



## The proceedings

[1] My judgment of 6 September 2023 outlines a summary of the context of these proceedings:<sup>1</sup>

[1] Cryptopia Ltd (Cryptopia) is a company that ran a cryptocurrency exchange. In January 2019, there was a serious hack of Cryptopia's cryptocurrency and the loss of some \$30 million of its cryptocurrency holdings. In May 2019, the shareholders of Cryptopia appointed Mr David Ruscoe and Mr Malcolm Moore as liquidators of the company under s 241(2)(a) of the Companies Act 1993. Mr Ruscoe and Mr Moore are chartered accountants, partners in the firm Grant Thornton New Zealand Ltd, and licenced insolvency practitioners. The liquidation involves complex arrangements regarding around 370 functioning cryptocurrencies owned by some 960,000 holders of accounts with positive balances in around 180 countries.

[2] On 8 April 2020, the High Court determined that each type of cryptocurrency is intangible property held by Cryptopia as trustee for the benefit of all the account holders of that currency. Cryptopia itself is a beneficiary of some of those trusts. The High Court's judgment sets out a more detailed account of the factual background of the liquidation.

[2] The liquidators of Cryptopia have applied for directions about distribution of the cryptocurrency assets. On 13 November 2023, Epic Trust Ltd (Epic Trust) sought to make submissions on the application. Epic Trust is owned by Mr Victor Cattermole. As explained in my judgment of 15 November 2023, Epic Trust had not filed and served a notice of appearance, an application to be joined, or a notice of opposition to the application for directions.<sup>2</sup> I declined to hear Epic Trust at that hearing. I noted the evidence provided to date raised doubts about whether Epic Trust really had an interest in the proceedings.<sup>3</sup>

[3] On 14 November 2023, Epic Trust filed and served an application to be joined as a respondent and a notice of opposition to the application for directions with supporting affidavits.<sup>4</sup> I heard the application to be joined, which was opposed by the liquidators, on 11 December 2023.

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<sup>1</sup> *Ruscoe v Houchens* [2023] NZHC 2490 at [1]–[2] (footnotes omitted), citing *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809.

<sup>2</sup> *Ruscoe v Houchens* [2023] NZHC 3224 at [19].

<sup>3</sup> At [21].

<sup>4</sup> At [22].

## Law of joinder

[4] The High Court Rules 2016 (the Rules) provide, relevantly:

### 4.1 Limit on parties

The number of persons named or joined as parties to a proceeding must be limited, as far as practicable, to—

- (a) persons whose presence before the court is necessary to justly determine the issues arising; and
- (b) persons who ought to be bound by any judgment given.

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### 4.56 Striking out and adding parties

- (1) A Judge may, at any stage of a proceeding, order that—
  - (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
  - (b) the name of a person be added as a plaintiff or defendant because—
    - (i) the person ought to have been joined; or
    - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
- (2) An order does not require an application and may be made on terms the court considers just.

[5] In *Mainzeal Corp Ltd v Contractors Bonding Ltd*, where the High Court held that the proposed party's rights or liability in respect of the subject matter of the proceeding must be directly affected.<sup>5</sup> In *Newhaven Waldorf Management Ltd v Allen*, the Court of Appeal observed that New Zealand's approach to joinder is regarded as liberal but the Court ultimately has discretion to decide joinder applications.<sup>6</sup>

## Epic Trust's application for joinder

[6] The grounds for Epic Trust's application for joinder are that there is no named respondent to the proceedings, no counsel appointed to represent the interests of

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<sup>5</sup> Jessica Gorman and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR4.56.09] citing *Mainzeal Corp Ltd v Contractors Bonding Ltd* (1989) 2 PRNZ 47 (HC).

<sup>6</sup> *Newhaven Waldorf Management Ltd v Allen* [2015] NZCA 204, [2015] NZAR 1173 at [44].

beneficiaries of the cryptocurrency trusts of Cryptopia, no representation of beneficiaries, and Epic Trust has a legitimate interest to be heard as respondent, given it is a beneficial owner by virtue of sale and purchase of 2,289 beneficiaries' interests.

[7] If joined, Epic Trust would oppose the liquidators' application for directions on the grounds that the liquidators should disclose to the beneficiaries full particulars of the trusts and the number of coins of each beneficiary at the date of the hack of Cryptopia on 1 January 2019, at the date of appointment of liquidators on 14 May 2019, and at the date of the liquidators' application.

### **Submissions**

[8] Mr Henry, for Epic Trust, submits:

- (a) Epic Trust is an undisputed owner of Cryptopia cryptocurrencies as a purchaser for value from a group of beneficiaries, specifically and namely Mr Joshua Stevenson. The agreements are under an arbitral rule. Epic Trust is appointed as agent until settlement and there is a right of subrogation to Mr Stevenson's claims in the liquidation. Accordingly, Epic Trust has a right to appear and be named in the proceeding and to make applications, be bound by the Court's decision, and to appeal.
- (b) The proceeding is not a liquidation proceeding but a trustee seeking orders for distribution of trusts. The trustees must disclose to beneficiaries the assets held in the trusts under s 51 of the Trusts Act 2019, for the beneficiaries to formulate their claims. None of the beneficiaries are represented before the Court.
- (c) The beneficiaries' agreement with Cryptopia was fundamentally breached by Cryptopia whenever it stopped operating the trading platform, entitling a beneficiary to cancel the agreement under s 37(1)(c) of the Contract and Commercial Law Act 2017 (CCLA) and Epic Trust to claim relief under s 48(b). So Cryptopia's terms and conditions with the beneficiaries, including the prohibition against

assignment, are no longer valid. Otherwise, the dispute resolution clause would also be valid, contrary to the liquidators' proposed application.

- (d) Epic Trust denies its acquisition of beneficial interests for the COG digital coins in Mr Cattermole's metaverse is a scam. Those agreements are for the beneficiaries to assess and to decide whether to accept or reject. Mr Cattermole's conviction in 2002 was not a minor crime and does not provide any proper basis for assuming he is involved in digital currencies in any similar way now. Epic Trust is not trying to be irresponsible in any way.

[9] Mr Barker, for the liquidators, submits:

- (a) Epic Trust LLC is a one-euro Montenegrin company. There is no evidence on which Mr Henry can properly rely to say that Epic Trust has a relevant interest. It is not an account holder according to Cryptopia's and the liquidators' records. There is a genuine dispute as to whether Mr Stevenson has a claim. Even if he does, the purported assignment of his claim to Epic Trust is not valid. An agent has no ability to bring proceedings in its own name. The terms and conditions of the agreement between cryptocurrency owners and Cryptopia prohibit assignment and there is no evidence of cancellation. It is not obvious that term should be implicitly disapplied just because the exchange is no longer effective. If it were disapplied, the management of accountholder claims and verification would be even more complicated, which is not a cost that should be borne by the general body of account holders.
- (b) In the liquidators' verification process, if an account holder is unable to recall the email address they used, there are seven to eight other indicators that can be used to satisfy the liquidators they are the account holder. An approximation of the balance of the holding is one of them.

So, providing the balance to a claimant, which is the point of Epic Trust's wish to be joined, could compromise the identification process.

- (c) It is not necessary for Epic Trust to be joined for the liquidators' application to be determined. No one is named to represent the account holders because all issues could be spoken to by: counsel for the liquidators; Mr Watts KC as counsel assisting the Court regarding the interests of account holders; and Ms Cooper KC as counsel assisting the Court regarding the interests of creditors. All account holders were served with the application and leave was reserved for them to appear or apply to vary or rescind any orders made.
- (d) The Court should be reluctant to entertain any application from Epic Trust because Mr Cattermole is its shareholder. He has been held in contempt by the High Court on 7 July 2021 for improperly obtaining and retaining confidential information about Cryptopia including the email addresses of account holders. He appears to have breached the Court order in relation to the non-use of that information. The liquidators are concerned the offer to purchase account holders' cryptocurrencies may have been misleading and deceptive. Furthering Epic Trust's business venture is not a direct and direct interest in the relief sought by the liquidators.

[10] Mr Watts, as counsel assisting the Court, has approached his role with a view to the generality of account holders or the hypothetical account holder. He submits:

- (a) Trustees owe obligations only to parties who are truly beneficiaries and commit a breach of trust if they part with trust property in favour of those who are not, unless authorised by the terms of the trust. At equity trustees are obliged to provide information relating to the trust only once they are satisfied that the parties asking for it are indeed beneficiaries.<sup>7</sup> The Trusts Act has probably not altered this position. So a trustee is entitled to be satisfied that assignment of a beneficial

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<sup>7</sup> *O'Rourke v Darbishire* [1920] AC 581 (HL) at 620.

interest is adequately proven, and that an agent is entitled to act as agent, before being required to act on it. It is not necessarily inappropriate for a liquidator or trustee, in identifying claimants or beneficiaries, to use their knowledge of the size of the holding as one indicator of identification.

- (b) It is a difficult question whether there are grounds for arguing the non-assignment clause in the purported sale and purchase agreement ceases to apply. There may be an implied term that assignment will become possible if the established method of transfer by computer has become impracticable. But then the assignee should bear the costs of Cryptopia satisfying itself as to the validity of each assignment.
- (c) It is not clear that Parliament envisages s 43 of the CCLA might confer rights that are directly inconsistent with the contract. Cancellation operates prospectively and does not rescind a contract.
- (d) The question of jurisdiction could be important but he has not researched whether a clause in an agreement that chooses a non-existent jurisdiction would be severable or the entire agreement would not be recognised.

[11] Ms Cooper, as counsel assisting the Court in relation to the interests of creditors, does not consider the application has any potential effect on the position of the unsecured creditors and does not have additional issues to raise.

[12] GYN.io Ltd, which has no association with Epic Trust, takes no position on the outcome of the application. But Ms Bercovitch, for GYN.io Ltd, submits that the application turns on its particular facts. I accept her submission, subject to any future argument, that it may be appropriate and valid for account holders or creditors to be able to assign or sell their claims in the liquidation, irrespective of the outcome of this application.

### **Should Epic Trust be joined?**

[13] In support of the proposition that Epic Trust has a claim as a beneficiary of a Cryptopia cryptocurrency trust, Mr Henry points to a sale and purchase agreement with Mr Stevenson exhibited to Mr Cattermole's affidavit of 14 November 2023 and his evidence that it is a binding agreement.

[14] However, Epic Trust has not proven, on the balance of probabilities, that Mr Stevenson himself has a claim to Cryptopia cryptocurrency assets. In an affidavit of 26 July 2023 in related proceedings, Mr Stevenson asserted he is an account holder in Cryptopia and stated his holdings of cryptocurrency. But Mr Stevenson acknowledged, in an affidavit of 6 September 2023, in a separate related proceeding, that he has not submitted his claim to Cryptopia cryptocurrency for verification through the process established by the liquidators. That verification process would be substantively similar whether it relates to a claim in the liquidator or a claim as a beneficiary. I accept the submission of Mr Watts and Mr Barker that it would be a breach of trust for a trustee to distribute trust assets to the wrong person at equity and that the Trusts Act does not change that. So the liquidators need to be satisfied they are being distributed to the correct person. And the Court needs to be satisfied that Mr Stevenson has a claim arising from a Cryptopia cryptocurrency in order to be satisfied that assignment of that claim gives Epic Trust a direct interest in this proceeding.

[15] Secondly, and more significantly, there is no evidence Mr Stevenson has assigned to Epic Trust any claim he has arising from Cryptopia cryptocurrency assets. The purported sale and purchase agreement from Mr Stevenson to Epic Trust contains no signature by Mr Stevenson. Mr Henry objects that, in law, an electronic signature is sufficient. But, in fact, there is no electronic signature on this document either. Section 209 of the CCLA defines an electronic signature to mean "a method used to identify a person and to indicate that person's approval of that information".

[16] Epic Trust has not provided any evidence from Mr Stevenson himself as to whether he has assigned any claim. But he is the fourth interested party to this proceeding, and is an interested party in other proceedings, in his own right. Indeed, he is currently appealing the judgment of 24 October 2023 in his own name, as a



purported beneficiary. That suggests he does not consider he has assigned his claim. There is no evidence that he has assigned a claim.

[17] An exchange of correspondence between counsel raised the possibility that the purported assignment under the sale and purchase agreement, which is expressed to occur upon payment by Epic Trust, is not yet complete and so there is an equitable interest. But there is no evidence of that before the Court either and Mr Henry did not make specific submissions on that.

[18] There is even dispute as to whether Mr Stevenson is lawfully able to assign any claim he has status in relation to Cryptopia cryptocurrency. Clause 18.2(b) of the terms and conditions between Cryptopia and account holders prohibits assignment. There is no evidence of the cancellation of the contract by Mr Stevenson that Mr Henry submits is possible. And it is not clear that would affect the trust relationship between them in any case.<sup>8</sup> But I do not decide this because I consider it is clear that there is no evidence Mr Stevenson has assigned any claim.

[19] Similarly, I do not need to decide on the validity of the purported sale and purchase agreement between Epic Trust and Mr Stevenson. Clause 6(a) expresses that agreement to be subject to the “laws of the Principality of Cogito ... to the exclusion of all other jurisdictions.” Cogito is a metaverse created by Mr Cattermole. It is not a foreign jurisdiction and its “law” is not foreign law recognised by this Court. Its “constitution” of April 2023 provides ultimate decision-making power to Mr Cattermole as Crown Prince of Cogito. There is no evidence of Cogito’s “laws”, including its “laws” of assignment of interests, even if this Court were to recognise the agreement as governed by those “laws”, which I do not.

[20] Mr Henry also says Epic Trust is acting as agent for Mr Stevenson. But that relies on the validity of the unsigned purported sale and purchase agreement. And even if it was signed and valid, as Mr Barker and Mr Watts submit, an agent has no ability to bring proceedings in its own name but must bring proceedings in the name

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<sup>8</sup> See also *Ruscoe v Cryptopia Ltd (in liq)*, above n 1, at [185]–[186].

of the principal.<sup>9</sup> Epic Trust has not done so, and has declined to provide a list of the account holders for whom it says it is acting as agent.

[21] So Epic Trust has failed to demonstrate its rights are directly affected by the proceedings. I also accept that it is not necessary for Epic Trust to be joined in order for the liquidators' application to be determined. As I effectively held in the judgment of 24 October 2023, I consider the liquidators' counsel, the two counsel assisting the Court, and the ability of any beneficiary demonstrating a legitimate interest to be joined and be heard, provides sufficient advice to the Court to determine the application.<sup>10</sup> And the submission Epic Trust wishes to make if it were joined, that the liquidators should disclose to the purported beneficiaries full particulars of their asserted holdings of cryptocurrency before verifying they are beneficiaries, has little obvious merit.

## **Result**

[22] I decline Epic Trust's application for joinder.

Palmer J

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<sup>9</sup> See *Re application by Cron (for appointment as litigation guardian for Mauger)* [2020] NZHC 1074.

<sup>10</sup> *Houchens v Ruscoe* [2023] NZHC 2969.