FOCUS

SFO INVESTIGATIONS

A wider reach

It is an interesting time for the Serious Fraud Office (SFO) and the reach of its powers of investigation and ability to compel the disclosure of documents. Coming hot on the heels of the Court of Appeal's decision in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* that products of an internal investigation were privileged and beyond the SFO's reach, was another decision that may affect the SFO's approach to investigations (*[2018] EWCA Civ 2006; see feature article "Privilege in investigations: the road ahead", this issue*).

In *R (KBR Inc) v Serious Fraud Office*, the High Court held that, where the SFO issues a notice to a foreign company for the production of documents under section 2(3) of the Criminal Justice Act 1987 (1987 Act) (section 2(3)), provided that there is a sufficient connection between the foreign company and the jurisdiction, the foreign company must produce those documents (*[2018] EWHC 2012 (Admin)*).

KBR has important implications for foreign parent companies of subsidiaries that are under investigation by the SFO, where that parent company holds documents overseas that are potentially relevant to the investigation. It also represents a widening in the SFO's powers and it remains to be seen how the SFO will use this tool in future.

Facts of the investigation

On 28 April 2017, the SFO opened an investigation into a UK-registered company, Kellogg Brown and Root Ltd (KBR Ltd), in relation to the SFO's ongoing investigation into Unaoil. KBR Ltd's parent company is KBR Inc (KBR), registered in the US. On 25 July 2017, a meeting in London with the SFO to discuss the investigation was attended by, among others, a senior officer of KBR. At this meeting the SFO handed over to the senior officer of KBR a notice under section 2(3) (the notice), requiring that KBR hand over certain categories of documents to the SFO.

KBR brought an application seeking permission for judicial review and, having been granted, KBR challenged the notice on the following three grounds:

- It was ultra vires as it requested material held outside the UK from a company incorporated in the US, that is, KBR.
- It was an error of law on the part of the SFO to exercise its section 2 powers despite having power to seek mutual legal assistance (MLA) from the US authorities.
- The notice was not effectively served by the SFO handing it to a senior officer of KBR who was temporarily present within the jurisdiction.

Jurisdiction

As it was common ground that KBR did not carry on business in the UK and so was not within the UK's jurisdiction, KBR alleged that section 2(3) did not operate extraterritorially and that, while in personam jurisdiction could be established by the representative of KBR being physically present in the jurisdiction, this should not be confused with subject matter jurisdiction.

The SFO argued that if KBR was right, it would be unlawful to require a UK company to provide, for instance, documents that it holds on an overseas server. Instead, the question was one of statutory construction, and section 2(3) contains no express jurisdictional limits.

The court agreed that whether section 2(3) has extraterritorial application is a question of statutory interpretation, having regard to the wording of the provision, the statutory purpose and the relevant context. On that basis, the court was of the view that:

- While sections 2(4) and 2(5) of the 1987 Act cannot operate extraterritorially, it does not follow that section 2(3) is similarly restricted.
- Various provisions of the Insolvency Act 1986 analysed in case law that could be analogous to the debate over section 2(3) (being section 238 (*In re Paramount Airways Ltd [1993] CH 223; www.practicallaw.com/7-100-4697*), section 133 (*In re Seagull [1993] Ch 345*) and section 213 (*Bilta (UK) Ltd v Nazir (No 2) [2015] UKSC 23; see News brief "Clarifying the illegality defence: no end to the carousel?", www.practicallaw.com/9-614-4192*) would not be able to achieve their object if their effect was confined to the UK.

The court held that section 2(3) must have an element of extraterritorial application. For example, it would be scarcely credible that a UK company could resist an otherwise lawful section 2(3) notice on the ground that the documents in question were held on a server out of the jurisdiction. So the question becomes one of the extent, rather than the existence, of the extraterritorial reach of section 2(3).

The court held that section 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.

While the court did not set out a generally applicable test of what would constitute a sufficient connection to the jurisdiction, it did set out which factors, on the facts before it, would and would not assist in establishing a sufficient connection in respect of KBR.

The following did not assist in establishing a sufficient connection to the UK:

- The mere fact that KBR was KBR Ltd's parent company.
- The fact that KBR co-operated to a degree with the SFO's request for documents and remained willing to do so voluntarily, that is, it would apply SFO search terms across data held in the US.
- The fact that a senior representative of KBR met the SFO in the UK in that capacity.

The court found that it did assist in establishing a sufficient connection to the UK that payments central to the SFO's investigation of KBR Ltd, and KBR Ltd's contracts or arrangements with Unaoil, required the approval of KBR, and were paid by KBR through its US-based treasury function.

The court underscored this point by highlighting that, on the evidence, it was impossible to distance KBR from the transactions that were central to the investigation of KBR Ltd. That is, KBR's own actions established a sufficient connection between it and the UK. The court also noted that a corporate officer of KBR (as opposed to KBR Ltd) was based at the KBR group's offices in the UK, and appeared to carry out his functions from the UK. The court did not say that this was of itself sufficient to establish sufficient connection to the UK; instead it was a factor giving weight to that analysis.

Discretion

KBR alleged that, if section 2(3) did have exterritorial application, the SFO had made an error of law in using the powers under that section. Specifically, the SFO had failed to take into consideration the availability and background of the MLA regime. The SFO argued that the power to seek MLA is separate and distinct from the power to issue a notice under section 2(3).

The court held that the MLA procedure is an additional power to that set out in section 2(3), giving the SFO additional options rather than limiting its discretion to issue section 2(3) notices. A state is entitled but not obliged to pursue MLA. KBR therefore failed to demonstrate any error of law by the SFO in choosing the section 2(3) route.

The court also observed that, even where there is an available MLA regime, there may be good reasons for the SFO to prefer the section 2(3) route; these could include delay and the risk of a request being ignored.

Service

The court did not need to consider whether a section 2(3) notice could be given to a person outside the jurisdiction because that situation did not arise here. In *KBR*, a senior representative of the foreign company was physically present in the jurisdiction when the notice was given to her.

KBR argued that this temporary physical presence was insufficient to render KBR as present within the jurisdiction for the purposes of receiving the notice. KBR argued that the situation was analogous to the various provisions of the Civil Procedure Rules governing service.

The court held that considerations about service were irrelevant as section 2(3) does not require a notice to be served. And, in any event, KBR was plainly present in the jurisdiction by the senior representative in question being present in that capacity. The court found that section 2(3) requires no additional formality beyond the giving of the notice and there is no basis for importing any such requirement.

The court did note in an aside that there were "unappealing features" in the SFO's decision to give the notice to the senior representative of KBR at a meeting to discuss the investigation, as this might affect the willingness of others to attend similar meetings in the future.

Companies should tread carefully

All three of KBR's arguments having failed, the court dismissed KBR's judicial review challenge to the issuing of the notice.

This decision has important implications for companies under investigation by the SFO, where the parent company is not registered in the UK and does not carry on business in the UK, and the parent company is issued with a section 2 notice. In light of *KBR*, for a section 2 notice to be effective, there must be a sufficient connection with the jurisdiction so that the section 2 notice has extraterritorial effect. This will, by necessity, depend on the facts, not just of the corporate structure but also of the investigation being conducted.

The key principle for a sufficient connection to be established would appear to be that the parent company must have performed certain actions which, on the facts, are central to the investigation. However, the question of whether positive actions are required (as opposed to, for example, omissions, deliberate or otherwise), and whether those actions relate to issues that are central to the investigation in question, will inevitably be questions of fact that any company will have to evaluate carefully before taking any steps in relation to a section 2 notice issued against it.

Where a party receiving the section 2 notice in a situation like *KBR* forms the view that there is not a sufficient connection between it and the jurisdiction, and so believes the section 2 notice is not valid, it will have to weigh up its response. In order to contest the section 2 notice, it would either have to persuade the SFO that its analysis is correct or potentially have to emulate KBR and issue an application for judicial review.

In any event, the courts have widened the scope of the power of the SFO in stating that section 2 notices can have extraterritorial effect: any foreign company receiving a section 2 notice will now have to tread very carefully.

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