

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT INVERNESS

INV-A157-21

JUDGMENT OF SHERIFF EILIDH MACDONALD

in the cause

GLENWYVIS DISTILLERY LIMITED, a Community Benefit Society registered under the Cooperative and Community Benefit Societies Act 2014 (registered number 7305) and having its address at
Glenwyvis, Scroggie Farm, Dingwall, IV5 9UF

PURSUER

against

JOHN MCKENZIE, an individual residing at Scroggie Farm, The Mount, Uplands, IV15 9TT

DEFENDER

Pursuer: Davis, Advocate; Wright Johnson & Mackenzie Glasgow

Defender: Kiddie, Advocate; McEwan Fraser Legal, Edinburgh

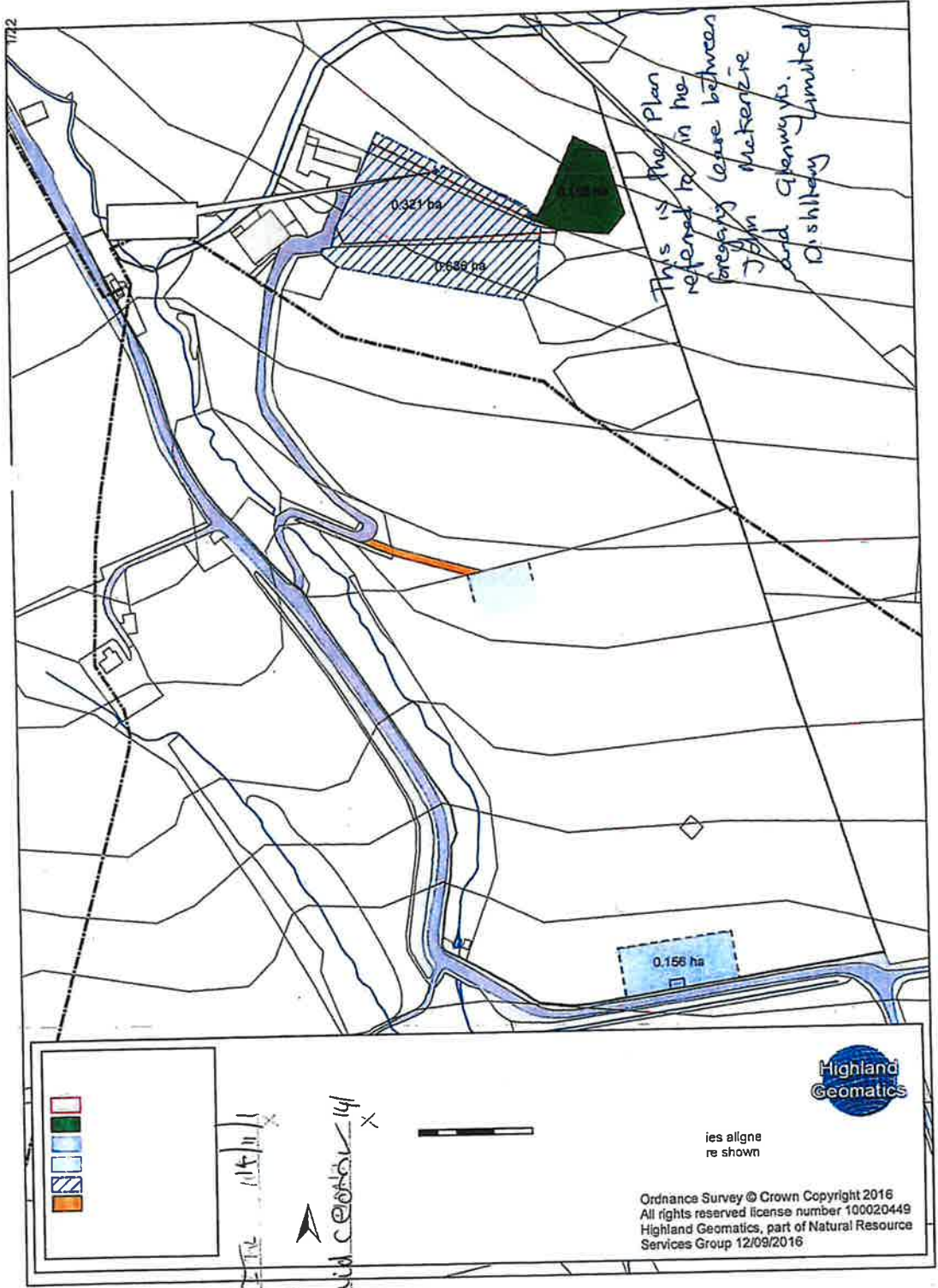
Inverness 13 March 2024

The Sheriff, having resumed consideration of the cause **Finds in fact;**

1. The parties are as designed in the instance.
2. The defender owns the property known as Scroggie Farm in Dingwall.
3. The defender purchased Scroggie Farm in 2007.

4. The defender submitted planning applications to the Highland Council between 2007 and 2009 for development on Scroggie Farm.
5. On 4 August 2009 a planning application submitted by the defender for the erection of a farmhouse on Scroggie Farm was granted. The farmhouse was built and completed in 2015. A completion certificate for the farmhouse was issued on 3 February 2017. The defender and his wife moved into the farmhouse in October 2018.
6. The farm is a livestock farm and because of the topography of the land it is unsuitable for crop farming.
7. The pursuer's distillery premises are situated within the Scroggie Farm, farmland.
8. The public highway leading to the defender's farm is a single lane road.
9. The entrance to the defender's farm is situated on a hill.
10. The private access road from the entrance to the pursuer's principal distillery site is a single lane road, which slopes upwards towards that site and has bends in it.
11. The defender and his wife live in the farmhouse.
12. The pursuer's distillery building is situated at a distance of approximately 15 metres from the defender's home at its nearest point.
13. In 2014 planning permission was applied for by the defender seeking to build a micro whisky distillery.
14. In 2015 the defender set up a limited company called Glenwyvis Distillery Limited ("the distillery") with the purpose of building a distillery on land at Scroggie Farm. The Company number of Glenwyvis Distillery Ltd was SC502061. It was registered on 31 March 2015 and closed on 2 December 2016. The defender is the founder of the distillery.
15. By resolution dated 11 March 2016 the company was converted to a Community Benefit Society (CBS) and registered as number 7305 on the Mutuals Public Register on 5 April 2016.
16. The defender was the Managing Director of the CBS from inception until 28 February 2019.

17. On 27 September 2016 planning permissions were granted to Glen Wyvis Community Benefit Society for the erection of a warehouse building and a micro whisky distillery building on Scroggie Farm.
18. The defender is the Landlord, and the pursuer is the Tenant, of land and buildings located generally at Scroggie Farm, Dingwall, in terms of a lease between the parties dated 14 November 2016 ("the Lease").
19. The pursuers' date of entry to the subjects of lease was 1 February 2017.
20. The Lease was entered into for the purpose of permitting the pursuer to build a distillery building and associated workings.
21. At the time the lease was granted the defender was the Managing Director of the pursuer.
22. The defender granted the distillery the Lease for 175-years at a nominal rent of £1 per annum for the land on which the distillery was built.
23. In Clause 1.1 of the lease, the Subjects of Lease, being the property let to the Pursuer in terms of Clause 2 of the Lease, are defined as "the Property together with the Building and others to be erected thereon from time to time". "The Property" is defined as: "From the Date of Practical Completion onwards ALL and WHOLE the site at Glenwyvis, Dingwall comprising (i) the area extending to 0.321 hectares or thereby and shown coloured pink and hatched in blue on the Plan; and (ii) the area extending to 0.158 hectares or thereby and shown coloured green on the Plan; (iii) the Distillers House Subjects; and (iv) the Lower Subjects and all forming part and portion of the Landlord's Property".
24. The plan referred to in said lease, which delineates "The Property" which comprise the subjects of lease, is as follows:



25. Clause 20 of said lease provides for a Minute of Variation to be entered into between the parties following construction of the distillery to ensure that the built extent of the distillery premises is properly reflected in the definition of the Subjects of Lease. Clause 20 provides for adjustment to be made to the area of the subjects of lease, to reduce that area in order to reflect the area of the property reasonably required by the pursuers for the operation of the business. It is subject to a 'time of the essence' condition and therefore should have been completed by both parties early in 2018.
26. A Minute of Variation in terms of clause 20 of said lease was prepared by the pursuers and sent to the defender in 2018. To date the Minute of Variation has not been progressed and completed by the defender. The defender refuses to execute and register the Minute of Variation.
27. The current subjects of lease in terms of said lease between the parties remain per the original plan attached to said lease.
28. The construction of the distillery took place during 2018 and 2019. During that time the defender was Managing Director of the company and operated as the project manager for the construction of the distillery building, supervising and directing the execution of all aspects of the construction project.
29. During construction of the distillery the position of the distillery and warehouse building were altered.
30. The bottling facility on site was erected during the defender's tenure as managing director. It was erected outwith the terms of the planning permission. The distillery subsequently obtained retrospective planning consent for the temporary structure through to 2023.
31. The defender, as Managing Director of the distillery, was responsible for the installation of the distillery's CCTV monitoring system.

32. In the latter stages of construction, and while the defender was not resident on site, the building that is now the defender's house was occupied by the distillery and used partly as a store and gin production and bottling facility, and partly as an office, in terms of the lease.
33. In 2016 the defender launched the distillery's first share offer to raise investment.
34. The distillery opened on 30 November 2017.
35. The first distillation at the distillery took place on 25 January 2018.
36. The first cask was filled at the distillery on 2 February 2018.
37. Prior to 2018 Glenwyvis Gin had been produced elsewhere and bottled onsite. In 2018 onsite gin production started.
38. In October 2018, the defender and his wife began to occupy the farmhouse as their principal private residence.
39. In October 2018 gin production and bottling was moved to two shipping containers located in front of the bonded warehouse at the far end of the distillery site.
40. The acquisition and location of the bottling facility was undertaken by the defender during his tenure as Managing Director.
41. In October 2018 the defender informed the distillery that he wanted to instigate a 9am-5pm Monday to Friday operating pattern for the distillery.
42. A Premises Licence was issued by the Highland Council on 25 September 2019, which permits off-sales and on-sales at the Subjects of Lease.
43. HGV vehicles access the distillery as an essential part of the operation of the distillery. HGV vehicles have carried out deliveries to the distillery since operations began in 2017. HGV vehicles made deliveries to the distillery when the defender was the Managing Director. HGV vehicles deliver and collect malted barley, full and empty casks, and effluent.
44. Malted barley is delivered to the distillery approximately 4 times a year. Effluent from the distillery process is removed 26 times a year. Empty casks are delivered to site approximately 4 times a year. Full casks are removed from site approximately 4 times a year. These traffic

movements are essential to the operation of the business. The shared access route is used for deliveries. It is the only access road to the distillery. It is a single track road.

45. The pursuers' staff erected signage near the public road cautioning the public that HGV vehicles are operating in the area. The HGV vehicle movements are scheduled on a digital diary which is shared with the defender in order to advise him in advance of HGV movements along the shared access road.
46. In August 2020 the defender unilaterally, and without the authority of the distillery, contacted the distillery's delivery contractors requesting that these companies contact him or his father in advance of each delivery to notify them of same.
47. On 15 March 2021 McPherson's haulage, the main haulage contractor for the distillery, completed a risk assessment of the site and produced a report setting out clear safety instructions for all deliveries to the distillery. McPherson's haulage consider it to be safe to deliver to the distillery by HGV.

Complaints

48. The defender resigned as managing director of the distillery on 28 February 2019 and further resigned as a Director of the distillery on 18 September 2019. The defender is no longer involved in the management of the distillery. The defender has had no management responsibilities for the distillery since 28 February 2019.
49. The defender remains a member of the distillery Community Benefit Society.
50. After the defender resigned as Managing Director he began to complain about aspects of the distillery's operations.
51. In June 2019 the defender asked staff at the distillery to only use the premises between the hours of 9am and 5pm. A special meeting was arranged by the distillery and held on 29 July 2019 to discuss same.
52. On 30 October 2019 the defender had a meeting with Tom Inglis Company Secretary to discuss his concerns about the operation of the distillery.

53. Between 8 and 10 November 2019 the defender sent 24 emails to Tom Inglis raising complaints.
54. A CBS Board Meeting on 11 November 2019 was taken up substantially by the defenders complaints.
55. On 13 November 2019 the distillery wrote to the defender requesting that in future he should send any correspondence in relation to the operation of the distillery to the relevant officers of the distillery.
56. On 25 November 2019 the defender sent correspondence directly to the Distillery Manager Duncan Tait about the following: complaining about traffic movements to and from the distillery site; demanding numbers of traffic movements and numbers of visitors to the site; alleging a breach of planning as a result of traffic levels to and from the distillery; stating that advance notification of visitors to the site should be given to him as the landlord and demanding a minimum 24 hours' notice of same; alleging a problem with road safety arising from distillery traffic; threatening to lock the farm access gates and install access via telephone only; demanding a copy of the "fire report"; demanding a "time-line of works" prior to any construction repairs; requesting a breakdown of staff working patterns over Christmas and New Year; intimating a demand for closure of the distillery on all public holidays in 2020; and intimating that legal advice was being taken by him in respect of all of these matters.
57. Since April 2019 the defender has repeatedly complained to the distillery about many matters including the following:
- a) That the distillery building exceeds the size for which planning consent was originally given.
 - b) That the distillery building has been erected too close to his private dwelling,
 - c) That there is noise and disruption of his family life from living in close proximity to the distillery building.
 - d) About visitors coming to the distillery site.

- e) About regular traffic movements which are required to empty the distillery's effluent tank.
- f) That the distillery's CCTV installation is an invasive of his privacy.
- g) That the distillery is in breach of the Lease for the siting of the bottling facility.
- h) Alleging that the distillery has been selling product onsite.

58. The defender's complaints have often been accompanied by demands by the defender and threats by him to take some action against the distillery, if his demands are not met.

59. The repeated complaints and demands made by the defender about the operation of the distillery have caused the distillery to spend time, money and resource to deal with these complaints.

Reporting to outside agencies

60. On August 25 2020, the defender called the police to complain that the distillery CCTV cameras were recording his bedroom window. Two uniformed officers arrived at the distillery, accessed the system, and left satisfied that no cameras were intentionally pointed at anything outside of distillery grounds. The Police suggested that masking of the video coverage be implemented to shield from view any contentious areas. Masking was implemented immediately, and the distillery received no further communication from the police on the matter.

61. In November 2019 the defender reported the distillery to the Highland Council alleging a breach of planning control at the site relating to: the installation of gin making equipment including an onsite building; and alleging illegal direct selling of products at the distillery to members of the public. The distillery received retrospective permission for the containers and no further action was taken.

62. In or around November 2019 the defender filed a complaint with Environmental Health regarding false fire alarms and noise from a cooling tower fan that operates during production hours. In response the distillery installed an attenuator on the fan and the

distillery's smoke detectors were replaced to mitigate future false alarms. The distillery has had no further contact from Environmental Health.

63. In August 2020 the distillery tried to remove some CCTV cameras which the defender had complained about. The removal was consented to by the defender in advance and confirmed in writing by his solicitors. When the removal process started, the defender called the police and complained that his property had been violated and insisted that the cameras be left *in situ*.

Planning Matters

64. In 2021 the distillery commissioned Alison Tait a chartered planning consultant to prepare a Planning Advice Report (PAR). Part of the remit was to assess the concerns repeatedly raised by the defender.
65. The grievances relating to planning which had been raised by the defender were:
- a) The type and number of vehicles accessing the distillery via the access road.
 - b) The use of articulated lorries on Dochcarty Brae, which is the public road leading to the site access road, and their impact on road safety.
 - c) The number of visitors to the distillery and the purpose of their visit.
 - d) The loss of privacy and amenity for the defender and his wife as occupants of the farmhouse due to operations at the distillery.
66. The Planning Authority (PA), which is the Highland Council, did not impose restrictions on the distillery's production levels.
67. The PA did not place any controls or restrictions on the number of vehicles which can use the distillery access road.
68. The distillery are not breaching the terms of their planning permission by allowing articulated lorries to serve the distillery with deliveries.
69. The PA did not attach a planning condition to control staff numbers working at the distillery.

70. The detailed planning application did not provide for a landscape plan.
71. The detailed Planning Permission does not contain restrictions relating to noise from the distillery operations.
72. Since the granting of the detailed Planning permission there has been no material change in use. The distillery are operating in accordance with approved plans and per the terms of their planning permission.
73. The distillery are not in breach of their planning permission by allowing access to visitors to the site. The planning authority have never refused to grant authority for visitors to the Subjects of Lease. The planning authority only provided that there was to be no visitor centre constructed on site.
74. The planning permissions granted in favour of the pursuers do not restrict the number of permitted vehicle movements in any way.
75. The planning permissions do not require the pursuers to “minimise the use of” the access road.
76. There is no restriction in the Lease which prevents the sale of alcohol from the Subjects of Lease.

Mediation

77. A mediation agreement, was entered into between the parties on or around 1 May 2021.
78. In terms of the mediation agreement, the parties agreed in the period prior to January 2025, the distillery would not be worked on Saturdays or Sundays without the defender’s prior approval.
79. In terms of the mediation agreement parties agrees that the distillery’s working hours would be limited to 8am to 5pm.
80. In terms of the mediation agreement the parties agreed that the distillery would not operate for more than 46 weeks in a year and agreed that the remaining 6 weeks would be a 2 week closure at Christmas; a 2 week closure in the summer, during the school holidays; and the

remaining 2 weeks closure to be “flexible to be for repairs but added to the fixed periods wherever possible”.

81. In terms of the mediation agreement parties agreed that “Maintenance will take place in shutdown, but weekends and public holidays will be quiet days where no maintenance takes place, unless safety critical”. There was no agreement that the distillery would close and stop operations on public holidays.
82. In terms of the mediation agreement parties agreed that signage was to be placed around the site, more clearly dissuading potential visitors from accessing the site, increasing visibility and designating overflow parking.
83. In terms of the mediation agreement parties agreed that the defender could undertake construction of a large, fenced ‘bund’ to the west side of the distillery. The construction of the ‘bund’ was contingent on the Minute of Variation of the Lease being signed and the boundaries of the bund being agreed by the parties.
84. Following on mediation, in October 2021, the pursuers provided a production schedule to the defender which set out the dates and periods on which the pursuers intended to carry out operations at the distillery.

Post Mediation

85. In terms of the agreement regarding signage, the pursuer placed two slightly larger signs at the entrance, one facing each direction, each stating ‘no public access’. Another larger sign was placed facing outwards on the inner gate, stating ‘no public access’ and giving instructions and hours for deliveries.
86. The defender objected to the new signage which the pursuer had erected, and demanded that this new signage be removed, claiming it was too large and against planning permission. The entrance signs were replaced by the distillery in accordance with the defender’s demands: the original one remained in the same location, but the sign on the inner gate was retained, in order to prevent deliveries from attempting access outside of operating hours.

87. After mediation, access to the distillery CCTV was granted to the defender, and remains to date.
88. After mediation, the defender refused to agree to the distillery reconnecting old cameras to allow vision of the access road. The defender requested to point one camera onto neighbouring land. The defender then installed his own CCTV system, monitoring both the access and the distillery and installed motion cameras at the entrance of the distillery to record movements of vehicles and staff.
89. After mediation, the defender repeatedly sent correspondence to the distillery insisting on being provided staff movements, staff working hours and began enquiring about personal staff holidays. The defender suggested in correspondence that the distillery manager was purposefully extending hours and refusing holidays. The defender suggested in correspondence that it was inappropriate for staff to be arriving separately or leaving mid-day for personal reasons.
90. The continual correspondence from the defender about staff hours and staff movements required distillery staff and board members and legal representatives to spend time and resources to respond.
91. Between May and October 2021 the defender frequently contacted the distillery manager to 'update' him on any staff hours and movements which he considered to be "unacceptable". During this period staff members were often stopped on the road by the defender and questioned about their movements.
92. During this period, staff would not leave the site for lunch because of their reluctance to encounter the defender. If the defender was working around the access road on the farm, staff would often delay leaving until he was gone. Staff carried out bank, post office and office supply runs before or after work to avoid mid-day movements, and staff collected all work related parcels at their homes to avoid potential conflict. Staff were uncomfortable working outside on the distillery site, as they believed they were being closely monitored by the

defender, and any small movement or incident could jeopardize the success of the mediation agreement.

93. On 1 October 2021 the defender sent an email to the distillery manager analysing and complaining about staff movements.

The Bund

94. The mediation agreement provided for the defender to undertake construction of a large, fenced 'bund' to the west side of the distillery. The bund was intended to be an embankment made of straw bales which would provide a screen between the defender's house and garden area and the distillery yard. The construction of the 'bund' was contingent on the Minute of Variation and confirmation of lease boundaries being signed and formally agreed. The bund was initially agreed in principle with a hand-drawn map in the mediation agreement. A final map setting out the agreed extent of the bund area, and taking into account the distillery's requirements for safe access and a turning space for HGV vehicles in the distillery yard was to be agreed between the parties. This final map was never completed. The defender refused to agree the boundaries with the distillery.
95. The defender continues to refuse to sign the Minute of Variation.
96. On or around 13 October 2021 defender proceeded with the construction of the 'bund' area without giving the distillery due notice; without seeking their permission to enter onto distillery premises to do so; without agreeing the boundaries of the bund; and without first completing the Minute of Variation as required in the mediation agreement. The defender proceeded with the construction of the bund area by approximating the location, and creating an area much larger and more obstructive than suggested by him in the draft proposal.
97. The current bund construction allows access to the distillery yard for HGV vehicles but forces a particularly severe angle on reversing HGVs, giving them very little room for adjustment. The distillery has since had to paint guide lines for malt lorries on the distillery yard due to

their continued difficulty in lining up correctly, as a result of the defender's siting of the 'bund'. The bund creates an obstacle in the distillery yard.

Access to the distillery

98. The access road depicted in the lease plan is the only means of access to the subjects of lease. Any blockage or restriction of use of the access road would cause disruption to the pursuers business. If the Access Road were to be blocked for even one day it would cause significant financial loss to the pursuers. One day of unplanned closure could cost upwards of £16,000 of lost production for the distillery.
99. The defender has always parked vehicles including tractors and other farm vehicles on the access road in front of his cow shed. He continues to do so. This often causes an obstruction of the access road.
100. On 1 September 2020 the defender unilaterally decided to lock and close the inner access gates with access by combination padlock only.
101. 20 January 2021 the defender prevented staff member Josh Fraser from leaving the distillery site against his wishes.
102. On 15 March 2021, the defender stopped a risk assessor from McPherson's haulage contractor on the access road. He questioned who he was and why he was attending and detained the assessor for 15 minutes, unnecessarily.
103. On 30 July 2021 the defender stopped a visitor on the access road and 'escorted' him onto distillery premises.
104. On 21 September 2021 the defender arranged for his wife to film delivery vehicles driving on the access road with deliveries for the distillery.
105. On 8 October 2021, the defender parked a vehicle on the access road blocking access for a scheduled cask movement. The delivery vehicle was forced to stop abruptly on the access road due to the defender's parked vehicle blocking access.

106. On or about 13 October 2021 the defender commenced an operation to move large quantities of straw on the shared access road during distillery business hours. He impeded a courier van making a delivery to the distillery with his tractor. He stopped his tractor in front of the courier van, got out and questioned the driver before allowing them access.
107. On 13 October 2021 the defender ordered a delivery of straw for the 'bund' area. The delivery operation, which involved movement of straw bales to the 'bund' up the access road and through the distillery yard, to the site adjacent to the entrance to the yard lasted 5 hours and took place during distillery operating hours. The operation blocked the distillery access multiple times during the day and impeded a large portion of the distillery yard, during which time deliveries to the distillery had to take place, and which were impeded by the operation.
108. 13 October 2021 the defender impeded the access road into the distillery yard with his tractor. A delivery vehicle was prevented from entering the yard by the access road for some time by the defender's tractor.
109. On or around 14 October 2021 the defender unexpectedly locked the outer gates at the entrance of the access road, impeding the entry of a palletised delivery to the distillery, which had to wait for the defender to open the locked gates.
110. On 29 November 2021 the defender entered the distillery yard and stood in front of Mr David Graham's departing car preventing the car's exit to the access road.
111. On 22 June 2022 a charity cyclist attended uninvited at the distillery seeking a photograph. As he was leaving he was intercepted by the defender at the gate stopped and questioned.
112. On 1 August 2022 the distillery manager welcomed an Inverness businesswoman and a research student to the distillery site, to discuss a potential business opportunity. The defender intercepted these two visitors on the access road, stopping them and questioning them.

113. On 5 August 2022 the distillery's German importer attended at the distillery for a business meeting. The defender intercepted their car at the road entrance and began to film them on his mobile phone. He demanded to know their identity and the purpose of their visit. He would not let them pass until they answered his questions. He then allowed them access.
114. The defender has threatened to block the access road on several occasions, both verbally to members of staff and officers of the distillery and in writing. In particular he threatened to block the access road in an email to Duncan Tait on 25 November 2019; by email dated 1 September 2020 in which he threatened to lock the gates on the access road unless certain demands were satisfied; by email dated 13 March 2022 when the defender's father wrote to the pursuers on the defender's behalf advising that the defender was planning to carry out landscaping works on land surrounding the distillery and the access road, which would mean that articulated lorries would no longer be able to access the site.
115. In correspondence in November 2021 and during a meeting on 29 November 2021 the defender was insisting that the pursuers should not operate for business on 30 November 2021. He was insisting that the pursuers close that day. The pursuers apprehended that the defender would try to prevent them opening on that day and had a reasonable apprehension that the pursuer would block the access road or lock the gates to achieve his stated aim of preventing the distillery opening on that day, given his threats and behaviour in the past.
116. Since April 2019 the defender has repeatedly interfered with persons using the access road to gain access to the distillery; repeatedly blocked or restricted the pursuers' use of the access road; and repeatedly impeded persons and vehicles legitimately using the access road to gain access to the distillery.
117. The defender's interference with the use of the access road has caused difficulties for the pursuers in their relationships with suppliers and customers.
118. The defender continues to assert that there are limits on the pursuer's use of the access road; that there are planning restrictions in place which require the pursuers to minimise the use of

the access road; and continues to dispute the right of the pursuers to use articulated lorries on the access road. There are no such restrictions in place.

Entering the subjects of lease

119. Since February 2019, the defender has entered the subjects of lease repeatedly without giving due notice to the pursuers.
120. Since February 2019, the defender has repeatedly entered the subjects of lease without a legitimate purpose in terms of the lease agreement.
121. Since February 2019, the defender and his wife have regularly and persistently crossed the subjects of lease, walking their dog and for other unknown reasons.
122. Between April 2019 and August 2020 the defender would enter the subjects of lease on almost a daily basis, without notice, to speak to the distillery manager, Duncan Tait, about complaints that he had. These visits were mostly confrontational on the part of the defender.
123. Between April 2019 and August 2020 the defender would regularly enter distillery premises and leave straw bales on the premises, causing an obstruction which had to be removed by distillery staff.
124. On 8 August 2020 the defender entered onto the subjects of lease and spray painted words and lines on the ground.
125. On 24 March 2021 the defender entered the subjects of lease to interrupt the unloading of a quantity of glass from a lorry, demanded that it move and unload elsewhere and had a 30 minute long, confrontational, exchange with the distillery manager.
126. On 17 May 2021 the defender entered the subjects of lease and interrupted a business meeting, questioned the attendees and made demands of the pursuers' employees in the presence of the attendees.
127. On 30 July 2021 the distillery had pre-arranged visit from a customer who had come to fill a cask they had purchased. The defender stopped the visitor on the access road and 'escorted'

him onto distillery premises. The defender remained on site during the filling of the cask, uninvited.

128. On 8 October 2021 the defender drove his motorhome onto the subjects of Lease and parked it in a loading yard. The defender did not ask permission of the pursuer before doing so. The distillery manager requested that he remove the vehicle within two days to avoid a delivery being impeded. The defender did not do so. The vehicle remained parked there for several days. The presence of the vehicle impeded delivery to warehouse.
129. Between 8 and 12 October 2021 the defender and his wife crossed distillery premises repeatedly to access the motorhome parked on distillery property.
130. On 8 October 2021 the defender entered the subjects of lease and interrupted the unloading of a lorry. He intercepted the distillery staff as the vehicle was being manoeuvred, attempted to speak to the driver during the operation, and stood directly in the way of the vehicle as it was reversing. The defender remained on site for some time thereafter, complaining about the unloading operation to the distillery manager.
131. On 8 October 2021 and in the days thereafter the defender and his wife drove quad bikes across the subjects of lease repeatedly.
132. On 12 October 2021 the defender entered the distillery site by quad bike and left it parked there unattended.
133. On 13 October 2021 the defender repeatedly entered the distillery site with his tractor, without permission to do so. He spent 5 hours that day managing a delivery of straw bales, driving in and out of the distillery yard in his tractor repeatedly during distillery operating hours. He repeatedly entered the distillery yard for the construction of the bund, encroaching on the distillery yard and thereby impeding distillery operations.
134. On 13 October and in the days thereafter the defender placed straw bales in the distillery yard, outwith but adjacent to the 'bund' area, creating another obstacle for the lorries delivering malt and effluent to the distillery.

135. On 16 November 2021 the defender drove his car across the subjects of lease and stopped, exited his vehicle and began to inspect a vehicle belonging to a visitor which was parked in the pursuers' car park.
136. On 17 November 2021 the defender entered the subjects of lease and laid a line of plastic bollards in the distillery yard.
137. For several days following 17 November 2021 the defender repeatedly entered the subjects of lease to repeatedly re-lay the line of bollards in the distillery yard.
138. In the days following the 17 November 2021 the defender repeatedly entered the distillery yard and parked his car in the space created behind the plastic bollards which he had placed in the distillery yard.
139. On 18 November 2021 the defender entered the subjects of Lease and then entered the distillery building, interrupting a business meeting with French cask suppliers.
140. On 18 November the defender and his wife repeatedly walked with their dog across the distillery yard beside the plastic bollards which the defender had laid and re-laid.
141. On 29 November 2021 the defender entered the subjects of lease by car and drove around the distillery yard. He then left his car and stepped in front of an exiting vehicle to confront Mr David Graham, Director, who was in the car.
142. On same date of 29 November 2021, the defender thereafter entered the distillery building uninvited, forced his way into the office and confronted Mr Farmer the distillery manager and Mr Fraser, distillery employee. He refused to leave despite being asked repeatedly to do so.
143. On 13 January 2022 the defender entered on the subjects of lease without notice to prevent the removal of draff from the premises.
144. The defender does not provide notice to the pursuer of his intended visits to the subjects of lease and the purpose of those visits in accordance with the provisions of the lease.

145. When the defender attends at the subjects of lease he has no regard to the health and safety requirements of the pursuer's business.

Behaviour towards distillery officers, contractors and staff

146. Bruce Morrison resigned as a Voluntary Director of the CBS on 3 October 2018. He said this was because he was unable to continue working with the defender.

147. On 11 March 2019, following a difference of opinion with the defender on a staff matter the HR director Colin McAndrew resigned.

148. On 5 December 2019 Tom Inglis resigned as member of CBS citing his inability to work with the defender and his frustrations about the defender's complaints and behaviour as the main reason for this.

149. Mr. Duncan Tait distillery manager resigned citing the reason as the defender's behaviour towards him.

150. During Mr Tait's time as distillery manager the defender was repeatedly rude and aggressive towards him. The defender sent excessive email and written correspondence to Mr Tait, complaining about distillery operations. He confronted Mr Tait in an aggressive manner with various demands on almost a daily basis. On one occasion the defender threatened Mr Tait, that if he did not reduce the distillery working hours he would become "the nightmare neighbour next-door".

151. The distillery's first employee, Craig MacRitchie, was signed off work for 5 months due to mental health concerns which he attributed to the defenders abusive behaviour towards him, when the defender was Managing Director. Mr MacRitchie continues to be employed by the distillery but continues to experience severe anxiety concerning the defender, avoiding contact with him at all costs.

152. The defender has been frequently demeaning, disparaging, and rude towards Mr David Graham, in person and in correspondence.

153. On 20 January 2021, when the distillery's electricity supply was interrupted, the distillery manager, Mr Farmer, went to speak to the defender at the distillery gate. The defender was highly agitated, and shouted aggressively at Mr Farmer complaining about Mr David Graham.
154. On 24 March 2021 when the defender had come on site to interrupt a glass delivery, the defender was belligerent and aggressive towards the distillery manager and spoke at him incessantly in an intimidating manner for 30 minutes.
155. On 17 May 2021 when the defender entered on site, uninvited, to interrupt a business meeting with a local restaurant and drinks group, he was belligerent and demanding towards the staff members in front of the attendees.
156. In September 2021 the defender contacted suppliers of the distillery in an attempt to curtail movement of heavy vehicles making deliveries to the distillery via the access road as follows:
- a) The defender contacted the supplier of the biomass boiler fuel (woodchip) telling them that he required them to let him know of every delivery "for insurance purposes".
 - b) The defender contacted McPhersons, the haulage company responsible for effluent pick up and cask deliveries, and during an hour long phone call with them claimed that there was a Fatal Accident Inquiry about a distillery employee killed on the road by HGVs, and that therefore there were safety issues on the road.
 - c) The defender arranged for his wife to film a McPherson's lorry on the access road during a cask delivery, which caused the haulage operators concern, and threatened the working relationship between the distillery and the haulage company.
157. On 8 October 2021 when the defender entered the subjects of lease and interrupted the unloading of a lorry, he behaved in an intimidating manner towards the distillery manger, refusing to leave the subjects of lease.

158. On 18 October 2021 the defender demanded a meeting with Mr Farmer, the distillery manager. The distillery manager, Mr Farmer attended the meeting at the defenders request on 18 October 2021 in the defender's cattle shed. The meeting lasted 3 hours. During that meeting the defender was heated, confrontational and intimidating towards Mr Farmer. The defender talked incessantly at Mr Farmer and made personal insulting comments him and his family. Mr Farmer was intimidated by the defender's behaviour. Mr Farmer was fearful for his safety during the conversation.
159. On 17 November when the distillery manager approached the defender who had entered the subjects of lease to lay a line of bollards across the distillery yard, the defender was hostile, abusive and aggressive towards Mr Farmer and refused to refrain from laying the bollards as requested by Mr Farmer. He refused to remove the bollards when requested to do so. When Mr Farmer later repeatedly removed the bollards from the yard the defender repeatedly re-entered the subjects of lease to replace them.
160. On 18 November 2021 the defender entered the subjects of lease again and interrupted a meeting between the distillery Manager and some French Cask Suppliers. He entered the distillery building, uninvited, in an agitated state claiming there was an "emergency access issue" and began to ask the visitors questions. The visitors were concerned by his unexpected his attendance, his questioning and his manner. The defender demanded that Mr Farmer, the distillery manager, leave the meeting and go outside in to the car park with him. Mr Farmer did so. Outside in the car park the defender shouted at Mr Farmer. His behaviour was intimidating and aggressive towards Mr Farmer.
161. On 29 November 2021 when the defender entered the distillery yard and stood in front of Mr Graham's car to stop it, he confronted Mr Graham in an aggressive manner.
162. On 29 November 2021 when the defender entered the distillery building uninvited, he was argumentative, aggressive and confrontational with Mr Farmer and Mr Fraser, the distillery staff. He was agitated, aggressive, belligerent and rude to the staff. He refused to leave when

asked repeatedly to do so. He was demanding the staff make changes to entries on Google maps; would not listen to staff when they were responding to his demands; interrupting staff and barking questions at them.

163. On 13 January 2022 when the defender entered on the subjects of lease without notice to prevent the removal of draff from the premises, he was confrontational and aggressive towards the distillery manager.
164. The defender's interactions with the employees of the pursuer is not polite but is mostly confrontational and aggressive.
165. The defender has no legitimate purpose in interacting with the pursuer's employees on the distillery site.
166. The defender's interactions with visitors to the distillery is not polite and is mostly confrontational and/or rude.
167. The defender's behaviour towards the distillery manager, Mr Farmer, has made Mr Farmer concerned about his physical safety in Mr McKenzie's presence. The defender's behaviour towards the distillery manager, Mr Farmer, has caused Mr Farmer stress and anxiety.
168. The defender's repeated uninvited entry to the subjects of lease and his repeated unwanted interventions in the operation of the business take up staff time and resource; they cause disruption to the operation of the business; cause annoyance, frustration and often distress to the members of staff involved; they interrupt staff working time and cause staff to have to work longer hours to make up the lost time caused by the defender's interference.

Visitors to the distillery

169. The distillery's website informs the public that visitors are not permitted to the distillery site.
170. The Google listing for the distillery advises that there is "No visitor centre or shop" and confirms that it is "Not open to the public".
171. Distillery staff answer telephone enquiries confirming that visits to the distillery site are prohibited.

172. The distillery has installed signs at the foot of the access road to the subjects of lease which state “No public access” and “Visitors by appointment only”. At the entrance to the access road there are 2 gates. The outer gate was installed by the defender in 2019 without consultation with the Pursuer. It is situated 5 metres from the public road. There is an area off the public road before the outer gate where vehicles can sit before entering the outer gate. The outer gate consists of two sections, a $\frac{3}{4}$ gate and a $\frac{1}{4}$ gate. The inner gate was installed by the defender. It is a full double gate. There is 20 metres of access road between the two gates.
173. The defender insists that the inner gate is closed at all times. He insists that the outer gate is closed and locked overnight. The pursuers comply with these demands at all times. The lock on the outer gate requires to be manually opened by either a distillery employee or the defender.
174. On 1 May 2021 a mediation agreement, was entered into between the parties. In terms of the mediation agreement, the parties agreed at Clause A5 that access to the Subjects of Lease would be granted to those people necessary for the pursuer to carry on its business. These persons include directors, employees, some pursuer members, contractors and suppliers, and other persons with whom they do business. and that “Access to others would only be permitted if the express permission of the Landlord has been obtained”.
175. Since May 2021 the pursuers have not permitted access to anyone other than those referred to in Clause A5 of the said mediation agreement.
176. The distillery has taken all reasonable steps to dissuade unsolicited visits by member of the public.
177. The distillery is unable to eliminate all incidences of unsolicited attempts to visit.
178. The defender has no legitimate reason to interact with visitors to the site who have been authorised to attend there by the pursuer.

The 'druff'

179. In terms of the lease the landlord is entitled to collect the draff, which is a waste product produced by the distillery's mashing process. Draff has to be removed from site regularly to allow room for production to continue. One ton of draff is valued at approximately £20. Draff can be used as animal feed.
180. During December 2021 the defender did not enter distillery premises and did not interact with staff, except to collect draff by tractor every few days, with the permission of the distillery.
181. On 13 January 2022 the defender delayed in collecting the draff. The distillery manager sent an email to the defender asking him to confirm his intention regarding collection of the draff that day. There was no reply to the email by 1 pm and the distillery manager arranged for someone else to take the draff instead. James Cameron, a local contractor, came to collect the draff. As he was loading it, the defender arrived on site in his tractor uninvited and without permission to do so, and attempted to stop Mr Cameron from leaving with the draff. The defender filmed Mr Cameron on his phone and made accusations of theft towards Mr Cameron. He was confrontational with the distillery manager, Mr Farmer. Mr Cameron left with the draff.
182. Following the incident on 13 January 2022 an informal arrangement was reached between the distillery and the defender, and subsequently a formal undertaking was given to the court in the present action, that draff pickups would be offered to the defender when available, the defender would have 24 hours to confirm his intent to collect same and then would have 24 hours thereafter to actually collect. The agreement and undertaking further provided: if that 2 day window expired without collection of the draff, the distillery would make alternative arrangements for the removal of the draff.
183. The distillery continue to make arrangements to enable the defender to collect the draff on a regular basis.

Finds in fact and law

1. This court has jurisdiction.
2. The lease dated 14 November 2016 regulates the legal relationship between the parties in respect of the tenancy of the distillery.
3. The terms of the lease dated 14 November 2016 have not been amended by Minute of Variation as required in terms of said lease.
4. In terms of the lease the defender, as landlord, has restricted access to the subjects of lease. In accordance with Clause 1.9 thereof: "Any entry on the Subjects of Lease by the Landlord or by any person authorised under this Lease by the Landlord to enter, shall be at reasonable times and upon reasonable notice (or no notice in cases of emergency)....." In addition, the specific access rights reserved to the landlord are set out in terms of Schedule Part 2 thereof ("Rights Reserved to Landlord and persons authorised by Landlord"), at Paragraph 2: "The Landlord and its surveyors or agents shall be entitled to enter upon the Subjects of Lease at reasonable times on not less than 10 Working Days prior written notice to the Tenant, to inspect the Subjects of Lease; to assess whether the Tenant is complying with its obligations in terms of this Lease or for any other reasonable purpose"
5. The only rights of access to the subjects of lease by the defender, as Landlord are to enter upon the Subjects of Lease at reasonable times on not less than 10 Working Days prior written notice to the Tenant, to inspect the Subjects of Lease; to assess whether the Tenant is complying with its obligations in terms of the Lease, or for any other reasonable purpose. The defender only has the right to enter the subjects of lease with no notice, in an emergency. An 'emergency' is usually defined as a serious, unexpected, or dangerous situation requiring immediate action.
6. The defender has repeatedly accessed the subjects of lease in breach of the terms of said lease.
7. In terms of the lease the pursuer as tenant has rights of access to the site over the defenders land. In accordance with the said lease at Schedule Part 1 ("Rights Granted to Tenant"), in Paragraph 1 there is granted to the pursuer: "A non-exclusive right of access for pedestrian and vehicular access

including heavy vehicles over and across the Access Road.....". In accordance with the lease the "Access Road" is defined in Clause 1.1 as "the access road running from the publicly maintained highway (through the Landlord's Property) to the Leased Subjects and shown shaded grey on the Plan (but to the extent the grey colouring is outwith the Property but within the Landlord's Property)".

8. The defender has repeatedly interfered with the pursuers' right of access in breach of the terms of the lease.
9. In terms of the lease the defender, as Landlord, is "entitled (but not obliged) to use for the Landlord's own purposes the draff and pot ale produced by the Tenant's distillery for no charge".
10. The pursuers have a reasonable apprehension that the defender will take steps to block the access road to the distillery by *inter alia* closing and locking the inner and outer gates to the distillery, or in any other way.
11. The pursuers have reasonable apprehension that the defender will continue to take access to the subjects of lease without having given contractual notice to the pursuers and to take such access for purposes other than those permitted by the lease, including interfering with distillery operations and causing alarm and distress to the pursuer's staff.
12. The pursuers have a reasonable apprehension that the defender, or those acting on his behalf, or under his instruction, will continue to act in a manner which harasses or causes alarm and distress to the pursuer's staff or any other individuals authorised by the pursuer to be on or within the subjects of lease.

Therefore: in the principal action:

In terms of pursuer's crave one, Interdicts the defender, or those acting on his behalf or under his instruction or those who he has permitted to do so, from taking any step the result of which would be the blockage of the Access Road running from the unnamed publicly maintained highway through the defender's heritable property at Scroggie Farm, Dingwall to the subjects let by the pursuer from the

defender and known as and forming Glenwyvis Distillery, in terms of a Lease between the defender as landlord on the one hand, and the pursuer as tenant on the other hand, dated 14 November 2016 (“the Lease”);

In terms of pursuer’s crave two, Interdicts the defender, or those acting on his behalf or under his instruction, or those who he has permitted to do so, from taking access to the Subjects of Lease as more particularly described in the Lease and including in particular the pursuer’s distillery building or its surrounding and associated land and buildings insofar as forming part of the Subjects of Lease, and including (a) the area extending to 0.321 hectares or thereby and shown coloured pink and hatched in blue on the Plan annexed to and forming part of the Lease; (b) the area extending to 0.158 hectares or thereby and shown coloured green on the said Plan; (c) the Distillers House Subjects as more particularly described in the Lease; and (d) the Lower Subjects as more particularly described in the Lease; otherwise than on reasonable notice (being not less than 10 working days written notice) and only then for the purposes of inspection of the said Subjects of Lease, to assess whether the pursuer is complying with its obligations under the Lease, or for any other reasonable purpose;

In terms of pursuer’s crave three: Interdicts the defender, or those acting on his behalf or under his instruction, or those who he has permitted to do so, from taking any action which has the effect of harassing any member of the pursuer’s staff while they are on or within the said Subjects of Lease, or any other individuals authorised by the pursuer to be on or within the said Subjects of Lease, or causing any such individual or individuals alarm or distress;

Thereby Sustains the pursuer’s fourth, fifth and sixth pleas-in-law;

And in respect of the Counterclaim, Repels the defender’s pleas-in-law and Dismisses the defender’s first and second craves;

Discharges the pursuer from the obligations incumbent on them in terms of the undertakings given by them to the court on 16 February 2022;

Thereafter, Finds the defender liable to the pursuer in the expenses of the cause, as taxed; Allows an account of expenses to be given in and Remits the same when lodged to the Auditor of court to tax and report.



A handwritten signature in black ink, appearing to read 'Eilidh MacDonald', is written over a grey arrow-shaped graphic pointing to the right.

Sheriff Eilidh MacDonald

NOTE

Introduction

1. The action relates to a dispute between a Community Benefit Society, which operates a distillery, and the founder of the distillery who owns the land on which the distillery is situated. The distillery is called Glenwyvis Distillery. The defender conceived the idea of building a distillery on his farmland. He applied for planning permission and proceeded with the project. In 2015 he set up a company to run the distillery. The company was converted to a Community Benefit Society in 2016. At the time the company was set up the defender was the Managing Director and the main actor in the project. The defender granted a lease to the distillery for part of his farm land for the purpose of building and operating the distillery. The distillery was built on the defender's farmland. The defender is the pursuer's landlord. The defender lives on his farm in a farmhouse adjacent to the distillery premises. The farm and the distillery have a shared access road. In 2018 the defender resigned as Managing Director and since then the relationship between those running the distillery and the defender, their landlord, has soured. The pursuer now seeks interdict against their landlord, the defender, to prevent him interfering with the access road, to prevent him from entering the distillery premises outwith the terms of the lease, and to prevent him from harassing employees. The defender has counterclaimed

seeking to interdict the pursuers from enabling and allowing visitors to the distillery and to interdict them from giving a waste product called draff to anyone else but him.

2. On 29 November 2021 in this action an *interim* interdict was granted at Inverness Sheriff court in the following terms:

“ad interim: 1. Interdicts the Defender, or those acting on his behalf or under his instruction or those who he has permitted to do so, from taking any step the result of which would be the blockage of the Access Road running from the unnamed publicly maintained highway through the Defender’s heritable property at Scroggie Farm, Dingwall to the subjects let by the Pursuer from the Defender and known as and forming Glenwyvis Distillery, in terms of a Lease between the Defender as landlord on the one hand, and the Pursuer as tenant on the other hand, dated 14 November 2016 (“the Lease”); until further orders of court”.

3. On 8 December 2021 in this action at Inverness Sheriff court a further interim order was made Continuing the *interim* interdict granted on 29 November 2021 but varying the terms thereof by including after "2016" on line 7 the words “without reasonable excuse or to facilitate the movement of cattle, having given the pursuers 24 hours’ notice”; so that the order for *interim* interdict became as follows:

“ad interim: 1. Interdicts the Defender, or those acting on his behalf or under his instruction or those who he has permitted to do so, from taking any step the result of which would be the blockage of the Access Road running from the unnamed publicly maintained highway through the Defender’s heritable property at Scroggie Farm, Dingwall to the subjects let by the Pursuer from the Defender and known as and forming Glenwyvis Distillery, in terms of a Lease between the Defender as landlord on the one hand, and the Pursuer as tenant on the other hand, dated 14 November 2016 (“the Lease”) without reasonable excuse or to facilitate the movement of cattle, having given the pursuers 24 hours’ notice; until further orders of court”.

4. On 8 December 2021 at Inverness Sheriff Court, the Sheriff refused to grant an *interim* order in terms of the pursuer’s crave 2 *in hoc statu*.

5. On that same date the Sheriff granted an *interim* interdict in terms of the pursuer’s crave 3 as follows:

“Interdicts the defender, or those acting on his behalf or under his instruction, or those who he has permitted to do so, from taking any action which has the effect of harassing any member of the pursuer’s staff while they are on or within the said Subjects of Lease, or causing any such individual or individuals alarm or distress”.

6. On 16 February 2022 at a hearing at Inverness Sheriff court the pursuer gave the following undertakings to the court in respect of these proceedings:

“The Pursuer undertakes that neither it nor its members of staff will invite, encourage, permit or otherwise enable, without the express permission of the Defender (which is not to be unreasonably withheld or delayed), except in the case of emergency, any party to access the Subjects of Lease as defined in the Lease between the parties dated 14 November 2016, under exception of: - a. employees or officers of the Pursuer or those specifically authorised by the Pursuer’s Board for carrying out specific works or duties in connection with the Pursuer’s business; b. subject to the Defender’s consent, which consent shall not be unreasonably withheld or delayed, members of the Pursuer providing that those members were promised to them a visit as a condition of their investment and that such a visit is scheduled at an appointed date and time, and subject to the Pursuer complying with existing planning permissions; and c. contractors and suppliers of the Pursuer.

And 2. Subject to the Defender having confirmed to the Pursuer within 24 hours of receiving a request from the Pursuer that he wishes to uplift the draff produced by the Pursuer’s operations, and subject to the Defender then arranging that such draff is uplifted within 24 hours thereafter, the Pursuer undertakes to refrain from permitting any party other than the Defender, or those appointed by the Defender, to remove any draff from the Subjects of Lease without the express consent of the Defender.”

7. The action proceeded to a proof before answer. In total there was 6 days of evidence, written submissions and a further day fixed for a short hearing on submissions. Evidence-in-chief of witnesses had been submitted by affidavit.

The Legal Framework

Interdict

8. “Broadly speaking, interdict is granted against a wrong which is in the course of being committed or where there is reasonable ground for apprehending that a wrong is intended to be committed” *Inverurie Magistrates v Sorrie* 1956 S.C. 175, per L.J.C. Thomson.

Leases

9. At common law, the landlord and tenant under a lease each owes the other a number of implied obligations. All of these automatically apply unless the lease document specifically states otherwise.

10. There is an obligation on the landlord to place the tenant in full possession of the subjects of let. The landlord, therefore, has no right to retain any part of the leased property, or any rights over it, unless this has been expressly provided for in the lease. Rennie *Leases*. Para 14-03 and *Baxter v Paterson* (1843) 5 D 1074.

The Evidence

11. Five witnesses were called for the Pursuer: Mr David Graham, Mr David Allan, Mr Duncan Tait, Mr Matthew Farmer, and Mr Richard Sandbach. An affidavit was lodged by the pursuers containing testimony from James Cameron. Mr Cameron did not appear to give evidence, so this was untested by cross-examination.
12. Three witnesses were called for the defender: Mr John McKenzie, the defender; Margot Esplin, the defender's wife; and Kenny McKenzie, the defender's father.
13. There were a large number of documentary productions. There were also videos from the distillery CCTV cameras, and mobile phone footage was shown. There were a number of photographs also produced.
14. The evidence-in-chief of all witnesses had been lodged prior to the proof by way of affidavit. I will not repeat what is in those affidavits: they are sometimes lengthy and often detailed. I will try to summarise the evidence in the following paragraphs, although even the summary will be lengthy.

Witnesses for the Pursuer

15. Mr Graham gave evidence on behalf of the pursuer. At the time he signed his affidavit he was the Chairman of Glenwyvis Distillery Ltd. He became a Director in 2019. At the time of his joining the Board the defender was the Managing Director of the company and the distillery was in financial trouble. In February 2019 an extraordinary Board Meeting agreed that a better financial management structure was required and more scrutiny required. Several of the directors had indicated they were standing down in October 2019. At the Board meeting on 11 March 2019 the HR Director Colin MacAndrew resigned following a difference of opinion with

Mr McKenzie. The defender agreed at that meeting to step back from being Managing Director and agreed to hand over day-to-day responsibility of operations of the distillery to the distillery manager at that time, who was Duncan Tait. Immediate action was required to address the imminent cash shortfall of the company and Mr Graham led the preparation of a new business plan. A previous attempt to compile a comprehensive business plan by Mr McKenzie as Managing Director and a former director Bruce Morrison had failed and Mr Morrison had resigned as a Director citing the defender's behaviour as a reason for resigning. This included the defender giving "misleading information" to Mr Morrison. At the point of Mr Graham joining the company, five key officers of the company had recently stood down or notified their intention to stand down. At the time Mr Graham joined, all professional services provided to the distillery had been set up and were controlled by the defender. Changes had to be made to the operation of the business. The business was in financial trouble. In September 2019 the board agreed that audited accounts were necessary. The defender complained to the auditors, which stalled the audit process and increased the cost of the audit process to the company by approximately £10,000 and delayed completion of the audit by two months. During that time the defender was repeatedly contacting distillery staff directly, on site, without recourse to the Board. To avoid further difficulties, parties agreed that the defender's point of contact for any issues would become Tom Inglis, Company Secretary. Tom Inglis resigned as Company Secretary on 31 December 2019 and in his resignation letter advised that this was largely as a result of the defender's conduct. By the end of 2020 the responsibility for being Mr McKenzie's point of contact passed to David Norcom and parties then agreed to go to mediation to resolve Mr McKenzie's concerns. Since March 2019 Mr Graham says there were very few periods when the defender has not raised contentious issues. Mr Graham believed most of these to be vexatious. Mr McKenzie refused to complete the Minute of Variation for the lease. He continues to do so. There is a very distinct benefit to the distillery in having the Minute of Variation signed. It is being used by Mr McKenzie as leverage against the distillery. The completion of it

has been unreasonably withheld by Mr McKenzie. Mr McKenzie continues to make many complaints about the distillery. He complained that the distillery building exceeded the size of planning consent. He complained that the distillery was built too close to his house. He complained about noise and disruption from the operation of the distillery. He repeatedly insisted that there should be no visitors to the distillery, and any unsolicited visits he complained about. He repeatedly complained that the distillery has breached the terms of the lease. He complained about the regular traffic movements to the distillery on the shared access road, which provided necessary deliveries to the distillery. He complained the distillery CCTV cameras invading his privacy. He complained that the distillery was in breach of the lease for distilling gin. He reported the distillery for breach of planning for having a bottling facility on site, and complained about where it had been situated. He complained about the officers of the distillery not residing in the local area. He complained about the distillery selling product on site. This all despite the fact that it was Mr McKenzie, as Managing Director, who managed the build of the distillery; Mr McKenzie had decided where the building was situated; he had decided how large the building was to be during construction; Mr McKenzie was instrumental in arranging the pattern of transport to and from the distillery; Mr McKenzie initiated gin production on the site when he was managing director; Mr McKenzie acquired and located the bottling facility when he was Managing Director. He was now complaining about all the things he had put in place. Mr McKenzie has also complained to outside authorities, including the Police, Environmental Health, and the Highland Council Planning Authority about the distillery operations after he resigned as Managing Director. Mr McKenzie's approach when dealing with matters with Mr Graham could be seen as bullying, coercive and oppressive. Mr McKenzie has made demeaning, disparaging and distasteful comments to him, some of which he felt were defamatory. Mr Graham's work with the distillery has been extensive over the years. The defender remains an investor. Mr Graham is aware that the defender has on several occasions expressed a desire to see the distillery close. These comments have been passed on

to Mr Graham by two members of staff and two Directors. In July 2021, after mediation had ended with a mediation agreement, Mr McKenzie was persisting in his refusal to sign the Minute of Variation required for the lease. Mr Graham had a zoom meeting with him when Mr McKenzie raised a myriad of complaints and this has all been recorded by Mr Graham in an email he sent to the Directors on 29 July 2021. Mr Graham described Mr McKenzie as “being in full rant mode” during the meeting.

In cross-examination Mr Graham confirmed that all of the current Board members are volunteers. He became involved because of his local connections to Inverness, although he lives in Essex, and because he has an interest in Malt Whisky. He was happy to volunteer. He has carried out paid services for the distillery in the past on one occasion at a cost of £7000 to the distillery. This was to write a business plan. He confirmed that the distillery have prepared the Minute of Variation but it remains unsigned by Mr McKenzie. He conceded that some of Mr McKenzie’s complaints would be legitimate complaints. It was the repetition of the complaints and lack of agreement to solve them which was ‘vexatious’. There is a pattern of behaviour by Mr McKenzie which is difficult to deal with. Some of his behaviour amounts to harassment. Mr McKenzie’s complaints about the distillery building have been vexatious in the context that he was the one who supervised the build of it. In regard to the letter sent by Mr Norcom to Mr McKenzie he could see Mr Norcom’s point of view.

16. Mr Allan is qualified as a Solicitor in England and Wales. His work is primarily with commercial matters. He was elected as a director of the pursuer on 24 June 2021 and appointed as Secretary on 12 July 2021. He gave evidence of the historic position of the company as he was aware of it from the company records. He gave his opinion on the terms of the lease. He was often the first point of contact for the defender and his legal representatives. He came into post after the mediation agreement between the parties had been finalised. Since then the defender raised numerous allegation that the pursuers were in breach of same. In correspondence with him, the defender frequently made allegations about the conduct and character of his fellow

directors, primarily directed at David Graham. Mr McKenzie did not pursue any of the complaints via the Standards Committee which had been set up. In Mr Allan's opinion the defender sought to exert control of the pursuer's operation of the distillery to a degree not supported by the terms of the lease, the Mediation Agreement nor the company's rules. Mr Allan gave examples of this including: Mr McKenzie requesting advanced notification of all movements by or on behalf of the pursuer on and off the distillery site, including demanding the work schedules of the pursuer's employees; and demanding documentation and business information in excess of that he was legally entitled to. The defender made repeated complaints to the pursuers about the use of articulated lorries delivering to the site and made demands that this stop. Mr McKenzie demanded the closure of the distillery on St Andrew's Day 2021. It was feared that he would try to stop access to the distillery on that day which would have caused production to stop and would have caused financial loss to the pursuers. During the summer months of 2021 the defender repeatedly entered the pursuer's leased subjects other than in accordance with the lease, causing disruption to the pursuer's employees and to the operation of the distillery. The defender's father sent an email on 13 March 2022 advising that the defender intended to undertake landscape works on the surrounding farm land which would then prevent articulated lorries from entering the site. The indication in that email was that Mr McKenzie was going to change the landscape around the distillery and the access road to make it impossible for articulated lorries to access the site. The distillery has been designed and set up (by Mr McKenzie) for delivery of commodities by articulated lorry. It is essential for articulated lorries to access the site. Three different commodities are delivered by articulated lorry: empty and full casks; effluent; and malt grain. The delivery of these commodities by articulated lorry deliver significant cost savings to the distillery.

In cross-examination, he confirmed he became involved in the project as a whisky enthusiast. In his role with the distillery he disproportionately spends most of his time and effort trying to deal with the dispute with Mr McKenzie. When he joined, he reviewed the mediation

agreement between the parties. He was concerned about what the distillery had agreed to. He has other concerns about matters arranged with Mr McKenzie prior to his involvement: for example, in his professional experience, landlords are not usually allowed to attend Board meetings of the tenant, as happens in this case. In his opinion Mr McKenzie is seeking to exercise a level of control over the distillery in a way he is not entitled to. Mr McKenzie is overstepping the boundaries of the landlord/tenant relationship. He conceded that there had been no explicit threat made to him by Mr McKenzie to block the access road, but it was Mr Farmers' assessment that was possible. He confirmed that there was no landscaping required by the Planning authority.

17. Mr Duncan Tait was the previous Distillery Manager at GlenWyvis Distillery. He was employed between 27 November 2017 and August 2020. He resigned from his role. He said his resignation was solely due to "the constant harassment from the defender on a daily basis. The barrage of emails, letters and face-to-face altercations had become too much and was starting to take a toll....." on his mental health. He felt he had no choice but to resign. He continued as Manager until a replacement was found, and that replacement was Matthew Farmer. He set out the history of his involvement with the Distillery. Whisky production commenced in January 2018. The defender was Managing Director of the distillery company at the time he started employment and Mr McKenzie continued in that role until April 2019. During that time Mr Tait reported directly to the defender. Whilst Managing Director the defender was in charge of all aspects of running the distillery, except production. In April 2019 when the defender stepped down as Managing Director, Mr Tait then took over as general manager, taking responsibility for all aspects of the business that the defender had previously managed. He stated that: after the defender stepped down as Managing Director, the defender's attitude changed and he had "become more obstructive". The defender started to install new gates and fencing around the distillery site without any consultation with the distillery. Mr McKenzie sent an invoice for the fencing to the distillery and passed it through the distillery account. Mr

McKenzie began to invoice the distillery for electricity use, some of which the distillery may not have been liable for. The defender made complaints to Police Scotland, the Environmental Health, and the Planning authority about the distillery. The management of these complaints was time consuming for the small team of staff and did not result in any action against the distillery by these agencies. On one occasion, on a date he could not recall, the defender entered on the distillery site uninvited to speak to him. The defender was aggressive towards him during the conversation and advised him that if he did not do the things he was demanding (restricting distillery working hours and other things) then he, the defender, would become his “nightmare neighbour next door”. Mr Tait initially intimated his resignation from his role in November 2019 because: “working alongside, and having to deal with, the defender was becoming unbearable...” He agreed to stay for 6 months to see if the situation would improve, but it did not, and he resigned again in February 2020 with 6 months’ notice. Mr Tait limited his contact with the defender during that time. Time and money was being wasted dealing with constant requests from the defender. The defender would contact staff regularly if he thought they had arrived on site “too early”. Mr Tait witnessed spray paint on the gravel within the distillery site on Saturday 8th August 2020. He reviewed CCTV footage and saw this had been done by the defender. The defender had not asked permission to come on site. On 27 August 2020 the defender emailed him to advise that he had contacted the distillery’s suppliers directly to raise concerns about the distillery’s use of articulated lorries on the access road. Mr Tait described this as the suppliers being “harangued” by the defender. He was concerned about the effect of this on the distillery’s relationship with those suppliers.

In cross-examination Mr Tait confirmed at the beginning of his time at the distillery he saw Mr McKenzie as a “figurehead”. He had respect for him because of his concept for the distillery, and the idea that it was to be for community benefit. As soon as Mr McKenzie left post as Managing Director and as time went on, he was “making life more and more difficult”. Mr Tait was careful not to share his personal feelings about Mr McKenzie with Mr Farmer when he

was engaged in post. He did not want to jeopardise Mr Farmer's employment: he wanted him to be able to make his own mind up about Mr McKenzie. Mr Tait confirmed that he was involved with the dispute about removal of CCTV cameras in August 2020. He had received a letter from Mr McKenzie's solicitors confirming that these were to be removed and that Mr McKenzie agreed. Despite that, Mr McKenzie sent his father to stop them removing the cameras. Mr Tait became annoyed at Mr McKenzie senior when he was accused by him of not caring about the distillery. As he was walking away Mr Tait confirms he said: "I am only leaving because of your asshole son". He was not proud of that comment. He reiterated that he only left the job because of Mr McKenzie's "harassment" and expanded on this by saying that he couldn't sleep because: "I didn't know what I was going in to the next morning". There were numerous email complaints from Mr McKenzie and letters from solicitors which he had to read and deal with. There was a very small workforce and he had no spare time to deal with other things because of dealing with Mr McKenzie. Mr McKenzie would put straw bales on the distillery site on almost a daily basis which impeded distillery work and had to be removed. Mr McKenzie would lock gates, sometimes with padlocks. He regarded all of this as harassment.

18. Mr Farmer is currently employed as the Distillery Manager. He took over the role from Duncan Tait in August 2020. During the interview process he had been made aware that there had been historical disagreements with the landlord, the defender. He started work on 24 August 2020. On 25 August 2020 the defender called the police to complain that the distillery CCTV cameras were recording through the window of his bedroom. The police left satisfied that there were no cameras intentionally pointed at anything outside the distillery grounds but gave advice to the distillery about how to manage the CCTV system going forward to avoid any further complaints. During his induction period Mr Farmer became aware of the full history of the defender's conflict with the distillery. One of his greatest concerns was the effect of the defender's behaviour on an employee, Craig MacRitchie, who had previously been signed off

from work due to mental health concerns and continues to experience severe anxiety about having any contact with the defender. Mr Farmer has to manage Mr MacRitchie. In his initial meetings with Mr McKenzie, Mr McKenzie made insulting comments about Mr MacRitchie which concerned Mr Farmer. Mr Farmer attempted to develop a working relationship with the defender, nonetheless. Any operational issues Mr McKenzie had were to be raised with him as Distillery Manager. Between September 2020 and January 2021 the defender made complaints about the distillery's operation to outside agencies; locked access gates and demanded information from Mr Farmer about traffic and staff movement to and from the distillery; threatened legal action to try and stop the distillery operating on 30 November 2020; sent a number of disputed invoices to Mr Farmer demanding payment for matters unrelated to the distillery; refused electricity usage for the distillery without payment in advance (the defender has control of the distillery's electricity supply box); threatened to move boundaries; repeatedly stated that he had the right to access the distillery site at will as landlord; repeatedly accessed the distillery site at will; physically prevented a member of staff from leaving the distillery site; and sidestepped Mr Farmer to directly interact with staff members, delivery agents and contractors on many occasions. All of these matters caused Mr Farmer concern and resulted in him spending an excessive amount of time responding to what he called Mr McKenzie's "scattershot complaints". This resulted in parties agreeing to go to Mediation. Mediation took place between February and May 2021. During this time the defender made repeated complaints directly to Mr Farmer about deliveries to site. On 24 March 2021 Mr McKenzie came on site to interfere with a delivery of glass bottles; began to direct staff and the delivery driver and became hostile towards Mr Farmer when he intervened. This intervention by Mr McKenzie caused disruption. The defender repeatedly requested information from Mr Farmer about the name and identity of every visitor to the site and repeatedly stopped and questioned legitimate distillery visitors as they made their way to the distillery on the shared access road. The defender's interference with visitors to the distillery site according to Mr Farmer "became so

commonplace that I stopped noting every individual incident". Mr Farmer was able to give details of specific incidents on 15 March, 17 March and 30 July 2021. Following mediation being completed there was "a brief period of peaceful coexistence" then Mr McKenzie began to cause issues again. Firstly he complained about the additional new signage erected by the pursuers at the entrance gate, which the pursuers had to change to meet his demands; then he prevented the pursuers from reconnecting CCTV cameras and then installed his own cameras to monitor the access road and distillery premises; then he insisted on being provided details of all staff movements, staff working hours and started enquiring about staff holidays. Mr McKenzie would complain to Mr Farmer repeatedly about staff movements that he was apparently monitoring by motion cameras he had installed at the entrance to the distillery site and repeatedly contacted Mr Farmer to notify him of staff movements which he felt were unacceptable. The staff found the monitoring of their movements in this way to be intimidating and began to restrict their movements accordingly to avoid comment by the defender. This caused the staff inconvenience, and made them feel uncomfortable. At the beginning of October 2021 Mr McKenzie started to build a large fenced 'bund' to the west side of the distillery, on the subjects of lease. This had been agreed in mediation but was subject to certain conditions being fulfilled by Mr McKenzie before construction could begin. Mr McKenzie did not fulfil the obligations incumbent on him before commencing construction. He commenced construction without giving Mr Farmer any notice of the construction. The construction of the bund impeded distillery operations. There are photographs of this. The bund area had not been agreed with the distillery. The bund area as now completed is obstructive to the use of the distillery yard, causing disruption and inconvenience to HGV lorries delivering to the site. By September 2021 the defender had started to raise issues with Mr Farmer about the movement of articulated lorries to and from the site, insisting that they were not allowed; threatening to lock the access gates to the distillery until he saw specific approval from the council; contacting the distillery's suppliers in an attempt to curtail the movement of these vehicles; and filming

delivery vehicles as they drove up the access road. Mr Farmer was very concerned about these interventions as movements of casks, malt and effluent are vital to the continued operation of the distillery: missing even one delivery could shut down production with all the disruption and costs that would involve. Every production day is worth approximately £8350 to the distillery. Mr Farmer raised the matter as an emergency with the Society's Management Committee. Mr Farmer was spending a huge amount of his time dealing with Mr McKenzie and he was conscious the Directors were also engaged in this way unnecessarily. From September 2021 tensions with Mr McKenzie were escalating. Mr McKenzie and his wife were continuing to enter distillery grounds more freely and more frequently, repeatedly driving vehicles through the grounds during the day and Mr McKenzie was parking his vehicle at either end of the site. During a week in mid-October 2021 these activities reached a peak. During that time the defender interfered with multiple deliveries and blocked access. During that time the defender drove his motorhome onto the distillery premises without notice, and left it parked there for several days, impeding a warehouse delivery yard. Mr McKenzie, his wife and his dog accessed the motorhome repeatedly during that time, freely crossing the distillery premises during operational hours. Mr McKenzie and his wife would drive a quad or Mr McKenzie would drive his pick-up across distillery premises at unnecessary speed past the distillery office. Mr McKenzie was denying requests by the distillery to keep the outer access gates open to facilitate necessary deliveries. Mr McKenzie, on a number of occasions was stacking hay bales on the distillery yard outside the controversial bund area. The defender requested a meeting with Mr Farmer, and Mr Farmer attended on 18 October 2021 in Mr McKenzie's cattle shed. Mr McKenzie's father was present. The 'meeting' lasted 3 hours: Mr McKenzie became "heated" and made personal insulting comments to Mr Farmer. Mr Farmer felt intimidated by Mr McKenzie and felt he could not leave the meeting without an escalation occurring. In November 2021 there were further incidents with Mr McKenzie that caused concern which included Mr McKenzie coming on site to inspect visitors vehicles; erecting a

path of bollards on the distillery yard which were repeatedly replaced by Mr McKenzie when removed; Mr McKenzie being hostile, insulting, abusive and aggressive to Mr Farmer; Mr McKenzie parking his car in the distillery yard behind the bollards; Mr McKenzie entering the distillery office uninvited during a business meeting, demanding Mr Farmer's attention, and shouting and being abusive to him. On 26 November 2021 the defender emailed Mr McKenzie demanding that the distillery cease operation on 30 November 2021. Mr Farmer considered that email to be a veiled threat that the defender would try to stop production on that day. The Management Committee agreed with this assessment. The staff, including Mr Farmer, were concerned for their safety if Mr McKenzie's demands were not met. This began the process of seeking interdict in this action. There was concern for the safety of staff and a real concern that access to the distillery would be stopped by Mr McKenzie. On 29 November 2021 directors David Graham and David McIntyre arrived at the distillery for a meeting. The defender drove onto the site and stepped in front of Mr Graham's vehicle as it was exiting, to speak to them. Mr Farmer saw this as it happened on the CCTV monitoring system. Mr McKenzie then entered the distillery building despite being asked not to do so, forcing his way in, and confronted Mr Farmer and two other members of staff demanding information from them, refusing to leave and generally being belligerent. Mr Farmer recorded the incident on his personal phone. After that incident Mr Farmer had concerns for his own physical safety, and his mental wellbeing as a result of Mr McKenzie's behaviour. He started seeking counselling for work related stress. After the interim interdict was put in place the defender refrained from entering the distillery grounds except to pick up 'draff' which is a by-product of the distilling process and can be used for animal feed. There was an incident on 13 January 2022 when Mr McKenzie failed to engage with him regarding the collection of draff, so Mr Farmer made alternative arrangements for another to collect it. Mr McKenzie came on site uninvited whilst the draff was being collected and attempted to prevent it being taken, made accusations of theft towards the person taking it, and filmed him on his mobile phone. In addition to all of this there were many incidents

where the defender had repeatedly and needlessly stopped and questioned legitimate visitors to the distillery site, causing the visitors and the distillery concern. He gave specific examples of incidents like this taking place on 4 June, 6 June, 22 June, 1 August and 5 August 2022. These interactions often involved intimidating behaviour on the part of Mr McKenzie. Because of Mr McKenzie's repeated complaints about visitors coming to the site the distillery had taken steps to modify the signage at the gates; amended the distillery's website to reinforce the message that visitors were not permitted; the listing on Google was updated with clear messaging stating 'No visitors'; and distillery staff were instructed to answer any queries by telephone clearly indicating that visits to the site were prohibited. Mr Farmer requested permission from the defender via solicitors for some visits for cask owners and investors looking to inspect their investment. These requests were denied by the defender.

19. In cross- examination, Mr Farmer did not depart from his testimony. He clarified that Mr McKenzie's complaints were making life difficult for the distillery and that in Mr Farmer's opinion "he was making the distillery close to failure" by his actions. It was suggested to him that Mr McKenzie had been invited into the distillery office by Josh Fraser on 29 November 2021. Mr Farmer disagreed and clarified that he had specifically asked Mr McKenzie not to enter the building. Mr McKenzie was agitated and Mr McKenzie tried to close a door on him. Thereafter they were "fighting with the door" being pushed and pulled until Mr McKenzie entered. He confirmed that Mr McKenzie is "entitled to the draff", but on the occasion of the 13 January 2022 he had arranged for someone else to collect it because he had no indication from Mr McKenzie that he would collect it that day and he believed that Mr McKenzie had no intention of collecting it that day. The draff needed to be removed.

20. Mr Sandbach (known as Dickon) is the Finance Director of the pursuers. He was elected and subsequently re-appointed as Finance Director on 28 October 2019. He is a shareholder and bond holder in the distillery. When he became Director, there wasn't enough money to keep the distillery going. It was the nature of the business. Action had to be taken, however, to raise

money. The defender has raised many issues over the years with the distillery. In early 2021 they agreed to a mediation process to try and resolve all matters of dispute raised by the defender. Mr Sandbach was in the group dealing with this on behalf of the distillery. In October 2020 Mr Sandbach began to keep a personal diary about his dealings with the affairs of the distillery because he was concerned that the distillery might become insolvent in large part due to the defender's actions. He described the defender's actions towards the distillery as "a continual assault". In April 2019 the defender sent a letter to the distillery's auditors making a complaint that he was owed money. This delayed the issuing of the audit report which in turn delayed fundraising efforts and put the distillery in some difficulty. The defender raised numerous concerns complaining that the distillery was in breach of governance rules. He complained to the Plunkett Foundation (an entity that supports community enterprises) concerning the alleged breach by the distillery of its governing rules. On 20 January 2021 he received an email from the Office Manager Josh Fraser advising that the defender had refused to let him leave the distillery premises because of light snow. On 21 January 2021 mediation began. The mediation agreement was signed on 30 April 2021. On 14 May 2021 he instructed the distillery's solicitor to progress the signing of the Minute of Variation and drafting of the supplemental lease. The defender still refuses to implement the Minute of Variation. The dispute with Mr McKenzie presents a risk to the financial position of the business and is a risk that potential investors may see as relevant. During July 2021 the defender was in contact on numerous occasions complaining about unspecified problems which he said needed to be sorted out before completing the Minute of Variation and alleging that the distillery were in breach of the Mediation Agreement for various reasons. During August 2021 Mr McKenzie sent several emails complaining about a volunteer member of the Standards Committee, and again alleging that the distillery had breached the terms of the Mediation agreement. During September 2021 the defender sent an email complaining about a number of different issues and alleging the distillery were in breach of the Mediation agreement. In Mr Sandbach's opinion the defender

has failed to adhere to the terms of the Mediation agreement whilst continuously and falsely accusing the distillery of breaching same.

In cross examination, he was asked about the letter sent to the defender by Mr Norcom. The letter came as a complete surprise to him. He did not discuss matters with Mr Norcom before Mr Norcom sent the letter. Mr Sandbach confirmed that he considered Mr McKenzie to be a very difficult person to deal with.

21. Affidavit from James Cameron. This was untested evidence as Mr Cameron did not attend to give evidence in person. In the affidavit he spoke of knowing the defender well for many years. He said that the defender had “changed into a very unlikeable character, who seems to be set on trying to destroy the company that he has created”. Mr Cameron was a voluntary Director of the distillery and spoke of having to deal with a list of ongoing issues raised by the defender. In Mr Cameron’s opinion the defender is “doing everything he can to disrupt and continually cause problems at a great time and expense to the Distillery” This opinion is based on comments made to him by the defender. Mr Cameron collected draff from the distillery site on 13 January 2022. He was invited to do so by Mr Farmer. He did not engage with the defender, just took the draff and left. He was telephoned thereafter by the defender’s father asking for the return of the draff or the police would be called. If the draff was not discharged by the distillery it would be unable to operate efficiently. Mr Cameron used the draff to feed his cattle. The defender had video recorded him leaving the site that day and sent him and others a copy of the recording and saying that Mr Cameron was “stealing his rent”.

22. Video evidence was produced and shown as follows:

- a) CCTV footage of the defender coming on site during a delivery on 24 March 2021.
- b) CCTV footage showing the defender driving a quadbike across the distillery site on 30 July 2021.
- c) CCTV footage of the defender’s wife and dog exiting the motorhome which had been parked on site, on 8 October 2021.

- d) CCTV footage of the defender moving a vehicle to allow access, on 8 October 2021.
- e) CCTV footage of the defender's wife driving a quad bike across the distillery site on 8 October 2021.
- f) CCTV footage of the defender coming onto the distillery premises during a delivery on 8 October 2021.
- g) CCTV footage of the defender using a tractor and blocking a delivery vehicle at the entrance of the distillery yard on 13 October 2021.
- h) CCTV footage of the defender driving on site and walking in the distillery yard and looking into car windows on 17 November 2021.
- i) CCTV footage of the defender placing plastic bollards on the distillery yard on 17 November 2021.
- j) CCTV footage of the defender and his wife and dog walking across the distillery yard outside the plastic bollards on 18 November 2021 on more than one occasion.
- k) CCTV footage of the defender standing in the distillery yard in front of a departing car on 29 November 2021.
- l) Mobile phone footage of the defender in the distillery office on 29 November 2021.
- m) CCTV footage of the defender entering the distillery yard to interfere with the uplift of draff on 13 January 2022.

Witnesses for the Defender

23. Mr John McKenzie is the defender; the founder of the distillery; the owner of the farmland surrounding the distillery; the owner of the land on which the distillery was built; the landlord of the distillery premises; and a significant investor in the distillery. He lives with his wife and dog in a farmhouse he built adjacent to the distillery site. He operates the farm as a livestock farm and also works as a helicopter pilot. He is a member of the distillery Community Benefit Society. He was Managing Director of the distillery until he resigned in 2019. He created the

lease which he then signed in favour of the distillery dated 14 November 2016. Three acres of land are leased to the distillery for an annual rent of £1. A Minute of Variation is required to reduce the area of the subjects of lease but that has not been completed. Mr Mackenzie says: "The Minute of Variation remains outstanding due to the subsequent disagreement between myself and the distillery about the distillery's lack of transparency". He is aware of the terms of the lease which provide restrictions on the landlord accessing the subjects of the lease. He entered into mediation with the distillery to try and manage a number of disputes with them. He did not get any legal advice on the terms of the mediation agreement which is dated 1 May 2021. He has concerns about the distillery opening on dates that they shouldn't, in accordance with the mediation agreement. He denies ever threatening to actually blocking the access road to the distillery. He has installed the gates across the access road to ensure the farm's security. At night, for security reasons the Inner and Outer gates are closed. There is a padlock on the inner gate which the distillery have an access code for. He has concerns about road accidents on the approach road at the farm and what his liability for that might be. Mr McKenzie needs to move his cattle about his farmland often and this involves using the access road. He gives the distillery notice of this unless there is an emergency situation. He did not threaten to block access to the distillery on 30 November 2021. He denies the specific instances alleged in terms of Article 5 of condescendence; he has explanations for his actions on each occasion. He speaks to visitors on the access road sometimes when they speak to him. He parks his vehicles and farm machinery in the farm yard "where the visitors have to drive through" but does not block the access. There are occasions when he is using the access road at the same time as delivery drivers and there will be a temporary inconvenience. The distillery buildings as constructed are larger than planned and have exceeded the boundaries of the site. In his view, the distillery have failed to have the Minute of Variation dealt with and that has created difficulties for him and his farming business. He has been required to erect a large straw 'bund' adjacent to his house, which is used as a bale store and to protect him and his wife from the noise of the

distillery. The bund has been necessary because the distillery have “failed to complete the required landscaping which would have reduced noise levels.” On 13 March 2022 his father sent an email to the distillery setting out landscape works that “needed to be done.” He has to access some of his fields through parts of the distillery premises, as they currently are in terms of the lease. This is because, he says, the distillery have not “provided the Minute of Variation” to reduce the curtilage of the subjects of lease. The distillery was built 2 metres closed to his house than intended. He did not know about this. There are two smaller areas of ground which are part of the lease situated in the farm which have not been fenced off. They need to be removed from the subjects of lease by the Minute of Variation but this has not been progressed by the distillery. He is entitled to receiving the waste product called draff in terms of the lease. He needs to access the distillery site to collect it. He states that there is a “road access use restriction” in that “Highland Council planning state the operator is to seek to minimize use of the access road”. His farming interests would be restricted if he were unable to access parts of the site which are currently included in the subjects of lease. He denies ‘accosting’ distillery employees. He accepts that he does enter onto the distillery site, and has “always done that”. He is away from Scroggie Farm for work 50% of the time. He does have occasion to interact with distillery staff and on many occasions he has been invited to meetings with staff, and these meetings have always been cordial and polite. No one told him of any issues with this prior to the court action being raised. He does not accept that any of the directors resigned because of him. He, himself, resigned “specifically due to breaches of the distillery rules by Directors” which put his business and his home at risk. When the distillery suffered a major fire in 2019 the manager did not contact him about it. He “handed the business over” to Mr Tait in March 2019. When Mr Tait left the distillery he cut off the water to the farm and they were left without water for four days. The water supply is shared. He believes he has assisted the distillery over the years. He provides the distillery of notice of any intended visits to the subjects of lease in accordance with the provisions of the lease. When he goes there he has regards to Health and

Safety requirements; distillery staff do not. The spray painting incident occurred at the suggestion of his architect, who suggested he mark out "the correct boundary of the subjects of lease" with spray paint. The spray paint washed off, days after. On 24 March 2021 he only gave the delivery driver instructions on where to park after he was approached by him. He did not interrupt a meeting on site on 17 May 2021. He did not interrupt a telehandler operation at the distillery on 8 October 2021. He confirmed that he had placed moveable plastic bollards on the site in October 2021 in order to "create a safe space for my tractor (to access the top field to feed livestock) and dog walking". He stated: "I effectively put the bollards there at the request of the distillery manager". When he entered the distillery building on 17 May 2021, that was the first time he had done so, entering as an emergency. This was because the visitors were not permitted to be there in terms of the Mediation agreement. He did not stand in front of the chairman's car in the distillery yard on 29 November 2021. He merely spoke to the car occupants from the side of the car, calmly about the visitors coming to the gate. The occupants raised their voice at him and the chairman spun his wheels, almost driving over his foot. He has never expressed a desire for the distillery to "go bust". He refutes any claims of 'harassment'. He explained why he parked his motorhome on premises used by the distillery in October 2021. He described the area he parked it on to be "my own land". He let the distillery know and they raised no concerns. The motorhome was never an obstacle. The battery unfortunately went flat. He has never deliberately blocked the access for delivery vehicles. The distillery boundaries do not exist as asserted. He refers to moving around the property as "moving on our own land within supplemental lease areas". He gave notice to the distillery of his straw delivery on 13 October 2021. He said the bund area to which the straw was delivered "should not form part of the subjects of lease once the Minute of Variation has been entered into". Any blockages were brief and communicated to the distillery staff. No boundary breach occurred. He confirms contacting MacPhersons the haulage contractor but only to acquire a risk assessment. Planning permission was not granted for visitor access to the site because of

problems with the steep access road. He has only made reasonable requests for details of staff working hours because of late working by staff contrary to the working hours agreed in the mediation agreement. He denies making any derogatory comments to the distillery manager. He has expressed concerns that the distillery are not adhering to the terms of the mediation agreement. He has made a reasonable request for holiday schedules for staff because he was “attempting to create the peaceful coexistence of distillery and home life”. He has gone out of his way to assist the distillery manager. The distillery continually breaches the terms of the mediation agreement regarding visitor parking, but he did not peer into a visitor’s car as alleged on 16 November 2021. He was not aggressive to the distillery manager when placing his plastic bollards. He only entered the distillery premises on 18 November 2021 “using his emergency powers”, and that was because there was a tour by French holidaymakers taking place on that day. He did not prevent Josh Fraser from leaving the distillery site on 20 January 2021: he was simply concerned about the state of the road that day. He has made two reports to Police Scotland about the distillery: one complaint about the distillery moving CCTV cameras and pointing them at his house and garden; and one about a threatening letter he had received from David Norcom. He did report the distillery to Environmental Health about noise and to Planning control about lack of planning consent for a building but these were legitimate concerns. He did not refer to himself as “the nightmare neighbour next door”: he had a different explanation for what he said on that occasion. He feels he and his wife have been intimidated and harassed by the distillery. He is making a counterclaim seeking to prevent visitors to the site because the distillery have taken steps to actively encourage visitors to the site. He and his wife have experienced a lot of tourists turning up to the site to try and visit the distillery. Public access is not permitted. The distillery allows numerous visitors to site who are “not authorised”. He gave examples. There are excessive movements on the access road. Now there are in excess of 30 movements per day on a regular basis. He has Health and Safety concerns about this. The distillery has increased the volume of traffic to the site and are now regularly

using larger vehicles. This has impacted considerably on his enjoyment of his home. In 2022 there were a number of examples of unauthorised visitors attending. The distillery are continuing to invite, encourage and permit visitors to the distillery, and using the access road without asking his permission. They are behaving contrary to the court undertaking that they gave in the court action. In relation to collection of the draff, and the incident on 13 January 2022, he says: "I believe the distillery was trying to antagonise me into breaching the harassment interdict order. I think it was all a setup."

In cross-examination he confirmed he was responsible for the siting of the distillery building and responsible for managing its construction. The distillery was completed in July 2018 when he was still Managing Director. He confirmed that at that stage he thought it was compatible to run the farm and distillery on the same site, and he confirmed that his 'difficulties' with the distillery only arose after he resigned as Managing Director. He said he understood that he was an employee of the distillery on a "zero hours contract" and then changed his position and confirmed that he actually did not have a zero hours contract. He was asked whether he thought the lease entitled him to access the distillery site whenever he wanted and he said "yes". He said "My understanding is that I would always be able to access the land". On 29th November 2021 he entered the building because he said there was an emergency. He said he wouldn't do it again, now. He denied expressing a view that he has the right to stop production at the distillery. He denied that his email dated 26 November 2021 was an indication from him that the distillery should not open that day. There was at some point a realignment of the farm access road, which he confirmed he agreed to while he was Managing Director. He denied he was in the habit of stopping and questioning people using the access road to get to the distillery: he stated that mostly they stopped to speak to him. He confirmed there is area on the access road where he parks his farm vehicles, but denied that they ever block that road. He insisted that he had given the distillery due notice of his delivery of straw to the farm and the 'bund' on or around 13 October 2021. He denied video footage of that day showed him blocking the

access, but if he did it was only temporarily. He confirmed he has not progressed the completion of the Minute of Variation of the lease: the only explanation for that being “lack of transparency” of the distillery. He confirmed that the boundaries of the subjects of lease are therefore those set out in the original lease, and when asked whether he was observing those boundaries he said “Effectively, no”. He confirmed his garden is constructed on part of the leased premises. He confirmed he had constructed the ‘bund’ on part of the leased premises but stated that the distillery agreed to it in the Mediation agreement. He did not accept that there was no condition in the planning permission which required the distillery to carry out landscaping, but then said he did not disagree with Alison Tait the Planning expert, who said exactly that in her report. In order to access the fields of his farm he has to cross the distillery yard. He confirmed that he uses distillery premises to access his fields, and confirmed that he drives over the leased subjects to do so, because it is “the only way to feed my animals. It is the way I have done it for 20 years.” He accepts that the distillery building ended up being built 2 metres closer to his home than originally intended, but stated that this happened without his knowledge, despite him being project manager for the build. He confirmed that there was no planning condition which restricted the use of the access road. He accepted he spray painted within distillery premises in August 2020 on the advice of his architect, said that Mr Tait knew he was going to do it, but confirmed he had no permission to do so. He confirmed that there is a provision in the lease which allows him to attend Board meetings, but that he has no other role in the operation of the distillery. He confirmed the video evidence of him entering the site repeatedly on 8 October 2021. He was “just doing farming”. He confirmed he entered the site to become involved with a glass delivery on 24 March 2021, admitted he had no business interfering with it, but explained it was because the committee was not giving staff information and he was “trying to sort out problems”, and then made some references to the Mediation agreement. He denied interrupting a meeting on 17 May 2021, confirmed the visitors were entitled to be on the premises, said he was on site anyway at that time and that he might have

asked who they were because of COVID. He denied shouting or interrupting the meeting. He accepted he laid plastic bollards on the distillery yard in November 2021. He said that he was laying a path for his tractor to use and said: "That area is effectively my land". He denied blocking the yard as a result. He confirmed the distillery had not agreed to the laying of the bollards and that this was done on his own initiative. He said he was only trying to make it safe for his 70 year old father to drive the tractor there. He denied being antagonistic to the distillery in doing this. He accepted he entered the site on 18 November 2021 and spoke to the French visitors to the distillery. He said he was polite, but audio recorded the incident because he was "conscious of constant spying and recording". He didn't interrupt, he just wanted to speak to Matthew Farmer. He maintains there are tourists at the distillery "every day". He sees people arriving and acting suspiciously, coming in and wandering about. The lease and the mediation agreement do not allow tourists because there is "sub-standard access". He entered the site on 29 November 2021 because some Germans "nearly reversed into me" at the entrance off the public road. He agreed there was nothing that could be done to stop the public drawing up on the public road, but when it was suggested to him that there was nothing the distillery could do about this he talked about "scores of incidents", and difficulties with quad bikes and Artic lorries and stated that the "planning application said all vehicles would be small vehicles". When asked whether deliveries to the distillery had always been with articulated lorries, he firstly said "No", then changed his mind to "yes" when the Planning Advice report was shown to him. He then accepted the public road was safe and accepted that the distillery was not in breach of planning in relation to the access road. He accepted that the distillery cannot stop the general public coming along to see the distillery. He confirmed the video footage of incidents on 8 October 2021 including CCTV footage of the defender moving a vehicle to allow access, and CCTV footage of the defender coming onto the distillery premises during a delivery. He confirmed that he and his wife regularly drive quad bikes on distillery premises and stated "we have always driven on all areas". He was asked whether he wanted

to monitor movements of staff after mediation and he said he did. He disagreed it was none of his business how the staff went about their business on a daily basis. He only looked in the car on the distillery site on 16 November 2021 because he heard a dog barking in the car, so he came on site to investigate. He confirmed he reported the distillery to the police in relation to the CCTV because "they moved the cameras to point at our house". He reported them to the police when he received a letter from Mr Norcom, one of the Directors. The Police said at that point, the letter wasn't a crime. When he complained about the bottling on-site, in Summer 2019, it said was a safety issue and he expected the distillery to get retrospective planning consent. He denied ever saying that he wanted the distillery to go bankrupt. He confirmed that he has recently sought planning permission to make changes to the use of the farm but denied that that would have an adverse effect on the running of the distillery. He accepted that the email from his father on 13 March 2022 was accurate and sent on his behalf. It was suggested that he was planning to carry out landscaping work on the farmland that would block the access roads for articulated lorries, and in response he said "yes". He continues to believe that the distillery have taken steps to encourage people to come to the site. He has seen scores of people standing at the gate taking pictures. The distillery website was only changed to say "No Visitors" after months of solicitor's letters from him. He confirmed when he was a Director the distillery applied for permission for 4 buses a day to attend at the distillery and promises were made to investors that they could visit the distillery. He denied ever saying to Alison Tait that he held Farm Open Days for investors. That didn't happen. He disagrees that the distillery have only been allowing business visitors on site. He blames the distillery for not being able to collect draff from the site on 13 January 2022. He was waiting for his solicitor to confirm that he could go on site that day to get it. He stated that the draff had been given away up to half a dozen times prior to that incident. He then confirmed, to the contrary, that there had been no occasion prior to 13 January 2022 when he was not allowed to collect draff from site.

In re-examination, Mr McKenzie stated that “the distillery have never adhered to the lease” in relation to boundaries, visitors and the uplift of draff. When articulated lorries use the access road, nobody else can use it during that time as it takes a lorry 10 minutes to get up to the distillery from the gate. He confirmed that he parks on an area of the access road as shown on the lease map, just in front of the cow shed. He parks his tractor, quad bikes and grass cutter there. There is sufficient space for other vehicles to pass, although it is “very tight”. The fire at the distillery on 19 October 2019 was a “traumatic” event which affected his confidence in the distillery’s ability to manage itself. On 9 April 2019 unauthorised buses with visitors came on site.

24. Mr Kenneth McKenzie is the defender’s father. He is the retired Managing Director of the Dingwall Mart. He and his wife invested in the distillery at the start and he is a member of the distillery company. He volunteered to become a Director in 2021 but he was not elected. He had concerns about how that happened, particularly relating to how David Graham handled it. In August 2020 he was called by John to attend the farm because he was told that CCTV camera on John’s cowshed was to going be removed by the distillery and that was not allowed. He went to try and prevent this happening. Duncan Tait, the distillery manager was there. John McKenzie’s wife Margot was there. The situation became heated. Mr Tait lost his temper and was shouting. It was eventually agreed that the camera would remain. Mr Tait was angry and nasty and shouted about his son John, advising that he was leaving the distillery because of him. He was not overly concerned with Mr Tait’s behaviour. Mr McKenzie senior helps out on the farm when John is not there working away. He sees a lot of visitors coming up to the farm gates at the entrance. This happens every few days. The gates usually stop people from entering but there have been occasions when people come through the gates. He described the gates across the access road: five in total, which he describes as necessary. He has been approached by a number of people asking if there is to be a visitor centre for the distillery and he is in favour of this happening, situated in Dingwall. In January 202 he was phoned by John who told him

of a problem with the 'draff'. He went up to the distillery. He saw John entering the distillery premises to speak to James Cameron who was loading the draff into a trailer. John was calm and told Mr Cameron he could not take it. Mr Cameron took it away and he phoned Mr Cameron afterwards to ask him to return it so John could have it to feed his animals. As far as he knew John was entitled to the draff and the distillery gave it away to another. He is now involved in collecting the draff for John on 24 hours' notice.

In cross examination he stated that, as far as he was concerned the distillery did not have permission from his son's solicitor to remove the CCTV camera in August 2020. He confirmed that after the incident with the draff on 13 January 2022 his son asked him to contact Mr James Cameron, and he did.

25. Ms Margot Esplin is the wife of the defender. She resides in the farmhouse at Scroggie Farm with him. She is a teacher. She helps to run Scroggie Farm which is a working livestock farm with sheep and cattle. She has been a member of the distillery since 2017, by virtue of purchasing some shares as a personal investment. She helped to set up the distillery. She sees a lot of movements on the distillery access road every day: between 16 and 20 per day. Staff arrive and leave at various times. Staff leave during lunch breaks. Deliveries to the distillery happen nearly every day. Arctic lorry deliveries are a regular occurrence. She is not given any advance notice of distillery movements despite a "shared calendar" being set up. The distillery don't properly share information with them. Staff attend the distillery outwith permitted working hours. Any visitors to the distillery disturb her, her husband and their dog, because they live so close to the distillery. She has to plan her dog walking routine around the staff movements. The distillery have not kept to the terms of a mediation agreement entered into with her husband in relation to agreed periods of shutdown. There is excessive noise from the distillery which affects her. In August 2020 she attended at the cowshed after hearing raised voices. She saw Duncan Tait and Kenny McKenzie there. Duncan Tait was shouting and waving a piece of paper at Mr McKenzie. Mr Tait was acting very aggressively. She was very

frightened. She was concerned for Mr McKenzie senior. She was "not sure what Duncan Tait was capable of". James Cameron was also there. Mr Cameron was trying to remove a CCTV camera from the cow shed without having asked for authorisation to do so. Mr McKenzie was very calm and telling them they could not do this. Duncan Tait was walking away by the time she arrived. The camera remained in place. This confrontation made her feel very vulnerable. Mr Tait and Mr Cameron were intimidating towards her. It made her feel "unsafe". She said she feels "less secure about living in my home". There was fire at the distillery in 2019. When this happened no-one from the distillery contacted them about it. In August 2020 she and John "found out" that the distillery's CCTV camera was pointing into their home and garden. She said "John happened to walk past the camera monitor" and saw that it showed an image of their house. This, she said "adds to the feeling of being attacked and vulnerable". The Police were called. She said: "I don't know for how long the distillery had been watching me in my home on my own. I felt like I was being harassed by the distillery". She and John decided to put up a new fence for more privacy and in order to do so they "had to move the motorhome up to the land (which we own) beside the top end of the distillery". The battery of the motor home went dead. She drove to the motorhome by quad bike. The distillery said this was a Health and Safety issue and sent a video of her riding the quad to their planning consultant. She was shocked and distressed by this and sent a letter of complaint. She received an apology. Sharing images of her made her feel "unsafe". She and John received a "threatening letter" from David Norcom an investor in the distillery. She was really anxious and shocked about this. She felt it was "bullying". They complained to the distillery. She says the distillery were "meant to landscape the land in between the house and the distillery with an earth bund for privacy and to reduce noise levels". The noise of vehicles pulling into the distillery car park is quite loud because of the gravel. There are "quite a lot" of repeated fire alarms going off at night at the distillery. Once or twice a month. The distillery often leave lights on at night and other machinery. The effluent tank is right next to their house. The collection of effluent is really

loud. This is a nuisance for noise and privacy. Visitors are constantly parking outside the distillery building instead at the visitor's car park. It is constant irritation on a daily basis because of noise. She avoids speaking to distillery staff and board members and says "there is an oppressive feeling caused by the distillery's behaviour". In August 2019 a man entered her home looking for the distillery office. He thought the house was the office. It made her feel unsettled and unsafe. She doesn't believe that man mistook her home for the distillery. They accepted an apology from the distillery. She described it as "chilling". She has seen "other unauthorised visitors "walk up or drive up to the distillery. Duncan Tait and the girlfriend of an employee 'Craig' attended at the distillery on the day of the "interim court hearing". She often sees people at the main entrance gate, attempting to visit the distillery. There have been "many incidents" of people blocking the farm entrance and obstructing the main road by stopping to film and take photographs. In particular there was an incident on 29 July 2022, and on 1st August 2022. She stated that; "The distillery's behaviour is directly impacting my own quality of life and making me feel unsafe in my own home" There has been "spying that has gone on", and "filming by Mr Farmer" which has compounded her feeling that she is not safe in her home environment.

In cross-examination she confirmed that she crosses the distillery access road to access the farm fields. She confirms that she walks in the distillery yard but adjacent to the field, not 'across' it. She denied walking her dog in the distillery yard, but then confirmed that she was seen doing so in the CCTV footage on 18 November 2021. She did not do this by choice but "just because the cattle in the bottom field". She confirmed the CCTV of 8 October 2021 showing her exiting the motorhome parked on distillery premises. She explained "this was a one-off incident". She did not accept that her husband was responsible for the siting of the distillery building which she said was built "closer to her house than it needed to be". She did not accept that the distillery had rotated the fan on the cooling tower to try and reduce noise. Noise had not been reduced. She did not accept that the distillery had permission to remove CCTV from the cow

shed in August 2020. She confirmed that she and Mr McKenzie had set up their own CCTV cameras filming down the access road, and denied actively filming staff movements. Her understanding is that landscaping round the distillery site was not completed by the distillery as intended, and that understanding is based on what Mr McKenzie has told her. It would be better if there were less lorry movements on the access road and it was her understanding that collections could be done using smaller vehicles.

Submissions

26. Written submissions were lodged at my request.
27. Mr Davis for the pursuers asked me to grant decree as craved by the pursuers and dismiss the craves of the defender. He made able submissions on the relevant law in relation to Interdict and the relevant law in relation to Leases. I will not repeat his submissions here: they are lodged in process. In response to the defenders submissions he made the following comments. Mr McKenzie is entitled to complain, but he is not entitled to pursue illegitimate or inappropriate methods to pursue those complaints, as he has been doing. The orders sought are to stop him from doing so. He is not entitled to enter the distillery site and disrupt business, disrupt deliveries and berate employees with his complaints. The raising of this litigation was ultimately triggered by the defender's demand that the distillery close for business for a day in November 2021. The defender's evidence cannot be relied upon because he sees events entirely from his own perspective. The defenders witnesses to a large extent relied on what the defender had told them. The defender's position is that everything he has done in the past has been entirely reasonable and that everything he has done is consistent with his obligations in the lease, therefore he would continue to act in this way in the future. The case for the pursuer's reasonable apprehension relating to the orders sought has been made out and the orders are therefore needed. In respect of the orders sought by the defender the pursuer does not deny their obligations in respect of these matters. The pursuer's actions are entirely consistent with the proper application of the terms of the lease. There is no evidence that they have been acting

in breach of these obligations. Therefore these orders are not necessary. No part of this case involves the law of Nuisance, and the defender's submissions on this point are not relevant. That part of the pursuer's case which refers to the many complaints made by Mr McKenzie serves to highlight how 'strange' Mr McKenzie's position is. He complains about situations which he himself created. This may suggest that his complaints are not, in fact, genuine complaints.

28. Mr Kiddie for the defender asked me to dismiss the pursuer's craves and grant the defender's. The pursuer's witnesses exaggerated and have created a 'false narrative' because of their frustrations with the defender. He asserted that the defender has a right to complain about distillery operations. He made some submissions on the relevant law but strayed into the Law of Nuisance which was not relevant in this case. I will not repeat his submissions here: they are lodged in process. In response to the pursuer's written submissions he made a confusing submission about the defender's rights of access to the subjects of Lease as Landlord, suggesting that they may be wider than the specific access rights reserved to the landlord set out in terms of Schedule Part 2 of the Lease. I reject that submission. He submitted that the authorities cited by the pursuer's agent should be treated with 'caution' because of their age, and because they are fact specific. In this case Mr McKenzie has simply been asserting his rights which has been characterised by the pursuers as 'complaining'. Mr McKenzie's grievances on occasion were legitimate. The pursuer's craves if granted could potentially interfere with the defender's rights, particularly in relation to his use of the access road to the farm.

Assessment of witnesses

29. Mr Allan, Mr Graham, and Mr Sandbach are or were at some time in the relevant history of the case, directors of the distillery. Mostly they have given their time to the distillery voluntarily. They all presented well in giving their testimony. They were all clearly dedicated to the successful operation of the distillery. They gave straightforward factual evidence mostly.

Otherwise, they did not appear to exaggerate or embellish matters they were describing, despite there appearing to be being a difficult and frustrating relationship with Mr McKenzie. Their testimony was measured. They all presented as intelligent, professional persons doing their best to tell the truth. Their evidence was entirely consistent with each other's and consistent with the other evidence in the case. For these reasons I found them all to be credible and reliable witnesses.

30. Mr Tait was the former Distillery Manager. He gave his evidence in a straightforward way. He appeared a little reluctant to be giving evidence and I sensed his evidence to be understated, but it was clear and focused. I found him to be a credible and reliable witness.

31. Mr Farmer, the current Distillery Manager, spent a long time in the witness box. He was pleasant and calm and measured when giving his testimony, despite the difficulties he was describing. His evidence was plainly given, without hyperbole and indeed at times I felt that it was understated. His evidence was completely consistent with the other evidence in the case. I was content that he was telling the truth on all matters. He was credible and reliable.

32. Mr Mackenzie when giving his testimony was somewhat erratic. He talked excessively; often hadn't listened to what had been asked of him; used certain language repetitively and almost robotically; and rambled off topic and onto topics that he obviously felt were important. He had an inability or unwillingness to focus on the questions being asked of him. He often told untruths, as measured against the objective and agreed evidence before the court. He would deny matters that were objectively factually correct. An example of this is his testimony about his perception of planning authority decisions regarding the distillery, as opposed to the actual facts as set out in the planning consultant's report. He gave testimony contrary to what we had already seen in the video evidence shown to the court. There also were significant conflicts within his own testimony: he would say one thing on one occasion and then say the opposite on another. My overall impression was that he was trying to control the narrative as he saw it. How he saw things did not often match up to the objective facts and often was not relevant to

the issue in hand. At times the testimony he gave was bizarre, and sometimes the phrases he used when answering questions were incomprehensible. For all these reasons I did not find his evidence to be credible and reliable.

33. Ms Esplin, the wife of Mrs Mackenzie was very articulate, however I found her oral testimony to be performative, and hyperbolic in places. Her affidavit was peppered with phrases about her feelings e.g. "feeling unsafe" and "being attacked". These descriptions of her feeling 'unsafe' as a result of what she called "the distillery's behaviour", were not consistent with the other evidence. There was plenty of evidence (including video evidence) of Ms Esplin regularly walking casually through the distillery premises and freely driving through the premises. Her testimony about the distillery allegedly breaching the terms of the mediation agreement had obviously been informed by what her husband had told her, and bore no relation to the factual position of what had actually been agreed. She showed no recognition that there were restrictions on her and her husband in relation to the distillery's leased premises. She, along with her husband, had repeatedly entered the subjects of lease at will. She referred to some of the subjects of lease as land "which we own", which is correct, but there was no recognition of the restriction of that ownership as a consequence of the lease. My overall assessment was that Ms Esplin's evidence was crafted to support her husband's position and was aimed at painting the distillery operators in the worst possible light at all times, while the factual evidence did not support her position that the distillery operations affected her feelings in the way she described. Her evidence was incredible for these reasons.
34. Mr McKenzie senior gave his evidence in a straightforward manner but he was obviously and understandably partisan towards his son, the defender. His view of most matters had been informed by his son. For these reasons I did not find his evidence to be reliable.

Decision

35. Where there were conflicts in the evidence of witnesses for the opposing sides, I preferred the evidence of the pursuer's witnesses for the reasons I have stated.
36. There is a legal relationship between the pursuer and defender relating to the subjects of the lease. That relationship is regulated by the lease. The parties' rights in relation to the land which forms the subjects of the lease and the access road thereto are governed by the lease. The terms of the lease are clear. In terms of the lease the pursuers have a right of access over the shared access road. The defender therefore has no right to block or impede the access road. In terms of the lease the defender has no right to enter the subject of lease except in certain restricted circumstances.
37. It appeared that either Mr McKenzie did not understand, or did not want to understand, the legal relationship between him as the landlord and the pursuer as the tenant. This is the crux of the case. Mr McKenzie has refused to accept that there are obligations and restrictions on him as the landlord of the pursuer. The land that he leased to the pursuers is no longer his to do with as he pleases. He does not recognise that, by his own admission. He has patently breached the terms of the lease by repeatedly entering the subjects of lease at will, without good reason. He has repeatedly interfered with the pursuer's rights in relation to access over the shared access road.
38. The history of the interactions between Mr McKenzie and the distillery since he ceased his role as Managing Director reveals a sour relationship. Mr McKenzie has made repeated complaints to and about the distillery which have been mostly unfounded. Mr McKenzie has been difficult with, and rude, belligerent and threatening to, the officers and staff of the distillery. He has used the fact that there is a shared access road as a way to cause disruption to the business. He has been abusive and threatening to the staff, for no good reason. He has repeatedly entered the subjects of lease without just cause. His intention in doing so appears to be to cause as much disruption as possible to the pursuer's business. My overall impression of the pursuers is that

they have tried everything to appease Mr McKenzie over the years, possibly because they originally had a level of respect for him as the founder of the distillery. But it is clear that everything the pursuers have done to try and appease Mr McKenzie over the years has failed, mainly because Mr McKenzie appears to have had no interest in resolving his manufactured disputes with them.

39. There is ample evidence from which to conclude that Mr McKenzie has in the past blocked the access road and has repeatedly impeded those using the access road legitimately to gain access to the distillery premises. Until the action was raised and interim orders and undertakings put in place this was happening regularly. There is also evidence of the defender threatening to block the access road on occasions, mainly to try and force the distillery to accede to his demands, which in my view were mostly unreasonable. In Mr McKenzie's own testimony at Proof he asserted his belief that he was entitled to act the way he had in the past, and that he remained entitled to do so. In these circumstances a reasonable apprehension by the pursuers that he would behave in this way again, in the future, is well founded. For these reasons the granting of Interdict in terms of the pursuers' crave one is necessary.

40. There was also ample evidence about Mr McKenzie repeatedly accessing the distillery premises in breach of the terms of the Lease agreement. He has repeatedly violated the pursuer's rights of exclusive possession, in terms of the lease. Essentially Mr McKenzie entered the distillery premises whenever he wanted to do so. Sometimes he would claim it was for 'emergency purposes', when patently it was not. Most times he would enter without any explanation. There was no evidence that he had ever abided by the terms of the lease when entering the distillery premises. There was no evidence that he has ever given the distillery due notice of his intended entry, and no evidence that he had ever entered there for the purposes prescribed by the Lease. On many of the occasions shown in evidence of him accessing the subjects, his presence appeared to be designed to, and did cause, disruption to the pursuer's business; it caused alarm and annoyance to the staff and legitimate visitors; and his attendances resulted in the pursuer's

staff expending unnecessary time, energy and resources dealing with him. Mr McKenzie's own testimony showed that he does not recognise or understand the terms of his legal relationship with the pursuer: he believes he was entitled to repeatedly enter the distillery premises in the past without notice; he believes that he is still entitled to do so; he believes that his reasons for entering in the past were entirely valid; and he does not recognise that his presence on these occasions may have caused disruption to the business or concern by the staff. In these circumstances a reasonable apprehension by the pursuers that he would behave in this way again, in the future, is well-founded. An interdict in terms of the pursuer's crave two is necessary.

41. There is also ample evidence, which I accept entirely, that on many occasions Mr McKenzie has been abusive, aggressive, and threatening towards members of the pursuer's staff. This is corroborated by the video evidence. In CCTV footage, where there is no sound, Mr McKenzie can be seen to be physically highly agitated, and this corroborates Mr Farmer's accounts of Mr McKenzie's behaviour on these occasions. The mobile phone footage has sound, and Mr McKenzie can be seen and heard behaving in exactly the way witnesses have described him acting on numerous occasions prior to that. There is ample evidence of the effect of his behaviour on members of staff. I accept that evidence. His behaviour towards staff has been oppressive and unacceptable. His intentions are not relevant. His conduct is objectively likely to cause alarm or distress to those members of staff. "Aggressive", "ranting", "insulting", "shouting", "heated", "hostile", "rude" and "intimidating" are some of the words used by those members of staff who gave evidence to describe Mr McKenzie's behaviour towards them and other members of staff. These descriptions are consistent with the video evidence produced. This has been a course of conduct on behalf of Mr McKenzie, perpetrated over a number of years since he resigned as Managing Director in 2019, starting with Duncan Tait and Craig MacRitchie and continuing with Josh Fraser and most particularly Matthew Farmer. Other members of staff have also felt intimidated and concerned by Mr McKenzie's actions in

watching and criticising their times of attendance on distillery premises and their movements to and from work. These actions by Mr McKenzie do amount to harassment. There is also ample evidence of Mr McKenzie being rude and confrontational with legitimate visitors to the site. His behaviour has caused concern to visitors to the distillery on many occasions. Again, in his testimony, Mr McKenzie did not admit that any of his behaviour towards the pursuer's staff or visitors was at any time unacceptable, he tried to justify all of his actions, and refused to accept that anything he had done might have caused difficulty or concern to the staff, or to the visitors. In those circumstances a reasonable apprehension by the pursuers that he would continue in this type of behaviour is well founded, and an interdict in terms of pursuer's crave three is necessary.

42. The defender, in his counterclaim, seeks interdict which would restrict the pursuers from having visitors on site. Firstly: the extent of the interdict craved is too wide and vague. Secondly: there is no evidence that the pursuers have done the things complained of in support of this crave. I have made no findings that the pursuers have breached the terms of their planning permission, the lease, or any agreement with Mr McKenzie in relation to the matter of visitors coming to the distillery. There was no persuasive evidence for me to find that the pursuers have violated the terms of the mediation agreement between the parties in so far as it related to the agreements about visitors to the site. There was no persuasive evidence that the pursuer's had violated the terms of the mediation agreement in any way. There is plenty of evidence that Mr McKenzie has violated the terms of the mediation agreement, in contrast. In all of these circumstances the defender has not established that the pursuers have committed any "wrong" that requires to be addressed by the order of interdict in terms of the defender's crave one. There having been no "wrong" committed by the pursuers in the past in this regard, there can be no reasonable apprehension that they would do so in the future. Interdict is not necessary. The evidence in fact points the other way. The pursuers have done everything they can to dissuade unnecessary visitors to the site, possibly to their own detriment. They have

been extremely cautious in this regard mainly for fear of 'upsetting' the defender with all the disruption that has brought them in the past. I therefore refuse to grant interdict as first craved by the defender.

43. In respect of the defender's second crave for interdict. This is premised on one occasion on 13 January 2022 when the defender did not engage with the pursuers in relation to the collection of draff. The pursuers did not refuse to give the draff to him: they made every effort to try and get him to come and collect it on that occasion, but he did not engage with them and make the appropriate arrangements to do so. A practical arrangement for the collection of the draff has been put in place now and the pursuers have consistently honoured that. Again, no wrong was committed by the pursuers on this single occasion and no reasonable apprehension that the pursuers may do what is being complained of in the future has been made out. I therefore refuse interdict as second craved by the defender.

44. I further discharge the pursuers from the obligations incumbent on them in terms of the undertakings given to the court in relation to the arrangements for draff collection and the entry of visitors to the site. The terms of the lease and the mediation agreement are sufficient to regulate these matters going forward. The pursuers have never breached the terms of the lease nor the mediation agreement in either regard.

45. On the basis that expenses usually follow success, and I was not moved by any party to depart from that convention, I make an award of expenses against the defender, and in the pursuer's favour. The pursuers have been wholly successful in this action.

