

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

CIV 2019-409-544

Under Part 19 of the High Court Rules and Part 16 of the
Companies Act 1993

In the matter of an application concerning **CRYPTOPIA LIMITED (IN
LIQUIDATION)**, a company having its registered office at
Level 15, Grant Thornton House, 215 Lambton Quay,
Wellington, 6143 and carrying on business as a
cryptocurrency exchange

And

In the matter of an application by **DAVID IAN RUSCOE** and **MALCOLM
RUSSELL MOORE** of **GRANT THORNTON NEW
ZEALAND LIMITED**, insolvency practitioners of Wellington
and Auckland respectively

Applicants

**ORIGINATING APPLICATION
BY LIQUIDATORS FOR DIRECTIONS IN RELATION TO
DIGITAL ASSETS HELD BY THE COMPANY**

DATED: 1 October 2019

Judicial Officer assigned: Justice Gendall

BUDDLE FINDLAY
NEW ZEALAND LAWYERS
Barristers and Solicitors
Wellington

Solicitor Acting: **Scott Barker/Bridie McKinnon**
Email: scott.barker@buddlefindlay.com/bridie.mckinnon@buddlefindlay.com
Tel 64 4 499 4242 Fax 64 4 499 4141 PO Box 2694 DX SP20201 Wellington 6140

TO: The Registrar of the High Court at Christchurch

AND TO: Peter Watts Q.C., as court appointed counsel for certain accountholders

AND TO: Jenny Cooper Q.C., as court appointed counsel for other accountholders and unsecured creditors

AND TO: those directed by the Court to be served pursuant to the application for directions as to service and representation dated 1 October 2019.

This document notifies you that –

1. The Applicants, David Ian Ruscoe and Malcolm Russell Moore of Grant Thornton New Zealand Limited, liquidators of Cryptopia Limited (**Cryptopia** or the **Company**) will on **3 - 4 February 2020** apply for orders:

As to the legal status of the Digital Assets:

(a) Whether any or all of the various cryptocurrencies (**Digital Assets**) held by the liquidators of Cryptopia constitute 'property', as defined in section 2 of the Companies Act 1993;

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

(c) If the answer to question (a) or (b) is no, then to the extent that such Digital Assets are not 'property' whether the Applicant liquidators should satisfy claims of:

(i) Any account holder of the Company (**Account Holder**) for the return of his/her/its Digital Assets; and

(ii) Unsecured creditors,

by conversion of such Digital Assets into fiat currency and paying such in accordance with Part 16 of the Companies Act 1993;

(d) If the answer to question (b) is yes in any respect, then:

(i) When did the trust(s) come into existence? When the Company updated its Terms and Conditions on 7 August 2018 (**Amended Terms**), or at some alternative date?

- (ii) What are the terms of the trust or trusts?
- (iii) Are the Digital Assets held on trust:
 - (1) In an individual trust for each Account Holder, with the result that each Account Holder is the sole beneficiary of the trust?
 - (2) In one trust for the benefit all Account Holders with the result that all Account Holders are co-beneficiaries of the same trust, or
 - (3) In multiple trusts for the benefit of specific groups of Account Holders, with the result that Account Holders within a specific group are co-beneficiaries of same trust, or
 - (4) On some other basis.
- (e) What is the consequence of the Applicant liquidators being unable to ascertain the identity of any Account Holder, and what consequences flow in relation to any Digital Assets associated with that Account: specifically;
 - (i) Can the Applicant liquidators close any such Accounts and retain any Digital Assets as assets of the Company; or
 - (ii) Do any such Digital Assets fall to be dealt with pursuant to the Trustee Act 1956, or otherwise.
- (f) If and to the extent that the Applicant liquidators recover stolen Digital Assets, then are such to be dealt with by the Applicant liquidators:
 - (i) in accordance with the determinations sought above;
 - (ii) pro rata according to the amounts recovered assessed against amounts stolen; or
 - (iii) as assets of the Company.
- (a) Directing that the reasonable fees and disbursements of Peter Watts QC, Jenny Cooper QC, Buddle Findlay and the liquidators shall be met, in the first instance, from the pool of realised Bitcoin holdings pursuant to paragraph 3(b) of the Order of this Court dated 29 May 2019, on the basis that the fees are a necessary and reasonable expense of the

Liquidation, of and incidental to the protection, preservation, recovery, management and administration of the assets of Cryptopia, with the Court's decision as to the ultimate incidence of counsel's costs to be reserved until the Originating Application has been determined, or as otherwise ordered by the Court.

- (g) That leave is reserved for the applicants to apply for such further ancillary orders as are necessary.

2. The grounds on which each of the orders is sought are as follows:

As to directions generally

- (a) The applicants are the liquidators of Cryptopia appointed pursuant to s 241(2)(a) of the Companies Act 1993.
- (b) The liquidators were appointed by special resolution of shareholders on Tuesday 14 May 2019.
- (c) The issues upon which directions are sought are matters arising in the liquidation of the Company.
- (d) This application is necessary because:
 - (i) The issues upon which directions are sought are matters of law, and are of significant importance to the liquidation of the Company, and the entitlements of any affected parties.
 - (ii) The liquidators require direction in order to make any distribution of the Digital Assets or their proceeds to the entitled parties.

As to directions relating to the legal status of Digital Assets

- (e) The Company operated a cryptocurrency trading exchange, which is an online platform that enables account holders to trade various types of cryptocurrency.
- (f) Each customer account had a coin balance that represented the amount of that cryptocurrency that the account holder could trade on the exchange, or that it could withdraw from the exchange (providing certain circumstances were met).
- (g) The customer account did not in fact 'contain' any cryptocurrency as reflected in the customer's account balance. Rather, all of the

customer Digital Assets were stored by the Company in digital wallets, in aggregate, held in the Company's name.

- (h) When a trade took place between customers on the exchange, the transfer would be reflected in the Company's general ledger and the account holders' respective coin balances, but the actual cryptocurrency itself remained stored in the Company's digital wallets.
- (i) The Company's coin balances would not change unless and until there was a transfer in or out of the exchange, or new currency was "mined" and then transferred into the exchange.
- (j) In January 2019, the exchange was hacked by an unknown party (or parties) and Digital Assets were taken from the Company wallets.
- (k) The Company took steps to recover the Digital Assets, but ultimately the resolved to put the Company into liquidation.
- (l) The liquidators took control of the Digital Assets and have taken steps to reconcile the Company's Digital Assets held in the Company wallets with the coin balances showing in its customer accounts.
- (m) The Company's terms and conditions as at 7 August 2018 provided that the Digital Assets were held by the Company on trust for its customers.
- (n) The liquidators require direction as to the status of the Digital Assets at law, and specifically whether the Digital Assets are property within the meaning of the Companies Act 1993.
- (o) The liquidators also seek directions as to whether the Digital Assets are held on trust for the benefit of account holders or whether each account holder ought to receive a distribution as a general unsecured creditor, with a contractual claim against the Company for a withdrawal in an amount equivalent to the account holder's coin balance.
- (p) A trust is a proprietary institution. It cannot exist over the Digital Assets if the Digital Assets are not legal property.
- (q) The issue of whether the Digital Assets are property at law, has not been determined in New Zealand at the date of filing this application.

As to directions for payment of costs:

- (a) It is appropriate that the liquidators' reasonable costs (including legal fees) and disbursements be met from the proceeds of Digital Assets, for the following reasons:
 - (i) Determination of the Originating Application is a necessary condition precedent to the distribution of the assets held by Cryptopia, including any trust property, if the Court finds that particular assets are beneficially owned by account holders. The Liquidators are unable to discharge their duties, nor distribute the assets of Cryptopia to creditors or beneficiaries, until the issues raised in the Originating Application are determined.
 - (ii) The costs of counsel for the liquidators is a necessary and reasonable expense of the liquidation, being of and incidental to the protection, preservation, recovery, management and administration of the assets of Cryptopia including cryptocurrency assets and potential trust assets.
 - (iii) On 29 May 2019 this Court granted Orders permitting the Liquidators to deduct such costs and expenses from the assets of Cryptopia (including potential trust property).
 - (r) Further grounds set out in the Memorandum of Counsel filed with this application.
3. This application is made in reliance on:
- (a) Part 19 of the High Court Rules 2016;
 - (b) Sections 2, 240, 253, 284, 302, 303, 306, 312 and 313 of, and the Sixth and Seventh Schedules to, the Companies Act 1993;
 - (c) *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 (HL); *OBG Ltd v Allan* [2008] 1 AC 1 (HL), *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41 (EWCA), *Pearson & Ors v Lehman Brothers Finance SA & Ors* [2010] EWHC 2914 (Ch); [2012] 2 BCLC 151 (EWCA); *AIB Group (UK) plc v Mark Redler & Co* [2015] AC 1503 (UKSC); *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 14 March 2019) (SICC);

- (d) For payment of costs and expenses, the trustee's right to indemnification from trust assets for recovery and preservation of same and/or the principle of salvage; section 38(2) of the Trustee Act 1956; *LSF Trustees Ltd v Footsteps Trustee Company Ltd* (in liq) [2017] NZHC 2619; *Ranolf Company Ltd (in liq) v Bhana* [2017] NZHC 1183; *Re Secureland Mortgage Investments Ltd (in liq)* (No 2) (1988) 4 NZCLC 64, 266; *Re Newsmakers International Ltd (in liq)* HC, Napier M 153/86, 24 February 1994.
- (e) In respect of the Application for directions and the Originating Application Procedure, Rule 19.4 of the High Court Rules; and
- (f) In respect of all orders, the affidavit of David Ian Ruscoe sworn 1 October 2019 filed herein.

DATED 1 October 2019



Scott Barker
Solicitor for applicant liquidators of Cryptopia Ltd
(in liquidation)

This document is filed by **Scott Barker**, solicitor for the Applicants whose address for service is at the offices of Buddle Findlay, Level 17, State Insurance Tower, BNZ Centre, 1 Willis Street, Wellington, 6011. Documents for service on the abovenamed may be left at that address or may be:

1. posted to the solicitor at PO Box 2694, Wellington 6140; or
2. left for the solicitor at a document exchange for direction DX SP20201, Wellington;
3. transmitted to the solicitor by facsimile to 64-4-499 4141; or
4. sent to the solicitor by email at scott.barker@buddlefindlay.com or bridie.mckinnon@buddlefindlay.com .