

R (on the Application of KBR Inc) v The Director of the Serious Fraud Office ***[2018] EWHC 2368 (Admin)***



THE FACTS

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.

KBR Inc is a US company and the parent of a multinational group of companies, the KBR Group. KBR Inc does not have a fixed place of business in the UK and it was not argued by either party that it carries on business in the UK. It does, however, have subsidiaries in the UK, including KBR Ltd.

The SFO began a criminal investigation into KBR Ltd concerning suspected offences of bribery and corruption in February 2017. In April 2017 a s.2(3) notice was served on KBR Ltd.

During a meeting held in the UK to discuss the investigation with the SFO in July 2017, the SFO handed a KBR Inc representative (who had attended at the SFO's request) a notice to produce documents under s.2(3) of the Criminal Justice Act 1987.

THE GROUNDS

KBR Inc sought to quash the SFO's notice requiring KBR Inc to produce documents held by it outside the UK, on the following three grounds:

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

THE JUDGMENT

➤ Jurisdiction

The Court found in favour of the SFO, holding that s.2(3) must have an element of extraterritorial application. Otherwise UK companies could resist an otherwise lawful notice on the ground that the documents sought were held on a server out of the jurisdiction.

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 Inc’s approval and that KBR’s UK subsidiaries made payments that were processed by KBR Inc’s US treasury function.

The Court held the mere fact that the applicant company was a parent of the UK company under investigation, its earlier cooperation by the applicant company with an SFO request for documents; and the fact that a senior corporate officer (the General Counsel and Executive Vice President) of the applicant company attended a meeting with the SFO in the UK were not reasons to establish a sufficient connection.

➤ Discretion

The Court held that the availability of MLA provides the Director of the SFO with an ‘additional power’ to obtain documents but it does not restrict the discretion to issue s.2(3) notices. It was acknowledged that there may be reasons for the preferment of 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

The Court held that the giving of the s.2(3) notice to the KBR representative at the July 2017 meeting in the UK was sufficient for the requirements of s.2(3) as the legislative provisions do not require a notice to be ‘served’.

However, Lord Justice Gross stated there were *“unappealing features”* of the SFO’s decision to give the notice to the KBR representative during a meeting that had been called in order to discuss the investigation. He stated this may *“impact on the willingness of others to attend such meetings in the future.”*

DAVID STERN

9 October 2018