**Property (Digital Assets etc) Bill [HL] Special Public Bill Committee**

**Call for Evidence – Response**

**December 2024**

[1] This response has been written by Dr Alisdair MacPherson, Professor Donna McKenzie Skene, Professor Burcu Yüksel Ripley, Dr Jonathan Ainslie, Dr Chike Emedosi and Dr Euan West. We are all members of the Centre for Commercial Law and/or the Centre for Scots Law at the University of Aberdeen.

[2] We have also previously responded to consultations undertaken by the Law Commission in relation to digital assets. These responses are available at the following link – https://www.abdn.ac.uk/law/research/centres/centre-for-commercial-law/public-policy--stakeholder-engagement/.

1. **Please could you summarise your view on the Bill in fewer than 300 words?**

[3] We generally support the introduction of legislation for digital assets to provide more clarity and predictability regarding relevant legal issues. The Bill offers certainty on a particular point of classification, by recognising that a “thing”, including a digital or electronic thing, is not prevented from being the object of personal property rights simply because it is neither a “thing in possession” nor a “thing in action” (i.e. this is not an exhaustive dichotomy). We are aware of the debate as to whether digital assets are already accommodated under the category of things in action at common law but note that this Bill confirms definitively that digital assets can be recognised as property objects, even if they do not fall into that category. There is always the possibility of cases being overturned in England and Wales or of conflicting authority and so there is merit in legislation and the Bill itself will place certain matters beyond doubt. The Bill of course gives significant latitude to the courts in determining whether a particular digital asset is recognised as being a property object and which category is the relevant one. This also applies to other assets, including those which may emerge in future.

[4] While we agree that legislation in this area ought to be relatively brief, technologically neutral and future-proof, the Bill may represent a missed opportunity to provide additional legal rules for digital assets, such as in relation to rules of transfer and good faith acquisition. This approach would help avoid future uncertainty.

[5] We also note that the Scottish Government is currently consulting on digital assets in Scots private law (<https://www.gov.scot/publications/digital-assets-scots-private-law-consultation/>) and this may result in legislation for Scotland – see further below in our responses to questions 4 and 6.

1. **Do you think that the Bill, in its current form, is necessary and effective?**

[6] It may be queried whether the Bill is “necessary” for digital assets, given that the English courts have already accepted their status as property objects and can select the most appropriate rules from the existing categories of property to apply to them. The Bill just removes one possible (and debatable) constraint and otherwise retains the flexibility available to the courts. They will determine on a case-by-case basis the relevant rules deriving from the existing categories of property for particular assets. Yet the Bill, on balance, may be considered *desirable* for the reasons stated in the previous answer.

[7] The Bill is effective in achieving its intended purpose by clearly confirming that a thing (including a digital object) is not precluded from being a personal property object if it is not a thing in possession or thing in action. The chosen language in the Bill is acceptable, albeit that it arguably merely confirms the position as it already exists under the current law. The Bill’s negative wording (i.e. “is not prevented from”) seems to reflect the purpose of the legislation better than the language in the Law Commission’s draft Bill (i.e. “is capable of being”), which could have been regarded as a positive imputation. However, it does again pose the question of whether more could be done by this Bill in terms of clarifying the law relating to digital assets.

1. **Would the Bill have any negative or unexpected consequences?**

[8] Given its limited purpose, it is difficult to say that the Bill will have notably negative consequences. There are, however, likely to be various consequences, some of which may be considered unexpected.

[9] While it would remain a possibility that a particular digital asset could be considered a thing in action, we expect that the Bill (upon its passing) will make it less likely in practice that digital assets will be classified as things in action, and instead that they will probably be recognised as falling within an unnamed miscellaneous third category. Yet it is unclear whether this is truly one umbrella category, containing a variety of different types of asset, or if, in reality, there is a multiplicity of different categories beyond things in possession and things in action. One approach may be to consider that in English law things in possession correspond entirely to tangible personal property, whereas intangible personal property constitutes not only choses in action (if defined in a narrow sense) but also other forms of property. However, whichever approach is adopted, the precise boundaries of the categories are not entirely clear, including what is included and what is excluded.

[10] The assets falling into a third category will have a number of different characteristics and it is uncertain what they will all have in common. Will assets in the category share certain features with things in possession, while having other features comparable to things in action? In this respect, are they a hybrid form of property? In any event, the courts will have to determine the extent to which the applicable rules for certain property on a given matter are derived from the rules relating to things in possession, things in action, a hybrid thereof or bespoke rules, and this may lead to unexpected results. The courts will have flexibility to adopt a “pick-and-mix” approach, but the parties or users of digital assets will not know in advance what the courts will select and this may undermine legal certainty and predictability for them.

[11] There are also new forms of property for which the relevant property category is uncertain, such as for tokenised securities (see e.g. para 2.60 of Law Commission, *Digital Assets as Personal Property: Supplemental Report and Draft Bill* (Law Com No 416, 2024)). The tokenised asset may be in one category (e.g. things in action), but the tokenisation element may suggest that another category is applicable. With reference to electronic trade documents, while those falling within the relevant definition in the Electronic Trade Documents Act 2023 would be things in possession, the Law Commission has stated that those which do not satisfy the relevant criteria “will not be things in possession” but they “might be things in action or third category things, dependent on their form” (para 3.40). It may also be the case that some digital assets are considered to be third category things, while others are deemed to be things in action. Different courts may take contrasting views on categorisation because the Bill does not set out any criteria to determine whether a (digital) asset will be a third category thing.

[12] In addition, the Bill may also serve as a signal to courts to reconsider the categorisation of certain types of property that have been classified in the past. Some types of property hitherto classified as “things in action” – perhaps simply because they are not things in possession, coupled with the traditional perception that property objects must constitute either things in possession or things in action – would “migrate” to the new category of personal property recognised in the Bill. While it may be likely that such property will remain in the categories to which they have previously been allocated, this could undermine the coherence of the categories. There is scope for courts to re-draw some taxonomical lines or to provide more certainty regarding categorisation, where this is currently ambiguous.

[13] Many other matters will require to be determined in the years ahead. Leaving various issues unaddressed and undetermined could be viewed as a negative consequence through omission.

1. **How could the Bill be improved? How should it be amended to achieve this?**

[14] The answer to this depends on whether there is satisfaction with the Bill’s current purpose or whether there is a desire to make it more expansive and ambitious. Some relevant points have already been mentioned above. We do not think it is desirable to create a code for digital assets; however, targeted legislation on digital assets may have been more useful than the current Bill. Cryptoassets and/or other digital assets could be identified as property within a particular category (even if the category was wider) and there could, for example, be a (potentially non-exhaustive) list of indicative features. More modestly, there could be a statement that just because property is not a thing in possession or thing in action will not mean that it does not have some characteristics of such property. It could also be provided that relevant rules for those other property types may also apply to property in that third category.

[15] The Scottish Government is consulting on various issues relating to digital assets in Scots private law, such as definitional questions, including limiting characteristics, rules of transfer, good faith acquisition and more. It may be that any legislation emerging from this will be relatively brief but we still expect it to be more extensive and detailed than this Bill. To some extent there is a greater need for legislation in Scotland given the absence of case law, especially in comparison to the fairly sizeable volume in England and Wales, and the issues in the two jurisdictions may differ somewhat, for example the question of characterisation may be less of an issue in Scots law. We are also aware of the Law Commission’s reasons for their approach to the legislation (see e.g. Law Commission, *Digital Assets as Personal Property: Supplemental Report and Draft Bill* (Law Com No 416, 2024) para 3.24). However, some of the issues being considered in the Scottish Government’s consultation could have been usefully addressed for England and Wales in the present Bill, along with perhaps remedies and enforcement mechanisms for digital assets.

[16] The Law Commission has done a lot of excellent work in relation to digital assets and it seems unfortunate that this will not be suitably reflected in legislation. Presumably, courts will seek to rely on the Law Commission’s work when determining what constitutes a property object and which category it should fall within, including when interpreting this Bill once passed. This of course will raise questions about the value and permitted usage of the Law Commission’s statements regarding such matters.

[17] There remains a need for a bespoke regime for digital assets, much as has been constructed for e.g. intellectual property, and that is so whether digital assets are regarded as a type of thing in action or as belonging to some third category. Perhaps the Bill will encourage the courts to develop the law in this area further in a coherent way but the opportunity to create more certainty and to give judges legislative direction has been rejected. In addition, disputes relating to digital assets may not necessarily be brought before courts because of the litigation cost involved for the parties and/or the tendency of the parties to resolve disputes (particularly commercial disputes) out of court. Furthermore, given the global nature and reach of digital assets, such disputes may not necessarily be brought before courts in England and Wales (even if English law would be the law governing the dispute and this Bill, once passed, would be applicable as part of that law). Given these considerations, common law development of this third category of personal property left by the Bill to the courts may not happen anytime soon. A more expansive Bill in its scope would be preferable from this perspective too.

1. **Should the Bill have retroactive effect?**

[18] We are not usually in favour of legislation having retroactive effect. However, we would be willing to support it in relation to this Bill. It seems to be merely clarificatory and confirmatory, and continues to give courts a large degree of flexibility. It may be highly artificial and complicated if different rules were to apply to the same type of property before and after the introduction of the legislation.

1. **What implications could the Bill have for the development of this area of common law, both in England and Wales and in other legal jurisdictions?**

[19] We reiterate our comments above in relation to the courts and judicial decision-making. We also suspect that the Bill may have an impact on legal developments in other jurisdictions, especially in the Common Law world. We anticipate that this will be true in relation to cases and legislation.

[20] As we have already mentioned above, the Scottish Government is consulting on digital assets in Scots private law. The work of the Law Commission (of England and Wales) has been influential in terms of the recommendations proposed by the Scottish Government’s Expert Reference Group on Digital Assets. The passing of the Bill will likely serve as further motivation for the passing of legislation in Scotland in the relatively near future. Scots law does not face the same categorisation issues as English law but does have an absence of authority on digital assets and more uncertainty in relation to them, and lower prospects for a stream of illuminative cases. As such, any legislation is likely to differ from the Bill in terms of substance and approach.