News and Views
twm solicitors
ISSUE 34: **SPRING 2020**

# Air Ambulance Kent Surrey Sussex celebrates 30th anniversary

This year, Air Ambulance Kent Surrey and Sussex (AAKSS) is celebrating its 30th anniversary. Some years ago, following a staff vote, TWM adopted AAKSS as the firm's official partner charity. On Tuesday 4 February, Anne Fowler, Patrick Stewart and Andrew Hayes from TWM were honoured to be invited to join AAKSS at their base at Redhill Aerodrome for a visit from Her Royal Highness, The Princess Royal.

AAKSS serves 4.8 million residents across the South East and is a world leader in the provision of helicopter emergency medical services. It is the only air ambulance service in the UK to operate 24 hours a day, 7 days a week. Since it was founded in 1989, AAKSS has treated more than 30,000 patients and saved hundreds of lives.

During the visit, The Princess Royal met staff and patients and heard, first-hand, about the life-saving work carried out by AAKSS, and also viewed the new technology and training facilities that will allow the AW169 aircraft to operate in weather conditions where it is currently not possible and enable paramedics to deliver more inflight patient care.

The Princess Royal completed the visit by unveiling a plaque to mark the 30th anniversary and met some of the charity's volunteers, fundraisers and patrons.

Anne Fowler, Senior Partner of TWM, commenting after their visit to AAKSS, said *"I think that sometimes we need a reminder of what an amazing job they [AAKSS] do and how vital our fundraising is. AAKSS needs approximately £14 million each year, and 98% of that comes from donations. They do not simply provide an air ambulance service, but are constantly working to improve that service and the outcomes for their patients. They have now developed new facilities for use in the helicopter, together with a simulator, so they can practice treating patients in this confined and noisy, moving space. This is a service that any of us, our friends or our family may need to use, so it is good to know our fundraising is so much appreciated and please can we try even harder to increase the funds we raise this year."*

## TWM's annual quiz and raffle event

We would like to thank all of the generous organisations who donated a prize to us for our annual quiz and raffle event, which took place on Friday 6 March 2020. We are pleased to announce that we raised a record breaking £1,700 in aid of AAKSS.

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# TWM's Private Client team are available and happy to assist clients with their Wills and LPAs in this difficult time.

In light of the current Government and NHS guidance regarding COVID-19, or coronavirus, we would like to reassure our clients that we are still able to take instructions and prepare documents for you. However, we are taking reasonable precautions where necessary.

We are aware that many of our clients fall into one or more of the at-risk categories, and have therefore been advised to self-isolate.

If you would like to instruct TWM on a new matter, please contact your local office by email or telephone in the first instance. The solicitor who will be acting for you will then be able to discuss your situation and wishes, and decide whether it is essential for you to visit the office in person. If it is not essential for you to visit in person, then we will continue to take instructions from you remotely. Face-to-face meetings will be arranged where required.

If you contact us in relation to making a Will, please let us know if you currently have no Will in place at all. Please be aware that we may only be able to advise regarding basic Wills if we are not seeing you in person.

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BUSINESS LAW

# Setting sale...

Getting your business ready for sale is a daunting prospect. Unless you have sold one before, you may not know what to expect. Luckily, there are steps you can take to ensure that you set off on the right foot for a streamlined sale process, with minimal stress and delay.

## Paperwork

Getting documents in order is an inevitable task for business owners. At no time is this more important than in the run up to sale.

Check that all contracts and legal documents with customers, suppliers, employers or other third parties are in place. Review their terms (at least an outline) prior to any sale, paying particular attention to clauses relating to notice, assignment, change of control and exclusivity, which may cause delay if not identified early on.

Companies, even those run by an individual, are distinct legal persons subject to many filing requirements. Filing at Companies House should be up to date and accurate. Any errors should be identified and corrected as soon as possible. Likewise, your Statutory Registers should be accurate and up to date, having all previous stock transfer forms and all stamp duty stamped by HMRC, where appropriate. This is crucial in a sale by shares.

## Know what it's worth

Knowing the value of your business will assist in negotiations. Precedent transactions (sales of similar businesses) can take you some way to a ball-park value, but each business is unique and engaging a professional is advisable.

## Spring clean

You can never have a second try at a first impression. Buyers want to know that they can trust you. Clean and tidy premises help build this relationship by showing that you have pride and care in your business.

## Stay involved

In the run up to sale, minimise disruption by retaining active involvement in the company. This is crucial where the sale agreement links purchase price to future performance or where you retain some involvement in the business (for example, as a consultant) post sale.

## Know your goals

Selling a business is not always about maximum capitalisation of years of hard work. Some sell quickly to relocate or sell an underperforming part of the business to focus on other opportunities. Identifying and communicating your objectives will guide the sale process and influence the method of sale used. For example, it may be best to sell as a collection of assets if you intend to retain parts of the business, or sell the shares of the Company owning the business if you want a clean break.

"Check that all contracts and legal documents with customers, suppliers, employers or other third parties are in place."

> Selling a business is not always about maximum capitalisation of years of hard work. Some sell quickly to relocate or sell an underperforming part of the business to focus on other opportunities.

## Get ahead of the game

It is sensible to engage with your professional advisers at an early stage, ideally a year to two ahead of any sale/exit. At TWM, we have particular expertise in this area and can:

- review your legal documents
- relieve the stress of the process, so you can keep focussed on doing what you do best and keep running your business smoothly; and
- help to save you time and money by having your business ready to be sold in advance of any sale.

For further information, contact Rory Partridge

**Rory Partridge:**
rory.partridge@twmsolicitors.com

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EMPLOYMENT

# Veganism as a philosophical belief

Coinciding with Veganuary at the beginning of 2020, the Employment Tribunal ruled that ethical veganism is a "philosophical belief" and protected under the Equality Act 2010.

## Background to the case

Jordi Casamitjana was dismissed by the League Against Cruel Sports after raising concerns that its pension fund invested in pharmaceutical companies involved in animal testing. Mr Casamitjana claims he was unfairly disciplined for making the disclosure and discriminated against on the basis of his philosophical belief in ethical veganism.

At a preliminary hearing, the Employment Tribunal concluded that ethical veganism satisfied the test for it to qualify as philosophical belief under the Equality Act.

## What is a philosophical belief?

To qualify, a number of criteria must be met, including that the belief is:

- genuinely held, not a mere opinion or viewpoint based on existing facts;
- relevant to a weighty and substantial aspect of human life;
- of a certain level of cogency, seriousness, cohesion and importance; and
- worthy of respect in a democratic society, but it need not be shared by others.

Although a high hurdle to overcome, the following have been ruled philosophical beliefs:

Anti-fox hunting – Hashman v Milton Park (Dorset) Ltd gave protection to a gardener fervently opposed to fox hunting.

Climate change – Nicholson v Grainger Plc saw protection obtained for a belief in catastrophic climate change.

Public service broadcasting – Maistry v BBC involved a BBC journalist given protection for his belief that public service broadcasting served a "higher purpose of promoting cultural interchange and social cohesion".

Telling the truth – Hawki*ns v Universal Utilities Ltd* said a belief that 'it is wrong to lie under any circumstances' amounted to a philosophical belief.

The Employment Tribunal has not found every belief to be a protected philosophical belief. In *Farrell v South Yorkshire Police Authority* the claimant's belief that the 9/11 and 7/7 attacks were part of a global conspiracy was not protected by law.

## What is ethical veganism?

Ethical vegans oppose the use of animals by humans for any purpose. This goes beyond maintaining a plant-food based diet as they do not buy clothes made of wool or leather and do not use products tested on animals. Mr Casamitjana said ethical veganism *"involves much more than just not eating food with animal ingredients, it's a philosophical belief system which encompasses most aspects of my life".* For instance, he will walk rather than take a bus to avoid *"accidental crashes with insects or birds".*

## What is the potential impact?

For those familiar with the definition of philosophical belief, this decision will not be a surprise, especially as it involves ethical veganism rather than dietary veganism. However, it demonstrates the scope of the Equality Act 2010 and liability for discrimination can be substantial.

Mr Casamitjana's case now continues to determine whether he was treated unlawfully.

Our Employment Law team are experienced at advising employees and employers about protection under the Equality Act and representing them in disputes.

Please contact us if you require advice.

**Tiggy Hawkesworth:**
tiggy.hawkesworth@twmsolicitors.com

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RESIDENTIAL PROPERTY

# Stamp Duty Land Tax (SDLT) - what is "chargeable"?

SDLT is a tax on land transactions in England and Northern Ireland and has been with us for over 16 years – it replaced "stamp duty" which was a tax on documents. Scotland and Wales have their own land tax regimes. Some of the rules are extremely complex and even the Revenue have been known to get their guidance wrong.

A tax return and payment of the tax due on the "chargeable consideration" has to be filed/paid within 14 days of the effective date. The "effective date" is usually completion, but beware – if the contract is substantially performed earlier, such as a buyer going into possession of the property, the "effective date" will be triggered immediately. Penalties and interest will accrue for late filing and payment of tax.

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Some facts:

- If a relief is available, it should be claimed in the tax return. Amendments can be made if this has not been done - but only for 12 months from the filing date, which is 14 days after the "effective date".
- Contrast this timing with the HMRC power to raise a "discovery assessment" for up to 4 years after the filing date and, in the case of fraud, for up to 20 years afterwards.
- Beware of apportioning the price with chattels. The Revenue will not accept a separate price for fixtures. The sum ascribed to any fittings must be a realistic and true (i.e. second hand) value. Trying to get large sums through for threadbare carpets and curtains is not going to work. To be safe, have an inventory and give proper (not inflated) values.
- Payment of any agent's commission by purchasers is deemed to be part of the chargeable consideration. If you are a keen auction goer, it is imperative that the contract and legal pack is read. For example: A person bought a house at auction for £450,000. The buyer had not read the pack or contract. The auction contract included a term that the buyer pay the 10% commission, plus VAT to the auctioneer. Not only did it cost that buyer an extra £54,000 on top of the bid, but it resulted in tax being due on £504,000, not £450,000.
- In considering this story - if the buyer had been a first time buyer – the buyer would have lost their ability to claim First Time Buyer Relief (FTB), which is only available where the consideration is under £500,000. FTB tax on a price of £450,000 is £7,500, whereas standard rate tax on £504,000 is £15,200.00. A very costly mistake all round.
- Debt. Imagine two cohabiting parties A and B. They separate and A buys out B. If A also assumes liability for the entire mortgage debt (which is common), the amount of debt that B is released from is also "chargeable consideration" for the purposes of calculating the SDLT.
- Some consideration might be contingent or uncertain i.e. dependent on an event occurring (such as planning permission being granted). SDLT must be paid on these elements as if all consideration were payable at the effective date.

For further information, please contact Claire Fountain.

**Claire Fountain:**
claire.fountain@twmsolicitors.com

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# If we can't afford to sell our family home, do we need to sort out finances on separation?

Unfortunately, given house prices and stricter mortgage requirements, many couples find that when they separate, they have to leave their family home in their joint names, with the person that has moved out of the property having to rent a separate property.

They may then look at selling their home when the children finish education or at a point in the future when the person remaining in the house is able to buy out the other person's interest. If you are looking at that kind of arrangement, is there any need to sort out your finances on divorce? The answer is a resounding yes!

If you are dealing with finances within Divorce Proceedings, you will enter into a Consent Order confirming how finances are to be dealt with. That can include an Order that, while the family home might stay in joint names, the couple would enter into a Declaration of Trust recording the specific interest that the person not living in the property has in it and the obligations of the person remaining in occupation.

If the Declaration of Trust records show that one of you will have a larger share of the property as part of your settlement, then there may be Capital Gains Tax (CGT) implications for the person

If you are dealing with finances within Divorce Proceedings, you will enter into a Consent Order confirming how finances are to be dealt with.

who has the smaller share. For the purposes of CGT, they will be considered to have disposed of part of their share of the property.

There is no CGT payable on transfers of assets/properties between spouses, provided you are living together. This applies until the end of the tax year in which you cease to live together. It is, therefore, important to ensure that any transfer of a property, or preparation of a Declaration of Trust relating to a property remaining in joint names, happens before the end of the tax year in which you have separated.

### What about selling a house some time after separating?

This family home will no longer be the principal private residence (PPR) of the person who moves out. If the house is sold within

New rules coming in from 6 April 2020 mean that if you transfer all or part of an interest in a residential property to your spouse or civil partner, your spouse will inherit your previous history of use of that property. HMRC has indicated they believe this will result in fairer outcomes. This is most relevant if the property has not always been your principal private residence during your period of ownership, perhaps if it has been rented out at times.

It is, therefore, worth taking advice from both a solicitor and an accountant about the best way to structure a settlement, to make sure you are aware of both immediate and longer term tax implications, so that you can make an informed decision.

eighteeen months (for disposals before 5 April 2020) of the spouse vacating the property, PPR relief will continue to be available to cover the period between moving out and the date of disposal as the "last eighteeen months" rule will apply. From 6 April 2020, however, this period is being reduced to nine months (see Caroline Foulger's Tax article later in this newsletter).

However, if more than eighteen (soon to be nine) months elapse between one spouse moving out and the subsequent sale or transfer of the property, a period of absence will be created and a capital gain could arise.

"New rules coming in from 6 April 2020 mean that if you transfer all or part of an interest in a residential property to your spouse or civil partner, your spouse will inherit your previous history of use of that property."

## Other reasons for having a Consent Order within divorce proceedings

You and your husband, wife or civil partner will have financial claims on each other as a result of your marriage/civil partnership. A Consent Order ends those claims, so that if one of you inherits assets, or wins the lottery, those assets are not vulnerable to being shared with someone you may have split up from many years beforehand.

If you would like to discuss this further, please contact Demelza Patricio.

**Demelza Patricio:**
demelza.patricio@twmsolicitors.com

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CONTENTIOUS TRUSTS AND PROBATE

# Barnaby v Johnson - Why the "kitchen sink" approach can send you down the drain

In Barnaby v Johnson [2019] EWHC 3344 (Ch), the defendant challenged her mother's Will on four different grounds. This is a risky strategy for success, especially if you are lacking in evidence…

Mrs Bascoe died in 2015. She had four children. Her surviving son is the Claimant, Mr Barnaby. Her surviving daughter is Mrs Johnson, the Defendant.

Mrs Bascoe left a Will dated 27 April 2005. Mrs Johnson was left a legacy of £100 and the remainder of the estate was left to Mr Barnaby. If the 2005 Will was deemed invalid, Mrs Johnson would have received a legacy of £10,000 from Mrs Bascoe's 1992 Will.

When drafting her Will, Mrs Bascoe left a note to explain why she had changed both of her daughters' legacies so drastically. The note said they had *"shown very little care and concern"* towards her and they had *"been rude, unpleasant and in some instances physically violent and abusive".*

The Claimant issued proceedings to have the 2005 Will authenticated. Mrs Johnson disputed the validity of this Will on four different grounds:

1. Lack of testamentary capacity;
2. Undue influence (by Mr Barnaby);
3. Forgery of Mrs Bascoe's signature; and
4. Want of knowledge and approval.

Mrs Johnson did not seek any legal advice and she defended the proceedings as a litigant in person. The court found as follows and dismissed her case:

### Testamentary capacity

*"[Patricia Johnson] has adduced no credible evidence to cast doubt upon the testamentary capacity of her mother in 2005. She has not put before the court any expert evidence as would usually be expected in such a claim… in the absence of any expert or counter evidence, there can be no other conclusion other than Mrs Bascoe had testamentary capacity."*

### Undue influence

*"Importantly, had there been any basis for her claim of undue influence by her brother, she could have done something at the time – she did not. Neither did she record her concerns… Accordingly, there is no evidence whatsoever to amount to undue influence."*

### Forgery

*"I dismiss without reservation the allegation of forgery. There is no basis for it and it should never have been made."*

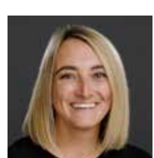
### Knowledge and approval

*"I accept […] that Mrs Bascoe gave [her solicitor] instructions for the 2005 Will alone. Once it was drafted and ready for execution he read it out to her. She then the same day signed it in his offices but with a different solicitor and the receptionist as witnesses who themselves signed after she did. The evidence of all three of them is clear and compelling… the Claimants have proved Mrs Bascoe's knowledge and approval of the 2005 Will through the evidence of those three witnesses."*

Mrs Johnson had thrown everything and the kitchen sink at her defence and attempted to challenge on multiple grounds with weak evidence. The Judge criticised her approach by stating she *"came nowhere near establishing the basis for any proper challenge"* and her evidence was *"contradictory, self-serving and deliberately misleading".*

A challenge to any Will is difficult and requires compelling and persuasive evidence. A legal team can assist you at an early stage to assess the strength and value of your evidence. Mrs Johnson did not obtain legal representation and this judgment clearly demonstrates the need for specialist legal advice before embarking on a claim to challenge a Will.

If you require advice in this regard, then please contact Kirsty Manley.



**Kirsty Manley:**
kirsty.manley@twmsolicitors.com

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ENFRANCHISEMENT

# Leasehold reform

On 9 January 2020, the Law Commission, further to their 2016 consultation, published their report on options to reduce premiums payable by flat owners ("tenants") to their landlords to extend the term of their lease or buy their freehold interest.

The report discusses three potential reform options which centre upon how premiums are calculated with the overarching focus being to reduce the price payable by tenants; the question then being "but what about compensating landlords?"

### Enfranchisement and lease extensions

When tenants seek to collectively acquire the freehold interest in their building from their landlord, they pay a premium. This reflects the fact that after the enfranchisement, the landlord's entitlement to the property and right to receive ground rent is lost. The heightened interest tenants obtain through an enfranchisement claim (i.e. owning the freehold) is valuable and correspondingly, the landlord is compensated.

Where the term of a lease is extended under the Leasehold Reform Housing and Urban Development Act 1993 ('1993 Act'), the tenant will instruct a surveyor for valuation advice regarding the premium that is likely to be demanded by the landlord for the enhanced value conferred onto the tenant by obtaining a ninety year lease extension.

### Premium calculation

Currently, the premium to be paid to the landlord will be determined by a surveyor based on:

- relativity
- the value of the landlord's interest
- the release of the marriage value (being the difference in the value of the property if the leasehold and freehold interest was owned by the same person or held by the landlord and tenant respectively) when the tenant subsequently comes to own the freehold interest in a property post enfranchisement; and
- potential development value.

As described in the Law Commission's Report, tenants take the view that lease extensions and enfranchisements are too expensive. The calculation of premiums should be simple and it is unfair a leaseholder should essentially have to pay twice to obtain full security of their home.

On the other hand, landlords take the view that tenants should pay full market value for the asset, having initially paid a reduced price in return for the annual ground rent.

"As described in the Law Commission's Report, tenants take the view that lease extensions and enfranchisements are too expensive."

In considering the opposing views, and taking into account human rights of both landlords and tenants, the Law Commission has proposed three schemes, outlined briefly below.

### Scheme 1

This assumes the tenant is not and never will be in the market. Therefore the premium produced reflects what the landlord would receive if the leaseholder never chose to extend the lease or buy the freehold and no marriage value would be payable.

### Scheme 2

This assumes the tenant is not in the market at the time the premium is calculated, but will be in the future. This reflects what a landlord would receive if their interest was sold to a third party. Similarly, no marriage value would be payable.

### Scheme 3

This reflects the way that premiums are calculated under the current law, but is designed to be combined with other reforms to potentially reduce the premium payable.

The Law Commission has not recommended any one of the three schemes. It is evident that implementation of Scheme 1 or 2 will, beneficially for tenants, reduce the premium payable. However, as contested by landlords, when buying a leasehold property, tenants have agreed to pay for a time-limited asset and should compensate the landlord when the landlord is compelled to sell their interest under the 1993 Act.

Currently, it remains to be seen whether any of these proposals will be implemented in the future and the Government have the challenging task of ensuring that, primarily, any wholescale reform of the premium calculation process is fair.

Our Enfranchisement team is able to assist both landlords and tenants in relation to lease extensions and enfranchisement matters.

For further information, please do not hesitate to contact us.

**Shanice Golder:**
shanice.golder@twmsolicitors.com

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PRIVATE CLIENT

# Charitable gifts in Will drafting and estate administration

Leaving money to a charity in a Will is a great way to leave a lasting legacy for a cause particularly close to your heart, and reduce the Inheritance Tax your estate will be subject to on your death at the same time.

## Types of charitable giving in Wills

### Cash Gift

Leaving a gift of a cash amount is the simplest way of leaving a gift to charity. However, this can be problematic if you are unlikely to be able to predict how such a gift will compare with the size of your estate on your death.

On the one hand, inflation may mean that the gift makes up a smaller proportion of your estate than intended (although this can be countered by linking the legacy to the Retail or Consumer Prices Index). On the other hand, if the estate is substantially diminished compared with when you make your Will (for example, due to paying care costs) the gift may make up a larger proportion than intended, especially because a cash gift takes priority over the residuary beneficiaries. For this, you can also leave cash gifts to the residuary beneficiaries, so that if the estate is insufficient to pay all of the cash gifts in full, the cash gifts then each reduce proportionately.

Depending on the size of the estate, even a comparatively small legacy can mean the estate qualifies for the reduced rate of Inheritance Tax.

### Gift of a proportion of your estate

Alternatively, by leaving a fixed percentage of your estate to a charity, this ensures you give the proportion you intend, whether larger or smaller than the sum you have in mind at the time you are making your Will. A minimum and maximum sum can be specified, to keep the gift within the parameters intended.

### Inheritance Tax

UK registered charities are exempt from Inheritance Tax. In addition, depending on the proportion you leave, the taxable part of your estate may qualify for a reduced rate of Inheritance Tax.

You may have heard that in giving 10% of an estate to charity, it will qualify for a reduced rate of Inheritance Tax at 36% compared with 40%. This is a more generous provision than it first seems, as in order to qualify for the reduced rate, it is 10% of the taxable estate rather than 10% of the entire estate.

This taxable amount is calculated, in simple terms, by deducting your available tax free allowances from the net estate at date of death. This means that an estate worth £700,000, with two nil-rate bands of £325,000 available, would have a taxable estate of £50,000, and therefore the 10% would be satisfied if at least £5,000 is passing to charity.

Depending on the size of the estate, even a comparatively small legacy can mean the estate qualifies for the reduced rate of Inheritance Tax.

If you would like to review your Will in light of introducing or extending charitable gifts in your Will, please contact a member of the Private Client team in your local TWM office.

**Madeleine Beresford:**
madeleine.beresford@twmsolicitors.com

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TAX

# Overhaul to Capital Gains Tax reporting on residential property for UK residents

If you sell or give away assets like shares or property which is worth more than it was when you acquired it, Capital Gains Tax (CGT) may be due. At present, CGT must be paid anywhere between 22 months and 10 months after the disposal. From 6 April 2020, the payment time will be shortened quite considerably.

Where CGT is due on residential property disposals, a return will need to be filed and the 'notional CGT' due must be paid within 30 days of the date of completion. Previously, this expedited deadline only applied to non-UK resident individuals disposing of UK property.

For UK resident individuals, a UK land return will need to be filed with HMRC where a disposal of residential property gives rise to a chargeable gain or an allowable loss.

Where a gain is fully covered by a relief (such as principal private residence relief), there will be no requirement to file a UK land return. If you are simply moving home, then you will probably not need to file a UK land return if the property has been your main residence for your entire period of ownership.

A return will also not be required where the gain is covered by the annual exemption, or a brought forward capital loss, from disposals on other assets in the previous four years.

In any other case, the 30 day deadline will apply. The requirement to complete a UK land return is therefore most likely apply to individuals who are private landlords on the sale of a rental property.

Of course, the quick turnaround time means that the exact details you need to complete the return may not be readily available. HMRC requires the taxpayer to make 'reasonable estimates' of the tax payable on the disposal as if the tax year ended on the date of disposal. Taxpayers will, therefore, have to estimate their income for the year so that the correct CGT rate (18% or 28%) may be applied, and also take into account any disposals of UK residential property which have already taken place. Gains on other assets are ignored in calculating the notional CGT due. Where an estimate changes, a further return may be filed correcting the estimate and, if appropriate, generating a repayment of tax. Interest and penalties will not apply if you have underpaid the tax due as a result of an incorrect estimate, provided you make the correction when the information is available.

Given the much tighter deadline for filing post transaction, it is advisable to take advice on Capital Gains Tax as early as possible during the sale process.

For further information, please contact Caroline Foulger.

**Caroline Foulger:**
caroline.foulger@twmsolicitors.com

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## New branded TWM taxis for Epsom and Wimbledon

We are proud to showcase our new branded taxis, which have recently taken to the streets in Epsom, Wimbledon and beyond. The iconic and quintessentially British black cab provides a stylish platform to promote our brand and we hope that this will help to bring TWM's name to the forefront of people's minds for all their legal needs in and around Epsom and Wimbledon where two of our offices are located.

News and Views is TWM's quarterly newsletter for clients and contacts. The articles included in this publication are necessarily brief, and because the law may change subsequently, it is essential that legal advice is obtained prior to proceeding.

TWM Solicitors is a full service law firm. Our office network covers Surrey, SW and Central London. Our approach centres on achieving success for our clients.

If we can help with a legal issue, please do not hesitate to contact one of our team:

| | | |
|---|---|---|
| **Cranleigh** | Victoria Adams | 01483 273515 |
| **Epsom** | Anne Fowler | 01372 729555 |
| **Guildford** | Matthew Truelove | 01483 752700 |
| **Leatherhead** | Mark Stevenson | 01372 374148 |
| **London** | Claire Fountain | 020 7736 6277 |
| **Reigate** | Demelza Patricio | 01737 221212 |
| **Wimbledon** | Eileen Barry | 020 8946 6454 |

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Information contained in this document is correct at time of publishing (3/03/2020) but may be subject to change.