THE PERSON IN PROPERTY

OTC on Cryptoassets: a commentary on David Ian Ruscoe and Malcolm Russell Moore v Cryptopia Limited (in liquidation)

[2020] NZHC 728

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5 June 2020

OuterTemple Chambers

INTRODUCTION

The proprietary status of cryptoassets is a point of fundamental importance to the regulation of, and resolution of disputes about, cryptoassets. On 8 April 2020 the High Court of New Zealand gave judgment in *David Ian Ruscoe and Malcolm Russell Moore v Cryptopia Limited (in liquidation)*[1]('***Ruscoe***') - a judgment which dealt in some detail with this point.

The judgment in *Ruscoe* is significant as the first fully reasoned judgment in the common law world (as opposed to a judgment following interim proceedings[2] or without the issue being disputed[3]) on how cryptoassets should be characterised. As the court observed, *"the status of cryptocurrencies as property has attracted significant attention around the common law world in recent years without, it seems, as yet receiving a definitive judicial analysis"*.[4] With this judgment, the common law world now has a judicial analysis and conclusion – *"cryptocurrencies… are 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"*[5]. The extent to which that analysis turns out to be persuasive in the rest of the common law world remains to be seen.

The present article gives an overview of the decision in that case and provides commentary commending Gendall J's judgment for discussing the policy and social dimension to the property question. Before this judgment, the few common law authorities which have considered the proprietary status of cryptoassets have done so on the assumption that that question should be answered by applying the *"the classic statement"* [6] of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*[7] in the UK House of Lords:

"Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable of assumption by third parties, and have some degree of permanence or stability". [8]

Whilst these criteria are useful, their application, without more, is an artificially limited approach. At the very least, we suggest, courts and legislatures need to be alive to the profound policy and social implications of how cryptoassets are categorised at this still comparatively early stage in their main-stream legal existence. When the same question inevitably comes to be determined domestically it is hoped that the courts will look beyond purely conceptual issues and focus on the person in the

proprietary relationship. In our view, in order for existing property and contractual doctrine (developed to be used by persons) to provide appropriate answers to legal problems arising from cryptoassets, the person in the relationship cannot be ignored.

In a recent speech given by Lord Sales on 'Algorithms, Artificial Intelligence and the Law'[9] he said:

'[t]*he law has to provide structures so that algorithms and AI are used to enhance human capacities, agency and dignity, not to remove them. It has to impose its order on a digital world and must resist being reduced to an irrelevance*'.

These important comments are equally applicable to the law's accommodation of cryptoassets in its existing frameworks and doctrines.

WHAT IS 'PROPERTY' AND WHY DOES IT MATTER?

The concept of property is of fundamental significance in modern society. However, establishing when property exists can be a *"surprisingly difficult"* task.[10] Before looking at how the court in *Ruscoe* dealt with that issue, it is necessary to take a step back and consider why, in our legal system and many others, it matters whether something is 'property' or not.

Clearly, whether or not the law recognises something as 'property' does not alter what a thing or object is as a matter of fact. Rather than thinking of property as a thing, it is helpful to conceptualise property as relationship between a person (natural or legal) and a thing. Property law provides a framework which determines the effects of that relationship on the rest of the world. A person who feels that this relationship is challenged will seek legal redress to prevent the perceived or actual interference.

It follows it can be seen that the value of recognising a relationship between a person and a thing as a proprietary relationship lies in the remedies available. Proprietary remedies are powerful – they are available not only against the person threatening one's relationship with the thing, but against the world at large.

This is plainly observable in the insolvency context. A creditor's property rights are protected on the debtor's insolvency in a way that his personal rights are not. Personal creditors in an insolvency situation are distributed on a pari passu basis, treating them all equally. A creditor seeking to enforce a personal claim, as opposed to a proprietary claim, against a debtor has a claim to a share of the debtor's remaining (and often very limited) assets. Consequently, his personal claim is only as valuable as the debtor's credit standing and, often, that will not be very valuable.

However, it is only the **debtor's** assets that are collected into the pool to be sold to repay personal creditors. If a particular creditor can show that assets in the debtor's possession are not the debtor's, but belong to him, then these must be withdrawn from the pool. He can exclude the debtor and, importantly, the debtor's creditors from having access to his property.[11]

The monetary value of the personal/proprietary distinction in the insolvency context was clear in *Ruscoe* itself:

a. If the accountholders had a proprietary interest in the cryptocurrencies in Cryptopia, the assets remaining in the insolvency pool would be around NZD 5.4 million. This would mean that personal creditors would recover less than 50% of the amount of their claims (one such creditor being the Inland Revenue which was owed NZD 5 million).[12]

b. If the accountholders only had a personal interest in the cryptocurrencies and the assets were to be available to all accountholders and creditors on a pari passu basis, the total pool of assets would be NZD 217 million and the percentage recovery by each creditor would then be likely to be over 85% of its total claim.[13]

Two further examples illustrate the importance of whether or not something is categorised as 'property'. First, the sometimes sharp fluctuations in the value of cryptoassets highlight the impact of the distinction between proprietary remedies and personal remedies. If a claimant was entitled to damages only, then the value of the cryptoasset at the time of the remedy would be crucial, and the claimant would be vulnerable to a substantial drop in value between the date of breach and the date of judgment and again to the risk of a significant increase in value after judgment.[14] Secondly, the

taxation of cryptoassets depends on their characterisation by national revenues. Consequently, their value as tradable and usable assets depends on their proprietary status.

These examples illustrate that there is a fundamental difference in value between something which the law recognises as 'property' and something which does not receive that level of legal protection. It is this core issue which is at the heart of the development of the jurisprudence and commentary on the treatment of cryptoassets.

As other authors have observed:

"[p]roperty is a gateway to many standard forms of transactions. A crypto-coin can never become the subject matter of a trust or a proprietary right of security, nor will it be an asset in a deceased's person's estate, unless it is first recognised as an object of property…The development of a viable cryptocurrencies derivative market may sometimes require that the primary assets from which secondary claims are constructed are capable of legal recognition as property":[15]

The UK Jurisdiction Taskforce made similar observations, as well as pointing out that many statutes refer to property and it is a well-known concept in the case-law. It is therefore important to know whether those statutes and cases apply to cryptoassets.[16] Indeed, counsel for the accountholders in *Ruscoe* submitted that a finding that cryptocurrencies were not property would have profound implications for New Zealand's law.[17]

RUSCOE V CRYPTOPIA

<u>The background and facts</u>

Cryptopia is an exchange platform for cryptocurrency. Accountholders were able to trade pairs of cryptocurrencies and Cryptopia profited by charging fees for transactions.

The platform was successful and, in January 2019, had around 800,000 accountholders.

In January 2019, Cryptopia's servers were hacked. The hackers transferred a significant proportion of the cryptocurrencies on the platform to an undisclosed external exchange, effectively stealing cryptocurrency then worth around NZD c.30 million (then equivalent to GBP c.16 million).

Shortly thereafter, Cryptopia went into liquidation.

In order to distribute Cryptopia's assets, estimated at NZD c.170 million (then equivalent to GBP c.90 million), the liquidators had to understand the nature of the cryptocurrencies held on the platform and the basis upon which they were held. Consequently, the liquidators applied to the court for guidance and directions.

The core issues before the court were:

a. what were the cryptocurrencies 'in reality' in this case – how could the cryptoassets be conceptualised in practical terms;

b. what was the legal nature of the cryptocurrencies – how should these cryptoassets be characterised in law; and

c. were the cryptocurrencies held on trust – can a cryptoasset be the subject of a trust and, if so, what were the terms of the trust?

The key question was '**are cryptoassets property**?' It was common ground that cryptoassets were 'assets' (within the meaning of the relevant domestic legislation (the Companies Act 1993), but the parties strongly disagreed about whether they were also 'property'.

Strictly, the court only needed to consider whether these particular cryptoassets were 'property' within the meaning of the relevant domestic legislation (s. 2 of the Companies Act 1993). However, the court went much further than this and considered the concept of 'property' in a more general sense. (This was, in part, because of the *"circularity"* within the Companies Act definition which defines 'property' as *"… property of every kind whether tangible or intangible, real or personal, corporeal or incorporeal and includes right, interests, and claims of every kind in relation to property however they arise"*).

Issue One: how to conceptualise the cryptoassets in real terms as a matter of fact

For some practitioners, one of the judgment's most useful features may be the way in which the court explained, in comparatively simple language, what cryptoassets ('cryptocurrencies', in this case) are in a 'real' (as opposed to 'legal') sense.[18]

Drawing heavily upon and expressly endorsing the analysis carried out by the UK Jurisdiction Taskforce ("the UKJT") and published in the UKJT *'Legal Statement on Cryptoassets and Smart Contracts'*[19] ("the UKJT Statement"), the court explained that cryptoassets using the blockchain could be defined and conceptualised as follows:

The term 'cryptoasset' is a broad term which refers to dealings in assets of some kind which are represented digitally by reference to the rules of the system in which the asset exists[20]. A cryptoasset is *"a conglomeration of public data, private key and system rules"*[21].

It would be *"difficult to formulate a precise definition"* of a cryptoasset and it *"would not be a useful exercise"* to do so[22].

Functionally, a cryptoasset is represented normally by a **pair of data parameters**[23]:

a. a **public** one ('the public key') – contains encoded information about the asset, such as its ownership, value and transaction history; and

b. a **private** one ('the private key') – the private key which permits transfers or other dealings in the cryptoasset to be cryptographically authenticated by digital signature. The private key *"in effect, is like a PIN"*[24].

   i. The public key *"is essentially the digital wallet address"* and the private key *"is similar to a password, that is known only to the user".*[25] A varied public key and new private key are generated each time a cryptoasset is transferred.[26]

   ii. Dealings in cryptoassets are broadcast to a network of participants and, once confirmed as valid, are added to a digital ledger which is often decentralised with no one person

having a responsibility or right to maintain it.[27] The purpose of the ledger is to keep a reliable history of transactions to prevent 'double-spending' of the same asset. The rules governing dealings are often established by the informal consensus of participants.

iii. The *"principal and novel features of cryptoassets"* are:[28]

- *"intangibility"*;
- *"cryptographic authentication"*;
- *"use of a distributed transaction ledger"*;
- *"decentralisation"*;
- *"ruled by consensus"*.

Issue Two: the legal nature of cryptoassets – whether they are 'property'

The applicable legal test

In setting out the legal test for whether something constitutes 'property', the court made two important decisions of principle.

First, the court adopted what it described as *"the classic statement"* of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*[29] in the UK House of Lords.[30]

"Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable of assumption by third parties, and have some degree of permanence or stability".

The court held that something would be 'property' if it satisfied four criteria.

a. First, the thing must have *"identifiable subject matter"*.

b. Second, the thing must be *"identifiable by third parties"*. This requires an assessment of whether the 'asset' had an *"owner capable of being recognised as such by third parties"*[31] which, in turn, requires that the 'owner' have *"the degree of control necessary for ownership (namely the power to exclude others)"*[32].

c. Third, the thing must be *"capable of assumption by third parties"* which involves two aspects[33]:

   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 within justification"*; and

   ii. *"normally, but not always, … property will be something which is potentially desirable to third parties such that they would want themselves to obtain ownership of it"*.

d. Fourth, the thing must have *"some degree of permanence or stability"*, although the court felt that this *"does not add much to the other three criteria"* and *"some assets will have little permanence yet undoubtedly be property, such as the example of the ticket to a football match"*[34].

Secondly, the court rejected an argument that a thing cannot be 'property' if it is not a 'chose in possession' (i.e. a physical and tangible thing) or recognised as an existing 'chose in action'.

a. This argument has met with some support in other cases. In *Your Response Ltd v Datateam Business Media Ltd*[35], Moore-Bick LJ in the English Court of Appeal commented that the dictum of Fry LJ in the English Court of Appeal in *Colonial Bank v Whinney*[36] – that *"all personal things are either in possession or in action. The law knows no tertium quid [third thing] between the two"* – makes it *"very difficult to accept that the common law recognises the existence of intangible property other than choses in action (apart from patents, which are subject to statutory classification"*[37]. The Court of Appeal went on to find that the electronic database with which that case was concerned did not constitute 'property'. *Datateam* was cited before the court in this case, but it seems that the argument was not seriously advanced[38] and the judgment does not consider the relevant part of Moore-Bick LJ's judgment – the court simply and in effect distinguished the decision, stating that it *"does not go much further than to make a determination upon the particular facts of the case"*[39].

b. In any event, in this case, Gendall J held (without analysing *Datateam*), that such an argument based upon *Colonial Bank* is based upon a misunderstanding of Fry LJ's dictum. Read in context,

Fry LJ's dictum[40] was not *"taking a narrow view of what can be classified as property, but rather he was simply wanting to push all examples of property into one of two categories"*[41]. In doing that, Fry LJ was adopting a flexible definition of 'property' and expanding the **existing** category of 'choses in action' to include a previously unacknowledged form of property – in that case, shares. Read in context, Fry LJ was saying that 'choses in action' was a residual class of property, not a restricted or limited category.

c. Viewed in that way (rightly, as it seems to us), *"the most that could be said [based on Colonial Bank] is that cryptocurrencies might have to be classified as choses in action".*[42]

Applying the test

The court then went on to apply the *Ainsworth* four-part test to the cryptoassets held by Cryptopia, finding that each of the criteria was *"clearly met":*[43]

a. Cryptoassets have identifiable subject matter as a result of the **public key** and the **public ledger**. The court observed that *"the identifiability provided by cryptocurrency data recorded in the network of computers (called the 'distributed ledger') is no less than the identifiability which results from the bank's inclusion of balances in their customers' numbered bank accounts"*[44].

b. Cryptoassets are identifiable by third parties as being owned by an owner who has a sufficient degree of control. The **public key** identifies the asset to non-owners, whilst the **private key** permits the private key's holder to deal with the asset to the exclusion of others[45].

c. Cryptoassets are capable of assumption by third parties. Cryptocurrencies are *"the subject of active trading markets"* in which the participants in the market respect the rights of the holder of a cryptoasset and in which the cryptoasset is a thing which is perceived to have some form of value[46].

d. Cryptoassets have sufficient permanence or stability. A cryptoasset persists and remains *"in existence and stable unless and until it is 'spent through the use of the private key"* and, even if

a particular 'token' of currency is 'spent', the *"entire life history"* of a cryptoasset on the blockchain is available in the ledger which gives the cryptoasset stability[47].

Issue Three: are cryptoassets capable of being the subject of a trust and, if so, what were the terms of the trust?

Cryptoassets are capable of being the subject of a trust

The court concluded, without any apparent discussion, that it followed necessarily from the fact the cryptoassets were 'property', that they could be held on trust.[48]

The terms of the trust

The court held that there was an express trust over the cryptoassets held by Cryptopia in favour of its clients. The court was particularly influenced by the fact that:

a. Cryptopia maintained its own separate database of accountholders and assets, which allowed there to be sufficient certainty about which accountholder 'owned' which assets, and reflected the intention that the assets 'belong' to the relevant accountholders;
b. repeated reference in the documents sent by Cryptopia to accountholders to the cryptoassets being *"your coin balances"* and similar statements;
c. possible evidential difficulties in identifying some beneficiaries do not invalidate a trust in respect of those beneficiaries who can be identified.

The court found that Cryptopia held the cryptoassets as a bare trustee and was required to deal with them as directed by the beneficiary accountholders. The court declined to *"comprehensively list all the terms that might govern the trusts in question"*, finding that it was *"not necessary or practicable"* to do so, instead leaving the parties to fall back on applying general principles.[49]

THE IMPORTANCE OF THE PERSON IN PROPERTY

Almost as a matter of course, courts in the common law world (and Gendall J in *Ruscoe* was no different) have turned to the four indicia of property expounded by Lord Wilberforce in *Ainsworth* (set out above) as the framework for assessing whether or not cryptoassets are property.

It is not clear why this has become the judicial touchstone of property. No doubt the familiarity of these criteria and their repetition over the years gives judges a degree of comfort and certainty in conferring proprietary status on something that is novel. It also accords with general common law reasoning:

"the conclusion that an asset falls within the meaning of property has been by way of reasoning by analogy to existing forms of property, looking for shared attributes".[50]

In *Ruscoe*, it is notable that the judgment does not make any suggestion the analysis of the *Ainsworth* criteria in the first instance might not have been the correct test – it appears to have been taken as read that the appropriate test for whether something is 'property' of any type is the *Ainsworth* test, notwithstanding that that test was expounded before the advent of modern computing and the associated virtual world.

However, as Professor Bridge observes in his text *Personal Property*: *"[a]s important as the conceptual features of property are, one must never lose sight of the practical"*.[51] Indeed, it is important that courts do not resort to a box-ticking exercise without engaging with the policy reasons of why they are prepared to recognise something as property.

As mentioned above Gendall J in *Ruscoe* did apply the *Ainsworth* criteria. However, he did not merely assert that they were fulfilled and treat that as the end of the matter, as previous authorities have done. He went further and analysed each criterion individually. He also referred to case-law which might be seen to be at the boundaries what is understood as property.[52] In addition, he referred to international common law cases on the classification of cryptoassets as property, such as the Singaporean Court of Appeal decision in *Quoine*[53] and the English decision in *AA v Persons Unknown*.[54]

In our view, however, perhaps the most significant element of Gendall J's judgment is his reliance on public policy and the practical usage of cryptoassets by persons in resolving the property question.

This is to be welcomed because property is a 'tool of social life' and it should be recognised that:

"property is not an acontextual entity that demands conceptual purity, but a purposive concept to be used to meet social needs".[55]

The law's changing perception of what is property' reflects the contemporary balance between commercial and economic demands and social and moral constraints that society is prepared to condone. For example, slaves were historically recognised as property, but are no longer due to modern society's moral aversions.

Similarly, cryptoassets were not initially condoned by society. They were viewed by some as the means of criminals, a method of attempting to evade financial regulation and a way to launder the proceeds of past criminal activity. Gendall J observed however that *"[c]ryptocurrencies have also become popular with honest people as a method of effecting payments and of investing"*.[56] He went on to say that *"honest commercial developments may very well be hindered by a failure of the general law to recognise cryptoassets as property"*.[57]

Given that property is about a relationship between a person and a thing, it makes sense that the social implications of characterising cryptoassets as property are analysed by the courts and that the person (not just the thing) in property is considered. People are increasingly attributing value to and using cryptoassets. By placing value on them, it is inevitable that they will want that relationship to be protected when it comes under threat.

The core idea behind the protection which the law affords to 'property', we suggest, is that a society that safeguards property is wealthier than one that does not. Resources will only increase in value if people work to develop them, and this will only happen if people own the resources and reap the rewards (and bear the losses) of their efforts.[58] Recognising this, the UKJT stated it would be '*highly unsatisfactory*' if property law did not apply to cryptoassets.[59]

The importance of engaging with the relational and human aspect of property is all the more important when resolving disputes concerning assets that you cannot see, but which will have important effects 'in the real world'. This was recognised by Lord Sales in his recent lecture (cited above) when highlighted the legal challenges posed by algorithms and technology:

'[t]hese problems play out in a world in which machine processing is increasingly pervasive, infiltrating all aspects of our lives; intangible, located in functions away in the cloud rather than in physical machines sitting on our desks; and global, unbound by geographical and territorial jurisdictional boundaries'. [60]

A powerful example of this (in the context of contract as opposed to property law)[61] is the dissenting judgment of Lord Mance (who was sitting as an international judge in the Singapore Court of Appeal) in *Quoine* and how he made sense of the contractual doctrine of unilateral mistake with respect to cryptoassets. He said as follows:

"Do conventional legal principles work, or may they need to adapt, when traders hand their affairs to computers, operating by algorithm'".[62]

"…whether the law of unilateral mistake falls to be applied in a manner which leaves out of consideration circumstances which are normally central to its application, simply because the parties entrusted their dealings to computers which can have no such consciousness. In my opinion, it does not and should not. The law must be adapted to the new world of algorithmic programmes and artificial intelligence, in a way which gives rise to the results that reason and justice would lead one to expect. The introduction of computers no doubt carries risks, but I do not consider that these include the risk of being bound by an algorithmic contract, which anyone learning of would at once see could only be the result of some fundamental error in the normal operation of the computers involved. Computers are outworkers, not overlords to whose operations parties can be taken to have submitted unconditionally in circumstances as out of ordinary as the present. I do not think that the obvious malfunctioning of a computer-based system should be given the dominance that B2C2's case implies".[63]

In contrast to the majority's view that the 'knowledge' limb of unilateral mistake should be analysed at the time the algorithm in that case was drafted and in advance of any mistake occurring, Lord Mance considered the test for knowledge should be applied more pragmatically and less artificially:

"[w]hether the unknown activities of two computers in the middle of the night should bind the parties should be judged by asking whether any reasonable trade, on the relevant exchange, knowing what was happening (or what had happened) could or would have thought…that this was anything other than the consequence of a gross and unintended…error".[64]

This difference in approach led to opposing outcomes on the part of the majority (who found mistake was not made out because the trader could not have known in advance that his coding in relation to deep prices would only ever lead to a contract being concluded in error) and Lord Mance, dissenting, (who found that there was a unilateral mistake in equity because a human looking at the contract would have realised, and indeed did realise on the evidence, that it was made in error).

Common law courts are well placed to conduct this kind of analysis because judges, on a case-by-case basis can engage with the precise facts and relationship in a thorough manner and in a way that a legislature looking at the issue in the abstract cannot.

For that reason, Gendall J is to be commended for engaging with the person in property and the policy reasons associated with characterising cryptoassets as property. As Lord Sales recognised in his speech (cited above):

'[w]ith the human application of law, the open-textured nature of ideas like justice and fairness creates the possibility for immanent critique of the rules being applied and leaves room for wider values, not explicitly encapsulated in law's algorithm, to enter the equation leading to a final outcome'.[65]

The present authors hope that when the time comes for our domestic courts to consider the property question in a final judgment, they will engage with these issues. Not only will this ensure that the law is applied in a sensible and pragmatic way, producing results that '*that reason and justice would lead one to expect*' but a case presented through the lens of the real world to a judge will be eminently more attractive than taking a purely conceptual approach to the property question in relation to cryptoassets.

A BRIEF WORD ABOUT THE WORLD BEYOND THE COMMON LAW

A further practical advantage of engaging with the purposive rationale behind notions of 'property' is an opportunity to strive for coherence with legal systems beyond the common law world.

There have been a series of judgments in other jurisdictions on the proprietary status of cryptoassets. We summarise some notable decisions below[66].

a. In *Skatteverket v Hedqvist*[67] the CJEU ruled that services of a Bitcoin exchange in exchanging Bitcoin for a traditional (fiat) currency is exempt from VAT on the basis of the 'currency' exemption of the VAT Directive. It was apparently common ground before the Court that *"virtual currency is neither a security conferring a property right nor a security of a comparable nature"*[68].

b. The Spanish Supreme Court in STS 326/2019 (20 June 2019) in a case of misappropriation of Bitcoins rejected their proprietary status in holding that the victims of the fraud were not entitled to restitution of the coins but only compensation in damages.

c. In the Japanese case of *MtGox,* the Japanese Courts in the insolvency context held that Bitcoins were not cognisable as 'things' capable of being owned under the Japanese Civil Code. This was because they did not satisfy the legal definition of a 'thing'. Under Japanese law, it is necessary for a 'thing' to be: (1) tangible, spatio-temporal entities that can; (2) be made subject to one's exclusive control. As a result, the creditors had only personal claims in damages against the insolvent cryptoasset exchange.

d. In the Netherlands by contrast, Bitcoins have been recognised as property. In February 2018 the District Court of Amsterdam concluded that Bitcoin had all the characteristics of a property right, that Bitcoin represented a value and was transferable.[69]

e. In Russia, again in the insolvency context, the 9th Arbitration Court of Appeal of Moscow relied on Article 128 of the Russian Civil Code to find that Bitcoins were 'an object of civil law rights' which were property to be included in the insolvent's estate.[70]

f. The Court of Florence in the case of *Sezione Fallimentare*[71] concluded that cryptoassets (mainly Nano XRB) were 'assets' under Article 810 of the Italian Civil Code because they could be the 'subject of rights'. The Court also confirmed that cryptoassets were to be considered as fungible assets because exchange platform in issue had full and exclusive use of the assets. As a result, the assets deposited by the user to the exchange qualified as an 'irregular deposit' pursuant to Article 1782 of the Italian Civil Code, according to which the depositary acquires the property in the fungible goods and the user is entitled to restitution of the same assets.

The differing approaches and remedies in one jurisdiction over another will inevitably give rise to conflicts of laws complications. If only a personal remedy is available in one jurisdiction but a proprietary and a personal remedy is available in another, this will undoubtedly encourage forum shopping. Conflicts of laws issues have not been argued or addressed in any detail cases thus far. In *Ruscoe,* all parties agreed that the law applicable to the issues was New Zealand law and it was not addressed in the judgment.[72] It is only a matter of time, however, before this is a contentious issue. Conflicts of laws issues in the context of cryptoasset disputes will be analysed in the next OTC Commercial Newsletter.

CONCLUSION

The judgment in *Ruscoe* is significant and will undoubtedly be cited in forthcoming judgments around the world.

Gendall J's judgment is to be commended for its engagement with not only the conceptual aspects of property but also the person in the property relationship. It is hoped that our domestic courts will engage with the property question in a similar way to ensure that our existing doctrines are seen to be fit for purpose in modern society and make sense in the real world.

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[1] *David Ian Ruscoe and Malcolm Russell Moore v Cryptopia Limited (in liquidation)* [2020] NZHC 728.
[2] *AA v Persons Unknown* [2019] EWHC 3556.
[3] *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 at first instance where it was not argued by parties that cryptoassets could not be property or held on trust.
[4] *Ruscoe*, [¶68.b].
[5] *Ruscoe*, [¶69].
[6] *Ruscoe*, [¶75].
[7] *National Provincial Bank v Ainsworth* [1956] AC 1175.
[8] Per Lord Wilberforce at pp. 1247-1248.
[9] Justice of the UK Supreme Court. The Sir Henry Brooke Lecture for BAILII, Freshfields Bruckhaus Deringer, London, 12 November 2019.

[10] Bridge, *Personal Property Law*, (OUP, 2014), p. 1
[11] Worthington, *Equity* (OUP, 2nd edn), p. ii.
[12] *Ruscoe*, [¶57].
[13] *Ruscoe*, [¶59].
[14] Of course this may cut both ways.
[15] Sarah Green, Chapter '*Cryptocurrencies in the Common Law of Property*', in Sarah Green and David Fox, *Cryptocurrencies in Public and Private Law*, OUP, 2019, p. 141.
[16] UK Jurisdiction Taskforce's Legal Statement on Cryptoassets and Smart Contracts, November 2019.
[17] *Ruscoe*, [¶66].
[18] It is important to note that the cryptoassets in this case were assets based on blockchain technology and that heavily influenced the court's analysis of the issues, both factually and legally. Blockchain is used widely in popular cryptocurrencies but it is by no means the only system.
[19] Published November 2019, available at https://technation.io/about-us/lawtech-panel.
[20] *Ruscoe*, [¶21] (citing UKJT Statement [¶26] [¶28]).
[21] *Ruscoe*, [¶121] (citing UKJT Statement [¶65]).
[22] *Ruscoe*, [¶21] (citing UKJT Statement [¶26]).
[23] *Ruscoe*, [¶21] (citing UKJT Statement [¶28]).
[24] *Ruscoe*, [¶112].
[25] *Ruscoe*, [¶22.j].
[26] *Ruscoe*, [¶112].
[27] *Ruscoe*, [¶21] (citing UKJT Statement [¶29]).
[28] *Ruscoe*, [¶21] (citing UKJT Statement [¶31]).
[29] [1956] AC 1175.
[30] *Ruscoe*, [¶75], citing *Ainsworth*, per Lord Wilberforce at pp. 1247-1248.
[31] *Ruscoe*, [¶109].
[32] *Ruscoe*, [¶112]].
[33] *Ruscoe*, [¶114].
[34] *Ruscoe*, [¶117].
[35] [2014] EWCA Civ 281; [2015] QB 41.
[36] (1886) 11 App Cas 426.
[37] *Datateam*, per Moore-Bick LJ at [¶26].
[38] *Ruscoe*, [¶123].
[39] *Ruscoe*, [¶126].
[40] Fry LJ's judgment was a dissenting judgment which was ultimately preferred by the English House of Lords.
[41] *Ruscoe*, [¶124].
[42] *Ruscoe*, [¶124].
[43] *Ruscoe*, [¶102].
[44] *Ruscoe*, [¶106].
[45] *Ruscoe*, [¶112].
[46] *Ruscoe*, [¶115].
[47] *Ruscoe*, [¶118].
[48] *Ruscoe*, [¶132].
[49] *Ruscoe*, [¶196].
[50] Babie, Brown, Catterwell, Giancaspro, *Cryptocurrencies as Property: Ruscoe and Moore v Cryptopia Limited (In Liquidation) [2020] NZHC 728*, SSRN-id3578264, p. 7.
[51] Bridge, *Personal Property* (OUP, 2015), p. 3.
[52] For example, a digital copy of CCTV footage which was regarded as property in New Zealand courts at [¶90], the content of private emails at [¶91] and a variety of other assets recognised as property around the world such as quotas, payments through the banking system and copyright at [¶89].

[53] *B2C2 Ltd v Quoine Pte Ltd* [2020] SGCA(I) 2 at [¶77ff].
[54] *AA v Persons Unknown* [2019] EWHC 3556 at [¶87ff].
[55] Ziff, *Principles of Property Law* (Carswell, 6th edn 2014), p. 53.
[56] *Ruscoe*, [¶129].
[57] *Ruscoe*, [¶130].
[58] Worthington, *Equity* (OUP, 2006), p. ii.
[59] UKJT Statement [¶37].
[60] Lord Sales, (n. 9), p. 5.
[61] But the rationale is nevertheless the same.
[6262] *Ruscoe*, [¶152].
[63] *Ruscoe*, [¶193].
[64] *Ruscoe*, [¶200].
[65] Lord Sales, (n. 9), p. 6.
[66] The authors refer to the extremely useful article on this issue by Chiara Zilioli, *Crypto-assets: Legal Characterisation and Challenges under Private Law* (2020) E.L.Rev. 251.
[67] C-264/14 *Skatteverket v Hedqvist* EU:C:2015:718.
[68] *Ruscoe*, [¶55].
[69] NL:RBAMS:2018:869.
[70] Award of 15 May 2018 No.09AP-16416/2018, in Case No. A40-124668/2018.
[71] n. 18/2019.
[72] *Ruscoe*, [¶49].