

# ... to your legal & business advice Addendum

Issue ONE Summer 2011

The private client magazine from Gillespie MacAndrew

## *Wildlife crimes*

New Bill could  
render landowner  
employers liable

### Plus:

Economic outlook  
The beauty of thematics  
Where there's a will  
Gold diggers  
Succession planning  
Paternity leave  
Wind, wave or hydro?  
Boom to crash



**GILLESPIE MACANDREW**  
LAW · PROPERTY · FINANCE

**Beauty of thematics**

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**Employment spotlight**

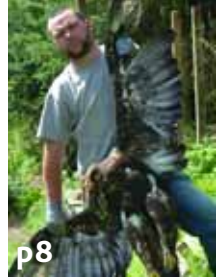
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# Addendum

To your legal and business advice

By **Simon Leslie**,  
Chairman,  
Gillespie Macandrew

Welcome to Addendum, the first issue of our newsletter for private clients. In this publication I wanted to ensure that we reflected the breadth and depth of advice and knowledge we have at Gillespie Macandrew – as well as creating an informative and thought-provoking but casual read. With features and opinions on the economy, investment prospects, personal and family affairs, land, property, business and renewable energy, I have tried to keep firmly focused on the issues many of you are facing today, with one eye fixed on the implications for tomorrow.

I'm delighted to welcome three new partners to the firm over the past few months who have joined our Land and Rural Business, Commercial Property and Corporate/Charity teams. I'm also delighted that we are supporting the inaugural International Horse Trials which are taking place at Hopetoun House in July. It promises to become one of the fixtures on the Scottish sporting calendar, not to mention a great day out. I very much look forward to seeing many of you there. Do please put the date into your diary. It promises to be great fun.

I do hope you enjoy this first edition and please do let me know what you think by sending me a note at the address below. ■

simon.leslie@gillespiemacandrew.co.uk

## Market outlook

Thoughts on the prospects for the UK and global economy, plus



By **Scott Ballantyne**,  
Investment Manager,  
Gillespie Macandrew

### Global Investment Strategy

An unremarkable rise of 8.9 points in the FTSE 100 Index for the first quarter of 2011 masks the gyrations witnessed in the market during March, as investors have had to contend with several geo-political tensions and the devastation caused by Mother Nature in New Zealand, Australia and then Japan on 11th March.

In the UK, the Monetary Policy Committee remains acutely aware of the potential damage of interest rate rises on the consumer, especially ahead of the looming job cuts in the public sector. However inflation rates are continually coming in above the Government's target, and in February we saw a 4.4% increase in the Consumer Prices Index. The Retail Prices Index, which takes account of housing costs, also rose to a 20 year high of 5.5%, up from 5.1%. Accordingly, we are preparing for the inevitability of more expensive money.

In general Economists are forecasting that the Committee will raise interest rates earlier than expected, but it does not look likely that Andrew Sentence, as the outspoken Hawk on rates, will approve an increase prior to his term on the Committee ending on 1st June.

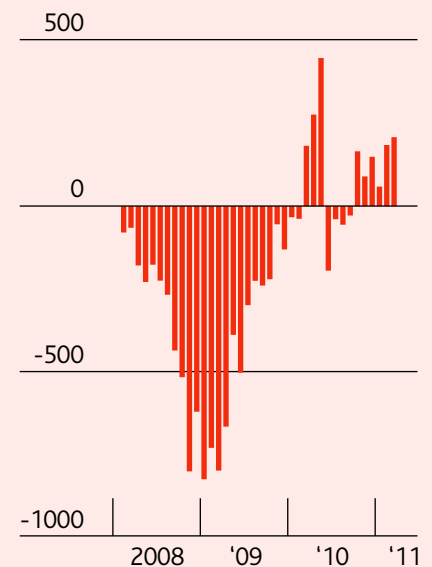
In the US, recent jobs data has been well received by the markets and the unemployment rate is now falling, suggesting that the economy is recovering. The private sector could still take up the slack in the labour market although the housing market continues to struggle with falling prices still evident. Coupled with this, Global Merger and Acquisition activity was 26% higher in Q1 with a staggering £350bn worth of activity, suggesting company Executives are gaining confidence in the recovery and are once more willing to take on bank loans after a frantic period of repairing balance sheets following the financial crisis – will lessons ever be learned?

Investors have now become familiar with the

acronyms, BRIC (Brazil, Russia, India and China), MENA (Middle East and North Africa) and PIIGS (Portugal, Italy, Ireland, Greece and Spain) all countries which have been dominating headlines and it seems causing concern. The unrest witnessed first in Egypt and then spreading to Yemen, Syria and Libya has been caused by one of our previously highlighted global trends; that is food price inflation. In China, the authorities have increased interest rates for the fourth time in five months, and although headline inflation is around five percent, food inflation is closer to seven percent and this has a disproportionate impact on the less wealthy population. We believe food costs will continue to be a major issue for many economies for the years ahead. In Europe, Portugal has resisted calls to accept an International bail-out, however, with the Government having now resigned following the defeat of its fiscal reform proposals and rating

### US employment:

Change in nonfarm payrolls  
from previous month (000s)



Source: Thomson Reuters Datastream

## Succession planning



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## a) Wind b) Wave or c) Hydro?



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## Horse Trials



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## A passion for fishing



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## short and medium term outlook for investments

agencies continuing to downgrade the country's sovereign debt, yields in the country have now risen to Euro-era highs of around ten percent and a bail-out seems imminent.

Teutonic plate movement has also brought unexpected concerns to the markets following the Earthquake in Japan on 11th March, and we now have the subsequent tsunami and nuclear clear-up which will undoubtedly harm the country's growth prospects. With Japan accounting for around 9% of Global output, disruptions to the country's production, (as a result of continued power outages), will impact on international supply chains and does not bode well for the Global recovery over the short term.

## Commodities

Owing to the unrest in the MENA regions, the price of oil has spiked to around \$120, further stoking our inflationary predictions. The recent

flooding in Queensland has resulted in reduced supplies of thermal coal to Asia, and UK listed Xstrata has signed a record contract at \$130 a tonne, some 32% higher than last year's prices. Meanwhile in the precious metals markets, silver has recently been trading at a new high and gold continues to trade above \$1400.

## Currencies

The strength of the Japanese Yen in the days following the earthquake was driven by speculators who were soon chased from the markets by the concerted efforts from the Bank of Japan and other central banks who intervened to the tune of ¥700billion. The Euro has been buoyed by heavy hints from Jean-Claude Trichet, the European Central Bank president, that interest rates are likely to rise in the short term, whereas, the Dollar has remained relatively weak as investors cannot see interest rates moving up in the US until the fourth quarter, at the earliest.

## Bonds

Although widely expected to be net sellers of foreign bonds to repatriate assets, recent data has not shown the Japanese as having been particularly active in the bond markets. Insurers in the country, who will have to pay out to cover losses, are likely to use their vast reserves and holdings in Japanese Government bonds for payments, rather than sell their higher yielding foreign holdings.

## Conclusion

Whilst geo-political tensions remain, markets are unlikely to make significant progress and any further shocks could well harm investor sentiment which has so far proved fairly resilient this year. As we enter the first quarter reporting season, analysts will be looking for reassurance that the global economic recovery continues. Believe it or not we remain positive on our 2011 outlook whilst mindful of potential pitfalls and commitment to our long term core investment themes should continue to prove rewarding. ■  
scott.ballantyne@gillespiemacandrew.co.uk

## Taxing times

## Budget review - at a glance

Just in case you missed the press coverage following the Chancellor's Budget and publication of the Finance Bill 2011, we list here a summary of the headline changes. And you can download our up to date UK Personal and Business tax rate card from [www.gillespiemacandrew.co.uk](http://www.gillespiemacandrew.co.uk).

- **IHT** – from 6th April 2012 a 10% reduction in IHT if 10% of an estate is left to charity. This saves £23,000 in IHT on a £1m estate with one Nil rate band.
- **CGT** – Entrepreneurs Relief – increased to £10m from £5M; annual allowance for 2011/12 will be £10,600.
- **Income Tax** – personal allowance increased to £8,105 in 2012. It will be £7,475 for 2011/12. EIS relief increased to 30% and limits may be increased following consultation. Income Tax and National Insurance are to be merged at some point in the future.
- **Non Dom** charge increased to £50,000 if someone has been in the UK for 12 years or more.
- **Corporation Tax** reduced by 2% in April 2011, and by 1% a year to 2015 so reducing the top rate of CT to 23%. Bank Levy increased so banks do not benefit from lower CT rates. There were also several references to steps to reduce tax evasion/avoidance of which we expect to hear more over the next period.
- **Air Passenger Duty** – the planned increase has been withdrawn.
- **Fuel Duty** – reduced by 1p per litre
- Mileage Rate increased from 40p per mile to 45p from 6/4/11 on the first 10,000 miles.
- **Gift Aid Scheme** amended and possibly made easier for Charities to reclaim.
- **SDLT** – a new relief is being introduced with effect from Royal Assent which reduces the SDLT on linked transactions of multiple residential properties by charging SDLT on the mean value of all transactions. More info is awaited but it looks as if an SDLT return will be needed for each property, with the purchase price being the mean value. This could lead to an SDLT reduction but will have to be considered in each set of transactions. Claiming the relief is optional and you seek should advice. ■

## For more economic information:



For monthly economic outlook, commentary and advice on how to maximise the return on your investments in volatile markets visit

[www.gillespiemacandrew.co.uk](http://www.gillespiemacandrew.co.uk).

On 1 June 2011, at our offices in Atholl Crescent, Charles Fortheringham, Head of Investment Management, Scott Ballantyne, Investment Manager and John McArthur, Tax Partner will take a look at the impacts of the Chancellor's Budget and Finance Bill 2011 on investments – and your taxable allowances. If you would like to attend please contact Kate Mayor at [kate.mayor@gillespiemacandrew.co.uk](mailto:kate.mayor@gillespiemacandrew.co.uk)



# The beauty of thematic

When investing, whether by design or by default, an individual stock or fund selected will by definition follow a theme of some sort or other



By **Charles Fortheringham**,  
Head of Investment Management,  
Gillespie Macandrew

What we at Gillespie Macandrew are interested in is spotting longer term thematic or secular trends which will deliver consistent investment returns for our clients. Conversely, it is equally important to avoid if possible, late entry in to an established trend some of which have led to much disappointment (the technology bubble back in 2000 or the property bubble of 2007).

As discretionary fund managers we are well known for our thematic approach to managing money as we build our portfolio structures around basic investment themes such as energy, agriculture, water, and infrastructure. However it is not as simple as it sounds and we have to work hard to ascertain suitable entry and exit points.

Good theme spotters also tend to be contrarian investors who are able to maximise divergences in market pricing in order to capture the rewards of being early into an economic cycle. Unfortunately the majority of investment managers do not want to risk being too early in a cycle as they risk underperforming their benchmarks. Ideally a staggered approach is better when establishing a new portfolio but if the investment is a conviction trade for a one to two year hold then timing of the transaction is not too critical. The aim is to allocate money across several of our favoured themes which we hope offer good growth potential and importantly do not require too much fine tuning. Once a trend becomes established, the next

step is to look down the risk curve to find lagging participants. For example, we may consider silver instead of gold, gas instead of oil, Japan instead of Korea, financial shares instead of property, software designers instead of hardware manufacturers, nuclear technology instead of alternative power and small oil and gas exploration companies instead of the large

multinationals. Once this has taken place it is a warning for us that a cycle is becoming fairly mature and better opportunities might be found elsewhere.

We firmly believe global equity markets have much to offer the longer term investor as the globalisation and urbanisation of our world continues. The recent financial crisis is a strong wake up call to address the spending imbalances in both the US and Europe and whilst this will take some time to sort out there are still great growth stories in the international earners.

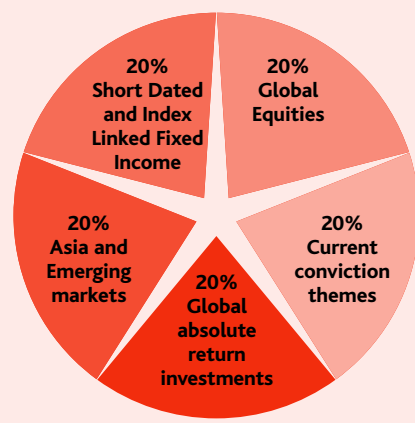
However, as we know the capital outflows to Asia continue unabated and it is here that investors will stay for several more years as we see business securitisation and huge amounts invested into new power and infrastructure businesses etc. Similarly there are still rising GDP numbers in the emerging and frontier markets which are indicating that the future is still bright for those markets. But if we use our contrarian approach, perhaps we should not forget North America as it is after all the home of many future technologies and fashions. As one Scottish Fund Manager told us "you buy North America if you want to buy a bit of the future"

Finally, a warning for gilt and investment grade bond investors who have enjoyed a secular bull market since the autumn of 1994. Interest rates are heading higher. In the meantime the markets are forever testing best laid plans so one activity for us that never changes is information analysis and for that we rely on technology, one of our current favourite sectors. ■

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## Gillespie Macandrew Asset Allocation:

- 20% Short Dated and Index Linked Fixed Income (including international corporate bonds and BBB Corporate Bonds).
- 20% Global Equities (Large Brand Owners with dividend ability).
- 20% Asia and Emerging markets (including frontier economies).
- 20% Global absolute return investments.
- 20% Current conviction themes.



# Fathers, senior employees and health screening

Employed fathers will be entitled to take up to 6 months paternity leave, with such leave starting not earlier than 20 weeks after the child is born.

A timely aide memoir on some of the recent and forthcoming changes to employment law – forewarned is forearmed



By John Norrie,  
Associate, Employment Law,  
Gillespie Macandrew

## Right of Fathers to take 6 months Paternity Leave

For the first time, working couples have greater flexibility to choose who goes to work and who stays at home to look after a new baby. Previously, fathers were entitled to only 2 weeks paternity leave, while the mother can usually take up to 12 months maternity leave. For babies born on or after 3 April 2011, however, employed fathers will be entitled to take up to 6 months paternity leave, with such leave starting not earlier than 20 weeks after the child is born.

As a result, instead of a working mother taking 12 months leave, the care of a new child can be shared. For example, the mother may take the first six months and return to work, leaving the father to take the second six months. If an employed father decides to take such extended paternity leave his job will usually have to be kept open for him and he must not be subjected to any detrimental treatment (for example, losing out on a promotion) as a result of exercising his right.

Whilst this introduces flexibility for families, it does introduce cost and planning implications for employers who will have to arrange suitable temporary cover.

## Employment Seminar

### Equality and Pension Changes: Forward Planning for Your Business

A briefing on the new legal and accounting requirements in relation to pensions, equality and employment legislation.

19th May 2011, 5.00pm- 6.30pm

Gillespie Macandrew offices, 5 Atholl Crescent, Edinburgh, EH3 8EJ. If you would like to attend please contact Kate Mayor at [kate.mayor@gillespiemacandrew.co.uk](mailto:kate.mayor@gillespiemacandrew.co.uk)



## Abolition of the Default Retirement Age (DRA)

Employers previously enjoyed the right to retire any employee aged 65 or over, provided they gave at least 6 months prior notice and provided they consider any request by that employee to stay on. This was referred to as the default retirement age (DRA).

Given the UK's changing demographic and the increasing need or desire for many to work beyond traditional retirement ages, the coalition government have enacted legislation to abolish the DRA. The result is that employers have two options in relation to retirement. Firstly, they can simply refrain from using any particular retirement age and allow employees to remain on for as long as they want or need to, provided they remain capable of doing their job.

Alternatively, notwithstanding the abolition of the DRA it will still be possible for employers to operate their own compulsory retirement age under the contract of employment. However, this can only be used if it can be objectively justified as being a proportionate means of achieving a legitimate aim. Legitimate aims include, for example, economic factors such as the need for efficiency or other factors such as health, welfare and safety. To pass the proportionality element of the test the discriminatory effect must be

significantly outweighed by the importance and benefits of the aim. If an employer adopts a particular retirement age, and an affected employee takes issue with it, the question of whether it is objectively justified will ultimately be a question to be determined before the employment tribunals. Any employers looking to adopt a compulsory retirement age should therefore ensure they have sound reasons before doing so and that the reasons can be backed up with evidence.

## Prohibition on Pre-Employment Health Questionnaires

Following the introduction of the Equalities Act 2010, from 1 October 2010 there has been a general prohibition on employers asking pre-employment health questions. The only questions permitted are those which are truly necessary to establish whether an applicant can (or will be able to with reasonable adjustments) undertake a particular function which is intrinsic to the job. Any other health-related questions must wait until after the person has been offered the job. Members should ensure that any questions asked at interview, or any questionnaires issued to job applicants, are suitably restricted to avoid falling foul of the new legislation. ■

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# Where there's a Will and where there's not

Making a Will should be a reasonably straightforward procedure but there are pitfalls and alternatives which should be compared and contrasted when considering how best to commit your intentions to writing



By **Gordon Cairns**,  
Private Client Partner,  
Gillespie Macandrew

I have lost count over my 30 years of practise as a Solicitor to the number of times I have been asked "should I make a Will"?

My answer, not surprisingly, has always been a resounding "yes you should". Throughout our lives we accumulate assets and possessions of worth and it is important that we put down in writing what we wish to happen to these assets in the event of our premature deaths. We have all heard stories from friends and colleagues of arguments and fallings out over the manner in which a deceased's estate has been distributed as a result of no Will having been put in place – see case study examples.

To be fair, there may be arguments even when a Will is made but at least in that scenario the wishes of the deceased have been made known and are very clear if the Will has been drafted properly.

I would, of course, always encourage the instructing of a solicitor to put your wishes in writing after meeting with you to discuss the various options available and taking into account your circumstances. On completion of the Will a copy is given to you and a letter will be sent to you on a five yearly basis encouraging you to consider updating the terms of your Will taking into account your current circumstances at the time.

It is false economy, in my view, to try to save a few hundred pounds by trying to complete pre-printed "fill in the gaps" forms that can be purchased from the shelves of well known stationers or indeed copied from the websites of solicitors, accountants etc. Inaccurate completion of these forms can have expensive consequences.

There is so much to think about when making a Will, especially as we are now living longer as a norm and wishing to preserve our estates for the next generation whilst continuing to enjoy, as best we can, the standard of living we have reasonably come to expect during our working lives.

As we go through life our situations change as do our personal relationships and commitments and it is very important that we ensure as best we can that we update our wishes to reflect those circumstances. For example, a house may have been purchased in joint names of a partner, spouse or friend, you may have got married, become a parent or benefitted from an inheritance. There are so many triggers during

our lives which should make us reflect on making a Will or indeed altering an existing one.

There are the usual reasons why you need not do so – "I am too young" or "I have nothing much to leave" and possibly concern over expense. There may be tax to consider or issues as a result of impaired mental capacity of those

both making the Will and/or their beneficiaries.

A straightforward Will which nominates your executors and leaves your estate to your spouse or parents or children can cost as little as £150-200 plus VAT. There could be considerable additional expense incurred should a Will not be available on your death.

## Case studies

### Absence of a will led to large expense for the family

The first case involves a married man and the head of a very successful family business with a gross estate in excess of a seven figure sum. Because a Will had not been made, even in the simplest of terms, nominating executors and leaving his estate to his wife, additional expense, time, emotion and anxiety resulted.

An executor was required to be appointed through the Court system which, in itself, is reasonably straightforward but that executor required to take out what is known as a Bond of Caution which would not have been necessary had a Will been prepared. The single insurance premium was originally quoted at some £25,000. We appealed to the Sheriff Court and had this reduced to approximately £10,000. The confirmation of the appointment of the executors to the estate was delayed as a result and caused significant practical day to day difficulties in the running of the family business causing distress to the deceased's family.

A simple Will leaving the deceased's estate to his spouse could have been arranged at a fraction of the cost of the insurance premium cost.

### Ensure that your intentions are carried through after your death

A relatively young sole trader died in a tragic accident leaving behind a son by a previous relationship his parents and a fiancée of only a few months. His son was in his early years at secondary school and clearly the intention of the deceased was to leave everything for the benefit of his son.

Had he not made a Will at the time of his son's birth the law now allows for a possible claim to be made by the deceased's current partner.

It is fair to say that no matter what a parent states as his or her intentions in a Will there is the potential for children of that deceased parent to claim a proportion of their moveable estate (anything other than bricks and mortar). It is also vitally important that parents of young children should state their preference in a simple



Will as to who they would wish to look after the children. Whilst that preference is not legally binding it must be of benefit to the remaining larger family be they grandparents or siblings in considering what is in the best interest of the children of the deceased.

### Be sure to consider the tax implications

A couple had a Will drawn up as they each wanted to leave their half of their house and half of the value of their investment portfolio to their children. All well and good but, unfortunately, they did not think to calculate the accurate market value of the house, which, at over £500,000 added to an investment portfolio of over £230,000, meant that the amount which the children would have received (£365,000) exceeded the current Nil Rate Band threshold of £325,000 for Inheritance Tax.

Thus, they were not just leaving their children valuable assets, they also left them a potential £16,000 IHT bill. It could have been done in a

A member of our team will gladly sit down with you for a 30 minute interview free of charge to discuss your own particular circumstances and the various options open to you. To arrange an appointment get in touch with me in the first instance. ■

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way that is more tax efficient which would have resulted in the children receiving the share of the house and portfolio but without the IHT liability initially and potentially no liability at all on the death of the survivor.

#### Don't forget to prepare a Power of Attorney (PoA)

As we mature together and you become "elderly clients" it is more important than ever that a Power of Attorney should be prepared stating who you would wish to look after your affairs were you unable or unwilling to do so yourself for whatever reason.

A Power of Attorney document can be executed and placed with your Will in the hope that it might never be used but which could be activated if required. The alternative might well be an application to the courts to appoint a guardian to manage your affairs which involves expense running into thousands of pounds. Be sure to put a PoA in place alongside your Will.



In October 2010, the Supreme Court, in an English case involving a French heiress and a German, acted to bring English law into line with Scots law.

## Time's up for gold diggers

London is no longer the divorce capital of the West.



By **John Stirling**,  
Family Law Partner,  
Gillespie Macandrew

People believe that the law is certain, fixed and immutable. That is not so. There are some issues on which diametrically opposed positions are morally defensible. Freedom of contract is one such and over a 200 year period it is possible to see the courts moving from one extreme view, that contracts properly entered into will always be honoured to the opposite; that if they turn out to be unfair they should be revised. This is particularly true when the contract concerned regulates a person's status, in this case a contract of marriage. Whilst often you see the moment when the pendulum changes direction, it is less easy to judge where the point lies on the arc of the swing. The Supreme Court's decision last October in *Radmacher v Granatino*, suggests that the current direction of travel is in favour of freedom of contract.

Formal marriage contracts have been with us for centuries. Until comparatively recently law gave complete control of a woman's finances (and her person) to her husband that being so the bride's family would set up a contract with the groom to ensure amongst other things that their daughter would have a guaranteed income and that her assets could not be squandered by her husband. Now that women are properly protected by marriage contracts, pre-nuptial agreements act to protect wealth rather than women. Specifically they protect the wealth of the wealthier of the two spouses, often in the context of disparity. It's often

said that the pre-nuptial proves the honourable intentions of the less well off partner.

However honourable the initial intention was, circumstances change. English law has had particular difficulty with the enforcement of pre-nuptial contracts after the birth of a child. English courts have been more keen than any in Europe to overturn the arrangements made at the beginning of a marriage. The result was that London became the divorce capital of the west, at least for those married to persons wealthier than themselves.

The effect was that marriages that would normally have been governed by Scots or French or German law were being dealt with by the English courts simply by dint of the physical presence of the spouse disadvantaged by the pre-nuptial in England. That was considered to be a bad thing. Why? Because the richer of the spouses were universally advised to raise actions of divorce whilst the accusations and the sound of wheel spin in the drive was still ringing in their ears. Thus a protective action in a state that wouldn't interfere with a pre-nuptial action would be raised and many misunderstandings that might well have been recovered, given time and grace, were converted into marriage killers. In October 2010, the Supreme Court, in an English case involving a French heiress and a German, acted to bring English law into line with Scots law.

England will now honour pre-nuptial agreements if they are properly set up even if children are involved, so long as it's clear that that was the intended. Divorce tourism to London is now at an end - at least for the time being. ■

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# Landowner employers: could you be liable for wildlife crimes?

After much debate the final terms of The Wildlife and Natural Environment (Scotland) Bill (WANE) was passed on 2 March 2011



By **Karen J Scholfield**,  
Associate,  
Gillespie Macandrew

The Bill is wide reaching and its intention is to introduce a range of measures which will update legislation protecting Scottish wildlife and ensure legislation which regulates and manages the natural environment. Specifically, the Bill regulates the killing of wild animals and, in particular, birds. One such measure introduced by the Bill in Section 20B was Vicarious Liability.

## What is vicarious liability?

The traditional example of vicarious liability is when one person may be liable for the acts of another person such as an employee or agent. The Bill introduces vicarious liability in respect of certain offences under the Wildlife and Countryside Act 1981.

In addition the Bill extends the traditional definition of vicarious liability to include a wider definition which is described as being an “anti-avoidance” measure. The extended definition includes the situation where a person – such as an employee or agent commits an offence whilst engaged in providing “relevant services” for another person. This is designed to prevent someone making their employees self-employed or setting up a company to sit between them and their previous employees in an attempt to remove themselves from liability. This would now be caught under the new provision.

“Relevant services” are where the employee or agent “manages or controls” the killing of wild birds, release of birds from captivity for the purpose of killing them, etc.

## Can I be liable?

If you fall within the definition of a person who appoints another person, either as your employee or simply acting on your behalf in the capacity of an agent, and that person commits an offence, then you too may be liable for their actions. In addition, there is a concern over the extent of the liability given the wide reaching “anti avoidance” measure that has been introduced by the Bill. An immediate question is raised as to whether liability may extend to landlords of sporting



PC Rafferty of Lothian and Borders Police holds up an illegally killed golden eagle. Found in August 2007, the bird was one half of the area's only breeding pair. Tests confirmed that the banned substance carbofuran had been involved in its death. A follow up investigation involving multiple agencies took place but did not lead to a successful identification of a perpetrator.

Picture & cover: RSPB

tenants under this extended definition.

The concern is that a Court would look at what mischief the Act was designed to remedy in reaching a conclusion. The Minister for Environment and Climate Change who introduced the additional amendment to extend the definition stated that the purpose was to strike at those who would benefit. A court may well conclude that a landlord of a sporting lease would benefit from the killing of wild birds and would therefore be vicariously liable.

## What are the defences?

There is a defence to vicarious liability. The accused needs to demonstrate that:

- 1 they did not know the offender was committing the offence, and
- 2 they took all reasonable steps and exercised all due diligence to prevent the offence being committed.

Both points need to be demonstrated in order to provide a successful defence. Reasonable steps will include, for example, the production of

guidelines for employees or sending employees on training courses. The aspect of due diligence involves, again for example, an annual review of guidelines and training to ensure employees are kept up to date with the rules.

## When will it come into effect?

The Bill has passed the final stage of debate and is likely to come into force in the Autumn of this year, although the exact date will be set by the Scottish Ministers in due course.

## What should I do as an employer?

Traditionally employers have revised working arrangements with individuals so that they provide a service, rather than the individual acting as an employee, as a method of managing vicarious liability. However the “anti-avoidance” measure is designed to address such methods. An employer must therefore ensure that they exercise extra vigilance over their employees, agents or individuals performing “relevant services” in line with the two defences described. ■

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“Despite what some people think, there is no rule which says the eldest son gets everything.”

# How simple is it to pass on the business?

In theory at least, owner occupiers are in a better position than most when it comes to succession planning



By **Robert Scott-Dempster**,  
Land and Rural Business Partner,  
Gillespie Macandrew

In theory at least, owner occupiers are in a better position than most when it comes to succession planning. The availability of Agricultural Property Relief and Business Property Relief for Inheritance Tax (IHT) should allow the substantial proportion of the family farm to be passed on free of IHT on death. However, proper planning and preparation is likely to be required to ensure that full advantage is taken of these reliefs and to avoid a number of potentially very serious consequences.

For example, if the owner of the farm has moved out of the main farmhouse and is living in say, a cottage on the farm having allowed his son and young family to move in then that could have significant adverse IHT implications for the farmhouse.

If a person dies without a will his Estate will fall to be distributed through the laws of intestacy. A surviving spouse has a claim to assets up to a certain value and thereafter the remainder of deceased's property will usually pass to his children. Despite what some people think, there is no rule which says the eldest son gets everything.

Leaving things equally to the children may seem reasonable. Indeed, some people intentionally leave things to their children in this way in their will. However, the law of

common ownership is a rather blunt weapon. In the event of a dispute, the only remedy available to one of the co-owners is to seek an action of division and sale. Essentially, this is the judgement of Solomon. If the commonly owned property cannot be divided into parcels of equal value (which is often impossible) then it will be sold and the proceeds divided amongst the owners. The other owners may not want to sell the property. However, they have no pre-emptive right to purchase the shares of their co-owners, nor are they entitled to any discount if they want to purchase the other shares. In practice, this means that if a farm is left to several children, those who are not involved in the farming business have no means of unlocking their share of the value in the farm. Therefore, they may be forced into seeking division and sale. Consequently, the farm may be sold from under the feet of the child in occupation who wants to continue the farming business.

Similar problems can arise when the farming operations are carried on through a business vehicle such as a partnership. While partnerships are a useful means of introducing the next generation they can have some unintended consequences. For example, not everyone realises that a farm held in one person's sole name can nevertheless become an asset of the partnership if it appears on the balance sheet of the firm accounts. Likewise, if a partnership is in operation what happens when one of the

partners dies? What happens if a dispute occurs which cannot be resolved? Unless there is a properly drafted partnership agreement which provides for these scenarios the likely outcome may be a bitter dispute which will not be resolved to anyone's satisfaction.

The interaction between succession planning and business vehicles has been illustrated in recent years by the introduction of Single Farm Payment Entitlement. The Entitlement is owned by a legal person, is tradeable and is not linked to a particular area of land. In theory, the Entitlement will form part of someone's 'moveable estate' along with assets such as shares and money. Consequently, where a will or partnership agreement has not adequately addressed the future ownership of SFPE, there may arise a situation whereby one person acquires the farm upon the death of the farmer, but someone else receives the Single Farm Payment Entitlement which may be vital to the farming business.

Farmers, probably more than other family business owners, have to be clear about how they want to pass on the business to the next generation. No one likes to consider their own mortality, however, failure to plan properly can result in the loss of a family business which has been carefully built up over generations. Death and higher taxes may be inevitable but for farmers at least, the two do not have to occur at the same time. ■

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As threat hangs over the FITs schemes for small scale renewable energy projects, farmers and landowners still considering diversifying will need to act fast

# Don't miss out on renewables opportunity



By **Kirsty Macpherson**,  
Partner,  
Gillespie Macandrew

Landowners who are still considering whether or not to diversify into renewable energy production have had a sharp reminder earlier this year of the need to focus on which type of system to opt for or they could lose out completely. This follows the announcement by the Government of the start of the first review of the Feed in Tariffs (FITs) scheme for small scale low carbon electricity generation

"Two main concerns have been brought into focus as a result of the statement made on 7th February by Chris Huhne, Secretary of State for Energy and Climate Change," explains Kirsty Macpherson, Head of Gillespie Macandrew's Energy Group.

"The first is the risk that many farmers or landowners who are looking to opt for wind or hydro energy generation schemes may miss out due to the fact that there is a danger that large scale solar photovoltaic (PV) schemes appear to be taking a disproportionate amount of the available funding. In Scotland, simply due to our geography, wind and hydro schemes are more practical than solar ones. It would be wrong if large scale take up of the latter empties the FITs 'pot' at the expense of the other two schemes.

"This situation is compounded by the fact that the Government is seeking to make the FITs scheme fiscally more efficient and has also indicated it is seeking 10% of savings (£40 million) within the scheme in 2014/15. Therefore, I believe that Scottish farmers and landowners who are looking to diversify into renewable energy derived from hydro or wind sources should do so sooner rather than later.

"The second matter brought into focus by the Minister's announcement is the fact that there has been a disappointing introduction of farm-based Anaerobic Digestion schemes, apparently due to the low level of tariffs on offer for this form of energy generation scheme. To that end, the Government is going to review the tariffs for such schemes and this could be good news for farmers who may be considering such an option. Schemes using slurry, crop waste or vegetable waste as the biogas source could be attractive to farmers, but only if the price is right." ■  
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## Feed-in Tariffs (FITs): The rules

### How do they work?

In essence a local generator of electricity (i.e. the landowner) will be paid the FITs by their current electricity supplier. They will receive a Generation Tariff for all electricity produced (whether used on site or exported) and an Export Tariff for that electricity which is exported. The only electricity which need be paid for is the shortfall (if any) between that required and that which is self generated.

The level of the Generation Tariff depends on the scale of the scheme and the method of electricity generation. Once a Generation Tariff has been allocated it will remain fixed for a period of 20 years in the case of wind, hydro and AD schemes and 25 years for solar schemes. The Export Tariff is set at 3p/kWh and both this and the Generation Tariff are linked to the Retail Price Index.

### What are the key considerations?

**1 Feasibility** – depending on the type of project the necessary data will need to be collated. This might be water flow or wind speed to make the scheme viable.

**2 Costs** – the initial capital costs of such a project (even at the small end of the scale) can be considerable. Not only will this include the installation of the necessary equipment for generation, but there will be costs associated with obtaining planning consent (and related surveys/assessments), grid connection and meter installation.

**3 Funding** – in addition to the FITs there may be other grant opportunities. At present there are opportunities under the SRDP to secure

funding for up to 50% of the cost of equipment purchase and installation for projects where more than half the energy produced will be used to supply agricultural activities directly. However, it is likely that the costs of the project will be such that external funding will be required. In the case of a bank it is likely to demand security.

**4 Planning** – securing planning consent for the project goes without saying. As indicated above, this will almost certainly require specialist surveys and reports to satisfy the planning authority that there will be no adverse social or environmental consequences. It is not uncommon for applications to be turned down at the initial hearing which may necessitate entering an appeal process.

**5 Grid Connection** – this is often the make or break issue. Smaller projects in areas already connected to the grid can connect at the customer side of the meter at minimal cost. Larger scale projects require independent connection which will be carried out by the local Distribution Network Operator at the cost of the benefiting party.

**6 Legal Structure and tax planning** – for any such scheme consideration should be given at the earliest possible opportunity to structure and tax implications. Much will depend on the scale of the scheme, but if a joint venture is proposed it may be necessary to form a Limited Company or a Limited Liability Partnership, there may be a requirement for a lease and consideration will need to be given as to how any bank is given security.

# From boom to crash to... who knows?

As the banks, building societies and economists continue to offer their contradictory views on the housing market, just what can we expect in the next couple of years?



By Wilson Hunter,  
Partner,  
Gillespie Macandrew

You will be aware, and no doubt tired, of the many seemingly conflicting reports about property prices that have been produced over the last 12 months. One week the newspapers are telling us that prices in a certain area have shot up over the last 12 months and that average prices in general are on the rise only to be told the next week by another publication that the exact opposite is in fact the case.

We are constantly receiving figures from either Nationwide or Halifax plc that, on the face of it, appear to fly in the face of figures produced locally but that should not come as a surprise. The Nationwide figures are derived from Nationwide's own lending data and we should bear in mind that a very low percentage of their overall lending relates to property in Scotland. The same applies to the likes of the Halifax plc.

If you are looking for the best indicator of where the market is at present then look at the statistics produced by your local Solicitors



Wilson Hunter runs Hunters, the estate agency branch of Gillespie Macandrew

Property Centre. These figures are based on what is happening now and what is happening locally and are therefore far more relevant.

However, one more word of caution: In a market that is both smaller and slower than we are used to, figures can be far more easily influenced by the sale of one or two larger properties over a short period of time and it is sensible therefore to look only at average prices taken over a longer period.

Taking all of the above into account the ESPC have just produced figures for 2010 that show an overall reduction in average prices of "like for like"

properties over the year of around 5% and the experts are predicting that a further reduction of between 3-5% can be expected in 2011. Inflation continues to rise and there is more and more talk of the Bank of England giving in to pressure to put interest rates up. In other words, in real terms, people's income is falling and there is nothing to indicate that this is going to be anything other than a flat period for the property market.

On the plus side there hasn't been a better time to buy property. ESPC figures currently tell us that 3 out of 4 Fixed Price properties are failing to achieve that Fixed Price. The power is in the hands of the buyer at the moment.

We mustn't forget however that for those of you who were lucky enough to have bought your property over 5 years ago you will still receive a good return on your investment and for those of us who may not sell at the price we were hoping will also be able to pay less than we have anticipated for our next property.

Visit [www.hunters-residential.co.uk](http://www.hunters-residential.co.uk) to review Willie Hunter's property blog for regular and often irreverent views on all things property. [wilson.hunter@huntersresidential.co.uk](mailto:wilson.hunter@huntersresidential.co.uk)

## The Gillespie Macandrew Hopetoun International Horse Trials 2011

Gillespie Macandrew has become principal sponsor of Scotland's new two day international equestrian event to be held at Hopetoun on July 30th and 31st



THE International Horse Trials is expected to attract a strong field of competitors for this inaugural event which will make full use of Hopetoun's spectacular 6,500 acre estate, situated on the banks of the Forth near Edinburgh.

Olympic silver medallist Ian Stark will be designing the course through the 6,500-acre estate, including the gardens and right in front of the main mansion house, near South Queensferry.

Simon Leslie, Gillespie Macandrew's Chairman said "we are delighted to be supporting this new and prestigious event and look forward to welcoming over 400 top class riders to Hopetoun in the summer".

The Earl of Hopetoun, who is at the centre of the new venture, welcomed Gillespie Macandrew's role.

"This new partnership will strengthen Hopetoun's bid to stage an event which will

ultimately become one of the highlights in the Scottish sporting calendar," states Lord Hopetoun.

"We are incorporating our annual Summer Fair with the Gillespie Macandrew Hopetoun International Horse Trials, making it much more than just a sporting event," explains Lord Hopetoun. "There will be West-End style shopping and family fun as well as top-level equestrian action during the weekend."

Event director Stuart Buntine said: "This is a magnificent location for an international event. The fabulous setting in the grounds of this beautiful stately home will provide a unique day out."

"The opportunity for riders to compete at all levels during the weekend should be a distinct attraction," he said.

Log on to [www.hopetoun.co.uk/Horse-Trials](http://www.hopetoun.co.uk/Horse-Trials) for more information. ■

[www.gillespiemacandrew.co.uk](http://www.gillespiemacandrew.co.uk)

## Our current online highlights:



### Big Society needs Big Answers

We've had some hints and possible suggestions of answers recently, but the fundamental questions still need to be addressed: how will the funding gap be bridged? Tom Murray provides some of his thoughts in our latest Charity Insights briefing. Also in this edition: changes to gift aid, investing for income growth and health and safety at the spring fete.



### Monthly economic outlook

Charles Fortheringham and his investment team regularly get together at the end of each month to look ahead to what's in store for the markets, the UK and global economies and what stocks are likely to go up... and go down. Their monthly thoughts and predictions are available now for May.



### Commercial Law Update

Monthly business and legal news delivered straight to your inbox and available in our News & Views section.

### Coming soon:



### Business Addendum

Scotland needs to go back to the future if it wants to truly realise the benefits which exporting can provide, according to Derek McCulloch. Don't let your competitors tread all over, and trade from, your mark, Chris Smith provides some very useful brand protection measures and he also takes a look at bribery (it's all above board though, honest guy).



### Gillespie Macandrew Library

Have you ever wondered what a lawyer keeps in his or her library. No? Nor did we until clients started to ask us to borrow our legal volumes. With this in mind, we've begun to compile business, charity, private client and land & rural business libraries on the website. It is work in progress, but the casual reviewer or the serendipitous may well be rewarded.



### UK business & personal tax rate card

Our guide to up to date tax rates and allowances. You can download a copy or request a pocket sized guide to be mailed to your letterbox.



### Firm news

Two new partners join our Land & rural business and Commercial property teams. Gordon Innes and Liz McLaughlin are formally recognised for handling disputes within the construction industry.



### Alternative musings on the law

The difference one word can make. Have we forgotten the underlying purpose of the Common Agriculture Policy? And the importance of brevity – part 1 and part 2.

"I am certain that the wild brown trout fishery of Scotland can be exploited to give future generations something of the joys that I experienced as a child." **John Stirling, Partner, Gillespie Macandrew**



# The last word ... fishing

John Stirling enthuses about his first love

“ Since I was about eight I have been at my happiest fishing. That is the more surprising because my father didn't fish and nor did anybody else in the immediate family. As Jack London would have agreed, the call of the wild is both urgent and clear. I remember the early lessons that I had from ghillies: try to enjoy the peace and stillness of the many hours where the fly comes round to no effect, the wildlife all around, the movement of the water and the light off it; the atavistic thrill of the thing itself.

I remember too being told never to regret a missed fish for “It means rather more for them than it does for you”.

When my own children, both boys, decided to take an interest in what daddy did and came fishing with me for the first time, I tried hard to impart these lessons. Beyond that I tried in words and deeds to teach them to treat the fish that we caught with respect. As proof of the divine, five trout were gracious enough to take the worm that first day.

Whilst there is an enormous joy in sharing something that one loves with ones children,

it does force one to reflect on the future. The rivers on the west coast of Scotland have seen dramatic declines in salmon and sea trout numbers. There seems to be a consensus that a major component in that decline has been sea lice predation on smolts (young fish leaving the river system on their first journey to the sea).

In addition the trawling of estuaries and fiords and the commercial exploitation of sand eels has had a very negative effect on migratory fish weights. Current government policy is to increase the numbers of estuarine fish farms of both salmon and “sea” trout in the near future. If a choice is faced does one simply join the elegy for the passing of an age, or do what one can to preserve the essence of the sport?

I hope that both of my boys will live to catch a wild salmon and a sea trout by rod and line in Scotland but I am certain that the wild brown trout fishery of Scotland can be exploited to give them something of the joys that I experienced as a child. Together we will sing a hymn of praise to highland brown trout, five to a pan and as delicious as anything I have ever tasted.”