IN THE SHERIFF COURT AT INVERNESS

BEFORE : SHERIFF MCDONALD

Case Ref: INV-A157-21

TRANSCRIPT OF PROCEEDINGS

taken in the matter of

GLENWYVIS DISTILLERY LTD

Pursuer

against

JOHN MCKENZIE

Defender

THURSDAY, 1ST SEPTEMBER 2022

MR DAVIS, Counsel, appeared on behalf of the Pursuer.

MR KIDDIE, Counsel, appeared on behalf of the Defender.

Transcribed from the official notes and
tape recording by
LARKING HODGE POLLOCK
Suite 3F, 30 Gordon Street,
Glasgow, G1 3PU.

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1st September 2022

MR DAVIS: My Lady, my name is Mr Davis. In this matter, I appear for the pursuer. My learned friend, Mr Kiddie, appears for the defender.

My Lady, there are a couple of preliminary matters before we commence. First of all, there is a joint minute of admissions which is signed between myself and my learned friend, which I can proffer to the court. It deals with background points.

SHERIFF MCDONALD: Thank you (same handed).

MR DAVIS: Secondly, in terms of the documents that were lodged. There are witness affidavits. Now, when they were exchanged at that stage, they had been signed by the witnesses, but not by the notary, so I have the fully notarised copies which I can, again, also tender to the court process.

Sorry, I should have said, to draw to your Ladyship's attention one of the points in the joint minute in relation to the affidavits, that it is agreed that the parties will not take any objections at this stage to the content of the affidavits, but the matter may be raised later in submissions. So, that explained, we can set those aside for now.

SHERIFF MCDONALD: Yes.

MR DAVIS: I do not have any other preliminary matters. I think my learned friend may have one.

MR KIDDIE: Yes, thank you, my Lady. I will try and be brief.

First, I am obliged to your Ladyship for allowing us to attire as we are. I am told that the courtroom can become a bit warm. I wonder if it could be clarified, given that this is the first day of what is expected to be a number of days of proof, whether that is going to be the same throughout?

SHERIFF MCDONALD: Yes, we can keep it the same if that is what you wish to do.

MR KIDDIE: Because obviously I am not wearing a business suit and it lets me know what to pack for my next trip up to Inverness.

I want to raise an issue – I am not going to make a formal motion, but I think it is proper to raise it with your Ladyship so that a view can be taken, and I do not know to what extent your Ladyship is familiar with the background to this case, but the parties are neighbours and matters remain ongoing. So, given that we have one day of proof today and we do not know when we are going to get the next one, further incidents could occur between those two dates, and either party might take the view that it is would be appropriate to apply to amend the Record. So, I have a slight concern about if witnesses give evidence today and then they are allowed to remain in the courtroom and then they are recalled, how would that ...

SHERIFF MCDONALD: Yes, well, we will just make it a rule that they can exclude ...

MR DAVIS: Well, my Lady, I think ...

SHERIFF MCDONALD: ... unless you have a particular concern about that.

MR DAVIS: Well, my Lady, I think the view is that I think my learned friend's concerned is unnecessary. The first point is, as I understand the concern, is that there will be new matters which might ... the trouble is this is theoretical, but there are, essentially, new matters on which a witness may be recalled. Now, by definition, they will only be giving evidence about new matters on which no evidence has been heard by the court and, therefore, there is no question that the prior evidence should have any influence on that. So, it does not seem to me that it is a particular concern. This assumes that this is allowed in the first place.

The other aspect is – I am not sure how practical it is actually going to be – Mr Graham is the first witness. Now, he is actually the managing director ... sorry, chairman of the company, so would, in any event, be entitled to sit in. Mr Allan, who is next, lives down south, so he is unlikely to be hanging about. Whether any of the other witnesses choose to sit in or not, I do not know. I mean, I do observe that the defender, while, of course, he is entitled to sit in, is very much taking the opportunity to sit in on the entire case, so he will hear all the evidence, and given that the other defence witnesses are his wife and his father, I am not sure that there is anything ...

SHERIFF MCDONALD: Okay.

MR DAVIS: ... particularly arising out of this.

SHERIFF MCDONALD: Mr Kiddie.

MR KIDDIE: Yes, I take onboard my learned friend's comments. Like I said, it is not a formal motion. I just thought it was proper to bring it to your Ladyship's attention.

SHERIFF MCDONALD: Okay. Well, we will keep an eye on it, but if you need to make a formal motion, then I will deal with the formal motion at that time, Mr Kiddie.

MR KIDDIE: I am obliged, my Lord.

The only other matter at this stage – again, it is a practical one – is, as I understand it, my learned friend intends to call witnesses in a certain order. Now, number 4 on his list is going to be my longest witness for cross, I anticipate. So, given the late start, I am not sure how far we will get, but I just wanted to raise it, that if we get to the end of witness number 3 by, say, half past 3.00, I am not going to complete witness number 4 in half an hour. So, my learned friend might want to slot one of his other witnesses in just to make best use of the court time given the late start.

SHERIFF MCDONALD: Okay, we can deal with that at that time.

MR KIDDIE: I am obliged.

SHERIFF MCDONALD: How do you feel about that?

MR DAVIS: Yes, my Lady, no further preliminary matters, and the first witness for the pursuer will be David Graham.

EVIDENCE OF DAVID JOHN GRAHAM (sworn)

Examination-in-chief by MR DAVIS

Mr Graham, could you please state your full name. – David John Graham.

And your age? – I am 73.

And your address? – Elm Green House, 125 to 127 Main Road, Danbury, which is Essex.

Now, your position with the pursuer, which is Glenwyvis Distillery Ltd, what is your position with them? – I am its chairman.

For the purposes of this litigation, were you asked to prepare and sign an affidavit? – I was indeed and that was done a matter of a week or so ago.

Yes. If you could please have the affidavit in front of you. My Lady, I do not actually have the process number, which is perhaps here in my notes.

SHERIFF MCDONALD: Neither do I. The clerk is not here. We will proceed without it meantime and let's find that later.

MR DAVIS: I am much obliged.

Examination-in-chief by MR DAVIS (continued): Mr Graham, could you just have a look at the document and confirm that is your affidavit, please. – Yes, it is. It bears my signature.

And is that the evidence ... do you adopt that affidavit as the evidence that you are giving to the court today in relation to this case? – I do.

Right. And in the affidavit, I think we see references to certain pursuer's productions where you are referring to documents. – Yes.

I take it you have seen those documents that are referred to in your statement? – I have indeed.

And can we take it you are adopting those documents as part of your evidence? – Yes, please do.

There are one or two other matters I want to ask you about. The first matter I want to ask about is actually just perhaps so we understand the ... obviously the dispute concerns the happenings around the distillery and the farm. It may be useful just to look at a map of the farm. Could you have the defender's production 79 in front of you, please.

If you have a look at the first of the two pages, do we see that is a diagram of what is the existing site of the distillery? – Yes, sir, I think that is, as such.

At this stage, please ignore any handwritten entries on that map. The two orange blocks on the right hand side, do they represent the distillery buildings? – They represent the distillery production building, which is the larger of the two, and to the right, the second one represents our first bonded warehouse.

Okay. So, the larger building is where the whisky is produced and the processes that go on there? – Yes.

And where the offices of the business is? – The offices are actually at the front of that building to the south face.

Okay.

SHERIFF MCDONALD: Of the main distillery building?

THE WITNESS: Of the main distillery building.

SHERIFF MCDONALD: Yes, thank you for that clarification.

Examination-in-chief by MR DAVIS (continued): And the area which is in brown and purple to the south of the main building, what is that area? – That area is the area which was encompassed in the lease dated November

2016, I think, and that area was granted to the distillery over a 175 year period at a payment of £1 per annum rent. The grey area is, essentially, the shared access route through, and the brown area is, effectively, the curtilage of the buildings.

When you talk about the access route, do we see the access going down towards the bottom of the diagram and ... – Yes. In the bottom left hand corner, there is the number "10" in a circle. That is the junction with the country road that passes and services the distillery site. We have shared access from that point right up to the front of the distillery building along that grey access road.

In terms of ... you talk about shared access. That is with Scroggie Farm. – That is indeed.

Yes. And the two other, again, orange squares, can you explain what those two on the left hand side are? – Yes. The larger building is a cow shed, which belongs to the farm, and the smaller of the buildings is the house occupied by the landlord and his wife.

You did mention the lease and it may be helpful, actually, just to look briefly at that. Can you please look at production 1 in the pursuer's joint bundle. It was principally anticipated that an operator would be needed for certain videos in the productions ... but, yes. If you could ... can we see this document is headed up, "Lease between John McKenzie and Glenwyvis Distillery"? – That is correct, yes.

Yes. And this is the lease in which the distillery occupies the subjects. – That is right.

Yes. And if you could look at the very last page. – The site map?

Yes. – I have that.

Yes. And, in fact, this lays out the full property that is let in terms of the lease, yes? – That is correct.

Yes. – There has to be some distinction drawn. In the centre of the page at the top part, there are two areas. I cannot distinguish between them easily in monochrome, but on the original, one was hatched in purple and the other in blue. The lower number shows point 686 hectares and that was the full amount of the area allowed during the course of construction of the distillery, and my understanding of the lease, although I was not present at the time, is that that area would be returned to the landlord after practical completion had taken place, and that the residual area, point 321 hectares, was the area that was, effectively, provided to the distillery to carry out its operations, and that is greater than the area of the production building itself. And then over to the right, the darker shaded area, I can't read the actual number of hectares, but that was the distillery warehouse and its surrounding.

Yes. I mean, on the right is roughly where the now bonded warehouse is. – That is right.

And within the point 321 hectares is where ... that is the area that is ... – That is the area on which the distillery building is sited, including its offices and, to one side, the boiler house and the attendant store, and to the other side, the (inaudible).

Okay. Yes. I think we can see this from the terms of the lease, but the idea was a larger area was allowed for the construction of the building, and then it became a (inaudible) after that. – Actually, (inaudible) who would bring on raw materials which would then be used in the

construction phase, and the area for storing those, as I understand it, was that larger area.

Yes. I think, again, having looked at that hatch there, just to the left of that there's the grey, as it were, access road running down to the main road? – There is indeed. That shows the access route to the farmhouse, but it does not show the access route which runs from the east/west from the entrance to the distillery, point 321 hectares up to the warehouse.

Yes, but that part of the access ... you are talking about the access for the distillery up to the warehouse. – Yes.

That runs across part of the leased land. – Yes.

Yes. I think there is a slight difference in shape just in the section of the access road where it meets the public road, which is on the left hand side running north/south. Do we take it, comparing the two documents, there has been some reshaping of that road around that junction? – I understand that has taken place. That was before my time.

SHERIFF MCDONALD: Sorry, it was which road and which junction?

MR DAVIS: Sorry, your Ladyship can see, looking up to ... there is a ...

SHERIFF MCDONALD: Can you get the witness to point it out? That might be useful.

Examination-in-chief by MR DAVIS (continued): Well, if the witness could look at the orange part ... – This is the area here which ... this area here is where the plant was for access to join the main country road which runs, effectively, up at the top diagonal there. Now, in the

course of construction and negotiation with the planners, there was an issue about access to that road and the planning requirement stipulated that it had a better visibility splays because to the north, there is a blind summit, maybe 70 or 80 metres away from that entrance, and to the south, there are some sharp bends. Now, I don't know exactly what happened, but I do know that the way in which that is presently configured, it does not (inaudible) on that map. It is better evidenced from the photograph we saw earlier.

SHERIFF MCDONALD: Thank you. Thank you, Mr Davis.

Examination-in-chief by MR DAVIS (continued): Having looked at the layout of the premises, if you can look back at your affidavit. There are a couple of other issues arising from that I wanted to ask about. If you could please look to paragraph 3 of the statement. You are talking about the formation of the pursuer, which is a community benefit society. – Yes.

That is the structure, and you say it has got 3,625 shareholders. How did that number shareholders compared when you took over? Is that the number that has been there throughout your period as chairman? – Yes, it is with some leeway. A community benefit society has withdrawable shares, so there were slightly more shareholders at the point in time when I took over, but some shareholders have passed away; some shares have been divided up between members of a family as part of an estate; and others have been surrendered in circumstances of need. The funding of the distillery largely took place up to and including June 2019. There were two share offers. The first one raised something like £2.5M, and the second one raised a further £1.2M, taking us to the total of £3.74M that we have at the end

of December 2021. It may have been slightly higher, but the number of shares that have been withdraw is relatively small. Equally, the same thing applies to the shareholder number

Yes. Is it correct, therefore, to say that the bulk of the shareholders had been recruited before you became chairman? – That is indeed the case.

Yes. And do you know who was responsible for bringing together the original shareholders into the business? – I am sorry, would you repeat the question, please.

Who were ... who oversaw the recruitment of the original shareholders in this project? – It was the founder. He raised the capital through crowdfunding.

And when you say the "founder", who are you referring to? – John McKenzie.

Okay. And I think you referred to a split in terms of the membership, how many are local, how many are in the rest of Scotland and then the UK and the rest of the world. How does that split? What was the original split as far as you are concerned? – As far as I am concerned, yes, it is. There would be a distinction between the first and the second share offer because no two offers have the same distribution of shareholders in share capital source, but to all intents and purposes, that is what we ended up with as of June 2019, and that is where we start from. But it is important, in one sense, because within the community benefit society, there is a statement that says there can be constituencies of shareholders, and that was focused on one constituency being, essentially, the IV post code area, and the second being everybody else. Now, although that power exists in the rules of the

society, it was never enacted, but the statistics were gathered, lest we needed to (inaudible).

Okay. Thank you. Now, if I could then take you on to paragraph 23(a) of the statement. – Yes.

In that paragraph, you .. paragraph (a) begins, "There is a reference to failure to complete the minute of variation of the lease". And I think you explained it was envisaged there would be a minute of variation to adjust the boundaries of the lease. – That is absolutely correct.

However, that has not happened yet. I just want to ask you to confirm a document, which is production 74 in the pursuer's bundle. Sorry, I think ... right sorry, it is not ... I have got the wrong document. Apologies.

SHERIFF MCDONALD: That is okay. Take your time. There are a lot of documents. You can have a seat at the moment.

THE WITNESS: Yes, thank you, but I am quite happy standing.

SHERIFF MCDONALD: Okay.

MR DAVIS: (After a pause) Right, sorry, apologies. My bundle is muddle up. It should be the pursuer's bundle, which is 74. Apologies.

Examination-in-chief by MR DAVIS (continued): Now, could I just ask you to confirm that that is an email which you sent on 29th July 2021? – It is indeed.

And is it, essentially, a summary of a discussion you had with Mr McKenzie by way of Zoom call? – That is right.

A summary, I think you say, at the end, the last sentence: "I apologise for the length of this email, but

it is a full and accurate summary of our (inaudible) stance." – Yes.

And we do not need to read through that at this stage, but that was part of the discussions you were having with the defender in relation to the minute of variation at the time. – That is correct.

SHERIFF MCDONALD: Repeat that. That was part of the discussions?

MR DAVIS: The discussions that the distillery was having with Mr McKenzie in relation to the minute of variation.

SHERIFF MCDONALD: Okay, thank you. And you said yes?

THE WITNESS: I did indeed, my Lady.

Examination-in-chief by MR DAVIS (continued): Now, I think the last matter ... sorry, my Lady, my computer has failed me now.

SHERIFF MCDONALD: (After a pause) Mr Davis, do you need me to rise for a short while?

MR DAVIS: I apologise, my Lady. Unfortunately most of my notes are on my computer and it seems something has gone wrong. If you could give me a few minutes just to ...

SHERIFF MCDONALD: Yes, yes.

MR DAVIS: I apologise for that.

SHERIFF MCDONALD: You are under worse pressure when I am sitting here waiting, so ...

(Court adjourns and then reconvenes)

MR DAVIS: I apologies for that, my Lady, the technical glitch that I am hoping has now been resolved.

SHERIFF MCDONALD: Yes, thank you. I hear there is a problem with the system.

MR DAVIS: Yes, my computer, yes.

SHERIFF MCDONALD: Pardon?

MR DAVIS: There was a problem with my computer. Sorry, is there another problem?

SHERIFF MCDONALD: No, no, I thought there was a problem with the whole system.

MR DAVIS: Oh, no, no. I think the system is all right. Sorry, it was just my computer that was the problem.

SHERIFF MCDONALD: All right, then; yes.

MR DAVIS: So, I apologise for that.

SHERIFF MCDONALD: Carry on.

MR DAVIS: I will carry on. Thank you, my Lady.

Examination-in-chief by MR DAVIS (continued): Mr Graham, could you have your statement in front of you again, please. And if you could look at paragraph 23(e). And I think you are there referring to the issue of visitors to the distillery just on the subject of the (inaudible) between the distillery and Mr McKenzie. – Yes, indeed.

Yes. And you refer there to a production 61. If you could please have that in front of you, please. So, the pursuer's bundle. – Okay.

Do we see this appears to be an email exchange involving Mr McKenzie? I think the final email is sent to ...

SHERIFF MCDONALD: Sorry, can I just stop you there. Sixty-three, did you say?

MR DAVIS: Sixty-one.

SHERIFF MCDONALD: My apologies. Thank you. Carry on.

Examination-in-chief by MR DAVIS (continued): We can see there is an email involving Mr McKenzie, I think ... or the main exchanges, if we look at the first email, which is on the second page. That is an email to William Reynolds. Do you know who William Reynolds is? – Yes, I do. He is one of the original directors and he was also the project architect.

Thank you. And it is in October 2018 and Mr McKenzie writes, "Let me know thoughts on this. Can I rent a unit that James has on Airbnb website? I can give discounts to GW", which I think we assume is a reference to Glenwyvis ... – I presume so, yes.

"... Glenwyvis members and get the review distillery that way, given tours not allowed." Just explain, I think in the history, which I do not think is in dispute, there was an application for visitors to be allowed in the distillery, which is ... – A couple of things. The distillery asked for planning consent for a visitor centre on the site. That was rejected by the planning authority.

But this is Mr McKenzie seeing if he can have extra tours associated with his Airbnb guests, and it goes on: "I'm not concerned about the tours restriction. I just want to check out the situation." So, what do you take from that email about his attitude to visitors? – I think, generally, he was quite supportive of the idea.

I should say, that was in 2018 he was supportive of the idea? – Yes.

So, what is the current position in relation to whether or not you have visitors ... tourists and visitors at the distillery? – Can we distinguish between visitors who are there for commercial reasons and on business, and tourists. Again, I answered two separately.

Yes, well, specifically, if you can deal with tourists. – Okay. As far as tourists are concerned, we do not support any tourism of the distillery. We make it clear on our website, we make it clear by signposts at the entry gates to the farm, let alone the distillery itself, that we have no facilities to permit guests to come to the distillery and we give them tours, or we give them visitor experiences at the distillery. So, it is quite clear that we are abiding by the generality of the provision that said there shall be no visitor centre in the distillery. Now, to some extent, that is almost equivalent of King Canute turning the waves away. We had a distillery that broke world records in terms of its publicity and its founding. And so, there are a huge number of people out there who are whisky buffs and aficionados who would be delighted to visit the distillery, and they turn up unannounced, asking to see the distillery, and we generally made it clear to them that we had no facilities and we do not support visitor tours.

So, if it was suggested there was a policy of the distillery to encourage visitors to come to the site ... – That is not the case.

Thank you, Mr Graham. I do not have any further questions for you, but my learned friend may have questions to put. – Thank you.

SHERIFF MCDONALD: Yes, Mr Kiddie.

Cross-examination by MR KIDDIE

Good afternoon, Mr Graham. – Good afternoon, Mr Kiddie.

Although we now have the benefit of the big screen, I have only got my reading glasses, so I am going to have to refer to my little screen as well, which I can see better. – I understand the problem. Please go ahead.

Thank you. Is that a Glenwyvis badge? – It is indeed.

Okay. The first time I have seen one of those. Now, you were appointed as ... first as director in March 2019, correct? – No.

No? Okay. Sorry ... – I was co-opted to the board in March 2019. Co-option is permitted under the community benefit rules, but to become a director, you have to go through the process of presenting a nomination at an annual general meeting of shareholders and being voted in as a director. Now, it is a subtle distinction, but it is there.

Perhaps if I reframe the question. When did you initially become involved with the distillery in that official capacity? – In March 2019.

Okay. Thank you. And you have been chairman since October of that year? – That is correct.

Now, as I understand it, the distillery board meets regularly. – Once a month.

And I have seen some of the productions referring to board meetings at a physical venue. – Yes.

One of them, for example, was a football club. – That is the case.

Yes. Since your appointment, however ... obviously we have had covid and lockdown ... so, would I be correct in assuming that the meetings moved over to a remote style of conducting business during that time? – It has. Of course, it has. We used facilities provided by Ross County Football Club ever since I was involved with the distillery. Prior to that, there had been an agreement with Mr McKenzie that we do not meet in the distillery building, and that has never since been replaced, despite the fact that that is the proper headquarters. From the start of covid, we had our monthly meetings by Zoom and we had had intervening meetings as when the need arose, for example.

In a way, Zoom is much more convenient, is it not? – It is very convenient.

So, are you still conducting your board meetings by Zoom? – Yes, we are.

So, is that a lesson that you have learnt from Covid in a way, that it is easier to do business that way? – There are advantages and disadvantages of that route. One of the advantages of meeting in physical presence, is that you form a deeper and better rapport with everybody round the table, and it is a more relaxing atmosphere. You read body language. You have a bit of banter. That works. It does not work as well on Zoom as, I am sure you will have come to find yourself in your business during covid.

But in any event, since the start of covid and lockdown ... so, we are talking about the early part of 2020 ... – Yes, indeed.

... the distillery has conducted its meeting by remote ... – It has.

... technology. – That is right.

So, that would represent, by far, the lion's share of your tenure as chairman. – Yes, that is correct.

Notwithstanding that, I take it you have been to the distillery? – I have.

You have been to the farm ... – Yes.

... and the distillery. And you mentioned when my learned friend was asking you questions, you mentioned the public road. – I did.

There was a discussion about how the first section of the private access road had been altered. – That is right.

And I understood you to mean that it was altered in order to make the road safer. – That was my general understanding as well. That just happened before I became involved.

Thank you, Mr Graham, I appreciate that it happened before you became involved, but obviously you have some awareness of ... – Yes.

... events prior to your appointment. And obviously you have been to this public highway yourself. – Yes, I have.

And you mentioned that there is a blind summit, I think you said, to the north. – That is correct.

So, there is a hill? Is the entrance to the distillery access road by hill? – It is accessed from a hill.

So, if you are going up the hill in a northerly direction, the distillery would be on your right hand side? – It is on the right hand side, yes.

But there is a blind summit at the top. – Ahead of you. I would guess probably somewhere in the region of 70 or 80 metres further north than the junction.

And just to be clear, this is a single lane road? – This is an unclassified country road where the national speed limit applies.

It is not dualled, is it? – Absolutely not.

No. It is a country road. I am sure all of us in this courtroom are familiar with what that means. And I think you mentioned there had been an accident on that section of road. – I do not recall making that statement here.

But it might be fair to say that there was concern about the possibility of an accident given that the road was altered. – I do not believe that to be the case. Whatever alteration was put in place, my understanding was that that alteration was to conform better to the standard that is required by the planning authority and its traffic consultancy. They wanted to have a safer entrance and exit to that country road from the farm, at they had a set of standards which they referred to as visibility splays.

So, there was a safety concern? – There was a safety concern about access and egress to that road.

And in terms of roads and highway safety concern, usually means a concern about the possibility of accidents. Would that be fair to say? – Yes, it is.

Thank you. I am going to turn to your affidavit now, Mr Graham, so you might want to have that handy. You told us that the distillery is set up as a community benefit society with directors. Are some of those

volunteer directors? – All of the current board are volunteers. – Forgive me. For the sake of the record, the society rules refer to a management committee and committee members, but by way of shorthand, we have always referred to them as a board with directors.

I understand. In a sense, are the directors trustees? – They have the same duties as a director of a joint stock company would have, or as the members of a board of trustees would have.

Now, can I just ask, you have told us you are from Essex. You live in Essex. – I do.

Which is 600 miles away. – Yes.

Why would someone who lives in Essex want to become involved in the running of a community benefit society board 600 miles further north in Dingwall on a voluntary basis? – It is a fairly easy answer. I was brought up in Inverness. I did my secondary and tertiary education in Edinburgh. I had an interest in malt whisky for at least 41 years. My background is that I have been a financer in the automotive industry and latterly I have dealt with companies that are struggling and help refinance and restructure them as an independent consultant. When I saw Glenwyvis advertised, I thought that is a lovely idea because, to this day, I lament the fact that Inverness lost all three of its distilleries in the early 80s, so there was an emotional tie for me. What I had discovered very early on in my involvement with the distillery was the fact that it was struggling to survive and, as a consequence, I said, "Well, if there's anything that I can do to help, I'd be happy to volunteer". I said that at the annual general meeting in 2018. I approached both Hazel Allan, the then finance director, and

John McKenzie, the founder, and volunteered my services in the sense of being a sounding board if they needed any help in putting together a business plan, or a financing request, thinking in terms that, okay, maybe few hours here or a few hours there, I would be capable of doing that.

Just to be clear, Mr Graham, because you have mentioned that since your career in the automotive industry, I think you said? – Yes, that is right.

You have done work as an independent consultant? – Indeed.

Have you worked in that capacity for the distillery? – No, but I have worked for a drinks business. I worked for Seagram for a year and a half.

SHERIFF MCDONALD: Mr Kiddie, can I just interrupt just briefly? Mr Graham, just to confirm, you are a volunteer?

THE WITNESS: That is correct, my Lady.

SHERIFF MCDONALD: Thank you.

MR KIDDIE: I am obliged to my Lady.

Cross-examination by MR KIDDIE (continued): Now, in your affidavit, pages 3 to 4, paragraph 10, you refer to the resignation of Reece(?) Morrison. – I do indeed.

And you refer to his letter of resignation, which is pursuer's production number 49. So, perhaps we could have a look at, please. I am just having to find it on my technology, since I cannot actually see it all the way up there, sorry. So, do you recognise that? – I recognise the letter, yes.

Because you refer to it in your affidavit. It is not addressed to you, is it? – No, it is not.

It is addressed to David O'Connor. – Who was then then chairman.

Okay. And it is dated 3rd October 2018. – That is correct.

So, that is prior to your ... well, I will not use the word "appointment" because I think there is a technical distinction, isn't there? – Prior to my involvement.

That is prior to the beginning of your involvement with the distillery. – Yes.

Now, in this email ... sorry, letter ... or is it? It is not clear. I think it is referred to in your affidavit perhaps as a letter. In any event, some of it is highlighted in yellow. – It is.

And without going into the detail of it, because you say you recognise it, is it fair to say that it is critical of Mr McKenzie? – It is indeed.

Yes. But you are not the author nor the recipient of this. – That is perfectly correct.

And it predates the beginning of your involvement. – Also correct.

So, you are not in a position to confirm the accuracy or otherwise of the content of this document, are you? – I am not in that position, no.

Thank you. And are you aware whether Mr Morrison, the author of this document, or Mr O'Connor, its recipient, if either those gentlemen has been ... shall be a witness in this case? – Neither of them has been called.

Anyway, Mr Morrison says, essentially, that he cannot get on with Mr McKenzie. That is what this

document is about. Is that a fair summation? – I think it goes deeper than that.

But I am trying to ... – My understanding ...

If you put it in a very brief way. – My understanding of how I read this document is that despite his best endeavours to make progress towards a business plan, that has failed and, as a director, he felt that he and the other directors had been misled for a period of time. So, yes, there was grounds for disagreement between the two and Mr Morrison chose to resign over it.

Does this document mention Mr McKenzie blocking the access road? – I do not recall it doing.

Well, if you want to take a look ... – I am happy to read it through again.

If you want to take a moment to refresh your memory. – (After a pause) I see no mention of a blocking of the access road in this document.

Does it mention Mr McKenzie taking access to the distillery premises inappropriately? – No.

Does it mention Mr McKenzie harassing anyone? – It does not mention Mr McKenzie harassing anyone, but I take it from the tone of the letter that there is considerable disquiet about the behaviour of Mr McKenzie and his fellow directors.

But this is a letter that you neither wrote ... – That is correct.

... nor was it addressed to you, and it predates your involvement. – Yes.

Moving on in your affidavit, paragraphs 5, 6, 8 and 9. In fact, we might be tracking backwards. Let me

just check. Yes, 5, 6, 8 and 9, you speak about the distillery being in some financial difficulty, and I think you mentioned that it was a little while ago. And this is one of your areas of expertise. – Indeed it is.

Thank you. And you mention that the finance director, Hazel Allan, had stepped down. – Correct.

Paragraph 8 you use the term "better financial structure was needed". Correct? – That is correct.

Paragraph 8, cash flow forecasts. – Yes.

And paragraph 9 you say that you could see that immediate action was required to address the imminent cash flow shortfall. – That is correct.

Paragraph 27 of your affidavit, a little bit further on, you even refer to the distillery's imminent insolvency. It is on page 11. – Yes, that is also correct.

Give me a moment, please. (After a pause) Now, did you mention that you had previous experience working within the drinks industry? – I did.

Sorry, I cannot remember the name of the company. – I worked for Seagram.

Right. And do they make whisky? – They do.

Was it a distillery that you worked for? – No.

You cannot just make whisky and sell I straightaway, can you? – Certainly not.

Because whisky, by its nature, has to mature. – That is right.

Do you know how long for before you can sell it as whisky? – You can sell grain whisky at a young age, but for it to be single malt whisky, it needs to be matured in

oak casks for a minimum of three years, one day, before it can be legally sold as whisky.

And what type of whisky is it that the Glenwyvis Distillery ... – Single malt whisky.

Okay. So that falls into the latter category. – Absolutely.

Three years and a day. I do not want to forget about that day because I know that you might pull me up on it, Mr Graham. Three years and a day before you can legally sell it. – Correct.

And this is a new distillery. – It is. We started production in January 2018.

Right. And I think the date of entry in the lease was February 2017? Again, I appreciate that ... – I may have to take your word for that.

... was before your time. Okay. – But you can imagine that with any production kit, it takes time for the machinery to be properly calibrated, tested, thoroughly inspected and commissioned before actual production can start. So there would be an expected lead time between date of entry to the property and start of physical distillation as production of spirit.

It strikes me that such a project would be somewhat challenging. Would that be fair? – That would be very fair.

To set up a new distillery that cannot market and sell its product for three years and a day. – You would be drowned out if you took this proposition to *Dragons' Den*. You would hear a chorus of (inaudible).

And I do not know, but perhaps you do as you are better qualified than I about this, I would imagine not all such projects succeed. – I am sure they do not, but to be clear, we are talking about three years between the time at which you make the product and its availability to be sold as whisky in the market, and beyond that, the market says it adds value to whisky which is 10 or 12 years' old. So, we are really talking about an extended period of time during which that whole organisation has to be funded, and patient capital is essential to make that happen.

Any such project in its infancy can expect to have cash flow difficulties ... – Yes, it can.

... would that be fair? Success is not guaranteed, would that be fair? – That is correct.

Any such project might face the risk of insolvency, would that be fair? – That is correct.

Due to ongoing cash flow difficulties, yes? – You would expect there to be cash flow difficulties in a recent organisation, and particularly in one which has a very long term between production and sale product.

Including malt whisky? – Absolutely.

Yes. Page 4 of your affidavit, paragraph 11, you refer to five key officers of the company who either resigned, or have been noticed to resign? – Yes, that is correct.

Did those include directors? – Those were only directors that we are talking about. The distinction I will draw is between those who were appointed directors of the company and those who were office bearers who were, in this instance, the finance director, the managing

director, the vice chairman, the chairman and the head of HR.

Okay. And they are all volunteers? – They were ... no. The finance director was a paid consultant. The managing director at that time was a volunteer that had previously been paid.

I am trying to note this. The finance director? – The finance director was a paid consultant.

Yes. – The managing director, I understand at the time, was not paid, but had previously been paid in two capacities: one as project manager and one as managing director.

So, I understood you to say earlier, Mr Graham, that all the directors are volunteers. – In the present tense, all of today's directors, nine of them, are volunteers.

Thank you for that qualification. So, in the past, some of the directors have been paid? – That is correct.

So, so financial problems ...

SHERIFF MCDONALD: Mr Kiddie, can I just stop you there. Mr Graham, in the past some of the directors have been paid. Has that been for specific pieces of work?

THE WITNESS: Yes, it was. It was payment for a specific skillset.

SHERIFF MCDONALD: Okay.

THE WITNESS: It is not uncommon in new organisations for people to assume the role of, shall we say, finance director, without necessarily being involved on a day-to-day basis, but in order to be able to meet the needs of raising capital, you need to be able to speak the language

and have the ability to interact with finance professionals, whether they be bankers or investors, or whatever, and for that, you need the services, generally speaking, of a qualified professional. So, this lady, our finance director, fulfilled that role on contract, but she did that as part of a portfolio of other activities she was involved in.

SHERIFF MCDONALD: Thank you.

THE WITNESS: I hope that is clear.

MR KIDDIE: Thank you. My Lady, I note the time. I am about to start a new chapter, so ...

SHERIFF MCDONALD: Okay. Very well. I think we will finish for lunch and resume at 2 o'clock.

Mr Graham, just to caution you, if you like, that you are subject to your oath. While you are still giving your evidence, do not discuss your evidence with anybody during the lunch break, and when we come back, I will remind you of your oath and let Mr Kiddie continue with his questions.

THE WITNESS: Thank you.

SHERIFF MCDONALD: Very well.

(Court adjourns and then reconvenes)

SHERIFF MCDONALD: Yes, thank you, Mr Graham. Just as I said, I remind you, you are still subject to the oath that you took, and Mr Kiddie will carry on with his questioning. Thank you.

MR KIDDIE: Thank you, my Lady.

Cross-examination by MR KIDDIE (continued): Mr Graham, I just want to come back to something that we discussed earlier in order to clarify my understanding

of it, if that is okay. Initially I think you said that the directors are all volunteers, and then subsequently you qualified that by saying that, historically, some of the directors had been paid ... – That is correct.

... for some of their services. – That is correct.

And you explained to her Ladyship that where a director had a particular skillset, then it was considered appropriate to remunerate them. – That is right.

And I also ... I asked whether you in your capacity as someone with experience as an independent consultant, whether you had given services to the distillery of that nature. Do you remember that? – I have given services to the distillery of that nature. When I was first asked to be involved, I had told you I had already represented to Mr McKenzie and to Ms Allan that I was a willing volunteer to give assistance on a sounding board basis. At the first meeting that I attended of the board of directors, there was considerable amount of concern expressed about the way ahead, given that the cash flow situation of the distillery was extremely uncertain. At that point in time, I presented my own thoughts on a forecast of the distillery's finances based purely on what was in the public record, and my indication was that their previous ceiling as to how long the distillery could last an infusion of cash, was very optimistic. Later in that same meeting, there was concern about the way ahead. The distillery directors wanted to appoint a local firm of accountants to take over the managing of the finances of the distillery, and they were unable to find anyone among them who was capable of writing a business plan to go out and generate a new share offer and new funds. At that point in time, they asked me if I would undertake the job and I said, yes, I would, but that was way in excess of

the kind of voluntary help that I had previously offered. So, they asked me if I would write a business plan. I said I would do so and I would do it for a fee, which the distillery themselves would determine was affordable to them. That fee was (inaudible) subsequently by Highlands and Islands Enterprise. They paid roughly the half of it, and I agreed to deliver a business plan on that basis, which I have subsequently done. But from that point onwards, my involvement with the distillery had been on a purely voluntary basis.

Thank you. So, you have undertaken bought and paid for services ... – I have.

... for the distillery. – I have, and I regret if my previous testimony had not indicated that in full.

I dare say it does. It is my fault for not understanding you, Mr Graham. – Thank you.

On how many occasions have you rendered such services to the distillery? – Just the once.

And ... – For the distillery.

For the distillery. – Mm-hmm.

What sum of money are we talking about? – In total is was £14,000.

So, half of that from the distillery ... – In rough terms. I have not seen the invoices. I do not remember the detail, but roughly half of that was paid by HIE.

Well, you said half previously, so ... – Yes.

... I took you to mean 50 per cent. – Yes, I do not know about HIE involvement, but ...

Match funding, I think it is called. – Yes.

Is that right? – Pretty much.

When was that? – March 2019.

And was a commercial rate? – Far from it.

What would be a commercial rate? – Well, previously, as independent, I have been paid upwards of £750 a day. It would not take very many days to write business plans generally for £14,000 if that were the case.

Right. So, would you care to hazard a guess how much it might have been on a commercial basis? – No, because it was impossible to determine at that point in time how long that exercise was going to take.

No, but you have done the exercise now. – I have.

So how much would you have charged if you were charging commercially for it? – I would have charged on a daily rate in order that it would match the amount of effort required.

How many days did it take you? – At a conservative estimate, if I was writing a business plan from scratch, I should be capable of doing it within a month or two.

I am asking you how many days this particular business plan took you to do? – It took me nearly a year.

Okay. Are you retired? – I am.

And you told us that the reason you were involved with the distillery is personal and sentimental reasons, is that fair? – Yes.

You could have done this free of charge. – I could have.

Thank you. – But I could not have justified giving up that amount of time versus other things I was involved in.

Do you pay your staff commercial rates? – We do.

And what is the going commercial rate for a distillery manager? – Upwards of £50,000 per annum.

Do you know how much you pay your current distillery manager? – About £55,000.

I want to move away from the distillery's financial difficulties now, Mr Graham, and address another difficulty, and I think my learned friend, he took you to some of this in your introduction, but I just want to look at it in a slightly different perspective. You know, don't you, that the land which the distillery currently occupies exceeds that for which provision was made in the lease, don't you? – I understand that to be the case.

And this land that the distillery occupies being, of course, Mr McKenzie's land. – Yes.

And in your affidavit ... it is paragraph 13. Do you still have the affidavit? – I have, yes.

You refer to this minute of variation of the lease. Yes, can you see that? – I can.

Such a minute of variation was necessary in order to deal with this difficult ... – Precisely that.

Can we have a look at the lease, please, if that could be put on the screen. That is pursuer production number 1. Do you have that, Mr Graham? – I have.

So, this lease is dated 14th November 2016. – Correct.

And it provides that the date of entry for the distillery shall be 1st February 2017. – Agreed.

Could you look at clause 20, please. I think it is on page 11 of the lease. – Yes.

Do you recognise that clause? – I do.

If you can give me a moment for my laptop to catch up. Okay. So this clause 20, it is headed "Minute of Variation/Reduction of Leased Subjects". Without reading it out in full, do you agree that what this clause does is to make provision whereby parties will correct the difficulty created by the construction phase. – Absolutely so.

So, just to be clear, as my learned friend asked you to confirm earlier, when you build a distillery, you need more space for the building materials and the machines and all that kind of thing. – When you build any project, you need more than the building blueprint to accommodate materials and tools and the like. But in addition to that, what is drawn is (inaudible) what is built in construction. There are variations created by the topography and drainage for unforeseen circumstances, and I am perfectly familiar from other eventualities that a minute of variation is necessary to correct discrepancies between something somebody has drawn in isolation, and something somebody has physically built in practice.

Just to clarify, I think there are two things going on here. The first is that during the construction phase, more space was needed. – Yes.

And the second thing is that even after construction, the land that the distillery occupied was not what had been anticipated by the lease, or agreed by the lease. – I agree with you on both points.

And what this clause does is to make provision for parties to correct that and, specifically, the onus is on the distillery to draw a ... – Yes.

... to draw a plan ... – That is right.

... to reflect more accurately what land the distillery actually uses. And can you see that it says in the clause that this is to be done as soon as reasonably practicable after the date of practical completion? – I have to tell you, that came as a surprise to me, because I had not conceived when joining the distillery that this would not already have been done, because, as you pointed out, the date of entry was in 2017, physical production started in February 2018, and here we are, whatever it was, several months afterwards without agreement on the distinction between the as-built and the as-drawn.

That is a good way of putting it, Mr Graham. Thank you. As-built and as-drawn. And you agree that this clause requires that this be done as soon as reasonably practicable? – Yes.

And you seem to be saying that, in your view, it was not done as soon as reasonably practicable. – That is my view.

Can you look at paragraph 13 of your affidavit, please. – Indeed.

Here you say of Mr McKenzie that he made a demand against the distillery in January 2020 through his solicitors, demanding *inter alia* that the distillery prepare and submit a minute a variation of the lease. Your words? – That was ... those are my words and that was the tenant of the solicitors' letter we received from Ledingham Chalmers on or about that date.

You use the word “demand” twice. – I do.

Is that the word that Mr McKenzie used? – It is the word that I took to mean ... sorry, the meaning I took from the letter from the solicitors.

From Mr McKenzie’s solicitors? – From Mr McKenzie’s solicitors.

So not from Mr McKenzie personally? – No.

Do you remember the word from which you took the sense of demand? – I am sure we can produce the correspondence from the solicitor, but I do not have it to hand.

But in any event, that was the inference that you drew. – Absolutely.

And you also used the word “against” ... “demand against the distillery”. – Yes.

So, the language there is quite confrontational, would you agree? – Not necessarily. It is factual.

Would you agree that another way to put it would have been, “We were asked from Mr McKenzie’s solicitors” or, “A request was made of us through his solicitors”? – I think, given the passage of time since the date of practical completion, it was more a case of a demand than a polite request. So, I am going to stand by what I said.

Because these are the words that you chose for your affidavit. – Absolutely, yes.

No-one else wrote the affidavit for you. – No.

You see, the thing is, this demand, or request, or however you wish to characterise it, this is something

that Mr McKenzie was asking the distillery to do, but the distillery, by your own concession, ought already to have done. – Absolutely correct, but what I cannot understand is that during the time between practical ... the date of entry and my joining the board in March 2019, this had not already been done because at that point in time, Mr McKenzie had been the project manager and the managing director of the distillery, as well as landlord. Nobody was better placed to have made this minute and variation than he.

Well, it does not seem to me, Mr Graham, with respect, that that is what you are complaining about in your affidavit. It seems to me what you are complaining about in your affidavit is the nature of how this demand, or request, was intimated. Is that fair to say? – On reflection, I have nothing I wish to change there.

Paragraph 15 of your affidavit, if you could find that, please. You say, "In the latter stages of construction and while the defender was not on site, the building that is now the defender's house was occupied by the distillery". – That is correct.

And then a little bit lower down in the same paragraph you say, "In October 2018, the newly married defender and his wife began occupying the house as their principal residence". – Yes.

And then you say, "They did so knowing that they were moving into a house that was built within 50 metres of the distillery". Your words. – My words.

You see, the impression that creates is distillery first, house second. Do you agree? – I accept that.

But you know, do you not, that Mr McKenzie and his wife began living in that house in 2015? – I am told so, yes.

So, do you agree that the impression given by your affidavit was misleading? – No.

And you said you had been told that Mr McKenzie and his wife began living there in 2015. – I had been told so.

Because you, yourself, was not involved with the distillery at that point. –That is right.

Moving on, please, looking at paragraphs 15 to 17 of your affidavit. You speak of a disagreement between the distillery and Mr McKenzie about operating hours. Yes? – Indeed.

And this was eventually agreed in a mediation agreement, is that correct? – It was.

Can we have a look at the mediation agreement, please. That is the defender's production number 2. Do you recognise this document? – I do.

I think my Ladyship is trying to find the ...

SHERIFF MCDONALD: No, it is okay. Carry on.

Cross-examination by MR KIDDIE (continued): So, this was agreed on 1st May 2021. – Correct.

Could you look at clause 9, page 5, please. And this is headed, "Operating hours", is that right? – It is.

So, just to sum it up, in essence, this makes provision requiring that the distillery shall only operate Monday to Friday from 08.00 in the morning until 5.00 in the late afternoon/early evening; 5.00 pm. – Yes.

Is it fair to say that the background to this provision is that Mr McKenzie and his wife live in the farmhouse as their home that is beside the distillery? – That was their motivation for asking for the operating hours.

And the distillery agreed to it. – We agreed.

Can you look at clause 4, please. Can you see that clause? – I can.

And can you see it is headed, "Minutes of Variation and Supplemental Lease"? – That is right.

So, does this clause correspond with the clause 20 in the lease that we looked at slightly earlier? – Yes, it does.

And again, without going into the detail of it, because these documents have been addressed in a minute of admissions between parties, but, in any event, essentially what this clause in the minute of agreement does is to reverse the onus that we have already seen in clause 20 of the lease whereby, rather than it be the distillery who would take on responsibility for drawing up a plan more accurately to reflect the distillery's actual occupation of the land, rather than that with the distillery, as of the date of agreement of the minute of agreement, it would be Mr McKenzie who would do that. – In so far as Mr McKenzie required us to sign a supplemental piece for that part of the frontage of the building that exceeded the footprint of the building itself, yes, it does.

Well, what it says, clause 4(a), is: "The landlord will prepare and agree with the Society a minute of variation as required under the original lease." So that's changing the onus, is it not? – I find it difficult to agree with that statement because ...

It is perhaps ... – ... as far as I am concerned, we, the distillery, had prepared a full minute of variation. We submitted it, as required under the lease, in June 2020. It was rejected. Now, what the reasons were for that, I do not understand, but when it came to the negotiation of this mediation agreement, we said, "Let's look at it differently. Let's agree that a piece of the land be given up and be encompassed in a supplemental lease; therefore, will you tell us what you will be prepared to accept by that, and agreement between the parties can be reached on the basis of that?" Does that help clarify things?

Well, it is perhaps of little moment at this stage given the ... I don't want to ask you to give an interpretation of a legal document. That is really a job for the court, but thank you for your view, Mr Graham. – That is all right.

It does refer to drawings. Can you see that? That is clause 4(e). It says, "For the purpose of legal documents, the drawings will be prepared by Boults(?)" or "Bowlts(?)". I am not sure how to pronounce it. – Neither am I, but that was to distinguish between two sets of drawings which purported to do the same job. We, the distillery, had prepared a minute of variation which was carefully prepared after a year's worth of conversations between James Cameron, who had been, effectively, the contractor who built the distillery and, therefore, knew pretty much all of the land lie, and we had a company called Camtech(?) produce a topographical survey and maps to illustrate that, and we believed that was an appropriate basis for the minute of variation. We paid for that service. We produced those drawings. They were dismissed on the basis that ...

By Mr McKenzie. – ... Mr McKenzie thought that one of the members of staff of Camtech had a conflict of interest because he was an individual shareholder in the distillery. I cannot see how that can have been of any real consequence, but having said, we withdraw. Mr McKenzie went ahead and appointed Bowlts, who did these drawings, and that's why the agreement was we would base all of our information on the Bowlts drawings and a supplement lease would be based upon those drawings.

What nature of business is Bowlts? – I believe that they are physical surveyors.

Architects? – I do not know the answer to your question, I am sorry.

Well, the onus here is for the landlord to progress this along. – Yes, it is.

What you have just told us about what happened in terms of the distillery arrange for drawings to be prepared, all of that was before this minute of agreement. – Before the mediation ...

So, historical. Water under the bridge, as it were. – We submitted those drawings under a (inaudible) minute of variation in June 2020. Nothing happened. I wrote a letter in July or August to Ledingham Chalmers to ask if that could be signed, and the response is still (inaudible). At that point in time, I knew that where this was going was it was going to follow the line that Mr McKenzie and started with Bowlts, and so we agreed, for purposes of the mediation, that we would accept that as the basis on which things would progress. And we asked for the supplemental lease to be prepared which would then sit

alongside the minute of variation and deal with all of those matters in one go. I still have not seen that.

Okay. Was this at the same time that you were ... or, I should say, was this during the same year that it took you to draw up the business plan? – Strictly speaking, no. The business plan was presented to the annual meeting of members in January 2021, together with a number of recommendations, largely that we raise additional money to allow the business to grow.

So, the business with the toing and froing between you and Ledingham Chalmers, was that after you finished the business plan? – To all practical intents and purposes, yes.

Well, you said "strictly speaking" a moment ago and now you are saying "to all practical intents and purposes". It seems to me that these questions are capable of being answered "yes" or "no". So, "yes" or "no"? – Please repeat the question.

Had you already completed the business plan before you had a process of negotiation, or an attempt to engage with Mr McKenzie's solicitors in respect ... – Yes.

Yes. Only recently completed the business plan? – The answer was yes.

Well, I am not asking a different question.

SHERIFF MCDONALD: You asked "only recently" and he said "Yes".

MR KIDDIE: Okay. Sorry.

SHERIFF MCDONALD: Unless you want to ask when?

Cross-examination by MR KIDDIE (continued): No, I thought you were repeating your answer to the previous

question. Okay. Thank you, Mr Graham. It seems to me that you, on behalf of the distillery, had been working quite hard to try and push this along, would that be fair? – Absolutely.

And you are getting met with a blank wall from the defender. – Yes.

Because it takes two to engage in a process of negotiation towards agreement, does it not? – Yes.

So, that must have been quite frustrating. – It was.

Given that this ... sorry, moving on and looking again at the minute of agreement. The onus now becomes that of Mr McKenzie to push it along. – It does.

Yes. And this ...

MR DAVIS: Sorry, my Lady, that is really not what this agreement says, so I am a bit concerned about the framing that question. I think ... I mean, the reading of this document is a matter for the court.

SHERIFF MCDONALD: What are you objecting to? The premise of the question?

MR DAVIS: Well, the premise of the question was that it was the landlord's responsibility to push the minute of variation along, and it seems to me that all the agreement does is acknowledge that the ... it is simply the same obligation under the lease. I think the point which has already been made by the witness is that separate matter was in relation to supplemental lease, although the drawings had become the responsibility of Mr McKenzie. So, there is a whole series of bits in the question that seem to me not specific.

SHERIFF MCDONALD: Okay. I think Mr Kiddie put to Mr Graham that then the responsibility passed to the landlord, and I think your witness agreed with him. So, I can you can proceed on that basis.

MR KIDDIE: I am obliged, my Lady.

Cross-examination by MR KIDDIE (continued): I think, in any event, it seems to be agreed on both sides of the bar that Mr McKenzie had ... there was an obligation on his part, or a responsibility, to take to do with the drawings. – A responsibility to do what?

To take to do with the drawings; the plan. – Yes.

Yes. And these would be drawings relating to the land. – Correct.

Including the land that the distillery occupies. – Yes.

Can we move on to paragraphs 21 to 24 of your affidavit, please. Now, there is quite a lot there and I do not want to get into all of it, but would it be fair to say that, in essence, what you are saying here in this part of your affidavit is that you are referring to the relationship between the distillery and Mr McKenzie? – Yes.

And to put it bluntly, it seems to me, at least, that you came to regard him as a bit of a pain in the neck, would that be fair? – It is fair to say that over an extended period of time, we were unable to reach agreement with him on a number of things, some of which we thought we had dealt with and had closed and they kept reappearing.

Okay. I mean, I appreciate that "pain in the neck" might not be your choice of words. It is my choice of words and I might be a bit more colloquial than you,

Mr Graham. But I take it you understand what that term of phrase means? – I understand the term of phrase.

Is it your position that it would be inaccurate to say he was being a pain in the neck? – Do I have to answer that question? That is inferring ...

SHERIFF MCDONALD: If you disagree that "pain in the neck" was something that you would think of, or refer to Mr McKenzie as, then just disagree and perhaps Mr Kiddie will reframe his question.

THE WITNESS: I accept that colloquially "pain in the neck" is the description that could be applied in these circumstances. I do not personally believe I had ever used it.

Cross-examination by MR KIDDIE (continued): I acknowledge perhaps I have not been clear enough. I am not suggesting that you, personally, have used that expression. And in these paragraphs you accuse Mr McKenzie of sending emails. – I do.

Making demands. – I do.

And even threats. – I do.

Can we look ... you refer to a number of productions. I just want to look at one of them. Can we look at production ... pursuer's production number 58, please. Do you recognise that? – I do indeed.

What this appears to me to be is a kind of compilation of some of Mr McKenzie's emails, is that correct? – That is correct.

And again, I do not want to go through all of them, but am I right in saying that his emails are on the left hand side? There are two columns and I appreciate it is

pretty small writing. – It is very small writing and I am fairly equipped to deal with that. But I recall the process. At the time, Tom Ingles(?), a director, had taken it upon himself to act as the single point of communication between Mr McKenzie and the board, there having been, in the past, previous routs of communication, some of which did not achieve the desired effect. So, Tom agreed with Mr McKenzie that we would make a catalogue of his outstanding issues and we would try to work through them and take them off one at a time, or more, quicker than, if at all possible. What is on the left of the page are the individual emails received by Tom Ingles, and I think there are 21 in total, received en bloc over a 28 hour period.

And in the right hand column, what is that? – Are Tom's comments on those, written in a way that says, "This is how I, director, will tell my colleagues on the board what I think the issues are and how we might go about dealing with each one".

Okay. Thank you. I just wanted to be clear so that there is no confusion, so that the court does not attribute the comments in the right hand column to Mr McKenzie, because you acknowledge that they are not his. – They are not his.

Not attributable to him. But I just want to ...

SHERIFF MCDONALD: Can I just stop you there. So, this document was prepared by Tom Ingles?

THE WITNESS: That is correct, my Lady.

SHERIFF MCDONALD: And on the left hand side, the issue raised, that is Tom's words describing what the issues raised were.

THE WITNESS: In many cases we had an email from John McKenzie, in which case it is quoted. If not, Tom has taken the sense out of it because some of the emails, I am sorry to say, were a tad convoluted.

SHERIFF MCDONALD: Okay. Thank you.

MR KIDDIE: I am obliged, my Lady.

Cross-examination by MR KIDDIE (continued): I had not appreciated that was the case. It had been my understanding that the words in the left hand column were all taken word for word from Mr McKenzie's emails. – That would have resulted in a much lengthier document.

Right. You seem to be suggesting that not only have certain emails been selected but, moreover, that the content has been changed? – Essentially summarised.

So, those are not Mr McKenzie's words in the left hand column? – I can see exactly what you are driving at. For example, if we take the second entry on the page, it says, "John emailed both Duncan and James as follows".

Yes. – What happens thereafter is taken from John McKenzie's email in his own words.

Okay. So, it is a bit of a mix? – Some mix, yes.

So, anyone scrutinising that document, would need to take care in terms of which words they attributed to Mr McKenzie or not, would that fair? – That is a fair statement.

Can you find in the left hand column, please, an extract from email dated 8th November 2019. – Is that the one on page 1?

Yes. – Because there are several dated 8th November 2019.

It is very, very tiny. It is the one ... it is broken down into a number. I think there are six. It is particularised. It is on page 6 and it starts, "In the past seven days we have had: (1) uninvited visitor into home". This is on page 6 of the ... – Yes, that is dated 8th November 2019, timed at 22.58 pm, right?

I should have given you the time. That was my failing. – So, "In the past seven days we have had: uninvited visitor into home; drone filming, not authorised; plant onsite outside filming, only emailed today after I asked for it; visitors parking along the hedgerow when no fence has been completed; staff left before 5.00 pm; and two auditors out walking offsite."

Thank you. I think it says, "Auditors out walking offsite whilst having lunch near cowshed where corner is blind". – Yes.

Are all these words Mr McKenzie's from the words that you have just read out?

SHERIFF MCDONALD: To be fair, I think he would probably have to compare it directly to the email, and he is not the author of this document, so I am not sure that is a fair question to ask him.

MR KIDDIE: Okay.

THE WITNESS: My Lady, my understanding is that this is the text of the email that was sent by John McKenzie at 22.58.

SHERIFF MCDONALD: Thank you. I think that is as much as you can say in relation to that question.

Cross-examination by MR KIDDIE (continued): In any event ... well, just to clarify, with reference to "lunch near cowshed where corner is blind", what is your understanding of what that means? – There is a sharp turn as you come up the hill from the country road which leads to the distillery entrance, and the cowshed is situated facing downhill on that corner. It is quite a tight corner, but it is my no means a 90 degree bend. So, if they were walking by the cowshed in an area where the road is, I would not have thought that would produce necessarily any kind of hazard, but that is not my judgment.

In your opinion. – In my opinion.

But in someone else's judgment it might be. – It could be.

So, is Mr McKenzie's concern there one of road safety? – Within the context of the access road, yes, it is.

SHERIFF MCDONALD: I think ... I am not sure that this witness can answer that. Mr McKenzie might be able to speak on his own behalf about what his concerns was in relation to that email.

MR KIDDIE: Yes, my Lady.

Cross-examination by MR KIDDIE (continued): My question here is in the context of Mr McKenzie's conduct having been characterised as threatening and demanding. – And I guess my response to that, Mr Kiddie, is to say that we have had several instances where a list like this has been produced, but with no supporting evidence whatsoever. So, none of us in the distillery was present to witness those auditors taking their lunch by the cowshed at the blind bend, and I therefore do not know whether or not they were standing

in the middle of the road, or whether they were standing in the hedgerow, or what they were doing, and it is very difficult indeed for us to say, "What is it that we should do about this? Is this a high level of safety risk, or a low level of safety risk? Is it a one-off event, or is it multiple times?" And the lack of specificity about these allegations, is something we found increasingly difficult to deal with.

Especially? - Increasingly difficult to deal with.

Okay. But you are not saying that Mr McKenzie has made this up? - Not at all.

And on the face of it, he seems to be complaining about ... has misgivings about domestic privacy, parking, noise nuisance, road safety and a drone flying about the farm. That is what he seems to be complaining about. - Correct.

And you are not saying that he made it up? - No. I personally did not see any drones.

If not made up, if, therefore, legitimate, if, therefore, there might be some substance, these would be legitimate complaints, would they not? - They would be.

Can we look at production number 59, please. - Having said what you have said, may I just interject ...

SHERIFF MCDONALD: Mr Graham, I think you just need to wait for Mr Kiddie to ask you a question and then just answer.

THE WITNESS: Thank you, ma'am.

SHERIFF MCDONALD: Do not volunteer any information, thank you.

THE WITNESS: Okay.

SHERIFF MCDONALD: Sorry, Mr Kiddie, what did you say you were referring to?

MR KIDDIE: Pursuer's production number 59 in the joint bundle, my Lady.

SHERIFF MCDONALD: Thank you.

Cross-examination by MR KIDDIE (continued): Do you recognise this? – I do indeed.

Yes. So, this is Tom Ingles's email to Mr McKenzie. – Correct.

It is dated 30th November 2019. – Yes.

And Mr Ingles is writing on behalf of the distillery. – He is indeed.

And it appears ... and, again, I appreciate that you are not the email's author, but you do recognise the document ... it appears to be the distillery's response to various requests, demands, complaints or points of concern made by Mr McKenzie. Is that a fair description? – It is a fair description.

And if you could scroll down for me ... if you have the hard copy ... now, I am not sure if your productions are coloured. I do not think they are. – No, but I can see it has been greyed out.

Yes. Well, it is actually blue. So, if you glance up at the screen, you will see it there, Mr Graham, what I mean. – Yes.

It is highlighted in blue, yes? – Yes.

Now, you will see in the highlighted parts of the email ... and this is the emails ... the distillery's email ...

or an email drawn up on behalf of the distillery. You will see the word "agreed" appearing throughout it, is that correct? – It is.

Now, I am not going to ask you to count on how many occasions the word "agreed" is used, but if I were to suggest to you that it is used 15 times, do you think that would be accurate? – I am happy to accept your count.

So, that is Tom Ingles on behalf of the distillery agreeing to Mr McKenzie's requests ... – Yes.

... demands, complaints or points of concern on the 15 occasions. Yes? – Yes.

Yet these are the types of requests, demands, complaints etc, that you would characterise as what? How would you characterise them? Difficult? – I believe that many of those are fairly straightforward and simple.

Okay. Is that harassment? – In the first instance, no, it is not.

Page 8 of your affidavit, paragraph 23, you say ... have you found it? – Yes.

You say, "There has been very few periods since I started work with the board of the distillery in March 2019 where the defender has not raised contentious issues, some of which I believe have been vexatious". Your words. – My words.

Okay. And we just looked at a production, Tom Ingles's letter, that your side in this case lodged, and to which you have made reference in your affidavit. – Correct.

And you said that the points of concern that Mr McKenzie had raised that led to that email, they were reasonable. – Yes.

Okay. So, that is not an example of him being vexatious or contentious, is it? – But it leads on to that behaviour, because many of these points, although we said he agreed to them, were subsequently raised again repeatedly, and at that point in time, we got to the stage of thinking, "What are we being asked to here?" It was the repetition of that, it was the lack of agreement to put a line under any one issue and deal with it as solved, that I regard it as being vexatious and harassing.

Nagging? Is that the word that might describe it? – You may use that word.

Would it be inaccurate to use that word? – I do not think so.

MR DAVIS: My Lady, my learned friend has, on a number of occasions, put in these words. The witness can choose his own language.

SHERIFF MCDONALD: Yes, the witness can, but the witness is very good at telling Mr Kiddie when he does not agree with the words when they are attempted to be put his mouth, so you can carry on.

MR KIDDIE: I take the point, my Lady. I apologise to my learned friend.

Cross-examination by MR KIDDIE (continued): But in any event, you do acknowledge, you have acknowledged, that some of the complaints might be legitimate. – I have.

Including, for example, road safety. – Yes.

And domestic privacy. – Yes.

Just while we are still on this, in respect of domestic privacy and, again, this goes back to the compilation of emails from Mr McKenzie, there is reference to uninvited visitor into home. – Yes.

Yes. That is Mr McKenzie's home? – It is.

Do you what that refers? – It was not an incident that I was aware of until subsequently. I had been told a different version of events from the version that Mr McKenzie has put forward, and the version of events that I had been told is that somebody did, indeed, go into their house, but this was somebody who had been to the distillery on a number of occasions previously while the house was being used temporarily with the landlord's permission and consent as office and bottling(?) facility. This person went in there looking for a member of staff from the distillery, not knowing that Mr McKenzie and his wife had already occupied the premises as their domestic dwellinghouse.

I understand. So, the same building was used as commercial/office premises ... – Yes.

... when this visitor first went there. – Yes.

And then a period later, the same visitor went to the same building ... – Yes.

... assuming that it was still commercial/office premises, but, by that time, it was actually someone's home. – Correct.

That is what he is referring. Thank you.

SHERIFF MCDONALD: Sorry, can I ask you, Mr Graham, when did that house stop being used for distillery purposes?

THE WITNESS: In October 2018.

SHERIFF MCDONALD: Okay.

THE WITNESS: The distillery then started production of whisky in January of that year. Mr McKenzie had been absent away in the south of Scotland up until October when he and his new wife moved into the premises, and my understanding from my colleagues who were present at the time, was that it was at relatively short notice that he wanted to have his house back. So, things got done in a hurry at that particular juncture, which may be partly why this incident took place, but, as I say, I do not know. I was not present.

SHERIFF MCDONALD: I am sorry, the date of the incident that you learned about (inaudible) subsequently when this person went into the house? If you do not know, just say.

THE WITNESS: I do not know the date.

SHERIFF MCDONALD: Okay. That may be clarified by somebody else at another time.

THE WITNESS: I am sure. Thank you.

MR KIDDIE: Thank you, my Lady.

Cross-examination by MR KIDDIE (continued): In so far as you have been made aware, do you know the gender of the visitor who went into the house by mistake? – He was male.

And do you know whether Mr McKenzie's wife was living there at that time? – I understand that she was.

Thank you. Moving on, I think you say in your affidavit that Mr Ingles resigned. – He did.

December 2019. – He did.

And paragraph 22 of your affidavit you refer to his resignation letter, production number 60. I do not think we necessarily need to put it up, but I am happy to do so if it assists the court. My question for you is whether you were aware if Mr Ingles was to be a witness in this case? – He has not been called.

Can we look at pages 8 to 10 of your affidavit. So, that is paragraphs 23(a) through to 23(n). – Yes.

Paragraph 23 is split up using letters of the alphabet. So (a) to (n), that counts 14, I think. So, you give 14 examples of Mr McKenzie being ... and I am not going to put words in your mouth this time, Mr Graham. I apologise for that. But to take the words that you have used from your affidavit, examples of him being contentious or vexatious, would that be fair? – That is correct.

And again, in essence, these appear to be various requests, demands, complaints or points of concern that Mr McKenzie has raised, would that be fair? – It is, yes.

And I do not want to explore them individually and the reason for that is none of them is directly relevant to this case, isn't that so? – My understanding is that these represent a history of a pattern of behaviour that indicates some degree of non-compliance by the defender while he was managing director, or project manager, being then set at the foot of the distillery for subsequent resolution well after the event. I do not know how better to express that than that is ... I am struggling to find an appropriate word, but it is difficult to deal with because we all like to be able to say, "Okay, we've had a disagreement. Let's resolve it. Let's move on". These

are things that we were being told are our responsibility when clearly somebody could have avoided a lot of that delay and procrastination and obfuscation.

I will try and make it a bit easier, Mr Graham, if my learned friend permits me. Paragraph 23(a) to (n), are these examples of harassment? – I think some of them are.

Okay. Emails, complaints, some of which you have no way of knowing whether it is true or false, but you acknowledge might be legitimate. – Mm-hmm.

And that is harassment? – It is when you know that there is nothing anybody can do without it. For example, the distillery may well have been bigger than it was intended to be. It may have been built in a different location to the one that it was intended to be. It may, in fact, create noise and disruption. But the fact of the matter is, all those were things that were under the defender's control when he was project manager and managing director and he, annoyingly, then occupied that as his domestic dwelling and, sort of, woke up one morning and surprised to find a distillery within 15 metres of his house that was a working distillery. That, to me, is repetition of a complaint about which the distillery, presently, can do nothing. It cannot, for example, pick up sticks and move 20 metres further away, or to a different location altogether without serious consequences and huge amounts of cash.

You see, it strikes me ... no, I withdraw the question. Look at paragraph 24 of your affidavit where you say that Mr McKenzie has complained about the distillery to the police. – Indeed.

To the noise pollution authority. – Yes.

And to the planning authority. – Yes.

And I think ... am I correct in saying that the noise pollution authority and the planning authority are both departments of the local council, is that right? – I believe so, yes.

Okay. On an occasion when Mr McKenzie did complain to the police about CCTV, the distillery's CCTV pointing into his bedroom window, the police concluded they were satisfied that any invasion of privacy had not been intentional. – That is my understanding.

Are you aware of that? – I am aware of that.

And the police also recommended that there be masking used. – Which we put in place immediately thereafter.

So, it is not intentional. It is not deliberate. – No.

But the police did not rule out that, actually, the substance of the complaint was correct. – I cannot answer that.

MR DAVIS: I am sorry, my Lady, please, that is not what the police said.

SHERIFF MCDONALD: Yes, thank you, Mr Davis. Your objection is?

MR DAVIS: It really is, that is not what the police said, at least according to the letter from the police which has been produced by the ...

SHERIFF MCDONALD: Can Mr Kiddie repeat to me the premise of your question?

MR DAVIS: Well, he is putting something to this witness ...

SHERIFF MCDONALD: I need to ask Mr Kiddie what the question was, because I was slightly behind in my noting.

MR KIDDIE: Right, well, this relates to when the police responded to the complaint in respect of the CCTV pointing into the defender's bedroom window, and the question ... or the point that was put to the witness was that the police concluded that it was not intentional.

SHERIFF MCDONALD: Okay. And so, that is the point, Mr Davis.

MR DAVIS: No, I had not any objection at that stage. It was when it went on to be ... what did he go on to say?

SHERIFF MCDONALD: What was the next bit? Maybe the shorthand writer can help.

MR DAVIS: Yes, I am sorry.

SHORTHAND WRITER: Sorry, I did not catch that.

SHERIFF MCDONALD: You did not catch it either.

MR DAVIS: Well, perhaps if my learned friend just re-asks the question.

SHERIFF MCDONALD: Well, it means you have nothing to object to, so maybe if we can just move on.

MR KIDDIE: Well, I mean, the point was, I was trying to get that it was not intentional to suggest that ...

SHERIFF MCDONALD: I think you already said that ... I think you already agreed that that was the point, and then you moved on to say the police suggested masking and he said that was put in immediately, and then you moved on to the point that we are not really clear on.

MR KIDDIE: Well, the point is, the police did not say that the complaint was without merit.

SHERIFF MCDONALD: Right, I think that ... is that the point that you are objecting to, Mr Davis?

MR DAVIS: Yes, my Lady.

SHERIFF MCDONALD: The police did not say the complaint was without merit.

MR KIDDIE: I am not sure that I used the same phraseology the first time I put it. The essence is the same.

(Hushed conversation)

MR KIDDIE: Can I have just a moment, my Lady, and I will confirm with my instructing agent?

SHERIFF MCDONALD: Yes.

MR KIDDIE: Thank you.

SHERIFF MCDONALD: In fact, gentlemen, I am going to take this opportunity for a short break because I would normally have a short break about this time in the afternoon. Just for 5 minutes and that will give the witness a short break too. And have a look and we can come back and start again, so hold that thought. Thank you.

(Court adjourns and the reconvenes)

SHERIFF MCDONALD: Thank you. Mr Graham, you are still subject to your oath. Thank you.

THE WITNESS: I am sorry?

SHERIFF MCDONALD: I said you are still subject to your oath.

THE WITNESS: Thank you.

MR KIDDIE: My Lady, I withdraw that question.

Cross-examination by MR KIDDIE (continued): But can I just ask you about that complaint in respect of the CCTV camera. Is that a complaint by Mr McKenzie that you considered to be contentious or vexatious? – It is, yes.

And when he complained to the local council about noise pollution, was that contentious or vexatious? – I believe so.

Okay. Now, that was to do with a piece of distillery cooling equipment. – Correct.

Now, are you aware that the council concluded that the noise coming from the distillery ... or described it as a "noise steady in terms of its subjective loudness with noticeable character in terms of tonal elements"? Is that ... are you aware of this? – I remember seeing a report.

I can refer you to the report. – It may well have said those words.

It is the defender's production number 25. – Okay.

You recognise that. So, you will see that it is a report from Highland Council and it says near the top, "Highland Community Services Environmental Health". – Yes.

And it's dated 27th October. It just says "20". I take it that is 2020, yes? – Accepted.

Okay. If we can look down at the bottom, please, and it is a three page report. So, we are looking at the top page 3, its conclusions. So, do you agree with me that it says, "Noise steady in terms of subjective loudness, notable character in terms of tonal elements"? – That is what it says.

And it also says, "The orientation of the equipment means that noise is propagating most significantly in the direction of the complainer's house". – Correct.

And the complainer being Mr McKenzie. – Correct.

And it also makes a recommendation that the problem should be solved by "rotating the equipment by 90 degrees". Is that correct? – That is what it says.

Do you stand by your answer that you gave before, that you would characterise this as a complaint that is a vexatious and ... – In the context that the building was erected under the supervision of the complainant, and in the context of its proximity to the house was a known, established fact, I have some difficulty in saying what it is we could legitimately do about it because that is not cheap equipment to rotate by 90 degrees, nor is it capable of being changed in terms of its tonalities. What we have done is fitted the baffle that is suppressive of the noise emitted since the date of this complaint.

So, you did not actually follow the council's recommendation, is that right? – No, we did not.

Can I turn now, please, to paragraph 24 of your affidavit.

SHERIFF MCDONALD: Just before we move on, you fitted a baffle.

THE WITNESS: We fitted the baffle.

SHERIFF MCDONALD: Explain to me what a baffle is.

THE WITNESS: In simple terms ...

SHERIFF MCDONALD: Yes.

THE WITNESS: ... it is an acoustic device ...

SHERIFF MCDONALD: Okay.

THE WITNESS: ... that reduces the amount of noise emitted from an noise source.

SHERIFF MCDONALD: Thank you.

THE WITNESS: So, effectively, it is trying to mitigate the source of noise for the complainant.

SHERIFF MCDONALD: Thank you. Yes, sorry, Mr Kiddie.

MR KIDDIE: I am obliged, my Lady.

Cross-examination by MR KIDDIE (continued): Yes, paragraph 24 of your affidavit. Here you say of Mr McKenzie that "He has regularly accosted visitors to the site". Yes? - Yes.

Your words. Now, you have told us that you live in Essex, about 600 miles away, and that since the start of covid, you have not had any distillery board meetings in person. - Correct.

And when you are up in Dingwall ... I mean, I take it you do not follow Mr McKenzie around his farm, do you? - Not at all. I have other things to do.

But he does get out and about on his farm. - Yes.

Because he is a farmer and he has livestock to look after. - Yes.

So, you have not actually been privy to any of these encounters when you say he ... - Personally, no.

Yes. - But in the position I hold, I receive reports from a number of the distillery workers and a number of my co-directors, and I have reason to rely upon their reports.

Have any of the people accosted been cited as witnesses in this case? – No, they have not.

SHERIFF MCDONALD: Sorry, I missed that question, Mr Kiddie. Can you repeat it.

MR KIDDIE: Have any of the allegedly accosted visitors been called as a witness in this case.

SHERIFF MCDONALD: Okay. Thank you. And the answer was, "No, they have not"?

THE WITNESS: No, they have not.

Cross-examination by MR KIDDIE (continued): Paragraph 26, you accuse Mr McKenzie of defaming you. Yes, Mr Graham?– "Demeaning, disparaging and distasteful comments", were my words.

Okay. You say, "Demeaning, disparaging and distasteful comments, some of which were also defamatory". – Correct.

Yes. But you are not suing him for defamation. – I do not see the point in doing that.

But you feel defamed. – Yes, I do.

You see, that is what this is really about, isn't it? – In what respect?

Well, that is what this case is really about. It is about the relationship between you and Mr McKenzie and the way you feel about him. – I would dispute that. My stance here is to represent the 3600 people who invested a considerable sum of money in this distillery to make it a success, and there are a number of areas where that success has been thwarted. What happens in my instance, I have been called far worse.

You describe him ... sorry, paragraph 25, you describe him as "Bullying, coercive and oppressive". – Those are all words which my staff have used and which fellow directors have used.

So you say, is that right, Mr Graham? – (No response).

Can you look at production number 62 ... pursuer's production number 62, please. Have you found that, Mr Graham? – I have indeed.

And do you recognise what this is? – Yes, I do.

Do you want to tell us what it is, please? You do not have to read the whole thing out, just ... – It is an email chain between the defendant and one of the other directors at the time my appointment.

Who is that? Jenny Henderson.

Now, Mr McKenzie is using his Glenwyvis email address, is that correct? – Yes, it is.

And I take it ... or you can tell me if my assumption is wrong ... but I take it that that is an email address that he got given to him when he was a director? – It was an email address which he had the use of while the was the director, yes.

And he is emailing Jenny Henderson? – Jenny Henderson was the proprietor, I understand, of the hotel in Cromarty, which is why it is from the royalhotelcromarty.co.uk.

Thank you, Mr Graham. But the point is, they are not personal email addresses, are they? No.

They are work email addresses. – Yes.

But the emails are personal. – If you say so.

Are they not? I am asking you. It is a personal exchange. – Indeed, it is.

So, how did you come by this? – It was given to me by one of the former directors.

By whom? – I do not recall.

Is it Jenny Henderson? – No, it was not.

Does the distillery still have access to the email that Mr McKenzie sent from and received into his glenwyvis.com email address? – We have an archive of old emails.

Including Mr McKenzie's? – Including Mr McKenzie's.

Have you read it? – I have read some of it, yes.

Does he know you have read it? – Probably not.

You have been spying on him? – That is putting it harshly, but yes, if you wish.

Yes. Who is David Norcom? – David Norcom is a director of Glenwyvis.

Now, like yourself, he is a non-Scotland based director, is that correct? – That is correct. He lives in Texas.

He lives in Texas. Does he ... has he come to the distillery's aid in respect of its financial difficulties? – He is a significant investor in the distillery. He also owns, personally, a number of casks.

Can you look at defence production number 24, please. I should perhaps say there has been a difficulty

with the quality of the production of this document. – I recognise it.

A cleaner copy could be provided, Mr Graham, if you need it. – I am quite all right with the one I have got.

Right. Okay. So, you recognise this document. So, this is Mr Norcom's letter to Mr McKenzie ... – And his wife.

... and his wife, Margo. Now, when I first saw this, I assumed the date is 12th February 2020. – It is the other way round. It is the American date system.

It is the other way round because it is Mr Norcom's text to him, so he uses the America system. So, it is actually ... – 2nd December.

... 2nd December. Could you, please, read out the first sentence of the second last paragraph. – The one beginning, "So, John"? "So, John, buckle up because you're for the fight of your life case. Disappointingly, you are no friend of mine."

What do you suppose that means? – It means that Mr Norcom was expressing considerable frustration.

And was that frustration that you felt; that you shared with him? – I can understand his point of view.

Can you also read out the first sentence of the paragraph above that. – "To this end, my recommendation to the board is that we aggressively pursue resolution of our differences in the courts."

You can put that way, thank you, Mr Graham.

SHERIFF MCDONALD: Sorry, was there a question to follow on from reading that out, or ...

MR KIDDIE: Well, I asked ... okay, well, I will ask the same question I asked in respect of the previous one.

Cross-examination by MR KIDDIE (continued): What do you suppose that means? So, that is in respect of the recommendation to the board that "we aggressively pursue resolution of our differences through the courts"? – I take it for what it is. That is a personal letter, written in a personal capacity by a significant investor who was disillusioned with the way in which the distillery was being managed, and disillusioned in the course of protracted negotiations with Mr McKenzie, trying to find resolution to our various differences.

He is also director. – He is also a director, but as a director, he has one voice in front of the board, and he may make a recommendation. That does not automatically mean that that is what the board does or says.

You hired the current distillery manager, Matthew Farmer. – I did.

At his job interview, you told Mr Farmer your thoughts on Mr McKenzie. – I did.

Is it fair to say that they were not positive? – It is fair to say that Mr McKenzie was a strong personality and had the ability to be contentious in how he put across his points of view. I felt it only fair that the incoming would know that.

I have no further questions for you. Thank you very much, Mr Graham. My learned friend might have some more for you, however. – Thank you.

SHERIFF MCDONALD: Mr Davis.

MR DAVIS: My Lady.

Re-examination by MR DAVIS

Mr Graham, in the cross-examination, you said in relation to the finances of the company, that it was ... I think you talked about three years from the initial distillery before it could be sold as single malt whisky and, after that, it might be longer for a 10 year aged whisky, and so forth. - The market recognises that 10, 12, 15-year-old whisky has an ability to command a premium.

So, that ... the large gap between the initial investment to the final sales, what effect does that have on the kind of financial viability of the business? - Okay. The initial share offers raised £3.7M, and that is a very sizeable sum of money. That was enough to establish with distillery buildings and to pay for the operating costs of the first three years. But for us to be able to attain the volumes set out in the original business plan, we are required for somewhere between £400,000 worth and £500,000 worth of spirit into casks every year to build a stockpile so that we have accurate supplies to meet future sales. So, that involves us in: (a) spending the money on making the spirit; (b) spending the money on acquiring casks in which to store it for that length of time; and (c) in acquiring warehouse space to preserve those tasks in the traditional dunnage form, and dunnage means leaving the cask lying on its side, rather than on its end, and that has been the traditional method of making and maturing whisky throughout the industry.

And I think you also mentioned the issue of cash flow ... - Indeed.

... the impact that has. – When I arrived, I made plain to the members of the board that there was a considerable lack of cash, but, much more importantly, that there was insufficient foresight and planning to derive new cash from whatever sources, whether that be by launching a new share offer, or going out and finding bonds, or going to existing sources of finance and asking for more. Any which way you look at it, the distillery was unlikely to have survived the year 2019 with the cash resources it had at hand, and it had no specific plans in place, no action plan, no agenda, for raising additional money to cross that gap before the end of 2019.

Okay. So, you concerned about the viability of the business. Would it be fair to say it was financially vulnerable during those ... – It was very vulnerable.

And what would be the impact of disruption to production when it is in a vulnerable state? – Disruption to production would have cost a lot of money because if it was unplanned, then we have to shut down an entire facility, and because it is a chemical process, once you start a fermentation, you cannot just shut it off and then throw a switch and begin it again. You lose the product, the wash still, the low wine still and the spirit still as a consequence. So, taking out distillery production for any two days, would cost the distillery somewhere in the region of £17,000 or £18,000.

Thank you. You were also asked about the minute of variation and the supplementary lease that has been discussed. From the distillery's point of view, is there interest in having the issue of the title resolved, or not in having it resolved? – There is a very distinct benefit to the distillery in having the issue resolved because it is being used as leverage against us. Now, frankly, if the minute

of variation could have been completed in 2018 after production started, then it would have been a very simple matter for that to take place, and I could not understand why it had not been done when I was confronted with the solicitors letter in June 2020, and I immediately put in place a process to get that minute of variation presented to the solicitors for approval, which, according to the terms of the lease, should not have been unreasonably withheld. It actually stipulates in the lease that the landlord has, I think, 15 days.

In other words, the distillery has an interest in having the matter sorted? – Yes.

You were asked about ... or the issue of the CCTV was raised with you. – It was.

There is CCTV onsite ... – Yes, there are a number of cameras which are shared in terms of their location between what is for the distillery and what is for the defendant's home and cowshed. Now, all of those ...

So, when you say "shared" ... – There is a central CCTV network which is serviced by a number of cameras. Now, that was installed while the defendant was managing director, and nobody changed it. So, when it came to the point at which we looked for a distinction between what was the defendant's property and what was the distillery's property, which we were required to do after he resigned as a director and as managing director, then we had agreed that we would take away the cameras from his site and focus purely on the distillery. Now, up until that point in time, as far as I am aware, nobody had changed the number of cameras or their orientation. We received a letter from defendant's solicitors which we effectively took as consent to go

ahead and remove the camera specifically from the roof of the defender's cowshed, and we set about doing that and were told, "No, he has not agreed to doing this", and that was a cause of some considerable frustration on the day.

And so, are there other cameras now onsite which are the defender's cameras, as it were, on his property? – On his property, yes, and they feed into that same network. We proposed segregation of networks because it would have been easier to manage.

And does the defender have access to that? – I am not sure, is the answer.

SHERIFF MCDONALD: Can I just clarify, you say, "We proposed segregation of networks". Has there been an outcome of that proposal, or not?

THE WITNESS: It was rejected, my Lady.

SHERIFF MCDONALD: Okay.

MR DAVIS: I have no further questions, my Lady.

SHERIFF MCDONALD: Thank you. Mr Graham, you have completed your evidence. You are now free to go. Thank you.

THE WITNESS: I have a question, madam. Am I permitted to sit in the gallery for the rest of this session?

SHERIFF MCDONALD: Yes, you are.

THE WITNESS: Thank you very much.

SHERIFF MCDONALD: Very well.

(Witness is released)

SHERIFF MCDONALD: Mr Davis, what is your proposal now? It is 10 to 4.00.

MR DAVIS: Well, my Lady, I am in your Ladyship's hands. I mean, I have another witness, obviously, available, although I cannot imagine he will be finished today.

SHERIFF MCDONALD: Finished as far as your are concerned, or finished as far as Mr Kiddie is concerned?

MR DAVIS: Well, I might struggle to ... he should not be long. Excuse me, my Lady.

SHERIFF MCDONALD: Which witness is it?

MR DAVIS: I am sorry, my Lady, it is David Allan.

SHERIFF MCDONALD: Okay. Well, I am presuming you will not take very long with Mr Allan, given you have got his affidavit.

MR DAVIS: No, I will be relatively brief with this witness.

SHERIFF MCDONALD: Yes. Well, Mr Kiddie, what is your position?

MR KIDDIE: I do have some questions, my Lady. I am never the best at assessing how much time it is going to take, but if it helps, I had ... not as long as the previous witness, but not ... I do not have that much less. So, the number of pages for the previous witness was 13. I think I might have 8 and 10 for the next witness, so it could take us towards 5 o'clock, my Lady.

SHERIFF MCDONALD: Yes, okay. I think we will have to call it a day today. There is other business that we have. I will wait for the clerk to come. Has there been any discussion about future dates?

(Hushed conversation)

SHERIFF MCDONALD: What I am going to is I am going to rise and we can have a discussion with the clerk and then we can work out what the next days will be.

(Court adjourns)

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Certified as correct,

Larking Hodge Pollock, shorthand writers & transcribers.

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