

**REPORT ON WORKSHOP 2**  
**MAPPING THE LEGAL LANDSCAPE FOR CRYPTOASSETS IN SCOTLAND**

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The second workshop of the RSE-funded project ‘Digital Assets in Scots Private Law: Innovating for the Future’ was held at the Law Society of Scotland in Edinburgh on 29 May 2024.<sup>1</sup> The workshop focused on mapping the legal landscape for cryptoassets in various areas of Scots private law and legal practice and explored how the law could be improved.<sup>2</sup> It was conducted under the Chatham House Rule with participants from the judiciary, academia, legal practice, the Scottish Law Commission, the Law Commission of England and Wales (LCEW), the Scottish Government, and the Faculty of Advocates.

The workshop was divided into three panels: (1) Classification, Property and Trusts; (2) Family Law, Succession and Obligations; and (3) Commercial and Corporate Law. For each panel, presentations were followed by a roundtable discussion.

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<sup>1</sup> The authors would like to thank the Law Society of Scotland for providing their facilities for this workshop.

<sup>2</sup> For the workshop programme, see the project website at <https://www.abdn.ac.uk/law/research/centre-for-commercial-law/digital-assets-in-scots-private-law-innovating-for-the-future-1850.php>.

## Panel 1: Classification, Property and Trusts

The first panel considered: the classification of cryptoassets in Scots private law; the status of digital assets as property; and cryptocurrency intermediaries, including the question of whether they can be considered trustees under Scots law.

### **Classification**

The participants discussed how cryptoassets should be classified within Scots private law. They considered a proprietary classification, with reference to existing categories of property as well as a possible new category, and a contractual classification. The participants also considered whether cryptoassets can be accommodated by Scots private law without legislative intervention or whether such intervention is desirable.

Regarding proprietary classification, it was noted that:

- The classification of property in Scots law is divided between moveable and heritable (immoveable) property and between corporeal and incorporeal property. There is a focus in Scots law on things as the objects of rights, with physical (tangible) things corresponding to corporeal property and non-physical (intangible) things corresponding to incorporeal property. Cryptoassets can be generally considered incorporeal moveable property, albeit that some contest this analysis pointing to features comparable to corporeal moveables, with the factual relationship of control serving as an equivalent to the physical possession of corporeal moveables. Even if they are incorporeal moveables, they have unusual characteristics. For example, they can be considered to exist outside the legal system and can thereby be contrasted with claim rights.
- Incorporeal moveable property is nowadays the most important type of property in value terms in some economies. As well as claim rights, the category contains a number of different types of such property, with their own special rules, including various intellectual property rights, shares in companies, interests in partnerships and pension rights. Cryptoassets do not fully fit into any of these and seem to be a further type.
- In relation to LCEW's recent law reform proposal for a third type of property, it is crucial that Scotland keeps up-to-date in its own terms and does not simply borrow the approach adopted in England and Wales. Although categories in English law may broadly correspond to equivalents in Scots law (e.g. choses (or things) in action overlap considerably with incorporeal moveable property), Scots law's focus is on the things themselves (i.e. the property objects) as in Roman law, in contrast to English law's separate history and focus on the remedies in the categories.
- It was queried whether "rivalrousness" is an essential feature of property, with reference to what others can do, or cannot be stopped from doing, in relation to e.g. the law of tenements and also how digital billboards are used. The LCEW have relied on rivalrousness in contending that property rights can be held in some digital assets, as their use or consumption by one person prevents the use or consumption of those assets by others.<sup>3</sup> Rather than being itself a vital criterion for property, rivalrousness may be instead considered an important indicator of control. It was also pointed out that possession and control are not necessarily exclusive and can be subject to the rights of others, such as in the context of a tenement, and they may also be held on a fiduciary basis.

Regarding contractual characterisation, it was noted that:

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<sup>3</sup> Law Commission for England and Wales, *Digital Assets: Final Report* (2023) (Law Com No 412), paras 4.27-4.47. Rivalrousness does not apply to pure information (as it can be duplicated) and so it cannot be made subject to property rights.

- Cryptoasset systems underpinned by blockchain can be viewed as a complex contractual arrangement involving all participating parties in the relevant system: as a “super-contract” arrangement. In a sense, it involves the creation of a micro-legal system by the parties involved. If it is viewed in this way, Scots law may be considered to provide a solution in its private law regime, with a cryptoasset being a type of property with its own set of laws under the law of contract for the system. However, even if the relationships can be viewed internally in this contractual way, it was queried whether this would be the case externally. While contractual rights can be viewed from the external perspective of a creditor or in the holder’s insolvency as property rights, in the case of cryptoassets there may be no clear contractual counterparty as regards enforcement.

The following was discussed in relation to cases and reform:

- There have been very few cases in Scots law on cryptoassets.<sup>4</sup> The participants assessed that for commercial disputes the Court of Session’s Commercial Court would be the most appropriate forum to deal with cryptoasset disputes, due to the expertise and procedure available. Expert evidence was considered essential in these cases. In terms of other methods for legal development in this area, the Scottish Law Commission was recommended as an option for reviewing the law and recommending reforms, given its permanent structure and ability to offer opportunities for engagement over an extended period of time. It was also noted there may be merit in setting up an expert group for cryptoassets, in the form of a body similar to the Scottish Building Contracts Committee with legal and technical representation, to consider cryptoasset-related matters, provide updates and address newly arising issues. In relation to the desirability of law reform via legislation, it was discussed that while courts can deal with matters that come before them, legislation can determine which issues to address and can make clear to the wider world how Scots law is dealing with cryptoassets. For future developments in the area, the participants considered that there may also be a need for public law and criminal law to intervene too, and the involvement and cooperation of national and international authorities would be desirable.

### **Property**

The discussion then moved on to further consideration of digital assets as property. Reference was made to the work of the LCEW, UNIDROIT and the Scottish Government’s Expert Reference Group on Digital Assets. It was noted that:

- “Digital asset” is a descriptive term rather than a legal term of art (cf e.g. corporeal moveables, which is a legal category). There is wide recognition, including by UNIDROIT, that property rights can be held in (certain) digital assets.<sup>5</sup> Yet they exist on a spectrum, with e.g. Bitcoin at one end meeting the test for property without much difficulty, and emails in an inbox subject to password entry at the other end clearly failing that property test. In between there are examples like a digital security issued and transferred on a blockchain, which is a composite asset and may still be recognised as property, and a private page on a social media account, which may only confer contractual rights and in most legal systems fail the test for property. There is a need to identify the requirements for a thing to be recognised as property and corporeal things existing tangibly can offer useful analogies here. This may be viewed as influential in the LCEW’s definition of a “digital object”.<sup>6</sup>
- In identifying a thing as a digital object, the participants considered that the thing must be more than simply data, even if data is the “outward manifestation” of the thing. The “transfer”

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<sup>4</sup> For a recent criminal law case, see *HMA v Rennie*, High Court of Justiciary, 28 November 2023 – sentencing statement – <https://judiciary.scot/home/sentences-judgments/sentences-and-opinions/2023/11/28/hma-v-john-ross-rennie>.

<sup>5</sup> UNIDROIT, “Principles on Digital Assets and Private Law (2023), principle 3(1).

<sup>6</sup> Law Commission for England and Wales, *Digital Assets: Final Report* (2023) (Law Com No 412).

of a digital object in technical terms does not involve copying or transferring data. Instead, something new is created. It was therefore argued that a digital object can be considered a “composite entity” which, as well as including a manifestation of data, involves an exclusive transactional power determined by the rules of the digital system itself. This power can move from A to B in the context of a transfer.

- In terms of digital objects as objects of real rights, their classification will likely impact upon such matters as what rules of transfer apply. It was suggested that the transfer of ownership of digital assets should require the intentional transfer of control as the minimum sufficient test, irrespective of whether the transaction is on-chain or off-chain.<sup>7</sup> There was some discussion among the participants as to whether Scots law’s adherence to the publicity principle, at least as an objective if not always achieved in practice, would justify only accepting the transfer of ownership if there is an on-chain transfer, given that there is an element of publicity. It was, however, considered that there is an expectation from market participants that off-chain transfers will also be given effect to as regards the transfer of ownership. In addition, the on-chain position is not a perfect reflection of the legal position, e.g. if there has been a transfer arising from hacking, but is an indication of ownership.
- Regarding the work of the Scottish Government Expert Reference Group, including its consultation, it was noted that the unanimous view in consultation responses was that there should be some form of digital assets legislation in Scotland. This is particularly because, unlike England and Wales and other common law jurisdictions, there is no flood of court decisions in Scotland to be able to rely on case-law for reforming the law without legislative intervention. In comparison to England and Wales, the precise categorisation of digital objects is less important for Scotland than their recognition as things in property law terms. There seems to have been a desire in relation to Scots law to confirm that transfer of control should be the minimum necessary condition for transfer of ownership of digital assets. Regarding legislation, there was some consensus among the workshop participants that it should be as tech-neutral as possible and shorter legislation (avoiding certain complexities) would increase the likelihood of it receiving widespread support and passing.

### **Trusts**

Attention next turned to the law of trusts and specifically whether cryptocurrency intermediaries may be trustees under Scots law. The participants discussed cryptoassets as intermediated assets, whether a Scottish trust can arise in that context, the advantages and disadvantages of this, as well as whether there is scope for law reform. It was noted that:

- The involvement of intermediaries is a notable feature of cryptoassets. Digital wallets may be hosted or unhosted.<sup>8</sup> Hosted wallets involve a platform that enables the exchange of cryptoassets (e.g. Coinbase and Binance) and the wallets contain information about the cryptoassets. There are crypto platforms in various jurisdictions around the world, including in Scotland. A significant issue for regulators has been whether cryptoassets can be considered “securities” in the sense of financial instruments, and if platforms are security-holding intermediaries.<sup>9</sup>
- Cryptoassets can be held on trust as a result of their recognition as property. Since Scots law has particular rules as to the creation of trusts and the transfer of assets into them, these would need to be complied with for cryptoassets too. If property is held in trust, it is ringfenced and protected from the insolvency and creditors of the trustee. In the context of cryptoassets,

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<sup>7</sup> Reference was made to Law Commission for England and Wales, *Digital Assets: Final Report (2023)* (Law Com No 412), para 4.67, in contrast to UNIDROIT, “Principles on Digital Assets and Private Law (2023), principle 6, commentary para 6.1.

<sup>8</sup> Most of the focus in the workshop was on hosted wallets. Unhosted wallets are held directly with the issuer of cryptoassets and depend on the issuer’s team for maintenance.

<sup>9</sup> *Securities and Exchange Commission v Coinbase Inc* 23 Civ. 4738 (KPF) - New York.

if an intermediary is deemed to hold cryptoassets in trust for the investors this would give significant protection to investors in case of the insolvency of intermediaries. However, a trustees' powers and liabilities may not be suitable for intermediaries (albeit that some could be excluded by the declaration of trust, e.g. terms and conditions).

- The terms and conditions of the platforms vary. The participants discussed examples of the terms and conditions of different platforms and potential issues associated with them. For example, whether an applicable law clause referring to "the relevant laws of the United Kingdom" if a user is resident in the United Kingdom could lead to the application of Scots law for a user resident in Scotland; or whether a clause with an exclusion of trust regarding digital assets held by the platform can still be interpreted as involving a trust relationship.
- It was pondered whether hosted wallets involve property being held in constructive trust. However, it has been queried whether such trusts can truly be considered part of Scots law and there is a need to distinguish between trusts and contracts of agency.<sup>10</sup> It is possible that breach of fiduciary duty by an agent as regards the principal's asset might give rise to a constructive trust over the asset or its proceeds.<sup>11</sup>
- The participants discussed the extent to which the Scots law of trusts is flexible or inflexible. They noted that there are unclear effects and that there is no equivalent of English equity to help deal with difficulties. It may also be unlikely that the courts will be in a position to offer clarification. There might be benefit in new legislation specifically for crypto wallet-hosting intermediaries, which could balance the interests of investors and intermediaries. Inspiration could be drawn from the UNIDROIT Convention on Substantive Rules for Intermediated Securities and Civil Law jurisdictions.

## **Panel 2: Family Law, Succession and Obligations**

The second panel considered: digital assets in the context of divorce and succession law; contractual issues relating to cryptoassets; and non-contractual obligations relating to cryptoassets, with specific reference to delict and unjustified enrichment.

### ***Family Law and Succession Law***

The participants first discussed how digital assets, in a broader sense including cryptoassets, are dealt with in family law, focusing on divorce (and dissolution), and in succession law. It was noted that:

- Unlike other areas of law, it is not always the most commercially valuable items that are the most important in family law and succession law, as some items may have low monetary value but high sentimental value. There is also a need to recognise the gender dimension in family law, including in relation to the greater likelihood of males owning digital assets or otherwise being in control of them. There is also the possibility of domestic abuse in the form of tech abuse, and conduct such as revenge porn and the manipulation of images.
- Digital assets that may be important in family law and succession law are diverse in nature, e.g. cryptocurrencies, NFTs, digital files (including family photos and videos), email accounts, domain names, curated content, in-game digital assets and carbon credits. Succession may involve the transfer of different digital assets or destroying or closing them down, whereas divorce is often more about dividing assets. Sometimes though there is also a desire to have items destroyed and/or transferred in the context of divorce (e.g. intimate images).
- There are also questions as to what extent children own digital assets, how parents best manage digital assets for children and what transactions children may engage in with digital assets, bearing in mind the rules regarding legal capacity in Scots law.<sup>12</sup> Reference was also

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<sup>10</sup> See e.g. J Drummond Young, "Trusts, Agency and Lehman Brothers" in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017).

<sup>11</sup> For a relevant case from Singapore, see *ByBit Fintech Ltd* [2023] SGHC 199 (Singapore).

<sup>12</sup> See e.g. Age of Legal Capacity (Scotland) Act 1991, s 2(1).

made to the UNCRC (Incorporation) (Scotland) Act 2024, and the need to consider the best interests of the child when making decisions concerning them, and how this may impact upon the management of digital assets.

- The participants discussed the issues around discovery and valuation of digital assets. They noted that digital assets can be easily concealed, with entry and exit points being the only indicators, and that disclosure is a very significant issue. As regards procedure, commission and diligence can be challenging if a party is prepared to deceive and there is no obvious “haver” in Scotland for cryptoassets. If a haver is outside Scotland, they cannot be compelled to comply. In relation to a deceased individual, their record-keeping is vital in terms of knowing of the existence of assets and how to access them in succession. The problems with valuation of cryptoassets arise from their volatility.
- In terms of remedies in divorce, the participants considered that there is generally enough flexibility but more certainty regarding the property status of different digital assets would be helpful. As well as transfer of property orders, incidental or ancillary orders can also be utilised.<sup>13</sup> While interdict can also be used to stop dealings with digital assets and other remedies may be available too, diligence seems difficult to utilise against digital assets.
- The participants discussed whether legislative reform may be desirable, particularly to improve enforcement mechanisms which are currently inadequate to deal with digital assets and a spouse acting in bad faith. They also noted the need for family lawyers and digital assets lawyers to communicate more effectively with one another.

### **Contract**

The discussion then moved on to contractual aspects of cryptoassets, including issues relating to: contracts concerning the transfer or other dealings with cryptoassets, location, implied terms, the relationship between the parties and consumer protection. It was noted that:

- The relationship between the parties depends upon the situation and the assets involved. For instance, if a party is the first acquirer of a cryptoasset such as an NFT, the contract will be with the issuer, whereas if the NFT is transferred, there could be a contract only with the transferor or also with the original issuer (depending on the terms and conditions applicable). In relation to wallet providers, the relationship depends on the wallet involved and whether it is a custodial or non-custodial arrangement. The terms of use of issuers and wallet providers can be important, and the relationships between holders of assets on the same blockchain may be based on an implied contract.
- There are uncertainties regarding where the asset is located, is it e.g. where the server is located or where the issuer of the cryptoassets is based?
- For contracts for the transfer of cryptoassets, there is a need to identify the assets, agree to transfer control, and consider whether there is to be an on-chain or off-chain transfer. The latter can give rise to the risk of double-dealing by the transferor and there may be uncertainty as to whether ownership has transferred. The differences in this area between custodial and non-custodial wallets were also highlighted by the participants.
- The participants considered that cryptoassets are not goods under the Sale of Goods Act 1979. Depending on the circumstances, there may be some protection for consumers under the Consumer Rights Act 2015 and there are regulatory requirements, involving the Financial Conduct Authority, for firms seeking to promote cryptoassets to consumers. There may be obligations regarding the cryptoassets being of satisfactory quality, fit for purpose and as described by the seller, and in relation to unfair terms and pre-contract information.
- The participants also discussed smart contracts and their interaction with blockchain.

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<sup>13</sup> See Family Law (Scotland) Act 1985, ss 8-14.

### ***Delict and Unjustified Enrichment***

The participants next considered non-contractual obligations, primarily with reference to delict but with some mention of unjustified enrichment too. It was noted that:

- Delictual issues are more practical and fundamental than those relating to unjustified enrichment. It was suggested that the law of delict is arguably the most adaptable area of law, and should be well-placed to accommodate cryptoassets. However, the impact of technological change needs to be recognised.
- Fraud in relation to cryptoassets seems to be more straightforward than other areas of delict, as the courts will seek to identify the wrongdoer and provide suitable redress.
- In the discussion, the participants principally focused on the concept of duties, the scope of duties, and quantum. The leading cases on duty of care in relation to pure economic loss, and issues of assumption of responsibility, reliance, proximity, reasonable foreseeability and disclaimers, were referred to as being applicable to situations involving cryptoassets.<sup>14</sup> It was also noted that there is case law in England and Wales which indicates that developers may owe a duty of loyalty or fiduciary duties in tort to owners of Bitcoin.<sup>15</sup> The Quincecare duty<sup>16</sup> that banks owe to their customers to prevent fraud, where they have reasonable grounds to believe that instructions received are an attempt to misappropriate the customer's funds, may also have relevance in relation to cryptoassets. Regarding the scope of duties, it was noted that this depends on the nature of the service the defender has undertaken for the pursuer.
- The quantification of loss in relation to cryptoassets is a matter of some difficulty. There are questions as to when the damages or loss are valued. Although this is ordinarily the date of the wrong, the volatile nature of the assets can lead to a different approach.
- There can also be similar valuation issues for unjustified enrichment. More broadly, however, determining whether unjustified enrichment is applicable, and precisely how, simply depends on applying the usual tests for that type of obligation.
- The participants also discussed the importance of good expert evidence in litigation involving cryptoassets and how this may best be utilised.

### **Panel 3: Commercial and Corporate Law**

In the third panel, the participants considered commercial and corporate law matters, in particular: security rights and debt enforcement in relation to cryptoassets; legal options concerning cryptoassets in commercial legal practice; and tokenisation projects from a Scots law perspective.

#### ***Security Rights and Debt Enforcement***

The participants discussed the forms of voluntary security (including pledges, assignments in security and floating charges, as well as functional securities, e.g. trusts and retention of title) and debt enforcement processes (diligences of attachment, arrestment and adjudication for debt) available for cryptoassets. It was noted that:

- The property categorisation of digital assets is important for the law of security rights and debt enforcement given that specific security rights and diligences can only be used in relation to particular types of property.
- Possessory pledge is limited to corporeal moveables, as it relies upon possession of the security property. It is therefore not generally applicable to cryptoassets.<sup>17</sup> However, the pledge of a "cold wallet" hardware device enabling a creditor to have control of cryptoassets

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<sup>14</sup> E.g. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5; *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

<sup>15</sup> *Tulip Trading Limited v van der Laan* [2023] EWCA Civ 83.

<sup>16</sup> Named after *Barclays Bank Plc v Quincecare Ltd* [1992] 4 All ER 363.

<sup>17</sup> Cf the position for electronic trade documents in Electronic Trade Documents Act 2023, s 3; see also Moveable Transactions (Scotland) Act (MTSA) 2023, ss 42 and 44.

might be possible. In terms of the statutory pledge, once it is brought into force, it will be able to cover corporeal moveables and certain specified types of incorporeal moveable property, including intellectual property,<sup>18</sup> but cryptoassets are not a specified type.

- Floating charges can certainly cover cryptoassets or rights to cryptoassets, as they can encompass all types of property. However, only certain corporate entities can create them. There is some uncertainty as to the effect of their attachment (crystallisation) over cryptoassets.<sup>19</sup> From a creditor's perspective, the level of control they have over cryptoassets with a floating charge is low, with the debtor being able to dispose of the assets, and there is likely to be a lack of awareness regarding the existence and status of cryptoassets. This can only be partially addressed by the use of liquidation or administration for the enforcement of floating charges.
- Incorporeal moveable property can usually be assigned in security. For claims, this requires intimation to the claim debtor; however, the law accepts alternative approaches for e.g. shares and intellectual property, and it would likely also do so for cryptoassets. They would presumably require to be transferred to the creditor using the normal method of transfer, but for security purposes.
- Trusts can be used as a functional security to ringfence cryptoassets from the debtor's insolvency, but there remains a risk that the debtor will dispose of the property. Retention of title is a functional security that only has limited relevance in the context of cryptoassets being transferred from a creditor to a debtor. Other mechanisms may, however, be more relevant, such as the creditor obtaining a private key (but without the transfer of ownership of digital assets), and multi-signature arrangements. The participants discussed advantages and disadvantages of these methods.
- Regarding diligences, the situation seems more difficult than for voluntary security in the absence of cooperation by the debtor. It was contended that arrestment is appropriate if cryptoassets are held for the debtor by another party (e.g. on trust or they owe the debtor the assets).
- Adjudication for debt is the residual diligence in Scots law, and so is to be used if no other diligences are appropriate, which may be true for cryptoassets in some instances. However, the participants raised various issues with the enforcement mechanisms for this diligence and the dangers of transfer by the debtor.
- Attachment is a diligence for corporeal moveables only,<sup>20</sup> but could be used for cryptoassets if for example a private key is held on a hardware device. Yet there would be difficulties obtaining the device, particularly if it is held in a dwellinghouse,<sup>21</sup> and accessing it prior to any transfer by the debtor.
- The participants discussed various possible reforms including: confirmation of the property status of cryptoassets; the extension of statutory pledges to cryptoassets; recognition of control as equivalent to possession to create security in some circumstances; and clarification regarding the effects of good faith acquisition of cryptoassets on existing voluntary security and diligence. The participants also considered matters specific to debt recovery, including the desirability of the introduction of residual attachment or an equivalent with suitable remedies,<sup>22</sup> greater powers to compel debtors to provide information about cryptoassets and to transfer property.<sup>23</sup> They also emphasised the value of introducing information disclosure orders.<sup>24</sup>

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<sup>18</sup> MTSA 2023, s 47.

<sup>19</sup> For the attachment effect generally, see A D J MacPherson, *The Floating Charge* (2020), ch 5.

<sup>20</sup> Debt Arrangement and Attachment (Scotland) Act 2002, s 10(1).

<sup>21</sup> Debt Arrangement and Attachment (Scotland) Act 2002, s 47.

<sup>22</sup> See Bankruptcy and Diligence etc (Scotland) Act 2007, ss 129-145.

<sup>23</sup> Cf insolvency procedures such as sequestration and liquidation where some relevant powers are available.

<sup>24</sup> Bankruptcy and Diligence etc (Scotland) Act 2007, s 220.



### ***Legal Options for Cryptoassets in Commercial Practice***

The participants then focused on legal options for cryptoassets in Scottish commercial practice. It was noted that:

- Various commercial objectives are important in legal terms, including certainty, predictability, and flexibility for innovation and tensions may exist in trying to achieve these objectives.
- Regarding the interrelationship between changes in the business environment and law, it was pointed out that business change ordinarily happens first, and then legal changes are made to catch up. There is often considered to be a temptation to legislate, but there are risks in doing so, particularly if the change is radical and prescriptive. A gradualist approach may be preferable.
- The participants discussed, amid business environment change, how to manage the specific legal challenge of plugging in cryptoassets into the law. They considered the property categorisation work of the LCEW clarifying the existence of a third category of personal property in English law and the UK Jurisdiction Taskforce (UKJT)'s consideration of how cryptoassets fit with English insolvency law. Cryptoassets are not (yet) considered money, however it was queried whether some cryptoassets could be designated as money when this is sensible to do so. The participants considered the ETDA 2023 as an obvious need which adapts the meaning of possession to plug electronic trade documents into the existing system. From the perspective of Scotland, it was asserted that there is not a need for an extra category of property in the same way as English law, but developments in England and the use of equity to resolve issues there should be carefully monitored from a Scottish perspective.
- In relation to possession and control, it was noted that control is a key feature of cryptoassets, with possession a poor factual comparator but a useful functional analogy. This was also considered with specific reference to financial collateral and the MTSA 2023. Control could be added as a functional equivalent to notice or registration for title or to create security. Care should, however, be taken with any analogy between possession and control.

### ***Tokenisation Projects from a Scots Law Perspective***

The participants then focused on tokenisation projects and considered how particular projects would have been dealt with under Scots law. It was noted that:

- Tokenisation, also known as digitalisation, involves the creation of digital versions of traditional assets in different forms, e.g. fungible and non-fungible tokens, to exploit or create a variety of opportunities, including: the expansion of market hours, near instantaneous settlement, reporting in real time, information transparency and liquidity optimisation in terms of current barriers to trading. There was discussion of the models available for tokens: native, where the token is the asset; and proof of ownership/mirroring, where the token represents the asset.
- Regarding debt instruments in the context of tokenisation, it was noted that there are fewer issues for these in comparison to shares. An example was used involving a loan note issuance by a company to investors. In the absence of statutory requirements for registration, it was considered the blockchain could operate as the register of noteholders, with each token as the loan note certificate. The next example involved shares being tokenised using a nominee structure. It was pointed out that the Companies Act 2006 does not expressly provide for, or even consider the possibility of, the tokenisation of shares. In the example, investors held the beneficial interest in the shares (represented by tokens) with ownership of such interest recorded on the blockchain and the nominee company held the legal interest in the shares which was recorded in the register of members.
- As regards real estate (immoveable property), it was pointed out that the tokenisation of such property currently involves the tokenisation of shares of a company that owns real estate, rather than tokenisation of the real estate itself. The latter is not possible at present in England and Wales, due to the role of HM Land Registry. However, the tokenisation of contracts relating to land, such as leases, is being explored in proof-of-concept projects.

- For Scotland, like England and Wales, tokenisation is very difficult for assets that require registration of title in a central register, such as the Land Register of Scotland. Tokenisation of debt is easier than for e.g. shares. As regards the latter, the English nominee structure cannot be utilised as property law in Scotland is unititular. Instead, alternatives such as express trusts and/or rights under contract could be used. There are also issues arising from the formalities necessary for transfer.
- The participants also highlighted wider issues of relevance for Scotland. English law faces competition from other jurisdictions in this area. There are some advantages for Scotland in being part of the wider UK corporate and regulatory environment. The participants also discussed whether Scotland could take advantage of legislative change or whether a more iterative approach should be taken.

The workshop closed with concluding remarks and thanks to the participants.