HOUSE OF LORDS

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

Corrected oral evidence: Property (Digital Assets etc) Bill [HL]

Thursday 9 January 2025

2.35 pm

Watch the meeting

Members present: Lord Anderson of Ipswich (The Chair); Lord Bassam of Brighton; Lord Holmes of Richmond; Lord Shamash; Viscount Stansgate.

Evidence Session No. 5 Heard in Public Questions 59 - 67

Witness

I: Professor Sarah Green, Professor of Private Law at The University of Bristol, and Head of Digital Assets and Trade Finance at D2 Legal Technology

USE OF THE TRANSCRIPT

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Examination of witness

Professor Sarah Green.

Q59 **The Chair:** Welcome to this further evidence session of the special Bill Committee on the Property (Digital Assets etc) Bill. I am very pleased to welcome back Professor Sarah Green. You have given evidence to us once already, but this is your return visit. Would you like to start by explaining once again, for the record, your affiliations and the authority that you may have to speak on behalf of the Law Commission in this matter?

Professor Sarah Green: Of course. I was the Law Commissioner for commercial and common law from 2020 to 2024. The project that culminated in this Bill, as well as the final report that this Bill is attached to, was completed entirely during my tenure. So this Bill is something that I worked on from start to finish.

I have now left the Law Commission and am a professor of private law at the University of Bristol. I am also the head of digital assets and trade finance at D2 Legal Technology.

The Chair: Thank you very much indeed. As you know, we have received evidence from a range of witnesses, both orally and in writing. I hope that you have been able to watch some of the oral sessions and read some of the written evidence. I should say that not all of it has yet been published on our website, but we hope that that will happen soon.

Some of the evidence was supportive of the Bill. Some was critical, for a variety of reasons. Just as a short opener, can you give us an overview of whether you think there is any merit in any of the criticisms of the Bill that have been made? Also, do you think there is any merit in any of the amendments to its wording that have been suggested?

Professor Sarah Green: None of the arguments I heard during the oral evidence sessions, and nothing I have read, were a surprise to me at all. They are all arguments and points that were made to us during our two consultation processes. As I think I made clear before—if I did not do so, it is certainly worth me doing so now—this was a three-year project at the Law Commission. We had a team working full-time and two sets of consultation. We did hear, of course, arguments that did not support this final recommendation, of which at least two or three were made in the oral evidence sessions. So they are not a surprise to me. They were, during that consultation process, significantly outweighed by other views that were supportive of the Bill. It is not just about the Bill; it is also about the final report and the analysis therein, as well as the Law Commission's ultimate position.

The Chair: We will see how much you want to add to what you have told us before. Do not feel obliged to go over old ground if you feel it has been adequately covered, but we have a number of questions on what we have heard.

Q60 **Lord Shamash:** Some people have told us that the Bill is unnecessary on the basis that all it does is preserve the dictum in the 1885 case of Colonial Bank v Whinney, with which you might be familiar, that the courts plainly do not treat the dictum as binding in any way. Can you summarise what you think is achieved by persisting with the Bill in these circumstances?

Let me just add a little addendum to that. Some have suggested that it is worth legislating almost regardless of the Bill simply because it is important that the UK is seen to be doing something in this field. Is that indeed a justification for the Bill? You have two limbs to answer on here.

Professor Sarah Green: That is certainly not the main justification for the Bill, in the Law Commission's view. This is not to say that passing a Bill of this nature would not be a positive signal to the world but, in the Law Commission's view, that is definitely auxiliary to the main point: dispelling the uncertainty over the Whinney dictum that you referred to. To some extent, I take the point that the dictum in that case is not strictly binding, but the point is that, in practice, it has proven itself as being regarded as important, significant and authoritative. In fact, in common-law development both in this jurisdiction and elsewhere in the common-law world, it appears to be a barrier to the development of the law, which, as result of that dictum, is being limited into the dichotomy to which that dictum refers: things in action and things in possession.

Lord Shamash: Can you just explain to me what you meant by "barrier"?

Professor Sarah Green: The way in which that case has been interpreted and used, and the effect it has had, is that, if something is not a thing in action or a thing in possession, it cannot be the object of property rights. Also—this is more important in terms of what the Bill does—those categories are exhaustive. So, if the court decides, "Actually, we do want this thing to be the object of property rights", which seems to be the way common law is going across most common-law jurisdictions, it has to shoehorn the asset into one of those classifications. That is the mischief the Bill seeks to remedy: there is no need to do that because this dictum is not something that should continue to stultify the development of the common law.

Lord Shamash: The second part of my question was, "Should we be legislating regardless?" Do you have an answer on that?

Professor Sarah Green: No—I am so sorry; I thought I had answered that part first. I do not think that we should be legislating regardless. I do not think that this Bill is simply a symbol to the world. I think that it does more than that: it addresses a substantive mischief. However, as I said, I think at the same time that, as an auxiliary effect, it gives a very good signal to parties that we have looked at this issue in great depth, that we have considered it and that we are aware that the law needs to change in order to adapt to these digital assets.

The Chair: On your point that Colonial Bank v Whinney has a surviving influence, and perhaps requires judges to shoehorn types of property into the existing categories, what is your reaction to those who have told us about recent authorities that seem to suggest that judges feel more freedom than that? I shall give you four examples: Swift v Dairywise in 2000 about milk quotas; Re Celtic Extraction Ltd in 2001 about waste management licences; Armstrong v Winnington Networks in 2013 about carbon emission allowances; and Tulip Trading v van der Laan in 2023 about Bitcoin. Some witnesses have suggested to us that those are signs of the common law being vigorously developed by judges who have not felt Colonial Bank v Whinney to be a barrier, and who have not felt obliged to shoehorn novel types of property into ancient categories. I wonder, with specific reference to those cases, what your reaction is.

Professor Sarah Green: In those cases, as we say in the report, this Bill recognises the development that has already certainly begun in common law. This is an important point: there is now little doubt that the law of England and Wales recognises that things can be property—or can be the object of property rights, I should say, to be strictly accurate about it—despite the fact that they do not easily fit within one of those categories. What has not yet been fully worked out, because it was not the subject of the questions in those cases, is exactly what the consequences of the classification should be and how those things are therefore treated. So, in terms of remedies or in terms of the analysis beyond saying "This thing can be the object of property rights", there is a difficulty, particularly with digital assets.

Although the Bill is certainly not limited to digital assets, the problem that we have seen in the common law has been that digital assets are regarded as intangible. Once something is regarded as intangible, because of the way that the common law has developed to date, there is a tendency to think that those things must therefore be treated as things in action but, where digital assets are concerned, that is not always going to be the most effective classification. The consequence of that is that they will then be treated the same way as other things that are things in action, which are pure, old-fashioned, conventional things in action, such as debts. That is a treatment that will not be appropriate in all circumstances for digital assets. I saw and heard some of the objections that were presented to you in the oral evidence sessions, saying that the Bill will cause problems because it will stop courts regarding digital assets as things in action when they should be seen as things in action.

The Chair: We might come on to that, if you do not mind. I am keen to keep separate the arguments that the Bill is pointless, which is what we are dealing with now, from the arguments that it is actively harmful, which we might come on to.

Before we finish with the authorities that I put to you, are you saying that there are decided cases in this jurisdiction that would have been decided differently over the last 20 to 25 years if this Bill had been in place? Or are you saying that cases such as those that I referred to might have been decided more easily, perhaps with less argument and less expense, if the Bill had been in place? Or is it difficult to say that it would have made any difference to the way that the courts have decided things?

Professor Sarah Green: In the early cases that you referred to, because they do not refer to digital assets, the questions were not so dependent on a classification between things in action and things in possession. I think more recent cases, and those that concern digital things and digital assets in general, would have been decided more cleanly and efficiently. There have been a couple of references to this. Lord Justice Moore-Bick, in a case called Datateam, specifically said, when he was trying to decide how a database should be treated for the purposes of property law, that these arguments are very convincing but it is quite a leap for the common law to make, and it would be helpful to have a steer from Parliament or from the Law Commission. As I have already made clear, and hopefully we have made clear in our written evidence, this is a request that came direct from the senior judiciary when we were discussing with them our final report, which is basically a framework for analysis on which the common law could be based. We said, "Are you happy with this as an approach?", and they said, "We are, but it would be helpful to have this unlocking provision that would make the decision a nice, clean, efficient one".

The Chair: I wanted to ask you about that. It is very helpful to be told what the senior judiciary were asking for; I am conscious of the sensitivities that they feel about expressing a view publicly on matters of policy. Indeed, this committee has not been successful in persuading members of the judiciary to come and give evidence to us, and I entirely understand that there may have been good reasons for that. Can you tell us the most up-to-date expression of judicial opinion that you know of, and from what source precisely does it come?

Professor Sarah Green: Do you mean in terms of case law?

The Chair: No, in terms of attitude towards this Bill. You have been praying in aid the approval of the judiciary, and I would like chapter and verse on that. Which judges have said that they approve the Bill and when did they say it? That is what I would like to know.

Lord Shamash: Also, in what form did they say it?

Professor Sarah Green: It was at a formal Law Commission round table during the lead-up to the publication of our final report. So we have round tables at the commission with stakeholders from a number of backgrounds. We have academic round tables, legal practitioner round tables, technology round tables—with all our stakeholders. We hear from businesses and, as part of the project, we regularly have round tables with the judiciary.

The Chair: That was your final report of 2023, was it?

Professor Sarah Green: Yes.

The Chair: And they were prepared to be on the record as approving the Bill?

Professor Sarah Green: Yes, we checked with them before we put that in.

The Chair: What about the amended version of the Bill as published with your supplemental report in July 2024? Is there an expression of judicial approval or otherwise in relation to that?

Professor Sarah Green: As far as I know, we have not heard anything one way or another about the exact drafting of the Bill.

The Chair: That is most helpful, thank you.

Lord Bassam of Brighton: Where would we go if we wanted to get some more up-to-date intel from the judicial world? Is there someone we should invite to come to one of these sessions, notwithstanding the reluctance?

The Chair: We have tried. That is probably all we can say about that; in fact perhaps I have said too much already. One could understand if judges were unwilling to comment in public on laws that they might have to apply. That is why it is very useful to know from you, Professor, what they have said in the past.

Professor Sarah Green: It was probably because at a round table it was not a case of putting individuals on the record, which would be difficult for them when they are then deciding a case that is based on that statute. So I could not give you individual names, but definitely a majority of the people at that round table said they would find this sort of provision very helpful.

Lord Shamash: Were the people who were there mainly judges?

Professor Sarah Green: They were all judges, from High Court to Supreme Court, I think—or at least they were invited. I would have to check. Certainly High Court and Court of Appeal judges were present.

Lord Shamash: What is the status of that meeting? Is it all minuted or is it Chatham House?

Professor Sarah Green: No, it is minuted.

Lord Shamash: Could we see those views?

Professor Sarah Green: I imagine so.

Viscount Stansgate: Perhaps we could sort out the minutes. You see where I am going. If it is minuted, then individual views would be attributed to individual judges.

Professor Sarah Green: I suppose it would depend how it was minuted.

The Chair: We had probably better move on. Having said that, as you have heard, the committee would be interested to see the minutes, so if there is any way that we could then, please, we would like to do so.

Q61 **Lord Holmes of Richmond:** Professor Green, I want to take you to the evidence that we received from Professor Stevens, who was critical of the Bill, suggesting that it signalled that the UK recognised, as he described them, socially harmful cryptocurrencies and that the UK was open for business for such currencies. What is your response to that criticism?

Professor Sarah Green: The first point to make on that is that this Bill is not just about cryptocurrencies. It covers digital assets that are of a far broader nature than cryptocurrencies, such as tokenised securities and dematerialised bonds—basically, products that are now very much mainstream. They are used by central banks, the Bank of England and mainstream banks. It is simply not the case that the Bill is about nefarious, old-school cryptocurrencies. That is the first point to make; it was made very clearly in our final report.

However, there is another point to make here: even if this Bill were about the property interests that relate to cryptocurrencies—it absolutely is not—which, as I remember, were described in the oral evidence session as "evil", that is no reason not to think about how property rights in relation to them are treated. We do not do that legally with anything else that we find difficult or potentially harmful. This is more of a reason to establish very clearly what the property rights are in relation to them, I think.

The final point I would make is that an asset cannot be inherently evil, good or bad. For instance, cash is obviously used for a whole host of nefarious purposes on a daily basis, and we do not shy away from outlining what the property rights are in relation to cash. That is my response to that, but the main point to emphasise is that this Bill is not just about cryptocurrencies. Sometimes it is a bit unfortunate that the media has portrayed this as a crypto Bill, in the sense of cryptocurrencies, but it is far broader than that.

Lord Shamash: Would you regard a database as a digital asset? You touched on this earlier, I think.

Professor Sarah Green: It certainly could be. I think you would call a database a digital asset, in generic terms. Whether or not it would attract certain property rights would depend on the nature of the database, the way it was developed on a platform and the way a party has used it. The whole point of the analysis we put forward in the report, in terms of what the Bill achieves, is that we do not predetermine the proprietary classification of anything in a generic sense because it depends so very much on what individual parties do in a particular arrangement and the way in which a digital asset is formulated and used. So, to answer your question, yes—potentially.

Lord Bassam of Brighton: If you have an app and it is, obviously, reliant on data, would its owner then have property rights?

Professor Sarah Green: That would depend on the nature of the app. In most cases, yes.

Lord Shamash: Just to develop that point, Lord Bassam is a keen Brighton

& Hove Albion fan. If all of the fanbase was in a database owned solely by the club, surely that would be a substantive digital asset; it has acquired and agglomerated it over a period of time. Lord Bassam and others who support Brighton & Hove Albion—for whatever reason—would be part of that database, would they not? Surely that must be a digital asset in that situation.

Professor Sarah Green: You could put it within digital assets. If you have a database, it depends on what it is you are trying to protect and the nature of your interest. I should start on the point you are making about data. Pure information—that is, pure data; this is an important distinction—is not something that the law treats as the object of property rights when it is just information in itself. This is because it is not something that can be transferred. Obviously, if I have an idea in my head or I know a name and address and I tell it to you, you now have that information but I also still have it.

The point about the property rights coming out of this Bill that we are talking about is that property needs to be something that can be fully divested on transfer. The database is not necessarily so much of a problem, depending on how the pure information is held, but the data is a separate issue. However, most of the time, with that sort of information, you do not want these kinds of property rights; they are not what you need to protect it. You want these kinds of property rights when what you have is an asset that can be fully transferred. Say you have an asset in your online wallet and somebody else hacks your wallet: if they take that asset out of your wallet, you no longer have it. It is not like information; it is completely removed from your wallet. That is the sort of protection personal property rights give.

Lord Shamash: Give me time; I just want to thrash this out in my head. Let us say we have a database of all Brighton & Hove Albion's members. It has taken time to acquire that information. It is then in a position to use that membership to sell scarves, hats, tickets or something else. That is of enormous value to the club, is it not? Why would it not be a property asset? Surely it must be so.

Professor Sarah Green: I am not saying that it is not a property asset; I am just distinguishing between the different types of property rights. Information qua information cannot be completely removed—that is the point—but it is certainly a digital asset.

Lord Shamash: Thank you; sorry about all that.

Viscount Stansgate: Without introducing another football club, suppose an individual has a spreadsheet that they email to members of their family and which contains a huge range of data. Is that not an asset that might, depending on the nature of the information, be considered an asset in a family context? If someone died and the question of what to do with it arose, who owns it and so on, could this Bill be drawn into that situation?

Professor Sarah Green: No. In relation to both of those things, the law already protects those interests. We do not need the Bill for them; that is an old-school problem, if you like. When we are talking about that sort of pure information, there are other things in the law that already protect against that. This Bill deals with a whole new problem where what you have is a novel asset, in legal terms.

This is why this problem and the legal problem have come about: in the past two decades, we have gone from having electronic and digital information that is pure information, in a sense, to having electronic and digital things that are not like information, in a sense, because they are fully removable, transferable and divestible. That is exactly what gives rise to this problem. Those sorts of old-school digital assets, if you like, are already protected by the law; they do not need this new change and law reform.

Q62 **Lord Holmes of Richmond:** On that—tempting though it is to mention Aston Villa, I will leave you to ponder that one—I want to bring us to the actual issue here. As you rightly suggest, it is much broader than so-called crypto assets or cryptocurrencies. When you considered all of the asset types that would fall under this Bill—people have made points about databases—in terms of putting them into asset classes, such as wallets and other holding formats, what were the most tricky assets and most tricky holding or custodial arrangements that you came across, where you thought, "This is getting to the edge of the simple consideration set out in the Bill"?

Professor Sarah Green: There were a number of questions that came up or that we anticipated would come up. For instance, you mentioned custodians and omnibus accounts, where custodians hold a selection of assets all in one account rather than having individual accounts for individual holders; they put them all in one account, which is a fairly common custody arrangement. We recognised that that would obviously give rise to questions about, for instance, whether you can have trust property in those assets.

But there are two points: one is that that is a problem that needs to be worked out by the common law, but it is not one that is exacerbated by an asset being digital. This is one of the reasons why we wanted the Bill to be a very short, sharp unlocking provision which would then allow the common law to develop. The idea of trying to set out in statute when a trust would arise and when it would not is unhelpful, would be incredibly difficult to draft, and that is just not the way that English law works in relation to conventional assets. So it does not seem very sensible at all to try to do it in relation to digital assets, which of course by their very nature will evolve more quickly anyway.

That was one of the tricky questions that we knew would arise, but as I said, it is not a question that is tricky because these assets are digital; it is a legally tricky question anyway. That is certainly something that we said in the final report. I noticed that this was brought up in one of the oral evidence sessions, and I think the point was made that the Law

Commission had not considered it. We absolutely did consider it, it is in the final report, and we said—some of the other submissions to this committee have said the same—that there was no reason why a trust cannot be taken over an omnibus account of fungible assets and that it would simply be on the basis of an equitable tenancy in common, which is exactly what happens with conventional assets. So that is a tricky question, but as I said, I do not think it is exacerbated by the fact that these assets are digital. The questions are about whether they are fungible and interchangeable as a matter of legal interest.

Q63 **The Chair:** Thank you very much. Some witnesses, as you have seen—this is familiar ground for you—have expressed the view that the Bill nudges the courts in the wrong direction by implying that a new category of property rights is needed, or indeed categories of property rights; the Bill is not clear. Just to give you a flavour, you will have seen the speech by Justice Jackman in Australia in June 2024, which concluded that under Australian law there is no impediment to treating cryptocurrency as a chose in action, and that approach was endorsed in the decision of the Supreme Court of Victoria in the Blockchain Tech Pty Ltd decision in 2024. You have seen decisions of the Singaporean court as well.

So, while I understand entirely the case that you have made in your final report for some of these digital assets being difficult to fit within established definitions of things in action, is there not a respectable body of opinion elsewhere in the common-law world to the effect that the concept of a thing in action is quite capable of adapting itself so as to include these assets? Sarah Smith made the point to us that a wide and inclusive concept of things in action is quite feasible. She made the point that some forms of things in action can exist independently of any legal claim—she mentioned government debt—and some can even be stolen: she mentioned some types of share. Then, going further still, we heard from Professor Robert Stevens that it is "conceptually impossible" to have a third category of property rights, and that "There is no problem … that could be solved by adding in an extra category".

Plainly, it is not within the competence of this committee to determine the relative merits of all these various arguments. But would you accept that there is at least a respectable body of opinion within the common-law world which believes that the concept of things in action is capable of encompassing the sorts of assets that this Bill addresses, and for as long as that is the case, is it really sensible for a Bill to be brought in that seems to nudge the courts rather firmly in the other direction?

Professor Sarah Green: I acknowledge that that body of legal opinion is indeed respectable, but there are a few things I would say about it. The first is that the two cases to which you refer, in Australia and in Singapore, really do not actually ever examine the question of whether the dichotomy should exist. They reach their conclusion based on the assumption that the dichotomy is there. As I think I mentioned earlier on, there is a fairly common acceptance now across the common-law world that these things will be property, and then the court turns to, "Well, where should we put it: things in action or things in possession?" There is nothing in any of those cases—this is slightly different to the Justice Jackman article, which I will come back to—which asks the question, "Should there be a third category?" and answers, "No, there shouldn't". The Australia and the Singapore cases reach their conclusions on slightly different bases as well, so it is not even as if that body of legal opinion is doing exactly the same thing and going in the same direction.

On the Mr Justice Jackman article, as I said, what the Bill already does is not say that a court will never analyse a digital asset as being a thing in action; it just says that it just allows courts, where the circumstances are appropriate, to see it as something which is neither a thing in action nor a thing in possession. These are problems that are brought about not by the Bill but by the nature of digital assets themselves.

As I understand it, Mr Justice Jackman's argument is that there is no need to do this, that digital assets can go into things in action because it has happened before with debts and with rights, which are no longer enforceable, and I think he refers specifically to statute-barred debt. The problem with that argument, as I see it and as the Law Commission sees it, is that when you have something that is statute-barred, that bars the remedy and not the right, for a start. I think he refers directly to our argument here and says, "It's not just about things that are enforceable rights, because here you have a right that is not enforceable—it's still a thing in action". But what he is referring to in his article are things which are entirely different in nature and type to digital assets. This is the important thing that I think deals with quite a few of the arguments that you have heard: you mentioned the Sarah Smith position as well—she talks about shares and about government debt. The problem with that is that they are things in action—undoubtedly they are—and there is nothing in the Bill or the report that would disagree with that.

Digital assets are an entirely different thing. Their independence from the legal system and their independence from persons who claim them is entirely different to a debt that is not enforceable or a government debt. A government debt is still a legal creature, so, whether or not you have individual claims to it, it is still something that depends on the legal system for its very existence, regardless of claims. Whereas, if you have a digital asset, that is not dependent on the legal system for its existence at all: they are there all the time now and they are already being used; whether we as a group of lawyers or a jurisdiction recognises them or not, they are still there. That is the key difference that I think those objections overlook.

So, there are two points about the body of legal opinion. One is that those cases reach their conclusion based on there being a dichotomy; apart from the article, they do not reject a third category; and the rejection of the third category in that article uses the wrong objects to show that there is no need for another category.

The real difference, and the really important thing, which brings me on to Sarah Smith's point about shares, is, as I think I mentioned in my last session—we certainly did in the written statement—what is so different about digital assets is that they are involuntarily alienable. I wish we could have come up with a snappier term; we tried but we could not. That is really important. It is the point I made earlier about how you can hack somebody's wallet and take their digital asset without their consent. As a matter of fact, you can take it away in the same way you can steal their watch or their car. As a matter of law that is a different question, but as a matter of fact, you take that thing, you have possession of it and have control, and you actually also have relative title. But the factual point is the important one. You cannot do that with a debt, whether it is a government debt or a statute-barred debt, and you cannot do that with a share. So these are very different things.

There are some digital assets which in some contexts might sometimes be properly regarded as things in action, but the Bill will not stop that happening; it just says that where it is more appropriate to regard them as something that is involuntarily alienable—"I have had my virtual coins stolen from my wallet"— that is what we will do.

Is that the whole of your question? Sorry, that was a long answer.

Q64 **The Chair:** I think it is. I knew it was a horribly difficult question and you have given us a very full answer, for which I thank you very much. If I may summarise on the nudge point, I think you accept that the Bill gives a nudge to the courts towards the idea of a third or even perhaps fourth category of property, although you make the point that they are not compelled by the Bill to go down that route, and if they wish to classify something as a thing in action then they remain at liberty to do so. You think it is a good nudge and, the last time you consulted the judges, they appeared to agree.

Professor Sarah Green: The important word is "unlocking". I am not sure that I would necessarily agree that it is a nudge, but it is facilitative. That is the best way of putting it. It might have been regarded by some as a nudge, I suppose, but that is certainly not what we were doing. We were facilitating what we thought would be the most effective development of the common law.

Lord Shamash: You were around the table with the judges. Did any of them push back—no names, obviously—and, if so, what did they push back on?

Professor Sarah Green: There was an objection, as I remember it. This is all from my memory.

The Chair: Do not say anything that any of us might regret.

Professor Sarah Green: No, I certainly will not name anyone, but there was an objection. Actually, I am not even sure it was an objection, but there was a question about intellectual property rights. Those rights are an entirely different kettle of fish because they are dealt with through their own statutory regime. This is not exclusive of that; it is not saying, because there could be another category that that will in any way affect intellectual property rights. That is the only one I remember.

The Chair: So what the judges welcomed was the freedom the Bill gives them. You are not asserting to us—and we are not asking you to tell us—that the judges specifically welcomed what some have described as a nudge towards the third category.

Professor Sarah Green: That is right.

The Chair: That is very clear, thank you.

Lord Bassam of Brighton: To explore this further, another argument advanced against the Bill was the uncertainty that a third class of assets might generate. Do you accept that a good deal of case law will be required to work out what would be included within this third class of asset and how it might be treated, for example, for the purposes of security, custody and bailment? What would be the consequence of any uncertainty for businesses conducting business?

Professor Sarah Green: I absolutely accept that a lot of case law will be needed to work all these questions out; that is undeniable. However, as I might already have said, that is generated by the unique and genuinely novel nature of digital assets, not by the Bill. As I have said, the Bill is the unlocking provision that allows the common law to do that development. If we did not have the Bill, the common law would still have to work it out and it would have to do so without that clarity and the reaffirmation—or affirmation, I should say—that that category can be developed in its own right.

Lord Bassam of Brighton: Are you arguing that a framework is absolutely necessary and that the Bill provides that?

Professor Sarah Green: Sorry, what framework is absolutely necessary? The third category?

Lord Bassam of Brighton: Yes.

Professor Sarah Green: A third category is the cleanest and easiest way for the common law to develop. If we have certainty about it being possible to have another category, then that will reduce litigation and litigation costs. I am not saying there would not still have to be the cases to work these questions out, but it would remove one question and one area of contention at least. Those cases could then start from the idea that this is not quite a thing in action nor quite a thing in possession, but none the less under property rights we have this category so we can then develop remedies or analyses that fit the unique nature of these digital assets, because they do not quite look like the things we have been used to.

You mentioned bailment, as did some of the submissions to the committee. That is exactly why we at the Law Commission decided that this third category was the easiest way to do it, rather than setting out an argument for why these assets should belong in one of the other two categories. I have already made the point about these assets being involuntarily alienable. They are capable of being the object of control in the way that pure information is not because you can be exclusive, you can keep them to yourself and you can fully divest them on transfer; they are entirely rivalrous in a way that information is not. So they look a lot like things in possession in that sense, because those are all descriptions of things in possession that you can have as a subject of a bailment, for instance. The problem with just saying, "Well, let's put them in things in possession", is that they will not always look and behave in exactly the same way.

Transfer is potentially the really difficult point with digital assets, because to some extent the legal analysis will depend on how that transfer occurs. When you transfer a thing in possession—if I give you my watch, the watch that you take from my hand is exactly the same as the watch that left my hand; you have the same thing—there is a persistence there that does not always, or does not necessarily, apply to digital assets. Sometimes they will be completely transferred and divested, but by means of being extinguished from my online holding form and recreated in your online holding form, which in that sense looks a bit more like a thing in action because it looks like bank money. That is what happens when I transfer from my bank account to yours: it is extinguished in my account and recreated in yours.

So they have characteristics and behaviours of both things in possession and things in action, and they have legal requirements that parties have of them which take from both categories. The problem with saying they are things in possession or they are things in action is that those two categories bring with them a whole set of remedies and treatments that might not be appropriate for an asset that sits in the middle in terms of its characteristics. The nice and liberating thing about the law having this new category is that it can develop those remedies and analyses from scratch, being properly cognisant of what those digital assets are, the way that they behave and the way that they are used. That is something that we changed our minds about over time across the consultation. Full disclosure: as an academic, I had certainly argued in the past for digital assets to be regarded as things in possession as I thought they were closer because of the involuntary alienability. However, speaking to consultees over three years persuaded us otherwise: since Parliament can obviously do what it likes, why not take the opportunity to start a category that just makes that exercise easier? Then you are not constrained by the baggage of two centuries of distinguishing between a debt and a horse.

The Chair: Do you think it would just be one category, or do you think we are going to end up with several new categories?

Professor Sarah Green: It may well be several categories over time. Again, the Bill deliberately does not want to stultify any of that. The genius of the common law is doing exactly that. We were very clear that we did not want the Bill to stop any development of that nature.

The Chair: In some quarters the Bill has been sold as a way of simplifying things, making them quicker and so on, but it strikes me—would this be a fair way of putting it?—that really you are trying to do the right thing. You appreciate that there are always going to be difficulties in classification and in attaching remedies to different categories of property, and the Bill is not going to get rid of any of those. In fact, by requiring new categories to be devised and invented, it might make some of these problems a little more difficult. Still, in the Law Commission's view, it is worth doing because this better reflects the modern world and the way that we should be thinking about property. Would that be a fair summary?

Professor Sarah Green: Yes, except when you said "requires a new category". I do not think it requires one; it facilitates a new category. It is not mandatory in any way. All of the results or consequences that come from the Bill will be filtered through the common law. I suppose there is a universe in which it might not make any difference at all, although I would be very surprised if that happened, but, because of its facilitative nature, it does not require a new category of property; it just allows for there to be one or several if circumstances seem to a court to dictate or require that.

Q65 **Lord Bassam of Brighton:** Chair, you described what seems to me to be an added complexity in the creation of this new category. I wonder whether there is a danger, given that there is a debate about this, of us falling out of step with other common-law jurisdictions, such as Singapore or Australia, where the courts are not particularly keen on creating another class of asset. I also wonder whether this uncertainty might make our own jurisdiction a little less attractive. That is a danger, is it not? Is it a risk?

Professor Sarah Green: Do you mean the uncertainty that comes from having a different analysis to Australia and Singapore?

Lord Bassam of Brighton: Partly that and partly the fact that we would be out of step with other common-law jurisdictions.

Professor Sarah Green: There are two things to say about that. First, there are two jurisdictions where, as in the cases I have talked about, they do not have a third category at the moment and they have put digital assets in the "things in action" category; as I said, this is as a result of them presuming that there are only two categories.

There are other common-law jurisdictions that are already doing what we are doing. I might have got the order of that wrong for all of them but, if you take Hong Kong, Dubai and New Zealand, we already have from all of those jurisdictions cases that put digital assets in neither of those categories yet say definitively that they are none the less the object of property rights. So I do not think it is true to say that we are out of step with other jurisdictions. There are two from which we have cases that would seem to reach a different conclusion, based on the dichotomy that we already have.

There are another two points. One is that, at the risk of sounding jingoistic, it is simply a fact that those jurisdictions, in particular Australia, commonly follow—they have certainly done so in the past—English law changes. When we consulted on an earlier project that had a similar underpinning theme—our electronic trades document project, which culminated in the Electronic Trade Documents Act—I spoke to my counterparts in Australia. They certainly made it clear to us that they would be interested to see what English and Welsh law did before they moved forward.

So I certainly do not think it is a very convincing argument to say, "Other jurisdictions aren't doing it; therefore we shouldn't do it, even though we think it's the best thing", because they are not doing it. It is not all other jurisdictions. It is very common, although it is certainly not the case across the board: for instance, there are some points in recovery and tort for pure economic loss on which we still differ from Australia and have done for 20 years, although this does not seem to create much of a problem. There are far more cases where Australia and New Zealand have followed what the law of England and Wales has done.

There are two points there: first, I do not think that we are necessarily out of step with several jurisdictions; and, secondly, I do not think that we should not do what we very much think is the right thing to do because, as I said, we have two cases that did not actively focus on the specific question of whether we should have a third category but instead proceeded on slightly different reasoning. The Singapore case proceeded on the reasoning that "things in action" is a residual category: if you have something that is not possessable and obviously physical—that is, touchable and holdable—it must go in "things in action" because that is a residual category. The Australian case was much more about the debt point.

Those cases do not look at rejecting a third category; they just ask, "Based on what we've got, where should these things go?" They then put them in "things in action", which, because it has historically been seen as a residual category—until the advent of involuntarily alienable digital assets—sort of worked and was fine.

One of the other problems—I have seen this in the case law and in submissions both to this committee and to us at the Law Commission—is that the result of that is that the dichotomy, in a lot of people's minds, still seems to be between tangibility and intangibility and the fact that those things are definitive. This is slightly problematic because that has never been a legal distinction; it has been a proxy for the legal distinction. Until digital assets, which are involuntarily inalienable, came along, that was fine: you could pretty much decide between things in action and things in possession on the basis of tangibility and intangibility. Whereas digital assets are arguably intangible—not everybody thinks that they are but I do not think that that really matters—because you cannot see them, perceive them with the unaided senses or hold them in your hand, although they do have an independent existence. Yet they do not behave like things in action, which are intangible, because they are involuntarily alienable. I think that the whole line or boundary has been blurred by that use of tangibility and intangibility as a touchstone when it no longer works in the digital age.

Lord Bassam of Brighton: I am listening to you and thinking that this piece of legislation may well make us a field leader, even if other common-law jurisdictions are slightly out of step with us.

Professor Sarah Green: I think so.

Lord Bassam of Brighton: Right, okay.

Q66 **The Chair:** Going back to that, and building on it, you frankly accepted that a lot of case law will be needed if you are to create a new category. You would have the advantage of not having all the baggage that went with the old one, but someone is going to have to pay lawyers to help judges construct these categories. You will have seen that Professor Duncan Sheehan told us that this could make England and Wales a less attractive jurisdiction in which to litigate on some of these issues. I am not sure what he was thinking about—Singapore or other such places, perhaps. Do you have any brief comments to make on that?

Professor Sarah Green: I should clarify what I said earlier. I did not mean to suggest that a lot of case law would be generated by the Bill. My point was that the case law will be generated by the nature of digital assets.

The Chair: By the technology.

Professor Sarah Green: Yes—and that the Bill will reduce this, I hope, although it will still be absolutely necessary because of the nature of digital assets.

I disagree with the point made by Professor Sheehan. From what I remember hearing him say, his point was that England would be less attractive as a forum for litigation because there will be less certainty if we do not say, "These things are things in action". Obviously, there is a downside to certainty: the loss of flexibility. As I think I have already made clear, saying that all digital assets are things in action might give you a certain answer but that is not necessarily the right answer. At the moment, if something is classified as a thing in action and you want to transfer it, you have to go through certain legal processes such as assignment or novation. You certainly cannot do that with digital assets; in fact, what I should say is that you cannot necessarily do that with digital assets.

If a court decides that a digital asset is a thing in action, regardless of the label that the court puts on it or the category that it puts it in, it will have to change some rules because you cannot have such a digital asset. Again, I use as an example a token, which is fully divestible and which I can transfer from my control to your control completely. That is not a good candidate for assignment as a means of transfer. Assignment is for pure intangibles, such as debts; you need to notify the obliger of the debt and, because it is a creature of law and not independent of the legal system, assign it and transfer it through particular legal means. You do not have to do that with physical things such as digital assets.

So, it is not appropriate to apply the rules of assignment to all digital assets in all transactions. We could say, "All digital assets are things in action". At a high level, that would give us certainty, because we would be putting a particular label on them, but the courts would not then just be able to treat them like things in action. You would still have all that case law where you would have to work out, "Okay, they're things in action. Now we have to create a subset for things in action that need a different means of transfer". All you would be doing is putting a label on something that would still be a problem and still need working out.

The Chair: What about the proposal—I know that you have seen it because you kindly commented on it in your written evidence—from the City of London Law Society and others? They proposed a way to rescue what they saw as perhaps a useful part of the Bill: the unlocking of the subject and giving judges the key, while avoiding some of the more controversial assumptions about things in action. I will just read it out for the record, although I know you are very familiar with their amended Clause 1. They suggest that the clause should be amended to read: "A thing is not prevented from being the object of personal property rights merely because it is neither capable of possession nor a right that may only be claimed or enforced by legal action against another person or persons".

We have seen your written response to that, and it may be that you feel that speaks for itself, but I simply wanted to give you the opportunity to comment further on that suggested amendment if you wished to do so.

Professor Sarah Green: I do not think there is anything to add to that, but I would like to underline that if that were the drafting of the Bill, it would completely undermine the Law Commission's position and recommendation. That would really take away the whole bite of the Bill in that, as I said at the beginning, the whole mischief that it addresses is that we no longer have to be stuck with these categories. The redrafting does not grasp that nettle at all and leaves open lots of questions about what remains a thing in action and a thing in possession.

The Chair: That is very clear.

Q67 **Viscount Stansgate:** I want to ask about the Title of the Bill. Adam Temple in evidence suggested that the Long Title is inapposite. In particular, he points out that the Bill was redrafted to avoid "capable", but "capable" persists in the Long Title and not in the text in the Bill itself. Could this have been an oversight, and do you think there is a case for removing "capable"? In short, what are your thoughts about the fact that it appears in the Long Title but not in the text of the Bill?

Professor Sarah Green: It was not an oversight and, although the Bill was redrafted a few times, removing "capable" was never the focus of those redrafting exercises. I do not know what the problem with the Long Title is, in that it seems to me to say exactly what the Bill is doing. That is to say, and this is the point about the facilitative nature of the Bill: "These are the things that are capable"—that is, courts can—"of being the object of property rights if courts think that that is appropriate in the circumstances". So, I do not understand the objection to "capable" in the Long Title. That said, there could be a redrafting of the Long Title that did not change its meaning but did not have "capable" in, as long as it did not change what the Bill does. I just do not understand what the objection to "capable" is. Was there an elaboration on that?

Viscount Stansgate: If I understand this correctly, it was suggested that the Bill was redrafted to avoid "capable" in the Short Title.

Professor Sarah Green: I do not remember that being specifically to get rid of "capable".

The Chair: You could remind me, Professor Green—my memory is faulty. I recall that with your final report there was a slightly different version of Clause 1. It now says "is not prevented from being the object of personal property rights" but I thought it previously said something like "is now capable of".

Professor Sarah Green: Yes; as I said, there were iterations of drafting, but it was never with a specific view of "We don't want 'capable' in there".

The Chair: Was not the objection made that "capable" or some similar word was too prescriptive? In other words, you were saying "it is capable of being" whereas by saying "not prevented", you give the judges more freedom. I thought that was why this change was brought in. I may have remembered it slightly wrong but I thought that was the thrust of it.

Professor Sarah Green: Neither of those forms of the drafting would alter in any problematic way—certainly in terms of the Long Title—what the Bill does. You are absolutely right that it is more facilitative in the negative, but I am not sure that the Long Title would have much of a bearing on that.

Viscount Stansgate: Can I move on to an amendment suggested by the City of London Law Society? It would amend the Short Title of the Bill, which, as we know at the moment is Property (Digital Assets etc) Bill, to the following: Property (Objects of Personal Property Rights) Bill. That is different. The argument is that the Bill is about the principle of property rights rather than digital assets specifically. Is there anything you would like to add on why the Law Commission thought it necessary to refer to digital assets in the Short Title of the Bill, and to refer to "a thing that is digital or electronic in nature" in Clause 1? Can you shed any light on the view the Law Commission took on the Short Title?

Professor Sarah Green: It was really just because in the short term, digital assets will be the assets which really require the attention of this Bill. On it being in a Title, there is nothing in the draft that you have just read out to me that would alter the substantive effect of the Bill. The Title is really just a signal, I suppose, and draws attention to where the Bill is going to have its biggest bite in the medium term.

Viscount Stansgate: You have answered both of those questions perfectly clearly. Thank you very much.

The Chair: You have been very full and patient in your answers, as you were before. The only other thing I can think to ask you is whether there have been other criticisms or comments from any quarter to which you would like to respond, or whether you now feel you have had your say.

Professor Sarah Green: No, I think I have covered everything, thank you.

The Chair: On behalf of the committee, I thank you very much for coming once again. We will look very carefully at what you have had to say, but I think I can speak for all of us in saying you have been most helpful.