
Case Note: KBR Inc. v SFO

SEPTEMBER 25, 2018

On 6 September 2018 the UK High Court handed down its judgment in the application for judicial review brought by KBR Inc. (“KBR”) against the Director of the Serious Fraud Office (“SFO”). In a victory for the SFO, the High Court confirmed the SFO’s ability to require foreign companies to produce documents held outside the UK jurisdiction, provided that there is a ‘sufficient connection’ between the company and the jurisdiction.

The facts

KBR is a US company and the ultimate parent of a multinational group of companies employing a subsidiary structure, the KBR Group. KBR does not have a fixed place of business in the UK and it was not contended by either party that it carries on business in the UK. It does, however, have UK subsidiaries, including KBR Ltd, into which company (and others) the SFO commenced a criminal investigation concerning suspected offences of bribery and corruption in February 2017.

During a meeting held in the UK to discuss the investigation with the SFO in July 2017, the SFO handed a KBR representative (who attended at the SFO’s request that ‘the clients’ be present), with a notice to produce documents under s.2(3) of the Criminal Justice Act 1987. S.2(3) provides the SFO with one of its powers of compulsion and provides that, “*the Director of the SFO may by notice in writing require the person under investigation or any other person to produce ... any specified documents which appear to the Director to relate to any matter relevant to the investigation.*”

Grounds for review

KBR sought to quash the SFO’s notice requiring KBR to produce documents held by it outside the UK, advancing three grounds:

1. Jurisdiction - The s.2 (3) notice was *ultra vires* as it requested documents held outside the UK by a company incorporated in the US;
2. Discretion - The Director of the SFO erred in law by exercising his s.2(3) powers despite his power to seek Mutual Legal Assistance (“MLA”) from the US authorities; and
3. Service - The s.2(3) notice was not effectively served on a KBR representative who was temporarily present in the jurisdiction.

The findings

Jurisdiction – ‘sufficient connection’

The Court found in favour of the SFO, holding that s.2(3) must have an element of extraterritorial application as to do otherwise would permit UK companies to resist an otherwise lawful notice on the ground that the documents sought were held on a server out of the jurisdiction. Notably, the Court held that s.2(3) extends extraterritoriality to foreign companies in respect of documents held outside the jurisdiction, “*when there is sufficient connection between the company and the jurisdiction.*” The factors establishing such ‘sufficient connection’ in this case were that payments and contracts central to the SFO’s investigation required KBR’s approval and that KBR’s UK subsidiaries made payments that were processed by KBR’s US treasury function.

Discretion – ‘entitled but not obliged’

The Court held that the availability of MLA provides the Director of the SFO with an ‘additional power’ (to s.2(3) of the CJA 1987) to obtain documents but it does not curtail her discretion to issue s.2(3) notices. The Court acknowledged that there may be sound reasons for the Director to prefer to issue a s.2(3) notice, including delay and the risk of a request being ignored, finding that a, “*State is entitled but not obliged to proceed by way of the MLA route.*”

Service – a blemish for the SFO

The Court held that the giving of the s.2(3) notice to the KBR representative at the July 2017 meeting held in the UK was sufficient for the requirements of s.2(3) as the legislative provisions do not require a notice to be ‘served’. Lord Justice Gross was, however, moved to criticise obiter the “*unappealing features*” of the SFO’s decision to give the notice to the KBR representative during a meeting that had been ostensibly called in order to discuss the investigation and queried how this may, “*impact on the willingness of others to attend such meetings in the future.*”

Conclusion

The judgment is a qualified win for the SFO - early in Lisa Osofsky’s tenure as the new Director - given that almost all the investigations under her ultimate supervision have an international aspect, with documents relevant to the investigation of UK companies held in foreign jurisdictions. The qualification being that the SFO’s use of s.2(3) notices in similar factual circumstances may be stymied as well-advised companies under investigation (who have determined it is not in their interests to adopt a cooperative posture) are unlikely to agree to have representatives from foreign group companies attend meetings in the UK with the SFO, thereby leaving the SFO to fall back on its MLA powers, where available.

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