R (on the Application of KBR Inc) v. Director of the Serious Fraud Office: English High Court Determines Government Office Can Compel Production of Documents Held Overseas

I. OVERVIEW

As part of a larger bribery and corruption investigation, the Serious Fraud Office of the Government of the United Kingdom (SFO) opened inquiries into payments made for consultant services in excess of $23 million by Kellogg Brown & Root Limited (KBR Ltd.), a United Kingdom-based subsidiary of the United States incorporated parent company, Kellogg Brown & Root Incorporated (KBR Inc.).[1] The SFO alleged these payments had required both express approval and processing by KBR Inc.[2] In April 2017, pursuant to the Criminal Justice Act 1987 (CJA 1987), the SFO issued a notice to KBR Ltd. requiring the production of specified materials and documents.[3] Cooperating with the investigation, KBR Ltd. provided the SFO with pertinent materials under their control in the UK as well as materials forwarded to them from the United States by KBR Inc. with the direction to provide them to the SFO.[4] Lastly, KBR Inc. also turned over relevant documents to the SFO on a "voluntary basis" that it had previously disclosed to the United States

1. The Queen on the Application of KBR Inc. v. Dir. of the Serious Fraud Office [2018] EWHC (Admin) 2368 [3]-[7] (Eng.).
2. *Id.* at [7].
3. *Id.*
4. *Id.* at [13].

Department of Justice (DOJ) and Securities and Exchange Commission (SEC) as a result of related inquiries.[5]

Eventually, the SFO became concerned that KBR Inc. was beginning to draw a contrast between documents held by KBR Ltd. in the U.K. and those documents held by KBR Inc. outside the country.[6] Under the presumption of providing an update regarding the pending investigation to the parent company, the SFO scheduled a meeting in the United Kingdom in July 2017 and insisted upon the attendance of two senior U.S.-based executives of KBR Inc.[7] After asking whether the outstanding requested material held outside the U.K. would be provided and not receiving an affirmative response, the SFO presented one of the KBR Inc. executives with an additional notice pursuant to the CJA 1987 requiring KBR Inc. to produce documents of the parent company held outside the United Kingdom.[8] Following the meeting, KBR Inc. responded to the notice by contending that a notice pursuant to the CJA 1987 could not apply to a company incorporated outside the United Kingdom.[9] KBR Inc. then applied by way of judicial review for the notice to be because the SFO had given unauthorized extraterritorial effect to the CJA 1987 by using it to compel the production of documents held overseas; the SFO had alternative means available to it, namely the mutual legal assistance process (MLA), to obtain these documents; and the CJA 1987 notice was not served upon KBR Inc. in accordance with English law.[10] The High Court of the United Kingdom *held* that notices issued pursuant to the Criminal Justice Act 1987 could require the production of documents held overseas provided that the recipient of the notice had a "sufficient connection" to the United Kingdom. *KBR Inc., R (On the Application Of) v. Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin).

II. BACKGROUND

A. The Criminal Justice Act 1987

During the 1970s and early 1980s, public concern mounted in the United Kingdom over the government's ability to investigate and

5. *Id.*
6. *Id.* at [14].
7. *Id.*
8. *Id.* at [15]-[16].
9. *Id.*
10. *Id.* at [1]-[2].

prosecute serious commercial fraud.[11] As a response, the Lord Chancellor and Home Secretary established the Fraud Trials Committee under the Chairmanship of Lord Roskill in 1983.[12] Three years later, the Committee published the *Roskill Report* pinpointing detailed recommendations to improve and make efficient the procedures employed to fight commercial fraud.[13] The *Roskill Report*'s key guidance was the formation of a new entity responsible for the "detection, investigation and prosecution" of serious fraud cases.[14]

The Criminal Justice Act 1987 (CJA 1987) served as the legislative embodiment of the *Roskill Report*'s recommendations.[15] Section 1 of the CJA 1987 formed the Serious Fraud Office (SFO) and appointed the position and manifestations of the Director, granting him the authority to "investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud."[16] Section 2 created the SFO's primary investigative tools, known as the Director's investigative powers.[17] These powers included the ability to search property and compel others to produce documents and answer questions following written notice.[18] Specifically, section 2(3) of the CJA 1987 states:

> The Director [of the SFO] may by notice in writing require the person under investigation or any other person to produce . . . any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified class which appear to him so to relate . . .[19]

Noncompliance with CJA section 2 notices without a reasonable excuse serves as guilt punishable by imprisonment.[20]

While the CJA 1987 is notably silent regarding the extraterritorial application of the powers it creates, English courts have undergone a recent shift in the way they treat jurisdictional expansion.[21] In previous years it was universally understood that a statute enacted in the United Kingdom applied only to individuals present in the United Kingdom

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11. *SFO Historical Background and Powers*, SERIOUS FRAUD OFF., https://www.sfo.gov.uk/publications/corporate-information/sfo-historical-background-powers/ (last visited Nov 1, 2018).
12. *Id.*
13. FRAUD TRIALS COMMITTEE, FRAUD TRIALS COMMITTEE REPORT, 1986, at 1 (UK).
14. *SFO Historical Background and Powers*, *supra* note 11.
15. *Id.*
16. Criminal Justice Act 1987, c. 38, § 1, sch. 3 (Eng.).
17. *Id.* § 2, sch. 1.
18. *SFO Historical Background and Powers*, *supra* note 11.
19. Criminal Justice Act 1987, c.38, § 2, sch. 3.
20. *Id.*
21. Bilta Ltd. v. Nazir [2015] UKSC 23 [212] (appeal taken from Eng.).

unless the relevant statute expressly or impliedly provided to the contrary.[22] As courts began to find implied extraterritorial effect for statutes when the purpose of the legislation could not "effectually be achieved unless it ha[d] extraterritorial effect," the once universal principle began to soften into a question not of express or implied extraterritorial authority, but rather one of interpretation.[23]

Currently, whether a statutory provision applies to persons or matters outside the jurisdiction depends on its proper construction and is "underpinned by considerations of international comity and law."[24] Unless intent to the contrary is apparent, a statute applies to all persons and issues within the territory but not beyond it.[25] The extent to which a statutory provision might apply outside the jurisdiction depends upon who is "within the legislative grasp, or intendment" of the relevant provision.[26]

B. The Alternative Mechanism: The Mutual Legal Assistance Process

Countries oftentimes engage in agreements to facilitate the assembly and exchange of information and documents in an effort to enforce their laws.[27] For much of the 20th century, the United States and the United Kingdom were engaged in such an agreement but limited the exchange only to "crimes committed within their own borders."[28] Following the World Wars, however, the international community began to expand upon its willingness to cooperate through extradition and the development of international criminal law.[29] The United Kingdom was notably slow to join certain international instruments related to the mutual exchange of legal information but began to ratify and enter a number of multilateral and bilateral treaties in the 1990s.[30] In an effort to encourage such international participation, Parliament enacted both the Criminal Justice (International Co-Operation) Act 1990 and the Crime (International Co-Operation) Act 2003.[31]

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22. *Id.*
23. Cox v. Ergo Versicherung [2014] UKSC 22 [29] (appeal taken from Eng.).
24. Masri v. Consol. Contractors Int'l Ltd. [2009] UKHL 43 [10] (appeal taken from Eng.).
25. *Id.*
26. Clark v. Oceanic Contractors Inc. [1982] 2 WLR 94 [152] (Wales).
27. CLIVE NICHOLLS, CLARE MONTGOMERY & JULIAN KNOWLES, THE LAW OF EXTRADITION AND MUTUAL ASSISTANCE (3d ed. 2013).
28. *Id.*
29. *Id.*
30. Criminal Justice (Int'l Co-Operation) Act 1990 pmbl. (UK).
31. *Id.*; Crime (Int'l Co-Operation) Act 2003 pmbl. (UK).

In 1994, the United Kingdom entered into a bilateral mutual legal assistance treaty with the United States (the 1994 Treaty) in which it agreed that the "Requested Party shall take whatever steps it deems necessary to give effect to requests received from the Requesting Party."[32] Furthermore, this treaty granted Courts of the Requested Party the "authority to issue subpoenas, search warrants, or other orders necessary to execute the request."[33] It additionally outlined certain safeguards including the necessity to consult and resolve with the other Party.[34]

The Crime (International Co-Operation) Act 2003 gives a "designated prosecuting authority" the ability to request assistance under the mutual legal assistance process (MLA) through the 1994 Treaty when "(a) it appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and (b) the authority has instituted proceedings in respect of the offence in question or it is being investigated."[35]

According to both case law and legislative analysis, MLA processes are mechanisms states are entitled, but not obligated, to pursue.[36] In *R v. Redmond*, British officers were accused of deliberately bypassing the MLA process agreed upon with Spain.[37] The High Court relied upon the strict reading of the Criminal Justice and Crime Acts and their use of the word "may" to identify MLA processes as opportunities not requirements.[38]

III. THE COURT'S DECISION

In the noted case, the High Court of the United Kingdom kept in trend with the evolving understanding of extraterritorial statutory application while also identifying a nuanced qualifier, finding that the CJA 1987 must have application for documents held overseas as long as the recipient of the CJA 1987 notice had a "sufficient connection" to the U.K.[39] To do this, the Court examined the legislative intent or purpose, historical treatment, and public policy arguments surrounding the CJA 1987.[40] Next, the High

32. Mutual Legal Assistance Treaty, U.K.-U.S., Jan. 6, 1994, T.I.A.S. 96-1202.
33. *Id.*
34. *Id.*
35. Crime (Int'l Co-Operation) Act 2003, c. 32, § 2, sch. 5 (UK).
36. The Queen on the Application of KBR Inc., v. Dir. of the Serious Fraud Office [2018] EWHC (Admin) 2368 [91] (Eng.).
37. *Id.*
38. *Id.*
39. *Id.* at [71].
40. *Id.* at [66]-[84].

Court again identified the mutual legal assistance process as an entitlement rather than an obligation, finding the preference of the notice under CJA 1987 permissible despite the option of MLA.[41] Lastly, the High Court determined the "service" procedure used by the SFO to deliver its CJA 1987 notice to the parent company, KBR Inc., through its executive officer was proper.[42]

A. Extraterritorial Jurisdiction

First, the High Court addressed the extraterritorial application of the notice mechanism provided to the Director of the SFO pursuant to CJA 1987.[43] It held that the CJA 1987 must have extraterritorial application but also determined a limitation on this power.[44] The Court came to this conclusion using three principled discussions: legislative intent or purpose, historical treatment, and public policy.[45]

First, the Court examined both the legislative purpose and intent surrounding the enactment of CJA 1987.[46] It noted that the purpose behind the legislation was to protect the United Kingdom against well-crafted and complex business enterprises engaged in fraud and corruption.[47] The Court pointed out these business infrastructures are almost always international in nature and exist across multiple jurisdictions.[48] Therefore, determining a notice under CJA 1987 does not apply extraterritorially would almost always inhibit and frustrate the purpose of the legislation.[49] Additionally, the Court also noted that despite the technological advancements in subsequent years, when CJA 1987 was passed, it had at least a degree of extraterritorial application.[50] To determine otherwise now would be contrary to the original legislative use.[51]

Next, the Court examined the historical treatment of the power bestowed upon the Director under the CJA 1987.[52] Prior to this legislation, the power to compel the production of documents in relation to foreign

41. *Id.* at [85]-[96].
42. *Id.* at [97]-[100].
43. *Id.* at [66]-[84].
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at [68].
48. *Id.*
49. *Id.*
50. *Id.* at [64].
51. *Id.* at [67].
52. *Id.* at [73].

companies belonged to the Department of Trade and Industry (DTI).[53] Their power was extraterritorial, assuming the company carried on business in the United Kingdom.[54] Here, the Court noted, should the Court have determined there is no extraterritorial application of the CJA 1987, then it would have limited the powers of the SFO beyond that even of the DTI, which the Court reasoned was not the intent when the legislation was enacted.[55]

Additionally, the Court discussed the many policy reasons surrounding the necessity of determining the extraterritorial application of the CJA 1987.[56] Chiefly, it began by highlighting the fact that the CJA 1987 was enacted prior to the advent of the Internet.[57] Due to the ease and speed with which documents can be transferred, the Court suggested companies would simply evade oversight by storing their servers out of jurisdiction under the care of a related but foreign business entity.[58] The Court addressed any concern for its interpretation by emphasizing the fact that the power given to the Director under the CJA 1987 is not to conduct searches or seizures or subject individuals to questioning, but merely to request documents, failure of which could result in legal prosecution. [59]

With this context detailed and the extra-territorialism of the CJA 1987 established, the Court elected to nuance its application by limiting the ability only to instances where there is a "sufficient connection" between the company and the United Kingdom.[60] The Court emphasized that the "'sufficient connection'" test strikes a balance: ensuring SFO investigations have power and are not futile endeavors while also justifying the reach by clearly linking the actions to the United Kingdom in some way.[61]

The Court then applied its new test to the facts at hand to determine that there was a sufficient connection between KBR Inc. and the United Kingdom so as to make it susceptible of the extraterritorial reach of the CJA 1987 notice.[62] The Court began by identifying connections that were not sufficient to draw this connection: KBR Inc.'s status as a parent

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at [64].
57. *Id.*
58. *Id.* at [68].
59. *Id.* at [70].
60. *Id.* at [71].
61. *Id.* at [72].
62. *Id.* at [79].

company of the U.K. subsidiary KBR Ltd.; KBR Inc.'s prior voluntary cooperation with the notice pertaining to certain documents; and the temporary presence of a KBR Inc. executive within the jurisdiction.[63] The Court then pinpointed the factors that did serve as a sufficient connection: KBR Inc.'s role in the approval and routing of payments central to the SFO investigation and the permanent placement of a KBR Inc. Vice President at the U.K. office.[64]

B. Director Discretion

The Court next addressed KBR Inc.'s arguments pertaining to the availability of the mutual legal assistance process. KBR Inc. asserted that the existence of the MLA indicated the jurisdictional limits of the CJA 1987.[65] In the event that argument failed, KBR Inc. asserted that the presence of the MLA option creates an obligation to proceed by that means rather than relying on the notice mechanism of the CJA 1987.[66]

The High Court rejected both claims.[67] First, the Court insisted that they were unable to say that the mere existence of the MLA process had an effect on the extraterritoriality of the CJA 1987.[68] The Court rationalized its understanding by pointing to countries that were not part of MLA agreements or treaties and suggested that relying only on MLA processes and failing to extend the jurisdiction extraterritorially would result in no possibility of pursuit for the SFO when pertinent documents were held in these uncovered countries.[69] Additionally, the CJA 1987 was enacted prior to the MLA arrangements of the early 1990s, so supposed implied limitations of the CJA 1987 due to the MLA processes could not have been envisioned.[70]

Furthermore, the Court determined that the MLA processes are a power of the SFO Director provided by way of his prosecutorial authority in addition to the powers vested in him under the CJA 1987.[71] The existence of the MLA processes within the United States serves as an additional option but does not limit his ability to use his CJA 1987

63. *Id.* at [80].
64. *Id.* at [81].
65. *Id.* at [19].
66. *Id.*
67. *Id.* at [96].
68. *Id.* at [77].
69. *Id.*
70. *Id.*
71. *Id.* at [93].

powers.[72] The Court points to case law to show that the state is entitled to but not obligated to proceed by way of MLA.[73] The Court also highlights the practical reasons why the Director of the SFO might choose to proceed via notice under CJA 1987 instead of a MLA process. These reasons include a risk of delay and risk of ignored request by the responding state.[74]

C. Service

The last issue addressed by the High Court answers the question of whether the handing of the CJA 1987 notice to the KBR Inc. executive while she was in the United Kingdom under her official capacity was sufficient notification.[75] Here, the Court looked to the text of the CJA 1987 to explain that CJA 1987 notices clearly do not require formal "service" as is outlined by the rules of civil procedure and as pertains to other documents.[76] The Court reasons that here, KBR Inc. was plainly present within the territory of the United Kingdom through its agent executive employee.[77] Furthermore, she was in the country for business-related activities and not in her private capacity.[78] Lastly, it is clear that this executive relayed the notice provided to her at the meeting in the United Kingdom to KBR Inc., the key impetus behind providing notice, as this is the subject of this litigation.[79]

Following this analysis, the Court dismissed the judicial review because it determined there was a sufficient connection between KBR Inc. and the United Kingdom so as to compel the production of the documents.[80]

IV. ANALYSIS

In extending the reach of the SFO to documents held overseas by companies with a "sufficient" connection to the United Kingdom, the High Court drastically expanded the authority over which the United Kingdom is able to solicit material held beyond its jurisdiction and also

72. *Id.*
73. *Id.*
74. *Id.* at [94].
75. *Id.* at [97]-[100].
76. *Id.* at [99].
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at [102].

ostensibly increased the ease and speed with which these documents could be obtained.[81]

To begin, the nature of the responsibilities of the SFO very rarely result in investigations that do not target multinational entities.[82] Because these complex fraud cases are almost always across multiple jurisdictions, the United Kingdom will, as a result, see very few limits on its ability to compel documents abroad.[83] The only limiting factor will be the imposition of the "sufficient connection" test to the United Kingdom.[84] However, this threshold, as it is outlined in the noted case, is seemingly easy to fulfill as any degree of decision making or processing authority retained by a company outside the jurisdiction would serve as a "sufficient connection" to the United Kingdom.[85] In fact, even though the Court in the noted case says the fact that a KBR Inc. employee worked out of the U.K. office did not, on its own, constitute a "sufficient connection," it used this fact to further emphasize the connection of the parent company to the subsidiary.[86] It is highly unlikely that should a company with whom a foreign company holds enough of a relationship that the foreign company might be in the possession of relevant materials be under investigation that that company would not also be determined to inherently have a "sufficient relationship" with the United Kingdom.[87] Therefore, will the "sufficient connection" test ever truly serve as a limit?

Additionally, the ease with which the SFO is able to "serve" its notices to compel documents upon foreign companies will have immense ramifications for cross-national meetings, trust, and travel. Here, the SFO was able to properly issue a notice to compel documents upon an agent of a foreign company by urging the company's executive officer to attend a meeting in the United Kingdom under not only the assumption but also the explicit guarantee that the meeting was to provide an update on the investigative status.[88] Moving forward, companies will be apprehensive to send their officers to meet with members of the SFO out of fear of ulterior motives. Companies will be forced to be expected to obtain "safe passage guarantees" from the SFO prior to their meetings, or they will be

81. *Id.* at [71].
82. *Id.* at [68].
83. *Id.*
84. *Id.* at [71].
85. *Id.*
86. *Id.* at [83].
87. *Id.*
88. *Id.* at [14].

forced to not attend the meeting all together. This will lead to less cooperation by companies with the SFO.

Furthermore, this ruling will embolden the SFO to request extraterritorial documents with more regularity and to avoid the MLA processes, especially when they prove to be cumbersome, untimely, or challenging.[89] This effect will be seen not just at the SFO but also within other governmental agencies of the United Kingdom who enjoy similar compulsory powers. This will lead to the eventual obsolescence of the MLA process.

Despite its appearance, it is possible this ruling will not serve to be as far reaching in reality as it is presumed to be in theory. Oftentimes extraterritorial companies operating tangentially to SFO investigations willingly cooperate with CJA 1987 requests in hopes of gaining leniency in the wake of the SFO prosecution.[90] Nevertheless, it is indisputable that this ruling grants a government entity of the United Kingdom sweeping authority to compel the production of documents it deems pertinent regardless of their extraterritorial location.[91]

V. CONCLUSION

The Court in the noted case seems to have ruled not out of an adherence to case law or long-held international criminal theory, but rather out of common sense. In the advent of the Internet, the cloud, and e-mail, it seems astute to suggest documents truly have no fixed location in a certain country but rather are located wherever they are accessible, anywhere in the world. From a reasonable perspective, it is logical that the Court read the CJA 1987 extraterritorially to confront the digital age. However, this ruling sets aside international interpretations and boundary principles and leaves the United Kingdom with the ability to request documents it desires subject to no approval by a court or by a controlling state's consent.

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89. *Id.* at [94].
90. *Id.* at [13].
91. *Id.* at [71].

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