Law Commission
Reforming the law

# Digital assets as personal property: Supplemental report and draft Bill

HC 188

Law Com No 416

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# Digital assets as personal property: Supplemental report and draft Bill

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# The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Justice Fraser, Chair

Professor Sarah Green

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The terms of this report were agreed on 22 July 2024. All website links were correct at 23 July 2024.

The text of this report is available on the Law Commission's website at https://www.lawcom.gov.uk/project/digital-assets/.

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# Glossary

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| Cryptoasset<br><br>Crypto-token<br><br>Token | In this report, we prefer the term “crypto-token” but we use “cryptoasset" in certain circumstances, such as where this is the term used in legislation, regulation, case law or commentary.<br><br>We do not distinguish between “token” and “cryptoasset” in the same way as we did in the main digital assets report (where we used “cryptoasset” to refer to a crypto-token which has been “linked” or “stapled” to a legal right or interest in another thing).<br><br>A crypto-token exists as a notional quantity unit manifested by the combination of the active operation of software by a network of participants and network-instantiated data. |
| Cryptocurrency | A subset of crypto-token designed to act like money/currency. |
| Digital asset | Any asset that is represented digitally or electronically. There are many different types of digital assets, not all of which will be capable of being things to which personal property rights can relate. In this report, we use the term in a broad sense. |
| Distributed ledger / distributed ledger technology (DLT) | A distributed ledger is a digital store of structured data regarding transactions and other operations performed within a DLT system. A distributed ledger is replicated amongst a network of computers (known as “nodes”) and may be visible or accessible to other participants. Nodes approve/validate and eventually synchronise valid additions to the ledger through an agreed consensus mechanism.<br><br>A blockchain is a data structure that represents one form of distributed ledger.<br><br>A DLT system is a technology system that enables the operation and use of a distributed ledger. |

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| Fiat currency | Currency that is accepted to have a certain value in terms of its purchasing power which is unrelated to the value of the material from which the physical money is made or the value of any cover which the bank (often a central government or state bank) is required to hold. |
| Fungible | A subjective quality of things that parties are willing to accept as mutually interchangeable with other things of a similar kind, quality and grade. For example, pound coins are generally treated as a class of fungible things because one pound coin is generally accepted by counterparties as equivalent to and interchangeable with another pound coin. Other classes of things that are generally treated as fungible include gold, crude oil, shares in a company and goods stored in bulk. |
| Know your customer/client (KYC) | Requirements for a business to verify the identity of a customer or client including for anti-money laundering purposes. |
| Non-Fungible Token (NFT) | A token, generally a crypto-token, with a unique identification number (or mechanism) such that each token is not replaceable or interchangeable with another identical token. |
| Public key cryptography | Also known as asymmetric cryptography. An encryption scheme that uses two mathematically related, but not identical, keys (normally structured as long strings of data) – a public key and a private key. The generation of such key pairs depends on cryptographic algorithms which are based on mathematical problems. Each key performs a unique function. The public key is used to encrypt and the private key is used to decrypt. So, in a public key cryptography system, any person can encrypt a message using the intended receiver's public key, but that encrypted message can only be decrypted with the receiver’s private key. |

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| Stablecoin | Crypto-tokens with a value that is intended to be pegged, or tied, to that of another asset, currency, commodity or financial instrument. The peg might be based on assets held by the issuer, or on a mathematical algorithm and is generally intended to remain on a stable (often 1:1) basis over time. |
| Unspent transaction output (UTXO) | The output of a valid transaction on certain crypto-token systems, which is available to be used by the transferee as the input for a new transaction. The distributed ledger or structured record of the crypto-token system records (in the form of data) these available and spendable transaction outputs. |
| Voluntary carbon credit (VCC) | A carbon credit created pursuant to self-regulatory programs. Those who participate in voluntary carbon markets can “offset” their emissions by purchasing VCCs, which evidence that investment has been made or action has been taken in projects aimed at reducing greenhouse gas. |

# Main project publications

Throughout this document we make numerous references to the following Law Commission publications which form part of our work on digital assets and which contain material relevant to the final recommendations set out in this paper.

| Document | Full title |
|---|---|
| Consultation on draft clauses | Digital assets as personal property: Short consultation on draft clauses (February 2024) |
| Digital assets final report | Digital assets: Final report (2023) Law Com No 412 |
| Original digital assets consultation paper | Digital Assets (2022) Law Commission Consultation Paper No 256 |
| Call for evidence | Digital assets call for evidence (April 2021) |

All available at https://lawcom.gov.uk/project/digital-assets/

# Digital assets as personal property

*To the Right Honourable Shabana Mahmood, Lord Chancellor and Secretary of State for Justice*

## Chapter 1: Introduction

1.1 Digital assets are increasingly important to modern society and the contemporary economy. They are used in growing volumes and for an expanding variety of purposes — including as valuable things in themselves, as a means of payment, or to represent or be linked to other things or rights.

1.2 The Law Commission has been considering how principles of private law, specifically personal property law, apply to digital assets. Personal property rights are important for many reasons. They are important in cases of bankruptcy or insolvency, in cases where objects of property rights are interfered with or unlawfully taken, and for the legal rules concerning succession on death. They are also important for the proper characterisation of numerous modern and complex legal relationships, including custody relationships, collateral arrangements and structures involving trusts. Property rights are powerful because, in principle, they are rights that are recognised against the whole world.

1.3 In our report on digital assets, published in June 2023, we concluded that certain types of digital assets are things to which property rights relate.[1] However, they do not easily fit within the categories of personal property that have been recognised traditionally. Consequently, we said that they are better regarded as belonging to a separate category. We recommended legislation to confirm the existence of a "third category" of personal property rights, capable of accommodating certain digital assets including crypto-tokens.

1.4 This supplemental report explains that recommendation and appends the draft legislation intended to implement the recommendation. A fuller explanation of the policy and legal background can be found in our original consultation paper from 2022, and the 2023 report.[2]

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1 Digital assets: Final report (2023) Law Com No 412.

2 Digital assets: Final report (2023) Law Com No 412 (see in particular Chapters 3 and 4) and Digital Assets (2022) Law Commission Consultation Paper No 256 (in particular Chapter 4).

## BACKGROUND TO THE PROJECT

1.5 In March 2020, the Ministry of Justice asked the Law Commission to review the law on crypto-tokens and other digital assets and to consider whether the law of England and Wales required reform to ensure that it can accommodate such assets.

### Call for evidence, consultation paper and digital assets report

1.6 We began our work with a call for evidence in April 2021, receiving 37 responses. We published an interim update paper in November 2021, and a full consultation paper with proposals for law reform in July 2022, to which we received 81 responses. We also held many individual meetings with stakeholders and arranged or spoke at multiple seminars and roundtables to discuss our proposed approach.

1.7 We published our report on digital assets in June 2023.[3] We concluded that crypto-tokens and potentially other kinds of digital assets can be the object of property rights (colloquially, that crypto-tokens "are property"). We said however that they do not sit easily within either of the two traditionally recognised categories of personal property: things in possession (broadly, things that can be physically possessed) and things in action (at least traditionally, personal property that can only be claimed or enforced through a court action). We also concluded that the flexibility of the common law has already seen the courts move towards recognising a distinct category of personal property that better accommodates and protects the unique features of certain digital assets (including crypto-tokens). We recommended legislation to confirm that a thing can be property even if it does not fit easily into the traditional categories of personal property (provided that it is capable of attracting property rights according to existing indicia). We said it should be for the courts to develop this category including, for example, to determine where its boundaries sit and what rights attach to "third category" things.

### Consultation on draft Bill, and this supplemental report

1.8 In February 2024, we published draft clauses that would implement the recommendation concerning the recognition of a further category of personal property. That short, limited consultation exercise was designed to test with consultees whether the draft clauses successfully implemented the recommendation. We also asked for views on potential impact, costs and benefits, and any potential unintended consequences, in order to inform the Government's decision on whether to proceed to implementation. We did not ask further questions on the underlying policy, which has already been the subject of consultation.

1.9 We received responses from 45 consultees including law firms, academics, and industry bodies. A list of respondents is included in Appendix 1. We are extremely grateful to all those who took the time to respond. The responses will be published on our website in due course.

1.10 This supplemental report follows the limited consultation on the draft legislation. It summarises the views expressed by consultees, and recommends the implementation of the draft Bill attached. The text of the Bill has been amended in response to

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[3] Digital assets: Final report (2023) Law Com No 412.

consultee comments. These are changes of drafting and not of substance. The draft Bill is set out in full in Appendix 2.

### Other recommendations

1.11 Beyond the recommendation concerning the existence of a "third category" of personal property, our 2023 report made several other recommendations. To ensure that courts can respond sensitively to the complexity of emerging technology and apply the law to new fact patterns involving that technology, we recommended that Government create a panel of industry experts who can provide guidance on technical and legal issues relating to digital assets. We also made recommendations to provide market participants with legal tools that do not yet exist in England and Wales, such as new ways to take security over crypto-tokens and tokenised securities. We recommended this work be undertaken by a multi-disciplinary project team. All these recommendations emerged from an extensive process of consultation and discussion with stakeholders. These recommendations are currently being considered by the Government.

1.12 In response to the consultation on the draft clauses, several consultees emphasised that the expert group we recommended would be important in ensuring that courts have the requisite information about digital assets to assist their development of the common law, given the minimal approach taken (deliberately) in the draft Bill.

1.13 For further information about the project, see https://lawcom.gov.uk/project/digital-assets/, which links to our earlier papers.

## AIMS OF THE DRAFT BILL

1.14 The intended effect of the draft Bill is to confirm that digital assets such as crypto-tokens, and potentially other assets such as voluntary carbon credits, are capable of being recognised by the law as property. This will enable courts to determine a number of issues, including, for example, in the following situations.

(1) If digital assets are the subject of a legal dispute and there is a danger of their holder dissipating them before that dispute can be resolved, a court can, if these assets are classed as property, order a proprietary freezing injunction over them to prevent this. These remedies exist for things already recognised as property; as yet, it is an open question whether they are available in relation to digital assets.

(2) If someone's digital assets are taken from them or destroyed, the remedies available to them are significantly stronger if those assets are regarded as being their property than if the law does not recognise any property interest in them. Currently, there is a considerable and growing market in such assets and most investors (commercial and private) presume that, when they buy them, they acquire property rights in the same way as they do when they buy, say, a watch or a laptop. As the law currently stands, this is not necessarily the case.

(3) If the owner of digital assets becomes bankrupt or insolvent, any such assets that are considered to be property will be part of the estate that is available to be sold in order to make repayments to creditors.

1.15 The draft Bill would definitively lay to rest any lingering doubt about the existence of a third category of property capable of accommodating the unique nature of digital assets. As we observed in our 2023 Report:

> the use of confirmatory legislation will constitute a clear and unequivocal statement from Parliament on the point which will cement legal certainty under the law of England and Wales. It will also indicate to the judiciary that Parliament has decided that the development of parameters which describe when a digital asset is capable of being an object of personal property rights (and if that digital asset does in fact attract personal property rights) is a matter for the common law. Such a statutory confirmation will allow court time that might otherwise be spent on questions of categorisation of things to which personal property rights can relate to be used instead to focus on substantive issues. It will provide a strong platform from which common law development can proceed.[4]

1.16 Members of the judiciary themselves had suggested to the Law Commission that the recommended legislation would be a useful tool in developing the law in this area, setting the future direction of common law development.

1.17 The draft Bill is by no means the only legislation or potential legislation touching on digital assets and the crypto ecosystem. For example, regulation and consumer protection are being addressed by HM Treasury and the Financial Conduct Authority. Recent legislation has given new powers to law enforcement agencies to seize cryptoassets.[5] Our work, and the draft Bill, focuses on private law aspects of digital assets, ensuring that relevant assets are sufficiently recognised, protected and valued in law. It complements, rather than duplicates or undermines, other activity in this area.

## TERRITORIAL EXTENT

1.18 As the Law Commission of England and Wales, we can make law reform recommendations only for England and Wales. This report, and the draft Bill, address the law of England and Wales only.

1.19 In Northern Ireland, private law is transferred to the Northern Ireland Assembly. It is our broad expectation that law in this area is similar, if not identical, to the law of England and Wales. We did not receive any views from stakeholders as to whether there would be an argument for extending the draft Bill to Northern Ireland. In any case, it is not for the Law Commission to take a view on this, and any potential extension of the draft Bill to Northern Ireland would be for Government and the Northern Ireland Executive to discuss.

1.20 In Scotland, private law, including the law of personal property, is devolved to the Scottish Parliament. In addition, personal property law in Scotland, though similar in some ways to the law of England and Wales, does not have the concepts of things in action and things in possession which are central to our recommendations. We have

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4 Digital assets: Final report (2023) Law Com No 412, para 2.17.

5 The Economic Crime and Corporate Transparency Act 2023, part 4 and s 179 and following.

heard therefore that any reform in Scotland is likely to be better carried out separately, and that the solution posed by the draft Bill would not be appropriate for Scotland.[6]

## RELATED PAST AND CURRENT LAW COMMISSION WORK

1.21 In addition to this work, we have completed or are working on four other digital asset related projects.

### Past work

1.22 **Smart legal contracts**: We undertook a detailed analysis of the current law as it applies to smart legal contracts, highlighting any uncertainties or gaps, and identifying such further work as may be required now or in the future. We published our advice to Government in November 2021, concluding that the current legal framework in England and Wales is clearly able to facilitate and support the use of smart legal contracts.[7]

1.23 **Electronic trade documents**: We undertook a project to make recommendations to enable the legal recognition, in electronic form, of certain trade documents such as bills of lading and bills of exchange. Physical possession of those trade documents has significant legal effects, with a body of law that has built up over hundreds of years. We recommended that trade documents in electronic form should be regarded by law as possessable, provided that certain criteria were satisfied. We published our final report with draft legislation in March 2022.[8] The Electronic Trade Documents Bill, based on our recommendations, was introduced into Parliament in October 2022 and became the Electronic Trade Documents Act 2023. It came into force in September 2023.

1.24 **Decentralised autonomous organisations ("DAOs")**: The term decentralised autonomous organisation or DAO describes, in very broad terms, a new type of online organisation using rules set out in computer code. A DAO will generally bring together a community of (human) participants with a shared goal – whether profit-making, social or charitable. They are part of what is sometimes called the "crypto ecosystem". The term DAO does not necessarily refer to any particular type of organisation (in legal terms) and therefore cannot on its own imply any particular legal treatment or consequences. The Government asked the Law Commission to explore and describe the treatment of DAOs under the law of England and Wales and identify options for how DAOs should be treated in law in the future in a way which would clarify their status and facilitate their uptake. The scoping paper was published on 11 July 2024.[9]

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6 This was view of both the Centre for Commercial Law/Centre for Scots Law at the University of Aberdeen (joint working group), and of Dr Hamish Patrick. Their views were that the differences in Scots private law mean that the solution proposed for England and Wales would neither impact on, nor be appropriate for, Scotland.

7 More information is available at https://www.lawcom.gov.uk/project/smart-contracts/.

8 More information is available at https://www.lawcom.gov.uk/project/electronic-trade-documents/.

9 More information is available at https://lawcom.gov.uk/project/decentralised-autonomous-organisations-daos/.

### Ongoing work

1.25 **Digital assets and electronic trade documents in private international law:** Our work in these areas has shown that these technologies raise issues of private international law. Private international law is engaged when the parties to a private law dispute are based in different countries, or where the facts and issues giving rise to the claim cross national boundaries. In these circumstances, questions arise as to which country's courts the parties should litigate the dispute in, and which country's private law should be applied to resolve the claim. We have been asked to undertake a project looking at the private international law questions associated with emerging technology, including digital assets and electronic trade documents, and to consider whether reform is required. We published a call for evidence in February 2024 and are working on a forthcoming consultation paper.[10]

## STRUCTURE OF THIS REPORT

1.26 This report has three further chapters, and two appendices.

(1) Chapter 2 summarises the legal background which led to our recommendation and the draft Bill, including introducing the two historically recognised classes of personal property: things in action and things in possession. More detailed explanation and analysis of the law in this area can be found in our previous consultation paper and report.[11]

(2) Chapter 3 sets out the terms of the draft Bill itself and explains what it does (and what it does not do).

(3) Chapter 4 considers the potential impact of the draft Bill.

(4) Appendix 1 contains a list of respondents to our recent short consultation on the draft Bill.

(5) Appendix 2 sets out the draft Bill in full.

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[10] More information is available at https://lawcom.gov.uk/project/digital-assets-and-etds-in-private-international-law-which-court-which-law/.

[11] Digital assets: Final report (2023) Law Com No 412, and Digital Assets (2022) Law Commission Consultation Paper No 256.

# Chapter 2: Legal background

2.1 "Property" can be divided into real property (interests in land) and personal property (interests in other things). The law of England and Wales traditionally recognises two distinct categories of personal property rights: rights relating to "things in possession" (generally, tangible things),[12] and rights relating to "things in action" (legal rights or claims enforceable by action).[13] "Choses" in possession and action are older terms for the two categories of personal property rights. A 19th century case, *Colonial Bank v Whinney*,[14] is often used as authority for the proposition that these two categories of personal property are exhaustive, so that anything that is an object of personal property rights must fall within one or other of them.

2.2 Court decisions over the last ten years show that the common law of England and Wales has moved toward the recognition of a "third"[15] category of things to which personal property rights can relate, but which do not fall easily within either of the two traditionally recognised categories. Initially, this development was in response to emergent forms of intangible things such as milk quotas;[16] more recently, it has been in response to crypto-tokens.[17] For instance, Mr Justice Bryan in *AA v Persons Unknown* stated in relation to crypto-currencies that "they are neither chose in possession nor are they chose in action" but nonetheless concluded that they were a form of property.[18]

2.3 A strong majority of our consultees in response to our original consultation agreed that either a third category of things to which personal property rights can relate has already developed in England and Wales at common law, or, to the extent it has not, that one should be recognised as existing.[19] Some consultees, including senior and specialist judges, said to us that the explicit recognition of such a category would

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12 Although the Electronic Trade Documents Act 2023 provides that certain trade documents in electronic form are capable of being possessed.

13 Because property rights are rights in relation to things, it is more accurate to refer to "rights in things in possession" and to "rights in things in action" to capture the divide between the property right and the object of the property right; see M Bridge, L Gullifer, K Low and G McMeel, *The Law of Personal Property* (3rd ed 2021) para 4.002.

14 (1885) 30 Ch D 261 at 285, by Fry LJ. See further at para 2.31 below.

15 See note on terminology below, especially at para 2.13.

16 *Swift v Dairywise (No 1)* [2000] 1 WLR 1177, [2000] BCC 642 concerned the question of whether a milk quota was "property" under the Insolvency Act 1986, s 436.

17 See, for example: *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm) (November 2022); *Tulip Trading Ltd v Van Der Laan* [2023] EWCA Civ 83, [2023] 4 WLR 16 (February 2023); *Osbourne v Persons Unknown Category A* [2023] EWHC 39 (KB) (January 2023); *Osbourne v Persons Unknown Category A* [2023] EWHC 340 (KB) (February 2023); *Piroozzadeh v Persons Unknown* [2023] EWHC 1024 (Ch) (March 2023).

18 [2019] EWHC 3556 at [55].

19 We received 66 responses to this consultation question. Forty-one consultees agreed that the law of England and Wales should recognise such a third category. Seventeen consultees agreed with the proposition in our question but provided a qualified or mixed answer, most often drawing on the themes and difficulties summarised in our consultation paper. Seven consultees disagreed in some form.

confirm the existing law, facilitate the law's future development and lay to rest any lingering uncertainty as to whether such a category exists. It also would have a further beneficial effect in demonstrating the flexibility and forward-looking nature of the law of this jurisdiction in respect of digital assets.

2.4 In this chapter, we briefly explain the legal background to, and reasons for, our recommendation, and summarise consultee views on the approach that we recommend.

## TERMINOLOGY

### Property

2.5 Colloquially, the term "property" is used interchangeably to describe both a thing, and a claim or entitlement to that thing. However, in a stricter legal sense, the term describes a relationship between a person and a thing, and not the thing itself.[20] For example, in the phrase "that phone is my property", the thing is the mobile phone. The property rights are the rights that a person has in relation to that mobile phone.

2.6 The distinction between the thing itself, and the relationship to the thing, is easier to make in relation to things in possession which are, as discussed below, generally physical things that are independent of the rights that relate to them. In respect of things in action, by contrast, the right and the thing to which it relates are co-extensive. In other words, the content of the right is not to claim something that exists external to the parties (like A suing B for stealing A's painting), but rather to claim something that exists because it has been created by law (like C exercising their shareholder rights). So, in approximate terms, the distinction is between a right to claim a thing and a right to exercise a right.

2.7 Even in legal writing such as academic papers, cases and statutes,[21] the term property is sometimes used in its broader, more colloquial sense or as a shorthand term, and we also use it in this way from time to time. However, the draft Bill refers to something being an "object of property rights" rather than being "property".

2.8 As will be seen in the next chapter where we set out the terms of the draft Bill itself, we do not consider that we need to define "personal property" or "property" in legislation. These are legal concepts that are used without elaboration in legislation and that the courts are used to considering.

2.9 It is worth, however, addressing in some detail comments received on the term "property" in response to the consultation on the draft Bill. Professor Robert Stevens' consultation response criticised the Law Commission for using "property" in different ways: first, as a classification based on something being exigible (actionable against the whole world, according to his response); second, in the patrimonial sense of including, for instance, assignable claims (such as debts); and a third "idiosyncratic"

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[20] Property has been described as "not a thing at all but a socially approved power-relationship in respect of socially valued assets": Kevin Gray, "Equitable Property" (1994) 47(2) *Current Legal Problems* 157, 160.

[21] See, for example, Insolvency Act 1986, s 436: "property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.

sense, in which something can be "property" despite there being no right in relation to it.

2.10 The distinction between the first and second senses is not one that is borne out, or widely accepted, in the relevant literature, case law, or legislation. Professor Stevens argues that things in action and things in possession are not two species of the same genus ("property") because the two terms do not compare like with like: things in action relate to rights and things in possession to external things. This is a well-recognised potential issue with the two categories, and is a result of the way in which law develops by exigency rather than design. It is, however, not an issue *created* by the draft Bill. Rather, the draft Bill does no more than refer to this long-established dichotomy, in order to suggest a means of ameliorating its effects in the modern world. Legislation, case law and academic literature deal with the issue by making it clear that both categories are essentially about rights to things, but that, in the case of things in possession, the right is to an independent thing and, in the case of things in action, the right is co-extensive with the thing.

2.11 Although Professor Stevens says in his response that "It is incorrect to refer to [a] "right in things in action", the leading authoritative text in this area takes a different view:[22]

> It is nevertheless customary to refer by way of shorthand to things in possession and things in action, rather than to rights in things in possession and rights in things in action. Moreover, the difference between the thing and rights in the thing is more elusive for things in action than for things in possession.

This is also the approach that has been taken by Parliament when legislating on the point.[23]

2.12 Professor Stevens suggests that the third sense in which we use the term "property" applies it to things in relation to which there is no right. The Bill is not intended to recognise as being property, things to which no rights relate. Rather, it is to ensure that things which are fundamentally different to traditional types of property[24] are not prevented from being the objects of personal property rights merely because they are neither things in action nor things in possession. There is already a very widespread use of such assets by parties (commercial, private and public) and recognition by the courts that they do attract property rights. As discussed further below, we have updated the text of the draft Bill to minimise the chance that it is read as imbuing with property rights things that otherwise would not attract them.

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22 M Bridge, L Gullifer, K Low and G McMeel, *The Law of Personal Property* (3rd ed 2021) para 4.002.

23 See, for example, section 136 of the Law of Property Act 1925:

> Any absolute assignment by writing … is effectual in law … to pass and transfer from the date of such notice:
>
> (a) the legal right to such debt or thing in action;
>
> (b) the legal and other remedies for the same; and
>
> (c) the power to give a good discharge for the same without the concurrence of the assignor…

24 We explain this proposition from para 2.36.

### "Third" category/thing

2.13 In our original digital assets report, and in this supplemental report, we use the term "third category" to make it clear that the categories of things in possession and things in action are not exhaustive. In adopting this terminology, we acknowledge the argument that other distinct categories of things to which property rights can relate might already exist at law (including patents and statutorily created intellectual property rights).[25] We adopt the term "third category" as shorthand: mostly as a direct reference to Lord Justice Fry's influential judgment in *Colonial Bank v Whinney*[26] and the longstanding practice to which that gave rise among lawyers and judges of referring to the dichotomy between things in possession and things in action; but also as a convenient and readily understandable term, with which almost all consultees were comfortable. We deliberately do not, however, use the term in the draft legislation.

### "Thing"

2.14 Some respondents to our consultation on the draft Bill have queried the use of the word "thing", both generally and in the specific context of "things in action" and "things in possession".

2.15 The Commercial Bar Association and Chancery Bar Association (who submitted a joint response) asked:

> In the context of further categories of rights, is the 'thing' an object, or a right, or something else? The draft bill gives no guidance on how wide this definition of a 'thing' is: does it include an email address? What about an idea for a book? Is happiness a 'thing'? To date the Courts have not considered it necessary to determine whether cryptocurrencies are 'things', or what that concept may mean, but the draft Bill could force the Courts to do so, creating disputes and litigation where currently there is none. After all, prima facie, all 'things' are capable of being the object of personal property rights under the draft Bill.

2.16 Professor Joshua Getzler said that "The word "thing" in law is equivalent to "res" as a marker of value, an asset".

2.17 Outside of the specific thing in action/possession context, we use the word "thing" – in the draft Bill and in this document – in the ordinary way to mean something to which one need not, cannot, or does not wish to give a specific name. This was deliberate, so as to avoid circularity of reasoning: here, the word "thing" is used to refer to everything that might be considered for classification as a legal concept. The Bill is intended to prevent a proprietary analysis being denied to something simply because it is a thing that the law has not previously encountered and classified, and the drafting has been amended to better reflect that intention. Of course, the outcome will sometimes be that the thing in question is not one that is deemed to attract property rights.

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[25] See, eg, M Bridge, L Gullifer, K Low and G McMeel, *The Law of Personal Property* (3rd ed 2021) para 9.007.

[26] Referred to at para 2.1 above, and again at 2.33 below.

2.18 As we discuss below, the courts will still have to apply existing law to determine whether a particular "thing" is capable of being the object of personal property rights at all. It is this enquiry that would be important when considering the qualities of happiness or the idea for a book – neither of which, in our view, are likely to be things capable of attracting property rights because they do not exhibit the qualities usually required of things recognised in law as property.[27]

### "Things" in action/possession

2.19 The reference in this report, and in the draft Bill, to things in possession and things in action is a reference to the common law dichotomy that has long been in existence, discussed further below. Historically, as referred to above, that dichotomy has used the terms "choses in possession" and "choses in action", "chose" being French for "thing". These older terms remained in use in the legal system over time, for example a cheque drawn on a bank being described as a chose in action. The use of the word "thing" in this context in our publications and in the draft Bill is not intended to be a departure from the legal term "chose" and is simply a substitute word with the same meaning. We use it because it is a more accessible term than "chose" in modern parlance. Importantly, it also reflects the modern practice in statutory drafting.[28]

## DIGITAL ASSETS AS PROPERTY

### What constitutes an object of property rights generally?

2.20 There is no single definition of property under the law of England and Wales, either in statute or common law, but the courts have a wealth of case law to draw upon to assist them in determining whether a particular type of thing before them – whether digital or otherwise – is capable of attracting property rights.

2.21 In our first consultation paper and digital assets report, we considered various indicia for property including:

(1) the characteristics described by Lord Wilberforce in *National Provincial Bank v Ainsworth*:[29]

(a) definable,

(b) identifiable by third parties,

(c) capable in its nature of assumption by third parties, and

(d) with some degree of permanence or stability;

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27 We discuss these indicia from 2.20 below.

28 See, for example, Law of Property Act 1925, s 136; Theft Act 1968, s 4; Torts (interference with Goods) Act 1977, s 2(2); Insolvency Act 1986, s 436.

29 *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1247 to 1248.

(2) excludability;[30]

(3) rivalrousness;[31]

(4) separability; and

(5) value.[32]

2.22 Of these, we consider that rivalrousness is a particularly important feature of things that are appropriate objects of property rights. A resource is rivalrous if use of the resource by one person necessarily prejudices the ability of others to make equivalent use of it at the same time.[33] For example, if Alice uses a Game Boy to play her Pokémon Red game, Bob cannot use the same Game Boy at the same time. Alice's use of the Game Boy necessarily prejudices Bob's ability to use it.

2.23 One of property law's principal functions is to allocate rivalrous objects between persons, and to protect their liberty to use those objects free from the interference of others. In a world without property law, a person's liberty to make use of a rivalrous resource would effectively depend in large part upon the extent to which they could physically keep others away from it. Few would be secure in their property rights, and security would be most likely to come at the cost of use.

2.24 In their response to the consultation, Powering Net Zero (PNZ) Group commented on the relevance of rivalrousness to potential third category things other than crypto-tokens and, in particular, to voluntary carbon credits (VCCs):[34]

> We particularly agree with the Law Commission's assessment that rivalrousness is a helpful indicator of property in the case of digital assets, and in our case, VCCs. This is because the use (retirement) of a VCC by one buyer necessarily prejudices the ability of others to make equivalent use of it.

### Digital assets as property

2.25 Not all digital assets have characteristics that make them property or third category things. The concept of rivalrousness (as endorsed by the Court of Appeal in *Tulip Trading*)[35] is particularly useful in distinguishing between digital assets that do,

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30 K Gray, "Property in Thin Air" (1991) 50 *Cambridge Law Journal* 251; D Fox, "Cryptocurrencies in the Common Law of Property", in S Green, D Fox, *Cryptocurrencies in Public and Private Law* (2019) para 6.22. Professor Sarah Green is the Commissioner for Commercial and Common Law at the Law Commission of England and Wales, and lead Commissioner on this project.

31 A thing is rivalrous "if use or consumption of the thing by one person, or a specific group of persons, inhibits use or consumption by one or more other persons": T Cutts, "Crypto-Property? Response to Public Consultation by the UKJT of the LawTech Delivery Panel" (2019) p 2, https://ssrn.com/abstract=3406736.

32 "capable of possessing realisable value": R Goode and K van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th ed 2018) paras 6-03 and 6-15; see also *In Re Celtic Extraction Ltd* [2001] Ch 475 at 489 by Morritt LJ.

33 See also the description in fn 31 above.

34 VCCs are carbon credits created pursuant to self-regulatory programs. Those who participate in voluntary carbon markets can "offset" their emissions by purchasing VCCs, which evidence that investment has been made or action has been taken in projects aimed at reducing greenhouse gas.

35 *Tulip Trading Ltd v Van der Laan* [2023] EWCA Civ 83 at [24] by Birss LJ.

and those that do not, belong in that category. To illustrate the distinction, consider a Word document and a non-fungible token (NFT) held on a blockchain. An individual Word document (as currently designed) neither invites nor requires the protection of personal property rights. One reason is that it can, like pure information, be replicated indefinitely (and it has long been held that information cannot and should not be the object of personal property rights).[36] This means that it is not rivalrous. Certain things associated with digital assets, such as private keys, also comprise only information.

2.26 A non-fungible token, on the other hand, is different to a Word document because it is rivalrous: it is singular and exclusive, meaning that one person's use of it necessarily excludes use by another.[37] It is worth re-iterating here that NFTs are not limited to "Bored Apes" or digital art, but are used, for example, to represent governance rights in organisations,[38] or the ownership of assets such as diamonds, or to operate as tokenised bank deposits.[39]

2.27 The common law of New Zealand has already recognised these fundamental differences. In *Ruscoe v Cryptopia Ltd*, the High Court said that:[40]

> it is wrong ... to regard cryptocurrencies as mere information because … the whole purpose behind cryptocurrencies is to create an item of tradeable value not simply to record or to impart in confidence knowledge or information …
>
> every public key recording the data constituting the coin is unique on the system where it is recorded. It is also protected by the associated private key from being transferred without consent.

2.28 On one interpretation, *all* digital things are nothing more than strings of (alphanumerical) data, represented in code by a stored sequence of bytes.[41] On this analysis, those digital things could be said to be nothing more than pure information. If this interpretation were adopted, there could be no property rights in any digital things at all.

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36 See Chapter 3 of our original consultation paper for a full discussion.

37 Of course, one could use a Word document in a singular sense and exclude others from it, but its design is such that sharing is key to its functionality. An NFT, on the other hand, derives its value and function from being unique and singular, and it cannot be shared. So, on the analytical approach taken by the Bill alongside common law development, neither digital thing would be excluded from being considered by a court as attracting property rights. On the analysis set out here and in our Final Report in 2023, however, an NFT is likely by its nature to fit within the "third thing" category and a Word document only on very exceptional facts, if at all. This method, as opposed to providing a fixed statutory list of things that can be "property", is better able to accommodate future technological developments and particular, if unusual, uses of current technology.

38 Like DAO governance tokens, discussed in our DAOs scoping paper, from para 2.73. The token itself could be a third category thing, stapled or linked to the governance right (likely to be a thing in action, provided it is genuinely a right).

39 See, eg, Bank of England, 'Cross-authority roadmap on innovation in payments' (November 2023) particularly section 3, https://www.bankofengland.co.uk/paper/2023/cross-authority-roadmap-on-innovation-in-payments.

40 [2020] NZHC 728 at [127].

41 Themselves composed of bits.

2.29 However, crypto-tokens are more than just information. They comprise different components, rather than being purely a data structure. Professor Fox has suggested that a digital asset such as a crypto-token is:[42]

> An ideational thing containing different components. It is more complex than the £1 coin since it lacks any tangible basis and its most significant properties are matters of digital functionality rather than legal attribution. Like the coin, however, it comprises more than one component. It is grounded in, but not confined to, the technical features of its own digital design. Its outward manifestation is a string of data generated by transactions between participants on a distributed ledger system. But to see the asset as mere data would ignore its larger functionality, just as we would fail to appreciate the full economic or legal significance of a coin by treating it as a mere metal disc.

2.30 Even though each of the individual data elements of a crypto-token can be copied — in the sense that the information can be reproduced on an equivalent medium — the copier does not get the same discrete instance of a crypto-token. Instead, what the copier gets is data in a different system. Even an exact recreation of all the elements of a particular network would result in the creation of a materially identical, yet distinct, network, populated by materially identical but distinct, rivalrous crypto-tokens. One way of thinking about this is to make an analogy with banknotes. Every Bank of England banknote has a unique serial number, but knowing or copying that serial number will not duplicate the function or value of the banknote; that number is of no use except as an intrinsic element of the banknote in question. Similarly, taking the data that makes up a token on a distributed ledger will not replicate the token because the data has no function except as instantiated in the token on the network.

### Traditional categories of personal property

2.31 Two categories of personal property have traditionally been recognised by the law of England and Wales:

(1) Things in possession are, broadly, any object that the law considers capable of possession. This category includes assets which are tangible, moveable and visible, such as a bag of gold.[43] Possession of a thing gives its possessor a property right which is enforceable against the world (*in rem*).[44] Rights in things in possession can be asserted by use and enjoyment as well as by the

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42 David Fox, "Digital Assets as Transactional Power" (2022) 1 *Journal of International Banking and Financial Law* 3. See also *The Law of Personal Property* (3rd ed 2021) para 8-050: "The owner of a [crypto-token] is not so much given exclusive control over the information per se as the value of the ideational asset that the information records."

43 The Electronic Trade Documents Act 2023, based on Law Commission recommendations in Electronic trade documents: Report and Bill (2022) Law Com No 405, provides that certain trade documents in electronic form are capable of possession, provided that they satisfy certain requirements effectively designed to replicate the properties of paper documents. This means that they have the same status in law as the equivalent paper trade documents, which were already things in possession. As we explain in more detail in our Report on digital assets, the same considerations do not apply for digital assets like crypto-tokens, which do not seek to replicate an existing asset, which justifies a different approach.

44 This is the standard account of the effect of a property right. A full account also needs to recognise that, in the common law's system of relative title applicable to things in possession, this really means a right good against the whole world except against those with a superior possessory right.

exclusion of others from them.[45] Things in possession[46] exist regardless of whether anyone lays claim to them, and regardless of whether any legal system recognises or is available to enforce such claims. Things in possession have historically been aligned with things that can be physically possessed but, as a result of Law Commission recommendations, statute now provides that electronic trade documents such as bills of lading and bills of exchange are susceptible to possession if certain criteria are satisfied.[47]

(2) Things in action include, traditionally, any personal property that can only be claimed or enforced through legal action or proceedings, enforceable against a particular party (*in personam*). Common examples of things in action are debts, rights to sue for breach of contract, and shares in a company. Things in action have no independent form and exist only insofar as they are recognised by a legal system. This means that the presence of a thing in action in the world is dependent on there being both a party against whom the thing in action (the right) can be enforced and a legal system willing to recognise and enforce that right.

The category of things in action is sometimes given a much broader meaning as a residual class of personal property — that is, it is sometimes regarded as encompassing any personal property that is not a thing in possession.[48]

2.32 Things in possession and things in action are susceptible to different types of legal treatment.

2.33 In the 1885 case of *Colonial Bank v Whinney*, Lord Justice Fry said:[49]

> All personal things are either in possession or in action. The law knows no *tertium quid* [third thing] between the two.

2.34 Although this statement has often been taken to reflect the legal position, it is almost certainly no longer correct (to the extent that it ever was). As Professor Fox and Professor Gullifer observed in their joint response to our call for evidence:

> The reasoning in [*Colonial Bank v Whinney*] turned on the interpretation of the bankruptcy statutes then in force. It has been taken out of context and used as authority for a proposition that it [was] not meant to support.

2.35 The same dichotomy can however also be found in Sir William Blackstone's Commentaries:[50]

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45 M Bridge, L Gullifer, K Low and G McMeel, *The Law of Personal Property* (3rd ed 2021) para 4.002.

46 As opposed to the personal property rights in things in possession, which are of course legal rights.

47 Electronic Trade Documents Act 2023, s 3. The Act is based on Law Commission recommendations: Electronic trade documents: Report and Bill (2022) Law Com No 405.

48 For more detailed discussion on this argument, see from para 4.29 of our original consultation paper and para 2.32 to 3.37 of our original report.

49 *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 285, by Fry LJ.

50 Bl Comm, II 389.

> Property in chattels personal may be either in possession; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing; or else it is in action; where a man hath only a bare right, without any occupation or enjoyment.

The proposition has not been overturned in an appellate court although a number of first instance cases have, explicitly or implicitly, moved away from it.

### Digital assets as things in possession or things in action?

2.36 Digital assets do not sit easily in either of the traditionally recognised categories of things in possession or things in action (at least in the narrow sense). They are not tangible things in the normal sense, meaning that courts are likely to feel unable to find that they are things in possession.[51] Nor are they claimable or enforceable only by legal action or proceedings. Crypto-tokens would continue to exist even if the law were to fail to recognise them as objects of personal property rights and even were a law to prohibit their existence.[52] Their useful characteristics and the ability of people to use, enjoy and interact with them (and exclude others from them) would also continue to exist: the functionality of the crypto-token system would remain unaffected. They therefore function more like objects in themselves. Unlike things in action, they are not co-extensive with the rights associated with them – there is something external to point to (the token itself). Holding such a token does not give the holder a right to enforce a legally-created right. Rather, it establishes a factual relationship between the holder and an external thing. It is this factual relationship (analogous to the one that exists between, say, a person and their car) that invites and requires the protection of personal property rights if parties' legitimate expectations are to be met and if the law is to remain relevant to contemporary social and economic behaviour.

2.37 Some digital assets, such as crypto-tokens, might represent, record, or be linked to other things (including to things in action) that are external to that particular crypto-token and/or crypto-token system. In doing so, their function is analogous to, say, a paper share certificate or a bill of lading. A crypto-token, like the piece of paper comprising a bill of lading, is a thing in itself to which personal property rights can relate, regardless of whether it is also linked to another thing. Specifically in respect of crypto-tokens, almost all consultees agreed that crypto-tokens cannot be conceived of as merely rights or claims in themselves and that they can be used and enjoyed independently of whether any rights or claims in relation to them are enforceable by action. Further, the use or enjoyment of a thing in action is dependent entirely on the enforceability of the right or claim of which it is constituted. That is not true of crypto-tokens because they exist independently of persons and legal claims (unlike, say, debts). This is the crucial distinction that needs to be made for proprietary classification purposes.

2.38 Crypto-tokens and certain other digital assets can be used and enjoyed independently of whether any rights or claims exist in relation to them. Moreover, any property rights in relation to such assets can be asserted by the use and enjoyment of the things themselves and by the exclusion of others from them. This is one of the fundamental

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51 See eg *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] QB 41.

52 Of course, such a law might impact the use of and treatment by the market of such crypto-tokens.

underlying innovations of crypto-tokens, because it is all achieved through software where this was not previously possible.[53]

2.39 It is this quality of digital assets, as things independent of the rights that relate to them, that makes them susceptible to involuntary alienation (such as theft). This is relevant to a proprietary classification because it helps to distinguish between the legally relevant characteristics of different things. A debt, for example, as a thing in action, cannot be alienated from a person without a legal process (usually one which requires that person's consent).[54] A crypto-token, on the other hand, like a thing in possession such as a car or a watch, can as a matter of fact be alienated from a person without a legal process and without their consent. In other words, A can infringe B's rights in action, but that does not take them away from B, or destroy them. If, however, B possesses a car and A takes it, it has been involuntarily alienated in fact and without more.[55] This susceptibility to involuntary alienation is a crucial distinction between things in possession and third category things like crypto-tokens, on the one hand, and true things in action on the other.

2.40 That they do not fit easily into either of the existing categories does not mean that digital assets cannot (or should not) attract property rights. As we suggest above, if a particular type of asset satisfies the various indicia of property previously identified by courts and commentators, the law should – and we would argue already does – regard it as property. The question is then how it should be analysed and categorised.

2.41 Despite the longstanding existence of two categories, the courts have consistently concluded that certain things (often digital assets) are capable of being objects of personal property rights, even where the thing in question does not neatly fit within either of the traditionally recognised categories of thing to which personal property rights can relate. The courts have done so, either expressly or impliedly, in respect of milk quotas,[56] European Union carbon emission allowances (EUAs),[57] export quotas,[58] waste management licences,[59] and a wide variety of crypto-tokens, including non-fungible tokens (NFTs).

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53 *Tulip Trading v Van der Laan* [2023] EWCA Civ 83, [2023] 4 WLR 16 at [24], by Birss LJ.

54 Unless and until a debt is paid to the right person, it remains a debt. For example, if A owes B money and, when purporting to settle the debt, C intercepts the money, B is still entitled to payment by A. B has lost nothing, legally speaking. See *OBG v Allan* [2007] UKHL 21 at [102] - [104], and further, S Douglas, 'The Scope of Conversion: Property and Contract' (2011) 74 MLR 329; M Crawford, 'Contract as property: triangles and tragic choices' CLJ 2023, 82(1), 83-109.

55 If, however, a debt is represented by a documentary intangible and that document is, say, stolen or its endorsement forged, the possession of the document is involuntarily alienated and with it the rights that document embodies, causing actual loss to the true creditor, who might not be able to recover the debt: *OBG v Allan* [2007] UKHL 21, [104].

56 *Swift v Dairywise (No 1)* [2000] 1 WLR 1177, [2000] BCC 642 concerned the question of whether a milk quota was "property" under the Insolvency Act 1986, s 436.

57 *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156.

58 *A-G of Hong Kong v Chan Nai-Keung* [1987] 1 WLR 1339, (1987) 3 BCC 403 at p 1342.

59 *Re Celtic Extraction Ltd* [2001] Ch 475, [2000] 2 WLR 991.

2.42 In *AA v Persons Unknown,* the High Court of England and Wales said that "[cryptocurrencies] are neither [things] in possession nor are they [things] in action".[60] Nonetheless, in that case, the court held that cryptocurrencies were a form of property.[61] Mr Justice Bryan said that it would be "fallacious" to proceed on the basis that the law of England and Wales recognises no form of property other than things in possession and things in action. He explicitly recognised the difficulty in the classification of crypto-tokens (which, on their face, are things which are neither things in action nor things in possession). He held that a crypto-token could be an object of personal property rights even if it was not a thing in action in the narrow sense.[62] The idea that crypto-tokens are capable of being objects or things in themselves (and are best described in those terms) is now widespread in legal and academic commentary, to the extent that it is standard in authoritative practitioner texts and textbooks.[63]

2.43 The Court of Appeal has said that "a cryptoasset such as bitcoin is property" under the law of England and Wales.[64] This is also affirmed, or necessarily implicit, in at least 26 other cases decided at first instance,[65] although most were decided in connection with interim relief.[66]

2.44 Since the judgment in *AA v Persons Unknown*[67] was handed down in 2019, courts in at least 15 of those 26 cases, including the Court of Appeal,[68] have cited that judgment in support of the proposition that the digital asset in question is a thing which is capable of being an object of personal property rights.

2.45 Taken together, the case law demonstrates that the courts of England and Wales now recognise crypto-tokens as distinct things that are capable of being objects of personal property rights. Further, through the consistent application of *AA v Persons Unknown* (as opposed to any contrary approach),[69] courts have deliberately

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60 *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 at [55] by Bryan J.

61 *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 at [61] by Bryan J.

62 *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 at [58], [55], [59] respectively.

63 See eg G Virgo, *The Principles of Equity & Trusts* (5th ed 2023), para 4.3.1; M Bridge, L Gullifer, K Low and G McMeel, *The Law of Personal Property* (3rd ed 2021) para 8-049.

64 *Tulip Trading v Van Der Laan* [2023] EWCA Civ 83, [2023] 4 WLR 16 at [24]–[25], by Birss LJ who also described the thing to which the property right can relate.

65 See footnote 166 in Digital assets: Final report (2023) Law Com No 412. See also *Mooji v Persons Unknown* [2024] EWHC 814 (Comm); *Boonyaem v Persons Unknown* [2023] EWHC 3180 (Comm); *Joseph Keen Shing Law v Persons Unknown and Huobi Global Ltd* (unreported) 26 January 2023.

66 Most cases involve interim applications in which a party seeks an order or directions before the substantive hearing of a claim. They are therefore concerned with specific preliminary issues (such as whether the court has, or should accept, jurisdiction), and subject to rules which limit the extent to which these issues are argued before the court. Jurisdictional facts may only need to be proved to the standard of a "good arguable case", and certain issues may not be in dispute for the purposes of the application although not determined finally. In *Tulip Trading Ltd v Van Der Laan* [2022] EWHC 667 (Ch), for example, there was no dispute at first instance that the bitcoin in issue was property (at [141]), and no argument on the point on appeal.

67 [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 at [55]–[61].

68 *Tulip Trading v Van Der Laan* [2023] EWCA Civ 83, [2023] 4 WLR 16 at [24], by Birss LJ.

69 Contrast *Fetch.ai v Persons Unknown* [2021] EWHC 2254 (Comm) but see footnote 171 of the Digital assets: Final report (2023) Law Com No 412 for further discussion.

proceeded in a manner that carves out a further common law-based category of thing to which personal property rights can relate.

## CONSULTEES' VIEWS ON DIGITAL ASSETS AS PROPERTY, AND RELEVANT CATEGORISATION

2.46 In our February 2024 consultation on the draft Bill, we said that we were not consulting again on policy issues, including the categorisation of certain digital assets as falling within a third category of personal property, since we had consulted on them already in March 2022. However, several respondents to the consultation on the draft Bill took the opportunity to re-state the need for, or desirability of, a third category, thus further endorsing the recommendation we made in our 2023 report that legislation be passed on this subject. A small number argued that crypto-tokens and other digital assets should not be regarded as property at all or, if they are, they must be categorised as things in action rather than as a third type of property. We record those views here for completeness. We begin by summarising the comments that did not agree with our position, and then summarise the comments in favour; in some cases, those comments in support assist in countering the points of disagreement.

### Digital assets should not be property at all

2.47 A small number of consultees suggested that digital assets should not be property at all.

2.48 Professor Rob Stevens said that it is "extremely contentious" to suggest that digital assets are fundamental to modern life. He continued:

> Whether encouraging the use of Bitcoin and other forms of crypto by recognising it as "property" in English domestic law for some or all purposes is commercially sensible is a matter for debate.

2.49 As well as doubting the proposition from a policy perspective, he also doubted it as a matter of law.

> "Property" in the patrimonial sense refers to transferable legal rights. It therefore includes both rights in relation to things (eg title to a gold chain) and rights that are not in relation to things (eg debts, shares). "Property" in any useful legal sense does not however include anything in relation to which there is no right. The apparent intention of [the Law Commission's approach] is to remove the barrier to recognition of something as "property" that there is any recognised legal right in relation to it. This would only be productive of confusion.

2.50 Michael Crawford addressed both sides of the argument (although the second part of his argument, set out below, refers (as does Professor Stevens') to crypto*currencies* when, as discussed below, our proposals cover a broader range of crypto-tokens than this):

> The basic justification for recognising something as an object of property is made by Merrill. He writes that:
>
> > ''The "things" to which property attaches are scarce resources that humans find valuable, and they are valuable because they are things people want.

> Property does not attach to things that are so plenteous they are not scarce, or to things that no one wants.' – Thomas Merrill, 'Property and the Right to Exclude II' (2014) 3 Brigham-Kanner Property Rights Conference Journal 1, 4.

More specifically, something should be the object of property rights if it is something people want and it is subject to non-consensual transfer (ie what we would more generally call 'theft' – I have made this argument in Crawford, 'Contract as Property: Triangles and Tragic Choices' [2023] 82 Cambridge Law Journal 83, 85–7). Because cryptocurrencies satisfy this requirement, there is a prima facie case for considering them objects of property, irrespective of the tangible/intangible distinction or their precise classification in English law.

On the other hand, systems of private property are not free. Those who use courts to vindicate their rights in court do not, for instance, completely internalise the costs of doing so. For most objects of property, this does not much matter as the benefits of 'propertising' most resources are broadly shared, so that the benefits exceed the costs. However, this is not obviously true of purely speculative commodities such as cryptocurrencies. Those who use the courts to litigate claims in respect of crypto assets generate uninternalised costs in order to vindicate rights to assets whose benefits are entirely confined to those who (successfully) speculate in them. A similar argument, though not in so many words, can be found in Stevens, 'Crypto is not property' (2023) 139 LQR 615. This is, however, more of an argument for not recognising cryptoassets as an object of property rather than an argument about which taxonomical category they should fall into.

### Digital assets should be things in action

2.51 A few consultees suggested[70] that, if and to the extent that digital assets are capable of attracting property rights, they are properly categorised as things in action rather than as a "third thing".

2.52 Professor Joshua Getzler said:

> There is no conceivable category of claim in the world that is not captured successfully by the existing categories of things in action (claims realised through a legal suit, whether obligational or proprietary) and things in possession (claims over assets where those rights may be enjoyed by the possession of the underlying objects to which those rights relate). One can by legislation create fresh rights to control behaviour (eg intellectual property licencing powers and other such monopolistic controls of third party behaviour); and the legislature may make such claims assignable in order to constitute markets in these claims. If digital assets are for policy reasons worthy of recognition by creating such exclusory and assignable rights in them, then do this directly by enlarging the category of things in action.

2.53 Others of this view made similar points, effectively arguing that the scope of things in action should be wider than simply "a thing that is only enforceable by legal action", and should encompass all personal property which is not amenable to (physical)

[70] Such as Professors Joshua Getzler, Robert Stevens and Lionel Smith, and Katie McCay.

possession, or "any personal property of an incorporeal nature".[71] This would make it a default or residual category. Professor Lionel Smith said:

> Things in possession refers to rights that are tied to a tangible movable thing; things in action, to rights that are not. This is a logically exhaustive dichotomy.

### The law should recognise a third category of personal property

2.54 Those arguing that there is no place for a third category of personal property, or that they should be things in action, were very much in the minority. As was in the case in response to our original consultation, most consultees supported the recognition of a third category of personal property.

2.55 Clifford Chance LLP said that:

> there are challenges with categorising certain cryptoassets as either choses in possession or choses in action. We agree that the best way to address this is the creation of a new and third category of property.

2.56 Norton Rose Fulbright LLP warned against regarding crypto-tokens and certain other digital assets as things in action:

> This would hamper the development of the digital asset economy and impose risk and uncertainty on participants in digital assets platforms. The danger is most acute in the simplistic equation of digital assets with things in action because both are intangible. In fact, if anything, the analogy with things in possession is more apposite, because both things in possession and digital assets exist independently of any legal system. … [the draft Bill] directs the judiciary to develop rules relating to digital assets that are not simply incremental offshoots of rules applicable to things in action or things in possession, but take account of the unique characteristics of digital assets.

2.57 Many consultees noted that legislative confirmation of a third category almost certainly reflects the way the common law is moving in any case. For example, Ashurst said:

> The Law Commission's Final Report on Digital Assets is a strong and compelling statement that the law of personal property is not limited to the two classes described in *Colonial Bank v Whinney.*

2.58 Agreeing with the recommended approach, Prakash Kerai emphasised the importance of property rights generally, noting:

> we are on our way to an inflexion point where advanced computer processing (Quantum Computing, but perhaps sooner with High-Performance Computing combined with new and yet to be created mathematical methods) will seriously threaten the cryptographic methods used for crypto assets. Once these cryptographic methods are penetrated – for example, private keys generated through brute force, or private keys 'calculated' from public keys (currently thought to be impossible) – the question of who has actual 'possession' or control will not be as

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[71] Fry LJ in *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 276, quoted by Katie McCay.

important as the personal property rights of the true owner (from whom the crypto-asset was effectively stolen). The statutory confirmation / draft Bill gives us a very solid basis on which to allow people to protect their crypto assets in such scenarios.

### Discussion

#### Do and should (certain) digital assets attract property rights?

2.59 We do not consider in detail the argument that digital assets should not attract property rights. The courts have already made clear that certain digital assets are properly the object of property rights, and the vast majority of respondents to our original consultation agreed that this is the correct position. In addition, as we have explained above, we think it is correct on the application of existing principles relating to the characteristics of property that certain kinds of digital assets, including crypto-tokens, satisfy the threshold (unlike, for example, some other kinds of electronic files). We also think it is correct from a policy perspective that property rights should attach to certain digital assets to ensure appropriate legal treatment (so that, for example, they are part of a bankrupt or insolvent estate, or so that a person whose crypto-tokens have been interfered with can obtain a satisfactory remedy).

2.60 We do not agree with the suggestion by Professor Stevens that the draft Bill might "encourage" the use of bitcoin or other digital assets, nor that digital assets are not important assets in the modern world. It may be that the submission is focused on crypto*currencies* (that is, a subset of crypto designed to act like money), given the reference to Bitcoin. While in any case the draft Bill does not encourage or mandate the use of any digital assets, our work is not limited to a focus on cryptocurrencies (although, as commodities as opposed to currencies, they are within its remit). Rather, the Law Commission's work in this area, and the Bill, are potentially concerned with a wide range of digital assets, many of which are of fundamental commercial importance. Major examples include: the tokenisation of bank deposits, digital securities and RWA (real world assets);[72] electronic documentation such as ID tokens that can both improve KYC (know your customer) processes and increase privacy for individuals;[73] and stablecoins.[74] As is evident from the small selection of relevant literature in the footnotes to this paragraph, the widespread economic use and considerable importance of these assets is clearly acknowledged by, amongst others, the Bank of England, the World Bank, HM Treasury, the Financial Conduct Authority, the Prudential Regulation Authority, the Monetary Authority of Singapore, International

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[72] See eg 'The shape of things to come: innovation in payments and money', speech by Sir Jon Cunliffe, Bank of England (April 2023); UK Finance, Unlocking the power of securities tokenisation, July 2023; Ledger Insights, 'Securitize to launch lending service using tokenized assets as collateral', February 2024; Financial Times, 'Tokenised securities: blockchain offers more than lower cost and faster speed' (December 2023); Coindesk, 'Tokenization of Real-World Assets a Key Driver of Digital Asset Adoption: Bank of America' (April 2023); 'The UK's Digital Securities Sandbox: supporting the next frontier of innovation' − speech by Sasha Mills, Bank of England (May 2024).

[73] By, for example, allowing them to prove that they are a UK citizen or a certain age without having to share any further details. See eg World Bank Identification for Development (ID4D) Initiative, 'Practitioner's Guide: Tokenization', https://id4d.worldbank.org/guide/tokenization.

[74] See eg HM Treasury, Update on Plans for Regulation of Fiat-backed Stablecoins (October 2023); Linklaters, '2024 promises to be a landmark year for stablecoin regulation in the UK' (April 2024); Bank of England, Regulatory regime for systemic payment systems using stablecoins and related service providers: Discussion paper (November 2023); Financial Conduct Authority, Regulating cryptoassets Phase 1: Stablecoins, DP23/4 (November 2023).

Swaps and Derivatives Association, the Global Financial Markets Association and the International Capital Markets Association.[75]

2.61 Where cryptocurrencies themselves are concerned, the policy argument that they should not be recognised as personal property because they are not a welcome thing is not necessarily a logical one. While we recognise, for example, that one concern about cryptocurrencies and other crypto-tokens is that they can be employed in scams to con vulnerable investors out of their money, this would not be ameliorated by the law's refusal to recognise property rights in the same; it would leave the weak with fewer protections.[76] In any dispute over assets that have been transferred in exchange for money, having property rights in the assets concerned will always give the claimant better rights than having a merely contractual claim (which is what they may have were the assets in question not to be recognised as property).[77]

2.62 What is more, other things easily employed for nefarious purposes (such as drugs or knives) are not dealt with by denying that they exist and are property, or that people buy and sell them.

2.63 As for the concern about imbuing with property rights things in relation to which there is no right, this is not our policy intention, nor the intention or the effect of the draft Bill. We have amended the drafting to better reflect this, in response to concerns from consultees who read the previous bill as having this effect. The draft Bill does not cause to be recognised as personal property things (such as pure information) that would otherwise not meet the existing indicia for property. Rather, something that can attract property rights should not be denied the status of property merely because it does not fit into either of the two traditional categories.

### Things in action or third category things?

2.64 We dealt fully with our reasons for recommending a third category of personal property, rather than an expanded category of things in action, in our June 2023 report which recommended the legislation. We summarise those arguments here.

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75 Monetary Authority of Singapore, Project Guardian (June 2024), https://www.mas.gov.sg/schemes-and-initiatives/project-guardian.

76 We recognise too the work done by other bodies specifically in the area of consumer protection and education; see for example, Financial Conduct Authority, https://www.fca.org.uk/investsmart/crypto-basics, and changes to the financial promotions rules which bring cryptoassets within them: Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023, SI 2023 No 612. For further information about the extension of the rules to cover cryptoassets, see https://www.fca.org.uk/publications/policy-statements/ps23-6-financial-promotion-rules-cryptoasset.

77 For example, in a scam, the assets in question might not be worthless. The infringement might come about because they are made inaccessible to the claimant (eg by a hack or because they have been fraudulently induced to transfer their assets or give their password to scammers), or because the same asset has been purportedly sold to several different parties. A property right gives the claimant a right to reclaim the value of the assets that is good against third parties (to whom the scammer might have attempted to transfer the assets as a purported multiple "sale" of the same asset). As above, such rights will also give the claimant rights to claim from the trustee in bankruptcy, the right to trace and follow the assets and (potentially, if the common law develops as we suggest in our 2023 report that it could – see from para 9.47 – the right to proprietary restitution).

2.65 In the course of the project, we have heard two (contrary) arguments in favour of the conclusion that cryptoassets are better seen as things in action. First, that crypto-tokens could be narrowly conceived as "the right to the unique data strings on a particular distributed ledger, or put slightly differently, the right to have unspent transaction output (UTXO) locked to a public address with a particular ledger".[78] This argument was not repeated in response to our most recent consultation on the draft clauses, and we do not therefore dwell on the point. However, it is helpful to record in this supplemental report that this argument conflates the right to a crypto-token with the crypto-token itself. While there will of course be rights to these unique data strings, the point of our recommendations and of the draft Bill is that those unique data strings themselves are independent vehicles to which rights can attach. As we say above, crypto-tokens are not just data, but data that is only relevant in a single instantiation on a blockchain (like the banknote serial number analogy).

2.66 The second argument is that set out above: that the category of things in action is not, or should not be, limited to things which consist of rights or claims enforceable only by action.[79] For a crypto-token, the thing itself (the token) is not co-extensive with the right in relation to it in the way that a thing in action is. Crypto-tokens would continue to exist even if the law were to fail to recognise them as objects of personal property rights and even were a law to prohibit their existence.[80] Their useful characteristics and the ability of people to use, enjoy and interact with them (and exclude others from them) would also continue to exist: the functionality of the crypto-token system would remain unaffected. This means that they are different in type, rather than just degree, to existing things in action.

2.67 That is not to say, however, that things in action will not exist in relation to them. Parties will, for example, have contractual claims to crypto tokens (for example, the contractual right to have them delivered to one's wallet) in exactly the same way as they do in relation to conventional assets. There is, for instance, no question that a car is a thing in possession, and yet things in action (such as the contractual right to delivery following a sale) can nonetheless arise in relation to it. Such things in action (rights) should not be confused with the independent thing in itself.

2.68 For example, in Japan, the proprietary status of crypto tokens was considered after the bankruptcy of the Mt. Gox crypto exchange in 2014. In August 2015, the Tokyo District Court held that bitcoin was not a thing that was capable of ownership within Article 85 of the Japanese Civil Code.[81] That finding prevented the potential argument

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78 See K Low and M Hara, "Cryptoassets and property" in S van Erp and K Zimmermann, *Edward Elgar Research Handbook on EU Property Law* (forthcoming): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4103870. See also K Low, "Cryptoassets and the Renaissance of the *Tertium Quid*?" (2023): https://ssrn.com/abstract=4382599.

79 Professor Low, above p 688. See also the discussion in *Janesh s/o Rajkumar v Unknown Person* [2022] SGHC 264 at [56]–[68] referencing Kelvin Low, "Bitcoins as Property: Welcome Clarity?" (2020) 136 *Law Quarterly Review* 345 and K Low, "Cryptoassets and the Renaissance of the *Tertium Quid*?" (2023), available at: https://ssrn.com/abstract=4382599.

80 Of course, such a law might impact the use of and treatment by the market of such crypto-tokens.

81 For a detailed consideration of this case and a translation of the judgment, see: L Gullifer, M Hara, C Mooney, "English translation of the Mt. Gox judgment on the legal status of bitcoin prepared by the Digital Assets Project", available at: https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/english-translation-mt-gox-judgment-legal-status-bitcoin-prepared.

that customers of the exchange had a proprietary right or interest in the bitcoin held by the exchange (as opposed to merely a personal claim against the exchange). Regardless of that finding, the bitcoin in question (and its functionality and utility) continued to exist and distributions of the remaining Mt. Gox held bitcoin to creditors of Mt. Gox could be made. We conclude, therefore, that the better view is that a crypto-token is a thing in itself to which personal property rights can relate.[82] Indeed, that was also the conclusion that the Japanese legislature came to after initially rejecting the analysis that bitcoin could be an object of personal property rights.

2.69 To treat crypto-tokens and similar assets as things in action ignores the fact that they are fundamentally different from traditional things in action. They are, unlike things in action, independent from persons and the legal system, rivalrous and therefore involuntarily alienable.

2.70 In *The Law of Personal Property*, the authors explain:[83]

> The distinction between things in possession and things in action goes to the way in which rights to them may be enforced. Since things in possession are capable of being physically possessed, rights in them can be asserted by use and enjoyment as well as by the exclusion of others from them. In contrast, rights in things in action, denied physical enjoyment, are asserted by taking legal action or proceedings …

2.71 This explanation is a convenient way of explaining by analogy why crypto-tokens and certain other assets are not truly things in action. While they are not susceptible to physical possession, they are susceptible to the kind of control that means that A can steal B's assets (for example, by hacking), and B can (try to) take them back again, without the need for legal action. Neither action is possible with a true thing in action such as a debt, a bank account, a company share (rather than the share certificate) or copyright.

2.72 Take, for instance, a crypto-token and a debt. If A owes B money, and A saves up the money to pay B, but instead pays it to C, the debt still exists and B still has it as an asset. B cannot be deprived of that right without their consent and a legal process. There is no need, for example, for the law to provide B with any action against C. If, however, A promises to transfer a crypto-token to B but instead transfers it to C, that asset *has* been alienated without B's consent in the same way as if A had promised the delivery of (for example) a watch but delivered it elsewhere. The question of involuntary alienation is a key distinguishing factor in the different legal responses to things in action and things in possession and explains why, for example, there is no possessory remedy available (or needed) for a debt.

2.73 We nonetheless accept (as we did in the original report[84]) that it would be possible for the courts to recognise the category of things in action as a wider, residual category of

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82 We explain why in detail from para 4.13 below.

83 M Bridge, L Gullifer, K Low and G McMeel, *The Law of Personal Property* (3rd ed 2021) para 4.002 (references omitted).

84 Digital assets: Final report (2023) Law Com No 412, para 3.35.

things encompassing everything that is not a thing in possession. It would also then be possible to develop, as has been suggested:[85]

> a sub-classificatory system distinguishing certain kinds of [things] in action (such as contractual rights) from others (such as intellectual property rights).

2.74 As Professor Duncan Sheehan points out:

> The thing about intangible property is that it is heterogenous. A carbon credit is not the same as a bank account, which is not the same as a company share, which in turn is not the same as copyright or a patent or a bitcoin.

2.75 We recognise that the intangible assets that fall within the category of things in action (narrowly defined) are also not homogenous. However, we think that bitcoin and other crypto-tokens, and potentially some other kinds of asset, sit – and should sit – outside even this heterogenous class.

2.76 While it would be possible to insist on the existing taxonomy, it is not clear how it would be helpful for the development of the law to extend the category of things in action to include this fundamentally different type of asset. Digital assets simply could not have been conceived of when these taxonomies were developed. Things have now moved on. The options are either to recognise reality, or to insist on the taxonomy. We do not see the benefits of the latter. Nor is it obvious why, if such an approach were desirable, it has not been the position taken by the common law for the last ten years.[86] Moreover, we conclude that such an approach risks creating additional legal uncertainty, particularly if certain third category things such as crypto-tokens were inadvertently conceptualised as "rights" to which personal property rights could relate (or with which they were co-extensive). It also risks diluting or confusing the defining features of things in action (in the narrow sense), which at the moment can (for the most part) be clearly identified, and would mean that different things in action would be subject to (very) different treatment. That is to say that the sub-category of crypto-tokens and similar assets would, for the reasons outlined above, require a different set of operational and remedial rules from the wider category of things in action. To treat them as "pure" things in action – without suitable remedies in particular to account for the possibility of involuntary alienation – would give inappropriate and insufficient legal protection.

2.77 Crypto-tokens are fundamentally different in nature from things in action.[87] We conclude that, if different things are to be treated differently, it is clearer to recognise a separate third category rather than multiple "sub-categories" of a broad residual category. Our recommended approach is more direct and reflects the views of a strong majority of consultees both to our original consultation and our consultation on the draft Bill. These consultees agree that the more conceptually coherent position is to recognise a third category of things to which personal property rights can relate.

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85 K Low, "Cryptoassets and the Renaissance of the *Tertium Quid*?" (2023) p 688 (para 20.1), available at: https://ssrn.com/abstract=4382599.

86 See from para 2.41 above.

87 As we discuss from para 2.36 above.

Our approach is also consistent with and aligns and effectively encourages a clear — and ever increasing — line of case law.

2.78 We agree that, historically, the categories of things in action and things in possession was "a logically exhaustive dichotomy", to quote again the words of Professor Smith. But we think that to continue to insist on this fails to recognise the fact that there now exists a new asset class; one that was not contemplated by the existing categories and which they are simply not set up to accommodate. The assets in this class are those that replicate many of the characteristics of things in possession (independence and rivalrousness) without being possessable in the conventional sense. In particular, we do not think it is right to treat something that can be involuntarily alienable (and which frequently is so alienated, through hacking) to be treated like something that cannot.[88] Our approach is also consistent with the logic that underpinned the Electronic Trade Documents Act 2023, which is that that certain features of how the world used to work (in that case, physical possession of trade documents; here, property falling into two categories only) need statutory refinement in order to accommodate developments that have occurred in the digital world.

2.79 The need to recognise a third category was strongly supported by legal practitioners and industry stakeholders who emphasised the practical challenges faced in real life scenarios by people who are using or advising on such assets and who have first-hand experience of their unique qualities. Our recommended approach is grounded in both principle and pragmatism. In Chapter 4, we set out some of the advantages that consultees predicted would flow from the legislative recognition of a third category of personal property capable of accommodating crypto-tokens.

### International approaches

2.80 Professor Joshua Getzler said in his response to the consultation on the draft Bill that the recommended reform would "[bring] the process of law reform and legislation in this country into disrepute, and will be derided in other jurisdictions, which have far more intelligent approaches to the legal recognition of, and constitution of markets, in digital assets." Yet courts in other jurisdictions have reached the same (or a similar) conclusion. Courts across the common law world, including in Australia, Canada, Hong Kong, New Zealand, Singapore, and the United States, now consistently proceed on the basis that crypto-tokens are capable of being objects of personal property rights and are therefore susceptible to the various consequences that follow.[89] This includes recognition that crypto-tokens can be subject to an interlocutory proprietary injunction, are capable of being held on trust and fall within certain broad statutory definitions of "property".

2.81 Examples of this can also be seen in some civil law-based systems, including Japan, Liechtenstein, and Switzerland, and Dubai International Financial Centre (DIFC) has recently set out principles on digital assets as a matter of property law.

2.82 Our conclusions are also consistent with international law reform developments, including those that are intended to be applicable in civil law jurisdictions. The

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88 See discussion above at para 2.40.

89 See references in Digital assets: Final report (2023) Law Com No 412, at para 3.43.

UNIDROIT Working Group recently published a set of international principles,[90] which set out a proprietary framework applicable to digital assets.[91] The UNIDROIT Working Group Principles apply to "electronic records", of which digital assets are a sub-set.[92] In effect, the UNIDROIT Principles apply proprietary concepts to a category of things distinct from things in possession and things in action.

## OUR RECOMMENDATION: STATUTORY CONFIRMATION OF A "THIRD THING"

2.83 We have concluded that certain digital assets, including crypto-tokens, are capable of attracting property rights on an application of existing legal principles and indicia of property. We have further concluded that such things do not fit well within the historical legal categories of personal property but that does not mean that they are, or should be, deprived of legal status as objects of personal property. Rather, the law can and should recognise a further category of personal property that reflects their unique characteristics. The courts have already moved towards this position, but it has not been confirmed by an appellate court capable of putting this beyond doubt. Such confirmation would also depend upon the right case reaching the right stage of the court hierarchy, which if it occurs at all, may be some way in the future. We therefore recommended the explicit recognition, in statute, of a third category of personal property, to make this clear. A distinct, third category will better allow the law to focus on attributes or characteristics of the things in question, without being fettered by analysis or principles applicable to other traditional objects of personal property rights. As discussed further below, we consider that such things include, but are not limited to, crypto-tokens such as bitcoin.

2.84 Although it may not change the common law position,[93] we conclude that such a statutory confirmation will provide greater legal certainty and will allow the law to develop from a strong and clear conceptual foundation. A statutory confirmation will alleviate any lingering judicial uncertainty surrounding the status of *Colonial Bank v Whinney* or any concern that recognising a third category is not an appropriate development for the common law to make.[94] This point was underlined during our roundtable discussion with senior members of the judiciary of England and Wales

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90 The principles are intended to facilitate an international standard of best practice and framed such that they can be applied by member states regardless of their underlying conceptual foundations of property law: "Background", Digital Assets and Private Law Project, available at: https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/; therefore, these principles should also be applicable by member states whose domestic legal systems are civil law-based.

91 The UNIDROIT Working Group explicitly recognises the difficulties that some member states face when dealing with questions as to the proprietary status of new things, particularly intangible things. Nonetheless, principle 3(1) provides that "A digital asset can be the subject of proprietary rights", with accompanying commentary clarifying that while the principle "does require that digital assets must be susceptible to proprietary rights, it does not prescribe, for instance, the specific requirements for a valid right of ownership in a digital asset or for a valid transfer of the same": UNIDROIT Working Group, *Principles on Digital Assets and Private Law* (2023) principle 3(1) and pp 23–24 para 3.3.

92 "'Electronic records' comprise a class of which 'digital assets' ... form a subset": UNIDROIT Working Group, *Principles on Digital Assets and Private Law* (2023) p 17 para 2.1.

93 Nor would such a statutory confirmation prevent a thing from being deprived of legal status as an object of personal property rights for any other reason.

94 See, for example, the concerns of Moore-Bick LJ in *Your Response v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] 1 QB 41 at [27].

when they told us that they would find such a statutory confirmation of the kind we recommend very helpful. The exact parameters of the third category, and the legal treatment afforded to things that fall within it, will be matters for common law. There are centuries of case law considering the factors that make a thing an appropriate object of personal property rights, all of which will continue to apply in this context, so that the third category does not become inappropriately broad. We consider this to be the most effective and least interventionist recommendation that we can make to facilitate the law's development on this point.

2.85 A statutory confirmation will explicitly recognise the reality that in the modern world there exist things that are neither purely intangible rights nor conventionally tangible objects, and that the law is capable of treating those things as objects of personal property rights. It also means that the category of things in action can remain usefully distinct and descriptively accurate.[95]

2.86 A statutory confirmation will reduce the time spent by the courts on questions of categorisation of objects of personal property rights, and instead allow them to focus on the substantive issues before them. It gives explicit effect to:[96]

> [the] powerful case for reconsidering the dichotomy between [things] in possession and [things] in action and recognising a third category of intangible property … in a way that would take account of recent technological developments.

2.87 A statutory confirmation is likely to help protect new and emergent forms of property from intermediation imposed by the application of ill-fitting private law principles, such as the idea that independent digital assets are things in action. A statutory confirmation is also likely to help protect emergent forms of property from regulation which might mandate intermediation or reduce a person's ability to hold their own asset directly rather than through an intermediary such as a wallet provider.

2.88 A statutory confirmation will also provide a strong signal to market participants that the law of England and Wales will continue to protect personal property rights, even in new and emergent forms of property. It will also re-emphasise the fundamental difference between third category things that can be "owned", and other existing types of software, the rights to which are generally governed by a mixture of statute (for example, intellectual property rights) and contract (for example, licences granted by Microsoft), without clear principles of "ownership". Crypto-tokens, for example, are so fundamentally different to other types of software or digital assets that this distinction alone is worth codifying in statute. Doing so will facilitate and encourage innovation based on the underlying principle that certain digital things can now be "owned".

### Consultee overarching views on the need for, or desirability of, legislation

2.89 In our consultation on the draft Bill in early 2024, we did not ask directly whether consultees agreed that the third category should be confirmed in statute, as this was already the subject of a Law Commission recommendation in the 2023 report.

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95 Leaving the legal principles applicable to rights or claims in action which are enforceable only by action to apply to those things that fall squarely within the category of things in action.

96 *Your Response v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] 1 QB 41 at [27], by Moore-Bick LJ.

However, we did ask whether consultees agreed with the general approach of the draft Bill, and whether it would achieve the desired effect, and many consultees included in their response an explanation of their views on the proposition that there should be legislation at all.

2.90 Those who did not agree, or who broadly agreed but made additional comments, had two main concerns.

(1) That the Bill is not strictly necessary because it almost certainly just confirms what the common law already says. We deal with this point below.

(2) That the Bill leaves too much unsaid, and does not go far enough in terms of setting out what kind of assets fall within the third category, and the kind of legal treatment to which they are subject. We address these comments and concerns in the next chapter, where we explain in more detail what the Bill does and does not do.

2.91 We recognise that there is a strong argument that the common law has already developed to recognise a third category of personal property. Most consultees agreed on this, and the main point of divergence was whether or not a statutory confirmation of that third category is necessary or desirable.

2.92 For example, the majority of the authors of the joint response of the Commercial Bar Association (Combar) and the Chancery Bar Association (ChBA) preferred to leave the question entirely to the courts.

> The justification for the draft Bill provided in the 2024 CP, paras 1.10, 2.3, and 2.25, is that explicit recognition of a third category of things to which personal property rights can relate would facilitate the law's future development and lay to rest any lingering doubt about the existence of such a category. However, the Law Commission itself relies on case law which has not been held back by resistance to the idea of a tertium quid; the common law's future development therefore needs no facilitation. […]
>
> Given the Law Commission's confidence in the common law, Authors consider it would be more appropriate to allow the issue to be developed in the Courts, as it has been to date with no claims of any ill effects … And at some point, the issue of digital assets can be considered by the Supreme Court, unhampered by the draft Bill.

2.93 The Financial Law Committee of the City of London Law Society similarly suggested that the Bill was not needed.

2.94 On the other hand, agreeing with the Law Commission's approach, Professor Louise Gullifer explained:

> Although it might seem a little strange to pass a piece of legislation apparently overruling a dictum in a case (*Colonial Bank v Whinney*), the dictum (that all personal things are either in possession or in action) has been relied on in argument

in many cases[97] and even in at least one decision (*Your Response* case). While this reliance was misplaced (the statement has been taken out of context and is not authority for the proposition that there are only two categories of personal property, see my joint response with Professor Fox to the Law Commission consultation on digital assets) the dichotomy of 'two types of personal property' has formed the basis of some academic arguments, and is part of the discussion in most cases[98] and academic articles[99] relating to whether digital assets can be the subject of proprietary rights (even if the conclusion is that a 'third' category of property exists). We don't yet have an English law case at the highest level establishing that digital assets can be the subject of proprietary rights, and the issue was not fully argued in the CA decision in *Tulip Trading.* It seems to make the utmost sense to pass a Bill which does not actually change what most people think to be the law, if this gives the judiciary sufficient certainty to develop this area of law, especially as the question of property may well arise in many different contexts and in relation to different types of assets (for example, voluntary carbon credits, which are currently being considered at a transnational level by UNIDROIT). There are already types of assets which have been held to be 'other intangible property' such as Carbon Emission Allowances[100] and milk quotas, and this Bill would enable the law to be developed further in relation to such assets without the '*Whinney*' question having to be discussed each time.

2.95 The majority of consultees supported the prospect of a legislative provision to confirm a third category of personal property, recognising that it was desirable for certainty (albeit not strictly necessary). For example, Allen & Overy LLP said:

> Like you, we believe that the position under the common law is already as set out in clause 1 of your draft Bill. We also agree with your observation that the Bill would "definitively lay to rest any lingering doubt about the existence of a third category of property accommodating the unique nature of digital assets". For this reason, we support the proposal and suggest that any explanatory notes (to the extent they fall within your remit) emphasise the confirmatory nature of the Bill.

2.96 The International Digital Assets Counsel (IDAC) said:

> We believe that the draft Bill provides a strong basis around which a coherent legal framework can be developed and will promote legal certainty as to the categorisation of digital assets under English property law.
>
> IDAC considers that the draft Bill confirms what we understand the English common law position to be in respect of the existence of a third category of property.

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97 England and Wales: *AA v Persons Unknown* [2019] EWHC 3556 (Comm); Hong Kong: Re Gatecoin *Ltd* [2023] HKCFI 914 [47] – [59]; Singapore: *ByBit Fintech Ltd v. Xin* [2023] SGHC 199 [34] – [36], where the court took the *Whinney* view as correct and characterised crypto assets as things in action; New Zealand: *Ruscoe v Cryptopia* Ltd [2020] NZHC 728, [122] – [125].

98 See above.

99 See, for example, Weiping He, "Is cryptocurrency personal property under Australian Law? It depends" (2023) 52 *Common Law World Review* 14, 26.

100 *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156; *Swift v Dairywise (No 1)* [2000] 1 WLR 1177, [2000] BCC 642.

However, we are of the view that there is still some uncertainty on this point. In turn, this limits the ability of law firms to provide, and market participants to obtain, clear legal opinions on the matter. This threatens the competitiveness of UK markets.

2.97 Similarly, the International Swaps and Derivatives Association said:

> We believe that both the Digital Assets Consultation and subsequent Digital Assets Report presented a strong case for concluding that a third category of property already exists under English law. However, we acknowledge that there are benefits associated with the Law Commission's proposal for the laws of England and Wales to recognise a third category of property so as to avoid any perceived or residual uncertainty on this matter.

### Discussion

2.98 Supported by the views of a strong majority of consultees, we continue to believe that a statutory confirmation of a third category of personal property would remove one area of uncertainty which has generated considerable debate over the past few years. While the courts have moved towards this position, the lack of authoritative decision means that there is residual uncertainty which is unhelpful and unnecessary. To be entirely clear in statute would therefore be more than merely clarificatory. A statutory confirmation would remove this uncertainty and allow the common law to develop a robust framework of personal property rights for digital assets.

# Chapter 3: The draft Bill explained

## THE DRAFT BILL

3.1 The draft Bill is short, so we copy it here in full.

*Property (Digital assets etc) Bill*

**1 Objects of personal property rights**

A thing (including a thing that is digital or electronic in nature) is not prevented from being the object of personal property rights merely because it is neither—

(a) a thing in possession, nor
(b) a thing in action.

**2 Extent, commencement and short title**

(1) This Act extends to England and Wales only.

(2) This Act comes into force at the end of the period of two months beginning with the day on which this Act is passed.

(3) This Act may be cited as the Property (Digital Assets etc) Act 2024.

## THE PROVISIONS EXPLAINED

### Clause 1

3.2 The main purpose of clause 1 is, as discussed in the previous chapter, to remove any lingering doubt arising from *Colonial Bank v Whinney* that there are only two categories of personal property: things in action and things in possession.

3.3 The Bill provides that "a thing … *is not prevented* from being the object of personal property rights *merely because*" it is neither a thing in possession nor a thing in possession. The draft on which we consulted said that "a thing … *is capable of* being the object of personal property rights *even though*" it is neither a thing in possession nor a thing in possession.

3.4 The change is intended to address the concern that the previous wording could be (and, in some cases, was being) read as providing that *any* "thing" was capable of being personal property. That is not the Law Commission's policy and was not the intended effect of the Bill. The new drafting makes it clear that there may be other reasons why a thing cannot be personal property – such as the thing in question not satisfying the indicia for personal property generally. We hope that this will alleviate some of the concerns raised by consultees and discussed in Chapter 2.

3.5 The draft Bill is not intended to, and does not, confirm the status of any particular type of thing (that is neither a thing in possession nor a thing in action) as the object of personal property rights:

(1) it does not attempt to delineate what does and does not constitute "a thing";

(2) it does not attempt to say what things are, in fact, objects of property rights despite not being things in possession or things in action; and

(3) it does not attempt to detail what the implications of such proprietary recognition would be.

3.6 This is deliberate; as explained in more detail below, we concluded in our report that defining "third category things", and the implications of recognising them as such (including, for example, the operation of tortious liability for interference with them), should be left to common law development. This inevitably entails some uncertainty while we wait for the relevant cases to arise, and acceptance of the fact that the law will develop incrementally. As we discuss in more detail below, most consultees agreed with this approach, though a small number regretted that the draft Bill does not identify the characteristics of "third category things" or set out the legal consequences of falling into such a category.

3.7 Although the draft Bill is deliberately agnostic about the characteristics of third category things, it does refer expressly to things that are "digital or electronic in nature" as things that could potentially be capable of attracting property rights despite not necessarily being things in possession or things in action. Although this was not envisaged by our original recommendation, and is not necessary in legal terms, we consider that the reference is helpful because digital things such as crypto-tokens are likely to be the main type of thing that users of the law will be concerned with, at least in the short to medium term, and because they are the main impetus for the draft Bill. It is important to note, however, that there is nothing in the draft Bill to restrict the "third category" to digital things; nor does it mean that any particular kind of digital thing will fall within that category and so be capable of attracting property rights. Of the few consultees who commented specifically on the particular reference to digital, views were mixed on whether this inclusion was helpful. We discuss this further below.

### Clause 2

#### Geographical extent

3.8 Clause 2(1) provides that the draft Bill extends to England and Wales only. As the Law Commission of England and Wales, this is the basis on which we made our recommendations. We explain this further from paragraph 1.18 above.

#### Commencement

3.9 Clause 2 currently provides for the draft Bill to come into force automatically 2 months after Royal Assent. Although this is ultimately a matter for Government, we do not consider that there is any need for the Bill to be commenced instead by regulations at a later date. No consultees gave any alternative views.

## THE APPROACH OF THE DRAFT BILL

3.10 The draft Bill simply confirms that things outwith the categories of things in possession and things in action are capable of being property. As stated above, this leaves questions to be answered by common law including:

(1) what things fall within the third category; and

(2) what personal property rights attach to third category things, and the consequences of that (such as tortious liability, applicable remedies etc).

These will be matters for the courts to develop through the common law, rather than being set out in statute. We set out our reasoning for this approach, and our initial thoughts, below. First, we look at consultee views.

### Consultee views on the approach of the draft Bill

3.11 A majority of consultees agreed with the approach of the draft Bill.[101]

3.12 For example, Linklaters LLP said:

> We strongly support the formulation of the draft Bill. … a highly targeted intervention … these are highly nuanced and complex issues which are best left to development under the common law. … While some uncertainty will remain as to the precise boundaries around what qualifies as an object of personal property and what legal rules apply to novel forms of property for which the jurisprudence remains underdeveloped, we consider that there is sufficient certainty for market participants to structure arrangements in a way that achieves the desired legal outcome.

3.13 Clifford Chance LLP said that their:

> main concern with clarification of the law in this area is that great care needs to be taken in defining any new third category of property, particularly at an early stage of market development, to avoid creating new uncertainties and/or unintended consequences. Therefore, the approach now proposed with a draft Bill that merely confirms that digital assets are capable of being the object of personal property rights while leaving scope for what does and doesn't fall within such category to be determined on a case-by-case basis is very helpful from our perspective. This will allow judges to make assessments of the exact parameters and the legal treatment relevant to third category things in line with the particular circumstances, and also with market understanding and practices as they develop and evolve over time. This should help to ensure, for example, that the new third category is not overly expansive and does not include uses of distributed ledger technology (DLT) that it would not be appropriate to extend to, for example where cryptoassets are already caught by the traditional two-limbed test or where DLT is used for record keeping purposes only and no new asset is created. This will also allow judges to consider where there may be other existing legal concepts that may be capable of being utilised, with adaptation where appropriate.

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[101] Of 45 consultees, 27 agreed, 12 gave qualified answers which neither agreed nor disagreed, and 6 did not agree.

3.14 The International Swaps and Derivatives Association (ISDA) said:

> ISDA's response to the Digital Assets Consultation noted that attempts to define the proposed third category (particularly where introduced by statute) may give rise to difficult boundary issues that could have the effect of introducing greater uncertainty (whether by implication or otherwise) for intangible assets that do not fall neatly within any such definition. In particular, we highlighted concerns relating to Verified Carbon Credits ("VCCs") and EU Allowances under the EU Emissions Trading Scheme ("EUAs"). In many instances, the market in VCCs and EUAs already operates on the basis that these instruments amount to a form of intangible property as a matter of English law.
>
> We are pleased that the Law Commission agreed with ISDA's response and has sought to address our concerns within the Draft Bill. As such, we agree with the Law Commission's approach:
>
> (i) Not to delineate between what does and does not constitute a 'thing' for the purposes of determining the proposed scope of the Draft Bill;
>
> (ii) Not defining or confirming the status of any particular type of thing (that is neither a thing in possession nor a thing in action) as the object of personal property rights.
>
> (iii) Not to define the personal property rights that such things may be the object of.

3.15 A response on behalf of the members of 4 Pump Court said:

> We are in favour of the highly focused nature of the Bill, which addresses the *tertium quid* issue head on but does not seek to define the boundaries of a third type of property. We would not have been in favour of a broader approach, owing to the risk of unintended consequences and, in particular, the uncertainty that a broader approach might have introduced in relation to the treatment of information at law.

3.16 As discussed further in the next chapter on impact, consultees who supported the approach said that this would clear up a lingering doubt about the existence of a third category of personal property. They said this would go some way towards increasing certainty while not unduly limiting the development of the new category of personal property. They recognised that the draft Bill is not intended as a silver bullet but rather a nudge to move the common law along a particular path.

3.17 James Burnie FRSA, responding on behalf of gunnercooke llp and WAGMI Advisers, and CryptoUK, both emphasised that the Bill would be a "starting point" and welcomed the recommendation in our 2023 report that:

> Government creates or nominates a panel of industry-specific technical experts, legal practitioners, academics and judges to provide non-binding guidance on the complex and evolving factual and legal issues relating to control involving certain digital assets (and other issues relating to digital assets more broadly) in order to assist the courts.

3.18 A few consultees queried whether the Bill should have gone further. CMS said:

> While there is an argument to be made for legislation which is more prescriptive, we agree with the Law Commission's view that incremental common law development is a preferable approach.

3.19 While Peters and Peters agreed that the approach would be, "on balance", a positive advancement, they continued:

> It is our concern that whilst the courts may be able to reduce the time dedicated to establishing whether digital assets can be property, instead the courts will now have to dedicate time to ascertain whether a specific asset can fall within this new category.

3.20 Sean Edwards, of the International Trade & Forfaiting Association, referred to the criteria we initially considered (discussed from paragraph 3.25 below) and said:

> Admirably short as [the Bill] is, I suggest that the addition of the three criteria you have identified which generally characterise a cryptoasset, namely: it consists of data;[102] it is independent of a legal system and it is rivalrous. Arguably including these factors may limit development of qualifying assets but I would argue that they provide suitable "tramlines" along which to develop such assets with predictability and certainty.

3.21 Others voiced concerns for the approach in stronger terms. For example, the joint working group of the Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen said:

> While producing a code on digital assets would be onerous, and would no doubt bring its own problems, the fact that the draft bill has only one substantive provision is unfortunate. It savours of a missed opportunity. Much of the law's development will simply be left to the courts. If there is to be legislation on a third category of personal property, a number of points would benefit from clarification. For example, it would be helpful for the legislature to define the boundaries of this third category, lest it become nothing more than a vague miscellany. Is the third category defined negatively: that is, simply as any type of personal property that does not fit into the more established categories of choses in possession and choses in action? It would also be useful to clarify what this new category would exclude. If there are limits on what can constitute a property object, what are those limits? Whether or not the third category is defined positively or negatively, what is it about the three types of personal property which makes them distinctively categories of property, such as to distinguish them from other private law categories? …
>
> Another area on which clarification would be welcome is the availability of bespoke remedies for digital assets, including debt enforcement (execution) provision, and bespoke rules regarding such matters as transfer and good faith acquisition.

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[102] Note that, while we included "composed of data" in our suggested criteria in our first consultation paper, we moved away from it in the 2023 report: see from para 3.26 below.

3.22 The Federation of Small Businesses also thought that the draft Bill did not go far enough towards giving certainty. They noted that small businesses are unlikely to be able to afford litigation to establish common law development and may be averse to taking risks absent such developments:

> Many businesses, especially smaller ones, cannot afford the luxury of establishing precedent and must avoid taking existential risks. It would therefore be helpful to future innovation if more could be done by the Bill and government to clarify the extent of digital assets that businesses might enjoy and prescribe a number of obvious cases where those rights accrue and may be protected.

3.23 The European Focus Committee of the Association of Global Custodians agreed that legislation would be beneficial but argued that it should do more to shape the direction of the law so as to increase certainty, highlighting the drawbacks of common law development. They quoted their joint response with the Association of Financial Markets in Europe (AFME) to our original digital assets consultation:

> We do not envision that litigation can or should be the primary motor for legal reform in an area based upon innovative technology that breaks down the traditional (and highly regulated) roles and responsibilities of actors in securities markets. While disputes will arise, which require the assistance of the courts to resolve, the focus of cases on particular facts and arguments in the interests of the parties is unlikely to lead to clarity where it is needed most. In the book-entry securities markets, there are problems that never reach the courts, because the actors resolve them between themselves in commercially appropriate ways; leaving academics to speculate on how the lacuna ought to be filled. Where disputes do reach the courts, the results may not provide satisfactory clarity. …

They added:

> We continue to believe that – especially in the context of equity securities and fixed income securities which make up the bulk of the capital markets that are instrumental to the UK's and wider economy as well as other major asset classes that could have significant systemic impacts (such as tokenized loans or other real world assets, for example) – clarity is warranted in order to enhance certainty that investors will have property rights that will be respected by the courts, including where there is an insolvency of a platform or an intermediary.

### Discussion

3.24 Our recommendation and this draft Bill aim to recognise, and establish a statutory footing for, the existence of a further category of personal property, into which things that do not fit easily within existing categories – including crypto-tokens – could fall. However, as discussed in more detail in our final report, we do not consider it necessary or desirable, and perhaps even possible, to define the boundaries of such a category, or to specify criteria that would determine which assets should fall within or outwith it. These issues are subject to nuance and properly left to the common law.

3.25 This view reflects the feedback received from the majority of consultees in response to our original consultation in 2022. In that paper, we suggested that a thing should be recognised as falling within the proposed third category of personal property if:

(1) it is composed of data represented in an electronic medium, including in the form of computer code, electronic, digital or analogue signals;

(2) it exists independently of persons and exists independently of the legal system; and

(3) it is rivalrous.

3.26 As discussed in the 2023 report,[103] consultees said "composed of data" should not be included at all, because: (1) the conceptualisation of the thing in question was overly focused on data; and (2) the criterion potentially created an unnecessary hard boundary. Beyond that, although many consultees agreed that the remaining features could be good indicators of many things that might fall within a third category, they did not agree that they should be exhaustive markers, or that they should be expressed in legislation. Consultees suggested that it would be difficult, and arguably unhelpful, to list exhaustively in legislative form the characteristics of assets that might, now or in the future, be deemed to be appropriate objects of property rights.

3.27 We do not wish to ossify in statutory form any particular type of technology (that might be commonplace today, but could well be obsolete in five years' time, or even less). Consultees were particularly concerned about where the boundaries of third category things lie, with different views about the appropriate analysis of, for example, private, permissioned blockchain systems, voluntary carbon credits (VCCs), in-game digital assets and digital files. We recognised that pre-existing boundary issues will remain and that those boundary issues cannot be solved by (and indeed, would likely be exacerbated by) statutory law reform, and that the common law has well-established tests for determining what is properly property and how it is characterised, which can be deployed in this context. We concluded therefore that the common law is the most appropriate tool for dealing with characterisation of (digital) assets, with the difficult boundary issues relating to digital assets that are bound to arise, given the varied technologies, and for determining whether such assets can (and should) attract personal property rights on any given sets of facts.[104]

3.28 We recognise that this means that many questions are left to the courts to answer. It is a deliberate decision that the draft Bill is minimal and does not prescribe how the common law should develop. All the draft Bill is intended to do is to remove the lingering doubt left by *Colonial Bank v Whinney* in respect of digital assets in particular, provide certainty, and to provide direction to the courts. It will make clear that crypto-tokens and potentially other assets can be property despite not falling comfortably into either things in action or things in possession. The courts could also do this without the draft Bill, but have not (yet) had the opportunity to make a definitive decision on this specific matter. The draft Bill does not create additional uncertainties: without it, the common law would have to develop on its own, and uncertainty would remain. With the draft Bill, a fundamental uncertainty is removed, and the consequential issues are then left to common law development.

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[103] Digital assets: Final report (2023) Law Com No 412, from para 4.6.

[104] For detailed discussion, see chapter 4 of Digital assets: Final report (2023) Law Com No 412.

3.29 The draft Bill is intended only as means of "unlocking" the development of the common law, without unduly restricting the way in which it can then respond to technological developments and to the increasingly varied ways in which people are likely to use digital assets in the future. The substantive guidance for how the common law should develop is set out in the Law Commission's Final Report of June 2023. It was in the process of discussing the development of this guidance further that we were told by stakeholders that, while they agreed with the principle of common law development, they felt it would be ideal were there to be a concise and negatively-expressed statutory provision on which that development could be based.

3.30 In the 2023 report, we identified in broad terms those characteristics that we recommend should attract a proprietary analysis: rivalrousness, and independence from persons and from the legal system. These qualities mean that such assets will be involuntarily alienable – something that makes them analogous to those tangible things that the law is used to classifying as being amenable to possession. Given the fact that these characteristics will manifest in different ways across different technologies, we consider (based on the views of consultees and our own analysis) that it would be more effective to retain them as common law concepts, capable of a more flexible application, than to attempt to distil them in statutory form.

3.31 It may well be that some digital assets, previously classed as things in action simply because they were deemed not to be things in possession (rather than actively being deemed to be analogous with things in action) will now find a home in the third category. Indeed, this was one of the motivations behind the provision of a category more accommodating of novel types of digital asset and unrestrained by historical notions of possession and tangibility. However, we do not intend, and do not think it will be the case, that (digital) things that previously did not satisfy the indicia for property will suddenly be found to be objects of property rights as a result of there being a third category.

## THE EFFECT OF THE DRAFT BILL

### What falls within the "third category"?

3.32 Broadly, a thing will fall within the third category if it:

(1) is functionally analogous to those things that attract property rights and is itself capable of attracting property rights (in terms of existing indicia); but

(2) is not comfortably either a thing in possession or thing in action.

3.33 We consider these questions briefly below.

#### Capable of attracting property rights

3.34 Although we do not recommend criteria for determining what falls within the third category, it is important to remember that any potential third-category thing will need to be an appropriate object of property rights in the first place – and some digital assets are not. There are already a number of indicia for those things amenable to proprietary rights, including characteristics described in *National Provisional Bank v Ainsworth*, and excludability and rivalrousness, which we discussed in our final report, and looked at briefly in the previous chapter. As we discuss in much more detail in our

original consultation paper and report, some digital assets, such as most digital files in their current form and in-game purchases are very unlikely to satisfy the existing requirements for proprietary legal treatment.

3.35 As 4 Pump Court pointed out:

> … there are a variety of situations, outside the context of Virtual Assets, in which Courts have had to consider whether unusual, or novel, forms of 'things' are capable of attracting property rights (or liabilities), including (by way of historic example only):
>
> - Human bodies and human body parts;
> - Certain types of information;
> - A power of revocation under a trust;
> - The listing status of a company;
> - Business licences;
> - Milk quotas;
> - EU carbon emissions allowances; and
> - Goodwill.

3.36 They continued:

> We do not consider that the draft legislation, in and of itself, increases the risk of unintended, or unexpected, consequences, beyond the risks and uncertainties that already exist as a matter of common law. We consider that the Law Commission's approach to drafting the legislation, and its very narrow focus, assists in this regard.

3.37 We think it is correct to assume that the courts are capable of weighing up these questions as they have in many other contexts. The draft Bill does not mean that things which would never previously have satisfied the general indicia of things capable of attracting property rights could now be so capable.

### Not a thing in possession or a thing in action

#### *Things in possession*

3.38 Under the current law, a thing in possession is any object which the law considers amenable to possession.[105] This includes assets which are "tangible, moveable and visible and of which possession can be taken".[106] But in our report on electronic trade documents we said that, whilst the concept of tangibility helps accurately to describe

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[105] While this might seem question-begging, the point is simply that the category is broad enough to encompass all of those things amenable to possession, as opposed to any subset.

[106] M Bridge, L Gullifer, K Low and G McMeel, *The Law of Personal Property* (3rd ed 2021) para 1.018; and *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156 at [44], by Stephen Morris QC. See also Financial Markets Law Committee, "Issues of legal uncertainty arising in the context of virtual currencies" (2016) p 6.

those things amenable to possession, it is not — nor should it be — a necessary criterion for the law's recognition of amenability to possession.[107] So, in the limited context of electronic trade documents, we recommended that it should be possible for electronic versions of trade documents to be treated as possessable things, provided that they meet certain criteria. We also identified elements of the concept of possession which we thought could be extrapolated to electronic trade documents, notwithstanding that they are things which are treated by the law as being intangible.[108]

3.39 The joint working group of the Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen asked about the interaction between the draft Bill and the Electronic Trade Documents Act 2023. They noted that the 2023 Act deems electronic trade documents within the meaning of that Act to be capable of being possessed,[109] and referenced section 3(4) of the 2023 Act which

> specifies that such a document "is to be treated as corporeal moveable property" (ie broadly the equivalent of choses in possession) for the purposes of Scottish legislation relating to the creation of pledges over moveables (the broad equivalent of personal property).

They added:

> However, it is not wholly clear to us whether the intention now is for an electronic trade document to be a thing in possession due to the Electronic Trade Documents Act or a third category thing in English law, in terms of the draft bill.

3.40 The intention underlying the 2023 Act was that an electronic trade document is the same in law as the equivalent paper trade document.[110] The Act provides that they are capable of being possessed. Electronic and paper trade documents are to have the same legal effect and functionality, and the same rules should apply to both. Further, anything done in relation to an electronic trade document should have the same effect (if any) as it would have in relation to a paper trade document. Section 3 of the Act gives effect to these overarching policy intentions. All of this requires that an electronic trade document is treated as a thing in possession at common law. It is important to note however that, for electronic versions of trade documents that do not satisfy the criteria in the 2023 Act such that they are not "electronic trade documents" as defined thereunder, they will not be things in possession. But they might be things in action or third category things, dependent on their form.

3.41 We have taken different approaches with electronic trade documents and digital assets regarding possession. We do not think that the arguments for using possession as the operative concept in respect of electronic trade documents are as persuasive in respect of other forms of digital asset. One reason is that digital assets such as crypto-tokens, in general, do not seek to replicate the legal functionality of a specific

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107 Electronic trade documents: Report and Bill (2022) Law Com No 405, para 5.9.

108 Electronic trade documents: Report and Bill (2022) Law Com No 405, chapter 7.

109 Electronic Trade Documents Act 2023, s 3(1).

110 For a brief discussion of section 3 of the Electronic Trade Documents Act 2023 see the explanatory notes to the Act, from para 63.

form of tangible thing in the same way that electronic trade documents attempt to replicate exactly the legal functionality of paper trade documents.[111] Indeed, many third category things were designed deliberately to avoid replicating some of those features. Most obviously, crypto-tokens were designed to facilitate communication of value on a global and trust-minimised basis, without the need for physical exchanges of tangible things.[112]

3.42 Given the approach of the courts thus far,[113] we think it is unlikely that crypto-tokens or other digital or intangible assets would be held to be things in possession. We think this would require statutory intervention, which we do not think would be helpful or appropriate. We think that drawing analogies between tangible things and third category things is helpful up to a point but, inevitably, those analogies are not perfect. This is particularly true in respect of those third category things that rely on novel technology, such as open-source code, distributed ledgers and public key cryptography.

3.43 In our report, we concluded that instead of directly applying the concept of possession, the law of England and Wales can develop jurisprudence around a concept of control which is better suited to the functions of third category things and the technology they use.

3.44 We identified that third category things might be composed of data represented in an electronic medium, including in the form of computer code, electronic, digital or analogue signals, and that such qualities would distinguish them from things in possession. However, we do not think that third category things should be confined to, or completely determined by, such qualities, because that could unduly limit the development of the category. It is also worth noting that, while data is an important part of crypto-tokens, they are not mere data alone.[114]

### *Things in action*

3.45 As explained above, we do not think that crypto-tokens or other things in digital form are properly categorised as things in action. We accept that it is – and has been – open to the courts to find that things in action are a residual category into which all personal property not susceptible to possession will fall. This result would be possible because the concept of things in action is a legal rather than a factual one, and depends on a legal definition. We do not agree that the categories are logically and factually exhaustive.

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111 For some digital assets that might do this, such as digital bearer securities, see UKJT, "Legal statement on the issuance and transfer of digital securities under English private law" (2023).

112 S Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (2008) at pp 1 and 8, available at: https://nakamotoinstitute.org/static/docs/bitcoin.pdf.

113 See eg *Your Response v Datateam Business Media Ltd* [2014] EWCA Civ 281, [2015] 1 QB 41.

114 We conceptualise certain digital assets, such as crypto-tokens, as both, and a composite of, technical and social dimensions. It is crypto-tokens as notional quantity units, arising from a composite of technical form, technical function and social participation/recognition, that the market and the legal system treat as a thing, and to which society has chosen to attach legal consequences. The combination of the active operation of software by a network of participants and network-instantiated data gives rise to certain functionalities of crypto-tokens that manifest characteristics which make them distinct from other digital assets.

3.46 In our report, we discussed independence from persons and the legal system as a factor that could assist in distinguishing some third category things from things in action: that is, a third category thing is something that exists independently of any rights that might exist in relation to it and can be used and enjoyed independently of whether any rights or claims in relation to it are enforceable by action before a court.

3.47 It is important to note that a thing's *recognition by* a legal system does not mean that the thing does not exist independently of the legal system. The point is that the thing does not rely on a legal system for its continued existence. Anything can be recognised by a legal system, but things in action can only come into being by virtue of, and can only function within, a legal system. A bag of gold, for example, exists independently of the legal system, but rights in relation to it can still be legally recognised. The same is true of crypto-tokens within crypto-token systems. Crypto-tokens are not rights in themselves and they exist independently of any rights or claims that might also exist in relation to them. They can also be used and enjoyed independently of whether any rights or claims in relation to them are enforceable by action. In contrast, the same is not true of debts: their existence relies on, and is co-extensive with, legal recognition. This means that they cannot function, be used or enjoyed without that legal recognition.[115]

3.48 Blockchain and distributed ledger technology (DLT) systems can be used in different ways by market participants — for example, merely as a method of recording certain "offchain" things using tokens. Legal rights (as opposed to things such a crypto-token) that are created within blockchain or DLT-based systems or multi-lateral contractual frameworks will be treated as things in action by the law.[116] Those things in action will therefore be different from, and will attract different legal treatment to, third category things.[117]

3.49 Some third category things have an even closer relationship with the legal system than crypto-tokens. Specifically, European Union carbon emission allowances (EUAs) and carbon emission allowances (CEAs) rely on statutory provisions for their continued existence, yet have been categorised by the courts as intangible things that are not a thing in action in the narrow sense.[118] Even if EUAs and CEAs are not independent of the legal system, this does not necessarily prevent them being third

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115 See, for example, paras 10.75 to 10.77 of Digital Assets (2022) Law Com Consultation Paper No 256 where we discuss the case of *Re Lehman Brothers International (Europe) (in administration) (LBIE)* [2017] UKSC 38, [2018] AC 465, in which the Supreme Court ruled that the foreign currency creditors of LBIE did not have non-provable claims to recover "losses" arising from currency fluctuations following the start of LBIE's administration, overturning the decisions of both lower courts.

116 This was also the conclusion of the Financial Law Committee of the City of London Law Society in their response to our digital assets consultation: "with particular regard to private, permissioned systems, the claimant is likely to have some form of [thing] in action in the traditional sense in relation to the digital asset held and transferred through the system; and, to that extent, the subject-matter of that claim will be recognised under traditional English law concepts as a form of incorporeal property."

117 This point was explicitly recognised by the UKJT, "Legal statement on the issuance and transfer of digital securities under English private law" (2023), para 68: "Such a power [to have ultimate control over the register or record] may, depending on the structure, be incompatible with the recognition of any tokens deployed in the system as the object of property."

118 *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156. The court concluded that an EUA was "not a chose in action in the narrow sense" at [61], by Stephen Morris QC.

category things. It is a matter for the common law to draw the line between things in action and third category things.

3.50 The Financial Law Committee of the City of London Law Society (CLLS) raised concerns about the use in the draft Bill of "things in action" without definition which, they suggested, meant that the Bill is drawn too widely.

> … absent the Bill, there remain potentially two senses in which the English courts (and, in particular, the English senior courts) might ultimately determine how the concept of a "thing in action" should (as a matter of English personal property law) be interpreted and applied […]
>
> This use of the undefined term "thing in action" in clause 1 of the Bill runs the risk of creating legal uncertainty. As the Bill itself does not appear to be (and … cannot be) a declaratory enactment, the use of the term in clause 1 potentially creates other wider issues. Even though the scope of the term is in itself uncertain as a matter of the existing common law, the implicit effect of clause 1 is to require the term to be given some form of narrow interpretative scope. […]
>
> Absent the Bill, it would remain open to the Court of Appeal or the Supreme Court to recognise crypto-tokens and other digital assets as falling within the scope of an expanded concept of a chose or thing in action. The Bill, as drafted, pre-empts any such common law development and effectively provides a statutory declaration that the concept as a matter of common law is to be limited to a right that can only be claimed or enforced by legal action or proceedings (i.e. the "narrow view" of the term, "thing in action").

3.51 They suggested that instead of referring to "things in action", the draft Bill should refer specifically only to the narrow view of things in action (that is, "a right that may only be claimed or enforced by legal action or proceedings against another person or persons").

3.52 By contrast with the suggestion that the draft Bill would hamper the courts' flexibility, Professor Duncan Sheehan suggested that, even with the Bill, the courts would still be able to find that all intangible property falls within the category of things in action.[119]

3.53 The draft Bill does not require the courts to take a particular position. We do not think the suggested redraft is necessary or desirable. Many statutes refer to "things in action" and the courts have used the flexibility to their advantage. The negatively-phrased drafting of the Bill is deliberate, so as to ensure that the current dichotomy between a thing in action and a thing in possession does not exhaust the options for something's being amenable to property rights and treatment. It does not depend, therefore, on a particular interpretation of either established category (although, of course, in our view, where an asset exhibits rivalrousness and independence, it cannot properly be a thing in action because its existence is not dependent upon action).

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[119] Professor Sheehan said that patents might be an exception.

### Interaction between categories

3.54 The Electronic Money Association was concerned at the formulation that third category things are objects of property rights despite being neither things in action nor things in possession:

> This exclusionary approach will make it harder to regard things as third category things if they share certain aspects with things in action or things in possession yet fall into neither category.

The Electronic Money Association suggested that electronic money should be a third category thing but was concerned that this may not be because they consider that electronic money shares features with both things in action and things in possession, depending on its form.

3.55 We do not take a view on the categorisation of electronic money because this is a significant area of investigation which is beyond our scope. However, we consider crypto-tokens to have features of both things in action and things in possession and this is one of the reasons for suggesting a third category which can accommodate their unique combination of features. We do not therefore agree that having features of things in possession and/or things in action would preclude something from the third category.

3.56 D2LT, while agreeing with the general approach of the draft Bill, added:

> As part of the Law Commission's ongoing work on this topic, we would welcome complementary guidance on whether a thing can be treated both as a thing in action and as a thing under this open category, the consequences of a thing transitioning from one category to another, and the relationship and priority of a thing in this open category to a thing in the former two categories.

3.57 The Law Society said:

> Although the Bill does not dictate a hierarchy of legal rights, in introducing a third, new category of legal rights, the Bill may result in the manifestation of a hierarchy of legal rights in practice. Our understanding of the Law Commission's prior work and consultation paper on this issue is that a hierarchy would exist uniquely, such that a right cannot simultaneously be a real property right and an intangible one; and if something is already a thing in action, then it cannot be a new form of right. A hierarchy of legal rights may also manifest by nature of client considerations as to how a single or a bundle of rights could be designated. This may be driven by any current or future differences in the regulatory treatment of the third category of rights. A hierarchy may also emerge where there are different remedies attached to different rights by virtue of their potential reliance on the wider operations of a network or system, and the need to provide remedies in the context of interconnected rights and obligations (where one person's digital asset depends upon another not burning their tokens and destabilising a protocol). Additionally, there may be circumstances when it could be advantageous for this new form of property right to take priority over categorisation of an asset as a traditional thing in action, again perhaps driven by future differences in available remedies or regulatory treatment, or recognition internationally.

3.58 Although we did not make an explicit recommendation on this, we tend to think that the categories of thing in possession, thing in action and third thing are, and should be, mutually exclusive (as things in action and things in possession already are). That is, they cannot be both things at the same time.

3.59 Yet regarding the categories as mutually exclusive does not mean that a third category thing could not at the same time represent or be associated with another category of thing. A (traditional) bill of lading or promissory note is a physical piece of paper (a thing in possession) but also embodies a legal right (a thing in action) because it has multiple facets which are categorised individually. Similarly, a crypto-token could be a third category thing while also representing a legal right, or being linked (legally) to a physical thing such as land or a diamond. The consequences of the link will depend on its legal nature (for example, whether the token embodies the right to another asset, or merely records a right or interest).

3.60 That the categories are mutually exclusive does not mean, however, that they cannot share certain features.

3.61 Nor does it mean that there would or should be a "hierarchy" of rights. There is no hierarchy between things in action and things in possession. Things in action and things in possession are all objects of personal property rights, but they are susceptible to different types of legal treatment, reflecting their different characteristics. For example, transfer of things in possession and things in action is effected differently (for example, by delivery and assignment/novation respectively), and only things in possession can be the subject of possessory securities and protected by the property torts such as conversion. But there is no hierarchy between them. For third category things, the appropriate legal treatment will develop under the common law, reflecting the qualities of those things. We do not consider that it will be possible to "pick and choose" whether you would like your property to be categorised as one thing rather than another, simply because the legal treatment is thought to be more favourable, whether generally or in a particular circumstance. Rather, categorisation will depend on the nature of the thing itself, assessed objectively. But that assessment would, were this Bill to be passed, be undertaken with an acceptance that the digital nature of the thing did not mean it was not property; and without having to "shoehorn" it into one of two exhaustive categories.

3.62 Some consultees also queried whether things could change their characterisation over time. We think it is possible that a thing's characterisation as a third category thing could change over time. For example, a digital file that comprises pure information could be put on a system that gives it characteristics such as rivalrousness that might make it a third category thing. Or, in the case of a crypto-token, if the nature of the system changed such that the token was no longer rivalrous but could be replicated and effectively "double-spent", we think it would no longer be a third category thing and would likely fall outside of what could be called property. If that crypto-token had embodied a thing in action, that thing in action (that is, the claim) might still nevertheless exist. Or a crypto-token (as a third category thing) could later have a thing in action or thing in possession linked to it.

3.63 We do not consider that it would it be possible for a particular instance of a thing in action or thing in possession itself to become a third category thing, or vice versa.

That is because the distinctive categorisations go to the fundamental nature of a thing and we cannot envisage a situation in which the nature of any particular asset could be sufficiently altered such that it could move from one category to another. It is hard to say this with absolute certainty, however, particularly in terms of classes of things; for example, there may, in the future, be certain digital things that function more like things in possession than digital assets do now and the common law may then categorise them as such. But in terms of a specific instance of a thing, we think that changing between different classifications of personal property (because of some fundamental change to its form) is highly unlikely and probably impossible. In other words, whilst some, say, non-fungible tokens might over time start to function more like things in possession and so be classed as such in particular instances, it is not the case that the particular NFT held by someone today could be a third thing today but become a thing in possession in a year's time.

### What falls outside the category?

3.64 Although we do not recommend hard boundaries around the third-thing category, we think there are certain things – including certain digital assets – that do not and will not fall within the third category, largely because they do not satisfy the existing criteria for being appropriate objects of property rights.[120] In many cases, this is because they are neither rivalrous nor independent. For example:

(1) Pure information – that is, the intangible, abstract thing that is information, distinct from the means by or on which that information is recorded.

(2) Certain digital assets, such as (in most but not necessarily all cases):

(a) digital files and records

(b) email accounts and certain in-game assets

(c) domain names.

### What should fall within the category?

3.65 In an increasingly online and digital world, we expect that other intangible things and assets whose parameters are difficult to predict and define in the abstract are bound to develop.

3.66 There will inevitably be things – already in existence or yet to be developed – that are or will be difficult to categorise. Courts will also have to determine whether new things can (and should) be capable of being objects of personal property rights.

3.67 Our approach and the draft Bill are technology neutral, in that they do not focus on any single or class of (digital) asset, or any protocol, system, network or technological feature. This will allow the law to interrogate the particular features of the asset in question when considering its proprietary status. It avoids drawing arbitrary boundaries or creating rigid definitional lines. It emphasises the success, and trusts in

[120] See more detailed discussion in Digital assets: Final report (2023) Law Com No 412, from para 4.76; Digital Assets (2022) Law Commission Consultation Paper No 256, chapters 6 to 10.

the continued ability, of the common law to develop sensitively and flexibly in the face of rapidly developing technology. It maintains the common law's position at the heart of the law of personal property, reflecting the fact that statute does not seek to define things in action or things in possession. It distinguishes the law of England and Wales as a flexible and open system that is alive to the particular characteristics and design features of specific technology.

3.68 We have focused on crypto-tokens because our initial terms of reference focused on digital assets, and because they have been a major disruptor in recent years. But as discussed elsewhere, we recognise that other assets such as voluntary carbon credits might properly fall within the third category.

### CONSEQUENCES OF BEING A THIRD THING

3.69 Things in possession, things in action and third category things are all different. They function in different ways. Control in the digital context, as applicable to third category things, might well look different to the control that is exercised over conventional tangible objects, and remains open to technological evolution. For instance, software is often controlled by means of password protection whereas the laptop on which it is stored may well be controlled by being placed in a locked drawer. Partly as a result of this, different markets and market practices have arisen in relation both to tangible things, things in action and also to third category things.

3.70 For these reasons we conclude that the common law is likely to develop legal principles specific to third category things. Those principles will probably diverge, either significantly or in small ways, from the existing legal principle of possession and the associated legal treatment of possessable things, such as bailment, pledge, lien, and the tort of conversion. We think it is entirely appropriate for the common law to do so and do not seek to prescribe in legislation how these or other issues should be dealt with. Our report is intended to reinforce the legal foundations for that process.

3.71 In our report we noted that, in many ways, the legal treatment of things in action and things in possession is consistent, and we concluded therefore that, in those instances, the same treatment could and should be applied to third category things.

3.72 Clifford Chance LLP asked whether third category assets would be regarded as "property" for particular purposes:

> One area that it is important to consider is whether any assets falling within the new statutory category would also fall within the ambit of the definition of "property" for the purposes of section 436 of the Insolvency Act 1986. We think this would be the case based on the reference to "every description of property wherever situated" included in the definition, particularly as we note that judges have already shown flexibility around the interpretation of property in this context as outlined in the Consultation. However, for the avoidance of any doubt, it might be useful for the Law Commission to confirm this. We assume that this is also likely to be addressed by the upcoming UK Jurisdiction Taskforce (UKJT) statement on the treatment of digital assets in English insolvency law.

3.73 We agree that third category things would – and should – fall within the meaning of "property" in legislation where such term is used without further particularisation, as in

the Insolvency Act 1986, or in the Theft Act 1968 which says that "'property' includes money and all other property, real or personal, including things in action and other intangible property". We do not think any (further) statutory reform would be required to achieve this.

3.74 Where, however, a statute specifies further classificatory detail, we do not think that third category things should be presumed to be included. For example, in the Sale of Goods Act 1979 and the Torts (Interference with Property) Act 1977, the definition of "goods" includes "all personal chattels other than things in action and money".[121] On one reading, it would be possible to bring third category things within this definition as being "personal chattels" – traditionally all property other than real property. However, the category of goods contemplated by these statutes is narrower than the generic category of personal property and this is reflected in the operation of the two statutes mentioned here. The Sale of Goods Act 1979, for instance, implies into contracts transferring an interest in goods in exchange for money, certain terms relating to the sellers' title and to the quality and fitness for purpose of those goods. The Torts (Interference with Goods) Act 1977 consolidates the remedies available for interference with possessory and reversionary rights. It is not obvious, as discussed in our earlier Final Report, that either of these consequences should follow from a transaction involving, or an infringement or rights relating to, digital assets.

3.75 Third category things will not be covered by statutes that use a more restricted term, such as "things in action" only. For example, we do not think they would fall within section 136 of the Law of Property Act 1925, which refers to a "debt or other legal thing in action"; this was a query raised by the Commercial Bar Association and Chancery Bar Association in their joint response.

3.76 They also commented on other legislation which addresses digital assets:

> The Economic Crime and Corporate Transparency Act 2023 ("ECCTA") was enacted on 26 October 2023 to upgrade both the criminal and civil asset recovery tools under the Proceeds of Crime Act 2002 ("POCA"), to enable law enforcement to seize, freeze, and recover cryptoassets more easily. The ECCTA extends the power to destroy property held by persons subject to confiscation orders to 'cryptoassets', 'so far as the property consists of cryptoassets' thereby already assuming that cryptoassets are property. The draft Bill seems superfluous in the context of this legislation.

We do not consider that the ECCTA negates the arguments in favour of the draft Bill as the ECCTA only deals with cryptoassets (as defined for the purposes of that Act) and not the potentially far wider category of assets, and also does so only for the very specific purposes of confiscation. In contrast, the draft Bill has a much more general scope and effect.

3.77 The joint working group of the Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen said:

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[121] Sale of Goods Act 1979, s 61; Torts (Interference with Property) Act 1977, s 14. The language used in both is identical except that "chattels personal" is used in the 1977 Act.

> Another area on which clarification would be welcome is the availability of bespoke remedies for digital assets, including debt enforcement (execution) provision, and bespoke rules regarding such matters as transfer and good faith acquisition. Again, the bill seems to leave the task of developing the law on such matters to future litigation. The brevity of the draft bill belies the thoughtful discussions in the consultation documentation. Perhaps that documentation would one day offer interpretative guidance, but such guidance should perhaps be provided in the draft bill itself.

3.78 In our original report, we concluded that much of the current law concerning remedies can be applied to third category things by common law analogy and without law reform. In this area, the law frequently does not distinguish between causes of action and associated remedies that apply to things in possession or to things in action,[122] and we concluded that this is also likely to be true of causes of action and associated remedies that apply to third category things.

3.79 In other words, we think that the legal treatment relevant to things in action and things in possession will be helpful, and in some cases persuasive, when determining how third category things should be treated, but should not be determinative where different rules or treatment may be required or justified. Although we note the suggestion that the relevant treatment of third category things should be set out in the draft Bill, we consider that statute is an overly rigid tool for dealing with a class of assets for which the appropriate remedies will be better determined by the way in which they function in practice than by the category in which they fall.[123]

3.80 As we have noted above, and discuss in detail in our report, some of the fundamental, defining features and purposes of third category things are that they function differently to both things in possession and to things in action. As Timothy Chan and Professor Low argue:[124]

> it is crucial that courts faced with cryptoasset disputes avoid the simplistic analogy between the tangible and intangible.

3.81 We agree that the better approach is for the law to develop by analogy with principles applicable to things in possession or things in action where appropriate, while also recognising that those analogies will be imperfect. The law should instead focus on the attributes or characteristics of the thing with which it is concerned in a particular case. It should not attempt rigidly to apply to third category things legal principles that were formulated by reference to other things that are capable of being objects of personal property rights. This will be a common law assessment for the courts to make, assisted by existing property principles and reflective of the unique nature of

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[122] Although it does in some cases. The primary example of this is the tort of conversion, but there are other distinctions and nuances that we highlight in Chapter 9 of the report.

[123] For example, there may be arguments for different remedies for fungible or non-fungible assets.

[124] T Chan and K Low, "Post-Scam Crypto Recovery: Final Clarity or Deceptive Simplicity?" (2023), available at: https://ssrn.com/abstract=4394820, referring to B McFarlane and S Douglas, "Property, Analogy and Variety" (2022) 42(1) *Oxford Journal of Legal Studies* 161.

third category things.[125] Although this is in some ways a significant task for the courts, it is no different to the way in which the law has developed in relation to things in possession and things in action.

3.82 In our report we identified some situations – particularly in the case of legal concepts applicable only to things in possession – where an analogous equivalent might usefully be developed for third category things. There is fuller discussion in our report, but we include these examples for context.

(1) Pledge: The development of the common law to recognise a control-based proprietary interest potentially akin to pledge could facilitate both the holding of and the grant of security over crypto-tokens and cryptoassets[126] and might therefore be beneficial. We noted however that the development of such a security interest would likely not be a complete solution given that such a security interest would likely be reliant on static, comprehensive notions of control.

(2) Conversion: We concluded that, while claims in proprietary restitution and restitution for unjust enrichment will likely be available in the context of third category things, a claim in conversion will not. This is because conversion only applies to things in possession.

We noted, however, a gap in protection for a claimant when their crypto-token is "burned" by a defendant.[127] On such facts, neither proprietary restitution nor restitution for unjust enrichment would be available. Given the absence of a remedy in conversion, there is therefore a lacuna in the current law relating specifically to objects that fall within the third category. We concluded that it would therefore be appropriate for the courts to develop specific and discrete principles of tortious liability by analogy with, or which draw on some elements of, the tort of conversion to deal with unlawful interferences with digital objects. Since the principal objection to extending the tort of conversion to digital assets seems to be to its strict liability nature, it might be that developing and applying a fault-based interference tort might be the best means of addressing the current deficit in protection.

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125 As a separate recommendation, we have recommended that Government creates or nominates a panel of industry-specific technical experts, legal practitioners, academics and judges to provide non-binding guidance on the complex and evolving factual and legal issues relating to control involving certain digital assets (and other issues relating to digital asset systems and markets more broadly) in order to assist the courts.

126 In our report, we distinguished "crypto-token" from "cryptoasset", using the latter term to describe a crypto-token which has been "linked" or "stapled" to a legal right or interest in another thing. See the glossary to the digital asset report.

127 Burning involves irreversibly sending a crypto-token to an inaccessible "burn address", the result being that the token is removed from circulation.

(3) Good faith purchaser defence: We concluded that the existing good faith purchaser defences – in statute (for goods)[128] and at common law (for money[129] and negotiable instruments[130]) – would not apply to third category things without further legal development. However, many consultees made strong arguments in favour of the recognition and development of a common law special defence of good faith purchaser for value without notice applicable to crypto-tokens (and third category things more broadly).[131] We agree with the arguments made by consultees and would support the development by the courts of a such a defence applicable to crypto-tokens and third category things.

3.83 It may be that, ultimately, legislation is thought to be desirable in specific contexts because a particular policy outcome is desired, or shown to be needed, and which the courts have not chosen, or had the opportunity, to develop. At the moment however, while third category things are an emerging class of asset, we do not think there is sufficient justification for tying their treatment down in statute when the law of things in action and things in possession is almost entirely common law.

## RETROSPECTIVITY

3.84 The Financial Law Committee of the CLLS suggested that, if the Bill were to apply retrospectively, it could cause unfairness, for example if a person, prior to the Bill's enactment, took a charge over the chargor's things in action, believing this to include the chargor's crypto-tokens and other digital assets:

> [T]he Bill, as drafted, if given retrospective effect, would now remove crypto-tokens and other digital assets from the scope of the relevant charging clause. This would prevent the chargee (contrary to its legitimate expectation or belief and the chargor's intention) having an equitable proprietary interest in the relevant digital assets of the chargor. This potentially raises the concern that the Bill could retrospectively, unnecessarily and unfairly prevent the chargee's peaceful enjoyment of its property for the purpose of the European Convention on Human Rights, or otherwise operate unfairly upon the legitimate interests or expectations of parties affected by the Bill.

3.85 They suggested that, in order to avoid this result, a court might treat the Bill as applying only to things, rights or interests created after the Bill comes into force, but commented:

> That approach would, though, defeat one of the key purposes of the Bill, which is to clarify the law of personal property rights as applicable to crypto-tokens and other digital assets (as well as proprietary rights or interests in or in relation to such assets) howsoever and whensoever arising or existing – and so avoid "two tiers" of personal property rights in or in relation to digital assets dependent upon the time

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128 Sale of Goods Act 1979, s 24 (Seller in possession after sale), s 25 (Buyer in possession after sale), s 47 (Effect of sub-sale etc. by buyer), s 48 (Rescission: and re-sale by seller).

129 See eg D Fox, "Cryptocurrencies in the Common Law of Property" in D Fox and S Green, *Cryptocurrencies in Public and Private Law* (2019) para 6.59.

130 Such as bills of exchange and promissory notes. *Miller v Race* (1758) 1 Burr 452; *Clarke v Shee* (1774) 1 Cowp 197; Bills of Exchange Act 1882, s 29.

131 See discussion in report, Chapter 6.

they are considered to exist or arise. This could also raise material legal uncertainty as to the practical application of the Bill, once enacted, as affected by difficult temporal issues relating to when a digital asset, or relevant right or interest, is to be considered to exist or arise so as to be properly within or outside the scope of the Bill's operative provisions.

3.86 The draft Bill does not have retrospective effect. Unless the contrary intention appears, an enactment is presumed not to operate retrospectively.[132] In our view there is nothing to displace the presumption here. The effect of the Bill is to confirm in statute, from the date on which it comes into force, what we consider is the better view of the current (common) law. Prior to that date, the common law will continue to govern the question of whether a thing is the object of personal property rights despite being neither a thing in possession nor a thing in action. But it is worth emphasising that, because the draft Bill confirms what we consider to be the existing common law position, we would not expect cases to be decided differently before or after the coming into force of the draft Bill.

3.87 Furthermore, the effect of the draft Bill is that, if implemented, a court would not be able to say that something is incapable of attracting property rights merely because it is neither a thing in action nor a thing in a possession. The draft Bill does not determine that any particular assets are third category things/are not things in action or things in possession; this will depend on a common law analysis that would occur whether or not the Bill was enacted. The Bill does not therefore itself change the scope of the charge over things in action in the example given by the Financial Law Committee of the CLLS. In any case, to assume that a charge over things in action would catch crypto-tokens and other digital assets would also be to ignore the direction of recent case law.

### REFERENCING "DIGITAL" SPECIFICALLY

3.88 As pointed out above, although the draft Bill is agnostic about the characteristics of third category things, there is an express reference to things that are "digital or electronic in nature". We also called the Bill the "Property (Digital assets etc) Bill". This was not envisaged by our original recommendation; the working title of the Bill was simply the "Personal Property Bill".

3.89 A few consultees commented on the inclusion of references to "digital" things, with some being in favour and some against.

3.90 For example, Linklaters LLP suggested:

> The Law Commission may wish to consider amending the title of the Bill so that it does not refer specifically to digital assets, given that the effect is much broader. While the title will not impact the operation of the Bill, it may influence how it is perceived.

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[132] D Feldman, D Bailey, L Norbury, *Bailey, Bennion and Norbury on Statutory Interpretation* (8th ed) para 7.14.

3.91 The Financial Law Committee of the CLLS suggested that the reference to "digital or electronic" in clause 1 be removed, and that the title of the Bill be the "Property (Objects of Personal Property Rights)" Bill.

3.92 On the other hand, Felicity McMahon, a barrister, said:

> I agree with the Law Commission that it is sensible to include the reference in brackets to "(including a thing that is digital or electronic in nature)" to reinforce this point, and as the types of thing that are currently envisaged as being immediately covered by this third category are indeed digital or electronic in nature (such as cryptocurrency).

3.93 The joint response of the Commercial Bar and Chancery Bar Associations said:

> If the inclusion of 'electronic' was not accidental, that risks further uncertainty and debate – an electronic device is already classified as a thing in possession – if it means something other than a device that relates to a flow of electrons or otherwise to electricity, that appears to be more confusing than singling out 'digital things' for special treatment.

3.94 We included the references in the draft for consultation because digital things such as crypto-tokens are likely to be the main type of thing that users of the law will be concerned with, at least in the short to medium term, and because they are the main impetus for the draft Bill. We felt that it could give helpful context to the Bill. We recognise though that there are competing arguments: inclusion of references to "digital" could be misleading in terms of suggesting that the Bill has more of a direct effect on digital assets than it in fact does. There is nothing in the draft Bill to restrict the "third category" to digital things; nor does it mean that any particular kind of digital thing will fall within that category and so be capable of attracting property rights, and it does not say what the effect of being a third category thing will be for all or any particular asset.

3.95 Inclusion of the word "electronic" reflects the language used by legislation dealing with electronic and digital matters for many years.[133] It is a broader term than "digital". Whilst the latter may, strictly speaking, be a more accurate term for the types of asset that we envisage engaging the draft Bill at present, we think that a broader term is preferable given the pace of technological development. Looking to the future, the term "digital" may well be rendered outdated before the term "electronic" will be. We do not however envisage that the draft Bill will capture electronic *devices*, as suggested by the Commercial Bar Association and Chancery Bar Association. "Electronic device" generally refers to hardware – a physical thing such as a computer, or mobile phone. This would be a thing in possession and not a third category thing.[134]

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133 eg Electronic Trade Documents Act 2023 and the Electronic Communications Act 2000. See further, Digital assets: electronic trade documents, A consultation paper (2021) Law Com CP 254, para 2.3 and associated footnotes.

134 On the current understanding of electronic devices, but subject always to the possibility of future technological developments which we cannot even envisage at this point.

3.96 Given that only a few consultees gave their views on the inclusion of digital/electronic and that those views were mixed, we have retained the references. We note however that these references are presentational rather than substantive and that to remove them would not affect the legal impact of the draft Bill, should it be enacted.

# Chapter 4: Assessing the impact

4.1 As explained above, the intention behind the draft Bill is to remove doubt as to the existence of a third category of personal property and facilitate the common law development of a set of rules that recognise the unique qualities of third category things.

4.2 An economic impact assessment is required as part of Government's consideration of our recommendations and to inform the decision whether to implement the draft Bill. We asked for stakeholder views on impact to inform the development of the impact assessment. Here we summarise the responses received; these will also be used to inform any future impact assessment.

## ANTICIPATED BENEFITS

4.3 As we explained in our February 2024 paper, the intended effects of the draft Bill are to:

(1) allow crypto-tokens and potentially certain other assets to be recognised by the law as property despite not being things in action or things in possession;

(2) decrease litigation costs by giving certainty as to the existence of third category things (including by giving courts confidence that it is appropriate to develop the law of personal property in this way); and

(3) ensure that this jurisdiction continues to be an attractive place to deal with, and litigate in respect of, crypto-tokens and other third category things.

4.4 The Bill would eliminate the need for the courts to decide the question whether a thing is capable of being the object of property rights despite not being a thing in possession or a thing in action. This will make disputes more efficient by enabling parties to focus on the substantive questions about legal treatment of crypto-tokens or other third category things.

### Consultee views on anticipated benefits

4.5 We asked stakeholders what they considered to be the key benefits, including any specific examples or figures where possible.

4.6 We did not receive many estimates as to what costs – or what percentage of costs – could be saved, and several consultees said explicitly that it was not possible to estimate costs. However, most consultees who answered this question agreed that the Bill would have a positive impact. Consultees variously referred to added legal certainty, the reduction of issues for dispute with a corresponding reduction in costs, help for law firms in giving legal opinions, and increased competitiveness of the jurisdiction's legal system. We include some example quotes below.

4.7 Linklaters LLP said:

> Given the nature of the Bill, we expect the impact only to be positive. Above all, it will provide greater clarity to the market and avoid unnecessary agonising or debate, both in the context of structuring and in the context of disputes.

4.8 Felicity McMahon:

> I consider the draft Bill will have a considerable positive impact in terms of clarity in the law, as set out above. Again as set out above, the draft Bill does leave certain matters to the common law, which of course will all need to be argued. However, the clarity the Bill does bring in respect of there being a type of thing that is property, but is not a thing in possession or a thing in action, will allow the court to move straight to the meat of the argument about how the law should be applied. This will save time and legal costs. The amount of costs is difficult to quantify as it will depend upon the nature of the dispute and the lawyers involved (both in terms of their costs and whether they are experts specifically in this area or are touching upon it when the issue impacts upon their area(s) of expertise). However, at present if one is seeking to argue that a thing is property, even though it does not quite fit into either the thing in action or thing in possession category, one must set out and explain all the relevant case law. This is not a short task. One must also deal with *Colonial Bank v Whinney*, which suggests that there are only two types of property, a case a court may be reluctant to go against even though it is possible to do so. The clarity provided by the draft Bill will avoid all of that cost and uncertainty, both at the stage of arguing matters before a court, and at the stage of explaining the position to a client. Legal certainty will have a positive impact for clients, lawyers and the courts.

4.9 Norton Rose Fulbright LLP said:

> It is difficult to quantify the benefit of a hypothetical correct rule created in the future over a hypothetical counterfactual incorrect rule. The many recent High Court actions started to recover misappropriated digital assets may serve as an example. Although they proceeded on the basis that proprietary remedies were available, this has not been tested properly at a full trial and *Piroozzadeh v Persons Unknown*, where an interim proprietary injunction was discharged, shows that this area is still in flux. Rules on tracing and following, proprietary remedies, dishonest assistance and knowing receipt and the scope of the bona fide purchaser defence will all need to be elucidated. Without the draft Bill, there is a risk that these rules will not be developed correctly and claimants in these cases will be left without a remedy.
>
> This example has wider repercussions. If the rules developed in relation to digital assets are inappropriate, digital asset platforms are less likely to select English law or to be based in the United Kingdom. The digital asset ecosystem, as with any property-based section of the economy, is dependent on clear underlying legal rules and is threatened without them. It is also a highly mobile sector – the certainty and professionalism of the English legal system is currently a key competitive advantage.

4.10 Similarly, Ashurst said:

> It is impossible to quantify how much time might be saved by implementing the measures in the draft Bill, but the experience of the traditional securities markets demonstrates that the common law tends to lag behind shifts in technology (eg from paper to book-entry, dematerialised securities), even by decades. This is understandable, due to the ways that disputes arise and are dealt with, but uncertainty can affect risk assessments made by businesses and inhibit investments. The greatest (although immeasurable) impact of providing clarity through statute is likely to be the resolution of questions that stand in the way of commercial and technical developments through investment.

4.11 Clifford Chance LLP said:

> Introduction of the Bill would give market participants much greater legal certainty. It would help to reduce the level of legal analysis required by law firms when opining on cryptoasset related queries and therefore should reduce the level of legal fees payable. We agree that introduction of the Bill would also reduce the time spent by the courts on questions of categorisation of objects of personal property rights, allowing them to focus on the substantive issues before them and so reduce legal fees and court time in relation to contested matters as well.
>
> Removing this legal uncertainty would also provide the UK with a competitive advantage, building on wider UK regulatory initiatives in this space. Together these would offer the potential for stronger development of the UK market.

4.12 W Legal gave a list of positive impacts. They said:

> The positive impacts of the bill that are not quantifiable in £ or days/hours are the following:
>
> > **Clarity and Legal Recognition:** By explicitly recognising digital assets as objects of personal property rights, the bill provides clarity in legal frameworks. This recognition can reduce ambiguity in transactions involving digital assets. Quantifying this impact could be challenging, but it might lead to a reduction in legal disputes and associated costs.
> >
> > **Reduced Disputes and Litigation:** Clarity in property rights can reduce disputes over ownership and rights related to digital assets. This could lead to fewer legal proceedings, saving both time and money for individuals and businesses involved. Quantifying the reduction in disputes might involve estimating the number of cases related to digital asset disputes and calculating the associated legal fees and time spent in litigation.
> >
> > **Facilitation of Innovation and Investment:** Clear legal recognition of digital assets as property can foster innovation in the digital economy. It may encourage investment in digital assets and related technologies by providing a stable legal environment. Quantifying the impact on innovation and investment could involve analysing trends in digital asset investments and evaluating the growth of related industries.

**Protection of Property Rights:** The draft Bill ensures that individuals' property rights extend to digital assets, offering protection against unauthorised use or appropriation. This protection can enhance confidence in digital asset ownership and usage, potentially encouraging broader adoption and utilisation of digital assets. Quantifying the value of this protection might involve assessing the financial worth of the digital assets protected under the new legal framework.

**Efficiency in Asset Management:** Clear legal recognition of digital assets allows for more efficient management and transfer of these assets, potentially streamlining processes such as inheritance, estate planning, and asset distribution. Quantifying the efficiency gains might involve estimating the time and resources saved in managing digital assets under the new legal framework compared to previous practices.

4.13 ClearToken said:

ClearToken believes that the draft Bill has the potential to positively facilitate the development of a true digital assets market in the UK. Revenues in the digital assets market are projected to reach US$80bn in 2024, with projected total amounts of US$112bn by 2028. Disputes in relation to title and interests in digital assets (in particular alleged fraudulent assertion of those rights or fraudulent denial of those rights) is commonplace, and expensive. These disputes often revolve around remedies and redress available. The Draft Bill would have material benefit in these issues.

4.14 James Burnie FRSA responding on behalf of gunnercooke llp and WAGMI Advisers, said:

Generally, there is a tendency in the legal profession to take a cautious approach to advising on matters unless there is regulatory certainty. For example, in the context of insolvency, there is a tendency to not commit whether a particular security will work unless it has been successfully tested in court. This has been to the detriment of the industry, in that (for example in the context of lending), it has led to a reluctance to rely on security linked to cryptoassets.

Providing statutory clarity therefore has the potential for material cost savings for both the legal system and any entities or individuals engaged with cryptoassets, because it gives a legal basis on which practitioners can be more sure of advice. More fundamentally than reducing the time period of a dispute, it may actually avoid the need for a dispute in the first place.

4.15 DECaDE, the “UKRI Centre for the decentralised digital economy”, came at it from a different angle and said that, from their perspective:

the greatest benefit of the Bill could be a "heuristic signal" it sets for software developers and businesses in the digital economy: IF you think that your business/your customers would benefit from a property right in the digital assets you provide, THEN these are the design requirements you need to think about - and if you come up with good design solutions, the law will recognise your efforts. We mentioned the example of in-game items already in our response to the 1.

consultation: IF a platform thinks giving their players property in in-game items, as a USP for the business to differentiate their offering from that of competitors, THEN this is the type of functionality (control by owner, rivalrousness etc) that you need to develop. This could be a significant incentive for the software industry to develop new and original tools and functionalities.

4.16 Peters & Peters Solicitors LLP were more guarded in their response:

> Perhaps once a bank of suitable test cases has been established, and there is a clearer understanding as to what type of assets can be captured by the proposed statute's provisions, then it is possible that the courts will not need to dedicate as much time to questions concerning the underlying property characteristics of a given digital asset. However, until then, it is possible that the overtly broad language of the draft Bill, will in fact (at least in the short term) increase time expenditure in this regard. We are therefore of the view that data on the reduction of a dispute in terms of "£ or days/ hours" is not quantifiable at present, and will require practical application and monitoring, if and when the Bill is enacted.

4.17 The Commercial Bar Association and Chancery Bar Association joint response, which did not support the approach of the draft Bill, did not think that the benefits would be substantial, because the proprietary status of cryptoassets is already settled:

> Authors' experience was that, at least by the time counsel was instructed, the issue whether cryptoassets were property had been conceded and this was not a contentious issue, and certainly not since the proliferation of authorities establishing (at least to the standard of a serious issue to be tried, or equivalent) that cryptoassets are property, including at the Court of Appeal level. Accordingly, Authors considered that a dispute would not be narrowed by the draft Bill and there would be no positive impact in that regard.
>
> One Author expressed the view that an inexperienced legal representative or litigant may find the draft Bill assists in that it confirms the common law position without being obliged to trawl the relevant authorities and consider their conclusions.

### Discussion

4.18 We continue to consider that the draft Bill would give certainty in an important area which will reduce the need for legal analysis and debate and therefore time and costs. We agree with consultees that it is a "starting point" in the development of a personal property regime for relevant assets and – quite deliberately – does not give certainty across the whole spectrum of questions that could arise. However, it is clear from the support expressed by law firms and practising lawyers that the aims of the draft Bill will have a practical, beneficial impact on market participants.

## ANTICIPATED COSTS OR RISKS

4.19 In the consultation paper on the draft Bill we said that we were not aware of any costs of the recommended legislation, particularly since it is primarily a clarification of the position that courts have been increasingly moving towards.

4.20 Market participants already regard crypto-tokens and other digital assets as things that are protected by property rights. We do not envisage that there will be transitional

costs of training or investing in technology because market participants are already creating and dealing in these assets, and because the draft Bill does not require any particular change in behaviour. Because the legislation is confirming a position that many stakeholders already assume to be the case, we do not expect a significant increase in the use of such assets with, for example, a corresponding increase in environmental costs due to the energy consumption of some blockchain platforms.

4.21 We do not consider that to facilitate the recognition of crypto-tokens and certain other digital assets as "third category" objects of property rights will upset other markets where assets are not constituted or dealt with in the same way. For example, in the money markets where debt securities (debentures) are generally issued in registered form, and are things in action, we do not envisage that the draft Bill will have an impact.

### Consultee views

4.22 Clifford Chance LLP's response reflected our own understanding and assessment of the cost. It said:

> We do not consider there to be any particular costs or risks associated with the draft Bill.
>
> As the Bill is an enabling measure, merely confirming that a third category of things capable of being the object of personal property rights exists and which is broadly consistent with the position under common law already, we do not consider that the introduction of the Bill would generally have a negative impact on existing commercial arrangements. To the extent existing commercial arrangements have been brought into being based on a previous understanding between parties or legal advice that conflicts with the position under the Bill, we are confident that this would be taken into account as part of a judicial assessment for any particular decision to the extent necessary.

4.23 Similarly, the response from 4 Pump Court said:

> There is, inevitably, some risk of unintended, or unexpected, consequences, potentially in other areas of the law, in the absence of any statutory definition of "a thing" or "a thing that is digital in nature". … However, we do not consider that the draft legislation, in and of itself, increases the risk of unintended, or unexpected, consequences, beyond the risks and uncertainties that already exist as a matter of common law. We consider that the Law Commission's approach to drafting the legislation, and its very narrow focus, assists in this regard.

4.24 ClearToken said:

> We are not aware of any risks associated with the draft Bill other than its jurisdictional limitations (which are unavoidable and we hope that other jurisdictions (such as Scotland) will follow the Law Commission's lead). We do not regard the draft Bill's expectation that common law would develop to define where the boundaries of "third category things" lie as a risk.

4.25 Ashurst noted that while "questions will remain about the nature of digital assets and the ways that rules of personal property can be applied to them", the draft Bill is "a

meaningful first step to address them". James Burnie FRSA on behalf of gunnercooke llp and WAGMI Advisers stated:

> The ambitious scale of the bill, and the fact that represents a starting point rather than a conclusion to the question of the legal treatment of cryptoassets, means that it (unavoidably) incurs the costs involved in working out the consequences of certain cryptoassets being property.
>
> These costs are unavoidable, however, if the view is to be taken that cryptoassets do not fall within an existing category of cryptoasset – and for the reasons set out in the Law Commission Consultation we agree this is the case – the bill at least avoids the costs of answering the preliminary question of whether cryptoassets are property and allows practitioners to focus on the consequences of cryptoassets being property.
>
> There will, therefore, be an ongoing cost as the implications of the bill are determined, and this would include legal and advisory costs.
>
> The risks are therefore in our view twofold:
>
> (a) There is a risk that the way in which cryptoassets as property are interpreted by advisors is hindered by the fact that they do not fall within a pre-existing category of property.
>
> (b) There is a risk of a cryptoasset being treated as property in circumstances where that is not appropriate (for example, where it is acting as a record only and does not have the indicia of being property). This issue could be exacerbated for those cryptoassets that change their attributes during their lifecycle (and so arguably could be / not be property at different points of the lifecycle.

4.26 Peters & Peters Solicitors LLP said the following:

> [i]t is our concern that whilst the courts may be able to reduce the time dedicated to establishing whether digital assets can be property, instead the courts will now have to dedicate time to ascertain whether a specific asset can fall within this new category. Any time saving measures will effectively be negligible. … by requiring the common law to provide the answers to what things fall within the third category, what personal property rights attach to third category things, and the consequences of that, this approach could still lead to "piecemeal"[135] results and uncertainty.

4.27 W Legal expressed the following views:

> **Enforcement Challenges**: Enforcing property rights in the digital realm may present unique challenges, such as jurisdictional issues and the pseudonymity/anonymity of participants. Law enforcement agencies may require enhanced capabilities and resources to investigate and prosecute crimes involving digital assets.

[135] Referring to the Law Com's use of this in the consultation paper.

**Technology and Infrastructure Requirements**: The legal recognition of digital assets may necessitate advancements in technology and infrastructure to support their secure storage, transfer, and management. Investments in cybersecurity and blockchain technology, for example, may be required to ensure the integrity and authenticity of digital assets.

**Unintended Consequences**: As with any new legislation, there is a risk of unintended consequences. The draft Bill may have unforeseen effects on various stakeholders, including individuals, businesses, and regulatory bodies. Continuous monitoring and evaluation of the draft Bill's impact may be necessary to address any unintended consequences promptly.

**International Harmonisation**: The draft Bill's application limited to England and Wales could create discrepancies in legal frameworks across jurisdictions, potentially complicating cross-border transactions involving digital assets. Efforts to harmonise regulations internationally may be required to facilitate global trade and investment in digital assets.

**Curtailing Digital Innovation:** Whilst the initiative of introducing the draft Bill is overall positive, it is possible that its high-level approach may, in time, lead to developing law and regulation in England and Wales along different lines to other key jurisdictions. This, in effect, could impede the growth of the digital assets sector in England and Wales and, therefore, we consider it very important to gain early clarification as to the perimeters for the definition of "Digital Assets" and to see the Courts/Legislature/Regulators working in harmony to clarify the legal and regulatory treatment in a flexible yet clear way which conforms to expectations of technologists, international businesses, and jurists.

4.28 DECaDE raised two issues:

Given that the precise consequences of the new rights are still unclear, there could be concerns by the "infrastructure providers" that they suddenly get obligations towards these parties that can't be mitigated by contract. What are the obligations of a digital infrastructure provider, far removed from a specific DAO, its members and the digital assets that generate and share, if these are now deemed "property". Is suffering a server outage the equivalent, in the physical world, of a local water company accidentally flooding my property? As the commission notes, digital assets are by their nature more "fragile" than physical assets. We agree with the commission that this is not a reason to exclude them from being ownable, but third parties may need some assurances about just how much responsibility they now shoulder on other people's property to continue to invest in these services.

The second concern remains that inadvertently, companies may feel nudged towards the use of environmentally particularly problematic systems. The Commission addresses this directly, and it is true, the technology-neutral formulation of the Act "should" prevent it from becoming a boost to "proof of work blockchain technologies only". But it remains a fact that the discussion took place because of the excitement and controversy that that specific technology has generated, and also the Commission's own document uses crypto assets such as NFTs as paradigmatic cases, while rejecting "at least" current forms of digital music files, eBooks, in-game assets etc. Given this background, it seems not implausible that

companies who want to "play it safe" will direct their efforts to those technologies that seem the most likely to gain the desired recognition for their assets. This is why we suggest that the language of the Bill may want to emphasise that what is asked for is functional equivalence only, however it is achieved.

4.29 The Financial Law Committee of the CLLS, which did not support the Bill on the basis that the matter was one that is best left to the common law, said:

> It is not possible to determine with any precision the costs that may be incurred if the Bill is enacted. Possible categories of potential costs would include (a) litigation arising from the concern we raise … regarding the temporal scope or limitations of the Bill (notably, whether it would, or would not, have retroactive effect),[136] and (b) the costs that may be incurred by regulatory authorities in determining, and perhaps seeking advice in connection with, the extent to which the Bill (or the potential developments in English personal property law that the Bill may be taken to support adopting possessory-like concepts) may impact upon regulated activities, including (i) the safeguarding and custody of digital assets and the distribution of digital assets in the event of an insolvency of the custodian or any other person who has a personal property right to those digital assets, and (ii) whether it is correct, for the purposes of determining regulatory capital requirements, to assume that regulated custodians should hold capital against operational risk but not necessarily against counterparty risk or market risk. …
>
> These areas of potential uncertainty and litigation may affect precisely the most sensitive areas for the financial markets in the UK – the allocation of resources to persons with proprietary interests and creditors without such interests in cases where a failed business may hold an insufficiency of assets to satisfy all claims – an area where the scope for expensive litigation should be minimised as the associated costs will likely reduce the asset pool further and may place additional costs on parties already suffering, or potentially exposed to, substantial losses. Issues such as these will need to be considered and developed in any event, but it is not clear that the Bill (or wider principles of English personal property law that it may be taken to support) will provide any meaningful assistance in resolving them.

4.30 The response of the Commercial Bar Association and Chancery Bar Association said that most Authors of the response felt that the draft Bill has the potential to create more disputes and attendant costs than it resolves:

> This is because of the lack of definition of a 'thing'; the lack of specificity as to what is meant by such a 'thing' being 'capable of being the object of personal property rights'; and, potentially, what is meant by the words 'digital', 'electronic' and 'in nature'. …

### Discussion

4.31 We continue to think it is the case that the draft Bill itself will not have a significant impact on cost or risk. It confirms the way that the common law is going and the position that many lawyers and market participants already consider to be the case.

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[136] We address this point from para 3.84 above.

The draft Bill does not create any new obligations, nor does it force or even encourage the use of digital assets.

4.32 While the draft Bill deliberately does not outline the boundaries of third category things or determine their legal treatment and leaves this to the common law, this is not a situation *caused* by the draft Bill. Implementation of it would not therefore lead to any additional uncertainty or risk beyond that which already exists, and would in fact act to reduce it. Without the Bill, all these questions would still be for the courts to determine. With the Bill, one major question – whether there is a third category of personal property – is answered, with the rest remaining for common law development. It does not therefore remove all the existing uncertainties (nor does it attempt to). We do not consider however that this can be regarded as a "cost" of the Bill; legislation must be judged for what it does, and not what it (deliberately) does not do.

4.33 While we recognise that some consultees wish the draft Bill went further in terms of setting out a fuller statutory framework for third category things, we consider that the costs and risks of doing so would be significant. This has been consistently reflected in the majority of consultee views throughout the duration of our digital assets work.

# Appendix 1: Respondents to consultation on draft Bill

1. 4 Pump Court
2. Professor Orkun Akseli
3. Allen and Overy LLP
4. Ashurst LLP
5. Association of Global Custodians, European Focus Committee
6. James Burnie FRSA on behalf of gunnercooke llp and WAGMI Advisers
7. Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen (joint working group)
8. ClearToken Holdings Limited
9. Clifford Chance LLP
10. City of London Law Society (CLLS), Financial Law Committee
11. CMS Cameron McKenna Nabarro Olswang LLP (CMS)
12. Coinbase
13. Commercial Bar Association and Chancery Bar Association (joint response)
14. Dr Michael Crawford
15. CryptoUK
16. D2 Legal Technology (D2LT)
17. DECaDE, the UKRI Centre for the decentralised digital economy
18. Electronic Money Association
19. Federation of Small Businesses
20. Professor Joshua Getzler
21. Professor Louise Gullifer
22. Professor Yuliya Guseva
23. Intercontinental Exchange Inc and subsidiaries (ICE)

24. International Digital Assets Counsel (IDAC)
25. International Swaps and Derivatives Association (ISDA)
26. International Trade & Forfaiting Association (ITFA)
27. Prakash Kerai, Shoosmiths LLP
28. Michal Kloczkowski
29. Law Society
30. LawBEAM
31. Linklaters LLP
32. Mattereum
33. Katie McCay
34. Felicity McMahon
35. Norton Rose Fulbright LLP
36. Dr Hamish Patrick, Shepherd & Wedderburn LLP
37. Peters and Peters Solicitors LLP
38. Powering Net Zero (PNZ) Group
39. Fred Pucci
40. Professor Andreas Rahmatian
41. Professor Duncan Sheehan
42. Professor Lionel Smith
43. Professor Robert Stevens
44. Lizzie Williams, Harbottle and Lewis LLP
45. W Legal Limited

# Appendix 2: Draft Bill

[DRAFT]

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# B I L L

TO

Make provision about the types of things that are capable of being objects of personal property rights.

BE IT ENACTED by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

## 1 Objects of personal property rights

A thing (including a thing that is digital or electronic in nature) is not prevented from being the object of personal property rights merely because it is neither—

(a) a thing in possession, nor

(b) a thing in action.

## 2 Extent, commencement and short title

(1) This Act extends to England and Wales only.

(2) This Act comes into force at the end of the period of two months beginning with the day on which this Act is passed.

(3) This Act may be cited as the Property (Digital Assets etc) Act 2024.

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