

**Additional written submission from Professor Yüksel
Ripley, Dr MacPherson and Professor McKenzie Skene, 22
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We agree that digital assets would be part of the “whole estate of the debtor” which vests in a trustee in sequestration (personal or non-corporate insolvency), in accordance with s 78(1) of the Bankruptcy (Scotland) Act 2016. For these purposes, digital assets would be considered incorporeal moveable property, as per s 2 of the Digital Assets (Scotland) Bill.

However, the insolvency law challenges that we and others have identified relate to the characterisation of digital assets as corporeal moveables for the purposes of acquisition of ownership, rather than to their status as incorporeal moveables in legislation such as the 2016 Act. Vesting itself can sometimes give rise to acquisition of ownership – this is true for moveable property that requires delivery or possession or intimation of assignation for title to be completed (see s 78(8) of the 2016 Act). Consequently, for e.g. corporeal moveables and claims, vesting itself means that the trustee in sequestration acquires ownership. In other cases, however, something further requires to be done for the trustee to acquire ownership: e.g. in the case of shares, registration is required. The challenge here is determining whether or how the trustee acquires ownership of digital assets as distinct from vesting.

One possible interpretation regarding digital assets would be that by virtue of s 4 of the Bill, exclusive control stands in for delivery/possession, meaning that for the purposes of s 78(8) of the 2016 Act “delivery or possession” (in the form of exclusive control) is deemed to be ordinarily required to complete title for digital assets (i.e. beyond the Bill’s scope). In which case, the trustee would be considered to have received exclusive control (and thus ownership) at the time of vesting. Of course, this will not be true in reality and the debtor will continue to have the ability to transfer the assets. Nevertheless, the trustee can seek to use the general mechanisms available to them under the 2016 Act to seek to obtain control of digital assets. This will enable them to acquire ownership, if they obtain exclusive control – which may necessitate transferring the assets to their own account and thereby defeating any retained control by the debtor – or transferring ownership to a third party by way of sale. Whether there should be further provision to give a trustee additional mechanisms against the debtor and third parties to acquire exclusive control is another matter and should be considered in the next phase of reform.

An alternative interpretation is that the deeming effect does not apply here, since s 4(3) expressly disappplies its operation in relation to the acquisition of ownership in any enactment. This would mean that digital assets would not be viewed as property for which “delivery or possession” is required to complete title in s 78 of the 2016 Act. As such, the question would then be, how is ownership of the digital assets to be acquired or transferred by the trustee? The digital assets would still be considered to vest in the trustee as a special form of incorporeal moveable property, which should give the trustee the legal entitlement to seek to obtain control of them, as Lord Hodge and Professor Fox suggest, or to sell or otherwise realise or transfer them without acquiring ownership first. (Albeit that our point above about additional mechanisms to assist the trustee is relevant here too.) On this analysis, section 4(3) disappplies acquisition of ownership of digital assets under s 78(8) of the 2016 Act. As such, if the trustee wishes to acquire ownership of the digital assets, then they would have to do so on the basis of the common law. However, it is unclear if they would be doing so under the common law relating to corporeal moveables or as regards a special type of incorporeal moveable property. If digital assets for this purpose are deemed to be corporeal moveables, the position is unusual for sequestration, since normally s 78(8) would operate. If they are considered to be incorporeal moveable property here, we assume that the trustee would still have to obtain exclusive control in order to acquire ownership but that is not entirely certain, as it is essentially whatever the law is for the acquisition of digital assets at present (and is unclear, hence the need for this Bill).

The position is potentially different if the private key for a digital asset is held on a cold wallet (i.e. a physical device such as a USB stick or a computer), since the trustee would be deemed to have possession of that and thus ownership of the corporeal moveable property. However, the cold wallet device is itself a different item of property from the digital asset for which the private key is held. In any event, there would though again be practical challenges in dealing with the relevant digital asset.

We hope that this helps to explain the position and demonstrates some of the complexity involved, which may need to be considered further.

We are happy to provide more details if required.