

**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**, insolvency practitioners of Wellington and Auckland respectively, Liquidators of **CRYPTOPIA LIMITED (IN LIQUIDATION)** and **CRYPTOPIA NZDT LIMITED (IN LIQUIDATION)**

Applicants

**SUPPLEMENTARY SUBMISSIONS
OF COUNSEL ASSISTING THE COURT ON
LIQUIDATORS' APPLICATION FOR DIRECTIONS**

20 May 2026

Judicial officer assigned: Isac J
Next event date: Substantive Hearing 25 May-2 June 2026

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MAY IT PLEASE THE COURT:

1. RESPONSES TO GNY’S SUBMISSIONS ON THE WINDING UP OF THE TRUSTS¹

A General response to GNY’s submissions

1.1 One underlying theme of GNY’s submissions is that there is no merit in the surplus assets going to the Crown bona vacantia. But what is not clear from GNY’s submissions is what is to happen to surplus cryptocurrency if a surplus would remain were trade creditors and hack victims such as GNY to be made whole. The likelihood of such a scenario arising would increase if GNY were successful only on its claim for its hacked cryptocurrency and not on its claim for loss of value in its remaining non-hacked cryptocurrency.

1.2 It is submitted that, notwithstanding GNY’s attack on the bona vacantia solution, if such a surplus arises it is likely to go to the Crown (after the 6-year window for Non-EAHs to rescue their share of the surplus). The bona vacantia solution becomes an even more obvious solution if GNY and Counsel for the Creditors are right in their respective arguments that the Non-EAHs have abandoned their interests. The key question is not, therefore, one whether bona vacantia is a solution to be avoided at all costs, but whether the merits of the trade creditors’ and GNY’s claims are sufficient to justify some sort of intervention in their favour.

1.3 What possible alternative solutions to the bona vacantia solution might there be? One can posit three alternatives. First the Court could appoint a new trustee other than the Crown, if one who was prepared to take on the role could be found, under which solution the Cryptopia trusts would simply continue on indefinitely. Secondly, the ultimate

¹ We adopt the defined terms used in our primary submissions save as noted.

surplus could go to the shareholders in Cryptopia as surplus assets in the liquidation of Cryptopia, what we called the Companies Act solution in our main submissions. Thirdly, the EAHs could accede to the surplus even if their fixed interests had been fully paid out. Only the first of these solutions is, it is submitted, tenable. It would not in itself result in the trade creditors of GNY being paid out.

1.4 As to the Companies Act solution, Cryptopia never purported to have any ownership in these assets, but was providing a trading platform from which it derived fee income. In the vast majority of cases Cryptopia had not sold the cryptocurrency in the first place. It was brought onto the platform by accountholders. For the surplus to go to Cryptopia's shareholders at the end of the liquidation would be as much a windfall for them as the Crown, and far less meritorious given that the failure of the company would lead to the shareholders being rewarded. At [491.3] and at [611]-[616] GNY does contemplate Cryptopia acceding to the surpluses (see [491.3]), but in other places it appears that it proposes that Cryptopia accede to the surplus only to the extent that is necessary to pay out creditors: see [556].

1.5 There is no more merit in the surplus going to EAHs once their fixed interests have been fully paid out. They had no rights or expectations of getting more cryptocurrency than they had brought onto the platform. The lack of merit is even more stark if EAHs were to share in the surpluses of cryptocurrencies of a different type to that in which they had invested. As to GNY's position on this, GNY does want access to cryptocurrencies in which it never invested and had no expectations in relation to. However, it is not arguing for EAHs or creditors to accede to the surpluses beyond being made whole for their original entitlements: see [490].

1.6 We turn now to more specific topics addressed in GNY's submissions, taking them mostly in the order in which they appear in those submissions.

B Conversion of cryptocurrency to cash or financial products said to be a radical step and if it can be done, so too can steps be taken to see creditors made whole

- 1.7 GNY at [487] argues that the Liquidators' request for the Court to sanction the conversion of the cryptocurrency to cash or financial products under s 130 of the 2019 Act, so that the ss 147–152 regime can be invoked, is a departure from the fundamental terms of the trusts (as bare trusts). The implication seems to be that if the Court can permit that departure from the trusts then the Court should be able to do anything, or at least see that the trustee's creditors are paid.
- 1.8 GNY returns to this argument twice later in its submissions: see at [559]-[562] and at [640]-[645]. Hence, at [640], GNY argues: "First, the flexibility, creativity and initiative displayed by this submission would be better employed in support of distributing surplus assets to render Hack victims whole."
- 1.9 With respect, there is no comparison between what the Liquidators are asking for in the use of s 130, and the departures from principle that would be involved in rewriting the trusts to introduce as beneficiaries persons who are wholly new to the trusts, or in introducing a power in whoever is the trustee to make payments or distributions to non-beneficiaries such as the creditors/hack victims, as GNY seeks.
- 1.10 It is true that in an ideal world there would not be a conversion of the assets of a bare trust to another form. But there is a practical need to wind up these trusts, and the ss 149-152 regime is tailor-made for the present circumstances. That regime provides that the Crown can only be made to accept money or financial products, and conversion therefore becomes virtually essential.

C Bona vacantia solution argued to be remedy of last resort

- 1.11 GNY argues at [488] that the case law establishes that the bona vacantia solution is “an unsatisfactory step of last resort, to be avoided if there is any viable alternative”. This, we submit, is a significant overstatement. It is true that the law generally prefers that unallocated trust assets result to the persons who provided them, but there is no general principle that is hostile to trust assets going bona vacantia. The bona vacantia principle is there to be used where appropriate. Resulting trusts are not viable in the current situation where settlor-beneficiaries are un-co-operative, uncontactable, or cannot be identified with confidence. Again, given that it is likely that there will be surplus assets even if creditors’ claims are met, the bona vacantia solution is likely to be appropriate, if not inevitable. It is mainly a question whether it would be legally possible to meet the moral claims of creditors either before transferring the asset to the Crown or afterwards.
- 1.12 GNY expands upon its argument that bona vacantia should be avoided at all costs at [621]-[622] of its submissions. It relies on dicta of Michael Green J in *Re Instant Cash Loans* that payment into court (the England and Wales now equivalent to the ss 149-152 regime) is a process of last resort and to be discouraged. These dicta need to be read in context. *Re Instant Cash Loans* was a case where the settlor had established the trust partially to meet liabilities it had come under for widespread mis-selling of loans. It was known that the trust assets fell well short of what the beneficiaries were in the aggregate entitled to under the relevant consumer law that had been violated. In those circumstance there was an obvious use for unclaimed trust money in topping up distributions to those beneficiaries who had lodged claims. It was similar in that respect to the proposed top-ups to hack victims from unclaimed assets in the same trust that are

sought in the present proceedings. There was no question in that case of new beneficiaries being added to the trust.

- 1.13 The two recent New Zealand cases on which GNY relies where the Court made orders under s 136 of the 2019 Act (statutory *Re Benjamin* orders) that unclaimed shares in an estate should go to residuary beneficiaries, rather than to the Crown *bona vacantia*, are also distinguishable: *Re Holland* [2023] NZHC 464 and *Fowler v Hizo* [2024] NZHC 3881.
- 1.14 In *Re Holland* one of two beneficiaries under a will, X, was persistently unco-operative when the executor tried to contact him. Although the precise terms of the will at issue in *Re Holland* are not set out in the judgment, it is to be inferred that if X had died before the testator his share would have gone to the other beneficiary, Y, his brother. The Court endorsed a *Re Benjamin* order allowing X's share to go to the beneficiaries under Y's will because Y had died by the time of the proceeding. This was seen as preferable to the share going *bona vacantia* to the Crown. It is noteworthy that Jagose J recorded (at [9]) that in an earlier minute the Judge had indicated that he considered that this was a case for the use of s 149, since X was not really missing but simply unresponsive. The idea was that X could still come forward in the 6-year waiting-room to claim his share. But it was an affidavit from the trustee, as a family friend, that the testator would definitely have wanted Y and his descendants to take the share rather than it potentially going *bona vacantia* that ultimately swayed the Judge. In a family case like *Re Holland* there is an understandable motivation to keep the assets "in the family" and there was an identifiable residuary beneficiary. That is not the case with *Cryptopia*.
- 1.15 *Fowler v Hizo* was similar to *Re Holland* except that there the relevant beneficiary of the will was both unidentified and missing. The will expressly stated (see at [14]) that if one residuary beneficiary's interest "failed" that person's share should go to the remaining (6)

residuary beneficiaries. In contrast, with Cryptopia there are no suitable residuary beneficiaries, nor are there any clear trust terms dealing with failed interests.

- 1.16 The material that GNY relies upon at [626]-[631], with respect, also does not take GNY far. This material relates to s 316 of the Companies Act 1993 and the case law under it. Section 316 deals with unclaimed creditor funds in a company liquidation, and provides for a similar two-stage process to that in the ss 149-152 regime, except the second stage involves the Liquidation Surplus Account (**LSA**) rather than the Crown. Insofar as the case law under s 316 shows a reluctance for such funds to go to the LSA, this is only because the Courts would prefer that creditors who have not received a full dividend in the liquidation should accede to the unclaimed shares of the funds. In such cases the parties benefiting from the approach taken by the Court are beneficiaries of the statutory trust that is said to arise in favour of unsecured creditors in respect of a liquidated company's own assets. And they all have an undifferentiated interest in all the residual assets of the company. The analogy is with the distribution orders made in the Distribution Judgment. In contrast, GNY is not a beneficiary of the trusts which have surplus assets, and the unsecured creditors of Cryptopia are not beneficiaries of any of the Cryptopia trusts.

D Is there a basis for differentiating between trade creditors and hack victims?

- 1.17 At [489] GNY argues that in terms of the merits there is no basis for differentiating between trade creditors and hack victims. This is not obviously correct. One can assume that most trade creditors have provided services that helped the individual trusts to operate, and in many cases all trusts will have benefited from the services. It is true that the creditor with the largest claim is the Inland Revenue Department, which will not have provided services. However, a

liability to taxation was an incident of Cryptopia acting as trustee of all its trusts. That is not to say that the trade creditors' position is a strong one, since the people benefiting from their services, the accountholders, did actually pay something for those services, albeit to Cryptopia in the form of fees (as they were legally obliged to do). But hack victims, including GNY, have not provided any services or benefit to other accountholders. Moreover, accountholders in non-hacked trusts, whether EAHs or Non-EAHs, bear no moral responsibility for any deficiencies in the operations of Cryptopia that led to investors in hacked trusts suffering losses. In hacked trusts where there remains a surplus because Non-EAHs have not claimed, there is a case for saying that EAHs can be made whole because there was never any specific allocation of the cryptocurrency of the relevant type to individual accountholders. Their interest was fixed in size but not earmarked to particular parts of the relevant type of cryptocurrency.

E The Cryptopia trusts are court-created and hence can be fashioned to achieve justice?

- 1.18 At [496], relying on submissions of the Liquidators ([3.7] Liq subs), GNY submits that “the nature of the Trusts in this case is that they are post-hoc and Court-ordered in the Trust Decision with the explicit purpose of allowing for the mechanics of distribution of trust property”. Counsel for Creditors makes a similar submission at [156] (“the trusts were imposed by the Court following the liquidation”). The suggestion is that the trusts were Court-created (in the nature of a constructive trust) as opposed to Court-confirmed.
- 1.19 Such characterisation, with respect, is wrong. These are all express trusts created by the relevant parties, not the Court.
- 1.20 Why does this matter? Two things appear to be being argued for, at least by GNY. First, if the trusts are court-created, the Court can

fashion solutions that do justice to third parties. Secondly, the trusts are said to be created by the Court to meet pragmatic ends, in particular “the mechanics of distribution of trust property”. The aim here seems to be that because Gendall J had only limited ends in mind, namely distribution in the liquidation, his ruling should not be treated as decisive when it comes to considering other issues. In particular, the ruling that there was one trust for every type of cryptocurrency did not have in mind hack victims and unclaimed assets.

1.21 Taking what can be called the “constructive trust” point first, the Court in the Trust Judgment was recognising an ordinary express trust, albeit only a bare trust. A trust that arises out of words, conduct and context can be as much an express trust as a formal deed. No formalities are needed for an express trust (except where interests in land are involved).

1.22 It is clear beyond doubt that the Trust Application was argued by the accountholders and then decided by Gendall J on the basis that what was involved were express trusts for which an intention to create a trust was essential. See Trust Judgment at [138]-[139] and [151]-[157]. At [139] Gendall J quoted with approval a lengthy passage from *Jacob’s Law of Trusts in Australia*. That passage in turn relies heavily on the decision of the High Court of Australia in *Bahr v Nicolay* (1988) 164 CLR 604 at 618-619 where in a joint judgment Mason CJ and Dawson J stated:

If the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then there is no reason why in a given case an intention to create a trust should not be inferred. The present is just such a case. The trust is an express, not a constructive, trust.

1.23 The second of GNY’s arguments (the limited and pragmatic focus of the Trust Judgment), is used to undermine, or at least confine,

Gendall J's finding that there was a separate trust for each type of cryptocurrency (see GNY submissions at [496]-[497], [503], [507] and [606]). We submit that there is no basis for the argument that His Honour was concerned only with the mechanics of distribution. He was making rulings about the nature of what was intended when the exchange was set up and operated, and made findings that are prima facie of general application to any question of law or fact that might arise.

- 1.24 It was indeed crucial to His Honour's reasoning that there was a separate express trust for each cryptocurrency. Otherwise there could not be the necessary certainty of subject matter. If all accountholders could claim an interest in every type of cryptocurrency even when they had invested in only one type, how could a court know who could claim what in a competition? Just as fundamentally, for accountholders, as effective settlors of the assets of each trust, the type of cryptocurrency in which they had invested was essential to them. That there were separate trusts for each cryptocurrency is, therefore, not an accidental or a merely pragmatic finding, but the only finding consistent with both the parties' intentions and establishing certainty of subject matter.

F Alleged scope of the Court's inherent jurisdiction to achieve justice

- 1.25 GNY at [505]-[507] of its submissions emphasises the (almost limitless) width of the Court's inherent jurisdiction to achieve justice in dealing with trusts. Counsel for the Creditors makes a similar submission at [161] relying on a dictum in *Re Vandervell's Trusts (No 2)* [1974] EWCA Civ 7, [1974] Ch 269: "*Every unjust decision is a reproach to the law*".
- 1.26 We submit that the inherent jurisdiction is not anywhere near as wide as GNY and Counsel for the Creditors submit. The dictum in *Vandervell* is one of Lord Denning MR's. His colleagues delivered

separate judgments without needing to rely on such unbridled discretion.

- 1.27 In *Chapman v Chapman*, referred to in our main written submissions, Lord Simonds LC [1954] AC 429 at 443-444 expressly repudiated the very broad approach to the inherent jurisdiction that Denning LJ had taken, dissenting, in the Court of Appeal in that case. Even if there have been suggestions that Lord Simonds' approach erred too rigidly in the opposite direction, it remains the case that the inherent jurisdiction is not a licence for the courts to sanction departures from the terms of trusts.
- 1.28 The inherent jurisdiction does not permit the Court either to rewrite or generally to add to the terms of an express trust. Nor does the jurisdiction otherwise permit the Court to do whatever it might think just, including by adding beneficiaries or making financial provision for parties with arguable moral claims. As to the moral claims in the present case, it is hyperbole to say as GNY does at [507] that the Crown's receiving the surplus assets results in a "perverse outcome" if the losses of creditors and hack victims are not made up.
- 1.29 In a Privy Council case in 2014, *Crociani v Crociani* [2014] UKPC 40, the Court was prepared to allow an exclusive jurisdiction clause in a trust deed to be overridden, because doing so was plainly in the interests of the beneficiaries, but the Court was also careful to disown a general jurisdiction to change trusts to achieve justice. Lord Neuberger stated at [36]:

This is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contracts.

1.30 Again, consistently with what was submitted in our main submissions, neither the trustee nor the Court has the power to engage in largesse with trust assets in favour of third parties, including in favour of beneficiaries of a different trust to that from which it is proposed to distribute largesse.

G *Re Benjamin* orders and deemed abandonment

1.31 At [525]-[537] GNY now appears to accept (in contrast to what is said in GNY's Notice) that the *Re Benjamin* orders made in the Distribution Judgment did not as a matter of law extinguish the interests of Non-EAHs. However, Counsel for the Creditors submits that the Distribution Judgment as a matter of law extinguished the interests of Non-EAHs. Those arguments are addressed separately in the next section of these submissions.

1.32 GNY's argument is that, whatever the strict legal position, the orders were premised on a finding that there had in fact been abandonment. This is a sort of factual deeming. We submit that this was not the intention of the orders in the Distribution Judgment. It may be that as a matter of actual fact, not deeming, some accountholders have abandoned their interests, but that cannot be assumed merely from non-participation nor from the terms of the Distribution Judgment.

1.33 At [530.1] GNY states in relation to the *Re Instant Cash Loans* case that "the relevant scheme sought to pay creditors' claims after costs". This is not an inaccurate statement, but it is important to note that it was not trust creditors who were benefiting from the scheme. The creditors were themselves the express beneficiaries of the trust in question, which had been set up under a scheme of arrangement.

1.34 Continuing its argument for deemed abandonment, GNY submits at [536] that: "Continuing to hold the trust assets for the possibility of a future claim would serve little purpose". But it is not clear what the implications of that submission are. Is it being suggested that the

assets should go straight to the Crown bona vacantia? Or is it being suggested that Cryptopia gets beneficial as well as legal ownership? We assume that the former possibility is not what GNY has in mind, especially since it is not clear that the Court would have any power to impose a condition on the Crown that creditors are to be paid before bona vacantia takes effect, as opposed to leaving it to the Crown whether it makes ex gratia payments. If the latter, then it would be contrary to principle, and the merits, that Cryptopia as trustee should accede to beneficial ownership of surplus cryptocurrency.

H Application of limitation periods

- 1.35 At [537], GNY expands upon the limitation argument it raised in GNY's Notice. GNY suggests that certain clauses in the 2018 Terms resulted in termination of accountholders' interests when accounts were closed, and from that point limitation commenced to run (reference in footnote 597 to clause 4(c)(iii), should be to clause 4.4(c)(iii)).
- 1.36 We submit that: (a) it is not clear that clause 4.4(c)(iii) results in inactive accountholders losing their cryptocurrency. While the clause says that closure of an account relieves Cryptopia from liability of "any loss, cost, damage or expense" that is not the same as saying "we can keep your cryptocurrency"; (b) it is not clear that Cryptopia has ever invoked this clause; (c) distributions of cryptocurrency approved by the Distribution Judgment have occurred on the basis that accountholders have retained their beneficial interests despite the platform ceasing to operate. There has been no suggestion that Cryptopia had at any stage repudiated the beneficial interests of accountholders.
- 1.37 In footnote 597 of its submissions, GNY suggests that the orders in the Distribution Judgment may themselves have started limitation running if accountholders failed to participate in the distribution process. We submit that the orders were not intending to start a

limitation period running, but merely held that non-participation carried the risks specified in the orders. In any event, judgment was given only on 1 March 2024.

1.38 Insofar as footnote 597 relies on dicta of Associate Judge Bell in *Sain v Erceg* [2021] NZHC at [63] that there is a 3-year time limit to recover trust property under the 2010 Act once a plaintiff knows of its cause of action, it is, with respect, not clear that this dictum is correct. It is not necessary here to elaborate on this point. Save to say, the relationship between ss 31 and 49 of the 2010 Act is problematic. It is arguable that s 49(2), which refers to a 3-year time limit, is not intended to truncate the standard 6-year limitation period applied by s 31. The intention of s 49 is to provide that, where a trustee has retained or misapplied trust property, time continues to run past the 6-year cut-off so long as the claiming beneficiary was (reasonably) unaware of the trustee's conduct but once knowledge is gained that person must lodge a claim within three years.

I Basis for distinguishing between hack victims of trusts that still have unclaimed assets and hack victims whose trust have no assets

1.39 At [540]-[542] GNY argues that there is not a difference in principle between the Court in the Distribution Judgment allowing unclaimed cryptocurrency of a trust to be used to top up hack losses suffered by colleagues in the same trust, and the proposal to use unclaimed cryptocurrency to compensate non-beneficiaries, whether hack victims of a different trust or trade creditors.

1.40 These are, however, very different situations. Accountholders in the same trust have all suffered a loss from the hack, because, although the amount of the holding of each is fixed, the pool of assets has all along been co-owned by all beneficiaries of that trust. If some of these people have failed to claim, it seems appropriate to distribute the resulting surplus amongst the participating co-owners up to the

fixed quantities they had before the hack. The group as a whole beneficially owns the assets. In contrast, there is no basis for using assets from one trust to make up for losses in another trust with different beneficiaries. Trade creditors do not have any proprietary interest in any of the trusts, except by way of subrogation to any lien the trustee may have by way of indemnity.

1.41 *Re Philips New Zealand Ltd* [1997] 1 NZLR 93 relied upon by GNY at [544]-[546] is not helpful to GNY's case. The departure from the trust terms in that case had been unanimously approved by every beneficiary. It was a variant on the principle in *Saunders v Vautier*.

1.42 The cases relied upon by GNY at [547]-[549] are also not helpful. These are cases where identifying which assets were trust assets and which were not either was not possible or was uneconomic given the small values involved. That is not the position with Cryptopia. The cases relied on by GNY are what in our main submissions we call Gordian-knot cases, where things are such a mess that something has to be done to sort it out. They are not cases of unclaimed assets, so bona vacantia is not at play. They are simply cases of difficulty of classification as between competing claimants.

J Putative exceptions to the rule that creditors have no more access to trust assets than the trustee

1.43 At [556] GNY argues that the general principle that unclaimed trust assets cannot enure for the benefit of a trustee should be capable of exception, so that to the limited extent that the trustee has creditors and is insolvent, the trustee should be permitted access to unclaimed trust assets to pay those creditors even though those parties have no legal claim on the assets. This is effectively an argument for the Court being able to condone the use of trust assets for the benefit of non-beneficiaries. It is contrary to principle to do so. It may be possible to do so under s 151(2)(a) of the 2019 Act, but if that is indeed a legal possibility that is a statutory jurisdiction. It is particularly hard to

justify doing so, when the assets of one trust are used to salve losses in a different trust.

1.44 At [557] GNY argues that the principle that creditors have no access to trust assets (beyond rights of indemnity) should not apply where there are unclaimed assets. Particularly in relation to GNY's claims, it is difficult to see how merely having the same trustee could suffice for looking through separate trusts. That separation is intrinsic to the trusts and not just a mechanical convenience imposed by Gendall J in the Trust Judgment.

1.45 GNY's reliance on *Alpari* and *Re Pritchard* at [563]-[568] is again unconvincing. These were cases where the extinguishment of claims was being used to give unclaimed assets to beneficiaries of the same trust who had not received their fixed entitlements. The ruling in *Re Pritchard*, in particular, was similar to that in the Distribution Judgment.

K Court powers to vary or resettle trusts

1.46 At [569]-[610] GNY addresses the applications it made in GNY's Notice to have the Court vary or resettle the trusts. The following points in response are made.

1.47 We concede, having read [572]-[576], that the argument made in our submissions (at [3.97]) that the Cryptopia trusts are specified commercial trusts is probably unsustainable in the light of the definition of a commercial transaction in Schedule 3 of the 2019 Act. It is possible that with some of the trusts that all the accountholders made their investments in trade, but we simply do not have the necessary information.

1.48 But the other difficulties, outlined in our submissions at [3.98]-[3.110], with GNY's proposal that the Court use powers to vary or resettle the trusts remain. The moral case for varying or resettling the

trusts in order to allow assets of one trust to be used for creditors of a different trust, as GNY proposes, is particularly weak. The position for trade creditors is stronger because their services benefited all trusts. But again it would be surprising if the powers to vary and resettlement trusts extended to adding creditors as beneficiaries and it is submitted that they do not.

1.49 At [594], GNY attempts, as we understand it, to deal with the problem that under the relevant provisions of the 2019 Act, in particular s 124(5), court-ordered variation or resettlement powers cannot be used to reduce or remove any vested interest in the trust property, by arguing as follows:

Adding an additional beneficiary with no fixed interest in trust assets does not, per se, displace the interests of current beneficiaries. The beneficiaries' interest can be expressed as residual, and would not, therefore, displace any vested or unvested interest in trust property.

1.50 It is not clear here whether GNY is suggesting that the Court add creditors as residuary beneficiaries then elevate those interests by making orders of a *Re Benjamin* type against Non-EAHs, or whether it is suggesting that the Court make existing accountholders residuary beneficiaries, GNY arguing that that would still leave accountholders with vested interests. The former solution is opportunistic. Both solutions involve reductions in the vested interests of accountholders (even if only Non-EAHs). It is submitted that the concept of reduction in s 124(5) must be intended to encompass a reduction in the value of a vested interest, and not just a reduction in type of vested interest.

1.51 GNY's attempt to argue at [598]-[603] that, even without the process proposed in the foregoing paragraphs, Non-EAHs have no vested interest in the Cryptopia trusts is, we submit, not borne out by the orders in the Distribution Judgment, nor by the law on *Re Benjamin* orders, nor by the terms of the ss 149-152 regime which presupposes unclaimed interests remain extant. It is not the case that the effect of the orders in the Distribution Judgment was to turn Non-EAHs into

contingent beneficiaries. Their interests were subordinated to the interests of the EAHs but they remain vested interests. Non-claiming beneficiaries' interests simply continue on: see *Re MF Global UK Ltd (No 3)* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874 at [26].

1.52 It is also not correct, we submit, that the Non-EAHs need a further order of the Court in order for their interests to be enforceable, contrary to GNY's submission at [602]. While, owing to the existing *Re Benjamin* orders, Non-EAHs cannot force Cryptopia to make a distribution while Cryptopia remains trustee (it has a discretion), the interests of Non-EAHs remain enforceable. A new trustee could be appointed, which process would not effect a revival of an interest, but rather simply change the trustee of existing interests. In the interim, if there were an attempt by any third party to misappropriate the cryptocurrency, the Non-EAHs would have rights to sue to protect and vindicate their proprietary interests.

1.53 The factors to guide the use of s 125 of the 2019 Act discussed in [604]-[610] are only applicable where non-consenting beneficiaries do not have fixed vested interests. Non-EAHs do have vested interests.

L The argument that the Cryptopia trusts have all expired

1.54 At [611]-[616], GNY submits in the alternative that the Cryptopia trusts all expired once the exchange platform ceased to operate, or shortly thereafter, because of the 2018 Terms and events, or because of events subsequent to the end of Cryptopia's operations. The argument is that at that point Cryptopia became beneficial owner of the surplus assets. At [625] GNY reiterates the argument in the following way:

[I]f anything, the fact that Cryptopia's Terms and Conditions clearly provided for account holders to lose access to their coins and the

platform if they did not retrieve those coins when the platform ceased to operate suggests that transfer to the Crown was not contemplated.

1.55 In our submission, the 2018 Terms do not go (anywhere near) as far as submitted by GNY. An “inference” of forfeiture (see [615]) is certainly not enough. The terms do not provide for a forfeiture of beneficial interests. In relation to clause 4.4(c)(iii), we have already addressed this issue above at [1.35]-[1.36], in relation to the limitation argument. Clauses 4.3(a)(vii) and (viii) and 4.4(a)(viii), relied on by GNY at [625], also do not provide for a total forfeiture. In particular, closure of an account does not necessitate forfeiture.

1.56 The clearest language would be needed to enable a trustee to walk off with the trust assets merely because the business purpose of the trust had ceased to be operative. All of Equity’s alarm bells would be ringing. How do we know that the collapse of the platform was not engineered? Furthermore, such an outcome would result in Cryptopia’s own failure enriching it. That unjustified enrichment would be even more acute if the surplus ended up going to Cryptopia’s shareholders. The mere fact in that event that Cryptopia’s unsecured creditors would get paid out would not change the principle of the matter. It is a fundamental principle of both trust law and company law that unsecured creditors cannot be in any better position than the company/trustee.

M Argument that ss 149-152 regime involves termination of the trusts

1.57 At [651] GNY submits that the transfer to the Crown that takes place under the ss 149-152 regime involves termination of any trust. The argument seems to be that in that event the substratum of the trusts has gone and with it any rights of the Non-EAHs to stand in the way of the Court doing justice to all parties with any connection to the trust.

1.58 As we submitted in our main submissions (at [3.19]), the Crown does become the trustee of assets transferred under the ss 149-152 regime

while they remain in the waiting room. That was also the position under the 1862 Act and its successors. The mere fact that s 151(6) states that the Crown is not subject to the duties or liabilities of a trustee has to be read in the light of the clear indicators elsewhere in the regime that the Crown is indeed a trustee. So, the Crown cannot deny the claim of a beneficiary who comes forward to claim their beneficial interest in the separate trust account that the Crown is required to establish while the assets are in the waiting-room. Insofar as s 151(6) provides that no claim shall be made against the Crown for a distribution it makes in good faith under s 151(2), it is implicit that a claim would be available if the Crown simply pocketed or spent assets from the fund.

1.59 Even if there were no trust, which there clearly is, the Crown comes under a statutory duty under the ss 149-152 regime to distribute assets received to beneficiaries who come forward. Non-EAHs would remain beneficiaries for that purpose. Even GNY accepts that the Crown is “in loco trustee” (at [656]). The regime effects so little change to the status quo that it is most unconvincing to argue that the regime transforms the legal position or wrecks the substratum of the trusts. And it is beside the point that Cryptopia ceases to be a trustee as a result of the regime (as remarked by GNY at [651]). A change of trustee is routine, especially once a corporate trustee has gone into liquidation.

1.60 As a fallback, at [656]-[659] GNY makes the case for the Court to make orders for distribution from funds transferred under the ss 149-152 regime in favour of creditors and hack victims. More particularly, at [659] GNY submits that it would be appropriate for such an order to be made in favour of Cryptopia (implicitly before it is dissolved) in a sum sufficient to enable Cryptopia to pay out its creditors, including hack victims.

1.61 Our main submissions suggest that the questions as to the Court’s power to make orders in favour of non-beneficiaries using s 151(2)(a), and the suitability of doing so if it does have the power, are not as straightforward as GNY submits. Hence: (a) It is not the case, we submit, that many, or indeed any, of the Non-EAHs have abandoned their interests; (b) It is not clear whether the ss 149-152 regime envisages that the Court might make orders in favour of non-beneficiaries; (c) It is even less clear whether it would be appropriate for a Court to make an order in favour of parties who were not even creditors of the relevant trusts, as hack victims would not be in relation to claims on trusts other than their own. Merely having a trustee in common with other trusts says nothing about beneficial ownership; (d) It is also not the case that such orders would have “no impact on the Crown” (at [659.2]); (e) Nor is it clear that the Crown has been made aware that orders in favour of non-beneficiaries might be made against it in relation to the funds.

2. RESPONSES TO THE WRITTEN SUBMISSIONS OF COUNSEL FOR THE CREDITORS

2.1 It is not necessary to respond to many of the points made by Counsel for the Creditors in their written submissions. In some cases, they make the same or similar arguments to GNY and where that is the case we have already addressed what Counsel says in the foregoing section of these submissions. On some other topics we consider that our written submissions already adequately address the issues.

A Trustee’s right to indemnity

2.2 Counsel for the Creditors at [47]-[97] make extensive submissions on Cryptopia’s rights of indemnity as trustee and trade creditors’ rights to be subrogated to those rights of indemnity.

- 2.3 We do not need to engage with most of the detail of those submissions, for the reason that we submit that Cryptopia as trustee has already been indemnified for its costs and expenses by the accountholders, as beneficiaries. This has occurred through the fees that Cryptopia charged accountholders on both sides of the transactions that took place on its platform, and through the larger fees charged for hosting new cryptocurrencies. In general, a trustee's creditors can only claim access to trust assets for payment through the trustee, and their rights are no more extensive than the trustee's.
- 2.4 We submit that it would be implausible to suggest, as we infer Counsel may be doing (at [49] and [85]), that the fees that were paid were intended only to cover the time and effort of Cryptopia (through its employees), and not also the "costs and expenses" that Cryptopia had incurred with third parties. There is no evidence, so far as we are aware, of Cryptopia having ever rendered invoices to accountholders for disbursements or expenses additional to the fees it charged. It is fairly obvious that that would not have been a practicable way of operating. Apart from the difficult mechanics that would have been involved in trying to allocate expenses separately from fees, adding charges on top of fees would have been calculated to induce accountholders to exercise a beneficiary's right to require the trustee to justify any and all of its expenditure.
- 2.5 It is true that clauses 13.1 and 13.2 of the 2018 Terms refer to "fees and expenses" but that is not inconsistent with both types of charge being wrapped up in a global figure. Indeed Counsel at [83] accepts that the fees paid were used to meet company expenses and that, while solvent, that was the normal way for the company's expenses to be covered. Counsel goes on submit that "there is nothing to suggest that this was the only way that Cryptopia could pay those expenses or that it could not have recourse to trust resources if

necessary to maintain the business of the trusts, for example, in an insolvency situation.”

- 2.6 We accept that once Cryptopia ceased to trade and was wound up it had an implied right to be indemnified against essential expenditure incurred in preserving the assets and in winding up the trusts. This was accepted by Mr Watts in his submissions as amicus in proceeding CIV-2023-485-411 [201.0425], although it is not clear whether the right in such circumstances turns on a right to indemnity or on the law of restitution for services performed out of necessity. See too the discussion by Palmer J in the Distribution Judgment at [33]-[35]. Once Cryptopia failed there was bound to be much time spent and many costs incurred by the Liquidators in sorting out the affairs of the trusts and in making distributions. The fees paid by accountholders were not intended to cover such a situation, and plainly the winding up was not going to be undertaken for nothing. We understand, however, that all debts owed to the trade creditors pre-date the liquidation.
- 2.7 Counsel for the Creditors at [90]-[95] points out that the general principle that creditors’ rights of access to trust assets for payment are no greater than the trustee’s is not absolute. What can be called “a benefit exception” has been provided for in s 86(1) of the 2019 Act. This section gives access to an indemnity even where the trustee would not be entitled to one (for instance because of breach of trust). However, the indemnity can operate only to the extent that the beneficiaries of the trust have benefited from the transaction between the trustee and creditor that led to the relevant debt. Counsel for the Creditors accepts that s 86 is not retrospective in operation so would not apply in relation to debts incurred before 30

January 2020, the commencement date of the 2019 Act, a date after the liquidation of Cryptopia.² We agree.

- 2.8 However, Counsel for the Creditors submits that a similar exception existed at common law and in s 38(2) of the 1956 Act. It is not clear, nonetheless, that s 86(1) did not create a new exception to the general principle that creditors can stand in no better position than the trustee. Professor Peart in her book, *Trusts Act 2019: Act and Analysis* (Thomson Reuters, Wellington, 2024) at [TU86.01] states that this exception is new, and at [TU86.02] references the Law Commission's Report that led to the 2019 Act: *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013) at [16.47] (see also [16.49]). A Butler (Gen Ed), *Equity and Trusts in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2026) at 1112-1113 also sees s 86 as expanding upon the pre-2019 Act position.
- 2.9 We submit that any exception that existed before s 86 of the 2019 Act came into force would not permit a Court to look behind the contractual arrangements between beneficiaries and trustees. On this basis we submit that the Court should accept that the fees paid for transactions on Cryptopia's trading platform were intended to be fully comprehensive of any liability accountholders had to Cryptopia for using the platform.
- 2.10 Section 86, even if it were applicable, limits any recourse to trust assets to such benefit as beneficiaries have received from the creditors' goods or services. This may permit a right of indemnity if the benefit of the goods or services provided was greater than the fees charged beneficiaries by the trustee, but no award could be greater than the difference between the benefit and those fees. It is further submitted that in deploying s 86 the Courts should be very reluctant

² We concede that the argument made in our submissions at [4.5] that the indemnity provisions of the 2019 Act would not apply to the present trusts because the Cryptopia Trusts are specified commercial trusts is unlikely to be correct in relation to any of the trusts.

to look behind the price the parties have set for meeting the costs of running the trust.

- 2.11 In respect of trusts that suffered a hack, Cryptopia (and through it, the trade creditors) may have legal difficulty in pursuing rights of indemnity if it is shown that Cryptopia was in breach of duty in some way in relation to the hacks. In respect of those trusts, the rule in *Cherry v Boulton* may preclude the exercise of any indemnity rights, should they exist. More is said about the rule in *Cherry v Boulton*, below in Part 3.
- 2.12 Finally, Counsel for the Creditors submits (at [96]) that giving effect to a right of indemnity will not be prejudicial to accountholders because there are bound to be surplus assets. This argument cannot, however, expand the right of indemnity. If accountholders have effectively already paid the trustee for the creditors' goods and services, there is no indemnity to be had. For the same reason, if benefit cannot be established there can be no recourse to s 86 of the 2019 Act. The presence of a surplus does not alter the analysis.

B Deemed abandonment

- 2.13 While we understand, as noted above, that GNY no longer argues that in law all claims of Non-EAHs have been abandoned, Counsel for the Creditors appears to be adhering to an analysis that the orders made in the Distribution Judgment resulted in those claims being treated as abandoned for all purposes (see at [102]-[109]).
- 2.14 Counsel argues (at [105]) that, while the Liquidators may have intended that the *Re Benjamin* orders being sought in the Distribution proceeding would not result in the interests of Non-EAHs being treated as abandoned for all purposes, the actual terms of Palmer J's orders in the Distribution Judgment had that effect.

- 2.15 We adhere to our main submissions on this point. While it is true that at [30g] of His Honour’s judgment Palmer J was setting out the gist of the Liquidators’ submissions, it is to be strongly inferred that Palmer J agreed with those submissions. In adopting the terms of the orders sought by the Liquidators it is submitted that His Honour was also following the reasoning. It is relevant to note too that it is not the normal effect of a *Re Benjamin* order to deem beneficial interests to be abandoned for all purposes.
- 2.16 Counsel for the Creditors also refers to the Distribution Judgment at [49]-[50], but these paragraphs simply set out Ms Cooper KC’s argument that the claims of Non-EAHs should be deemed to be abandoned and extinguished, as she submitted had happened in *Re Instant Cash Loans* and *Re Pritchard*. Palmer J gave no indication that he preferred Ms Cooper’s argument over the Liquidators. If he preferred it, His Honour would have said so, we submit. Nor, with respect, is there anything in the other paragraphs of the Distribution Judgment that Counsel refers to, namely [54]-[57], to suggest that the Judge intended that the interests of Non-EAHs were to be destroyed by the *Re Benjamin* process.
- 2.17 At [107] Counsel states: “The issue which Palmer J intended to leave open to be determined by this application was not whether the non-eligible account holders’ interests are extinguished, but what should occur with any surplus assets.”
- 2.18 Counsel’s submission appears to be arguing that all that Palmer J had in mind in relation to the surplus assets was whether they went to the Crown or elsewhere (perhaps Cryptopia) and the place of creditors’ claims in relation to that surplus.
- 2.19 With respect, there is no basis for concluding that Palmer J had determined that there was no role for Non-EAHs in relation to the surplus. It is implausible to suggest otherwise. At [54] Palmer J notes

the Liquidators' proposal to transfer the surplus to the Crown under s 149 of the 2019 Act. That proposal can be taken to assume that Non-EAHs still had claims. The whole ss 149-152 regime is designed to deal with beneficiaries who cannot be found or who have not claimed, and creates a 6-year window where the Crown is substituted as trustee for the former trustee. If Palmer J intended that the interests of Non-EAHs would be terminated by the Orders he was making, the question would have been whether the surplus was to go bona vacantia to the Crown outright or to Cryptopia as trustee. That was not the Liquidators' proposal, nor, it is submitted, is there evidence that Palmer J thought differently.

2.20 Counsel for the Creditors proceeds to argue that even if the interests of Non-EAHs were not deemed abandoned by the Distribution Judgment, fresh *Re Benjamin* orders can and should now be made that override the beneficial interests of Non-EAHs in order to allow creditors of Cryptopia to be paid. We know of no case where *Re Benjamin* orders have been used for the purpose of meeting the claims of a trustee's creditors. Such orders would not be needed where creditors have access to the trustee's right of indemnity. Where they do not have such access, there is unlikely to be a good enough reason for using *Re Benjamin* orders. We put aside cases where it is not possible to differentiate trust assets from non-trust assets. We accept that we have not found a case where this issue has arisen precisely.

2.21 In the Distribution Judgment the *Re Benjamin* orders did allow for payment for the Liquidators' services and expenses in making distributions and in effecting a winding up of the trusts, but the Liquidators already had access to the trust assets for that purpose, either under a right of indemnity or in the law of restitution. The significance of the *Re Benjamin* orders was to put the costs of meeting that indemnity on the Non-EAHs not the EAHs. It was justice

as between beneficiaries that was involved, not justice as between beneficiaries and creditors. These new costs incurred by the Liquidators were unanticipated when the accountholders first invested.

2.22 Counsel for the Creditors also puts a good deal of weight in relation to orders for abandonment on the decisions in *Re Instant Cash Loans* and *Re Pritchard*. We have explained these cases in our main submissions. However, Counsel for the Creditors points out (at [125]) in relation to *Re Pritchard* that our submissions were incorrect insofar as we submitted that the Court approved an Unclaimed Dividends Account for unclaimed beneficial interests. We accept that that account does appear to have been for parties who had claimed but then for some reason failed to accept payment.

2.23 However, the basic point remains that in *Re Pritchard* there was an overall shortfall (client funds available to the trust were £23.5 million, and lodged claims alone were £25.75 million), so that there was no issue of there being surplus assets once the unclaimed assets were allocated to claiming beneficiaries. That is why the judgment in the case does not discuss what would happen with a surplus. In the result, the outcome was similar to the orders made in the Distribution Judgment. In substance, the position was the same in *Re Instant Cash Loans*.

2.24 At [131(c)] Counsel for the Creditors suggest that treating the interests of Non-EAHs as abandoned is in the interests of EAHs. But the orders in the Distribution Judgment have already provided for EAHs to prevail over Non-EAHs, trust by trust. Otherwise, there can be no basis for using unclaimed assets from one trust to supplement a shortfall of another trust.

2.25 In conclusion on this topic, most Non-EAHs at some stage will have given value for their cryptocurrency (even if at very much lower prices

than the current values in some instances) in the same way as trade creditors have given value. In addition, as noted already, they will have paid Cryptopia a fee that was meant to pay for the services they received from the company. The lack of diligence of Non-EAHs in some instances, and undue scepticism in others, might be thought not sufficiently culpable to warrant permanent loss of their property. The ss 149-152 regime is there to be used, and it does not require late claimants of beneficial interests to provide an excuse for their tardiness.

3. COMPANY’S RIGHTS TO BITCOIN, NZDT AND BENEFICIAL INTERESTS IN OTHER HACKED TRUSTS

3.1 At [8]-[23], Counsel for the Creditors submit that no provable creditor claims by hack creditors arise from the hacks either under statute or for dishonest breach of trust. Counsel for the Creditors at [24]-[46] proceed to deal with the company’s dealings with, and residual rights in, BTC and NZDT.

3.2 A material point emerges, if the Court considers that hack creditors have valid claims against the company.

A The rule in *Cherry v Boulton* – the “clear accounts rule”

3.3 The issue of Cryptopia’s potential liability to hack victims is already well addressed in the submissions for the Liquidators, GNY and Counsel for the Creditors and, therefore, is not addressed by counsel assisting the Court.

3.4 However, at paragraphs [17]-[18], Counsel for the Creditors raise an important issue which is contrary to the interests of trade creditors.³ They accept, by reference to the so-called “clear accounts rule”, also known as the rule in *Cherry v Boulton* (1839) 4 My & Cr 442, 41 ER 171, that if hack victims can prove claims against Cryptopia, then any

³ No criticism is intended by this remark. Counsel has an overriding duty to assist the court.

beneficial interest that the company may have in a hacked trust must first be applied to making such trust whole for losses caused by the company's defaults.

- 3.5 In short, Counsel for the Creditors accepts that the beneficiaries of those trusts have a priority interest in the company's trust assets, the effect of which is to subordinate trade creditors in Cryptopia's liquidation.
- 3.6 In our main submissions at Part D [5.14] we agreed with the Liquidators' submissions at [7.67] and noted that "*Claims for breaches of fiduciary or other duties do not give rise to proprietary claims against the company's assets (in the absence of tracing), only claims for equitable compensation or damages*". That statement is accurate on its own but does not address the clear accounts rule as it may apply in a trustee insolvency context. It is anticipated that Counsel for the Creditors may also wish to address the point further in oral submissions.
- 3.7 The rule is of significant antiquity, but there is no suggestion that it is no longer relevant. It was considered by the United Kingdom Supreme Court in *Re Kaupthing Singer & Freidlander Limited* [2011] UKSC 48, [2012] 1 AC 804 where application of the principle, in an insolvency context, was held to give way to the rule against double proof in a liquidation. The Supreme Court explained the rule by reference to *Re Akerman* [1891] 3 Ch 202, at [13] (page 815B-D):

A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate; nothing is in strict language set off; but the contributor is paid by holding in his own hand a part of the mass, which, if the mass were completed, he would receive back.

3.8 The Supreme Court extensively examined the history of the rule before going on to consider why it should not be applied on the facts. Application of the rule in that case would have led to the creditor (a note trustee) receiving a lower distribution in liquidations of both parent (bank) and subsidiary (corporate note issuer)⁴ unless the rule yielded to the insolvency principle against double proofs. The case did not concern an insolvent corporate trustee where there could be competing interests between general creditors and (in our case) hack creditors.

3.9 In Mr Jha's article (*A 'clearer' accounts rule: challenging the inflexible application of the clear accounts rule*) referred to at footnote 16 of Counsel for the Creditors' submissions, he advocates for a flexible and discretionary approach to the operation of the clear accounts rule when applied to the insolvency of a corporate trustee given the prejudicial effect on trade creditors (or what he called trust creditors). His articulation of the rule (page 639) is:

The clear accounts rule provides that the value of an indemnity that a trustee may recover from the trust fund is subject to *any* liability that the trustee has incurred to increase the trust fund, either by making good a loss or by disgorging an unauthorised profit or gain. In simple terms, the rule suggests that the court will subtract the value of the trustee's liability to increase the trust fund from the value of the trustee's indemnity. [emphasis in original]

3.10 It is submitted that there is no logical distinction between Mr Jha's reference to the value of the trustee's indemnity and the value of a trustee's fixed beneficial interest in a homogenous trust fund. Both are personal rights of the trustee.

3.11 Accordingly, the question arises as to whether or not, given the general applicability of the equitable rule, it should give way (as it did

⁴ The Court may be assisted by Clifford Chance's explanation of the case (see separate PDF document) found at http://www.cliffordchance.com/briefings/2011/10/the_kauthing_caseplayingbytherules.html.

in *Re Kaupthing*) to orthodox insolvency principles including the general rule requiring *pari passu* distributions to all admitted company creditors – which would include established hack creditors and trade creditors alike. A strict application of the rule would see the trade creditors of Cryptopia in effect subordinated to the interests of hack creditors (to the extent that the hacked trust still had assets) if Cryptopia is first required to account to the relevant hacked trust.

3.12 A case (and perhaps a strong case) can be made for the disapplication of the clear accounts rule in respect of the insolvency of a corporate trustee in circumstances where the breach of trust (or statute) giving rise to damages or equitable compensation has not personally benefited the trustee – which is the case at hand, there being no suggestion that Cryptopia benefited in any way from the hacks.

3.13 For example, in *Re Dacre* (discussed in our primary submissions at [5.5]) the impounding principle was applied because of the trustee’s misappropriation of trust funds for personal use, prior to his becoming a beneficiary of the trust. The Court in *Re Dacre* referred to *Cherry v Boulton* as “*not an authority to which it is necessary to refer*” (at p346) and decided the matter on what were said to be independent, well-established principles (at 347).

3.14 Similarly in *Chillingworth v Chambers* [1896] 1 Ch 685, the English Court of Appeal considered whether one trustee (plaintiff) could seek a contribution from another trustee (defendant) where the plaintiff had a beneficial interest in the trust sufficient to make up for the trustees’ breach of trust. It was determined that there was no right to contribution and the plaintiff’s entire beneficial interest was impounded to make the trust whole. A finding of fact was that the plaintiff had derived a benefit from the breach of trust, being the making of secured loans, from which the beneficiaries derived interest, but which loans were realised at a loss. However, the rule in

Cherry v Boulton was not referred to in the decision, and yet a simple application of that rule would (it seems) have led to the same result: the plaintiff could not have taken his share of the trust without first accounting to it for his breach of trust – i.e. no finding of benefit would have been required if all that was required was a simple accounting for obligations mutually owed.

3.15 Accordingly, the cases (i.e. on the clear accounts rule and the impounding principle) are difficult to reconcile when it comes to the application of a trustee's beneficial interest in a trust, and even more difficult to reconcile if the relevant trustee's insolvency is overlaid. All that Counsel assisting the Court can sensibly say at this point (in the time available) is that if the Court were to decide that claims by hack creditors are proved, the Court will then need to grapple with the application of the clear accounts rule which pits the hack creditors directly against trade creditors. The issue is moot if the Court decides that hack creditors have no claims. It is respectfully suggested that, given the potential complexity of the application of the clear accounts rule, further submissions on the point may be required to assist the Court.

B Bitcoin

3.16 Counsel for the Creditors submits that there is insufficient evidence of a dishonest breach of trust in relation to Cryptopia's use of Bitcoin (at [24]-[38]) but accept that for a non-dishonest breach of trust (whereby Bitcoin was used to discharge company expenses) its remaining Bitcoin (being 7.47) should be applied to make the Bitcoin trust whole.

3.17 Our primary submission on this point at [5.12] was premised on a finding of breach of fiduciary duty giving rise to the impounding principle. But we agree with Counsel for the Creditors that an innocent breach of trust would also require Cryptopia's remaining

beneficial interest in Bitcoin to be applied to make up the shortfall based on the principle in *Re Hallett's Estate* where the trustee is considered to have spent its own funds first, from a mixed fund.

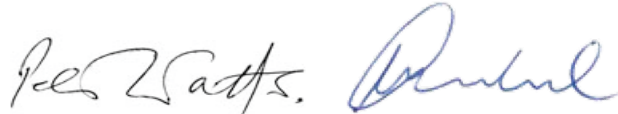
3.18 However, further and perhaps more importantly, the evidential issues raised by Counsel for the Creditors may call into question whether, on a balance of probabilities, the 600 Bitcoin that Cryptopia was in possession of after the hack in fact belonged (beneficially) to the company or to accountholders. If there is a proper evidential basis to conclude, on a balance of probabilities, that the 600 Bitcoin belonged to Cryptopia, then there would potentially be sufficient Bitcoin available (despite Cryptopia utilising 256 Bitcoin pre-liquidation) to pay all trade creditors in full, depending on: (1) whether hack creditors of that trust emerge; (2) the applicability of the clear accounts rule discussed above (where Cryptopia's beneficial interest may be required to come into account); and (3) the amount of hack losses in that trust (i.e. whether sufficient Bitcoin are left over to Cryptopia in any event).

3.19 The Liquidators at [7.64] of their submissions suggest, however, that it appears likely that the 600 unaccounted for Bitcoin was accountholder property. We submit that in ruling on this issue, it is relevant for the Court to take account of the fact that in the Trust Judgment (at [144]) Gendall J held that (prima facie) all cryptocurrency of each type was held on trust, and that if Cryptopia itself had any interest in any of it, the company held it in its capacity as a beneficiary of the trust. In these circumstances it could be argued that the onus is on Cryptopia (or the creditors) to show that the 600 Bitcoin were part of its beneficial entitlement.

C NZDT

3.20 If there is an insufficient evidential basis to conclude that Cryptopia's use of NZDT funds was a dishonest breach of trust, then we would

agree, again on the basis of *Re Hallett's Estate*, that Cryptopia is to be taken to have spent \$180,000 of its \$187,682 entitlement such that it is only entitled to the balance. If there is evidence of a dishonest breach of fiduciary duty, then the entire amount should be impounded as set out in our primary submissions.

Handwritten signature in blue ink, appearing to read "Peter Watts. Matthew Crawford".

Peter Watts KC/Matthew Crawford

Counsel assisting the Court

20 May 2026