

**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

**SUBMISSIONS OF COUNSEL ASSISTING THE COURT ON
LIQUIDATORS' APPLICATION FOR DIRECTIONS AS TO
TREATMENT OF UNCLAIMED TRUST ASSETS**

8 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 INTRODUCTION

1.1 Counsel assisting the Court provides these submissions on the issues relevant to the Court's determination of the Liquidators' Originating Application dated 31 July 2025, as amended in April 2026¹ (**OA**), for orders relating to unclaimed assets and ancillary orders intended to assist with the resolution of the liquidation of Cryptopia Limited (**Cryptopia** or **the company**).

1.2 The issues are addressed in the following order, based on counsel's assessment of the relative importance of the issues for determination.

- (a) **Part 2** – Summary of views;
- (b) **Part 3** - Winding up the trusts – OA at [8] and Liquidators' submissions, Part 10;
- (c) **Part 4** - Trustee's right of indemnity; and
- (d) **Parts 5-8** – Responses to issues dealt with in Part 7 of the Liquidators' submissions under their heading "*Determination of Account Holders' Final Entitlements to Trust Property*" – taken (largely) in the order addressed by the Liquidators.

1.3 Counsel assisting have not addressed every aspect of the OA because certain issues are anticipated to be fully elucidated between counsel for the Liquidators, GNY.io Limited (**GNY**) and counsel assisting trade creditors (e.g. hack victims' creditor claims including contractual exclusions), or they are of an administrative nature in the

¹ References in these submissions to the OA are to the amended version at [401.001] and [401.0013].

liquidation and appear orthodox and unobjectionable (e.g. treatment of low/no value trusts).

- 1.4 We note also that these submissions are being filed before those of counsel for the trade creditors and those of GNY. Given that our role is not adversarial, we may seek at the hearing to revise aspects of these submissions in response to the other submissions.
- 1.5 We adopt the definitions used in the Liquidators' submissions dated 23 April 2026 (**Liquidators' submissions**) save as set out below or otherwise subsequently defined in these submissions:
- (a) **Trust Judgment:** decision of Gendall J in *Ruscoe v Cryptopia Limited (in liquidation)* [2020] NZHC 728; [2020] 2 NZLR 809.
 - (b) **Distribution Judgment:** decision of Palmer J in *Ruscoe v Houchens (in liquidation) (Distribution)* [2024] NZHC 419.
 - (c) **EAHs:** eligible accountholders i.e. beneficiaries of a Cryptopia trust completing claims by the Final Cut-Off Date.
 - (d) **Non-EAHs:** accountholders that are not EAHs.
 - (e) **accountholders (or beneficiaries):** any beneficiary of any Cryptopia trust.
 - (f) **trade creditors:** all creditors whose claims are not derived, directly or indirectly, from beneficial interests in any Cryptopia trust.
 - (g) **unsecured creditors:** any creditor of that class whether trade creditor or derived from an admitted claim against Cryptopia (e.g. claims arising from hack losses, if any).
 - (h) **2018 Terms:** Cryptopia's Terms and Conditions dated 7 August 2018.²

² [302.0577].

- (i) **2019 Act:** the Trusts Act 2019.

2. SUMMARY OF VIEWS

2.1 Counsel assisting respectfully summarise their views as follows:

- (a) **Surplus trust assets:** We submit that the appropriate way to deal with the anticipated unclaimed beneficial interests is for the trust assets to be converted into New Zealand dollars or financial products under section 130(1)(a) of the 2019 Act and for Cryptopia to transfer the proceeds to the Crown under section 149(1) of the 2019 Act. The Court should declare, or give directions under s 133 of the 2019 Act confirming, that Non-EAHs remain beneficiaries of the Cryptopia trusts.
- (b) **Indemnity:** The trade creditors would in principle have an arguable right of recourse to the trustee's right of indemnity from the trusts administered by Cryptopia were it not for the limitation on Cryptopia's rights implied by the 2018 Terms, and by Cryptopia's receipt of the fees and charges paid by accountholders for the use of its services.
- (c) **Company's beneficial interests:** We agree with the Liquidators that Cryptopia's beneficial interests in the NZDT Funds and Bitcoin should be impounded and made available to the beneficiaries of those trusts on the assumption that Cryptopia used those trusts' assets in breach of fiduciary duty. However, Cryptopia's beneficial interests in any other trusts are not subject to the same principle, or any other proprietary claim and, therefore, should be available for distribution under Part 16 of the 1993 Act.
- (d) **Assignment of claims:** Although the case for assignability became more compelling once Cryptopia ceased to operate its exchange platform, the non-assignment clause in the 2018

Terms is probably effective. In any event, assignability would not remove the need for an assignor to establish its status as an accountholder.

- (e) **Top up for hack losses:** We consider that the application of unclaimed trust assets to top up hack losses for EAHs is unobjectionable and an appropriate use of a further *Re Benjamin* order as sought by the Liquidators and consistent with the Distribution Judgment.
- (f) **Surplus assets:** We consider that surplus assets in any trust, unless belonging to the company on a balance of probabilities, remain subject to claims by accountholders in accordance with the ss 149-152 regime of the 2019 Act. There is no obvious basis for surplus assets to revert to the company beneficially.

3. WINDING UP THE TRUSTS

A Overview

- 3.1 Cryptopia as trustee of all the separate trusts of cryptocurrency,³ holds substantial quantities of ‘surplus’ currency. These surpluses have arisen either because accountholders have not lodged claims for their currency by the cut-off dates or because they have not met the criteria for establishing a claim, in each case in the manner approved by the Court in the Distribution Judgment.⁴
- 3.2 There are in addition some five trusts where the company is holding more of the relevant cryptocurrency than its database shows as allocated to beneficiaries, whether accountholders or the company itself (see Liquidators’ submissions [7.43–7.48]). The Liquidators propose a different solution for these cases. While not convinced by

³ Recognised by Gendall J in the Trust Judgment at [155], [183], [187].

⁴ As amended by Isac J on 23 April 2025 [204.1362].

this difference in treatment, these submissions also address this category of case separately – see Part 8 below.

3.3 In the OA at [8], two main solutions for dealing with the surplus cryptocurrency are proposed:

(a) For the Court to order that the trusts be extinguished [8.1], with remaining trust assets sold into New Zealand dollars or converted to stablecoins with the proceeds used to pay the costs of any conversion, and then applied in accordance with Part 16 of the Companies Act 1993 (**1993 Act**). The Part 16 process would include meeting the (established) claims of Cryptopia’s unsecured creditors [8.2]. We refer to this for convenience as the **Companies Act solution**.⁵

(b) Alternatively, as supported by the Liquidators in their submissions, orders are sought to sell and convert the cryptocurrency into New Zealand dollars followed by the transfer of the proceeds to a new trustee, whether pursuant to s 149 of the 2019 Act or otherwise. Although the solution using s 149 is not expressly tied to the common law doctrines of bona vacantia, that tie is implicit and we refer to it as the **bona vacantia solution**.⁶

3.4 GNY’s Notice of Opposition dated 15 August 2025 (**GNY’s Notice**) proposes different solutions as follows:

(a) Resettle all the trusts so that all EAHs, or otherwise the victims of the 14 January 2019 hack, become beneficiaries of each of the trusts [2.2(b)]; or

(b) Vary the trusts to the same effect [2.2(c)];

⁵ The Companies Act solution has been abandoned by the Liquidators in their written submissions at [10.51-10.92] and [11.12].

⁶ The heading to s 149 is “*Transfer to the Crown of non-distributable trust property*”.

- (c) By way of fallback position:
 - (i) declare that the trusts have expired with the result that surplus assets vest in Cryptopia for the purpose of paying outstanding claims of EAHs or of the hack victims [2.2(d)]; or
 - (ii) if the Court approves a transfer of surplus assets to the Crown under s 149 of the 2019 Act, make consequential orders under s 151(2)(a) requiring the Crown to meet the claims of EAHs, or hack victims [2.2(e)].

3.5 The effect of the first two of GNY's solutions (as drafted) would seem to be that EAHs would accede to all the surplus cryptocurrency, even though many of those will already have received the fixed entitlements they had under their contracts with Cryptopia. Presumably, hack victims would receive their original fixed entitlements before the surplus was further divided amongst EAHs. It is not clear whether unsecured creditors would be paid out under these proposals. GNY does not account for Cryptopia's trade creditors under its fallback options, although presumably it would raise no objection to the claims of such creditors being met.

3.6 GNY's fallback option (c)(i) above, it will be observed, is a variant of the Companies Act solution. Rather than relying on the Court to terminate the trusts, it assumes that the trusts automatically became extinguished once the purpose for which the trusts had been created, namely to provide a mechanism for participation on a cryptocurrency trading platform, had ceased to be achieved. That occurred, GNY asserts, when the trading platform ceased to operate or within 90 days of that event in accordance with the contracts made by accountholders and Cryptopia ([3.19] of GNY's Notice).

- 3.7 The Liquidators' submissions [10.2. to 10.6] clarify that they do not consider that Non-EAHs have ceased to be beneficiaries.
- 3.8 On the other hand, in at least the first three, and probably all four, of GNY's alternatives, GNY's stance is that Non-EAHs' rights in relation to the trusts have ceased ([3.17] of GNY's Notice), for one or more of the following reasons:
- (a) the terms of the *Re Benjamin* orders in the Distribution Judgment permanently exclude Non-EAHs from asserting beneficial interests;
 - (b) renunciation or abandonment of interest;
 - (c) expiry of the limitation period under s 31(1)(b) of the Limitation Act 2010; and
 - (d) the objectives of the trusts intended that unclaimed assets would vest in Cryptopia.
- 3.9 It is submitted, for reasons explained below, that the most, and probably only, appropriate solution for the Court is to sanction the sale of the surplus cryptocurrency into fiat currency pursuant to s 130 of the 2019 Act and then to declare that the Liquidators on behalf of Cryptopia may transfer the proceeds to the Crown under s 149 of the 2019 Act.
- 3.10 All of the other proposed solutions are considered inappropriate, including for the following reasons:
- (a) It would be inconsistent with both principle and authority for Cryptopia, as trustee (or former trustee were it first to be removed as trustee), to accede to beneficial ownership of the surplus cryptocurrency. Its creditors, not to say its shareholders, are not in any better position than the company

in that regard. We consider this rules out the Companies Act solution and GNY's variants of it;

- (b) All of the solutions other than the bona vacantia solution are, or at least appear to be, premised on Non-EAHs ceasing to have any status as beneficiaries of the trusts and therefore any rights in the surplus cryptocurrency. It is at best doubtful that any of the four GNY bases for this premise (namely, the terms of the *Re Benjamin* orders, abandonment, limitation, implied terms of the trusts) can be made out. Even on the assumption that the concept of abandonment applies in principle, the criteria for its application may not be made out in relation to every Non-EAH;
- (c) Insofar as the Companies Act solution proposed at [8.1] of the OA rests on a Court order for extinguishment of the Cryptopia trusts, it is doubtful whether there is any jurisdiction to make the order; and
- (d) Similarly, it is doubtful whether there is any jurisdictional basis for the Court to be able to resettlement the trusts or vary them as sought by GNY and nor would it be appropriate.

3.11 The reasoning for the above is now set out.

B Unclaimed trust assets, ss 149 to 152 of the 2019 Act and bona vacantia

3.12 Although trusts with many thousands of beneficiaries each of whom holds a defined interest in trust assets are a relatively modern phenomenon (let alone the more than 960,000 accountholders in Cryptopia, beneficiaries across several 100 trusts⁷), trusts with

⁷ Trust Judgment at [8].

unidentifiable, non-contactable, or otherwise uncooperative beneficiaries have been known to the law for centuries.

3.13 In cases where: (a) the probabilities are that a trust or estate does not, or has ceased to, have beneficiaries; (b) for some reason the trust has unallocated assets that cannot result to those who settled them on the trust;⁸ or (c) beneficiaries have dis-owned or deliberately abandoned their interests in the trust, Equity has long concluded that the relevant beneficial interests enure to the benefit of the Crown, under one of the many branches of the law of bona vacantia.⁹ As will be explained below, such a solution has been held preferable to one that permits unallocated trust assets simply to fall into the beneficial ownership of the trustee.

3.14 However, the legal position of trustees who found themselves with known but unidentifiable beneficiaries or identifiable but uncooperative beneficiaries was historically more difficult. Although it never provided a foolproof guide,¹⁰ the general precept was that the law of bona vacantia applied only “*where there is no other owner, not where the owner is unknown.*”¹¹ The position, therefore, with unidentifiable or uncontactable beneficiaries was thought to be sufficiently problematic that the legislature was persuaded to intervene. This occurred in 1847 in England and Wales with the Trustee Relief Act 1847, 10 & 11 Vict ch 96, which was then amended by the Trustee Relief Act 1849, 12 & 13 Vict ch 74. New Zealand followed suit in 1862, with the Trustee Relief Act 1862 (**1862 Act**). It is

⁸ See *Colchester v Law* (1873) LR 16 Eq 253 (fixed entitlement to principal only, leaving surplus); *Cunnack v Edwards* [1896] 2 Ch 679 (CA) (surplus once fixed annuities paid out); *Rees v Dominion Insurance Co of Australia Ltd* (1981) 6 ACLR 71 (NSW SC).

⁹ See *Middleton v Spicer* (1783) 1 Bro CC 201, 28 ER 1083 (LC).

¹⁰ Waifs (property discarded in flight by a thief) and estrays (unearmarked stock found wandering off a farm) belonged to the Crown via bona vacantia notwithstanding that they may well have an owner, but one who is unknown: see the discussion in A Bell, “Bona Vacantia” in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd ed, Informa, London, 1998), Chapter 8.

¹¹ *Re Wells, Swinburne-Hanham v Howard* [1933] Ch 29 (CA) at 56 per Romer LJ.

useful to trace some of the history of the regime created by this legislation.

- 3.15 The 1862 Act permitted trustees to elect to surrender trust property to be administered by the Colonial Treasury of New Zealand (which having no legal personality separate from the Crown, is taken to be the Crown). It was a voluntary process, and no order of the Court was required.¹² The comparable process under ss 149 to 152 of the 2019 Act remains voluntary, so that, generally speaking, unless trustees elect to use the process, the trust just continues on.
- 3.16 The provisions of the 1862 Act, largely adopting the English legislation, were very broadly drafted. The Act did not specify when it would be appropriate for trustees to pass over trust assets to the Treasury, but it was widely understood that the power would be used where there were practical difficulties in executing the trust. Courts discouraged, through costs orders, trustees from using this legislation to shift their responsibilities onto the State without good reason.¹³ Equally, however, the Act did not confine the sorts of orders that the court might make in relation to assets so paid over. Otherwise, the legislation expressly indicated that the mere movement of the trust funds to the Treasury did not terminate the trusts; the Crown became the trustee to await any orders of the Court (see s 2). Claims by beneficiaries who could establish their entitlement under the original trust could still be made.
- 3.17 The provisions of the 1862 Act were carried forward into the Trustee Act 1883, then into the Trustee Act 1908. When, however, the provisions were further carried forward into the Trustee Act 1956 (**1956 Act**), a new provision was added, in the form of s 78(4). This subsection provided that at the end of 6 years, unclaimed funds held

¹² The voluntary nature of a comparable Australian process was recognised in *O'Hearn Lawyers v Barker* [2020] NSWSC 131 at [11] (declaration not direction appropriate order).

¹³ See *Re Knight's Trusts* (1859) 27 Beav 45, (1859) 54 ER 18 (Ch).

under the regime were to be transferred to the Consolidated Fund. The implication was that at that point the Crown ceased to be a trustee and the funds went to the Crown bona vacantia.

- 3.18 The 1956 Act in essence created a 6-year waiting-room after which the statutory trust came to an end. Even then, s 78(5) provided that a person who established that they had had an entitlement as a beneficiary could still make a claim for payment. But the Crown could not in the aggregate be liable for more than it had originally received under the regime (thereby protecting itself if it had paid out the wrong persons). That such belated beneficiaries remained able to claim was not inconsistent with the law of bona vacantia. The general law of bona vacantia operates where the probabilities are that there is no owner, but it provides that where someone entitled turns up against the odds (such as a long lost relative on an apparent intestacy) such party may still claim against the Crown.¹⁴
- 3.19 The regime as found in the 1956 Act has been carried through, with modernised language, into ss 149 to 152 of the 2019 Act. The heading to s 149 now spells out that it is concerned with “*non-distributable trust property*”. The 6-year waiting-room remains after which unclaimed assets go bona vacantia to the Crown, as provided for in s 151(4). While in the waiting-room, the Crown holds the assets on trust for eligible claimants, as has been the position since the 1862 Act. In relation to moneys, that is explicit in the wording of s 150(2) and of s 151(1), the latter provision requiring money to be held in a “*Trust Bank Account*” established under s 67 of the Public Finance Act 1989, which provision in turn reinforces that the Crown is a trustee of the money. The position is less explicit with financial products transferred to the Crown but there is no reason to think that the same trust obligations do not exist. A trust obligation is implicit in

¹⁴ See *Re Lowe's WT* [1973] 1 WLR 882 (CA) at 887 (undistributed rents and freehold some 120 years after the death of the testator); and *David Barry Logistics Pty Ltd v Victoria* [2021] VSC 828, (2021) 65 VR 233 at [50].

the limited things that s 151(2) permits the Secretary to the Treasury to do with property transferred under s 149. It is also implicit, including from s 151(2)(b), that the beneficiaries of the statutory trust are the outstanding beneficiaries of the trust that existed before the transfer to the Crown.

3.20 It should be noted that s 151(6) provides that: “*The Crown is not subject to the duties or liabilities of a trustee in respect of any transferred property, and no claim lies against the Crown or the Secretary to the Treasury if a payment was made under subsection (2) in good faith.*” It is submitted that this provision is not intended to deny that the Crown is a trustee of the funds, for that would be inconsistent with the provisions just discussed, but rather signals that the Crown is only a bare trustee without any active duties other than those provided for in s 151(2). What in particular is contemplated by s 151(6) is that the Crown will not be liable if it accidentally makes a distribution to a person who was not a beneficiary or makes too large a distribution to a beneficiary.

(i) The (solvable) problem that cryptocurrency is not money or a financial product

3.21 As the Liquidators identify in their submissions [10.7–10.8], the regime in ss 149 to 152 of the 2019 Act (**ss 149–152 regime**) can be invoked only where the assets to be transferred to the Crown are moneys or financial products: see s 149(1). We agree with the Liquidators that it is doubtful whether cryptocurrency is either money or a financial product. The dominant view currently is that cryptocurrency is not money.¹⁵ As for “*financial products*”, the concept is defined in s 9 of the 2019 Act by reference to s 7 of the

¹⁵ *Loh v Hodlnaut Pte Ltd* [2023] SGHC 323 at [13], discussing *Algorand Foundation Ltd v Three Arrows Capital Pte Ltd* (HC/CWU 246/2022, Sing HC) judgment not available. See too D Fox “Cryptocurrencies in the Common Law of Property” in D Fox and S Green (eds) *Cryptocurrencies in Public and Private Law* (Oxford University Press, Oxford, 2010) at paras 6.60 to 6.66. Cf S Green “It’s Virtually Money”, *ibid*, Chapter 2.

Financial Markets Conduct Act 2013 (**FMCA 2013**). Section 7 of FMCA 2013 categorises financial products into four categories: debt securities, equity securities, managed investment products and derivatives. Each of these concepts is in turn defined in s 8 of FMCA 2013 and, in the case of managed investment products, further defined by reference to the definition of “*managed investment schemes*” in s 9 of FMCA 2013. Investments on a cryptocurrency exchange like that operated by Cryptopia do not readily fit any of the four categories.¹⁶

3.22 As the Liquidators’ submissions also note [paras 10.20–10.21], no express powers of sale were conferred on Cryptopia in relation to cryptocurrency.¹⁷ Cryptopia’s liquidation would not, we submit, give Liquidators any greater powers of sale than the terms of the trust permitted.¹⁸ Beneficiaries of a bare trust, such as the beneficiaries of the Cryptopia trusts were,¹⁹ are prima facie entitled to a distribution in specie where practicable.²⁰ Submissions by Mr Watts to the foregoing effect were recorded without demur by Palmer J in the Distribution Judgment at [14].

3.23 The Liquidators’ submissions suggest three possible solutions for this difficulty:

¹⁶ In relation to debt securities, some assistance may be derived from *Australian Securities and Investments Commission (ASIC) v Wallet Ventures Pty Ltd* [2025] FCAFC 93, (2025) 309 FCR 447. More generally, see *ASIC v Web3 Ventures Pty Ltd* [2025] FCAFC 58 at [78], under appeal to the High Court of Australia (however, the relevant Australian provisions are differently worded to the New Zealand legislation, and the case was concerned with the terms of fixed-interest lending coupled with a mutuum of cryptocurrency).

¹⁷ See: (1) Cryptopia terms and conditions up to August 2018; (2) Terms and Conditions Updated 7 August 2018; and (3) Cryptopia Risk Statement of 20 April 2018. Documents (1) and (2) found at [301.0002] and [302.0577] respectively. Document (3) is [301.0413].

¹⁸ *Re Stansfield DIY Wealth Pty Ltd (in liq)* [2014] NSWSC 1484, (2014) 103 ACSR 401 at [40].

¹⁹ See Trust Judgment at [183] and [196].

²⁰ See Distribution Judgement at [10b], citing L Tucker et al *Lewin on Trusts* (20th ed, Sweet and Maxwell, London, 2020) (**Lewin on Trusts**) at [22-006]–[22-009]. See also *Burns v Steel* [2006] 1 NZLR 559 at [35]; *Yang v Chen (No 2)* [2010] NZHC 1947, [2011] NZCCLR 13 at [268]–[272]; *Re Montpac Pty Ltd* [2020] NSWSC 1237, (2020) 149 ACSR 138 at [28]; and *Re Deppeler (as joint and several Liquidators of Total Truss Systems Pty Ltd)* [2021] VSC 205, (2021) 152 ACSR 323 at [60].

- (a) a declaration that s 56 of the 2019 Act, which presumptively confers on a trustee “*all the powers necessary to manage the trust property*”, extends to a power of sale [10.22];
- (b) an order of the Court under s 130 of the 2019 Act [10.27]; and
- (c) exercise of the Court’s inherent jurisdiction [10.34].

Each is taken here in turn.

3.24 It is submitted that s 56 would not apply to the Cryptopia trusts, even though this is a provision of the 2019 Act that applies to trusts in existence before the 2019 Act came into force. Not only were the trusts bare trusts, but retaining cryptocurrency was the essence of the trust, at least short of necessity. Section 56 takes effect subject to the express or implied terms of the trust: see s 5(4) and Schedule 2. Moreover, s 4 of the 2019 Act requires every person or court performing a function or duty or exercising a power under the 2019 Act to have regard to the principle that a trust should be administered in a way that is consistent with its terms.

3.25 However, in the circumstances that face the trustee and the Court in the present case, we accept that it would be appropriate for the Court to order a conversion of the cryptocurrency to money under s 130 of the 2019 Act. Again, s 130 is a provision that applies to pre-existing trusts. Conferring a power of sale is “*necessary or desirable for the proper management or administration of the trust property*”, within s 130(1). Accountholders have, under the *Re Benjamin* orders, had a reasonable opportunity to recover their beneficial interests in specie. For similar reasons of necessity, s 130 was used by Palmer J in the Distribution Judgment at [24] to order the conversion to fiat currency of cryptocurrency held by accountholders in jurisdictions where receipt of cryptoassets would be unlawful.

3.26 We are more doubtful about the third option, the Court's inherent jurisdiction. It has been established law that courts have no inherent power to vary a trust. The leading case, but by no means only case, is *Chapman v Chapman* [1954] AC 429 (HL). In that case, Lord Simonds LC stated (at 446):

It is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt and, if they do wrong, to penalise them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary. ... If, then, the court has not, as I hold it has not, power to alter or rearrange the trusts of a trust instrument, except within the limits which I have defined, I am unable to see how that jurisdiction can be conferred by pleading that the alteration is but a little one.

See too the judgment of Lord Morton of Henryton at p 455, Lord Asquith of Bishopstone at p 469, and Lord Cohen at p 471. *Chapman v Chapman* has been followed in New Zealand in relation to the Court's inherent jurisdiction.²¹

3.27 However, it is also true, as the Liquidators' submissions point out [10.35], that a number of more recent New Zealand cases have held that the approach taken in *Chapman* was too restrictive. These cases include *Re Setter (as trustees of Central Hawkes Bay Consumers Power Trust)* [2021] NZHC 1603 at [36] where Your Honour stated that a case can be made for allowing the broader statutory powers of variation conferred first by the 1956 Act and then by the 2019 Act to justify a review and extension of the scope of the inherent jurisdiction, despite *Chapman*. It is respectfully submitted that this is not an obvious conclusion. While statute law enacted in response to a perceived state of the common law is not conclusive as to the actual content of the common law, nor does it prevent ongoing elucidation of the common law, the statute ought not to license change in

²¹ *Chapman* was followed in *Re Gray (dec'd)* [1956] NZLR 764 at 769; and *Re Ebbett (dec'd)* [1974] 1 NZLR 392 at 396.

established common law. In any event, we submit that any jurisdiction at Equity to vary trusts should not be used to contradict the evident intentions of the settlor. We accept, however, that necessity or ‘emergency’ could provide a case for exceptional intervention (Liquidators’ submissions, [10.50]).

3.28 On any basis, it would seem appropriate to credit to accountholders of the relevant trust the fiat currency obtained from selling the cryptocurrency as at the date or dates of conversion (to propose an answer to the question posed at Schedule 2, [2.19], of the Liquidators’ submissions).

(ii) Why use of the ss 149–152 regime is appropriate - *Re Benjamin* orders, abandonment, and limitation do not make the regime otiose

3.29 It would not be necessary for Cryptopia to invoke the ss 149–152 regime if the Non-EAHs had by now all lost their beneficial interests in the Cryptopia trusts. That is because such termination of beneficial interests would have resulted in the assets going directly to the Crown bona vacantia, under either or both of the common law (the royal prerogative) and s 66 of the Public Finance Act 1989.²² The relevant law of bona vacantia is discussed at [3.13]-[3.14] above, and again at [3.72–3.74] and [3.88–3.90] below. It is submitted that in fact the Non-EAHs have not lost their beneficial interests and that therefore it is appropriate for the Liquidators, on behalf of Cryptopia, to invoke the ss 149–152 regime.

3.30 However, GNY’s Notice [para 3.17] pleads that the Non-EAHs have lost their beneficial interests, for one or more of four reasons (in summary):

²² Section 66 of the Public Finance Act 1989 would appear to apply if Cryptopia deposited the proceeds of sale of cryptocurrency with the Crown. If some person simply attempted to appropriate the assets, the Crown would be entitled to take proceedings against that person under the common law of bona vacantia. For a finding of concurrent statutory and common law rights of bona vacantia, see *David Barry Logistics Pty Ltd v Victoria* [2021] VSC 828, (2021) 65 VR 233 at [165].

- (a) The *Re Benjamin* orders made in the Distribution Judgment permanently barred Non-EAHs from asserting their beneficial interests once the relevant deadlines had passed;
 - (b) Non-EAHs have renounced or abandoned their interests;
 - (c) s 31(1)(b) of the Limitation Act 2010 applies; and
 - (d) the objectives of the trusts intended that once beneficiaries had exhausted their opportunity to claim their cryptocurrency the unclaimed assets would vest in Cryptopia.
- 3.31 Before turning to each of GNY's pleaded grounds for asserting that Non-EAHs have lost their beneficial interests, it should be noted that in only one of GNY's pleaded solutions for dealing with the surplus cryptocurrency (see [3.4] above) does GNY consider that the result of the alleged loss of beneficial interests is that the surplus goes bona vacantia to the Crown. GNY's solutions are discussed at [3.95-3.110] below.

Terms of the Re Benjamin orders

- 3.32 There are two places in the orders made in the Distribution Judgment²³ where on their face it might be inferred that Non-EAHs were to lose their substantive rights if they failed to meet the requirements of the orders (i.e. to become EAHs):
- (a) Order 2.2 sanctions distributions by the Liquidators as if non-claiming account holders "*are not in existence*"; and
 - (b) Order 2.5 provides that where accountholders have started the eligibility process but have not completed it by the Final Cut-off Date "*the Liquidators are permitted, and shall procure Cryptopia, to treat any such account holder as having*

²³ The amended order arising from the Distribution Judgment is at [204.1363].

abandoned their claim with consequent loss of entitlement to receive a distribution”.

3.33 Notwithstanding the peremptory language used in the orders, the context in which those orders were sought supports the view that they were not intended permanently to exclude Non-EAHs from participating in a distribution of surplus trust assets. The *Re Benjamin* orders were being sought for purposes other than dealing with surplus cryptocurrency.

3.34 It is clear from the orders read as a whole, and from the Liquidators’ synopsis of submissions in support of the orders dated 13 October 2023 (**13 October 2023 submissions**), that the orders were designed to achieve three objectives:

- (a) The Liquidators were seeking orders that permitted the costs of administering and winding up the trusts to be borne first by the Non-EAHs before being borne by EAHs (see Order 2.8; and [6.44] of the 13 October 2023 submissions). To that extent, Non-EAHs were penalised;
- (b) The Liquidators were seeking orders against the possibility that at least some trusts would have inadequate cryptocurrency to make full distributions if the interests of Non-EAHs were taken into account. Where there was a shortfall, the proposal was that Non-EAHs would be excluded and EAHs would then be entitled to a top-up, up to 100% of their fixed entitlements (see Orders 2.8 and 2.9 read together; and [6.45] of the 13 October 2023 submissions).²⁴ The orders did not address surplus cryptocurrency after such a distribution or distributions had been made; and

²⁴ We agree with the Liquidators’ submissions at [3.18] that accountholders had a fixed interest in their respective trust.

- (c) The Liquidators wanted to progress things to the point that the liquidation of Cryptopia could be completed (see [8.1] of the 13 October 2023 submissions). Doing that would not necessitate termination of the trusts. Compellingly, the 13 October 2023 submissions indicated that the Liquidators at that point planned to hand over the surplus assets (in monetary form) to the Crown under s 149. But they also indicated that further Court orders would be needed to confirm that proposal and otherwise to wind up Cryptopia's involvement as trustee.

3.35 Other parts of the 13 October 2023 submissions are pertinent:

- (a) At [6.43], the Liquidators submitted:

Finally, the Re Benjamin and Re Instant Cash Loans orders **would not, the Liquidators submit, have the effect of extinguishing any account holder's beneficial entitlement** (Direction 2.3). Rather, they would permit the Liquidators to proceed with distribution without retaining assets to accommodate those interests. That will allow the Liquidators to distribute to account holders who have completed the process and proceed with winding up the trusts and, ultimately, the liquidation of Cryptopia, without risk of the Liquidators or Cryptopia being liable for doing so (Direction 3.6). [our emphasis]

- (b) At [6.44], the Liquidators submitted:

The specific effect of proceeding on the basis that (i) account holders who have not registered; and (ii) account holders who have not completed the process; do not exist is on the allocation of trust administration costs. If the Liquidators can proceed on the factual footing that those account holders do not exist or are not beneficially entitled, then their beneficial entitlement will not need to be taken into account when allocating trust administration costs. Trust allocation costs would be borne by the "unclaimed" holdings (ie, the holdings that the Liquidators can distribute without regard to, pursuant to Directions 2.2 and 2.5).

3.36 The Distribution Judgment also supports a conclusion that Non-EAHs were not intended to be permanently excluded from distributions. Palmer J stated at [30g]:²⁵

The Orders sought would not extinguish any account holder's beneficial entitlement but would permit the Liquidators to proceed with distribution without retaining assets to accommodate those interests. Neither would those interests bear trust administration costs which would be borne by the "unclaimed" holdings. [our emphasis]

3.37 Finally, [8.6] of the OA contemplates that Non-EAHs will be able to request a distribution from surplus assets if they first complete the eligibility requirements. The Liquidators' submissions are consistent with that pleading: see [10.55].

3.38 In short, it is to be inferred that the language of the *Re Benjamin* orders is, as a matter of convention, expressed in draconian terms, but only so that the ends being pursued allow of no contradiction.

3.39 By an Interlocutory Application to Vary Orders in respect of Distribution of Cryptocurrencies dated 23 April 2026 (**Variation Application**)²⁶ the Liquidators have now sought an amendment to the orders made in the Distribution Judgment to permit them, in their discretion, to make distributions to Non-EAHs. That Application (see [2(d)]) and the supporting Memorandum of 23 April 2026 at [12]²⁷ both accept that Non-EAHs have not lost their beneficial interests in the Cryptopia trusts.

3.40 It is to be inferred that the reason the Variation Application seeks only a discretion, rather than confirmation of a duty on Cryptopia, to make further distributions, is to ensure that further distributions do not inhibit the winding up, not of the trusts but of Cryptopia itself as trustee. Distributions can then continue to be made by any

²⁵ See also *Re MF Global UK Ltd (No 3)* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874 at [26]–[30], referring to *Re Green's WT* [1985] 3 All ER 455 at 462; and *Re Plato* [1989] 2 NZLR 360 (HC) at 365.

²⁶ [401.0161].

²⁷ [401.0164].

replacement trustee, including the Crown under the ss 149–152 regime. This seems to us a sensible approach.

Abandonment

- 3.41 The concept of abandonment of property interests at common law is underdeveloped.²⁸ Even its availability is in doubt in relation to some assets, and its scope, application and effects seem to vary by type of asset. Authority, nonetheless, supports as a matter of principle interests in both tangible and intangible personal property as capable of being abandoned by their owner.²⁹ However, in contrast to independently-owned tangible property where title to abandoned property generally goes to the first subsequent person to assert ownership, where a merely beneficial interest under a trust is abandoned, the interest *prima facie* goes to the Crown *bona vacantia*, as explained at [3.13] above.
- 3.42 Abandonment is, almost by definition, a unilateral act. Once parties have abandoned their property interests they ordinarily cannot change their minds. But abandonment must be objectively manifested.³⁰ While in some contexts a court has been prepared to infer an abandonment,³¹ there appears on present authority to be considerable reluctance to do so in relation to abandonment of beneficial interests under a trust. A mere refusal by a beneficiary to engage with the trustee seems insufficient.
- 3.43 The reluctance of Equity to assume an abandonment of beneficial interests merely through refusal to engage with a trustee is reflected in the case law under s 149 of the 2019 Act and its predecessor

²⁸ See M Bridge et al, *Law of Personal Property* (3rd ed, Sweet & Maxwell, London, 2021), Chapter 30, Section B, para 30-010. A Hudson “Abandonment”, in N Palmer and E McKendrick (eds) *Interests in Goods* (2nd ed 1998), Chapter 23.

²⁹ As to disclaiming a gift of shares in a company, see *Standing v Bowring* (1885) 31 ChD 282.

³⁰ See *Moorhouse v Angus & Robertson (No 1) Pty Ltd* [1981] 1 NSWLR 700 (CA) at 706.

³¹ See, for example, *Hong Kong and Shanghai Banking Corp Ltd v Erceg* [2010] NZHC 2003 at [24]; *Murray v McOnie* [2019] NSWSC 189 at [60].

provisions. Hence, in *Public Trust v Gargan* [2013] NZHC 1058 the Court held that s 77 of the 1956 Act, the immediate predecessor of s 149, was in principle available to a mortgagee holding surplus proceeds following a mortgagee sale but the Court also held that the mortgagors had not abandoned their interest despite their refusal to engage with the mortgagee. The Court indicated that the mortgagors could change their minds in the 6-year period before the assets transferred beneficially to the Crown under the equivalent provision to s 151(4) of the 2019 Act.

3.44 There are a number of other decisions that support a conclusion that a refusal to engage by a trust beneficiary does not entail that their beneficial interest is treated as abandoned.³² One should note, however, two relatively recent cases from England and Wales.

3.45 In *Re Pritchard Stockbrokers Ltd* [2019] EWHC 137 (Ch) at [29], the eponymous stockbroking and investment company had failed to comply with the Financial Services and Markets Act 2000 (**FSMA**) in relation to client funds and it came under a process involving statutory trusts for the return of funds to clients. Over 2400 former clients subsequently failed to engage with the distribution process. Some 1839 of these people had claims of £1 or less, although there was one unclaimed entitlement of over £43,700. The FSMA had its own version of the common-law *Re Benjamin* order, and the Court used it to sanction orders that provided that unclaimed interests ceased to have an interest in the fund. The terms are not dissimilar to those sought and obtained in the Distribution Judgment. However, it did not follow that the unclaimed interests were permanently destroyed by the order because at the end of the process unclaimed moneys were to be paid into Insolvency Services Unclaimed Dividends Account, which is a fund which appears to operate

³² See *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch), [2013] 1 WLR 3874 at [21] and [27]; *Tomich v Tomich* [2015] WASC 502 at [8] and [14] where the beneficiary's conduct was "bizarre"; *O'Hearn Lawyers v Barker* [2020] NSWSC 131 at [6].

similarly to that provided for by s 151 of the 2019 Act, and from which unresponsive clients could later claim. Nonetheless, Norris J said (at [29]): “*Many of the outstanding individual claims are so small that the view may properly be taken that the unpursued claims are abandoned*”. He did not address the position of the £43,700 claim, but the inference is, it is submitted, that only the very small claims were being suggested as having been abandoned.

3.46 In *Re Instant Cash Loans Ltd* [2021] EWHC 1164 (Ch), Michael Green J treated as amounting to abandonment a lack of continued communication by beneficiaries of a trust in the face of persistent requests for responses by the trustee (see at [25] and [29]). However, the trust in question had been set up as part of a redress scheme for borrowers who had been the victims of mis-selling of loans. The capital put into the trust fund was less than the aggregate amounts that borrowers were entitled to from the lender under the relevant law that had been broken through the mis-selling. The fund was essentially the result of a settlement. This meant that where beneficiaries failed to claim, or failed to meet the requirements for a distribution, the surplus funds could be used to top up distributions to the other beneficiaries, even though that had not been expressly provided for in the original terms of the trust. In that respect the Court was only making orders similar to those that were sanctioned in the Distribution Judgment.

3.47 In relation to Cryptopia, on the basis both of the terms and context of the Distribution Judgment orders and of existing case law there may be few Non-EAHs who can be treated as having truly abandoned their interest. However, if there is evidence that some beneficiaries have indeed expressly abandoned their interests, it would be useful if the Court were to confirm that such accountholders have permanently lost their rights and their interests have gone to the Crown bona vacantia.

Limitation

- 3.48 GNY pleads that any claim by Non-EAHs to recover personal property held by Cryptopia on trust was out of time as of May 2025, being six years after appointment of the Liquidators. Reliance is placed on s 31(1)(b) of the Limitation Act 2010 (**Limitation Act**).
- 3.49 The application of limitation periods to trust claims has always been complicated. The Limitation Act has introduced a range of new difficulties. However, it is submitted that the Act does not operate to bar distributions to Non-EAHs on the present facts, whether under the ss 149–152 regime or otherwise.
- 3.50 Most importantly, if, as submitted above, neither the Liquidators on behalf of Cryptopia nor the orders made in the Distribution Judgment have purported permanently to exclude Non-EAHs from their status as beneficiaries there has been no requirement for such accountholders to make a claim, i.e. the trusts simply exist and have been administered without any action needing to be taken by the accountholders. By failing to participate in the distribution process, Non-EAHs ran certain risks, but automatically forfeiting their interests in the trusts, including on the basis of limitation, was not one of them. If GNY’s argument were correct, beneficiaries of a trust who had a present entitlement, but not duty, to call for a distribution would be constantly at peril of losing their trust interest if they did not every six years regularly assert their entitlement and obtain acknowledgement by the trustee.³³ This is not the law.
- 3.51 There are a number of interpretative difficulties with s 31 of the Limitation Act and its relationship with s 49 of that Act, but it is submitted that, on any basis, the section cannot have been intended to require beneficiaries of trusts of personal property to be regularly

³³ The position is analogous to *Joachimson (a firm) v Swiss Bank Corp* [1921] 3 KB 110 (CA), and distinguishable from *DFC New Zealand Ltd v McKenzie* [1993] 2 NZLR 576 (HC).

asserting their interest in the trusts lest limitation destroy their interests. For the purposes of s 31(1), a “*cause of action*” in an ongoing trust does not accrue until a claim to the relevant trust fund is made and the trustee declines to meet its obligation to make a distribution. It may be that some Non-EAHs have engaged in disputes with the Liquidators such that a cause of action has arisen which is now more than 6 years old, but such an assumption could not be applied to the generality of Non-EAHs.

3.52 Another tenable answer to the limitation argument is that, even in relation to claims against a company that are not trust claims, there is a longstanding principle that limitation periods cease to run once a defendant that is a company goes into liquidation (they may begin to run again if a company comes out of liquidation). This principle arose out of a judicial inference from the scheme of the United Kingdom companies legislation, even though there was no express recognition of it in the relevant limitation statute. The leading case is *Re General Rolling Stock Co* (1872) LR 7 Ch App 646 (CA) (the *General Rolling* principle). A recent discussion of the *General Rolling* principle can be found in *Contract Natural Gas Ltd v ZOG Energy Ltd* [2025] EWHC 86 (Ch), [2025] 2 All ER (Comm) 628. The same inference has been recognised in New Zealand, including in relation to the 1993 Act: see *Orion International Ltd v Horne* [2009] NZHC 2458, [2010] NZCCLR 1. *Orion International* was concerned with the Limitation Act 1950, not the 2010 Act. However, it is at least arguable that the principle continues to apply in New Zealand.

3.53 In the *General Rolling* case itself, two reasons were given by James LJ for the suspension or termination of limitation periods upon a defendant’s liquidation. First, the companies legislation prohibited proceedings being brought against a company in liquidation without the Court’s leave, and in those circumstances it would be unjust to require a creditor, even one who had failed to lodge a proof, to file

proceedings to seek leave to sue simply against the prospect that the Liquidators might later raise a limitation argument. Section 248(1)(c) of the 1993 Act still precludes proceedings being brought against a company in liquidation unless the liquidator consents or the Court grants leave. It can be noted that, at least on its literal reading, the prohibition in s 248 would apply to trust claims, even if it can be anticipated that a Court would readily grant leave were a liquidator to refuse to recognise the relevant trust. The second reason adopted by both Lords Justices, was that liquidation effects a statutory trust over the company's assets in favour of creditors to which limitation periods do not apply.

- 3.54 In a line of more recent cases, including *Orion International* and *Contract Natural Gas*, Courts seem to have jettisoned the first rationale and relied only on the second, i.e. the trust, rationale. However, it is respectfully submitted that this rejection of the reasoning of James LJ in *General Rolling* is unwarranted. It remains a powerful argument that a claimant should not be subjected to limitation periods when it is not able to bring a claim without leave of the Court, at least until the liquidator makes it clear that the claim will not be admitted. In any event, the statutory trust argument tends to reinforce the argument above that ongoing rights under a trust do not attract limitation unless and until the trustee purports to controvert them.

Implied term that trusts would end if claims not made in time

- 3.55 The last of GNY's arguments that Non-EAHs have lost their rights is that the objectives of the trusts intended that once beneficiaries had exhausted their opportunity to claim their cryptocurrency the unclaimed assets would vest in Cryptopia.
- 3.56 In the absence of supporting evidence, it is submitted that this argument can be quickly dismissed. It is not apparent that there is any

basis for finding such an intention in the terms and conditions by which accountholders became beneficiaries, in the circumstances surrounding the creation or operation of the trusts, or otherwise.

C What are the consequences of invoking the ss 149–152 regime?

- 3.57 As noted above, the ss 149–152 regime can be invoked by an existing trustee without the need for a court order, but the trustee needs to show to the Secretary to the Treasury that it is holding property that, as provided by s 149(1), the trustee is “*not able to distribute in accordance with the terms of the trust*”. As also noted above, the Liquidators have needed orders to convert the unclaimed cryptocurrency to money or financial products before Cryptopia can take advantage of the regime. Such orders are sought at [8.3] of the OA and it might be taken as implicit that the Liquidators are also seeking confirmation from the Court that the use of the ss 149–152 regime is appropriate. We confirm that we consider that the present circumstances are appropriate for the deployment of that regime and that, in order to be able to use it, it is appropriate for the Court to order conversion of the cryptocurrency using s 130 of the 2019 Act.
- 3.58 Section 151(2)(a) provides that the Secretary to the Treasury must deal with property transferred under s 149 in accordance with any order made by the Court. The Liquidators have not sought any orders from the Court under s 151(2)(a) of the 2019 Act, whether in favour of the trade creditors or otherwise.
- 3.59 The Liquidators may consider that it is premature for the Court to be making any order under s 151(2)(a) before there has been a transfer of trust property to the Crown, and otherwise that it would be inappropriate to do so where the Crown is not a party to the proceeding. We note that obiter dicta in another context where bona vacantia operates, namely, property that has been disclaimed in a company’s liquidation, support the view that ordinarily the Crown

should be given the opportunity to be heard before the Court makes an order to vest the property in someone else.³⁴ It appears that officials at Treasury have advised the Liquidators that the Crown does not wish to be served with these proceedings,³⁵ but it is unclear whether the Secretary to the Treasury, or the Crown more generally, comprehended that orders might be sought against it under s 151(2)(a) in its absence.

- 3.60 GNY, on the other hand, at [3.20] of GNY's Notice is seeking orders against the Crown from the Court under s 151(2)(a). We do not know whether the Crown has been served with GNY's Notice. We anticipate too that counsel for the trade creditors may also seek that orders be made under s 151(2)(a) but in favour of trade creditors.
- 3.61 We can appreciate the attraction for parties such as GNY and the trade creditors of obtaining orders from the Court under s 151(2)(a) but the procedural issues raised in [3.59] above might be thought by the Court to be too problematic. On the basis, nonetheless, that the Court were prepared to entertain the possibility of making orders under s 151(2)(a), we have prepared the following submissions on the, not straightforward, issues that we see as arising from any such application.
- 3.62 We have already seen that the primary effect of a transfer of trust assets from an existing trustee to the Crown under s 149 is that the Crown becomes trustee of the assets (s 150(2) and s 151(1)). The existing trustee is discharged as such (s 149(5)).
- 3.63 Apart from the Crown simply holding the funds transferred, s 151(2) provides that the Secretary to the Treasury must do three things: (a) if the Court makes an order in relation to the property, comply with the order; (b) pay out to any person who establishes to the Secretary's

³⁴ *Rural Banking and Finance Corporation of New Zealand Ltd v Official Assignee* [1991] 2 NZLR 351(HC) at 362.

³⁵ See Updating Affidavit of David Ruscoe dated 23 April 2026 at [36] [401.0026].

satisfaction that they are a beneficiary their interest in the trust funds; and (c) return the funds to the original trustee if it asks for them.

3.64 As to the orders that the Court might make under s 151(2)(a), we note that the provision simply provides for the Secretary to the Treasury to follow orders of the Court. However, it must be implicit that the Court is conferred with powers to make orders. There is no guidance as to the types of order that a Court might make. This has largely been the case too with the predecessor provisions of ss 149–152, way back to the 1862 Act, s 3 of which provided: “*Such orders as shall seem fit shall be from time to time made by the Supreme Court of New Zealand in respect of the trust monies or securities so paid in transferred and deposited as aforesaid.*”

3.65 There is very little case law to guide the Court on the scope of the discretion in s 151(2)(a). The Court appears to us to be faced with two interesting questions:

(a) Can the Court take account of merely moral claims in authorising payments from the Trust Bank Account and, if so, to what extent?

(b) To the extent that there is evidence that some Non-EAHs have abandoned their interests in the relevant Cryptopia trust, can the Court authorise those moneys to be used to meet moral claims, or are those moneys effectively already held for the Crown bona vacantia, and it is up to the Crown, not the Court, whether it makes ex gratia payments to parties who are thought to have sufficiently strong moral claims?

3.66 At least two types of claim that are not in principle capable of being vindicated against the trust assets, and whose claimants therefore need to establish some sort of moral claim, appear to be in prospect in the present proceeding: (a) the claims of the trade creditors of Cryptopia to the extent that there is no trustee’s right of indemnity to

which they can have recourse; and (b) the claims of GNY made at [3.20] of GNY's Notice that the Court should use s 151(2)(a) to meet the outstanding claims of accountholders (one infers EAHs) or alternatively hack victims, including itself and including, one infers, compensatory claims.

- 3.67 Notwithstanding the lack of specificity in s 151(2)(a), context suggests that the Court does not have a free discretion. Given that the Crown becomes a trustee of the relevant trust assets, and that beneficiaries of the former trust are recognised as being entitled to make requests for a transfer of their entitlements once proven, one would expect the Court to be required to respect the status of the assets as trust assets. On that basis, one might argue that the primary function of s 151(2)(a) is to permit the Court to give direction to the Secretary to the Treasury as to whether a late-claiming beneficiary has made out its status as such in cases where the Secretary has declined to reach their own decision on that status under s 151(2)(b).
- 3.68 Even if the orders that the Court can make under s 151(2)(a) extend to the recognition of moral claims, it is submitted that it is unlikely that the drafter of the provision (and its predecessors) intended that the Court be permitted to exercise or endorse the exercise of broad largesse with trust assets in favour of non-beneficiaries.
- 3.69 As regards the position of a standard trustee, Equity has traditionally frowned on trustees exercising any largesse at all. Often cited is the dictum of Templeman J in *Re Wyvern Investments Ltd* [1974] 1 WLR 1097 at 1106: “[the Official Receiver] *is in a fiduciary capacity and cannot make moral gestures, nor can the court authorise him to do so*”. Templeman J referred to *Buttle v Saunders* [1952] 2 All ER 193 (Ch) at 195 as authority for the proposition that, rather than being permitted to take into account the interests of third parties, the duty of the trustee to further the interests of the beneficiaries of a trust is so strict that, in some circumstances at least, trustees may have to

act dishonourably in relation to third parties. Note that Templeman J's dictum suggests that the court has no greater freedom than the trustee.

- 3.70 However, more recent authority holds that where a statute confers powers on a court that relate to a trust a court may have more room for manoeuvre (sometimes substantially more) than the trustee: see *Bagum v Hafiz* [2015] EWCA Civ 801, [2016] Ch 241 at [23]–[24] (directions for sale of house with offer first to one of beneficiaries).
- 3.71 On the assumption that some recognition of moral claims is available to the Court under s 151(2)(a), we have been able to obtain very little guidance as to appropriate orders from such case law as there has been on regimes such as the present, whether in New Zealand or elsewhere.
- 3.72 It has long been accepted that the Crown itself can make ex gratia payments out of assets it has received bona vacantia in order to meet moral claims. But again there is very little curial discussion. This may be because some authority suggests that the Crown's power to make ex gratia payments is non-justiciable.³⁶
- 3.73 One case that is of relevance to the present is *Re Banque des Marchands de Moscou* [1953] 1 WLR 172.³⁷ In this case the Court sanctioned payment for the extensive services that a solicitor had performed in relation to winding up the affairs of the English branch of a Russian bank which had been dissolved under Soviet law and the English assets of which had gone bona vacantia to the Crown. The solicitor had no contractual claim because the bank had ceased to

³⁶ See *Re Wells* [1933] Ch 29 at 38 in arguendo, and *Att-Gen for the Prince of Wales v Information Commissioner* [2016] UKUT 0154 (AAC) at [132]–[134]. Cf Ombudsman case note W25391, 1992 where the New Zealand Ombudsman exercised a power of supervision over the statutory discretion conferred on the Crown by s 77(1)(e) of the Administration Act 1969 to make ex gratia payments from moneys that have become bona vacantia.

³⁷ *Re Banque des Marchands de Moscou* [1953] 1 WLR 172. See also *Re Banque des Marchands de Moscou* [1952] 1 All ER 1269 (Ch).

exist legally, and he might be taken to have known that. Nonetheless, his services had been very valuable in securing the assets for the Crown.

3.74 In *Rees v Dominion Insurance Co of Australia Ltd* (1981) 6 ACLR 71 at 79 the Court recognised that former employees of a company might have a moral claim against the Crown, which had received assets of a superannuation trust as bona vacantia. This was because the way in which their employment contracts had been terminated before the liquidation meant that the employees had by accident missed out on having a legal right to the surplus of the trust under its terms.

3.75 As for the claims of the trade creditors of Cryptopia, there is no doubt that these creditors had a legal claim on Cryptopia. But under trust law, they had no legal claim on the beneficiaries of the Cryptopia trusts except by way of recourse to any lien that might have arisen out of the trustee's right to indemnity for services performed for the trust or for liabilities incurred by Cryptopia in administering the trusts (these rights of indemnity are dealt with separately below). At this point, we are assuming that there is no right of indemnity, anticipating the discussion of the issue below.

3.76 The difficulty in ordering an ex gratia payment in favour of the trade creditors using s 151(2)(a) is that the reasons which might preclude a right of indemnity also weaken the moral claim. So, if Cryptopia has no right of indemnity because accountholders have already paid for the services which Cryptopia provided (in some cases through the services of the trade creditors) by way of the fees Cryptopia charged for every transaction that took place on the cryptocurrency exchange, then why would a moral claim spring up just because Non-EAHs did not make a claim before the commencement of the ss 149–152 regime? In contrast, in the *Banque des Marchands* case, above, the claimant-solicitor's services had been performed after the relevant

assets had gone bona vacantia to the Crown so that the Crown had directly benefited from them.

- 3.77 On the other hand, if at the end of 6 years there are still surplus assets, would it then be right to regard the Crown as under a moral obligation to these creditors since it is about to get a windfall by way of bona vacantia? It can be noted that the Inland Revenue Department is by far the largest unsecured creditor (being owed c\$19.2 million out of c\$22 million of proven debt, ignoring contingent claims³⁸), so in substance the potential prejudice to the Crown is confined to the remaining \$3 million of debt (again ignoring contingent claims).
- 3.78 Even on the footing that the Crown is getting a windfall when the creditors have been left out of pocket, it is possible to isolate stronger moral claims than those of the unsecured creditors in this case. Compare their claims with cases where the moral claimant has directly benefited the party on whom the moral claim is being made, as in *Banque des Marchands*, or the situation where an intestate party has had their personal needs cared for in his or her lifetime by the party making the claim (one of the established categories of ex gratia payment by the Crown).³⁹
- 3.79 However, we do not feel compelled to argue that trade creditors have no moral claim. The questions then arise whether the Court can anticipate now that there will still be unclaimed moneys in 6 years' time and whether the likelihood of that justifies the Court making an order now under s 151(2)(a). It could be argued that such an order would be no more damaging to the interests of Non-EAHs than the *Re Benjamin* orders that the Court made in the Distribution Judgment at 2.8 of [58], which resulted in the Non-EAHs effectively bearing all the costs of the winding up of the trusts to that point. Moreover, the present is a case that has already, through the *Re Benjamin* orders,

³⁸ See Liquidators' submissions at [2.16].

³⁹ See *N Ing Bona Vacantia* (Butterworths, London, 1971) at 105.

given accountholders a substantial window to come forward and claim their interests.

- 3.80 This then leaves the position of GNY's application for orders under s 151(2)(a) made at [3.20] of GNY's Notice. To repeat, it seeks an order that the Crown make payments "*towards outstanding claims of account holders (or alternatively, Hack victims)*". It is apparent from [3.17] of GNY's Notice that GNY does not include Non-EAHs among those beneficiaries whose claims should be met. GNY says nothing about whether it thinks orders should be made in favour of trade creditors of Cryptopia under s 151(2)(a).
- 3.81 For the reasons already given, it is submitted that GNY is not correct in submitting that Non-EAHs have lost their interests in the remaining assets of the respective trusts. Moreover, it is clear that the Non-EAHs bear no moral responsibility for any losses that other beneficiaries or hack victims have suffered, especially when their trusts had completely separate assets to those of the hack victims. In contrast, most of the debts owed to trade creditors will have arisen out of obligations Cryptopia incurred by operating the trusts for the benefit of all accountholders.
- 3.82 However, on the important assumptions that: (a) GNY can establish that Cryptopia is legally liable for the losses that GNY (and potentially others) suffered from the relevant hacks; and (b) there are likely to be substantial assets left over when the Crown ceases to be a trustee of the moneys at the end of 6 years, the question again arises whether the Crown should get a windfall through bona vacantia when there are people who have suffered losses as a result of Cryptopia's breaches of duty. We note, as the Liquidators' submissions point out (Part 9), that such moral claims may, however, not be confined only to GNY and if the potential aggregate claims of hack victims are very large (and not subject to limitation) they could cut against the apparent

intention of the ss 149–152 regime that there be a trust for beneficiaries for the 6-year period following the invocation of s 149.

3.83 This leaves the question raised at [3.65(b)] above, in relation to accountholders who truly can be taken to have abandoned their interests. Do their interests in the fund go directly to the Crown bona vacantia, so that any moral claim that creditors or GNY might make is solely a matter for the ex gratia discretion of the Crown?

3.84 Although the point is not without difficulty, it is submitted that abandoned interests do become subject to the ss 149–152 regime once the regime is triggered. Given that abandonment will in every case turn on what has been said or done by particular beneficiaries it would otherwise be difficult for the Crown to know much money had gone directly to bona vacantia and how much was still in the waiting-room.⁴⁰ It is relevant to note that, on one reading anyway, s 151(5) would permit Court orders to be made even once the 6-year waiting-room had ended and the statutory trust had ceased. However, on another reading, s 151(5) may be intended to operate only in relation to orders made before the end of the 6-year period but not actioned during the period. Assuming s 151(2)(b) does apply to abandoned interests, such evidence of abandonment as exists may assist a Court in the exercise of any discretion to take account of moral claims.

D Why the Companies Act solution is not appropriate: fundamental principle that trustee, including in insolvency, has no recourse to trust assets, except by way of indemnity

3.85 As noted above, one of the rival solutions for dealing with the surplus assets is the Companies Act solution, which involves termination of the trusts, with the result that Cryptopia would become beneficial owner of the assets to be distributed in the orthodox way under Part

⁴⁰ If this analysis is correct, the Crown would be one of the beneficiaries of the statutory trust to the extent that interests had been abandoned.

16 of the 1993 Act. Although raised as a possibility in the OA, the Liquidators abandon any support for it in their submissions [10.52–10.56]. However, GNY also supports the Companies Act solution, albeit it asserts that the trusts have automatically expired ([2.2(d)] of GNY’s Notice).

- 3.86 It is submitted that, even if it were possible for the Cryptopia trusts to be terminated, or for them to have expired, termination or expiry would not lead to Cryptopia acceding to the beneficial ownership of the surplus assets, as is now explained. The reasons why termination or expiry has not happened will be addressed in the next section of these submissions.
- 3.87 Except to the extent that a trustee of a trust is also within its terms a beneficiary of it or has a right of indemnity,⁴¹ a trustee is precluded under almost all circumstances from having any access to the assets of the trust for personal purposes. That fundamental principle of Equity extends to exclude any possibility that the trustee might accede, or have recourse, to surplus trust assets.⁴² That is so for the usual prophylactic reasons, including who is to know whether the trustee did not manipulate its management of the trust assets so that there was a surplus?
- 3.88 That it is anathema to Equity that a trustee accede to surplus assets of a trust is supported by numerous authorities dating from the mid-18th century to the present.⁴³ Although there are earlier cases, the leading case is *Middleton v Spicer* (1783) 1 Bro CC 201, 28 ER 1083 (LC). Here a testator left leasehold property to a charity, but the gift

⁴¹ A trustee’s right of indemnity is discussed in Part 4 below.

⁴² *Lewin on Trusts* [46-097] “Occasionally, however, there is no one to whom the property can result ... and then the question arises whether the trustees can retain the trust property beneficially. The rule now is that in no circumstances can they do so and that in such a case the Crown takes the trust property as bona vacantia.”

⁴³ *Colchester v Law* (1873) LR 16 Eq 253; *Cunnack v Edwards* [1896] 2 Ch 679 (CA); *Re Wells, Swinburne-Hanham v Howard* [1933] Ch 29 (CA) at 47 and 51; *Commissioner of Australian Federal Police v Courtenay Investment Ltd (No 4)* [2015] WASC 101 at [346].

was invalid by virtue of the Statute of Mortmain. A contest ensued between the executor who claimed he acceded to the property and the Crown, asserting *bona vacantia*. The Crown won. Lord Thurlow LC stated (204): “*The question results, whether the executor, being appointed only as a trustee, can claim as highly as an occupant at common law. Where there is a trustee, the general rule of the court is that he can have no other title*”. Following an adjournment, the Chancellor is reported as further saying (205): “*Here the executors, having legacies bequeathed, and being clearly trustees, cannot by any possibility take any beneficial interest*” (emphasis in original).

- 3.89 A more modern authority is *Re Wells, Swinburne-Hanham v Howard* [1933] Ch 29 at 47 per Lord Hanworth MR, and as follows at 51 per Lawrence LJ:⁴⁴

[F]rom the time of Lord Thurlow’s decision in *Middleton v Spicer* (1783) 1 Bro CC 201, 28 ER 1083 it had been an accepted proposition of law that chattels real and personal vested in a person as a trustee on private trusts which have failed are as a general rule held by him as trustee for the Crown as *bona vacantia*. The principle upon which this proposition is founded is that a trustee cannot conscientiously set up a claim to the beneficial title to the trust property as against the Crown any more than he could have set up a claim to such a title as against his *cestui que trust* had the trusts not failed.

- 3.90 In the Trust Judgment itself, Gendall J, in relation to a question directed to unidentifiable accountholders (i.e. beneficiaries), implicitly held (at [200]) that it would be inappropriate for any unclaimed beneficial interest to be retained as assets of Cryptopia in its own right.
- 3.91 The fundamental principle that trustees may not have recourse to trust assets is unaffected by the formal insolvency of the trustee. Thus, in the liquidation of a corporate trustee, the trust assets do not form part of the assets, or “property” to use a narrower term, of the

⁴⁴ See too *Armbrister v Lightbourne* [2012] UKPC 40 at [36], [42]–[43].

company. Hence, the general statutory and common law rules for dealing with the assets of an insolvent company, including the payment of the company's creditors, do not extend to trust assets.⁴⁵

3.92 Although the insolvency of a trustee, including formal insolvency, is not in itself fatal to the trustee continuing in office, that occurrence would normally warrant the removal and replacement of the trustee.⁴⁶ Where an insolvent trustee is replaced, there can be no question of the former trustee having recourse to trust assets to pay its creditors, except to the extent of any lien it may have by way of a right to an indemnity.

3.93 Sometimes, and Cryptopia's liquidation is an instance, it is in the interests of the beneficiaries of a trust that the liquidated trustee remain in office under the control of the liquidators.⁴⁷ But retaining as trustee an insolvent company could not be the basis, or the excuse, for improving the position of the creditors of that company should it turn out that the trustee has bare legal title to surplus assets. That would be so whether or not the trust was to be 'wound up'. For completeness, we agree with the Liquidators' submissions [10.57–10.62] that the Ponzi scheme cases, and the other, what might be called Gordian-knot, cases discussed, have no application to the circumstances of Cryptopia.

3.94 For the foregoing reasons, we submit that a negative answer should be given to the question posed at [8.2(c)] of the OA that once all trust administration costs have been paid and all EAHs have received a distribution of the trust property, the remaining cryptocurrencies

⁴⁵ See *Ex parte Dumas* (1754) 1 Atk 232 at 233–234, 26 ER 149 at 150; *Levin v Ikiua* [2010] 1 NZLR 400 (HC) at [85] (affirmed on appeal on other points: *Levin v Ikiua* [2010] NZCA 509, [2011] 1 NZLR 678); *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20, (2019) 268 CLR 524 at [25]–[26]; *Finnigan v Yuan Fu Capital Markets Ltd (in liq)* [2013] NZHC 2899 at [46].

⁴⁶ *CIR v Newmarket Trustees Ltd* [2012] NZCA 351, [2012] 3 NZLR 207 at [69]–[74]. Of relevance too, ss 105(1)(b)(iii), 112 and 114 of the 2019 Act.

⁴⁷ *CIR v Newmarket Trustees Ltd* [2012] NZCA 351, [2012] 3 NZLR 207 at [71]; *Irvine v Australian Sharetrading and Underwriting Ltd* (1996) 22 ACSR 765 at 783.

(whether first sold or not) should be applied in accordance with the priorities set out in Part 16 of the Companies Act 1993. For the same reasons we disagree with the submission made in GNY's Notice at [3.17(d)] and [3.19] that unclaimed cryptocurrency defaults to Cryptopia.

E Other unviable solutions: resettlement, variation, termination or expiry of trusts

3.95 As noted in the overview to this section of the submissions, GNY at [2.2] of its Notice raised four alternative solutions for dealing with the surplus assets. These were: (i) resettling the trusts; (ii) varying the trusts; (iii) declaring the expiry of the trusts; and (iv) making orders under s 151(2) of the 2019 Act.

3.96 The last of these alternatives has already been addressed. Insofar as GNY's pleading in respect of other three of these solutions is premised on Non-EAHs having lost any entitlement in the surplus assets, the premise has also been rejected—see [3.32]-[3.40] above. But other difficulties attend these solutions, as now explained.

3.97 First, insofar as GNY's applications for resettlement and, alternatively, variation of the Cryptopia trusts are made under the 2019 Act, it is at least doubtful whether the 2019 Act is the correct legislation under which to be seeking such orders. At [4.1] of GNY's Notice, GNY refers to s 125 of the 2019 Act. Section 125 is, however, not a standalone provision, but presupposes that the resettlement or variation is taking place under s 122 of the 2019 Act.⁴⁸ Section 122 is one of the provisions of the 2019 Act that in relation to "specified commercial trusts", as defined in Schedule 3 of the 2019 Act, are subject to transitional provisions. In particular, these provisions do not apply to such trusts where they were created before the

⁴⁸ See *Sherwin v JKA Holdings Ltd* [2024] NZHC 920 at [55].

commencement of the Schedule, which was 30 January 2021;⁴⁹ see clause 4(2) of Schedule 3. It is submitted that all the trusts recognised by the Trust Judgment are specified commercial trusts and were in existence before the commencement date and have been in continuous existence ever since: see Trust Judgment at [155], [187], [193], [196]–[197].

3.98 Secondly, even if ss 122 and 125 of the 2019 Act applied to the Cryptopia trusts, the Court’s power under s 125 to waive the consent of beneficiaries to a resettlement or variation, which consent would otherwise be required under s 122, cannot be exercised by the Court if the resettlement or variation would result in the reduction or removal of a vested interest in the trust assets of any beneficiary: see s 125(4). Unless the Court finds that Non-EAHs have forfeited their interests in the trust assets, it would not be possible under s 125 to make the orders sought because changes in vested interests would result.⁵⁰

3.99 As outlined above, the Court has powers pursuant to s 130 of the 2019 Act to vary the terms of trusts, which power applies to trusts created before the Act came into operation. But s 130(1)(b) and (c) impose restrictions on the Court’s power. Paragraph (b) of s 130(1) stipulates that any variation must not alter a beneficiary’s interest under a trust.⁵¹ Paragraph (c) of s 130(1) stipulates that any variation must not involve a power to distribute trust property to a beneficiary. Admittedly, it is arguable that a resettlement or variation that made all account holders (or all hack victims) beneficiaries of all trusts would not in itself confer a power of distribution; that power is already

⁴⁹ The Schedules incepted at the same date as the main provisions of the 2019 Act, namely 18 months after the enactment date, which was 30 July 2019.

⁵⁰ In contrast, reduction in, or removal of, the contingent interests of discretionary beneficiaries is permitted under s 125: see, for example, *Re TJ & HM Hamilton Family Trust* [2024] NZHC 3893.

⁵¹ See *Re Setter (as trustees of Central Hawkes Bay Consumers Power Trust)* [2021] NZHC 1603 at [16].

inherent in the trusts. But making all account holders beneficiaries of all trusts would, it is submitted, infringe s 130(1)(b), since it would change the beneficial interests in the trusts.

3.100 Thirdly, on the assumption that the 1956 Act was and remains applicable to the Cryptopia trusts, rather than the 2019 Act, similar difficulties arise, as follows.

3.101 Section 64 of the 1956 Act permits the Court to authorise dealings with trust assets that are not provided for by the trust instrument (so long as not expressly precluded by the instrument), but any such order must be “*in the best interests of the persons beneficially interested under the trust*” (**benefit test**). It is difficult to see how introducing a large range of new beneficiaries to a trust would pass the benefit test when the introduction came at the expense of existing beneficiaries, unless the existing beneficiaries had already permanently lost their entitlements.

3.102 Section 64A of the 1956 Act permits Court variation where there are incapacitated beneficiaries or future beneficiaries. But again, this provision is subject to the benefit test. This provision finds its equivalent in s 124 of the 2019 Act, but once more there is a benefit test. In any event, we are not in the present proceedings concerned with incapacitated or future beneficiaries.

3.103 Fourthly, it is doubtful whether the Court has an inherent jurisdiction to sanction or order a resettlement of trust assets or a variation of a trust. The limited scope at Equity for a court to vary a trust has already been addressed (see [3.26]-3.27 above]). There is no inherent power either for a court to order a resettlement of a trust.

3.104 Fifthly, once one assumes that Non-EAHs who have not expressly abandoned their interests remain beneficiaries for the purposes of dealing with the surplus assets, there is no basis for the Court to conclude that the trusts have expired, as submitted by GNY. There is

no general principle of expiry in the law of trusts, except in accordance with its terms, at least so long as a beneficiary of the trust remains.

3.105 Nor is there a general principle permitting a Court to terminate a trust. The Liquidators in the OA at [8.1], posited the possibility of the Court exercising a power to extinguish the trusts. However, in the Liquidators' submissions at [10.2–10.3], the Liquidators take the position that trusts cannot simply be extinguished by judicial fiat. We agree.

3.106 A trust can be terminated with the unanimous consent of its sui juris beneficiaries, and this principle (at common law called the rule in *Saunders v Vautier* (1841) 4 Beav 115) has been carried forward into s 121 of the 2019 Act. However, it is impracticable on the present facts to get the consent of all the beneficiaries of the Cryptopia trusts to terminate the trusts, and if it were practicable the assets could simply be distributed without invoking s 121.

3.107 It is true that the 2019 Act has added a rider to s 121, and thereby extended the *Saunders v Vautier* principle. This rider is found in s 125 which permits the Court to dispense with unanimity, implicitly on the basis that it is just to do so. However, the power cannot be used to reduce or remove any vested interest, including it is submitted the interests of Non-EAHs (at least those who have not abandoned their interests): see s 125(4).

3.108 Moreover, as already pointed out, the power in s 125 of the 2019 Act is unlikely to be available to the Court in the present proceeding, because that section is parasitic on the power in s 121 being exercised,⁵² and s 121 is inapplicable to specified commercial trusts

⁵² See again *Sherwin v JKA Holdings Ltd* [2024] NZHC 920 at [55].

that existed before the commencement of the 2019 Act, including the Cryptopia trusts.

3.109 Sixthly, even if the Court did have jurisdiction to resetttle, vary, or terminate the Cryptopia trusts, it is submitted that *as a matter of substance* it would not be appropriate in dealing with surplus assets for the Court to sanction a distribution: (a) whether direct or by way of resettlement, to accountholders who were not beneficiaries of the trust where the surplus has arisen; or (b) whether direct or by way of resettlement, to accountholders whose original fixed entitlements have been fully met even where they were beneficiaries of the same trust as retains surplus assets; or (c) to Cryptopia beneficially.

3.110 Instead, the surplus assets should be converted to money under s 130 of the 2019 Act and dealt with under the ss 149-152 regime. Where a beneficiary has truly abandoned his or her interest, that interest will go bona vacantia to the Crown, even if mediated by the ss 149–152 regime.

4. TRUSTEE’S RIGHT TO INDEMNITY

4.1 Trustees are permitted at Equity to have recourse to trust assets to meet debts and liabilities properly incurred by them in administering the trust. The resulting right of indemnity is supported by an equitable lien in the trustee’s favour over the assets, which lien enures for the benefit of the trustee’s creditors if it becomes insolvent.⁵³ A useful summary of the right of indemnity and its limits is found in the judgment of Lord Hodge in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 272 at [59]. It can be seen from that summary that a trustee has no right of indemnity in respect

⁵³ See *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* [2019] HCA 20 at [32], [80], [83], [133], [137] and [141]; *Levin v Ikiua* [2010] NZCA 509, [2011] 1 NZLR 678 at [53]; *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, [2019] AC 272 at [59]; Trust Judgment at [89]; *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36, [2023] AC 877 at [93] and [110].

of unauthorised and/or wrongful conduct, including breaches of contract committed by the trustee (unless the breach were shown to have been in the beneficiaries' interests) and torts committed by the trustee. In such circumstances, victims of the trustee's conduct must take the trustee as they find it, which vulnerability was noted by Lord Hodge in the afore-mentioned dicta. Nonetheless, it seems that if the trustee becomes insolvent any outstanding lien in respect of properly incurred obligations remains enforceable for the benefit of all the trustee's creditors, including tort victims.⁵⁴

4.2 While the extent to which at Equity a trustee's right of indemnity can be excluded by the trust instrument or contract is unsettled,⁵⁵ it is submitted that a court would not normally look behind an agreed arrangement between trustee and beneficiary as to trustee remuneration and payment for trust services. Given that Cryptopia charged all accountholders substantial fees for listing a cryptocurrency and trading fees for every transaction that took place on the exchange, it is strongly arguable that the accountholders have already indirectly paid for the services that trade creditors may have performed.

4.3 Provision for the charging of fees was made in clause 13 of the 2018 Terms and in the "Customer Manual" and website material detailed in the affidavit of Mr Timothy Brocket dated 27 November 2019, filed in the Trust Application.⁵⁶ The same affidavit explains the actual listing and trading fees that Cryptopia charged for services on its exchange. Trading fees were charged to both sellers and buyers, typically set at 0.2% of the cryptocurrency being traded. Exhibited to the Updating Affidavit of Mr Ruscoe dated 23 April 2026⁵⁷ is an

⁵⁴ See *Lerinda Pty Ltd v Laertes Investments Pty Ltd* [2009] QSC 251, (2009) 74 ACSR 65; *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36, [2023] AC 877 at [59].

⁵⁵ P Edmundson "Express Limitation of a Trustee's Rights of Indemnity" (2011) 5 J Eq 77.

⁵⁶ [102.0361].

⁵⁷ [401.0026].

extensive range of the terms and conditions of other cryptocurrency exchanges that were operating at the time of Cryptopia's exchange. Fees are not detailed in these but a number of them have an internet link (URL) for finding out the fees then current. We have made no attempt to compare Cryptopia's fee structure with that of other contemporary exchanges. It is submitted that unsecured creditors would bear the onus of showing that the fees Cryptopia charged were so inadequate that a right of indemnity should survive.

4.4 In fact in none of the hearings involving Cryptopia that have so far taken place following its liquidation has the question of any pre-liquidation rights of indemnity been squarely before the Court. However, in submissions made for accountholders in proceeding CIV-2023-485-411 Mr Watts submitted at [23] as follows:

At least in relation to the general costs of administering the trusts while the Company's cryptocurrency exchange was operating the Company had no rights of recourse against account holders because the contractual arrangements between the Company and account holders provided for the company to charge set fees when transactions occurred. The Company cannot have been entitled to both fees and the costs it incurred with third parties in operating the exchange. Having said that, the Terms and Conditions dated 7 August 2018 contained in clause 12.2 a right of indemnity, but it is submitted that that was confined to indemnifying the company for losses and costs caused by the account holder, implicitly referring to idiosyncratic costs.

4.5 Mr Watts proceeded to submit that the implied right of indemnity found in s 38 of the 1956 Act, in force at the time the Cryptopia trusts came into existence, was always subject to the terms of the trust (see s 2(5) of the 1956 Act).⁵⁸

4.6 In the Distribution Judgment at [34], Palmer J agreed with Mr Watts's foregoing submissions although the issue of pre-liquidation debts

⁵⁸ It was also submitted that the comparable provision in the 2019 Act, s 81, would not apply to the Cryptopia trusts because those trusts are specified commercial trusts and came into existence before the 2019 Act came into effect on 30 January 2021: see clauses 4(2) and 4(3) of Schedule 3 of the 2019 Act.

incurred by Cryptopia was not live, and hence the Judge's statement comprises obiter dicta.

4.7 We submit that, in the circumstances, Cryptopia had no right of indemnity in relation to the debts it incurred in operating the exchange (let alone debts or other obligations external to paying for the operation of the exchange), and its creditors can be in no better position than Cryptopia.

5. TREATMENT OF CRYPTOPIA'S BENEFICIAL INTERESTS IN NZDT, BITCOIN AND OTHER TRUSTS

5.1 These submissions address [2.4-2.7], [3.2] [6.2(a)] of the OA and corresponding paragraphs of the Liquidators' submissions at [7.3(b)], [7.13-7.18], [7.20] and [7.65-7].

5.2 We proceed on the assumption that Cryptopia misappropriated certain NZDT Funds and Bitcoin trust assets in breach of fiduciary duty as supported by the Liquidators and (for the purposes of OA [2.4-2.7]) that claims for breach of fiduciary duty and/or breach of contract/negligence can be established.

5.3 In summary, the Liquidators seek directions on: (1) whether Cryptopia's own beneficial interests in the NZDF Fund and Bitcoin trusts are subject to proprietary claims of other beneficiaries up to 100% of their interests; and (2) whether Cryptopia's beneficial interests in other trusts should similarly be subordinated for breaches of duty. The effect of such orders would, by extension, be to subordinate the interests of unsecured creditors.

A General principle of impounding

5.4 We agree with the Liquidators' proposals regarding the subordination of Cryptopia's beneficial interests in both the NZDT Fund and the Bitcoin trust. The Liquidators' submissions at [3.19-3.22] discuss the orthodox distinction between personal claims against trustees in lieu

of an ability to trace or follow the misappropriated trust property into the hands of a third party. Paragraph [3.22(b)] refers to *Lewin on Trusts* at [27-070] which in turn refers to [43-013]. Reference should also be made to *Lewin on Trusts* at [43-007] which refers to the impounding principle, illustrated by *Re Dacre* [1916] 1 Ch 344.

- 5.5 In *Dacre*, an executor of a will subsequently died insolvent, having first misappropriated funds from the estate under his administration. His wife was to receive a legacy under the will which was unpaid at the time of her death and which devolved to her husband (the transgressing executor) beneficially. At the time of his death, therefore, the executor was both trustee and beneficiary of the will under his administration and insolvent. Lord Cozens-Hardy MR said [page 347] *“It has been settled by a long series of authorities, which are binding upon us, that a defaulting trustee cannot claim a share in the estate unless and until he has made good his default...”*
- 5.6 The Master of Rolls went on to refer to *In Re Towndrow* [1911] 1 Ch 662 where Parker J said: *“The real principle is that where there is an aggregate fund in which the trustee is beneficially interested and to which he owes something, he must be taken to have paid himself that amount on account of his share”*. Phillimore LJ put it this way [page 348] *“Where a trustee who is also a beneficiary is found to have misapplied a portion of the trust funds, and therefore, technically speaking, to be a defaulter, yet if he is able to produce as much as is necessary to satisfy the other beneficiaries he is not really in default, but is treated as having paid himself by advance or in anticipation.”*
- 5.7 The principle was discussed without demur by Lord Neuberger in *Moriarty v Various Customers of BA Peters PLC* [2008] EWCA Civ 1604, [2010] BCLC 142 at [16-18] but was held inapplicable on the facts because the proprietary claim in that case related to monies paid into an overdrawn account was not the client account in dispute. There is no such impediment to the principle being applied

to either the Bitcoin or NZDT trusts which contain homogeneous assets in which the beneficiaries each have defined interests.

B Application to NZDT Funds

- 5.8 It is understood from the Liquidators' submissions at [7.6-7.8] and [7.14] that Cryptopia's present entitlement to \$187,682 is insufficient to repay the entire shortfall of monies expended by Cryptopia in breach of fiduciary duty – said to be at least \$180,000 – such that Cryptopia's entire beneficial interest is subject to the impounding principle and available to all beneficiaries *pari passu*.
- 5.9 Thereafter, the Liquidators seek *Re Benjamin* orders as regards the payment of EAHs at OA [6.3], which is unobjectionable in accordance with the Distribution Judgment. However, following such payments net of allocable trust costs,⁵⁹ it is understood that a balance is likely to remain which is attributable to Non-EAHs.
- 5.10 Unless the Liquidators conclude that a beneficial interest had expressly and unequivocally been abandoned (and this appears to be possible in relation to one Non-EAH with a 36% interest as referred to in the Liquidators' submissions at [7.18(c)]), it is respectfully submitted that the balance should be treated in the same manner as for any other unclaimed beneficial interests for the reasons discussed in Part 3 above and, therefore, subject to the ss 149-152 regime. This is consistent with the first alternative set out in the Liquidators' submissions at [7.20], i.e. the unclaimed funds are not available to unsecured creditors.
- 5.11 We therefore disagree with the suggestion in the Liquidators' submissions at [7.61] that Cryptopia can receive any remaining

⁵⁹ The 50% allocation model submitted to be appropriate for the NZDT trust funds is matter for the Liquidators' judgement and is unobjectionable.

beneficial interests in the NZDT funds after the Final Cut-Off Date for NZDT assuming its entire holding is impounded.

- 5.12 We agree that an EAH in relation to NZDT has an unsecured creditor claim against the company to the extent that it is not paid 100% of its entitlement. A Non-EAH would also in theory have an unsecured creditor claim for breach of trust as regards any shortfall from the remaining trust funds (depleted as a result of the *Re Benjamin* orders sought), but such claims can be treated as non-existent unless submitted via the claims portal by the NZDT Cut-Off Date referred to at OA [6.3].

C Application to Bitcoin trust

- 5.13 Counsel assisting understands from the Liquidators' submissions at [7.65] that Cryptopia used 256 Bitcoin to meet company liabilities in breach of fiduciary duty. The Liquidators' records indicate that Cryptopia is a beneficiary of the Bitcoin trust to the extent of 7.47 Bitcoin. For the same reasons set out above in relation to the NZDT Funds, counsel assisting submit that Cryptopia's beneficial interests are subject to the impounding principle and may be allocable to the remaining beneficiaries of the Bitcoin trust *pari passu*, with any EAHs not receiving 100% of their entitlements being unsecured creditors for the balance.

D Treatment of other Cryptopia beneficial interests

- 5.14 We agree with the Liquidators' submissions at [7.67] and would answer OA [2.4(a) and [2.7] in the negative. The impounding principle only applies to a trustee's dishonest use of an aggregate fund to which the trustee would otherwise be entitled to a fixed share. 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. Accordingly, we consider that Cryptopia's other beneficial interests in trusts are

available for distribution under Part 16 of the 1993 Act which would include hack victims or others with proven claims against the company.

6. ASSIGNMENT OF ACCOUNTHOLDERS' CLAIMS

- 6.1 The Liquidators' OA at [4.1] ask the Court to confirm that the Liquidators must refuse to accept any purported assignment of an accountholder's beneficial entitlement to cryptocurrency owing to the prohibition on assignment found in clause 18.2(b) of the 2018 Terms.
- 6.2 A preliminary point arises insofar as there existed a prior set of Terms and Conditions dated January 2015,⁶⁰ which did not contain an express prohibition on assignment. Before the Court in the Trust Application was evidence that some 536,662 accountholders (there were some 960,143 accountholders at the date of liquidation on 18 October 2019⁶¹) did not engage in trading on the Cryptopia exchange after the 2018 Terms came into effect.⁶² Nonetheless, Gendall J held that all accountholders became bound by the 2018 Terms from their promulgation: Trust Judgment at [182]–[183].
- 6.3 The Liquidators point out there was no appeal from that ruling (see Liquidators' submissions, para 6.5). However, the Liquidators also acknowledge that the issue of assignability was not before Gendall J and, in those circumstances, it was not clear that any party would have, or indeed could have, appealed the ruling on that issue. Accordingly, the Liquidators have proceeded (at [6.7 to 6.19]) to argue why, on the facts, assignment is not possible, even for accountholders who had no dealings on the exchange after the inception of the 2018 Terms. Unless the Court were concerned to

⁶⁰ Trust Judgment at [23].

⁶¹ Trust Judgment at [8].

⁶² Trust Judgment at [180].

have our assistance on this issue, it seems that this is an issue that the Court can assess on the basis of the material put before it by the Liquidators. We would submit, however, that if there were evidence in a particular case that an assignment took place before the inception of the 2018 Terms, it might be difficult for the Liquidators to succeed on this point in relation to such an assignee.

6.4 As for the efficacy of the 2018 Terms, the issue of assignability was before the Court in proceeding CIV-2023-485-411 but Palmer J found that he did not have to rule on the issue: see *Epic Trust Ltd v Ruscoe* [2024] NZHC 21 at [18]. In submissions made by Mr Watts as amicus curiae in that proceeding,⁶³ Mr Watts accepted that non-assignment clauses are generally effective to invalidate an attempt to assign a contract,⁶⁴ and that there were practical reasons why Cryptopia would have introduced such a clause, including to simplify its operations; persons wishing to trade their rights had an adequate means of doing so through effecting transactions on the computerised trading platform. Mr Watts, however, accepted that an argument could be made for implying a right to assign once the computerised platform ceased to operate, as it did following the liquidation of Cryptopia. Case law suggesting that non-assignment clauses should be strictly construed⁶⁵ might assist in making an argument for limiting the clause in the 2018 Terms to circumstances where the computerised exchange was still operating.

6.5 The foregoing submissions are repeated here, while accepting that any case of assignability is no more than arguable. A more recent

⁶³ Dated 6 December 2023 [201.0488].

⁶⁴ Citing *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL). See also *New Zealand Payroll Software Systems Ltd v Advanced Management Systems Ltd* [2003] 3 NZLR 1 (CA) at [21]–[26]; *FTG Securities Ltd v Bank of New Zealand* [2019] NZCA 16, [2019] 3 NZLR 607 at [59].

⁶⁵ See *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2022] EWHC 3287 (Comm), [2023] KB 269 at [36]. This decision was reversed on appeal but on grounds that the relevant clause did not apply to insurance subrogation: *Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd* [2024] EWCA Civ 5, [2024] KB 421. See too *First Abu Dhabi Bank PJSC v BP Oil International Ltd* [2018] EWCA Civ 14 at [28]–[30].

decision from the England and Wales High Court has accepted that, depending on the context, it may sometimes be appropriate to imply a term into a clause requiring consent to assignment that the consent not be unreasonably withheld.⁶⁶ However, Foxton LJ stated that that will not always be the case and the Judge generally took a cautious approach to implication in this context.⁶⁷ An implied term that a prohibition on assignment ceases to apply altogether when the justification for it ceases could be said to involve too large a step by the Court.

6.6 We agree with the Liquidators' submissions at [7.38] to [7.39], that, even if assignment were permissible, the Liquidators would be entitled, for their own protection, to satisfy themselves as to the identity of the original account holder and as to the other information that was required to be provided by the process approved in the Distribution Judgment. And then, the Liquidators would be entitled to be satisfied that there had been a valid assignment before acting on it.⁶⁸

6.7 Similar requirements would attend the possibility of an accountholder declaring itself a trustee of its rights in favour of a third party.⁶⁹ The original accountholder as trustee would prima facie remain the only party with whom Cryptopia and its Liquidators would have to deal. Even if Cryptopia was obliged to acknowledge a declaration of trust, the beneficiary of such a trust would have to establish its entitlement.⁷⁰

⁶⁶ *Abraaj Investment Management Ltd v KES Power Ltd* [2026] EWHC 65 (Comm).

⁶⁷ *Abraaj Investment Management Ltd v KES Power Ltd* [2026] EWHC 65 (Comm) at [110].

⁶⁸ See *Promontoria (Oak) Ltd v Emanuel* [2021] EWCA Civ 1682, [2022] 1 WLR 2004 at [52]–[56].

⁶⁹ As to non-assignment clauses not precluding declarations of trust, see *Levin v Ikiua* [2010] NZCA 509, [2011] 1 NZLR 678 at [36] and [45]; *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 2 All ER (Comm) 445 at [43] and [88].

⁷⁰ It is for a putative beneficiary of a trust to establish that it is a beneficiary: see *O'Rourke v Darbishire* [1920] AC 581 (HL) at 620, 627.

6.8 The Liquidators' submissions at [7.33(b)] also note that two accountholders have appointed agents by powers of attorney. Again, such an appointment would not obviate the need for the accountholder to establish that it was an entitled beneficiary, and the Liquidators would be entitled to assure themselves of the validity of the appointment of the attorney. Any court proceedings brought by the attorney on behalf of the accountholder would need to be in the name of the principal.⁷¹

6.9 None of what is said above would, we submit, prevent persons entitled under the laws of succession on the death of an accountholder (whether as executor, administrator or otherwise) from establishing an accountholder's entitlement. Again, such a person would need to establish the deceased's entitlement. However, in relation to deceased Non-EAHs it would, by virtue of the *Re Benjamin* orders, be in the Liquidators' discretion whether they chose to deal with such claims or left them to be dealt with by the Crown under the ss 149–152 regime.

7. TOP UP FOR HACK LOSSES ON RE BENJAMIN BASIS

7.1 Counsel assisting agree with the Liquidators' submissions at [7.54–7.59] regarding proposals to top-up EAHs in hacked trusts up to a maximum of 100% of their account balances based on further *Re Benjamin* orders as sought at OA [5], consistent with the Distribution Judgment.

8. TRUSTS WITH SURPLUS ASSETS

8.1 The OA at [7] seeks directions on the application of 'surplus' trust assets with a choice between a 'scaled up' distribution to EAHs or whether the surplus reverts to the company for distribution to unsecured creditors. We are concerned here with Cryptopia trusts

⁷¹ See too *Arjoon v Daniel* [2023] UKPC 42 at [89].

that have more cryptocurrency than, according to Cryptopia's records, was allocated to accountholders, whether EAHs or Non-EAHs or Cryptopia itself.

- 8.2 The Liquidators' submissions at [7.47] abandon any case for treating such assets as trust assets available to EAHs and at [7.48] suggest that a pragmatic way is to treat the surplus as company property available to unsecured creditors. We do not know the amount (in NZD) in question although it should not alter the legal treatment.
- 8.3 For the same reasons set out in Part 3, we consider that the surplus assets ought immediately to fall bona vacantia for the Crown (i.e. they cannot be subject to any claim by an EAH or Non-EAH) unless the Liquidators were positively able to reach the view, on the balance of probabilities, that the surplus assets were company property, for example, because it is more likely than not that the currencies were unallocated fees earned by Cryptopia, or some other legitimate receivable.
- 8.4 However, the Liquidators expressly leave open the prospect of an accountholder proving beneficial ownership of these assets at paras [7.48] and [11.7] and, accordingly, counsel consider that this sub-category of surplus assets should be treated in the same manner as other surplus assets and, therefore, dealt with under the ss 149-152 regime.


Peter Watts KC/Matthew Crawford

Counsel assisting the Court

8 May 2026