



## NZ High Court issues landmark judgment on whether cryptocurrency is “property”

**David Ian Ruscoe & Malcolm Russell Moore v Cryptopia Limited (in liquidation) [2020] NZHC 718 (“Cryptopia”)**

- 1 On 8 April 2020, the High Court of New Zealand issued a landmark judgment directly addressing the questions of whether cryptocurrency is “property”, and whether that can properly be the subject of a trust.
- 2 *Cryptopia* answers both questions in the affirmative. It also appears to be the first common law decision that has comprehensively considered the question of whether cryptocurrency is “property”<sup>1</sup>.
- 3 *Cryptopia* is therefore likely shape how Singapore consider the issue the next time it arises for consideration.

### The facts

- 4 In January 2019, Cryptopia's servers were hacked. Somewhere between 9% to 14% of the cryptocurrency on its servers was stolen. After the hack, the remaining cryptocurrency on Cryptopia amounted to approximately \$170 million.
- 5 In May 2019, the shareholders of Cryptopia decided to put the company into liquidation. The liquidators of Cryptopia then sought the New Zealand High Court's assistance in determining the categorisation and distribution of assets in the liquidation.
- 6 On one hand, the account holders of cryptocurrency on Cryptopia asserted that Cryptopia was holding the cryptocurrency for them on trust. They argued that accounts on a crypto-platform were different from

bank accounts. The latter consists of a creditor-debtor relationship; the former is a trustee-beneficiary relationship. Therefore, when Cryptopia was put into liquidation, to the extent that the account holders' cryptocurrencies exist and could be identified, such cryptocurrencies were not subject to the insolvency regime, and could not be distributed to creditors.

- 7 On the other hand, the creditors of Cryptopia asserted that all the assets of Cryptopia should be distributed *pari passu* to the creditors and account holders alike. In other words, the account holders were to be treated as unsecured creditors and rank equally with other unsecured creditors in the insolvency process.
- 8 Cryptopia's liquidators posed two questions for the Court's determination: first, what are the assets in the liquidation; and second, how the assets in the liquidation should be distributed.

### Question 1: Can cryptocurrency be property which forms the subject matter of a trust?

- 9 On the first question of whether cryptocurrencies are a type of property which could form the subject matter of a trust, the Court went on a comprehensive analysis of New Zealand and foreign case law, including the Singapore International Commercial Court's decision in *Quoine*, and concluded that the cryptocurrencies situated in Cryptopia's exchange were a “species of intangible personal property and clearly an identifiable thing of value. Without question they are capable of being the subject matter of a trust”.

<sup>1</sup> The Singapore, English and Canadian courts have briefly addressed this, but not to such a comprehensive extent. See *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 3; *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2;

*Vorotyntseva v Money-4 Ltd* [2018] EWHC 2596 (Ch); *AA v Persons Unknown* [2019] EWHC 3556; *Shair.Com Global Digital Services Ltd v Arnold* [2018] BCSC 1512

- 10 The Court found that cryptocurrencies satisfied the 4 criteria set out in Lord Wilberforce's classic definition of property in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) at 1247 – 1248:

*"Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability" [emphasis added]*

- 11 First, the Court found that the cryptocurrencies in this case were definable. It consisted of computer-readable strings of characters recorded on networks of computers that are sufficiently distinct to be capable of being allocated uniquely to an account holder on that particular network.
- 12 Second, the Court found that the cryptocurrencies were identifiable by third parties. The unique strings of data recording the creation of and dealings with cryptocurrency are always allocated via a public key to a particular accountholder connected to the system. This public key needs to be matched with the private key, which is only available to the account holder, before the cryptocurrency can be transferred. The private key, in effect, is like a PIN.
- 13 Third, the Court found that the cryptocurrencies were capable of assumption by third parties. Lord Wilberforce had explained in *Ainsworth* that there are two elements to this requirement: (i) third parties must respect the rights of the owner in that property and will be subject to actions expressly devised by the law to give effect to proprietary rights if they assert their own claim to ownership without justification and (ii) the property must be potentially desirable to third parties such that they would want to obtain ownership of it themselves .
- 14 This third requirement was met on the basis that *"there can be no doubt that*

*cryptocurrencies can be, and many are, the subject of active trading markets"*.

- 15 Finally, the Court noted that the cryptocurrencies had some degree of permanence or stability. Here, the blockchain methodology which cryptocurrency systems deploy give stability to cryptocurrencies. The entire life history of a cryptocurrency is available in the public recordkeeping of the blockchain. A particular cryptocoin stays fully recognised, in existence and stable, unless and until it is spent through the use of the private key.
- 16 In conclusion, the Court found that cryptocurrencies were a type of intangible property as a result of the combination of three interdependent features: definition, as a result of the public key recording the unit of currency; and the control and stability necessary to ownership and for creating a market in the coins, by virtue of the private key attached to the corresponding public key and the generation of a fresh private key upon a transfer of the relevant coin .

#### **Question 2: Were the cryptocurrency held on trust for the accountholders?**

- 17 The Court then addressed the second question as to whether the cryptocurrencies were held on trust for the accountholders. The Court also answered this affirmatively.
- 18 Classically, to create a valid express trust, apart from compliance with the necessary formalities and the rule against perpetuities, there must be three "certainties" to be satisfied:
- a. certainty of intention;
  - b. certainty of subject matter; and
  - c. certainty of objects.
- 19 The Court found that all three certainties were met on the facts of the case.
- 20 Intention: Cryptopia manifested its intent 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. The database that Cryptopia created showed that the company was a custodian and trustee of the cryptocurrency. Further, Cryptopia did not intend to and did not trade in the cryptocurrency in its own right.

- 21 Subject matter: all cryptocurrency holdings were held on trust by Cryptopia, although Cryptopia was itself one of the beneficiaries of some trusts relating to cryptocurrency which the company itself introduced. There was a single trust created for each relevant cryptocurrency. Beneficial co-ownership of the relevant currency was shared by relevant accountholders in proportion to the numbers of relevant cryptocurrencies that they had each contributed (either initially when new coins were acquired or as a result of trades between accountholders). The subject matter of the various trusts was clearly recorded in Cryptopia's database records and thus there was sufficient certainty of subject matter.
- 22 Object: it was clear that those with positive coin balances for the respective currencies in Cryptopia's database were beneficiaries of the relevant trusts. As such, the requirement for certainty of objects was established.

## Conclusion

- 23 With the increasing worldwide acceptance of cryptocurrency as a medium of exchange, and the attendant benefits resulting from the implementation of blockchain technology, it is extremely timely that a court has finally analysed whether cryptocurrency can be considered "property" that can be subject to a trust.
- 24 While the Singapore Court in *Quoine* previously addressed in passing the question of whether cryptocurrency can be property, *Cryptopia* appears to be the first fully argued common law decision extensively dealing with that issue. *Cryptopia* is thus likely to be an important authority on this issue the next time it arises before the Singapore courts.

If you would like more information on this area of the law, please contact:



**Lim Mingguan**

**Director**

([mingguan@providencelawasia.com](mailto:mingguan@providencelawasia.com))

Mingguan undertakes a diverse range of work in the firm's Corporate and Commercial Disputes Practice. He has an active practice representing and advising tech companies, technology-focused venture capital funds and start-ups, and has extensive experience appearing before the Singapore Courts (including the SICC) and arbitral tribunals across several different institutions (SIAC, ICC, LCIA).



**Danny Quah**

**Counsel**

([danny@providencelawasia.com](mailto:danny@providencelawasia.com))

Danny is a commercial litigator with unique niche in tax disputes and a growing practice in insolvency and civil fraud matters. He was recently recognised as an up-and-coming litigator by the Singapore Academy of Law and was nominated for an attachment with UK "magic circle" barristers set Fountain Court Chambers.