Welcome to the summer 2016 edition of our newsletter!

We have now been at 85 Fleet Street, with our panoramic views of St Paul’s Cathedral and the City skyline, for more than a year and are very well settled. We have successfully adjusted our journeys to work and found new lunch spots. Many of you will by now have visited us and I am sure will agree that the new offices are impressive; if you have not yet seen the offices, we would be very pleased to welcome you here.

We have an interesting year ahead of us with the news currently dominated by the Brexit vote in June. Who is in and who is out and what it all means for us will continue to be hot topics of conversation over the coming weeks, and we will keep you informed through our briefings on our website and alerts on:

Twitter: @RLB_LAW
LinkedIn: www.linkedin.com/company/radcliffeslebrasseur

April saw changes to the Stamp Duty Land Tax rules for the purchases of second properties and in the offshore world the lowering of the ATED threshold (tax on UK residential property held in company structures) to properties valued at over £500,000. A welcome reduction in Capital Gains Tax will be seen as of the new tax year with the higher rate reduced to 20% and the threshold rate to 10% – but not for second homes, sadly! The complex proposals for a residential nil rate band, which will be effective from 2017, have attracted media attention and are summarised in this edition.

Finally, a continued drift towards alternatives to traditional pension savings will be seen as of April 2017 with the new Lifetime ISA, attracting 25% contributions from the government of up to £1,000.

We hope you find this newsletter interesting and informative. If you would like us to feature any topics or questions in the next newsletter, or of course discuss any concerns you have about legal matters, we would be pleased to hear from you.

In this issue:

- The Residence Nil Rate Band
- Family Contribution Problems
- Basement Development Issues
- Bonus Schemes
The Residence Nil Rate Band (RNRB): Where are we?

A summary of the RNRB
• How to calculate the RNRB
• Practical considerations
• A summary of the RNRB

Background
The Residence Nil Rate Band (RNRB) was announced in the July 2015 budget as a means of achieving the Conservative Party's manifesto promise to increase the Inheritance Tax (IHT) tax free amount to £1 million for married couples/civil partners. The £1 million figure is achieved by using a combination of the Nil Rate Band (NRB) tax-free amount (fixed at £325,000 until April 2021), the transferable NRB (spouses/civil partners) and the RNRB.

In summary the RNRB is available when a person, who dies on or after 6 April 2017, holds a ‘qualifying residential interest’ (QRI) at their death, which is ‘closely inherited’ by a ‘lineal descendant’.

The RNRB is going to be phased in, so that the maximum RNRB available, or the ‘residential enhancement’ will be:
• £100,000 in 2017/18
• £125,000 in 2018/19
• £150,000 in 2019/20
• £175,000 in 2020/2021

Following this, the RNRB will rise in line with CPI.

What is a ‘qualifying residential interest’?
A qualifying residential interest is an interest in a dwelling house (including a garden or grounds of any size, but not woodland attracting relief from IHT) that was the deceased's residence at any point during their ownership of the residence. This includes foreign property but not buy to let property. If the deceased owned more than one QRI in different dwellings, their personal representatives must elect one of the properties within two years of their death; the residence does not have to be the deceased's residence for PPR. The residence can include property interests that are no longer owned at death, for example if they have downsized or moved to residential care. If an individual holds more than one interest in the same dwelling, the interests will be combined for the purposes of the calculation.

Who are ‘lineal descendents’?
In order for the RNRB to be available, the QRI must be ‘closely inherited’, by one or more lineal descendents. Lineal descendents include children, grandchildren, remoter issue, stepchildren, foster children, adopted children (who are treated as children of both their natural and adoptive parents), a spouse or civil partner of a lineal descendent and a surviving spouse or civil partner of a lineal descendent who has not remarried.

How is something ‘closely inherited’?
The QRI can be closely inherited in a number of ways:
• where there was an actual disposition on the deceased's death
• where the deceased has a qualifying interest in possession and there is an absolute gift on death or a gift to a disabled person's trust
• where the property was subject to a gift with reservation of benefit and as a result is treated as part of the deceased's estate.

Where there is a gift to a trust under a will the RNRB will only be available if the trust in question is a disabled person's trust, 18-25 trust, bare trust, a trust for a bereaved minor or an immediate post death interest; all of course for a lineal descendent(s). In all other trusts, the RNRB will not be available.

Where the property has been gifted absolutely in the deceased's lifetime, but there was a reservation of benefit, the RNRB can be available only if the gift was made to a lineal descendent.

The transferable RNRB
Any unused portion of the RNRB can be transferred to a surviving spouse in the same way that any unused NRB can be transferred. This can occur where the first deceased spouse did not have a QRI on their death, or did have a QRI but it was not left to lineal descendents and consequently the RNRB was not available. The RNRB can only be transferred where the surviving spouse dies on or after 6 April 2017, and, if the pre-deceased spouse died before 6 April 2017, the amount available to transfer to the surviving spouse is £100,000. As with the transferable NRB, the amount of RNRB that can be transferred is capped at an additional 100% of a surviving spouse's available RNRB but more than one pre-deceased spouse's RNRB can be transferred. Taper withdrawal (see below) also applies to a transferable RNRB where the pre-deceased spouse's estate was worth £2 million or more.

Where there is a transferable RNRB available from a pre-deceased spouse or spouses, either the personal representatives of the surviving spouse or the person liable to pay any inheritance tax due must claim this amount within the later of two years from the end of the month in which the surviving spouse died, or three months from the date on which the personal representatives started acting.
Taper withdrawal provisions

A taper threshold has been set at £2 million until the 2020-2021 tax year, following which it will rise in line with CPI. This means that for every £2 in a net estate above the £2 million threshold, £1 will be withdrawn in relief. So, by 2020/2021 there will be no RNRB available to an estate worth £2.35 million.

The taper withdrawal is calculated by deducting the taper threshold from the value of the estate. This figure is then deducted from the default allowance (the total of any transferred RNRB and the available residential enhancement) and divided by two.

Downsizing provisions

It was recognised that this legislation might unfairly prejudice those who had downsized, or even disposed of, their QRI (for example, to release equity to meet care needs or to move to a more manageable property), and as a result downsizing provisions have been outlined. The current proposal (which is in draft form) is that where the deceased had downsized from a more valuable property, or had sold a residential property on, or after, 8 July 2015, the lost RNRB would still be available. This would take the form of an ‘additional RNRB’ equal to the RNRB that was lost as a result of the move, up to the value of the unused RNRB.

This preserved RNRB, along with any RNRB in the usual way, can be applied against the value of the deceased's estate if a lineal descendant inherits some part of the estate (that is derived from the proceeds of the downsize or sale). The death must occur on or after 6 April 2017 for the RNRB to be available, but there is no time limit as to how long before death the property was sold or downsized, or indeed how many times a downsize can take place, although only one ‘downsizing’ would be relevant for the purposes of the calculation. The downsizing provisions are not available where the deceased occupied a property under the terms of a trust and the trustees sell or downsize on their behalf.

Conditionally exempt property (heritage items)

If any part of the QRI is a conditionally exempt transfer under s.30 IHTA 1984, it is treated as not being closely inherited and as such the RNRB cannot be used. However, the RNRB can be transferred for use upon the death of a surviving spouse as long as no charge is triggered.

The amount of the RNRB is limited by the value of the property, so the RNRB cannot exceed the value of the chargeable estate.

Any property attracting Agricultural Property Relief or Business Property Relief, and any debts or charges on that property would also be deducted prior to any calculation.

Practical considerations

General observations:

- As with the transferable NRB it will be important to retain relevant documents for later use when claiming the RNRB, for example records of the house valuation on the first death and evidence of downsizing. Personal representatives will need to be aware of the need to elect which property to apply the RNRB against and the criteria and records needed to use transferable RNRB, and the relevant timeframes.
- The RNRB will have no relevance to some estates due to their size (taper withdrawal will wipe out the availability of the RNRB for estates worth over £2.35m), although the size and complexity of an estate can change greatly over time reinforcing the need for regular estate planning review.
- Elements of the RNRB legislation appear disproportionately unfair, particularly to unmarried people and those with no lineal descendants.
- Where it is possible, consider moving charges away from a property to enable the maximum amount of RNRB to be claimed.
- Review your will regularly and if you would like more specific advice in regard to the RNRB please get in touch.

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Problems with family contributions towards the purchase of a family home on divorce or separation

There are many situations when family relatives contribute towards the purchase of a property. An example is parents helping a child who is a first time buyer. Another example which is becoming more common is for elderly parents to sell a home and make a contribution towards a larger family home. These contributions can come into question if the relationship between the adult child and his/her husband/wife breaks down and there is a permanent separation/divorce. In this situation there is frequently a dispute about who owns what.

To avoid this it is very important for there to be a Deed of Trust or other formal document recording the acquired legal interest of the donating party. Unfortunately, it is frequently the case that a formal document is not drawn up and the family members have worked on verbal agreements. This can result in substantially increased costs and delay if there is an issue about whether the legal title of matrimonial property accurately reflects the beneficial ownership. It can also mean the generous parent is at risk of losing what they contributed.

If there is a dispute, other family members can be joined to the financial proceedings on divorce/separation, so that the Court can decide who owns what in advance of dividing the assets between the divorcing couple. This can be expensive but may be necessary. Failure to join to the proceedings between the divorcing couple a third party who has an interest in the matrimonial property can result in serious costs consequences and delay.

In the case of Fisher Meredith v JH and PH there was a dispute as to who owned shares in a company. In the Judgment on appeal of Mostyn J, he identified two types of case where joining a third party would be an issue:

**Category 1**

Where the legal title to property in dispute is held in the name of a third party and the claimant asserts that the other spouse is in reality the beneficial owner. In this type of case, the onus is on the claimant to join a third party in the early stages of the case.

**Category 2**

Where the spouse asserts that he/she holds the legal title on behalf of others, the duty is not so clear cut. In this type of case, the duty to apply for joinder lies primarily and equally on the non-legal owner, third party and the spouse who makes the assertion.

In either category, the onus is on the person asserting that the beneficial ownership is different to the legal ownership to take action and failure to join third parties where necessary will lead to wasted costs orders.

It is essential where a dispute arises about ownership of property in financial proceedings between a spouse and a third party that:

1. the third party should be joined to the proceedings at the earliest opportunity
2. directions should be given for the issue to be fully pleaded by Points of Claim and Points of Defence
3. separate witness statements should be directed in relation to the dispute; and
4. the dispute should be directed to be heard separately or as a preliminary issue, before the Financial Dispute Resolution hearing (without prejudice settlement meeting in the divorce proceedings with a Judge)

Such proceedings can be avoided if a Trust Deed or other formal document was executed at the time of the original contribution.

There can also be problems if monies are loaned by one family member to another who subsequently gets divorced. The general public may not be aware that if a parent loans monies towards the purchase of a property for an adult child, the Family Court has the power to decide that the loan was a ‘soft debt’ and that it should therefore be ignored by the Family Court when deciding what should happen to the property. The Court may decide a debt is a ‘soft debt’ if it forms the view the lender would not ask for repayment if it were not for the divorce. Therefore if making a loan to a family member, it is extremely important to have a formal loan agreement or a charge registered against the property securing the loan.

To avoid the costs and stress of litigation it is very important to consult your solicitor to ensure you have the necessary trust deed or agreement drawn up at the time the parent contributes towards the adult child’s property.

If you would like any further information or advice with regard to the above, please contact:

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Digging deep – Issues with basement development

Recent newspaper headlines recount stories of bizarre proposals by owners to enlarge their substantial London houses by digging down to create several levels under the building and under the garden, to house swimming pools, cars and wine collections!

On a more everyday scale, for most of us the cost of property in London and the expense of selling and buying, including the increase in Stamp Duty Land Tax, renders moving house a costly decision and in some cases those costs are prohibitive. Families continue to grow and the owners’ needs for extra or different space change over time. If you live in a city, where space is at a premium, digging out an existing basement or cellar or creating new levels underground and going outwards under the garden can be an attractive option.

Whilst by their nature basement developments may have less visual impact on the neighbourhood than a rear or roof extension, they do raise other issues. The nature of the works means that the construction process involves major structural work to existing buildings and that can prompt concern amongst neighbours about the effect on the structural stability of nearby buildings. The removal of dug out waste can lead to noise and disturbance during the construction process and issues of management of works traffic, plant and equipment during that time. In London terraces the works will invariably impact on party walls or structures with neighbouring properties and the procedures under the party wall legislation will need to be followed.

Local authorities have noticed a marked increase in the number of applications for consent to such works over recent years. They have expressed concern at the impact on the quality of life and living conditions for nearby residents and consider this to be a material planning consideration of which they should take heed. Both Kensington & Chelsea and City of Westminster councils have taken steps to restrict the size of the basement proposals to which they will consent, with the aim of limiting the extent and duration of construction works, for example, by limiting the extent of basement development to one storey and to not exceed more than 50% of the garden.

If you are considering such an option then you must approach the local planning authority at an early stage to ascertain their approach to your proposals.

Also bear in mind the perceived and actual impact on neighbours and the possibility that might give rise to vigorous opposition in the public planning process and even a breakdown in relations generally.

If you would like any further information or guidance, please contact:

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Bonus schemes: are they really discretionary?

Bonus payments tend to form a significant part of an employee’s remuneration package; and therefore, it is important to ensure that any bonus schemes are considered carefully. In most cases, bonus schemes are stated to be discretionary; however, are they really so?

The most common types of bonus scheme:

1. Contractual
2. Discretionary

Contractual bonus schemes

If an employee’s remuneration package includes participation in a contractual bonus scheme, and the employer fails to pay the bonus, then an employee will potentially have a claim for breach of contract and seek damages against the employer.

Discretionary bonus

There are two elements to a discretionary bonus. Firstly, whether to award a bonus – that could be either contractual or discretionary and, secondly, how much. In a discretionary scheme, the employer could potentially argue that it was a discretionary scheme if it wanted to avoid paying it.

If, however, an employer decides for whatever reason not to pay a bonus where the scheme is discretionary, the employee should note that there are limits on an employer’s discretion.

These limits are:

- the employer has a duty to exercise discretion honestly and in good faith
- the employer has a duty not to exercise discretion in an arbitrary, capricious and irrational way
- the employer has a duty not to breach the implied term of trust and confidence when exercising it’s discretion.

If an employee meets the bonus criteria, an employer must have reasonable grounds for not paying that bonus if it is defending a claim that it has exercised its discretion in good faith. Furthermore, if the reason for not making a bonus payment is because of a protected characteristic, for example on the grounds of sex, race, or disability, then the employee may have a claim for discrimination.

The fact that bonus payments are stated to be discretionary in an employment contract is not necessarily determinative of the issue. Therefore, if you have an issue with your employer in relation to the payment of a bonus, consider reviewing the contract of employment carefully and the rationale provided by your employer for not paying the bonus.

If you would like any further information or guidance, please contact:

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We would like to welcome three new joiners to the firm

**Anil Rajani** has joined the firm as a partner. Anil has extensive experience dealing with individuals and organisations in relation to corporate fraud, white collar crime, tax investigations and regulatory matters. The Legal 500 has noted that he is a ‘thoroughly experienced and skilled lawyer who is increasingly in demand.’

**Celia Speller** joins us from Mills & Reeve in Cambridge. Celia is two years’ qualified and advises on a broad range of private client matters including tax and succession planning, wills, powers of attorney, trusts and probate.

**Tulin Hamit** is a dual qualified UK/Turkish tax and private client lawyer. Tulin has a wealth of experience in working with complex multi-national clients who are looking to enter, consolidate and expand their operations in the UK. Tulin is also one of few solicitors to achieve the status of Chartered Tax Adviser (CTA).