OUTER HOUSE, COURT OF SESSION

[2025] CSOH 95

CA90/23

OPINION OF LORD LAKE

In the cause

EE LIMITED

Pursuer

against

(FIRST) IAN THOMAS APPLEBY AND (SECOND) ELIZABETH HOWE

Defenders

Pursuer: Mitchell; Shepherd & Wedderburn LLP
Defenders: Parties

9 October 2025

Introduction

[1] The first defender owns and both defenders live at Station House, Altnabreac, Caithness. Their house is adjacent to the Far North Railway line leading to Thurso and Wick. The relevance of this will become apparent below. As part of the Shared Rural Network provided by collaboration between mobile network operators and the UK Government, the pursuer wished to install a mobile telecommunications mast in Caithness approximately half a kilometre from the first defender's property. This is with the intention of providing mobile data services and eliminating a "partial not-spot". The pursuer obtained planning permission and entered into agreements with Caledonia Forest Land

Investments Limited ("CFLIL"), the owner of the land on which the mast is to be erected, which on the face of them permit the erection of the mast and access to the mast site. CFLIL later granted a lease in favour of the pursuer regulating use of and access to the mast site. The pursuer also entered into an agreement with Ulbster Estates (Sporting) Limited for access over land owned by them where it was required to reach the mast site. The route for access to the mast site crosses the railway line at what is referred to in the pleadings as a level crossing situated roughly 600m from Altnabreac railway station and the defenders' home.

[2] The summons alleges that the defenders have sought to prevent the pursuer and contractors engaged by them obtaining access to the mast site. In outline, it is averred that the defenders obstructed the level crossing at Altnabreac by locking gates, parking vehicles across the track leading to the crossing and erecting fences. After correspondence with the defenders by solicitors acting for the pursuer, the present action was raised. The pursuer seeks interdict and interim interdict preventing the defenders from interfering with their entitlement to take access over land owned by CFLIL, orders requiring them to carry out specified acts (*ad factum praestandum*) and payment of damages in respect of losses they claim they suffered as a result of obstruction of their right of access. The defenders have counterclaimed seeking decree (a) for payment of what they term a compensation payment in respect of use of the crossing, (b) ordaining the pursuer to enter into an access agreement with the first defender and make payments in terms of such agreement and (c) "in the event that the pursuer rejects the first defenders conclusions at '1' and '2'" for interdict preventing the pursuer or persons acting on their behalf from entering onto the level crossing at Altnabreac. These remedies are sought, and the principal action is defended, on the basis that the first defender owns the crossing. The pursuer makes no averments as to present

ownership of the level crossing but in Article 11 includes in their averments in response that the railway line was conveyed to Sutherland and Caithness Railway Company by feu disposition dated 3 April 1876. It is the defenders that have put ownership of the level crossing in issue.

[3] Once the summons was called there were various steps of procedure including minutes of amendment, the granting of an order under the Court of Session Act 1988 section 47(2) and motions for leave to reclaim. They are not relevant to the issues considered in this Opinion, but the followings steps of procedure have taken place and are relevant:

(a) On 1 November 2024 and 26 November 2024, the case was sisted to allow the defenders to seek legal representation. The defenders have continued to represent themselves at all hearings.

(b) On 7 February 2025 a motion at the defenders' instance to grant decree of absolvitor was refused. The basis on which absolvitor was sought was that the action was irrelevant and/or lacking in specification and also that the pursuer's averments were unfounded in fact.

(c) Ahead of a preliminary hearing on 7 March 2025, the pursuer lodged a note of proposals in which they sought a 6 month sist of the action. That motion was opposed by the defenders and was refused at the preliminary hearing.

(d) At a procedural hearing on 14 May 2025 a further motion was made by the defenders that the summons should, in effect, be dismissed and that summary decree should be granted in terms of the counterclaim. These motions were refused. On the same day, a motion made on behalf of the defenders to sist proceedings was also refused and the case was sent for a debate on 16 and

17 July. Parties were required to lodge Notes of Arguments no later than 2 July 2025.

[4] In response to the interlocutor issued following the procedural hearing, both parties lodged Notes of Argument. In the pursuer's Note they sought dismissal of the counterclaim and exclusion from probation of certain specified averments in the defences. In the defenders' Note they responded to arguments for the pursuer and contended that the pursuer lacked title to being their action. Their arguments were not based solely on the pursuer's pleadings and documents incorporated into them. They require consideration of titles, maps and a proposed Notice of Title. In the Note, the defenders contended that the first defender has title to the solum of the Altnabreac railway crossing (paragraph 4) and that the pursuer has no right to use it. They state that the first defender is in the process of having a Notice of Title prepared which would include the solum of the crossing and which he intends to register in order to acquire a real right in the land. The defenders claim that the solum of the railway was conveyed in a disposition by Robin MacDonald Sinclair to John Archibald Sinclair, recorded in 1979, of the Loch Dhu Estate including (one) the Lands and Estate of Altnabreac, (two) Station House and (three) the former School House ("the 1979 Disposition") and contend that thereafter, the rights to the railway crossing solum were transferred to the first defender.

[5] In the hearings that have taken place, the pursuer has been represented by counsel. The defenders have not had legal representation. The submissions for the defenders were made by the second defender with occasional interjection from the first defender. There was no objection from the pursuer to proceeding in this way and I allowed it. The approach of the defenders means that there were a number of unusual procedural aspects to the diet of

debate and what followed and, for that reason, I set out the arguments that were advanced in more detail than I would normally.

Submissions for the pursuer

[6] The submissions for the pursuer can be divided into a number of chapters challenging particular averments of the defenders in the defences and counterclaim. The first set of submissions challenges the averments for the defenders that the first defender owns the level crossing at Altnabreac under a registered title. The defenders plead in Answer 9 of the defences and Statement of Fact 3 in the counterclaim that the first defender is the heritable proprietor of Subjects registered in the Land Register of Scotland under Title Number CTH7726 and that this title includes ownership of the solum to the private level crossing at Altnabreac (Defences Answer 11 and counterclaim, Statement of Fact 3). Title Number CTH7726 relates to Station House. The defenders admitted that production 6/35 is their title sheet and that production 6/36 is their title plan.

[7] There are several other averments which follow on from this. In the first Statement of Facts in the counterclaim the defenders aver:

> "Station House used to form the Title of a larger property known as the Loch Dhu Estate. Station House was subsequently 'split off' from the original Loch Dhu Estate and is now a standalone property registered to the First Defender."

Other averments by the defenders explain some of the conveyancing history concerning Title Number CTH7726. The following deeds are averred:

(i) The 1979 Disposition.

(ii) A disposition by John Sinclair to Fountain Forestry Limited in 1984.

(iii) A change of name by Fountain Forestry Limited to OCS Forestry UK Limited in 2012.

(iv) A disposition by OCS Forestry UK Limited in 2014 of part of the land - including Station House. The land split off was registered under Title Number CTH5589.

(v) In 2016, OCS Forestry UK Limited split Station House, Deer Lader [*sic*] and Badnaheen Cottage from the CTH5589 subjects and sold them to Kevin Alan Booth leading to them being registered under Title Number CTH7265.

(vi) The remaining subjects in CTH5589 (excluding *inter alia* Station House) were subsequently sold by OCS Group Limited to CFLIL in May 2019.

The defenders lodged and incorporated into their pleadings (i) their title sheet, (ii) the 1979 Disposition, (iii) the disposition from 1984 by Robin Sinclair in favour of Fountain Forestry Limited, (iv) the disposition from 2016 by OCS Group Limited in favour of Kevin Booth, (v) the disposition from 2019 by OCS Group Limited in favour of CFLIL, (vi) a disposition from 2025 by Summerleaze Limited in favour of CFLIL and (vii) documents from the Registrar of Companies recording a change of a company's name form OCS Forestry UK Limited to Fountains Forestry Limited to Fountains Forestry UK Limited between 2012 to 2024.

[8] The pursuer submitted that as the first defender's title was registered in the Land Register, the extent of his ownership was to be ascertained only by reference to the Title Certificate. That certificate and the title plan shows clearly that the level crossing is not part of that title. It was submitted that it was not appropriate to consider prior deeds to determine what was owned. It was said that to do so was at odds with the purpose of the Land Register which is that the contents of the register are the measure of a party's rights such that the extent of ownership is to be ascertained only by reference to the registered title. It ought not to be necessary to go behind the register. It was pointed out to me that the

register was intended to operate on the "curtain principle" which meant extent ownership was to be determined by a reference only to the title sheets. In this regard I was referred also to the decision of the Lands Tribunal for Scotland in *May Fung Chung* v *Keeper of the Registers of Scotland* [2024] LTS 14, paragraph 17 and 20, and the Opinion of Lady Wolffe in *BAM TCP Atlantic Square Limited* v *British Telecommunications PLC* [2020] CSOH 57, para [64]. In the former case, in response to an argument on the basis of prior deeds that sought to amend the applicant's title so as to include an additional area of ground, the Tribunal stated:

> "Registration supersedes the recording of the deed in the Register of Sasines. The subjects of the 1955 Feu Disposition (and, for that matter, the subjects of the other deeds underlying the applicant's registered title) were registered under the Land Registration (Scotland) Act 1979 in 2006. The curtain principle applies. Accordingly, what matters is the description in the applicant's registered title". (Paragraph 20)

[9] Counsel for the pursuer submitted that the statement in the defenders' Note of Argument that the first defender intended to register a Notice of Title in relation to the solum of the level crossing was an acknowledgement that they do not presently have a real right to anything other than the land contained in Title Number CTH7226. In relation to the contents of the Note as to the intended Notice of Title it was submitted that it was apparent that the railway line did not form part of the land transferred in the 1979 Disposition. The two areas of ground shown in the plan annexed to it are clearly either side of the railway line and it therefore appears that the line is not included. In addition, the relevant written part of the disposition includes the following wording:

> "(Five) my whole right, title and interest, present and future in and to the said subjects including without prejudice to the following generality such rights as I may have in (a) the school at Altnabreac and (b) the railway line passing through or *ex adverso* the subjects hereby disponed together with the solum of the said railway line, ground attached and buildings erected thereon".

It was pointed out the terms of this do not indicate that the railway line is part of the land conveyed and, even if it did, the first defender does not identify any means by which the

right to the solum of the railway line would have transmitted from the disponee of the 1979 Disposition to him as owner of Station House as opposed to any other owner of lands it conveyed. It was submitted that the first defender had not made relevant averments that he was in a position to prepare and lodge a Notice of Title. The defenders would have to explain the link in title or midcouple in terms of the Conveyancing (Scotland) Act 1924 between John Sinclair (the disponee in the 1979 Disposition) and the first defender such that he has a right to be registered as proprietor. Without such a midcouple, it was submitted that the Keeper would refuse to register the Notice of Title. The procedure in the 1924 Act, section 1, in relation to Notices of Title, required that the person have a right to the land not merely a right to a conveyance.

[10] The defenders' pleadings contain averments as to what are termed "solum rights" or "solum ownership". These are as follows:

- "The First Defender's solum ownership to the private level crossing and other land at Altnabreac was granted together with the Station House title in prior deed Robin MacDonald Sinclair to John Archibald Sinclair, recorded in the General Sasine Register in 1979 ('1979 deed'). Clause Five (b) at page second of the 1979 deed constitutes solum rights together with the Station House title to '(b) the railway line passing through and ex adverso the subjects hereby disponed together with the solum of the said railway line, the ground attached and the buildings erected thereon...'." (Answer 11)

- "Explained and averred that Scottish property law defines solum as 'soil' beneath the surface of the ground and like Mineral Rights, Solum Rights can be a separate interest in land that transfers with the property. It is averred that it was the intention of Robin MacDonald Sinclair to transfer his solum interest to the area of land specified on page second at clause (five) (b) together with the Subjects in the 1979 disposition to his son John Archibald Sinclair." (Statement of Fact 3)

The clause (five)(b) referred to in these excerpts is that quoted in the preceding paragraph. The pursuer submitted that there is no such concept as "solum rights" over and above ownership of the land. Ownership of the solum is ownership of the land. If the first

defender wished to claim "solum rights", it would be necessary for him to identify his title to ownership of the land in question. The pursuer submitted that the averments as to solum rights were irrelevant.

[11] The next section of submissions concerned the defenders' averments as to ownership of mineral rights. The defenders plead that the first defender has mineral rights over the CFLIL subjects over which the pursuer's right of access runs and on which they have erected the mast. The principal averments in this category are:

- The mineral rights to CFLIL's subjects CTH3449, CTH558 and CTH3311 were granted together with the first defender's title in prior deed John Archibald Sinclair in favour of Fountains Forestry Limited, recorded in the General Sasine Register in 1984 ("1984 deed"). The first defender is preparing to register a separate mineral title in the Land Register of Scotland. (Answer 9)
- The first defender has mineral rights to the land upon which the mast site is constructed. (Answer 10)
- The first defender's title includes mineral rights to the forestry subjects. (Statement of Fact 2)
- The first defender is preparing to register a separate mineral title in the Land Register of Scotland. (Statement of Fact 2)
- The first defender, who has mineral rights to the said subjects, had not been consulted about the development to obtain his permission to build [the base for the mast] on land to which his mineral interest pertains. (Statement of Fact 9)

[12] The pursuer submitted that the Title Sheet CTH7726 does not indicate that minerals are owned by the first defender. It was noted that there was no reference there to ownership of minerals beyond the boundaries of the area depicted in the title plan. In relation to the

claim to own minerals under the land owned by CFLIL under Titles CTH3311, CTH3449 and CTH5589, it was submitted that a conveyance of land would normally carry with it the minerals (*Campbell* v *McCutcheon* 1963 SC 505) and minerals were not excepted from the CFLIL titles. It was submitted that titles CTH5589 and CTH3311 to not make any reference to minerals being excluded. Title CTH3349 does refer to a reservation of minerals but this was in favour of the Crown and was made in 1964.

[13] The next section of submissions concerned the defenders' averments as to ownership of servitude rights of access over CFLIL's land. The principal averments in this category are:

- The first defender's title also includes a heritable and irredeemable servitude right of pedestrian and vehicular access over CFLIL's said subjects and a heritable and irredeemable servitude right to use for the water supply, drainage and sewerage of the first defender's subjects all existing spring wells, streams, water courses, reservoirs, tanks, pipes and connections, drains, ditches, sewers and others in or under any other parts of CFLIL's said subjects which are at present so used with right of access for the maintenance or renewal thereof. (Answer 9)
- That the first defender's title includes a heritable and irredeemable servitude right of pedestrian and vehicular access over the subjects registered to CFLIL in the Land Register of Scotland under Title Number CTH3449 ("the low road"). (Answer 13)
- It is averred that the interdict interfered with these servitude rights. (Answer 44)
- The exact terms of the interdict breached the first defender's servitude rights of pedestrian and vehicular access to the subjects registered in the Land Register

of Scotland to CFLIL under Title Numbers CTH3449, CTH5589 and CTH3311 by restraining the defenders from entering the said subjects by foot or vehicle which also meant they could not access their water well. (Answer 45)

- The first defender's title includes mineral rights to the forestry subjects. The first defender's title also includes a heritable and irredeemable servitude right of pedestrian and vehicular access over the forestry subjects and a heritable and irredeemable servitude right to use for the water supply, drainage and sewerage of the first defender's subjects all existing springs, wells, streams, water courses, reservoirs, tanks, pipes and connections, drains, ditches, sewers and others in or under any other parts of the forestry subjects which are at present so used with right of access for the maintenance or renewal thereof. (Statement of Fact 2)
- The terms of the interdict breached their property rights by preventing and restraining them from entering the forestry subjects when the first defender has a heritable and irredeemable servitude right of pedestrian and vehicular access over the forestry subjects and his water well is located on CFLIL's subjects CTH5589. (Statement of Fact 22).

[14] The pursuer accepted that the first defender has the servitude rights claimed but it was submitted that they were not a relevant defence to the pursuer's claims of interference with their access. The rights claimed by the pursuer will not interfere with and are not excluded by the first defender's rights. It was contended that the existence of servitude rights in the first defender's favour did not entitle him to prevent any other person exercising rights over the same land. They were also not a basis on which the defenders could resist interdict as the terms of the order sought did not interfere with exercise of the

defender's rights. The pursuer submitted that the existence of servitude rights did not prevent the burdened proprietor from carrying out juristic acts including granting further servitudes (Cusine & Paisley, *Servitudes*, paragraph 12.15). In addition, as a benefited proprietor in a servitude, the first defender is subject to an obligation to exercise his rights reasonably and in a manner least burdensome to the servient tenement (civiliter) (*Alvis* v *Harrison* 1991 SLT 64, 67). It was submitted that I could conclude at debate that the defenders were not exercising their rights in this way. It was contended that the defenders make no averments seeking to justify the conduct complained of by the pursuer is justified on this basis. They do not aver that the conduct complained of was necessary for the exercise of any rights which the first defender may have or that the steps they have taken are in pursuance of any access rights. They do not aver that exercise by the pursuer of its rights will interfere with the reasonable enjoyment of the defenders' rights.

[15] In relation to the counterclaim, it was noted that many of the averments were subject to the same criticisms that had been made of the defences. In relation to the conclusions, it was noted that the second sought to compel the pursuer to enter into an agreement with the first defender and make payment of sums due in terms of it. It was submitted there were no averments by the defenders of any obligation which the court could enforce to require conclusion of an agreement or payment of sums to the defenders. I was referred to *PIK Facilities Limited* v *Shell UK Limited* 2005 SCLR 958 for the proposition that specific implement would not be granted to require the defender to do something they had not contracted to do. It was submitted in addition that the second conclusion lacked detail. In relation to the third conclusion seeking damages for trespass, it was submitted that as the defender had not averred title to the level crossing, he was not in a position to seek damages for wrongful entry upon it.

[16] In relation to the first conclusion, it was noted that what was sought was a "compensation payment" of the same amount that had been paid to CFLIL in return for an access agreement granted by them. It was submitted that as the first defender was not owner of the level crossing, there was no reason why a compensation payment should be made to him or an agreement entered into with him. In addition, there were no averments of any contractual obligation to make payment and no averments as to the basis on which the sum sought was arrived at.

Submissions for the defenders

[17] When Ms Howe came to address me on behalf of both defenders she began by making a number of criticisms of the conduct of the pursuer and their legal representatives. I was invited to conclude that in bringing and advancing the claim, the pursuer was abusing the court process. She claimed they had concealed matters which ought to have been brought to the attention of the court. There had been she said, an attempt to conceal or avoid the pursuer's title issues. Ms Howe submitted that the core issue was the title to the crossing. The pursuer has contractual rights granted to them by CFLIL but the level crossing is not owned by CFLIL. While the pursuer might have contractual rights, the first defender claims ownership of the crossing and that 'supersedes' contractual rights. Her submissions were directed to an argument that the pursuer did not have "standing" to pursue the claim against the defender. It was accepted that there was no plea to this effect in in either the defences or the counterclaim.

[18] In relation to authorities, Ms Howe referred to *GCN (Scotland) Limited* v *Gillespie* [2019] CSOH 82 and submitted that this vouched the proposition that standing in the form of a *prima facie* title or real right was required to challenge the title of another party.

It was submitted that the first defender had a "valid legal title claim" to the land at the private level crossing which was founded on prior titles and his entitlement to register a Notice of Title to give effect to his real rights. This means that the first defender has a patrimonial interest in the land whereas the pursuer has "neither title nor any real right in the land". On that basis, it was said that the pursuer lacked standing to make the challenge to the first defender's title that they sought to make. It was submitted also that, on the basis that they lacked standing, I should not consider any of the pursuer's arguments at debate. To do so would mean that a party that did not have an interest would be able to challenge the title of others. It was submitted that the pursuer was advancing the claim on behalf of Network Rail Infrastructure and that this should not be allowed.

[19] In relation to the issue of the pursuer's title I was also referred to the statement of Lord Anderson in *Mather* v *Alexander* 1926 SC 139 at 149 that, "It is true that absence of title to defend cannot supply a defect in title to sue." It was submitted that the pursuer did not have title to the level crossing and that this mean that the pursuer was not able to challenge the defenders' averments as to their title as it was not capable of rectifying the defect in the pursuer's title.

[20] It was said that as CFLIL had not been in a position to grant any rights over the level crossing, the pursuer's remedy would be against CFLIL. It was submitted that if it was the position that Network Rail owned the crossing, it would be for them and not the pursuer to challenge the defenders. However, it was submitted that Network Rail did not own the crossing. Mr Appleby interjected at this point that the defenders had expert evidence which Network Rail had provided in a different action in the sheriff court to the effect that they (ie Network Rail) did not own the land. Neither this evidence nor the detail of it were provided to me. It was submitted that the pursuer sought to advance its title claim "on

behalf of" or as a "proxy" of Network Rail and that this was illegitimate. The pursuer should not be entitled to challenge the defenders' averments as to ownership of the crossing.

[21] I was referred also to *Douglas & Angus Estates & Carmichael* v *McAllister* [2015] CSIH 2. My attention was drawn to the fact that the Inner House there noted that, although the case had been sent to debate on pleas as to relevancy, the arguments advanced had concerned title to sue. The Inner House considered that this was the correct order in which to address the issues and referred to the decision in *Mather*. In giving the Opinion of the Court, the Lord Justice Clerk (Carloway), referred to the Opinion of the Lord Justice Clerk (Alness) in *Mather* in which he said that establishment of the pursuer's title is, "always the first and essential step which a pursuer must take in proceedings such as these, if his title is challenged, as it is here" (para [21]). It was submitted that this meant that I was bound to consider arguments concerning the pursuer's title before considering any of the arguments directed to the defenders' pleadings. It was accepted that there was no plea-in-law to give effect to the arguments. I was invited to adjourn the diet of debate and continue it to a date in future to enable the defenders to take legal advice and to prepare a response to the pursuer's submission and to fix a further diet at which the defenders would have an opportunity to challenge the pursuer's title. I was also invited to exercise the dispensing power in terms of RCS 2.1 to allow the defenders to make their arguments in the absence of a plea-in-law.

[22] I adjourned briefly to consider the defenders' motion to continue the diet to a new date. On resuming, I refused it. I considered that there had been ample opportunity for the defenders to prepare for the debate and, had they wished, to obtain legal advice and/or representation. The pursuer's Note of Argument was detailed and nothing that was submitted on their behalf at the debate should have come as a surprise to the defenders.

Had they considered they required further time to respond to the arguments that were going to be made, that could have been done as soon as they saw the pursuer's Note of Argument. No reason was given as to why this was not done. Nothing was said even at the start of the debate. The defenders chose to wait until the pursuer had advanced its arguments and then sought additional time. No good reason was advanced for leaving it to the diet of debate.

[23] In making my decision I took into account the fact that the defenders are presenting their own case, but that did not dictate that their motion should be granted. They had had the chance to seek legal advice if they wanted. As I note above, earlier in the history of the action, the defenders had been given two opportunities when the action was paused to enable them to seek legal advice. I do not know whether or not they did so, but it is clear that they had the opportunity even if they continued to represent themselves at the hearings. The defenders' pleadings and Note of Arguments are extensive and contain various references to legal propositions. It is apparent that the defenders understood and were able to comply with the requirement to lodge a Note of Argument. The defenders' Note contains arguments as to title and makes reference several times to *GCN*. If I had continued the debate to another day, it would have resulted in delay and additional expense. While that is sometimes unavoidable, there was no necessity for it in the present circumstances. It could result in unfairness to the pursuer. Apart from the wasted diet and the costs that results, there would be delay. Against that, I did not consider that the defenders would be prejudiced. They had already had an opportunity to present arguments and, if they added a plea in future, they would be able to put the pursuer to proof on the issue of whether they have a right to use the crossing. This addresses the motion for me to continue the debate to

another day. In relation to the issue of what arguments were properly before the court, I consider that below in the context of further procedure which took place.

[24] On resumption of the diet of debate, Ms Howe advanced the submissions for the defenders. In many respects these sought to advance the arguments as to title for which she had no plea-in-law. Having regard to the fact that she was a party litigant I decided on balance that I would not prevent this. Had I been in favour of her arguments, I would have considered a motion from her to allow the defenders to add a plea and would, in all probability, have granted it. There is no prejudice to the pursuer in proceeding as I have done.

[25] Ms Howe claimed that the basis of the pursuer's case is that the defenders have no right or title to prevent the pursuer from exercising their contractual rights to access the mast site over land owned by CFLIL. The defenders do not dispute the CFLIL is the registered proprietor with Titles CTH3449, CTH5589 and CTH3311. They contend, however, that they have not interfered with the contractual rights held by the pursuer and have not committed actionable wrongs. She explained that the first defender was the registered proprietor of Station House, and his title was held in the Land Register under Title Reference CTH7726. She accepted that the title plan to that property reflected the boundaries only of Station House and its garden ground and that she did not contend the extended area of land to which the first defender claims title is included in the title to Station House. She submitted that, for that reason, the issue concerning the Land Certificate needs to be resolved by parties who do have the rights.

[26] Ms Howe reiterated that the core issue is who has title to the crossing. She submitted that it is a private level crossing and that it is not owned by Network Rail. Ms Howe said that her point was not that the first defender had title to the crossing at present but that he

had a valid claim to title as "legal successor entitled to Station House to ownership of the solum of the crossing". This arose from the Disposition in 1979 of the larger area of Loch Dhu Estate of which both Station House and the solum of the crossing were part and the various subsequent dispositions by which portions of the land were split off and conveyed away.

[27] It was submitted that the curtain principle was there to give certainty to people as to who owns what. It was said that although this was a good principle in theory, it had limitations and was not infallible. It was diligent and prudent and sometimes necessary to undertake research beyond the title sheet to go behind the curtain to ascertain true rights which attach to land. The first defender's title was such an instance. It had been part of a larger estate with parts split off at various times and it was necessary to go beyond the title sheet to discover what the first defender actually owned. Had the first defender not done this, he would not have discovered the rights he had. The first defender has now had a title plan prepared by a surveyor to show the extent of the ownership to which he wishes to seek title. His claim is that this land was conveyed to him along with Station House. He submitted that the land in question remained part of the Station House whether or not he had been a party to the deeds. It was submitted that it was clear from the 1979 Disposition that the grantor intended the rights which he held in the solum of the railway line would be conveyed as part of the Station House subjects. In relation to inclusion of the words "such right as I may have in" before reference to the solum of the railway line when narrating the property conveyed, Ms Howe submitted that these were a catch all and were "just words used". Unless the grantor had had a right, it was contended that that he would not have bothered to include this in the disposition. It was submitted that he "clearly had the right", hence the inclusion. It was noted that the 1979 Disposition said that it was for value and it

conveyed the items heritably and irredeemably and conveyed the grantor's whole right title and interest. It was claimed that the solum of the railway line remained with Station House from the time of the 1979 Disposition and through all the subsequent dispositions notwithstanding the fact it was not mentioned in any of the deeds. It was submitted that the first defender would acquire a real right in that land by registering his Notice of Title.

[28] The reason it was said that that the land at the level crossing would be part of the title for Station House rather than other land conveyed in 1979 was that the railway line was used in conjunction with the stationmaster's cottage which is what Station House was. Ms Howe submitted that it was the only property that is connected functionally and geographically with the railway. It was said to be a matter of logic that the solum of the railway line would be part of the title to the Station House. The first defender acquired the title to the solum of the railway line - including the level crossing - by means of the conveyance to him of Station House.

[29] The first defender is entitled to complete his right to the solum of the railway line by means of Notice of Title as explained in the Note of Arguments. Ms Howe claimed that the pleadings had never said that the first defender's registered title included the solum of the level crossing but that he had acquired rights in 1979 and on the basis of those would be able to secure title by using the Notice of Title mechanism. The Notice of Title would bridge the gap between the 1979 Disposition and the first defender's title. On completion of the registration of the Notice of Title, the first defender would have a real right in terms of the Land Registration (Scotland) Act 2012 to the solum of the level crossing. It was submitted that the Keeper of the Registers would accept a Notice of Title prepared on behalf of the first defender. A draft Notice of Title had been lodged by the defenders. It was submitted that the first defender is gathering "what is required" to lodge the application. In relation to the

question from me as to what the midcouple would be – what would bridge the gap in title between the 1979 Disposition and the disposition in favour of the first defender of Station House – Ms Howe said it was "off register rights".

[30] Because he was in a position to have a Notice of Title registered giving him real rights, it was submitted that he has a patrimonial right. It was submitted that the first defender should be protected from third parties who have no such right – such as the pursuer – making claims to the land. In this regard, I was referred again to the case of *GCN*. In that, the pursuers had been protected from dispossession. They did not have title but were seeking to register a disposition with a view to acquiring ownership. The same approach should be applied to the present. In *GCN*, the pursuer had no title to the land at all but nonetheless Lord Pentland had said it was appropriate that they protect themselves from third parties seeking to interfere with their rights. Here, the pursuer seeks to interfere with the rights of the first defender and his title would be secured by means of the Notice of Title procedure. That would have the effect that the land would be part of his estate. The pursuer was the biggest user of the level crossing and causing excessive wear. This was resulting in loss to the defenders. Paragraph 38 of Lord Pentland's Opinion in *GCN* indicated that this factor taken with the first defender's right to complete a Notice of Title was sufficient for him to have a patrimonial interest. It was accepted that in *GCN*, there was actual possession but it was submitted that the reasoning regarding the pending application would apply also to the present situation. The defenders invited the court to protect the first defender's patrimonial land proprietary interests.

[31] It was argued that the pursuer's contractual rights do not extend to access over land outwith CFLIL titles or over land to which they hold no right of access. It was submitted that CFLIL does not have title to the level crossing and does not have a legal right of access

over it. Therefore, if there is to be a right of access across that land it must come from the first defender who is the owner of that land. In short, both CFLIL and the pursuer required permission from the first defender to access the mast site.

[32] In relation to the issue of "solum right" where it was referred to in the 1979 Disposition and in the defences, Ms Howe said that the defenders accepted that there was no such right and that the solum rights in fact referred to ownership of the land in question. In referring to "solum rights", the defenders recognised that at present the first defender did not have title to the land at the crossing but was making the point that he was in a position to take steps to register Notice of Title and thereby become owner.

[33] It was submitted that the pursuer's claim was not about title and their claim was based solely on the lease from CFLIL. It was submitted that allowing the pursuer to proceed with this action inevitably involves adjudicating upon the ownership of the level crossing. It was submitted that it was beyond question that the determination of the debate will require the court to adjudicate upon the underlying dispute as to title. It was submitted, once again, that the pursuer and its legal representatives are abusing the court process to circumvent a lack of standing regarding resolution of the issue of who owns the crossing. It was submitted again that the pursuer is, in effect, advancing a title claim on behalf of Network Rail.

[34] It was said that the action was unquestionably a dispute as to who owns a level crossing. The real issue is whether or not the court accepts one set of averments or the other as being relevant. However, it was said that the pursuer is "picking apart" the first defender's title claim and that it was not the pursuer's role to do that as it does not have title or interest to the land in question. It was submitted that in allowing the pursuer to proceed

in this way the court would be misapplying the law set down in *Douglas and Angus Estates* and *GCN*. It would be highly prejudicial and wholly unfair to the defenders.

[35] It was submitted again that to allow the action to proceed would inevitably result in the court adjudicating upon the question of ownership of the level crossing and that it was not appropriate to allow the pursuer to advance a claim on behalf of Network Rail. It was submitted that it was not competent for this court to adjudicate upon matters of land ownership in this way. The correct focus should be on the rights that the pursuer had been granted under the lease from CFLIL. It was submitted that this concerned only land owned by CFLIL or rights of access that they had. It was for the pursuer to demonstrate that CFLIL had independent real rights which meant that they could in turn grant rights to the pursuer. The court process should be about "establishing truth and administering justice". Ms Howe moved that I should dismiss the pursuer's action on the grounds that it is "incompetent for lack of standing". If not, the court should continue the diet it to give the defenders more time to respond.

[36] In relation to servitude rights, it was submitted that the first defender had extensive servitude rights and the pursuer's actions had interfered with them in the course of the events of October 2023 averred on record. The defenders did not claim that the interdict in the conclusion itself would interfere with their rights, but it was contended that the interdict granted later on 30 October and the associated uplift order did so interfere. In October 2023 there had been flooding caused by a storm. It was a one-off event. The defenders needed to release backed up water and needed to get to the pipes that had been damaged. When doing so, they had erected fences to block access in the interest of health and safety. It was accepted that the defender was required to exercise his rights civiliter but it was a submitted

that he had done so. The defenders were not aware that the pursuer was coming to the site that day.

[37] In relation to the third conclusion in the counterclaim, the pursuer denied having trespassed on the first defender's land and submitted that he does not have title. The first defender maintains that it is his land and therefore it is the pursuer that is trespassing on it and interfering with his property rights. The court ought to prevent that trespass continuing.

[38] As the arguments advanced over the 2-day diet of debate were quite extensive, at the end of it I made avizandum. Before a judgment has been issued, the defenders enrolled a further motion in the following terms:

> "1. To dismiss the action in its entirety on the basis that the Pursuer has not relevantly pled the legal basis upon which it avers that Network Rail holds title to the land comprising the private level crossing at Altnabreac. In the absence of title, Network Rail cannot competently confer any right of access to Caledonia Forest Land Investments Limited ('CFLIL'), and, in turn, the Pursuer. Accordingly, the Defenders have not interfered with the Pursuer's contractual rights by preventing its contractors from accessing the said crossing, as any access rights granted under the Pursuer's lease with CFLIL do not extend to the crossing.
>
> 2. In the alternative, if the Court is not minded to dismiss the Pursuer's action at this stage, to assign a diet of debate to examine the legal basis upon which the Pursuer avers that Network Rail holds title to private level crossing over which it claims to have been granted permission to exercise access rights."

They submitted a detailed further Note of Arguments at the same time. Two matters are immediately obvious from the terms of the motion. The first is that it is substantially an attempt to achieve what the defenders had been told was not permissible during the diet of debate. The second is that it is predicated on an assumption that the pursuer avers that Network Rail has title to the level crossing. However, as noted above, neither the summons nor the answers to the counterclaim contain any averment that Network Rail hold title to the level crossing. Although there is an averment that the solum of the railway was conveyed to

Sutherland and Caithness Railway Company in 1876, as I note above, this is in response to the defenders' averments and is not the foundation of either the principal action or the defence to the counterclaim. Therefore, both procedurally and in substance, the motion was misconceived. Nonetheless, on behalf of the defenders, when the motion came before me, Ms Howe was insistent on advancing all her submissions. In large part, these repeated what had already been said at the diet of debate. Nonetheless, for completeness, I will summarise their contents.

[39] At the outset, submissions were directed to my conduct of the hearings. It was submitted that in refusing the motion to adjourn the debate to enable the defenders to obtain legal advice they had been denied a fair hearing. They considered it was a breach of the requirement in terms of Article 6 of the ECHR that there be a fair hearing and that there be equality of arms. It was submitted that litigants had a right to seek legal advice and representation and that the right remained throughout the proceedings. The defenders had been unable to take legal advice during the diet of debate. The diet of debate should have been halted and continued to another day to permit the defenders to take legal advice. It was submitted that parties must be treated equally and afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage compared to their opponent and that this too required that the motion to continue the debate should have been granted.

[40] It was claimed that the defenders had not been afforded equal treatment at the diet. The court had allowed the pursuer to challenge the first defender's title claim to the crossing, but it did not afford the defenders an opportunity to respond and challenge the relevancy of the pursuer's averments that Network Rail holds title to the crossing. It was submitted that as the court had permitted the pursuer to challenge the relevancy of the

defenders' averments, fairness required that the defenders be allowed to challenge the relevancy of the pursuer's averments. If a diet of debate was not fixed to allow the defenders to these arguments, the court is acting partially and would be:

> "accepting the Pursuer's position as a legal and factual certainty without subjecting Network Rail's alleged title to the necessary judicial examination and legal scrutiny, which can only be achieved through a properly convened debate."

It was argued that the defenders had an absolute entitlement to have a debate on that issue. It was submitted that the purpose of the debate was "to examine whether the averments are founded in law or in fact". The defenders wished the exclusion of the pursuer's averments from proof. If they were successful, there might not require to be a proof and thus it was the most expeditious and cost-effective way of dealing with the proceedings.

[41] I was referred to the Guidance to Judicial Office Holders on Judicial Ethics in 2023 and The Six Bangalore Principles and it was contended I had failed to observe these in that I had not acted impartially. It was submitted that the court was "shielding the Pursuer's own title-related averments from equivalent legal scrutiny" (Note of Argument, paragraph 46) and "shielding the Pursuer's position from proper legal scrutiny and permitting it to continue the action under false pretences" (Note of Argument, paragraph 63). It was submitted that to comply with its duties under Article 6 of the HRA 1998, the court was obliged to permit the defenders a further diet of debate to address these their challenges to the pursuer's title before determining further procedure in this action.

[42] In relation to the merits of the dispute, the arguments largely repeated points which had been made at the debate. I explain in paragraph 47 which parts I consider were properly before me. They may be summarised as follows:

(a) The pursuer's case is based on a bare assertion that Network Rail holds title to the crossing and is therefore an attempt to vindicate those rights by proxy.

Any determination of this action will entail adjudication on the true ownership of the crossing and that "lies outwith the jurisdiction and proper scope of this Court". The question of ownership of the crossing is already subject to proceedings between the defenders and Network Rail in the sheriff court at Wick. The question of ownership of the crossing is not properly justiciable in the context of this action.

(b) The pursuer's arguments that the defenders' averments as to the first defender's ownership of the crossing are irrelevant cannot be considered as the pursuer themselves have no title to bring the claim. Reference was again made to *Douglas & Angus Estates & Carmichael* paragraphs 141 – 143 and also to *Mather* v *Alexander* 1926 SC 139 at 148, and *Wills' Trustees* v *Cairngorm Canoeing and Sailing School* 1976 SC (HL) 30. A defender who wishes to challenge the pursuer's title had to produce a contradictory title and until that is done, there is no onus on a pursuer to produce anything more than a *prima facie* title. There was no difference in this regard between a *prima facie* title and a legal title (*Colquhoun* v *Paton* (1859) 21 D 996).

(c) The defenders object to being required to defend that title to the crossing in litigation brought by a pursuer who does not assert a competing title of their own.

(d) Once it was established that the pursuer had no title, the court should have dismissed the action on the motion of the defenders.

(e) The defenders did not consider it appropriate to lodge evidence in support of their averment that Network Rail does not own the crossing as there were already proceedings between Network Rail and the defenders.

(f) The defenders deny that Network Rail has title to the crossing and submit that the pursuer's averments are misconceived "and wholly lacking in evidential foundation".

(g) If Network Rail do not have title to the crossing, they are not in a position to confer access rights over the land.

(h) A refusal to dismiss the action would amount to overlooking relevant evidence supporting the defenders' pleadings.

(i) The defenders should be able to subject the pursuer's arguments to proper scrutiny.

[43] The pursuer opposed the motion for a further diet of debate. It was submitted that the disputes concerning the pursuer's title included issue of fact and that a proof (hearing of evidence) would be required to resolve them. At such a hearing, the burden of proof to demonstrate title would be on the pursuer. The procedure that had been adopted did not involve "shielding" the pursuer. It had been made clear to the defenders on more than one occasion that the debate would not remove their entitlement to challenge the pursuer's title in due course. The contents of the submissions made in support of the motion had been made to the court at the diet of debate and at the earlier motion hearing. It was submitted that the court should not entertain a motion which is to the same effect as one that has already been refused.

Analysis and decision

Pursuer's conduct, fair hearing and equality of arms

[44] It is appropriate to begin by considering the preliminary matters of the allegations of misconduct on the part of the pursuers and the defenders' arguments that they have not

been given a fair hearing. I do not consider that the defenders' criticisms of the pursuer and their solicitors is justified. They have presented a case and then responded to the defence as they were entitled to. It is not apparent to me that there has been any concealment. Procedure has been regulated by the court. In terms of the interlocutor of 14 May 2025, a debate was fixed at a hearing at which the defenders appeared. The matter of what issues were to be considered at the debate was principally decided by parties in terms of what they put in their Notes of Arguments.

[45] I do not consider that there is any merit in the submissions that the defenders did not get a fair hearing – either as a result of inequality of arms or the scope of arguments at the debate. It is quite correct for the defenders to state that there must be equality of treatment and equality of arms before the court. However, these matters must be established over the course of an action as a whole. Here the defenders have been afforded full opportunity to present arguments in accordance with the timetable set by the court. This included opportunity to take legal advice and/or instruct legal representation if they wished. As I note above, the action was twice sisted to enable them to take legal advice. The defenders were able to frame their pleadings in the time made available for adjustments. They did not object to the time fixed to lodging a Note of Arguments prior to the debate and they were able to comply with that timetable. The requirement to have equality of arms and for a party to seek legal advice if they wish does not mean that part way through a hearing a party has an unconditional right to demand that it be halted and continued to another day so that they may seek additional advice. The defenders are entitled to a fair hearing but so is the pursuer. This is something the defenders overlook. Giving one party what would essentially be an absolute right to stop any hearing anytime they wished, would be very likely to result in injustice and unfairness.

[46] The requirement for impartiality entails that decisions are made on an objective basis, that there be no bias on the part of the decision-maker and there is no conflict of interest on the part of the decision-maker. Although Ms Howe for the defenders made repeated assertions that I was not impartial, despite being asked about the matter directly, she did not identify in what respect it was claimed there was a lack of impartiality. It appeared to rest principally on the fact that the defenders' motion that the diet be adjourned and continued to another day was refused. However, the requirement to act impartially requires consideration of the arguments for and interests of *both* parties. As I set out above, it was considering the interests of the pursuer as well as the defenders that led me to conclude that it was not appropriate to abandon a part heard debate and fix a new diet to enable the defenders to take advice that could have been taken earlier. I reject any suggestion that there was a lack of impartiality on my part.

Scope of arguments to be considered

[47] At the debate, the issue arose of whether the arguments for the defenders could all properly be advanced at the diet. There were two distinct categories of arguments identifiable. One consists of the arguments as to title which were included within the defenders' Note of Arguments but for which there was no plea-in-law. The pursuer was on notice that the defenders wished to advance these points. In my view there is no prejudice to the pursuer in considering these arguments. In relation to arguments that the defenders sought to put forward which were not foreshadowed by a plea-in-law or inclusion in the Note of Arguments, I do not consider that these arguments can be considered - either in exercise of the dispensing power in Rule of Court 2.1 or otherwise. To do so would be unfair to the pursuer who had not been given prior notice. The defenders will be able to put

the pursuer to proof in future on the existence of their entitlement to use the crossing. This is an important consideration. Many of the arguments that defenders have advanced regarding unfairness and the procedure that should be adopted are predicated on the view that if they do not challenge the pursuer now, they will be unable to do so in future. As I pointed out several times during the course of the debate, that is incorrect. They have had a full opportunity to raise the matter in the past and may still have further opportunity in future.

[48] The defenders argued that if these arguments were not heard it would mean that there would unfairness or a lack of impartiality in that they would be unable to challenge the pursuer's title at the debate despite the pursuer challenging their averments. The response to this is simple. The pursuer was able to make challenges as it had the required plea-in-law and gave advance notice of the arguments they wished to take in a Note of Arguments as required in the earlier orders of the court. The defenders could have challenged the relevancy of any part of the pursuer's case at debate if they had appropriate pleas-in-law and included the points they wanted to make in their Note of Arguments for the debate. It is critical to have in mind that the defenders had this opportunity. If, after lodging the Note of Arguments, they had become aware that they had omitted something, they could have applied to be able lodge a supplementary Note of Arguments before the debate. Subject to considering what was to be added and when such a motion is made, it is likely that such a motion would have been granted.

[49] In some of the submissions made to me it was said that I had no discretion and that I was obliged allow the defenders to put all their arguments at the debate or a further diet that I should fix. This was either on the basis that it was required as a matter of giving them a fair hearing or that it was the correct order in which to consider issues or was a logical

necessity. I deal with the arguments concerning the order in which the issues are to be considered below. In relation to the argument based on fairness, I do not consider that this means that the defenders must be allowed to advance arguments of which they did not give notice. In this regard I have a discretion. In this connection, I was asked to exercise the dispensing power in RCS 2.1 and that alone is sufficient to indicate that I have a discretion. I must exercise any discretion having regard to what is in the interests of justice taking account of the whole circumstances and the likely consequences for the parties if my discretion is exercised one way or the other. Considering the lateness of these arguments being raised, the potential prejudice to the pursuer if they are allowed and the lack of prejudice to the defenders if they are not allowed, as outlined above, I did not allow arguments not contained in the Note of Arguments to be advanced.

[50] Turning from the arguments which the defenders sought to make at the debate to what occurred at the hearing of their motion, it was an attempt to get a second bite of the cherry. In a roundabout way, it sought to obtain for the defenders the adjournment and opportunity to consider their position which I had refused. This is inappropriate. I am not willing to take into account any arguments advanced at the hearing of the motion or in the Note of Arguments submitted in support of it which are not developments of what was said at the debate. In that the motion was clearly a device to get round the decision made during the debate, there is a strong argument to be made for not taking into account the arguments made in support of the motion at all. With some hesitation, however, I have decided to take them into account alongside the submissions made at the debate where they relate to an issue which properly arose at the debate or concerned issues of fairness or impartiality. I do so on the basis that that the defenders are representing themselves and because I am satisfied that there is no prejudice to the pursuer. The extent to which the arguments were a

repetition of what had been said at the debate means that the pursuer's response was already available. To the extent that they concern fairness and impartiality of proceedings, the court is always mindful to ensure that these standards are maintained. In fact, Ms Howe was not to be deterred and insisted at the motion diet on reading through the whole of a pre-prepared Note of Argument. I have considered only those submissions that are a development of the debate submissions.

[51] In so far as the defenders' motion at the hearing after the debate seeks a new diet of debate, I refuse it. The defenders have had ample opportunity to put their arguments before me. Any further diet will only add to the cost and delay.

Approach to arguments advanced at debate

[52] Moving now to the substance of the arguments raised at debate, before considering the merits of the arguments that have been advanced, it is necessary to emphasise that these arguments are all considered as matters of relevancy. This means that in considering any argument, I am limited to taking account of what is pled by the other party together with the contents of any documents which are incorporated into those pleadings. A debate is not an opportunity to argue that a party might not prove their case or even that a party is very unlikely to prove their case. Unless it can be said that the party in question will necessarily fail, the pleadings are not irrelevant (*Jamieson* v *Jamieson* 1952 SC (HL) 44).

[53] This has three important consequences for my decision. The first is that, contrary to the submission for the defenders, not only I am not bound to consider the evidence that they have put forward, I am not entitled to do so. They invited me to consider evidence as to why the pursuers did not have title to the level crossing. They insisted I should consider whether there was any evidential basis for the pursuer's averments or whether they were

founded in fact. This is not the purpose of a debate and it is not possible to do these things at this stage of the court process. Both parties invited me to consider the contents of documents which were not incorporated in the pleadings they were challenging. I declined all such invitations. The second consequence is that a decision as to relevancy of pleadings will not be a determination of who owns the solum of the level crossing. The court will not make a binding decision as to who owns the crossing in this hearing. It is not accepting "the Pursuer's position as a factual and legal certainty" as was claimed. All this decision can be is a consideration of whether or not averments made by one or other party meet the test of relevancy so that they may be the subject of the proof in due course. This is an important point. It appeared to me during the debate that the defenders did not fully understand it. I endeavoured to explain it to them on a number of occasions. The third consequence overlaps with the second and is that the outcome of the debate does not constitute a decision as to the existence or otherwise of the pursuer's title and cannot dictate the outcome of any dispute that that may have with Network Rail.

Title or standing

[54] The defenders relied on *GCN (Scotland) Limited*. It was concerned with the question of what title had to be demonstrated by a party who had raised an action seeking a remedy to protect their possession of property. After considering textbooks and authorities, Lord Pentland concluded that a party who had no title but who was in possession of lands can apply to the courts to prevent another party without title from dispossessing them. The decision does not address the proposition which the defenders claimed it did; that a party who lacked both title and interest in the disputed land was not entitled to challenge or oppose the other party's valid interest therein (Note of Argument, paragraph 55). *GCN* is of

no direct relevance to the issues concerning the level crossing. Here, neither party possesses the crossing. Network Rail are the possessors. It might be said in their favour that, the pursuers claim they have a *right to use* the crossing and that the defenders are "dispossessing" them of this by preventing its exercise. That is a matter for proof. The purpose of the action raised by the pursuer is not to challenge the defenders' title. The defenders are the ones that have put their claim to ownership of the level crossing in issue by relying in it to defend their actions. The pursuer has responded to that and, in so doing, has challenged the relevancy of the averments. This does not mean that the action is about who owns the crossing. It is about whether the defenders carried out the acts the pursuer avers they did to interfere with them obtaining access to the mast and, if so, whether they have a defence.

[55] The defenders also referred to *Douglas & Angus Estates Limited*. This was firstly in relation to the issue of which issues should be considered by the court and in what order. The comments in para [21] of the Opinion of the Court in that regard are a statement of what could be said to be the logical sequence in which to determine issues - with title coming first. The court acknowledged that the issue of title could be considered in the hearing before them as it has been addressed in the arguments in the debate before the sheriff even although it was said to be on issues of relevancy and it was natural to consider it first. It is notable that the defences in that case did contain a plea that the pursuer had no title to sue (para [3]). The court was not laying down a rule that issues of title must in every case be considered before all others regardless of when they are raised. Still less was it saying that this was the position where, as here, there was no plea-in-law challenging title. It is notable that the dictum from Lord Justice Clerk (Alness) that was quoted is to the effect that establishment of the pursuer's title is "always the first and essential step which a pursuer

must take in proceedings such as these, *if his title is challenged*, as it is here" (emphasis added). Here, the defenders did not have a challenge to the pursuer's title in their pleadings. Nothing in *Douglas & Alexander Estates* has the effect that the party wishing to challenge title must be permitted to do so at any time regardless of whether they have taken issue with the titles in the pleadings or otherwise given notice. That would make case management impossible and would result in unfairness to the other party. The defenders are correct to say that there must be fairness and equality of arms in a court process but have not taken account of the fact that the proceedings must be fair to the pursuer.

[56] A second issue considered in *Douglas and Alexander Estates* concerned what the pursuer had to demonstrate by way of title to pursue the action. By reference to the decision in *Mather,* the court concluded that where a defender has no competing title to offer, it is sufficient for the pursuer to provide an *ex facie* valid conveyance in his favour (para [23]). Here, the pursuer does not seek to establish title to the land in question – merely a right to cross it. The requirement is therefore not to provide *ex facie* valid conveyance in this favour but only to provide an *ex facie* valid basis for the rights claimed. The pursuer has done this in the form of the lease granted by CFLIL in their favour which is the subject of averments and is incorporated into their pleadings. There is nothing *Douglas and Alexander Estates* which leads to dismissal of the pursuer's case or particular averments being excluded from probation.

[57] *Colquhoun* was referred to by the defenders as a development of what was said in the original Note of Arguments. It was submitted that this draws a distinction between a *prima facie* title and a "legal title". I do not consider that the case makes any such distinction. The court there allowed a party to obtain interdict over part of a pier which was not in their ownership. The party seeking interdict had constructed the pier and from the time when

they were erected had charged persons for using them. The pier ran from land owned by the party seeking the order into the sea below the high-water mark. This meant that it was attached to the foreshore and, as such, was owned by the Crown. The interdict had been sought on the basis that the piers were owned by the party seeking the order and Lord Cowan noted that the order sought might require revision but that the issue before them was concerned with possession of the pier (page 1001). Despite the lack of ownership, interdict was granted. The case cannot be authority that a person must show they own property before they are entitled to obtain interdict to prevent another person from trespassing or encroaching on it. The party seeking the order did not own the pier and yet the court said it had no difficulty in sustaining his right and title to obtain interdict (page 1004). Both this case and *GCN* are examples of interdicts against interruption of possession of property granted to parties that did not own the property question.

[58] None of these cases vouch the proposition for which they were cited – that the pursuer is not entitled to make a challenge of the defenders' title unless and until they have established their title. It would be surprising if that was the position for a number of reasons. Many parties may seek to protect their possession of heritable property even if they do not own it. Tenants and holder of servitudes are two obvious examples. In addition, it is necessary to have in mind how the issue of the defenders' title arises in this action. It has been raised by the defenders rather than the pursuer. The defenders' claim is that their actions on the property are not unlawful because they own it. If they did own it, there would be some force in this. That being the defence that has been put forward, the pursuer is entitled to resist it. Resisting it can include challenging the relevancy of averments that they own it as well as contesting the facts. It is an odd contention that, as soon as a defender claims title, the pursuer is unable to vindicate their position. It would mean that in

situations such as this all a defender had to do was claim that they were owner and, unless the pursuer could claim title, they would have to accept the defender's position. That is not the legal position. The remainder of the arguments for the defenders were a response to the pursuer's averments and are considered in that context below.

Pursuer's challenge to averments of first defender's title – Land Certificate

[59] Turning then to the pursuer's challenges to the defenders' pleadings. The starting point is to consider the challenge to the defenders' averments concerning ownership by the first defender of the level crossing. Contrary to the submissions for the defenders, their pleadings do claim that the first defender presently owns the solum of the level crossing. Answer 3 states, "The First Defender's Title CTH7726 also includes ownership of the solum to the private level crossing at Altnabreac". The terms of that title are held as repeated within the defences. It is clear from an examination of the title plan and the description of the land in that title sheet that it does not include the solum of the crossing. This was acknowledged by the defenders during submissions. This being the position, the averment quoted is accordingly irrelevant.

Pursuer's challenge to averments of first defender's title – prior titles

[60] It is then necessary to consider the averments as to prior titles and statements about the defenders' intended Notice of Title in the Note of Arguments. Although the contents of a Note of Argument could not generally be relied on to support the relevancy of pleadings, I considered it appropriate to take it into account as the defenders are not represented.

[61] The averments about the prior titles do not assist the defenders. They are said to be there to indicate a right to the title of the solum of the crossing that will completed by the

recording of a Notice of Title. As noted by Lady Wolffe in *BAM TCP Atlantic Square Limited*, the curtain principle applies where titles are registered and is intended to remove the requirement to consider prior titles. While this will apply in relation to burdens, descriptions of land registered and the extent of a particular plot, I agree with the defenders to the extent that it cannot apply where the argument is that a party has title to land that has not been registered. In this situation, the argument is, in essence, that there is an error in the title sheet so the sheet cannot be determinative. The issue then is whether the averments as to prior titles are a basis in which the first defender might establish title.

[62] A Notice of Title is a means by which a person who has a right to land may complete their title so as to be recognised as owner – to become infeft. Registering a Notice of Title is one means by which a person may seek to be registered as a proprietor of land – whether already registered in the Land Register or still in the Register of Sasines. In the Scottish Law Commission Report which led to the 2012 Act (*Report on Land Registration*, Scottish Law Commission Report No 222, 2010) the definition of a Notice of Title that is given is "A deed whereby title is *completed* on the basis of a *midcouple"* (italics in the original). The midcouple is an important element of this. It connects the last person who was infeft (ie to have a registered or recorded title) to the person who now wishes to be recognised as having title. Commonly used examples of midcouples are an order of a court which appoints a trustee in sequestration to the estates of a bankrupt or the order of a court confirming the appointment of a person as executor on the estate of someone who has died. In these examples, it is the order of the court that effects the transfer but, because it will not contain a conveyancing description of the property, it cannot be registered. The Notice of Title addresses that problem. It contains the description of the property. When that description is taken together with the midcouple which effected the transfer, the elements necessary to register

the transfer are all present. Although it is no longer necessary to deduce title in the body of the notice as it was in the past, there must still one or more midcouples to indicate how the title was transferred and to form the link between the title of the person last infeft and the party wishing to register the notice. The existence of this link will be checked by the solicitor or notary public who signs the notice. When the notice is presented for registration in terms of section 21 of the 2012 Act, the Keeper of the Register will also check that it is valid before making an entry in the title sheet.

[63] This issue that arises here lies in identifying the midcouple; what link or links are there that transferred the title of the level crossing solum from someone with a registered or recorded title to the first defender. The defenders claim that the solum was conveyed in terms of the 1979 Disposition. This is incorporated into the defenders' pleadings. It is apparent on its face that it was registered. This means that if the level crossing was included in the subjects conveyed by it, the disponee, John Archibald Sinclair, would have been infeft. This leads to two issues; (1) was the solum of the crossing part of the subjects conveyed in the 1979 Disposition and (2) if it was, how was title transferred from John Archibald Sinclair to the first defender.

[64] In relation to the first issue, the starting point is the plan attached to 1979 Disposition. It clearly does not include the solum of the railway and level crossing. The areas it delineates are in two parts with the railway passing between them. The plan is referred to in the written description of the subjects conveyed in the context of the land forming the fourth element of the subjects conveyed. They are described as:

> "certain parts of the subject's known as Ulbster Estate and which are more particularly described in a disposition granted by Sir George Tollemache Sinclair, Baronet in favour of Archibald Henry MacDonald Sinclair dated sixteenth and seventeenth April and recorded in the set Division of the General Register of Sasines as also in the Books of Council and Session on sixth May, Nineteen hundred and

> Twelve all as the whole subjects hereby disponed are delineated within a boundary coloured red on the plan annexed and signed as relative hereto (which plan is taxative as regards that part of subjects hereby disponed and forming part of the subjects in the said last mentioned Disposition but is otherwise demonstrative only)."

The status and effect of the plan turns on whether it is taxative or demonstrative. If it is the former, the plan is definitive. However, it is not clear on the pleadings whether the level crossing falls within the land conveyed by the disposition granted in favour of Archibald Henry MacDonald Sinclair recorded on 6 May 1912 (ie "the subjects in the said last mentioned Disposition"). To reach a decision on that issue would require evidence so it cannot be determined at debate. The question of whether the solum of the crossing was included in the subjects conveyed does not, however, depend solely on that section of the disposition. In terms of the written part of the deed, when describing what the principal lands are conveyed with, there is express reference in part (Five) (quoted in para [9] above) to the solum of the railway. It states that in relation to this the granter conveyed only "such rights as I might have". These words cannot just be ignored. In view of them, it cannot be inferred simply from the mention of the solum of the railway that the grantor did in fact own it. I reject the submissions for the defenders to the contrary. The expression "my whole right, title and interest, present and future in and to ..." which is also within part (Five) does not add anything to this. This wording features in most older conveyancing deeds. If anything, it indicates that all rights in the land identified are transferred but do not assist in this situation in determining the scope of the land conveyed. The issue of whether or not the solum was actually conveyed requires determination of whether the granter of the 1979 Disposition, Robin MacDonald Sinclair, did own the solum of the level crossing at the time and whether it was part of the 1912 Disposition. Once again, this is a matter of

evidence and I cannot determine it at debate. However, it is at least possible that this recorded disposition does identify the last person infeft.

[65] It is therefore necessary to consider the next issue for the Notice of Title; what is the midcouple or how was the title transferred to the first defender. The defenders' pleadings do not identify it. In submissions, the defenders referred only to "off Register rights" or contended that the railway and Station House were connected functionally and geographically. However, the fact that an area of land has a functional or geographical connection with another plot conveyed is not sufficient to result in the area being transferred just because that other plot is conveyed. Although it is not incorporated into the pleadings, I checked the terms of the draft Notice of Title which has been lodged in case it indicates how the transfer was made. This indicates only that the first defender acquired it by means of the disposition of subjects registered under Title Number CTH7726 to him. It does not indicate how the disponer in that disposition came to have title to the level crossing so on no view does it provide the link back to John Archibald Sinclair. In the Note of Argument for the diet of debate there was reference merely to "lawful succession". None of the pleadings, the submissions and the Notice of Title identify a means which would have resulted in title being transferred to the first defender.

[66] At one point, the defenders appeared to suggest that the various conveyances which are averred themselves included the railway solum such that it was transferred by them. It may be noted that that is not what is averred and that it would be inconsistent with a need for a Notice of Title. If it was true, it would mean that the land had been conveyed to the first defender and that there was error in his Land Certificate. This would need to be the subject of averment. There are no averments of prescriptive possession and it would be difficult to see how any party other than Network Rail (and their predecessors) could

possess it. There are no averments identifying a foundation writ for the purposes of prescriptive possession. It would be necessary to have averments of the full chain of dispositions from the last acknowledged owner of the railway solum, John Archibald Sinclair, to the defender and of the basis on which it can be said that they should be construed so as to have included the level crossing but, as I note above, nothing is said. It can be the case where there are a number of "break-off" dispositions from a larger estate that they do not include all that it intended with the result that the residual title comprises of a number of properties which would not naturally be thought to belong together. That cannot be of assistance to the defenders here, however. On the basis of the defenders' averments, the title to Station House was not part of the residue of the estate but was part of a break-off from the Loch Dhu Estate and then a further break-off to the current title. Their averments are that the remaining parts of the first break-off from which the second break-off was made (CTH5589) was ultimately conveyed to CFLIL. They aver also that part of the residue of the Loch Dhu Estate from which the first break-off was made was subject to further break-offs to form CTH3449 and CTH3311. These subjects are also said to be owned by CFLIL. There is no averment as to who owns the residue of the Loch Dhu Estate. If the railway solum was to be part of the first defender's title it would have to have been included within the subjects conveyed as part of the break-off disposition in 2014 and as part of the further break-off in 2016. This is not what the defender avers.

[67] I have considered this at length to assess whether there is anything in the defenders' submissions or their pleadings or the prior deeds which if proved might result in them owning the solum of the level crossing. I do not consider that there is. The result is that all the averments concerning prior deeds are irrelevant. As the defenders explained that the references to "solum rights" were part of the case that the first defender could establish

ownership of the crossing other than by means of Title Sheet CTS 7726, they too are irrelevant.

Servitude rights

[68] It was plain from the submissions that the servitude rights play only a limited role in the dispute. There is no dispute that the first defender has servitude rights and that that he must exercise those rights civiliter. The issue has come to be whether, during the events which are averred to have taken place in October 2023, the first defender was exercising his rights in this manner. This is fact sensitive. The account in the pleadings for each party is very different. I cannot determine this matter on the basis of relevancy of pleadings. It is not incumbent on the defenders to aver that their conduct was necessary for the defence that they were exercising servitude rights to be relevant.

Mineral rights

[69] Once again, there is no dispute that the first defender has mineral rights. Although the pursuer made submissions about what was included in the titles of CFLIL, these are not incorporated into the defenders' pleadings and I therefore cannot take them into account in determining relevancy. The issue is the extent to which the claimed mineral rights afford the first defender any defence to the conclusions. The defenders' principal concern appears to be that the mast and its foundations have been erected on land in which they have the mineral rights. However, even if they first defender does own mineral rights in that land it would not be a basis on which he could prevent the works carried out for the pursuer or prevent the pursuer from taking access across the land in question. Also, the first defender's ownership of the minerals would not prevent the pursuer or their contractors from taking

access over the level crossing and would not entitle the defenders to undertake the acts it is claimed that they did. The averments as to mineral rights are irrelevant.

Counterclaim

[70] As I note above, the counterclaim proceeds on the basis that the first defender owns the solum of the level crossing. Both the averments that he presently owns it under Title CTH7726 and the averments that he has an entitlement to ownership and can made himself infeft are irrelevant for the reasons given above. The counterclaim as a whole is therefore irrelevant.

Disposal and further procedure

[71] I sustain the first plea-in-law for the pursuer in the summons and refuse probation of the averments that are irrelevant. For convenience, the affected averments struck out will be specified in the interlocutor of even date. I also sustain the second plea-in-law as amended for the pursuer in the answers to the counterclaim and dismiss the counterclaim.

[72] The case will be put out for a By Order hearing at a date to be advised to consider further procedure, to consider any expenses motions and to consider any other motions either party may have to make. There have been numerous applications to the courts since the diet of debate to have motions heard. This results in delay and, no doubt, expense. It will be in the interests of both parties to have a single hearing at which *all* relevant issues can be aired and determined. The hearing will take place in Edinburgh and parties should attend or be represented in person. The hearing will be treated as if it was a Procedural Hearing in terms of RCS 47.12. Three days prior to the hearing, parties must lodge with the court a Note setting out:

(i) What issues remain to be determined

(ii) The names and addresses of any witnesses they wish to lead and a summary of the evidence to be given by each witness

(iii) What other investigations or preparations each party wishes to undertake

(iv) What further orders (if any) the parties seek from the court) and any written submissions they wish to make relative to such orders.