KBR v SFO – High Court Determines SFO Can Compel Production of Material Held Overseas

11 September 2018
By Ross Dixon and Chris du Boulay

Summary

On 6 September 2018 the High Court handed down judgment in *R (on the Application of KBR Inc) v The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin). The Court had been asked to determine the extraterritorial extent of powers granted to the Serious Fraud Office (SFO) by s.2(3) of the Criminal Justice Act 1987 (the Act) to issue notices compelling suspects and witnesses to produce documents relevant to its inquiries. The Court ruled that s2 notices could require the production of documents held overseas, provided that the recipient of the notice had a "sufficient connection" to the United Kingdom.

Background

The case arises out of the SFO's bribery and corruption investigation into Unaoil, and latterly Kellogg Brown & Root Ltd (KBR Ltd), which engaged Unaoil ostensibly to provide consultancy services in the Caspian region. The recipient of the s2 notice was KBR Inc, the US-based parent company of KBR Ltd and other subsidiaries in the worldwide KBR Group. While KBR Ltd was based in the UK, it was accepted that the parent company KBR Inc did not itself carry on business in the UK.

The SFO alleged that a large number of corrupt payments, totalling in excess of US$23 million, were made by KBR Ltd and its UK subsidiaries to Unaoil. The SFO further alleged that a number of these payments required express approval by KBR Inc and to have been processed by KBR Inc's treasury function.

The KBR Group initially agreed to co-operate with the SFO's investigation and handed over documents held by KBR Ltd in the UK as well as documents held by KBR Inc in the US which had already been given to the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) as part of a related investigation. However, the SFO became concerned that KBR was seeking to draw a distinction between documents held by or under the control of KBR Ltd and documents that were outside of the jurisdiction and thus beyond KBR Ltd's control.

On 25 July 2017, purportedly in order to provide an update on its investigation, the SFO invited two senior US based executives of KBR Inc to a meeting in the UK. At the meeting the SFO handed one of the executives a s2 notice requiring production of material held by KBR Inc.

KBR Inc argued that the notice was unlawful and commenced the present judicial review proceedings.

Ruling

It was common ground between the parties that the Act was silent on the question of whether or not s2 notices had extraterritorial extent. It was also accepted that the SFO's power to obtain a Court search warrant under ss.2(4) and 2(5) of the Act was confined to properties within the UK, and that the SFO could only give a s2 notice to someone who was, at the time, within the jurisdiction.

The Court considered legislation and case law from other areas of law to obtain assistance on whether in such circumstances it should be inferred that the scope of the Act was universal, or that (in the absence of an express extension) the scope was limited to the UK.

The Court found that the starting principle was that, unless contrary intention appeared, statutes had territorial but not extraterritorial application. The Court stated that 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.*" However, the Court balanced this against the "*extremely strong public interest*" in there being an extraterritorial ambit to s.2(3) and the fact that it was "*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."*

KBR relied on in particular the Supreme Court decision in *SOCA v Perry (Nos 1 and 2)* [2012] UKSC 35; [2013] 1 AC 182, concerning a disclosure order under the Proceeds of Crime Act 2002 which had been served on individuals outside of the jurisdiction. The Supreme Court held that to confer authority on a UK public authority to impose on persons outside the jurisdiction a positive obligation to provide information subject to criminal sanction in the event of non-compliance would be a "*particularly startling breach of international law*." The Supreme Court also gave some consideration to the application of a "sufficient connection" test, but thought it went beyond the boundaries of legitimate statutory construction.

The Court took account of the recent US Court of Appeals decision in *Microsoft v US* which had declined to enforce a warrant for the production of material held outside of the US, on the basis that it constituted an unlawful extraterritorial application of the relevant legislation. The US Supreme Court subsequently agreed to hear the case, however, in the interim Congress enacted the Clarifying Lawful Overseas Use of Data Act (CLOUD Act) which extended the territorial application of the legislation, rendering the issue moot.

The Court concluded that a nuanced approach should be adopted and held that the s2 notice did extend to documents held overseas, provided that the recipient of the notice had a "sufficient connection" to the UK. The Court distinguished *Perry* on the basis that it concerned a notice given to individuals outside the jurisdiction who did not have *any* connection with the UK, save for the presence of assets here. The Court also relied upon its own conclusion that s.2(3) must have *some* extraterritorial reach in order to conclude that it was not going beyond the bounds of statutory construction which the Supreme Court had declined to cross in *Perry*.

In finding that KBR Inc did have a sufficient connection to the UK the Court took into account the following factors which did <u>not</u> assist the SFO:

- The mere fact that KBR Inc was the parent company of KBR Ltd;
- The fact that KBR Inc cooperated to a degree with the SFO's request for documents and remained willing to do so voluntarily (to find otherwise would diminish the likelihood of companies co-operating);
- The fact that the senior executive attended the meeting with the SFO and was therefore temporarily within the jurisdiction (such temporary presence being insufficient to found a sufficient connection); and

- The fact KBR Inc did not carry on business in the UK.

However, the Court found that the fact that payments made by KBR Ltd required the express approval of KBR Inc, were processed by KBR Inc's US-based treasury function, and required the approval of KBR Inc's compliance function, meant that a "sufficient connection" with the UK had been established.

The Court also ruled that it was within the discretion of the SFO to utilise its s2 powers in preference to relying upon Mutual Legal Assistance treaties, notwithstanding the additional safeguards such treaties provide.

Finally, the Court noted its concerns with the "*unappealing features*" of the SFO's decision to give a s2 notice during the course of a meeting to discuss the investigation, given the impact this might have on the willingness of others to attend such meetings in the future.

Comment

This case is relevant to any practitioners representing individuals or corporates who may be subject to SFO investigation, or who may hold material relevant to such an investigation. Practitioners should also note the tactics employed by the SFO in order to secure the attendance of a foreign executive in the UK, and way wish to ensure that sufficient safe passage guarantees are obtained from the SFO in advance of attendance at such meetings.

In remains to be seen whether KBR will appeal the decision, and if so whether the High Court's convenient distinction of *Perry* will stand up to further judicial scrutiny.

Ross Dixon, corporate crime partner at Hickman & Rose Solicitors, said:

"This is a significant development that will change the way the SFO conducts its investigations.

"Before this decision the SFO already had sweeping powers to compel the handover of material within its jurisdiction.

"This decision means, for the first time, that for a company or individual with sufficient connection to the UK, these powers now extend to material kept overseas.

"Companies and individuals conducting business overseas may have to rethink the way they engage with the SFO when under investigation.

"But as well as extending the SFO's investigatory reach, the Court also criticised some features of the SFO's investigation, in particular their use of a meeting, ostensibly called to discuss the case's progress, to serve notice to handover material.

"It will be interesting to see whether the SFO continue to deploy the same tactics in the future. "

Hickman & Rose are a leading criminal and human rights law firm, based in London. Partner Ross Dixon and associate Chris du Boulay specialise in business and white collar crime. They frequently advise corporates and individuals caught up in investigations into bribery, fraud and other complex financial matters.