IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-404
[2025] NZHC 2003

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)
AND	an application by **David Ian Ruscoe** and **Malcolm Russell Moore** of Grant Thornton New Zealand Limited Applicants

Hearing: 14 July 2025

Counsel: S C D A Gollin, A E Simkiss and H Malik for Applicants
J S Cooper KC, Amicus Curiae (via AVL)

Judgment: 18 July 2025

JUDGMENT OF GENDALL J

Introduction

[1] The applicant, Digital Asset Exchange Limited (Dasset or the Company), a cryptocurrency exchange company, was placed into liquidation on 14 August 2023 by special resolution of the Company's shareholders.

[2] The applicants David Ian Ruscoe and Malcolm Russell Moore (together the Liquidators) were appointed as Liquidators of the Company.

[3] Dasset was incorporated in April 2017 following which it offered an online platform or exchange to New Zealand users (Account Holders) which they could

utilise to buy and sell cryptocurrencies (Digital Assets or cryptocurrency) in New Zealand Dollars. The Company charged fees for use of its services.

[4] In carrying out activity with Dasset, Account Holders could fund this by depositing either cryptocurrency or New Zealand Dollars, but most Account Holders traded on Dasset's platform using New Zealand Dollar deposits. These were paid into a bank account the Company had set up for this purpose known as the 'Dasset Custodial Bank Account'. All funds which were deposited by Account Holders to the Custodial Bank Account were co-mingled and held together in one pool.

[5] Dasset did not operate its own wallet or exchange infrastructure. Instead, it relied on other cryptocurrency service providers, mainly Bittrex, for this purpose. As a result, Dasset did not itself hold any of its own or Account Holders' cryptocurrency. Rather, Dasset contracted with Bittrex which operated a cryptocurrency exchange and provided a "Master Account" that recorded all the cryptocurrency purchased by Dasset or deposited by the various Account Holders.

[6] This Master Account had a master key which allowed Dasset to control all activity of Dasset and Account Holders on the Bittrex exchange. In this regard, the Liquidators understood that only Stephen Macaskill (Mr Macaskill), Dasset's CEO and Director, had access to the master key.

[7] Although Dasset had told Account Holders that it would act in accordance with their individual instructions when carrying out transactions on the exchange, using both fiat currency (New Zealand Dollars in the Custodial Bank Account) and cryptocurrency, those Account Holders did not have individual accounts (for fiat currency) or wallets (for cryptocurrency) of any kind. This was in spite of Account Holders being informed that their individual accounts were linked to both their:

(a) Legal Tender Account, being a digital account represented by amounts deposited and withdrawn from the Custodial Bank Account; and

(b) Digital Currency Wallet, being where their cryptocurrency was stored, and where transactions were recorded.

[8] The reality, however, was that all digital assets held by Account Holders were in Dasset's Master Account with Bittrex. This meant they were held in Bittrex's wallet, together with all other cryptocurrency held by Bittrex. Accordingly, Account Holders did not have access to the Master Account.

[9] In terms of the records Dasset kept, it assured each Account Holder that they would have a unique subID within the Master Account that was associated with that party's cryptocurrency as part of the total balance of cryptocurrency held in the Master Account. Dasset represented too that it would keep track of Account Holder balances and transactions in a private ledger. This would show a complete record of all transactions and funds held for the benefit of each individual Account Holder, and the amount and types of cryptocurrency held for that Account Holder on the Bittrex exchange in that party's Digital Currency Wallet. The Liquidators say generally that did not occur, and on the occasions when Dasset purported to do so, the records were entirely inaccurate.

[10] In addition, the Liquidators say:

(a) Dasset never returned a trading profit, this being attributable to accumulated trading losses and an uneconomic operating model.

(b) From 2020, there were 30 unexplained and unrecorded withdrawals of cryptocurrency from the Master Account, having an approximate value in excess of USD$5 million. This was of considerable concern. In addition, there were unexplained purchases of cryptocurrency on other cryptocurrency exchanges using US Dollars and Euros obtained from the sale of Account Holders' cryptocurrency held on the Master Account. It is thought overall that these amounted to misappropriations. Largely the Liquidators confirm too at this point that it is simply not feasible for that cryptocurrency and fiat currency to be recovered.

(c) From the account activity the Liquidators have uncovered, they say this is of concern and must suggest that Dasset used new deposits by

Account Holders to fund withdrawals from other Account Holders, in the manner of what is known as "a ponzi scheme".

(d) From February 2023, it seems the Company did not have its own bank account. Accordingly, fewer purchases of Digital Assets occurred using customer funds. As a result of the unexplained withdrawals from 2020, this has meant that only a very small proportion of the cryptocurrency, purportedly purchased by Dasset for Account Holders through Bittrex, remains—this being in the order of approximately NZ$600,000. Although the value of this has fluctuated, in any event, there is a significant shortfall between the quantum of Digital Assets held by the Company at the date of liquidation, and the claims of Account Holders and creditors of the Company.

(e) Evidence from the Liquidators is that, as a result, all of this means they have no practical way of identifying the property relating to individual Account Holders within the Digital Assets. No complete or verifiably accurate information exists which would enable the Liquidators to investigate Dasset's affairs and properly trace Account Holders' claims. Further, the Liquidators say two things. First, that even if this exercise was theoretically possible, they do not have sufficient resources to carry it out. And secondly, any attempt would likely exhaust the assets available with no certainty of reaching defensible conclusions.

(f) Instead, the Liquidators confirm that the information they have available has simply enabled them to identify the remaining Digital Assets left of all the cryptocurrency purchased and traded on behalf of Account Holders. This they say is a mixed fund where all the cryptocurrency is co-mingled.

The present application

[11] On 12 June 2024, the Liquidators filed in this Court an originating application seeking a number of directions to assist in the liquidation of Dasset. These include orders:

(a) that the various Digital Assets held by the Liquidators of the Company constitute property under s 2 of the Companies Act 1993 (CA 1993);

(b) that all of the Digital Assets are held on trust by the Liquidators for any or all of the Account Holders;

(c) that each of the Account Holders has an unsecured claim to any cash or other assets which are available for payment of claims in the liquidation of the Company, including any unclaimed Digital Assets, pro-rated in proportion to the value of their unsatisfied claims against Dasset for Digital Assets and any other property including fiat currency;

(d) that, to the extent the Liquidators are trustees of any trust of Digital Assets or other property held by the Company, the Liquidators have all of the powers and rights of trustees under the Trusts Act 2019 (TA 2019) and otherwise, and as trustees, are entitled to indemnification from the trust assets for their own fees, and all costs and liabilities incurred by them in exercising their powers or carrying out their duties as trustees, including legal costs of this application on a solicitor-client basis;

(e) permitting the Liquidators to convert into fiat currency any necessary quantity of any Digital Assets held on trust or otherwise to cover the necessary and reasonable expenses of the liquidation, and to distribute the proceeds to Account Holders and creditors of the Company; and

(f) authorising payment of the reasonable fees and disbursements of the Liquidators on this application.

[12] In prior procedural directions made by this Court, service on all known Account Holders, creditors and customers of the Company occurred. No appearances, notice of opposition or submissions were received, nor have any such persons come forward to oppose the directions and orders sought by the Liquidators here. Accordingly, this Court appointed an amicus curiae, Jenny Cooper KC (Ms Cooper),

to assist. Ms Cooper provided detailed and helpful submissions as amicus and appeared before me at the hearing of this matter for which I thank her.

Legal principles

[13] Under s 284(1)(a) of the CA 1993, on an application by liquidators of a company, the Court may give directions in relation to any matter arising in connection with the liquidation. In determining whether to exercise its discretion, the Court will consider the particular circumstances of the liquidation, and how the liquidators should respond to their duty in those circumstances.[1] The discretion is said to be broad, with the Court able to make any orders necessary to enable a liquidation to proceed pragmatically.[2]

[14] The principal duty of a liquidator is set out in s 253 of the CA 1993. This requires a liquidator, in a reasonable and efficient manner, to:

(a) take possession of, protect, realise and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with the CA 1993; and

(b) if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with s 313(4) of the CA 1993.

[15] Authorities have noted that the fact liquidators may be administering an insolvent company must dictate the need for a pragmatic approach and for efficient and effective procedures to be put in place both to realise assets and to distribute the net proceeds to creditors.[3] Consequently, a balance needs to be struck between the need for liquidators to comply with duties imposed while doing so in a cost-efficient manner.

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1 *Re Waller* HC Auckland CIV-2005-404-7051, 26 July 2006 at [22].
2 *Re Fisk* [2018] NZHC 2007 at [81].
3 *Flynn v McCallum (Re Roslea Path)* [2013] 1 NZLR 207 (HC) at [112].

[16] In addition, I am satisfied that, if I find in all of the circumstances here, that Dasset is the trustee of the Digital Assets, then the provisions of the TA 2019 will apply. Under s 8 of the TA 2019, the Court has a supervisory jurisdiction under both its inherent jurisdiction, and also under s 133, to supervise all matters relating to the administration of a trust. This s 133 allows a trustee to apply to the Court for directions concerning trust property or the exercise of any power by a trustee. Again, the Court has a broad discretion to give any directions it considers fit.[4] This includes matters in respect of substantial questions of law concerning the meaning or administration of a trust, and not just points of minor importance.[5] Importantly here, it must also be noted that, in determining whether to exercise a power either under the TA 2019 or within its inherent jurisdiction, the Court must have regard to the principle that a trust should be administered in a way that avoids unnecessary cost and complexity.[6]

Key issues to be determined

[17] Counsel for the Liquidators and Ms Cooper as amicus, have agreed to a joint list of issues to be determined. These are:

(a) Are the Digital Assets "property" and also property held on trust by the Liquidators for the Account Holders, or are they property owned by Dasset, rendering each Account Holder an unsecured creditor with a claim against Dasset for an amount equivalent to the value of their holding on the exchange?

(b) If the Digital Assets are held on trust for the Account Holders, are those assets held together in one trust for the benefit of all Account Holders, or on some other basis, such as separate trusts for each of the different cryptocurrencies comprising the Digital Assets, or individual trusts for each Account Holder?

(c) Should the Liquidators, as trustees or otherwise, be authorised to realise the Digital Assets by converting them to fiat currency, and to use those

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4 *Re PV Trust Services Ltd* [2017] NZHC 2957, [2018] 3 NZLR 160 at [40].
5 *New Zealand Māori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441 at [46].
6 Trusts Act 2019, s 4(b).

funds to make distributions to Account Holders and creditors, and cover the necessary and reasonable expenses of the liquidation as well as reasonable expenses of and incidental to the protection, preservation, recovery, management, administration, and distribution of the assets of Dasset or their proceeds?

(d) Should the Liquidators be permitted to follow the process for distribution set out at [6] of the Originating Application?

Are the Digital Assets company or trust property?

Liquidators' submissions

[18] Counsel for the Liquidators submit there are two distinct paths that lead to the conclusion that there is an express trust over the Digital Assets, namely:

(a) Dasset's terms and conditions established an express trust in respect of all funds deposited by Account Holders into the Company's Custodial Bank Account, meaning that all Account Holders' deposits were impressed with the trust. In using deposited funds to purchase cryptocurrency, Dasset was acting as agent or bare trustee on the instructions of an Account Holder, with the Digital Assets in effect a mixed fund made up of what is left of the assets purchased using trust funds. The Digital Assets are therefore held on trust for the benefit of Account Holders who deposited those funds.

(b) Dasset's terms and conditions evidence an express trust in respect of all cryptocurrency held by Dasset, whether deposited directly by an Account Holder or held as a consequence of transactions carried out on an Account Holder's instructions. The Digital Assets are what is left of that cryptocurrency, again in essence a mixed fund.

[19] In terms of the test for establishing a valid express trust, counsel for the Liquidators submit that there is certainty of intention. This is because, although there is no express declaration of trust over the Digital Assets, there is sufficient evidence

to show Dasset intended that fiat deposits made by Account Holders, and the cryptocurrency held in the Master Account, were held on trust for Account Holders. They say this evidence is the express wording of Dasset's terms and conditions, and Dasset's conduct. They draw comparison to the case of *Cryptopia,* in which the Court found the company there manifested its intent to hold the digital assets on trust through its conduct in creating the exchange without allocating to account holders public and private keys for the digital assets it commenced to hold for them.[7]

[20] Counsel also submit there is certainty of object, with the beneficiaries of the trust sufficiently certain. Those beneficiaries are every Account Holder who deposited New Zealand Dollars or cryptocurrency with Dasset and being someone who has not received either that property or its full value before the time of liquidation. Counsel note it might seem that there is some evidential uncertainty in determining precisely whether or not an Account Holder had a balance with Dasset that would make them a beneficiary as at the date of liquidation. But they say the Liquidators do have a complete record of all Account Holders from which beneficiaries can be identified. They propose a claims process whereby claiming Account Holders will provide evidence of their claims.

[21] Lastly, counsel for the Liquidators contend here that there is certainty of subject matter, namely what property is to be subject to trust obligation. They say the evidence establishes that the Digital Assets are what remains of the trust property, as a substitute for both the funds originally deposited into the Dasset Custodial Bank Account and the cryptocurrency transferred by Account Holders to Dasset to hold. The fact there has been misapplication or misappropriation of trust property is not evidence against the existence of a trust, but rather is evidence of a breach of trust. To the extent trust assets are mixed with Dasset's own property, and the mixed fund is depleted, Dasset will be treated as having withdrawn their own property first.

Amicus' submissions

[22] Ms Cooper agrees that the Digital Assets are held on trust for the Account Holders, either as the result of an express trust or alternatively by tracing of Account

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7 *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [153].

Holders' funds to the Digital Assets. She notes that Dasset's customer terms and conditions expressly provide that Account Holder funds paid into Dasset's Custodial Bank Account are held on trust, and that the language used with respect to the Digital Assets is largely consistent with an intention that the Digital Assets will belong to Account Holders. Although cl 10.2 of Dasset's terms and conditions might suggest that Account Holders do not have an unqualified right to withdraw their Digital Assets, there is nothing to suggest they cease to be the property of the Account Holder. Ms Cooper considers that similar evidence was held to show an intention to create a trust over account holders' cryptocurrency assets in *Cryptopia.* While she does note that in *Quoine,*[8] the Court of Appeal of Singapore held that the cryptocurrency trading platform there did not hold cryptocurrencies on trust for users, she argues the circumstances here are clearly closer to *Cryptopia,* in which *Quoine* was distinguished.

[23] Ms Cooper also submits that, even if the Court were to find there was no express trust over the Digital Assets, they are likely to be subject to tracing claims by Account Holders, having been acquired (at least in part) using funds from the Custodial Bank Account which were indisputably held in trust. She acknowledges the availability of a tracing claim assumes that Account Holders paid funds into the Custodial Bank Account and that those funds were used to acquire the Digital Assets. However, she accepts this may be an over-simplification in some respects, given some Account Holders may have deposited cryptocurrency directly. She notes also that the evidence suggests that over time Dasset's Custodial Bank Account changed, from ANZ to Crown to third party accounts. But she says that, given the terms and conditions do not identify a specific account, as long as deposits were made on the basis of the Terms and Dasset had control of the accounts, the funds remained held on trust. However, Ms Cooper acknowledged that if Account Holder funds in third party accounts were not used to acquire Digital Assets, but instead were used for other purposes, Account Holders would not have a beneficial interest in the Digital Assets. Rather, they would potentially have claims over any other property acquired using their funds, or unsecured claims for breach of trust.

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8 *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02.

[24] Overall, although some Account Holders may be in a different position to others, Ms Cooper agrees there is sufficient certainty of trust objects and subject matter to support the finding here of a trust or trusts.

Analysis

[25] The digital assets here, as I see it, are clearly "property" in terms of the CA 1993 for similar reasons and on the same basis as this Court found in *Cryptopia*. Also then, on the trust questions, to establish a valid express trust, three certainties must be satisfied, namely certainty of intention, certainty of subject matter and certainty of objects. As noted in *Re Baden's Deed Trusts (No 20)*,[9] so long as there is conceptual certainty, that is the words used by the settlor are sufficiently precise, evidential uncertainty (uncertainty around the facts) will not defeat a trust.[10]

Certainty of intention

[26] In terms of certainty of intention, the question is whether there is language or conduct which shows a sufficiently clear intention to create a trust,[11] that intention being of the trustee/settlor,[12] in this case Dasset.

[27] I agree with the submissions of counsel that there is evidence here to support certainty of intention. This is clear with respect to Account Holders' funds held in Dasset's Custodial Bank Account, as cl 19 of the customers' terms and conditions expressly provides that the funds contributed by Approved Users and stored in the Dasset Custodial Bank Account are "held on trust for the benefit of those Approved Users". As to the Digital Assets, the terms and conditions also make clear those Assets are considered by Dasset to be the property of the Account Holders. Clauses that provide particular evidence of this are:

> **3.1 Purpose of your Legal Tender Account**

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9 *Re Baden's Deed Trusts (No 2)* [1973] 1 Ch 9 (CA) at 19–20 cited in *Cryptopia,* above n 7, at [149].

10 See discussion of definition of those terms in *Re Tucks Settlement Trusts* [1978] Ch 49, [1978] 1 All ER 1047 at 59–60.

11 *Cryptopia,* above n 7, at [139] citing JD Heydon, MJ Leeming and KS Jacobs *Jacob's Law of Trusts in Australia* (8th ed, LexisNexis, Sydney, 2016) at [5.02].

12 Andrew Butler "Creation of an Express trust" in A Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) at [4.2.2].

You can use *your* Legal Tender Account to fund the purchase of Digital Currencies, and to receive the proceeds of sale of *your* Digital Currencies, using the Services.

4.1 Supported Digital Currencies

Your Digital Currency Wallet allows you to send supported Digital Currencies to, and to receive and store supported Digital Currencies from, third parties on *your instructions*, using the Services.

4.5 Your confirmations in relation to your Digital Currency Wallet

…Dasset will process *your* Transactions in *accordance with your instructions*…

5. Dasset Ledger

Dasset maintains a private exchange ledger (the Dasset Ledger) to track each Approved User's Legal Tender Account balance and the Digital Currencies reflected in *his or her* Digital Currency Wallet.

6.5 Transaction Records

Dasset maintains the records of these offers in our Order Book. When Dasset's trading engine matches the buy and sell offers in our order book, we record the trade on our Dasset Ledger. This *transfers ownership* of the seller's traded Digital Currencies to the relevant buyer.

10.2 Consequences of a Suspension Event

…If Dasset considers that it is practicable and prudent for it to do so in the circumstances of the Suspension Event, and in the view of the interests of Dasset and its Approved Users (or the affected Approved Users), it will give you the opportunity to withdraw *your Digital Currencies* from *your Digital Currency Wallet* and transfer them to another service (that is, a service which is not provided by Dasset).

(Emphasis added)

[28] Similar language was found in *Cryptopia*. References to "you" and "your" were considered to support the establishment of an express trust.[13] I agree with Ms Cooper that cl 10.2 suggests that Account Holders do not have an unqualified right to withdraw their Digital Assets in the event of a suspension event. But this does not mean the Digital Assets cease to be the property of the Account Holders. The fact this property was held by Dasset on trust for the Account Holders is also supported by references to a "custodial service" in the terms and conditions. In *Cryptopia* it was noted that a "custodian of property" is someone who is responsible for managing real

[13] *Cryptopia,* above n 7, at [172].

or personal property, with their duties to include securing, safeguarding and maintaining the property in the condition received and accounting for any changes in it.[14]

[29] As pointed out by counsel for the Liquidators, the financial statements for Dasset prepared by Deloitte from 2019 to 2021 also record that the Account Holders' cryptocurrency is held "in trust". Additionally, a former director of Dasset, Mr Stranjar, informed the Liquidators that Account Holder funds and cryptocurrency were held on trust, with operational and technical processes in place to enforce this.

[30] Based on the above, I consider there is sufficient evidence here to support certainty of intention to hold the Digital Assets on trust for the Account Holders. It is evident that Dasset did not consider itself to be the owner of the Digital Assets, but rather that it was managing those assets on behalf of the Account Holders. I agree the decision in *Quoine* can be distinguished in the present case. Quoine's conduct pointed away from an intention to create a trust. This was so, given in that case it was an active market-marker that lent cryptocurrency to other market-makers, it did not attempt to ensure it held cryptocurrency in its wallets to match the loans, and it had active market makers rather than investors as customers.[15] It is true that in both the present case and in *Quoine* the customers' assets were held in a mixed pool with the company's own assets. However, I consider the distinguishing factor is that here, this mixed pool arose due to Dasset's mismanagement, rather than because it considered it had ownership of the Digital Assets. This is supported by the representations Dasset made to Account Holders, including the assurance that their accounts were linked to a supposed "Legal Tender Account" and "Digital Currency Wallet".

Certainty of object

[31] Certainty of object refers to certainty around the beneficiaries, with a valid trust needing to have clearly identifiable beneficiaries who are both entitled to the trust property, and to enforce the trust.[16] The fact that there may be some evidential

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14 At [173] citing Bryan A Garner *Black's Law Dictionary* (10th ed, Thompson Reuters, Eagan, 2014).
15 At [165].
16 Butler, above n 12, at [4.2.4(1)].

uncertainty in establishing whether a given person falls within the defined class of beneficiaries does not render the trust invalid.[17] I acknowledge there may be some uncertainty here around whether a particular Account Holder had a specified balance with Dasset that would make them a beneficiary at the time of liquidation. But given the Liquidators have a complete record of all Account Holders from which beneficiaries can be identified, I am satisfied overall there is sufficient certainty of object to support the existence of a trust.

Certainty of subject matter

[32] Certainty of subject matter concerns certainty as to the property that is held on trust.[18] I agree with counsel that this requirement is easily satisfied here. The Digital Assets and the remaining funds deposited by the Account Holders in the Dasset Custodial Bank Account constitute the remainder of the trust property.

[33] Accordingly, I consider the requirements for an express trust over the Digital Assets and funds in the Dasset Custodial Bank Account are met. And it follows therefore that I do not need to address Ms Cooper's tracing claims argument.

Conclusion

[34] I conclude that the Digital Assets are held on trust by the Liquidators for the Account Holders.

In what form are the Digital Assets held on trust?

Liquidators' submissions

[35] Counsel for the Liquidators contend that the Digital Assets should be found to be held in one trust, with each Account Holder a co-beneficiary of that trust with a *pari passu* interest proportionate to their claim/holding of Digital Assets on the exchange. They suggest such a trust came into existence on 24 April 2017, when Dasset was incorporated, and that it is a bare trust, so that Dasset's duty as trustee is to act on the instructions of the beneficiaries. They say the Court should authorise the

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17 At [4.2.4(3)].
18 At [4.2.3].

Liquidators to act as trustees in respect of this trust and the Digital Assets on the terms sought in the Originating Application.

[36] Counsel acknowledge that this result is different to *Cryptopia*. There, the Court found the cryptocurrency was held by the liquidators in multiple trusts, with there being a separate trust for each type of cryptocurrency. That approach is not possible in these circumstances according to the Liquidators, given there is not a comprehensive and accurate database of information to identify and establish each investor's exact holding of a particular cryptocurrency, as was the case in *Cryptopia.* Nor are there sufficient assets to allow the Liquidators to investigate the company's affairs. They say too that in the present case, there is no practical way of conducting the tracing analysis needed to establish Account Holders' individual proprietary claims.

[37] Counsel note the traditional approach to allocation of trust assets held in a mixed fund, namely the 'first-in-first-out' rule, has now been recognised as unfair.[19] They consider the Court's determination in the present case must instead be driven by the fact that it is difficult, if not impossible, here to trace Account Holder claims in a thorough way, as was done in *Cryptopia*. An argument is advanced that to achieve substantial justice between innocent beneficiaries, the only "rational mode of distribution" is one where the assets are divided based on the contribution of each investor.[20] This means a *pari passu* sharing on a pragmatic basis is to occur. Counsel contend this case falls into the first category of *pari passu* sharing identified in *Priest v Ross Asset Management Ltd (in liq),* namely sharing directed as a result of a pragmatic decision where tracing is not possible to allocate losses amongst those who have suffered a common misfortune.[21] They consider 'one pool, *pari passu* sharing' in this case is consistent with previous application of the relevant principles, and is appropriate to do substantial justice between the parties in all the circumstances, as well as being consistent with the Liquidators' duties.

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19 See *Graham v Arena Capital Ltd (in liq)* [2016] NZHC 194 at [61].

20 At [17].

21 *Priest v Ross Asset Management Ltd (in liq)* [2016] NZHC 1803, (2016) 4 NZTR 26-016 at [74](a).

[38] Alternatively, counsel suggest that the same outcome of *pari passu* sharing can be achieved by applying principles of substitution and tracing.

[39] According to the Liquidators, the trust is a bare trust, as the terms and conditions do not give Dasset any discretion. It is instead obliged at all times to act in accordance with Account Holders' instructions to sell, purchase and trade cryptocurrency using its services. Counsel say the findings in *Cryptopia* were based on similar evidence. In *Cryptopia* the liquidators were granted the authority to deal with trust assets as trustees, and ultimately to make distributions to account holders. Accordingly, it is said that similar orders should be made in this case.

Amicus' submissions

[40] Ms Cooper submits that while the existence of different Custodial Bank Accounts at different times raises the question of whether there may be a separate trust for the Digital Assets acquired with funds from each account, Mr Moore's evidence does suggest it may not be possible or practical here to identify which Digital Assets were acquired with funds from which particular account. She notes also that the evidence shows Dasset did not apply Account Holders' funds or deal with Digital Assets in accordance with Account Holders' instructions, and did not maintain accurate records. Tracing individual interests here therefore would be both impractical and prohibitively expensive. Accordingly, the position here, Ms Cooper acknowledges, is different to *Cryptopia*. In that case, very substantial assets remained and were capable of being reconciled against the database of Account Holders' holdings.

[41] In conclusion, Ms Cooper agrees with the Liquidators that the Digital Assets are effectively subject to a single trust in which Account Holders have beneficial interests according to their respective contributions. However, she does note the potential qualification identified by the Liquidators, namely that some Account Holders' funds may not have been used to acquire Digital Assets, in which case those Account Holders would not have any beneficial interest in the Digital Assets. Ms Cooper agrees with the Liquidators on the date the trust came into existence, that

Dasset was effectively a bare trustee of the Digital Assets, and that the Liquidators should be permitted to act as trustees in respect of those Digital Assets.

Analysis

[42] As I understand the position, the "old" approach to a case in which there was difficulty or an inability to trace investor's funds adopted a 'first in, first out' approach. Under that approach, earlier investment monies were deemed to have been those first used or lost, and therefore later investors were to be paid in full with any residue of funds divided amongst earlier investors.[22] Such an approach would not only cause difficulties here, given the poor record keeping of Dasset, but as I see the position, would also be unfair, given it discriminates on the basis of the timing of investments. It has accordingly been rejected in other cases, with the Court in *Graham v Arena Capital Ltd* finding that where each group of investors innocently contributed to a mixed fund, there "should be no reason to favour the interests of one over the other".[23] Instead, in such cases a *pari passu* approach (treating the claims of each claimant equally) is generally the approach to be taken now.

[43] I see no reason to depart from that practice in this case. Given the scarce resources available to the Liquidators, and the poor record keeping of Dasset, it is clear to me that this is a case in which tracing of each individual Account Holders' funds and Digital Assets would be highly impracticable, if not impossible. Accordingly, the outcome achieved in *Cryptopia,* where there were separate trusts for each category of cryptocurrency, is not workable in the present case. The *Cryptopia* outcome was viable only because of the considerable resources available to the liquidators in that case. These were well over $1 million, and the reliable records held by Cryptopia were critical too given their thoroughness and accuracy.

[44] In my view, a finding in the present case that all Digital Assets are held in one trust, with each Account Holder being a co-beneficiary of the trust with a *pari passu* interest proportionate to their holding of Digital Assets on the exchange, will "do substantial justice between" all the Account Holders.[24] I agree that the circumstances

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22 *Graham v Arena Capital Ltd,* above n 19, at [45] citing *Clayton's Case* [1816] 35 ER 781.
23 *Graham v Arena Capital Ltd,* above n 19, at [57].
24 *Re Registered Securities Ltd (in liq)* [1991] 1 NZLR 545 (CA) at 555.

here are similar to other cases where such an approach has been taken. These include *Re Registered Securities Ltd* where the company failed to allocate investment funds to particular mortgage securities for a large percentage of investors, with most investor funds unable to be traced and some funds misused resulting in a significant shortfall.[25] There may be some Account Holders whose funds actually may not have been used to acquire any Digital Assets, and therefore who do not have a beneficial interest. However, when the Liquidators have limited resources at their disposal, I consider it expedient here to treat all Account Holders as having an interest in the Digital Assets.

[45] A pragmatic and sensible approach, as I see the position, is also to set the date at which the trust came into existence as Dasset's incorporation date of 24 April 2017. This aligns with the findings in *Cryptopia*.[26] The same can be said for authorising the Liquidators to act as trustees in respect of the trust and the Digital Assets.

[46] As to whether the trust is a bare trust, I note that the only potential indicator against such a finding is cl 10.2 of Dasset's customer terms and conditions, which is noted above at [26]–[27]. This cl 10.2 provides that in a suspension event, only with Dasset's permission can an Account Holder withdraw their Digital Assets and transfer them to a different service. A bare trustee, the definition of which is helpfully explored by Duffy J in *Body Corporate 185960 v North Shore City Council,*[27] holds property in trust for the absolute benefit and at the absolute disposal of the beneficiaries. But cl 10.2 might be seen as suggesting that the Digital Assets were not held at the absolute disposal of the beneficiaries. However, this limitation is engaged only in the event that Dasset suspends its services. Outside such events, it appears the Digital Assets are indeed held at the absolute disposal of the Account Holders, with Dasset obliged to act in accordance with the Account Holders' instructions to sell, purchase and trade cryptocurrency using its services. Therefore, since conditional disposal is the exception, rather than the rule, I do not consider this counts against the trust being considered as a bare trust.

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25 See other examples *Re Waipawa Finance Company Ltd (in liq)* [2011] NZCCLR 14; and *Graham v Arena Capital,* above n 19.

26 *Cryptopia,* above n 7, at [155].

27 *Body Corporate 185960 v North Shore City Council* (2008) 2 NZTR 18-032 at [48]–[57].

Should the Liquidators be authorised to realise the Digital Assets?

Liquidators' submissions

[47] Counsel for the Liquidators submit that the Digital Assets should be allowed to be converted to fiat currency, in part at least, to cover the costs of the Liquidators in carrying out their duties. They note that such an order has already been made on an interim basis by Isac J, subject to a cap. Reference is made to s 81(2) of the TA 2019 which provides that a trustee may be reimbursed from trust property when acting reasonably on behalf of the trust. Counsel also rely on the findings of McGechan J in *Re Newsmakers International Ltd (in liq)* that when a liquidator is forced to carry out work in relation to assets held on trust, the Court has an inherent jurisdiction to allow reasonable costs against those assets.[28]

[48] As an alternative to converting the Digital Assets to fiat currency amongst other things for distribution to Account Holders and creditors, the position in *Cryptopia* is noted where a distribution in specie of cryptocurrency was most appropriate. This can be distinguished from the present case. The Liquidators say this is because unlike in *Cryptopia,* there is no way here to practically identify which Digital Assets are beneficially attributable to which Account Holders. While in theory in specie distribution could be attempted by dividing tokens of different cryptocurrency types into tiny fractions, this would likely result in some Account Holders arbitrarily receiving more valuable property than others, because the tokens are not the same. Doing so would also incur avoidable time and cost, which would otherwise be disproportionate to what is said to be the limited value of the Digital Assets. Their duty as Liquidators, they note is to act in a responsible way in the administration of the trust, and to administer it in a way that avoids unnecessary cost and complexity. It is argued this must heavily favour permitting conversion into fiat currency for distribution here. Counsel also point out there is also no opposition to this in the present case.

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[28] *Re Newsmakers International Ltd (in liq)* HC Napier M153/87, 24 February 1994 at 6.

Amicus' submissions

[49] Ms Cooper in her submissions agrees that the Liquidators should be authorised to convert the Digital Assets to fiat currency to allow the proceeds to be applied to their costs and to enable distribution of any balance to Account Holders. She does note that trust assets do not initially fall within a liquidator's right to reimbursement under s 278 of the CA 1993 as they are not assets of the company. While she observes the Court may order the Liquidator's costs incurred in relation to trust assets be met out of those assets, she says such assets are not usually available to meet the general costs of the Liquidation. However, Ms Cooper points to cases where the Court has directed that liquidators are entitled to recover all their costs from a common pool of trust and non-trust assets. These include *Graham v Arena Capital Ltd (in liq)*[29] and *Re Fisk.*[30] She accepts there are differences between the circumstances in those cases and the circumstances here. However, she says it may still be impractical and disproportionate to any potential benefit to Account Holders for any general costs of the liquidation to be identified and managed separately from the cost of dealing with the trust assets. Given the Digital Assets represent the large majority of assets held and the Account Holder's claims are the large majority of total claims, Ms Cooper concludes that any unrelated costs may be minimal.

[50] Ms Cooper notes the Liquidators do not appear to suggest that the proceeds of the Digital Assets should also be available for distribution to general creditors as well as Account Holders. She submits that unless there is a surplus remaining after the claims of the Account Holders have been met, neither the Digital Assets nor their proceeds should be used to make distribution to creditors who are not Account Holders and do not have a beneficial interest in the Digital Assets. She says while orders were made in *Re Fisk* and *Graham v Arena Capital* permitting ordinary creditors to benefit from trust assets, in this case, where all Digital Assets are identifiable as trust assets and there is likely to be a substantial shortfall in meeting Account Holders' claims, it is difficult to justify them being applied to meet obligations to creditors.

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29 *Graham v Arena Capital Ltd (in liq)* [2017] NZHC 973.
30 *Re Fisk,* above n 2.

Analysis

[51] I accept that conversion of the Digital Assets to fiat currency (currency issued by a government) is appropriate in this case. There is a clear lack of clarity around which cryptocurrency belongs to which Account Holder. Significant expense will also be incurred in dividing up each token, compared to converting the Digital Assets to New Zealand Dollars and, after proper costs are paid, distributing those funds amongst the Account Holders. As noted by counsel and the amicus, although specie distribution was ordered in *Cryptopia,* that was because it was possible to identify which token belonged to which account holder without exhausting the assets of the company.

[52] However, as raised by Ms Cooper, there are issues with the Liquidators being allowed to apply the proceeds of sale of the Digital Assets to be used to cover their costs of liquidation. Section 278 of the CA 1993 provides that the expenses and remuneration of the liquidator are payable "out of the assets of the company". But the Digital Assets are not the assets of the company—as outlined above they are the property of the Account Holders held on trust by the Liquidators. While s 81(2) provides a trustee is entitled to reimbursement for any expense or liability incurred when acting reasonably on behalf of the trust, that only applies to expenses incurred when acting as the trustee, not as a liquidator. I consider that provision is a codification of the inherent jurisdiction outlined in the *Re Newsmakers International Ltd* case cited by counsel for the Liquidators, and accordingly that case does little to answer the issue here.

[53] I agree with Ms Cooper that the circumstances of this case do not exactly mirror those cases where liquidators have been allowed to recover such costs. It was permitted in those cases because company and trust assets were in a common pool and determining which assets were company assets was uneconomical.[31] However, I observe that in *Re Fisk,* the Court noted "the only available source of payment for [the liquidator's actual and reasonable costs] is the common fund".[32] That is arguably also the case here. Additionally, a capped interim order allowing some of the Digital Assets to be converted and applied towards the Liquidator's costs has already been granted

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31 *Graham v Arena Capital Ltd,* above n 29, at [46]–[47]; and *Re Fisk,* above n 2, at [149].
32 *Re Fisk,* above n 2, at [149].

by Isac J. I also accept Ms Cooper's submissions that, given the vast majority of the Liquidator's expenses will be incurred in relation to managing and distributing the Digital Assets, and it will very likely be the case that the company's assets will be exhausted before any distributions can be made to creditors other than the Account Holders, any costs unrelated to the trust may be minimal. Accordingly, these issues may largely be academic. I am therefore of the view here that it is appropriate for a direction to be made that the Liquidators are able to meet all reasonable costs from the total pool of assets, including the Digital Assets.

Should the proposed process for distribution set out at paragraph 6 of the Originating Application be followed?

Submissions

[54] Counsel for the Liquidators submit that the proposed process is consistent with the usual process followed in liquidation. The proposed process is, in brief, that:

(a) the Liquidators will give notice that claims must be received by a certain date, and late claims may be disregarded for the purpose of distribution;

(b) the Liquidators will determine whether a claim is admitted or not;

(c) the available assets will be used to meet the Liquidators' own costs and the costs of the liquidation, and thereafter be distributed rateably among the Account Holders.[33]

Analysis

[55] Having reviewed the procedural directions sought, I largely consider them appropriate, and in line with directions made in similar cases such as *Cryptopia.* The exception is the order sought that the Anti-Money Laundering and Countering Financing of Terrorism Act 2008 (AML Act) does not apply to the distribution of the proceeds of any Digital Assets or other assets held by the Company. While I accept

[33] Given too, as I understand it, that no surplus company assets will be available for creditors.

that Dasset is no longer a reporting entity for the purposes of the AML Act due to the fact it is in liquidation,[34] that does not mean the AML Act does not apply at all to the distribution of the Company's assets. Accordingly, I am not willing to make the orders sought, and note this is unlikely to cause issues, when the Liquidators have stated they have nonetheless designed their identity verification process in line with the standards required by the AML Act.

[56] The orders set out at [1]–[21], [23] and [26]–[27] of the Originating Application are therefore granted, with the further order I note below at [59].

Conclusion

[57] I consider the directions sought by the Liquidators to be appropriate in the circumstances, and in compliance with their duties both as liquidators and as trustees.

[58] The application is granted.

[59] Orders are now made as set out at paragraphs [1]–[21], [23] and [26]–[27] of the Originating Application dated 12 June 2024, with paragraph [24] of that application also deleted and substituted therefore by the following:

> [25] That leave is reserved for the liquidators to apply to vary these orders or for such further orders as are necessary.

Gendall J

Solicitors:
Minter Ellison Rudd Watts, Auckland for Applicants

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[34] Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011, r 22(1)(a) and (2).