

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

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

CIV 2019-409

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

**INTERLOCUTORY APPLICATION WITHOUT NOTICE FOR ORDERS AS
TO REPRESENTATION AND DIRECTIONS AS TO SERVICE**

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

**INTERLOCUTORY APPLICATION WITHOUT NOTICE AS TO
REPRESENTATION AND FOR DIRECTIONS AS TO SERVICE**

TO: the Registrar of the High Court at Christchurch

AND TO: Peter Watts Q.C.

AND TO: Jenny Cooper Q.C.

This document notifies you that –

1. The applicants, David Ian Ruscoe and Malcolm Russell Moore, liquidators of Cryptopia Limited (in liquidation) (**Cryptopia** or **Company**), hereby apply to the Court for orders:
 - (a) Appointing Peter Watts QC as counsel to represent parties who stand to benefit from a finding that the cryptocurrency holdings of the Company (**Digital Assets**) Digital Assets are property that is held on trust for account holders, being those individual account holders with a positive coin balance of realisable value (**Potential Trust Beneficiaries**).
 - (b) Appointing Jenny Cooper QC as counsel to represent those parties who stand to benefit from a finding that the Digital Assets are property, but not held on trust, being all known and potential creditors of the Company, other than the Potential Trust Beneficiaries, and including trade creditors and any party who might have claims against Cryptopia (**Creditors**).
 - (c) That to the extent that there is a need for argument on a matter which is not in contest between the two classes of creditors, Buddle Findlay as counsel for the liquidators will put the contrary position for the benefit of the Court.
 - (d) Directing that the reasonable fees and disbursements of Peter Watts QC, Jenny Cooper QC 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.

- (e) Directing that the draft notice to all creditors and interested parties annexed to the affidavit of David Ian Ruscoe dated 1 October 2019 be served along with the proceedings.
- (f) Reserving leave for any party to file an application for joinder to the Originating Application if it wishes to obtain separate representation.
- (g) Reserving leave for any party to apply to the Court to extend the representation order beyond determination of the Originating Application.
- (h) Directing that service be effected on the Potential Beneficiaries and Creditors by:
 - (i) posting downloadable copies of the Proceedings to the Cryptopia website at <https://cryptopia.co.nz> and posting a notification on the Cryptopia Twitter account @Cryptopia_NZ; and
 - (ii) if the Liquidators hold an email address for an individual member of the Potential Beneficiaries or Creditors, sending an email with a link to the Cryptopia website where copies of the proceedings can be downloaded.
- (i) Directing that, once counsel have been appointed, service be effected on Potential Beneficiaries and/or Creditors by the applicants by personal service upon counsel hereby appointed and in accordance with the method of service described at (h).
- (j) That any creditor or shareholder of Cryptopia is granted leave to apply to the Court within 10 working days of such service referred to in (h) above to modify or discharge these orders on appropriate notice being given to the applicants.
- (k) Leave is reserved for the applicants to apply further in respect of any ancillary orders.

2. The grounds on which each order is sought are as follows:

As to representation

- (a) The Liquidators have filed the Originating Application to seek directions from the Court as to the legal status of the various cryptocurrencies, including whether the Company holds Digital Assets on trust for certain account holders, or whether the Digital Assets are beneficially owned by the Company and account holders are general unsecured creditors of the Company.
- (b) The Liquidators are unable to discharge their duties under the Companies Act 1993, or distribute any of the Company's assets, until the Originating Application is determined. The Liquidators do not have an interest in the outcome of the Originating Application.
- (c) The Digital Assets are valued at approximately **NZD200 million**, and form the significant majority of the assets held by the Company. The remaining assets of the Company are currently valued at no more than **NZD6 million**. This excludes potential recoveries in the liquidation.
- (d) A significant number of parties have an interest in the outcome of the Originating Application, including (**affected parties**):
 - (i) There are over 2 million account holders, each potentially a creditor of the Company, who hold an account registered to Cryptopia (**Account Holders**), including over 900,000 Account Holders with positive balances in their accounts, who will have an interest in the Originating Application, as persons who either stand to benefit from the Court finding that the Digital Assets are held on trust for account holders, or who would otherwise expect to receive a distribution as creditors of Cryptopia.
 - (ii) There are 37 known unsecured creditors with claims valued at NZD12.7 million who will have an interest in the Originating Application, as persons who may receive a distribution as creditors of Cryptopia. There may be additional creditors, who are not yet known to the Liquidators, such as parties who may have a claim against Cryptopia.
- (e) Individual representation for each party would cause significant delay in resolution of the matter and would result in unnecessary duplication of

cost for affected parties who share a common interest. The interests of justice can be met through appointment of experienced counsel to represent the classes of affected parties who share a common interest. This achieves the objective of the High Court Rules 2016, to secure the just, speedy and inexpensive determination of the matter.

- (f) Representation proposed in paragraphs 1(a) and 1(b) above and the method of service set out in paragraphs 1(h) and 1(i) above, will ensure that all of the affected parties' interests in the outcome of the Originating Application are represented and those affected parties who seek to have input into determination of the Application are afforded an opportunity to do so.
- (g) Intended counsel appointees have both consented to be appointed.
- (h) The Potential Trust Beneficiaries defined at paragraph 1(a) of this application share a common interest in that:
 - (i) They stand to benefit from the Court finding that the Potential Trust Beneficiaries have a proprietary interest in the Digital Assets.
 - (ii) They stand to benefit from the Court finding that any interest acquired from the Digital Assets is held on the same trust as the property which gave rise to the interest;
 - (iii) They may have a traceable equitable interest in respect of other assets of the Company, for any breaches of trust that may have occurred;
 - (iv) If the Court finds that the Digital Assets are held on trust for certain account holders, the Potential Trust Beneficiaries will stand in a category separate to unsecured creditors, and will share a common interest in respect of the liquidators' application for directions on how to distribute the Digital Assets of any account holder who fails to claim his or her interest in the Digital Assets.

- (j) The Creditors defined at paragraph 1(b) of this application share a common interest in that:
 - (i) they stand to benefit from the Court finding that the Potential Trust Beneficiaries are general unsecured creditors, and the Digital Assets are assets of the Company, to be the proceeds of sale of which would fall to be distributed between creditors in accordance with their statutory entitlement(s).
 - (ii) They stand to benefit from the Court finding that any interest acquired from the Digital Assets is company property.
 - (iii) If the Court finds that the Digital Assets are held on trust for certain account holders, the Creditors share a common interest in respect of the liquidators' application to the Court for directions on the appropriate method of distribution of the Digital Assets of an account holder who fails to claim his or her interest in the Digital Assets transfers to Cryptopia.
- (k) The classes defined in paragraph 1(a) and 1(b) capture all affected parties, and appropriately group the affected parties into classes of common interest.
- (l) To the extent that there is a need for argument on a matter which is not in contest between the two classes of creditors, counsel for the liquidators are able to put the contrary position for the benefit of the Court.
- (m) If an individual member of a class considers that his/her/its interests are separate from that of the class, or it becomes apparent that a group of individuals share interests that are incompatible with the class, then the following mechanisms are available:
 - (i) leave is expressly reserved for any party to apply to this Honourable Court to vary the representation orders made, including appointing additional counsel to represent a distinct class;
 - (ii) An individual member may apply for joinder to the proceedings, or a group of individuals may request a representation order under r 4.24 of the HCR.

As to costs

- (n) It is appropriate that the Court appointed counsel's reasonable costs 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) Representation of the interests of parties affected by the Originating Application is necessary in order to protect the interests of affected parties, and to assist the Court. The representation orders sought provide the most just, speedy and inexpensive method for determining the Originating Application.
 - (iii) The costs of counsel appointed to represent the classes of interest affected by the outcome of the Originating Application 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.
 - (iv) 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).

As to service

- (o) The directions as to service set out in paragraphs 1(h) to 1(i) are appropriate on the following grounds:
- (i) The Liquidators are not otherwise able to effect personal service on 90% to 95% of the account holders, because the only contact information held by the Liquidators in respect of 90% to 95% of account holders is an email address.

- (ii) The proposed orders would reduce or avoid costs and delay in arranging for a process server personally to serve affected parties for whom the Liquidators hold personal contact details. Reducing the costs to the liquidators is in the interest of all Creditors and Potential Trust Beneficiaries.
 - (iii) This Court previously granted Orders on 27 May 2019 allowing the Liquidators to serve the Liquidators' Reports on account holders by uploading the document to the website <https://www.cryptopia.co.nz> and emailing a link to the website to account holders for which the Liquidators hold an email address.¹ The proposed method of service is consistent with the method of service used by the Liquidators to serve the Liquidators' Reports on creditors and shareholders.
 - (iv) The proposed method of service is consistent with the usual method by which Cryptopia gave notice to account holders, under the terms and conditions (per clause 17).²
 - (v) It is reasonable to expect that the account holders who intend to make a claim in the liquidation are already aware of the liquidation, and are monitoring the company website and social media platforms, such as Twitter.
3. This application is made in reliance upon:
- (a) the affidavit of David Ian Ruscoe filed in support of this application;
 - (b) section 284(1) of the Companies Act 1993;
 - (c) Subpart 2 of Part 7 of the High Court Rules 2016 and the associated commentary in *McGechan on Procedure*; and
 - (d) The decisions in *Re Fisk* HC Wellington CIV-2012-485-2591, 13 December 2017 per Thomas J; *Re Fisk* [2018] NZHC 2007; *Registered Securities Ltd (in liquidation)* (1990) 5 NZCLC 66,248; *Re Landbase Securities Ltd (in liquidation) (No 4)* HC Auckland, M1258/88, M1259/88, 17 July 1989.
4. The application is made without notice to any other party than proposed counsel on the following grounds:

¹ Varied Court Orders under ss 255 and 257 of the Companies Act 1993, dated 27 May 2019.

² Affidavit of David Ian Ruscoe sworn 1 October 2019 at annexure DIR1.

- (a) That requiring the applicants proceed on notice would cause undue delay or prejudice to the applicants; and
- (b) The application relates to a routine matter; and
- (c) The interests of justice require the application to be determined without service notice of the application.

5. I certify that: –

- (a) The grounds set out in paragraph 4 on which the application relies are made out; and
- (b) All reasonable inquiries and all reasonable steps have been made or taken to ensure that the application contains all relevant information, including any opposition or defence that might be relied on by any other party, or any facts that would support the position of any other party.

Dated 1 October 2019



Scott Barker / Bridie McKinnon
Solicitor for the applicants

This document is filed by **Scott Barker**, solicitor for the applicants whose address for service is at the offices of Buddle Findlay, Level 17, Aon Centre, 1 Willis Street, Wellington, 6011. Documents for service on the above named 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 and bridie.mckinnon@buddlefindlay.com.