Property (Digital Assets etc) Bill
Briefing for Peers – Second Reading

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The Bill

The MOJ's Explanatory Notes[1] contain a very good summary of the background and legal effect of the Property (Digital Assets etc) Bill. We have distilled the relevant legal background and provided some observations below.

Legal background

Whether something is treated by the law as "property" (strictly, in lawyers terms, an "object of property rights"[2]) has considerable consequences, for example, in relation to succession on death, the vesting of property in personal bankruptcy, and the rights of liquidators in corporate insolvency, as well as in cases of fraud, theft or breach of trust.

Over a number of years, the courts have developed legal tests for ascertaining whether something is property or not. In particular, Lord Wilberforce said in the 1965 case of *National Provincial Bank v Ainsworth*[3], that, "Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

Property is divided into various categories. "Real property" is land, and interests in land. "Personal property"[4] has been traditionally sub-divided into two categories, called "things in action", and "things in possession".[5] Things in possession are things which can be possessed – necessarily physical, tangible things. The category of things in action has, over the years, been something of a catch-all, but includes non-tangible things which can be enforced by legal action. Examples include shares and debts.

In the 19th century case of *Colonial Bank v Whinney*,[6] Fry LJ said: "All personal things are either in possession or in action. The law knows no *tertium quid* [third thing] between the two." From time-to-time, people have argued therefore that if something is not a thing in action, or a thing in possession, it cannot legally be property at all.

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[1] https://bills.parliament.uk/publications/56208/documents/5089
[2] Hence the language in clause 1 of the Bill.
[3] [1965] 1 AC 65.
[4] strictly, "personal chattels".
[5] In older language, and some of the literature, "choses in action", and "choses in possession".
[6] (1885) 30 Ch D 261 (CA), 285.

There have, however, also been suggestions that notwithstanding what Fry LJ said, there is indeed a "third category" – personal property which is neither a thing in possession nor a thing in action. For example, the Theft Act 1968, the Proceeds of Crime Act 2002, and the Fraud Act 2006 all define property (for their own purposes) as including things in action "and other intangible property". The Patents Act 1977 says that a patent or application for a patent (which is clearly not a thing in possession because it is not tangible) "is personal property (without being a thing in action)". Some legal cases have also supported this idea.

The advent of cryptoassets, such as Bitcoin and NFTs, posed particular questions -– they are intangible, but commercial markets viewed them as property. Because of the particular nature of the novel technologies, they could fulfil Lord Wilberforce's test of being "definable, identifiable by third parties, capable in [their] nature of assumption by third parties, and have some degree of permanence or stability". But they were not easy to fit within the existing category of things in action – not least because they cannot normally be 'enforced by action' – there is generally no-one to sue (unlike, for example, in the case of a simple debt).

Perceived market uncertainty concerning this and other questions led in 2019 to the UK Jurisdiction Taskforce's[7] public consultation and subsequent Legal Statement on cryptoassets and smart contracts.[8] The authors[9] concluded that English common law is well able to deal with technological developments and it has an impressive track record of doing so, and that cryptoassets could indeed be categorised as property, notwithstanding Fry LJ's comments in *Colonial Bank*.

The Legal Statement's analysis has now been adopted by the English Courts, and several courts elsewhere in the world, and the proposition that a cryptoasset can be the subject of proprietary legal remedies now appears to be well-established in this country.

In "Digital Assets: Reforming the Law" (June 2023) the Law Commission considered whether the law nevertheless needed reform. According to the Law Commission, various members of the judiciary, including senior and specialist judges, expressed support for a statutory confirmation of what they saw as the existing common law position. This point was subject to significant discussion and received broad support. The Law Commission favoured a minimalist approach, and considered that a statutory confirmation would provide greater legal certainty and would allow the law to develop from a strong and clear conceptual foundation: "It essential that the law keeps pace with evolving technologies and this legislation will mean that the sector can maintain its position as a global leader in cryptoassets and bring clarity to complex property cases".

Conclusion

The Bill adopts the above outlined approach. It is extremely short, and merely confirms what is already considered to be the position,[10] namely that there are not only two categories of personal property — a thing may still be property if it is not a thing in possession or a thing in action. In short, it allows, but does not oblige, the courts to decide in appropriate cases that other types of things can

[7] The UKJT is one of the task forces established by The LawTech Delivery Panel, set up by the UK Government, the Judiciary and the Law Society of England and Wales with the overarching objective of promoting the use of technology in the UK's legal sector. The UKJT is one of six taskforces established by the LTDP, for the purposes of promoting the UK jurisdiction. It is chaired by the Master of the Rolls, Sir Geoffrey Vos.

[8] https://lawtechuk.io/our-reports/

[9] Lawrence Akka KC, David Quest KC, Matthew Lavy KC and Sam Goodman.

[10] The press release at https://www.gov.uk/government/news/new-bill-introduced-in-parliament-to-clarify-cryptos-legal-status is therefore incorrect – the Bill does not "mean that for the first time in British history, digital holdings including cryptocurrency, non-fungible tokens such as digital art, and carbon credits can be considered as personal property under the law." This was the view of the common law in any event, and the Bill merely confirms the position.

be personal property. Although its genesis was the advent of cryptoassets, it deliberately does not mention cryptoassets or say how they should be categorised, nor is its scope restricted to them. There is a significant risk that statutory definitions in this fast-moving area will be out-of-date before they are published, and the flexibility of the common law is better placed to address specific cases.

It therefore remains open to the courts, on a case-by-case basis to develop the law in this area, and to define the boundaries of personal property, as they always have. In our view, the Bill is important and elegantly drafted, and ought to be uncontroversial.

The Bar Council
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