SHERIFF APPEAL COURT

[2018] SAC (Civ) 7
ALO-A4-16

Sheriff Principal Abercrombie QC
Appeal Sheriff Stewart QC
Appeal Sheriff Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF HOLLIGAN

in the cause

DEVON ANGLING ASSOCIATION, JOHN B ANDERSON, A L ARMSTRONG, D K MUDIE, respectively The President, Treasurer and Secretary thereof, as representing the association as individuals

Pursuers and Appellants

against

SCOTTISH WATER

Defender and Respondent

Pursuer/Appellant: Upton, advocate; Fish Legal
Defender/Respondent: Balfour, advocate; Berrymans Lace Mawer LLP

27 March 2018

[1] This appeal concerns a claim for reparation. The pursuers and appellants are an angling association. They are an unincorporated body whose objects are to sustain and protect fishing in the River Devon and its tributaries along a particular stretch of the water. The defenders and respondents are Scottish Water, a body incorporated in terms of the

Water Industry (Scotland) Act 2002. We will refer to the parties as "the Association" and "Scottish Water" respectively.

[2] The circumstances giving rise to the present claim are set out in the closed record. For the purposes of this opinion the material facts are not greatly in dispute. It is a matter of agreement that the Association bears to be the tenant of three leases executed in 1982, 1988 and 2013 respectively (although we recognise there is a dispute as to whether the Association are lessees and the documents leases, for convenience we shall refer to them as "the leases"). There is little material difference in the terms and conditions of each of the leases. They are short documents. We set out the terms of one of the leases in detail later in this Opinion. The Association avers that the River Devon is a popular destination for anglers for salmon, sea trout and native brown trout. The Association has been in existence for some time and takes an active interest in ensuring adequate stocking of the river.

[3] At some point between 3 and 4 July 2011, approximately 12000 litres of 96% concentrated sulphuric acid were discharged from a tank situated on the property of Scottish Water at the Glendevon Water Treatment Works. Put very shortly, the Association avers that the sulphuric acid entered into the River Devon killing large quantities of fish, including brown trout. The Association avers that the discharge of the sulphuric acid was caused by the fault of Scottish Water. It seeks reparation therefor. The Association founds its claim in both negligence and nuisance. The loss condescended upon is patrimonial (the cost of certain reports) and loss of amenity (the alleged effect of the pollution on the value of the members' subscriptions).

[4] The Association raised an action against Scottish Water at Alloa Sheriff Court. Scottish Water tabled a plea of no title to sue. The matter came before the sheriff in Alloa. Having heard the parties in debate the sheriff sustained the plea of Scottish Water of no title

to sue and dismissed the action. As the argument before us is very similar to that presented to the sheriff, we need not refer in detail to the sheriff's judgment. Counsel lodged detailed notes of arguments which we summarise as follows.

Submissions for the Association

[5] For the Association, Mr Upton submitted that the Association does have title to sue. The parties agree the following proposition: that where by delict a person injures the subjects of a lease, the tenant, generally, has title to sue him for reparation. As section 66 of the Salmon and Freshwater Fisheries (Scotland) (Consolidation) Act 2003 ("the 2003 Act") provides that contracts such as the present shall be deemed to be leases it follows that the Association has title to sue for damage caused by Scottish Water. It is not disputed that the terms of each contract meet the criteria in section 66. It is also a matter of agreement that section 66 applies the Leases Act 1449 ("the 1449 Act") to the contract. The effect of section 66 is not only to deem the 1449 Act to apply to such a contract; it is also to deem the contract to be a lease. Reference was made to section 69(2) of the 2003 Act. The 1449 Act can only apply to a lease. If the contract were not a lease then the 1449 Act could not apply to it. That is why Parliament provided that such a contract "shall be deemed to be a lease". Parliament did not leave the matter to implication. Accordingly, in saying that the leases were not "true leases" the sheriff was in error.

[6] The tenant of a lease has title to sue for pollution of a river within the let subjects. There is limited agreement between the parties that a tenant of a lease, generally, has a title to sue for reparation in such circumstances (*Fleming* v *Gemmill* 1908 SC 340; *Hand* v *North of Scotland Water Authority* 2002 SLT 798; *East Lothian Angling Association* v *Haddington Town*

Council 1980 SLT 213 and *Mull Shellfish Limited* v *Golden Sea Produce Limited* 1992 SLT 703). Accordingly, the defender's plea of no title to sue should have been repelled.

[7] Before the sheriff, the issue arose as to whether the interest held by the Association is a real right. When an action is brought for delictual damage to a given subject, title to sue does not depend on having a real right in the damaged item (*Leigh & Sillivan Limited* v *Aliakmon Shipping Company Limited* [1986] AC 785, followed in Scotland in *Nacap Limited* v *Moffat Plant Limited* 1987 SLT 221). The test stated in *Nacap* is that in order to have a claim in delict for loss of, or damage to, property a person must have had either legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred. In the present case there is a lease in favour of the Association. A lease is a possessory title. It is therefore unnecessary to go further and say that the Association has a real right. However, section 66 provides that the Association does have a real right. A lease to which the 1449 Act applies is a real right (*Stair Institutes* IX, 9, ii; *Brock* v *Cabbell* (1830) 8 S 647; *Campbell* v *McLean* (1870) 8 M (HL) 40 at page 46 and *Mountain's Trustees* v *Mountain* 2013 SC 202 at paragraph [9]). A real right such as the present lease entitles the persons vested with it to possess the subjects as their own and, if it be injured by another, to demand reparation from that person in consequence to the right which they have in the subject itself (*Erskine Institutes* II, 1, ii). In the course of her judgment the sheriff held that the 2003 Act does not deem the appellants to have "a real right of title to sue". If title to sue depends upon having a real right the sheriff applied the wrong test but in any event section 66 obliges the court to treat the right as a real right. On the question of the nature of the right necessary to found title to sue counsel referred to *Delict* (various contributors), paragraphs 3.10-3.29.

[8] Section 66 provides that a relevant contract shall be deemed to be a lease to which the 1449 Act applies and the right of fishing shall, for the purposes of succession to that right, be deemed to be heritable property. The sheriff concluded that the leases were not leases in terms of the 1449 Act. However, they do satisfy the criteria set out in section 66. The sheriff appeared to take the view that the provisions limited the rights conferred by section 66 to the tenant's rights as to succession and in the event of the landlord selling the land. That is not what section 66 provides and ignores the words "shall be deemed to be a lease". Section 66 has been said to render the tenant rights a real right *simpliciter* without qualification (Gloag Henderson, *Law of Scotland* (14th Edition) paragraph 35.03). It is not for the courts to rewrite legislation but to give effect to clear legislative language even if the consequences are unintended (Craies, *Legislation* 11th Edition, paragraphs 17.11 and 17.14; *Slamon* v *Planchon* [2004] EWCA Civ 799). In Mr Upton's submission it would be odd if a tenant had a real right in any question with the greater claim of the proprietor of the land but not in a question with the lesser claim of a polluting neighbour. The effect of the 1449 Act is to render real not only such rights of a tenant as are essential to a lease but also a wide variety of subsidiary rights, even extending to those which could not on their own have been the subject of a lease (Paton and Cameron, *Landlord and Tenant* at page 104). In essence section 66 has deemed a contract to be a lease and it is to be given effect as a lease for all purposes. Section 66 applies "notwithstanding any rule of law to the contrary" which includes any rule of the law of delict that holds such a contract not to qualify as a lease.

[9] Salmon fishing has been treated differently from trout fishing. In relation to policy considerations the purpose of section 68 was not to remove any discrimination against trout fishermen by putting them in the same position as salmon fishermen. The object was to give tenants an incentive to cultivate their interest in the fishings. There was a practical policy

objective. It would encourage tenants to maintain, improve and develop fishing. Fishings can be affected by poaching, vandalism and other encroachment or damage done by third parties. The 1449 Act encouraged good husbandry by giving protection to tenants against the sale of the land by a landlord to third parties with a consequential loss of the tenancy. A right to sue third parties bolsters those rights. The only alternative would be for the tenant to be dependent upon the landlord pursuing claims, something the landlord may be unwilling or reluctant to do. Reference was made to the speech of Lord Hoffman in *Hunter* v *Canary Wharf Limited* [1997] AC 655 at page 708. That involved an issue of title to sue and is directly analogous to the present situation. Another policy consideration is that the effect of the sheriff's judgment is that only the landowner has title to sue for pollution to the river. The landowner has conveyed the substantive value of the fishings to the tenant; the fishings having been injured, the landowner has title to sue but in substance no loss, whereas the tenants have suffered the loss but have no title. There is therefore a legal black hole. Reference was made to *McLaren Murdoch & Hamilton Limited* v *Abercromby Motor Group Limited* 2003 SCLR 323; the law should avoid such a consequence. So far as statutory interpretation is concerned the court presumes Parliament not to have intended an undesirable or unfair result (*Coutts & Co* v *Inland Revenue Commissioners* [1953] AC 267 at page 281). Even if the Association did not meet the criterion of having a lease the test in *Nacap* does not depend upon whether the Association's right is labelled a lease but on the substantive content of his rights in respect of the damaged physical subjects. Scottish Water takes issue with the Association's exclusivity of possession of the fishing. The rights conferred upon the tenants are subject to reservation of the landlord's rights to fish and to permit others to fish. A reservation of rights to a landlord is not inconsistent with a tenancy (this proposition is agreed between the parties (Gloag and Henderson *Law of Scotland*

(14th Edition) at paragraph 35.02). Exclusivity of possession is not a necessary condition for title to sue for wrongful damage to the subjects. A co-proprietor has title to sue for injury to the extent of his title to the subjects (*Lawson* v *Leith and Newcastle Steam Packet Company* (1850) 13 D 175). Likewise, a co-tenant who shares his lease with another tenant shares possession but nonetheless has a separate *pro-indiviso* right and has a right to sue for damage to the let subjects to the extent of his interest (*Stair Memorial Encyclopaedia, Landlord and Tenant*, volume 13 paragraph 189). In the present case there is a limited reservation in favour of the landlord. That reservation does not negate title to sue for damage any more than in the case of shared rights. The true state of the law is that a tenant has a title to sue for injury to the interest which has been let to him. *Palmer's Trustee* v *Brown* 1989 SLT 128 is authority for the proposition that a tenant does not require to have an exclusive right to possession in order to have a title to sue for an injury to what has been granted to him. The right to fish for salmon incorporates the right to fish for trout. The right to fish for salmon can be held on a separate title. In Mr Upton's submission, on any river where the salmon fishing is owned separately, the riparian proprietor's right to fish for trout is not exclusive nor therefore has any tenant of the trout fishing an exclusive right either. That would entail that not only had no tenant of trout fishings the right to sue for harm to them but even the landowner would not have such a title.

Submissions for Scottish Water

[10] For Scottish Water Mr Balfour submitted that in deciding the crucial question of title to sue, the leading authority is *Nacap*. That established the proposition that, in order to have title to sue in a case based on damage to property, the pursuer must have either legal ownership of, or possessory title to, the property. In so far as the Association relies upon

public policy issues, there are policy issues in the law of delict. The limitation as to the right to maintain an action was clearly established by Lord Brandon in *Leigh & Sillivan*. In the present case the principal issue is whether the Association has a right of ownership, or a right of possession similar to that of an owner. In the case of *Hand*, Lord Wheatley described the test as "a high one". That was a case involving a claim by a tenant. In that case, the lease was registered in the General Register of Sasines which Lord Wheatley described as being in many respects identical to the interest of ownership. Mr Balfour accepted that, generally speaking, a tenant's interest under a lease meets the test in *Nacap*. In most cases the tenant's interest will be identical to that of the owner because the lease will usually grant to the tenant exclusive possession of the property. Accordingly, the question here is whether the rights under consideration are similar to that of an owner. The answer is no because the landlord has reserved to himself exactly the same rights to those he has conferred upon the tenant. He can also grant permission to friends and guests to fish. The leases themselves describe a right to fish. The leases are not leases or licences to occupy property. The lease confers upon the tenants the right to enter onto the land to lop trees. There is no right of possession to property. Assignees and subtenants are excluded. The exclusive right to the fishings is expressly subject to a reservation in favour of the landlord.

[11] The 2003 Act is a consolidation measure. It was first enacted in section 4 of the Freshwater and Salmon Fisheries (Scotland) Act 1976 Act ("the 1976 Act"). At common law a right to trout fishings was considered a personal right (*Earl of Galloway* v *The Duke of Bedford* (1902) 4 F 851 at 861). Accordingly, one should start from the proposition that the right of trout fishings is a personal right. Section 66 of the 2003 Act provides that such a lease is deemed to be a lease for the purposes of the 1449 Act and also in relation to the tenant's succession. The draftsman of section 66 could have stopped at the words "deemed

to be a lease" but he did not. He went on to provide that it is a lease for the foregoing two purposes. It is clear from the opinion of the Inner House in the *East Lothian Angling* case that exclusive possession was regarded as a key feature (page 219). In the Outer House, Lord Allanbridge had commented upon the absence of any real rights pertaining to the pursuers. By reference to Paton & Cameron at page 103, the effect of the 1449 Act is to give a tenant under a lease to which it applies, security of tenure in a question with a singular successor of the grantors. The authors seem to doubt whether this conferred a "real right" at all. Mr Balfour did not concede that the effect of section 66 is to confer upon the Association a real right. Section 66 has nothing to say about exclusive possession. If there is no exclusive possession section 66 does not apply.

[12] Turning to the appellant's note of argument, where the sheriff concluded that the leases are not leases in terms of the 1449 Act, she was applying the tests set out in page 104 of Paton & Cameron as to the five conditions which require to be satisfied for the Act to apply. The first condition (the subjects must be land) clearly could not be satisfied but for the enactment of section 66. The fifth condition, possession, requires to be exclusive (see page 113 of Paton & Cameron). Accordingly, the sheriff was correct to conclude that the 1449 Act did not apply. In *Mull Shellfish* there was no dispute as to the existence of a lease (see also Lord Bannatyne in *Cruden Building & Renewals Ltd* v *Scottish Water* [2017] CSOH 98 at paragraphs [53] to [63]). That is not the case here. The Association cited no authority to say that a reservation of rights to the landlord similar to the present case would still confer upon a party title to sue. The reservation contained in the leases is identical to the right conferred. It is very different from the example relied upon by the Association, namely the landlord reserving to himself the right to go to a locked room to collect possessions. Accordingly, the right conferred upon the Association was not a right similar to that of an

owner. Mr Balfour distinguished the case of *Palmers Trustees* v *Brown*. Firstly, it had nothing to do with title to sue and a third party wrongdoer. It was a breach of contract case. It also involved an exclusive right of shooting but not an inclusive right of occupation.

Reply by Association

[13] The Association has a real right and that gives title to sue. Subject to the reservation in favour of the landlord, the lease grants exclusive rights to the Association. A tenant has the right to seek interdict against delinquents. There is no authority that reservation to the landlord negates the tenant's right to sue. If Scottish Water is correct in relation to its argument then any such reservation will apply to all leases and not just those of trout fishing. Reservations are common but do not affect title to sue. The correct formulation is to be found in *Nacap*. Here the tenants have the right to fish. They have exactly the same right as the landlord. The reservation of the landlord's right to fish is not a sufficient qualification of the possessory title or the right to sue. *Nacap* does not suggest that there is an exclusive right to sue.

Decision

[14] The appellants' position is that they have a lease. In order to pursue their present claim they require to have either a right of ownership or a right of possession similar to that of an owner (*Nacap*). They say that the leases in question give them a possessory title sufficient to satisfy the test or that, irrespective of the label, the substantive content of the rights conferred satisfy the test in *Nacap*. The respondents say that the appellants do not have a lease or right of ownership nor do they have a right of possession similar to that of an owner.

[15] The three leases condescended upon are written in similar terms. It is sufficient to set out the terms of one of the leases. (When we refer to the one lease we should be taken as referring to all three.)

> "FIRST. The First Party as far as he has the right thereto, lets to the Second Party excluding assignees and sub-tenants the exclusive right of all fishings on the River Devon within the lands of … together with the right to interdict, and if deemed necessary, prosecute at the expense of the Second Party all or any persons found fishing the waters of the River Devon within the aforesaid lands, either illegally, or without permission, or in any way which contravenes the Rules and Byelaws of the Second Party.
>
> SECOND. The duration of the let shall be from [year] and thereafter from year to year subject to six months (sic) notice given by either party in writing six months before the first day of April in any year.
>
> THIRD. The Rental for each year is the sum of £20 payable on the fifteenth day of May in advance.
>
> FOURTH. The First party reserves to himself the right to fish the aforesaid waters of the River Devon free of Membership of the Devon Angling Association and to grant similar permission to his guests or friends by written permission duly signed by the First Party.
>
> FIFTH. Only with the permission of the First Party shall the Second Party have the right to lop where necessary the branches of trees over-hanging the river within the aforesaid lands, where these have become overgrown, and any measures taken under this clause to be at the expense of the Second Party.
>
> SIXTH. The Second Party shall fish in a sportsmanlike manner and in accordance with the rules of the Devon Angling Association and all fishing shall be by rod and line only".

[16] The document purports to be a lease. It is described as so. It grants to the Association the "exclusive right" to all fishings within the relevant stretch of water with the right to interdict or prosecute persons found fishing there who do not have the relevant permission (as in *Lamington*). The document has an ish and provides a sum by way of rent. The only qualification is the reservation of the right to fish in the stretch of water by the landlord and by his guests or friends ("the reserved rights"). It is these reserved rights

which Mr Balfour says are fatal to the qualification of the document as a lease and the rights enjoyed by the Association.

[17] Whatever their legal status, heritable proprietors have been willing to grant rights to fish in favour of fishing associations for some time. Different methods have been adopted. One example is the case of the *East Lothian Angling Association* v *Haddington Town Council*. The document relied upon in that case was a letter which never purported to be a lease and which was titled "Fishing Privilege for the River Tyne and its tributaries". It was described as a "permission to fish". The particular structure of the arrangement was that, each year, the Angling Association wrote to each proprietor inviting them to renew their permission for the forthcoming season upon certain terms and conditions. The court held that the document was nothing more than a personal licence to fish. Furthermore, the document narrated that not only did the grantor retain the right to fish but similar rights were also conferred by the grantor in favour of all other contiguous proprietors.

[18] The Inner House contrasted the arrangement in that case with the arrangements in *Lamington Angling Improvement Association* v *Millar* (1924) 40 Sh. Ct Rep 190. The facts of that case are much closer to the facts in the present case. Indeed the wording of the lease set out above has many similarities to the lease in the *Lamington* case. As the Inner House recorded (at page 219), in *Lamington* there was an absolute assignation in the lease or contract by the riparian owner of his exclusive right to fish for trout *ex adverso* his land in a private river. The assignees in that case were, in terms of the lease or contract, authorised to take action by interdict to prevent unauthorised persons trespassing on the water. We note that in that case the exclusive right to fish for trout and grayling was subject to the rights of the landlord or his tenant and their guests of the right to fish with no charge owing to the association (page 192) ("free tickets" were issued to them). In that case the association

sought to interdict a third party from fishing without leave. It was held that the association had title to sue in pursuing an action for interdict.

[19] As we understand it, it is common ground between the parties that, if only in general terms, a tenant has title to sue in reparation for infringement of his rights. Reference was made to *Fleming* v *Gemmill* 1908 SC 340 and *Hand* v *North of Scotland Water Authority* 2002 SLT 798. The case of *Fleming* concerned an action raised by a tenant farmer on account of pollution to a stream which adversely affected his livestock following consumption by them of the polluted water. The Lord President (Dunedin) said at page 348:

> "I do not think there is any difference in the quality of the title, if I may use such an expression, of the proprietor and of the tenant in this matter. It seems to me that the tenant is the assignee of the landlords' title, by the mere force of the lease, to every extent that it is necessary to give it to him for his protection in the lease, and inasmuch as the subjects let include a stream, one of the natural uses of which is to water cattle at it, it seems to me that the tenant has every right which the landlord had to maintain the purity of the stream. In other words, he is the assignee of the landlord's title in so far as it is necessary for his own protection in the subjects let".

That formula, "assignee of the landlord's title", is a formula invoked in the *East Lothian Angling Association* (page 219).

[20] Mr Balfour's position was that the leases were not leases at all because they did not give exclusive possession of the subjects to the Association. The basis for this proposition was the reserved rights. Mr Balfour principally relied upon the *East Lothian* case and also page 113 of Paton & Cameron. However, both agree that the reservation of rights to a landlord is not, of itself, inconsistent with the existence of a tenancy; reference was made to paragraph 35.02 of Gloag & Henderson *The Law of Scotland* (14th Edition) to which we shall return. Although reference was made to the two authorities cited by the learned authors which support that proposition we were not addressed on them.

[21] The passage in Paton & Cameron referred to by Mr Balfour appears under the heading of "Possession". That is said to be one of the five conditions necessary to bring a lease within the scope of the Act of 1449, the five conditions being: (a) the subjects must be land; (b) that the lease, if for more than one year, must be in writing; (c) that it must have a definite ish; (d) that it must specify rent, and; (e) there must be possession by the tenant. The text in Paton and Cameron requiring possession to be exclusive is brief and subject to a qualification, not relevant to the present case, namely possession by outgoing and incoming tenants in relation to different crops or plants on a farm. We accept that, in the course of its opinion, the Inner House in the *East Lothian Angling* case made reference to exclusive possession but, as the document in that case never purported to be a lease in the first place, we regard these comments as obiter. Reading the whole passage from Paton & Cameron on the subject of possession (pages 110-114) it does not seem to us that, taken in the round, possession requires to be exclusive. Indeed, if it is accepted, as it is, that a landlord may reserve certain rights it is difficult to see how such a right would ever be consistent with a requirement of exclusive possession.

[22] In the passage in Gloag & Henderson referred to above reference is made to the case of *South Lanarkshire Council* v *Taylor* 2005 1 SC 182. The terms of that arrangement were that the tenant was required to vacate the grazing areas within 24 hours' notice to permit other events to take place. The pursuers in that case sought declarator that the defender had no right or title to occupy the areas whereas the defender asserted that she was a tenant under a lease. The sheriff grated decree; the Inner House recalled this interlocutor and allowed a proof before answer. The Inner House held that a limited reservation in favour of the landowner or a limitation in the nature of the use to which the occupier can use the land would not necessarily be inconsistent with the existence between them of the relationship of

landlord and tenant. The Inner House noted with approval the opinion of the Lord Justice Clerk (Ross), in *Brador Properties Ltd* v *British Telecommunications Plc* 1992 SC 12, to the effect that the definition of a lease in Scotland is wider than in England so that it may be enough in Scotland that the alleged tenant receives the right to certain limited uses of the lands as opposed to entire control of them. In our opinion, the mere fact that a landlord has reserved certain rights to himself is not destructive of the relationship of landlord and tenant. It is a matter of degree. The lease grants to the Association (which includes its members) the exclusive right of all fishings on the river. The reserved rights are not of such a magnitude to undermine the grant. Proportional to the exercise of the fishing rights by the tenant, the reserved rights may be considered modest. We do not consider that the reserved rights are equivalent to the rights conferred upon the Association and therefore do not accept Mr Balfour's argument as to possession.

[23] At this point we turn to section 66 of the 2003 Act. Section 66(1) provides:

> "Application of Leases Act 1449
>
> (1) Notwithstanding any rule of law to the contrary, any contract entered into in writing for a consideration and for a period of not less than a year whereby an owner of land to which a right to fishing for freshwater fish in any inland waters pertains or the occupier of such a right authorises another person to so fish shall be deemed to be a lease to which the Leases Act 1449 applies, and the right of fishing so authorised shall, for the purposes of succession to that right, be deemed to be heritable property".

Section 69(2) provides:

> "References to an occupier of a right of fishing for freshwater fish are references to a person who is in possession of that right as tenant under a lease of land to which such a right pertains or under a contract which by virtue of section 66 of this Act is deemed to be a lease and, for the purposes of this subsection "tenant" and "lease" include "subtenant" and "sublease" respectively."

[24] Section 66 may be broken down into several components. Firstly, there requires to be a contract in writing, for a consideration and for a period of not less than a year.

Secondly, one of the parties must be either an owner of land to which a right of fishing for freshwater fish pertains or is an occupier of such a right. Section 69(2) addresses what is meant by an occupier. The contract authorises the grantee to fish for freshwater fish. If these conditions are satisfied then (a) the contract shall be deemed to be a lease to which the 1449 Act applies; and (b) the right of fishing is deemed to be heritable property for the purposes of succession to that right.

[25] For practical purposes the effect of a lease coming within the protection conferred by the 1449 Act gives to the tenant the rights against singular successors of the landlord, rights which, absent section 66, he would not have. Put another way, at common law, a "tenant" of rights to trout fishings (with no rights in land granted additionally) had only contractual rights against the party granting those rights. There is a clear dispute between the parties as to the legal implications of section 66. Section 66 is an Act of the Scottish Parliament. It is a consolidation measure. The section first appeared in section 4 of the 1976 Act, an Act of the United Kingdom Parliament. The heading to section 4 was "Legal Status of Right of Freshwater Fishing". The heading to section 66 is "Application of Leases Act 1449". Quite why the two headings are different in respect of the same text is not apparent. (Our attention was drawn to the limited use to which recourse may be had to headings when construing legislative provisions of the United Kingdom Parliament – Craies, *Legislation* (11th edition) paragraph 26.1.8. At common law it has long been held that the lease of trout fishings without a grant of land did not come within the terms of the 1449 Act – see *Earl of Galloway* v *Duke of Bedford* (1902) 4 F 851. The issue in the *Earl of Galloway* case was whether a lease of trout fishings was binding upon an heir of entail. It was held that, without possession of the land, a lease of trout fishings was a personal privilege and (unlike salmon fishings) not a separate feudal tenement. For that reason it did not fall within the terms of

the 1449 Act. Mr Balfour maintains that the effect of section 66 is to limit the effect of the two consequences set out in the section; Mr Upton says that section 66 deems a contract for trout fishings to be a lease for all purposes. We recognise, although again obiter and distinguishable given the different documentation, in the *East Lothian Angling Association* case the Inner House seemed to think that the effect of section 4 of the 1976 Act might permit the creation of a lease (page 219).

[26] In our opinion section 66 (formerly section 4) is carefully phrased. The core issue is a contract which authorises a person to fish and, to borrow the words of the heading to section 4, the legal status of a right to freshwater fishing. At common law, a personal right to fish for freshwater fish was actionable as between the original parties to such a contract and could confer rights good against third parties (*Lamington*) but, not being a separate feudal tenement, the substance of the rights was limited (*Earl of Galloway*). Section 66 says nothing about the possession of land exclusive or otherwise. It is not dealing with such issues. Section 66 provides that certain contracts authorising others to fish shall, by statute, carry with them two consequences: firstly, the protection afforded by the 1449 Act; secondly, it is heritable property for the purposes of succession. The word "deem" appears twice in the section. It is carefully selected. The section does not say that a contract authorising fishing is a lease; it is deemed to be a lease for certain purposes. In some respects the deeming provision recognises the nature of the present issue. "Deeming" something to be a lease for certain purposes does not make it a lease for all purposes. If a person is authorised to fish, it is difficult to see what he would have exclusive possession of.

[27] However, the issue in this case is not whether there is a lease but whether the pursuers have title to sue. Parties agree that the test for title to sue is set out in *Nacap,* namely whether, in cases of damage to property, there is a right of legal ownership or there

exists a right of possession similar to that of an owner. The rights to be vindicated are those of the Association. The rights conferred are those contained in the leases and by way of the 2003 Act. The leases confer substantial rights – they are exclusive to the Association and include the right to interdict and prosecute third parties who infringe their exclusive rights. *Lamington* confirms that an Association with rights similar to those in the present case can sue for interdict. It is settled law that a tenant can sue to protect his rights. The Association avers considerable investment and interest in the maintenance of the fishings and the protection of the rights of the significant number of members who enjoy the exercise of those rights. Section 66 adds to the plenitude of the rights enjoyed by the Association. It is unnecessary for us to decide whether the rights of the Association can be characterised as real rights because, in our opinion, adding all of the foregoing together we conclude that the rights enjoyed by the Association amount to a right of possession similar to that of an owner. Indeed it would be an odd result if the Association enjoyed the right to pursue an interdict against those infringing their rights but not an action for damages. Furthermore, as Mr Upton submitted, one might end up with a vacuum in which a landowner could not pursue a claim because he had suffered no loss, whereas the Association which had suffered a loss could not pursue a claim because it was held to have no title.

[28] Accordingly, given that we differ from the sheriff we propose to allow the appeal; recall the interlocutor of the sheriff dated 19 December 2016; repel the first plea in law for the defenders; remit the cause to the sheriff to proceed as accords; and we shall reserve all matters of expenses. Should parties agree the issue of expenses the matter can be dealt with without a hearing. If not, a hearing will be fixed.