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NFTs defined as property – but do they have value?

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This decision by the High Court – *Lavinia Deborah Osbourne v (1) Individuals Unknown (2) Ozone Networks Inc.* – has now confirmed that NFTs should be considered property.

The facts of this case are that Ms. Osbourne's MetaMask wallet was used without her knowledge or permission and two NFTs representing digital pieces of art were discovered to be missing. In response to this, she instructed MITMARK (an intelligence and tracing firm) to draft an evidential report. This was achieved by conducting a blockchain audit in which the NFTs were traced into two separate wallets linked to two separate OpenSea accounts.

The next stage in retrieving these NFTs was to apply to the High Court for an injunction against persons unknown to prevent them from transferring the NFTs and thus making the tracing of them difficult. For an injunction to be allowed, the court needed to be persuaded that NFTs constitute property. To determine this, the test from *National Provincial Bank Ltd v Ainsworth* was applied. The decision to grant an injunction or not turned on the application of this test and, as all criteria set out in the test were satisfied, it was decided that NFTs can constitute property.

The aforementioned criteria warrant some analysis to see how the High Court arrived at its decision. For any object to constitute property, it must be, according to the criteria: definable; identifiable by third parties; capable in its nature of assumption by third parties; and have some degree of permanence or stability. The fact that we now discuss NFTs and they are part of our regular lexicon shows that they are definable. Even a quick online search will generate definitions. For example, Wikipedia defines NFTs as 'a financial security consisting of digital data stored in a blockchain'. We can therefore be assured that NFTs are definable.

Additionally, by the very nature of the circumstances of this case, it is clear that NFTs satisfy criteria two and three. For them to have been taken at all, they needed to be identifiable and capable of assumption by third parties. If this were not the case, the NFTs in question would not have been able to have been taken in the first place. Thus, criteria two and three are easily established.

The final criterion is the most contentious. As NFTs are digital assets and therefore not tangible like more conventional and valuable assets such as gold, property, etcetera, there is an understandable ambiguity regarding permanence or stability. However, when one considers the purpose of a blockchain domain and its role pertaining to NFTs, permanence and stability can be seen. As blockchain domains are essentially a log and/or record of transactions made in cryptocurrencies linked via a peer-to-peer network, there exists a solidity to the asset as it is made

visible and traceable. Taking these criteria into account, it is easier to see how the High Court arrived at its decision.

This decision could have massive ramifications for NFTs and their development as a commercially worthwhile asset. The first is that now prospective buyers can see there is a degree of enforceability involved in protecting NFTs. This is likely to encourage further investment in this area which could lead to larger businesses making investments in NFTs and this invariably would increase the degree of confidence that others would have in the field.

Another consideration is that, as this is a High Court decision, the status of NFTs as property is applicable to England and Wales. This decision could be advantageous to this jurisdiction. China, for example, is already known for its hard-line stance towards NFTs by being strongly against secondary marketplaces. Russia has seemingly taken a stronger stance by banning all digital payments. The situation in the US is better with its use of the Howey test given that NFTs are considered akin to investment contracts. However, it is arguable that even this is a higher threshold to satisfy than the test for property discussed above. Because of this, the question on everyone's minds will be: where is the best jurisdiction to buy and sell my NFTs? At this juncture, the only answer is to watch this space.

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