

THE HIGH COURT OF JUSTICE HAS CONFIRMED THAT THE SFO CAN COMPEL SOME FOREIGN COMPANIES TO PRODUCE DOCUMENTS HELD OUTSIDE THE UK

In a judgment dated 6 September 2018, the High Court of Justice in London has confirmed that the power of the SFO to compel production of documents under section 2(3) of the Criminal Justice Act 1987 ("**CJA 1987**") can extend to some foreign companies in respect of documents held abroad, when there is "sufficient connection" between the company and the UK. The High Court has also helpfully set out a number of factors that do not assist the SFO in making good its case of a sufficient connection between a company and the UK. The judgment represents a significant clarification of the extraterritorial reach of section 2(3) of the CJA 1987.

THE FACTS

In April 2017, the SFO opened a criminal investigation into the activities of Kellogg Brown & Root Ltd ("**KBR Ltd**"), concerning suspected offences of bribery and corruption. KBR Ltd is a subsidiary of KBR Inc, a US incorporated company forming part of a multinational group of companies employing approximately 34,000 people worldwide and with operations in 40 countries. According to the SFO's evidence, it has identified a large number of suspected corrupt payments which, from at least 2005 onwards, 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 June 2017, the SFO apparently became concerned that KBR would seek to draw a distinction between documents held by or under the control of KBR Ltd and those outside of the jurisdiction/their control. At the request of KBR, a meeting was arranged with the SFO. The SFO requested that "clients" (i.e. representatives of KBR) be present and not simply KBR's external lawyers.

The meeting between KBR and the SFO took place on 25 July 2017, attended by KBR Inc's General Counsel and Chief Compliance Officer. At the meeting, KBR said that it needed time to consider whether, going forward, it would provide documents to the SFO that were located outside the UK. In response, the SFO served KBR Inc's General Counsel at the meeting with a notice under section 2(3) of the CJA 1987 requiring the production of additional materials by KBR Inc (the "**July Notice**").

Key issues

- Section 2(3) of the Criminal Justice Act 1987 can extend to some foreign companies in respect of documents held abroad, when there is "sufficient connection" between the company and the jurisdiction
- The mere fact of a company being a parent company of a multinational group was not sufficient to establish a "sufficient connection"

THE JUDGMENT

KBR Inc challenged the July Notice on the following three grounds:

- The July Notice was ultra vires as it requested material held outside the UK from a company incorporated in the US;
- It was an error of law on the part of the SFO to exercise the section 2 CJA 1987 powers despite their power to seek Mutual Legal Assistance ("MLA") from the US authorities; and
- The July Notice was not effectively "served" on KBR Inc by handing it to a "senior officer" of KBR Inc who was temporarily present within the jurisdiction.

Ground I: Jurisdiction

In summary, KBR Inc's argument was that, as a matter of statutory construction and English rules of conflict of laws, section 2(3) of the CJA 1987 did not operate extraterritorially. KBR underlined that KBR Inc was a US corporation and the documents in question were held outside the UK.

The SFO 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 section 2 notice to produce them, no matter how relevant they were to KBR Ltd's operations. The SFO submitted that 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 SFO also argued that section 2(3) of the CJA 1987 contained no words of express (jurisdictional) limitation. The July Notice was given to KBR Inc in the UK and required KBR Inc to produce documents to the SFO in the UK.

Lord Justice Gross concluded 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...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." As adding "substantial weight" to a conclusion of there being a "sufficient connection", Lord Justice Gross noted that the allegedly corrupt payments made by KBR Ltd required the express approval of KBR Inc and were processed by KBR Inc's treasury function in the US.

Lord Justice Gross went on to set out a number of factors that he considered did not support a "sufficient connection" with the UK, including:

- 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";
- the fact that KBR Inc cooperated to a degree with the SFO's request for documents and remained willing to do so voluntarily, on terms that it would apply SFO search terms across data held in the US. Lord Justice Gross noted that "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)"; and

- the fact that KBR Inc's General Counsel attended the meeting with the SFO on 25 July 2017.

He also noted that KBR Inc does not and did not carry on business in the UK.

Ground II: Discretion

KBR Inc argued that, even if section 2(3) of the CJA 1987 did apply extra territorially, the SFO was obliged to take into account the background to the MLA. By failing to do so and bypassing the safe guards afforded by the MLA process, the SFO had erred in law.

The SFO's response was simple: namely the power to seek MLA was separate and distinct from the power to issue a notice under s.2(3) of the CJA 1987 and, in any event, the SFO's power to seek MLA was not to be confused with an obligation to do so.

Lord Justice Gross rejected KBR Inc's arguments noting that the MLA process is *additional* to section 2(3) of the CJA 1987 and that there may be good reasons for preferring the section 2(3) route to the MLA route (including delay and complexity).

Ground III: Service

The third issue before the High Court was whether the giving of the July Notice to KBR Inc's General Counsel at the meeting on 25 July 2017 was sufficient to satisfy the requirements of section 2(3) of the CJA 1987. KBR contended that it did not since KBR Inc was not itself present within the UK.

The Court rejected KBR Inc's submissions for reasons including that KBR Inc's General Council was plainly present in the jurisdiction when the July Notice was given to her. Moreover, the General Counsel attended the meeting as a representative of KBR Inc: "she was not here coincidentally or on some personal frolic". The July Notice was also communicated to KBR Inc. Finally, section 2(3) requires no additional formality beyond the giving of the notice and there is no basis for importing any such requirement.

CONCLUSION

The judgment is clear that section 2 notices can seek to obtain documents from overseas companies where those companies have "a sufficient connection" with the UK. That is a fact specific determination.

If there is sufficiency of connection then a section 2 notice will be effective if it is effectively served. As a practical matter, it is evident that if the SFO begin an investigation then foreign companies of interest to the SFO in relation to that investigation may want to take steps to avoid exposing themselves to service of a section 2 notice through the presence of representatives in the UK.

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