English Court rules that foreign companies must produce documents to the SFO in response to a section 2 notice if there is a "sufficient connection" with England

In a recent judgment[1], the English High Court has held that where the Serious Fraud Office (**"SFO"**) issues a notice (**"Notice"**) for the production of documents pursuant to section 2(3) of the Criminal Justice Act 1987 (**"CJA"**) on a foreign company, that foreign company must produce those documents where there is a "sufficient connection" between it and the jurisdiction.

This judgment has important implications for foreign parent companies of subsidiaries that are under investigation by the SFO, where that parent company holds documents potentially relevant to the investigation. Care will have to be taken to determine whether a "sufficient connection" exists such that the parent company must comply with any notice issued to it pursuant to section 2(3) of the Act.

Background

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"**), a company registered in the US. On 25 July 2017 a meeting in London with the SFO to discuss the investigation was attended by, amongst others, a senior officer of KBR. At this meeting the SFO handed over to the senior officer of KBR a notice pursuant to section 2(3) CJA (**"the Notice"**), requiring that it hand over certain categories of documents to the SFO.

KBR brought an application seeking permission for judicial review and, if permission was granted, the quashing of the Notice. The application was heard in April 2018 by the High Court, consisting of Lord Justice Gross and Mr Justice Ouseley. The judgment of Gross LJ, with which Ouseley J agreed, was handed down on 6 September 2018.

Permission having been granted for judicial review, KBR challenged the Notice on three grounds:

- It was *ultra vires* as it requested material held outside the (UK) jurisdiction from a company incorporated in the US (i.e., KBR); (**"Ground I: Jurisdiction"**);
- It was an error of law on the part of the Director of the SFO to exercise his s.2 CJA 1987 powers despite his having power to seek mutual legal assistance (**"MLA"**) from the US authorities; (**"Ground II: Discretion"**); and
- The Notice was not effectively "served" by the SFO handing it to a "senior officer" of KBR who was temporarily present within the jurisdiction; (**"Ground III: 'Service'"**).

Ground I: Jurisdiction

It being common ground that KBR did not carry on business in the UK (and so was not within the UK jurisdiction), KBR alleged that s. 2(3) CJA did not operate extraterritorially and that whilst *in personam* jurisdiction could be established (e.g. 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 documents it holds overseas (for example on an overseas server)".[2] Instead, the question was one of statutory construction, and s.2(3) CJA contained no words of express (jurisdictional) limitation.

1 *R (KBR Inc) v Serious Fraud Office* [2018] EWHC 2012 (Admin)

2 Paragraph 20

The Court agreed that whether s.2(3) CJA had extraterritorial application was a question of statutory interpretation, having regard to the wording of the provision in question, the statutory purpose and the relevant context. On that basis, the Court was of the view, *inter alia*, that:

(a) whilst sections 2(4) and 2(5) CJA cannot operate extraterritorially, it did not follow that s. 2(3) was similarly restricted;[3] and

(b) various provisions of the Insolvency Act 1986 analysed in case law that could be analogous to the debate over s. 2(3) CJA (being s. 238 (*In re Paramount Airways Ltd* [1993] CH 223), s. 133 (*In re Seagull* [1993] Ch 345) and s. 213 (*Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23)) would not be able to achieve their object if their effect was confined to the UK.[4]

The Court held that, "as a matter of first importance", s. 2(3) CJA must have an element of extraterritorial application. For example, it would be "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".[5] Then the question becomes "one of the *extent* rather than the *existence* of the extraterritorial reach of" s. 2(3) CJA.

The Court held that s.2(3) CJA "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"[6] (emphasis added).

Whilst 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 such sufficient connection in respect of KBR.

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

(a) The mere fact that KBR was KBR Ltd's parent company;

(b) The fact that KBR cooperated to a degree with the SFO's request for documents and remained willing to do so voluntarily, (i.e. it would apply SFO search terms across data held in the US); and

(c) 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.[7]

The Court underscored this point by highlighting that "on the evidence before us, it is impossible to distance [KBR] from the transactions central to the … investigation of KBR Ltd."[8] That is, KBR's "**own actions** [made] good a sufficient connection between it and the UK, so bringing it within s.2(3) on the construction of that section" that the Court preferred[9] (emphasis added).

The Court also noted that a corporate officer of KBR (as opposed to KBR Ltd) was based at the KBR Group's offices in Leatherhead, 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.

Ground II: Discretion

KBR alleged that, if (contrary to KBR's submissions on Ground I) s. 2(3) CJA had exterritorial application, the Director of the SFO had made an error of law in considering his use of the powers granted to him by that section. Specifically, he had failed to take into consideration the availability and background of the MLA regime.

The SFO argued that KBR's argument was "misconceived and totally without merit"[10] because the power to seek MLA was separate and distinct from the power to issue a notice under s. 2(3) CJA.

The Court held that the MLA procedure is an additional power to that set out in s. 2(3) CJA giving the Director additional options, rather than limiting his discretion to issue s. 2(3) notices. Pursuant to case law, a State is entitled but not obliged to pursue MLA. KBR therefore failed to demonstrate any error of law by the Director in choosing to pursue the s. 2(3) CJA route.

3 Paragraph 30
4 Paragraph 47
5 Paragraph 64
6 Paragraph 71
7 Paragraph 82
8 Paragraph 82
9 Paragraph 82
10 Paragraph 86

Even where there is an available MLA regime there may be good reasons for the Director to prefer the s. 2(3) CJA route – these could include delay and the risk of a request being ignored.

Ground III: 'Service'

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

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

The Court held that:

- considerations about "service" were irrelevant – s. 2(3) CJA does not require a notice to be "served";
- in any event KBR was "plainly present in the jurisdiction" by the senior representative in question being present in that capacity; and
- s. 2(3) "requires no additional formality beyond the giving of the notice and there is no basis for importing any such requirement", subject to any such notice being issued in accordance with the statutory framework in the CJA.

The Court also noted in an aside that there were "unappealing features" in the SFO's decision to give the Notice to the senior representative of KBR in the course of a meeting to discuss the investigation, as this "might impact on the willingness of others to attend such meetings in the future."[11]

KBR's challenge dismissed

All three grounds of challenge having failed, KBR's judicial review challenge to the issuing of the Notice was dismissed.

Comments

This judgment 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 such parent company is issued with a section 2 notice. There may be a "sufficient connection" with the jurisdiction such that the section 2 notice has extraterritorial effect – but it will depend upon the facts.

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 such 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.

If you have any questions or comments in relation to the above, please contact Alistair Graham, Sam Eastwood, Jason Hungerford or Chris Roberts, or your usual Mayer Brown contact.

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