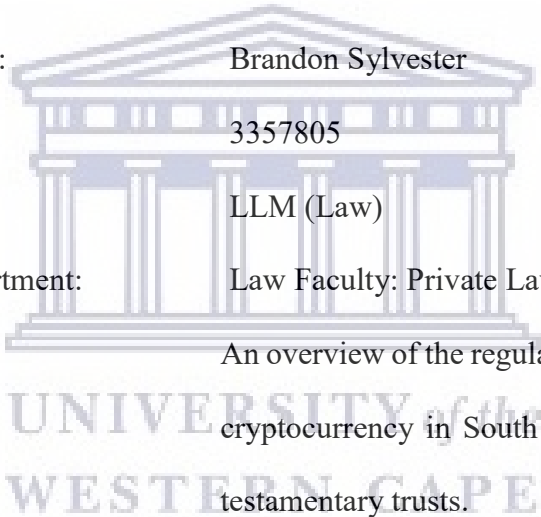


UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

A MINI-THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF LL.M: IN THE DEPARTMENT OF PRIVATE
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cryptocurrency in South African *inter vivos* and
testamentary trusts.
Supervisor: Prof François Du Toit
Date: March 2021

DECLARATION

I declare that: “An overview of the regulation and management of cryptocurrency in South African *inter vivos* and testamentary trusts” is my work; that all sources used or quoted have been indicated and acknowledged by means of complete references, and that this mini-dissertation has not previously been submitted by me or any other person for degree purposes at this or any other university.


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Signature

11 December 2020

Date



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ACKNOWLEDGEMENTS

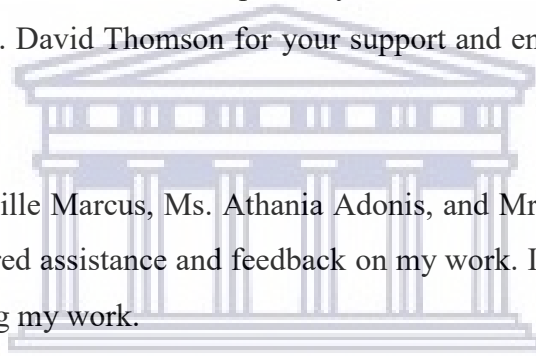
I wish to start by thanking God for giving me the ability to complete this mini-thesis and the perseverance I needed during this journey. With His grace, love, guidance, and strength, I was focused and driven to see this thesis to the end.

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ABSTRACT

Our lives, work, and behaviour have been changed both positively and negatively by the digital presence that has grown tremendously over the last three decades, and with this exponential growth, we cannot predict where we will be, digitally-speaking, in the years to come. As it stands in South Africa and the majority of the world today, we find that the law is yet to catch up to the technological explosion, in particular to the concept of digital assets. Digital material that is produced and purchased form a big part of our daily lives as we continue to consume media online, use social media platforms, and invest in cryptocurrency. The question of whether South African law makes sufficient provision for the incorporation of digital assets and, in particular, cryptocurrency in *inter vivos* or testamentary trust is yet to be fully established. This thesis proposes that, in order to ensure that an individual can do a proper estate plan going forward, the transfer and management of cryptocurrency in trust must be legally recognised under South African law.

KEYWORDS

- Blockchain Technology
- Crypto Assets
- Cryptocurrency
- Digital Assets
- Estate Planning
- *Inter Vivos* Trusts
- Miners
- Property
- Service Provider
- Testamentary Trusts
- Trust Property
- Virtual Assets



LIST OF ABBREVIATIONS

CFAA	Federal Computer Fraud and Abuse Act
CFTC	Commodity Futures Trading Commission
CGT	Capital Gains Tax
DLT	Distributed Ledger Technology
ECB	European Central Bank
ECTA	Electronic Communications and Transactions Act
EPJ	Estate Planning Community Property Law Journal
FIC	Financial Intelligence Centre
FinCEN	Financial Crimes Enforcement Network
HMRC	Her Majesty's Revenue and Customs
IBER	International Business and Economics Research Journal
ICO	Initial Coin Offerings
IFWG	Intergovernmental FinTech Working Group
IJBIT	International Journal of Business Insights and Transformation
IRS	Internal Revenue Service
J INT FINANC MARK	Journal of International Financial Markets, Institutions and Money
JEP	Journal of Economic Perspectives
JITIM	Journal of International Technology and Information Management
MEDAR	Meditari Accountancy Research
NZ	New Zealand
OFAC	Office of Foreign Asset Control
RSA	Republic of South Africa
RUFADAA	Revised Uniform Fiduciary Access to Digital Assets Act
SALJ	South African Law Journal
SAMLJ	South African Mercantile Law Journal
SARB	South African Reserve Bank
SARS	South African Revenue Service
SEC	Securities and Exchange Commission
TOS	Terms of Service

UK	United Kingdom
UPIA	Uniform Prudent Investor Act
UPMIFA	Uniform Prudent Management of Institutional Funds Act
US	United States (of America)



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CHAPTER 1: INTRODUCTION

1.1 Background/Rational

A trust is known to be a versatile and useful estate-planning instrument available to anyone wishing to accumulate, preserve, and over time transfer wealth.¹ The Trust Property Control Act² (hereinafter “the Act”) defines a trust as, inter alia, an “arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed” to a trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the nominated beneficiaries.³

The Act defines “trust property” as “movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.”⁴ Traditionally, when one thinks about property, the first ideas that may come to mind are tangible assets that are represented physically, such as livestock, land, cash and machinery, and intangible assets, including intellectual property, copyrights, patents, and company shares.⁵ However, the invention of the personal computer and the introduction and proliferation of the internet in the 20th century spawned the digital asset.

Examples of digital assets include digital documents created via Microsoft Office, videos and music from Apple Music⁶ (formerly known as iTunes)⁷, as well as any other relevant digital data that is capable of being stored and executed on a digital device like a desktop personal

¹ Coetzer K ‘A versatile tool, or a waste?: trusts’ (2010) *Tax Breaks* (293) 2.

² Trust Property Control Act 57 of 1988.

³ s 1 of Act 57 of 1988.

⁴ s 1 of Act 57 of 1988.

⁵ Toygar A, Rohm CE Jr, and Zhu J ‘A new asset type: digital assets.’ (2013) 22(4) 7 *JITIM* 114.

⁶ Conner J ‘Digital life after death: The issue of planning for person's digital assets after death.’ (2011) 3(2) *Estate Planning Community Property Law Journal* 303.

⁷ Dilger DE ‘iTunes isn’t dead! It’s faster, streamlined and renamed Apple Music in macOS Catalina’.

Available at

<https://appleinsider.com/articles/19/06/05/itunes-isnt-dead-its-faster-streamlined-and-renamed-apple-music-in-macos-catalina>. (accessed on 1 October 2019).

computer, laptop, and mobile phone or on cloud storage.⁸ Furthermore, digital accounts, such as PayPal or virtual currency, which includes the digital currency called cryptocurrency that has a monetary value, are also examples of digital assets.⁹

Some have considered digital assets as forming part of intangible assets, but due to the ever-changing and innovative growth of information technology, as well as the varying types of digital assets created on a daily basis, it is unique when compared to intangible assets.¹⁰ However, in some instances certain digital assets are regarded as intangible, which will be alluded to in chapter two of this thesis.

There does not appear to be a proper definition of digital assets yet. Eichler says that a universally accepted definition for digital assets does not yet exist because it is difficult to conceptualise what a digital asset actually entails.¹¹ Without a clear definition of digital assets, estate planners find it difficult to determine what qualifies as a digital asset and what does not.¹² Maintaining a broad definition would however be necessary to include every possible digital substance that has monetary and/or intellectual value.¹³ However, Van Niekerk defines “any form of content and/or media that has been formatted into a binary source which includes the right of usage” as a digital asset.¹⁴

In light of the foregoing, the rationale for this thesis is that the necessity of including digital assets in an estate plan has become very important when currency and monetary value with the potential to generate future income or capital growth are considered.

⁸ Toygar A et al (2013) 118.

⁹ Toygar A et al (2013) 114.

¹⁰ Toygar A et al (2013) 114.

¹¹ Eichler AC ‘Owning what you buy: How itunes uses federal copyright law to limit inheritability of content, and the need to expand the first sale doctrine to include digital assets.’ (2016) 16(2) *Houston Business and Tax Law Journal* 212.

¹² Conner J (2011) 303.

¹³ Conner J (2011) 303.

¹⁴ Van Niekerk AJ ‘The Strategic Management of Media Assets; a Methodological Approach.’ (2006) *Allied Academies, New Orleans Congress* 90.

1.1.1 Cryptocurrency

The terms “virtual currency”, “digital currency”, and “cryptocurrency” are often used interchangeably; however, they do have understated differences.¹⁵ Virtual currency was defined by the European Central Bank as a “type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community”.¹⁶

Digital currency is a form of virtual currency that is created and stored electronically, and includes cryptocurrency.¹⁷ Cryptocurrency is a subclass of digital currencies that uses cryptography¹⁸ in order to protect the currency against counterfeiting.¹⁹ A popular example of a cryptocurrency is Bitcoin, and according to Gilpin “Bitcoin was created to take power out of the hands of the government and central bankers, and put it back into the hands of the people.”²⁰

Although the value of cryptocurrency, such as Bitcoin is not backed by a central bank as opposed to government currencies, its value is derived and dependent on what a buyer is willing to pay to ascertain it.²¹ According to Rose, its value also consists of “a combination of speculation on future value and genuine, undeniable usefulness, the wild swings in price Bitcoin has been experiencing are a natural reaction to the massive global interest in a pool of money that is relatively tiny compared to its government-backed peers.”²² Many businesses,

¹⁵ European Central Bank ‘Virtual Currency Schemes’ (2012) *Frankfurt am Main: European Central Bank*. p. 5. ISBN 978-92-899-0862-7. 13.

¹⁶ European Central Bank (2012) 13.

¹⁷ European Central Bank (2012) 13.

¹⁸ Defined as ‘the enciphering and deciphering of messages in secret code or cipher: the computerized encoding and decoding of information’ on Merriam Webster ‘Cryptography’ available at <https://www.merriam-webster.com/dictionary/cryptography> (accessed on 26 September 2020).

¹⁹ Rose C ‘The Evolution of Digital Currencies: Bitcoin, A Cryptocurrency Causing A Monetary Revolution.’ (2015) 14(4) *International Business and Economics Research Journal* 617.

²⁰ Gilpin L ‘10 things you should know about Bitcoin and digital currencies.’ Available at <http://www.techrepublic.com/article/10-things-you-should-know-about-bitcoin-and-digitalcurrencies/> (accessed on 26 September 2020).

²¹ Rose C (2015) 618.

²² Rose C (2015) 618.

such as, PayPal and Microsoft accept payments via Bitcoin,²³ and it can be used as a medium of exchange between two individuals all over the world.²⁴ Rose says that Bitcoin can be used as a payment system as well as monetary raw material akin to gold, because “it does not decay and is perfectly divisible”.²⁵

1.1.2 The transferability of cryptocurrency into trust

Cryptocurrency is transferred with relative ease through blockchain technology, which allows the transferor to send cryptocurrency over a decentralised network of independent computers to the public address of the transferee. The decentralised network validates the transfer and updates a digital network to reflect that the transfer is complete.²⁶ In this case, it may be possible to have the trustee of the trust create a cryptocurrency wallet, and to receive the cryptocurrency via loan account or donation. On the other hand, a downside to cryptocurrency is that the executor to one’s estate may find it difficult to transfer the cryptocurrency into a testamentary trust, should they be unable to access the wallet via a complex, multi-character passcode,²⁷ which may be lost at the death of the deceased.²⁸ However, unlike traditional banks, the executor or trustee merely needs a passcode to access the cryptocurrency and does not need to complete any further steps.²⁹

It proves useful to place cryptocurrency into a trust to ensure that, (i) it is (or its proceeds are) available to the beneficiaries of the settlor or testator and (ii) that cryptocurrency is invested by

²³ 99Bitcoins ‘Who accepts Bitcoin as Payment’ available at <https://99bitcoins.com/bitcoin/who-accepts/> (accessed on 27 September 2020).

²⁴ Rose C (2015) 620.

²⁵ Rose C (2015) 620.

²⁶ Taylor PF, Woods VA and Tanenbaum J ‘Estate Planning with Cryptocurrency’ (2019) available at https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2019/july-august/estate-planning-cryptocurrency/ (accessed on 26 September 2020).

²⁷ Taylor PF et al (2019).

²⁸ Cuthbertson A ‘Bitcoin: Millions Of Dollars Of Cryptocurrency ‘Lost’ After Man Dies With Only Password’ available at <https://www.independent.co.uk/life-style/gadgets-and-tech/news/bitcoin-exchange-quadrigacx-password-cryptocurrency-scam-a8763676.html> (accessed on 26 September 2020).

²⁹ Taylor PF et al (2019).

the trustee to guarantee that it grows akin to traditional investments, including unit trusts and share portfolios after the death of the testator or outside of the estate of the settlor of a trust.

The importance of one's freedom of testation (and, commensurately, freedom of contract) has been echoed in the case of *In re BoE Trust Limited NO and Others NNO*.³⁰ Erasmus AJA emphasised that one's freedom of testation is directly connected to the constitutional principle of human dignity: "The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away." However, even though the process of transferring cryptocurrency into a trust is, as shown above, relatively easy, cryptocurrency must nevertheless be capable of constituting trust property before a trustee can accept and administer cryptocurrency in trust.

1.2 Aim/s of the research

The main aim of this thesis is to establish whether cryptocurrency is defined and regulated in terms of South African law and whether a trustee can accept and manage cryptocurrency as "trust property" in terms of the Act. The thesis addresses, furthermore, the questions regarding the benefits and risks of holding cryptocurrencies in a trust. The aims of this research will be accomplished by exploring South African law regarding cryptocurrency as well, as how international and foreign law has sought to address the issue of including cryptocurrency in estate planning.

1.3 Problem statement

In light of the technological age that we live in today, cryptocurrency has the potential to generate monetary growth; moreover, it continues to be adopted as a medium of exchange and investment throughout the world. It however remains relatively uncharted territory in South Africa's legal sphere, and therefore the questions as to whether it constitutes property, more specifically trust property; what asset class it belongs to; and thus whether it can be administered in an *inter vivos* or testamentary trust like other forms of assets prove to be problematic. The research questions posed hereafter seek to address these problems.

³⁰ *In Re BoE Trust Limited NO and Others NNO* 2013 (3) SA 236 (SCA) 27.

1.4 Research questions

Whilst it is possible to include “traditional” assets within the Act’s definition of “property” or “trust property”, the pertinent question arises whether South African legislation has made sufficient strides towards the adoption of defining cryptocurrency as legally-recognised property. This general question, in turn, raises the specific question of whether it is possible to place cryptocurrency in a trust for the benefit of the trust beneficiaries, as is the case with “traditional” trust property?

1.5 Research hypothesis

Cryptocurrency is a new concept that is not currently regulated under South African law. It likewise lacks sufficient legislative attention in other jurisdictions. The lack of a proper definition of cryptocurrency is a vital issue that arises in light of the problem statement and research questions stated above. This thesis will address the hypothesis that cryptocurrency is capable of constituting trust property and, therefore, that the trustee of an *inter vivos* or a testamentary trust is capable of accepting, managing, and investing cryptocurrency just as it would any other trust property.

1.6 Scope/limitations of research

South African law is largely underdeveloped when considering the regulation of cryptocurrency. This thesis will therefore only focus on the limited regulation of cryptocurrency in terms of the South African legal context. Legislation and other sources to be considered include the Act,³¹ the Administration of Estates Act,³² and position papers by the National Treasury, South African Reserve Bank (SARB), and South African Revenue Service (SARS). This research will also engage in a comparative analysis of other jurisdictions, including the United States of America (US), the United Kingdom (UK) and New Zealand (NZ) concerning its cryptocurrency and trust law innovation.

³¹ Act 57 of 1988.

³² Administration of Estates Act 66 of 1965.

1.7 The significance of the issue

With every day that passes by, digital assets, such as cryptocurrency are becoming more incorporated into our daily lives. They are becoming more attractive, convenient, and valuable to the ordinary person. Today, the value of a single Bitcoin stands at R794, 178.00³³ and SARS has expressed that they will apply normal income tax rules to the gains and losses that taxpayers declare as part of their taxable income.³⁴ SARS acknowledges that the word “currency” is not defined in the Income Tax Act;³⁵ however, they still do not regard cryptocurrency as a currency that can be used as a medium of payment in South Africa because it is not officially recognised as such.³⁶

The above points to a significant degree of ambiguity regarding the concept of cryptocurrency. It is submitted that this ambiguity is due to a dearth of legislation and case law on point. Trustees may consequently find it difficult to administer this new type of asset in today’s environment. The UK Law Commission has nevertheless noted that the law might have to address digital assets in terms of their dispositions by a will and testament, bearing in mind that these assets are generally regulated by their service providers.³⁷ Any such disposition of digital assets is thus also relevant to service providers of cryptocurrencies because cryptocurrency accounts are regulated by the terms of service of these providers.

The foregoing proves that the uncertainty and ambiguity surrounding cryptocurrency are indeed significant. It follows that, insofar as cryptocurrency is capable of constituting trust property, trustees need to be properly equipped to deal with these new types of digital assets, in particular, because the market appears to require it.

³³ XE.com ‘Currency Converter: 1 XBT to ZAR’ Available At

<https://www.xe.com/currencyconverter/convert/?amount=1&from=xbt&to=zar> (accessed on 26 March 2021).

³⁴ SARS ‘SARS’s Stance On The Tax Treatment Of Cryptocurrencies’ available at

<https://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx> (accessed on 26 September 2019).

³⁵ Income Tax Act 58 of 1962.

³⁶ SARS ‘SARS’s Stance On The Tax Treatment Of Cryptocurrencies’ available at

<https://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx> (accessed on 26 September 2019).

³⁷ Briggs A ‘Law Commission consultation on reform to the law of wills’ (2017) 23(9) *Trusts and Trustees* 934.

1.8 Research methodology

This study will consist mainly of a literature review of relevant textbooks, case law, law journal articles, legislation, and internet sources dealing with cryptocurrency and trust law. South African legislation, such as the Trust Property Control Act,³⁸ Electronic Communications and Transactions Act,³⁹ Administration of Estates Act,⁴⁰ Currency and Banking Act,⁴¹ Financial Markets Act,⁴² South African Reserve Bank Act,⁴³ Financial Intelligence Centre Act,⁴⁴ Income Tax Act as well as the Constitution of the Republic of South Africa⁴⁵ will be used.

This study's literature review will focus on primary and secondary sources on the topic of cryptocurrency and cryptocurrency in trusts. The primary sources include laws, policies, international conventions, and original accounts by independent researchers and academic scholars. The secondary sources include articles in journals, academic books and writings, newspapers, and web publications. The research will largely follow a theoretical analysis and interpretation approach on cryptocurrency, as well as constructing a chronicle on the estate planning and trust law in both South Africa and selected foreign jurisdictions.

The study will also develop arguments based on a discourse analysis of existing efforts to address cryptocurrency in South Africa. Lastly, the study will refer to relevant case law regarding cryptocurrency and trust law.

³⁸ Act 57 of 1988.

³⁹ Electronic Communications and Transactions Act 25 of 2002.

⁴⁰ Act 66 of 1965.

⁴¹ Currency and Banking Act 31 of 1920.

⁴² Financial Markets Act 19 of 2012.

⁴³ South African Reserve Bank Act 90 of 1989.

⁴⁴ Financial Intelligence Centre Act 38 of 2001.

⁴⁵ Constitution of the Republic of South Africa, 1996.

1.9 Chapter outline

An outline of the chapters in this thesis and a short overview of their contents are specified below.

Chapter 2: What is cryptocurrency?

In this chapter, the following questions will be answered. What is cryptocurrency, and how is it legally defined in South African law.

Chapter 3: The acceptance and management of cryptocurrency in a trust

This chapter will explain what a trust is; what constitutes trust property; whether cryptocurrency constitutes trust property and can be held in a trust; the importance of the trust instrument in the acceptance of cryptocurrency in trust and the management of cryptocurrency in a trust, which involves the attendant risks and implications for the fiduciary duties of the trustee.

Chapter 4: Cryptocurrency trusts in foreign law

This chapter will be a comparative study where the chosen jurisdictions shall include the UK, NZ, and the US. The approach that was taken by these countries, as well as their domestic legislation, case law, and regulations, will be observed in determining whether cryptocurrency has been defined as property; whether it can be held in a trust; and how these jurisdictions have developed their laws and regulations to accommodate it.

Chapter 5: Conclusion and recommendation

Chapter five will conclude this thesis and provide recommendations that will improve RSA's South Africa's current legislation and regulations pertaining to cryptocurrency, as well as other recommendations regarding how South Africa's trust law can be adapted to assist trustees in the administration of trusts with cryptocurrency assets.

CHAPTER 2: WHAT IS CRYPTOCURRENCY?

2.1 Introduction to cryptocurrency

To administer an asset in an *inter vivos* or testamentary trust, the asset must constitute trust property as defined in the Act. Trust property has been established as being the capital, *corpus*, or subject-matter of the trust, and it can comprise of any movable, immovable, corporeal or incorporeal asset or group of assets.⁴⁶ However, with the growth in cryptocurrencies like Bitcoin and its use as a means of payment,⁴⁷ as a speculative investment,⁴⁸ and as other non-monetary functionalities,⁴⁹ some authors have begun to identify it as a new asset class in its own right.⁵⁰

This chapter will explore the definition, concept, and classification of cryptocurrency. Establishing a definition will provide significant insight into how its unique characteristics allow this novel currency to exist alongside traditional assets, as well as how South Africa has made legislative attempts to define and regulate it.

Chapter three hereafter will assess this definition to determine whether cryptocurrency constitutes “trust property” for the purpose of s 1 of the Act.

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⁴⁶ Du Toit F Smith B and Van der Linde A ‘A Fundamentals Of South African Trust Law’ 1 Ed (2019) 12, see *Jowell Bramwell-Jones and Others* 1998 (1) SA 836 (W) para 872d, *Ex Parte Milton* 1959 (3) SA 426 (C) para 426h.

⁴⁷ Walton A and Johnston K ‘Exploring perceptions of bitcoin adoption: The South African virtual community perspective.’ (2018) *Interdisciplinary Journal of Information, Knowledge, and Management* 13 166.

⁴⁸ Baur DG, Hong K and Lee AD ‘Bitcoin: Medium of exchange or speculative assets?’ (2018) 54 *Journal of International Financial Markets, Institutions and Money* 177, Böhme R, Christin N, Edelman B and Moore ‘Bitcoin: Economics, Technology, and Governance’ (2015) 29(2) *The Journal of Economic Perspectives* 232.

⁴⁹ Ram AJ ‘Bitcoin as a new asset class.’ (2019) 27(1) *Meditari Accountancy Research* 155.

⁵⁰ Ram AJ (2019) 162, Sontakke KA and Ghaisas A ‘Cryptocurrencies: A Developing Asset Class.’ (2017) 10(2) *International Journal of Business Insights and Transformation* 12.

2.2 The definition of cryptocurrency

In chapter one it was shown that descriptive nouns, including “virtual currency”, “digital currency”, and “cryptocurrency”, are often used interchangeably; however, they do possess understated differences.⁵¹ “Virtual currency” is a term adopted by the ECB and are defined as follows:

“A type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community”.⁵²

Digital currency is a form of virtual currency, which is created and stored electronically.⁵³ This definition was amended by the ECB in 2015, and read as follows:

“Virtual currency can therefore be defined as a digital representation of value, not issued by a central bank, credit institution or e-money institution, which, in some circumstances, can be used as an alternative to money.”⁵⁴

The new definition steers away from categorising virtual currencies as “money” because, according to the ECB, it does not possess the nature of a highly liquid asset and it did not reach the wide level of acceptance associated with money.⁵⁵ Additionally, the term “unregulated” was deleted from the definition of “virtual currency” since some jurisdictions had begun to innovate and address virtual currencies through legislation and regulations.⁵⁶ Moreover, the words “used and accepted amongst the members of a specific virtual community” were also subsequently removed to avoid misunderstanding the theoretical limits for the acceptance of virtual currencies.⁵⁷ The report however acknowledges that, although the definition no longer refers to “money”, the term “virtual currencies” will still be used in order to describe both the

⁵¹ Rose C (2015) 617.

⁵² European Central Bank *Virtual Currency Schemes* (2012) 13.

⁵³ European Central Bank (2012) 13.

⁵⁴ European Central Bank *Virtual currency schemes – a further analysis* (2015) 25.

⁵⁵ European Central Bank (2015) 25.

⁵⁶ European Central Bank (2015) 25.

⁵⁷ European Central Bank (2012) 25.

factors of value and the transfer of value that is an inherent mechanism built into virtual currency schemes.⁵⁸

Bitcoin is one of the first and most popular forms of digital currency, which was developed in the year 2009 by a pseudonymous programmer or group of programmers going by the name of Satoshi Nakamoto.⁵⁹ Nakamoto published a white paper in 2008 titled: “Bitcoin: A peer-to-peer electronic cash system”, which described the concept of digital currencies before its creation.⁶⁰ This new form of currency was created to operate at a global level to be used for various types of transactions in respect of both real and virtual goods and services.⁶¹ Many businesses, such as PayPal and Microsoft accept payments via Bitcoin,⁶² and it can be used as a medium of exchange between two or more individuals all over the world.⁶³ The confusion regarding the asset class that cryptocurrency belongs to has been at the forefront of many authors and governments around the world.⁶⁴ This aspect will be addressed hereunder.

Cryptocurrency is thus a subclass of digital currencies⁶⁵ that utilises blockchain technology to create a decentralised, encrypted, open-source ledger, which is stored on a peer-to-peer network that is accessible to the public.⁶⁶ This ledger broadcasts all of its records and transactions over the internet and allows every computer of its members on the network to verify these

⁵⁸ European Central Bank (2015) 25.

⁵⁹ Sontakke KA and Ghaisas A ‘Cryptocurrencies: A Developing Asset Class.’ (2017) 10(2) *International Journal of Business Insights and Transformation* 1, Nakamoto S and Bitcoin. “A peer-to-peer electronic cash system” (2008) available at <https://bitcoin.org/bitcoin.pdf> (accessed on 20 April 2020).

⁶⁰ Reddy E and Lawack V ‘An overview of the regulatory developments in South Africa regarding the use of cryptocurrencies.’ (2019) 31(1) *SAMLJ* 6.

⁶¹ European Central Bank (2012) 21.

⁶² 99Bitcoins ‘Who accepts Bitcoin as Payment’ available at <https://99bitcoins.com/bitcoin/who-accepts/> (accessed on 21 April 2020).

⁶³ Rose C (2015) 620.

⁶⁴ Sontakke KA and Ghaisas A (2017) 10, see Reddy E, Lawack V (2019) Reddy E, Lawack V (2019) 19, see SARB ‘Consultation Paper for Policy Proposals for Crypto Assets’ (2019) 8 available at http://www.treasury.gov.za/comm_media/press/2019/CAR%20WG%20Consultation%20paper%20on%20crypt%20assets_final.pdf (accessed on 22 April 2020), European Central Bank (2015) 23.

⁶⁵ Rose C (2015) 617, Gilpin L ‘10 things you should know about Bitcoin and digital currencies’ available at <https://www.techrepublic.com/article/10-things-you-should-know-about-bitcoin-and-digital-currencies/> (accessed on 16 April 2020).

⁶⁶ Sontakke KA and Ghaisas A (2017) 11.

transactions. With every transaction that is verified, a block is created and added to a chain, developing a block-chain.⁶⁷ The encryption is done via secret codes called cryptography⁶⁸ to protect the currency against counterfeiting.⁶⁹ Blockchain is therefore the technology that allows cryptocurrency to be exchanged and stored. Nieman summarises the parties to a cryptocurrency transactions as a sender who sends a transaction over the cryptocurrency network, the receiver who accepts the cryptocurrency over the network, and the miners who act as the verifiers on the network by completing the aforementioned blocks on the blockchain.⁷⁰

The cryptocurrency network is legitimised and functions on the basis of absolute consensus by all the members on the network concerning the legitimacy of the balances and transactions recorded on the ledger.⁷¹ Therefore, if all members of the network agree with the transactions and balances that have been recorded, then the transaction has been verified.

The founder of Bitcoin stated the following: “The only way to confirm the absence of a transaction is to be aware of all transactions”.⁷² Quintessentially, to ensure that society’s medium of exchange remains trustworthy and free from fraud, it is required that all participants in the economy are aware of all the transactions that take place. Hence, the concept of centralisation and decentralisation will be discussed in the next subheading.

2.2.1 Decentralisation versus centralisation

An important aspect of cryptocurrency stems from the fact that it is decentralised, which means that cryptocurrency is not issued by a central authority, such as a central reserve bank.⁷³ Before

⁶⁷ Sontakke KA and Ghaisas A (2017) 11.

⁶⁸ Merriam Webster ‘Cryptography’ available at <https://www.merriam-webster.com/dictionary/cryptography> (accessed on 20 April 2020).

⁶⁹ Rose C (2015) 617.

⁷⁰ Nieman A ‘A few South African cents' worth on Bitcoin.’ (2015) 18(5) PELJ 1987.

⁷¹ Cointelegraph ‘What is Cryptocurrency. Guide for Beginners’ available at <https://cointelegraph.com/bitcoin-for-beginners/what-are-cryptocurrencies> (accessed on 20 April 2020).

⁷² Nakamoto S and Bitcoin ‘A peer-to-peer electronic cash system’ (2008) available at <https://bitcoin.org/bitcoin.pdf> (accessed on 20 April 2020).

⁷³ Rose C (2015) 617.

the concept of cryptocurrency decentralisation will be explored, the traditional concept of the modern centralised monetary system found in fiat currency will be explained briefly.

2.2.1.1. *Centralisation and central banking systems*

Central banks function as the heart of a country's financial system.⁷⁴ Their powers include the issuing of banknotes and coins as well as acting as the bank of the government.⁷⁵ The concept of central banks originated in older European countries where commercial banks assumed more power and responsibilities.⁷⁶ Over time, problems arose in maintaining a balance between, on the one hand, the interests of the shareholders in these commercial banks and, on the other hand, the interest of the public: the maximisation of profit for the shareholders in commercial banks frequently occurred at the expense of the public at large. This resulted in the nationalisation of central banks in order to move away from profit maximisation.⁷⁷

Today, central banks are found all around the world due to the understanding that having monetary reserves, the control of currency, and credit vested in a centralised bank, which perform under the supervision of the government yield distinct advantages.⁷⁸ One of the main advantages is that a central bank's main objective is not to maximise profit (as is the case with commercial banks), but rather to protect the value of the country's currency in the interest of the public.⁷⁹

South Africa also established a central bank to achieve the above-stated purpose. The SARB was originally established in the early 20th century.⁸⁰ Prior to the introduction of the Constitution of South Africa of 1996,⁸¹ served the purpose of protecting the value of the South African currency in the interest of establishing balanced and sustainable economic growth of

⁷⁴ De Jager J 'The South African Reserve Bank: An evaluation of the origin, evolution and status of central bank (part i).' (2006) 18(2) *SAMLJ* 159.

⁷⁵ De Jager (2006) 162.

⁷⁶ De Jager J 'The South African Reserve Bank: Blowing winds of change (part 1).' (2013) 25(3) *SAMLJ* 344.

⁷⁷ De Jager J (2013) 344.

⁷⁸ De Jager (2006) 159.

⁷⁹ De Jager (2006) 164.

⁸⁰ Act 31 of 1920.

⁸¹ Constitution of the Republic of South Africa, 1996.

the Republic.⁸² However, today the establishment, primary objects and powers of the SARB are regulated by the Constitution.⁸³

Therefore, SARB maintains control over the South African Rand and its circulation. However, in contrast to the approach taken by a central banking system, such as in South Africa, cryptocurrency follows a different, decentralised approach that is explained below.

2.2.1.2. The decentralisation and creation of cryptocurrency

The ledger of the peer-to-peer network can be accessed by anyone with a computer and an internet connection. Because this ledger is maintained publically, it remains permanent.⁸⁴ The absence of an intermediary, including central or commercial banks allows any two individuals to transact with each other directly.

Nakamoto drew a comparison between the creation of new tokens and the mining of gold. He states that the steady addition of a constant number of new tokens into the cryptocurrency network is similar to gold miners that are exhausting resources to increase the supply of gold into the economy.⁸⁵ In this case, the members of the network are referred to as the “miners”,⁸⁶ and the work of a miner refers to the time and electricity spent by the central processing units (CPU) of the miners’ computer.⁸⁷

The issuing of a cryptocurrency unit or token is accomplished through the work of the miners of the cryptocurrency network.⁸⁸ Each miner on the network serves two functions. The first function, which was previously discussed, is that they act as the transaction validators. The second function is that they supply new tokens into the network as a result of the validation.⁸⁹

⁸² s 3 of Act 90 of 1989.

⁸³ ss 223 - 225 of the Constitution of the Republic of South Africa, 1996.

⁸⁴ Sontakke KA and Ghaisas A (2017) 11.

⁸⁵ Nakamoto S and Bitcoin (2008) 4.

⁸⁶ Sontakke KA and Ghaisas A (2017) 11, Reddy E and Lawack V (2019) 11.

⁸⁷ Nakamoto S and Bitcoin (2008) 4.

⁸⁸ Nakamoto S and Bitcoin (2008) 4.

⁸⁹ Reddy E and Lawack V (2019) 11.

Cryptocurrency was designed to generate new tokens, which are distributed to the miners upon the completion of a transaction after it has been successfully effectuated and verified.⁹⁰ This compensation for their work is referred to as proof-of-work.⁹¹ The tokens are stored in a virtual wallet that is hosted by various service providers.⁹² This virtual cryptowallet is used to store private keys, cryptocurrency accounts, and everything necessary to spend and transfer cryptocurrency. These can be stored online or on a personal storage device.⁹³

The flow of the new tokens into the network is dependent on the number of transactions and miners active on the network.⁹⁴ The encryption becomes increasingly more difficult as the number of miners, transactions, and blocks rise on the ledger.⁹⁵ This ultimately leads to a reduction in the cryptocurrency reward that can be generated.⁹⁶ The cryptocurrency is designed in such a way that the reward of tokens will be halved as more tokens are mined. This is referred to as “halving”,⁹⁷ and generally takes place every four years and is expected to occur in or around the time of writing this thesis.⁹⁸ This brings us to the value of cryptocurrencies, and how the concept of halving affects its value.

2.2.2 The value of cryptocurrencies

Some authors assert that it is difficult to determine the intrinsic value of cryptocurrency because it does not belong to any of the established asset classes.⁹⁹ However, others say that the value of cryptocurrency stems from a few factors, such as its encryption which protects it against

⁹⁰ Reddy E and Lawack V (2019) 11.

⁹¹ SEBA Bank AG ‘Mining: the essence of proof of work’ (2019) 1-2 available at <https://www.seba.swiss/research/Mining-the-essence-of-proof-of-work/> (accessed on 26 April 2020).

⁹² Böhme et al (2015) 220.

⁹³ Reddy E and Lawack V (2019) 15.

⁹⁴ Sontakke KA and Ghaisas A (2017) 11.

⁹⁵ Sontakke KA and Ghaisas A (2017) 11.

⁹⁶ Sontakke KA and Ghaisas A (2017) 11.

⁹⁷ Meynkhart A ‘Fair market value of bitcoin: halving effect.’ 2019 16(4) *Investment Management and Financial Innovations* 72.

⁹⁸ Bloomberg ‘Bitcoin rises above \$8,000 due to halving hype’ available at <https://mybroadband.co.za/news/cryptocurrency/349960-bitcoin-rises-above-8000-due-to-halving-hype.html> (accessed on 29 April 2020).

⁹⁹ Sontakke KA and Ghaisas A (2017) 12.

counterfeiting; the lack of an intermediary due to the network being peer-to-peer; and no transaction costs.¹⁰⁰ These advantages have been said to position cryptocurrency as the most appropriate medium of exchange for our modern-day digital economy.¹⁰¹

Bitcoin has also been shown to derive its value from what a buyer is willing to pay to ascertain it.¹⁰² Therefore, its value has been derived from the value deemed by the market as being the local currency equivalent. Rose further states that its value also consists of speculation of future value, usefulness, and reaction to the global interest in this new form of currency.¹⁰³

However, similar to gold, there is a finite supply of cryptocurrency that can be generated because its yield has been pre-determined in its programming.¹⁰⁴ As an example, only 21 million units of Bitcoin can be created through mining.¹⁰⁵ At the time of writing this thesis, there are 2.644 million Bitcoins left to mine. Out of a total of 18.35 million that has been mined since its inception, only 13.35 million Bitcoins are available on the market today.¹⁰⁶

An estimated 30% of the Bitcoin ever produced has been lost forever due to misplaced private keys or hard drive crashes.¹⁰⁷ This cap on the supply of the currency, as well as halving, provides it with an element of scarcity, which, combined with future speculation of its value by its adopters, has contributed towards the high volatility of cryptocurrency in comparison to gold and fiat currency.¹⁰⁸ With a market capitalisation of 117.81 billion US\$ as of 2 April

¹⁰⁰ Rose C (2015) 618.

¹⁰¹ Rose C (2015) 618.

¹⁰² Rose C (2015) 618.

¹⁰³ Rose C (2015) 618.

¹⁰⁴ SEBA Bank AG 'Mining: the essence of proof of work' (2019) available at <https://www.seba.swiss/research/Mining-the-essence-of-proof-of-work/> (accessed on 15 April 2020).

¹⁰⁵ Kronenberg DE and Gwen D 'Bitcoins in bankruptcy: Trouble ahead for investors and bankruptcy professionals.' (2014) 10(2) *Pratt's Journal of Bankruptcy Law* 113.

¹⁰⁶ Buchko S 'How Many Bitcoins are Left?' (2020) available at <https://coincentral.com/how-many-bitcoins-are-left/> (accessed on 4 May 2020).

¹⁰⁷ Buchko S 'How Many Bitcoins are Left?' (2020) available at <https://coincentral.com/how-many-bitcoins-are-left/> (accessed on 4 May 2020), Böhme et al (2015) 220-221.

¹⁰⁸ Baur DG et al (2018) 179.

2020,¹⁰⁹ it becomes clear that its functionality and scarcity, in combination with market perception, have played a major role in determining the value of Bitcoin.

2.2.3 The asset class of cryptocurrency

It is evident that the asset class of cryptocurrency has yet to be established with certainty. However, without consensus on the sum of its substance; its nature; and whether or not it can be categorised as an existing asset class, the administration of cryptocurrency in trust will prove futile. Literature dealing with the concept “asset class” will be explored next to determine the asset class to which cryptocurrencies may belong.

Although cryptocurrencies like Bitcoin were created to be used as a medium of exchange, or a form of payment that did not rely on a central bank, such as the SARB, the world has found it difficult to treat it like money because many users also use Bitcoin as a speculative investment.¹¹⁰ Various authors approached the classification of cryptocurrency in different ways. Sontakke and Ghaisas completed a comparative study into blockchain technology and cryptocurrencies to determine which asset class cryptocurrency has the potential to be categorised as.¹¹¹

Assets in existence today can generally be classified as either equity stocks, bonds, commodities, foreign exchange, and real estate (to name but a few). These derive their intrinsic value from their fundamentals and valuations.¹¹² However, would this classification also be possible in respect of cryptocurrency? The aforementioned authors’ research measured cryptocurrency against two established asset classes, namely fiat currency and gold.¹¹³ Gold is a scarce commodity that makes it a valuable resource. However, it lacks any transactional value due to the limitations placed upon it by governments and policy control. Secondly, fiat currency

¹⁰⁹ Rudden J ‘Market capitalization of Bitcoin from 4th quarter 2013 to 1st quarter 2020’ available at <https://www.statista.com/statistics/377382/bitcoin-market-capitalization/> (accessed on 28 May 2020).

¹¹⁰ Baur DG et al (2018) 177, Böhme et al (2015) 232.

¹¹¹ Sontakke KA and Ghaisas A (2017) 12.

¹¹² Sontakke KA and Ghaisas A (2017) 12.

¹¹³ Sontakke KA and Ghaisas A (2017) 12.

is used as a medium of exchange but does not lack in scarcity, due to a central bank's ability to issue more currency into circulation.¹¹⁴

Sontakke and Ghaisas submit that cryptocurrency eliminates these limitations associated with gold and fiat currency. Cryptocurrency is scarce; decentralised, and its ability to be used as a medium of exchange gives it the characteristics of both gold and fiat currency.¹¹⁵ Furthermore, Sontakke and Ghaisas propose that cryptocurrency has assumed the appearance of an investment opportunity that will develop into an asset class of its own due to the aforementioned characteristics coupled with its liquidity and high trading volumes.¹¹⁶

Ram approaches the classification of cryptocurrency by assessing its investment characteristics.¹¹⁷ These include its “investability”¹¹⁸ and politico-economic features of the asset. Investability comprises of the investment opportunities in the asset class, which includes its liquidity.¹¹⁹ Politico-economic features speak to the similarity of the assets in the same asset class.¹²⁰ To establish investability, Ram submits that Bitcoin can be traded at various exchanges around the world, such as Bitstamp, Coinbase, Kraken, and the South African exchanges called Luno and Ice3X.¹²¹ The peer-to-peer nature of Bitcoin allows trading to take place between individuals directly.¹²²

The process of mining Bitcoin can also be seen as an investment, in the sense that a miner is compensated with Bitcoin tokens for the work completed in verifying transactions after the initial capital into the hardware, internet connection, and electricity has been invested.¹²³ However, it must be noted that the profitability of mining has reduced significantly, not only

¹¹⁴ Sontakke KA and Ghaisas A (2017) 12.

¹¹⁵ Sontakke KA and Ghaisas A (2017) 12.

¹¹⁶ Sontakke KA and Ghaisas A (2017) 12.

¹¹⁷ Ram AJ (2019) 153.

¹¹⁸ Ram AJ (2019) 153.

¹¹⁹ Ram AJ (2019) 151.

¹²⁰ Ram AJ (2019) 151.

¹²¹ Ram AJ (2019) 153.

¹²² Ram AJ (2019) 154.

¹²³ Ram AJ (2019) 153, Antonopoulos AM ‘Mastering Bitcoin’ (2017) *O’Reilly Media, Sebastopol, CA* available at <https://unglueitiles.s3.amazonaws.com/ebf/05db7df4f31840f0a873d6ea14dcc28d.pdf> (accessed on 30 April 2020).

as a result of halving, but according to Ram, also due to the contribution of larger mining institutions into the network, making it unfeasible for individuals.¹²⁴ Nevertheless, due to the market capitalisation of Bitcoin, and the copious number of exchanges accessible to provide liquidity, the market capitalisation is adequate to absorb a material portion of the investment.¹²⁵

To establish politico-economic features, Ram finds that Bitcoin does not have any identifiable intrinsic value, such as tangible assets like gold.¹²⁶ Instead, as had been previously mentioned by Rose,¹²⁷ its value is derived from its utility; consensus of its users; speculation on future value; and its decentralised nature.¹²⁸ The underlying technology, namely blockchain, enjoys certain unique functionalities, including the ability to store metadata other than currency, in the forms of timestamps, asset ownership, and notarial data.¹²⁹

In conclusion, Ram could not decisively place cryptocurrency into a specific established asset class, but instead noted that cryptocurrency represents a unique asset class.¹³⁰ This deduction is similar to the supposition reached by Sontakke and Ghaisas. Cryptocurrency provides opportunities for investment as well as huge market capitalisation and growth, but it also has unique attributes, such as the ability to store non-monetary metadata that sets it apart from other investment classes.¹³¹

There is little to no correlation between cryptocurrencies like Bitcoin, and any other asset class in the market.¹³² Ultimately, the underlying technology of cryptocurrency can be used to develop new types of assets other than currency. To categorise cryptocurrency as a whole as a specific asset class would ignore the unique capabilities of blockchain technology, and restrict its further development. Cryptocurrency can thus not be categorised as falling under any of the established asset classes. It is therefore submitted that establishing a definition of

¹²⁴ Ram AJ (2019) 153.

¹²⁵ Ram AJ (2019) 154.

¹²⁶ Ram AJ (2019) 154.

¹²⁷ Rose C (2015) 618.

¹²⁸ Ram AJ (2019) 154.

¹²⁹ Ram AJ (2019) 154.

¹³⁰ Ram AJ (2019) 162.

¹³¹ Ram AJ (2019) 162.

¹³² Ram AJ (2019) 162, Sontakke KA and Ghaisas A (2017) 17.

cryptocurrency is of greater value to engaging with its suitability as “property” or “trust property” for purpose of the Act. Consequently, attempts to define cryptocurrency in the South African context will be explored next.

2.3 Legislative attempts to define cryptocurrency in South Africa

Having discussed the general definition and nature of cryptocurrency in the previous sections, the focus now turns to the regulatory developments regarding cryptocurrency in South Africa, in particular insofar as these developments point to a definition of cryptocurrency in the domestic context.

Bitcoin and other cryptocurrencies like Ether are traded on South African cryptocurrency exchanges.¹³³ South Africa also has its own cryptocurrency named “Number 42”.¹³⁴ According to a research study by Blockchain Academy, there were, as of 2018, approximately 550 000 – 650 000 cryptocurrency users in South Africa, and 60 000 of them had invested a significant amount of money in it.¹³⁵ Furthermore, a small percentage of South Africans utilise the currency for payments, and Reddy and Lawack believe that this may be due to the fact that a low number of merchants accept cryptocurrency as a payment method, including, Pick n Pay online and Takealot.¹³⁶

South Africa does not have any primary or secondary legislation that regulates virtual currencies.¹³⁷ However, some authors explored three possible classifications of cryptocurrency, namely legal tender, electronic money, and securities, in their analysis of South Africa’s regulatory approach to cryptocurrency.¹³⁸

¹³³ Ram AJ (2019) 153.

¹³⁴ Reddy E and Lawack V (2019) 15.

¹³⁵ Reddy E and Lawack V (2019) 15, Blockchain Academy ‘South Africans, Cryptocurrency and Taxation: Research Report’ available at <http://blockchainacademy.co.za/wp-content/uploads/2018/09/SA-Cryptocurrencies-Research-Report.pdf> (accessed on 28 April 2020).

¹³⁶ Reddy E and Lawack V (2019) 15.

¹³⁷ Nieman A (2015) 1988.

¹³⁸ Reddy E and Lawack V (2019) 17-19.

2.3.1 Legal tender

The South African Reserve Bank published a paper on virtual currencies in 2014, which read as follows:

“Only the Bank [South African Reserve Bank] is allowed to issue legal tender i.e. banknotes and coins in [the Republic of South Africa] RSA which can be legally offered in payment of an obligation and that a creditor is obliged to accept. Therefore, [decentralised virtual currencies such as cryptocurrencies] DCVCs are not legal tender in [the Republic of South Africa] RSA and should not be used as payment for the discharge of any obligation in a manner that suggests they are a perfect substitute for legal tender.”¹³⁹

The SARB, therefore, declared that cryptocurrencies would not be recognised as legal tender, and fall outside of the ambit of South African regulations on point. Merchants may refuse to accept cryptocurrencies as payment without contravening the law.¹⁴⁰ Therefore, transactions with cryptocurrencies is dependent on each participant’s willingness to use it as a payment instrument.¹⁴¹ This stipulation implies that cryptocurrency remains unregulated and individuals who transact via cryptocurrencies do not enjoy any consumer protection.¹⁴²

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¹³⁹ The South African Reserve Bank *Position Paper on Virtual Currencies* (2014) 4–5.

¹⁴⁰ Nieman A (2015) 1991.

¹⁴¹ Nieman A (2015) 1991.

¹⁴² Reddy E and Lawack V (2019) 18.

2.3.2 Electronic money

According to Reddy and Lawack, cryptocurrency and electronic money share conceptual similarities; however, cryptocurrency cannot be regarded as electronic money because the two are not legally the same.¹⁴³ The authors came to this conclusion based on a number of factors. First, they interpreted the definition of electronic money in terms of a SARB research paper on electronic money published in 2009¹⁴⁴ to exclude cryptocurrencies.¹⁴⁵ This exclusion is on the basis that cryptocurrencies are not issued upon the receipt of funds; it is generally not redeemable for cash or accepted by a third party and able to be deposited into a bank account. Furthermore, the ability to deposit electronic money into a bank account implies that it must be linked to a sovereign currency.¹⁴⁶

Secondly, s 7 of the SARB research paper¹⁴⁷ states that electronic money can only be functionally legal if it is issued by a bank or a merchant that works in partnership with a bank.¹⁴⁸ A modern-day example of this is First National Banks's Ebucks rewards programme or Clicks ClubCard rewards which allows its customers to earn points that are linked to a Rand value that may be used for the purchase of goods and services.¹⁴⁹ Nieman also points out that both SARB and the Financial Action Task Force (FATF)¹⁵⁰ does not consider electronic money as part of the virtual currency ecosystem.¹⁵¹ Therefore, based on the fact that cryptocurrency is decentralised and not issued by a bank or merchant, it does not meet this requirement, and it can thus not be considered as electronic money. The National Treasury further supports the

¹⁴³ Reddy E and Lawack V (2019) 18.

¹⁴⁴ The South African Reserve Bank *Position Paper on Electronic Money* (2009) 3.

¹⁴⁵ Reddy E and Lawack V (2019) 18.

¹⁴⁶ Reddy E and Lawack V (2019) 18, Bank for International Settlements: Committee on Payments and Market Infrastructures 'Digital currencies' (2015) 3. Available at <https://www.bis.org/cpmi/publ/d137.htm> (accessed on 5 May 2020).

¹⁴⁷ The South African Reserve Bank *Position Paper on Electronic Money* (2009) 7.

¹⁴⁸ Reddy E and Lawack V (2019) 18.

¹⁴⁹ Ebucks 'Be rewarded by banking with FNB or RMB Private Bank' available at <https://www.ebucks.com/web/eBucks/aboutus/> (accessed on 1 May 2020), Clicks 'ClubCard' available at <https://clicks.co.za/clubCardPage> (accessed on 1 May 2020).

¹⁵⁰ Financial Action Task Force 'Virtual Currencies Key Definitions and Potential AML/CFT Risks' (2014) available at <http://goo.gl/G1Pmdl> (accessed on 23 March 2021)

¹⁵¹ Nieman A (2015) 1984.

stance that cryptocurrency cannot be used as a means of payment because it is not issued on the receipt of funds.¹⁵²

2.3.3 Security

The ability to trade cryptocurrencies on exchange platforms, such as Luno and Ice3X could mean that cryptocurrency is recognised as a form of security. However, Reddy and Lawack submit that cryptocurrency does not fall within the definition of security on the basis that the National Treasury issued a statement in which they affirmed that the Financial Markets Act¹⁵³ does not include cryptocurrency within its definition of security.¹⁵⁴ Nieman arrives at the same conclusion in this regard.¹⁵⁵

2.3.4 Attempts at a legal definition of cryptocurrency in South Africa

It was submitted earlier that the ability to use cryptocurrency as a medium of exchange, speculative investment as well as other non-monetary purposes, calls for the introduction of a new type of asset class specifically for cryptocurrencies.¹⁵⁶ Furthermore, it was shown in the preceding sections that, from a legal perspective, although the use of cryptocurrency is not illegal, South African law does not recognise cryptocurrency as fiat currency, legal tender, electronic money or security.

In a paper published by SARB in 2019 titled “Consultation Paper for Policy Proposals for Crypto Assets”, the issue of a definition of cryptocurrency was addressed. SARB chose to rebrand the term cryptocurrency to “crypto assets”.¹⁵⁷

The new definition of crypto assets according to SARB is:

¹⁵² National Treasury *User alert: Monitoring of virtual currencies* (2014) 3.

¹⁵³ Chapter 1 ss 30–55 of Act 19 of 2012.

¹⁵⁴ Reddy E and Lawack V (2019) 19, National Treasury *User alert: Monitoring of virtual currencies* (2014) 3.

¹⁵⁵ Nieman A (2015) 1991.

¹⁵⁶ See subheading 2.2.3.

¹⁵⁷ The South African Reserve Bank *Consultation Paper for Policy Proposals for Crypto Assets* (2019) 9.

“Crypto assets are digital representations or tokens that are accessed, verified, transacted, and traded electronically by a community of users. Crypto assets are issued electronically by decentralised entities and have no legal tender status, and consequently are not considered as electronic money either. It therefore does not have statutory compensation arrangements. Crypto assets have the ability to be used for payments (exchange of such value) and for investment purposes by crypto asset users. Crypto assets have the ability to function as a medium of exchange, and/or unit of account and/or store of value within a community of crypto asset users.”¹⁵⁸

This new definition recognises the various functions that cryptocurrency can perform. On the one hand, some authors have argued that the term “crypto assets” is most appropriate based on the fact that the word “cryptocurrency” may be construed as misleading since it is not a legal tender.¹⁵⁹ On the other hand, the ECB classifies cryptocurrency as a form of virtual currency with a bi-directional flow, which means that it intersects with the real economy.¹⁶⁰ Furthermore, SARB’s definition also shares similarities to the definition proposed by the ECB, in directing its focus away from “money” as being the primary objective of cryptocurrency.¹⁶¹ It must however be noted that this definition was later amended to a simpler definition in April 2020, which reads as follows:

“A crypto asset is a digital representation of value that is not issued by a central bank, but is traded, transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology.”¹⁶²

This definition is simpler and will be used in the next chapter when considering whether cryptocurrency constitutes property.

¹⁵⁸ The South African Reserve Bank *Consultation Paper for Policy Proposals for Crypto Assets* (2019) 9.

¹⁵⁹ Spruyt W ‘An assessment of the emergent functions of virtual currencies.’ (2018) 4 *SALJ* 717-718.

¹⁶⁰ Reddy E and Lawack V (2019) 19.

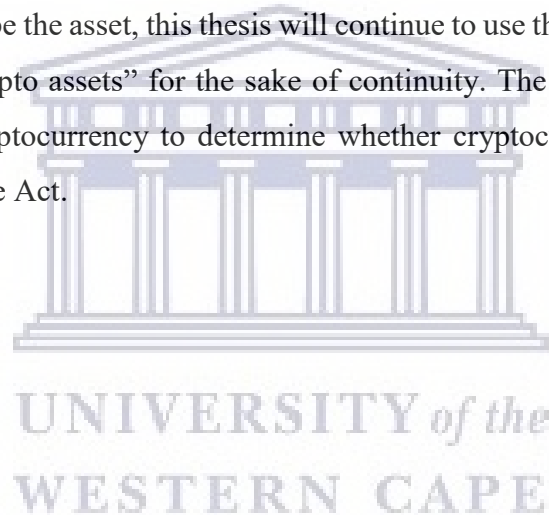
¹⁶¹ European Central Bank (2015) 25.

¹⁶² The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 9.

2.4 Conclusion

This chapter has shown that cryptocurrency was created to be a medium of exchange, yet its unique features and capabilities have placed its utility far above this. Cryptocurrency was created to put the power of money back into the hands of the people. It was meant to defy the status quo in which intermediaries, such as banks and the government maintain a significant amount of control over the money in the economy.

Due to the ever-growing market capitalisation and the potential to use crypto technology, South Africa has sought to address some of the legal uncertainty that cryptocurrency has created. This newfound definition provided by SARB will be used for the purpose of this thesis moving forward. Note that even though the term “crypto assets” has been adopted by SARB as the most appropriate term to describe the asset, this thesis will continue to use the term “cryptocurrency” interchangeably with “crypto assets” for the sake of continuity. The next chapter will assess SARB’s definition of cryptocurrency to determine whether cryptocurrency constitutes trust property for purpose of the Act.



CHAPTER 3: THE ACCEPTANCE AND MANAGEMENT OF CRYPTOCURRENCY IN A TRUST

A trust is an arrangement that is said to protect the weak¹⁶³ and create generational wealth.¹⁶⁴ If one is to imagine a financial institution that has accepted trusteeship over a trust, and the inventory includes a cryptocurrency, such as Bitcoin, how would this institution manage it? It might be the case that the trustees are aware of cryptocurrency, but have no knowledge or experience of how to administer it. When considering this new generation of digital assets, is the current trust an adequate vehicle to administer it? Cryptocurrency is a risky asset, so could a trustee accept it as trust property, and how would they manage it? These questions will be explored in this chapter.

3.1 What is a Trust?

A “trust” is a broad and flexible concept that may be difficult to comprehend with any reasonable certainty.¹⁶⁵ This is because it is a generic term that can apply to various legal relationships.¹⁶⁶ Therefore, a trust can be interpreted in a juxtaposed manner, which was referred to by the authors Du Toit et al as a wide sense and strict sense.¹⁶⁷

A trust in a wide sense is an arrangement in which a representative holds or administers property on behalf of another or for an impersonal object and not for their own benefit.¹⁶⁸

Examples of trusts in a wide sense are:

- curatorship, in which a curator manages the affairs of a person suffering from an incapacity;
- tutorship, in which a tutor takes control of their pupil’s affairs;

¹⁶³ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 19.

¹⁶⁴ Fischer-French M ‘Using a trust to create intergenerational wealth’ available at <https://mayaonmoney.co.za/2017/05/using-trust-create-intergenerational-wealth/> (accessed on 25 June 2020).

¹⁶⁵ De Waal MJ ‘The core elements of the trust: Aspects of the English, Scottish and South African Trusts compared.’ (2000) 117(3) *SALJ* 548.

¹⁶⁶ De Waal MJ (2000) 548.

¹⁶⁷ Du Toit F et al (2019) 1.

¹⁶⁸ De Waal MJ (2000) 548.

- agency, in which agents act on behalf of their principals; and
- executorship, in which an executor winds up a deceased estate in favour of the heirs and legatees.¹⁶⁹

The trustees in these trusts do not have any vested ownership in the property because they are merely tasked with administering it on behalf of another person or entity.¹⁷⁰ Notwithstanding this, an executor of a deceased estate does temporarily become the owner of the assets in his or her official capacity to wind up the estate.¹⁷¹

A trust in a strict sense is a legal institution in which a trust founder vests the control of the property in a trustee, who then has to administer the property and its profits for the benefit of the beneficiaries of the trust or in the fulfilment of an impersonal object.¹⁷² The trustee, in this case, may either be the owner of the trust property or simply its administrator.¹⁷³

An ownership trust is a type of trust in which ownership vests in the trustee in his or her official capacity.¹⁷⁴ This type of trust is explicitly envisaged in s 1(a) of the Act.¹⁷⁵ On the other hand, a *bewind* trust is a type of trust that is contemplated in s 1(b) of the Act, in which the ownership of the trust property vests directly in the beneficiaries of the trust; however, the control of the property vests in the trustees.¹⁷⁶

In essence, the legal rules that govern trusts in a wide sense and a strict sense are the differentiating factors that set them apart.¹⁷⁷ Some trusts in a broad sense, including curatorship, tutorship, and executorship are governed by the Administration of Estates Act.¹⁷⁸ A trust in a strict sense, on the other hand, is governed and regulated by both the common law

¹⁶⁹ Du Toit F et al (2019) 1.

¹⁷⁰ *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) para 794E.

¹⁷¹ De Waal MJ and Schoeman-Malan MC *Law of Succession* 4th Ed (2013) 11.

¹⁷² *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) para 794F.

¹⁷³ *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) para 794F.

¹⁷⁴ Du Toit F et al (2019) 8.

¹⁷⁵ s 1(a) of Act 57 of 1988.

¹⁷⁶ *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) para 542B–C.

¹⁷⁷ Du Toit F et al (2019) 1.

¹⁷⁸ Act 66 of 1965.

and the Act. To define a trust based on the wider interpretation would be insufficient for a definition of a trust *strictu sensu*, according to the De Waal.¹⁷⁹ He further quotes Honoré who states, “there is a difference between a law of entrusting and the law of trusts”¹⁸⁰ and proposes that the definition of trust must be narrower and specific for the purpose of trust law.¹⁸¹ This thesis deals only with trusts in the strict sense as it is defined in terms of the Act. Therefore, any reference that is made to a trust references the trust narrowly as is shown below.

3.1.1 The legal definition of a trust in the strict sense

Section 1 of the Act defines a trust as follows:

“...“Trust” means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed:

1(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

1(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.

but does not include the case where the property of another is to be administered by any person as executor, tutor, or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act 66 of 1965).”

¹⁷⁹ De Waal MJ (2000) 548.

¹⁸⁰ Honoré T ‘Obstacles to the reception of trust law? The examples of South Africa and Scotland’ in Alfredo Mordechai Rabello (ed) (1997) *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* 794.

¹⁸¹ De Waal MJ (2000) 548.

The definition also establishes that all trusts created in the strict sense fall within the regulatory scope of the Act.¹⁸² The two types of trusts that this definition creates in section 1(a) and 1(b), namely, an ownership trust and *bewind* trust have been explained above. The ownership trust is the most popular trust in South Africa, and although the *bewind* trust is rarely used, its recognition in the Act appears to confirm that the control a trustee has over the trust property is an essential feature of a trust, rather than the ownership of that property.¹⁸³ The definition also emphasises another essential feature of a trust, namely, that there is a separation between the trustees' administrative power over the trust property and the trust beneficiaries' enjoyment of the benefits of the trust property as a result of the trustees' administrative control over it.¹⁸⁴

The last-mentioned feature was first identified in *Land and Agricultural Bank of South Africa v Parker* where the Supreme Court of Appeal (hereinafter "SCA") held that the core idea of a trust is to separate ownership from enjoyment, in that a person is entrusted with exercising control on behalf and in the interests of another. Therefore, a trustee may also be a beneficiary of a trust, but cannot be the sole trustee and sole beneficiary of a trust. The concurrent interests of the person who holds this position would negate the core idea of a trust and would cause a trust not to come into existence.¹⁸⁵

The Act establishes that the trustees administer the trust property in favour of the trust beneficiaries or in pursuance of an impersonal object, and not for their personal benefit. However, it fails to overtly identify the nature of the trustee's office as being fiduciary, as well as the notion of a segregated trust estate with respect to real subrogation.¹⁸⁶ A segregated trust estate refers to the assets and liabilities of a trust that vest in a trustee as a separate entity.¹⁸⁷

Real subrogation means that the substitution of trust assets or the proceeds from the sale of trust assets should also form part of the trust estate and not be seen as acquiring a separate

¹⁸² *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 (C) para 794G.

¹⁸³ De Waal MJ (2000) 561-562.

¹⁸⁴ Du Toit F et al (2019) 2.

¹⁸⁵ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 19.

¹⁸⁶ Du Toit F et al (2019) 7.

¹⁸⁷ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 10.

identity.¹⁸⁸ These features are provided for in s 1 of the Income Tax Act,¹⁸⁹ which establishes that a trustee holds office in an official fiduciary capacity, and secondly acknowledges the notion that a trust fund is a segregated estate (and thus that any asset therein may be replaced without changing the identity of the trust estate).¹⁹⁰

3.1.1.1. *The inter vivos trust*

The first of the two types of trusts that will be referred to in this chapter is the *inter vivos* trust. This trust is created by a founder during his or her lifetime by entering into a contractual arrangement with the trustee.¹⁹¹ It has been established in South African law to be a trust created by way of a stipulation for the benefit of a third party, otherwise known as a *stipulatio alteri*.¹⁹² This type of trust would therefore be created upon the conclusion of the trust contract.¹⁹³

3.1.1.2. *The testamentary trust*

The testamentary trust, distinct from the *inter vivos* trust, is created by way of a founder's will (*mortis causa*), and usually comes into existence on the death of the founder.¹⁹⁴

3.1.2 Practical applications of a trust with regard to cryptocurrency

Trusts have a wide array of applications that may be used in various circumstances¹⁹⁵ due to their flexibility, ease of creation, and operation.¹⁹⁶ Nevertheless, the protection of the weak or vulnerable and the safeguarding of the interest of the deceased and absent persons remain the primary functions of the trust.¹⁹⁷ For example, a testator can create a trust through his will to

¹⁸⁸ De Waal MJ (2000) *SALJ* 564.

¹⁸⁹ s 1 of the Income Tax Act 58 of 1962.

¹⁹⁰ Du Toit F et al (2019) 7.

¹⁹¹ Du Toit F et al (2019) 8.

¹⁹² De Waal MJ and Schoeman-Malan MC *Law of Succession* 4th Ed (2013) 169.

¹⁹³ Du Toit F et al (2019) 8.

¹⁹⁴ Olivier PA, Van den Berg GPJ, Strydom S *Trustreg en Praktyk Service Issue 5* (2018) 2.5.1.

¹⁹⁵ Du Toit F et al (2019) 189.

¹⁹⁶ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 23.

¹⁹⁷ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 19.

provide economic protection for his surviving spouse, children, or future generations.¹⁹⁸ Consequently, the trust has become a popular tool amongst legal and commercial practitioners, in particular, to effect prudent estate planning or asset management.¹⁹⁹

A trust founder may thus elect to preserve cryptocurrency in trust for his or her descendants or to hold high-growth assets, such as cryptocurrency in trust to peg his or her estate value as part of a tax-saving estate plan. The latter practical application of a trust suits cryptocurrency most appropriately because it has seen tremendous growth in market capitalisation since its inception in 2009 and will likely continue to grow exponentially. A founder who wishes to invest in cryptocurrency will benefit from the protection that a trust offers this aggressively growing asset, which may contribute towards a larger estate and will thus address, among others, estate duty²⁰⁰ liability on the founder's death.

3.2 What constitutes “trust property” in terms of the Trust Property Control Act?

A legal definition of cryptocurrency as well as its unique characteristics were discussed in chapter two. However, having established what a strict sense trust is, one finds that the Act still requires these assets to be included within the definition of “trust property” as found in s 1 of the Act.

Section 1 reads as follows:

“...“Trust property” or “property” means movable or immovable property, and includes contingent interests in property, which in accordance with the provisions of a trust instrument are to be administered or disposed of by a trustee.”

¹⁹⁸ Du Toit F et al (2019) 191.

¹⁹⁹ Du Toit F et al (2019) 189.

²⁰⁰ Estate Duty Act 45 of 1955.

The definition of trust property has been established as being the capital,²⁰¹ *corpus*,²⁰² or subject-matter²⁰³ of the trust. It can comprise of any movable, immovable, corporeal, or incorporeal asset or group of assets.²⁰⁴ This includes corporeal assets, such as a farm and an art collection, as well as incorporeal assets like copyright and shares.²⁰⁵ Trusts can also hold cash²⁰⁶ as corporeal trust property, although in recent times it has taken an incorporeal form represented as a claim against a financial institution.²⁰⁷ Olivier et al propose that other legislation that provides a definition of “property” may offer assistance in determining what constitutes trust property for the purpose of the Act.²⁰⁸ Olivier et al also propound that any asset which one can exercise ownership over, and that is capable of being converted to cash if sold, can be held in a trust.²⁰⁹

Therefore, to establish whether cryptocurrency constitutes trust property, it must be assessed in the light of the abovementioned factors, summarised in question form below:

1. Is cryptocurrency identifiable as a movable, immovable, corporeal, or incorporeal asset or group of assets?
2. Does other legislation define cryptocurrency as “property”? This may assist in determining whether cryptocurrency constitutes trust property.
3. Is it possible to exercise ownership over cryptocurrency?
4. Can cryptocurrency be sold or liquidated?

Should cryptocurrency successfully fulfil the requirements above (and the aforementioned questioned be answered in the affirmative), cryptocurrency will be capable of being held in trust as trust property.

²⁰¹ *Jowell v Bramwell-Jones* 1998 (1) SA 83 6 (W) para 872D.

²⁰² *Jowell v Bramwell-Jones* 1998 (1) SA 83 6 (W) para 872D.

²⁰³ *Ex parte Milton* 1959 (3) SA 42 6 (C) para 426H.

²⁰⁴ Du Toit F et al (2019) 12.

²⁰⁵ Pace RP and Van der Westhuizen WM *Wills and Trusts Service Issue* 20 (2016) B8.3.

²⁰⁶ Du Toit F et al (2019) 12.

²⁰⁷ Fox DD ‘Defective payments of incorporeal money in South African and English Law.’ (2009) (4) *SALJ* 638.

²⁰⁸ Olivier PA et al (2018) 2.3.

²⁰⁹ Olivier PA et al (2018) 2.3.

3.3 Does cryptocurrency constitute trust property?

3.3.1 Is cryptocurrency a movable, immovable, corporeal or incorporeal asset or group of assets?

In chapter two, it was established that cryptocurrency is a subclass of digital currencies²¹⁰ that utilises blockchain technology to create a decentralised, encrypted, open-source ledger, which is stored on a peer-to-peer network that is accessible to the public.²¹¹ This network can be used to transfer a token, which represents value from one individual to another and is capable of being stored on a virtual wallet.²¹² It was established in South African law that cryptocurrency does not constitute a legal tender, electronic money, or security.²¹³ It is therefore not legally recognised as cash or shares.

In 2018, SARS released a statement in which they regarded cryptocurrency as an intangible (incorporeal) asset. For income tax purposes, capital gains tax (CGT) will apply to cryptocurrencies, in that taxpayers are expected to declare gains and losses.²¹⁴ Moosa pays special attention to Bitcoin in this regard and argues that it is an incorporeal asset because it exists within a digital paradigm where it is stored in a virtual wallet and does not take up any physical form.²¹⁵

Although Moosa refers predominantly to Bitcoin, he submits that cryptocurrency, in general, is typified by Bitcoin, also because it is the most commonly used cryptocurrency in South Africa.²¹⁶ Consequently, for the purpose of this requirement, the case for

²¹⁰ Rose C (2015) 617.

²¹¹ Sontakke KA and Ghaisas A (2017) 11.

²¹² Böhme et al (2015) 220.

²¹³ See subheading 2.2.6.

²¹⁴ South African Revenue Services, 'SARS stance on the tax treatment of cryptocurrency' available at <https://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx#:~:text=SARS's%20stance%20on%20the%20tax%20treatment%20of%20cryptocurrencies,part%20of%20their%20taxable%20income>. (accessed on 30 May 2020).

²¹⁵ Moosa F 'Cryptocurrencies: Do they qualify as 'gross income'?' (2019) 44(1) *Journal for Juridical Science* 27.

²¹⁶ Moosa F (2019) 14.

attributing an incorporeal nature to Bitcoin can be made because it forms part of cryptocurrency as a group of assets. This is based on the fact that it does not take on a physical form, and it can only be created and stored digitally.

It is submitted that cryptocurrency is in a sense similar to cash, in particular insofar as financial institutions represent it on their digital platforms as having a monetary value despite its incorporeal nature. It is nevertheless conceded that cryptocurrency lacks the dual nature of cash because it is incapable of being represented in the corporeal form of minted banknotes or coins. Hence, cryptocurrency's nature is, as Moosa argues, truly incorporeal.

3.3.2 Do other legislation define cryptocurrency as “property”?

The incorporeal nature of cryptocurrency has been established above. It was nevertheless shown in chapter two that, because cryptocurrency is a new asset class, it would not necessarily constitute trust property. Using Olivier et al's proposal, which looks at other legislation's definition for “property”,²¹⁷ it is submitted that it is indeed possible to regard cryptocurrency as being capable of constituting trust property when one considers the definition of “crypto assets” as established by SARB in 2019.²¹⁸ To recall this definition:

“Crypto assets are digital representations or tokens that are accessed, verified, transacted, and traded electronically by a community of users. Crypto assets are issued electronically by decentralised entities and have no legal tender status, and consequently are not considered as electronic money either. It therefore does not have statutory compensation arrangements. Crypto assets have the ability to be used for payments (exchange of such value) and for investment purposes by crypto asset users. Crypto assets have the ability to function as a medium of exchange, and/or unit of account and/or store of value within a community of crypto asset users.”²¹⁹

It must however be noted, that this definition was later amended to a simpler definition in April 2020, which reads as follows:

²¹⁷ Olivier PA et al (2018) 2.3.

²¹⁸ See subheading 2.3.4.

²¹⁹ The South African Reserve Bank *Consultation Paper for Policy Proposals for Crypto Assets* (2019) 9.

“A crypto asset is a digital representation of value that is not issued by a central bank, but is traded, transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology.”²²⁰

The original and revised definitions in these papers are both the products of the IFWG, which includes members from the National Treasury and SARB. As previously mentioned, IFWG chose to use the term “crypto assets” instead of “cryptocurrency” to ensure that it is not mistaken for legal tender.

The objective of the 2019 paper was to provide a summary of the risks and benefits associated with crypto assets; to discuss regulatory approaches and to offer policy proposals to industry participants and stakeholders.²²¹ It also focussed on two crypto asset applications: the purchasing and selling of crypto assets and using it to pay for goods and services.²²² Although these applications exclude the other functional applications of cryptocurrencies, the paper notes that it still considers the latter to be equally important.²²³

The purpose of the position paper published in 2020 was to build on the feedback received from the 2019 consultation paper. It furthers the discussion into the development of a regulatory framework for crypto assets and addresses the required recommendations that must be implemented.²²⁴ It also sets out the goals and principles for the regulation of crypto assets and provides a summary and policy stance on the various ways in which crypto assets can be used.

The paper focuses on all five of the identified applications for cryptocurrencies, which, in addition to the applications identified in the 2019 paper, also addresses initial coin offerings (ICOs), crypto asset funds, derivatives, and crypto asset market support services.²²⁵ An ICO

²²⁰ The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 9.

²²¹ The South African Reserve Bank *Consultation Paper for Policy Proposals for Crypto Assets* (2019) 7.

²²² The South African Reserve Bank *Consultation Paper for Policy Proposals for Crypto Assets* (2019) 8.

²²³ The South African Reserve Bank *Consultation Paper for Policy Proposals for Crypto Assets* (2019) 8.

²²⁴ The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 7.

²²⁵ The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 8.

is the crypto industry's version of an initial public offering (IPO), in which the ICO allows a company to raise funds in order to develop a new crypto coin, application, or service. Those who invest in the company are issued new cryptocurrency tokens by the said company.²²⁶ The IFWG does however acknowledge that this list is not exhaustive.²²⁷

IFWG's definition of crypto assets does not necessarily amount to a statutory or legislative definition of a property. Rather, this definition was adopted by the IFWG for the purpose of the position paper, as well as an "umbrella term" to describe different crypto asset tokens.²²⁸ They also acknowledged that no legislative or regulatory framework for crypto assets exists as yet,²²⁹ which is what these papers had originally sought to address.

The absence of legislation that explicitly defines cryptocurrency as "property" renders it difficult to rely on Olivier et al's proposal to reference other statutory definitions of "property" to determine whether cryptocurrency is capable of constituting trust property. Nevertheless, the SARB acknowledges that they issue the position papers to state their position on different payment system issues. The various approaches, procedures, and policy issues that are applicable at a particular time, are usually contained in these documents.²³⁰ The position papers are thus published also with a view to future statutory development.

Due to the fact that SARB published these papers with the purpose of developing a regulatory framework for crypto assets, it is submitted that there is a distinct likelihood that the definition for crypto assets contained in these papers may be adopted in the future legislation on point that the South African legislature may enact. However, this remains a speculative assertion. It is submitted, furthermore, that another logical step to take in determining whether cryptocurrency constitutes trust property, would be to rely on the

²²⁶ Frankenfield J 'Initial Coin Offering (ICO)' available at <https://www.investopedia.com/terms/i/initial-coin-offering-ico.asp> (accessed on 22 September 2020).

²²⁷ The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 8.

²²⁸ The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 8.

²²⁹ The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 11.

²³⁰ SARB 'Position Papers' available on [https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem\(NPS\)/Legal/Pages/PositionPapers.aspx#:~:text=Position%20papers%20are%20published%20by,applicable%20at%20a%20particular%20time.](https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Legal/Pages/PositionPapers.aspx#:~:text=Position%20papers%20are%20published%20by,applicable%20at%20a%20particular%20time.) (accessed on 1 June 2020).

IFWG's 2020 definition in conjunction with the statements made by SARS regarding cryptocurrency.

Moosa points out that, in its media release of 2018,²³¹ SARS classified cryptocurrencies as intangible assets instead of currency, which would require an analysis of the term "asset"²³² because it falls under the CGT paradigm, in terms of the Eighth Schedule of Income Tax Act.²³³ Paragraph two of the Eighth Schedule defines "asset" to include:

- “(a) property of whatever nature, whether movable or immovable, corporeal or incorporeal,
excluding any currency, but including any coin made mainly from gold or platinum; and
(b) a right or interest of whatever nature to or in such property;”

Therefore, SARS has ostensibly interpreted the definition of an asset to include cryptocurrency. However, Moosa cautions that this media statement is not a binding ruling or a statement of the law.²³⁴

It would nevertheless seem that relying on Olivier et al's proposal is rather difficult in regard to cryptocurrency due to the lack of a clear legislative definition identifying it a property. However, for the purpose of this thesis, it is submitted that sufficient evidence confirms that attempts have been made at establishing a definition for cryptocurrency as property and that SARS has interpreted it as being included within the Income Tax Act's definition of "property".

²³¹ South African Revenue Services, 'SARS stance on the tax treatment of cryptocurrency' available at <https://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx#:~:text=SARS's%20stance%20on%20the%20tax%20treatment%20of%20cryptocurrencies,part%20of%20their%20taxable%20income>. (accessed on 30 May 2020).

²³² Moosa F (2019) 23.

²³³ The Eighth Schedule of the Act 58 of 1962.

²³⁴ Moosa F (2019) 23.

3.3.3 Is it possible to exercise ownership over cryptocurrency?

Based on the discussion above, as well as the 2020 crypto assets definition of the IFWG, the words “but is traded, transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility”, recognises some of the rights of ownership that a natural or legal person has over crypto assets.

Ownership is described in the case of *Gien v Gien* as follows:

“[e]iendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê”, which loosely translates to “ownership is the most complete real right a person can have with regards to a thing”.²³⁵

The IFWG’s definition of crypto assets infers that a legal person or natural person enjoys the right of ownership over their crypto assets. The position paper confirms that an individual holds ownership over the cryptocurrency, by the use of the words “crypto asset owners” in its discussion of the digital wallet, which is used to store and spend crypto assets.²³⁶ Furthermore, the SARS media statement also discusses the CGT gains and losses in relation to the acquisition of cryptocurrency through mining and acknowledges that the miner is rewarded with the “ownership” of new coins after transactions are verified.²³⁷ Therefore, it becomes clear from these two sources that the individual enjoys the right to own crypto assets in the traditional sense.

It must be noted that a trust is not considered as a legal person in South African law,²³⁸ albeit there are exceptions where legislation, such as the Income Tax Act designates a trust

²³⁵ *Gien v Gien* 1979 (2) SA 1113 para 1120.

²³⁶ The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 14.

²³⁷ South African Revenue Services, 'SARS stance on the tax treatment of cryptocurrency' available at <https://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx#:~:text=SARS's%20stance%20on%20the%20tax%20treatment%20of%20cryptocurrencies.part%20of%20their%20taxable%20income>. (accessed on 21 July 2020).

²³⁸ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 10.

as such.²³⁹ The persons that act together in their capacities as trustees of the trust, enjoy the legal personality to act on behalf of the trust.²⁴⁰ Hence, in an ownership trust, crypto assets would vest in the trustees in their capacity as the trustees of the trust, and in a *bebind* trust it would vest in the trust beneficiaries.²⁴¹

3.3.4 Can cryptocurrency be sold or liquidated?

In chapter two, it was shown that cryptocurrencies like Bitcoin had established a significant market capitalisation, and many exchanges provide a platform for the buying and selling of cryptocurrencies.²⁴² Cryptocurrency can be transferred between individuals on these markets, and there is sufficient liquidity in the market to facilitate these transactions.²⁴³

3.3.5 Conclusion

Based on the analysis above, it has been demonstrated that cryptocurrency is an incorporeal asset. Although a legislative definition has not (yet) been set in stone, the IFWG's definition together with SARS' interpretation of "asset" under the Income Tax Act does point to the distinct possibility that cryptocurrency will be statutorily recognised as property in the future. Cryptocurrency is capable of being held in ownership and can be sold. The foregoing leads to the conclusion that cryptocurrency is indeed capable of constituting trust property. With that being said, the fiduciary duties of a trustee when managing cryptocurrency in trust will be discussed next.

3.4 The trust instrument and the acceptance of cryptocurrency as trust property.

It must be emphasised at the outset that, although cryptocurrency is capable of constituting trust property and thus capable of being transferred to a trustee in trust, it must still be identified with reasonable certainty in the trust instrument. This enables the trustee to accept it into trust. The identification of trust property with reasonable certainty is, after

²³⁹ Du Toit F et al (2019) 5.

²⁴⁰ *Steyn v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB).

²⁴¹ See subheading 3.1.

²⁴² Reddy E and Lawack V (2019) 14.

²⁴³ Ram AJ (2019) 154.

all, one of the five requirements for the creation of a valid trust postulated in *Administrators, Estate Richards v Nichol*.²⁴⁴

The importance of the certainty of the trust property in the trust instrument is also recognised by Wu. However, instead of questioning whether crypto assets constitute trust property, Wu argues that the trust instrument can address the aforementioned question if it permits the trustees to invest in cryptocurrency.²⁴⁵ Wu states that a trust instrument generally provides a trustee with the powers of investment, and these powers may be prescribed in statute. Yet, the term “investment” may not always be defined and therefore it can be argued that trustees would not be restricted to investing in things that are regarded as property in law alone.

The author is of the opinion that a founder may explicitly provide for the power to invest in crypto assets in the trust instrument, regardless of whether the law considers it to be property or not.²⁴⁶ Here the author made sure to draw a distinction between holding crypto assets as trust property on the one hand, and investing in crypto asset class investment portfolios. The power to invest in crypto assets should however be provided for in the trust deed.²⁴⁷ The trustee’s fiduciary duties when investing in crypto assets will be explored later in this chapter.²⁴⁸

Being that crypto assets do not yet have a legislative definition that defines it as property in South Africa, it would prove useful for the founder to explicitly state crypto assets as trust property in the trust instrument in order to ensure reasonable certainty. In light of Wu’s recommendation, it is also recommended to allow explicitly, where appropriate, the investment in crypto asset classes. Should the law evolve through case law or legislation regarding the recognition of crypto assets as trust property, and crypto assets become synonymous with other investment classes, then the trust instrument may, of course, not need to be as explicit.

²⁴⁴ *Administrators, Estate Richards v Nichol* 1996 (4) SA 253 (C) para 258E–F.

²⁴⁵ Wu TH ‘Trustees’ investment duties and cryptoassets.’ (2020) 26(2) *Trusts and Trustees* 183-194.

²⁴⁶ Wu TH (2020) 188.

²⁴⁷ Wu TH (2020) 189.

²⁴⁸ See subheading 3.5.3.

3.5 The management of cryptocurrency in trust.

Cryptocurrency has a wide range of uses, and a founder may choose to identify it as “crypto assets” which encompasses all the possible functional applications, such as a medium of exchange, speculative investment, and so on. But what are the risks associated with administering cryptocurrency in trust and how do these risks impact the fiduciary duties of a trustee when investing in it?

3.5.1 What are the risks associated with cryptocurrency?

The risks associated with cryptocurrency include its use as both a target and a tool for financial and cybercrimes, including money laundering, investment fraud, theft, and the sale of illegal goods and services.²⁴⁹ SARB acknowledges these risks in their 2014,²⁵⁰ 2019,²⁵¹ and 2020²⁵² papers. The lack of a regulatory framework for crypto assets exposes consumer assets to the absence of protection or reparation against fraud, theft, or liquidation.²⁵³ Other risks include the high volatility of the cryptocurrency,²⁵⁴ terrorist financing, circumvention of exchange controls, and tax evasion.²⁵⁵ Finally, crypto assets like Bitcoin are also considered to have the highest volatility amongst asset classes.²⁵⁶ Although this volatility invalidates it from being a stable store of value, its level of absolute value return exceeds the return of any other asset class.²⁵⁷

²⁴⁹ Reddy E and Lawack V (2019) 20.

²⁵⁰ The South African Reserve Bank *Position Paper on Virtual Currencies* (2014) 5.

²⁵¹ The South African Reserve Bank *Consultation Paper for Policy Proposals for Crypto Assets* (2019) 6.

²⁵² The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 16.

²⁵³ Reddy E and Lawack V (2019) 20.

²⁵⁴ Reddy E and Lawack V (2019) 20.

²⁵⁵ Reddy E and Lawack V (2019) 20-21.

²⁵⁶ Ram AJ (2019) 159.

²⁵⁷ Ram AJ (2019) 159.

3.5.2 What are the fiduciary duties of a trustee in mitigating the risks of cryptocurrency when it is held in trust?

At common law, trustees are obliged to exercise the necessary care, diligence, and skill when dealing in the affairs of a trust, especially when administering trust property.²⁵⁸ In other words, a trustee should administer a trust as a reasonable, prudent, and careful person (*bonus et diligens paterfamilias*)²⁵⁹ with the utmost good faith²⁶⁰ in the best interest of the trust beneficiaries.²⁶¹ This duty has also been entrenched in s 9(1) of the Act.

Additionally, the trustee is also accountable for holding the trust property separate from his or her private estate;²⁶² providing a proper account of the trust administration should it be requested;²⁶³ and ensuring that each trustee acts independently in administering the trust property.²⁶⁴ Due to the risks associated with cryptocurrencies, it is important that the trustees who are considering cryptocurrency trading platforms, cryptocurrency wallets to accept the transfer of cryptocurrencies from third parties, or investing in crypto asset portfolios, bear the aforementioned risks associated with cryptocurrency in mind.

3.5.2.1. How does a trustee mitigate these risks?

The IFWG proposed that mitigating the risks described above would include only engaging with cryptocurrency service providers that are registered and licensed under the Financial Intelligence Centre (FIC),²⁶⁵ which is an institution established to combat money-laundering and the financing of terrorist and related activities.²⁶⁶ Under the FIC Act,²⁶⁷ these service providers will become FIC Act compliant, and comply with “Know Your Customer” (KYC), continued due diligence (CDD), and the enforcement mechanisms for suspicious

²⁵⁸ *Sackville West v Nourse* 1925 AD 516 para 534.

²⁵⁹ *Sackville West v Nourse* 1925 AD 516 para 534.

²⁶⁰ *Doyle v Board of Executors* 1999 (2) SA 805 (C) para 813B.

²⁶¹ Olivier L ‘Trusts: Traps and Pitfalls’ (2001) 118(2) *SALJ* 229.

²⁶² *Doyle v Board of Executors* 1999 (2) SA 805 (C) para 813G.

²⁶³ *Doyle v Board of Executors* 1999 (2) SA 805 (C) para 815F–G.

²⁶⁴ *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) para 22.

²⁶⁵ Reddy E and Lawack V (2019) 23.

²⁶⁶ Act 38 of 2001.

²⁶⁷ Act 38 of 2001.

transactional activity.²⁶⁸ KYC is provided for in s 21 of the FIC Act and requires the financial institution to identify the clients with which they do business.²⁶⁹ CDD is provided for in s 22 and requires these institutions to keep a customer due diligence record in order to achieve the objective of the FIC Act.²⁷⁰

Reddy and Lawack are of the view that compliance with FIC Act could assist consumers in verifying the legitimacy of the cryptocurrency service providers, and that FIC Act applies in principle to cryptocurrencies because this Act refers to transactions instead of currency.²⁷¹ It is therefore recommended that trustees ensure that cryptocurrency service providers are FIC Act compliant before using their services. This would be a fundamental step for a trustee to take in ensuring that the necessary care, diligence, and skill are exercised before deciding to do business with the service provider.

A FIC Act compliant service provider has a legal obligation to adhere to the FIC Act to ensure that the risks of money laundering, fraud, and theft can be mitigated. However, the trustee's fiduciary duties would not stop here. Trustees are obliged to provide safe custody to their private keys (these may be held on paper, hard drives, or cloud storage) which grants them access to their crypto assets to mitigate the risks of loss or theft. Trustees should be able to justify why they chose to do business with any service providers, should the service provider's platforms be compromised by hacking or a collapse.²⁷²

3.5.3 What are the fiduciary duties of a trustee when investing in crypto asset investment classes?

One of the duties and obligations of trustees in South African law is to ensure that the trust property is rendered productive.²⁷³ Trust administration requires that the trustee invest trust funds in order to generate an income for the trust beneficiaries. The power to invest, and

²⁶⁸ Reddy E and Lawack V (2019) 23.

²⁶⁹ s 21 of Act 38 of 2001.

²⁷⁰ s 22 of Act 38 of 2001.

²⁷¹ Reddy E and Lawack V (2019) 23.

²⁷² Wu TH (2020) 193.

²⁷³ Pace RP and Van der Westhuizen WM (2016) B15.1.5.

the extent thereof, is usually stipulated in the trust instrument.²⁷⁴ The trustee is responsible for actively managing the trust property.²⁷⁵ The trustee has a duty to see reasonable returns on the trust capital.²⁷⁶ This is due to the fact that inflation occasions a decline in the value of money.²⁷⁷

The trustee must adhere to his or her general fiduciary duty when conducting investments.²⁷⁸ This reverberates in s 9(1) of the Act. The standard according to which they conduct themselves is of a higher degree of care, skill, and diligence than what is expected of them if they were investing their personal funds.²⁷⁹

The courts' approach to a trustee's investment strategy has seen an evolution in case law. As far back as 1925, in the case of *Sackville West v Nourse*,²⁸⁰ the court took a no-risk approach to the investment of trust funds in which immovable property, fixed deposits together with government and municipal stocks were the chosen investment vehicles, unless the trustees were provided with wide investment powers by the trust instrument.²⁸¹

This stance relied heavily on the strict standard of care of a trustee and ensured that trust funds would be as risk-free as is as reasonably possible. However, a consequence of this approach is the fact that trust funds had the potential to depreciate in value as time passed and would not meet the financial needs of the trust beneficiary in the long run.²⁸² This investment approach had evolved to that of a contemporary approach in the case of *Administrators, Estate Richards v Nichol*.²⁸³

²⁷⁴ Du Toit F et al (2019) 138.

²⁷⁵ Pace RP and Van der Westhuizen WM (2016) B15.1.5.

²⁷⁶ Pace RP and Van der Westhuizen WM (2016) B15.1.5.

²⁷⁷ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA) para 557.

²⁷⁸ Du Toit F et al (2019) 138.

²⁷⁹ Du Toit F et al (2019) 138.

²⁸⁰ *Sackville West v Nourse* 925 AD 516.

²⁸¹ *Sackville West v Nourse* 925 AD 516 para 535.

²⁸² Du Toit F et al (2019) 138.

²⁸³ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA).

Here the court found that a trust in modern times requires the trustee to grow the trust capital, and this entails an unavoidable element of risk.²⁸⁴ Furthermore, the court held that a prudent and diligent trustee should diversify the risk of a trust capital investment in order to achieve a balance of stability and growth, and increase the trust income.²⁸⁵

3.5.3.1. *How does a trustee mitigate the risks associated with cryptocurrency investments*

Should a trustee choose to invest in crypto assets to grow the trust estate, it would prove to be prudent and diligent to diversify their risk when including cryptocurrency as a part of their investment portfolio by following the contemporary investment approach as set out in *Administrators, Estate Richards v Nichol*.²⁸⁶

Furthermore, an important aspect of creating an investment portfolio is asset allocation.²⁸⁷ Being that cryptocurrencies, such as Bitcoin provides a significant risk-adjusted return compared to other asset classes, it is useful to include crypto assets in their investment portfolios to enhance their return.²⁸⁸ Wu states that trustees considering any investments in crypto assets may find that it is a hazardous investment due to the risks of hacking, theft, lost keys and high volatility associated with it.²⁸⁹ However, should the trust deed permit investing in crypto assets, then the trustee should carefully consider the purpose, terms, and circumstances of the trust prior to making such investments.²⁹⁰

Wu argues that investing in crypto assets may only be justified if the trust portfolio is large enough to consider the risk of investing in it to be appropriate. Investing a small percentage of the fund therein must be considered as acceptable in the light of the entire trust

²⁸⁴ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA) para 558A-B.

²⁸⁵ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA) para 558C-I.

²⁸⁶ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA).

²⁸⁷ Ram AJ (2019) 162.

²⁸⁸ Ram AJ (2019) 162.

²⁸⁹ Wu TH (2020) 190.

²⁹⁰ Wu TH (2020) 191.

portfolio.²⁹¹ Wu's view thus appears to align with the approach that the SCA in *Administrators, Estate Richards v Nichol*²⁹² requires a trustee to take.

The trustee must assess whether the crypto asset in question is in fact considered to be a prudent investment by questioning the suitability of the type of crypto asset investment; which investment manager or crypto asset expert should be consulted; and the risk-to-reward ratio for the investment.²⁹³ In the light of risks associated with permitting crypto asset investments, trustee exemption clauses should be included in the trust instrument.

These clauses limit the trustee's liability where losses have occurred despite the trustee having acted in good faith when making the investments.²⁹⁴ Regarding this recommendation in the South African context, section 9(2) of the Act states the following:

“Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence, and skill as required in subsection (1).”

Here we find that “subsection (1)” refers to section 9(1), and that a trust instrument is not permitted to indemnify a trustee against liability for breach of trust. This also invalidates a provision in a trust instrument that purports to indemnify a trustee against negligence or dishonesty, which was previously enjoyed under common law.²⁹⁵ Section 9(2) does, however, not prohibit a trustee from obtaining exemption against negligence, intentional default through fidelity cover, or professional indemnity insurance.²⁹⁶ Therefore, Wu's recommendation is consistent with s 9(2) of the Act, in terms of the South African context, and the use of indemnity insurance is also recommended in the context of managing crypto assets and investments.

²⁹¹ Wu TH (2020) 191.

²⁹² *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA).

²⁹³ Wu TH (2020) 191.

²⁹⁴ Wu TH (2020) 194.

²⁹⁵ Du Toit F et al (2019) 115.

²⁹⁶ Geach WD *Trust Law in South Africa* (2017) 247.

3.6 Conclusion

Referring back to the questions asked in the introduction to this chapter, it has been argued that cryptocurrency is capable of constituting trust property; however, further regulatory development has to reinforce a firm platform for the legitimacy of cryptocurrency as a trust asset that will create generational wealth. Where the trust deed allows trustee to accept crypto assets and investments, they are obliged to consider the risks associated with cryptocurrency before accepting it as trust property and whilst managing it as such.

They must prove that they have exercised the necessary care, diligence, and skill when considering crypto assets as either property or investments. This includes ascertaining and procuring the necessary advice, research, and security measures to manage this form of asset in a trust. In this regard, the recommendations put forward by Wu are particularly useful.

The next chapter will conduct a comparative analysis of foreign jurisdictions, and how they have addressed the administration of cryptocurrency in trusts. This will underpin the recommendations in the final chapter that will allow South African law to develop the appropriate legal framework around cryptocurrency as well as its receipt and management in trust.



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CHAPTER 4: CRYPTOCURRENCY TRUSTS IN FOREIGN LAW

4.1 Introduction

In the previous chapter, it was argued that cryptocurrency (or crypto assets) is indeed capable of constituting trust property for the purpose of the Act. Secondly, that the trust instrument must provide trustee with reasonable certainty when considering crypto assets as trust property. Thirdly, that the trust instrument may also permit a trustee to invest in crypto asset investment classes. Lastly, that the risks associated with managing cryptocurrency in a trust will require trustee to align their fiduciary duties to this new type of asset. These questions were answered in the context of the Republic of South Africa (RSA), with guidance taken from the views of Wu, who explored the concept of trustee investment duties and crypto assets from an international perspective.²⁹⁷

In this chapter, a comparative study of crypto assets that are held in trusts in foreign jurisdictions, such as the United Kingdom (UK), New Zealand (NZ), and the United States of America (US) will be conducted. For the purpose of this thesis, a discussion into whether cryptocurrency constitutes trust property in the UK and the US will not be the focus of this chapter. However, a recent case in NZ dealt with this exact question, and the relevant decision will be discussed below. The approach taken by these countries to adopt cryptocurrency, as property, as well as the laws and regulations governing cryptocurrencies in these jurisdictions, will provide legal-comparative insight into the management of crypto assets in trust. From this study, possible recommendations will be made that allows RSA law to further develop the legal framework around cryptocurrency and its management in trust.

4.2 The United Kingdom

It is generally accepted that RSA trust law has its origins in the English trust law.²⁹⁸ Nevertheless, it has evolved and continues to evolve within the RSA courts and legislature

²⁹⁷ Wu TH (2020) 183.

²⁹⁸ *Estate Kemp v McDonald's Trustee* 1915 AD 491.

in its own unique way.²⁹⁹ Therefore, the UK has been chosen as the first foreign jurisdiction that will be examined, as it relates to cryptocurrency trusts.

4.2.1 Legislative attempts to define cryptocurrency in the UK

In the UK, the HMRC published a policy paper that set out the UK's stance on crypto assets. It defines crypto assets as follows:

“Crypto assets (or “cryptocurrency” as they are also known) are cryptographically secured digital representations of value or contractual rights that can be, transferred, stored, or traded electronically.”³⁰⁰

The HMRC states that cryptocurrency does not constitute currency or money, but instead identifies three different types of crypto assets, namely, exchange tokens, utility tokens, and security tokens.³⁰¹ Consensually, many agree that crypto assets have the characteristics of an asset. This is because individuals and companies acquire them so that it may eventually increase in value and later be sold for profit.³⁰²

Exchange tokens are defined as tokens that are intended to be used as a medium of exchange, a form of payment, and include cryptocurrencies, such as Bitcoin. These tokens do not provide a user with rights or access to goods and services. There is no underlying individual or group that underpins this asset because the asset derives its value from its means of exchange or investment.³⁰³

²⁹⁹ *Braun v Blann and Botha* 1984 (2) SA 850 (A) para 859E.

³⁰⁰ HMRC ‘Cryptoassets: tax for individuals’ available at <https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals> (accessed on 10 September 2020).

³⁰¹ HMRC (2019).

³⁰² Tringham M ‘What money laundering rules mean for crypto and trusts’ available at <https://www.ftadviser.com/regulation/2020/01/21/what-money-laundering-rules-mean-for-crypto-and-trusts/?page=1> (accessed on 10 September 2020).

³⁰³ HMRC (2019).

Utility tokens provide the holder with access to unique products or services on a network that may use a Distributed Ledger Technology (DLT).³⁰⁴ A DLT is a digital asset transaction tracking system in which transactions and their records are registered at various locations at the same time.³⁰⁵ Normally, a company or group of companies would issue the tokens and agree to accept the tokens as payment for the specific products or services that are in question.³⁰⁶ Security tokens can provide the holder with unique interests in the company, such as the existence of debt due to the business or a share of profits in the business.³⁰⁷

The taxation treatment of each token is dependent on the nature and purpose of the token and not necessarily by its definition. Therefore, the policy paper only considers the taxation of the exchange token, such as Bitcoin and acknowledges that the other types of tokens will require a different approach to their taxation.³⁰⁸ Similar to the RSA, crypto assets that are held for their capital appreciation will be subject to CGT when they are disposed of by individuals at a later stage.³⁰⁹ Furthermore, Income Tax and National Insurance are payable on crypto assets that individuals receive from their employer or through crypto mining, transaction confirmations.³¹⁰

4.2.2 Cryptocurrency in the UK trusts

The HMRC paper goes on to state that crypto assets constitute property for inheritance tax purposes.³¹¹ However, after extensive research on the topic of cryptocurrency trusts in the UK, there does not appear to be ample information to substantiate or unpack this position. Nevertheless, an article by Vollers acknowledges that the volatility and reputational

³⁰⁴ HMRC (2019).

³⁰⁵ Rouse M 'Distributed Ledger Technology (DLT) available at <https://searchcio.techtarget.com/definition/distributed-ledger> (accessed on 10 September 2020).

³⁰⁶ HMRC (2019).

³⁰⁷ HMRC (2019).

³⁰⁸ HMRC (2019).

³⁰⁹ McMullen M 'How cryptocurrencies are taxed for individuals' available at <https://www.bdo.co.uk/en-gb/insights/tax/private-client/how-cryptocurrencies-are-taxed-for-individuals> (accessed on 17 October 2020).

³¹⁰ HMRC (2019).

³¹¹ HMRC (2019).

concerns of cryptocurrency remain obstacles in the way of it becoming a mainstream trust investment.³¹² A professional trustee's appetite for risk is an important factor in whether or not they will invest in crypto assets.³¹³

Vollers further states that the fact that crypto assets constitute property for inheritance purposes, raises the following question:

“To the extent that Bitcoin is the property, can be owned, traded, gifted, and inherited and where the asset is located, which laws govern its succession?”

Vollers adds that this can give rise to complicated jurisdictional problems and overwhelmingly costly advice to clients. Bearing in mind that numerous questions are still to be answered, clients and their advisors need to grasp the essence of crypto assets to come up with realistic strategies to manage and control the succession of cryptocurrencies.³¹⁴ The author does not provide an answer to this question and this thesis does not intend to do the same. However, this is a call for the South African legislature to attend to these (and related) issues when cryptocurrency legislation is eventually passed.

4.3 New Zealand

The NZ trust law shares the same origin as that of the RSA because both countries derive their trust law from English law.³¹⁵ This fact is apparent in the NZ High Court which recently handed down a landmark judgment in *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* (hereinafter “the *Ruscoe* case”) in which it was declared that cryptocurrency constitutes property that is capable of being held in trust.³¹⁶

³¹² Vollers C ‘Bitcoin After Death: your digital inheritance: Part 2 - Estate planning tips’ available at <https://www.farrer.co.uk/news-and-insights/bitcoin-after-death-your-digital-inheritance-part-2---estate-planning-tips/> (accessed on 20 September 2020).

³¹³ Vollers C (2019).

³¹⁴ Vollers C ‘Bitcoin After Death: your digital inheritance: Part 1 - Bitcoin, blockchain and the cryptowallet’ available at <https://www.farrer.co.uk/news-and-insights/bitcoin-after-death-your-digital-inheritance-part-1--bitcoin-blockchain-and-the-cryptowallet/> (accessed on 20 September 2020).

³¹⁵ New Zealand Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (2010) 8.

³¹⁶ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728.

4.3.1 The *Ruscoe* Case

This decision is important because it is uncommon to find case law that seeks to address the question of whether digital assets, such as cryptocurrency constitute trust property. Although the same conclusion for the RSA was advanced in chapter 3, this judgment was fully reasoned by Gendall J in the NZ High Court and thus provides an opportunity to learn more about how the court came to the conclusion that cryptocurrency can be held in trust.

4.3.2 Background

Cryptopia was a cryptocurrency exchange that empowered account holders to exchange sets of cryptocurrencies among themselves. It kept a database posting the details of the account holders and their digital assets held on the platform³¹⁷ in the form of encrypted digital wallets.³¹⁸ Cryptopia charged fees for trades, deposits, and withdrawals made by the account holders.³¹⁹ The account holders did not know what their private keys to the digital wallets were, because they were kept and stored by Cryptopia.³²⁰

Cryptopia's servers were hacked in January 2019 and crypto assets to the value of NZD 30 million were stolen. Their services were suspended soon after the hack but later resumed in March 2019. Subsequently, in May 2019, the shareholders resolved to place the company into liquidation.³²¹

4.3.3 Issues

The liquidators applied to the Court to gain certainty on two questions:

1. Is cryptocurrency “property” for the purpose of section 2 of New Zealand’s Companies Act 1993 and capable of forming the subject matter of a trust?³²²
2. Was the cryptocurrency held in trust by Cryptopia for the account holders?³²³

³¹⁷ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 5.

³¹⁸ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 22(c).

³¹⁹ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 5.

³²⁰ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 147.

³²¹ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 12.

³²² *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 46(a).

³²³ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 46(b).

The reason for this application was due to a dispute between the account holders, on the one hand, and the unsecured creditors and shareholders, on the other. Both parties were of the view that they were entitled to the remaining assets of the company. The account holders argued that the cryptocurrency is a form of intangible personal property in common law and falls within the definition of section 2 of New Zealand’s Companies Act.³²⁴

Section 2 of the Act defines “property” as:

“Property of every kind whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise.”

The liquidator and the creditors disagreed with this argument, stating that cryptocurrency is not property capable of being the subject matter of a trust in the common law.³²⁵

4.3.4 The findings of the court

4.3.4.1. *The first issue*

Gendall J held that the cryptocurrencies at issue constitute property within the definition of section 2 of the Companies Act and are capable of forming the subject matter of a trust.³²⁶ This decision relied on the opinion of Lord Wilberforce in the House of Lords in the English case of *National Provincial Bank Ltd v Ainsworth*³²⁷ where he stated the following:

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

³²⁴ Companies Act 1993 No 105 (NZ).

³²⁵ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 50.

³²⁶ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 133.

³²⁷ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) para 1247–1248.

Gendall J stated that cryptocurrencies met all of these requirements. Before explaining the reasoning behind this view, a paper by Babie et al on the *Ruscoe* Case must be noted. The authors state that the majority of common law courts rely on the four criteria mentioned in Lord Wilberforce's opinion as persuasive in cases where one has to determine what constitutes property.³²⁸

Furthermore, they noted that Gendall J took a refreshing approach to the analysis of the four criteria of the *Ainsworth* case when considering the transactions of cryptocurrency exchange. This is due to the fact that many cases prior to the *Ruscoe* case determined whether an asset fell within the meaning of property by looking for comparable attributes that are shared between the asset and existing forms of property. This way of reasoning by analogy typically negates any analysis pertaining to whether the asset holds the characteristics of a proprietary right.³²⁹

The first criterion is whether cryptocurrency constitutes an identifiable subject matter.³³⁰

Gendall J stated the following:

“Computer-readable strings of characters recorded on networks of computers established for the purpose of recording those strings, as I see it, are sufficiently distinct to be capable of then being allocated uniquely to an account holder on that particular network.”³³¹

Gendall J added that the allocation that is made to an account holder is by way of a public key that holds data that is distinguishable from any other public key on the network. Therefore, even though every computer on the network holds identical data, every public key is unique. Cryptography also ensures that the data cannot be altered over the network and thus assists the network in giving the data stability.³³² Gendall J held that

³²⁸ Babie PT, Brown D, Catterwell R and Giancaspro M ‘Cryptocurrencies as Property: *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728’ (2020) 33 *U. of Adelaide Law Research Paper* 7.

³²⁹ Babie PT et al (2020) 8.

³³⁰ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 104.

³³¹ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 105.

³³² *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 105.

cryptocurrency is indeed identifiable, even more so than asserted rights, such as copyright where the issue of originality may come into play.³³³

The second criterion is that the asset should be identifiable by third parties.³³⁴ This means that the asset identified should be capable of having the owner recognised by third parties.³³⁵ Gendall J placed emphasis on the fact that the right to exclude others from the asset is a better indicator of proprietor status than the right to use the asset.³³⁶ He reasoned that a different public key and a new private key are generated for each cryptocurrency transaction.

The private key is akin to a personal identification number (a PIN), and it allows for the control and the ability to exclude others from the cryptocurrency.³³⁷ Once the private key is used, it cannot be used again. This prevents a transaction from being performed twice. Therefore, Gendall J held that, because the owner holds the private key, he or she has sufficient control over the asset and would thus be identifiable as such by third parties.³³⁸

The third criterion is that the asset should be capable of assumption by third parties.³³⁹ Gendall J held that this criterion was met. Cryptocurrencies have two characteristics relevant to this criterion. The first is that its nature concerns itself with the legal rights that give effect to third parties through bilateral transactions.³⁴⁰ The second is that this feature is present because there clearly is a market for cryptocurrency and that the rights of cryptocurrency owners are respected.³⁴¹

The last criterion is that there must be some degree of permanence or stability. The court was satisfied with this criterion based on the fact that the blockchain technology operates

³³³ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 108.

³³⁴ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 109.

³³⁵ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 109.

³³⁶ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 110.

³³⁷ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 112.

³³⁸ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 113.

³³⁹ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 114.

³⁴⁰ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 114.

³⁴¹ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 116.

by the digital destruction of an existing asset in the hands of the transferor and placing a new asset in the hands of the transferee.³⁴² Gendall J, consequently, concluded that all the criteria of Lord Wilberforce had been met, and therefore considered cryptocurrencies as a species of property.³⁴³

4.3.4.2. *The Second Issue*

In the second issue relating to whether cryptocurrency could be held in trust, Gendall J established that cryptocurrency is property and therefore can be held in trust.³⁴⁴ This conclusion was reached during the discussion of the three necessary formalities for the existence of a valid trust in NZ trust law. These are the certainty of the intention, subject matter, and objects of a trust.³⁴⁵ Gendall J held that Cryptopia had satisfied these three formalities and a trust did therefore come into existence.³⁴⁶

Gendall J was content that cryptocurrency was the subject matter of the trust because it was recorded on Cryptopia's database records.³⁴⁷ The intention to create the trust was established because Cryptopia's conduct had manifested this intention. This is because they had not allocated the public and private keys for the digital assets to the account holders but instead held it on their behalf. Furthermore, the database that Cryptopia created had shown that the company was a custodian and trustee of the digital assets.³⁴⁸ The certainty of the objects was satisfied because there was no uncertainty as to the identities of the beneficiaries. After all, the account holders who had positive balances in respect of their currencies were listed on Cryptopia's database.³⁴⁹

The *Ruscoe* case provides South Africa with a significant legal perspective on how cryptocurrency constitutes property in general and trust property in particular in NZ. It was

³⁴² *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 117.

³⁴³ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 120.

³⁴⁴ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 120.

³⁴⁵ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 138.

³⁴⁶ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 168.

³⁴⁷ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 147.

³⁴⁸ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 153.

³⁴⁹ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728 para 148-150.

proposed in chapter 3 that this is indeed possible within the South African context. However, the fact that the NZ High Court came to the same conclusion in the *Ruscoe* case shows that there is a future for cryptocurrencies within trusts.

Should a matter similar to this one find its way into a South African court, then the *Ruscoe* case may be considered in this regard. Section 39(1)(c) of the Constitution of South Africa states that our courts may consider foreign law when interpreting the Bill of Rights.³⁵⁰ It is therefore submitted that a judicial consideration of the *Ruscoe* case would be most appropriate in the context of the question on whether cryptocurrency constitutes property as contemplated under section 25 of the Constitution.³⁵¹

4.4 The United States of America

The stock market of the US is dominated by technology companies and has seen an unprecedented reach into the lives of many individuals in the US and the rest of the world during the Covid-19 pandemic.³⁵² Being that the US is the leading technological empire in the world today,³⁵³ it has been chosen as one of the foreign jurisdictions that will be compared to the RSA as it relates to cryptocurrency in trusts.

4.4.1 Legislative attempts to define cryptocurrency in the US

The US took a similar approach to that of the RSA in trying to establish a definition for cryptocurrencies. An endeavour was made to determine whether it fell within the ambit of the three types of traditional money, namely, commodity money, credit money, and fiat money.³⁵⁴ Commodity money refers to a physical commodity that has been valued for commercial use, such as gold or silver.³⁵⁵ Credit money differs from commodity money,

³⁵⁰ s 39(1)(c) of the Constitution of the Republic of South Africa.

³⁵¹ s 25 of the Constitution of the Republic of South Africa.

³⁵² Eavis P and Lohr S 'Big Tech's Domination of Business Reaches New Heights' available at <https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html> (accessed on 15 September 2020).

³⁵³ National Science Foundation 'Report shows United States leads in science and technology as China rapidly advances.' Available at <https://www.sciencedaily.com/releases/2018/01/180124113951.htm> (accessed on 23 March 2021)

³⁵⁴ Hughes SD 'Cryptocurrency regulations and enforcement in the U.S.' (2017) 45(1) *Western State Law Review* 7.

³⁵⁵ Hughes SD (2017) 7.

and is referred to by Hughes as consisting of “non-interest bearing receivables that cannot be redeemed on demand.” As a general rule, credit money is redeemable at a rate similar to commodity money or fiat money.³⁵⁶ The last type of money is fiat money, which are government-issued currencies that do not in itself hold any value. Rather, its value is derived from trust in the government or central bank that issues it.³⁵⁷ Cryptocurrencies do not ordinarily fit within the descriptions of the three types of traditional money of the US.³⁵⁸

Efforts were also made to classify cryptocurrencies as electronic money and virtual currency in the US. The latter classification received significant attention by a majority of rulings in federal hearings, federal cases, and state cases.³⁵⁹ In the Texan civil case of *Securities Exchange Commission v Trendon T. Shavers*, a US District Magistrate Court Judge referred to Bitcoin as a currency.³⁶⁰ In the criminal case of the *US v Anthony Murgio*, a federal judge held that “Bitcoin are funds within the plain meaning of the term” because it can be accepted as a medium of exchange, which can be used as payment for goods and services.³⁶¹ Furthermore, many institutions in the US have provided a regulatory framework in order to classify and define cryptocurrency. In the US, cryptocurrency is regulated by the SEC³⁶², the CFTC,³⁶³ the IRS,³⁶⁴ and the US Treasury Department.

The SEC has positioned cryptocurrency as a security unless it is otherwise used as a utility token or currency and requires initial coin offerings (ICO) to be registered with the organisation, or exempted from such registration.³⁶⁵ However, the chairman of the SEC

³⁵⁶ Hughes SD (2017) 8.

³⁵⁷ Hughes SD (2017) 8.

³⁵⁸ Hughes SD (2017) 8.

³⁵⁹ Hughes SD (2017) 9.

³⁶⁰ *SEC v. Trendon T. Shavers and Bitcoin Say. and Tr.*, No. 4:13-CV-416, 2013 U.S. Dist. LEXIS 10018, para 6 (E.D. Tex. Aug. 6, 2013).

³⁶¹ *United States v. Murgio*, 209 F. Supp. 3d 698, 707 (S.D.N.Y. 2016).

³⁶² SEC ‘Spotlight on Initial Coin Offerings (ICOs)’ available at <https://www.sec.gov/ICO> (accessed on 22 September 2020).

³⁶³ CFTC ‘Bitcoin’ available at <https://www.cftc.gov/Bitcoin/index.htm> (accessed on 22 September 2020).

³⁶⁴ IRS ‘Virtual Currencies’ available at <https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies> (accessed on 22 September 2020).

³⁶⁵ Shire JD, Jutkowitz S and Billings-Kang JR ‘United States: When Your Financial Institution Holds Cryptocurrency In Trust’ (2019) at 67 available at

previously stated that Bitcoin is not a security, because cryptocurrencies are replacements for sovereign currencies.³⁶⁶ These comments create further confusion around the classification of different types of cryptocurrencies. The chairman held off on commenting on the classification of other cryptocurrencies, such as Ripple and Ethereum which some have argued to be utility tokens camouflaged as securities.³⁶⁷

The debate around whether or not certain cryptocurrency tokens are securities will continue until the SEC provides clarity on the matter. Nevertheless, Shire, Jutkowitz, and Billings-Kang are of the opinion that most of the cryptocurrencies listed for purchase on an exchange are treated as securities.³⁶⁸ Chapter two of this paper has shown that the RSA does not recognise cryptocurrency as security regardless of this fact.³⁶⁹

The CFTC, on the other hand, has taken the view that cryptocurrency is considered a commodity under certain circumstances and that it is regulated by the US Commodity Exchange Act.³⁷⁰ The IRS, on the other hand, positions cryptocurrency as property and not currency.³⁷¹ Similar to the treatment of cryptocurrency by SARS in the RSA, the sale of cryptocurrency in the US generates a capital gain or a loss,³⁷² and therefore these transactions have CGT consequences for the sale of cryptocurrency and income tax consequences for the net earnings made from mining cryptocurrency tokens.³⁷³

https://www.seyfarth.com/dir_docs/publications/When_Your_Financial_Institution_Holds_Cryptocurrency_in_Trust.pdf (accessed on 22 September 2020).

³⁶⁶ Sharma R ‘SEC Chair Says Bitcoin Is Not A Security’ available at <https://www.investopedia.com/news/sec-chair-says-bitcoin-not-security/> (accessed on 23 September 2020).

³⁶⁷ Simmons J ‘Ripple: US congressman declares ‘XRP is not a security’ available at <https://www.crypto-news-flash.com/ripple-us-congressman-declares-xrp-is-not-a-security/#:~:text=US%20Congressman%20Tom%20Emmer%20stated,did%20not%20confirm%20it%20either> (accessed on 23 September 2020).

³⁶⁸ Shire JD et al (2019) 67.

³⁶⁹ See subheading 2.3.3.

³⁷⁰ Commodity Exchange Act 7 U.S.C 1-26 (1982) (as amended).

³⁷¹ IRS ‘Virtual Currencies’ available at <https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies> (accessed on 22 September 2020).

³⁷² Shire JD et al (2019) 67.

³⁷³ IRS ‘Internal Revenue Bulletin: 2014-16’ available at https://www.irs.gov/irb/2014-16_IRB#NOT-2014-21 (accessed on 22 September 2020).

Lastly, two offices under the US Treasury Department, namely the Office of Foreign Asset Control (OFAC)³⁷⁴ and the Financial Crimes Enforcement Network (FinCEN),³⁷⁵ have a particular interest in the regulation of cryptocurrency as a vehicle for money laundering and financing terrorist-related activities.³⁷⁶ OFAC and FinCEN appear to have a similar role to that of the FIC in the RSA as discussed in chapter three. However, the FIC Act³⁷⁷ does not regulate cryptocurrency activities as of yet. Following the IFWG's recommendations, previously discussed in chapter three,³⁷⁸ the Minister of Finance published proposed amendments to schedule 1 of the FIC Act in June 2020³⁷⁹ which aim to include cryptocurrency service providers as accountable institutions.³⁸⁰ This would align FIC's role with one that is analogous to OFAC and FinCEN.

Based on the discussion above, it is safe to say that the US, much like the RSA, does not have a clear classification of cryptocurrencies. Not only is there uncertainty regarding the classification of cryptocurrency as an asset class due to the varied definitions, but also as it relates to the different types of cryptocurrencies, such as Bitcoin, Ripple, and Ethereum. The IRS views it as property; however, there is a conflict in categorising cryptocurrency into a specific asset class. This is because certain institutions like the CFTC and SEC regard it as a commodity and security respectively.

³⁷⁴ US Treasury 'Office of Foreign Assets Control - Sanctions Programs and Information' available at <https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information> (accessed on 23 September 2020).

³⁷⁵ FinCEN 'Financial Crimes Enforcement Network' available at <https://www.fincen.gov/> (accessed on 23 September 2020).

³⁷⁶ Shire JD et al (2019) 67.

³⁷⁷ Act 38 of 2001.

³⁷⁸ See subheading 3.5.2.1.

³⁷⁹ Vermeulen J 'Cryptocurrency services in South Africa must be added to FICA' available at [https://mybroadband.co.za/news/cryptocurrency/348113-cryptocurrency-services-in-south-africa-must-be-added-to-fica.html#:~:text=South%20Africa's%20Intergovernmental%20Fintech%20Working,Intelligence%20Centre%20Act%20\(FICA\).&text=A%20regulatory%20regime%20for%20the%20monitoring%20of%20cross%2Dborder%20financial%20flows](https://mybroadband.co.za/news/cryptocurrency/348113-cryptocurrency-services-in-south-africa-must-be-added-to-fica.html#:~:text=South%20Africa's%20Intergovernmental%20Fintech%20Working,Intelligence%20Centre%20Act%20(FICA).&text=A%20regulatory%20regime%20for%20the%20monitoring%20of%20cross%2Dborder%20financial%20flows) (accessed on 23 September 2020).

³⁸⁰ South African Treasury 'Proposed Amendments To The Schedules To The Financial Intelligence Centre Act, 2001' available at http://www.treasury.gov.za/comm_media/press/2020/2020062301%20-%20Media%20statement%20Proposed%20amendments%20to%20FICA%20Schedules.pdf (accessed on 23 September 2020).

In the RSA, we find that SARS takes the view that cryptocurrency is defined as an “asset” when interpreted according to the Eighth Schedule of the Income Tax Act.³⁸¹ The IFWG classifies it as a digital representation of money that is traded, transferred, and stored electronically by natural and legal persons. Thus, they are identifying cryptocurrency as property but also noting that different types of cryptocurrencies may be classified differently based on their applications or utility.³⁸² However, both the RSA and the US are still in the process of developing the regulatory framework around the classification of cryptocurrencies, and these issues should eventually be resolved in the future.

4.4.2 Cryptocurrency in the US trusts

The IRS recognises cryptocurrency as property for tax purposes and is paying special attention to transactions that are made therewith. Recently, a court order was issued to a crypto exchange called Coinbase to provide the IRS with the data on 13 000 customers.³⁸³ This was done in an attempt to ascertain the taxpayer IDs, names, birth dates, addresses, and transaction records for customers who had transactions amounting to more than US\$20,000 on the Coinbase platform between 2013 and 2015. Many customers had profited significantly during this time and had not declared their gains to the IRS.³⁸⁴

As a response to this, individuals have turned to legal loopholes to avoid paying most of the taxes from their cryptocurrency profits. One of these loopholes includes the transferring of their cryptocurrencies into trusts.³⁸⁵ An interesting factor to consider in the US is that, unlike in the RSA, the taxes vary from state to state; therefore, creating a trust in some states is more advantageous than others.³⁸⁶ Some states, such as New York are considered as less appealing due to the fact that lawmakers understand how advantageous these tax

³⁸¹ See subheading 3.3.1.

³⁸² See subheading 3.3.2.

³⁸³ Chang S ‘IRS Wants to Tax Your Bitcoin Gains: Orders Coinbase to Hand Over User Data’ available at <https://www.investopedia.com/news/bitcoin-tax-looms-irs-orders-coinbase-turn-over-user-data/> (accessed on 24 September 2020).

³⁸⁴ Chang S (2019).

³⁸⁵ Buntinx JP ‘What Are Cryptocurrency Trusts?’ available at <https://nulltx.com/what-are-cryptocurrency-trusts/> (accessed on 6 September 2020).

³⁸⁶ Wood RW ‘Bitcoin Trusts Avoid Taxes, Including \$10,000 SALT Deduction Cap’ available at <https://www.forbes.com/sites/robertwood/2018/06/18/bitcoin-trusts-avoid-taxes-including-10000-salt-deduction-cap/#3edc38f327ad> (accessed on 6 September 2020).

laws may be to cryptocurrency users. Therefore, lawmakers implement policies that make the grantor (donor) of a cryptocurrency trust taxable regardless of where the trust has been set up and where the independent trustee is situated.³⁸⁷

Many US authors are of the view that a trust should only hold cryptocurrency as trust property if the trust is created to accept cryptocurrency.³⁸⁸ However, other authors are of the view that cryptocurrency should make up a small part of a trust investment portfolio. Furthermore, if a trust is created solely for cryptocurrency, then the trustee should be indemnified from any duty to diversify the trust investment portfolio.³⁸⁹

4.4.3 The limitations to the transfer of cryptocurrency in US trusts

In the US, currently, there is no authority that limits the amount of cryptocurrency that can be transferred into trust for tax purposes; however, it is important to guarantee that doing so does not violate any applicable laws or terms of service agreements (TOS).³⁹⁰ A trust can be funded by cryptocurrency with relative ease, because it does not require a letter of authority or executorship to hand over the control of cryptocurrency accounts from the owner to the trustee. Instead, the trustee merely requires the multi-character passcode to access the cryptocurrency.³⁹¹

Regardless of how easy it may be to transfer control of cryptocurrency, the TOS; federal and state privacy laws; computer fraud; and data protection laws should not be violated when providing the trustee with the passcode upon its acceptance as trust property.³⁹² Taylor et al mention that certain laws, including the Uniform Prudent Investor Act (UPIA),³⁹³ the Uniform Prudent Management of Institutional Funds Act (UPMIFA),³⁹⁴ the

³⁸⁷ Buntinx JP (2018).

³⁸⁸ Wood RW 'Bitcoin Trusts Avoid Taxes, Including \$10,000 SALT Deduction Cap' available at <https://www.forbes.com/sites/robertwood/2018/06/18/bitcoin-trusts-avoid-taxes-including-10000-salt-deduction-cap/#3edc38f327ad> (accessed on 6 September 2020), Buntinx JP (2018).

³⁸⁹ Taylor PF et al (2019).

³⁹⁰ Chang S (2019).

³⁹¹ Chang S (2019).

³⁹² Taylor PF et al (2019).

³⁹³ Uniform Prudent Investor Act of 1992.

³⁹⁴ Uniform Prudent Management of Institutional Funds Act of 1972.

Federal Computer Fraud and Abuse Act (CFAA),³⁹⁵ and the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA),³⁹⁶ may be relevant in this regard.

The UPIA is a uniform statute that provides trustees with guidelines on how to invest trust assets prudently.³⁹⁷ The UPMIFA guides charitable organisations on the management and investment of funds and has been adopted by 47 US states as of 2007.³⁹⁸ The CFAA is a cybersecurity law that outlaws the victimisation of computers through methods of fraud, espionage and hacking, among other methods.³⁹⁹ The South African counterpart to the CFAA regarding the regulation of cybercrime is governed by chapter 13 of the ECTA.⁴⁰⁰

The RUFADAA was developed by the Uniform Law Commission to address the practical concerns associated with executors and trustees attempting to gain access to the digital assets of a deceased, which are usually under the control and ownership of a service provider (the cryptocurrency exchange or crypto wallet managed by a third party) in terms of their TOS.⁴⁰¹ Dahl and Nel state that the overarching purpose of RUFADAA is to overrule the TOS and privacy laws that limit a fiduciary's access to digital assets.⁴⁰²

What legislation is available to South African executors and trustees when it comes to gaining access to the cryptocurrency accounts of a deceased, or the transfer of assets to trustees where the TOS does not permit this to be done? It appears that the RSA does not have a RUFADAA counterpart that achieves the same purpose.⁴⁰³ According to Booysen,

³⁹⁵ Federal Computer Fraud and Abuse of 1986.

³⁹⁶ Revised Uniform Fiduciary Access to Digital Assets Act of 2015.

³⁹⁷ s 1 of the Uniform Prudent Management of Institutional Funds Act of 1972.

³⁹⁸ Gary SN 'UPMIFA - Coming Some to a Legislature Near Year' (2007) 21 *PROB. and PROP.* 32.

³⁹⁹ Doyle C 'Cybercrime: an overview of the federal computer fraud and abuse statute and related federal criminal laws.' (2014) *Congressional Research Service, 'Summary'* 1.

⁴⁰⁰ Act 25 of 2002.

⁴⁰¹ Ronderos J 'Is Access Enough: Addressing Inheritability of Digital Assets Using the Three-Tier System under the Revised Uniform Fiduciary Access to Digital Assets Act.' (2016) 18 *Transactions: The Tennessee Journal Of Business Law* 1033.

⁴⁰² Dahl G and Nel R 'Virtual assets in your digital estate' available at <http://walkers.co.za/virtual-assets-in-your-digital-estate/> (accessed on 10 September 2020).

⁴⁰³ Booysen D 'The impact of privacy policies and terms of service on a user's freedom of testation' (unpublished LLM thesis, North-West University, 2018) 43.

the RSA can learn from RUFADAA when it comes to dealing with digital assets in deceased estates.⁴⁰⁴

Although the focus of her thesis is primarily on the terms of service of service providers and how they impact deceased estates, she states that many service providers, such as Facebook and Google use jurisdictional clauses that determine the legal jurisdiction that applies during a dispute, regardless of the user's domicile.⁴⁰⁵ She argues that s 39(1)(b) and (c) of the Constitution of RSA⁴⁰⁶ makes provision for the consideration of foreign and international law, and therefore allows South African courts to consider RUFADAA on point.⁴⁰⁷

Furthermore, in the case of *Foize Africa (Pty) Ltd v Foize Beheer BV*,⁴⁰⁸ the SCA had to decide on the issue of whether a contractual clause could remove the jurisdiction of South African courts. They held that a simple clause within an agreement cannot remove a South African court's jurisdiction. A user or his or her heirs would have to prove that the South African court had jurisdiction and the required power vested within the court to determine whether to rely on foreign law or retreat to South African law if it would provide a more applicable relief.⁴⁰⁹

Booyesen recommends that heirs and the executors of a deceased estate situated in the RSA should take action within a South African court and consider the RUFADAA to attain access to the deceased user's digital assets.⁴¹⁰ In the context of a trust, s 3(4) of RUFADAA is also applicable to a trustee acting under a trust.⁴¹¹ Therefore, a similar argument as the one made by Booyesen above can be made for a trustee when trying to access the cryptocurrency account of a testator, especially in the case of a testamentary trust.

⁴⁰⁴ Booyesen D (2018) 43.

⁴⁰⁵ Booyesen D (2018) 55.

⁴⁰⁶ Constitution of the Republic of South Africa.

⁴⁰⁷ Booyesen D (2018) 55.

⁴⁰⁸ *Foize Africa (Pty) Ltd v Foize Beheer BV and others* (2013) (3) SA 91 (SCA) 123 para 21.

⁴⁰⁹ Booyesen D (2018) 55.

⁴¹⁰ Booyesen D (2018) 55.

⁴¹¹ s 3(4) The Revised Uniform Fiduciary Access to Digital Assets Act of 2015.

Taylor et al also caution that merely passing the passcode from an owner of the crypto assets to a fiduciary does not guarantee that the former owner will be prevented from accessing the account again.⁴¹² However, they provide a recommendation that allows for technological control called “cold storage”. This reduces the aforementioned risk by storing the cryptocurrency account details on a USB storage device or similar device that contains the account credentials and passcodes. This device privately transmits the passcode without the fiduciary needing to know the passcode and can be handed over to the succeeding fiduciary upon transfer.⁴¹³

In light of the approach taken by the US in its adoption of cryptocurrencies in trust, it is evident that the RSA still has to develop the legal framework to regulate cryptocurrency. The US has made a myriad of legislation to regulate this new type of asset, but the matter is still up for debate and further development. At the same time, certain observations stemming from US authority can assist South African trustees and executors in the establishment of a trust that can accept cryptocurrencies.

4.5 Conclusion

It has been shown that the three foreign jurisdictions have approached cryptocurrency in a relatively similar fashion to that of RSA. However, certain countries, such as the US and NZ have made significant advances – both statutorily and judicially – in the area of managing cryptocurrency in trusts. These advances can and should underpin recommendations for similar developments in the RSA.

⁴¹² Taylor PF et al (2019).

⁴¹³ Taylor PF et al (2019).

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

In order to conclude this thesis, the initial research questions that were posed in chapter one and answered in chapters two, three, and four will be assessed hereunder. Recommendations based on the answers to these questions will then be made. **What is cryptocurrency?**

It was shown in chapter two that cryptocurrency is a digital currency that is created and stored electronically on an open-source ledger that is shared by a peer-to-peer network. This network uses blockchain technology to decentralise, encrypt, and facilitate transactions. Those individuals that are connected to the network are called miners and each transaction over the network is verified by them. The encryption is done through cryptography which uses secret codes or ciphers that protect the cryptocurrency against counterfeiting. Transactions are verified when all the miners on the network are confirmed via computational calculations that the balances and transactions have reconciled. As each transaction is verified, a new block is added to the blockchain.

5.2 What asset class is cryptocurrency?

The asset class of cryptocurrency is difficult to establish. In chapter two it was shown that the original intention of cryptocurrency, and more specifically Bitcoin, was to act as a medium of exchange or payment that does not rely on a central bank, such as the SARB to issue and govern it. However, most of the cryptocurrencies that are in circulation today are used as a speculative investment. A few authors have tried to compare the characteristics of cryptocurrency to other traditional asset classes, such as gold and fiat currency. However, they could not place cryptocurrency into any existing asset class due to its unique characteristics and abilities, such as storing information, which is useful in applications outside of money. This makes it incompatible with existing asset classes and the authors came to the conclusion that cryptocurrency should be classified as an entirely new asset class.

5.3 Legal definition for cryptocurrency in South Africa

Chapter two later assessed whether or not cryptocurrency constitutes a legal tender, electronic money, or security in the RSA. It was shown that cryptocurrency does not constitute a legal tender because it is not issued by SARB, and falls outside of South Africa's regulations regarding legal tender. It also does not constitute electronic money because it is not issued by a bank; it is not linked to a sovereign currency; and it is not issued in exchange for the receipt of funds. It, moreover, does not constitute security because the National Treasury has issued a statement that explicitly excludes cryptocurrency from the definition of security in the Financial Markets Act.⁴¹⁴ This approach differs from that adopted in the US, where cryptocurrency is considered to be a security by the SEC.

Nevertheless, it was shown in chapter two that the IFWG, as commissioned by SARB, issued a consultation paper in which they rebranded cryptocurrency with the term "crypto assets", and provided a definition for it. The new definition recognised the various functions of cryptocurrency and aligned itself with the ECB in that it focused its attention on the objective and purpose of the cryptocurrency and not solely on its functionality as an alternative to currency. In April 2020 the definition was further simplified and reads as follows.

"A crypto asset is a digital representation of value that is not issued by a central bank, but is traded, transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology."⁴¹⁵

This definition is important because it mentions that cryptocurrency can be used for the purpose of payment without explicitly stating that it is legal tender. Therefore, it can be used by natural persons and juristic persons as a medium of exchange, but it is not regulated and protected like the South African Rand is. The definition also recognises the other practical applications of cryptocurrency, which include investments and the storage of information. SARS also stated that cryptocurrency is subject to CGT. It is therefore

⁴¹⁴ Act 19 of 2012.

⁴¹⁵ The South African Reserve Bank *Position Paper on Crypto Assets* (2020) 9.

arguable that cryptocurrency constitutes property within South African law's conception of property.

5.4 Does cryptocurrency constitute trust property?

In chapter three, the fundamentals of the South African *inter vivos* and testamentary trusts were briefly explained as a prelude to answering the main research question posed in this thesis. Namely, whether cryptocurrency is capable of constituting trust property and, thus, whether a trustee can receive cryptocurrency in trust to manage it in accordance with the terms of a trust instrument. It was shown that cryptocurrency does constitute trust property based on a consideration of the following considerations:

First, cryptocurrency was found to be an incorporeal asset because it lacks a physical form, and only exists on the digital cryptocurrency network or inside the cryptocurrency wallet.

Second, even though the definition of crypto assets by the IFWG did not amount to a legislative definition, various sources and authors, including SARS, deem cryptocurrency to form part of the definition of assets in terms of Schedule Eight of the Income Tax Act. It was therefore submitted that the Income Tax Act's definition is sufficient to follow Olivier et al's proposal, which requires us a consideration of other legislation for assistance in answering the question of whether or not a particular asset or asset class is capable of constituting trust property.

Third, the position paper by SARS and the IFWG's definition for cryptocurrency confirm that individuals enjoy ownership over cryptocurrency. This points strongly to a conclusion that cryptocurrency can indeed be trust property.

Fourth, cryptocurrency can be sold and liquidated. There are countless exchanges and platforms in existence that fulfil this very purpose. Market capitalisation is substantial and this is also a reflection of the liquidity that exists within the market to facilitate the buying and selling of cryptocurrency.

It is thus submitted that, in light of the above considerations and the authority that supports it, cryptocurrency indeed constitutes trust property and can therefore be held in trust. An important factor in determining whether cryptocurrency can be held in a trust includes whether the trust instrument permits it. The trust instrument must provide reasonable certainty as to whether cryptocurrency can be held as trust property. Furthermore, due to the fact that it is not seen as a mainstream trust asset or investment, it is recommended that trust deeds explicitly include crypto assets in its wording regarding, or description and/or identification of, trust property and/or trust investment.

5.5 The management of cryptocurrency in trust

In chapter three, it was shown that certain risks are associated with the administration of cryptocurrency generally. These include cybercrime, money laundering, theft, investment volatility, and the sale of illegal goods and services. Where cryptocurrency is held in trust, the fiduciary duties of the trustee would evolve with any new risks that cryptocurrency would bring. It would therefore be important for a trustee to do the necessary due diligence when deciding to hold or invest in cryptocurrency assets. It was also recommended that trustee only invest with cryptocurrency exchanges that are FIC Act compliant and make the necessary attempt to protect the private keys to their crypto wallets.

Secondly, regarding the volatility of cryptocurrency investing, a trustee must ensure that they maintain a higher degree of care, skill and diligence than what is expected of them should they be investing their personal funds. However, a contemporary approach to investing trust assets was established in the *Administrators, Estate Richards v Nichol*⁴¹⁶ and it is submitted that this approach must also be adopted when investing in cryptocurrency assets. This involves, first and foremost, investing a smaller portion of the trust assets in cryptocurrency compared to other investment classes. Diversification of the investment portfolio – in consonance with the investment approach advocated by the SCA in the *Nichol* case – is, therefore, key to mitigating the risks associated with the high volatility of cryptocurrency.

⁴¹⁶ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA).

Lastly, it is acknowledged that a trustee assumes a significant risk when investing in high volatility investments, such as crypto assets, and it is therefore recommended that they should be exempt from or appropriately indemnified against liability where losses have occurred in spite of the trustee acting in good faith. For example, indemnity insurance is a useful way of mitigating the risks associated with the hacking of cryptocurrency exchanges.

5.6 Recommendations for South Africa

The findings of chapters three and four provided useful recommendations for the management and regulation of cryptocurrency in the RSA's inter vivos and testamentary trusts.

5.6.1 Recommendations for the management of cryptocurrency in trust

In order for a trustee to accept crypto assets into a trust, it is recommended that the trust instrument explicitly include crypto assets, in respect of whether it may be held as a trust property and/or as part of an investment portfolio. It was shown that the transfer of cryptocurrency into a trust is relatively easy because it only requires the handing over of a passcode or private keys to the trustee. However, there are limitations that a trustee must consider. These include the applicable laws and terms of service agreements may restrict this transfer. Applicable laws relate to privacy laws, cybercrime laws, and data protection laws. In the RSA, this includes the POPI Act,⁴¹⁷ FIC Act,⁴¹⁸ and ECTA.⁴¹⁹

A trustee must exercise the necessary care, diligence, and skill when considering the risk associated with crypto assets that includes money-laundering, fraud and theft. The IFWG has proposed that cryptocurrency service providers who are registered and licensed in terms of the FIC Act, are the only providers who should engaged with when dealing in crypto assets.

⁴¹⁷ Protection of Personal Information Act 4 of 2013.

⁴¹⁸ Act 38 of 2001.

⁴¹⁹ Act 25 of 2002.

A trustee should also note that they are responsible for the safe-keeping of the private keys that grants them access to a cryptocurrency wallet. There are practical ways in which a trustee can protect cryptocurrency from theft, one example being cold storage discussed in subheading 4.4.3. Furthermore, it is also important that the information technology infrastructure and cyber security of any professional trustee and trust companies are highly secure, and provides sufficient protection against hacking or a collapse.

A trustee who accepts crypto assets into a trust for the purpose of investing should follow the contemporary investment approach, which was established in *Administrators, Estate Richards v Nichol*.⁴²⁰ Crypto assets may be highly volatile, but the diversification of risk through prudent asset allocation may enhance the trustee's return on their investment portfolios. However, this does not constitute financial advice, and therefore, it is imperative that a trustee assesses whether crypto assets are a prudent investment in consultation with investment managers and crypto asset experts.

Finally, the trust deed should provide a trustee with indemnity where losses have occurred despite the trustee having acted in good faith when making a cryptocurrency investment, or holding cryptocurrency in a wallet. There are limitations to this indemnity, which were discussed in more detail in subheading 3.5.3.1.

5.6.2 Recommendations for the regulation of cryptocurrency in South African trusts

Recommendations can especially be gathered from NZ and the US. It was shown that NZ shares their trust law heritage with the RSA and that the landmark *Ruscoe* case established that cryptocurrency constitutes property that can be held in trust. This decision was reached based on an assessment of cryptocurrency against the four criteria that were set out by the *Ainsworth* case⁴²¹ without making comparisons to existing forms of property.

In researching this topic, it was common to find that cryptocurrency is compared to existing asset classes in order to define it as property and categorise it. A similar attempt

⁴²⁰ *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA).

⁴²¹ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) para 1247–1248.

to define cryptocurrency as property by analogy was discussed in chapter two. But many authors found that this approach is not that simple. Cryptocurrency is simply distinguishable from other asset classes. It has attributes that other assets do not have. Therefore, the court in the *Ruscoe* case determined that cryptocurrency was property based on its characteristics and underlying technology. The court was also satisfied that cryptocurrency constituted the subject-matter of a trust. Therefore, because cryptocurrency constitutes property, it can be held in trust.

It was shown that the US has adopted different definitions for cryptocurrency. The IRS recognises it as property; the SEC defines it as a security; and the CFTC defines it as a commodity akin to gold. The UK, NZ and the US position cryptocurrency as property for tax purposes. It therefore appears that there is consistency across the three jurisdictions regarding the tax treatment of different types of cryptocurrency based on their nature and purpose.

The RSA can certainly learn from the US when it comes to the anti-money laundering and financing terrorist activities provisions of the OFAC and FinCEN. The FIC Act does not regulate cryptocurrency and cryptocurrency providers, and this leaves a loophole for the proliferation of crime using cryptocurrency. However, the Minister of Finance has already made strides towards amending FIC Act to including cryptocurrency service providers, which should address this loophole.

Regarding terms of service agreements, cryptocurrency service providers may include clauses within their agreements that restrict the ability of a trustee to take control of the cryptocurrency. In the US, the RUFADAA sought to address this issue, and override TOS agreements that limit fiduciary access. It was argued that the RSA should develop legislation analogous to RUFADAA to address this issue and that it may be relied upon in a RSA court when a trustee is trying to gain access to cryptocurrency accounts.

5.7 A look to the future

The further development of the RSA's regulatory framework to regulate cryptocurrency is required to address and clarify its unique status as an asset class; its taxation implications and consequences; its impact on consumer protection regulation; its effects on cyber-security; its potential for abuse in money-laundering; and how cryptocurrency interacts with the current central banking system. However, it is submitted that the RSA legislature should not be solely responsible for addressing the issue of holding cryptocurrency as trust property or conducting trustee investment therein. This point of view stems from the fact that the primary development of RSA trust law is conducted by the courts.⁴²² It was shown in chapter four that the trust institution was originally introduced to the RSA via the English trust and that it had evolved and continues to be evolved by the RSA judicial system in a manner that is unique to this country.⁴²³

Cryptocurrency has existed for a short period of time and it is a unique asset class with characteristics that change depending on how it is programmed and the purpose of its creation. It may therefore take the RSA legislature some (if not considerable) time before it provides a comprehensive statutory framework for the regulation of cryptocurrency. In the meantime, it is important that the courts should develop the RSA law of trusts in particular insofar as it requires engagement with the holding of cryptocurrency in trust and the investing thereof, or therein, in accordance with the terms of a trust instrument.

It is thus submitted that the RSA courts should follow a developmental approach similar to that taken in NZ's *Ruscoe* case⁴²⁴ where the court recognised cryptocurrency as trust property and, in so doing, contributed significantly to cryptocurrencies' regulatory development in that jurisdiction. It is proposed that the same should apply in RSA, in that our trust law on point should be developed judicially in a piecemeal manner and, in the future, continue to be so developed within the broad statutory framework of future legislation on cryptocurrency in the RSA.

⁴²² Du Toit F et al (2019) 22.

⁴²³ See subheading 4.2.

⁴²⁴ *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC 728.

Cryptocurrency is by and large a new field of academic study that requires further development and intellectual innovation. Such academic study is important also for legal scholars. This thesis shows that RSA trust law must keep abreast of technological advancements in the area of cryptocurrency. After all, the assets that are accepted into trust today, will not be the same as the assets that will be accepted in the future.



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