Trust(s) in the Blockchain: Ruscoe v Cryptopia Ltd (in liq)

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I INTRODUCTION

On 14 January 2019, popular Christchurch-based cryptocurrency (crypto) exchange Cryptopia Ltd announced on Twitter that it was undergoing "unscheduled maintenance".[1] The firm was a striking success story in the New Zealand crypto scene, growing from a hobby project to a successful business with over 900,000 active user accounts.[2] Its holdings comprised over 500 cryptocurrencies, including a New Zealand dollar-backed cryptocurrency developed in-house, with a total book value of approximately $200 million.[3]

The following day, Cryptopia revealed that its "maintenance" was in fact the result of a serious hack in which millions of dollars of crypto had been siphoned from its reserves. The police were called in and, soon after, liquidators.[4] Directions sought by the latter for the distribution of the company's remaining crypto led to a significant statement of the legal principles applicable to cryptocurrencies by Gendall J in the High Court, in a decision that has garnered international attention. This note reviews the conceptual basis for the Court's decision and explores the challenges presented by applying traditional legal concepts to technologies designed to depart from the orthodox approach to money and stored value.

II BACKGROUND

Cryptopia operated an online exchange for its customers to buy, sell and hold cryptocurrencies.[5] Although a minor player in international terms, the company carved out a niche by allowing its users to trade some relatively uncommon cryptocurrencies.[6] Customers usually joined the exchange by

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1   Cryptopia Exchange (@Cryptopia_NZ) "We are currently experiencing an unscheduled maintenance, we are working to resume services as soon as possible." <https://twitter.com/Cryptopia_NZ/status/1084705458533785601>.
2   *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728 at [8].
3   At [39], [50] and [11]–[12].
4   Cryptopia Exchange (@Cryptopia_NZ) "We apologise for the delay in keeping you updated and appreciate your patience." <https://twitter.com/Cryptopia_NZ/status/1085084168852291586>.
5   As many excellent introductions exist elsewhere, this note does not explain the technical background to cryptocurrency in any depth. For a detailed and authoritative explanation, see Arvind Narayanan and others *Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction* (Princeton University Press, Princeton (NJ), 2016).
6   Nikki Mandow "Funds frozen after multi-million dollar Cryptopia heist" *The New Zealand Herald* (online ed, Auckland, 18 January 2019).

transferring cryptocurrency they controlled to Cryptopia. Such a payment was made by disseminating a transaction to the network of computers (known as nodes) that, for any given cryptocurrency, collectively store the register of all transfers in a comprehensive record known as the blockchain.[7] The transaction moved unspent value from one specific address on the blockchain, controlled by the user and uniquely identified by a parameter known as a public key, to another address, controlled by Cryptopia.[8] Each public key was mathematically paired with a second, secret parameter known as a private key, and to verify the legitimacy of the transfer, nodes confirmed the transaction was cryptographically signed with the correct private key before incorporating it into the blockchain and transferring value accordingly.[9] After receiving crypto in this way, Cryptopia would credit the user's account in its internal database, much like a commercial bank might record a customer's deposit of physical currency.[10] The crypto was then stored by Cryptopia in bulk at addresses it controlled, with individual customers' deposits commingled and the relevant private keys kept secret.[11]

Users with positive account balances in a particular cryptocurrency were free to trade that currency with other users, minus a transaction fee from each trade.[12] Because the crypto on either side of the transaction would be (from the blockchain's perspective) held in addresses controlled by Cryptopia both before and after the transaction, trades did not follow the process detailed above. Instead, they were effected by Cryptopia simply updating its own internal database with a record of the transaction. Consequently, internal trades were reversible: provided the recipient had not already withdrawn their coins from exchange, Cryptopia could undo accidental transactions on its database.[13] Like most crypto exchanges, it was thus a curious feature of Cryptopia's business model that it rolled back virtually all the defining features of crypto. In place of a decentralised and trustless system of public, pseudonymous, irreversible transactions, Cryptopia provided a centralised exchange that required customers to assume its honesty and solvency, and in which users' trades were secret and reversible at its discretion.

Although well over a year has passed since Cryptopia first went offline, there is still very little information in the public domain explaining the hack. Evidently the thieves accessed the company's private keys, though it is still not clear how — a police investigation is ongoing.[14] Evidence before the High Court indicated that at least five different types of crypto,

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7   Narayanan and others, above n 5, at 29.
8   *Cryptopia*, above n 2, at [22(b)].
9   At [21].
10   At [22(b)]. Cryptopia also allowed users to deposit New Zealand dollars into its domestic bank account, but as this was only an option for domestic customers (a minority of its user base), this feature was less commonly used: at [160].
11   At [22(k)].
12   At [22(l)].
13   At [22(n)].
14   At [38].

valued at around $30 million, were taken from Cryptopia (around nine to 14 per cent of its overall holdings).[15] Analysis published online has traced crypto lost from Cryptopia's addresses to numerous other addresses controlled by the hackers before being moved to other exchanges where it could be sold for hard currency.[16] At least some of the lost crypto has been "frozen" at those exchanges and, as a result, could possibly be recovered in time.[17]

For several months following the hack Cryptopia struggled through its difficulties and even briefly resumed trading for some cryptocurrencies.[18] Eventually, however, its shareholders succumbed to what was probably inevitable and in May 2019 appointed liquidators to take control of the company.[19] The question immediately facing David Ruscoe and Malcolm Moore of Grant Thornton was how to deal with the $170 million of crypto still held.[20] The hack and loss of millions of dollars' worth of crypto meant customers could not simply be reimbursed in full. Additionally, creditors with claims totalling some $12.7 million were understandably eager to maximise the pool of assets that could be realised for their benefit.[21]

The liquidators applied to the High Court for directions as to how the remaining cryptocurrency should be distributed, with senior counsel appointed to advance the interests of both customers and creditors.[22] For the customers, the position was straightforward: the crypto was held on trust and what remained needed to be returned to them as beneficial owners.[23] Owing to a significant shortfall in the company's remaining assets, however, this would mean Cryptopia's ordinary creditors would recover less than 50 cents on the dollar.[24] Unsurprisingly, the creditors refuted the existence of any trust and submitted that the company's crypto holdings should be shared between both creditors and customers (with losses shared equally among both).[25] This would mean all could expect to recover around 85 cents on the dollar.[26] The creditors relied primarily on the submissions that crypto was not, in law, "property" capable of being held on trust, and even if it were the

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15 At [12] and [38].

16 Keith Dallara "Cryptopia Hack Analysis" (18 January 2019) Medium <https://medium.com>; and Max Galka "Some overdue transparency into the Cryptopia exchange hack" (21 January 2019) <https://elementus.io>.

17 Grant Thornton *Liquidators' Third Report on the State of Affairs of: Cryptopia Limited (in Liquidation)* (12 June 2020) at 3.

18 Cryptopia Exchange (@Cryptopia_NZ) "Update: We have resumed trading on 40 trade pairs that we have quantified as secure." <https://twitter.com/Cryptopia_NZ/status/1107811759941779456>.

19 *Cryptopia*, above n 2, at [12].

20 At [11] and [14].

21 At [57].

22 See Companies Act 1993, s 284(1). The liquidators uploaded the submissions of all counsel, together with relevant affidavits, to <www.grantthornton.co.nz> and <www.cryptopia.co.nz>. Although this note examines Gendall J's judgment, it has benefited substantially from the analysis in those submissions.

23 *Cryptopia*, above n 2, at [55].

24 At [57].

25 At [54].

26 At [59].

purported trust failed for lack of certainty.[27] Gendall J's judgment focused on these two contentions, and each issue is discussed below.

III IS CRYPTOCURRENCY PROPERTY?

At the outset, Gendall J acknowledged that determining cryptocurrency qualified as property would substantially elevate the intensity of legal control a deemed owner could exercise over their crypto by granting rights as against the world — or, in the case of Cryptopia's accountholders, as against the creditors.[28] Notwithstanding the significance of such a determination, it has been previously acknowledged that the word "'property' is not a term of art with one specific and precise meaning".[29] The Judge therefore approached the task by referring to a number of previous statements of characteristics common to most classes of property, including two previous New Zealand decisions that addressed the question whether digital files could constitute property in law.[30]

First, Gendall J turned to *Dixon v R*, in which the Supreme Court considered whether video footage recorded by a bar's CCTV cameras constituted "property" that could be dishonestly obtained in terms of s 249 of the Crimes Act 1961.[31] The Court concluded that while the term "property" varied with context, in terms of the offence in question digital files were appropriately treated as property.[32] In doing so, Arnold J (for the Court) appeared to identify four criteria relevant to determining that digital files were not mere information but in fact qualified as "property". These criteria, as explained by Gendall J in *Cryptopia*, were that the files in question could be identified, had a value, were capable of being transferred and had a physical presence, albeit one that could not be detected by means of the unaided senses.[33]

Second, Gendall J considered *Henderson v Walker*, in which Thomas J determined whether the tort of conversion could apply to digital files.[34] Despite English authority to the contrary, her Honour held that it could. In doing so the Judge placed considerable weight upon the fact that digital files could be controlled and could be said, to that extent, to be owned.[35] Thomas J identified the criteria of excludability (the ability to prevent others from controlling the property) and exhaustibility (the ability

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27 At [50] and [136]–[137].
28 At [64], quoting UK Jurisdiction Taskforce *Legal statement on cryptoassets and smart contracts* (LawTech Delivery Panel, November 2019) at [35]–[37].
29 *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [89].
30 *Cryptopia*, above n 2, at [90]–[93].
31 *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678.
32 At [25].
33 *Cryptopia*, above n 2, at [96] citing *Dixon v R*, above n 31, at [25].
34 *Henderson v Walker* [2019] NZHC 2184.
35 At [260] and [264].

to deprive others of the property's value) as relevant to her Honour's determination.[36]

Gendall J was satisfied that the principles from both *Dixon v R* and *Henderson v Walker* "apply equally in the present case to the cryptocurrencies at issue".[37] While in general terms the overall findings were of some assistance, it could be added that Arnold and Thomas JJ's analyses, which considered whether property existed in specific copies of individual files (videos, photos, e-mails and so on), are a slightly awkward fit in the context of a blockchain, which is distributed over a very large network of nodes. There is consequently no particular physical presence from which others may be excluded in the manner those cases contemplate. Gendall J did not address this point, however, as he instead reserved the greater part of his analysis for the application of four criteria set out by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*:[38]

> 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 in its nature of assumption by third parties, and have some degree of permanence or stability.

Although this test has been criticised as being somewhat circular,[39] it has been applied internationally several times to determine whether a thing should be treated as property,[40] including in two recent decisions from Singapore and England that considered the legal status of crypto in particular.[41] As can be seen, Lord Wilberforce's four requirements only partially overlap with Arnold J's focus on identifiability and transferability and Thomas J's focus on excludability. The differing focus of each judge reflects not only the different legal context each court operated in, but a sprawling jurisprudential debate concerning the fundamental characteristics of property which has ranged from Lady Hale identifying "an existence independent of a particular person" as "[t]he essential feature of property",[42] to Professor Anthony Honoré distilling no fewer than 11 (not individually necessary) incidents of ownership, including the right to possess, the incident of transmissibility and the incident of residuarity.[43] Many of the various formulations have themes in common; for instance, an ability to distinguish the thing that is said to be owned (and for others to identify it) is

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36   At [264]–[266].
37   *Cryptopia*, above n 2, at [98].
38   *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) at 1247–1248.
39   Kevin Gray and Susan Francis Gray *Elements of Land Law* (5th ed, Oxford University Press, Oxford, 2009) at [1.5.29]; and Kelvin FK Low "Bitcoins as Property: Welcome Clarity?" (2020) 136 LQR 345 at 348–349.
40   *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10, [2013] Ch 156 at [42]; and *Commonwealth of Australia v Western Mining Corp Ltd* (1996) 67 FCR 153 at 160–161.
41   *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 at [142]; and *AA v Persons unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 at [59].
42   *OBG Ltd v Allan* [2007] UKHL 21, [2008] AC 1 at [309].
43   AM Honoré "Ownership" in AG Guest (ed) *Oxford Essays in Jurisprudence* (1st series, Oxford University Press, Oxford, 1961) 107 at 112–128.

a prerequisite for assuming exclusive possession or control of that thing. Thus, notwithstanding the general lack of judicial consensus, Lord Wilberforce's first requirement of identifiability is consistent with the definitions and incidents offered by Arnold and Thomas JJ, Lady Hale and Professor Honoré.

Gendall J was satisfied that crypto satisfied all four *National Provincial* criteria. The Judge first addressed the need for property to be definable. Some care is needed to define what particular *thing* is in focus with crypto — as noted, it cannot be isolated to a specific copy of a digital file like CCTV footage or personal e-mails. Nor is it a debt owing from one party to another, as is the case with electronically-recorded bank deposits.[44] The temptation to identify the private key associated with each address as an object of property should also be avoided, as while it allows for practical control of any given parcel of crypto, it is also simply a large number and thus indistinguishable from pure information. Here, Gendall J framed the property right as attaching to the "[c]omputer-readable strings of characters" which were "allocated uniquely to an accountholder" for a particular cryptocurrency.[45] Although his Honour did not specify *which* strings of characters he had in mind, the focus on *allocation* connected the proprietary right with the value (sometimes called the unspent transaction output) associated with a particular address at any given moment. This accords with academic commentary that suggests crypto has the status of property because the person who controls it enjoys the "right to have their [crypto's value] … locked to their chosen … address on the blockchain".[46] That is, by having crypto transferred to an address they control, individuals gain the exclusive right and ability to hold and distribute that crypto to others as they see fit. Importantly, defining the property right in this way means the right is to more than simply the bytes that comprise the private key or a particular portion of the blockchain, and is therefore more than mere information.[47]

Gendall J's analysis on the first *National Provincial* criterion meant the second, third and fourth were rapidly satisfied by fundamental features of most cryptocurrencies. Since the existence of any particular crypto was recorded in the blockchain and could be controlled exclusively by whoever held the private key for that address, crypto was identifiable by third parties.[48] The effectiveness of the transfer process described above and the presence of a flourishing trading market demonstrated an ability to pass the status of ownership on to others.[49] Finally, the immutability of, and rigorous record-keeping provided by, the blockchain (which for many forms of crypto

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44   David Fox and Sarah Green (eds) *Cryptocurrencies in Public and Private Law* (Oxford University Press, Oxford, 2019) at [6.30].
45   *Cryptopia*, above n 2, at [105].
46   Kelvin FK Low and Ernie GS Teo "Bitcoins and other cryptocurrencies as property?" (2017) 9 Law, Innovation and Technology 235 at 253. See also Fox and Green, above n 44, at [6.27].
47   *Cryptopia*, above n 2, at [126]–[127].
48   At [109]–[113].
49   At [114]–[116].

provided a public record of its "entire life history") established the necessary degree of permanency.[50]

Before concluding on this point, Gendall J addressed two possible arguments against cryptocurrency being property. The first, that crypto cannot be property because it is merely information, he dismissed as an oversimplification of the property right.[51] The second argument was that crypto falls foul of the binary classification adopted by Fry LJ in *Colonial Bank v Whinney* that "all personal things are either in possession or in action. The law knows no tertium quid between the two."[52] Crypto clearly cannot be classed as a chose in possession due to its intangibility. It generally does not imply any obligation between two parties, and so would not usually be identified as a chose in action either. The suggestion that this is fatal to crypto's status as property has been strenuously rebutted by an influential English paper on the subject (referred to by Gendall J on other points) on the basis that it misunderstands Fry LJ's purpose.[53] The authors suggest that rather than defining the boundary of what can and cannot be considered property, Fry LJ hoped to divide all known property rights into two categories.[54] While that created the obvious implication that things falling into neither category cannot be property, Gendall J clearly accepted the authors' argument that this corollary was not necessarily intended, and need not determine his conclusion.[55]

His Honour's decision to avoid the chose in action/chose in possession dichotomy is, at one level, hardly surprising. As Thomas J remarked in *Henderson v Walker*, digital assets have "all the characteristics of property and the conceptual difficulties appear to arise predominantly from the historical origins of our law of tangible property".[56] Withholding rights of great practical significance to those who control crypto on the basis of what many might see as an arcane legal dichotomy risks ossifying and marginalising the law. Sir Geoffrey Vos C (speaking extrajudicially) recently made this point in a speech specifically addressing the status of crypto in law:[57]

> As regards cryptoassets, the first point to make is that the market, nationally and internationally, is treating cryptoassets with various characteristics as economic assets. Of course, the law can decline to follow the market. But it does so rather at its peril.

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50   At [117]–[119].
51   At [126]–[128].
52   *Colonial Bank v Whinney* (1885) 30 Ch 261 (CA) at 285. See also *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41 at [26].
53   UK Jurisdiction Taskforce, above n 28, at [71]–[77]; approved in *AA v Persons unknown*, above n 41, at [59]; and cited on other points in *Cryptopia*, above n 2, at [21] and [64].
54   UK Jurisdiction Taskforce, above n 28, at [74]. Contrast Low, above n 39, at 348. For an alternative explanation, see Fox and Green, above n 44, at [6.32]–[6.38].
55   *Cryptopia*, above n 2, at [124].
56   *Henderson v Walker*, above n 34, at [270].
57   Geoffrey Vos, Chancellor of the High Court "Cryptoassets as property: how can English law boost the confidence of would-be parties to smart legal contracts?" (Joint Northern Chancery Bar and University of Liverpool Lecture, Liverpool, 2 May 2019) at [50].

A similar problem may arise depending on how strictly the *National Provincial* criteria are applied to crypto, a matter left open by Gendall J's judgment. In particular, if crypto must satisfy all four criteria all the time, uncertainty may arise for crypto vulnerable to "double-spending", a phenomenon in which the protocol underpinning some forms of crypto allows for confirmed transactions to be undone on the basis of community consensus or criminal manipulation of the blockchain.[58] Importantly, it is the inherent technical structure of the types of crypto in question that permits for value to potentially be arbitrarily reallocated in this way, cutting against the ability of crypto to maintain a personal connection to its putative owner in a way that casts doubt on the *National Provincial* criteria of identifiability and stability.[59] While a rare occurrence, "double-spending" is far from unheard of.[60] Thus, the strict application of the test would raise the possibility that not all forms of crypto constitute property, or alternatively that crypto does not constitute property all the time. The uncertainty of either result means they should be strenuously avoided.

The test is therefore better treated as supplying four useful indicia rather than a bright line. As previous commentators have observed, "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".[61] It should be said here that Gendall J did indeed refer to matters of policy, including the desirability of encouraging honest commercial development of crypto.[62] The broader point, however, is that notwithstanding the usefulness of the *National Provincial* criteria, they are but one of several relevant conceptions of property disclosed by the case law. Hence, they should not be treated as the single, watertight definition of property. Adopting a lenient and holistic approach will ensure that the rights Gendall J established for holders of crypto are enjoyed predictably and uniformly, even for species of crypto that stray towards (or even occasionally cross) the boundaries drawn by Lord Wilberforce.

IV WAS CRYPTOPIA'S CRYPTOCURRENCY HELD ON TRUST?

Once Gendall J was satisfied the crypto held by Cryptopia was property, he turned to the second major question before the Court: whether it was held on trust for Cryptopia's customers. This fell to be determined by the three

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58 Narayanan and others, above n 5, at 48–49 (51 per cent attacks) and 73–75 (hard forks).
59 See *Cryptopia*, above n 2, at [111] and [113].
60 Matthew De Silva "Ethereum Classic is under attack" (8 January 2019) Quartz <https://qz.com>; and Low and Teo, above n 46, at 251.
61 Richard Hitchcock, Stephen Butler and Chloë Bell *The Person in Property* (OuterTemple Chambers, 5 June 2020) at 12.
62 *Cryptopia*, above n 2, at [129]–[132]. Recourse to policy may itself indicate the Judge considered that satisfying the *National Provincial* criteria would not, in every case, qualify a thing as "property".

certainties: certainty of intention, certainty of subject and certainty of object.[63] Certainty of object was no barrier because the company's internal database traced the holdings back to specific registered users and notwithstanding some potential evidential difficulties confirming their real identities, there could be no doubt that the necessary conceptual certainty existed.[64] His Honour therefore focused his attention on the certainties of subject and intention.

Certainty of Subject?

While Gendall J had already concluded that (as a general matter of law) crypto was property that could be held on trust,[65] two points of contention emerged before him in determining whether, on the facts, this crypto was sufficiently definable and distinguishable for certainty of subject to be made out. The first was a question of comparatively narrow application, being whether all the crypto was held by one trust with many beneficiaries, or whether separate trusts existed for each type of crypto or even each customer. Gendall J concluded it was the intermediate option: Cryptopia was a bare trustee under a separate trust established for each cryptocurrency.[66] His Honour appeared to base that assessment on the fact that Cryptopia had not distinguished individual accountholders' deposits, instead transferring them among its own addresses on the blockchain as dictated by operational expediency.[67] Thus, although it would be technically feasible to rely on the blockchain's records to trace initial deposits as they moved between Cryptopia's addresses,[68] when it came to determining Cryptopia's intention, the more obvious implication from the fact the company had generally lumped customers' deposits of particular cryptocurrencies together was that each customer was a beneficiary of the same trust.

The second point of contention relied on the well-known case *Re Goldcorp Exchange Ltd (in rec)*, another example of commodity speculation gone wrong.[69] It was argued by counsel for the creditors of Cryptopia that, as with the majority of claimants in *Goldcorp*, the purported subject of Cryptopia's trusts was merely generic goods that the company was free to supply from any source. Gendall J ultimately rejected this argument by distinguishing *Goldcorp* as a sale of goods case involving tangible goods that his Honour suggested turned on its own facts.[70] Arguably, however, *Goldcorp* was of greater assistance to Cryptopia's customers than its creditors. Investors paid Goldcorp Exchange Ltd (Goldcorp) to purchase bullion that it promised to hold in a secure vault and to deliver up on seven

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63   At [138]–[140].
64   At [148]–[150].
65   At [141].
66   At [183].
67   At [22(b)–(g)].
68   Fox and Green, above n 44, at [6.67]–[6.100].
69   *Re Goldcorp Exchange Ltd (in rec)* [1994] 3 NZLR 385 (PC).
70   *Cryptopia*, above n 2, at [160]–[161].

days' notice.[71] Unfortunately, the company collapsed and it was discovered it had not kept gold in stock in equal measure with its obligations to customers.[72] Thus, if investors had in fact applied to Goldcorp for delivery of their gold in sufficiently large numbers, its stock would have been exhausted and it would have been forced to purchase gold on the open market. In contrast, Cryptopia held all the crypto it required in certain predetermined wallets. While Cryptopia was not expressly contractually obliged to fund customer withdrawals from its own stores, there was no evidence that the company ever did any differently. Thus, in the language of *Goldcorp*, Cryptopia delivered goods "ex-bulk" (that is, from a predetermined source). The Privy Council did not doubt that "goods sold ex-bulk" could be the subject of an express trust and no issue of certainty of subject could thus arise.[73]

Certainty of Intention?

Certainty of intention exists if the settlor intended to create a trust, even if they did not use that particular word, or indeed know the word's meaning.[74] Several examples of the material Cryptopia distributed to its customers were before the Court as evidence of how it perceived and advertised its role in relation to the crypto it controlled. These generally pointed to an expectation that coins would be held on trust: customers were described as "users" rather than "buyers" who were frequently told "their" assets were protected.[75] Two versions of the website's terms and conditions tended to confirm that expectation. The first provided that "the Buyer will become the item's lawful owner upon physical receipt of the item from the Seller".[76] As the reference to "physical receipt" indicates, the first version of the terms and conditions did a remarkably poor job of accurately describing Cryptopia's operations. The passage in question appears to have been copied from the eBay user agreement.[77] That the drafter of Cryptopia's terms considered an online auction house (which could not be said to take beneficial title to the items on its platform) to be an appropriate precedent is itself, however, a powerful indicator that the site merely intended to be a custodian of assets held on trust for its users. If the first version of the terms and conditions strongly pointed towards certainty of intention, then the second placed it beyond all doubt. In addition to continuous references to "your coin balances" which

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71 *Re Goldcorp Exchange Ltd (in rec)*, above n 69, at 390.
72 At 389.
73 At 394.
74 *Cryptopia*, above n 2, at [151] and [157(b)].
75 At [176]–[178].
76 At [25] (emphasis omitted).
77 The passage went on to suggest that Cryptopia was "not involved in the actual transaction between Buyers and Sellers", which was manifestly not the case — Cryptopia controlled the entire transaction. See "User Agreement" (1 February 2006) eBay <http://pages.ebay.com/services/registration/user-agreement-review.html>, archived at <archive.org>.

were said to be held "on the Cryptopia platform on your behalf", the second version ultimately provided: "[e]ach user's entry in the general ledger of ownership of Coins is held by us on trust for that user."[78]

Although such language in the amended terms was obviously of powerful assistance to the accountholders, that it only existed in the second set of terms caused some difficulty, and it was suggested by counsel for the liquidators that it could not apply to the approximately 500,000 accountholders who had not logged in since the amendment was introduced.[79] The company had also operated for several months before the first version had been introduced, meaning in the first instance Cryptopia acted without any particular written instrument.[80] Further, each set of terms granted Cryptopia (as trustee) expanding indemnities and powers to remove customers (as beneficiaries) from the exchange, implying the terms were amended for Cryptopia's benefit rather than the benefit of its customers. Such a variation could not, in equity, be made by Cryptopia unilaterally, even pursuant to an express power of amendment.[81] Rather, amendment of the trusts' terms in favour of the trustee would require securing unanimous consent of the beneficiaries — which had not been done.[82]

Gendall J neatly sidestepped this problem by concluding that amendments to the terms "merely confirmed what were the existing trusts in operation".[83] He based this assessment primarily on the uncontradicted evidence of a Cryptopia employee that the publication of the company's terms and conditions engendered no change in its operations and instead recorded the status quo.[84] Thus, the publication of additional sets of terms and conditions simply provided a sounder evidential basis for determining the terms of the trust which, by its conduct, Cryptopia had intended all along.[85] To state the obvious, settling a trust and recording its terms only subsequently is a dangerous approach for a settlor to take. As Gendall J recognised, however, a lack of proper documentation is not unusual,[86] and start-ups such as Cryptopia often take the approach of "launch now, seek legal advice later". In such circumstances, and as Briggs J previously remarked (in a passage cited by Gendall J):[87]

> The law does not lightly allow contracting parties' purposes and intentions to be defeated by supposed uncertainty … [i]n all such cases

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78   *Cryptopia*, above n 2, at [27], cls 5 and 19.
79   At [180].
80   At [23].
81   Malcolm Wallace "Variation and Resettlement of Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 235 at [9.3.1].
82   At [9.4].
83   *Cryptopia*, above n 2, at [181].
84   At [181].
85   At [153]–[155] and [157(a)].
86   At [156].
87   At [195] quoting *Re Lehman Brothers International (Europe) (in administration)* [2010] EWHC 2914 (Ch) at [245].

> the law fills the consequential gaps by implication, and by importation of
> generally applicable principles.

Consonant with this approach, the creation of a trust does not require an express declaration of intent at the outset and may instead be imputed from a course of conduct over many years.[88] Gendall J's adoption of the amended terms as evidence of the company's intention throughout its existence required the Court to draw a broad inference in much the same way. This approach had the added benefit of ensuring that the technicalities governing trust deed amendments did not disadvantage beneficiaries, the very group such rules are designed to protect. The Judge's willingness to depart from the strict contractual language and instead to infer the company's overall intent thus achieved two useful outcomes. First, the practical complexity of separate trusts arising at different times from each set of terms was avoided, and secondly, equity's preference for intent over form was vindicated. *Cryptopia*'s reasoning thus proves the benefits of satisfying equity's pragmatic streak.

V CONCLUSION

Gendall J's finding that Cryptopia's holdings were property held on trust will be a relief to its newly minted owners and encouraging for crypto enthusiasts throughout the common law world. Not only can the company's customers recover far more of their assets, but future crypto holders could perhaps — in New Zealand at least — enjoy remedies at common law for wrongful interference with their assets, or take advantage of the blockchain's comprehensive record of transactions to trace and recover misappropriated crypto.[89]

From a lay standpoint, it may be surprising that there was such a significant contest over whether a valuable commodity such as crypto could be property. However, the High Court's discussion of the varied approaches taken by previous courts to discerning what constitutes property discloses the ongoing and difficult task of identifying the concept's precise attributes. Likewise, the unequivocal statements in Cryptopia's amended terms and conditions that the company held crypto on trust may at first blush seem decisive, but demonstrating the formalities of express trusts were satisfied posed real difficulties. Although the Court cannot guarantee future operators will have better technical nous to secure crypto fans' investments, *Cryptopia*'s practical approach will provide the legal confidence necessary if the technology is to enter the mainstream.

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88   See *Paul v Constance* [1977] 1 WLR 527 (CA).
89   Fox and Green, above n 44, at [6.67]–[6.100].