to [redacted] first affidavit, 30 March 2025, 302.0912.
[459] The FMA circumstances in which one can contract out of the FMCA are very narrow. Contracting out appears to be limited to a manager contracting out of management functions (s 146), and a licensed market operator contracting out of continuous disclosure process requirements by agreement with the FMA (s 369).

services, from making certain false or misleading representations, including representations that the services are of a particular kind, standard, or quality.[460] If a breach of s 22 is established, the Court then can, on application of any person, make a compensatory order if it is satisfied that the aggrieved person has suffered, or is likely to suffer, loss or damage because of the contravention.[461] The Court may make any order that it thinks is just to compensate an aggrieved person, who need not be a party to the proceeding.[462]

8.171 As such, Cryptopia respectfully repeats its submissions in relation to the FTA cause of action (see [8.68]-[8.168] above).

CGA

8.172 GNY claims that Cryptopia breached s 28 of the CGA.

8.173 Section 28 provides:

> Subject to section 41, where services are supplied to a consumer there is a guarantee that the service will be carried out with reasonable care and skill.

8.174 The exceptions in s 41 include where goods or services are supplied otherwise than in trade, or where a supplier is a charitable organisation.

8.175 'Supplier' is defined in the CGA, relevantly, as a person who supplies "services to an individual consumer or a group of consumers (whether or not the consumer is a party, or the consumers are parties, to a contract with the person)"[463] "Services" is defined very broadly in the CGA.[464] It includes any rights, interest in personal property, benefits, privileges, or facilities that are "provided, granted, or conferred by a supplier [in trade]."[465]

8.176 "*Consumer*" is defined in the CGA as a person who acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption.[466]

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[460] The liquidators repeat the observation above at [8.85], and say that similarly, "kind, standard, [or] quality" seem to be most relevant to GNY's FMCA claim.
[461] Financial Markets Conduct Act 2013, s 494.
[462] Financial Markets Conduct Act 2013, s 495.
[463] Consumer Guarantees Act 1993, s 2(1).
[464] And likely encompasses a party that, in trade, provides services related to cryptocurrency: Lida Ayoubi "Cryptocurrencies and consumer rights in New Zealand: Risky business" [2018] NZLJ 108.
[465] Consumer Guarantees Act 1993, s 2(1).
[466] Consumer Guarantees Act 1993, s 2(1).

8.177 *Ordinarily acquired*" means *"as a matter of regular practice or occurrence"* or *"in the ordinary or usual course of events or things"*.[467] While statistical evidence on usage may be of some assistance, one cannot take a mathematical approach to identifying the most common use of a good or service – the test is not whether the majority of people acquired a particular service for a commercial purpose, or whether commercial use was the dominant purpose. Rather, whether goods or services are ordinarily acquired for private use is an objective assessment of fact and degree.[468]

8.178 Even if services are of a kind ordinarily acquired for personal use, they will not be captured by s 28 if a person acquires the services for any of the commercial purposes listed in subparagraphs (i), (ii), or (iii). In order for these exclusions to apply, the resupply of services must take place in the context of the business of the purchaser (for example, an accountant purchasing and leasing it to his accounting practice was not a resupply of the vehicle in trade – his business was accounting, not the supply of vehicles).[469]

8.179 The guarantee of reasonable skill and care is effectively a codification of the tort of negligence – the degree of skill and care required is the same.[470] It requires a supplier to exercise the ordinary skill of an ordinary competent person in relation to the nature of the service provided. The standard is an objective one, but there is no implied promise that the supplier's efforts will succeed.[471]

8.180 It is for a claimant to satisfy the court, on the balance of probabilities, that the supplier failed to carry out the supply of services with reasonable skill and care.[472]

8.181 When a service supplied to a consumer fails to comply with a guarantee of reasonable skill and care and the failure cannot be remedied, the consumer may "*obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through*

[467] *Nesbit v Porter* [2000] 2 NZLR 465 (CA) at [29].
[468] *Nesbit v Porter* [2000] 2 NZLR 465 (CA) at [27].
[469] *Kerry Stone Ltd v Knowles* (2006) 11 TCLR 768 (HC).
[470] *Sleight v Beckia Holdings Ltd* [2020] NZHC 2851 at [260] and [330]; *Jung v Templeton* [2010] 2 NZLR 255 at [24].
[471] *Andrews v AHS Construction Ltd* [2024] NZHC 937 at [53], citing Matthew Barber (ed) *Commercial Law in New Zealand* (online looseleaf ed, LexisNexis) at [18.6.1].
[472] *Andrews v AHS Construction Ltd* [2024] NZHC 937 at [53], citing *Jetz International Ltd v Orams Marine Ltd* [1999] DCR 831 (DC) at 837.

reduction in value of the product of the service) which was reasonably foreseeable as liable to result from the failure."[473]

Is GNY a consumer?

8.182 There is no dispute that Cryptopia was a supplier and that it supplied services to GNY. Similarly, there is no issue that Cryptopia was in trade. The issue for determination is whether GNY is a consumer.

8.183 GNY does not specify what service (or services) it alleges were provided in breach of the s 28 warranty. GNY refers to the following:[474]

> The defendant operates and provides services through its website and associated applications (the **Platform**). Through use of the Platform and services operated and provided by the defendant, users can:
>
> 4.1 buy, sell and exchange supported cryptocurrency coins; and
>
> 4.2 store supported coins in the defendant's hosted wallets

8.184 As discussed above at [8.25]-[8.43], GNY was not an account holder: the services that were provided by Cryptopia to GNY were listing services only. Such services plainly are not "*ordinarily acquired*" for personal use. The listing process involved:

(a) Payment of a listing fee;

(b) A review by Cryptopia of GNY's technical and business plans for the token;[475]

(c) Custom implementation work by Cryptopia's developers to integrate the new coin to the exchange;[476] and

(d) Public announcements on social media by Cryptopia of the listing.[477]

8.185 On that basis, the liquidators respectfully submit that GNY is not a consumer for the purposes of the CGA.

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[473] Consumer Guarantees Act 1993, s 33.
[474] GNY Draft Amended Statement of Claim, April 2025 at [4], attached to its notice of opposition (document 101.0016 at 101.0039).
[475] [redacted] first affidavit, 30 March 2025 at [10], 201.0003.
[476] Email communications between Cryptopia and GNY listing team, exhibit PJS1-22 to Sibenik first affidavit, 1 August 2025, 302.0732 at 302.0734.
[477] Email communications between Cryptopia and GNY listing team, exhibit PJS1-20 to Sibenik first affidavit, 1 August 2025, 302.0732 at 302.0732.

8.186 In any event, s 43 of the CGA permits parties to contract out of the CGA in prescribed circumstances (which mirror s 5D of the FTA), including if the parties to the agreement are in trade and agree to contract out, and that it is fair and reasonable for them to do so. If GNY is a consumer, then even if its claim under the CGA were made out, it would be limited to $5,000 for the reasons set out at [8.73]-[8.83].

Did Cryptopia fail to comply with the guarantee of reasonable skill and care?

8.187 If GNY is a consumer *and* an account holder, and its claim under the CGA relates to Cryptopia's security measures to prevent a Hack, then the liquidators respectfully repeat the submissions made in relation to the FTA cause of action (see [8.153] above).

Breach of contract

8.188 As explained above, the onus is on a creditor to establish that their claim is provable in the liquidation.

8.189 GNY's breach of contract claim alleges that Cryptopia has breached cl 8(a) of the Terms and Conditions[478] by failing to manage the platform and provide services with reasonable care, including by failing to:[479]

(a) Store tokens safely on the Platform;

(b) Have adequate safeguards to prevent the Hack; and

(c) Respond with reasonable care to the Hack.

8.190 The elements of a breach of contract claim are well-established. GNY must prove:

(a) the existence of a contract, and that the contract included obligations to store tokens safely on the Platform, have adequate safeguards to prevent the Hack, and respond with reasonable care to the Hack;

(b) that Cryptopia breached those obligations; and

(c) damages were incurred due to the breach.

[478] GNY statement of claim, 4 April 2019 at [5], exhibit [redacted] 8 to [redacted] first affidavit, 30 March 2025, 302.0912 at 302.0913; GNY Draft Amended Statement of Claim, April 2025 (attached to its notice of opposition, 15 August 2025, 101.0016) at [5], 101.0039),and [34]-[36], 101.0046.
[479] GNY statement of claim, 4 April 2019 at [21] 302.0916; and GNY Draft Amended Statement of Claim (attached to its notice of opposition, 15 August 2025, 101.0016), April 2025 at [25], 101.0043 and [34]-[36], 101.0046.

8.191 It is not disputed that the Terms and Conditions constituted a contractual arrangement between Cryptopia and an account holder.[480] However, GNY is not an account holder, and is not a party to that contract: the Terms and Conditions are effective between Cryptopia and account holders (see [6.7]-[6.19] and [8.25]-[8.43]).

8.192 GNY is not a party to the Terms and Conditions simply by virtue of LML being listed on the exchange. As addressed above ([8.35]-[8.40]), the contractual terms for the listing agreement are entirely separate, and that contract was fully performed when payment was made and the tokens were listed on the Platform. There is nothing to support GNY's assertion that it commenced listing and exchanging its LML tokens on the Platform in accordance with the Cryptopia's Terms and Conditions.[481] Because GNY was not a party to the Terms and Conditions, it cannot sue on that contract.[482]

8.193 Notwithstanding that, these submissions go on to consider the claim on the assumption that GNY *was* a party to the Terms and Conditions.

Law: contractual interpretation

8.194 The courts' approach to contractual interpretation can be summarised as follows:[483]

(a) The starting point of interpretation is the express words of the contract, and the ordinary meaning of those words. However, the surrounding factual matrix may also be relevant to the Court's assessment of the objective meaning of contractual provisions, even if the terms are not, on their face, ambiguous.[484]

(b) The purpose of interpretation is to find the meaning which the document would convey to a reasonable person, having all the relevant background knowledge which would have been reasonably available to the parties at the time of the contract.

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[480] The Terms and Conditions were an agreement between Cryptopia and an account holder on terms that were complete and certain; were intended to create legal relations; and which involved good consideration (see Stephen Todd and Matthew Barber *Burrows, Finn and Todd Law of Contract in New Zealand* (online looseleaf ed, LexisNexis, 2022) at [3.1]).
[481] GNY Draft Amended Statement of Claim, April 2025 (attached to its notice of opposition, 15 August 2025, 101.0016) at [9], 101.0040.
[482] Although the Contracts and Commercial Law Act 2017 (**CCLA**) modifies the doctrine of privity of contract, those provisions do not apply in the present case (see CCLA, ss 12 and 13).
[483] See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at [912]–[913]. These principles were also recently summarised by the Court of Appeal in *Bank of New Zealand v Christian Church Community Trust* [2024] NZCA 645, [2024] 3 NZLR 856.
[484] *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5, [2010] 2 NZLR 444, at [4] per Blanchard J, [23] per Tipping J, [62] per McGrath J and [151] per Gault J.

(c) The background is any material reasonably available to the parties that would have affected the way in which the language of the document would have been understood by a reasonable person. Recourse to the factual background is available even if the words of the contract are not ambiguous on their face.[485] This includes the nature of the industry, the history of dealings between the parties, the states of knowledge and experience of the parties; the legal background, the origins of the contract, particular concerns and needs of the parties, other interconnected contracts or subcontracts; and the commercial purpose of the contract.[486]

(d) Declarations of the parties' subjective intent are excluded from the admissible background.[487] Pre-contractual negotiations may be admissible when they are used to show what the parties intended their words to mean.[488]

(e) The meaning a document conveys to a reasonable person is not the same thing as the meaning of its words. The meaning of the document is what the parties using those words against the relevant background would have understood them to mean.

8.195 The wording of the contract is "*centrally important*". If the language used, construed in the context of the contract as a whole, has an ordinary and natural meaning, this will be a powerful, albeit not conclusive, indicator of what the parties meant.[489]

Application

8.196 In its entirety, cl 8 provides, following a heading titled "*Platform Change and Business Disruptions*":[490]

> a. We will use reasonable care in operating our Platform, so as to limit disruptions to the Platform, User Accounts and our Services. However, you accept that our Platform will not necessarily be available uninterrupted or

[485] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC) at [4] and [14] per Blanchard J with Gault J agreeing, [22], [23] and [29] per Tipping J, [57] per McGrath J, and [119] and [120] per Wilson J; *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.
[486] *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.
[487] In *L & M Coal Holdings Ltd v Bathurst Resources Limited* [2018] NZHC 2127, Dobson J permitted such evidence to the extent that it established mutual intentions. In his Honour's view, evidence of shared intention as to contractual meaning was within the concept of "background" information.
[488] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC) at [4] and [14] per Blanchard J, [23] and [28] per Tipping J, [62] per McGrath J, and [151] per Gault J; *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85.
[489] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.
[490] Terms and Conditions, exhibit DIR1-1 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0589.

error-free, and it may also be inaccessible from time to time while undergoing maintenance or upgrade work. If we are not able to provide advance notice of any interruption, we will give notice as soon as reasonably practicable afterwards.

b. We may, in our discretion, make changes to the Platform with or without notice, and we make no representation that any Services will continue to be provided in the same manner as they are currently provided.

8.197 The clause does not expressly impose any duty on Cryptopia to store tokens safely on the Platform; have adequate safeguards to prevent the Hack; or respond with reasonable care to the Hack. On its face, cl 8(a) is directed only at taking reasonable care to prevent disruptions and errors on the Platform, namely in relation to maintenance.[491] It does not apply to security matters or to the risk of a hack.

8.198 GNY has not in its unsecured creditor claim or its statement of claim referred to any background context that should be taken into account in interpreting cl 8(a). Rather, it says that Cryptopia's terms and conditions expressly "*provided that it would manage the exchange and provide its services with reasonable care.*"[492] Clause 8(a) simply does not say that.

8.199 Clause 8(a) must be read against the context of the Terms and Conditions as a whole, including cl 2, cl 12, and the Risk Statement (see above at [8.50]-[8.61]). Against that background, it is difficult to see how cl 8(a) imposes a contractual duty on Cryptopia in the manner argued by GNY.

8.200 Even if cl 8(a) did amount to a general contractual duty for Cryptopia to take reasonable care, there is a question about whether that duty was breached, as summarised in relation to the FTA cause of action (see paragraphs [8.110]-[8.131]).

8.201 Finally, GNY must establish causation. The general test for establishing causation in a breach of contract claim is the “but for” test. This is a question of fact and degree,[493] and requires GNY to prove that “but for” the Cryptopia's conduct (i.e., allegedly breaching the contract) GNY would not have suffered

[491] The heading of cl 8, "Platform Change and Business Disruptions", confirms that the clause is concerned with operational continuity, not security. The specific subject matter addressed in cl 8(a) (uninterrupted availability, error-free operation, and advance notice of maintenance) and cl 8(b) (changes to the Platform) are all directed at the same concern. To read cl 8(a) as imposing a general duty to maintain reasonable cybersecurity measures would be to divorce the words "reasonable care in operating our Platform" from their immediate context and from the structure of the clause as a whole.
[492] GNY letter to liquidators, 25 September 2019 at [43], exhibit [redacted]69 to [redacted] first affidavit, 31 March 2025, 302.0959 at 302.0965.
[493] *Sew Hoy & Sons Ltd (in rec & in liq) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA).

loss. A claimant cannot, therefore, look to recover losses that it would have sustained in any event.[494]

8.202 If an act or event intervenes in the chain of events from the defendant's breach of contract and the plaintiff's loss, this act or event may be considered to break the chain of causation, with no resulting liability.[495] However, if the intervening act or event was the very thing that the defendant was under a duty to guard against occurring, it is likely the defendant will still be liable for the loss.[496] As set out above in relation to the FTA cause of action ([8.153]), there is a real question about whether the Hack could have been prevented if Cryptopia had (as GNY argues) reasonable safeguards in place. The liquidators seek the Court's direction on this point.

Breach of fiduciary duty

8.203 GNY alleges that Cryptopia breached fiduciary duties it owed to GNY, for which GNY is entitled to equitable compensation.[497]

8.204 For completeness, counsel note that this cause of action did not appear in the 11 April 2019 Statement of Claim that was filed and was attached to GNY's unsecured creditor claim form. GNY first raised that cause of action in correspondence in May 2020[498] and has since included it in its August 2025 notice of opposition[499] and April 2025 draft amended statement of claim.[500]

8.205 GNY says that Cryptopia owed it fiduciary duties to:

(a) act honestly, in good faith and in accordance with GNY's best interests;

(b) hold, safeguard and deal with the plaintiff's LML tokens as directed by the plaintiff;

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[494] *Tiuta International Ltd (in liq) v De Villiers Surveyors Ltd* [2017] UKSC 77, [2017] 1 WLR 4627.
[495] This is a remoteness inquiry, for which the principles are well established, see *Hadley v Baxendale* (1854) 9 Exch 341, 156 ER 145. See also Stephen Todd and Matthew Barber *Burrows, Finn and Todd Law of Contract in New Zealand* (online looseleaf ed, LexisNexis, 2022) at [21.2.3], particularly at [21.2.3(c)].
[496] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).
[497] For completeness, counsel note that this cause of action did not appear in the 11 April 2019 Statement of Claim that was filed and was attached to GNY's unsecured creditor claim form (exhibit [redacted]8 to [redacted] first affidavit, 30 March 2025, 302.0912). It was included in GNY's notice of opposition, 15 August 2025 (101.0016) and its Draft Amended Statement of Claim, April 2025, (attached to its notice of opposition), 101.0038.
[498] Letter from GNY to liquidators, 12 May 2020, exhibit [redacted]84 to [redacted] first affidavit, 30 March 2025, 303.1012 at 303.1014.
[499] GNY notice of opposition, 15 August 2025, 101.0016
[500] GNY Draft Amended Statement of Claim, April 2025, (attached to its notice of opposition, 15 August 2025, 101.0016), 101.0048.

(c) maintain appropriate safeguards and security arrangements to ensure the safety and security of the LML tokens on Cryptopia's website and associated applications (the Platform); and

(d) act proactively in circumstances where it knew that GNY's interests were at risk of serious harm, including by taking appropriate steps to respond to the Hack and to recover GNY's stolen LML tokens.

8.206 GNY alleges that Cryptopia breached these duties by failing to ensure adequate safety and security of the Platform (which resulted in the Hack), failing to adequately respond to and communicate about the Hack, and failing to act proactively in GNY's best interests by taking appropriate mitigation measures, including blocking stolen tokens from reaching Bitbay.

8.207 GNY further says that Cryptopia was more than merely negligent: Cryptopia's conduct was disloyal and reflected a conscious disregard of the interests of GNY as a beneficiary.

GNY is not a beneficiary

8.208 For the reasons given above at [8.25]-[8.43], the liquidators consider that GNY is not a beneficiary. No duties, fiduciary or otherwise, are owed to it or are enforceable by it.

8.209 If the Court finds that GNY is a beneficiary, then the liquidators respond to its claim as follows.

Fiduciary and equitable duties

8.210 It is a well-established principle that express trusts create a fiduciary relationship. However, a fiduciary relationship is rarely fiduciary in all respects. Most fiduciary relationships are fiduciary only in part, particularly so when the relationship arises in a commercial setting.[501] Not all breaches of trust amount to a breach of fiduciary duty. Fiduciary obligations include the duties of loyalty (i.e., to act in the interests of the beneficiaries) and to act honestly and in good faith.[502] Other duties owed by a trustee are equitable in nature rather than fiduciary.[503] In summary:[504]

[501] Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (The Federation Press, Sydney, 2016) at 367.
[502] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18.
[503] *Equity and Trusts in New Zealand* at [17.2.2], [17.2.5] and [17.3].
[504] *Equity and Trusts in New Zealand* at [17.2.2].

Core duties imposed by fiduciary law

It has been said that "*the duty of loyalty owed by a fiduciary to their [beneficiary] is the root from which the recognised and more specific fiduciary duties stem. Each [of the more specific duties] represents a facet of the parent duty of loyalty*." The more specific duties are the duties:

> (a) to act in good faith and honestly for the benefit of the beneficiaries when exercising the powers that they hold;
>
> (b) to avoid unauthorised personal profit or benefit from the relationship;
>
> (c) to avoid conflict between personal interest and duty to the beneficiary;
>
> (d) to avoid divided loyalties; and
>
> (e) to report to the beneficiary the fact a breach of fiduciary duty has been committed by the fiduciary (albeit this duty appears to be still in its infancy).

… It should be emphasised, however, that the facts of individual cases can lead to these duties being applied in different ways that are sensitive to individual circumstances.

8.211 To identify whether a fiduciary duty has been breached requires asking:

(a) What duties are owed by Cryptopia, and are those duties owed *qua* trustee, or *qua* fiduciary; and

(b) If there is a fiduciary duty, did that duty extend to the subject matter over which a breach is alleged?[505]

8.212 There are different consequences for breach of a fiduciary duty as opposed to an equitable one:

(a) If a duty is fiduciary in nature, the ordinary common law concepts of causation and remoteness do not apply. Instead, a plaintiff alleging breach of fiduciary duty must show that they have suffered loss arising out of circumstances to which the breach was material. The onus then switches to the defendant fiduciary, who can resist the plaintiff's claim

[505] Paul Finn *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (The Federation Press, Sydney, 2016) at 342, citing *Birtchnell v Equity Trustees, Executors & Agency Co.* (1929) 42 CLR 384 (HCA) at 408 per Dixon J.

by showing that the loss would have occurred in any event, without any breach on the defendant's part.[506]

(b) Breach of a non-fiduciary equitable duty or obligation is treated in the same way as how the law treats other negligent but non-fiduciary defendants,[507] with the equitable rules of causation and remoteness mirroring common law rules.[508]

8.213 GNY alleges that Cryptopia owed it fiduciary duties to:

(a) act honestly, in good faith and in accordance with GNY's best interests;

(b) hold, safeguard and deal with GNY's LML tokens as directed by GNY;

(c) maintain appropriate safeguards and security arrangements to ensure the safety and security of the LML tokens on the Platform; and

(d) act proactively in circumstances when it knew that GNY's interests were at risk of serious harm, including by taking appropriate steps to respond to the Hack and to recover the plaintiff's stolen LML tokens.

8.214 GNY has not articulated where or how those duties arise, or how they are fiduciary in nature. It has not fulfilled the crucial requirement:[509]

> … for a plaintiff beneficiary to identify carefully the particular fiduciary obligations attaching to the relationship and demonstrate that any injury suffered, or any benefit which the fiduciary has gained, is linked to those obligations. If all that the plaintiff can show is that he or she has suffered loss due to the defendant's negligence, without more, there will be no fiduciary breach.

8.215 Notwithstanding that, the duty set out at [8.213(a)], subject to some rephrasing, is plainly fiduciary and must have been an obligation Cryptopia owed to account holders: it forms the irreducible core of trustee obligations, and without it, there can be no trust (see above at [3.12]). For completeness, the duty is of loyalty (i.e., to act in the interests of the beneficiaries as a

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[506] *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 687. This has been endorsed by the Supreme Court in both *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192 at [30] and *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 384 at [85].
[507] *Equity and Trusts in New Zealand* at [32.4.1(3)]; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 688.
[508] *Equity and trusts in New Zealand* at [32.5.1], [32.5.4] and [17.2.5], citing *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 16–17 per Millett LJ and *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 686–687 per Tipping J.
[509] *Equity and Trusts in New Zealand* at [17.2.5], citing *Marsh v Attorney-General* [2010] 2 NZLR 683 (HC) at [16]–[22].

whole, not in the best interests of any singular beneficiary) and to act honestly and in good faith.

8.216 The others (duties to safeguard trust property, duties to maintain appropriate safeguards and security arrangements, and duties to act proactively when it knew that account holders' interests were at risk of harm) are not typically fiduciary duties and are more akin to a general duty to exercise reasonable skill, care and diligence. As such, those duties would be equitable rather than fiduciary,[510] unless the breach also amounted to a breach of the duty of loyalty, honesty and good faith:[511]

> Breach of any of these duties, and their attendant sub-duties, results in a "breach of trust". But not all breaches of trust amount to a breach of fiduciary duty. For example, in discharging his or her duty to preserve the trust property, a trustee must exercise the care, diligence, and skill that a prudent business person would exercise in managing the affairs of others. This is not a fiduciary standard; it is a standard of care, expressed in language different from, but reasonably similar to, the tortious duty of care. Hence, a breach of this duty will be treated in a manner similar to its analogue common law duties, rather than by reference to fiduciary law. Similarly, it is not apparent that the equitable duty of a trustee to actively consider exercising a power is also a fiduciary duty. On the other hand, the duties of impartiality and loyalty clearly are.

8.217 For example, in *Bristol and West Building Society v Mothew*,[512] the defendant solicitor admitted negligence because he had represented to his mortgagee client that the borrowers (also his clients) were not resorting to any further borrowing – that information being incorrect, and in circumstances when the solicitor had the means of knowing that it was incorrect. The mistake was not dishonest or in bad faith and did not amount to a breach of the duty of loyalty. The English Court of Appeal accordingly held that the solicitor was not liable for breach of fiduciary duty.

8.218 The distinction between fiduciary and non-fiduciary duties was thoroughly canvassed recently in *Credit Suisse Trust Limited v Ivanishvili*,[513] where the Singapore Court of Appeal approved and applied *Mothew*. In that case, Credit Suisse admitted that it had breached its duty to safeguard the trust

[510] *Equity and Trusts in New Zealand* at [17.2.2], [17.2.5] and [17.3].
[511] *Equity and Trusts in New Zealand* at [17.3].
[512] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA). Applied in New Zealand in *Bank of New Zealand v New Zealand Guardian Trust Company Ltd* [1999] 1 NZLR 664 (CA).
[513] *Ivanishvili v Credit Suisse Trust Ltd* [2024] SGCA(I) 5, [2024] 2 SLR 0164.

property but said that duty was a tortious duty and it had not breached any fiduciary one. The Court of Appeal made the following points:

(a) All fiduciary duties stem from the duty of loyalty, and "it is beyond doubt that an express trustee owes a fiduciary duty to perform the trust honestly and in good faith for the benefit of, and in the interest of, the beneficiaries of the trust. This duty is both a fiduciary duty and part of the irreducible core obligations of a trustee."[514]

(b) A trustee's fiduciary duty to perform the trust honestly and in good faith for the benefit of, and in the interest of, the beneficiaries can manifest in two ways.[515] The duty can be 'adjectival', in the sense that a trustee must perform its duties and exercise its powers in good faith: a trustee must set their mind towards that goal and conduct himself in a manner befitting his obligation of loyalty. The duty can also be 'actuating', in the sense that when a trustee knows that the interests of the beneficiaries are at risk of harm, then the trustee may be required to act: the decision to act or not to act must be made honestly and in good faith for the benefit of the beneficiaries.

(c) The fiduciary duty to act in good faith is clearly distinct from the non-fiduciary duty to act with skill, care and diligence. The duty to act in good faith targets disloyalty rather than carelessness. While a person's incompetent best efforts might not be enough to discharge the duty of care, what matters to the duty to act in good faith is not competence but that they acted loyally. However, if the trustee is objectively negligent *and* so acted (or failed to act) in circumstances when they *did not* in good faith believe that to do so would be in the interests of their beneficiary, they would be in breach of *both* duties.[516]

(d) If a trustee decides upon a course of conduct that is obviously against the interests of the beneficiaries in an objective sense, such that an intelligent and honest trustee would never have reasonably believed that to do so would be in the interests of the beneficiaries, that will support an inference of the trustee's lack of good faith.[517]

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[514] *Ivanishvili v Credit Suisse Trust Ltd* [2024] SGCA(I) 5, [2024] 2 SLR 0164 at [39], upholding *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at [41].
[515] *Ivanishvili v Credit Suisse Trust Ltd* [2024] SGCA(I) 5, [2024] 2 SLR 0164 at [46]–[48].
[516] *Ivanishvili v Credit Suisse Trust Ltd* [2024] SGCA(I) 5, [2024] 2 SLR 0164 at [49].
[517] *Ivanishvili v Credit Suisse Trust Ltd* [2024] SGCA(I) 5, [2024] 2 SLR 0164 at [49].

8.219 The Court provided a useful analogy:[518] a trustee undertakes to hold gold bullion for the benefit of a person and stores it in an unlocked room visible to passers-by. The trustee unthinkingly leaves the room unsecured and the gold bullion is stolen. In such circumstances, they are negligent, but they have not been disloyal. If, however, the trustee watches strangers enter the room and take the gold bullion and the trustee does not intervene, then the trustee has consciously decided not to act in the best interests of the beneficiary and has breached the duty of loyalty.

8.220 The question, then, is did Cryptopia breach its obligation to act honestly, in good faith, and in the interests of beneficiaries by:

(a) Failing to maintain appropriate safeguards and security arrangements to ensure the safety and security of the LML tokens on the Platform; or

(b) Failing to act proactively in circumstances when it knew that GNY's interests were at risk of serious harm, including by taking appropriate steps to respond to the Hack and to recover the plaintiff's stolen LML tokens?

8.221 Even if the Court finds that Cryptopia had inadequate security arrangements, it is difficult to see how that could amount to any more than a duty of care issue (which is plainly non-fiduciary): for the reasons set out in relation to the FTA cause of action, it is clear that Cryptopia had turned its mind to security and was taking steps to develop and upgrade its security profile ([8.110]-[8.114]). It cannot be said that it was conscious of its security flaws and that it wilfully disregarded those issues, or that it failed to take into account the fact that appropriate security arrangements would be in the best interests of beneficiaries. Those circumstances are far from those in *Credit Suisse*, where the trustee was aware over a period of nine years that a third party was removing a significant amount of trust assets without authorisation against its own internal policies and procedures, permitted those assets to be removed, was concerned about that, and failed to notify the beneficiaries of that fact or to prevent the third party from accessing the assets.[519] None of those features are present here.

[518] *Ivanishvili v Credit Suisse Trust Ltd* [2024] SGCA(I) 5, [2024] 2 SLR 0164 at [50]–[53].
[519] *Ivanishvili v Credit Suisse Trust Ltd* [2024] SGCA(I) 5, [2024] 2 SLR 0164 at [1]–[23].

8.222 In relation to the alleged failure to act proactively when it knew GNY's interests were at serious harm, further factual background is required. In summary, GNY claims that:[520]

(a) Cryptopia failed adequately to respond to the Hack as it occurred and in the immediate aftermath.

(b) Cryptopia failed adequately to communicate with GNY and third parties, including Bitbay, with respect to the Hack.

(c) Cryptopia failed to take appropriate mitigation measures following the Hack, including by blocking stolen tokens from reaching Bitbay.

8.223 Mr [redacted] explains that:

(a) Immediately after the Hack, GNY contacted Cryptopia to understand how it planned to work through the issues caused by the Hack and to know how ongoing loss would be prevented.

(b) Stolen LML tokens were finding their way into other exchanges, including the Bitbay exchange, where they were being sold. GNY was able to get Bitbay to agree to place a temporary trading block on those tokens. However, Bitbay eventually removed that block. GNY says that this was because Bitbay could not permanently block those tokens without Cryptopia's assistance, and that Cryptopia failed to engage.

8.224 The liquidators have been told that following the Hack, Cryptopia took various steps, including:

(It should be noted that this information has been made available to the liquidators by way of interviews under oath pursuant to s 261 of the Companies Act 1993. This information was provided to the liquidators by Cryptopia management and the liquidators do not have personal knowledge on these points.[521])

(a) Shutting down the exchange and notifying the Police after Cryptopia identified the Hack (Cryptopia apparently identified the Hack between 4.30pm and 5pm on 14 January 2019 and shut down the exchange between 5.30pm and 6pm.[522] Cryptopia notified the FMA on 16 January 2019 and advised that the exchange platform had been put into

[520] GNY notice of opposition, 15 August 2025 at [3.3], 101.0019.
[521] Ruscoe second affidavit, 4 November 2025 at [7], 201.0119.
[522] Ruscoe second affidavit, 4 November 2025 at [40], 201.0128.

maintenance at 7.30pm.[523]). Blockchain data indicates that LML tokens were removed from Cryptopia's wallets at 3.49am NZT on 14 January 2019.[524]

(b) Attempting to secure wallets.[525]

(c) Assisting with the Police investigation, including tracing the stolen cryptocurrencies.[526] (The Police had possession of Cryptopia's building and other property and did not release that to the Company for approximately three and a half weeks.[527])

(d) Moving its cryptocurrency holdings into new wallets to prevent a further hack through the same vector.

(e) Assessing the cryptocurrencies stolen in the Hack and issuing CLM to account holders to reflect the NZD value of their stolen cryptocurrency.[528] (Ultimately, CLM were never redeemable because Cryptopia went into liquidation.)

8.225 It also appears from internal documents that Cryptopia took steps to reconcile its holdings and take a forensic copy of its exchange environment, although the liquidators do not have a copy of this.[529]

8.226 Before Cryptopia brought its exchange online again in March 2019, it required account holders to generate new deposit addresses and restricted trading to a limited set of cryptocurrencies. It also set up a new wallet environment and infrastructure and began recovering cryptocurrencies from the compromised wallet environment.[530] It was those new wallets that the liquidators were given access to when they were appointed.[531]

8.227 Those actions do not reflect a trustee that has not turned its mind to the interests of beneficiaries and made a decision to act in good faith. To return to the example in *Credit Suisse* (see [8.219] above), this is not a situation in which a trustee watched strangers enter the room and take the gold bullion but did not intervene. Even if the Court finds that those steps were

[523] Ruscoe second affidavit, 4 November 2025 at [48], 201.0130 and exhibit DIR2-226, 4 November 2025, 302.0849.
[524] Ruscoe second affidavit, 4 November 2025 at [42], 201.0129.
[525] Ruscoe second affidavit, 4 November 2025 at [45], 201.0129.
[526] Ruscoe second affidavit, 4 November 2025 at [45], 201.0129.
[527] Ruscoe second affidavit, 4 November 2025 at [44], 201.0129.
[528] Ruscoe first affidavit, 31 July 2025 at [116]–[118], 201.0054–201.0055.
[529] Ruscoe second affidavit, 4 November 2025 at [46], 201.0129.
[530] Ruscoe first affidavit, 31 July 2025 at [90], 201.0048.
[531] Ruscoe second affidavit, 4 November 2025 at [6], 201.0118.

inadequate, it is difficult to see how that could amount to any more than a duty of care issue (which is plainly non-fiduciary).

8.228 In relation to Bitbay:

(a) On 8 March 2019, GNY advised Cryptopia that it was hoping the hacker would transfer stolen tokens to Bitbay, where they could attempt to freeze them, but that the hacker had not yet done so.[532] Cryptopia confirmed the volume of LML stolen from the exchange and provided GNY with the wallet address within which the stolen LML was being held.[533] Cryptopia also suggested that "*as they have yet to send this to an exchange this may provide an opportunity to recover these funds external from relying on them to send them to an exchange…it may be a viable option to perform a token* swap *which would invalidate the stolen funds."* Cryptopia also advised that they were working with the authorities regarding the Hack and had teams dedicated to tracing the funds and communicating with exchanges and asked for a contact address for Bitbay.[534]

(b) GNY provided a contact address for Bitbay, advised that Bitbay had agreed that they would attempt to freeze funds that made its way to the exchange, and asked about Cryptopia's plans to rebate account holders.[535] Cryptopia advised on 13 March 2019 that it was working with management to respond to GNY's queries.[536]

(c) On 18 March 2019, GNY wrote a letter to Cryptopia notifying Cryptopia that "we have seen the hacker attempt to sell the stolen LML tokens on Etherdelta and Bitbay and we have alerted the exchanges of those attempts" and that "the recovery of any significant number of tokens is practically non-existent". GNY requested a one-time payment of 443 BTC from Cryptopia to account for its losses.[537]

(d) On 19 March 2019, GNY told Cryptopia that "more stolen tokens from Etherdelta have arrived at Bitbay for you to contact them."[538]

[532] Exhibit [redacted]32 to [redacted] first affidavit, 30 March 2025, 302.0868 at 302.0870.
[533] Exhibit [redacted]32 to [redacted] first affidavit, 30 March 2025, 302.0868 at 302.0869.
[534] Exhibit [redacted]32 to [redacted] first affidavit, 30 March 2025, 302.0868 at 302.0870.
[535] Exhibit [redacted]32 to [redacted] first affidavit, 30 March 2025, 302.0868 at 302.0869.
[536] Exhibit [redacted]37 to [redacted] first affidavit, 30 March 2025, 302.0875.
[537] Exhibit [redacted]46 to [redacted] first affidavit, 30 March 2025, 302.0887.
[538] Exhibit [redacted]49 to [redacted] first affidavit, 30 March 2025, 302.0893.

(e) On 20 March 2019, Bitbay advised GNY that they could not freeze the funds any longer because they "*need to have legal grounds to hold these funds (letter from the police should be sufficient)*" and that they had not received any contact from Cryptopia.[539] GNY responded that "*This is for Cryptopia to act on."* GNY then contacted Cryptopia and said "*A reminder that Bitbay cannot hold the stolen tokens indefinitely, you have not contacted the exchange and there has been no contact from the police either…Please contact bip@bitbay.net to give them the information required.*"[540] GNY followed up on the same day and said that Bitbay required Cryptopia's and the Police's confirmation that the tokens were stolen property.[541]

(f) Then, on 21 March 2019, GNY emailed Bitbay saying "*I am including the letter from NZ Police, which acknowledges the incident"* and provided the wallet address where the stolen LML tokens had been held (the same wallet address provided to GNY by Cryptopia on 8 March 2019).[542]

8.229 Cryptopia was not informed that LML tokens had made it to the Bitbay exchange until 18 March 2019. GNY did not ask Cryptopia to contact Bitbay until 19 March 2019 (although Bitbay had actually requested confirmation from Police, not Cryptopia).[543] Ultimately, on 21 March 2019 GNY provided the information sought by Bitbay, being a letter from Police and the wallet address where the stolen LML tokens had been held (which Cryptopia provided to GNY on 8 March 2019).[544]

8.230 The critical point is that it was GNY, not Cryptopia, that had the contractual relationship with Bitbay and was therefore best placed to protect its own interests in relation to the stolen LML tokens on that exchange. It was Bitbay's decision to unfreeze the stolen LML tokens. Bitbay could easily have independently verified that the funds were stolen through a tracing analysis and with the tracing information Cryptopia had already provided to GNY – the wallet address holding the stolen LML tokens.[545] In the event, GNY *did* provide information to Bitbay, as requested (and noting that Bitbay

[539] Exhibit PJS1-95 to Sibenik first affidavit, 1 August 2025, 302.0892.
[540] Exhibit [redacted]49 to [redacted] first affidavit, 30 March 2025, 302.0893.
[541] Exhibit PJS1-92 to Sibenik first affidavit, 1 August 2025, 302.0895.
[542] Exhibit PJS1-96 to Sibenik first affidavit, 1 August 2025, 302.0898.
[543] Letter from GNY to liquidators, 6 October 2020 at [5], exhibit [redacted]112 to [redacted] first affidavit, 303.1042 at 303.1042.
[544] Exhibit PJS1-96 to Sibenik first affidavit, 1 August 2025, 302.0898.
[545] Sibenik first affidavit, 1 August 2025 at [74]–[75], 201.0110–201.0111.

had requested information from the Police, not from Cryptopia). Ultimately, GNY had the information it needed to protect its interests, and it was open to GNY to apply for injunctive relief against Bitbay in respect of the stolen tokens if Bitbay would not cooperate.

8.231 Against all of this context, Cryptopia was taking steps in the interests of all beneficiaries as a whole (see [8.224]-[8.227]). It is difficult to see how any of that amounts to a failure to act honestly, in good faith, or in the interests of, and for, beneficiaries as a whole, in the circumstances.

8.232 On that basis, the liquidators respectfully submit that:

(a) No fiduciary duties were owed to GNY.

(b) Even if GNY were owed fiduciary duties, the content of the duty is to act honestly, in good faith, and in the interests of beneficiaries as a whole. None of the conduct alleged by GNY amounts to a breach of that duty.

Quantifying loss

The measure of damages available for each cause of action

8.233 The damages that may be recoverable by GNY for breach of contract, breach of trustee duties, and / or breach of the FTA, CGA and / or FMCA are addressed below. These submissions are premised on the Court having found one or more breaches and that GNY is the proper claimant (which is denied). Damages for breach of contract and / or breach of trust are also subject to any finding on the applicability of the limitation and exclusion clauses in Cryptopia's Terms and Conditions.

Damages for breach of contract

8.234 The purpose of an award for damages for breach of contract is to put the claimant in the position it would have been in had the contract been performed.[546]

8.235 Accordingly, if the Court finds that Cryptopia breached its contractual term to use reasonable care in operating its platform, and that reasonable care in operating the platform would have prevented the Hack occurring, the Court

[546] *Robinson v Harman* (1848) 1 Exch 850 at 855 per Parke B, reaffirmed by the Supreme Court in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] 2 NZLR 726 at [157], and in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12 at [12] per Lord Bingham, and the High Court of Australia in *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17 at [6].

must look at the position GNY would have been in if the Hack had not occurred.

8.236 Principles of remoteness and mitigation will also apply to any damages that are recoverable for breach of contract.

8.237 In terms of remoteness, the classic test in *Hadley v Baxendale* provides that losses for breach of contract will be recoverable if they are either:[547]

(a) Losses that would arise naturally, in the usual course of things, from the breach itself.

(b) Losses that would not arise naturally or in the usual course of things, but which were within the parties' contemplation when they entered the contract.

8.238 The New Zealand Court of Appeal in *McElroy Milne* suggested that remoteness is ultimately a question of fact taking into account a range of relevant considerations, with the degree of foreseeability usually being the most important.[548]

8.239 In terms of mitigation, the claimant will only be able to recover losses that it could not have avoided by taking reasonable steps to mitigate its loss.[549] What steps are reasonable is a question of fact to be assessed based on the particular circumstances. The onus is on the defendant (or in this case the liquidators on behalf of Cryptopia) to show that the claimant failed to act reasonably.[550]

Equitable damages for breach of trust

8.240 The claim to compensation for breach of trust has traditionally been brought by way of action for an account but is often now brought simply as a claim for equitable compensation or restitution.[551]

8.241 The general duty of a trustee to exercise reasonable skill, care and diligence is an equitable duty rather than a fiduciary duty.[552] The breach of this equitable duty is treated in the same way as how the law treats other

[547] *Hadley v Baxendale* (1854) 2 Exch 341, 156 ER 145 at [354].
[548] *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA).
[549] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) at 689.
[550] *Payzu Ltd v Saunders* [1919] 2 KB 581; *Governors Ltd v Anderson* CA94/04, 16 August 2005.
[551] *Lewin on Trusts* at [41-003], citing *Target Holdings Ltd v Redferns* [1996] AC 421 (HL).
[552] *Equity and Trusts in New Zealand* at [17.2.2] and [17.2.5].

negligent but non-fiduciary defendants,[553] with the equitable rules of causation and remoteness mirroring common law rules.[554] The award of equitable compensation in such a case is equivalent to the award of damages (for breach of contract or in tort) at common law.[555]

8.242 This can be contrasted with the position of a trustee whose breach of trust directly causes loss to the trust property. In a traditional trust situation, such a trustee would be required to restore the trust estate, either *in specie* or by value, in respect of any loss that would not have occurred but for the breach, with questions of foreseeability and remoteness not being relevant to such an assessment.[556] However, it is not clear whether that principle of full restitution would also apply to a commercial or bare trust[557] which is the type of trust at issue here.

Breach of FTA

8.243 Damages for breaches of s 13 of the FTA may be ordered under s 43(3)(f). Such damages are typically calculated as if the misrepresentation had not been made.[558]

8.244 Typically, expectation losses (the benefit the claimant expected to gain) are not recoverable. In particular, the claimant cannot recover losses calculated as if the misleading statement had been true.[559] This is because the alleged wrong under s 13 is a misleading statement, and the failure to make good a misleading statement does not constitute a breach of the FTA.[560]

8.245 Principles of causation and remoteness apply to damages assessed under the FTA, as is clear from the leading case of *Red Eagle*. The Court of Appeal recently summarised the causation test in *Red Eagle* as follows:[561]

(a) The language in the remedy section of the FTA (s 43) requires a practical or common-sense concept of causation.

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[553] *Equity and Trusts in New Zealand* at [32.4.1(3)]; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 688.
[554] *Equity and Trusts in New Zealand* at [32.5.1], [32.5.4] and [17.2.5], citing *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 16–17, 710–711 per Millett LJ, and *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 686–687 per Tipping J.
[555] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 17.
[556] *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 687.
[557] *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) at 435 per Lord Browne-Wilkinson; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 684 per Gault J.
[558] *Shabor v Graham* (2021) 22 NZCPR 466 (CA) at [62]; *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 26.
[559] *Shabor v Graham* (2021) 22 NZCPR 466 (CA) at [64]–[66]; *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 26; *Harvey Corp Ltd v Barker* [2002] 2 NZLR 213 (CA) at [14].
[560] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 26.
[561] *Shiu v Luo* [2024] NZCA 48 at [108], upheld by the Supreme Court in *Luo v Shiu* [2024] NZSC 79.

(b) The court needs to ask whether the defendant's conduct in breach of s 13 was an operating cause of the claimant's loss or damage. It need not be the sole cause, but it must be an effective cause.

(c) There must be a clear nexus between the conduct and the loss or damage.

(d) A claimant's own conduct may be an operating cause.

8.246 There must be reliance on the misleading statement in order for it to have caused loss (addressed at [8.143]-[8.149] above). There does not appear to be a specified date at which damages ought to be assessed, provided that the loss to which the damages relate is causally connected to the breach.

Breach of FMCA

8.247 If a breach of s 22 of the FMCA is established, a compensatory order may be sought in respect of loss or damage suffered because of the breach.[562] The Court would first need to make a declaration of contravention,[563] and would then have the discretion to grant any compensatory order it thought just to compensate for the loss or damage suffered because of the contravention.

8.248 Common law principles of causation seem likely to apply in respect of loss or damage suffered because of the contravention. The FMCA does contain a presumption as to loss in cases of defective disclosure,[564] thus removing the usual requirement to establish causation,[565] but that does not apply to the present circumstances.

8.249 A compensatory order under the FMCA serves the same purpose as compensatory damage under the FTA, so a similar measure of damages would be expected under the FMCA as it would under the FTA. The purpose of compensatory damages is to put the person whose rights have been violated in the same position, so far as money can do so, as if those rights had been observed.[566] Expectation losses are generally not available because this would seek to enforce the wrong complained of, rather than assess the position as if the misrepresentation had not been made.[567]

[562] Financial Markets Conduct Act, ss 494–495.
[563] Financial Markets Conduct Act, ss 486–488.
[564] Financial Markets Conduct Act, s 496.
[565] Financial Markets Conduct Bill 2013 (342-2) (select committee report) at 5.
[566] *Hyzon Motors Inc v Bartlett* [2024] NZHC 3687 at [66], citing *Joblin Insurance Brokers Ltd v M E Joblin Insurances Ltd* [2001] 1 NZLR 753 (HC) at [15].
[567] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 26.

Breach of CGA

8.250 If a breach of any of the guarantees in ss 28–31 of the CGA is established, GNY could claim damages for loss suffered as a result of the breach, which was reasonably foreseeable as liable to result from the breach.[568]

8.251 Similar to the approach taken under the FTA, the Court's jurisdiction to award damages is discretionary, with a commonsense approach to causation and remoteness.[569]

8.252 Causation is a question of fact and degree, the ultimate question being "whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances."[570]

8.253 The test for remoteness of damage is reasonable foreseeability, which is in line with the tort law rule as to remoteness of damage. The Federal Court of Australia has held that reasonably foreseeable losses under the equivalent Australian provision do not include expectation losses.[571]

Case law on valuing cryptocurrency

Difficulties valuing cryptocurrency

8.254 Cryptocurrency values are inherently volatile and fluctuate significantly on an hourly basis.[572] Unlike corporate stock, which is backed by hard assets, or fiat currency, which is backed by the issuing government, "*cryptocurrencies are only worth what someone is willing to pay for them on any given day*" and have no inherent value.[573] Cryptocurrencies are also much less regulated than fiat currencies or stocks.[574] These factors make the task of providing a dollar-value estimate of cryptocurrency incredibly difficult.

[568] Consumer Guarantees Act 1993, s 32(c).
[569] *Contact Energy Ltd v Moreau* [2018] NZHC 2884, [2019] 2 NZLR 692 at [148], citing *Contact Energy Ltd v Jones* [2009] 2 NZLR 830 (HC) at [133].
[570] *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41.
[571] *Vautin v BY Winddown, Inc (formerly Bertram Yachts) (No 4)* [2018 FCA 426, (2018) 362 ALR 702 at [293].
[572] See for example Palmer J's comments in *Ruscoe v Houchens (Distribution)* [2024] NZHC 419 at [42], where His Honour made a direction permitting the liquidators of Cryptopia Limited to liquidate cryptocurrency held by the liquidators in order to be able to meet future trust liabilities associated with distributing cryptocurrency to accountholders, "*given the volatility of cryptocurrency values to date*". See also Jae Lee "Valuation of Cryptocurrency in relationship property disputes" (2025) 11 NZFLJ 186: "*Small market cap cryptocurrencies are generally newer and have yet to establish a strong market presence, but with a lot of potential for growth. On price tracking platforms, observing cryptocurrencies with small market caps spiking or dropping in value by more than 40 per cent within a 24-hour window is relatively common.*"
[573] US Bankruptcy Court of Delaware's decision in *In re FTX Trading Ltd*, exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1302.
[574] Exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1303.

8.255 The Singapore High Court was required to consider the value of particular cryptocurrencies to assess damages in *Fantom Foundation*.[575] The Court noted that, as with any asset, the issue of whether to accept a valuation ascribed to cryptocurrency must turn on the evidence before the Court.[576] The Court made several observations about valuing cryptocurrencies in a damages context, acknowledging that there were several difficulties with identifying a 'source' of valuation for cryptocurrencies:

(a) Cryptocurrency will often have no real intrinsic value and depends solely on its value in the market.[577]

(b) Cryptocurrencies are often traded using other cryptocurrencies, making valuation complex.[578]

(c) Because cryptocurrency is decentralised and traded on multiple platforms, there is no "single *source of truth*" as there would be with shares listed on a particular stock exchange.[579]

Reliance on data from data aggregators like CoinMarketCap

8.256 In assessing damages, the Court in *Fantom Foundation* accepted uncontested expert evidence using data from CoinMarketCap, described as "*a leading cryptocurrency price-monitoring platform*".[580] The Court considered that the use of this data was "*unproblematic*" and that other jurisdictions had similarly considered CoinMarketCap to be a reliable valuation tool.[581]

8.257 The Court referred to the Delaware case *Diamond Fortress Technologies Inc v Everid Inc*.[582] In that case, the tokens in question were valued using CoinMarketCap's historical pricing data because the Court was satisfied of CoinMarketCap's reliability as a cryptocurrency valuation tool.[583]

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[575] *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173.
[576] *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173 at [18].
[577] *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173 at [39].
[578] *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173 at [37].
[579] *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173 at [37].
[580] *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173 at [24]. See also *Kalen, Alexandru v World Exchange Services Pte Ltd* [2026] SGHC 31 which also relied on data aggregators, though it is not clear what cryptocurrencies the claim related to and whether the circumstances were similar to that for LML. There was no dispute about valuation methodology (both parties appear to have relied on data aggregators and the defendant's expert agreed that CoinMarketCap was a reliable source of value (at [51]). The only criticism in that case was that the claimants did not possess technical skill or knowledge in cryptocurrency (at [50]).
[581] *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173 at [24(a)].
[582] *Diamond Fortress Technologies Inc v Everid Inc* 274 A 3d 287 (Del 2022).
[583] *Diamond Fortress Technologies Inc v Everid Inc* 274 A 3d 287 (Del 2022).at 306. See also *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173 at [24(a)].

Market mitigation rule applies

8.258 The English Court of Appeal heard an appeal of a strike-out application in respect of a cryptocurrency loss case in *BSV Claims v Bittylicious*.[584] The case involved representative claims against several cryptocurrency exchanges alleging that their delisting of a particular cryptocurrency (BSV) was anti-competitive and had caused its value to fall.

8.259 The Court noted that cryptocurrencies are, by their nature, volatile and that the market mitigation rule applies as it would to shares or other tradeable financial instruments.[585] The market mitigation rule was explained by Lord Brown in *The Golden Victory*:[586]

> Essentially it applies whenever there is an available market for whatever has been lost and its explanation is that the injured party should ordinarily go out into that market to make a substitute contract to mitigate (and generally thereby crystallise) his loss. Market prices move, both up and down. If the injured party delays unjustifiably in re-entering the market, he does so at his own risk: future speculation is to his account.

8.260 An exception to the market mitigation rule will apply if the claimant was not immediately aware of the breach or when there is no available market in which an adequate substitute can be obtained, in which case damages will be measured on a different date than the date of (or shortly after) the breach.[587]

8.261 Accordingly, once the holders were aware of the delisting event, they had to decide whether to retain their BSV holdings or to sell them and crystallise their loss. Electing to hold those cryptocurrencies "*did not entitle them to argue that their losses should be assessed by reference to the value of some other better-performing cryptocurrency at some future unspecified date*".[588] The Court found that "*[t]hey had a duty to mitigate their losses, and they cannot recover losses that they could reasonably have mitigated.*"[589]

8.262 The loss of a chance analysis was flawed for the same reasons:[590]

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[584] *BSV Claims v Bittylicious* [2025] EWCA Civ 661.
[585] *BSV Claims v Bittylicious* [2025] EWCA Civ 661 at [34].
[586] *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12 at [79]. The market mitigation rule was recently reconfirmed by Lord Leggatt in *Credit Suisse Life (Bermuda) Ltd v Ivanishvili* [2025] UKPC 53.
[587] *BSV Claims v Bittylicious* [2025] EWCA Civ 661 at [7], citing *Stanford International Bank v HSBC Bank* [2022] UKSC 34, [2023] AC 761 at [43] per Lord Leggatt.
[588] *BSV Claims v Bittylicious* [2025] EWCA Civ 661 at [35].
[589] *BSV Claims v Bittylicious* [2025] EWCA Civ 661 at [35].
[590] *BSV Claims v Bittylicious* [2025] EWCA Civ 661 at [38].

> To be clear, it was **not** reasonable mitigation of the damage caused by the alleged tortious events to retain the damaged BSV coins in the vain hope that they might become a top-tier cryptocurrency. The loss caused could and should have been crystallised as soon as it was known about. As I have already said, if the sub-class B holders chose to retain their damaged holdings of BSV, they did so at their own risk.

Market price does not always reflect value

8.263 The market price of a cryptocurrency does not always reflect its value, and discounts for lack of marketability are often appropriate. This is clear from the US Bankruptcy Court of Delaware's decision in *In re FTX Trading Ltd*,[591] which the Court noted was the first decision of any bankruptcy court estimating the value of cryptocurrency-based claims in an insolvency context.

8.264 FTX and its affiliates filed for relief under chapter 11 of the Bankruptcy Code. It received millions of claims from account holders seeking to recover the value of the cryptocurrency held by FTX on their behalf. FTX filed a motion seeking to estimate the value of the claims.[592] Three parties objected to the calculations proposed by FTX. The objectors collectively held three tokens: MPS, OXY and SRM.

8.265 FTX and its affiliates held almost all of the tokens in circulation – 99% of MAPS tokens, over 97% of all OXY tokens, and over 95% of all SRM tokens. As a result, daily trading volume was very low (1-3% of the total token supply was freely trading in markets), the smallness of the market for the assets meant it had limited ability to absorb sales, and any increase in trading was likely to have a negative impact on the price:[593]

> The practical impact of the fact that Debtors hold more than 95% of the existing supply of the Tokens is that any changes the Debtors make with respect to their holdings of these Tokens will have an immediate effect on the market. To estimate the value of the Objectors' Tokens without consideration of this fact would result in a vastly inflated value that would not accurately reflect existing market conditions.

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[591] *In re FTX Trading Ltd,* 26 June 2024, District of Delaware, United States Bankruptcy Court, exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302.
[592] The Bankruptcy Code required the estimation of *"any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case"*: exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1311.
[593] Exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1312–303.1313, and quote at 303.1314.

8.266 The parties offered different expert approaches to valuation. FTX's expert applied the "KO Model",[594] which resulted in a suggested valuation discount of 100% for MAPS and OXY and 58% for SRM. However, the Court was not satisfied that the KO Model was appropriate to value the crypto assets because it was designed to calculate transaction costs from a decision to take a position in a market of a certain size, not to value an asset, and it had not previously been used for the purposes of valuation.

8.267 The objectors' expert used the Blockage Method,[595] which the Court noted was a generally accepted methodology for determining the value of an asset, though there were issues with the way it had been applied:

(a) The expert only valued the tokens held by his clients and did not consider how the debtors' holdings would impact the token price.

(b) The tokens used as comparators were not in fact similar to the tokens at issue.[596]

(c) Neither of the two discount models used produced an accurate result, which is why the expert had averaged the results.

8.268 The debtors' expert addressed those issues in her rebuttal report, including by utilising a third discount model that demonstrated a more logical result. Consequently, the Court was satisfied that the tokens should be given discounts for lack of marketability of 100% (MAPS), 99.9% (OXY) and 18.6% (SRM).[597]

8.269 The objectors argued that the estimated valuation of two tokens as nothing was at odds with the fact that the tokens had a positive trading price on the liquidation date, which meant that selling the token must result in some number above zero. However, the evidence suggested that the market prices for the tokens were not a reliable indicator of their actual value; "*[c]ommon sense dictates that the fact that the Debtors hold all but a few of the Tokens here gives them enormous control over the price.*"[598]

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[594] Albert S Kyle and Anna A Obizhaeva "Market Microstructure Invariance: Empirical Hypotheses" (2016) 84 ECONOMETRICA 1345.
[595] Exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1316: *"The blockage discount method is a method that was invented in the 80's. It was sort of an agreement between the tax court and the valuation practitioners that realized for large holdings it doesn't make any sense to sell everything on the valuation date. You need to follow a phased liquidation approach, what we call in valuation theory a dribble-out method. So, everything is sold gradually for the certain period of time and then you go back on the petition date and apply the discount.*"
[596] Exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1320–303.1321.
[597] Exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1326.
[598] Exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1324.

8.270 The Court also acknowledged the argument that restricting the free float for the at-issue tokens was a deliberate strategy for FTX and Alameda to inflate the market prices of the at-issue tokens, and in turn inflate the value of FTX's and Alameda's balance sheets. The Court responded:

> While there is no evidence in the record that would allow me to make any conclusions regarding what FTX or its executives intended to accomplish in holding the vast majority of the at-issue Tokens, I need not understand the intent behind this decision in order to see its consequence. The simple fact that the Debtors held nearly all of the supply of the Tokens at issue had the effect of keeping trading volume low and, quite possibly, keeping prices artificially high.

Valuation date may not always be the date of breach

8.271 The date of the Hack was taken as the date of valuation of the stolen cryptocurrency in *Ruscoe v Houchens (Distribution)*.[599] Palmer J directed that any recoveries of stolen cryptocurrencies could, after first being applied to the trusts that contributed to Hack recovery costs, be paid to account holders in fiat or cryptocurrency proportionate to the amount they lost in the Hack and up to 100% of the value of their holding as at the date of the Hack.[600]

8.272 Loss is usually valued at the date of breach. However, this may not be the case if it would lead to the claimant being inadequately compensated. An example may be when cryptocurrency that was not transferred as agreed has subsequently risen in value, as was the case in *Southgate v Graham*.[601]

8.273 *Southgate* is an appeal decision of the High Court of England and Wales concerning the date for assessing damages in a cryptocurrency context. The appellant had advanced 144 ETH tokens to the respondent, which was to be repaid together with a premium of 10% within a reasonable time of demand, which was found to be 1 October 2019, demand having been made in July 2019. 115.69 ETH was still outstanding. The appellant sought specific performance or damages in the alternative.

8.274 The judge at first instance had declined specific performance and allocated a remedies hearing to determine the quantum of damages to be paid, with the valuation date to be 1 October 2019 (the date of breach). The appellant

[599] *Ruscoe v Houchens (Distribution)* [2024] NZHC 419.
[600] *Ruscoe v Houchens (Distribution)* [2024] NZHC 419 at [58], order 9.2.
[601] *Oliver Southgate v Adam Graham* [2024] EWHC 1692 (Ch).

appealed, seeking specific performance or damages valued as the date of judgment. The valuation date was a critical issue because of the significant difference in value between ETH as at 1 October 2019 and as at 2024.[602]

8.275 The Court saw merit in the appellant's arguments on the valuation date and directed that the appropriate valuation date be determined at the remedies hearing, observing that:[603]

(a) Although the general rule is to use the date of breach as the valuation date for loss caused by breach of contract, the Court should seek to ensure that the wronged party is adequately compensated by being placed in the same position they would have been in had the contract been performed.

(b) When it is not possible to give effect to the general compensatory principle by valuing the asset at the date of breach, it may be necessary to adopt another approach.

(c) In the present case, it seems the effect of a decision to assess the damages as at the date of breach would likely leave the appellant significantly out of pocket.

Requirements for valuing GNY's claim

Denomination of claim in NZD

8.276 Section 306(1) of the Companies Act 1993 requires GNY's claim in the liquidation to be denominated in New Zealand currency. The creditor claim submitted by GNY contains a claim in NZD ($27,228,202.35)[604] but also refers to the BTC value of the claim. In correspondence on 18 December 2024, GNY valued its losses in BTC.[605] The evidence of its expert also values GNY's losses in BTC. BTC is self-evidently not New Zealand currency.

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[602] The Court observed at [24] that, as at the time of judgment, ETH was worth approximately ten times its value as at the valuation date picked by the Judge, which itself was significantly less than the value at the time the ETH in issue were originally transferred to the respondent.

[603] *Oliver Southgate v Adam Graham* [2024] EWHC 1692 (Ch) at [50]–[54], citing *Johnson v Agnew* [1980] AC 367 (HL) at 400 per Lord Wilberforce, and *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12 at [29] per Lord Scott. See also *Kalen, Alexandru v World Exchange Services Pte Ltd* [2026] SGHC 31 at [39], in which the Singapore High Court held that the orthodox position that the breach date is the appropriate date depends on the availability of an immediately available market, which in turn alludes to the possibility and reasonableness of mitigation. The appropriate date for valuation in the cryptocurrency context, then, may be the date at which the claimant could reasonably have expected to mitigate its loss.

[604] The claim comprises $8,558,622.43 for the loss of GNY's LML tokens and a further $18,669,579.92 in loss of market capitalisation of the token. See exhibit [redacted]51 to [redacted] first affidavit, 30 March 2025, 302.0949 at 302.0956.

[605] Exhibit [redacted]121 to [redacted] first affidavit, 30 March 2025, 303.1351 at 303.1354.

8.277 In earlier correspondence on 25 September 2019, GNY noted that it was "*asked for an explanation of the basis for pegging our client's claim for lost LML tokens to the value of Bitcoin*". GNY replied that it had made its claim in BTC because Cryptopia gave GNY the LML / BTC pairing when it listed its tokens on the exchange platform, and it seeks to ensure consistency with that pairing. It said its preference was to have its creditor claim paid in BTC. It also said BTC was the first cryptocurrency and is the most visible, so it is a convenient currency to use to compare token values and provides a more authentic assessment of value than comparing a cryptocurrency to a fiat currency.[606]

8.278 It is not clear why the LML / BTC pairing was preferred: LML was also paired with other cryptocurrencies (LTC and DOGE on Cryptopia)[607] and fiat currency (Polish Zloty on Bitbay).[608]

8.279 What is clear is that LML was never pegged to BTC, or to any of the other cryptocurrencies or fiat currency with which it was paired, as that descriptor is understood by the liquidators. Pegging is explained as follows:[609]

> In the cryptocurrency context, pegging is the process of attaching one coin's market value to the value of another coin or real-world asset, such as gold or fiat currency. The goal of pegging is to stabilize a cryptocurrency asset by tying its value to a cryptocurrency or asset that maintains a consistent value. It is often linked to the designated asset or crypto at a predefined ratio. Once the ratio is established, the value of the cryptocurrency moves in the same direction as the value of the asset it is 'pegged' to.
>
> To peg a cryptocurrency to another asset, the project behind the crypto must hold a sufficient amount of the designated asset. In addition, they must maintain this reserve at all times to back their stability claim. This ensures that they can compensate users when they claim back their share of the designated asset anytime.
>
> The most common use case of pegging in the crypto space is stablecoins, a type of cryptocurrency asset that is attached to a less volatile asset. These cryptocurrencies are designed to offer price stability regardless of market direction. For instance, crypto projects may link their cryptocurrency value to

[606] Exhibit [redacted]69 to [redacted] first affidavit, 30 March 2025, 302.0959 at 302.0972.
[607] LML listing quote, exhibit [redacted]1 to [redacted] first affidavit, 30 March 2025, 302.0731.
[608] Sibenik first affidavit, 1 August 2025 at [20], 201.0096; Letter from GNY to liquidators, 6 October 2020 at [5], exhibit [redacted]112 to [redacted] first affidavit 30 March 2025, 303.1042 at 303.1042.
[609] "Pegged Meaning" (2 January 2024) <www.ledger.com>: Pegged Meaning | Ledger.

fiat money in a 1:1 ratio. This enables users to securely store a steady, less volatile value during market fluctuations.

8.280 It would not be possible for the value of LML to be pegged to multiple unrelated assets. The prices of each cryptocurrency or currency with which LML was paired were always floating in price relative to other assets.[610]

8.281 Further, cryptocurrency is often highly volatile and has prices that therefore fluctuate over short periods of time. It is therefore more appropriate to denominate any assessed loss in fiat currency (such as NZD or USD) because that is a stable reference point and what is required by statute.[611]

8.282 The fact there was no LML / NZD or LML / USD pairing does not mean LML did not have a distinguishable price that could be denominated in NZD or USD. It simply means LML was not traded against NZD or USD directly.[612] The daily trading volume charts for LML that Mr [redacted] has annexed to his affidavit show the value of LML in both USD and BTC.[613] A subsequent price chart shows the value of LML in both BTC and ETH.[614]

8.283 The liquidators also consider that there is no basis to link the value of LML to that of BTC, as they are very different cryptocurrencies. BTC was the first major cryptocurrency, its issuance and distribution are governed by code rather than a company, it is an effective store of value, and it has far more liquidity and real trading volume than LML had. In his reply affidavit dated 24 February 2026 at [8]-[11] Mr Sibenik outlines various drivers of value for BTC that are not shared by LML. In contrast to BTC, for the majority of new cryptocurrency tokens, the price declines significantly within a few months and often goes to zero sooner or later.[615]

8.284 A parallel can be drawn with the *BSV Claims v Bittylicious* case,[616] in which claimants sought damages for foregone growth in the value of BSV with reference to the values of Bitcoin and Bitcoin Cash. The Master of the Rolls, Sir Geoffrey Vos, found that the claimants' election to hold their delisted BSV coins "*did not entitle them to argue that their losses should be assessed by*

[610] Sibenik first affidavit, 1 August 2025 at [19]–[20], 201.0095–201.0096.
[611] Sibenik first affidavit, 1 August 2025 at [20] and [56], 201.0096 and 201.0104.
[612] Sibenik first affidavit, 1 August 2025 at [19], 201.0095.
[613] Exhibit [redacted]6 to [redacted] first affidavit, 30 March 2025, 302.0948.
[614] Exhibit [redacted]7 to [redacted] first affidavit, 30 March 2025, 303.1156.
[615] Sibenik first affidavit, 1 August 2025 at [27]–[29], 201.0097–201.0098; Sibenik second affidavit, 24 February 2026 at [10], 201.0261.
[616] *BSV Claims v Bittylicious* [2025] EWCA Civ 661.

reference to the value of some other better-performing cryptocurrency at some future unspecified date".[617]

8.285 Accordingly, while GNY may consider it "*convenient*"[618] to make its claim in BTC – presumably including because of the very substantial increase in the value of BTC relative to NZD since Cryptopia went into liquidation – there is no principled basis on which to cherry-pick BTC as a value comparator in this way. Any claim in the liquidation must be valued in NZD.

Date for valuing loss

8.286 If, as a result of the Hack, Cryptopia is liable to GNY pursuant to contract, trust law or statute (which is denied), the date of the Hack – 14 January 2019 – is the date that the loss or damage occurred.

8.287 However, s 306(1) of the Companies Act 1993 requires that the amount of GNY's claim be ascertained at the date and time of liquidation. Cryptopia's liquidators were appointed four months after the Hack, at 1:20pm on 14 May 2019.[619]

8.288 14 January 2019 – the date of the Hack – is the natural date for assessing any loss. It is the date that the loss (from the theft) was suffered. It is also the relevant date for assessing damages for any breach of contract, trustee duty or statute because until then any breach had caused no loss.[620]

8.289 Further, this is not a situation like *Southgate* in which damages assessed on that date would not adequately compensate the claimant, by putting it in the same position it would have been in had the Hack not occurred. The claim for damages here is based on the value of cryptocurrency just before it was stolen in the Hack and its value dropped, whereas in *Southgate* the loss arose from failure to transfer certain cryptocurrency on a particular date, following which the cryptocurrency rose in value.

8.290 The loss or damage should therefore be assessed in NZD at the date it was incurred (14 January 2019) and that assessment should then be given a value in NZD as at the date / time liquidators were appointed (1.20pm NZT

[617] *BSV Claims v Bittylicious* [2025] EWCA Civ 661 at [35].
[618] Exhibit [redacted]69 to [redacted] first affidavit, 30 March 2025, 302.0959 at 302.0972.
[619] Exhibit DIR1-1 to Ruscoe first affidavit, 31 July 2025, 302.0931 at 302.0931.
[620] Traditionally the date for assessing contractual damages is the date of breach, but this rule may be relaxed when fixing another date is required to achieve the objective of placing the injured party in the position it would have been in if the contract had been performed: Stephen Todd and Matthew Barber *Burrows, Finn and Todd Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [21.2.2(c)], citing *OHL Ltd v Johns* [2021] NZHC 77 at [34].

on 14 May 2019). It is likely that the value on 14 May 2019 will be the same as the value on 14 January 2019. This is because, if GNY had successfully brought a proceeding before Cryptopia had gone into liquidation in respect of loss or damage arising from the Hack, the judgment sum would likely be the amount of loss or damage assessed in NZD at 14 January 2019, though it could potentially also include an award of interest from that date pursuant to the Interest on Money Claims Act 2016 (noting that interest on any judgment could only have run to 14 May 2019, being the date of commencement of the liquidation, given that s 311 of the Companies Act 1993 prevents a claim in a liquidation from including interest past that date).

8.291 Accordingly, the liquidators submit that:

(a) Any loss or damage incurred by GNY as a result of the Hack for which Cryptopia has liability should be assessed in NZD as at the date of the Hack.

(b) GNY's creditor claim in Cryptopia's liquidation should be in the amount of the above assessed value (or the above assessed value plus interest from 14 January 2019 to 14 May 2019 in accordance with the Interest on Money Claims Act 2016).

How to value the LML-related claim

Different methodologies used

8.292 It is clear that the parties' respective experts utilise very different valuation methodologies. But this is consistent with Mr Sibenik's evidence that a variety of valuation methodologies are available in respect of cryptocurrency,[621] as is shown by the financial models considered in *In re FTX Trading Ltd*.[622]

8.293 Both experts utilise data from CoinPaprika, which is an online data aggregator like CoinMarketCap or CoinGecko. Data aggregators utilise a volume weighted average price across exchanges from which they aggregate data.[623] This kind of data was considered reliable for valuation purposes by the Courts in both *Fantom Foundation* and *Diamond Fortress*.[624]

[621] Sibenik first affidavit, 1 August 2025 at [31], 201.0098; Sibenik second affidavit, 24 February 2026 at [25]–[26], 201.0265.
[622] Exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302.
[623] Sibenik first affidavit, 1 August 2025 at [31], 201.0098.
[624] *Fantom Foundation Ltd v Multichain Foundation Ltd and Multichain Pte Ltd* [2024] SGHC 173; *Diamond Fortress Technologies Inc v Everid Inc* 274 A 3d 287 (Del 2022).

Characteristics of LML relevant to valuation

8.294 The background to LML is set out comprehensively from [8.16]. Key characteristics relevant to valuation are referred to here for ease of reference. LML was created in November 2018. 400 million LML tokens were generated, with half held as "treasury" tokens and half in circulating supply and (theoretically) available for trading.[625] Of the 200 million tokens in circulating supply 1 million were air-dropped (given away for free) to third parties[626] (despite Mr [redacted] indications to Cryptopia in the LML listing application that no airdrops were planned – see above at [8.19]-[8.20]).

8.295 LML was first listed on Cryptopia on 26 November 2018,[627] just 47 days prior to the Hack on 14 January 2019. It was also listed on Bitbay from December 2018.[628] There is no evidence it was ever listed on any other exchange.

8.296 All 15,444,570 LML tokens on the Cryptopia exchange were stolen in the Hack. The two accounts that are said to have been held on behalf of GNY held 15,409,316 of these, or 99.77% of the total on the exchange. GNY estimates that it held approximately 99% of the circulating supply of LML tokens at the time of the Hack.[629]

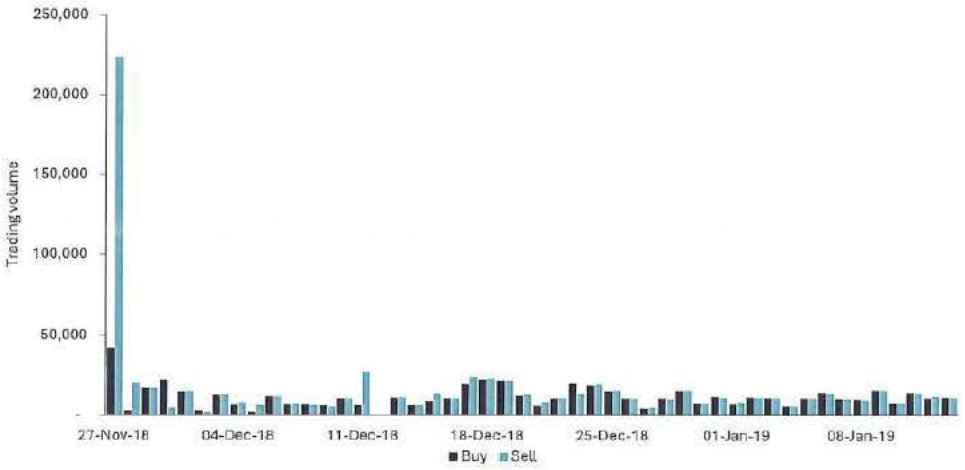
8.297 The only detailed trading data for LML that we have is from Cryptopia records. This is because GNY has failed to provide any records of trading of the LML token on Bitbay. (This unexplained failure is all the more surprising, given that GNY had engaged counsel in the Channel Islands and New Zealand within two months of the Hack in order to pursue claims for losses and issued proceedings against Cryptopia in April 2019.[630] Some losses arose from Bitbay allowing stolen LML tokens to be sold.[631])

8.298 The average daily trading volume on Cryptopia was 18,643 LML before the Hack. However, the vast majority of trades involved one or more of the three accounts linked to GNY or its founders. By number of trades, those three accounts were involved in 62%, 12% and 8% of LML trades respectively. But

[625] Letter from GNY to the liquidators, 3 April 2025 at [7], exhibit PJS2-1 to Sibenik second affidavit, 24 February 2026, 303.1404 at 303.1405.
[626] GNY letter to liquidators, 3 April 2025 at [9], exhibit PJS2-1 to second Sibenik affidavit, 24 February 2026 303.1404 at 303.1405.
[627] PJS1-50 to Sibenik first affidavit, 1 August 2025, 302.0770; [redacted] first affidavit, 30 March 2025 at [9], 201 0003.
[628] [redacted] first affidavit, 30 March 2025 at [13], 201.0003; [redacted] second affidavit, 19 December 2025 at footnote 19, 201.0147.
[629] Letter from GNY to the liquidators, 3 April 2025 at [10], exhibit PJS2-1 to Sibenik second affidavit, 24 February 2026, 303.1404 at 303.1405.
[630] Exhibit [redacted]37 to [redacted] first affidavit, 30 March 2025, 302.0875 at 302.0876.
[631] [redacted] first affidavit, 30 March 2025 at [16], 201.0004.

by volume of LML traded, they were involved in 92%, 30% and 22% of LML trades respectively.[632] For example, the following table from Mr O'Shea's report illustrates that after the first day of trading (27 November 2018), the GNY parties bought just as much LML as they sold:[633]

Figure 5: GNY Party buy and sell volumes



Clearly, the trading volume and market would have been drastically smaller if not for the involvement of the two principals of GNY.[634]

8.299 Mr [redacted] asserts that GNY was involved in 'market-making' LML trades because it was a newly launched token that was in the process of becoming established.[635] Market-making is when one person provides buying and selling liquidity on only one side of a trade.[636]

8.300 Cryptopia records show that 191 LML trades were between GNY-linked accounts (118 of which were between [redacted] and [redacted] which share IP addresses), and a further 10 trades involved the same GNY-linked user as both buyer and seller [redacted]

[632] Sibenik first affidavit, 1 August 2025 at [47], 201.0101 and exhibit PJS1-187, 303.1384 at 303.1391.
[633] O'Shea report at 6.5.11, exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1509.
[634] Sibenik first affidavit, 1 August 2025 at [48], 201.0102.
[635] [redacted] second affidavit, 19 December 2025 at [53], 201.0151.
[636] Sibenik first affidavit, 1 August 2025 at [48], 201.0102.
[637] Sibenik first affidavit, 1 August 2025 at [46], 201.0101.
[638] "Market Abuse & Trade Surveillance: How to identify Wash Trading" (10 November 2022) SteelEye <www.steel-eye.com>.

[redacted]

8.301 When the *volume* of LML traded is examined, it becomes clear that GNY-linked accounts were involved in the vast majority of LML transactions in the period prior to the Hack. The following tables from Mr O'Shea's report are illustrative of the extent to which [redacted] and [redacted] were selling LML to each other compared to third parties (noting that the majority of "[redacted]" sell trades to third parties occurred on the initial day of trading, 27 November 2018):[641]

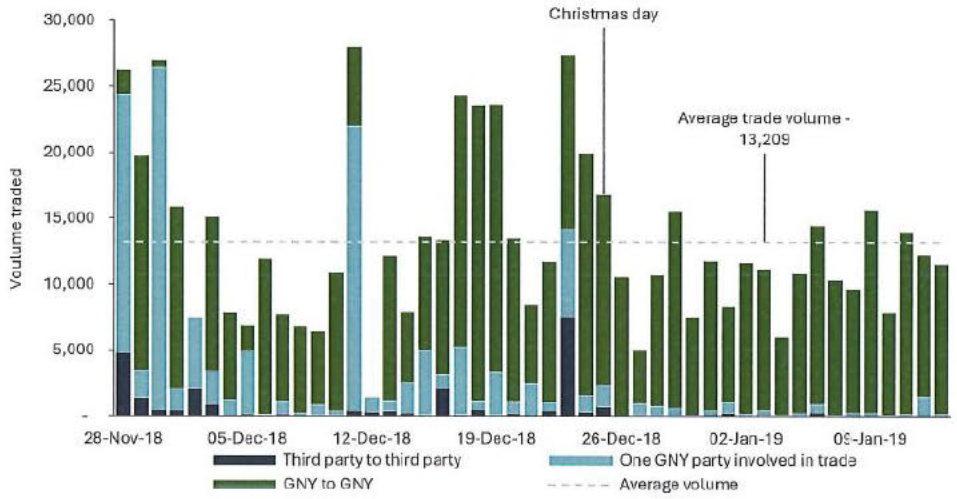
Table 8: Volume analysis

GNY Party	Total volume (LML)	Total sell volume (LML)	Sell / Total	Sell to third party volume (LML)	Sell to third party / Total
	A	*B*	*C = B / A*	*D*	*E = D / A*
[redacted]	845,105	533,168	63.1%	292,410	34.6%
[redacted]	204,746	104,440	51.0%	10,047	4.9%
[redacted]	274,308	135,582	49.4%	1,372	0.5%

Source: KordaMentha

[639] Lin Cong and others *Crypto Wash Trading* (National Bureau of Economic research, Working Paper 30783, December 2022) at 1.
[640] Lin Cong and others *Crypto Wash Trading* (National Bureau of Economic research, Working Paper 30783, December 2022) at 29 and 59.
[641] O'Shea report at [5.3.13]–[5.3.14] and [6.2.13], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1501 and 304.1509.

Figure 6: Breakdown of trade volume



Source: KordaMentha; GT Trading Data

8.302 Only around 10% of the stolen LML tokens were ever sold by the hacker, primarily in March and May 2019.[642] The sales by the hacker likely led to a drop in market price for LML.[643] Three days before the Hack, the market price was USD0.119021. By June 2019 the price was as low as USD0.01332.[644]

Mr Sibenik's valuation of the stolen LML

8.303 Mr Sibenik is an expert in blockchain forensics and cryptocurrency cybercrime investigation.[645] Conducting valuations of cryptocurrency assets and losses is a core aspect of his regular work.[646]

8.304 Given the low liquidity and trading volume of LML tokens, for the majority of which GNY or its founders were responsible (on one or both sides of most trades), Mr Sibenik considers that an accurate representation of what the realised value of the stolen tokens would have been, cannot be obtained by simply multiplying the market price of one LML token by 15,409,316.[647]

8.305 Given the extent of GNY's involvement in the trades [redacted] it is difficult to assess the extent to which such strategies increased the market price. We also do not know

[642] Sibenik first affidavit, 1 August 2025 at [34]–[35], 201.0099. No issue is taken with Mr Sibenik's analysis of the movement and sale of LML tokens: see O'Shea report at [4.4.7], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1496.
[643] Sibenik first affidavit, 1 August 2025 at [36], 201.0099.
[644] Sibenik first affidavit, 1 August 2025 at [39], 201.0100.
[645] Sibenik first affidavit, 1 August 2025 at [5], 201.0091.
[646] Sibenik first affidavit, 1 August 2025 at [8], 201.0092.
[647] Sibenik first affidavit, 1 August 2025 at [33], 201.0098–201.0099.

the extent of GNY's involvement in the trades on Bitbay because GNY has failed to provide the trading data from that platform.

8.306 Given these factors, Mr Sibenik considers the best way to value the stolen LML tokens is to look at what the hacker sold them for. While this is not an orthodox method of valuation, it is the only substantive real-world example available of the market value of LML that has not been influenced by GNY.

8.307 Only 1,617,190 (around 10%) of the stolen LML were sold, for a total of 264.863 ETH, which had a value of USD38,892.55 at the time. However, as the price had already dropped considerably as a result of the hacker liquidating this many tokens, the sale of any further tokens would have realised less and less value. In other words, the value that was obtained for the 10% of stolen tokens that were sold cannot simply be applied proportionately to the remaining 90% of unsold stolen tokens to calculate a total value.[648]

Mr O'Shea's valuation of the stolen LML

8.308 Mr O'Shea is GNY's expert. He is a Chartered Accountant. He states that he has over 20 years' experience in accounting, forensic accounting services, asset tracing, valuations, and assessments of loss and damage. He is not an expert in predicting the success or failure of crypto assets in initial offerings to the market,[649] or in the market dynamics of selling crypto assets into the market.[650]

8.309 Mr O'Shea bases his valuation on market theory:[651]

> Market theory suggests that a fully informed market incorporates many of the risks and issues identified into the asset's price. In my view, regarding the failure rates of new crypto assets, market theory indicates that the market is aware of these risks. In the absence of any price manipulation, the prevailing price reflects an informed assessment of risk of failure, provided there is no material information unknown to the market.

8.310 Mr O'Shea says that valuation theory takes the perspective that it is not appropriate to use hindsight when undertaking an assessment of value. The Hack is an intervening event that would impact the value of the LML coins and therefore any events that occurred after the Hack should not be

[648] Sibenik first affidavit, 1 August 2025 at [57]–[58], 201.0104.
[649] O'Shea report at [9.2.14], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1521.
[650] O'Shea report at [11.1.3], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1530.
[651] O'Shea report at [4.3.7], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1495.

considered in a valuation.[652] He has valued the LML tokens and market capitalisation but for the Hack occurring.[653]

8.311 Mr O'Shea uses fair market value as the standard of value. This is defined as:[654]

> [T]he estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and willing seller in an arm's length transaction, after proper marketing and where the parties have acted knowledgably, prudently and without compulsion.

8.312 Mr O'Shea says that market value is one of the three most commonly used and generally accepted approaches for valuing financial assets, with the other two being the income approach and the cost approach.[655] He adopts the market approach because crypto assets are non-income producing assets, their value is derived from changes in the market price based on demand and supply, and an active market was present for LML at the time of the Hack.[656] An *"active market"* is defined in International Financial Reporting Standard 13 (**IFRS 13**) as:

> A market in which transactions for the asset or liability take place with sufficient frequency and volume to provide pricing information on an ongoing basis.

8.313 Mr O'Shea "*implicitly assumed*" that an active market was present for LML, given the trades between GNY parties and third parties, and the trading of LML tokens on "*multiple exchanges*".[657] In fact, there is no evidence that LML was ever traded on exchanges other than Cryptopia and Bitbay, and the parties do not have raw trading data for Bitbay showing the extent to which GNY was involved in trades on that platform. Further, Mr Sibenik disagrees that there was an active market for LML because GNY held 99% of the circulating tokens and market participants did not have access to all LML-related publicly available information (that GNY held such a large proportion of the tokens and was the counterparty to most transactions).[658] As the Court observed in *In re FTX Trading Ltd,* "*common sense dictates that the fact that*

[652] O'Shea report at [4.4.9(a)], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1497.
[653] O'Shea report at [9.2.6], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1520.
[654] O'Shea report at [8.2.2], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1518.
[655] O'Shea report at [8.3.2], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1518.
[656] O'Shea report at [8.4.1], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1518–304.1519.
[657] O'Shea report at [9.2.3], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1520.
[658] Sibenik second affidavit, 24 February 2026 at [15], 201.0262–201.0263.

the Debtors hold all but a few of the Tokens here gives them enormous control over the price."[659] The same reasoning applies with equal force here.

8.314 Mr O'Shea includes in his consideration of the market the sales and purchases of LML when GNY-linked accounts were on one side of the transaction. He does this on the assumption that the non-GNY party is an independent market participant and on the assumption in market theory that the non-GNY party would only transact at a market price.[660]

8.31 

8.316 Mr O'Shea values the stolen tokens at the date of breach, multiplied by the number of GNY's stolen tokens. This results in a base valuation of 482.75 BTC.

8.317 Mr O'Shea considers a discount is then required for marketability issues. Prior to the Hack, daily trading volumes recorded on CoinPaprika[663] ranged from around 80,000 to 120,000 LML tokens. That shows the market was not liquid enough to sell the 15.4 million stolen tokens over a short period of time.

8.318 Mr O'Shea would apply a marketability discount of 30-50%. This is in the middle of the range of marketability discounts of 10-70% that studies show are reasonable for equity assets.[664] Mr O'Shea acknowledges it is difficult to

[659] *In re FTX Trading Ltd,* 26 June 2024, District of Delaware, United States Bankruptcy Court, exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1324.
[660] O'Shea report at [7.3.7] and [7.3.12], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1516.
[661] Sibenik second affidavit, 24 February 2026 at [15(c)], 201.0263.
[662] US Bankruptcy Court of Delaware's decision in *In re FTX Trading Ltd*, exhibit PJS2-65 to Sibenik second affidavit, 24 February 2026, 303.1302 at 303.1302, as quoted above at [8.254].
[663] It is important to note that the daily trading figures from CoinPaprika would include all trades, including those between GNY parties or those in which GNY were involved – on Cryptopia, this was the vast majority.
[664] O'Shea report at [9.2.19]–[9.2.22], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1522.

assess a precise marketability discount for the valuations, and it is ultimately a matter for the Court.[665]

Claim for loss of market capitalisation

8.319 As a matter of principle, GNY has no standing to claim market capitalisation loss. GNY did not own all the LML tokens and does not represent the entire LML market.

8.320 GNY's principals did, however, own at least 120 million LML tokens that were theoretically available for trading, in addition to the stolen tokens.

8.321 In any event, the liquidators consider that any loss in market capitalisation did not cause a financial loss to GNY. This is because most of the tokens held by GNY were worthless because at that time there was no buying demand to purchase tens of millions of LML tokens:[666] there were so few investors holding the LML token supply and so few investors interested in purchasing LML, as is shown by the minimal trading volume, a large portion of which GNY was responsible for due to market making activity.[667]

8.322 Indeed, Mr [redacted] has confirmed that GNY intended to sell off all the remaining circulating tokens over an extended period of time, which it ultimately did in the four years after the Hack.[668] However, the fact that the circulating tokens were sold at a later date for some value does not mean they had any value at the time of the Hack. Damages should be assessed at the time of the loss (the Hack).

8.323 Mr O'Shea has calculated a base valuation for loss of market capitalisation by comparing the market price on 13 January 2019 with the market price on 30 May 2019 (the date just after the hacker stopped selling the stolen LML, when Mr O'Shea was instructed to assume the impact of the Hack had ceased)[669] and multiplying the price difference by 120 million. The resulting base valuation is 3,553.6 BTC.[670]

8.324 Mr O'Shea would then apply a marketability discount of 60-80% to this base valuation.[671] This range is derived from studies showing that marketability

[665] O'Shea report at [9.2.21]–[9.2.22], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1522.
[666] Sibenik first affidavit, 1 August 2025 at [59(a)], 201.0105.
[667] Sibenik second affidavit, 24 February 2026 at [34]–[35], 201.0267–201.0268.
[668] [redacted] second affidavit, 19 December 2025 at [41]–[43], 201.0149.
[669] O'Shea report at [9.4.8], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1525.
[670] O'Shea report at [9.4.15], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1525.
[671] O'Shea report, exhibit BOS-1 to O'Shea affidavit, 22 December 2025, at [2.4.11], 304.1486 and [9.2.22], 304.1525.

discounts of 10-70% are reasonable for equity assets but has been extended to 80% given the higher risk in price volatility of this asset class.[672] This puts his assessed marketability discount at slightly above that of an unlisted equity. Mr O'Shea proffers no explanation for why equities represent a valid comparator to cryptocurrencies in this context.

8.325 Mr O'Shea also says a greater discount is justified than in respect of the stolen tokens because of the increase in scale of the quantity of units being dealt with.[673]

Causation

8.326 Causation is another obstacle GNY must overcome before any damages or compensation can be considered payable by Cryptopia under any of GNY's claims.

8.327 In addition to the factual causation analysis at [8.152]-[08.167], the liquidators submit that the evidence does not establish that the Hack caused the specific losses claimed by GNY. There are several reasons for this.

8.328 First, a large decline in price happens for the *majority* of new cryptocurrency tokens within a few months of listing. Mr Sibenik cites a 2020 study that showed there was only a 12% likelihood of ICO investors' tokens trading above their issue price after 6 months, and 65% of the tokens launched in ICOs in 2019 had lost almost all their value by July 2020.[674] It is not rare for the price of a new cryptocurrency token to plummet by 90% in the first six months or less.[675]

8.329 Secondly, the price of LML had declined by 30% (from USD0.119021 to USD0.08255) before the hacker sold any of the stolen tokens.[676] That price decline could not have been caused by market uncertainty regarding whether LML tokens in the market had been stolen, as none of the stolen tokens had been sold.

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[672] O'Shea report at [9.2.20], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1522.
[673] O'Shea report at [9.4.3], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1524.
[674] Sibenik first affidavit, 1 August 2025 at [27], 201.0097–201.0098; Exhibit PJS1-293 to Sibenik first affidavit, 1 August 2025, 303.1409 at 303.1409.
[675] Sibenik second affidavit, 24 February 2026 at [28], 201.0265. See also footnote 572 above.
[676] Sibenik first affidavit, 1 August 2025 at [37], 201.0099.

8.330 Thirdly, there were no further sales of stolen LML tokens after May 2019, yet the price continued generally to decline. By mid-2020 the price had declined a further 78% (to USD0.004079) from its value in June 2019.[677]

8.331 Accordingly, the drop in price between the time of the Hack and May 2019 is unlikely to have been wholly caused by the Hack. Mr Sibenik says it is probable that the price would have declined even if stolen tokens had not been sold,[678] though it is reasonable to suggest that the Hack may have had some downward pressure on the price for two reasons:[679]

(a) The sale of stolen tokens by the hacker in March and May 2019 would have resulted in a much higher selling demand.

(b) Investors and prospective investors may be more concerned about holding or buying LML tokens due to concerns that the hacker might 'dump' them and cause a decrease in price.

8.332 However, that downward pressure on price could have been ameliorated if GNY had elected to do a token swap, or if GNY had had the foresight to implement a blacklisting functionality in the LML token contract (addressed in the next section).[680]

8.333 Further, it was Bitbay's decision to unfreeze the stolen LML tokens that had entered its exchange that allowed them to be sold, causing the higher selling demand that may have led to a drop in market price (see [8.230]). The decision by Bitbay to unfreeze the tokens and allow them to be sold can be characterised as a *novus actus interveniens* – a break in the chain of causation between breach and the damage (the drop in LML price), which occurred when the stolen tokens were sold.

Failure to mitigate

8.334 The liquidators also submit that the evidence shows that GNY could and should have mitigated any loss caused by the Hack by undertaking a token swap straight away. The steps involved in this exercise are outlined in Mr Sibenik's 1 August 2025 affidavit at [63]-[69]. The likely costs are outlined in Mr Sibenik's 24 February 2026 reply affidavit at [32]. GNY could also

[677] Sibenik first affidavit, 1 August 2025 at [59(c)], 201.0105.
[678] Sibenik first affidavit, 1 August 2025 at [29], 201.0098.
[679] Sibenik second affidavit, 24 February 2026 at [29], 201.0266.
[680] Sibenik second affidavit, 24 February 2026 at [30], 201.0266; Sibenik first affidavit, 1 August 2025 at [63]–[70], 201.0107–201.0110.

potentially have blacklisted the tokens through the LML token contract if its code had included blacklisting functionality (which it did not).[681]

8.335 GNY has not provided any contrary expert evidence on this point, as Mr O'Shea is not an expert in the mitigation of theft of digital assets.[682]

8.336 Mr [redacted] says a token swap was "*a theoretical option*" but did not make sense for GNY.[683] He says the business was mid-launch, market trust was critically important, and if GNY had performed a token swap on LML so soon after the launch it would have risked destroying confidence in the project. He says the Cryptopia Hack was widely publicised and there was a high degree of uncertainty in the market about what the Hack meant, what had been taken and who held the hacked tokens. He states – without producing any evidence in support – that GNY's investor community could not be certain whether tokens they held or considered buying were stolen or not. He claims that market confidence in any new token would have been low following the Hack.[684]

8.337 This claim does not withstand scrutiny. If investors were uncertain about whether LML tokens that they held or were considering buying had been stolen, then a token swap would have been the most effective means of restoring confidence, precisely because it would have eliminated the stolen tokens from circulation and provided investors with certainty that the tokens they held or purchased were legitimate. That would have addressed the root cause of the uncertainty Mr [redacted] says was damaging the project. As Mr Sibenik explains, there was a two-month period in which the stolen tokens could have been isolated and invalidated in the course of carrying out a token swap.[685]

8.338 Mr [redacted] also claims GNY would have needed Bitbay's cooperation to carry out a swap and, when GNY explored this in June or July 2019, Bitbay was not prepared to facilitate a token swap.[686] However, Mr [redacted] does not provide any evidence of Bitbay allegedly taking such a position. Further, GNY *did* carry out a token swap eventually, in May 2023,[687] which presumably would have also required the cooperation of Bitbay.

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[681] Sibenik first affidavit, 1 August 2025 at [71], 201.0110.
[682] O'Shea report at [4.3.9], exhibit BOS-1 to O'Shea affidavit, 22 December 2025, 304.1476 at 304.1495.
[683] [redacted] second affidavit, 19 December 2025 at [6], 201.0142.
[684] [redacted] second affidavit, 19 December 2025 at [6]–[9] and [12], 201.0142–201.0143.
[685] Sibenik first affidavit, 1 August 2025 at [65] and [69], 201.0108 and 201.0109.
[686] [redacted] second affidavit, 19 December 2025 at [31], 201.0147.
[687] [redacted] first affidavit, 30 March 2025 at [24], 201.0005–201.0006.

8.339 If the Court considers that GNY should have mitigated (prevented) any loss from the Hack by carrying out a token swap, then any finding of liability against Cryptopia would mean that, at most, the likely costs of carrying out that token swap,[688] being USD5,000 to USD30,000,[689] would be recoverable instead of the damages claimed by GNY (subject to contractual limitations and exclusions discussed above).

Summary in relation to causation and quantum

8.340 There is a range of fundamental flaws in GNY's claim quantification, including causation of loss:

(a) Its failure to denominate its claim in NZD at the date of liquidation, as required by s 306 of the Companies Act 1993;

(b) Its reliance on market sales data derived in part from self-dealing in the form of wash trading and circular trading by Messrs [redacted] and [redacted] of which other market participants were likely to have been unaware;

(c) Its failure to produce transactional data from LML transactions on the Bitbay exchange;

(d) Its opportunistic attempt to quantify its claim in BTC and thus to follow the fortunes of BTC, despite there being no legal or factual premise for so doing;

(e) Its claim to have 'pegged' the value of the LML token to both the Polish Zloty and to BTC.

(f) Its failure to mitigate its claimed losses by immediately undertaking a token swap;

(g) Its failure to implement a blacklisting functionality in the LML token contract, which would have minimised or avoided any loss arising from the theft of the LML token.

(h) Its failure to take legal action against Bitbay when the latter permitted the sale of stolen LML tokens laundered via Etherdelta.

[688] James Edelman, Jason Varuhas and Simon Colton (eds) *McGregor on Damages* (online looseleaf ed, Thomson Reuters, 2023) at [10-103].
[689] Sibenik second affidavit, 24 February 2026 at [32], 201.0266–201.0267.

(i) The break in the chain of causation when Bitbay unfroze stolen LML tokens and allowed their sale.

(j) Various flaws in the approach taken by its expert witness.

8.341 Based on the range of costs to undertake a token swap and Mr Sibenik's assessment of the value of the stolen LML tokens, GNY's claim is estimated by the liquidators to be between USD30,000 and USD40,000. This is subject to the application of exclusions and limitations on liability and a finding of liability in favour of GNY or Messrs [redacted] and [redacted] as the two account holders, whose tokens were stolen. A finding is sought pursuant to s 307 of the Companies Act 1993 taking these points into account.

9. OTHER ACCOUNT HOLDERS' UNSECURED CREDITOR CLAIMS

9.1 If Cryptopia is liable to GNY for the losses it suffered in the Hack by reason of breach of contract, or breach of fiduciary duty, then other account holders who suffered losses in the Hack would have those same unsecured creditor claims against Cryptopia.

9.2 Statutory liability under the CGA, FTA or FMCA is more difficult, as it requires an account holder to be a consumer (CGA) or to establish reliance on particular misrepresentations (FTA and FMCA), and would require assessment on a case-by-case basis.

9.3 In addition to those claims, if GNY's claims are made out then account holders who suffered losses in the Hack may also (or alternatively) have unsecured creditor claims against the Company for:

(a) Breach of the terms of the trust (if the terms of the trust required Cryptopia to have reasonable safeguards against a Hack, and if Cryptopia did not have those safeguards).

(b) Negligence (if Cryptopia breached a duty to take reasonable care to prevent a hack).

9.4 Both of those claims would be precluded by the limitation of liability at cl 12 of the Terms and Conditions, if the Court finds that it applies in the circumstances (see [8.47]-[8.67]). If cl 12 does not apply, then each is addressed briefly below. The liquidators respectfully seek the Court's direction on these points.

9.5 If account holders *do* have claims against Cryptopia for breach of contract, breach of fiduciary duty, breach of the terms of the trust or negligence, then the liquidators respectfully seek the Court's direction on how those claims should be managed. The liquidators propose that:

(a) Account holders who have completed the claims portal can be deemed as having submitted an unsecured creditor form for Hack losses.

(b) Company assets can be distributed to account holders for unsecured creditor claims in stablecoin at the liquidators' discretion.

Negligence

9.6 The elements of the tort of negligence are well established. A plaintiff must establish:

(a) The defendant owed the plaintiff a duty to take reasonable care to prevent foreseeable harm;

(b) The defendant breached that duty;

(c) The plaintiff suffered damage as a result of the breach; and

(d) The damaged was a sufficiently proximate consequence of that breach – it was not too remote.

9.7 As to whether a duty arises: there must first be a sufficient relationship of proximity between the carelessness of the defendant and the plaintiff's loss, such that "*a reasonable person in the defendant's position could have avoided damage by exercising reasonable care and was in such a relationship to the plaintiff that he or she ought to have acted to do so*."[690] Whether a duty arises depends on the foreseeability of damage and proximity.[691] Second, it must be fair, just and reasonable as a matter of policy for a duty to be imposed. That will include consideration of any feature which "*should negative, reduce or limit the scope of the duty or the class of persons to whom it was owed or the damage to which a breach might give rise.*"[692] For example, a duty is more likely to be imposed where the plaintiff

[690] See Stephen Todd and others *Todd on Torts* (online looseleaf ed, Thomson Reuters) (***Todd on Torts***) at [4.4]; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, (2002) 211 CLR 540 at [240], cited in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).
[691] *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341, at [151]–[152].
[692] *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341, at [148].

is likely to be in a vulnerable position and therefore, the steps that a person could reasonably have taken to look after their own interests.[693]

9.8 If a duty of care exists, then that duty will have been breached if in the circumstances, the defendant did not do what the reasonable person, with the reasonable skill and knowledge of someone in the position of the defendant, would have done.[694] That involves an inquiry into reasonableness in all of the circumstances. The reasonable person is not expected to guard against every conceivable risk: the reasonable person will act proportionately.[695] In other words, the reasonable person would take measures to protect against a foreseeable harm if that presented no difficulty, disadvantage, or expense,[696] but if doing so would be difficult, disadvantageous or expensive, then it may not be as reasonable.[697]

9.9 If the duty of care has been breached, then the plaintiff must establish that the defendant's breach caused the plaintiff's loss (i.e., that "but for" the breach, loss would not have occurred). Evidentially, this requires a clear and substantial breach of duty.[698] Causation is determined by the "but for" test. Relatedly, the chain of causation may be broken by conduct of an intervening third party.

9.10 Once causation is established, the plaintiff must also establish that its loss was not too remote from the defendant's breach. This requires asking whether the kind of damage suffered by the plaintiff was a reasonably foreseeable consequence of the defendant's breach.[699]

Reasonable skill and care

9.11 It is clear that there was a relationship of sufficient proximity such that Cryptopia owed account holders a duty of care. What is in issue is what security measures the reasonable cryptocurrency exchange in Cryptopia's position would have in place, and whether Cryptopia fell short of that standard.

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[693] *Todd on Torts* at [4.4] and [4.4.3]
[694] *Hamilton v Papakura District Council* [2000] 1 NZLR 265 (CA) at 280 (on appeal *Hamilton v Papakura District Council* [2002] UKPC 9, [2002] 3 NZLR 308).
[695] *Bolton v Stone* [1951] AC 850 (HL); *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (PC).
[696] *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (PC).
[697] *Bolton v Stone* [1951] AC 850 (HL).
[698] *Todd on Torts* at [6.5.2], citing *Giblin v McMullen* (1868) LR 2 PC 317 (PC) at 335; *Lockwood v Auckland Electric Tramways Co Ltd* [1917] NZLR 857 (CA).
[699] *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617 (PC).

9.12 This point is addressed in detail under the FTA cause of action in GNY's unsecured creditor claim, and the liquidators respectfully repeat those submissions at [8.111]-[08.139] above.

9.13 In summary:

(a) There are important respects in which Cryptopia's security measures fell short – network segregation for one (see [8.123]).

(b) Notwithstanding that, Cryptopia took various steps to improve its security, including engaging security experts and conducting extensive testing and implementing at least 50% of those recommendations (see [8.112], [8.113], [8.124]).

(c) It was doing so in circumstances where it was experiencing major changes in its core personnel and staff, making it difficult to maintain consistency and momentum in its security improvements, and where it did not have the funds to engage Pulse to build the security system it had recommended.

9.14 For the reasons summarised above, and given more fulsomely at [8.111]-[8.139], the liquidators consider that it is not clear what more the reasonable person could have or would have done in the circumstances.

Causation

9.15 If Cryptopia did fall short of the standard of reasonable skill and care, the next inquiry is whether such a breach caused account holders' Hack losses.

9.16 The liquidators repeat the causation analysis above at [8.152]-[8.167]. Simply, the position is that the experts agree that it is impossible to say for certain whether the Hack would have happened had Cryptopia had reasonable security measures.

9.17 The liquidators respectfully seek the Court's direction on these points.

Breach of the terms of the trust

9.18 Account holders may have a claim against Cryptopia for breach of an equitable duty to take reasonable care and to safeguard the trust property. For the reasons set out below, such a duty may not have formed part of Cryptopia's trustee obligations. The liquidators respectfully seek the Court's direction on that point.

9.19 It is not in dispute that Cryptopia had a duty to hold the cryptocurrencies on behalf of account holders and to deal with them as directed (see [3.2]-[3.6]). However, it may not have owed any equitable duties of reasonable skill, care and prudence (i.e., the duties to safeguard trust property, duties to maintain appropriate safeguards and security arrangements, and duties to act proactively where it knew that account holders' interests were at risk of harm).

9.20 None of those duties are expressed in the Terms and Conditions, which the liquidators submit form the terms of the trusts (see [3.7], [3.15] and section 6). Similar claims are made by GNY in relation to breach of contract, and those submissions are repeated (see [8.189]-[8.202]) on the basis that the same principles apply to interpretation of a trust document as to contract.[700]

9.21 Nor are any of those duties set out in statute. The duty to act with the care and skill that is reasonable in the circumstances is now a default duty under the Trusts Act 2019[701] (which came into force after Cryptopia's liquidation[702]) but was not under the Trustee Act 1956 (except for when a trustee is investing trust property,[703] which is not the case here).

9.22 The only other source could be in general trust law. Gendall J determined that Cryptopia was a bare trustee with three principal duties:[704]

(a) to hold each group of digital assets as trustee for the accountholders;

(b) to follow their instructions; and

(c) to let individual accountholders increase or reduce their beneficial interest in the relevant trusts.

9.23 None of those speak to a duty to safeguard the cryptocurrencies, specifically to maintain appropriate safeguards and security arrangements on the Platform, or to act proactively in circumstances when it knew a specific account holder's interests were at risk of harm. Nor would it be consistent with the principle of a bare trustee having limited duties of performance (see [3.2]-[3.6]).

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[700] There is ample authority for the proposition. See, for example, *Bulley v Attorney-General* [2012] NZHC 615 at [48], citing *Re Sigma Finance Corporation* [2009] UKSC 2, and *New Zealand Māori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441 at [71], citing *Gosper v Sawyer* (1985) 160 CLR 548 at 568–569 and *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 at 286–290.
[701] Trusts Act 2019, s 29. Default duties remain subject to the express terms of a trust.
[702] Trusts Act 2019, s 2.
[703] Trustee Act 1956, Part 2.
[704] See above at [3.2]-[3.6]) and *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809.

9.24 The learned author of *Equity and Trusts in New Zealand* (accepted by the Law Commission in its review of the law on trusts in New Zealand) suggests that the following duties (other than fiduciary duties) are those that apply by virtue of trust law:[705]

(a) Duty to make acquaintance with trust terms.

(b) Duty to adhere to trust's terms.

(c) Duty to maintain impartiality between beneficiaries.

(d) Duty not to profit from trusteeship / duty to act gratuitously.

(e) Duty to invest.

(f) Duty not to delegate.

(g) Duty to be active.

(h) Duty to pay correct beneficiaries.

(i) Duty to keep proper accounts and give information where required.

9.25 For completeness, many of those duties would be inconsistent with the principle of a bare trustee having limited duties of performance (see [3.2]-[3.6]). In any event, duties of skill, care and prudence are not one of those duties, and it appears that they are not duties ordinarily implied at law. As the Law Commission observed in its review of trust law, "*while it is always open to a settlor to require a trustee to exercise a particular level of skill and care, in the current state of the law it is equally open to the settlor to permit the trustee to be completely incompetent.*"[706]

9.26 That position is reinforced by the fact that the English Trustee Act 2000 "*created a* statutory *duty of care for trustees*" following a Law Commission report, implying that such a duty of care did not exist in equity.[707] In the report, the English and Scottish Law Commissions observed that trustees exercising a power or duty to invest trust funds or delegate trustees' powers had a duty to exercise reasonable prudence.[708] They recommended

[705] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [5.3]. See also Law Commission *The Duties, Office and Powers of a Trustee - Review of the Law of Trusts: Fourth Issues Paper* (NZLC IP26, 2011) at 1.22.
[706] Law Commission *The Duties, Office and Powers of a Trustee - Review of the Law of Trusts: Fourth Issues Paper* (NZLC IP26, 2011) at 3.6.
[707] Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010) at 4.13.
[708] The (English) Law Commission and the Scottish Law Commission *Trustees' Powers and Duties* (Law Com No 260, Scot Law Com No 172, 1999) at [3.4]-[3.6].

imposing a general statutory duty of care, noting that (emphasis added) "*there is nothing novel in the idea of imposing a duty of care on trustees in the performance of their functions.* ***They are already subject to such a duty at common law in the performance of their investment function, and are under a statutory duty in exercising their limited powers of…delegation.***"[709] It seems plain from that context that duties of skill, care and prudence are not standard duties implied at law, but have been introduced by statute both in England and Wales and in New Zealand.

9.27 In any event, if a general duty of reasonable care, skill and diligence were owed, it would be excluded by cl 12.1 of the Terms and Conditions for the reasons set out at [3.23]-[3.26] and [8.47]-[8.67].

Submission of account holders' unsecured creditor claims

9.28 Section 304(1) of the Companies Act 1993 requires unsecured creditors to submit an unsecured creditor's claim form in accordance with the prescribed form under the Companies Act 1993 (Liquidation Regulations) 1994 (**Liquidation Regulations**).[710]

Direction 2.1 and the reasons it is sought

9.29 Direction 2.1 sought in the Liquidators' application would enable the completion of the claims portal process by an account holder to be treated as the submission of a creditor claim form in accordance with s 304(1). This would mean the account holder would not have to submit a separate paper form.

9.30 If Cryptopia's liability is established to those account holders for Hack losses due to breach of trust, negligence or breach of the terms and conditions (but not statutory claims such as under the FTA, CGA or FMCA),[711] the Liquidators could then deem eligible account holders' participation in the claims portal as being an unsecured creditor's claim in the liquidation for the extent of their Hack losses for which Cryptopia is liable and that remain unpaid.[712]

[709] The (English) Law Commission and the Scottish Law Commission *Trustees' Powers and Duties* (Law Com No 260, Scot Law Com No 172, 1999) at [3.10].
[710] Liquidation Regulations, reg 6 and Form 1 of the Schedule.
[711] For Cryptopia to have liability under the relevant statutes, individual account holders would need to prove further information, such as reliance on a statement that was found to be misleading.
[712] Ruscoe first affidavit, 31 July 2025 at [139], 201.0060.

9.31 This direction is aimed at reducing the administrative burden on both the Liquidators and account holders who have already fully completed the claims portal process (involving registration, identity verification and balance acceptance[713]).

9.32 As at 31 July 2025, there were 95,879 account holders who suffered losses in the Hack and who had registered in the claims portal. That number could also rise because there are a further 421,549 account holders who suffered losses in the Hack but, as at 31 July 2025, had not taken a step in the claims process.[714]

9.33 If all those account holders are also required to lodge unsecured creditor claim forms, that would significantly increase the administrative burden on, and the costs to, the Liquidators. The Liquidators will have to engage in (likely multiple) further rounds of communication with account holders to explain the requirement to complete and return an unsecured creditor claim form in addition to their completion of the claims portal process. The Liquidators have already undertaken substantial efforts to inform account holders of the necessary process in relation to their trust claims. (These efforts are described at [73]-[74] of Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application, and Palmer J recorded in his judgment that "*The liquidators detail their reasonably extensive efforts to contact account holders at each stage of the claims process. I cannot identify any further reasonable steps required to identify beneficiaries.*"[715].)

9.34 Account holders would also need to be afforded further time to complete and return these forms, which would further delay any distributions and the completion of the liquidation. The Liquidators have already encountered difficulties in getting account holders to respond to them and submit their claims through the existing claims portal.[716]

9.35 Account holders may be confused by the requirement to resubmit information relating to their claims, given they have already submitted this information through the claims portal in relation to their trust claims. Account holders may not understand the difference between these claims and may fail to

[713] Ruscoe first affidavit, 31 July 2025 at [15(c)], 201.0027.
[714] Ruscoe first affidavit, 31 July 2025 at [133], 201.0058.
[715] *Ruscoe v Houchens (Distribution)* [2024] NZHC 419 at [29].
[716] See Schedule 1 to Mr Ruscoe's 13 October 2023 affidavit in the Distribution Application (Tab 18 to the previous Cryptopia proceedings bundle).

submit their form. This is all the more so, given that the native language for many will not be English.[717]

9.36 There is also no practical benefit in having these account holders complete unsecured creditor claim forms. The information that those forms are designed to collect has already been provided in the claims portal. The information collected in the portal includes email address, name, date of birth, address, and balance acceptance or balance dispute.[718] The Liquidators do not need any further information to ascertain the value of each of those creditors' claims.[719] The account holders to which the direction would relate have already accepted their balance and therefore do not dispute the amounts they claim are owed.

9.37 There are two items of information that have not been collected through the portal but are in the unsecured creditor claim form: confirmation of whether the account holder is a related entity of Cryptopia, and confirmation of whether the creditor either holds no security or surrenders its security. However, the Liquidators do not require these confirmations from account holders who have completed the claims portal process because:

(a) Account holders claiming for Hack losses are a related entities of Cryptopia: by virtue of completing the claims portal, account holders have confirmed their beneficial interests in the cryptocurrency trusts, and the definition of 'related entity' expressly includes "*a beneficiary under a trust of which the company in liquidation is or has at any time been a trustee.*"[720]

(b) Account holders claiming for Hack losses do not have security for their claim.

9.38 The Liquidators do not consider it is in the interests of creditors to incur further expense and spend further time processing tens if not hundreds of thousands of unsecured creditor claim forms in circumstances when the necessary information has already been provided.[721] The direction sought would assist the Liquidators to carry out their principal duty in the most

[717] *Ruscoe v Epic Trust Limited* [2025] NZHC 2138 at [67].
[718] Ruscoe first affidavit, 31 July 2025 at [134], 201.0059.
[719] Ruscoe first affidavit, 31 July 2025 at [136]–[137], 201.0059.
[720] Companies Act 1993, s 245A(3)(h). Section 245A(3) is referred to in the proscribed unsecured creditor claim form at Form 1 of the Companies Act 1993 Liquidation Regulations 1994: "*The abovenamed creditor [*is/is not*] a related entity of the company in liquidation. (See section 245A(3) of the Companies Act 1993.)".*
[721] Ruscoe first affidavit, 31 July 2025 at [138], 201.0060.

"reasonable and efficient manner" possible, as required by s 253 of the Companies Act 1993.

Requirement to submit unsecured creditor's claim under Liquidation Regulations

9.39 Section 304(1) of the Companies Act 1993 provides that a "claim by an unsecured creditor against a company in liquidation must be made in the prescribed form". This is mandatory language.

9.40 Regulation 6 of the Liquidation Regulations also uses mandatory language, stating: "A claim by an unsecured creditor under section 304(1) of the Act shall be in form 1 of the Schedule."

9.41 Form 1 requires a name, contact information, full particulars of the claim, the identification of any supporting documents that substantiate the claim, a statement that the creditor either holds no security for the claim or surrenders its security, and confirmation as to whether the creditor is a related party. Once a claim is submitted in this form, the liquidator must then admit or reject the claim.[722] Once a claim is admitted by a liquidator it is to be treated as if it were a debt proven in accordance with the requirements of the Insolvency Act 2006.[723]

9.42 Despite the mandatory language of s 304(1) of the Companies Act 1993 and reg 6 of the Liquidation Regulations, some flexibility in respect of the required form is recognised in reg 4, which states: "*A form in the Schedule may be varied as the circumstances of any particular case may require.*"

9.43 Section 52 of the Legislation Act 2019 also addresses the use of prescribed forms generally, stating: "A form is not invalid just because it contains minor differences from an approved or prescribed form as long as the form still has the same effect and is not misleading."

Variation of the form is justified in the circumstances

9.44 The Liquidators submit that it is arguable that the form here may be "varied" (pursuant to reg 4) so as to comprise the Liquidators' claims portal database, in the case of account holders who have completed the portal claims process.

[722] Companies Act 1993 s 304.
[723] Companies Act 1993 s 302(2).

9.45 This permitted variation of the form is required in the circumstances, given the significant number of unsecured creditors who have completed the claims portal process and the cost and burden of requiring those account holders also to submit a claim in the standard form for the Liquidators to process.

9.46 This variation of the form would also accord with the purpose of s 52 of the Legislation Act 2019 because it would have the same effect as a standard paper prescribed form and would not be misleading, as it would provide all the same information as form 1 contains and as the Liquidators consider necessary to assess account holders' claims for Hack losses (as well as trust claims).[724]

9.47 In *Grant v Waipareira Investments Ltd*[725] a secured creditor had submitted a claim that was not in the prescribed form (form 2 in that case). The completed form had various differences from the prescribed form but, critically, it failed to request or contain full particulars of the valuation of the security or the amount of the remaining unsecured claim. The High Court held that the form was therefore "*ineffective for its intended purpose, with the result that Waipareira remains a secured creditor which has not proved in the liquidation.*"[726] This meant it was not a creditor for the purposes of s 240 and could not vote at the creditors' meeting. On appeal, counsel for the liquidators did not even suggest that the form could be saved by reg 4. The Court of Appeal confirmed the High Court's analysis of the form.

9.48 The present circumstances are very different; the use of the claims portal database would give effect to the intended purpose of form 1 because the database contains everything the Liquidators require to ascertain the value of those account holders' claims for Hack losses.[727]

9.49 The Liquidators therefore submit that the requested direction can, and should, be made (noting that they would require creditor claim forms be submitted independently for statutory claims for the reasons set out at [9.2], [9.30] and footnote 711 above.

Distribution in stablecoin

[724] Ruscoe first affidavit. 31 July 2025 at [136], 201.0059.
[725] *Grant v Waipareira Investments Ltd* [2015] 2 NZLR 725 (CA); *Waipareira Investments Ltd v Grant* [2013] NZHC 3281.
[726] *Waipareira Investments Ltd v Grant* [2013] NZHC 3281 at [58].
[727] Ruscoe first affidavit, 31 July 2025 at [136]–[137], 201.0059.

9.50 The liquidators seek a direction permitting them to pay account holders' unsecured creditor claims in stablecoin rather than fiat currency (i.e., a cryptocurrency designed to have a stable price, by pegging the value to another type of asset by reference, such as a commodity or fiat currency, by holding reserves of the underlying asset the stablecoin is pegged to.[728])

9.51 The liquidators respectfully submit that such a direction is not precluded by Part 16 of the Companies Act 1993. There are provisions that indicate that the usual manner of distribution is in cash:

(a) The amount of an unsecured creditor claim must be denoted or converted into New Zealand currency at the rate of exchange on the date of commencement of liquidation.[729]

(b) The principal duty of a liquidator is to take possession of, protect and realise (sell) the company's assets and to distribute the proceeds to creditors.[730]

9.52 The provisions of Part 16 of the Companies Act 1993 would ordinarily require assets to be realised and the proceeds distributed in cash for various reasons, including:

(a) To ensure that the priorities in Schedule 7 of the Companies Act 1993 are observed.

(b) To ensure that unsecured creditors are treated equally in accordance with the *pari passu* principle[731] (i.e., rank equally among themselves and abate rateably in the event of a deficiency): distributions of assets other than money could be inconsistent with this principle depending on the valuation of the property distributed.

(c) Liquidators have a duty to realise and distribute company assets in a reasonable and efficient manner, and distribution *in specie* or in a form other than money may typically not be reasonable or efficient.

9.53 But there is no provision in the Act prohibiting distributions of company property from being *in specie*, or in a form other than NZD. Rather, the liquidators submit that distributing company assets to account holders who

[728] Ruscoe first affidavit, 31 July 2025 at [95], 201.0049. See also the explanation of pegged tokens at [8.279]-[8.280].
[729] Companies Act 1993, s 306.
[730] Companies Act 1993, s 253.
[731] Companies Act 1993, s 313.

have unsecured creditor claims would be more efficient and reasonable than distributing money.

9.54 The Company has cryptocurrency holdings in each of the trusts, and converting those to stablecoin would be administratively easy (and would keep that Company property *in specie*, albeit in a different form). If any more were required, the Company would simply purchase more stablecoin using Company funds, depending on the total amount of Company assets that are payable to account holders for their unsecured claims on a *pari passu* basis.

9.55 The reasons for this are pragmatic:[732]

(a) Eligible account holders have already submitted cryptocurrency wallet addresses. Only a small percentage have provided bank account information. If unsecured claims were paid to account holders in fiat, further information would need to be collected.

(b) Transaction fees for cryptocurrency are much lower than transaction fees for fiat: a range of a few cents to USD5 compared to NZD50, respectively.

(c) Accordingly, administrative and transaction costs would be significantly reduced, and account holders with unsecured creditor claims would receive more.

9.56 Finally, by virtue of being a stablecoin such as USDC, which is pegged to the USD, converting the NZD value of an account holder's unsecured creditor claim to a stablecoin value would be administratively simple.

10. WINDING UP THE TRUSTS

10.1 Even after all eligible account holders have received a distribution of their beneficial entitlements and all trust administration costs have been reimbursed, the liquidators anticipate that there will be a significant number of unclaimed assets remaining in the trusts (see Mr Ruscoe's updating affidavit, 23 April 2026 at [8].[733]) The issue then becomes what should happen to those unclaimed assets?

10.2 *Re Benjamin* orders were granted by the Court in 2024, as set out above (see [2.22(a)], [2.22(b)], and [3.27]-[3.32]). As set out at [3.29], the *Re*

[732] Ruscoe first affidavit, 31 July 2025 at [140], 201.0060.
[733] Ruscoe updating affidavit, 23 April 2026 at [8], 401.0028.

Benjamin orders do not have the effect of extinguishing any account holder's beneficial interest; they simply provide Cryptopia and the liquidators with protection from liability if an account holder wishes to claim their beneficial entitlement after the distribution date, but insufficient trust assets remain. If an account holder wished to pursue their entitlement, they could bring a tracing claim for such portion of their entitlement that had been distributed to other beneficiaries (see [3.29]).

10.3 Because beneficiaries are still able to assert a claim after the distribution date, and because certain of the trusts still hold assets, the trusts continue in existence even after all eligible account holders have been paid. The liquidation of Cryptopia cannot be concluded while the Company remains the trustee. The liquidation has now been ongoing for seven years, and it cannot continue in perpetuity.

10.4 For the liquidation to be concluded, either:

(a) Cryptopia must be removed as trustee, and a new trustee appointed; or

(b) Cryptopia must be discharged from responsibility with regard to the trust property.

10.5 The liquidators' application for directions concerns whether, after trust administration costs have been paid and all eligible account holders have received their distribution, the trusts can be extinguished by Court order. If the answer to that question is yes, then there are various directions that follow on from that (direction 8.2). The liquidators submit that the answer is no for the reasons set out below and that they should be permitted to sell the cryptocurrencies into fiat for the purposes of s 149 of the Trusts Act 2019.

10.6 The Trusts Act 2019 contemplates that in circumstances when a trustee is unable to distribute trust property in accordance with the terms of the trust, the appropriate course of action is for the property to be transferred to the Crown. Section 149 provides:

> **Transfer to the Crown of non-distributable trust property**
>
> (1) A trustee who is administering trust property that the trustee is not able to distribute in accordance with the terms of the trust may transfer the trust property to the Crown if the trust property consists of money or of financial products that can legally be transferred to the Crown.

(2) The trustee must provide to the Secretary to the Treasury all the information that the Secretary reasonably considers necessary to allow the Secretary to know—

(a) the terms of the trust; and

(b) the persons having a beneficial interest in the trust property; and

(c) the state of the trust accounts with respect to the trust property being transferred; and

(d) the measures taken by the trustee to attempt to distribute the trust property and the reasons why it was not possible to do so.

(3) The Secretary to the Treasury may refuse a transfer if the required information has not been provided by the trustee.

(4) The Secretary to the Treasury may, before accepting a transfer, require the trustee to sell, or convert into money, any trust property that consists of financial products.

(5) A trustee is discharged from any further responsibility with regard to trust property transferred to the Crown under this section.

10.7 Property may only be transferred to the Crown pursuant to s 149 if it consists of money or other financial product that can be legally transferred.

10.8 A financial product is a debt security; equity security; managed investment product; or derivative.[734] That is effectively the New Zealand equivalent to a "security", as defined in other jurisdictions – i.e., stocks, bonds, and other forms of investment product. The liquidators submit that cryptocurrencies held by Cryptopia on trust, which were intended to be held on the platform on behalf of account holders and traded as a currency or as personal property (other than possibly stablecoins backed by fiat currency, such as NZDT. In relation to that, the FMA has recently given notice that a similar stablecoin, NZDD, is not a financial product because no income, interest or other gain is paid to the stablecoin holder, and the primary use of NZDD is as payment / currency.[735]) do not fall within this definition.

(a) Debt security: The cryptocurrencies held by Cryptopia do not confer a "*right to be repaid money or paid interest on money…deposited with, lent*

[734] Financial Markets Conduct Act 2013, s 7.
[735] Financial Markets Authority "Financial Markets Conduct (ECDD Holdings Limited Stablecoin) Designation Notice 2026" (11 March 2026) <www.fma.govt.nz>: https://www.fma.govt.nz/business/legislation/secondary-legislation/designations/financial-markets-conduct-ecdd-holdings-limited-stablecoin-designation-notice-2026/.

to, or otherwise owing by, any person". The cryptocurrencies do not pay interest and cannot be redeemed for fiat currency – they can be sold, as any other form of personal property can be.

(b) Equity security: The cryptocurrencies held by Cryptopia do not provide a share of a New Zealand incorporated or overseas company.

(c) Managed investment product: The cryptocurrencies do not relate to a managed investment scheme. The cryptocurrencies provide an individual interest in tokens and do not confer a right to participate in or receive "*financial benefits [i.e. capital, earnings, or other financial returns] produced principally by the efforts of another person*" (and are therefore not managed investment products). The cryptocurrencies are better viewed as individually owned tokens or currencies used for in-ecosystem payments. While their value may fluctuate due to supply and demand, there's no clear pooling of assets or investment efforts of any person that generate a return payable to token or cryptocurrency holders.

Derivative: The cryptocurrencies do not provide for the giving of future consideration, and do not vary by reference to the value or amount of an underlying asset. The analysis above is supported by guidance on the Financial Market Authority's webpage.[736]

10.9 Rather, the cryptocurrencies themselves hold a market value as a form of property and are typically used as a form of payment or currency rather than as a financial product. Section 149 of the Trusts Act 2019 would not therefore apply to trust property in the form of cryptocurrency. On that basis, the trust property would need to be in the form of money or financial products for the liquidators to make use of s 149 of the Trusts Act 2019.

10.10 Given that the Terms and Conditions do not expressly provide Cryptopia with the power to sell or convert the cryptocurrencies, the liquidators accordingly seek directions from the Court that would permit them to sell the unclaimed holdings to fiat currency (NZD) to enable transfer to the Treasury. Those orders are sought for the reasons set out in the section below, from [10.20.

10.11 The liquidators, through counsel, have discussed an application under s 149 with Treasury. Treasury has queried whether the cryptocurrency is a financial product (which the liquidators submit it is not), and at this stage

[736] Financial Markets Authority "Crypto asset service providers" <www.fma.govt.nz>: Crypto asset service providers | Financial Markets Authority.

prefers not to express a view on whether it would accept the cryptocurrency or whether it would be required to be converted to money. Treasury has advised that it would prefer to undertake its assessment once a formal application is made under s 149. For that reason, the liquidators consider it to be pragmatic to seek an order permitting conversion of the cryptocurrency to cash in this application to avoid the need to return to court for further directions later.[737]

10.12 If the unclaimed trust property cannot be transferred to Treasury under s 149 of the Trusts Act 2019, other options include the Unclaimed Money Act 1971, for Cryptopia to continue as trustee, or for the Court to appoint a new trustee.

10.13 The Unclaimed Money Act 1971 applies to money held in New Zealand that is payable by a "holder" to a person who is entitled to the money (**owner**) and meets the following requirements (relevantly):[738]

(a) The obligation of the holder to pay the money to the owner arises under an agreement, arrangement or situation described in s 4(4), including "*an agreement, arrangement or situation that give rise to an obligation under law or equity of the holder to make a payment to the* owner"*.*

(b) The money is payable to an owner by a holder who ceases to carry on business, the obligation of the holder to make the payment arises from the holder's business, and the money is held by the holder after a period of 6 months from the cessation of the business.

(c) The money is not excluded by s 4(5) (i.e., is not a dividend to a shareholder, a rebate, or a benefit from a pension or superannuation scheme).

(d) The amount of money payable is more than $100 and: for a single-term or renewing-term arrangement, the owner during a period of 5 years does not request information from and does not provide instructions or information to the holder; or the holder chooses to pay the money to the Commissioner as unclaimed money and satisfies the requirements in s 5B (makes reasonable efforts to locate the owner of the money and if provided to the Commissioner in a form acceptable to the Commissioner, the information relating to the owner and the money that is in the possession or control of the holder and is readily available

[737] Ruscoe updating affidavit, 23 April 2026, at [36], 401.0036.
[738] Unclaimed Money Act 1971, s 4.

to the holder, including source and history of the amount; identity and whereabouts of the owner; and source of the owner's entitlement to payment of the money).

10.14 Section 5 provides that the Act applies to unclaimed money held by "*any company incorporated in New Zealand and any liquidator or receiver of any such company*". Similar information is required to be provided to the Crown as under s 149 of the Trusts Act 2019 (i.e., all information in the holder's possession or control, including the source and history of accrual of the amount; the identity and whereabouts of the owner; and the source of the owner's entitlement to payment of the money).

10.15 There are some difficulties with using the Unclaimed Money Act 1971. First, money is not held by Cryptopia or the liquidators: property is. However, that challenge may be avoided if the cryptocurrency were converted to fiat instead.

10.16 Second, the Unclaimed Money Act 1971 only applies to amounts payable that are more than $100. There will inevitably be a large number of account holders whose holdings fall below that amount once converted to fiat currency and therefore do not fall within the ambit of the Act. (For example, by February 2023 404,697 account holders had taken some step in the claims process, even if that only amounted to opening the invitation to register. That is 42% of the total number of account holders with a positive value, but 81% of the total value of Cryptopia's holdings based on a February 2023 valuation.[739])

10.17 Third, the Unclaimed Money Act 1971 may not be intended to apply in these circumstances. Section 3 provides that unclaimed money shall be payable to the Crown "*except and so far as special provisions are made by or under any other Act.*" It may be that the availability of transferring undistributable trust property to Treasury makes the Unclaimed Money Act unavailable. The Law Commission seemed to consider that the Unclaimed Money Act provided a separate scheme to the Trusts Act 2019, indicating that this course of action would not be available for trust property (emphasis added):[740]

> Finally, as discussed in the Preferred Approach Paper, we consider that it would be sensible, at some future date, for the Government to consider

[739] Calculations carried out using the figures at Schedule 1 of Mr Ruscoe's 13 October 2023 affidavit in the Distribution Application (Tab 18 to the previous Cryptopia proceedings bundle).
[740] Law Commission *Review of the law of trusts: A Trusts Act for New Zealand (*NZLC R130, 2013) at [12.33].

> amalgamating all the different provisions and arrangements the Crown has for dealing with unclaimed money into one regime. **At present the Unclaimed Money Act 1971 covers unclaimed money from deposits in banks, financial institutions, some money in solicitors' trust accounts, unclaimed proceeds of life insurance policies, and unpaid wages and employee benefits**. Money is paid to the Commissioner of Inland Revenue under that Act. However, under some Acts other unclaimed money and assets are to be paid to the Public Trust, and under others to the Māori Trustee. In addition, unclaimed awards from court cases and reparations to victims of crime are held by the Ministry of Justice, and unclaimed prisoners' allowances are held by the Department of Corrections. The number of different arrangements involving different arms of the Crown suggests that a review of this whole area may be desirable.

10.18 That same position seems to be adopted by Treasury on its website.[741] Nevertheless, transfer to the Crown under the Unclaimed Money Act would be an option available to the liquidators if Treasury did not accept the property under s 149 of the Trusts Act 2019.

10.19 Under s 114 of the Trusts Act 2019, the court may appoint a new trustee when it is necessary or desirable to appoint a new trustee and difficult or impracticable to do so without the assistance of the court. As Cryptopia has no trust deed (because it was determined to be a trustee after it had gone into liquidation), there is no provision for appointment of a replacement trustee. The liquidators would have the power to remove Cryptopia as a trustee and appoint a replacement,[742] provided the replacement trustee consented to the appointment. Otherwise, s 114 would be engaged. Under that section, the court can propose to appoint Public Trust as the replacement trustee but must, before making the appointment, give Public Trust an opportunity to be heard on the matter. However, notwithstanding the difficulty of transferring the trust property (being cryptocurrency and Cryptopia's databases) to a new trustee, the trusts cannot continue into perpetuity. Even if a new trustee were appointed, for the reasons discussed later at [10.44]-[10.46], it would at some point become necessary to dispose of the trust property. It also appears that the Public Trust should not act in situations when there is an element of dispute or contention, or when there is

[741] Te Tai Ōhanga "Unclaimed money" (13 August 2024) <www.treasury.govt.nz>: Unclaimed money | The Treasury New Zealand.
[742] Trusts Act 2019, ss 92(1)(c)(iii) and 92(2)(b)(ii).

significant complexity.[743] It is difficult to see how Cryptopia's trusteeship could be viewed in any way other than complex.

Sale of trust property

10.20 The Terms and Conditions do not provide any express power to Cryptopia to sell the cryptocurrencies held on trust, and the learned authors of *Lewin on Trusts* opine that "*The court has…no inherent jurisdiction to permit the sale of trust property contrary to the terms of the trust, even though it would be for the benefit of all persons interested*".[744] Accordingly, Cryptopia's sale of the cryptocurrencies would necessitate either: a direction under s 133 of the Trusts Act 2019 confirming that Cryptopia has a power of sale, as a matter of interpretation of the terms of the trust; or a variation of the terms of the trust.

Does Cryptopia have a power of sale?

10.21 The source of a trustee's powers is the settlor – in principle, at least.[745] However, powers may also be conferred on a trustee by equity or statute.[746] The scope of a trustee's power is determined by interpreting the trust deed to ascertain the settlor's intention,[747] and may be included by express or implied provision.[748] Most of the case law relates to the court's review of a trustee's exercise of power: in such cases, the task before the court is to "*frame the law so that the powers and necessary protections of a trustee are properly balanced against the rights of beneficiaries*."[749] If a trustee is found to have the power that has been exercised, then in order for that exercise to have been valid, the court will examine:[750]

(a) Whether the trustee has actually exercised (i.e., considered) their discretion.

(b) Whether the power has been exercised ultra vires. If a power has been exercised ultra vires, the action is void.

(c) Whether the power has been exercised for a proper purpose.

(d) Whether the trustee has properly considered relevant matters.

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[743] Law Commission *Review of the law of trusts: A Trusts Act for New Zealand (*NZLC R130, 2013) at [51].
[744] *Lewin on Trusts* at [52-001], citing *Johnstone v Baber* (1845) 8 Beav. 233 (Ch); *D'Eyncourt v Gregory* (1876) 3 Ch.D. 635.
[745] *Lewin* at [28-006].
[746] *Lewin* at [28-006].
[747] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [6.4.1].
[748] *Lewin* at [28-049]–[28-031].
[749] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [6.3].
[750] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [6.5].

(e) Whether the trustee has acted irrationally, perversely, arbitrarily or capriciously. An exercise of a power in this manner will be void.

(f) Whether the power has been exercised for the purpose of benefitting the trust.

(g) Whether the power has been exercised in breach of the trustee's duty of care, or any other duties under the trust.

10.22 As summarised above, the Terms and Conditions do not expressly provide Cryptopia with a power of sale. However, s 56 of the Trusts Act 2019 grants trustees the following general powers:

> (a) all the powers necessary to manage the trust property including, in relation to the trust property, all the powers of an absolute owner of the property:
>
> (b) all the powers necessary to carry out the trust, including powers incidental to those in paragraph (a).

10.23 Section 56 is intended to give trustees wide powers to manage property and "*it is no longer necessary to spell out individual powers, such as powers to sell*."[751] The power to sell was a specific power given to trustees by the Trustee Act 1956 (s 14) and must be taken to be encompassed by s 56.[752] Section 56 is subject to any modification or exclusion in the trust deed.[753]

10.24 Although the Terms and Conditions contain no express power to sell the trust property, they contain no express prohibition either. Based on s 56 of the Trusts Act 2019 and s 14 of the Trustee Act 1956, it is possible that Cryptopia has, by implication, the power to sell the cryptocurrencies held on trust for the benefit of account holders. That may be reinforced by the fact that Cryptopia had the ability to amend the Terms and Conditions at its discretion (cl 18.1),[754] and therefore had the ability to amend its own powers.

10.25 In counter to that, the power to sell trust property may be inconsistent with Cryptopia's role as bare trustee, for which its primary obligations were to hold the trust property and to deal with it as directed by account holders (see [3.3]-[3.5]). It would likely be inconsistent with the concept of a cryptocurrency exchange and the ability for account holders to decide when to deposit,

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[751] *Law of Trusts and Trustees* at [23.16].
[752] *Law of Trusts and Trustees* at [23.36].
[753] Trusts Act 2019, s 5(4) and Schedule 2.
[754] See cl 18.1 of the Terms and Conditions, exhibit DIR1-80 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0589 and paragraph [6.8] above.

withdraw or trade cryptocurrency. Nor does Cryptopia appear to have undertaken any authorised sale of a beneficiary's trust assets during its operation (other than in those circumstances we have raised above for the BTC and NZDT trusts. Those circumstances slightly differ: trust assets may have been used for Company purposes, rather than trust property being sold and held on trust in a different form).

10.26 The liquidators respectfully seek the Court's direction on this point.

Variation of trust

10.27 It is not possible to anticipate every eventuality in a trust, and it is sometimes necessary to apply to the court to approve actions for which there is no authority.[755] If the court finds that Cryptopia does not presently have a power of sale, the liquidators respectfully seek an order varying Cryptopia's powers to permit a power of sale. The liquidators submit that the court has jurisdiction to do so under s 130 of the Trusts Act 2019 or the court's inherent jurisdiction, for the reasons set out below.

10.28 It is possible that Cryptopia has the power to provide that power to itself. Clause 18.1 of the Terms and Conditions provides Cryptopia with the power to add, vary or withdraw any of the Terms and Conditions.[756] If the Terms and Conditions are terms of the trust, then that may amount to a power of amendment and it would be open to Cryptopia to vary the Terms and Conditions to permit a power of sale (noting that powers of amendment vested in trustees are common[757]). However, in circumstances in which Cryptopia is in liquidation and account holders can no longer withdraw their cryptocurrency from the exchange if they do not accept the amendment to the Terms and Conditions, it would likely be inappropriate for Cryptopia to do so.

10.29 For that reason, the liquidators seek the Court's approval to allow it to exercise a power of sale in relation to unclaimed holdings remaining after the liquidators have made distributions to all eligible account holders. (If there are any unclaimed holdings remaining in a particular trust after eligible account holders have received a distribution, then trust administration costs will have already been removed from those unclaimed holdings. Eligible

[755] *Law of Trusts and Trustees* at [23.9].
[756] See cl 18.1 of the Terms and Conditions, exhibit DIR1-1 to Ruscoe first affidavit, 31 July 2025, 302.0577 at 302.0589 and paragraph [6.8] above.
[757] *Lewin* at [28-030].

account holders in that trust would have received a distribution of their full entitlement with no deduction for trust administration costs.)

10.30 The Trusts Act 2019 provides for variation of the terms of a trust in certain circumstances:

(a) **Section 130:**[758] The court may vary or extend a trustee's powers if the court considers that the variation or extension is necessary or desirable for the proper management and administration of the trust property; the variation or extension does not alter a beneficiary's interest under the trust; and the variation or extension does not involve a power to distribute trust property to a beneficiary.[759]

(b) **Sections 122–**125**:** The terms of a trust may be varied or resettled by unanimous consent of the beneficiaries.[760] (The court may approve a variation or resettlement on behalf of future beneficiaries or a beneficiary who lacks capacity;[761] or waive the requirement that a beneficiary consent to the termination, variation or resettlement of a trust.[762])

10.31 Trustee powers can be classified as either administrative or dispositive. Administrative powers are powers to manage and administer the trust, including powers to buy and sell trust assets, make investments, borrow money and grant security.[763] Dispositive powers enable the trustee to dispose of the income or capital of the trust fund for the objects permitted by the power granted.[764] The power of sale is an administrative power.[765] Administrative powers vested in trustees must be exercised exclusively in the interests of the beneficiaries.[766]

10.32 When trustees are in doubt as to their powers, or believe they lack power to do something that they consider desirable, they may apply to the court under s 130.[767] The most important words of the section are "*proper management or administration of the trust property*": the section is concerned with

[758] The predecessor to s 130 of the Trusts Act 2019 was s 64 of the Trustee Act 1956, which empowered the court to approve specific transactions where they would be in the best interests of beneficiaries, including a sale transaction.
[759] Trusts Act 2019, s 130.
[760] Trusts Act 2019, s 122.
[761] Trusts Act 2019, s 124.
[762] Trusts Act 2019, s 125.
[763] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [6.2].
[764] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [6.2].
[765] *Lewin* at [28-013], Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [6.2].
[766] *Lewin* at [28-014].
[767] *Law of Trusts and Trustees* at [23.32].

management of assets, not other powers trustees may have or may wish to be able to exercise.[768] In other words, only administrative and management powers can be varied under s 130.[769] Sections 122–125 may be more apt to address those other, more fundamental dispositive powers. Aside from that qualification, s 130 is broadly framed and as long as the extension or variation broadly relates to trust property and does not involve dispositive powers, that can be done under s 130.[770]

10.33 In full, s 130 provides:

> (1) The court may vary or extend the powers of the trustees of a trust if—
>
> > (a) the court considers that the variation or extension is necessary or desirable for the proper management or administration of the trust property; and
> >
> > (b) the variation or extension does not alter a beneficiary's interest under the trust; and
> >
> > (c) the variation or extension does not involve a power to distribute trust property to a beneficiary.
>
> (2) An application for an order may be made by—
>
> > (a) a trustee of the trust; or
> >
> > (b) a beneficiary of the trust.

10.34 In addition to its jurisdiction under the Trust Act 2019, the court has inherent jurisdiction to give further powers to trustees or to vary the trusts.[771] The court may exercise its inherent jurisdiction even in respect of matters regulated by statute, as long as it does not contravene any statutory provision.[772]

10.35 The learned authors of *Lewin on Trusts* consider that the court's inherent jurisdiction to authorise a departure from the terms of the trust is limited, and that there is no general power to alter a settlement or will because the court thinks it beneficial to do so (citing *Chapman v Chapman* [1954] A.C. 429, HL).[773] The position in New Zealand appears to depart from *Chapman*. The

[768] *Law of Trusts and Trustees* at [23.34].
[769] *Re Setter* [2021] NZHC 1603, (2021) 5 NZTR 31-008 at [16]; *Law of Trusts and Trustees* at [23.32].
[770] *Re Setter* [2021] NZHC 1603, (2021) 5 NZTR 31-008 at [16] and [23]–[26].
[771] *Law of Trusts and Trustees* at [23.10].
[772] *Clarke v Karaitiana* [2011] NZCA 154 at [38], cited in *Re Setter* [2021] NZHC 1603, (2021) 5 NZTR 31-008 at [32].
[773] *Lewin on Trusts* at [52-007]. *Chapman v Chapman* was initially applied in New Zealand in *Re Ebbett* [1974] 1 NZLR 392.

learned author of *Equity and Trusts in New Zealand*, referring to recent New Zealand authority, concludes that:[774]

> It is therefore now apparent that New Zealand courts no longer feel constrained by the House of Lords decision of *Chapman v Chapman.* Instead, they will take what can be described as a modern approach to exercising the inherent jurisdiction, while ensuring that any exercise of the inherent jurisdiction is neither proscribed by the Trusts Act 2019 nor inconsistent with the purpose and principles of the Trusts Act 2019.

10.36 In *Re Setter,* Isac J expressed the following tentative view as guidance for future cases:[775]

> The view of the limits of the inherent jurisdiction expressed in *Chapman v Chapman* may no longer be good law. That is because underpinning their Lordships' judgments was the rejection of any suggestion that the Court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. Yet Parliament when enacting s 130 expressly empowered the Court to approve variations which the Court considers desirable for the proper management or administration of the trust property. Implicit in Parliament's approach 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).

10.37 There may be a limit on the extent to which a court can approve a variation to a trust. There is a line of authority in England preventing the court from approving variation that would alter the 'substratum' of the trust.[776] In New Zealand, that authority was applied in *Holland v Jonkers*:[777]

> The trustees must therefore not exercise their powers in a manner which conflicts with the context and objectives of the trust or which exceeds the limits of the trust. Such exercises may constitute an attack on what is known as the

[774] *Equity and Trusts in New Zealand* at [10.7.1], citing: *Holland v Jonkers* [2021] NZHC 3469; *Ruby v Ruby* [2022] NZHC 282; *Clarke v Karaitiana* [2011] NZCA 154: *Re Setter* [2021] NZHC 1603, (2021) 5 NZTR 31-008; and *Re the CP Clifton Children's Trust, Clifton v Clifton* (2004) 1 NZTR 14-018 (HC).
[775] Approved by Gendall J in *Ruby v Ruby* [2022] NZHC 282.
[776] *Equity and Trusts in New Zealand* at [10.7.2], citing *Re Ball's Settlement* [1968] 2 All ER 438 (Ch) at 442.
[777] *Holland v Jonkers* [2021] NZHC 3469 at [166].

'substratum' of the trust. Substratum is a metaphorical concept, equating to the trust's underlying purposes, objects and substance.

10.38 The Privy Council has more recently indicated that the substratum approach is not necessarily helpful,[778] and it is uncertain whether that principle still applies in New Zealand.

10.39 The liquidators have not identified any cases in which a power of sale has been granted without beneficiaries either consenting, or being represented at the hearing (i.e., in the manner envisaged by ss 122–125, summarised at [10.30]-[10.31]). However:

(a) In *Re Greenwood,* the trustees applied for orders permitting them to sell farm property that had been settled on trust upon the settlor's death. The basis of the sale application was that administering the farm property was expensive and difficult, and the beneficiaries would receive more benefit from the proceeds of sale being invested. The will contained no power of sale. The Court made orders under s 64A of the Trustee Act 1956 (the predecessor to s 124 of the Trusts Act 2019) permitting the trustees of a deceased person's trust (which was settled upon their death) a power of sale although sale of the property would be inconsistent with the testator's wishes:[779]

> The power to approve a sale granted by s 64A is not however limited only to a case of expediency in the management or administration of any property vested in a trustee. The power arises additionally where, in the opinion of the Court, such a sale would be in the best interests of the persons beneficially interested under the trust. In such a case, power of sale being absent, the Court may by order confer such a power upon the trustees. As I have said that power may be exercised notwithstanding anything to the contrary in the instrument creating the trust. That can only be done in proceedings in which all trustees and persons who are or may be interested are parties or are represented or consent.

(b) In *Re Setter*, the applicants were trustees of the Central Hawkes Bay Consumers Power Trust. They applied to vary the trust deed under s 130 of the Trusts Act 2019 to require all seven trustees to be appointed by the beneficiaries of the trust in order to bring the trust within an

[778] *Wong Wen-Young v Grand View Private Trust Co Ltd* [2022] UKPC 47 at [108].
[779] *Re Greenwood* [1988] 1 NZLR 197 (HC) at 209.

exemption under the Commerce Act 1986 for "consumer-owned" electricity distribution companies. The Court considered ss 130 and 124 of the Trusts Act 2019 and identified some confusion about the interaction between them. The Court concluded that the appropriate course was to make the orders sought under the Court's inherent jurisdiction, noting that the orders did not relate to trustees' powers but the beneficiaries' (and accordingly did not fit nicely with s 130). The Court also concluded that administrative provisions had been varied by the Court before under its inherent jurisdiction on the basis that they are not a variation of the trust itself.[780]

(c) Respectfully, none of the cases counsel have reviewed are apt in Cryptopia's situation. That is partly because there is no trust deed proscribing the powers and duties on Cryptopia as trustee. Cryptopia was determined to be a trustee in 2020, after it had already gone into liquidation. In addition, it operated as a commercial trading trust and is now in liquidation. Notwithstanding that, the summary of law outlined above makes clear that: a power of sale can be granted even if it is expressly prohibited by a trust deed; and the court has both inherent and statutory jurisdiction to vary or enlarge a trustee's power. For the reasons set out below, the liquidators respectfully submit that it would be appropriate to do so here.

10.40 First: the power of sale proposed would not change any account holder's beneficial interest or their right to receive a distribution. The liquidators accordingly submit that it would not be precluded by s 130(1)(b) or 130(1)(c).

10.41 Second: sale of the unclaimed cryptocurrency is both necessary and desirable for the administration of the trust property, for the reasons set out below.

10.42 The beneficiaries on whose behalf a power of sale would be exercised are ineligible account holders (i.e., account holders who have failed to register in or complete the claims portal). They are beneficiaries who are unable to be identified or who have failed to respond, as envisaged by s 125. The effect of the *Re Benjamin* orders made in the Distribution Application is that these beneficiaries (factually) do not exist. The unclaimed holdings, however, legally remain trust property. That amounts to undistributable trust property.

[780] *Re Setter* [2021] NZHC 1603, (2021) 5 NZTR 31-008.

10.43 The Trusts Act 2019 contemplates transfer to Treasury if a trustee holds undistributable trust property. However, that is only available if the property is in the form of money or other financial product. Partly, that may be because different rules apply to real property (i.e., land) held on trust under the Property Law Act 2007. In principle, there is no real difference between financial products (for example, shares) and cryptocurrency in a trust context. It cannot be that as a matter of principle, transfer to the Treasury is available for shares held on trust and not for cryptocurrencies. More likely, the relatively novel and unregulated nature of cryptocurrency has simply resulted in a lacuna in s 149 of the Trusts Act 2019. In those circumstances, it would be appropriate for the Court to exercise its power under s 130 of the Trusts Act 2019 or its inherent jurisdiction to grant Cryptopia a power of sale (as envisaged in *Re Setter*, discussed at [10.36] above).

10.44 There are several pragmatic factors that mean sale of the cryptocurrencies is necessary and / or desirable. Cryptopia is in liquidation. Once eligible account holders have received distributions of trust property and unsecured creditors have received distributions of Company property, it is appropriate for Cryptopia to be removed from the Companies Register. That cannot occur while Cryptopia is trustee.

10.45 In all likelihood, few (if any) account holders will approach Treasury (or the liquidators) and be able to prove their entitlement to the trust property. The liquidation has now been running for seven years (as at the date of hearing), and the liquidators have undertaken significant effort to notify account holders of the need to lodge their claims. In reality, as time goes on, it will prove more difficult for account holders to prove ownership of their accounts simply by virtue of the fact that the information necessary to do so (account information, log in dates and times, and / or transaction information)[781] will be more difficult to recall and locate.

10.46 As a result, it is exceedingly unlikely that the beneficial interest will ever be exhausted. If Cryptopia continues as trustee, or if another trustee is appointed, the same issues will arise. The trustee will either need to hold the trust property as trustee almost in perpetuity, or there will need to be a method to dispose of that trust property in a way that is permitted by law. Transfer to the Treasury enables that and ensures that after a period of six

[781] Exhibit DIR1-47 to Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application (Tab 16 to the previous Cryptopia proceedings bundle).

years, the Treasury may transfer the trust property to be used by the Crown, with no risk of liability (the Crown is not subject to the duties or liability of a trustee in respect of any transferred property).[782] However, transfer to the Treasury does not extinguish any beneficial interests: any beneficiary that brings a late claim can receive a distribution, provided the Secretary is satisfied that the claimant is so entitled – even if the property has been transferred to a Crown bank account.[783]

10.47 If a trustee has a power of sale, the general obligation is that:[784]

> … trustees must obtain the highest possible price and must not do anything that would prejudice the sale. So, trustees were not allowed to do anything which would unnecessarily reduce the value of the property in the eyes of possible purchasers.

The liquidators submit that any sale of the cryptocurrency would comply with that duty.

10.48 The liquidators respectfully submit that it is necessary or desirable for the proper administration of the trust property for Cryptopia's trust powers to be extended to permit it to sell trust property for the purposes of transferring it to Treasury under s 149 of the Trusts Act 2019.

10.49 Finally: the liquidators respectfully submit that granting a power of sale would not invalidate the substratum of the trusts. Cryptopia was and is a bare trustee. In other words, it held property on trust for the absolute benefit and at the absolute disposal of other persons.[785] Its principal role was to hold each group of cryptocurrencies as trustee for the account holders, to follow their instructions, and to let individual accountholders increase or reduce their beneficial interest in the relevant trusts in accordance with Cryptopia's systems.[786] Although it is arguable that dealing with the cryptocurrencies *only* as directed by account holders is such a central part of the terms of the trusts that it constitutes the substratum, ultimately, selling the cryptocurrency from cryptocurrency to fiat does not change the nature of that relationship. Rather, s 149 of the Trusts Act 2019 preserves account holders' beneficial interests and right to receive a distribution, should they later claim. All that would change is the nature of the property itself: it does not change the

[782] Trusts Act 2019, s 151.
[783] Trusts Act 2019, s 151(2) and s 151(5).
[784] *Law of Trusts and Trustees* at [23.39].
[785] See paragraphs 3.3-3.4 above.
[786] See paragraph 3.3 above.

persons who are entitled or the extent to which they are entitled to the trust property.

10.50 If the Court considers that the circumstances above do not fall within the scope of s 130, then the liquidators respectfully submit that it would be within the Court's inherent jurisdiction to permit the sale for the reasons set out above. In addition, Cryptopia's circumstances may now engage principles under the Court's inherent jurisdiction to authorise otherwise unauthorised acts of management or administration in an emergency.[787]

Making unclaimed holdings available to creditors

10.51 The liquidators understand that Ms Cooper KC for the company's creditors will say: [788]

(a) The Court has the power, under its inherent jurisdiction to supervise and administer trusts, to make orders for distribution of trust property on terms that depart from the strict terms of the trust when it is just and expedient to do so.[789]

(b) The court has inherent jurisdiction to amend the terms of a trust to allow trust assets to be removed from the trust (*Re Phillips New Zealand Ltd* [1997] 1 NZLR 93).[790] Given that there is no trust deed and Cryptopia was, and is, simply acting as bare trustee, the Court has greater flexibility to fill in the gaps created by the absence of express provision for this situation.[791]

(c) Section 284 of the Companies Act 1993 provides the court with wide powers of supervision, including powers to give directions in relation to **any** matter arising in connection with the liquidation, referring to *Graham v Arena Capital Ltd (in liq)* [2018] NZHC 2007 as an example of a case where the court stepped outside the orthodox position to

[787] *Lewin on Trusts* at [52-001]: The court has inherent jurisdiction to authorise otherwise unauthorised acts of management or administration of the trust property where an emergency arises connected with the trust property. But this can only be done in a case where the emergency may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, the trustees are embarrassed by the emergency, the consent of the beneficiaries cannot be obtained to the course proposed, and the emergency must be dealt with at once.
[788] Submissions of counsel for creditors, 30 October 2023 in the Distribution Application (Tab 20 to the previous Cryptopia proceedings bundle).
[789] Submissions of counsel for creditors, 30 October 2023 in the Distribution Application from [4.6] (Tab 20 to the previous Cryptopia proceedings bundle), citing *In re MF Global UK Ltd (No 3)* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874 at [26] and Trusts Act 2019, ss 133–135.
[790] Submissions of counsel for creditors, 30 October 2023 in the Distribution Application at [4.14] (Tab 20 to the previous Cryptopia proceedings bundle).
[791] Submissions of counsel for creditors, 30 October 2023 in the Distribution Application at [4.16] (Tab 20 to the previous Cryptopia proceedings bundle).

allow distribution in a manner suiting the justice of the situation instead of the strict requirements of liquidation or the relevant trust.[792]

10.52 Although an issue to be ultimately determined by the Court, the liquidators' position is that using the unclaimed holdings to meet creditors' claims would be inconsistent with Cryptopia's trustee obligations.

10.53 In order to remove assets from the trusts for the benefit of creditors, there are three potential pathways:

(a) amendment of the trusts;

(b) termination of the trusts; and

(c) In limited circumstances, via the trustee's indemnity.

10.54 All three are considered further below.

10.55 Applying established trust law principles:

(a) Although Cryptopia is the legal owner of the cryptocurrencies, it is not the beneficial owner.[793] Beneficial ownership of the cryptocurrencies resides with the account holders.[794] Accordingly, the cryptocurrencies (other than those to which Cryptopia has beneficial ownership by virtue of its status as an account holder beneficiary) are not Company property.

(b) Creditors of Cryptopia have no equitable entitlement to the cryptocurrencies (unless they are also account holders).

(c) The *Re Benjamin* orders made in the Distribution Application do not extinguish an account holder's beneficial entitlement.[795] As such, even if all eligible account holders receive a distribution of their beneficial entitlement in full, the remaining unclaimed holdings are still subject to a trust and are not beneficially owned by Cryptopia.

(d) The fiduciary duties of a trustee include the duty of loyalty, duty to avoid conflicts of interest, and the rule against unauthorised profits.[796] Using the cryptocurrencies to which an equitable claim exists for the purposes

[792] Submissions of counsel for creditors, 30 October 2023 in the Distribution Application at [4.17] (Tab 20 to the previous Cryptopia proceedings bundle).
[793] *Equity and Trusts in New Zealand* at [2.2.1]–[2.2.3].
[794] See above at [3.2]-[3.3]
[795] See above at [3.27]-[3.33].
[796] *Lewin on Trusts* at [34-001]. See above at [3.10] and [8.210]-[8.219].

of paying the Company's debts may constitute a conflict of interest, a breach of the duty of loyalty (by putting the Company's creditors ahead of the beneficiaries) and arguably an unauthorised profit (although this may not apply in a liquidation context).

10.56 Unless the Company creditors are trust creditors (see from [10.93]), the liquidators would not be permitted to use trust assets for the purposes of paying the Company's debts. In *Re Suco Gold,*[797] approved by the High Court of Australia in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth ("Re Amerind"),*[798] the Supreme Court of South Australia held that (emphasis added):[799]

> A trustee however, has no legal right to use or apply the trust property other than for the authorized purposes of the trust. In particular he has no legal right to apply the trust property for his own benefit or for the benefit of third parties, *Keech v Sanford (1726) 2 Eq Cas Ar 741*. ***I cannot escape the conviction that if a trustee, or his trustee in bankruptcy, or liquidator in the case of a trustee company, is permitted to use the trust property, not for the discharge exclusively of liabilities incurred in the performance of the trust, but in the discharge of other liabilities as well, the money is being used for an unauthorized purpose and is being, moreover, for the benefit of the trustee, and of third parties, namely the non-trust creditors***.

10.57 Although the approach set out above can be regarded as the 'orthodox position', there are exceptions to this rule.

(a) In *Re Registered Securities Ltd (in liq)*,[800] the liquidators were required to distribute a deficient mixed fund. Trust and company assets had been intermingled. The Court held there that in situations where tracing each claimant's individual interest will involve enormous effort and produce an unreliable result, "*the Court must give such directions as will do substantial justice between the parties.*"

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[797] (1983) 33 SASR 99 (SASCFC), endorsed in *Mawhinney v Official Assignee* [2016] NZHC 2487 at [31], and cited in James Allsop "The intersection of companies and trusts" (2020) 43(3) MULR 1128 at 1141.
[798] [2019] HCA 20, (2019) 93 ALJR 807. *Re Amerind* was cited in the Trust Application (*Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [89(g)]. *Re Amerind* was applied in *Body Corporate 331094 v Marshall* [2024] NZHC 2044: a successful application by the Body Corporate to subrogate into the Official Assignee's indemnity to a bankrupt's trust assets (the Body Corporate was a creditor of the trust) in circumstances where the Official Assignee had declined to exercise that right to indemnity. It has also been referred to by the Court of Appeal in *Hong v Kinnon* [2025] NZCA 117 at [37] in relation to the right of indemnity creating an equitable charge or lien over trust assets, and applied in *Soroka v Meredith* [2023] NZHC 2510.
[799] *Re Suco Gold* (1983) 33 SASR 99 (SASCFC) at [105].
[800] [1991] 1 NZLR 545 (CA).

(b) In *Graham v Arena Capital Ltd (in liq)*,[801] a Ponzi scheme involving a deficient mixed fund, the liquidators sought directions that Arena Capital's assets could be treated as forming one common pool of assets for distribution to both unsecured creditors and investors, and that the assets be distributed on a *pari passu* basis. During its operation, Arena Capital had sought deposits from investors promising a return from foreign exchange trading – the investments were disbursed to existing clients and were not invested. Net claims amounted to $6.7 million, and total funds amounted to only $2.3 million. 926 investors had claims against Arena Capital, in addition to three general unsecured creditors.

(c) The liquidators accepted that the investors' funds were subject to a statutory trust but submitted that the exercise of creating two separate pools of assets and tracing the relevant transactions would cause unnecessary cost to the disadvantage of investors (at least $100,000). The High Court accepted that submission on the basis that it would be the most cost-efficient and pragmatic model.[802]

(d) In *Re Fisk (Ross Asset Management),*[803] the Court was asked to consider an appropriate distribution model for a Ponzi scheme. Unlike in *Arena Capital*, the liquidators had identified that 80% of the assets available were company assets and 20% were trust assets. Unsecured creditors' (of which there were 26) and investors' (of which there were 860) claims totalled $125 million, and available assets totalled $17.5 million. When investors were able to demonstrate a traceable legal interest, the liquidators had already accepted that claim.[804]

(e) This application for directions concerned distribution of the remainder. The judgment primarily concerned the distribution methodology that ought to be used by the liquidators, and whether a different approach should be taken for company and trust assets. Ultimately, the Court agreed that there was little advantage in ordering a hybrid distribution (i.e., distributing company and trust assets on different bases) the

[801] [2017] NZHC 975.
[802] *Graham v Arena Capital Ltd (in liq)* [2017] NZHC 975 at [15].
[803] [2018] NZHC 2007, per Associate Judge Johnston.
[804] *Re Fisk (Ross Asset Management)* [2018] NZHC 2007 at [48].

additional costs of which would further erode the assets available for claimants.[805]

10.58 Each of these cases involved Ponzi schemes with a deficient, mixed fund, where both beneficiaries and unsecured creditors had been defrauded and accordingly had a claim against the company in liquidation for the amount of their loss. As the Court noted in *Re Fisk*, liquidations of companies carrying out Ponzi schemes have very particular characteristics:[806]

(a) Investors' expectations are based on their capital investments plus the accumulated returns that they were told they had earned.

(b) Investors will have dealt with their investments differently (some will have never withdrawn funds, others will have made irregular withdrawals, and others still will have taken regular withdrawals). The disadvantage experienced by each investor therefore differs. Some will have withdrawn more than the amount of their capital investment, and others will have withdrawn nothing, and therefore "lost" more.

10.59 Those same features are not present in Cryptopia's liquidation:

(a) With the exception of those trusts that have suffered losses from the Hack, many account holders have received or will receive their full beneficial entitlement, depending on the amount of unclaimed holdings in each trust.[807]

(b) The liquidators have administered Cryptopia's trust and Company assets separately throughout the liquidation. It has been feasible to do so because Cryptopia's SQL database kept a record of account holders' deposits and withdrawals, and accordingly, a total balance (although it had never been reconciled).

10.60 As such, Cryptopia's circumstances differ from those where the Court has departed from the orthodox position out of necessity.

10.61 Because of those particular characteristics, the Ponzi scheme cases required bespoke directions from the Court resulting in the available assets (i.e., both investors' and company assets) being pooled. However, as the Court

[805] *Re Fisk (Ross Asset Management)* [2018] NZHC 2007 at [146].
[806] *Re Fisk (Ross Asset Management)* [2018] NZHC 2007 at [9].
[807] Ruscoe updating affidavit, 23 April 2026 at [8]-[9], 401.0028 - 401.0029.

observed in *Re Fisk*, that does not mean that the Companies Act ought to apply to the distribution of trust assets:[808]

> … I do not accept the contention…*that the Companies Act and the principles that apply to the distribution of company assets under that Act should also dictate – or at least heavily influence – the distribution of the trust assets. In that regard, I accept the submissions made by Mr Chisnall that insolvency law principles are not necessarily appropriate for application to Ponzi schemes.*

10.62 Without those particular characteristics present in the Ponzi scheme cases, the liquidators do not consider that there is a basis on which they can depart from the orthodox approach by applying insolvency law distribution principles to the distribution of the cryptocurrency trust assets, even if they are unclaimed. Returning to a first-principles analysis, the cryptocurrencies are trust property and cannot be used for Company purposes (see [10.55]-[10.56]).

Amendment of the trusts

10.63 As summarised above at [10.51]-[10.53], the liquidators anticipate that Ms Cooper KC will argue that the Court has inherent jurisdiction to amend the terms of a trust to allow trust assets to be used to pay creditors.

10.64 The law as to variation of trusts terms is set out above at [10.27]-[10.38]. Given that the variation in these circumstances would be dispositive (i.e., related to distribution of the trust assets and who is entitled to those assets), s 130 of the Trusts Act 2019 would not apply (see [10.31]). Any variation would need to be in terms of ss 122–125 of the Trusts Act 2019 (see [10.31]) or in the Court's inherent jurisdiction (see [10.34]).

10.65 In relation to the statutory pathways under the Trusts Act 2019, there is no dispute that the consent of beneficiaries cannot be obtained. The beneficiaries of the unclaimed holdings are ineligible account holders who have failed to register in or complete the claims portal, despite several attempts by the liquidators to contact them over the course of seven years.[809] On that basis:

(a) Section 122 (variation with the consent of beneficiaries) does not apply.

[808] *Re Fisk (Ross Asset Management)* [2018] NZHC 2007 at [141].
[809] See of Mr Ruscoe's 31 July 2023 affidavit in the Distribution Application at [73]–[74] (Tab 16 of the Cryptopia previous proceeding bundle) and exhibit DIR1-233.

(b) Section 124 permits the court to approve a variation on behalf of beneficiaries who lack capacity (for example, minors) and is not apt for circumstances where beneficiaries cannot be located or contacted.

(c) Section 125 "addresses circumstances where there are adult beneficiaries with full capacity who are difficult to locate, or are part of a disparate group, or simply fail to respond or who refuse to consent to what is proposed. Section 125 of the Trusts Act 2019 empowers the court to waive the requirement of consent from elusive, uncooperative or dissenting beneficiaries."[810] That provision is not apt to this situation: the liquidators have put any proposal to account holders suggesting that the terms of the trusts should be amended to permit payment to unsecured creditors out of the trust assets. In addition, the court may not make an order under s 125 if the effect would be to reduce or remove any vested interest in the trust property.[811] The Law Commission in its report refers to a "vested or indefeasible interest", and also to a "fixed" interest. Beneficiaries of the cryptocurrency trusts must have such an interest (see [3.2]-[3.6] and [3.17]-[3.18]).[812]

10.66 Accordingly, any amendment would be made under the Court's inherent jurisdiction.

10.67 As summarised at [10.37] and [10.38], the New Zealand courts have followed English authority to the effect that a trustee cannot act inconsistently with the substratum of a trust – i.e., the "context and objectives of the trust or which exceeds the limits of the trust". It appears that this may be the distinction between s 130 and ss 122–125:

(a) The court can amend or vary the trusts, provided it does not impact on any dispositive powers or beneficial interests (s 130), because such amendments would impact on the substratum of the trust.

(b) In contrast, the beneficiaries can consent to an amendment that would vary dispositive powers or beneficial interests (ss 122–125). That is based on the old principle in *Saunders v Vautier*[813] permitting a trust to be brought to an end by unanimous consent by the beneficiaries. That

[810] *Equity and Trusts in New Zealand* at [10.10].
[811] Trusts Act 2019, s 125(4).
[812] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [10.15]–[10.16].
[813] *Saunders v Vautier* [1841] EWHC J82, (1841) 4 Beav 115. See also Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at 162.

reasoning can be seen in *Re Phillips*,[814] where the Court permitted a variation to the terms of the trust to allow apportionment of a sum to go to the company (which was contrary to the existing terms of the trust). The Court concluded that if the beneficiaries have the power to unanimously put an end to a trust, then it is difficult to see why they could not use those same rights to amend the terms of the trust. In contrast, a similar application regarding an almost identical term in the trust deed was declined in *Re UEB Industries Ltd Pension Plan*[815] on the basis that any amendments to the trust deed would be invalid absent the consent of all beneficiaries. That must reflect the intention that dispositive powers and beneficial interests can only be amended with the beneficiaries' consent.

10.68 The liquidators respectfully submit that the court has jurisdiction under ss 123 and 125 to approve such amendments on behalf of beneficiaries that do not have capacity, or who cannot be located or refuse to respond, to avoid administrative unworkability, when such beneficiaries could effectively veto an amendment.[816] It is likely that this jurisdiction is intended to be exercised when the remaining beneficiaries *do* consent to it.[817] It is for that reason that the court is required under s 125 when waiving the requirement of consent to consider the nature of a person's interest in the trust property and the effect of the order; the benefit or detriment that may result from the order; and the intentions of the settlor in settling the trust: the Court is effectively stepping into the shoes of a beneficiary. It is also the reason why the court may not make an order under s 125 if the effect would be to reduce or remove any vested interest in the trust property.

10.69 On that basis, the liquidators respectfully submit that the Court may not *ordinarily* have jurisdiction to approve an amendment that would constitute an amendment to the substratum of the trusts (or perhaps, that the inherent jurisdiction is not exercised in such cases). It is acknowledged that more recent English authority indicates that the substratum concept may not be useful – it is possible that this law will no longer be followed in New Zealand (see [10.37]-[10.38]).

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[814] *Philips New Zealand Ltd Retirement Plan v Philips New Zealand Ltd* [1997] 1 NZLR 93 (HC).
[815] [1990] 3 NZLR 347 (HC).
[816] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [10.14].
[817] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [10.14]–[10.16].

10.70 In spite of that, the Court must surely have jurisdiction in circumstances of necessity. Of particular relevance (and referred to at [10.50]):[818]

> The court has inherent jurisdiction to authorise otherwise unauthorised acts of management or administration of the trust property where an emergency arises connected with the trust property. But this can only be done in a case where the emergency may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, the trustees are embarrassed by the emergency, the consent of the beneficiaries cannot be obtained to the course proposed, and the emergency must be dealt with at once.

10.71 Cryptopia's circumstances could well be considered a case of emergency: the Company holds assets on trust that remain unclaimed, and the beneficiaries cannot be located or identified. Something must be done with the assets so that Cryptopia's liquidation can be completed. However, the liquidators respectfully submit that the order sought and made must align with the emergency faced. The emergency arising here is how the trust assets can be managed to allow Cryptopia's liquidation to be completed. Respectfully, ensuring that all unsecured creditors are paid in full does not amount to an emergency: the liquidation process itself (arising from a company being unable to pay the debts that are due) anticipates that unsecured creditors may not be paid in full.

10.72 On that basis, the liquidators respectfully submit that there is no basis on which the trusts can be varied to permit the trust assets to be used to pay unsecured creditors.

Termination of the trusts

10.73 In some circumstances when liquidators (or other insolvency practitioners) have been appointed as liquidators of corporate trustee companies, the courts have been willing to go further than making *Re Benjamin* orders (discussed at [3.28]-[3.33]), and have made orders the effect of which is to terminate beneficial interests.

10.74 In *Re Alpari*, the High Court (Chancery) (UK) made orders to the effect that any person who had not submitted a client money claim prior to a specified cut-off date, or who had an entitlement of less than USD51.50 would cease to have an interest in client money upon a final distribution of client money in

[818] *Lewin on Trusts* at [52-001].

the trust.[819] Alpari (UK) was the trustee of the client money. The regulatory regime applicable to Alpari included the Client Assets Sourcebook, often referred to as the **CASS rules** – a statutory trust regime in the United Kingdom. Counsel have been unable to locate this judgment but have located a copy of the Orders made in that case.

10.75 *Re Alpari* was then referred to in a later High Court decision: *Re Pritchard Stockbrokers* [2019] EWHC 137 (Ch). *Re Pritchard* also involved the application of the CASS rules to an insolvent entity. Despite significant effort, the special administrators were unable to locate all of the beneficiaries of the client money and sought orders from the Court in relation to the unclaimed balance. The Court considered *Re MF Global* (discussed above at [3.31]) and other similar cases[820] before deciding that a *Re Alpari* order[821] was more appropriate than a *Re Benjamin* order because:[822]

(a) The objective of the special administration process was to return client assets as soon as practicable, and the special administration process had already lasted more than six years.

(b) Only 22% of claimants were unresponsive, amounting to only 3% of the client pool.

(c) The need for finality was greater than the need to preserve unpursued claims.

(d) Those who received a final distribution should be entitled to regard it as their own and not be exposed to a claim to follow or trace the funds.

10.76 *Re Alpari* and *Re Pritchard* might present a basis on which the Court could consider extinguishing ineligible account holders' beneficial interests.

10.77 There are, however, distinguishing features.

10.78 First, the CASS rules are prescriptive as to the distribution of client funds. The rules came into being following the failure of Lehman Brothers International (Europe) in 2008 following which an insolvency regime was created specifically for investment firms.[823] Once a company holding client

[819] Orders of the High Court of Justice (Chancery Division), *Re Alpari (UK) Limited (In special administration),* CR-2015-003442, 29 September 2016.
[820] *Re Worldspreads Limited* [2015] EWHC 1719 (Ch), *Re Allenfield Property Insurance Services v Aviva Insurance Limited* [2015] EWHC 3721 (Ch).
[821] *Re Pritchard Stockbrokers* [2019] EWHC 137 (Ch) at [15]–[19].
[822] *Re Pritchard Stockbrokers* [2019] EWHC 137 (Ch) at [29].
[823] Financial Conduct Authority *Discussion Paper: CASS 7A & the Special Administration Regime Review* (DP16/2, March 2016) at [1.9].

money receives a Supervisory Notice from the regulator, it can no longer trade and a 'primary pooling event' occurs.[824] The primary pooling event means that the client money held by the company is treated as pooled and the individual entitlement of any client is replaced by a claim on the pooled fund, to be distributed as prescribed under the CASS rules.[825] The difficulty that often arises is in identifying all of the beneficiaries.

10.79 Many other trust law cases have arisen out of the CASS rules, and in those cases, *Re Benjamin* orders were granted (see *Re MF Global; Re Worldspreads Limited; Re Allenfield;* and the *Lehman Brothers International (Europe)* cases – collectively referred to herein as the "**Re Benjamin CASS cases**").[826] As discussed above ([3.29]-[3.33]), *Re Benjamin* orders do not extinguish beneficial interests – they simply permit a liquidator or administrator to proceed on a particular practical footing. *Re Pritchard* and *Re Alpari* have been subject to some concern about their inconsistency with the Re Benjamin CASS cases, when an important factor weighed in the court's exercise of discretion was the fact that the order would not destroy any proprietary right, and those beneficially entitled could still trace their entitlement if they had a claim.[827]

10.80 Both Re Pritchard and Re Alpari have been criticised on the basis that they constitute a "radical departure from the basic principles of trust litigation" and have opened a "worrying crack in the court's supervisory jurisdiction",[828] which is to say that the approach is not an established one in either the UK or New Zealand. Counsel have been unable to locate any cases in New Zealand applying Re Pritchard or Re Alpari.

10.81 It is also significant that in 2016, the Financial Conduct Authority (**FCA**) commenced a review of the CASS rules. The FCA report more closely aligns with the approach in the Re Benjamin CASS cases:[829]

> …As discussed in the various *[Lehman Brothers International (Europe)]* judgments, on a firm's failure, clients may be able to trace their interests in the

[824] CASS Rules, cl 7A, referred to in *Re Pritchard Stockbrokers* [2019] EWHC 137 (Ch) at [5].
[825] CASS Rules, cl 7A, referred to in *Re Pritchard Stockbrokers* [2019] EWHC 137 (Ch) at [5].
[826] See footnote 827.
[827] See: *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874; *Re Instant Cash Loans Limited* [2021] EWHC 1164 (Ch) and similar cases preceding and following it (*Re Lehman Brothers* [2012] UKSC 6 and first instance decision [2009] EWHC 3228 (Ch); *Re Lehman Bros International (Europe) (No 2)* [2010] Bus LR 489 per Lord Neuberger; *Re Worldspreads Ltd* [2015] EWHC 1719 (Ch), *Allenfield Property Insurance Services v Aviva Insurance Limited* [2015] EWHC 3721.
[828] Aidan Briggs "Scope creep: deleting beneficiaries' interests in the name of cost-efficiency?" (2019) 25 Trusts & Trustees 830 at 834.
[829] Financial Conduct Authority *Discussion Paper: CASS 7A & the Special Administration Regime Review* (DP16/2, March 2016) at [4.49]–[4.50] and [4.68]–[4.76].

client money into the firm's house accounts where a firm has failed to segregate it… It would not be the right outcome of this review for clients' rights of action or their abilities to recover amounts held for them by the firm to be limited.

Treatment of allocated but unclaimed client money & de minimis balances following [primary pooling event]

… We recognise than an *[insolvency practitioner]* cannot retain unclaimed client money indefinitely, but are equally mindful that a client must be given sufficient opportunity to claim their money. In CP13/5 we therefore proposed to allow an *[insolvency practitioner]* to use any unclaimed *[client money entitlements]* to make good a shortfall in the *[client money pool],* provided reasonable steps had been taken to trace the clients concerned.

…

In the event of a shortfall having been met, or not arising, we propose that any residual surplus will become due to the firm in line with the statutory trust waterfall provision at CASS 7.17.2(5)R. We note this is counter to the general principles of trust law, which state that a trustee should not benefit financially from his position as trustee, however the client estate will have received a full return of assets.

10.82 The learned authors of *Lewin on Trusts* suggest that the Court's decision in *Re Pritchard* reflects a direction to fill a lacuna in the statutory trust regime giving rise to the trust where there was "*in reality no distinction between trust beneficiaries and creditors of the trustee*".[830] The liquidators respectfully agree and submit that *Re Alpari* and *Re Pritchard* are more appropriately viewed as cases specific to their statutory regimes. Cryptopia's circumstances differ: there is a distinction between unsecured creditors and trust creditors, and there is no prescriptive statutory scheme requiring distribution in a specific manner. There is no lacuna to fill.

10.83 A further relevant factor is that clients whose beneficial interests were extinguished may have had recourse to the Financial Services Compensation Scheme[831] – even the extinguishment of their beneficial interest may not have left them empty-handed, should they later bring a claim. In contrast, there is no equivalent compensation scheme in New Zealand, and

[830] *Lewin on Trusts* at [27-101]–[27-102].
[831] Aidan Briggs "Scope creep: deleting beneficiaries' interests in the name of cost-efficiency?" (2019) 25 Trusts & Trustees 830 at 833.

beneficiaries whose entitlements were extinguished would be left without anything at all.

10.84 In any event, the English High Court in Re Pritchard held that a relevant factor for the Court to consider was "if the statutory trusts are to be modified, then why the extinguishment of beneficial interests is to be preferred over a distribution on a particular footing which preserves those beneficial interests (i.e. why an Alpari order is to be preferred over an MF Global order."[832] In Cryptopia's case, the extinguishment of beneficial interests is not necessary to proceed with distribution. Distribution is ongoing. It would be going well beyond the scope of even an Alpari order to extinguish beneficial interests after distribution had been effected.

10.85 Extinguishing ineligible account holders' beneficial interests would not necessarily mean that the cryptocurrencies would be available to meet creditors' claims. With the exception of the proposed amendment to the CASS rules in the United Kingdom (set out above at [10.81]), which relates to a particular statutory regime, the primary purpose of the *Pritchard* orders was to pay out claiming beneficiaries in full (with 23.5 million pounds in assets and 25.7 million agreed claims, with 810,000 pounds of potential claims)[833]. In other words, if all beneficiaries had claimed, there would be insufficient assets to meet those claims in full.

10.86 Cryptopia's position is different. As summarised above at [10.55], Cryptopia itself has no beneficial ownership of or entitlement to the cryptocurrencies it holds for account holders (apart from its own holdings). When a trust fails to exhaust the beneficial interest (i.e., trust property remains), a resulting trust arises by operation of law in favour of the settlor / transferor of the trust property.[834] The same thing occurs if an event occurs that has not been provided for in the trust provisions.[835] If it is established that a settlor did intend to make a disposition on trust but did not intend to retain any beneficial ownership (which is not the case here), then the Crown takes the undisposed-of beneficial ownership – not the trustee.[836]

10.87 Given that the account holders themselves would be considered the settlors of the relevant cryptocurrency trusts, extinguishment of ineligible account

[832] *Re Pritchard Stockbrokers* [2019] EWHC 137 (Ch) at [26(e)]
[833] *Re Pritchard Stockbrokers* [2019] EWHC 137 (Ch) at [10] and [12].
[834] *Equity and trusts in New Zealand* at [13.4.4]; *Lewin on Trusts* at [9-002]–[9-007].
[835] *Equity and trusts in New Zealand* at [13.4.4]; *Lewin on Trusts* at [9-006].
[836] *Lewin on Trusts* at [9-002].

holders' entitlements would simply give rise to a resulting trust in their favour. It would not necessarily make that property available to the Company. In the liquidators' submission, directing that creditors be paid from any unclaimed holdings would be inconsistent with both established trust principles under the existing trusts and with the law of resulting trusts.

Consequences of terminating the trusts

10.88 If the trusts were terminated and the unclaimed holdings deemed to be Company assets for the purposes of paying creditors, then the remaining surplus after creditors had been paid would be distributed to the Company's shareholders.

10.89 Section 313 of the Companies Act 1993 provides that subject to s 311, after first paying preferential claims and then unsecured creditor's claims the liquidator must distribute the Company's surplus assets in accordance with the provisions outlined in the Company's constitution or, if the constitution does not contain provision for the distribution of surplus assets, in accordance with the Act. Section 311 relates to payment of interest on unsecured creditor's claims.

10.90 Section 316 provides that unclaimed assets of a company shall, after completion of the liquidation, be paid to the Public Trust. After 12 months, the Public Trust must pay the balance into the Liquidation Surplus Account. Money in the Liquidation Surplus Account may be distributed to any person entitled to distribution in the liquidation of a company or paid towards creditors or costs in a liquidation of which the Official Assignee or any other person is the liquidator.

10.91 Cryptopia's constitution provides, at cl 16.1:[837]

> Distribution of surplus: Subject to the rights of any Shareholders and to the terms on which their Shares are issued and to clauses 16.3 to 16.5, upon the liquidation of the Company the surplus assets of the Company (if any) must be distributed among the Shareholders entitled to those assets in proportion to their shareholding.

10.92 As such, the consequence of terminating the trusts would be that any remaining surplus, after creditors were paid, would be distributed to Cryptopia's shareholders and not to the Liquidation Surplus Account. Such

[837] Exhibit DIR3-93, 401.0131, to Ruscoe updating affidavit, 23 April 2026 at DIR3-105, 401.0143.

an outcome would be unwarranted: the Company's shareholders, much like the Company, have no beneficial interest in the cryptocurrencies and cannot have had any expectation that they would receive the benefit of that property.

Trustee's indemnity

10.93 As mentioned above, there may be an argument that the Company's creditors ought to have recourse to the trust property through Cryptopia's indemnity as trustee.

10.94 Trustees are entitled to be indemnified out of the trust property for liabilities, costs and expenses properly incurred in connection with the reasonable performance of their duties as trustee.[838] The indemnity operates as a first charge or lien on the trust fund: the trustee has an equitable interest in the trust fund that takes priority over the claims of the beneficiaries and third parties.[839] To that end, a beneficiary (even one that is absolutely entitled) cannot require a trustee to transfer trust property to them until the trustee's indemnity has been met.[840] The trustee's lien extends over the whole trust fund.[841]

10.95 The right of indemnity comprises the following rights:[842]

(a) Reimbursement for liabilities or expenses incurred in administration of the trust.

(b) Exoneration from the trust. A trustee may discharge or pay a liability directly from the trust property.

(c) Retention of trust assets or income until the trustee has been indemnified, both in respect of present liabilities and contingent or future liabilities to the extent required to meet the 'worst case' scenario on the basis of reasonable assumptions.

(d) Realisation of trust property in order to meet the trustee's proper expenses.

[838] Trustee Act 1956, s 38(2) and Trusts Act 2019, s 81. Both sections confirm the position in equity: *Lewin on Trusts* at [19-003]; *Butterfield v Public Trust* [2017] NZCA 367, [2017] NZAR 1439.
[839] *Lewin on Trusts* at [19-044].
[840] *Lewin on Trusts* at [19-044].
[841] *Lewin on Trusts* at [19-045].
[842] *Lewin on Trusts* at [19-044].

10.96 The right to indemnity will only apply if the trust expense or liability was incurred in the proper administration of the trust.[843]

10.97 Section 38 of the Trustee Act 1956 provided that (emphasis added):

> (2) **A trustee may 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, except as provided in this Act or any other Act or as agreed by the persons beneficially interested under the trust, no trustee shall be allowed the costs of any professional services performed by him in the execution of the trusts or powers unless the contrary is expressly declared by the instrument creating the trust: provided that the court may on the application of the trustee allow such costs as in the circumstances seem just.

10.98 Section 2(5) of the Trustee Act 1956 provides that the powers conferred by the Act on a trustee that is a corporation apply if and only so far as a contrary intention is not expressed in the instrument creating the trust and have effect subject to the terms of that instrument.

10.99 The Trusts Act 2019 amended and updated the law in relation to a trustee's indemnity. Section 81 provides:

> (1) A trustee is personally liable for an expense or a liability incurred by the trustee when acting as a trustee.
>
> (2) However, a trustee who incurs an expense or a liability when acting reasonably on behalf of the trust is entitled, —
>
> > (a) if the trustee has paid the expense or discharged the liability out of the trustee's own funds, to reimbursement from the trust property; or
> >
> > (b) in any other case, to pay the expense or discharge the liability directly from the trust property (or to have it paid or discharged by a remaining trustee).
>
> (3) The operation and enforcement of the indemnity in this section is governed by the rules of the common law and equity relating to trusts.
>
> (4) This section does not limit any indemnity available at common law or in equity.

10.100 In substance, s 81 is similar to its predecessor section in the Trustee Act 1956. The primary change arises in relation to subrogation. A creditor who

[843] *Equity and Trusts in New Zealand at* [42.7.9].

is owed money from a trust can subrogate into a trustee's indemnity, with the Court's permission, and have direct recourse to the trust fund in priority to the beneficiaries of those trusts.[844] Under the pre-Trusts Act 2019 position, subrogation became unavailable if the trustee's indemnity was impaired (see [10.96]). However, s 86 of the Trusts Act 2019 permits a trust creditor to be indemnified from the trust property in priority to any trust beneficiary even if the trustee's right to indemnity is impaired, as long as the creditor demonstrates to the court that it has acted in good faith, has given value, and the trust received a benefit.[845] For the avoidance of doubt, none of the Company's creditors have raised with the liquidators the issue of subrogation or applied to the Court for subrogation.

10.101 However, Schedule 3 of the Trusts Act 2019 creates certain exceptions for specified commercial trusts. A specified commercial trust is an express trust created for the purpose of facilitating one or more commercial transactions, and every beneficiary of which is a beneficiary as a result of entering into the commercial transaction that the trust is created to facilitate.[846] It is inarguable that the cryptocurrency trusts were formed in order to facilitate one or more commercial transactions: they were formed as part of Cryptopia's business in order for account holders to trade cryptocurrencies, and for Cryptopia to generate income from that trading.

10.102 Schedule 3, cl 4(2) of the Trusts Act 2019 provides that ss 81–85 of the Trusts Act 2019 do not apply to a specified commercial trust that was created before, or that was created under terms agreed to and in effect before, the commencement of cl 4(2). The Trusts Act itself came into force on 30 January 2021, well after Cryptopia went into liquidation (14 May 2019) and the obligations to unsecured creditors were accrued (which was prior to liquidation). The Terms and Conditions themselves applied from August 2018, well before the Trusts Act came into force.

10.103 On the basis that the cryptocurrency trusts are specified commercial trusts, the liquidators submit that no indemnity is available to Cryptopia pursuant to s 81 of the Trusts Act 2019. (There is no such exemption from s 86 permitting a creditor's subrogation, if an indemnity exists.)

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[844] *Lewin on Trusts* at [19-049]–[19-050].
[845] For a recent example, see *Body Corporate 331094 v Marshall* [2024] NZHC 2044, citing *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth ("Re Amerind")* [2019] HCA 20, (2019) 93 ALJR 807.
[846] Trusts Act 2019, Schedule 3, cl 1(a).

10.104 If the Trusts Act 2019 does not apply, then there may be a pathway through s 38 of the Trustee Act 1956 if it is not inconsistent with the terms of the trusts. The terms of the trusts themselves may equally provide a pathway for unsecured creditors to be paid from trust property.

Are the unsecured creditors trust creditors?

10.105 It may be arguable that the Company's sole service was as trustee of the cryptocurrencies and that, accordingly, all Company expenses were incurred for the purposes of the trusts. If that were the case, then it may be that they are expenses that can be met from the trust assets, subject to the trustee's indemnity.

10.106 (It should be noted, for completeness, that this argument would not apply to unsecured creditors who were victims of the Hack, if it is established that Cryptopia is liable for those losses in statute, tort, breach of contract, or equity, as those liabilities would not have been incurred in the proper administration of the trusts.)

10.107 For example, some of Cryptopia's creditors were directly connected to Cryptopia's operation of the exchange. Cloudflare and Incapsula provided DDOS protection software services to Cryptopia.[847] It would seem inarguable that such protection would have been necessary for Cryptopia to fulfil its role as trustee. PNAP stored Cryptopia's data and some of its wallets on its servers – a service directly related to Cryptopia's operation of the exchange and its role as trustee.[848]

10.108 Others were connected more indirectly. For example, Cryptopia had various operational expenses, such as rent (it rented its offices from Midland Properties), utilities (such as electricity from Powershop New Zealand Limited), office products (Office Products Depot) waste management (EnviroWaste Services Ltd; Waste Management), accounting (Xero), and physical security (Sandfly Security, Security Matters Christchurch Limited). However, Cryptopia's core function was to hold the cryptocurrencies on trust via its exchange, and these goods and services were acquired in order to support Cryptopia's core function. On that basis, these expenses could reasonably be considered trust expenses.

[847] Ruscoe affidavit 31 July 2025 at [62], 201.0040.
[848] Ruscoe affidavit 31 July 2025 at [15(a)], 201.0027 and [121], 201.0055.

10.109 The liquidators have not previously sought directions permitting them to meet creditors' claims from the trust assets. From August 2018 until liquidation, Cryptopia's Terms and Conditions provided that:[849]

> 13.1 You Agree to Pay Our Fees
>
> You agree 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.
>
> 13.2 Our Fees Can Change
>
> a. We may change, modify or increase fees and expenses associated with our Services and Platform, from time to time.
>
> b. By using our Services or Platform following any update to our rates you accept and agree to pay the fees or expenses as published.

10.110 The Terms and Conditions did not provide Cryptopia with any express indemnity beyond those referred to in relation to its liability to account holders (see [6.2]).

10.111 Cryptopia's fees and expenses were generated by collecting transaction fees from account holders' trades on the exchange.[850] A fee was charged for each trade, and a withdrawal fee.[851] In the Trust Application, in response to a request from Ms Cooper KC and Mr Watts KC, Mr Ruscoe provided the following explanation:[852]

> **How did Cryptopia pay employees and business expenses?**
>
> Income accounts such as Withdrawal fees or Exchange income generated a corresponding entry in the SQL database. The various income streams Cryptopia had were separate accounts in SQL database which operated like a user account for Cryptopia. When a user traded for example 1 BTC .02 BTC would be added to the internal account balance of SYSTEM_CRYPTOPIA_INCOME.
>
> To recognise income in the accounting system a weekly report was then pulled by the database administrator that summarised the daily trading fees for the

[849] Terms and Conditions at cl 13, exhibit DIR1-80 to Ruscoe affidavit 31 July 2023, 302.0577 at 302.0588.
[850] Ruscoe first affidavit, 31 July 2025 at [141], 201.0061.
[851] Mr Ruscoe's 8 November 2019 affidavit in the Trust Application at [31] (Tab 4 to the previous Cryptopia proceedings bundle).
[852] Mr Ruscoe's 13 January 2020 affidavit in the Trust Application at [10]–[12] (Tab 8 to the previous Cryptopia proceedings bundle).

previous week. The accounts administrator would then convert these fees to NZD and then import this report into Xero.

The underlying holdings of these accounts were reconciled to Xero whereby the income would be recognised as company assets. A journal entry would be recorded crediting the relevant income account and the debiting the relevant company asset account which was set up like a bank account in Xero. Revaluation of the actual crypto-asset in New Zealand Dollars occurred as part of the month end process via a manual journal entry.

10.112 If Cryptopia needed fiat currency to pay business expenses, then the Director of Finance and Administration would seek approval from management based on the amount due to creditors.[853] Once approval was given, the Director of Finance would use an over-the-counter cryptocurrency exchange service to convert the cryptocurrency collected as fees to fiat.[854]

10.113 On that basis, Cryptopia had an express contractual agreement with account holders that it would be remunerated, and its expenses met, from the fees it collected directly from account holders. The Terms and Conditions did not provide any other basis on which Cryptopia could meet Company expenses. The same point was made by Mr Watts KC in his submissions for the Distribution Application.[855]

10.114 Accordingly, the liquidators submit that the indemnity under s 38 of the Trustee Act 1956 (if it applied) would be excluded by implication.

11. CONCLUSION

11.1 These submissions address a wide range of issues that must be resolved in order to conclude the liquidation of Cryptopia. The liquidators respectfully summarise their position on each of those issues, and the orders sought, as follows.

11.2 **Terms and Conditions**. The liquidators submit that the Terms and Conditions are effective and binding on all account holders. In particular, the limitation and exclusion of liability in cl 12.1 and the prohibition on assignment in cl 18.2 apply to the conduct of the liquidation and trust

[853] Mr Ruscoe's 13 January 2020 affidavit in the Trust Application at [13]–[14] (Tab 8 to the previous Cryptopia proceedings bundle).
[854] Mr Ruscoe's 13 January 2020 affidavit in the Trust Application at [13]–[14] (Tab 8 to the previous Cryptopia proceedings bundle).
[855] Mr Watts KC (as amicus curiae) 27 October 2023 submissions in the Distribution Application, at [20]–[24] (Tab 19 to the previous Cryptopia proceedings bundle).

administration. The liquidators seek directions confirming that those provisions are operative.

11.3 **NZDT**. The NZD held in the NBS account is held on trust for NZDT account holders. Cryptopia's withdrawals from that account for its own purposes constituted a breach of trust. The liquidators seek directions that:

(a) Cryptopia's own beneficial entitlement in the NZDT trust be made available to account holders to make good the shortfall, and once eligible account holders have received a distribution of their entitlement, Cryptopia is entitled to receive a distribution if funds remain.

(b) *Re Benjamin* orders are made for the NZDT trust permitting the liquidators to proceed on the basis that account holders who have not completed the claims process by the NZDT Cut-Off Date (being a date not earlier than six weeks after the date of the Court's order, provided that notice of that date is given to NZDT account holders) are not in existence.

(c) Orders 6.1 and 6.2 in the Distribution Application apply to the NZDT funds, except that only 50% of trust administration costs be allocated to the NZDT trust.

11.4 **Assignment**. The liquidators submit that the prohibition on assignment in cl 18.2 of the Terms and Conditions is effective to prohibit account holders from assigning their beneficial interests in the cryptocurrency trusts. The liquidators seek a direction confirming that position. In the alternative, if the Court is minded to permit assignments, the liquidators seek a direction that any costs associated with processing an assignment are to be charged to the account holder seeking to assign, and that the liquidators are not obliged to take any steps to process an assignment request until those costs are paid.

11.5 **Hack Top-Up**. Account holders' beneficial interests are fixed and definable interests corresponding with the amount of cryptocurrency brought onto Cryptopia's platform (accounting for withdrawals and transactions). The cryptocurrency stolen in the Hack forms part of those beneficial interests. The liquidators accordingly seek directions permitting them to distribute a top-up to eligible account holders in Hacked Trusts, up to a maximum of 100% of their account balance as at 14 January 2019 (prior to the Hack), taking into account later transactions. If there are insufficient unclaimed

holdings to make good all losses within a Hacked Trust, the liquidators propose distributing the remaining cryptocurrency on a *pari passu* basis.

11.6 **Cryptopia's beneficial entitlements**. The liquidators seek the Court's direction as to whether Cryptopia's beneficial entitlement in the BTC trust should be made available to account holders in that trust (on the same basis as the NZDT trust), given that Cryptopia management used 256 BTC prior to the liquidators' appointment in circumstances that may amount to an unauthorised use of trust assets.

11.7 **Trusts with more than 100%**. The liquidators submit that account holders have no entitlement to receive a distribution of cryptocurrency that exceeds their account balance as determined by the claims portal. The liquidators seek a direction that in the absence of evidence that the surplus is intended to be held for the benefit of an identifiable account holder (i.e., unless an account holder proves beneficial ownership), it be treated as Company property available to unsecured creditors.

11.8 **Low and no value trusts**. The liquidators seek directions that where a trust has insufficient realisable value to contribute to trust administration costs, they are permitted to remove those cryptocurrencies from circulation permanently by keeping them in an inaccessible wallet and taking no further steps in relation to them.

11.9 **GNY's unsecured creditor claim**. The liquidators do not formally take a position on GNY's claim but have set out in these submissions the arguments available to Cryptopia. The liquidators seek the Court's direction as to whether GNY's claim should be admitted or rejected:

(a) GNY is not an account holder — the Accounts belong to Mr [redacted] and Mr [redacted] personally.

(b) If GNY is an account holder, the limitation and exclusion of liability in cl 12.1 of the Terms and Conditions precludes GNY's claims (other than statutory claims under the FTA, FMCA and CGA and for breach of fiduciary duty), and for statutory claims under the FTA, FMCA and CGA, limits Cryptopia's aggregate liability to $5,000.

(c) GNY has not established Cryptopia's liability under the FTA or FMCA because the Representations relied upon by GNY are vague promotional statements that do not convey any actionable meaning as

to the standard or quality of Cryptopia's cybersecurity measures; it is not clear that Cryptopia failed to have reasonable security measures; there is insufficient evidence that GNY relied on the Representations; and even if reliance were established, the Hack was likely perpetrated by a state-sponsored actor and there is insufficient evidence to conclude that improved cybersecurity measures would have prevented it.

(d) GNY has not established liability under the CGA because it is not a consumer and, even if it was, it is not clear that Cryptopia failed to have reasonable security measures.

(e) GNY has not established liability for breach of fiduciary duty because it is not a beneficiary of the cryptocurrency trusts and accordingly no fiduciary duties are owed to it; even if GNY were a beneficiary, the duties alleged to maintain appropriate safeguards and security arrangements and to act proactively to protect its interests are equitable duties of skill, care and diligence rather than fiduciary duties, and a breach of those duties does not constitute a breach of the duty of loyalty. Cryptopia's approach to security (including engaging external security providers and attempting to improve its security profile) and conduct in responding to the Hack (including shutting down the exchange, notifying the Police, securing wallets, and assisting with the Police investigation) does not reflect a trustee that failed to act honestly, in good faith, or in the interests of beneficiaries as a whole.

11.10 Quantum of GNY's claim. If GNY's claim is to be admitted, the liquidators seek the Court's direction under s 307 of the Companies Act 1993 as to the quantum. The liquidators say that even if liability were established, GNY's claimed loss is not recoverable, or is substantially less than claimed because:

(a) Any claim in the liquidation must be denominated in NZD as at the date of the Hack (14 January 2019), not in BTC, and there is no principled basis for pegging the value of LML to BTC and taking advantage of the fortune of an unrelated cryptocurrency.

(b) The "market price" of LML at the date of the Hack does not accurately reflect its realisable value, because GNY held approximately 99% of the circulating supply and was the counterparty to the majority of trades on Cryptopia's exchange, many of which bear the hallmarks of wash

trading and circular trading, such that the apparent market price was artificially inflated.

(c) Importantly, there was no active market for LML within the meaning of IFRS 13, and accordingly a more appropriate valuation methodology would be to assess what the stolen tokens could realistically have been sold for, which on the evidence of the hacker's actual sales amounts to a small fraction of GNY's claimed figure.

(d) GNY failed to mitigate its loss by undertaking a token swap promptly after the Hack, which could have invalidated the stolen tokens and preserved the value of the remaining circulating supply at an estimated cost of USD 5,000–30,000.

(e) GNY has no standing to claim loss of market capitalisation, as it did not own all LML tokens and does not represent the entire LML market, and in any event the decline in LML's price was not wholly caused by the Hack, as the price had already fallen 30% before the hacker sold any stolen tokens and continued to decline long after the hacker's sales ceased. Bitbay's decision to unfreeze the stolen LML tokens and permit their sale constitutes a *novus actus interveniens* breaking the chain of causation between any breach by Cryptopia and the loss arising from those sales. GNY's failure to implement blacklisting functionality in the LML token contract, and its failure to take legal action against Bitbay further limit any recoverable loss.

11.11 **Other account holders' unsecured creditor claims**. If Cryptopia is liable to GNY, then other account holders who suffered losses in the Hack will likely have unsecured creditor claims against the Company on the same basis. The liquidators seek the Court's direction on whether account holders are likely to have claims in negligence or breach of the terms of the trust, or whether (as submitted by the liquidators) those are precluded by cl 12.1 of the Terms and Conditions. The liquidators also seek directions:

(a) That completion of the claims portal process by an account holder be treated as the submission of a creditor claim form for the purposes of s 304(1) of the Companies Act 1993; and

(b) Permitting the liquidators to distribute Company assets to account holders in satisfaction of their unsecured creditor claims in stablecoin.

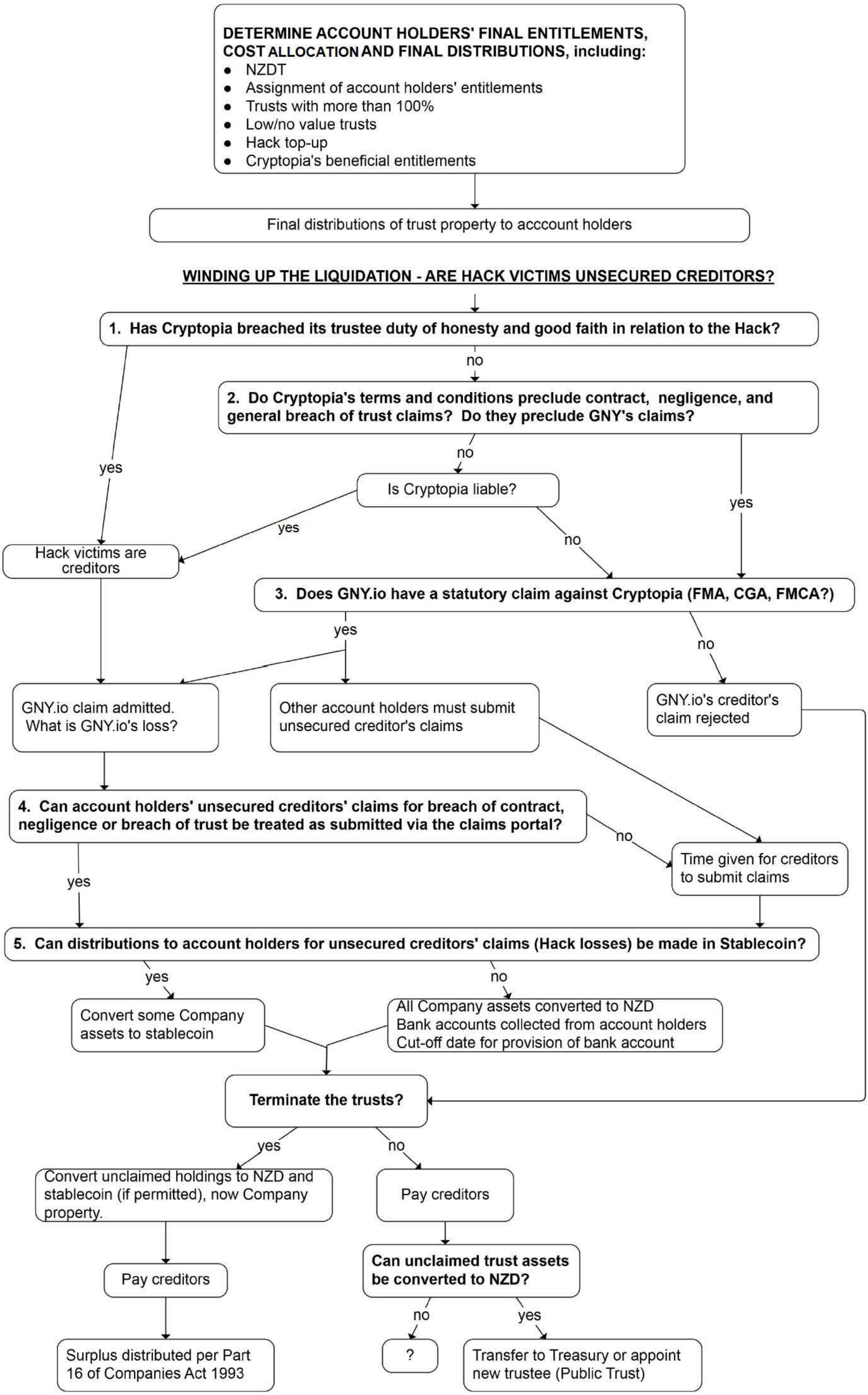
11.12 **Winding up the trusts**. After all eligible account holders have received a distribution of their beneficial entitlements and all trust administration costs have been reimbursed, the liquidators anticipate that a significant amount of cryptocurrency will remain unclaimed. The liquidators submit that there is no method permissible by legal principle whereby the unclaimed trust property can be made available to Company creditors (whether by using the unclaimed trust property to pay creditors, by extinguishing the trusts, or by permitting creditors recourse to the assets by way of Cryptopia's trustee indemnity). The appropriate course is for the unclaimed holdings to be converted to fiat currency and transferred to the Crown pursuant to s 149 of the Trusts Act 2019. The liquidators accordingly seek directions: (i) confirming Cryptopia has a power of sale in relation to unclaimed trust property, or varying Cryptopia's powers to confer such a power; and (ii) permitting the liquidators to sell the unclaimed holdings and transfer the proceeds to the Crown.

11.13 The liquidators respectfully submit that the directions sought are necessary and appropriate to bring the liquidation of Cryptopia to a conclusion in a manner that is fair to account holders and unsecured creditors.

Dated: 23 April 2026

S A Barker / J McGrath /
B Marriner
Counsel for the applicants

SCHEDULE 1 - FLOWCHART OF ISSUES



SCHEDULE 2 – ORDERS SOUGHT AND JURISDICTION

1. ISSUES ON WHICH THE LIQUIDATORS SEEK ORDERS:

Orders sought	Jurisdiction
Account holders' unsecured creditor claims (Section 1 of the originating application) 1.1 Cryptopia is not liable to account holders for any claims in breach of contract, breach of warranty, tort, negligent breach of trust, or breach of the terms of the trust per cl 12.1(a) of Cryptopia's terms and conditions. 1.2 For the avoidance of doubt, the exclusion of liability at 1.1 (if applicable) does not extend to: (a) statutory claims under s 13 of the Fair Trading Act 1986, s 22 of the Financial Markets Conduct Act 2013, or s 28 of the Consumer Guarantees Act 1993; or (b) breach of trust that amounts to or results from dishonesty or bad faith. 1.3 The value of any account holder's unsecured creditor claim is limited to $5,000 per cl 12.1(d) of Cryptopia's terms and conditions, unless the claim relates to breach of trust that amounts to or results from dishonesty or bad faith or is a statutory claim in relation to which Cryptopia is prohibited from contracting out.	Court's inherent jurisdiction to make declarations regarding terms of trust Companies Act 1993, s 284
CRYPTOPIA'S LIABILITY FOR HACK LOSSES **Submission of unsecured creditor's claims (directions 2.1 – 2.2 and 2.9)** 1.4 Any account holder wishing to make a claim in the liquidation of Cryptopia Ltd in respect of the coins and / or tokens owned by the account holder that were stolen from the exchange in January 2019 following the hack (**Hack Losses**) must submit an unsecured creditor claim form in respect of those Hack Losses, pursuant to reg 6 of the Companies Act 1993 Liquidation Regulations 1994 (**reg 6**), unless that account holder has already submitted and agreed its claim with the Liquidators via the Liquidators' claims portal, in which case: (a) The Liquidators shall be entitled to treat the information provided by the account holder for any agreed claim as complying with the requirements of reg 6; and	Companies Act 1993, s 284

Orders sought	Jurisdiction
(b) The account holder shall be required to provide bank account details or a cryptocurrency (**Cryptocurrency**) wallet address to the Liquidators if that account holder wishes to receive payment of any dividend to which the account holder is entitled based on the agreed claim. (c) The liquidators are permitted to make distributions of Company property to account holders in stablecoin. 1.5 To the extent that there is any unsecured creditor's claim against Cryptopia for Hack Losses, the quantum of hack losses is to be assessed in NZD, per s 306 of the Companies Act 1993, by reference to: (a) The amount of any Cryptocurrency lost in the hack; and (b) The NZD value of that Cryptocurrency as at the date of liquidation. 1.6 Hack victims who want to raise a claim that Cryptopia's statements about the security of its exchange were misleading, or in breach of one or more of s 13 of the Fair Trading Act 1986, s 22 of the Financial Markets Conduct Act 2013, or s 28 of the Consumer Guarantees Act 1993, must first prove to the liquidators' satisfaction that they suffered loss by reason of the misleading statements.	
Assignment of account holders' claims (direction 4.1) 1.7 The Liquidators must refuse to accept any purported assignment of an account holder's beneficial entitlement to Cryptocurrency, in accordance with the prohibition on assignment, transfer and / or subcontracting of any of an account holder's rights or obligations under Cryptopia's terms and conditions as stated in clause 18.2(b) thereof.	Court's inherent jurisdiction to make declarations regarding terms of trust Trusts Act 2019, s 133 (first category)
Top-up for Hack Losses (directions 5.1 to 5.3) 1.8 Following the Final Cut-off Date the Liquidators shall calculate the: (a) Quantum of unclaimed or abandoned cryptocurrencies in each trust (**Unclaimed Holdings**); (b) Actual trust administration costs to the Final Cut-off Date borne by each account holder in each trust; and	Trusts Act 2019, s 133 (first category, second category) Inherent jurisdiction

Orders sought	Jurisdiction
(c) Quantum, if any, of any shortfall in distribution(s) to each account holder in any trust for which there is an Unclaimed Holding. 1.9 In relation to any trust for which there is an Unclaimed Holding, and to the extent available from any such Unclaimed Holding, the Liquidators are permitted, and shall procure Cryptopia, to distribute to all eligible account holders (only after any reimbursement of trust administration costs has been paid) a top-up distribution to satisfy the account holders' accepted claims to a maximum of 100% of their holdings pre-hack, but taking into account any post-hack transactions. 1.10 If there is insufficient Unclaimed Holding to satisfy account holders' claims to a maximum of 100% of their holdings pre-hack, then the Liquidators are permitted to make a distribution of the remaining assets on a *pari passu* basis.	
NZDT (distribution) – directions 6.2 – 6.7 1.11 The Liquidators are permitted, and shall procure Cryptopia, to make a distribution of the funds held by Cryptopia for the benefit of account holders in the NZDT trust (**NZDT Funds**) to any eligible account holder with an entitlement to NZDT Funds on the basis that account holders who have not completed the claims process by the NZDT Cut-Off Date (being a date not earlier than six weeks after the date of this order) are not in existence, even when that account holder is shown in Cryptopia's records as having a beneficial entitlement, provided that no fewer than six weeks before the NZDT Cut-Off Date the Liquidators give notice by email to all account holders in the NZDT trust who have not completed the claims process of the consequences of failing to do so before the NZDT Cut-Off Date. 1.12 Orders 6.1 and 6.2 of the High Court's orders dated 8 May 2025 in CIV-2024-485-411 apply to the NZDT Trust as if references to Cryptocurrency were references to the NZDT Funds, except that the allocation of trust administration costs to the NZDT trust is to be reduced by 50%. <u>If Cryptopia's use of funds held by Cryptopia for the benefit of account holders in the NZDT Trust was a breach of its fiduciary duty of honesty and good faith to account holders then:</u>	Trusts Act 2019, s 133 (first category, second category and third category) Inherent jurisdiction Companies Act 1993, s 284

Orders sought	Jurisdiction
1.13 Cryptopia is permitted to return NZDT Funds to eligible account holders on a *pari passu* basis. 1.14 Cryptopia is not entitled to a distribution of its beneficial interest in the NZDT Funds to the extent that there is any shortfall in the funds available for distribution to eligible account holders. 1.15 Cryptopia is nevertheless permitted to receive a distribution of its beneficial interest in the NZDT Funds if there remain unclaimed holdings of NZDT after the NZDT Cut-Off Date. 1.16 Any claim from an account holder in the NZDT trust in relation to the NZDT Funds spent by Cryptopia prior to liquidation is an unsecured creditor's claim to which the exclusions and limitations of liability in the Terms and Conditions do not apply.	
Winding up the trusts (directions 8.1 and 8.5 – 8.6) <u>If the trusts can be extinguished by Court order after all account holders have received a distribution of trust property then:</u> 1.17 The Liquidators are permitted to sell the remaining Cryptocurrencies into NZD and / or convert such to a stablecoin for the purposes of payment of unsecured creditor claims. 1.18 The Liquidators are permitted to incur costs in connection with the conversion of Cryptocurrencies to stablecoin, such costs to be deducted from the assets. 1.19 The Liquidators are directed to apply the funds in accordance with the priorities set out in Part 16 of the Companies Act 1993. <u>If the liquidators are permitted to sell the Unclaimed Holdings into fiat currency for the purposes of transfer to the Treasury (or otherwise), then:</u> 1.20 After all eligible account holders have received a full distribution, the Liquidators are permitted to apply all incurred and future costs and expenses of and incidental to the winding up the trusts (including the conversion of Cryptocurrency to fiat, transfer under s 149 of the Trusts Act 2019 or otherwise, and accounting costs) by trust and, within each trust, by each non-eligible account holder contributing the same value towards such costs. [*illustrative example*: Costs are allocated to each trust in proportion to the number of users in that trust. For example, if Trust A has two account holders, Trust B has eight account holders, and Costs relating to both trusts totalled	Companies Act 1993, s 284 Trusts Act 2019, s 133 (second category)

Orders sought	Jurisdiction
$10, then Trust A would be allocated $2 of trust administration costs, and Trust B would be allocated $8. This cost allocation is to be applied regardless of the value of each account holder's holding in each trust.] 1.21 If, after the Liquidators have converted any Cryptocurrencies into NZD a non-eligible account holder of Cryptopia requests a distribution of trust property the Liquidators are permitted to complete the distribution in fiat currency, subject to completion of the Liquidators' eligibility requirements.	Trusts Act 2019, ss 130 and 133 (first and second category)
Low and no value trusts 1.22 The Liquidators are permitted permanently to place into a wallet that is inaccessible any Cryptocurrencies that have no or low realisable value, and thus no basis for contribution to the costs of trust administration; distribution; and / or conversion to fiat.	Trusts Act 2019, s 133 (second category)

2. ISSUES ON WHICH THE LIQUIDATORS SEEK THE COURT'S DIRECTION:

Orders sought	Jurisdiction
Breach of fiduciary duty and good faith (directions 2.3 to 2.6) 2.1 Did Cryptopia breach its fiduciary duty of honesty and good faith to account holders in relation to any of the Hack Losses? 2.2 If the answer is yes, then: (a) Is it correct that Cryptopia is not entitled to receive a distribution of its Cryptocurrency entitlement in any trust that has suffered Hack Losses unless all eligible account holders in that trust have received a distribution of 100% of their entitlement from that trust; and (b) Do account holders who have suffered Hack Losses have an unsecured creditor's claim against Cryptopia for the full amount of their losses in the Hack? 2.3 If Cryptopia did breach its fiduciary duty of honesty and good faith, is Cryptopia obligated to replace stolen Cryptocurrency for hack	Inherent jurisdiction Companies Act 1993, s 284 Trusts Act 2019, s 133 (first or third category)

	Orders sought	Jurisdiction
	victims from its own assets (other than its Cryptocurrency holdings within the deficient hacked trust)?	
2.4	If the answer is yes, does the obligation to replace the stolen property apply only to Cryptopia's holdings within a deficient trust, or does the obligation to replace property apply to all property held by Cryptopia?	
	Non-hack related losses (direction 2.7)	
2.5	If there is a shortfall in trust assets that is not hack related (arising, for example, from Cryptopia's negligence or breach of contract), then should Cryptopia be required to subordinate its claim to trust assets until eligible account holders of the trust(s) that have suffered the shortfall have been reimbursed in full?	Inherent jurisdiction Companies Act 1993, s 284 Trusts Act 2019 s 133, first category
	GNY's unsecured creditor claim (directions 2.8 and 2.10)	
2.6	Were any of Cryptopia's statements about the security of its exchange misleading, in breach of one or more of: (a) Section 13 of the Fair Trading Act 1986; (b) Section 22 of the Financial Markets Conduct Act 2013; or (c) Section 28 of the Consumer Guarantees Act 1993?	Companies Act 1993, ss 284, 306-307
2.7	Are the Liquidators bound to admit the claim submitted in the name of Gny.io for Hack Losses if it was not an account holder, but provides evidence that one or more accounts were held on Gny.io's behalf, albeit not in its name?	
2.8	Did Cryptopia breach its contractual obligation in cl 8(1) of its terms and conditions to use reasonable care in operating its platform: (a) Arising from the circumstances in which the Hack Losses occurred? (b) By failing to have appropriate security safeguards to prevent a hack that resulted in the Hack Losses? (c) By failing to contact Bitbay about the hack, as requested by an account holder ([redacted] / [redacted] in March 2019?	
2.9	Did Cryptopia breach its fiduciary duty to account holders holding the LML token, including Messrs [redacted] and [redacted] to hold trust	

	Orders sought	Jurisdiction
	property in accordance with the terms of the trust and to exercise reasonable skill and care?	
2.10	If the answer to any of the above is yes, what loss, if any, was caused to account holders holding the LML token, including Messrs [redacted] and [redacted]	
2.11	If owners of the LML token, including Messrs [redacted] and [redacted] establish liability against Cryptopia arising out of or in connection with their claimed Hack Losses, then for what amount, if any, should the Liquidators admit such account holders' claims to proof in the liquidation?	
	Cryptopia's beneficial interest in Bitcoin (directions 3.1 and 3.2)	
2.12	Was Cryptopia's use of Bitcoin (**BTC**) from the Bitcoin trust to meet business expenses prior to liquidation a breach of its fiduciary duty of honesty and good faith to account holders in the Bitcoin trust?	Inherent jurisdiction Companies Act 1993, s 284 Trusts Act 2019, s 133 (first or third category)
2.13	If there is a shortfall in the amount of BTC claimed by eligible account holders in the Bitcoin trust, then is it correct that any claim from account holders in the Bitcoin trust in relation to the 256 BTC spent by Cryptopia prior to liquidation (out of the 600 BTC retained by Cryptopia post-hack and the 'haircut" applied to BTC holdings) is an unsecured creditor's claim to which the exclusions and limitations of liability in the Terms and Conditions do not apply?	
	NZDT (direction 6.1)	
2.14	Was Cryptopia's use of the NZDT Funds a breach of its fiduciary duty of honesty and good faith to account holders in the NZDT trust?	Inherent jurisdiction Companies Act 1993, s 284 Trusts Act 2019, s 133 (first or third category)
	Trusts with surpluses (directions 7.1 and 7.2)	
2.15	For trusts holding more than 100% in the aggregate of account holders' recorded entitlements to a cryptocurrency, should eligible account holders in such trusts should receive a distribution calculated based on their agreed claim or a scaled-up entitlement calculated by reference to the total holdings in that trust?	Inherent jurisdiction Companies Act 1993, s 284 Trusts Act 2019, s 133 (first or third category)

	Orders sought	Jurisdiction
2.16	If distributions should be calculated based on agreed claims, then is the remaining 'surplus' Company property?	
	Winding up the trusts (directions 8.1 – 8.4)	
2.17	After trust administration costs have been paid and all eligible account holders have received a distribution of the trust property, can the trusts be extinguished by Court order?	Inherent jurisdiction; Trusts Act 2019, s 133
2.18	If the answer to that is no, then are the Liquidators permitted to sell the remaining cryptocurrencies into NZD for the purposes of a transfer of trust property to a new trustee, whether pursuant to s 149 of the Trusts Act 2019, or otherwise, on the basis that the Liquidators are permitted to combine the holding of NZD in one account, but must maintain ledgers for each individual Cryptocurrency, maintaining a record of the individual trusts' relative asset position?	Trusts Act 2019, s 130
2.19	If the Liquidators are permitted to sell the Cryptocurrencies, then is the value of an account holder's entitlement in NZD to be assessed by reference to the quantity of the account holder's Cryptocurrency entitlement and the NZD value of that Cryptocurrency as at the date of liquidation (14 May 2019) or some other date, such as the date of conversion of the Cryptocurrency to fiat?	Trusts Act 2019, s 133 (category 1 or 2)