



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY**

H1/2026

BETWEEN:

ADAM POULTON
Appellant

and

JEFF CONRAD
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The respondent generally agrees with the statement of issues in the appellant's submissions (AS), though the respondent says:

- a. The enquiry set out at AS [2] (*'is Bitcoin property...?'*), is apt to mislead. Property is a description of a legal relationship with a thing, not the thing itself. The better enquiry is can Bitcoin be the subject of a proprietary relationship?
- b. That being so, the enquiry in relation to the issue at AS [3] is *if* the outstanding Bitcoin is the property of the respondent, is he entitled to sue for damages in detinue or conversion?
- c. Ground 2 involves an appeal from a discretion. Contrary to the framing of the issue at AS [4], the question is not whether the decision of the majority was 'correct', but whether specific or inferred error can be established.¹

PART III: SECTION 78B NOTICE

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: CONTESTED MATERIAL FACTS

4. AS [9], [10] and [12] refer to evidence advanced by the appellant at trial that was rejected by the Magistrate.² The Magistrate's factual findings have not been appealed; accordingly, this evidence is not relevant to issues on appeal.

¹ *House v The King* (1936) 55 CLR 499.

² The Magistrate rejected this evidence (and the appellant's evidence more generally unless it was corroborated by '*clear, unambiguous and reliable evidence*') on the basis that the appellant was not a credible witness (MC [42]-[45], CAB 16-17).

5. The respondent otherwise agrees with the relevant facts set out at Part V of the appellant's submissions, but says the following facts are also material to the appeal.³
6. Further to AS [10], in July 2014 the respondent asked the appellant to give him his \$10,000 worth of Bitcoin. On the appellant's next visit to the respondent's clinic, the appellant gave the respondent what looked like a bankcard, which he called a cold storage wallet. The appellant told the respondent it had 10.5 Bitcoins on it, and to treat the cold wallet like cash, because if he lost it, all his Bitcoin would be lost (MC [14], CAB 9). The appellant's expert, Mr Richards, described these events as involving the 'supply of funds to Mr Conrad via paper wallet due to an upcoming overseas trip. This was a prudent step to take to ensure that Mr Conrad had custody of part of his funds in the event of incapacity of Mr Poulton' (AFM 58).
7. Further to AS [12], in September 2017 the respondent was able to access the cold storage wallet and made the discovery that it contained only six Bitcoin (MC [15] CAB 10). Following a meeting with the appellant in November 2017, the appellant transferred a further three Bitcoin to the respondent (MC [93] CAB 30).
8. Further to AS [13], there was no dispute that the appellant did not transfer any Bitcoin or other property to the appellant after November 2017 (MC [9] CAB 8).

PART V: STATEMENT OF ARGUMENT

9. **V(1) The nature of Bitcoin.** The key system components that facilitate trades in Bitcoin are set out at MC [5]-[8] (CAB 7-8), and elaborated on at AS [20]-[26]. Without repeating those components, the following six matters warrant particular emphasis.
10. *First*, Bitcoin can be purchased on cryptocurrency exchanges and used as payment for goods or services. Bitcoin can be valued, theoretically, against other world – or 'fiat' – currencies, such as the Australian or US Dollar. In this way, fiat currencies can be exchanged for Bitcoin and vice versa (AFM 9-10).

³ To the extent that the facts set out at [6] to [8] below are derived from evidence led on behalf of the respondent, that evidence was accepted by the Magistrate, who found both the respondent and his wife to be credible witnesses (MC [41]-[42]). The Magistrate went on to find that 'the history in relation to the dealings between the [respondent] and the [appellant] are as asserted by the [respondent] and his wife in their evidence apart from whether the [appellant] proposed to charge a fee for his services.' (MC [45], CAB 45).

11. *Second*, unlike fiat currency, Bitcoin is a finite cryptocurrency: once the 21,000,000 cap is reached, no more Bitcoin will be ‘discovered’.⁴ In this respect, at a basic level Bitcoin has something common with a share.
12. *Third*, the public key or address is publicly available information, although the identity of the person (or other entity) who holds the public address is not identifiable.⁵
13. *Fourth*, whether held on a ‘hot’ or ‘cold’ wallet, the private key is akin to a PIN and allows a person to ‘unlock’ funds from a wallet for the purpose of transfer (AFM 9). The private key permits the transfer, allowing it to be cryptographically authenticated by digital signature. Because of this it has been said that ‘*[k]nowledge of the private key confers practical control over the asset; it should therefore be kept secret by the holder*’.⁶
14. *Fifth*, the rules governing dealings in Bitcoin are established by the informal consensus of participants.⁷ These rules establish objectively which version of the blockchain ledger is correct. Transactions are added to the chain by work undertaken by ‘miners’, who develop a ‘*proof of work*’ to validate a series of transactions. The combination of private keys to effect transactions and their incorporation into a hashed chain of blocks prevents double-spending (cf., fiat currency, where exchanges are supported by trust in a third-party bank).⁸
15. *Sixth*, Bitcoin is more than the sum of its parts. In the present context, to reduce Bitcoin to ‘*nothing more than a string of code in a distributed computer database*’ (AS [20]) is to ignore its real-world, commercial power. The significance of a crypto-asset like Bitcoin is not what the data on the blockchain conveys, but what it allows its holder to do.⁹ Professor Fox has described crypto-assets in terms of their ‘*transactional power*’:¹⁰

⁴ R Marshall, ‘Bitcoin: Where Two Worlds Collide’ (2015) 27(1) *Bond Law Review* 89, 93.

⁵ *Re Blockchain Tech Pty Ltd* (2024) 76 VR 578, 601.

⁶ Emphasis added. See **UK Jurisdiction Taskforce Legal Statement on Cryptoassets and Smart Contracts** (LawTech Delivery Panel, November 2019) at [28].

⁷ *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWCA Civ 83 at [23] (Birss LJ, with whom Popplewell and Lewison LLJ agreed); UK Jurisdiction Taskforce *Legal Statement* at [30].

⁸ *Tulip Trading BSV* [2023] EWCA Civ 83 at [23]-[24] (Birss LJ, with whom Popplewell and Lewison LLJ agreed); *Connor Yeates (a pseudonym) v R* [2025] VSCA 288 at [24]; *Rusco v Cryptopia Limited (in liq)* [2020] 2 NZLR 809 at [107]; UK Jurisdiction Taskforce *Legal Statement* at [29].

⁹ UK Jurisdiction Taskforce *Legal Statement* at [60].

¹⁰ D Fox, ‘Digital Assets as Transactional Power’ (2022) 1 *Journal of International Banking and Finance Law* 3, 3, cited by the **UK Law Commission** in the *Digital Assets: Final Report* (Law Com No 412, 2023) at [4.14] and [4.19]-[4.20]. See also *Re Blockchain* (2024) 76 VR 578, 599 at [381], quoting *D’Aloia v Persons Unknown* [2024] EWHC 2342 at [156]; *Yeates* [2025] VSCA 288 at [122].

The asset is more than mere data. It is a set of transactional functionalities. The most important of these is the capacity of the person who holds the private key to effect new transactions which will be recognised as valid by the technical rules of the system. Analysed in this way, the asset can be viewed as a specific transactional power over unique data entries on the ledger.

16. **V(2) The concept of property.** The appellant’s principal argument is that Bitcoin is not property, but is mere information. The first difficulty with this argument is that it focuses on the *thing* (Bitcoin) rather than an individual’s relationship with it. This is too simplistic – both for the reasons referred to in the preceding paragraph and by reference to the legal concept of property. This Court has unanimously said that ‘[s]eldom will it be useful to use the word “property” as referring only to the subject-matter of [a] legally endorsed concentration of power’: *Telstra Corporation Ltd v Commonwealth*.¹¹ To describe a thing that is the subject of rights as ‘property’ is ‘false thinking’: *Hocking v Director-General of the National Archives of Australia*.¹² The appellant’s argument does not address how the common law conceives of property, which is that property is ‘a description of a legal relationship with a thing’: *Yanner v Eaton*.¹³
17. This conception of property appears in the works of Jeremy Bentham:¹⁴
- Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are now said to possess, in consequence of the relation in which we stand towards it.*
- There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.*
- To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else; to use it – none of these physical circumstances, nor all united, convey the idea of property...*
18. This approach directs attention not to the thing itself (including whether it is tangible or intangible) but to the relation which a person or persons have in respect of the thing, and

¹¹ (2008) 234 CLR 210 at [44] (the Court).

¹² (2020) 271 CLR 1 at [202] (Edelman J); *Yanner v Eaton* (1999) 201 CLR 351 at [18] citing K Gray, ‘Property in Thin Air’, (1991) 50 *Cambridge Law Journal* 252, 299.

¹³ *Yanner* (1999) 201 CLR 351 at [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) and [86] (Gummow J). In *Telstra Corporation* (2008) 234 CLR 210 at [44], the Court said in many cases it may be helpful to speak of property as a ‘bundle of rights’. At other times it may be more useful to identify property as ‘a legally endorsed concentration of power over things and resources’. See also *Hocking* (2020) 271 CLR 1 at [89] (Kiefel CJ, Bell, Gageler and Keane JJ), [171] (Gordon J) and [202]-[203] (Edelman J).

¹⁴ J Bentham, *Theory of Legislation*, translated from the French of Etienne Dumont by R Hildreth (Trubner & Co, 1864) 111-112; see also J Bentham, *Works of Jeremy Bentham Volume 1, Issue 2*, ed J Bowring (Edinburgh: William Tait, 1838) 308-309.

how – either individually or collectively – they conceive of that relationship. It is ‘*only because people generally accept the exchange value of shells or beads or differently printed paper notes that they become currency*’, which in turn holds value by virtue of ‘*a collective act of mutual faith*’.¹⁵ The value of Bitcoin is buttressed by the collective mutual faith of those who invest in it.

19. A corollary of this understanding is that property will not be the same thing at all times to all people. Property is not a ‘*monolithic notion of standard content and invariable intensity*’.¹⁶ It can have the quality of relativity: *Hocking*.¹⁷ Property does not always equate to full, beneficial, or absolute ownership;¹⁸ it could involve legal, beneficial, 10 possessory, or non-possessory rights, depending on the the relationship in which one stands towards the relevant ‘thing’.
20. How then does the law identify the outer limits of the concept of property? Or, as Professor Gray has asked, ‘*what constitutes the “propertiness” of “property”*’?¹⁹ Judges and legal scholars have drawn on a range of concepts to answer this question in different contexts.²⁰
21. Lord Wilberforce’s four criteria in *National Provincial Bank v Ainsworth*²¹ are often said to comprise the definition of property.²² His Lordship said:²³ ‘*[b]efore 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 20 third parties and have some degree of permanence and stability*’. The criteria draw out features of a thing with which it is possible to have a proprietary relationship.
22. Ultimately however, the criteria are not determinative. As Justice Jackman pointed out in a speech ‘*Is Cryptocurrency Property?*’²⁴ the impossibility of alienating a proprietary

¹⁵ *ByBit Fintech Limited v Ho Kai Xin* [2023] SGHC 199 at [36].

¹⁶ *Yanner* (1999) 201 CLR 351 at [19] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), quoting K Gray and S F Gray, ‘The Idea of Property in Land’, in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15 at 16; *Hocking* (2020) 271 CLR 1 at [89] (Kiefel CJ, Bell, Gageler and Keane JJ).

¹⁷ *Hocking* (2020) 271 CLR 1 at [90] (Kiefel CJ, Bell, Gageler and Keane JJ)

¹⁸ *Yanner* (1999) 201 CLR 351 at [22] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Hocking* (2020) 271 CLR 1 at [90] (Kiefel CJ, Bell, Gageler and Keane JJ).

¹⁹ Gray (1991) 50 *Cambridge Law Journal* 252, 299.

²⁰ See generally the discussion in L **Bennett Moses**, ‘The Applicability of Property Law in New Contexts: From Cells to Cyberspace’ (2008) 30 *Sydney Law Review* 639.

²¹ [1965] AC 1175.

²² See e.g., *Tulip Trading* [2023] EWCA Civ 83 at [24] (Birss LJ, with whom Popplewell and Lewison LLJ agreed); *Ruscoe* [2020] 2 NZLR 809 at [75] and [102].

²³ *Ainsworth* [1965] AC 1175 at 1248.

²⁴ (Speech, Commercial Law Association, 21 June 2024).

right is not an indispensable attribute of a right of property, a proposition which derives from *National Trustees Executors and Agency Company of Australasia Limited*,²⁵ *R v Toohey; ex parte Meneling Station Pty Ltd*²⁶ and *Federal Commissioner of Taxation v Orica Ltd*.²⁷ Thus, an inability to assign Bitcoin (cf., transfer it) is no bar to a finding that it is property.

23. An alternative unifying principle that has found favour in this Court²⁸ draws again from the work of Professor Gray, who has argued that ‘*the criterion of “excludability” gets much closer to the core of “property” than does the conventional legal emphasis on the assignability or enforceability of benefits... “Property” is not about enjoyment of access but about control over access.*’²⁹ On this approach, property is a term of ‘*wide signification*’ denoting a ‘*legally endorsed concentration of power*’.³⁰
24. Yet another approach to identifying proprietary relationships emphasises the relevance of commercial value; the argument being that if commerce treats valuable and transferrable assets as property, so too should the courts.³¹
25. **V(3) Bitcoin capable of being property.** Multiple courts, including the Victorian Court of Appeal, have now accepted that Bitcoin is capable of being property with reference to the *Ainsworth* criteria: *Yeates*;³² *Re Blockchain*;³³ *D’Aloia*;³⁴ *Tulip Trading*;³⁵ and *Ruscoe*.³⁶ The analysis of the four criteria in these cases should be accepted. Each is addressed briefly below.
26. *Bitcoin is definable*: it is a ‘thing’ manifested in an electronic coin, quantities of which are associated with and manifested by codes on the blockchain. Public and private keys

²⁵ (1954) 91 CLR 540,583 (Kitto J).

²⁶ (1983) 158 CLR 327, 342 (Mason J).

²⁷ (1988) 194 CLR 500 at [91] (Gaudron, McHugh, Kirby and Hayne JJ) and [110] (Gummow J).

²⁸ *Yanner* (1999) 201 CLR 351 at [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Hocking* (2020) 271 CLR 1 at [89] (Kiefel CJ, Bell, Gageler and Keane JJ), [129] (Nettle J), [171], (Gordon J) and [205] (Edelman J).

²⁹ Gray (1991) 50 *Cambridge Law Journal* 252, 294 (emphasis in original).

³⁰ Gray (1991) 50 *Cambridge Law Journal* 252, 299.

³¹ See Bennett Moses, (2008) 30 *Sydney Law Review* 639,549-50 and the authorities cited at footnotes 74 and 74. The author notes that the converse is not true: ‘*the fact that a thing is not commercially valuable should not generally prevent a thing from being property*’. See also *National Trustees* (1954) 91 CLR 540, 566, where McTiernan and Taylor JJ observed that ‘*[o]ther interests not enforceable by action... are so much a subject of trade that it would be idle to deny that a holder, being possessed of a saleable commodity, is not the owner of property*’.

³² [2025] VSCA 288 at [93]-[114] (Emerton P with whom Taylor and Kidd JJA agreed).

³³ (2024) 76 VR 578 at [374]-[389].

³⁴ [2024] EWHC 2342 at [154].

³⁵ [2023] EWCA Civ 83 at [24] (Birss LJ, with whom Popplewell and Lewison LLJ agreed).

³⁶ [2020] 2 NZLR 809 at [102]-[121].

make it capable of isolation.³⁷ This system of identification is comparable to what occurs through the use of recorded balances in bank accounts in the banking system, though the decentralised ledger is across a large network of computers, rather than held by a centralised bank.³⁸

27. *Bitcoin is identifiable by third parties:* the property in Bitcoin is identified by unique strings of data recording the creation of, and dealings with, Bitcoin. The private key allows users to exclude third parties.³⁹ The public key identifies an address on the public ledger.⁴⁰

10 28. *Bitcoin is capable in its nature of assumption by third parties:* the Victorian Court of Appeal considered this criteria as requiring that third parties must respect the rights of the property owner and be subject to legal sanction if they assert a claim to ownership without justification and, usually, that the property is a desirable asset.⁴¹ The Court considered the criterion satisfied essentially by Bitcoin's tradable nature. In *Re Blockchain*, Attiwill J acknowledged that while specific identifiable coin are not traded, alienability is not an indispensable attribute of property.⁴² There are parallels between Bitcoin and water rights. A body of water is not alienable, but a person can have a proprietary right to take part of the available water.⁴³ The digital tokens associated with Bitcoin identify the property, akin to the way one can identify a river by its name, '*even though the water contained within its banks is constantly changing*'.⁴⁴ The result is that
20 it is meaningful to describe Bitcoin as something which is 'rivalrous', in that the holding of it by one person prevents another from doing so.⁴⁵ As discussed further below, the rivalrous nature of Bitcoin is also a powerful reason for rejecting the appellant's argument that Bitcoin is 'mere information'.

³⁷ *Yeates* [2025] VSCA 288 at [94]-[95] (Emerton P with whom Taylor and Kidd JJA agreed).

³⁸ *Ruscoe* [2020] 2 NZLR 809 at [106].

³⁹ *Ruscoe* [2020] 2 NZLR 809 at [110]-[112]; *Yeates* [2025] VSCA 288 at [99]-[100] (Emerton P with whom Taylor and Kidd JJA agreed).

⁴⁰ *Re Blockchain* (2024) 76 VR 578 at [384].

⁴¹ *Yeates* [2025] VSCA 288 at [101] (Emerton P with whom Taylor and Kidd JJA agreed).

⁴² *Re Blockchain* (2024) 76 VR 578 at [387].

⁴³ In Tasmania, this can occur under s 60 of the *Water Management Act 1999* (Tas), which provides that a water allocation under licence is the personal property of the licensee.

⁴⁴ *ByBit Fintech* [2023] SGHC 199 at [31].

⁴⁵ *Tulip Trading* [2023] EWCA Civ 83 at [24] (Birss LJ, with whom Popplewell and Lewison LLJ agreed).

29. *Bitcoin has some degree of permanence and stability*: Bitcoin, while volatile trading stock, is permanent and stable in that it cannot be cancelled or deleted.⁴⁶ It remains on the ledger until a transaction is effected via the public and private keys.⁴⁷
30. Turning briefly to the other tests referred to above, the requirement of excludability is satisfied by the private key, which is the means by which practical control over access to Bitcoin is achieved.⁴⁸ There can also be no doubt that the commercial world regards Bitcoin as an asset that is both valuable and transferrable. Bitcoin can be used as an investment vehicle, to purchase goods online, and can be exchanged for fiat currency (AFM, 9-10 13). The appellant's own company, Get Paid in Bitcoin Pty Ltd, '*provides employers with a payroll solution whereby they can pay their employees part of their salary in bitcoin*'.⁴⁹ (In this regard it is clear that the appellant's company transacts in more than mere information.) Examples of the use of Bitcoin in commerce and its significance is discussed in Part V(4), below.
31. For the above reasons, and borrowing the words of McTiernan and Taylor JJ in *National Trustees*, the common law would be '*idle to deny*' that Bitcoin is a thing which is capable of being the subject of a proprietary relationship. The alternative conclusion would place the common law drastically out of step with the commercial world.
32. **V(4) Bitcoin is not mere information.** These submissions have already addressed why Bitcoin is more than digitally recorded information. Bitcoin represents value to those who use it. That value is not dependent on what the data underpinning Bitcoin *conveys* (as with information) but on what it allows one to *do*;⁵⁰ i.e. to engage in transactions in which value is exchanged (including for fiat currency or goods online (AFM 9-10)). Importantly, Bitcoin is rivalrous; while it can be duplicated, the transaction ledger and consensus rules prevent double-spending. This quality also distinguishes it from mere information, which can be shared and used simultaneously by different people.⁵¹
33. The distinction between Bitcoin and information is highlighted by the treatment of Bitcoin in various areas of regulatory and commercial life. To treat Bitcoin as

⁴⁶ *Yeates* [2025] VSCA 288 at [107] (Emerton P with whom Taylor and Kidd JJA agreed).

⁴⁷ *Re Blockchain* (2024) 76 VR 578 at [386]; *Ruscoe v Cryptopia Limited (in liq)* [2020] 2 NZLR 809 at [117]-[119].

⁴⁸ Emphasis added. The UK Jurisdiction Taskforce *Legal Statement* at [28].

⁴⁹ Affidavit of Adam Poulton affirmed 15 October 2020 at [5] (RFM 4).

⁵⁰ UK Jurisdiction Taskforce *Legal Statement* at [60]-[61].

⁵¹ UK Jurisdiction Taskforce *Legal Statement* at [62]-[63]. See also *Yeates* [2025] VSCA 288 at [66]-[80], but see esp. [76]; *Re Blockchain* (2024) 76 VR 578 at [388]; and *Ruscoe* [2020] 2 NZLR 809 at [126]-[128].

information would be at odds with the existing characterisation of cryptoassets as personal use assets for capital gains tax purposes and enrich those who invest in it.⁵² It would also validate a method of hiding assets as ‘information’, which would have consequences for means tested social security benefits.⁵³

34. The need to acknowledge Bitcoin as a form of financial wealth has recently been acknowledged by the *Corporations Amendment (Digital Assets Framework) Act 2026* (Cth), which from 8 April 2027 will require cryptocurrency exchanges and custody providers to obtain an Australian Financial Services Licence.
35. Bitcoin is not in substance materially different to other types of ‘property’ which can constitute ‘collateral’ under the *Personal Property Securities Act 2009* (Cth), including negotiable instruments, chattel papers, currency and financial products including shares.⁵⁴ More fundamentally, to hold that Bitcoin is information would remove it from the pool of property divisible amongst creditors of a bankrupt estate or an insolvent corporation.⁵⁵ It would also allow one tech-savvy partner to a marriage to avoid a just alteration of property interests under s 79 of the *Family Law Act 1975* (Cth).⁵⁶
36. The interests of coherence in the law both support and demand recognition of Bitcoin as being the object of property rights, not mere information.
37. **V(5) Categorising property in the electronic era.** In 1885, Fry LJ, delivering a dissenting judgment (ultimately upheld by the House of Lords)⁵⁷ in *Colonial Bank v Whinney*,⁵⁸ said personal property consisted of either choses in possession or action, and ‘[t]he law knows no tertium quid between the two’.⁵⁹ That idea has since pervaded the

⁵² The Australian Taxation Office’s website states that it considers cryptocurrency a ‘CGT asset’ for the purposes of s 108-5 of the *Income Tax Assessment Act 1997* (Cth): <https://www.ato.gov.au/individuals-and-families/investments-and-assets/crypto-asset-investments/what-are-crypto-assets> (accessed 18 April 2026).

⁵³ The Services Australia website states that it considers holdings of cryptocurrency to be ‘personal assets’: <https://www.servicesaustralia.gov.au/asset-types?context=51411> (accessed 21 April 2026). For the calculation of assets for age and disability support pensions and carer payment (for people who are not blind) see s 1064 of the *Social Security Act 1991* (Cth). Assets which are to be disregarded are set out in s 1118.

⁵⁴ *Personal Property Securities Act 2009* (Cth), s 10.

⁵⁵ *Bankruptcy Act 1966* (Cth) ss 5 (definition of ‘property’) and 116. The Australian Financial Security Authority’s website states that it considers cryptocurrency an asset divisible amongst creditors: <https://www.afsa.gov.au/professionals/dealing-cryptocurrency-bankrupt-estate> (accessed 18 April 2026). In relation to corporations, see: *Corporations Act 2001* (Cth), s 9 (definition of ‘property’); s 513AA (meaning of ‘property’ for Part 5.6); and ss 555, 556, 559 and 561, which facilitate payment of a company’s debts and claims from property of the company according to a specific set of priority rules.

⁵⁶ In this regard, cryptocurrency has already been recognised as property for the purposes of a property settlement: see e.g., *Kranz v Padmini* [2025] FedCFamC1F 45 esp. at [244]-[245], [415]-[416].

⁵⁷ *Colonial Bank v Whinney* (1886) 11 App Cas 426.

⁵⁸ (1885) 30 ChD 261.

⁵⁹ *Colonial Bank* (1885) 30 ChD 261 at 285 (Fry LJ).

common law. But of course there was no *tertium quid* in 1885: the first digital computer did not exist until some sixty years later. The idea that a network of computers could support tradable value through a system of cryptographically authenticated transactions would have been beyond the Lord Justice's wildest imagination.

38. The strict adherence to Fry LJ's rule in the digital era, particularly in the United Kingdom,⁶⁰ is difficult to explain. Strict adherence to it leads to the 'fallacious' view that cryptocurrencies are not property.⁶¹ Further, as the learned authors of the UK Jurisdiction Taskforce's *Legal Statement on Cryptoassets and Smart Contracts* note, it is not clear whether his Lordship intended to exclude from his dichotomy intangible property, if it is not a thing in action. While that might seem the logical implication of what was said, the issue was not squarely before the Court.⁶² In fact, by approving a passage from *Personal Property* by Joshua Williams, it appears that Fry LJ endorsed things in action as personal property of an incorporeal nature.⁶³
39. The authors of the *Legal Statement* concluded that 'Colonial Bank *is not therefore to be treated as limiting the scope of what kinds of things can be property in law. If anything, it shows the ability of the common law to stretch traditional definitions and concepts to adapt to new business practices*'.⁶⁴
40. The respondent submits that Estcourt J was correct to say there is a powerful case for reconsidering the dichotomy between choses in possession and choses in action, and for recognising a third category of intangible property, capable of assumption and susceptible to possession (FC [93] CAB 78). (That Bitcoin is capable of possession is addressed in Part V(7), below.) His Honour's view was an echo of comments by Moore-Bick LJ in *Your Response v Datateam Business Media Ltd*,⁶⁵ though ultimately the Lord Justice said the Court was bound by *OBG Ltd v Allan*⁶⁶ and could not move on the issue. Estcourt J was not so constrained. In *Yeates*,⁶⁷ the Victorian Court of Appeal did not need to resolve the categorisation conundrum, but concluded for the purposes of s 72 of

⁶⁰ See e.g., *Your Response Ltd v Datateam Business Media Ltd* (2015) 1 QB 41 at [13], [26] (Moore-Bick LJ).

⁶¹ *AA v Persons Unknown* [2019] EWHC 3356 at [58].

⁶² UK Jurisdiction Taskforce *Legal Statement* at [74].

⁶³ *Colonial Bank* (1885) 30 Ch D 261 at 286 (Fry LJ); UK Jurisdiction Taskforce *Legal Statement* at [75].

⁶⁴ UK Jurisdiction Taskforce *Legal Statement* at [77].

⁶⁵ [2015] 1 QB 41 at [27].

⁶⁶ [2008] AC 1.

⁶⁷ [2025] VSCA 288.

the *Crimes Act 1958* (Vic) that Bitcoin was ‘other intangible property’ which was capable of being stolen.⁶⁸

41. Even if property in Bitcoin does not fall within a ‘third category’, there is a sound argument that it consists of a chose in action, as that term is understood in Australian law. In *National Trustees*, Kitto J said that the proposition that choses in action comprise only rights enforceable by action in the courts needed to be recast in more flexible terms if the *Colonial Bank* dichotomy was to be maintained.⁶⁹ His Honour went on to explain the expression ‘chose in action’ now comprises a ‘heterogeneous group of rights which, as Goodeve observes... have only one common characteristic, viz. that they do not confer the present possession of a tangible object’.⁷⁰ The original meaning – a right to be asserted by an action – still existed, but the term had extended to accommodate many forms of personal property not within that original conception.⁷¹
- 10
42. In *Re Blockchain*, Attiwill J concluded that a person’s interest in Bitcoin is property. While his Honour said it cannot be possessed (a point returned to below), it was a chose in action on the basis expounded by Kitto J.⁷² The extension of the meaning of chose in action serves further to show how pointless the *Colonial Bank* dichotomy really is in the digital era. In *Yeates*, the Victorian Court of Appeal posited that the judgment of Kitto J in *National Trustees* itself suggested a ‘third class’, being a subset of causes in action for which enforceable rights do not exist.⁷³ Speaking extra-judicially, Justice Jackman has suggested that there is no need for a third category, because of the breadth of choses in action.⁷⁴ Academics have even argued that many cryptocurrencies can be categorised as choses in possession because, essentially, they can be possessed.⁷⁵
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43. Given the proliferation of digital assets like Bitcoin, which are neither neatly choses in action nor choses in possession, the *Colonial Bank* dichotomy no longer usefully serves to classify, much less identify, property in the digital age. In any event, difficult

⁶⁸ [2025] VSCA 288 at [120]-[124].

⁶⁹ *National Trustees* (1954) 91 CLR 540 at 584 (Kitto J).

⁷⁰ *National Trustees* (1954) 91 CLR 540 at 584 (Kitto J).

⁷¹ *National Trustees* (1954) 91 CLR 540 at 584 (Kitto J); see also 566 (McTiernan and Taylor JJ).

⁷² *Re Blockchain* (2024) 76 VR 578 at [389]; see also *Ruscoe* [2020] 2 NZLR 809 at [124].

⁷³ *Yeates* [2025] VSCA 288 at [31] (Emerton P with whom Taylor and Kidd JJA agreed).

⁷⁴ Justice Jackman, ‘Is Cryptocurrency Property?’ (Speech, Commercial Law Association, 21 June 2024).

⁷⁵ L Clover Alcolea and J Mihal, ‘The tiptoe to crypto: An analysis and account of property in cryptocurrency’ (2025) 54(1) *Common Law World Review* 43 at 58.

questions of classification should not distract from the sound arguments in favour of recognising Bitcoin as capable of being property, as set out in Part V(4) above.

44. **V(6) The torts of detinue and conversion.** Detinue is the older of the torts the subject of this appeal, having its origins in actions in debt in the twelfth century. A plaintiff would seek to recover specific chattels ‘owed’ by the defendant. Two actions developed from it: detinue *sur bailment* and detinue *sur trover*.⁷⁶
45. Conversion developed from an action in trover.⁷⁷ By the sixteenth century, trover was an established tort based upon a plea that the plaintiff had possessed certain goods but had casually ‘lost’ them.⁷⁸ The defendant having ‘found’ the goods, converted them to his own use. This fiction was not traversable and so the focus of the tort was on whether the defendant had in fact converted the plaintiff’s property (FC [16] CAB 58).⁷⁹
46. The essential elements of the tort of conversion therefore involve an intentional act or dealing with goods in a manner that is inconsistent with or repugnant to the rights of the owner or someone with a superior right to possession.⁸⁰ The wrong is the unauthorised assumption of the powers of the true owner;⁸¹ i.e., an intended act of dominion, control or assertion of rights over the goods.⁸²
47. There is much overlap between conversion and the tort of detinue, which arises from a refusal to surrender goods to the person with a right to immediate possession upon lawful and reasonable demand.⁸³ Conversion has almost entirely overtaken detinue, though the latter action has survived because it can result in an order for return of the chattel, a proprietary remedy not available in conversion.⁸⁴

⁷⁶ SLK Shaw, ‘Conversion of Intangible Property: A Modest but Principled Extension? A Historical Perspective’ (2009) 40 *Victoria University of Wellington Law Review* 419, 422; see also AWB Simpson, ‘The Introduction of the Action on the Case for Conversion’ (1959) 75 *Law Quarterly Review* 364, 364.

⁷⁷ Shaw (2009) 40 *Victoria University of Wellington Law Review* 419, 426. C Sappideen, et al, *Fleming’s The Law of Torts* (Lawbook, 11th edition, 2024) at [4.60].

⁷⁸ Shaw (2009) 40 *Victoria University of Wellington Law Review* 419, 426.

⁷⁹ See also *Fleming’s Law of Torts* at [4.60]; and *OBG* [2008] AC 1 at [224] (Lord Nicholls of Birkenhead).

⁸⁰ *Bunnings Group Ltd v Chep Australia Ltd* (2011) 82 NSWLR 420 at [124] (Allsop P, with whom Giles and Macfarlan JJA agreed).

⁸¹ *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 218-219 (Latham CJ).

⁸² See *Bunnings Group* (2011) 82 NSWLR 420 at [124] (Allsop P, with whom Giles and Macfarlan JJA agreed); see also *Penfolds Wines* (1946) 74 CLR 204 at 217-220 (Latham CJ); 228-230 (Dixon J, with whom Starke J agreed at 221); 234-235 (McTiernan J) and 239-244 (Williams J).

⁸³ D Rolph et al, *Balkin & Davis Law of Torts* (6th ed, 2021) at [4.54]; *Hoath v Connect Internet Services Pty Ltd* (2006) 229 ALR 566 at [166]; *Fleming’s The Law of Torts* at [4.200].

⁸⁴ *Fleming’s The Law of Torts* at [4.200].

48. Pausing there, it is important to emphasise that the focus of the torts is on the infringement of superior *possessory* rights, including ownership.⁸⁵ As is argued below, an essential component of possession is control. Hence, the torts have protected the rights of plaintiffs to control things, not the nature, state or condition of the thing. As Dixon J said in *Penfolds Wines Pty Ltd v Elliott*,⁸⁶ damage to the chattel is not conversion. Neither is use, nor, necessarily, loss beyond the hope of recovery. Detinue also does not protect against damage to the chattel.⁸⁷ Thus, like the concept of property, the torts strike at the interference with one's *relationship* with a thing, not at the thing itself. By way of contrast, the tort of trespass to goods strikes at the level of the 'thing' and, amongst other things, protects the physical condition of the goods.⁸⁸
49. In descriptions of the torts, the words 'goods' or 'chattels' are invariably used to refer to the 'thing' which must be dealt with inconsistently, or not returned upon demand. The likely explanation for this is that at the time the torts were developing, choses in action were not considered property,⁸⁹ and the human mind could not cast itself forward to conceive of technological developments which would lead to rivalrous intangibles.⁹⁰
50. Because detinue and conversion are concerned with the right to possess a thing (rather than the thing itself), as a matter of principle both torts can and should cover intangibles that are capable of possession. Therefore, the essential question is whether Bitcoin, as an intangible, can be possessed sufficiently for those rights to be protected.
51. **V(7) Bitcoin can be possessed.** This Court has said that the word 'possession' is one for which English law has never worked out a completely logical and exhaustive definition.⁹¹ **Pollock and Wright's** oft-cited *An Essay on Possession in the Common Law*⁹² is an entire book on the difficulties of defining possession. Tay says that in the law interpreted by judges '*we meet one possessory term after another*',⁹³ and lists the

⁸⁵ *Hocking* (2020) 271 CLR 1 at [91] (Kiefel CJ, Bell, Gageler and Keane JJ); *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 at 1092 [77] (Lord Nichols of Birkenhead).

⁸⁶ (1946) 74 CLR 204 at 229 (Dixon J).

⁸⁷ See Simpson (1959) 75 *Law Quarterly Review* 364, 364-5; Shaw (2009) 40 *Victoria University of Wellington Law Review* 419, 422.

⁸⁸ *Balkin & Davis Law of Torts* at [4.43]; *Fleming's The Law of Torts* at [4.10].

⁸⁹ *OBG* [2008] AC 1 at [309] (Baroness Hale of Richmond).

⁹⁰ Clover Alcolea and Mihal (2025) 54(1) *Common Law World Review* 43, 58.

⁹¹ *Queensland v Congoo* (2015) 256 CLR 239 at [11] (French CJ, Hayne, Kiefel, Bell Gageler and Keane JJ); citing *Taber v R* (2005) 225 CLR 418 at [7] (Gleeson CJ).

⁹² Clarendon Press, 1888.

⁹³ AES Tay, 'The Concept of Possession in the Common Law: Foundations for a New Approach' (1964) 4 *Melbourne University Law Review* 476, 476.

various labels ascribed to possessory interests, noting with apparent frustration that they are not rigidly observed ‘*by the very men who have drawn attention to them*’.⁹⁴

52. Possession denotes an extremely wide range of relationships. A farmer can possess cattle in an enclosed paddock many kilometres away. He can possess the gun in his safe and the five cattle dogs chained up outside. He also possesses the cup of tea in his hands and perhaps the vast expanse of land that is his farm. But how an observer draws this conclusion is not exactly clear. It is often intuitive, and sometimes it is legally recognised. At times we draw distinctions between *de facto* possession, which is an actual relation between a person and a thing (i.e., a matter of fact) and legal possession which is a definite legal relation of the person to the thing (i.e., a matter of law).⁹⁵
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53. Pollock and Wright say in relation to the possession of goods that ‘*[o]ften it is hard to say whether legal possession is the normal result of de facto possession or is conferred by a special rule of law. The possible combinations of facts offer infinite gradation from manifest power and will to hold the thing for oneself to cases where one of those elements, if not both, is so weak and obscure that it can only just be said to exist.*’⁹⁶
54. ‘*Manifest power and will*’ has also been described as the ‘*corpus and the animus*’, being a ‘*certain physical relationship*’ and a ‘*certain mental attitude*’.⁹⁷ Green and Randall have referred to it as ‘*the manual and the cognitive*’.⁹⁸ Whatever the label, it appears possible to plot various conceptions of possession of a chattel along a Cartesian plane, with reference to varying degrees of control and intent. If that is possible, why not with possession of intangible property too?
- 20
55. Green and Randall make a powerful case for possession of digital and intangible assets in their book *The Tort of Conversion*. Like Pollock and Wright, they say that physical control and intent (an *animus possidendi*) is necessary. Of these two elements, there are subcategories. Of physical control there is direct control (physical contact) and indirect control, which requires the means to control access to the asset (e.g., keys to the padlock that protects the farmer’s cattle in the paddock).⁹⁹ Of intent, they say there can be active

⁹⁴ Tay (1964) 4 *Melbourne University Law Review* 476, 476.

⁹⁵ *Federal Commissioner of Taxation v Smorgon* (1979) 143 CLR 499 at 519 (Gibbs ACJ).

⁹⁶ Pollock and Wright, 37 (emphasis added).

⁹⁷ *R v Hiep Tan Tran* [2007] VSCA 19 at [23] (Redlich JA, with whom Nettle and Neave JJA agreed), citing *R v Boyce* (1976) 15 SASR 40 at 43.

⁹⁸ S Green and J Randall, *The Tort of Conversion* (Hart, 2009) 109.

⁹⁹ For discussion of the concept of ‘indirect control’ in relation to both tangible and intangible property see *Hoath* (2006) 229 ALR 566 at [133]-[134] (White J).

cognitive control (intention to exclude others) and passive cognitive control (passive awareness of existence and form).¹⁰⁰ Importantly, for either type of manual control, they say the asset in question must possess two particular characteristics in order for it to be capable of possession: excludability (singular custody) and exhaustivity (the claimant can be deprived of its value). These aspects of a thing are essential for there to be a deprivation of rights of a sufficient extent and nature for a successful action in conversion.¹⁰¹ Bitcoin has these characteristics. It is exclusive by reason of the private key and it is exhaustible upon its transfer. The blockchain is designed to protect against the problem of double-spending.

- 10 56. The notion that possession must be of a physical thing is probably a product of history. However it has not always been considered that way, even historically. Anthony Honoré QC described possession as ‘*to have exclusive physical control of a thing, or to have such control as the nature of the thing admits*’.¹⁰² Salmond has said that possession ‘*is the security of enjoyment, and there are other means of attaining this security than personal presence or power*’.¹⁰³ Pollock and Wright say that in common speech, a man is said to possess anything of which he has apparent control, or from the use of which he can apparently exclude others.¹⁰⁴ What is important is that one possesses sufficient control recognised by third parties and society as a whole to secure enjoyment of the asset.¹⁰⁵ The nature of the asset is not a fundamental element of possession.
- 20 57. Possession is not something analysed, but instead is recognised intuitively. For example, without considering the issue of whether Bitcoin can be possessed, in *ASIC v A One Multi Services Pty Ltd*,¹⁰⁶ Derrington J remarked that a Mr Hala ‘*may have in his possession “Bitcoin” to a value of \$7 million to \$22 million*’.¹⁰⁷
58. An intangible asset can be the subject of exactly the same cognitive intent that one might also have towards a physical asset. To draw a distinction along that axis is not a meaningful one. Control is a different matter. Intangibles cannot be the subject of direct control, but what meaningful distinction can be drawn between indirect control of a

¹⁰⁰ Green and Randall, 110.

¹⁰¹ Green and Randall, 111.

¹⁰² AM Honoré, ‘Ownership’ in Guest (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, 1961) 107, 113 (emphasis added); *Henderson v Walker* [2019] NZHC 2184 at [264].

¹⁰³ JW Salmond, *Jurisprudence Or The Theory of the Law* (Stevens and Haynes, 1902) 318.

¹⁰⁴ Pollock and Wright, 1.

¹⁰⁵ Clover Alcolea and Mihai (2025) 54(1) *Common Law World Review* 43, 62.

¹⁰⁶ [2021] FCA 1297.

¹⁰⁷ *A One Multi Services* [2021] FCA 1297 at [18] (emphasis added).

physical asset and an intangible? It is submitted there is no material difference between the farmer's control of his exclusive and exhaustible cattle in the field and the control of his exclusive and exhaustible Bitcoin investments made online. He can equally control both, albeit by different methods: he can control the cattle by fences and the Bitcoin with a combination of his public and private keys. It is arbitrary and possibly incoherent to say the former can be possessed while the latter cannot.¹⁰⁸ As Shanahan CJ recognised, the exclusive private key signifies one's intent and readily confers control. The private key and PINs are simply '*contemporary avatars of the various means by which the common law recognises and secures proprietary rights, whether that be by occupation or other devices by which dominion is claimed over entitlements to wealth*' (FC [55], CAB 66).

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59. Attempts to draw a meaningful distinction between indirect control of tangibles and intangibles show up unsatisfactory aspects of the tort of conversion. The tort has thus far failed to protect intangibles remaining in that form, but it will protect them when they are reduced to paper or some other media. In this regard, the following obligations, evidenced by documents, have been found to be capable of conversion: proceeds of a life insurance contract, when evidenced by a written policy;¹⁰⁹ shares, when evidenced by share certificates;¹¹⁰ cash, when represented by cheques and other negotiable instruments;¹¹¹ and contracts of guarantee.¹¹² A plaintiff's ability to claim damages for a converted chose in action represented by a document is a 'legal fiction',¹¹³ which has allowed the value of the underlying intangible asset to be recovered upon the conversion of the document evidencing it. The position is illogical, unnecessary and unjustifiable because it makes the protection of interests in assets dependent upon the manner in which they have been acquired and maintained.¹¹⁴

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60. Applied to Bitcoin, the legal fiction would bring about the perverse result that while Bitcoin linked to a cold storage wallet could be converted (it having been reduced to paper, or a USB), Bitcoin linked to a hot storage wallet could not. Both facilitate indirect

¹⁰⁸ Clover Alcolea and Mihai (2025) 54(1) *Common Law World Review* 43, 61.

¹⁰⁹ *Watson v McLean* (1859) 120 ER 435.

¹¹⁰ *Solloway v McLaughlin* [1938] AC 247; *BBMB Finance (Hong Kong) v Eda Holdings* [1991] 2 All ER 129.

¹¹¹ *Lloyds Bank v Chartered Bank of India Australia and China* [1929] 1 KB 40; see also *Parsons v The Queen* (1999) 195 CLR 619 at 631-632 (the Court).

¹¹² *M'Leod v M'Ghie* (1841) 133 ER 771.

¹¹³ *Hoath* (2006) 229 ALR 566 at [127].

¹¹⁴ *Green and Randall*, 124; *OBG* [2008] AC 1 at [310] (Baroness Hale of Richmond).

possession of Bitcoin. The only difference is that in the former case, one has elected to hit ‘print’ or download the relevant data.¹¹⁵

61. The distinction is not a principled way to protect proprietary rights, including the right to possess and control. It must be recalled that: (1) property is concerned with the relationship and not the thing; and (2) the torts of conversion and detinue protect the plaintiff’s interest in possession, which is essentially the plaintiff’s relationship of control over an exclusive and exhaustible asset. Conversion and detinue do not protect the nature or condition of the thing itself. Focusing on the condition of the thing is misplaced. It engages in ‘false thinking’.¹¹⁶
- 10 62. That is why in the Full Court Estcourt J said to suggest that there can be no claim in conversion for wrongful interference with a chose in action because it cannot be possessed ‘*is foreign to contemporary common sense and the reality of the digital world*’ (FC [90] CAB 77). In *OBG*,¹¹⁷ Lord Nicholls of Birkenhead said that attaching liability to tangibles as opposed to intangibles ‘*makes no sense. It lacks any rhyme or reason*’.¹¹⁸
63. There are obvious policy reasons to protect intangible assets. In *Henderson v Walker*,¹¹⁹ Thomas J of the New Zealand High Court noted that digital assets have immense commercial value in the modern world. There are important economic reasons to ensure the law protects them.¹²⁰ Failing to protect intangible proprietary interests will have the same effects as failing to recognise property in physical assets. The practical effects on the economy and established legal systems have already been discussed above.
- 20 64. Thus, if Bitcoin is capable of being property, there is no reason to arbitrarily bar it from being the subject of possession. That the thing must be physical is not inherent in ordinary notions of possession. And if the concept of possession is broken down into its constituent parts, a person can have both ‘intent’ and ‘control’ over Bitcoin, much the same as they can have indirect control over any physical asset.

¹¹⁵ The absurdity of the distinction was discussed in *Kremen v Cohen* 337 F3d 1024 (9th Cir 2003) 1033-1034, a case in which a proprietary right to the domain name ‘sex.com’ was recognised as being capable of conversion.

¹¹⁶ To borrow the language in *Hocking* (2020) 271 CLR 1 at [202] (Edelman J); *Yanner* (1999) 201 CLR 351 at [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), citing Gray (1991) 50 *Cambridge Law Journal* 252 at 299.

¹¹⁷ [2008] AC 1.

¹¹⁸ *OBG* [2008] AC 1 at [221] (Lord Nicholls of Birkenhead).

¹¹⁹ [2019] NZHC 2184 (note there is a reported version: [2021] 2 NZLR 630, but this omits the relevant paragraphs at [248]-[315] which included her Honour’s discussion on the tort of conversion).

¹²⁰ *Henderson* [2019] NZHC 2184 at [268].

65. **V(8) The torts of conversion and detinue are made out on the facts.** The appellant has retained 1.5 Bitcoin that he purchased on the respondent's behalf using the respondent's money, along with the associated 4.5 Bitcoin Gold and 4.5 Bitcoin Cash (MC [90] and [102] CAB 29 and 31). He has (or was found to have) the keys to release these assets from his possession to the respondent, who had a better right to possession – and indeed ownership – of the assets (MC [90] CAB 29). Despite the respondent's unequivocal demands, the applicant did not do this. In this regard, he intentionally infringed the respondent's right to possess and control the outstanding Bitcoin, Bitcoin Gold and Bitcoin Cash. This is the very right which the torts of detinue and conversion have historically evolved to protect: they strike at behaviour which is in disregard of possessory rights. It is appropriate that the respondent's rights be vindicated by way of damages for detinue and conversion, as awarded in the Magistrates Court of Tasmania.
66. Alternatively, the case can be analysed by reference to the document fiction, on the basis that the respondent's proprietary rights to the outstanding Bitcoin, Bitcoin Gold and Bitcoin Cash (which for these purposes may be classified as a chose in action)¹²¹ was embodied in the paper wallet the appellant provided to him in July 2017, which contained the relevant public and private key. The appellant dealt with that chattel in a manner repugnant to the respondent's rights by: (1) transferring to the paper wallet 6 Bitcoin in July 2014 (leaving 4.5 Bitcoin outstanding); (2) transferring a further 3 Bitcoin in November 2017 (leaving 1.5 Bitcoin, 4.5 Bitcoin Gold and 4.5 Bitcoin Cash outstanding); and (3) failing to comply with the respondent's demand for the return of the outstanding 1.5 Bitcoin and 4.5 Bitcoin Gold and 4.5 Bitcoin Cash in March 2018 (MC [91] CAB 29). The Court should dismiss ground 1.
67. **V(8) The application to revive an abandoned argument before the Full Court.** The appeal from the Magistrates Court to the Supreme Court was made under s 28 of the *Magistrates Court (Civil Division) Act 1992* (Tas). The appeal was by way of rehearing: *Barnett v Tasmanian Water and Sewerage Corp Pty Ltd.*¹²² In an appeal by rehearing, the powers of the appellate court are exercisable only where '*the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the*

¹²¹ *Re Blockchain* (2024) 76 VR 578 at [389].

¹²² [2018] TASFC 7 at [14] (Pearce J, with whom Wood and Martin AJ agreed).

order that is the subject of the appeal is the result of some legal, factual or discretionary error'.¹²³

68. At the intermediate appeal before Brett J, the appellant did not demonstrate any error in the Magistrate's finding that Bitcoin was property and capable of being subject to the torts of conversion and detinue. Despite the ostensible breadth of ground 1 of the notice of appeal (CAB 38) the ground, as argued, comprised two elements relevant to possession: (1) that the respondent did not have an immediate right to possession of the Bitcoin because it represented the fee paid to the appellant; and (2) the Bitcoin was in the possession not of the appellant but of his company, Get Paid in Bitcoin Pty Ltd (i.e. the wrong defendant had been sued) (RFM 14-32, 43-45, 53-55). To state the obvious, the submissions made on behalf of the appellant before Brett J implicitly accepted that Bitcoin was capable of being property and could be possessed.
69. The finding at SC [32] (CAB 45) that '*[t]he nature of Bitcoin and the defendant's control over it makes it clear in my view that he was in possession of the relevant property at all relevant times*' must be read in the foregoing context (FC [36]-[40]). The submission at AS [78] that '*the appellant was entitled to test that finding [i.e. the finding at SC [32]] on appeal*', obscures the reality that the appeal to the Full Court did not 'test' Brett J's finding that the Bitcoin was in the possession of the appellant (not his company).
70. The appeal to the Full Court was also by way of rehearing.¹²⁴ The situation which then arose was perverse: the Full Court was asked to identify an error in Brett J's judgment in respect of a case that was not in fact argued before Brett J on appeal. Essentially, the appellant sought to have a second bite at the proverbial cherry by pursuing an argument that had been abandoned following the trial in the Magistrates Court.
71. The appellant submits he was '*entitled to appeal to the Full Court on the ground set out in the notice of appeal*' (AS [77], emphasis added). The appellant had no such entitlement. Rather, his ability to pursue the single ground in the notice of appeal (CAB 50) was contingent on the Court granting him leave to raise a ground that had not in substance been argued in the intermediate appeal.¹²⁵

¹²³ Emphasis added. *Allesch v Maunz* (2000) 203 CLR 172 at [23] (Gaudron, McHugh, Gummow, Hayne JJ).

¹²⁴ *Supreme Court Rules 2000*, r 657(1)(a); *Barnett v Tasmanian Water and Sewerage Corp Pty Ltd* [2018] TASFC 7 at [16] (Pearce J, with whom Wood and Martin AJ agreed).

¹²⁵ Section 47(3) of the *Supreme Court Civil Procedure Act 1932* provides that '*a Full Court, if it is satisfied that no injustice will thereby be done, may allow any party to raise any point of law which was not raised at the trial, and may determine the appeal on any such point*' (emphasis added). In this regard, the appellant says the word

72. The reasons of Shanahan CJ implicitly recognised that the Court had a power to allow an abandoned point to be resurrected on appeal; the question was whether that power should be exercised in the circumstances. In dismissing the appeal, Shanahan CJ (with whom Jago J agreed) exercised a discretion on a matter of practice and procedure,¹²⁶ the terms of which are discussed at FC [46]-[49] (CAB 64-65).¹²⁷ It follows that the appellant pursues ground 2 on the standard in *House v The King*.¹²⁸ No error of the type required has been identified by the appellant.¹²⁹ The fact that, in the appellant's submission, '*the approach of Estcourt J, in this respect, should be preferred*' (AS [79]) is not sufficient. Ground 2 should also be dismissed.

10 **PART VI: ARGUMENT ON NOTICE OF CONTENTION**

73. N/A.

PART VII: ESTIMATE OF TIME

74. The respondent's counsel estimates up to 2.5 hours will be required for address.

Dated: 23 April 2026



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'trial' in s 47(3) of the *Supreme Court Civil Procedure Act 1932* (Tas) encompasses the intermediate appeal, because the word extends '*any hearing by a court where matters of fact and law are finally determined by the court*' (AS [80]). The underlined words are a gloss on the definition of 'trial' found in s 3 of the Act.

¹²⁶ As to the definition of matters of practice and procedure, see *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at [8] (Gibbs ACJ, Aickin, Wilson and Brennan JJ). Decisions to open up a new issue on appeal are within the ambit of a discretionary judgment: *Coulton v Holcombe* (1986) 162 CLR 1 at 6 (Gibson CJ, Wilson, Brennan and Dawson JJ).

¹²⁷ It was a decision in which the decision-maker was allowed '*some latitude as to the choice of the decision to be made*': *Moore (a pseudonym) v The King* (2024) 419 ALR 169 at [15] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ); *GLJ v Trustees of Roman Catholic Church for Diocese of Lismore* (2023) 280 CLR 442 at [16] (Kiefel CJ, Gageler and Jagot JJ).

¹²⁸ (1936) 55 CLR 499 at 504 (Dixon Evatt and McTiernan JJ).

¹²⁹ See *Moore* (2024) 419 ALR 169 at [14] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ).

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	<i>Water Management Act 1999</i> (Tas)	Current	s 60	Illustrative	N/A
2.	<i>Income Tax Assessment Act 1997</i> (Cth)	Current	s 108-5	Illustrative	N/A
3.	<i>Social Security Act 1991</i> (Cth)	Current	ss 1064, 1118	Illustrative	N/A
4.	<i>Corporations Amendment (Digital Assets Framework) Act 2026</i> (Cth)	Current	N/A	Illustrative; to acknowledge recent development to regulate cryptocurrency	N/A
5.	<i>Personal Property Securities Act 2009</i> (Cth)	Current	s 10	Illustrative	N/A
6.	<i>Bankruptcy Act 1966</i> (Cth)	Current	ss 5, 116	Illustrative	N/A
7.	<i>Corporations Act 2001</i> (Cth)	Current	ss 9, 513AA, 555, 556, 559 and 561	Illustrative	N/A
8.	<i>Family Law Act 1975</i> (Cth)	Current	s 79	Illustrative	N/A
9.	<i>Magistrates Court (Civil Division) Act 1992</i> (Tas)	Version in force from 1 July 2019 to 26 November 2023	s 28	Act which gave the appellant the right to appeal to the Supreme Court of Tasmania	3 October 2023
10.	<i>Supreme Court Civil Procedure Act 1932</i> (Tas)	Version in force from 30 August 2024 to 1 October 2025	s 47	Act in force when the Full Court heard the appeal	1 July 2025
11.	<i>Supreme Court Rules 2000</i>	Current (in force since 29 November 2023)	r 657	Rules in force when the appeal to the Full Court was brought	25 February 2025