Neutral Citation Number: [2018] EWHC 2012 (Admin)

Case No: CO/4915/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/09/2018

Before :

LORD JUSTICE GROSS
and
MR JUSTICE OUSELEY

- -

Between :

	THE QUEEN ON THE APPLICATION OF KBR INC	**Claimant**
	- and –	
	THE DIRECTOR OF THE SERIOUS FRAUD OFFICE	**Defendant**

- -
- -

Richard Kovalevsky QC and Jamas Hodivala (instructed by **Barry Vitou, Greenberg Traurig LLP**) for the **Claimant**
Jonathan Hall QC and Simon Pritchard (instructed by **Raveen Patel**) for the Government Legal Department

Hearing date: 17 April 2018

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Judgment Approved**LORD JUSTICE GROSS:**

INTRODUCTION

1. On this rolled up hearing the Claimant ("KBR Inc") seeks permission to apply for judicial review and, if permission is granted, the quashing of the Defendant's ("the SFO's") Notice, issued on behalf of the Director of the SFO ("the Director") on 25th July, 2017 ("the July Notice"), pursuant to s.2(3) of the *Criminal Justice Act 1987* ("the CJA 1987"), requiring KBR Inc to produce documents held by it outside the United Kingdom ("the UK"), or declaratory relief to like effect. We grant permission.

2. The KBR Inc challenge to the July Notice is advanced on three Grounds:

   i) The July Notice was *ultra vires* as it requested material held outside the (UK)

jurisdiction from a company (KBR Inc) incorporated in the United States of America ("the US"); ("Ground I: Jurisdiction");

ii) It was an error of law on the part of the Director to exercise his s.2 CJA 1987 powers despite his power to seek Mutual Legal Assistance ("MLA") from the US authorities; ("Ground II: Discretion");

iii) The July Notice was not effectively "served" by the SFO handing it to a "senior officer" of KBR Inc who was temporarily present within the jurisdiction; ("Ground III: 'Service'").

3. *KBR:* KBR Inc is incorporated in the US but forms part of a multinational group of companies ("the KBR Group"), of which it is the ultimate parent, using a subsidiary structure. KBR Inc describes itself on its website as "a global provider of differentiated professional services and technologies…within the Government Services and Hydrocarbons sectors". According to the website, the KBR Group employs approximately 34,000 people worldwide (including joint ventures); it has customers in more than 80 countries and operations in 40 countries.

4. KBR Inc does not have a fixed place of business in the UK and it was not contended before us that it (i.e., KBR Inc itself) carried on business in the UK.

5. However, KBR Inc does have UK subsidiaries, including Kellogg Brown & Root Ltd ("KBR Ltd"). On 17th February, 2017, the SFO commenced a criminal investigation ("the KBR investigation") into, amongst others, KBR Ltd, concerning suspected offences of bribery and corruption. The KBR investigation continues; it arose initially out of the SFO's ongoing investigation into the suspected corrupt activities of the Unaoil Group ("Unaoil") with headquarters in Monaco, begun on 22nd March, 2016. (See, separately, *R (Unaenergy Group Holding) v Serious Fraud Office* [2017] EWHC 600 (Admin); [2017] 1 WLR 3302). According to the Witness Statement dated 12th March, 2018 of Mr Martin, a Case Controller and Solicitor at the SFO, Unaoil was engaged at various times by KBR's UK subsidiaries (including KBR Ltd) from 1996 onwards "… ostensibly to provide consultancy services in the oil and gas sectors in the Caspian region, primarily Kazakhstan and Azerbaijan".

6. Separately from the SFO's KBR investigation, KBR Inc is under investigation by the US Department of Justice ("DoJ") and the US Securities and Exchange Commission ("SEC"). As summarised by Mr Martin, the DoJ and SEC investigation is confined to KBR's UK subsidiaries' relationship with Unaoil; by contrast, the (SFO's) KBR investigation extends to the activities of other commercial agents suspected to have been used by KBR's UK subsidiaries for corrupt purposes, focused on but not limited to, activities in the Caspian region.

7. It is said by the SFO (on the basis of Mr Martin's evidence) that the KBR investigation has identified a large number of suspected corrupt payments made by KBR's UK subsidiaries to Unaoil, totalling in excess of US$23 million. Furthermore, from at least 2005 onwards, these payments appear to have required the express approval of KBR Inc and to have been processed by KBR Inc's treasury function based in the US. From

around March 2010, the SFO contends that the approval of KBR's compliance function was also required before a payment could be released.

8. "By way of example" Mr Martin details a Unaoil invoice dated 22nd December, 2010 requesting payment from KBR Ltd of a sum amounting to a little over US$1.1 million. The payment was said to be due under a consultancy agreement between KBR Ltd (in its former name) and Unaoil, dated 23rd October, 2002 (as amended) and in accordance with a Project Revenue Report covering the period 1st December, 2009 to 30th November, 2010. In response to the invoice, a "Payment Request" was prepared internally by KBR, requiring the approval of Ms Eileen Akerson (KBR Inc's Executive Vice President, General Counsel and Corporate Secretary) and Ms Symon (KBR Inc's Chief Compliance Officer), of whom more presently. Although the invoice was addressed to KBR Ltd, it appears to have been sent directly by Unaoil to the KBR Financial Controls Group in Houston and the approvals process was thereafter managed and verified by KBR Inc's Account Payment Managers, based in the US.

9. *The SFO:* One of the recommendations of the *Fraud Trials Committee* appointed by the Lord Chancellor and Home Secretary in 1983, under the Chairmanship of Lord Roskill ("the Roskill Committee") was the need "for a new unified organisation responsible for all the functions of detection, investigation and prosecution of serious fraud cases…". That recommendation gave rise to the creation of the SFO in 1987. As its immediate past Director observed in 2014:

> "…the SFO is not a regulator, an educator, an advisor, a confessor, or an apologist…the SFO is a law enforcement agency dealing with top end, well-heeled, well-lawyered crime. We enforce the law in our specialist field."

10. S.1(1) of the CJA 1987 provided for the constitution of the SFO. The Director is appointed pursuant to s.1(2) and is given the power, by s.1(3), to "investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud".

11. For present purposes, as provided by s.2(1), the powers of the Director under s.2 "… shall be exercisable, but only for the purposes of an investigation under section 1 above…in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person". S.2(3) is central to the present dispute and is in these terms:

> "The Director 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 description which appear to him so to relate…."

Any person who "without reasonable excuse" fails to comply with a requirement imposed on him by s.2, is exposed to criminal penalties and liable on summary conviction to imprisonment for a term not exceeding 6 months, or a fine, or both: s. 2(13).

12. *The April Notice:* On 4th April, 2017, a Notice under s.2(3) CJA 1987 was issued to KBR Ltd for the production of 21 separate categories of material ("the April Notice"). On any view there was, at least initially, a degree of cooperation from the KBR Group. Thus, on 2nd May, 2017, a letter from Mr Vitou of Pinsent Masons LLP, the solicitors acting for KBR Ltd and KBR Inc (in these proceedings), said this:

> "As discussed the KBR Group, namely KBR Inc, including but not limited to, KBR Inc's UK subsidiaries ('KBR' or the 'Company') will fully cooperate with the SFO investigation.
>
> Consequently, KBR's provision of information to the SFO is not limited to documents held by KBR UK – it extends to responsive documents from other KBR Group entities."

13. Thereafter, in summary, it appears that the SFO was provided with information in three different ways:

i) By KBR Ltd in response to the April Notice in respect of responsive documents already under the custody or control of KBR Ltd, located in the UK prior to the issuing of the April Notice;

ii) By KBR Ltd in response to the April Notice in respect of responsive documents *located outside the UK* and sent to KBR Ltd at KBR Inc's direction to forward to the SFO;

iii) By KBR Inc on a "voluntary basis" in respect of documents *located outside the UK* which KBR Inc had disclosed to the DoJ and SEC as a result of their inquiries into Unaoil.

14. *The July Notice:* Subsequently, especially from 21st June, 2017 onwards, the SFO became concerned that the KBR Group was seeking to draw a distinction between documents held by or under the control of KBR Ltd and documents outside of the jurisdiction and beyond KBR Ltd's control. In parallel, Mr Vitou for KBR was seeking a meeting with the SFO to discuss, *inter alia*, the progression of the KBR investigation. Mr Martin, on behalf of the SFO, was in favour of such a meeting, at least in part because he wished to voice his concerns as to the KBR Group's purported cooperation with the KBR investigation to date. Ultimately, a meeting was arranged for the 25th July and, at the insistence of the SFO, representatives of KBR Inc agreed to attend; in short, the SFO required "the clients" to be present, not simply the lawyers. In the event, those representatives were Ms Akerson and Ms Symon, both already mentioned.

15. According to Mr Martin, on the morning of 25th July, 2017 and in advance of the meeting that day, a draft of the July Notice was prepared in case "it might be necessary to hand the Notice" to either Ms Akerson or Ms Symon "in the event that a satisfactory response was not received as to KBR Inc's willingness to provide the outstanding materials sought in the April Notice". In his Witness Statement, Mr Martin goes on to

say this:

> "The first 21 requests in the [July] Notice mirrored the 21 requests contained in the April Notice, with the exception that the references to material '*held by KBR UK*' in the April Notice were amended to read '*held by KBR*'. Six additional categories of material were also requested which I considered would assist the SFO's investigation… The resulting July Notice was addressed to '*KBR Inc'*. "

It should be noted that the July Notice was prefaced by the wording that it sought the documents there set out "To the extent that such materials have not already been produced to the SFO by KBR UK".

16. In the event, in the course of the 25th July meeting, Mr Martin asked whether the outstanding material requested in the April Notice, not yet provided to the SFO on the basis that it was located outside of the UK, would be provided. In response, the SFO was told that KBR Inc's Board required time to consider the position. At that point, Ms Akerson's name was inserted in the draft July Notice and, thus completed, it was handed to her.

17. For extraneous reasons, including the impact of Hurricane Harvey on Houston, where KBR Inc had its headquarters, time for compliance with the July Notice was extended until 22nd September, 2017.

18. On 20th September, 2017, however, Mr Vitou wrote to the SFO saying that KBR Inc did not consider the July Notice lawful. Furthermore, Mr Vitou's letter included the following statement:

> " …if the July Notice was intended to require Ms Akerson, as an officer of KBR Inc or otherwise, to produce documents responsive to the July Notice on KBR Inc's behalf, KBR Inc has declined and resolved that it shall decline any request or demand made by Ms Akerson to be provided with material belonging to KBR Inc whose production the SFO seeks to compel from KBR Inc. "

GROUND I: JURISDICTION

19. *(A) The rival cases in outline:* For *KBR Inc*, Mr Kovalevsky QC's essential submission was that s.2(3) did not operate extraterritorially. This was so as a matter of statutory construction, according with international law and comity, together with English rules of conflict of laws. The presumption of territoriality had not been displaced. Moreover, on his construction, s.2(3) did not cut across the provisions for MLA. Mr Kovalevsky underlined that KBR Inc was a US corporation and the documents in question were held outside the UK. It was common ground that the documents had not been sent out of the jurisdiction in breach of s.2(16) of the CJA 1987. The production exercise requested of KBR Inc in the US was time-consuming and not straightforward. Even if *in personam* jurisdiction over KBR Inc was established (for example, by Ms Akerson's temporary

presence within the jurisdiction, addressed under Issue III below), it should not be confused with subject-matter jurisdiction. The problems posed by internet and cloud-based storage were a modern phenomenon, post-dating the CJA 1987 and did not assist the SFO's argument.

20. For the *SFO*, Mr Hall QC emphasised that most SFO investigations have an international dimension; many companies investigated by the SFO will be part of multinational groups conducting their business in multiple jurisdictions. Mr Hall submitted that the "principal question" in the case was whether the "mere fact" that documents are held outside the UK meant that KBR Inc could not be made subject to a s. 2 Notice to produce them, no matter how relevant they were to KBR Ltd.'s operations. If KBR Inc was right, it would "be unlawful to require a UK company to provide documents it holds overseas (for example on an overseas server)". There was no reason to think that foreign companies or nationals were exempt. In the present case, KBR Inc was connected by subject matter to the SFO's investigation through being the holding company of KBR Ltd and "through its involvement in some of the transactions by KBR Ltd which are the subject of the investigation". The businesses of KBR Inc and KBR Ltd were inter-dependent; KBR Ltd was not independent of KBR Inc and KBR Inc controlled the documents sought by the SFO. KBR Inc was also connected personally to the SFO's investigation. S.2(3) of the CJA 1987 contained no words of express (jurisdictional) limitation. The question was one of statutory construction. It was relevant to have regard to what KBR Inc was required to do, namely, identifying and collating the material responsive to the July Notice. Importantly, that Notice was given to KBR Inc in the UK and required KBR Inc to produce documents to the SFO in the UK. The SFO was not taking any investigative steps in relation to KBR Inc in the US. The legislative history, the purpose of the legislation and considerations of practicality (impacting on the SFO's ability to investigate and prosecute serious and complex fraud) supported the SFO's case.

21. Towards the end of the oral hearing, the Court indicated that it would be assisted by way of further written submissions from the parties on the issue of a "sufficient connection" test to the UK, in respect of a company, such as KBR Inc, incorporated outside the UK, in the context of a s.2 notice concerning documents held outside the UK, where the notice is given in the UK. In doing so, the Court was well aware that any "sufficient connection" test did not form the primary case of either KBR Inc or the SFO. KBR Inc's primary case was that s.2(3) of the CJA 1987 did not operate extraterritorially. The SFO's primary case was that there was no territorial limit on the application of s. 2(3).

22. In responding to the Court's request, the SFO (correctly) understood the inquiry as limited to foreign companies holding documents outside the UK. As already indicated, the SFO's primary case was that there was no need for any "sufficient connection" test because there were "statutory safeguards" in place to prevent the power being used "oppressively or unreasonably". If, *per contra,* Parliament did intend the wording of s. 2(3) to be limited, then "sufficient connection to the UK" was a workable limitation, consistent with authority in other fields and striking a balance between the ability of the SFO to investigate and the extent to which foreign companies may be required to take steps overseas. It would be for the SFO to decide whether the recipient of a Notice had or previously had a sufficient connection to the UK. The question would depend on the facts of the individual case. Sufficiency of connection would likely be made out where:

> "(i) the foreign company carries on business in the UK; or (ii) the

> foreign company is in the same group as a company registered or carrying on business in the UK; or (iii) the foreign company performs functions on behalf of a company registered or carrying on business in the UK such as treasury functions, or document storage functions. "

On the facts of the present case, including invoices, payments, approvals of payments and the presence of a corporate officer (a Mr Braendeland) of KBR Inc in the UK carrying out his functions here, a sufficient connection between KBR Inc and the UK was established.

23. Mr Kovalevsky approached the question of connecting factors to the UK as going to personal, not subject-matter, jurisdiction. His primary submission remained that s.2 of the CJA 1987 was silent as to "jurisdictional reach as Parliament intended that diplomatic channels were to be used in respect of material held overseas…". Even to establish personal jurisdiction, the relevant test was whether the company carried on business in the UK but it was common ground here that KBR Inc did not do so. The assumption of subject-matter jurisdiction under s.2(3) would entail a "coercive" requirement for an act abroad, contrary to international law principles. Any gaps in the scheme were to be filled by Parliament not by the Courts (as indeed had happened in the US, where a legislative solution had been adopted with regard to internet servers and the world wide web). The connections relied on by the SFO as to individuals did not suffice to establish a sufficient connection between KBR Inc and the jurisdiction. Mr Kovalevsky further submitted that Mr Martin's evidence as to "invoices" and "payments" did not extend beyond a single invoice and payment. KBR Inc had cooperated throughout the KBR investigation and the scale of the task sought to be imposed on it by the SFO should not be under-estimated.

24. *(B) The legal framework:* We were referred to a large number of authorities from a variety of contexts. While it is unnecessary to deal with all or even most of them, I shall seek to extract the most important from which the flavour of the Court's approach to the extraterritorial application of statutory provisions sufficiently appears. It can readily be seen that the authorities do not speak with one voice but it may well be that the differences in context go a long way to explain the contrasting decisions. At all events, it is convenient to start with the nature of the test.

25. *(1) A question of construction:* The question of whether a statutory provision applies to persons or matters outside the jurisdiction depends on its proper construction. It is not or, at least no longer, necessary to search for express authorisation or for necessary implication.

26. In *Masri v Consolidated Contractors Int (UK) Ltd (No. 4)* [2009] UKHL 43; [2010] 1 AC 90, Lord Mance observed (at [10]) that the "…principle relied upon is one of construction, underpinned by considerations of international comity and law." The principle was that "Unless the contrary intention appears…an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters …". The principle might not apply, "at any rate with the same force", to English subjects. Whether and to what extent it applied to foreigners outside the jurisdiction:

> "…depends ultimately as Lord Wilberforce said in *Clark v*

> *Oceanic Contractors Inc* [i.e., [1983] 2 AC 130] (p 152c) upon who is 'within the legislative grasp, or intendment' of the relevant provision. To this a nuanced answer may be given….."

27. Lord Mance added (at [19]) that the existence of a "close connection between a subject matter over which this country and its courts have jurisdiction and another person or subject over which it is suggested that they have taken jurisdiction" would be relevant in determining whether the further jurisdiction has been taken:

> "It will be a factor in construing, or ascertaining the grasp and intendment of, the relevant legislation or rule."

Helpfully, if in a different vein, Lord Mance referred (at [24]) to the test of whether "eyebrows might be raised" at the notion that Parliament had given the jurisdiction in issue to the Court concerned.

28. More recently, in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23; [2016] AC 1, personal jurisdiction (see further below) was not disputed but the Court's subject matter jurisdiction was in issue. Lord Toulson and Lord Hodge JJSC said this (at [212]) in their joint judgment:

> "…Their challenge is to the court's subject matter jurisdiction… .It relates to whether the court can regulate the appellants' conduct abroad. Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a United Kingdom statute applied only to United Kingdom subjects or foreigners present in and thus subjecting themselves to a United Kingdom jurisdiction unless the Act expressly or by necessary implication provided to the contrary…..That principle has evolved into a question of interpreting the particular statute. In *Cox* [i.e., *Cox v Ergo Versicherung AG* [2014] UKSC 22; [2014] AC 1379] Lord Sumption JSC suggested that an intention to give a statute extraterritorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect: para. 29. "

29. While *Bilta* puts it beyond doubt that the question of a statutory provision's extraterritorial application is one of construction rather than (for instance) "universal principle", I would not, for my part, read *Bilta* as sweeping away the contextual considerations to which Lord Mance made reference in *Masri;* not least, Lord Mance JSC was party to the decision in *Bilta* – and said nothing on this point. As always, therefore, what is involved is statutory interpretation, having regard to the wording of the provision in question, the statutory purpose and the relevant context.

30. *(2) The CJA 1987:* The provisions of s.2(3) have already been set out. It is convenient here to refer to certain other provisions of the CJA 1987, if only to put them to one side.

i) First, as was common ground, s.17 only addresses the territorial extent of the Act (i.e., whether it applies in England and Wales or throughout the UK), rather than

its ambit (i.e., whether it may apply extraterritorially to documents held outside the UK).

ii) Secondly, ss. 2(4) and 2(5) provide for the issue of warrants, *inter alia*, to obtain documents. Mr Kovalevsky placed some reliance on ss. 2(4) and 2(5), contending that as they were plainly of territorial application only, consistency in statutory construction required s.2(3) to be similarly construed. I cannot agree. Clearly, ss. 2(4) and 2(5) cannot operate extraterritorially. It does not follow that s.2(3) is similarly confined. Ss. 2(4) and 2(5) simply furnish one means by which compliance with the obligation to produce documents can be enforced. Moreover, a Notice under s.2(3) may be issued without knowledge of where the documents in question are in fact held. It is unnecessary to say more of ss. 2(4) and 2(5).

31. *(3) Sovereignty, personal and subject matter jurisdiction:* In *Mackinnon v Donaldson, Lufkin and Jenrette Corporation* [1986] 1 Ch 482, the Plaintiff brought an action against certain corporate and individual defendants alleging fraud. The Plaintiff obtained an order *ex parte* under s.7 of the *Bankers' Books Evidence Act 1879* against a US bank not party to the action. The order required the bank to produce books and other papers, held at its head office in New York, relating to an account of one of the defendants, a Bahamian company which since the issue of the writ had ceased to exist. The Plaintiff then issued a subpoena *duces tecum* against an officer of the bank at its London office.

32. The bank applied successfully to discharge the order and the subpoena. The Court's decision appears helpfully from the head note (at p.482):

> " .save in exceptional circumstances, the court should not require a foreigner who was not a party to an action, and in particular a foreign bank which would owe a duty of confidence to its customers regulated by the law of the country where the customer's account was kept to produce documents outside the jurisdiction concerning business transacted outside the jurisdiction; that the order and the subpoena, taking effect in New York were infringements of the sovereignty of the United States; and that, in all the circumstances and particularly as legitimate alternative procedures were available to the plaintiff, such infringements were not justified."

33. In the course of his judgment, Hoffmann J (as he then was) distinguished between "personal jurisdiction" and "subject matter jurisdiction", saying this (at p.493):

> " … this argument confuses personal jurisdiction, i.e., who can be brought before the court, with subject matter jurisdiction, i.e., to what extent the court can claim to regulate the conduct of those persons. It does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matters upon which the court may properly apply its own rules or the things which it can order such a person to do."

34. As Hoffmann J observed (at p.493), there was a certain irony in that the most frequent

insistence on the principle of a state refraining from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction had been by Her Majesty's Government, as a result of its violation by courts and government agencies of the US. Be that as it may, a number of strands from this decision bear keeping in mind. First, the distinction between personal and subject matter jurisdiction. Secondly, the concern as to infringing the sovereignty of a foreign state in respect of the conduct of its citizens on its territory. Thirdly, the fact that the bank was no more than a third party to the proceedings. Fourthly, that the bank would have owed a duty of confidence to its customers, albeit there was no suggestion (p. 493) that production of the documents sought would have been unlawful under US law.

35. In *Societe Eram Ltd v Cie Ineternatonale* [2003] UKHL 30; [2004] 1 AC 260, the question was whether the Court could make a third party debt order under Part 72 of the CPR in respect of a foreign debt, i.e., a debt payable in a foreign country and governed by the foreign law. Lord Hoffmann treated the attempt to execute a judgment (as this was) as an exercise of sovereign authority. As he expressed it (at [54]):

> "…And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries…"

36. *(4) Insolvency:* The extraterritorial application of statutory provisions has received repeated consideration in authorities coming under this heading.

37. *In re Paramount Airways Ltd* [1993] Ch 223 concerned the transfer of considerable sums of money belonging to a company by one of its directors to a bank in Jersey; the bank carried on business in Jersey but not in England and Wales. The administrators of the company sought (*inter alia*) declarations that the transfer constituted transactions at an undervalue within the meaning of s.238 of the *Insolvency Act 1986* ("the Insolvency Act 1986"). The question arose of leave to serve the originating application on the bank in Jersey, a matter which turned on whether s.238 had extraterritorial effect so as to include a foreigner resident abroad. The administrators succeeded before the Registrar; the bank succeeded before the Judge; the Court of Appeal allowed the administrators' appeal.

38. Giving the only substantive judgment of the Court of Appeal, Sir Donald Nicholls V-C (as he then was) said (at p.239) that the solution to the question of statutory interpretation arising on the appeal did "…not lie in retreating to a rigid and indefensible line":

> "Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities."

The "irresistible" conclusion was that when considering the expression "any person" in s.238 (and in certain other sections) of the Insolvency Act 1986, it was impossible to identify any particular limitation which represented the presumed intention of Parliament. Accordingly, the expression was to be given its literal meaning, unrestricted

to persons or territory; "any person" meant "any person".

39. The difficulties that might arise from giving the expression so wide an ambit were sufficiently overcome by the safeguards built into the statutory scheme, including the discretion of the Court under the relevant sections as to the order it would make or to make no order. In an extended passage which followed (at pp. 239-240), Sir Donald Nicholls formulated the "sufficient connection" test and elaborated upon the circumstances which might have a bearing on its application.

> "In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element. This connection might be sufficiently shown by the residence of the defendant. If he is resident in England, or the defendant is an English company, the fact that the transaction concerned movable or even immovable property abroad would *by itself* be unlikely to carry much weight. Likewise if the defendant carries on business here and the transaction related to that business. Or the connection might be shown by the situation of the property, such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not *by itself* normally be a weighty factor against the court exercising its jurisdiction under the sections. Conversely, the presence of the defendant in this country…will not necessarily mean that he has a sufficient connection with this country in respect of the relief sought against him. His presence might be coincidental and unrelated to the transaction. Or the defendant may be a multinational bank carrying on business here, but all the dealings in question may have taken place at an overseas branch.
>
> Thus in considering whether there is a sufficient connection with this country the court will look at all the circumstances, including the residence and place of business of the defendant, his connection with the insolvent, the nature and purpose of the transaction being impugned, the nature and locality of the property involved, the circumstances in which the defendant became involved in the transaction or received a benefit from it… whether the defendant acted in good faith. The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and any other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections.
>
> This would not be the first time that, in this field, Parliament has conferred on the English court a jurisdiction of unlimited application…Despite the width of the statutory provision [s.221], the English court does not exercise its jurisdiction to wind up a foreign company unless a sufficient connection with England and Wales is shown and there is a reasonable possibility of benefit to the creditors from the winding up…"

40. *In re Seagull Co. Ltd.* [1993] Ch 345 (heard by a different constitution of the Court of Appeal very shortly after *Paramount*) concerned a British director of a company in compulsory liquidation, living in the Channel Islands. On the application of the official receiver he was ordered by the Registrar to attend for public examination in London, pursuant to s.133 of the Insolvency Act 1986. The director successfully applied to the Registrar to set the order aside on the ground that it had been made without jurisdiction in that the director had been resident abroad at all relevant times. On the official receiver's appeal, the Judge restored the order and the Court of Appeal dismissed the director's appeal.

41. Giving the lead judgment, Peter Gibson J (as he then was) observed (at p.353) that s.133 contained no territorial limitation on its face, applying as it did to "any person" who came within the categories there specified. Nonetheless, he had regard to the well-established rule of construction that English legislation was territorial "in the absence of express enactment or plain implication" [the then applicable test]. That rule of construction exemplified (at p.354):

> "…what might be thought to be a proper reluctance of the court to construe English legislation in such a way as to enable it to assert jurisdiction over those subject to another jurisdiction by their presence in that other jurisdiction, unless compelled to do so by the language of the legislation."

In the event, Peter Gibson J held (*ibid*) that policy of the legislature in enacting s.133 pointed to its extraterritorial extension in the circumstances of that case:

> "Where a company has come to a calamitous end and has been wound up by the court the obvious intention of this section was that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation… Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice. That seems to be me to be a wholly improbable intention to attribute to Parliament…. "

Comity (at p.356) did not stand in the way of this conclusion. Moreover (*ibid*):

> "The fact that Parliament has provided for the compulsory winding up of foreign companies, knowing that those companies would only be wound up when there was a sufficient connection with the jurisdiction, and the fact that Parliament provided that section 133 should apply in such a case, seem to me to indicate that the officers of such companies who may well not be within the jurisdiction should be examinable publicly."

42. In a concurring judgment, Hirst LJ had regard to the purpose of the statutory public examination of corporate officers and continued (at p.360) as follows:

> "The efficient and thorough conduct of such investigation by the official receiver is of great public importance… This process would be frustrated if, for example, a director, who had with the aid of modern methods of communication run the company entirely from abroad, was immune from public examination … the same applies to a director who has defrauded the company in England and then absconded abroad shortly before the liquidation. These are by no means fanciful illustrations in the world of the 1980s and 1990s….."

43. Reverting to *Masri (supra)*, the issue there arose out of a judgment creditor obtaining judgment in English proceedings against (*inter alia*) a foreign company which had submitted to the jurisdiction; the judgment debt remained unsatisfied. The judgment creditor obtained, *ex parte*, an order under CPR 71.2 for an officer of the company, resident and domiciled outside the jurisdiction, to be examined in England in respect of the company's foreign assets. Reversing the decision of a constitution of the Court of Appeal (comprised of Sir Anthony Clarke MR, Longmore and Lawrence Collins LJJ), the House of Lords allowed the corporate officer's appeal and set aside the order.

44. Giving the only substantive speech of the House, Lord Mance underlined the separate legal personality of the corporate judgment debtor (which had submitted to the jurisdiction) and its officers (who had not). Although there was a close connection between the subject matter of an action against a corporate judgment debtor and its officer, CPR Part 71 was concerned with obtaining information in aid of the enforcement of a private judgment in private civil litigation. In contrast to proceedings where the public interest required an officer's public examination, parties in such private proceedings were not entitled to ask the court to summon witnesses from abroad to provide full information. This conclusion was consistent with the historical origin of CPR Part 71; furthermore, the extreme informality of its operation indicated a purely domestic focus.

45. Lord Mance took the view (at [25]) that Sir Anthony Clarke MR's observation, that it would defeat the object of CPR 71.2 were it restricted to those within the jurisdiction, "put matters substantially too high". He went on to say:

> "Small though the world may have become, relatively few officers of companies are likely to contemplate, let alone be able to undertake, emigration or flight to a different country in order to avoid giving information about their company's affairs."

For the same reason, the possibility of "deliberate evasion" referred to in *Seagull*, seemed to Lord Mance (*ibid*) to be "a factor of greater forensic than real weight" – although he accepted that such weight as it may have may be greater after "the calamity of compulsory winding up" than in the context of an unpaid judgment debt.

46. *Seagull* was distinguished (at [26]) on the ground that the "critical considerations" there were lacking in *Masri* – essentially that private civil litigation lacked the public interest element central to compulsory winding up. The position of corporate officers of the judgment debtor was closer to that of ordinary witnesses than to officers of a company being compulsorily wound up. For completeness, it does not appear that *Paramount* was

cited to the House of Lords in *Masri*.

47. *Bilta (supra)* concerned (*inter alia* and separately from the topic of attribution with which it was largely concerned) the question whether the statutory provision (s.213 of the Insolvency Act 1986), making persons party to fraudulent trading liable to contribute to the company's assets, had extraterritorial effect. The company had been incorporated in the UK. Dismissing the defendants' appeal, the Supreme Court held that it did.

48. Lord Sumption JSC treated this as "a short point and a straightforward one" (at [106]. In the case of a company trading internationally, it was difficult to see (at [108]) how provisions such as s.213 could achieve their object if their effect was confined to the UK. S.213 was one of a number of discretionary powers conferred by statute on the English Court "to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted its assets" (at [110]). Another such provision was s.238, dealt with in *Paramount*, a decision approved by the Supreme Court. The considerations which appeared "unanswerable" to the Court of Appeal in *Paramount* were equally unanswerable and applicable to s.213. Those considerations were summarised by Lord Sumption (*ibid*) as follows:

> "(i) that current patterns of cross-border business weaken the presumption against extraterritorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a United Kingdom company; (ii) that in the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of the exercise of the power; and (iii) that the absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion to grant the relief, which was enough to prevent injustice."

49. In their joint judgment (to which reference has already been made) Lord Toulson and Lord Hodge JJSC, approved the decision in *Paramount* in terms (at [214]); the same conclusion, for essentially the same reasons, was applicable with regard to s.213. Furthermore, the reasoning of Peter Gibson J and Hirst LJ in *Seagull* was explicitly approved (*ibid*) and was equally applicable to s.213.

50. *(5) Revenue: R (Jimenez) v FTT* [2018] STC 132 concerned the power of Her Majesty's Revenue and Customs ("HMRC") to issue an information notice, pursuant to Schedule 36 to the *Finance Act 2008*, requiring information from a British national, non-UK resident taxpayer. The taxpayer's claim for judicial review succeeded and the taxpayer notice was quashed. Charles J held that although the purpose of Schedule 36 was to provide a credible and effective system of checking and investigation, that purpose did not lead to the conclusion that Parliament intended Schedule 36 to have effect outside the UK. HMRC's public interest argument was undermined by the existence of mutual assistance arrangements with the relevant state, which provided the means for HMRC to seek information about liability to UK tax from persons who were abroad. Charles J highlighted that the provisions in question involved a power of investigation. He was much influenced by the "*Masri* principle" and the approach that Parliament was presumed to have intended to act in accordance with international law, so not to offend

against the sovereignty of another state.

51. In reaching his conclusion, Charles J said this at [45 (ii)]:

> " …the prospect that to avoid an investigation into his UK tax a person may move abroad and set up home there (become resident there) is more forensic or imaginary than real. This is because the footprint left in the UK by any such person will remain together with the ability to give information notices to person here (as the Revenue has done by giving the third party notices in respect of the claimant's tax position). And this is so even if the person moves to a country with which the UK has no mutual assistance arrangement."

52. Understandably, KBR Inc placed considerable reliance on the decision in *Jimenez*. It is, however, necessary to keep the following in mind:

i) The "almost universally accepted principle" that fiscal legislation is territorial and that tax investigations may not be mounted on the territory of another state, except under the terms of a treaty or by way of some other consent: [26] and [55], together with the authority and writing there cited.

ii) Schedule 36 was to be considered as a whole – i.e., not confined to taxpayer notices as such. Other provisions of Schedule 36 (including the power to inspect business premises) "raise[d] eyebrows" at the notion that Parliament intended the Schedule to have extraterritorial effect: [47]

iii) It would appear (from [43]) that HMRC confined the asserted extraterritorial reach of Schedule 36 to (so far as relevant) those states in which mutual international tax enforcement arrangements have been made. On that footing, it can readily be appreciated why Charles J held that the Revenue should proceed by way of those arrangements.

53. *(6) POCA:* In the context of the *Proceeds of Crime Act 2002* ("POCA"), we were referred to *SOCA v Perry (Nos 1 and 2)* [2012] UKSC 35; [2013] 1 AC 182. Mr Perry ("P") was convicted in Israel of fraud offences relating to a pension scheme he had operated there. SOCA commenced proceedings in England for a civil recovery order pursuant to Part 5 of POCA, seeking to deprive P, members of his family and entities associated with them of assets obtained in connection with his criminal conduct, wherever in the world those assets might be situated. SOCA subsequently obtained a Property Freezing Order under POCA, against (amongst others) P, his wife and a Manx company, freezing their assets in the UK and abroad. These proceedings gave rise to what the Supreme Court termed the "PFO" appeal. Additionally, SOCA obtained a Disclosure Order (leading to the "DO" appeal) under s.357 of POCA, against P, his wife and his two daughters, none of whom was resident or domiciled within the jurisdiction – or physically present at all material times. The DO notices were addressed to the DO defendants by letter to a residence P maintained in London. SOCA was successful in all the proceedings until the Supreme Court, where both the PFO appeal (by a majority) and the DO appeal (unanimously) were allowed.

54. For present purposes, the DO appeal is of particular interest and, unsurprisingly, KBR Inc strongly relied on it. DOs are defined by s.357, POCA; they authorise an appropriate officer to give to "any person" the appropriate officer considers has relevant information (to the investigation in question) notice in writing requiring him to answer questions, provide information and produce documents, at a time and manner specified. DOs thus require the provision of information – but extend beyond that. S.358, POCA contains the requirements for the making of DOs, including reasonable grounds for believing that information which may be provided is likely to be of substantial value to the investigation and that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if such information is obtained. S.359 contains the sanctions for non-compliance with a DO without reasonable excuse, extending to sentences of imprisonment.

55. In his judgment on the DO appeal, with which all the other members of the Court agreed, Lord Phillips of Worth Matravers PSC observed (at [91]) that the DO notices were given to persons "who were, and were known by SOCA to be, outside the jurisdiction of the United Kingdom". The Appellants submitted that the authority given by a DO to give disclosure notices only applied to notices given to persons within the jurisdiction. They relied, in particular, on the presumption that, unless it clearly provides to the contrary, a statute will not have extraterritorial effect.

56. The kernel of Lord Phillips' reasoning is to be found in the following passage from his judgment (at [94]):

> "The point is a very short one. No authority is required under English law for a person to request information from another person anywhere in the world. But section 357 authorises orders for requests for information with which the recipient is obliged to comply, subject to penal sanction. Subject to limited exceptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of country A. Section 357, read with section 359, does not simply make proscribed conduct a criminal offence. It confers on a United Kingdom public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in the event of non-compliance. To confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law. For this reason alone I consider it implicit that the authority given under section 357 can only be exercised in respect of persons who are within the jurisdiction."

57. Agreeing with Lord Phillips, Hughes LJ (as he then was) added some brief remarks but only in respect of the PFO appeal. Nonetheless, a short passage is of some relevance to the present case:

> "156. For my part, if it were possible to construe the complex provisions of POCA in such a way as to admit of limited extraterritorial effect for Part 5, but only where there is a sufficient jurisdictional connection between a part of the UK and the criminal proceeds, I should have wished to do so. I am,

> however, reluctantly persuaded that this cannot be achieved by construction and would involve illegitimately re-writing the statute. ”

58. Lord Judge CJ and Lord Clarke of Stone-cum-Ebony JSC dissented on the PFO appeal but concurred on allowing the DO appeal, saying this (at [183]):

> “.There is nothing in section 357 or 358 to indicate that it was intended that a notice under a disclosure order could be given to a person outside the jurisdiction. ”

59. A number of observations may be ventured at once in relation to *Perry:*

i) First, the critical consideration was that the persons to whom the notices were given were outside the jurisdiction. It can fairly be said that *Perry* was not concerned with the giving of a notice to a person *within the jurisdiction*, in respect of documents or information held outside the jurisdiction.

ii) Secondly, neither P nor any of his family members appear to have had *any* connection with the UK, save for the presence of various assets here.

iii) Thirdly, some consideration was given to the application of a “sufficient connection” test (at least in the context of the PFO appeal) but it was there thought to go beyond the boundaries of legitimate statutory construction.

iv) Fourthly, the public interest considerations under POCA are very similar to those pertaining to the CJA 1987.

60. *(7) The US Microsoft litigation:* Brief mention should be made of *Microsoft v US* 829 F 3d 197 (2d Cir. 2016). Before the Court of Appeals for the Second Circuit, Microsoft successfully appealed orders of the United States District Court for the Southern District of New York, holding Microsoft in contempt for failure to comply with a warrant requiring it to produce the contents of a customer’s email account stored on a server located outside the US. The majority judgment given by Judge Carney (Judge Lynch gave a concurring judgment) contains, with respect, a helpful reminder of the technological context in 1986 when Congress passed the *Stored Communications Act,* 18 USC ? 2701 (“the SCA 1986”), under which the warrant was issued. In passing, that context is of course of interest, given the date of the CJA 1987. Before 1988, the Internet had been mentioned only once; the World Wide Web was not created until 1990. In the event, the Court of Appeals held that to enforce the warrant, insofar as it directed Microsoft to seize the contents of the customer’s communications stored on a server in Ireland, constituted an unlawful extraterritorial application of the SCA 1986.

61. The US Government sought to appeal to the US Supreme Court and obtained (in English terms) leave to do so. In the event, however, on March 23, 2018, Congress enacted and the President signed into law the *Clarifying Lawful Overseas Use of Data Act (CLOUD Act)*, amending the SCA 1986 and providing expressly for its extraterritorial application. Soon thereafter, the US obtained a fresh warrant pursuant to the new law. In the circumstances, no live issue remained between the parties and the Supreme Court

declined to give any judgment on the appeal (other than making consequential orders for the disposal of the proceedings).

62. The *Microsoft* litigation is of interest in a number of respects. First, as a reminder of the state of technology in 1986/87. Secondly, for the ruling of the Court of Appeals, Second Circuit against the extraterritorial application of the SCA 1986. Thirdly, for the fact that the US Supreme Court was prepared to entertain the case. Fourthly, because the US chose a legislative solution to put the matter beyond doubt.

63. *(C) Discussion and conclusions – the true construction of s.2(3):* In approaching this question of statutory interpretation, my starting point is the principle that, unless the contrary intention appears, statutes have territorial but not extraterritorial application: *Masri*. This principle accords with international comity; it is a strong thing for a statute of state A to infringe the sovereignty of state B, for example, by requiring a citizen of state B, on the territory of state B, to take action, under threat of criminal sanction in state A should the citizen of state B fail or refuse to comply. That is so even if state A can establish *personal* jurisdiction over the citizen of state B, as the action required is a matter of *subject matter* jurisdiction: *Mackinnon v Donaldson, Lufkin and Jenrette.* That said, the question remains one of construction (any presumption being no more than rebuttable) and the principle in question can be displaced.

64. Turning to s.2(3) itself, in my judgment and as a matter of first importance, it must have an element of extraterritorial application. It is scarcely credible that a UK company could resist an otherwise lawful s.2(3) notice on the ground that the documents in question were held on a server out of the jurisdiction. In this regard, were a UK company in a position to forestall a serious fraud investigation by transferring documents abroad (in a manner circumventing s.2(16), CJA 1987), it would be in the highest degree unfortunate, for the reasons which appear from the judgments in *Seagull* and *Bilta*. The risks in the context of investigating and prosecuting serious fraud would be real indeed and anything but forensic only – however, with respect, they were perceived in the different contexts of *Masri* and *Jimenez.* Although it is certainly the case that the CJA 1987 was enacted before the internet age and without an appreciation of the ease with which documents can now be transferred electronically, the determination and ingenuity of those intent on frustrating corporate or criminal investigations is nothing new: *Paramount*. There is no difficulty in applying s.2(3) to the new technology. As expressed by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, at 822, cited in *R (Quintaville) v Health Secretary* [2003] UKHL 13; [2003] 2 AC 687, at [10] and [24]:

> ".when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made…."

The policy underlying s.2(3) required the section to have some extraterritorial application in 1987; and the same policy can and should permit s2(3) to apply where technological developments have further illustrated the necessity for a degree of extraterritorial application. If and to the extent that in the *Microsoft* litigation the US

Second Circuit Court of Appeals held otherwise and the decision cannot be explained on the basis of the particular issue and the US legislation in question, then I would, very respectfully, not find its decision persuasive.

65. If it be right that s.2(3) does have extraterritorial application with regard to UK companies, then the question becomes one of the *extent* rather than the *existence* of the extraterritorial reach of the section. It must then be asked whether *foreign* companies are in a different position and, if so, why.

66. In grappling with the question as to the extraterritorial reach of s.2(3) with regard to foreign companies, it may be noted that the CJA 1987 contains no express words of limitation either as regards the person from whom production of the documents is sought or the documents of which production is sought – save that (in short) the documents must appear to the Director to relate to any matter relevant to the investigation in question. By itself, that is far from decisive, given the starting presumption against extraterritoriality – but the absence of limiting words is not without significance given a statutory provision which (on the view I take) must have some extraterritorial application.

67. Before coming to the mischief at which s.2(3) is directed, a word should be said as to its legislative history. From the materials furnished by counsel, it seems plain that on its establishment the SFO was to be vested with the powers formerly given to Department of Trade and Industry ("DTI") Inspectors under s.447 of the *Companies Act 1985* ("the 1985 Act"). However, as with the absence of express limiting words in s.2(3), so the legislative history is inconclusive for present purposes. The reason is that the powers under s.447 of the 1985 Act, as originally enacted, requiring the production of books or papers were exercisable in relation to foreign companies – but only those foreign companies carrying on or which had carried on business in Great Britain. The provisions of ss. 447 and 453 of the 1985 Act as currently in force are to the same effect. The CJA 1987 contains no such wording as to foreign companies carrying on or having carried on business here. The absence of any such wording does not give rise to any safe inference for present purposes. On the one hand, it would be surprising if the SFO had been given more limited powers in relation to foreign companies than those available to DTI Inspectors at the time. On the other hand, were the "carrying on business" test imported or implied into the CJA 1987, it would not assist the SFO in the present case, whatever use it might be in other cases (and Mr Hall submitted that it would be unduly restrictive).

68. However inconclusive the debate as to legislative history, the legislative purpose and the mischief at which s.2(3) is aimed permits of no such doubt. As already indicated, the SFO's business is "…top end, well-heeled, well-lawyered crime…". By their nature, most such investigations will have an international dimension, very often involving multinational groups conducting their business in multiple jurisdictions, whether through a branch or subsidiary structure (it should matter not). It follows that the documents relevant to the investigation of a UK subsidiary of such a group may well be spread between the UK and one or more overseas jurisdictions. The simplicity of document transfer and access has of course been massively enhanced by internet and web technology post-dating 1987 but, as already discussed, it cannot be suggested that the international dimension of the SFO's mandate was unknown or not appreciated at the time of the enactment of s.2(3). For my part, putting to one side for the moment, any questions of MLA, there would be a very real risk that the purpose of s.2(3) would be

frustrated (*Bilta*) if, as a jurisdictional bar, the SFO was precluded from seeking documents held abroad from any foreign company.

69. The context here concerns the investigation and prosecution of top-end fraud. There is, accordingly, an extremely strong public interest in the extraterritorial ambit of s.2(3), which is anything but a private matter. That public interest extends to the UK's international obligations under instruments such as the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (2011). It is thus readily distinguishable from the private interest in civil litigation, with which *Masri* was concerned. S.2(3) is instead much more closely analogous to the other decisions in the insolvency field highlighted above, namely, *Paramount, Seagull* and *Bilta.* In all those decisions, much influenced by policy and public interest considerations, the provisions in question were treated as applying extraterritorially. There are of course differences between the regime of the Insolvency Act 1986 and that of the CJA 1987, as indeed Mr Kovalevsky contended. But those differences do not serve to displace the analogy or to obscure the very real similarities in terms of policy considerations. Put another way, it would be surprising if the law was more astute to assist inquiries into bankruptcy than investigations into and prosecutions of serious fraud on an international level.

70. In *Masri*, Lord Mance (at [24]) utilised the practical touchstone of whether "eyebrows might be raised" at the notion that Parliament had conferred the extraterritorial jurisdiction in issue. Applying that same touchstone here, I cannot see that eyebrows would be raised. Instead, a careful consideration of the context, the underlying policy considerations and the overwhelming case for s.2(3) having at least some extraterritorial application, would compel the answer that there was no jurisdictional bar precluding the SFO from giving a notice to *any* foreign companies in respect of *any* documents held abroad, regardless of their relevance to an investigation into a UK company, and regardless of the degree of connection between the foreign company, the UK and a UK company. Furthermore, it is to be appreciated that a s.2(3) notice seeks documents; it does not involve questioning individuals abroad, entering premises abroad, seizing foreign property (*cf.*, *R v Cuthbertson* [1981] AC 470, at p.485) or (certainly in this case) requiring the party to whom the notice is directed to take steps requiring permission from the US authorities.

71. Accordingly, I would conclude that the extraterritorial ambit of s.2(3) is capable of extending to some foreign companies in respect of documents held abroad. For my part, however, I would not go further and say that the reach of s.2(3) extended to *all* foreign companies in respect of documents held abroad, subject only to the safeguards or limitations in ss. 1 and 2 of the CJA 1987. As it seems to me, the right answer (to adopt the expression used by Lord Mance, in *Masri*, at [10]) is a "nuanced answer": s.2(3) extends extraterritorially to foreign companies in respect of documents held outside the jurisdiction when there is a sufficient connection between the company and the jurisdiction. It may be noted that the potential relevance of the documents to the investigation is not the basis of the challenge.

72. As it seems to me, a number of considerations strongly support this conclusion:

i) First, the starting point, as already suggested, is that s.2(3) has at least some extraterritorial reach in respect of UK companies with documents held outside

the jurisdiction. That is a matter of subject matter jurisdiction. By contrast with *Perry*, this is not a question of judicial legislation; here, provided only that the starting point is well-founded, s.2(3) already has some extraterritorial application – a feature which any construction of s.2(3) needs to accommodate. The question is the extent of the extraterritorial ambit in respect of foreign companies.

ii) With regard to foreign companies the "sufficient connection" test strikes a careful balance between facilitating the SFO's investigation of serious fraud with an international dimension and making excessive requirements in respect of a foreign company with regard to documents abroad. The existence of some extraterritorial reach guards against the risk of SFO investigations being frustrated or stymied while the requirement of a "sufficient connection" justifies the extraterritorial application of s.2(3) by reference to the foreign company's own actions linked to the UK. This is, accordingly, a principled balance.

iii) As demonstrated, the test is consistent with that adopted in the insolvency area (*Paramount, Seagull, Bilta*), where other important public interests are involved. Here, as there, it avoids the adoption of rigid, extreme and, to my mind, indefensible lines. Moreover, the sufficient connection test chimes with the observations of Lord Mance, in *Masri*, at [19].

iv) Furthermore, the SFO accepts that any s.2(3) notice must be given to a person (individual or corporate) within the jurisdiction. There is no question, therefore, of the notice being sprung on some unsuspecting corporate entity out of the jurisdiction without prior warning.

v) The test is easily workable. The Director would be required to apply his mind to the test before exercising his power to issue a s.2(3) notice. No practical difficulties are involved; instead practicality and common sense justify both the extraterritorial reach and the limit suggested.

vi) The test is necessarily fact specific, thus permitting practical justice in the individual case. There would not be a closed list of factors but it is likely that relevant factors would closely resemble those referred to by Sir Donald Nicholls V-C in *Paramount* (set out above).

73. Safeguards are readily apparent, even though there is no question here of the SFO needing to go through a gateway and fulfilling the other requirements for service out of the jurisdiction as in the insolvency context (see *Paramount* and, most recently: *Orexim Trading Limited v Mahavir Port and Terminal Private Limited and others* [2018] EWCA Civ 1660). Thus:

i) In the first instance, the decision is for the Director as to whether to exercise his power under s.2(3), CJA 1987. It is to be noted that a power is involved, not a duty; s.2(3) is permissive not mandatory. That power can, however, only be exercised lawfully, within the statutory framework and subject to the limits provided by ss. 1 and 2(1) and in compliance with general public law requirements.

ii) The exercise by the Director of his s.2(3) power is plainly subject to judicial review on the usual grounds. Fishing expeditions would be unlikely to survive scrutiny. Moreover, insofar as any notice can be seen as oppressive or unreasonable, Art. 8 of the ECHR may well be engaged.

iii) Should there be a failure or refusal to comply on the part of the foreign company and in the event of a prosecution resulting, s.2(13) furnishes a statutory defence going to "reasonable excuse".

74. It remains to address the principal objections to the suggested approach. To my mind, these are the *Jimenez* and *Perry* decisions, together with the availability of MLA. In the event and for the reasons which follow, they do not serve to dissuade me from concluding that s.2(3) has an extraterritorial reach but, in the case of foreign companies and documents held abroad, limited to those companies with a sufficient connection to the UK.

75. First, I am of the view that *Jimenez* is clearly distinguishable for the reasons already canvassed and need say no more of that decision.

76. Secondly, *Perry* requires more anxious consideration, both because it is a decision of the Supreme Court and because of the close similarity between the policy interests underlying POCA and those underlying the CJA 1987. However:

i) Plainly the decision in *Perry* is not *binding* on this Court in this case. It concerned a different statute and, as already explained, a different issue. The real question, however, is whether its persuasive authority is such that we ought (albeit not bound to do so) to reach the same conclusion.

ii) For my part, I do not think we are. Other than the presence of assets in the jurisdiction – dealt with uncontroversially by the various orders made in *Perry* – P, his family members and related corporate entities appear to have had *no* connection with the jurisdiction. Against that background, the decision of the Supreme Court is, with respect, readily explicable but sufficiently removed from the issue before this Court in this case as not to tell in favour of a decision denying any extraterritorial application of s.2(3).

iii) Furthermore, as noted above Hughes LJ in *Perry* underlined the attractions of a "sufficient connection" test but regarded it as beyond the proper limits of statutory construction in that case. The difference here, however, is the construction issue necessarily involves the *extent* of extraterritorial jurisdiction. With that in mind, I am persuaded that the sufficient connection test in the present context involves giving sensible effect to the Legislature's intention rather than impermissible Judicial legislation.

77. Thirdly, I am unable to accept that the availability of MLA in the present case impinges on the conclusion as to the extraterritorial reach of s.2(3). To begin with, the construction given to s.2(3) cannot vary, depending on whether MLA is available or not. If KBR Inc is right, then although the SFO would be able to pursue the documents by way of MLA

in this case (given the arrangements in place with regard to the US), the SFO would be without a remedy as to documents held by a foreign company abroad if that company was based in a state with which there were no MLA arrangements. For my part, I do not think that Parliament is likely to have intended such a result. Secondly, the CJA 1987 *pre-dates* the crucial MLA arrangements (discussed further under Issue II below). In the circumstances, I do not see how those MLA arrangements can impact on the *true construction* of s.2(3), whatever their impact on the exercise of the Director's discretion under that section (Issue II below).

78. For completeness, though there may be practical difficulties in some cases with regard to enforcement in respect of a foreign company, that is not a reason for concluding that s2(3) was not intended to have extraterritorial application.

79. *(D) Applying the true construction of s.2(3) to the facts:* I am amply satisfied that there was here a sufficient connection between KBR Inc and the jurisdiction so as to fall within the extraterritorial reach of s.2(3). It is, however, important to signify why that is so and to indicate, clearly, which factors do not suffice to make good that connection (at least on the facts of the present case).

80. To my mind, the following factors do <u>not</u> assist the SFO in making good its case of a sufficient connection between KBR Inc and the UK:

i) First, the mere fact that KBR Inc was the parent company of KBR Ltd. That would be altogether too broad a test and would ensnare sundry parent companies of multinational groups without adequate justification.

ii) Secondly, the fact that KBR Inc cooperated to a degree with the SFO's request for documents and remains willing to do so voluntarily, on terms that it would apply SFO search terms across data held in the US. Cooperation on a voluntary basis is to be encouraged; where offered, it should not give rise to a risk, in effect, of an acceptance of a sufficiently close connection to fall within the extraterritorial reach of s.2(3). Were that to be so, cooperation with SFO requests on a voluntary basis would inevitably diminish.

iii) Thirdly, the fact that Ms Akerson attended the meeting with the SFO on the 25th July, 2017. The point is much the same. The sensible conduct of SFO investigations may well warrant meetings with senior officers of foreign companies, part of the same group as the UK entity under investigation or from its parent company. Good sense is to be encouraged not discouraged. Whatever the impact on the giving of a s.2(3) notice (Issue III below), the attendance of senior corporate officers at a meeting such as that which took place on the 25th July, 2017 cannot be treated as bringing the foreign parent within the scope of the "sufficient connection" test if not otherwise within it – or such meetings would be most unlikely to take place.

iv) As is common ground, KBR Inc does not and did not carry on business in the UK.

81. Having put these factors to one side, I turn to the factors which do make good a sufficient connection between KBR Inc and the jurisdiction so as to bring KBR Inc within the territorial reach of s.2(3). Though these can be shortly stated, they are of substantial weight. The evidence of Mr Martin is plain:

> "The KBR investigation has identified a large number of suspected corrupt payments made by KBR to Unaoil, totalling in excess of US$23 million. From at least 2005 onwards, these payments appear to have required the express approval of KBR Inc and to have been processed by KBR Inc's treasury function, based in the United States. From about March 2010, it appears that the approval of KBR Inc's compliance function was also required before a payment could be released."

82. On the evidence before this Court, it follows that payments central to the SFO's investigation of KBR Ltd (i.e., the KBR investigation) and KBR Ltd's contracts or arrangements with Unaoil required the approval of KBR Inc and were paid by KBR Inc through its US based treasury function. The approvals were no small matter, involving Ms Akerson (KBR Inc's Executive Vice President and General Counsel) and Ms Symon, Director of Compliance at KBR Inc. Mr Kovalevsky correctly submitted that the supporting documentation particularised one transaction only. But that does not get him far; Mr Martin's evidence is clear that the particularisation simply covered a single example; his evidence, in terms, goes much wider. The ultimate outcome of the KBR investigation is as yet unknown as of course is the outcome of any prosecution, should there be a prosecution. However, on the evidence before us it is impossible to distance KBR Inc from the transactions central to the KBR investigation of KBR Ltd. The position of KBR Inc is thus markedly distinguishable from that of the US bank, considered by Hoffmann J in *Donaldson, Lufkin and Jenrette*. In the circumstances, KBR Inc's own actions make good a sufficient connection between it and the UK, so bringing it within s.2(3) on the construction of that section which I favour.

83. Matters do not quite end there. On the evidence, a Mr Jan Egil Braendeland, a corporate officer of KBR Inc, currently Executive Vice President, Global Sales and previously President, Oil and Gas, was based at the KBR Group's Leatherhead office – and appeared to carry out his functions from the UK. If not by itself sufficient to establish a sufficient connection with the UK for the purposes of the extraterritorial reach of s.2(3), it provides further support for the view to which I have come, when added to the close involvement of KBR Inc with the KBR Ltd transactions central to the SFO's KBR investigation.

84. For the reasons given, I reject the KBR Inc jurisdictional objection to the July Notice.

GROUND II: DISCRETION

85. *(1) The rival contentions:* KBR Inc's case was straightforward: if, contrary to its primary submission, the CJA 1987 conferred jurisdiction to require the production of material extraterritorially, there was "an error of law regarding …[the Director's] consideration of the use of his powers". As already underlined, s.2(3) is permissive not mandatory. In the exercise of his discretion, the Director was obliged to take into consideration the background of MLA when deciding whether to invoke his s.2(3) power

"to bypass the safeguards" contained in the available MLA regime. This he had failed to do and his failure amounted to an error of law. S.2(3) was silent as to any safeguards because it was not intended to "cut across" the MLA provisions.

86. The SFO's response was equally straightforward. The KBR Inc case on this issue was misconceived and totally without merit. The power to seek MLA was separate and distinct from the power to issue a notice under s.2(3). In any event, the Director's *power* to seek MLA was not to be confused with an *obligation* to do so. The Director's decision to utilise his s.2(3) power did not betray any error of law. It had been an entirely proper exercise of his discretion.

87. *(2) The legal framework:* As helpfully summarised in Nicholls, Montgomery and Knowles, *The Law of Extradition and Mutual Assistance* (3rd ed.), at paras. 17.05 and following, until the second half of the 20th century, criminal MLA:

> " "…was limited to informal cooperation based upon principles of comity"….. Countries primarily exercised (and were only interested in exercising) jurisdiction in relation to crimes committed within their own borders…. Crime was still regarded as a local matter, and states were not especially concerned with assisting other states, except on an uncertain and *ad hoc* basis.
>
> The post-war years saw the international community embark upon the process of multilateral treaty making in the area of extradition and international criminal law, including MLA."

As the authors go on to point out, the UK was "comparatively slow" to ratify international instruments relating to MLA; thus, the UK did not (for example) sign and ratify the *European Convention on Mutual Legal Assistance in Criminal Matters* ("the 1959 Convention") until 1991 – more than 30 years after it opened for signature. Since then, the UK has ratified a number of multilateral instruments and bilateral treaties.

88. It is against that background that Parliament enacted the *Criminal Justice (International Co-operation) Act 1990* ("CICA 1990") and, subsequently, the *Crime (International Co-operation) Act 2003* ("CICA 2003"). Passing CICA 1990 enabled the UK to ratify the 1959 Convention: *Gohil v Gohil* [2012] EWCA Civ 1550; [2013] Fam 276, at [11] and following. It is a hallmark of such MLA arrangements that, if utilised, there are safeguards restricting the use of evidence obtained by the requesting state under this route to the purpose specified in the request for assistance: *Gohil (ibid)*; CICA 2003, s. 9(2).

89. With regard to the US, the UK has entered into a bilateral MLA treaty signed on January 6, 1994 ("the 1994 Treaty"), and the 2003 EU/US Treaty ("the 2003 Treaty"), brought into effect between the UK and US by an instrument signed on December 16 2004 ("the 2004 instrument"). For present purposes, the 1994 Treaty and 2004 Instrument are in the same terms, which, for convenience, I take from the 1994 Treaty. Art. 5.1 provides that the Requested Party shall take whatever steps it deems necessary to give effect to requests received from the Requesting Party. The Courts of the Requested Party "shall have authority to issue subpoenas, search warrants, or other orders necessary to execute the request". Art. 18.1 provides that the Parties or Central Authorities "shall consult

promptly, at the request of either", *inter alia*, concerning the implementation of the Treaty in relation to a particular case. Art. 18.2 is in these terms:

> "With respect to any matter for which assistance could be granted under this Treaty, neither party shall enforce any compulsory measure requiring an action to be performed by any person located in the territory of the other Party, unless the Party proposing such enforcement has first exhausted the procedures established in paragraphs (3) and (4) of this Article."

Art. 18.3 provides for one Party to give information to the other Party, if it is aware that its authorities are intending to take measures falling within Art. 18.2 and further makes provision for consultation in that event, with a view to determining whether the assistance sought can be provided under the Treaty, or otherwise resolving the matter. Arts. 18.4 and 18.5 contain provisions for avoiding an impasse and delay. Art. 18.6 provides that even where the Parties' obligations under that Article have been fulfilled, "each Party shall continue to exercise moderation and restraint". "Compulsory measure" in Art. 18.2 is defined as including "any measure for the production of evidence located in the territory of the Party not issuing the measure".

90. As provided by CICA 2003, s.7(5), a "designated prosecuting authority" *may* request assistance under that section if:

> "(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."

It is common ground that the SFO is a "designated prosecuting authority".

91. Authority suggests that a State is entitled but not obliged to use the MLA procedure: *R v Redmond* [2006] EWCA Crim 1744; [2009] 1 Cr App R 335. In that case, it was alleged that the British police, by relying on the evidence of undercover officers, had deliberately pursued a course of conduct designed to bypass the legal process in Spain – which was to use the letter of request procedure set out in the 1959 Convention. The conduct of the police, it was argued, thus amounted to an abuse of process. Giving the judgment of the Court, Beatson J (as he then was) described this argument as "utterly misconceived". In dismissing the submission that a State was bound to use the MLA procedure, he emphasised (with reference to CICA 1990) the use of the word "may" – a word which features similarly in CICA 2003.

92. *(3) Conclusions:* My conclusions can be shortly stated.

93. First and in general, the use of the MLA procedure pursuant to CICA 1990 or 2003 is an *additional* power to that contained in s.2(3), CJA 1987. The availability of MLA gives the Director additional options; it does not curtail his discretion to use the separate power of issuing s.2(3) notices. As appears from *Redmond*, a State is entitled but not obliged to proceed by way of the MLA route. It follows that KBR Inc has failed to demonstrate any

error of law on the part of the Director in the exercise of his discretion to issue the July Notice.

94. Secondly, even where there is an available MLA regime, there may be good practical reasons for the Director preferring to proceed by way of s.2(3) notices. Such reasons, which appear in general terms from the evidence of Mr Martin, include delay, the risk of a request being ignored and the burden on the requested state of dealing with a request when direct recourse to the holder of the requested material would be simpler. In the present case it is noteworthy that KBR Inc has not suggested that compliance with the July Notice would give rise to any complexity or difficulty under local US law, or with regard to any duties owed to third parties. No doubt where any such complexity, difficulty or conflict of duties arises, or where assistance was required from the US authorities, the position would be different and would point towards MLA – but that is not this case.

95. Thirdly and with specific regard to the 1994 Treaty, after some reflection, I do not think it assists the case for KBR Inc: (1) Mr Kovalevsky carefully and in terms disclaimed any suggestion that Art. 18.2 was determinative in his favour; (2) he was right to do so, on any view, in that the Treaty has not been enacted in domestic UK law; (3) insofar as Mr Kovalevsky submitted that the Treaty "should not be ignored", the argument goes no further than those already dealt with relating to MLA in general. It may additionally be observed that, on a close reading, it is at least seriously arguable that Art. 18.2 inferentially *reinforces* the SFO's case in respect of jurisdiction (Issue I above) – by contemplating extraterritorial action, albeit subject to the terms of the Article.

96. Accordingly, I would reject the KBR Inc case that the Director's action, in exercising his discretion to issue the July Notice, disclosed an error of law.

GROUND III: "SERVICE"

97. This Issue can be taken almost summarily. It is unnecessary to consider whether a s. 2(3), CJA 1987 notice could be given to a person outside the jurisdiction (i.e., extraterritorially) because the SFO did not do that and does not contend that it could have done so. As will be recollected, the July Notice was given to Ms Akerson at the 25th July meeting, in the circumstances already outlined. Accordingly, the question for determination is whether the giving of the July Notice to Ms Akerson, within the territorial limits, sufficed to satisfy the requirements of s.2(3).

98. KBR Inc contends that it did not do so. It was a question of fact, "applying established legal principles", whether KBR Inc was present within the jurisdiction. The statutory wording to produce documents triggered by "notice in writing" must require some further formality to lawfully operate as a coercive demand on the person concerned. For the communication to be effective, either Ms Akerson by her presence in the UK must satisfy the territorial requirement, or KBR Inc must be present within the jurisdiction. By analogy with various provisions covering *service* strictly so-called under the Civil Procedure Rules ("CPR"), giving the notice to Ms Akerson did not suffice and KBR Inc was not itself present within the jurisdiction. For that matter, Ms Akerson's communication of the July Notice to KBR Inc must have taken place outside the jurisdiction; accordingly, KBR Inc was not notified within the territorial limits.

99. I am unable to agree with the KBR Inc submissions in this regard.

i) First and with respect, the central fallacy is KBR's Inc's reliance on the provisions for "service" in civil proceedings under the CPR. The 1987 Act, however, says nothing about service and those provisions are irrelevant. S.2(3) does not require a notice to be "served" on KBR Inc.

ii) Secondly, as a matter of fact, uncluttered by considerations as to *service*, KBR Inc was plainly present in the jurisdiction through Ms Akerson when the July Notice was given to her. With respect, it is unreal to contend otherwise. As already described, the 25th July meeting was sought by KBR Inc. The SFO, for its part, made the meeting conditional on the attendance of "the clients", not simply its lawyers. In that capacity, Ms Akerson and Ms Symon attended the meeting. Ms Akerson was accordingly present within the jurisdiction representing KBR Inc; she was not here coincidentally or on some personal frolic.

iii) Thirdly, it is obvious that the contents of the July Notice were communicated by Ms Akerson to KBR Inc. For the reasons already given, the July Notice was given to Ms Akerson, representing KBR Inc, within the jurisdiction; it accordingly matters not where the communication between Ms Akerson and KBR Inc took place.

iv) Fourthly, s.2(3) requires no additional formality beyond the giving of the notice and there is no basis for importing any such requirement. That said (and so far as here relevant), the Director can only issue a notice under s.2(3) within the statutory framework furnished by ss. 1(3) and 2(1) (set out above) and in accordance with the structured process of decision-making there provided.

100. It follows that I would reject the KBR Inc case under this Ground too. Before leaving this Ground, I cannot help observing that there are unappealing features of the SFO's decision to give the July Notice to Ms Akerson in the course of attending a meeting to discuss the investigation – but however those features might impact on the willingness of others to attend such meetings in the future, they do not serve to invalidate the giving of the July Notice here.

101. All three Grounds of challenge having failed, I would dismiss the KBR Inc judicial review challenge to the SFO's issuing of the July Notice.

POSTSCRIPT

102. On the material before us, KBR Inc had voluntarily provided quantities of documents before it took the decision to cease cooperation. Given the SFO's decision to abandon the request for various employment histories (item no. 27 in the July Notice), it might appear that the practical issues in dispute were somewhat limited. Against that background and the fact that no point was taken on the detail of the July Notice being unreasonable or oppressive (which might have led to the further narrowing of the

Notice), it is perhaps unfortunate that this dispute proceeded to litigation at all. For better or worse, however, it did so and, in my judgment, it should be resolved as set out above.

MR JUSTICE OUSELEY:

103. I agree.