

Written Evidence by Mr Quentin B. Schaefer Mr Linus J. Hoffmann (DAE0021)

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1. We are writing to respond to the Call for Evidence by the House of Lords' Property (Digital Assets etc) Bill [HL] Special Public Bill Committee.
2. We are legal academics teaching and researching in the areas of law and technology, private law, internet law, and competition law. Further details on our qualifications and prior work are available on the internet. We write in our personal capacity.

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

3. The bill is likely to increase legal uncertainty in the context of digital assets. On this basis, we would favour the amendment of the bill in order to restrict its application to cryptoassets, failing which it should not be passed into law.
4. Our opinion is based on the consequences of the application of the Bill to digital assets beyond cryptoassets. The explanatory notes of the Bill seem to indicate that the intention of the bill is to enable the common law to allocate personal property rights to a substantial range of digital assets beyond cryptoassets. In our view, this is doctrinally and consequentially unjustified.
5. It is fundamentally appropriate to preserve the common law in this area. There is no obvious deficiency in the way that the common law treats personal property that would require the substitution of a

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statutory framework for common law principles. A comprehensive statutory framework is unlikely to solve more issues that it will create.

Question 4: Do you think that the Bill, in its current form, is necessary and effective?

6. In so far as the bill applies to cryptoassets, the bill is desirable and effective, though likely not strictly necessary. In so far as the bill applies to digital assets, the bill is neither desirable nor necessary nor effective.
7. Cryptoassets can have enormous value and the common law should, in appropriate cases, provide for remedies that sanction the misappropriation of such assets. We endorse the idea in the Law Commission's report and previous government reports (e.g. the 2018 Cryptoassets Taskforce report)⁴ that the UK will benefit economically from becoming a favoured jurisdiction for the development and deployment of products and services in involving cryptoassets.
8. The bill is not *per se* necessary to achieve these aims; the common law as indicated by the High Court's holdings in *AA v Persons Unknown*⁵ and *D'Aloia v Persons Unknown*⁶ and the Court of Appeal in *Tulip Trading*⁷ seems to be generally willing to accept the nature of cryptoassets as personal property.
9. Nonetheless, the bill may speed up this process and avoid unnecessary litigation on the point. The bill prevents the courts

⁴ Joint Bank of England, Financial Conduct Authority and HM Treasury, Cryptoassets Taskforce: final report (October 2018).

⁵ [2020] EWHC 3556 (Comm).

⁶ [2024] EWHC 2342 (Ch).

⁷ *Tulip Trading Ltd v Van Der Laan* [2023] EWCA Civ 83. See also UK Jurisdiction Taskforce of the LawTech Delivery Panel, *Public consultation—The status of cryptoassets, distributed ledger technology and smart contracts under English private law* (May 2019) [59].

from going back to the view of Fry LJ in *Colonial Bank v Whinney* that no '*tertium quid*' exists in the law of personal property beyond the two categories of things in action and things in possession,⁸ which may create an undue impediment for the recognition of rights in cryptoassets beyond those that subsist in information.

10. The Law Commission has set out three intended effects as examples for the result of the bill: Allowing for proprietary and freezing injunctions to be ordered; allowing digital assets to be subject to the rules governing insolvency and succession; and allowing remedies to be granted for the misappropriation of digital assets.⁹
11. The common law has already recognised cryptoassets as a form of intangible property capable of being subject to a proprietary or freezing injunction.¹⁰ It seems to us that insolvency is unlikely to create issues given the broad definition of 'property' in s436 of the Insolvency Act 1986.¹¹ The primary purpose of the bill therefore concerns the availability of remedies of misappropriation of such assets. Among other issues, the common law seems to have trouble applying the doctrines of conversion and trespass in the absence of the characterisation of cryptoassets as a '*tertium quid*' and we recognise that the bill would direct the common law's development and prevent issues from arising on this point. For this reason, we see the bill as desirable and effective in this context.
12. For the reasons set out below, we do not believe that this should extend to digital assets generally. In so far as the bill is

⁸ (1885) 30 Ch D 261.

⁹ Law Commission of England & Wales, 'Digital assets as personal property: Supplementary report and draft bill' (2024), para 1.14.

¹⁰ *AA v Persons Unknown* [2020] EWHC 3556 (Comm).

¹¹ See *Swift v Dairywise Farms Ltd (No. 1)* [2000] 1 WLR 1177 (recognising a milk quota as property within the meaning of s436).

worded to include digital assets generally, we do not consider it desirable and effective.

Question 3: Would the Bill have any negative or unexpected consequences?

13. The bill is likely to have negative or unexpected consequences in the context of digital assets and the bill's use of the term 'thing'.
14. The terminology of 'thing', as in 'thing in action' or 'thing in possession', has replaced the traditional terminology of 'choses', at least since the Law of Property Act 1925. From this perspective, the choice of the term 'thing' is elegant drafting. Nonetheless, the unbounded nature of the concept of 'thing' is detrimental to the certainty intended to be provided by the bill.
15. Whether a tangible or intangible is subject to 'property' rights currently does not turn on whether it is also a 'thing'. Of course, it is linguistically difficult in English to refer to 'something' that attracts property rights without characterising it as a thing. Nonetheless, in cases at the margin, particularly as applied to digital assets, the characterisation as a 'thing' may give rise to litigation on the interpretation of the Bill. The use of the term 'thing' may even complicate the recognition of third category cryptoassets if 'thing' is given a restrictive meaning by interpretation.
16. Formally recognising a broad category of '*tertium quid*' for any asset, including the range of digital assets set out in the Bill's explanatory notes would be detrimental to legal certainty.
17. We harbour some doubt whether cryptoassets fit into the existing '*tertium quid*' category. Whereas most markets are created by demand and supply (and often regulated by law) (and this includes cryptoassets), in these cases the market is created in its

entirety by the intervention of the state, with quantities (and sometimes prices) set by the state to achieve public policy goals, e.g. a lessening of carbon emissions in the context of European Union carbon emission allowances (EUAs).¹² Such entitlements need not be transferable.¹³ A number of other types of 'property' have been analysed as belonging to the 'tertium quid', e.g. vehicle registration marks.¹⁴ The existing cases that purport to create a third category cited in the Bill's explanatory notes¹⁵ are therefore cases in which the state creates entitlements as well as markets that would otherwise not exist.¹⁶ In the case of cryptoassets, markets have been created and are largely efficient without government intervention. The bill preserves the common law's ability to categorise personal property entitlements, which may lead to a sui generis characterisation of cryptoassets, rather than belonging in the same category as many of the 'tertium quid' cases. In any event, the 'tertium quid' cases have been subject to significant criticism, largely for good reason. This is not to say that categorising cryptoassets in such a way is anathema.

18. The explanatory notes¹⁷ and the Law Commission's report seek to allow the law of personal property to extend to digital assets more broadly, though merely by allowing the common law to expand.

19. It is uncontroversial that property rights (generally) attach to the media on which a digital file is recorded, e.g. a hard drive. Information has, at times, characteristics of property. This has led

¹² *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156.

¹³ *Swift v Dairywise Farms Ltd (No. 1)* [2000] 1 WLR 1177.

¹⁴ Considered in *Goel v Pick* [2006] EWHC 833 (Ch); see also Michael Bridge, Louise Gullifer, Gerard McMeel, and Kelvin FK Low, *The Law of Personal Property* (3rd Edition, Sweet & Maxwell 2021) [1-069] (opining that vehicle registration marks constitute personal property).

¹⁵ Explanatory Notes for Property (Digital Assets etc) Bill [HL] as introduced in the House of Lords on 11 September 2024 (HL Bill 31), fn 1.

¹⁶ See also *A-G of Hong Kong v Chan Nai-Keung* [1987] 1 WLR 1339 (export quotas); *Re Celtic Extraction Ltd* [2001] Ch 475, [2000] 2 WLR 991 (waste management licences).

¹⁷ Explanatory Notes, paras 6-7.

the courts to, incorrectly, consider information as subject to property rights in a number of cases. Recent case law has departed from this position.¹⁸ It has been doubted by the Court of Appeal that databases can constitute personal property, at least for the purposes of a common law lien.¹⁹

20. All these entitlements are artefacts of the regulatory intervention of the State. Personal property and its effect on third parties may become problematic in a context where it is principally the State that assigns entitlements, revokes them, and influences the market mechanism for public policy goals.
21. Other candidates for third category 'things' beyond cryptoassets may arise in the digital economy, where existing private law and regulation and strong *de facto* control can substitute property rights. For example, e-mail accounts are governed by contractual rights and data protection laws. Domain names are governed by the ICANN registry system. Personal data is governed by data protection laws. Databases are governed by *sui generis* database rights. Assets in games can be protected by technology itself, e.g. DRMs.
22. Contractual entitlements, tortious duties, the law of unjust enrichment, and technological means of control will generally be sufficient to effectively protect the value emanating from digital assets.
23. The problem with the open-ended nature of the notion of 'thing' is that it might open the door to an excessive propertisation of yet unknown assets, though merely by allowing the common law to extend the law of personal property to these new assets.²⁰ We

¹⁸ See Michael Bridge, Louise Gullifer, Gerard McMeel, and Kelvin FK Low, *The Law of Personal Property* (3rd Edition, Sweet & Maxwell 2021) [1-071].

¹⁹ *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281.

understand that the bill will not by itself open the door to propertisation. We nonetheless would consider the bill to be unnecessarily broad because it gives rise to claims to property before the courts in a number of cases in which such property has either no beneficial effects or indeed some adverse effects. A general issue in this context is the so-called 'tragedy of the anticommons' where the excessive creation of fragmented property rights over an asset or resource leads to its under-utilisation.²¹

24. Another issue could be the ease with which dominant digital companies, through their *de facto* control over digital assets like web traffic or the predicted interaction between platform users, might be able to convert that control into formal property rights.

25. In sum, the law ought to protect the owners of cryptoassets against their misappropriation, but should not encourage the propertisation of other assets.

26. We understand that the bill will not by itself open the door to the propertisation of all the things in the explanatory notes. We nonetheless would consider the bill to be unnecessarily broad because it gives rise to claims to property before the courts in a number of cases in which such property has either no beneficial effects or indeed some adverse effects.

27. Further, recognition of subject matter as 'property' imports a general deference in English law generally to 'property' which is ultimately based on constitutional and quasi-constitutional protections, for example Article 1 of the First Protocol of the ECHR which obligates the state not to deprive a holder of personal property rights without compensation (unless in exceptional

²⁰ Explanatory Notes, paras 6-7.

²¹ Michael A Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 Harvard Law Review 621.

circumstances) and which is incorporated into the law of England and Wales by the Human Rights Act 1988.

Question 4: How could the Bill be improved? How should it be amended to achieve this?

28. The bill ought to be confined to cryptoassets. While substituting appropriate wording is likely to give rise to issues of interpretation as to which assets constitute 'cryptoassets', such uncertainty is preferable to that created by the broad wording of the Bill as drafted and in so far as it extends to digital assets generally.
29. We suggest the following alternative wording for section 1 of the Bill: "A cryptoasset 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."
30. Alternatively, the term 'crypto token' may be utilised.
31. The title of the Bill should be amended accordingly.

Question 5: Should the Bill have retroactive effect?

32. The bill need not make provision for retroactive effect since it, in effect, has no effect beyond allowing the common law to develop. Since the bill preserves the common law position, retroactivity of the application of judgment is a matter for the common law. Previously litigated matters will be covered by the principle of *res judicata*.

Question 6: 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?

33. See answer to Question #3.

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