The Aver Advisory

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presented by Aver Associates Estate Planners & Trustees

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PRIVACY

US appeals court clears way for Facebook privacy class action

Patel et al v Facebook Inc, 9th U.S. Circuit Court of Appeals, No. 18-15982

The US Federal Court of Appeals for the Ninth Circuit unanimously rejected Facebook's attempt to dismiss a privacy class-action lawsuit alleging that it violated the Illinois *Biometric Information Privacy Act* (BIPA) by not securing consent before recording facial biometric data for millions of users.

The lawsuit revolves around Facebook's Tag Suggestion feature, which uses facial-recognition technology to analyze whether the user's Facebook friends are in photos uploaded by that user. Facebook extracts the biometric face-prints in the photo and then compares them to those already stored in Facebook's face-print database. The database consists of users previously tagged in a photo who have not opted out of Tag Suggestions.

Under BIPA, no private entity may collect biometric data of individuals unless it satisfies several pre-requisites, including the receipt of consent from the individual. Facebook claimed that the plaintiffs failed to establish a concrete injury, which was sufficient to give them standing to sue in federal court.

The court noted that BIPA was intended to protect individuals' "concrete interests in privacy," and that Facebook's alleged unauthorized use of a face template "invades an individual's private affairs and concrete interests." The court also held that Facebook's enhanced technological intrusions pose a material risk of harm to the privacy interests of individuals, not merely to their procedural rights.

Relying on a recent Illinois Supreme Court decision, the Ninth Circuit indicated that BIPA's safeguards "are particularly crucial in our digital world because "when a private entity fails to adhere to the statutory procedures, the right of the individual to maintain his or her privacy vanishes into thin air". ■

Switzerland suspends automatic data exchange with Bulgaria following leak

The Swiss Federal Council has cancelled the automatic exchange of financial account information with Bulgaria, following the discovery that the personal data of four million Bulgarian and foreign taxpayers was hacked from the Bulgarian National Revenue Agency in July.

In addition to names, addresses, personal identification numbers and dates of birth of Bulgarian and foreign nationals, the leaked data includes individuals' annual tax returns; records of their income; 'acts of administrative violations'; health and social insurance status; and tax information automatically exchanged with foreign governments.

The personal information of 189 individuals was publicly disclosed by the hackers. These victims are at special risk of impersonation by fraudsters and have been personally contacted by the Bulgarian authorities. Swiss-resident individuals with accounts in Bulgaria were also affected by the leak, as were individuals having tax residence in Bulgaria with bank accounts in Switzerland.

Once Bulgaria confirmed the leak to Swiss authorities, the Swiss Federal Council immediately exercised its powers under the *Federal Act on the International Automatic Exchange of Information on Tax Matters* to suspend the exchange of data with Bulgaria. ■

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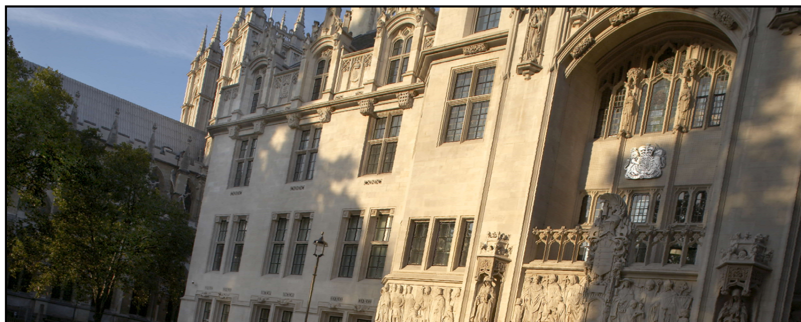

Equity and Justice

UK court increasingly likely to assume jurisdiction in interests of justice

Vedanta Resources plc & another v Lungowe & others, Supreme Court of the United Kingdom, [2019] UKSC 20

In a recent high-profile case, the Supreme Court of the United Kingdom again showed its willingness to assume jurisdiction over certain cases which have very little connection with England.

Facts. The case is a group tort claim for negligence and breach of statutory duty. The claimants comprised nearly 2,000 Zambian citizens who alleged that their health and farming activities had been damaged by toxic discharges from one of the world's largest copper mines.

The mine is owned and operated by Konkola Copper Mines, a Zambian company. Konkola's parent company is Vedanta Resources, which is domiciled in England. All of the relevant events took place in Zambia with little to connect the claim to England beyond the fact that the mine operator's parent company was English.

Decision. The court concluded that Zambia would plainly be the proper forum for the litigation. However, it found that there was a practical impossibility for the claimants to receive substantial justice in Zambia for several reasons:

- All of the claimants were living in extreme poverty and would be unable to retain lawyers.

- The claimants could neither obtain legal aid, nor access to alternative funding arrangements (conditional fee agreements are illegal in Zambia).

- There was an absence in Zambia of suitable legal teams to handle litigation of the size and complexity anticipated in this case, especially given that the claimants would be proceeding against a well-resourced defendant.

In those circumstances, the court agreed that, in the interests of all the parties and the ends of justice, the action should proceed in England. ■

Equity and Justice

Spanish High Courts of Justice begin nullifying penalties imposed by tax authorities regarding Form 720 (Reporting of Assets Held Abroad by Spanish Taxpayers)

Tax Form 720 is now in the spotlight of both the European Court of Justice (yet to issue a final decision) and the Spanish courts.

Background. In 2012, the Spanish legislator established an annual obligation for all taxpayers to provide information to the Tax Administration related to assets they hold abroad. This obligation applies to three asset groups:

- accounts in financial institutions located abroad;
- stocks, bonds, values, financial rights, and savings in insurance companies, deposited, managed or obtained abroad.
- real estate or rights over real estate located abroad.

Severe penalties are applied in cases of non-compliance. There is a fine of 5,000 euros for each set of data referring to a non-declared, incorrectly declared or falsely declared asset, with a minimum fine of 10,000 euros per group.

In addition, the income discovered that has not been declared will be considered as an unjustified capital gain. It will be taxed at the highest tax rate up to a maximum of 52%. It will also be subject to a 150% penalty and late payment interest.

Finally, the unjustified capital gain will be attributed to the last fiscal, but not elapsed, year. This means that the period of assessment will never expire for these undeclared goods and rights.

EU infringement proceedings. The European Commission opened EU infringement proceedings in November 2015 with a letter of formal notice that Spain was not respecting its obligations under EU law. While the Commission took the view that Spain has the right to require taxpayers to provide its authorities with information on certain assets held abroad, it found that the fines charged for failure to comply were disproportionate.

After Spain's continued non-compliance, the Commission took the next procedural step in February 2017 and followed up with a reasoned opinion—a formal request for Spain to comply with EU law.

The Commission argued that because the fines are much higher than penalties applied in a purely national situation, the rules may deter businesses and private individuals from investing or moving across borders in the single market. Such provisions are consequently discriminatory and in conflict with the fundamental freedoms in the EU, such as the free movement of persons, the free movement of workers, the freedom of establishment, the freedom to provide services and the free movement of capital.

Despite the opinion issued by the European Commission, the Spanish Tax Authority has still not complied. In June 2019, the Commission decided to bring the matter before the Court of Justice of the EU with a formal referral.

Recent Spanish court rulings. Undeterred by the Spanish Tax Authority's refusal to change its regulations, some Spanish Courts have started to rule in favor of Spanish taxpayers, finding that the penalty regime under Form 720 is disproportionate and unlawful.

In a November 2018 decision, the Supreme Court of Justice of Castile and Leon admitted the appeal of a taxpayer that had been sanctioned a total of 5.800 euros for having presented Form 720 after the deadline. It also condemned the Tax Authority for costs.

The High Court of Justice of Catalonia and the High Court of Justice of Extremadura have also recently issued decisions nullifying the penalty imposed for having submitted a late declaration. ■

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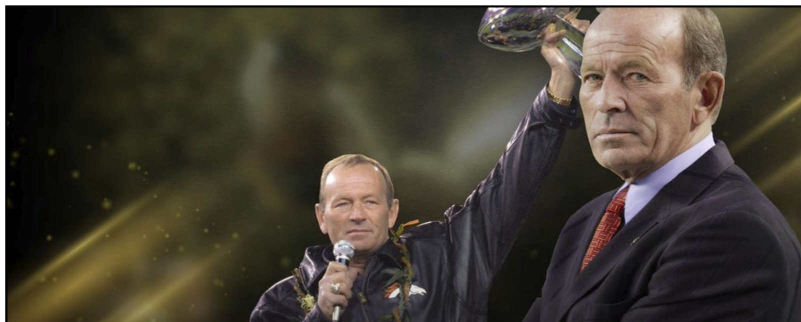

ESTATE PLANNING

Court dismisses pre-nuptial agreement as being wholly unfair
Ipekci v McConnell, England and Wales Family Court, 2019 EWFC 19

The England and Wales Family Court recently decided to ignore a pre-nuptial agreement made in New York between the Avon cosmetics heiress Morgan McConnell and her husband Anil Ipekci.

Facts. McConnell was the beneficiary of a number of trusts with a total value in excess of £50 million. The couple met in New York where the husband was working as a hotel concierge. They began living together in London and married in November 2005. They remained together until 2016 and had two children together.

The pre-nuptial agreement was presented to the husband for signature three weeks before the marriage. A lawyer, who had acted for the wife in an earlier divorce, was provided to the husband to give him independent advice, including that the agreement gave him no entitlement at all. The agreement also stated that both it, and any divorce proceedings between the parties, were to be governed solely by the law and courts of New York.

When the couple divorced a decade later, the matrimonial home was in London. The husband sought a financial remedy under English law.

Decision. The court found that the agreement was not duly certified as required by New York law and was therefore unenforceable in New York. It found that:

- the husband's lawyer was neither independent nor qualified to advise on the law of New York.
- due to the way the parties had organised their affairs, the husband had made no savings or pension provision for himself.
- it was in the interests of the children that the husband not be seen as the poor relation.
- the agreement did not meet the husband's needs at all, and it would be wholly unfair to hold him to it.

Accordingly, the court awarded the husband a lump sum of £1.3 million. ■

CELEBRITY ESTATES

Deceased NFL owner's incentive trust highlights importance of well-delineated trustee responsibilities

While many celebrities fall short in the planning of their succession, the passing of NFL Denver Broncos owner Pat Bowlen in June 2019 offers a helpful reminder of how conflicting interests can undermine an otherwise well-executed estate plan.

To ensure an orderly succession, Bowlen placed the Broncos franchise in a trust managed by three trustees—Joe Ellis, president and CEO of the Broncos; Rich Slivka, Bowlen's lawyer for decades and the Broncos' general counsel; and attorney Mary Kelly.

He laid out a series of qualifications—including work experience and education—that at least one of his seven children would have to meet if they wanted to assume control of the franchise. The ultimate judges of a candidate's worthiness would be the three trustees themselves.

While Bowlen's plan ensured that the Broncos' succession would proceed by his very specific rules, he did not appreciate that the trustees, who currently control the team, would be placed in a conflict of interest, as implementation of the plan essentially means that the trustees will be working themselves out of a position with the Denver Broncos Football Club.

Indeed, the most suitable candidate, 48-year-old Beth Bowlen Wallace—Bowlen's daughter from his first marriage—whose resume includes a law degree, various philanthropic and business ventures, and time working as a special project manager for the team, has been deemed by the trustees to be unqualified for the position. Instead, the trustees favor 28-year-old Brittany Bowlen—the daughter of Pat's current wife—who is years away from being ready to assume control of the team.

Having given the trustees the responsibility to both run the team and decide if one of the children is qualified to take over the team, Bowlen created an undeniable conflict of interest. Had the trustees not been forced to necessarily deprive themselves of a job, they would likely have already deemed one of the heirs worthy of assuming control of the franchise. ■

RESIDENCY

Instagram's digital footprint data used to prove residency

When French pop star Johnny Hallyday died in 2017, a battle over his US$100 million estate quickly ensued. Hallyday left everything by will to his most recent wife, Laeticia, who lives in California. His children from a previous marriage contested the will on grounds that excluding family members is illegal under France's forced heirship laws.

The dispute centres on the question of whether the deceased was a resident of France or the United States. His widow argued that they had been living in Los Angeles since 2007 and that their kids attended school there.

Hallyday's children from a previous marriage, David and Laura, put forward a very compelling and modern day argument by producing a chart that tracked their late father's location using his Instagram account.

They argued that the geolocation data from his Instagram posts proves that he was resident in France. This GPS tracking data showed that Hallyday spent 151 days in France in 2015, and 168 days in France in 2014. He also spent eight consecutive months in France while undergoing cancer treatment in 2016 and 2017.

The court accepted the geolocation data and found that Hallyday was in fact domiciled in France, and that French law applied to his estate. The French courts therefore had jurisdiction. ■