Personal Property+

COMMENTARY BY GILEAD COOPER QC, 3RD MARCH 2022

For every legal textbook on Personal Property, there is usually a whole shelf devoted to Real Property; the law of personal property is something of a neglected poor relation. Yet it is no less fascinating, with numerous arcane and unexpected problems. The new edition of *Bridge, Gullifer, Low & McMeel on The Law of Personal Property* (3rd edn), which was published on 31 December 2021, is therefore especially welcome.

One feature that sets the new edition apart from its predecessors is an entirely new chapter on Digital Assets, written by Professor Kelvin F.K. Low. Professor Low has been at the forefront of analysing the legal consequences of cryptocurrencies and other forms of digital assets, and has already written a number of important articles on the subject. He was one of the contributors to *Cryptocurrencies in Public and Private Law* (ed., Fox & Green), but that came out in March 2019 since when there have been about a dozen cases in courts around the world. Professor Low's new chapter in *Bridge, et al.,* builds on his previous work and provides the most up-to-date account of the issues, both theoretical and practical, raised by this new technology. He deals not only with the hot topic of cryptocurrencies (and other cryptoassets), but also domain names, "cybersquatting", NFTs (Non-Fungible Tokens), and the virtual money and things that can be acquired in on-line computer games such as *World of Warcraft*.

These topics bring into focus a number of fundamental conceptual questions, forcing one back to first principles. What is property? How is it different from "virtual" property? Can such assets (if they are assets) be the subject of a trust? How are they different from money? What does it mean to "own" something? What is the relationship between data and the medium on which it is stored? How can the rules of private

international law be adapted to deal with valuable rights that have no *situs*? Can such rights be the subject of trespass? Or conversion?

Professor Low is not the first or the only person to have asked these questions. Some, indeed, have already been considered in a number of cases, but most of those have been interlocutory decisions and their answers have only been provisional. Two substantive cases, *B2C2 v Quoine*[1] in the Singapore Court of Appeal and *Ruscoe & Moore v Cryptopia*[2] in New Zealand High Court, have gone further, but for reasons that Professor Low identifies, their reasoning is open to challenge and arguably rests on some misunderstandings. Several cases have referred to and adopted the reasoning of the *Legal Statement on Cryptoassets and Smart Contracts* by the UK Jurisdiction Taskforce, which concluded that cryptocurrencies were, or at least could be, property, and could be the subject of a trust; but Professor Low offers an account of his own that is both fresh and critical.

In particular, Professor Low identifies several areas of potential confusion. Quoting an earlier article of which he was a co-author, he comments that –

"much of the excitement over the blockchain's transformative legal prowess stems from a mutual misunderstanding. Many lawyers do not understand the core technical terms in the blockchain narrative and incorrectly assume that they map directly onto similar legal terms. Concurrently, many technologists make false assumptions about how legal rules work and thus imagine legal systems ripe for disruption."

He identifies the potential for confusion that can arise from misleading metaphors and analogies. For example, a digital "file" is not really a "file" at all – at least, it is not the same as a paper file. When a digital file is "transferred", what actually happens is that a duplicate is made on the new medium, and the original is then deleted. Only the data is not really deleted: it is usually simply transferred to a different location (on most computers, the Recycle Bin). Even when the Recycle Bin is emptied, the data remains on the computer but its address is removed from the master file table, leaving part of the computer's memory on which it is stored available to be overwritten. On some types of computer storage (such as hard drives), the data can in fact be recovered by forensic techniques even after it has been written over multiple times. In addition,

[1] [2020] SGCA(I) 2.
[2] [2020] NZHC 728.

although digital copies generally have a very high degree of accuracy, they are not (unless exceptional precautions are taken) 100% perfect: with large files, there is a "bit error rate".

What all this means so far as the law is concerned is that some of the criteria derived from existing caselaw, often cited as authoritative in defining what can be classified as "property", simply do not work. Fry LJ's assertion in *Colonial Bank Ltd v Whinney*[3] that all personal property is either a chose in possession or a chose in action ("there is no *tertium quid*") needs to be understood as adopting a very broad meaning for the expression "chose in action", not necessarily restricted to rights capable of being enforced in a legal action.

Professor Low is scathing about a decision of the New Zealand Supreme Court in criminal case, *Dixon v R*,[4] in which the accused was found guilty of dishonestly obtaining "property". Dixon had attempted to sell a digital recording taken from a security camera in a bar (after "deleting" the original) in which a rugby player who was married to a member of the British Royal Family was caught "socialising intimately" with a female. Borrowing partly from the indicia of property propounded by Lord Wilberforce in *National Provincial Bank v Ainsworth*,[5] the New Zealand Supreme Court held that the digital files in question were property for the purposes of the relevant statute because they were (a) identifiable, (b) valuable, (c) transferrable, and (d) had a physical presence. Professor Low points out that three of these indicia are inapt: not all digital files are valuable (indeed not all property is valuable); when property is transferred, the transferee receives the original, not a copy; and the physical presence of digital files cannot be separated from the medium on which they are stored.

It is likely that many more cases will have to go through the courts before the difficult and novel problems raised in the virtual world are worked out in detail, and it is still an open question whether the flexibility of the common law and the ingenuity of judges will be sufficient to accommodate them without the need for legislation. In his recent book, *Reality+*, the philosopher David Chalmers argues that we are unable to know if we are all living in a simulated virtual universe: virtual realities are genuine realities. If

[3] (1885) 30 Ch. D. 261.
[4] [2015] NZSC 147.
[5] [1965] AC 1175.

he is right, the difference between virtual assets and non-virtual assets may be equally elusive. Do android bankers dream of electric money?

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