

In the High Court of New Zealand  
Wellington Registry

I Te Kōti Matua o Aotearoa  
Te Whanganui-a-Tara

CIV-2024-485-404

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

In the matter of **Digital Asset Exchange Limited (in liquidation)**, a company having its registered office at Floor 15, 215 Lambton Quay, Wellington, 6011 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**

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Memorandum of counsel in support of an interlocutory application:  
(a) for procedural directions; and  
(b) for directions to convert cryptocurrency into New Zealand Dollars

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Dated: 17 March 2025

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## MAY IT PLEASE THE COURT:

### Introduction

1. This memorandum is filed in support of an interlocutory application (**Second Interlocutory Application**):
  - (a) for procedural directions for the conduct of this matter; and
  - (b) for directions permitting the Liquidators to convert cryptocurrency held by the Liquidators (**Digital Assets**) into New Zealand Dollars to meet the costs of this proceeding and the liquidation until final orders are made.
2. Counsel asks that the Court convene a case management conference to hear the applicants on these matters.

### Relevant background

3. This proceeding is an originating application on notice for directions by the applicants, who are the liquidators of Digital Asset Exchange Limited (in liquidation) (**Dasset or Company**) (the **Liquidators**), as to the conduct of the liquidation (**Originating Application**).
4. Prior to the appointment of the Liquidators in August 2023, the Company operated a cryptocurrency trading platform.
5. The Liquidators' investigations have established that there is a significant shortfall in the liquidation of Dasset. At the date of the liquidation, the shortfall was estimated to be NZD \$6,483,945.<sup>1</sup> At that time, the Digital Assets were valued at approximately \$656,777, and the Account Holders' claims had a book value of around \$6.8M.<sup>2</sup> The Digital Assets have increased in value since then,<sup>3</sup> although a significant shortfall remains.

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<sup>1</sup> Affidavit of Malcolm Russell Moore sworn 8 July 2024 (**July Affidavit**), at paragraph 30-31 and exhibit MRM "B".

<sup>2</sup> July Affidavit, at paragraph 28 and exhibit MRM "B".

<sup>3</sup> To \$1.5-\$1.6M at 31 December 2024. Affidavit of Malcolm Russell Moore sworn 17 March 2025 (**Second Affidavit**), at paragraph 25 and exhibit MRM "L".

However, the Digital Assets are volatile and their value has and likely will continue to change. The Company has no other assets.

6. The Originating Application was filed on 12 July 2024, together with:
  - (a) a memorandum of counsel;
  - (b) an interlocutory application without notice for initial procedural orders as to service and timetabling (**First Interlocutory Application**); and
  - (c) an affidavit of Malcolm Russell Moore in support of the Originating Application for directions and Interlocutory Application dated 8 July 2024 (**July Affidavit**).
7. On 18 July 2024 the Court made the orders sought in the First Interlocutory Application. The Liquidators have since carried out the orders, in particular to effect service of the Originating Application and the Court's orders.<sup>4</sup>
8. The purpose of the procedural orders was to bring the matters raised by the Originating Application to the attention of the users of Dasset's services (**Account Holders**) and Dasset's creditors so they could, if they wished, oppose and be heard on this matter. None of the Account Holders or creditors have indicated their opposition to the Originating Application or a wish to be heard.
9. In order to progress the liquidation in the most pragmatic and cost-efficient way, the Liquidators have also tried to seek creditors' consent to the orders sought in the Originating Application.<sup>5</sup> Creditors have not consented – most have not responded at all.
10. IRD, the Company's largest creditor, has not consented, but has said it does not oppose the orders sought in the Originating Application. However, the IRD has also said this is on the basis that it reserves its rights to seek to vary any direction made by the Court in respect of the Originating Application after the fact, should any further funds come to light.<sup>6</sup> The Liquidators' view is that all creditors must have the opportunity to be heard in relation to the final

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<sup>4</sup> Second Affidavit, at paragraph 11.

<sup>5</sup> Second Affidavit, at paragraphs 17 – 23.

<sup>6</sup> Second Affidavit, at paragraph 20.

orders sought and those who take that opportunity would have the usual appeal rights. The orders sought in the Second Interlocutory Application will allow for that.<sup>7</sup> However, final orders made cannot be subject to variation<sup>8</sup> at some point in the future on the application of a person who has chosen not to oppose or to be heard. Certainty is important, because it enables the realisation and distribution of assets to be made promptly following the delivery of final orders.

11. The Liquidators now return to Court seeking further orders to progress the Originating Application.

### **The issues raised by the Originating Application**

12. The Originating Application seeks orders which will determine the future conduct of the liquidation of Dasset. These are (at a very high level):
  - (a) whether the Digital Assets are "property" that the Liquidators are required to distribute under the Companies Act 1993;<sup>9</sup>
  - (b) whether the Digital Assets are Company property or held on trust by the Company for the Account Holders; and
  - (c) ancillary issues that flow from the Court's conclusions to the above two issues.
13. The Court's answer to the questions at 12 will make a significant difference to the distribution of available assets:
  - (a) if the Digital Assets are held on trust, then Account Holders will have a claim as beneficiaries of the trust and those proprietary claims will have priority over preferential creditors and all other unsecured creditors (there being no known secured creditors). The Digital Assets will be exhausted in distributing them to Account Holders,

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<sup>7</sup> Second Interlocutory Application, at paragraphs 1(f) and 1(g).

<sup>8</sup> The Originating Application asks for leave to be reserved to the Liquidators, any Account Holder or unsecured creditor to apply to the Court to set aside or vary any of the directions and orders made pursuant to the Originating Application by applying to the Court within 10 working days of the sealed orders being served on them. Having considered the position of the IRD, the Liquidators consider that it should be made clear that the final orders cannot be revisited in this way, only interlocutory orders and directions. The Second Interlocutory Application seeks a specific order concerning how any creditors may participate in the hearing of the Originating Application: see paragraph 1(f).

<sup>9</sup> This is not considered contentious given the findings of the Court in *Ruscoe v Cryptopia Ltd (in liquidation)* [2020] NZHC 728, [2020] 2 NZLR 809.

assuming sufficient Account Holders participate in the claims process;  
and

- (b) if the Digital Assets are not trust assets, but rather assets of the Company, the Account Holders will simply be unsecured creditors and their claims will rank together, *pari passu*, with all other unsecured creditors and behind preferential claims. The preferential creditors in this case include the IRD, with a claim of \$150,933 for outstanding GST and PAYE, and employees, with a claim of \$47,304.<sup>10</sup> Payments to preferential creditors will minimise the amounts available for distribution to Account Holders and other unsecured creditors.<sup>11</sup>
14. Given the significant shortfall in assets, and that any further recoveries of assets are likely to be cost-prohibitive, it is submitted that, in the interests of claimants, the Liquidators must adopt a pragmatic and cost-effective approach. The procedural orders sought in the Second Interlocutory Application have been crafted with this objective in mind.

#### **Procedural directions sought**

15. The Liquidators respectfully ask the Court to make the procedural orders sought in the Second Interlocutory Application. The orders are summarised below:
- (a) appointing Jenny Cooper KC as *amicus curiae* to assist the Court in any way it deems necessary, including as a contradictor to ensure the just and efficient conduct of this litigation;
  - (b) allocating this matter to Isaac J;
  - (c) setting this matter down for a two-day hearing in the Wellington High Court;
  - (d) that all parties will take the following steps in advance of the hearing:
    - (i) no less than 20 working days before the hearing will file and serve a joint list of issues;

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<sup>10</sup> July Affidavit at paragraph 29; and Second Affidavit at fn 3.

<sup>11</sup> July Affidavit at exhibit MRM "C", Liquidators' Second Report.

- (ii) no less than 15 working days before the hearing the Liquidators will file and serve written submissions in support of the Originating Application; and
  - (iii) no less than 8 working days before the hearing all other parties opposing, or who have given notice of their wish to be heard, will file and serve written submissions in respect of the Originating Application; and
  - (e) all documents filed in this proceeding will be served in accordance with the service orders granted by the Court in the First Interlocutory Application; and
  - (f) that any Account Holder or creditor may be heard in or may oppose the Originating Application by filing and serving relevant documents within 15 working days of service. Any such party who does so shall also file and serve their written submissions not less than 8 working days before the hearing; that leave is reserved for the Liquidators to apply for such further orders as are necessary.
16. The Liquidators submit these orders are appropriate and ought to be made for the reasons summarised below:
- (a) the Liquidators' position is that there is an evidential and legal basis to conclude that the Digital Assets are subject to a trust in favour of Account Holders. Counsel for the Liquidators will be instructed to advocate for this position. As yet, no creditor or other interested party has indicated it intends to oppose or to be heard on the Originating Application.
  - (b) The Court may appoint counsel as *amicus curiae* to assist the Court and/or to present contrary argument to facilitate the efficient and economic resolution of a matter.<sup>12</sup> To ensure that the Court has the benefit of such assistance, it is submitted that it is appropriate for Ms Cooper KC to be appointed as *amicus curiae* to assist the Court as it directs. This is on the basis that:

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<sup>12</sup> *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 266.

- (i) Ms Cooper KC is familiar with the key legal issues in the Originating Application because of her experience as counsel appointed by the Court in the liquidation of Cryptopia Limited (**Cryptopia**) to represent the interests of the creditors in that liquidation;
  - (ii) Ms Cooper KC has indicated that she is willing to accept an appointment as *amicus curiae* on the basis set out in the Second Interlocutory Application;
  - (iii) The Liquidators anticipate that as *amicus curiae*, Ms Cooper would be of most assistance to the Court on the second issue in this case: whether the Digital Assets were subject to a trust in favour of the Account Holders;
  - (iv) however, counsel's view is that it is not appropriate for the Court to give directions to about the of an *amicus curiae*'s instructions prior to their appointment. Accordingly, the procedural orders sought would enable the Court to give, and the *amicus curiae* to seek, directions at any time.
- (c) Isac J had some involvement in proceedings concerning the liquidation of Cryptopia, which also operated a digital currency exchange, and is likely familiar with the subject matter of this liquidation and the Originating Application;
  - (d) it is likely that the hearing of this matter will take more than one and a half days;
  - (e) it will be helpful to the Court to have a list of issues and written submissions in advance of the hearing date; and
  - (f) the Liquidators consider that the orders:
    - (i) will facilitate the pragmatic and efficient determination of the matter while avoiding any unnecessary cost or delay;

- (ii) achieve the objective of the High Court Rules, to facilitate the just, speedy and inexpensive determination of proceedings;<sup>13</sup>
- (iii) will ensure that all interested parties are able to view all documents filed, and to take a position in opposition if they wish to;
- (iv) will enable the interests of Account Holders and other creditors to be properly represented; and
- (v) are in the interests of all unsecured creditors.

### **Conversion of Digital Assets into NZD**

17. On 18 July 2024 the Court made the following order:

- 6. that the solicitor-client costs of the application shall be met, in the first instance, from the pool of realised cryptocurrencies held by the Liquidators, as a necessary and reasonable expense incurred by the Liquidators in carrying out their duties as liquidators, or alternatively, as trustees administering a trust.

18. The Originating Application seeks final orders permitting conversion of all Digital Assets and application of funds in accordance with the Liquidators' duties. However, as the Liquidators have not yet been authorised to convert any of the Digital Assets into New Zealand Dollars, to date the Liquidators have not been able to meet the costs of the liquidation, including this proceeding. They now seek an order permitting conversion of Digital Assets to New Zealand dollars to meet these costs, in order to give effect to the Court's order above.

19. The Liquidators' best current assessment of the cost of the liquidation and this proceeding for the next twelve months is \$901,748.38.<sup>14</sup> This is composed of:<sup>15</sup>

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<sup>13</sup> High Court Rules 2016, r 1.2.

<sup>14</sup> Second Affidavit, at paragraph 35 and exhibit MRM "M".

<sup>15</sup> Second Affidavit, at paragraphs 36 to 37 and exhibit MRM "M".



- (a) the Liquidators' actual costs incurred to date, \$492,887;
  - (b) the Liquidators' anticipated costs (excluding the cost of converting Digital Assets), being \$304,939; and
  - (c) the cost of converting the Digital Assets to fiat currency.
20. A detailed breakdown of the Liquidators' actual costs to date and anticipated costs of this liquidation and this proceeding are set out in the Second Affidavit of Malcolm Russell Moore filed in support of the Second Interlocutory Application.

### **Future conduct**

21. The Liquidators respectfully ask that the Court convene a case management conference and that the procedural orders set out in the Second Interlocutory Application be made.
22. Once orders have been made, the Liquidators will serve the orders in accordance with Orders 1(a) and 1(c) of the Interlocutory Application. If necessary, the Liquidators will return to the Court for further procedural orders. This may be necessary if (for example) any creditors file and serve a notice of opposition to the Originating Application.

**DATED** at Auckland this 17<sup>th</sup> day of March 2025




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**S C D A Gollin/ A E Simkiss**  
Counsel for the Applicants