INSOL EUROPE

DIGITAL ASSETS CASE SUMMARIES

<table>
<tr><th colspan="2">Overview</th></tr>
<tr><td>Case Citation</td><td>Ruscoe v Cryptopia Ltd (in liq) [2020] NZHC 728, [2020] 2 NZLR 809</td></tr>
<tr><td>Date of judgment</td><td>8 April 2020</td></tr>
<tr><td>Country</td><td>New Zealand</td></tr>
<tr><td>Original Language of Judgment</td><td>English</td></tr>
<tr><td>Court</td><td>High Court of New Zealand</td></tr>
<tr><td>Subject matter/catchwords</td><td>Insolvency – Liquidation – Property - Categorisation and distribution of assets – Digital assets - Cryptocurrency

Trusts and trustees – constructive trusts – express trusts</td></tr>
<tr><td>Decision summary</td><td>Gendall J of the High Court of New Zealand held that:

1. The digital coins held by Cryptopia (a cryptocurrency exchange) are "property" for the purposes of the Companies Act 1993 (NZ).
2. Cryptocurrencies are a species of intangible personal property capable of being the subject matter of a trust.
3. All coin holdings on the exchange were held on express trust by Cryptopia for the benefit of its account holders.
4. Cryptopia was the trustee of separate bare trusts for each cryptocurrency, which came into existence as soon as Cryptopia held a new currency for accountholders. Cryptopia's principal duty under each trust was to hold the currency and deal with each account holder's share as directed by the account holder.</td></tr>
<tr><td>Digital asset involved (e.g. Bitcoin, Ethereum, Ripple etc.)</td><td>Various (up to 900 different coins held by Cryptopia).</td></tr>
<tr><td>Valuation issues</td><td>N/A</td></tr>
<tr><th colspan="2">Expanded Case Description</th></tr>
<tr><td>Debtor</td><td>Cryptopia Ltd (in liquidation)</td></tr>
<tr><td>Identity of Insolvency Practitioner (if applicable)</td><td>David Ruscoe, Russell Moore, Grant Thornton New Zealand</td></tr>
</table>

Authorities considered by this case (categorised by country)	<u>Canada</u> *Shair.Com Global Digital Services Ltd v Arnold* 2018 BCSC 1512 <u>England</u> *AA v Persons Unknown* [2019] EWHC 3556, [2020] 4 WLR 35 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) *Vorotyntseva v Money-4 Ltd* [2018] EWHC 2596 (Ch) Legal statement on cryptoassets and smart contracts, UK Jurisdiction Taskforce, November 2019 <u>Singapore</u> *B2C2 Ltd v Quoine Pte Ltd* [2020] SGCA(I) 2
Domestic legislation applied	*Companies Act 1993* *Trustee Act 1956*
Factual background	From 2014, Cryptopia operated as a cryptocurrency trading exchange. In January 2019, its servers were hacked and approximately USD30 million in cryptocurrency was stolen. It was placed into liquidation in May 2019. Aside from the digital assets held for accountholders, Cryptopia's assets totalled approximately NZD5.4 million, and liabilities totalled approximately NZD12.7 million.
Legal issues	1. Whether the various cryptocurrencies held by the liquidators constituted "property" as defined in the Companies Act 1993 (NZ). 2. Whether any or all of the cryptocurrencies were held on trust for any or all of the accountholders. 3. When the trusts came into existence, and whether the assets held on trust are in an individual trust for each account holder, in one trust for the benefit of all accountholders, or in multiple trusts for the benefit of specific groups of accountholders. 4. If the liquidators are unable to ascertain the identity of an accountholder, do the digital assets associated with that account form part of the assets of the company or fall to be dealt with in accordance with trust legislation?
Reasoning	<u>Cryptocurrency is property and capable of being held on trust</u> First, the definition of "property" in New Zealand's Companies Act 1993 (governing the liquidation process) is wide, encompassing "*rights, interests and claims of every kind in relation to property however they arise*".

Second, Gendall J considered recent case law from several jurisdictions where proprietary rights had been asserted over cryptocurrency.

Finally, Gendall J considered whether cryptocurrencies satisfied the four criteria of "property" set out in Lord Wilberforce's judgment in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL). He considered that they did: cryptocurrency is definable, identifiable by third parties, capable in nature of assumption by third parties, and has some degree of permanence or stability. In particular, "*They obtain their definition as a result of the public key recording the unit of currency. The control and stability necessary to ownership and for creating a market in the coins are provided by the other two features — the private key attached to the corresponding public key and the generation of a fresh private key upon a transfer of the relevant coin.*"

Gendall J found that an assertion that cryptocurrencies were mere information was too simplistic an analysis: the entire purpose of cryptocurrency is to create an item of tradeable value, not simply to record or impart knowledge. Relevantly, currencies stored in wallets were protected by a private key, every transaction transferring value used a unique code, and a crypto asset could only be assigned once.

<u>All coin holdings were held on express trust</u>

Gendall J considered the three elements required for a trust:

1) Certainty of subject matter. Cryptopia itself kept and stored the private keys associated with the wallets of each cryptocurrency – accountholders themselves did not know the private key associated with any wallet. The subject matter of the various trusts was clearly recorded in Cryptopia's database records.
2) Certainty of objects. The beneficiaries were taken to be those with positive coin balances for each currency (relevantly, evidential uncertainty does not defeat a trust).
3) Certainty of intention. Cryptopia's terms and conditions provided that "*each user's entry in the general ledger of ownership of coins is held by us, on trust, for that user.*" Cryptopia manifested its intent by creating the exchange without providing to accountholders the details of the public and private keys for the coins it held for them. Its databases showed that the company was a custodian and trustee of the crypto assets and Cryptopia did not intend to (and nor did it) trade in those digital assets in their own right. Relevantly, Gendall J concluded that it was not necessary for all the terms of the trust to be expressly recorded – the law will simply fill the gaps by implication.

<u>Terms and consequences of trust</u>

A trust came into existence for each cryptocurrency as soon as Cryptopia came to hold a new coin on behalf of its

	accountholders. Cryptopia's duties were that of a bare trustee: to hold the relevant pools of currency on behalf of the accountholders, to follow their instructions, and to allow accountholders to then increase or reduce their beneficial interest in the relevant trusts in accordance with the system Cryptopia had created for that purpose.
Further information (e.g. liquidator's website)	Cryptopia Limited | Grant Thornton New Zealand Cryptopia Exchange (@Cryptopia_NZ) / Twitter

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA448/2020
[2020] NZCA 371

BETWEEN	MB TECHNOLOGY LTD Appellant
AND	ECOMI TECHNOLOGY PTE LTD First Respondent
AND	DAVID SHU-HAN YU Second Respondent
AND	DANIEL JOHN CROTHERS Third Respondent

Hearing: 20 August 2020

Court: Miller, Cooper and Gilbert JJ

Counsel: S A Barker and L C Sizer for Appellant

Judgment: 21 August 2020 at 3.30 pm

Reasons: 28 August 2020

JUDGMENT OF THE COURT

A Appeal allowed.

B Orders set out at [19]–[32].

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] In a results judgment delivered on 21 August 2020 we allowed the appeal and directed that freezing orders be issued.[1] These are our reasons.

Background

[2] By minute issued on 11 August 2020 Wylie J declined an ex parte originating application in which the appellant, MB Technology, sought freezing orders against all real and personal assets of the respondents, with various significant ancillary orders.[2] Two of the respondents are resident in New Zealand and the first respondent has an office here.

[3] The application was brought in aid of proceedings brought by MB Technology against the respondents in the High Court of the Republic of Singapore. The essence of the claim is that the respondents failed to pay MB Technology for work it had done on a project called the Ecomi project, described as the creation of a digital finance management platform which would allow users to spend fiat currency (money) and various cryptocurrencies, and also falsely induced MB Technology to invest in the project. Its investment was made in the form of "crypto assets", including 356.69 Bitcoin and 170 Ethereum, which are cryptocurrencies. MB Technology values its claim at USD3,227,000 against each respondent and an additional USD115,000 against the first respondent. The High Court of Singapore has issued an injunction restraining the disposition of assets.

[4] MB Technology is registered in the British Virgin Islands and it has no assets within the jurisdiction of New Zealand courts. Wylie J found in an earlier minute, issued on 30 July, that its undertaking as to damages offered no real protection to the respondents.[3] He advised that he was not prepared to consider the application further unless more information could be provided, or the undertaking could be secured against assets in New Zealand.

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[1] *MB Technology Ltd v Ecomi Technology Pte Ltd* [2020] NZCA 363.
[2] *MB Technology Ltd v Ecomi Technology Pte Ltd* HC Auckland CIV-2020-404-1256, 11 August 2020 [Minute No 2].
[3] *MB Technology Ltd v Ecomi Technology Pte Ltd* HC Auckland CIV-2020-404-1256, 30 July 2020.

[5] MB Technology then offered security in the form of 6,500,000 GoChain, held in a PIN-protected offline wallet which it had deposited with its solicitors, Buddle Findlay, in New Zealand. GoChain is a cryptocurrency and the "offline digital wallets" are physical items which may be stored in a safe or vault. There is evidence that GoChain is highly liquid and regularly traded. The value of the GoChain was estimated at approximately NZD110,000. Recognising that its value fluctuates, MB Technology was prepared to undertake that the value of the GoChain must be held at or above NZD75,000.

[6] In his minute of 11 August Wylie J found this security insufficient and accordingly declined the application. He did not hear from counsel but decided the application on the papers. He concluded that:

> [15] I am not satisfied with the proposed undertaking as to damages. In my judgment, MB Technology has not provided either appropriate or sufficient security for the undertaking, in the event that it transpires that the freezing orders sought should not have been granted. This is not a case where the Court should dispense with security. Very wide ranging freezing and ancillary orders are sought, all on a without notice basis. MB Technology is seeking a significant indulgence and it is an indulgence which could impact significantly on the respondents.
>
> [16] MB Technology has failed to offer adequate security to back up its undertaking as to damages, despite being invited to do so. The application for the freezing orders is accordingly declined.

[7] MB Technology then brought this appeal.

Does the appellant need leave to appeal?

[8] The first question is whether the order declining the application was interlocutory in nature, so requiring leave to appeal under s 56(3) of the Senior Courts Act 2016. That provision applies to interlocutory orders made in a civil proceeding.

[9] There is a substantive sense in which the High Court decision should be regarded as interlocutory. The application is a step in a substantive proceeding that remains to be determined. It was brought as an originating application, rather than an interlocutory application, only because the substantive proceeding that it serves has been brought in another jurisdiction. Further, as Mr Barker accepted, the issue is not res judicata. The appellant might bring a further application if circumstances changed.

We add that had the Judge granted the ex parte orders his decision undoubtedly would have been interlocutory. The New Zealand proceeding would have continued. The respondents would have been served and might have applied at short notice to cancel or modify the orders. His decision would also have been interlocutory had he refused to make orders ex parte and directed that the application be heard on notice.

[10] We accept, however, that form matters. The originating application is not an interlocutory application as defined in s 4 of the Senior Courts Act: an application to the High Court "in any civil proceedings" for "an order or a direction relating to a matter of procedure; or … for some relief ancillary to that claimed in a pleading …". It is a proceeding in its own right. Further, under s 56(4) a party may appeal as of right against an order striking out or dismissing a proceeding. The minute of 11 August did not preclude filing a new application if better security was provided, but subject only to appeal it did bring the existing application to an end; any further request for a freezing order would have required a fresh originating application. For these reasons we accept that the appeal may be brought without leave.

The application and the High Court decision

[11] Conscious that the proceeding has been conducted so far without hearing from the respondents, we confine ourselves to brief reasons.

[12] We begin by noting the scope and extent of the orders sought in the High Court. They would restrain all real and personal assets which the respondents own or in which they have a beneficial or legal interest, and extends to homes in New Zealand, funds held with any banks, the cryptocurrency assets transferred to them by MB Technology, the first respondent's account with the digital asset platform OSL and any assets held thereunder, the first respondent's licences or rights to exploit the intellectual property of any third party, and a mobile phone app called VeVe. They would also require that within 14 days after service the respondents must disclose assets and permit use of information disclosed in any legal proceeding anywhere. In support of the latter orders, they would also prohibit the second and third respondents from leaving New Zealand and require them to surrender passports.

[13] The Judge noted that potential losses to the respondents from the orders might include losses on volatile crypto assets that the respondents would be unable to trade.[4] He noted that the orders might delay the launch of the VeVe application, causing losses. He recognised that the potential losses are very difficult to estimate, but they could be substantial. The freezing orders would affect assets up to the sums mentioned at [3] above. He concluded that the security offered, cryptocurrency with a value of $110,000, was "woefully inadequate".[5]

The appeal

[14] MB Technology does not challenge the Judge's decision to insist on security, though it does emphasise that the interests at stake must be balanced. It does not claim to be impecunious as a result of the respondents' conduct. Rather, it argues that the Judge erred in a number of respects, which we summarise: the Judge was obliged to make an intelligent estimate of loss and state the amount and form of security that he found adequate under r 32.6(5) of the High Court Rules 2016, but contented himself with describing the security offered as inadequate; he failed to accept that cryptocurrency is valuable property; he discounted the appellant's offer to maintain the value of the security at no less than $75,000, so protecting the respondents against volatility; he failed to recognise that the security was securely held in New Zealand (it was in an offline digital wallet which would be physically held by Buddle Findlay); he overestimated the risk of losses to the respondents in the period between issue of the orders and a decision on any on-notice application to rescind them; and he failed to recognise that the least risk of ultimate injustice required the orders be made, having regard to the Singapore High Court's orders and the evidence that the respondents have misappropriated assets of the appellant.

[15] We need not address all of these points. In short, we are not persuaded that the Judge erred by dismissing the application. The central reason is that in our view the orders were more extensive than necessary to protect the appellant's position in the interim. They would extend to all assets of the respondents, including assets outside the jurisdiction to which the appellant has no proprietary claim. They would

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4 Minute No 2, above n 2, at [13].
5 At [14].

require disclosure of information within 14 days after service, in circumstances where Mr Barker could point to no reason why that order was necessary (similar orders have been made in Singapore) or could not be made on notice. They would restrain the second and third respondents' movements. The Judge was entitled to dismiss an application made in these broad terms. He need not pick and choose among the orders sought or craft a narrower set himself, nor need he convene an oral hearing. He did not rule out cryptocurrency as security but rather noted its volatility and the need to rely on the applicant's assurance that it would be maintained at not less than $75,000. He might have granted orders on terms that more security be paid, but he had previously signalled his concern and was entitled to assume the appellant had made a decision about how much security it was prepared to put up.

[16] We might have dismissed the appeal at that point, leaving the appellant to re-apply in the High Court if circumstances changed, but the matter is urgent and we accept Mr Barker's submission that there is on the material before us a plain allegation of investment fraud that is arguable and has been found sufficient to sustain interim orders in the High Court of Singapore. The respondents are in the jurisdiction, and they have assets here. There is reason to think that assets may be dissipated or taken out of courts' reach once the proceedings are served.

[17] We accordingly allowed the appellant to modify its application at the hearing before us, addressing our concerns about over-reach. The modified application focused on assets within this jurisdiction or controlled from New Zealand and crypto assets in which the appellant claims a proprietary interest. We are satisfied that interim orders may properly extend to those assets. MB Technology also offered increased security, in the form of at least 15 million GoChain, which have a present value of NZD300,000, and it will maintain security at not less than NZD200,000 on terms set out below. That sum is very much less than the value of the claim, but we accept that security must reflect all the circumstances of the case and need not approach that amount. The risk of loss to the respondents from the freezing orders is limited because the orders are of short duration — three weeks — and may be rescinded earlier on notice. The security is also much less than the potential future value of Ecomi assets restrained, but such value is highly speculative, depending on both investor commitment and success for the Ecomi platform in a crowded market, and there is

presently no reason to think it will be realised in the immediate future. We record that Mr Barker drew our attention to a number of generally comparable authorities in which modest amounts of security had been ordered.[6]

Disposition

[18] Orders were made accordingly, in the following terms:

[19] The appeal is allowed.

[20] A freezing order should be issued by the High Court in respect of the following assets (up to the net value of USD3,277,000.00 in such assets, for each of the first to third respondents, and an additional USD115,000.00 as against the first respondent):

(a) anything real or personal in which the first to third respondents have a beneficial or legal interest, and all assets over which they have a power of disposition or control (if and to the extent such assets are in New Zealand or controlled from New Zealand);

(b) any interest the first and/or second and/or third respondents have under any trust or similar entity, including any interest that may arise by virtue of the exercise of any power of appointment, discretion or otherwise howsoever (if and to the extent such assets are in New Zealand or controlled from New Zealand);

(c) any right, title or interest of the second respondent in the properties registered in the name of the second respondent and another at the following addresses:

(i) 175GF Hurstmere Road, Takapuna, Auckland;

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6 *Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch); *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295, [2015] 1 WLR 2309; and *Sinclair Investment Holdings SA v Cushnie* [2004] EWHC 218 (Ch).

(ii) The Quays Apartments, 4E/99 Customs Street, Auckland Central, Auckland;

(iii) 20B/9 Byron Avenue, Takapuna, Auckland;

(d) funds held by the first and/or second and/or third respondents with any bank or financial institution amenable to the jurisdiction of the High Court of New Zealand (subject to any right of set-off that any such bank or financial institution may have under any facility granted to any one or more of the respondents before it was notified of the order);

(e) the following cryptocurrency assets ("Crypto Assets"):

(i) the 356.69 bitcoins transferred by the appellant to the first respondent between 14 December 2018 to 14 May 2019, or any proceeds from the sale or exchange thereof;

(ii) the 170 Ethereum transferred by the appellant to the first respondent on 20 April 2019, or any proceeds from the sale or exchange thereof; and

(iii) the 64,459,050,000 OMI tokens that were to have been transferred to the appellant as compensation for the appellant's services under an agreement between the appellant and the first respondent entitled "Advisor Agreement", entered into on 21 September 2020 and varied by a deed of variation dated 11 May 2019.[7]

Ancillary order restraining dealing with certain assets

[21] A further ancillary order is made restraining the first respondent, whether by its directors, officers, employees, agents or servants or otherwise (including in particular the second and third respondents), until further order of the High Court from

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[7] These dates are taken from the originating application.

disposing of, dealing with, parting, transferring, encumbering, or in any other way diminishing the value of:

(a) the Crypto Assets; and

(b) the proceeds of the Crypto Assets, in whatever form (including fiat currency or other digital assets for which the Crypto Assets have been exchanged), if, before this order has been served, or if, for any other reason, the first to third respondents have removed, sold, or disposed of the Crypto Assets to third parties.

Further orders

[22] Subject to paragraph [23], this order restrains you (meaning a person to whom this order is addressed or an officer of that person, or an agent appointed by a power of attorney of that person, and including the respondents) from removing any of the assets listed in paragraph [20] from New Zealand, or from disposing of, dealing with, or diminishing the value of, those assets, whether they are in or outside New Zealand.

[23] This freezing order does not prohibit you from dealing with the assets covered by the order for the purpose of—

(a) paying ordinary living expenses; or

(b) paying legal expenses related to the freezing order; or

(c) disposing of assets, or making payments, in the ordinary course of your business, including business expenses incurred in good faith.

[24] As the freezing order has been made without notice to you, it will have no effect after **10:00am 11 September 2020**, unless on that date it is continued or renewed. On that date you or your counsel are entitled to be heard by the High Court in opposition to the continuation or renewal of the order.

[25] You may apply to the High Court by interlocutory application to discharge or vary the freezing order. If you apply, you must give the appellant notice.

[26] An undertaking as to damages given by the appellant is attached. In respect of the security to be held for the undertaking as to damages this Court orders:

(a) These freezing and ancillary orders shall have no effect and are not to be served until the appellant's solicitors file a certificate confirming that the appellant's solicitors hold at least 15 million GoChain on trust within the jurisdiction as security for the undertaking as to damages.

(b) The appellant's solicitors shall hold not less than NZD200,000 worth of assets on trust as security for the undertaking as to damages, pending further order of the High Court, such assets consisting of NZD, and/or the cryptocurrency named GoChain, and/or such other cryptocurrencies or security as may be permitted by the High Court or agreed by the respondents ("Security").

(c) The appellant will maintain the value of the Security held by its solicitors at or above NZD200,000 and if the value of the Security should reduce below NZD200,000, the appellant shall:

(i) notify the respondents of any deficiency as soon as possible; and

(ii) transfer further Security to its solicitors, to be added to the Security and to be likewise held on trust, within two working days of the value of the Security falling below NZD200,000.

(d) If the appellant fails to comply with paragraph [26(c)], then the respondents may apply on short notice to the appellant for variation or recission of these orders.

(e) In any case, leave is reserved to the respondents to apply for variation of the orders in paragraph [26].

[27] This freezing order does not affect anyone outside New Zealand until it is declared enforceable by a court in the relevant country, (in which case it affects a person only to the extent that it has been declared enforceable) unless the person is—

(a) a person to whom this order is addressed, or an officer of that person, or an agent appointed by power of attorney of that person; or

(b) a person who—

(i) has been given written notice of this order at that person's residence or place of business within New Zealand; and

(ii) is able to prevent acts or omissions outside the jurisdiction of the High Court that constitute, or assist, a breach of this order.

[28] This freezing order does not prevent, in respect of assets located outside New Zealand, any third party from complying with—

(a) what it reasonably believes to be the third party's obligations, contractual or otherwise, under the laws of the country in which those assets are situated or under the proper law of any contract between the third party and the first to third respondents; and

(b) any orders of the courts of that country, provided that reasonable notice of any application for such an order is given to the appellant's solicitors.

[29] For the purposes of this order, "assets" means all assets including but not limited to, cryptocurrencies, digital wallets and their keys and contents, intellectual property, software, licensing agreements, properties (real or personal), things in action, business, effects of business, monies, stock-on-trade, securities, shares, investments, debts owed to any one or more of the first to third respondents by any other person, partnership, or body corporate whatsoever, deeds, bank accounts, books, statutory filings, share certificates, title documents, instruments of control, financial and all other records and papers, whether they are located at any of the respondents'

offices/homes, their accountants, auditors, or other advisers or agents, whether in their own name or not, whether solely or jointly owned, whether any one or more of the respondents are interested in them legally, beneficially, or otherwise, and whether held directly or indirectly, and include any asset in which any one or more of the respondents have the power, directly or indirectly, to dispose of, deal with, or control or manage, as if it were their own. The respondents are regarded as having such power if a third party holds or controls the asset in accordance with their direct or indirect instructions.

Leave to serve first respondent out of jurisdiction

[30] The appellant is given leave to serve the first respondent with any documents required to be personally served on the first respondent out of the jurisdiction in Singapore in accordance with the law of Singapore. If service is effected abroad, the appellant is also to serve the attached Notice to the first respondent served overseas.

Next steps

[31] The matter is to be called in the Duty Judge list in the High Court at Auckland at 10 am on Monday 31 August 2020.

Costs

[32] Costs are reserved.

Solicitors:
Buddle Findlay, Wellington for Appellant