lindsays *life*

Issue 12

Our Services

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the *life* of this magazine

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Welcome to the twelfth issue of Lindsays *life*, our first of 2017.

This issue includes a diverse range of topics, relevant to individuals young and old, families and businesses.

On the surface, the issues appear disparate: cohabitation, succession planning in family businesses, gifting a home, crofting and decrofting, and postnuptial agreements, among others. They illustrate the breadth of subjects that matter to our clients but, otherwise, there would appear to be little linking them.

But dig deeper into this issue and you will find a common thread: that most of the topics covered are prone to misconceptions that can prove expensive or divisive for individuals or families: that cohabiting gives the same rights as marriage; that succession planning for businesses is primarily about tax efficiency; that decrofting is just a matter of filling in a form; that a day in court is the best way to resolve a family dispute conclusively; that once you are married it is too late to ring-fence assets; and so on.

We hope this issue will correct some of these misconceptions, and give readers greater clarity about their rights, responsibilities, pitfalls and possible courses of action – whether they run a business, are moving in with someone, trying to resolve a family dispute, or simply trying to make life run smoothly for themselves and their family.

Other topics covered in this issue include Powers of Attorney and the duties of the nominated attorneys; news about gender pay reporting; an update on whether the new charity fundraising self-regulation system affects charity volunteers or trustees; and an introduction to our new staff.

We very much hope you enjoy this issue of Lindsays *life* and find it informative.

Peter Tweedie
Chairman

petertweedie@lindsays.co.uk
0131 656 5607

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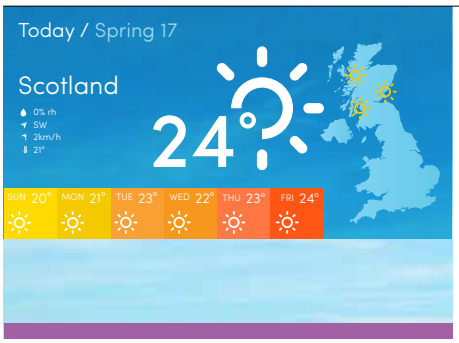
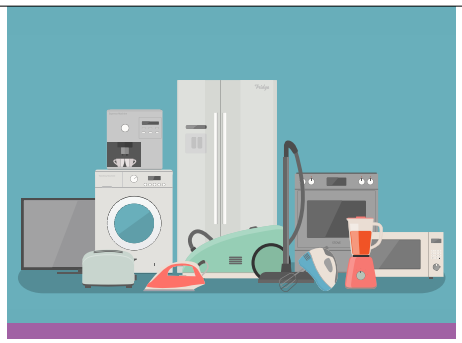
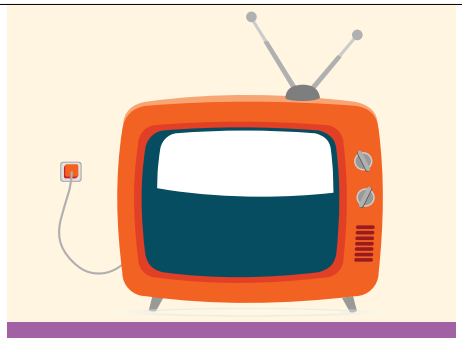
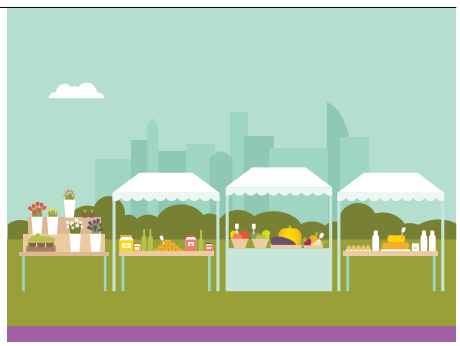
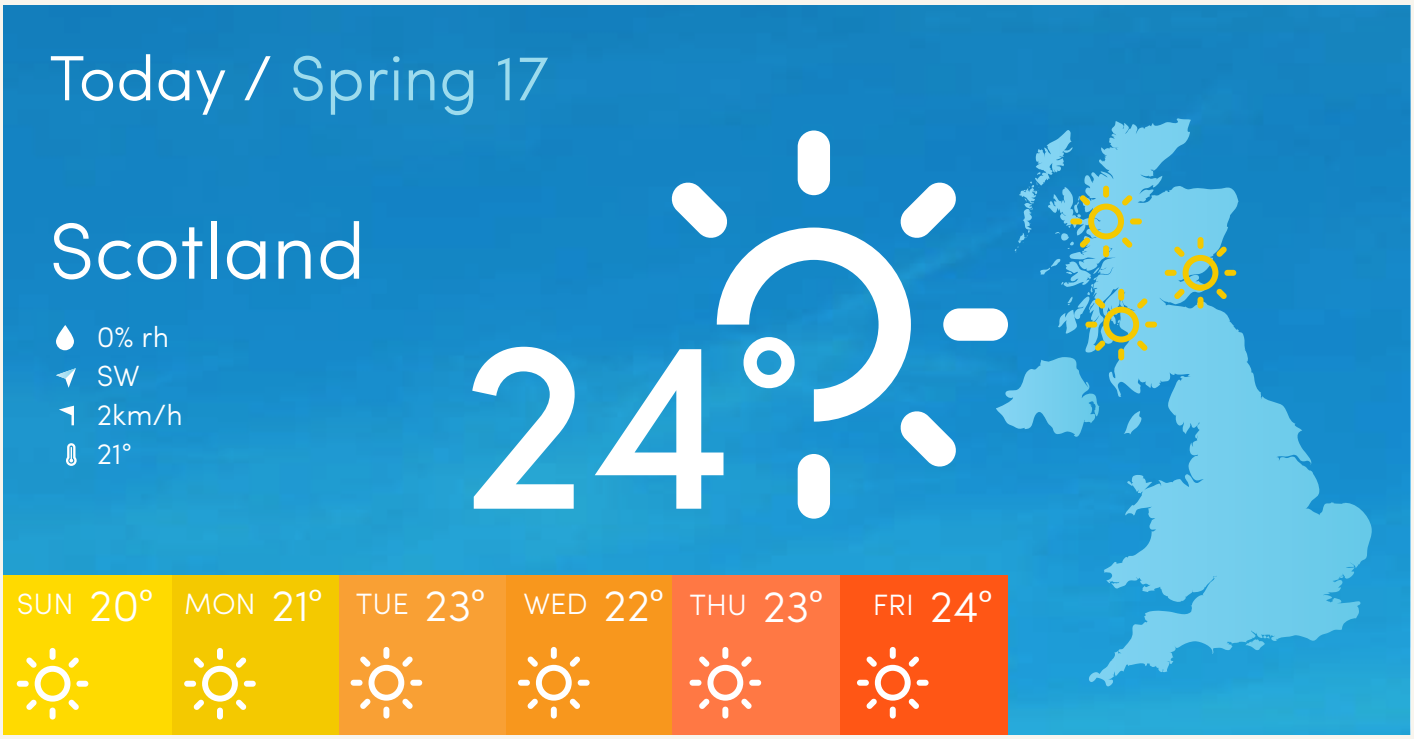










A gift *too good to be true?*

Gifting your home to the next generation is a complex decision to be planned with caution and care.

Rising property values mean that individuals and couples are often advised to gift their home to children or grandchildren, or to put it into a trust.

Such advice is usually driven by the desire to reduce liabilities for care home fees or inheritance tax. In addition, parents may wish to help younger generations climb the property ladder.

All these motivations are understandable. However, the reality of gifting a home can often derail the original good intentions, with unforeseen and unwelcome consequences.

"There are many avenues open to parents who want to plan their estates efficiently."

With care home costs for example, there are several pitfalls. In particular, if a local authority believes the home has been gifted to avoid care home fees, it can ignore the gift and include the property value in its assessment (even recovering costs from the recipients). There are no time limits on councils' discretion to do this.

Many proposed arrangements for gifting the home wholly to children include the intention that the parents continue to live in it. One risk here is that HMRC decides it is a 'gift with reservation of benefit'. So long as a benefit in the house is retained, the value of the gift will be included as a part of the parents estate and will not reduce inheritance tax on their estate.

Secondly, in practical terms, parents who continue to live in the property are reliant on the new owners' goodwill. Unfortunately this goodwill may be thwarted or dissipated by future events such as bankruptcy or divorce.

In addition, if a child who is given the house predeceases the parents, the house forms part of his or her estate. There is a clear risk of the home unintentionally passing to less sympathetic relatives (for example, if the child was intestate).

Despite the gloominess of these scenarios, there are many avenues open to parents who want to plan their estates efficiently and also help their children up the property ladder. However, proper advice and caution are essential to ensure that everyone is protected from the ill-effects of unintended consequences.

Peter Murrin
Associate, Private Client Services

petermurrin@lindsays.co.uk
0141 302 8410

Cohabitees miss out on more than cake and gifts

Cohabiting couples are often surprised by their lack of rights compared to married couples. A cohabitation agreement (or wedding) can prevent unwelcome shocks.

The fastest-growing type of family in the UK is the cohabiting couple. The number of cohabiting families grew by nearly 30% over 2004-14; in the same period, the number of married couple families grew by just 2%.

"Unfortunately, many of these cohabiting couples may not understand their legal rights or position."

Unfortunately, many of these cohabiting couples may not understand their legal rights or position, assuming it is the same as a spouse or civil partner. Such misconceptions can have serious financial consequences.

In Scotland, there are two situations where their rights (or lack of them) matter for cohabitees: when the relationship ends or when one partner dies. In neither case will the cohabitee have the same rights as a spouse.

At the end of a relationship, there are far fewer options for a cohabitating partner to claim a financial settlement from their former partner. A spouse may be entitled to settlements such as maintenance payments, or a share of a pension, whereas the only option available to cohabitees is a claim for a lump sum to compensate them for economic disadvantage suffered.

And if one partner dies without a Will, the cohabitee could be entitled to as much as a spouse. However, this is not guaranteed and doesn't happen automatically. They have to go to Court and their claim can be contested by family members.

There are straightforward ways to deal with these gaps or discrepancies. Making a Will can ensure that a surviving partner inherits the home or other assets, and can also prevent disputes between that partner and the deceased's family.

Also, a simple cohabitation agreement can set out what each partner is entitled to if they split – especially important if they are buying property or going into business together. The agreement should also anticipate arrangements for changes such as having children, or be updated as and when circumstances change.

Drawing up a cohabitation agreement may not seem the most romantic of steps for a couple moving in together. But neither are most arrangements around finances, mortgage payments, and what happens if someone leaves or dies.

Many cohabitees don't think of making such an agreement themselves, or are shy about suggesting one. In that case, a nudge from a third party – parent, relative, friend or adviser – can be helpful.

Lucy Metcalf
Director, Family Law

lucymetcalf@lindsays.co.uk
0131 656 5606

Would you let a *stranger* run your family business?

In family businesses, issues such as succession and relationships can determine the future of the business as much as profit and loss.

Family businesses are hugely important to Scotland's economy. Ranging from micro-businesses run from spare rooms to household names, they account for almost 70% of small and medium-sized businesses in Scotland.

Many of the facts and figures around family businesses are impressive. For example, there is evidence they outperform the FTSE All-Share Index. But there are also more worrying statistics, such as the fact that only a third survive into the second generation.*

Research shows that most conflicts and tensions in family firms arise from personal issues such as succession or relationship problems, and that more fail for family reasons than business-related reasons. Issues around succession planning, Wills, Powers of Attorney (PoA), and Prenuptial Agreements can be as important to the sustained success of the business as the commercial law side.

Put bluntly, without these arrangements in place, what happens in the family – from divorce to intestacy – could jeopardise the future of the business. Or at least subject it to lengthy litigation and forensic accounting processes. Not only are these expensive but they can drain the energy of the business and create long-lasting family disputes.

Probably the most critical issue to consider is succession planning. If someone dies without a Will in Scotland (and it is estimated that more than three out of five people do this), their estate is administered according to the intestacy laws.

In practice, this means that rather than the business passing in a planned way from one sibling or generation to another, its future will be decided by the law. In some cases, this leads to very young children or distant relatives inheriting control of the business.

Making a Will can avoid such problems, but when doing so, the personal and the commercial elements should not be treated in isolation. The provisions of the Will and the business's articles of association or partnership agreements must align.

Other possible issues to consider include:

Power of Attorney: this helps ensure business as usual – from paying bills to signing contracts – if a business owner or partner cannot work as a result of serious illness or accident.

Powers of Attorney are often viewed (wrongly) as relevant only to the elderly or infirm. In fact, they can be pivotal to the continuity of a business if a key person suffers a loss of capacity, either temporarily or permanently, and are relevant even to the youngest and fittest of business owners.

Prenuptial or cohabitation agreements: in family businesses, decisions around corporate structure, share issues and personnel are often based on commercial or tax reasons. In this planning, it is easy to overlook the consequences of relationship breakdowns for the business.

"Wills, Powers of Attorney, and Prenuptial Agreements can be as important to the sustained success of the business as the commercial side."

"Powers of Attorney are often viewed (wrongly) as relevant only to the elderly or infirm."

* *Source for data: Scottish Family Business Association.*

Incorporating family law advice, as well as corporate and tax advice, in this planning can protect the future of the business. Prenuptial contracts or cohabitation agreements can ring-fence a family business from being included in divorce or separation settlements, thereby safeguarding its future.

In the midst of all the paperwork that faces business owners, it is understandable to want to limit the legal arrangements involved. Especially when they involve events that may never happen.

However, it may help to think of it this way. If you asked Scotland's 60,000 family businesses whether they'd be happy to let a stranger take control of their future, they would probably send you packing.

"Incorporating family law advice, as well as corporate and tax advice, in this planning can protect the future of the business."

If you also told them that the stranger might not consider their commercial activities, customers or marketplace when deciding on their future – well, their response might not be polite.

Yet, the law in Scotland around intestacy, marriage settlements or incapacity mean that, if certain events or misfortunes occur and family members don't have Wills, PoAs or prenups or cohabitation agreements in place, then the future of the business could be left to lawyers and courts.

Far better to plan this future yourself by putting in place your own provisions for succession, attorneys and relationship ups and downs.

Nina Taylor
Partner, Family Law

ninataylor@lindsays.co.uk
0131 656 5788

Sandy Lamb
Partner, Private Client Services

alexanderlamb@lindsays.co.uk
0141 302 8444

Mind the *gap*

Under new regulations employers must gather and publish their own figures on gender pay. They may need to take rapid action to narrow any gaps.

Women in their 20s can expect to be paid 5% less than men, according to the latest published figures. By the time they reach their 30s and 40s, the gap has widened substantially.

These are national statistics but from early April this year larger employers will have to publish a 'snapshot' of their own figures on gender pay. With any gender pay disparities more visible, they may face growing pressure for equal pay, either by negotiation or through the courts.

Though full reports do not have to be published until April 2018, they must be based on the snapshot provided this year. Therefore, employers with 250 or more relevant staff should already be gathering and recording data, and remedying any discrepancies.

The data employers publish must include:

- overall gender pay gap figures
- the number of men and women in different pay bands.

The detail of producing this information is complex, with employers needing to understand the small print about which workers and employees are included in the reporting, bonuses, median and mean rates, quartile pay bands, and the position of employees on family-related or sick leave.

Reporting of gender pay will increase transparency, but it is important to remember that disparities in gender pay do not necessarily amount to discrimination or breaches of equal pay rules.

Even so, employers whose reports reveal significant gender pay disparities could be vulnerable to a variety of consequences, in addition to claims for equal pay such as:

- reputational damage
- discontent among staff about pay practices
- problems with tendering for public-sector contracts.

At present, there are no sanctions planned for employers who do not publish their own figures on gender pay. Some employers may therefore be tempted not to publish, especially given the possible consequences described above.

"From early April this year larger employers will have to publish their own figures on gender pay."

However, employers who do not publish their figures could easily suffer similar consequences. After all, they will likely be suspected, by staff and external stakeholders alike, of having something to hide.

Far better to gather the data and prepare to comply with the reporting requirements. Employers concerned about possible pay disparities can then take advice on dealing with gaps, and any legal, employee relations or communication issues.

Kate Wyatt
Partner, Employment

katewyatt@lindsays.co.uk
01382 317182

Leave courtroom *dramas* to TV and film sets

A day in court is rarely the best way to resolve divorce, separation, contact or family business disputes.

Courtroom scenes are a staple of TV, film and radio. Think To Kill a Mockingbird, 12 Angry Men, Erin Brockovich, right down to the recent and much discussed trial of Helen Titchener in The Archers. Most of us will have our own mental inventory of great film or TV courtroom storylines, usually involving a criminal trial.

"In reality, going to court to solve a legal dispute is often less satisfactory than expected."

Most TV and film courtrooms are places for revelations and vindication. They encourage the notion that a day in a court is a desirable way to sort out an issue.

In reality, going to court to solve a legal dispute is often less satisfactory than expected. Far from resolving issues, it can create new problems, especially when families and family businesses are involved.

One major drawback with using litigation in family law disputes is the irreversibility of what is said in court or in the lead-up to it. The process can encourage point-scoring, or force family members to take sides; hurtful things said in court cannot be unsaid, and the ripples can run more widely into people's circles of family and friends.

Secondly, the process can be very stressful for children and grandparents. Even when spared participation in court itself, they may be affected by damage to family relationships.

Thirdly, the reality of people having their 'day in court' is that they are letting the judge, a stranger to them and their family, make possibly life-changing decisions for them on the strength of a few hours of evidence.

Certainly, there are situations in family law where going to court is unavoidable and even desirable. These include obtaining protection orders against domestic abuse or forced marriage.

However, in most situations, resolving disputes outside the courts can be less inflammatory and less expensive.

A number of alternative resolution methods are available, including:

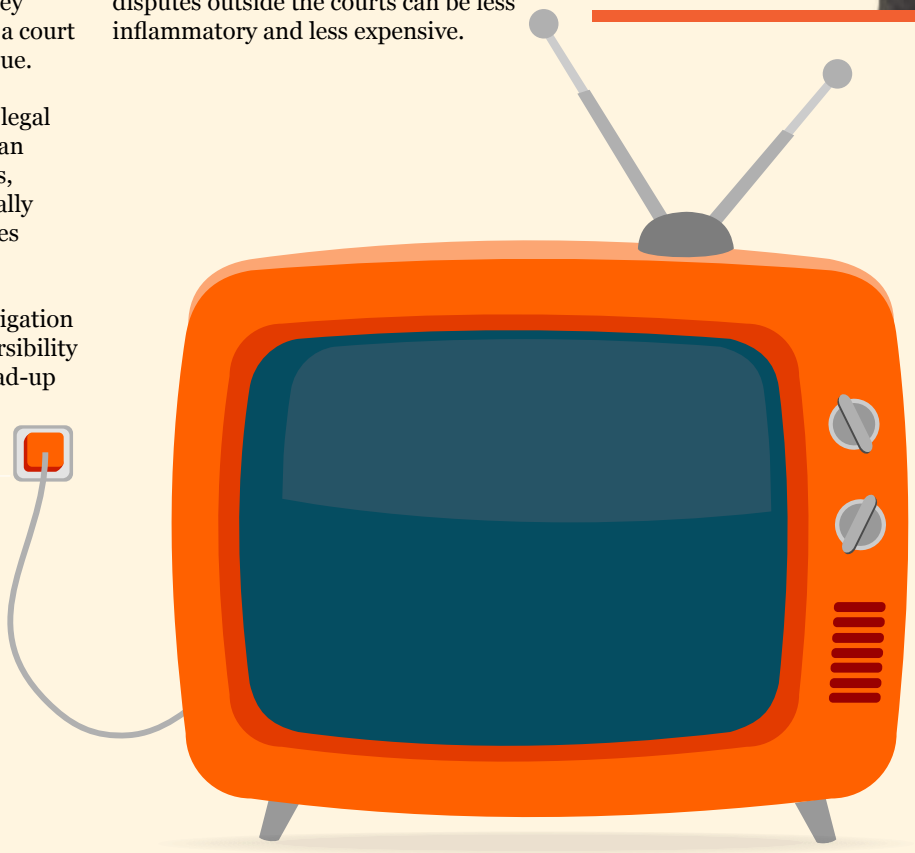
- mediation (using a trained mediator who helps the parties find a solution)
- collaboration (where clients and their solicitors meet together, and commit to avoid litigation).

A family law specialist can explain the pros and cons of the different options for each family including where litigation may be the right step.

Constructive negotiation, mediation and collaboration may not make good television, but they probably lead to happier endings.

Jennifer Gallagher
Partner, Family Law

jennifergallagher@lindsays.co.uk
01382 346400



Are *fundraisers* flying too close to the sun?

With charity fundraising under scrutiny, charities may want to avoid anything too hair-raising. What do trustees and volunteers need to know?

Most people who have any association with a charity – as trustee, volunteer, fundraiser or beneficiary – will have noticed the recent stream of headlines about fundraising.

First there were media stories about poor practices; then there was coverage of the measures being taken to improve matters. Now Scotland has a new system of self-regulation for fundraising, and charities must adhere to a Fundraising Code of Practice.

As a result, some trustees and volunteers may be wondering where they stand: what can they do, what can't they do, and what are the grey areas they must beware of?

For Scotland's 183,000 charity trustees, the duties are clear. They must make sure their charity's fundraising activities comply with relevant laws, and do not put the charity or its reputation at unnecessary risk.

In practice, this requires them to know how funds are raised; that their practices comply with legislation and standards; and that their system for dealing with fundraising complaints is robust.

But what about people who do volunteer fundraising, whether it's shaking a bucket at sports matches or coming up with creative ideas about winter sleep-outs or sponsored paragliding? Do they have new responsibilities?

Legally, no; their chosen charity should guide them about what's permissible or inadvisable. But on a practical level, all trustees and volunteers can support their charity by filtering their own or other people's ideas for raising funds by asking questions like:

Could the fundraising activity risk the charity's reputation, for example through health and safety risks, or by appearing to pressurise potential donors?

Could it create a backlash, when misinterpreted or viewed from a different perspective?

Could it cause donor fatigue through being too frequent or too trite?

If you are unsure that your charity's fundraising activities will pass through these filters, or may be questionable in terms of legality, transparency or respect for donors, it is worthwhile speaking up or seeking external advice.

As Benjamin Franklin apparently said, "It takes many good deeds to build a good reputation, and only one bad one to lose it." Fundraisers and trustees take note.

"If you are unsure that your charity's fundraising activities are appropriate... it is worthwhile speaking up or seeking external advice."

Alastair Keatinge
Partner, Head of Charities

alastairkeatinge@lindsays.co.uk
0131 656 5746

A *key partner* in the journey of life

If someone makes a Power of Attorney (PoA) and asks you to be their attorney, what are your duties and rights?

Godparent, spouse, even best man or woman – the request to be any of these is a milestone in the journey of adulthood, family life and friendship.

What should perhaps join that list is the request to be an attorney. It's a flattering sign of someone's trust in you, but will also involve long-term responsibilities.

Clients often ask us to explain the duties and rights of being an attorney. Below are some of the questions we most frequently receive.

Who can be an attorney?

Attorneys in Scotland must be aged 16 or over. If they hold 'continuing powers' (see box), they must not be bankrupt. As long as they are not ruled out by those conditions and are willing to act, they can be a relative, friend, solicitor, spouse or partner.

What are my duties as an attorney?

In a nutshell, you must always act in the best interests of the granter and keep records of how you exercise your powers. Continuing attorneys must also keep the granter's financial affairs separate from their own.

You must also notify the Public Guardian about certain events, such as changes of address, the death of the granter, or bankruptcy.

More detail about attorneys' duties is given in the Code of Practice for Continuing and Welfare Attorneys which can be found on the Public Guardian – Scotland website, or a solicitor can explain them.

Can I claim fees and expenses?

Attorneys are not generally paid to act, unless acting in a professional capacity but PoA documents can provide for attorneys to receive expenses. This should be discussed with the granter before the PoA is drawn up and registered.

What do I need to know before acting as an attorney?

Certain principles must be applied when exercising your powers as an attorney. These include:

- no action should be taken unless it will benefit the granter
- any action taken should be the least restrictive option available.

Beyond such principles, your responsibilities and rights will depend on the PoA document. It is therefore essential to discuss and understand these before signing it.

Callum Kennedy
Partner, Head of Private Client
callumkennedy@lindsays.co.uk
0131 656 5670

The *two* types of attorney in Scotland

- A *continuing attorney* has authority to manage the granter's financial and/or property affairs.
- A *welfare attorney* has authority to manage matters relating to the granter's personal welfare.

Changing a croft is far from a walk in the park

A recent court case concerning crofting law has ramifications for crofters and also non-crofters looking to buy property in some parts of rural Scotland.

It's often assumed by town dwellers and visitors to Scotland that crofts are part of history. They are, but they're also part of modern life.

Currently, there are over 20,000 crofts in Scotland, spread across the old 'crofting counties' of Argyll, Caithness, Inverness, Ross & Cromarty, Sutherland, Orkney and Shetland. All crofters have rights and duties under crofting law.

One aspect of crofting legislation very much relevant to modern-day life is that crofters who want to build new homes (or undertake various other developments) on their croft land have to have the land removed from crofting tenure. The main way to do this is by applying to the Crofting Commission for a decrofting direction.

With such applications, the Crofting Commission will weigh up different factors: for example, the public-interest benefits of building much-needed rural housing versus any detriment to the local crofting community or unmet local demand for croft land.

That's the background. A recent court case concerns a decision by the Crofting Commission not to grant a decrofting direction, and the ability of a crofter to challenge the discretion the Commission has when making such decisions. The case (called MacGillivray vs The Crofting Commission) has rumbled on for over five years.

"Crofters who want to develop some of their croft should not regard decrofting as straightforward or a foregone conclusion."

Without going into the legal minutiae, the impact of the Scottish Land Court's recent ruling is that it is clear that the scope to challenge a Crofting Commission decrofting rejection is smaller than many crofters and non-crofters might assume or hope.

In practice, this decision emphasises that crofters who want to develop some of their croft should not regard decrofting as straightforward or a foregone conclusion. Nor should they assume they will have the grounds to challenge a Crofting Commission decision successfully.

In contrast, crofters should work on the basis that, when applying to decroft land, they have just one shot at goal.

That shot must therefore be a fine one – with the application meeting all the legal requirements, anticipating the factors the Crofting Commission may consider, and countering any possible objections.

In addition, for those seeking to buy property in the crofting counties – as a main home or a holiday property – the case underlines the need for specialist advice and care with any property built on a croft or former croft.

Lauren Cook
Associate, Rural Services

laurencook@lindsays.co.uk
0131 656 5688

Tilting the balance in an *unbalanced property market*

A sellers' market can disadvantage sellers as well as buyers. With Edinburgh and Glasgow property markets both affected by this, are there ways to tilt the balance?

In a sellers' market, sellers may not worry about selling their current home. But they often choose not to do so, fearing they may struggle to buy the right new home.

Alternatively, they may make an offer on a new home conditional on selling their current home. But if the new home's owners have numerous other offers, a conditional offer is unlikely to find favour.

For sellers caught in these scenarios, there are several ways to move the odds of success in their favour.

Make the market work for you: Sell before you buy, but insist on a long date of entry to allow time to buy. In a competitive market, many purchasers will be prepared to wait for the right property, and you may find a high sale price boosts your purchasing power.

Offer a non-refundable deposit: If making an offer 'subject to sale', you could prove your commitment to the purchase by offering a non-refundable deposit. This helps to make your offer stand out from the crowd and is not such a risk in a sellers' market.

Consider bridging finance: This can bridge a short-term funding gap when the timing of a purchase and sale don't line up. Though expensive, it may be a price worth paying if it makes a move possible. This option does however require you having significant equity in your current property.

Unlock equity: You may be able to take a mortgage on your current property (typically a buy-to-let type loan) and a mortgage on the new property. When you do sell your old home, you can repay the mortgage.

A solicitor will be happy to discuss all these options (including combining them), and to explain the pros and cons of different approaches.

Andrew Diamond, Partner,
Head of Residential Property

andrewdiamond@lindsays.co.uk
0131 656 5781

A *strong* 2017 start for Tayside property

Property demand and prices in Tayside finished 2016 strongly, shrugging off initial worries about Brexit.

A more compelling influence on the market was local factors, with Dundee continuing to see steady benefits from the regeneration effect. The top end of the market, in particular, has seen good growth in prices.

Outside the city, demand remains keen for properties in Broughty Ferry, Monifieth and Carnoustie.

Looking forward to 2017, we expect good demand for most categories of residential property in the Tayside area, supported by interest rates remaining low and mortgage funding readily available.

The number of properties coming to the market at the end of last year – far higher than at the same time in 2015 - signalled good levels of market confidence.

Derek Petrie
Partner, Residential Property

derekpetrie@lindsays.co.uk
01382 346402

To have and to *hold*

You've probably heard of prenuptial agreements as a way to ring-fence assets after marriage, but did you know you could make a postnuptial agreement too?

On both sides of the Atlantic there's a growing interest in postnuptial agreements – similar to a prenuptial (or antenuptial) agreement in intent, but made after marriage rather than before. Generally, both types will determine the division of assets if a marriage or civil partnership breaks down.

Postnups are commonly seen – especially in the US – as something to negotiate if cracks are appearing in the relationship. However, there are other good reasons to consider them:

- one spouse receives an inheritance after marriage and wants clarity over what would happen to the capital if the marriage failed
- one spouse plans to take time out of work, and wants financial security during that period or subsequently
- the spouses considered a prenup, but did not get round to it.

Like prenuptial agreements, postnuptial agreements are the subject of myths and misconceptions: primarily, that they are only for the rich; that they are not legally binding; and that they represent a lack of confidence in the future of a relationship.

In reality, a prenup or postnup may be advisable for anyone who had substantial assets before the relationship started, and can be particularly helpful for people who are entering a second marriage or have children from a previous relationship.

They are also something to consider with family businesses, helping to ensure that control of a business is preserved within the family in the event of a relationship foundering.

"The modern reality is they can create a more solid foundation for marital and family relationships."

The second myth concerns legal enforceability. Unlike in England, prenups have been the legal norm in Scotland for centuries, and enforceability should not be an issue if a prenup or postnup is correctly drawn up by an experienced family lawyer.

Finally, in the case of the third myth – that prenups and postnups undermine a relationship – the modern reality is they can create a more solid foundation for marital and family relationships by introducing clarity and transparency. Far from being a sign of marital weakness, a well-made pre or postnup can signify a 'grown-up' approach to a relationship.

Alison McKee
Partner, Head of Family Law

alisonmckee@lindsays.co.uk
0141 302 8447

Eilish: *2017 outlook*

"It was brilliant to start 2017 in the same positive way I ended 2016 – with a personal best time over 10k (31.56 minutes). It now ranks me second on the all-time performance lists in Scotland behind my Mum! I'm slowly catching her records which is exciting. After spending a few weeks over the festive season with my family in Doha, Qatar, it was nice to throw myself back into a race and get an idea of my fitness levels heading into 2017.

I'm now at an altitude training camp with the rest of the GB squad in Iten, Kenya. This is my fourth visit and I'm looking forward to getting stuck into some hard training in the lead up to the indoor season. First up being the Indoor British Championships in Sheffield and then the Muller Indoor Grand Prix in Birmingham. Although these competitions aren't a major focus I will look forward to a few races to break up my training schedule.

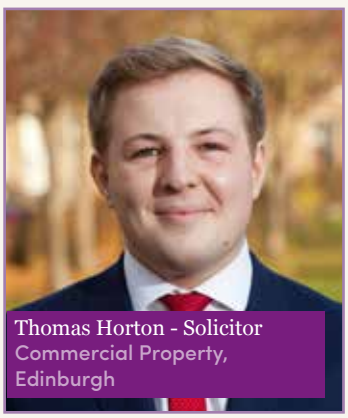
Sometimes as an athlete you can plateau, training for months and months on end without any competitions to light that fighting spirit inside you. I can't wait to get my spikes on and compete.

My big goal for the summer season remains the World Championships in London. As a British athlete, it's as big as the Olympic Games. Having the Olympic Stadium packed with British fans once more will bring back some cherished memories from 2012 and 2014. And I can't wait for it to begin."

We are proud to sponsor Eilish McColgan, talented Scottish athlete, two-time Olympian, three-time British Champion and GB international.

A warm *welcome* to...

Emma Conway - Solicitor
Residential Conveyancing, Dundee



Thomas Horton - Solicitor
Commercial Property, Edinburgh

Nimarta Cheema - Solicitor
Corporate, Edinburgh

Lorna Byres - Property Administrator
Estate Agency, Dundee

lindsays *offices*

Edinburgh
Caledonian Exchange
19A Canning Street
Edinburgh
EH3 8HE

T: 0131 229 1212
F: 0131 229 5611
E: edinburgh@lindsays.co.uk

Dundee
Seabraes House
18 Greenmarket
Dundee
DD1 4QB

T: 01382 224112
F: 01382 200109
E: dundee@lindsays.co.uk

Dundee (property)
21 Crichton Street
Dundee
DD1 3AR

T: 01382 802050
F: 01382 868109
E: dundeeproperty@lindsays.co.uk

Glasgow
1 Royal Bank Place
Buchanan Street
Glasgow
G1 3AA

T: 0141 221 6551
F: 0141 204 0507
E: glasgow@lindsays.co.uk

North Berwick
33 Westgate
North Berwick
East Lothian
EH39 4AG

T: 01620 893481
F: 01620 894442
E: northberwick@lindsays.co.uk