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JUDICIAL DECISIONS

KBR v. SFO: Implications for Overseas Document Production

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The U.K. Supreme Court has handed down its much-anticipated judgment in the KBR case, *R (on the application of KBR, Inc) v. Director of the Serious Fraud Office* [2021] UKSC 2, unanimously ruling in February 2021 that the SFO's powers under Section 2(3) of the Criminal Justice Act 1987 (CJA 1987) do not extend to compelling a foreign company located wholly outside of the U.K. to produce documents in the U.K. This article analyses the case and discusses its practical implications.

See ACR's three-part series on the SFO's Cooperation Guidance: "Transparency" (Sep. 18, 2019); "Waiving Privilege" (Oct. 16, 2019); and "Internal Investigation Expectations" (Nov. 13, 2019).

SFO Request for Out-of-Jurisdiction Documents

In 2017, the SFO launched an investigation into the U.K.-based company Kellogg Brown and Root Ltd (KBR Ltd) relating to suspected bribery and corruption offences. KBR Ltd was the U.K. subsidiary of KBR Inc., a company incorporated in the U.S. and the ultimate parent of a multinational group of companies. KBR, Inc. did not have a fixed place of business in the U.K. and did not itself carry on business there.

In April 2017, the SFO issued a notice to KBR Ltd under Section 2(3) CJA 1987 which compels the recipient to produce specified documents the director of the SFO (Director) believes relate to any matter relevant to the investigation. Failure to comply without reasonable excuse is a criminal offence.

KBR Ltd initially took a cooperative stance and provided documents in response to the notice, located both within and outside of the U.K. and KBR, Inc. also voluntarily provided some documents located outside the U.K.

The SFO subsequently became concerned that the KBR Group had started to draw a distinction between documents held within the U.K. and within KBR Ltd's control on one hand, and documents outside of the jurisdiction and beyond its control on the other. A meeting was arranged between the SFO and KBR, which the SFO insisted should be attended by representatives of KBR, Inc., as well as its lawyers.

KBR, Inc.'s executive vice president, general counsel and corporate secretary chief Eileen Akerson, along with its compliance officer Julia Symon, flew from the U.S. to the U.K. to attend the meeting. That morning, prior to the meeting, the SFO had prepared a further notice under Section 2(3) CJA 1987 addressed

to KBR, Inc. requiring it to produce responsive documents that had not already been produced in relation to the first Section 2 notice.

At the meeting, the SFO case controller asked whether the outstanding material that had not yet been provided on the basis it was outside of the U.K. was going to be provided. When the SFO was told that KBR, Inc.'s board required time to consider the position, the SFO inserted Akerson's name into the request for documents and handed it to her at the meeting.

KBR Inc. refused to provide the documents and instead challenged the notice via judicial review, seeking to quash it on three grounds:

1. the notice was *ultra vires* because it requested material held outside the jurisdiction from a company incorporated in the U.S.;
2. it was an error of law for the SFO to exercise its powers under Section 2 CJA 1987 despite its power to seek mutual legal assistance from the U.S.; and
3. the notice was not effectively served by the SFO handing it to a senior officer of KBR, Inc., who was temporarily present in the jurisdiction.

See "eDiscovery in Multi-Jurisdictional Investigations: Preparing to Play Multi-Level Chess" (Jan. 6, 2021).

SFO Victory in the Divisional Court

KBR, Inc.'s argument failed on all three grounds in the Divisional Court and the application was unsuccessful. The Divisional Court ruled[1] that although Section 2(3) of the CJA 1987 did not have extraterritorial effect in relation to all foreign companies in respect of documents held outside the jurisdiction, it did have extraterritorial effect in relation to those foreign companies where there was a "sufficient connection" between the company and the U.K.

The Divisional Court found that KBR Inc. did have a "sufficient connection" on the basis that payments central to the SFO's investigation of KBR Ltd required the approval of KBR Inc and were paid by KBR Inc. through its U.S.-based treasury function.

KBR, Inc. appealed the decision in relation to the first ground only.

The Divisional Court's decision was heavily criticized by legal practitioners who suggested the judiciary was reading in extraterritorial powers to Section 2 CJA 1987 that the legislation did not intend, and it was widely expected to be overturned.

Reversal by the Supreme Court

The Supreme Court did just that with a unanimous decision in February 2021.

It considered the question of whether Parliament intended to confer on the SFO power to compel a foreign company to produce documents held abroad on pain of a criminal penalty in the U.K.

The starting point in considering the scope of the Section 2(3) CJA 1987 power was the presumption that legislation is generally not intended to have extraterritorial effect, reflecting international law requirements that nations should not infringe on each other's sovereignty and the principle of comity.

The Supreme Court stated that the presumption against extraterritorial effect clearly applied in this case given that KBR Inc. had never carried on business in the U.K. nor had a registered office or any other presence in the U.K. It was noted, however, that the presumption would apply with much less force to legislation governing the conduct abroad of a U.K. company, as countries have a legitimate interest in legislating in respect of the conduct of their nationals overseas.

Whilst the Supreme Court suggested an intention to give a statute extraterritorial effect may be implied if the purpose of the legislation cannot be achieved without such effect, the provisions, purpose and context of the statute should be taken into account when considering whether the presumption against extraterritoriality should be rebutted in order to take that purposive approach. Other factors in the determination include the legislative history and whether Parliament could be taken to have intended that the purpose of the legislation be achieved by other means. Those factors were to be considered in light of English principles of interpretation and international law and comity.

Language & Legislative History

The Supreme Court accordingly examined the language of Section 2(3) CJA 1987, which included no express provision that it should have extraterritorial effect. It further examined the legislative history of the CJA 1987 and subsequent legislation, finding it supported that "Parliament intended that evidence should be secured from abroad by international co-operation as envisaged in the Roskill Report"[2]

MLA Regime

The Supreme Court also examined the progression of the statutory scheme for international cooperation and mutual legal assistance in criminal matters, noting the "comprehensive" regime in place. It suggested the safeguards and protections of the statutory regime for MLA in criminal investigations and proceedings were "of critical importance" and "fundamental to the mutual respect and comity on which the system is founded."

Parliament did not intend the MLA regime to sit alongside a unilateral power in Section 2(3) CJA 1987 with extraterritorial effect on foreign companies. It was "inherently improbable that Parliament should have refined this machinery as it did, while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the SFO, without any recourse to the courts or authorities of the State where the evidence was located and without the protection of any of the safeguards put in place under the scheme of mutual legal assistance."

Viability of Sufficient Connection Test

The Court also found there was no justification for reading an implied "sufficient connection" test into Section 2(3) CJA 1987 for a number of reasons:

1. it was inconsistent with Parliamentary intention;
2. such a test would not allow scope for the exercise of judicial discretion to limit the operation of a broad interpretation, or safeguard against exorbitant claims of jurisdiction, given that the power under Section 2(3) CJA 1987 was conferred on the SFO, not the court;

3. such a statutory rule would be inherently uncertain in the absence of a definition of what would constitute a sufficient connection; and
4. there was no basis for implying such a test and "any attempt to do so would exceed the appropriate bounds of interpretation and usurp the function of Parliament."

Limited Applicability

It is important to note that the Supreme Court's judgment only considered the position of a foreign company that had never carried on business in the U.K. nor had a registered office or any other presence in the U.K. The Court specifically stated the case before it was not concerned with the conduct abroad of a U.K. national or a U.K.- registered company. Although it was not specifically decided, the parties, and, it seems, the Supreme Court as well, shared the view that if the addressee of the notice had been a U.K. registered company, Section 2(3) CJA 1987 would apply so that a U.K. company would be required to produce in the U.K. a document (or data) held overseas such as documents covered by a Section 2 notice that are held on a server outside of the jurisdiction.

Similarly, the Supreme Court stated it was not concerned with the position of a foreign company which has a registered office or a fixed place of business in the U.K. or which carries on business in the U.K.

See "A Comparative Review of the SFO's Internal Guidance on DPAs" (Dec. 16, 2020).

Overseas Production Orders

Undoubtedly, the SFO will have been disappointed with the result of the appeal, which broadly returns it to the status quo of having to rely on the mutual legal assistance process to obtain overseas evidence from foreign companies that do not have a presence in the U.K., which is notoriously slow and can take months or even years to produce relevant evidence, often leading to significant delays to investigations.

There may be another way, however. The SFO and other relevant U.K. enforcement agencies will be heartened by new extraterritorial powers at their disposal under the Crime (Overseas Production Orders) Act 2019 (the COPOA).

Under this new legislation, the SFO will be able to directly compel the disclosure of electronic data stored outside of the U.K. via Overseas Production Orders (OPOs) where there is a reciprocal agreement in place with another country. Currently, the U.K. only has one such reciprocal agreement in place, with the U.S. (the U.S.-U.K. Bilateral Data Access Agreement), but more are expected to follow and it is advisable for companies likely to be the recipients of OPOs to be familiar with the process.

Apply Directly to the Court

Obtaining an OPO is expected to be significantly faster than using MLA requests as the SFO will be able to apply directly to a Crown Court in the U.K. for a court order with extraterritorial effect, which will directly compel a foreign company to provide electronic data. Although the COPOA provides that an OPO can be made against "a person," under the terms of the U.S.-U.K. Bilateral Data Access Agreement, OPOs can only be made in relation to Communications Service Providers. The default position is that the recipient will have just seven days to comply with an OPO.

Challenging the Order

OPOs are a novel tool in that a foreign recipient wishing to challenge such an order must make the challenge principally in the U.K. courts, although the reciprocal agreements allowing the orders may also provide other avenues through which challenges may be made. For example, the U.S.-U.K. Bilateral Data Access Agreement provides a process under which the party receiving the notice can raise objections first to the designated authority of the country issuing the OPO if it does not think the bilateral agreement has been properly invoked and, if the objections are not resolved, it can raise them to the designated authority of its own country.

The two designated authorities may confer and the designated authority of the recipient's country ultimately has the power to notify the issuing country that the bilateral agreement does not apply to that order if it concludes the bilateral agreement has not been properly invoked.

Incomplete Answer

This will be a very welcome new tool in the SFO's arsenal, but it is not a complete answer to the KBR judgment as it does not extend to all types of documents, nor all of the jurisdictions or types of entities from which the SFO might wish to obtain overseas evidence.

Further, the SFO cannot serve an OPO directly as they could a Section 2 notice. An OPO must be served by the Secretary of State, which may introduce some delay into the process, although it is still likely to be much faster than MLA requests.

The OPO process could be seen as something of a hybrid, on the one hand allowing the SFO to bypass the mutual legal assistance process but still potentially involving some consideration of issues of international cooperation given the bilateral agreements underlying them.

Still Hurdles to OPOs

Although the COPOA is in force and the U.S.-U.K. Bilateral Data Access Agreement was signed in 2019, the power is not yet in use and the start date for these is as yet unconfirmed.

The SFO is likely to face, at least initially, a raft of challenges to OPOs. For example, there may be issues over privilege considerations, data protection, the appropriate venue for challenges and in relation to U.S. recipients of such notices, it could potentially be argued that OPOs violate fundamental or constitutional rights.

See "Five Considerations in Cross-Border Anti-Corruption Matters" (Sep. 4, 2019).

Document Production Considerations

In the wake of the KBR decision, the following are a few practical points to consider:

- Careful strategic thought should be given as to whether it is necessary for specific people (e.g., representatives of the company) to attend meetings with enforcement authorities and the potential motivations behind such a request.
- For U.K. companies with documents held on a server in another jurisdiction or at offices of that company overseas, documents will be disclosable in relation to a Section 2 notice.
- For foreign companies without a presence in the U.K. (including a parent company of a U.K. company), the production of documents held overseas cannot be compelled through a Section 2 notice.
- Strategic thought should be given to where data is stored in a group of companies.
- Communications service providers should ensure they understand the implications of the introduction of Overseas Production Orders, the data that can be obtained under them and that they stand prepared to begin receiving them, especially given the tight default deadlines for compliance.

See "GDPR Lives On in the U.K. Post-Brexit" (Feb. 17, 2021).

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[1] *R (on the application of KBR, Inc) v. Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin)

[2] The 1986 report of the Fraud Trials Committee, led by Lord Roskill, was tasked with considering improvements in criminal proceedings related to fraud. The Roskill Report's recommendations lead to the enactment of the relevant provisions of the CJA 1987.