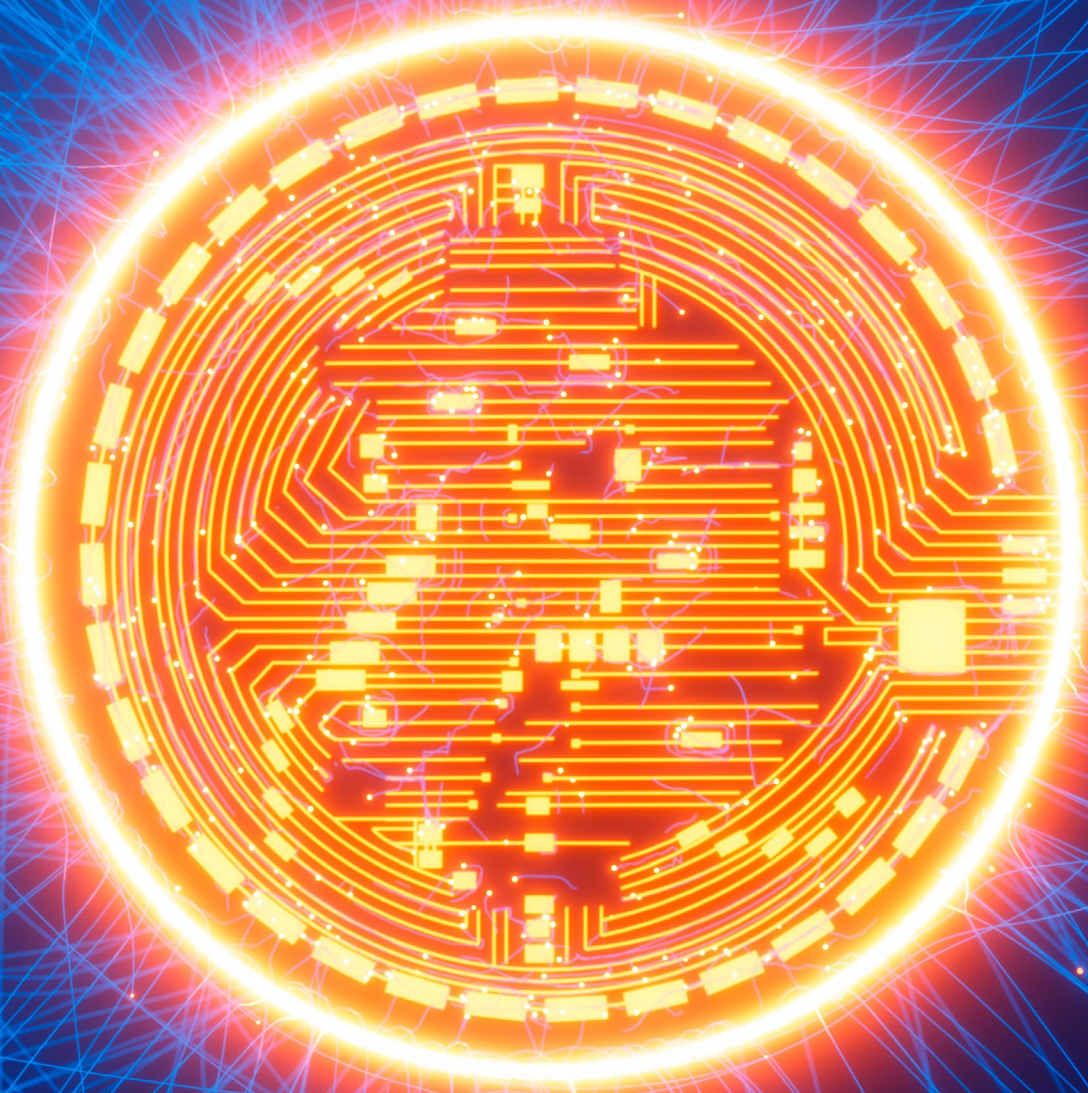




**Law
Commission**
Reforming the law



Digital Assets

Summary of final report

Summary

This summary

This summary describes at a high level the recommendations and conclusions in our report on digital assets, available at <https://www.lawcom.gov.uk/project/digital-assets/>.

Introduction

Digital assets are fundamental to modern society and the contemporary economy. They are used for an expanding variety of purposes — as valuable things in themselves, as a means of payment, or to represent or be linked to other things or rights — and in growing volumes. Electronic signatures, cryptography, distributed ledgers, smart contracts and associated technology have increased the ways in which digital assets can be created, accessed, used and transferred.

Such technological development is set only to continue. As technology advances and humans spend increasing amounts of time online, our relationships with digital assets will become ever more important.

Digital assets

The term digital asset is extremely broad. It captures a huge variety of things including digital files, digital records, email accounts, domain names, in-game digital assets, digital carbon credits, crypto-tokens and non-fungible tokens. The technology used to create or manifest those digital assets is not the same for each. Nor are the characteristics or features of those digital assets. We use “digital assets” as a general term, but most of our report and recommendations are concerned with a subset of digital assets with particular characteristics.

Personal property rights

Personal property rights are vital to social, economic and legal systems.

They are important for many reasons. Property rights feature in the analysis of most commercial transactions relating to things of value. Property rights are the key to a proper characterisation of numerous modern and complex legal relationships, including intermediated holding arrangements, collateral arrangements and structures involving trusts. Property rights are also important in cases of bankruptcy or insolvency, when objects of property rights are interfered with or unlawfully taken, and for the legal rules concerning succession on death. Property rights are particularly valuable because, in principle, they are good against the whole world, whereas other — personal — rights are good only against someone who has assumed a relevant legal duty.

Digital assets and personal property rights

Over the last 15 years or so, the law of England and Wales has proven itself sufficiently resilient and flexible to recognise certain digital assets as things to which personal property rights can relate. That is not surprising, because treating certain digital assets (including crypto-tokens) as things to which personal property rights can relate is a practical and effective way in which to bring the law into line with the expectations of the parties that interact with them.

We conclude that the law in this respect is now relatively certain and that the areas of legal uncertainty that remain are highly nuanced and complex. That complexity remains, in part, because both the digital asset market and the technology in question is evolving and will continue to do so. We identify the remaining areas of residual uncertainty and recommend law reform to reduce that uncertainty, but in a way that acknowledges the distinct features of different digital assets. The law reform that we do recommend aims to ensure that the legal system, as part of a wider social framework, can reinforce the overall strength of digital asset ecosystems (which also rely on social elements). Our recommendations also aim to ensure that the private law of England and Wales remains a dynamic, globally competitive and flexible tool for market participants in the digital asset space.

Uses for digital assets to which personal property rights can relate

Digital assets are used for a number of purposes, including:

1. making payments for goods and services;
2. transferring or communicating value by electronic means (often on a cross-border basis);
3. broadening the scope of and access to markets and increasing the transferability, composability and liquidity of other things;
4. recording other things and recording provenance; and
5. speculation and investment.

Complex, international (albeit still relatively small) markets have evolved for products and services involving digital assets and specifically crypto-tokens. A crypto-token can be used in a variety of ways:

1. as a thing of interest or of value in itself;
2. as part of a register or record of interests instead of a conventional database entry (albeit a register or record composed of “things”, analogous to the beads on an abacus); or
3. to link to or embody rights such that the holder of the crypto-token can claim performance of the obligations recorded by the crypto-token.

Tokenisation of securities

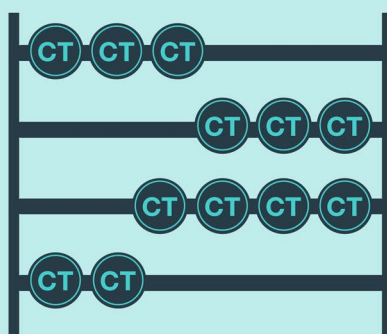
One clear use-case for crypto-tokens is the tokenisation of existing things, including securities. Using crypto-tokens to record, to link to or to embody debt and equity securities can be very appealing to market participants, because it allows for easily transferable, non-intermediated securities, accessible both to institutional and retail investors.

While existing securities markets enjoy a high degree of legal certainty, tokenised securities markets (or certain parts thereof) might operate differently or need to evolve to recognise the different features of digital assets and crypto-tokens. We think that many of our recommendations and conclusions — along with the work of bodies such as the UK Jurisdiction Taskforce — will be relevant to tokenised securities markets, and will help provide legal certainty in this growing area of finance.

Uses of crypto-tokens



Treated as a thing
of value in itself



Used as part of a
record or register



Used to link to,
or embody,
intangible rights

Our tripartite approach to law reform in our report

In our report we make very few recommendations for law reform. That is for two reasons. First, because we conclude that the common law of England and Wales is, in general, sufficiently flexible, and already able, to accommodate digital assets. Second, because we want our recommendations to be as direct and as implementable as possible. We therefore take a tripartite approach to law reform.

Prioritising common law development

First, we champion the common law of England and Wales and draw its successes in the digital asset and crypto-token markets to the attention of market participants. Our analysis is intended to form the foundation on which further common law development can be based. We conclude that the law in this area is now relatively certain and that any areas of residual legal uncertainty are highly nuanced and complex. We discuss these remaining areas of residual uncertainty and draw conclusions as to the most appropriate way for the common law to develop in relation to them.

Targeted statutory law reform

Second, we make two recommendations for statutory law reform. We conclude that, although some digital assets are not easy to place within traditional categories of things to which personal property rights can relate, this does not prevent them from being capable of attracting personal property rights, and that this is clearly the position at common law. Nonetheless, some consultees, including senior and specialist members of the judiciary, said to us that it would be helpful to express this position in legislation. We recommend such legislation and conclude that it will confirm and support the existing common law position.

In addition, we conclude that there is one area where the common law cannot give market participants sufficient legal certainty: the development of a new regime for collateral arrangements involving digital assets (specifically, crypto-tokens and cryptoassets). We acknowledge that this issue does not merely involve legal questions; it also involves policy-based judgements beyond the scope of our report. We recommend that, as a matter of priority, the Government sets up a multi-disciplinary project to formulate and put in place a bespoke statutory legal framework that better and more clearly facilitates the entering into, operation and enforcement of (certain) crypto-token and (certain) cryptoasset collateral arrangements.

Support from industry-specific technical experts

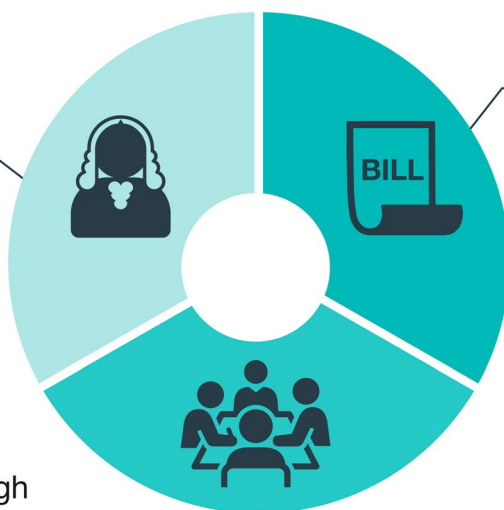
Third, we acknowledge that increasingly advanced technology is likely to lead to a proliferation of digital assets over time, in terms of number, use-case, design and technological functionality. Many of those digital assets are likely to be complex, composable (that is, built up of different interchangeable components and so malleable in their functionality over time) and multi-faceted, and to use different technology. This in turn will give rise to diverse products and services that the law will have to accommodate. We conclude that common law development is better able to keep up with this change than statutory law reform.

However, it is an enormous task for the judiciary to remain alive to such technological development. We recommend therefore that the Government creates or nominates a panel of industry-specific technical experts,¹ 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). We conclude that such detailed and technology-specific guidance will facilitate clear, logical and consistent applications of legal rules and reasoning over time.

Our tripartite approach

Common law development

We conclude that the common law of England and Wales is, in general, sufficiently flexible, and already able, to accommodate digital assets and therefore that any law reform should be through further common law development where possible.



Targeted statutory law reform

We recommend targeted statutory law reform only to confirm and support the existing common law position, or where common law development is not realistically possible.

Industry guidance

We recommend making arrangements for the provision of further guidance from industry experts which would support both the common law and statute.

¹ This would need to include those with expertise in the crypto-token markets, and not just those with expertise in traditional finance markets or intermediated securities markets.

Summary of our recommendations and conclusions

A “third” category of thing to which personal property rights can relate

We conclude that some digital assets are neither things in possession nor things in action, but that nonetheless the law of England and Wales treats them as capable of being things to which personal property rights can relate.

The three categories of thing to which personal property rights can relate



Thing in possession
For example, a car



Thing in action
For example, a debt



Third category thing
For example,
a crypto-token

Legislation to confirm and support the existing common law position

Some consultees, including senior and specialist judges, said that it would be helpful to express this position in legislation. They said that this would confirm the existing position at common law, facilitate the law's continued development on the point and lay to rest any lingering authority suggesting that there can be no "third" category of this nature. We recommend such legislation and conclude that it will confirm and support the existing common law position.

Avoiding defining hard boundaries of a third category of thing

We recommend statutory confirmation that a thing will not be deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in action nor a thing in possession. However, we conclude that it is not necessary or appropriate to define in statute the hard boundaries of such a third category of thing. We conclude that the common law is the better vehicle for determining those things that properly can (and should) be objects of personal property rights, and which fall within the third category: third category things. These might not necessarily always be digital things and could include things like milk quotas or certain carbon emissions allowances. We call digital things falling within the third category "digital objects".

Our third category recommendation and conclusions in practice

We consider in detail consultees' concerns with defining hard boundaries for a third category of thing to which personal property rights can relate. Given that our recommendation relating to the third category amounts to a confirmation and restatement of the existing common law position that such a third category exists, we do not consider that it will cause any additional legal uncertainty.

Application to crypto-tokens, private, permissioned blockchain systems, voluntary carbon credits, in-game digital assets and digital files

We demonstrate how our recommendations and conclusions might work by reference to a variety of digital assets, including crypto-tokens, private, permissioned blockchain systems, voluntary carbon credits, in-game digital assets and digital files.

We conclude that pre-existing boundary issues will remain and that those boundary issues cannot be solved (and indeed, would likely be exacerbated) by statutory law reform. We conclude that the common law is the most appropriate tool for dealing with difficult boundary issues relating to digital assets that are based on very different technologies and for determining whether such digital assets can (and should) attract personal property rights on particular sets of facts.

Our indicia of third category things

We discuss consultees' responses to the provisional criteria we proposed in our consultation paper for the third category. We make consequential modifications and clarifications to those criteria and now treat them as indicia. Our indicia (as modified in this report) accurately describe a certain "core" type of digital asset — namely crypto-tokens manifested by distributed, public, permissionless systems — that are things to which personal property rights can relate at law and which are neither things in possession nor things in action.

In our consultation paper we provisionally proposed that a thing should be capable of falling within our proposed third category of thing to which personal property rights can relate 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.²

Composed of data

Based on consultee responses, we conclude that "composed of data" need not be a criterion in itself, because the criterion (1) overly focuses the conceptualisation of the thing in question on data; and (2) potentially creates an unnecessary hard boundary for the third category.

Existence independent of persons and independent of the legal system

We clarify the application and interpretation of our second criterion — that a thing must exist independently of persons and exist independently of the legal system — and respond to some concerns raised by consultees about this criterion.

Rivalrous

We reiterate and confirm our analysis of the criterion that a thing must be rivalrous. Specifically, we clarify that whether a thing is rivalrous is binary and we distinguish our criterion that a thing must be rivalrous from the concepts of exclusivity of control and excludability.

We conclude that our indicia — specifically, the concept that a thing must be "rivalrous" (as endorsed by the Court of Appeal in *Tulip Trading*)³ — usefully distinguish this type of digital asset from other digital things such as digital files that are not (as currently designed) capable of attracting personal property rights as a matter of law.



² A thing is rivalrous if the use or consumption of the thing by one person (or a specific group of persons) necessarily prejudices the use or consumption of that thing by one or more other persons.

³ *Tulip v Van der Laan* [2023] EWCA Civ 83, [2023] 4 WLR 16 at [24], by Birss LJ.

Control

We describe (but deliberately do not define) the factual concept that best captures the ability to (1) exclude or to permit access to a third category thing; and (2) put the third category thing to the uses of which it is capable. We call this factual concept “control”. We discuss the legal significance of the concept of control over third category things. We conclude that both the factual concept of control and the legal consequences of control work differently for, and are highly complex in relation to, digital objects.

Factual control

First, we conclude that common law jurisprudence will be enhanced and made easier to understand for market participants by focusing on better descriptions and real-world examples of factual control. Factual control in this context is a highly technology-specific concept, in large part determined by the way in which the particular technology in question facilitates the imposition or creation of varying degrees of technical encumbrances in respect of the digital object in question.



Legal control

Second, we note that the legal consequences of control are necessarily complex and varied. We do not think that the concept of control alone is sufficiently nuanced, refined, or sensitive to market specificities adequately and definitively to determine the consequences of complex legal arrangements. Instead, we see control as a composite part of more complex legal principles and mechanisms (such as legal transfers, intermediated holding arrangements, collateral arrangements and actions and remedies in respect of digital objects). There are also a vast number of technically distinct digital assets, some of which function more like “digital bearer instruments” and some of which do not. Control works differently for different digital assets, by virtue of the inherent features and functions of the technology itself. The application of control and its legal consequences will therefore be different for different digital assets. Specifically, control works differently for things in possession, things in action and third category things (and, potentially, between different third category things). We conclude that the law should recognise and accept this reality.

Technical expert group

We recommend therefore that the 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).

Transfers

We consider how legal transfers of crypto-tokens operate based on, among other things, how a crypto-token transfers as a matter of fact, and the different perspectives of consultees on this issue.

Extinction/creation vs persistent thing

We discuss our observation in our consultation paper that “a transfer operation within a crypto-token system typically involves the replacement, modification, destruction, cancellation, or elimination of a pre-transfer crypto-token and the resulting and corresponding causal creation of a new, modified or causally-related crypto-token.” We discuss two opposing views put forward by consultees as to the legal characterisation of such a transfer operation that effects a state change.

First, that such a transfer extinguishes a pre-transfer object of personal property rights and creates a “new”, post-transfer object of personal property rights (the “extinction/creation analysis”). Second, that such a transfer involves the persistence of an object(s) of personal property rights through the transfer (the “persistent thing analysis”).

A transfer by a change of control

We conclude that it is possible to effect a legal transfer of a crypto-token offchain, by a “change of control” (along with the requisite intention). An example might include the physical transfer of control through the transfer of hardware, or a transfer on a Layer 2 system.



A common law special defence of good faith purchaser for value without notice applicable to crypto-tokens

We recognise that the majority of 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). We agree with the arguments made by consultees.

At the same time, we acknowledge that our recommendation for targeted, confirmatory legislation combined with common law development of the parameters of a third category of thing to which personal property rights can relate does not include a statutory definition of such third category things (or some subset thereof). We acknowledge that this in turn precludes a general statutory “innocent acquisition rule” in respect of such objects of personal property rights, because a statutory innocent acquisition rule would almost certainly need to define the objects of personal property rights in question that benefitted from the rule. We conclude that a special defence of good faith purchaser for value without notice applicable to crypto-tokens can be recognised and developed by the courts through incremental development of the common law. We conclude that this reasoning can also be extended to other third category things.

Intermediated holding arrangements

We consider how intermediated holding arrangements in respect of crypto-tokens can be structured under the law of England and Wales. We consider crypto-tokens by way of example given the importance of intermediated holding arrangements to crypto-token markets.

Clarification of terminology

We discuss consultee responses to the terminology that we used in our consultation paper to describe crypto-token specific intermediated holding arrangements, particularly our use of the term “custody”. In light of consultee responses, we now draw a distinction between “custodial intermediated holding arrangements”, “non-custodial intermediated holding arrangements” and “non-holding arrangements” based on the legal consequences of such arrangements. In particular, we highlight the risks that users of intermediated holding arrangements could be exposed to on the onset of insolvency proceedings of a holding intermediary.

Contract and trust-based intermediated holding arrangements

We consider the application of contract and trust law to crypto-token intermediated holding arrangements. We conclude that trusts can support a broad range of custodial intermediated holding arrangements, including where the underlying crypto-token entitlements are held on a consolidated unallocated basis for the benefit of multiple users. We confirm our preferred conceptual approach to the establishment of such a trust arrangement under the law of England and Wales.

We conclude that a presumption of trust for intermediated holding arrangements involving crypto-tokens is neither necessary nor appropriate.

Section 53(1)(c) of the Law of Property Act 1925

We consider the potential impact of statutory formalities on the operation of trust-based crypto-token intermediated holding arrangements. We conclude that the existing common law is sufficiently certain in this area and that statutory law reform in respect of section 53(1)(c) of the Law of Property Act 1925, which requires the disposition of an equitable interest to be in writing and signed, is not necessary at this time. We leave open the possibility that it might be necessary or warranted in future as the market evolves.

Shortfall allocation rule

We consider, but do not at this stage recommend, a general *pro rata* shortfall allocation rule in respect of commingled unallocated holdings of crypto-tokens or crypto-token entitlements held on trust by a custodial holding intermediary that enters insolvency proceedings.

We conclude that a more extensive, in-depth assessment of the merits of potential insolvency law reform applicable to specific custodial holding intermediaries is necessary.

Alternative and supplementary legal structures for custodial intermediated holding arrangements

We discuss the possibility of the common law developing alternative and supplementary legal structures for custodial intermediated holding arrangements that do not rely on trusts. We conclude that this could take the form of holding intermediaries being recognised as acquiring a control-based proprietary interest in held crypto-token entitlements that is subject to a superior title retained by users. We also discuss the application of other private law principles including agency and fiduciary duties.



Collateral arrangements

We consider how collateral arrangements in respect of crypto-tokens and cryptoassets can be structured under the law of England and Wales. Again, we specifically consider crypto-tokens and cryptoassets given their prominence in the digital asset markets.

Collateral	
<p>In an unsecured loan agreement, the lender lends money receiving only a promise to repay from the borrower.</p>	
<p>In a secured, or collateralised, agreement, the lender (or, more generally, collateral taker) acquires a proprietary interest in assets of the borrower (collateral provider) to cover the performance of the borrower's undertaking. This provides heightened protection in the event of default.</p>	
<p>Financial institutions will normally secure their arrangements (for example, a loan), often using securities to do so. Such institutions might enter into a financial collateral arrangement, making the process of securing obligations and realising security more efficient.</p>	

Title transfer, non-possessory security and possessory security

We discuss how title transfer and non-possessory security-based arrangements can be used to structure crypto-token and cryptoasset collateral arrangements without the need for law reform. We also explain that possessory security-based arrangements do not apply to crypto-tokens and cryptoassets.

A control-based security interest in respect of crypto-tokens

We discuss how the recognition of a control-based proprietary interest to facilitate both the holding of and the grant of security over crypto-tokens and cryptoassets might be a beneficial development within the common law. We conclude that the common law could develop to recognise a control-based security interest in respect of crypto-tokens and cryptoassets (possibly by analogy with pledge). But 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.

Application and clarification of the Financial Collateral Arrangements (No 2) Regulations 2003

We consider the applicability of the Financial Collateral Arrangements (No 2) Regulations 2003 (“FCARs”) to crypto-tokens, other collateral that might use and/or be linked to public, permissionless crypto-token systems or private, permissioned blockchain systems (including Central Bank Digital Currencies (“CBDCs”), stablecoins, equity and debt securities and credit claims) and mere register/record tokens.

We conclude that many crypto-tokens are likely to fall outside of the scope of the FCARs regime. However, for other collateral that might use and/or be linked to public, permissionless crypto-token systems or private, permissioned blockchain systems (including CBDCs, stablecoins, equity and debt securities and credit claims) or mere record/register tokens, we think the answer is possibly different. For at least some of those things, there is a better argument that they fall within the scope of the FCARs regime. We recommend law reform to clarify this position, although we do not ultimately conclude on what the complete scope of the FCARs regime should be, given that question necessarily involves policy considerations which fall outside of the scope of our current work.

Tokenisation of securities

We discuss the tokenisation of equity and other registered corporate securities. We recommend that the laws governing the tokenisation of equity and other registered corporate securities by UK companies are reviewed. The aim of this review would be to confirm, and where appropriate extend, the range of technological facilities (including potentially to public, permissionless ledgers) and operational arrangements through which the valid creation, transfer, and use of such tokenised equity and other registered corporate securities would be legally possible. This would require further legislative change.

A bespoke statutory legal framework for crypto-token and cryptoasset collateral arrangements

We conclude that although the law of England and Wales does provide options for granting security in respect of crypto-tokens and cryptoassets, those options are not adequate. As such, we recommend that, as a matter of priority, the Government sets up a multi-disciplinary project to formulate and put in place a bespoke statutory legal framework that better and more clearly facilitates the entering into, operation and enforcement of (certain) crypto-token and (certain) cryptoasset collateral arrangements.

Although this recommendation and the work required to implement it are significant, we conclude that there is a very high degree of demand for such law reform among consultees, markets participants and industry bodies.

Causes of action and associated remedies

We consider causes of action and associated remedies in the context of third category things. We conclude that much of the current law concerning causes of action and remedies can be applied to third category things without law reform. Often the law does not distinguish between causes of action and remedies that apply to things in possession, to things in action or to third category things and we identify where that is currently the case. In those cases there is no need for bespoke rules or for law reform. Instead, what is required is that the courts continue to recognise the nuances or idiosyncrasies of third category things (including their distinct functionality and technical characteristics) and apply existing legal principles to such things as appropriate.

Contract and vitiating factors

We consider the application of various causes of action that arise in relation to contracts, with particular focus on the legal characterisation of an obligation to “pay” non-monetary units such as crypto-tokens. We also discuss the application of various vitiating factors to contracts involving third category things. We conclude that the vitiating factors of mistake, misrepresentation, duress, and undue influence apply similarly to contracts involving third category things as they do to contracts involving things in possession and things in action. We also conclude that the legal principles relating to void contracts can apply to third category things, in the same way as they do to other objects of personal property rights, without law reform.

Following and tracing

We consider how the evidentiary processes of following and tracing might apply to third category things and discuss how the factual nature of third category things might complicate legal analysis in relation to those evidentiary processes.

Breach of trust, equitable wrongs, and constructive trusts

We consider the application of principles relating to breach of trust, equitable wrongs, and constructive trusts. We conclude that, as regards breach of trust and fiduciary duty, the principles of equity are sufficiently flexible to be applied in situations involving third category things. In relation to constructive trusts, we conclude that the common law is perfectly able to evolve in a logical and clear way and we do not recommend law reform.

Proprietary restitution, restitution for unjust enrichment and conversion

We consider three key common law causes of action and how they apply to factual scenarios involving third category things: proprietary restitution; restitution for unjust enrichment; and conversion. We conclude that claims in proprietary restitution and restitution for unjust enrichment likely will be available in the context of third category things, whereas a claim in conversion will not be available. This is because conversion only applies to things in possession.

However, despite the broad availability of claims in proprietary restitution and restitution for unjust enrichment, we conclude that such claims are unlikely to succeed where a claimant's crypto-token is burned by a defendant. Burning involves irreversibly sending a crypto-token to an inaccessible "burn address", the result being that the token is removed from circulation.

Given the unavailability of a claim for proprietary restitution, restitution for unjust enrichment, or conversion following a defendant's burning of a claimant's crypto-token, we conclude that there is a lacuna in the law relating specifically to objects that fall within the third category. We do not consider that common law development of the principles of proprietary restitution or unjust enrichment would be the most appropriate means by which to fill this lacuna. Instead, we conclude it would be better 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. This conclusion acknowledges that the lacuna currently existing within the law arises in situations where a claim based on unjust enrichment or proprietary restitution cannot be made out.

Injunctions, enforcement, and monetary awards

Finally, we consider some procedural aspects of the law of remedies, specifically the law relating to injunctions, enforcement, and monetary awards.

Cause of action	Generally available in relation to third category things?	Capable of providing recourse following the burning of a crypto-token?
Proprietary restitution	✓	✗
Restitution for unjust enrichment	✓	✗
Conversion	✗	✗
Tortious liability for wrongful interference with third category things	✓	✓

Our recommendations at a glance

Recommendations

Recommendation 1

We recommend statutory confirmation that a thing will not be deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in action nor a thing in possession.

Recommendation 2

We recommend that the 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 issues relating to control (and other issues involving digital objects more broadly). This panel would need to include those with expertise in the crypto-token markets, and not just those with expertise in traditional finance markets or intermediated securities markets.

Recommendation 3

We recommend statutory amendment to the FCARs:

1. To clarify the extent to which and under what holding arrangements crypto-tokens, cryptoassets (including CBDCs and fiat currency-linked stablecoins) and/or mere record/register tokens can satisfy the definition of cash, including potentially by providing additional guidance as to the interpretation of “money in any currency”, “account” and “similar claim to the repayment of money”.
2. To confirm that the characterisation of an asset that by itself satisfies the definition of a financial instrument or a credit claim will be unaffected by that asset being merely recorded or registered by a crypto-token within a blockchain- or DLT-based system (where the underlying asset is not “linked” or “stapled” by any legal mechanism to the crypto-token that records them).

3. To confirm that, where an asset that satisfies the definition of a financial instrument or a credit claim is tokenised and effectively linked or stapled to a crypto-token that constitutes a distinct object of personal property rights from the perspective of and vested in the person that controls it, the linked or stapled token itself will similarly satisfy the relevant definition.
4. We recommend that laws applicable to UK companies should be reviewed to assess the merits of reforms that would confirm the validity of and/or expand the use of crypto-token networks for the issuance and transfer of equity and other registered corporate securities. In particular, we recommend that any such review should consider the extent to which applicable laws could and should support the use of public permissionless ledgers for the issuance and transfer of legal interests in equity and other registered corporate securities.

Recommendation 4

We recommend that, as a matter of priority, the Government sets up a multi-disciplinary project to formulate and put in place a bespoke statutory legal framework that better and more clearly facilitates the entering into, operation and enforcement of (certain) crypto-token and (certain) cryptoasset collateral arrangements.

Conclusions

Conclusion 1

We conclude that factual control (plus intention) can found a legal proprietary interest in a digital object. We conclude that in certain circumstances such a control-based legal proprietary interest can be separated from (and be inferior to or short of) a superior legal title.

Conclusion 2

We conclude that it is possible (with the requisite intention) to effect a legal transfer of a crypto-token offchain by a change of control or onchain by a transfer operation that effects a state change.

Conclusion 3

We conclude that a special defence of good faith purchaser for value without notice applicable to crypto-tokens can be recognised and developed by the courts through incremental development of the common law. We conclude that this reasoning can also be extended to other third category things.

Conclusion 4

We conclude that under the law of England and Wales, crypto-token intermediated holding arrangements can be characterised and structured as trusts, including where the underlying entitlements are (1) held on a consolidated unallocated basis for the benefit of multiple users, and (2) potentially even commingled with unallocated entitlements held for the benefit of the holding intermediary itself.

We conclude that the best way to understand the interests of beneficiaries under such trusts are as rights of co-ownership in an equitable tenancy in common.

Conclusion 5

We conclude that recognition of a control-based legal proprietary interest could provide the basis for an alternative legal structure for custodial intermediated holding arrangements in addition to trusts. This could take the form of holding intermediaries being recognised as acquiring a control-based proprietary interest in held crypto-token entitlements that is subject to a superior legal title retained by users.

Conclusion 6

We conclude that it would be constructive 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 wrongful interferences with third category things.

