ALERT MEMORANDUM

English High Court Ruling on the Extraterritoriality of the Serious Fraud Office's Powers

2 October 2018

The English High Court recently handed down its judgment in a judicial review claim brought by KBR Inc. ("KBRI") against the U.K. Serious Fraud Office ("SFO").[1] The claim concerned the scope of the SFO's power to compel the production of documents held outside the U.K. under section 2(3) of the Criminal Justice Act 1987 ("Section 2(3)").

In summary, the High Court ruled that:

1. A U.K. company could be compelled through a notice under Section 2(3) (a "Section 2(3) Notice") to produce documents it holds overseas.
2. A Section 2(3) Notice extends extraterritorially to foreign companies in respect of documents held overseas when there is a "*sufficient connection*" between the company and the U.K..
3. The SFO was permitted to issue a Section 2(3) Notice despite having the power to seek mutual legal assistance ("MLA") from overseas authorities to receive the same information.
4. A Section 2(3) Notice is validly served by the SFO by handing it to a "*senior officer*" of an overseas company who was temporarily present within the U.K..

The Court's rulings will be of interest to international businesses with operations or interests in the U.K.. The Court's conclusions also have parallels to federal court decisions in the U.S. addressing the enforcement of grand jury subpoenas issued in criminal investigations.

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[1] *The Queen on the application of KBR Inc. v The Director of the Serious Fraud Office [2018] EWHC 2012 (Admin)*

The Section 2(3) Power

Section 2(3) of the Criminal Justice Act 1987 (the "1987 Act") provides:

> *"[The SFO] may by notice in writing require [a] person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified, any specified documents which appear to the [SFO] to relate to any matter relevant to the investigation or any documents of a specified class which appear to [the SFO] to so relate…[]"*.[2]

A failure to comply with a Section 2(3) Notice is punishable by criminal sanction.[3] The 1987 Act prescribes two bases on which a recipient of a Section 2(3) Notice may resist disclosure of responsive documents, namely, where: (i) the documents are privileged;[4] and (ii) where the notice recipient has a "*reasonable excuse*" for failing to comply with the Section 2(3) Notice.[5]

Factual Background

On February 17, 2017, the SFO opened an investigation into KBR Ltd ("KBRL"), a U.K. subsidiary of KBRI. Both KBRL and KBRI form part of the "KBR Group", of which KBRI is the ultimate parent. The SFO's investigation relates to its wider investigation into the activities of Unaoil.

In April 2017, as part of its investigation, the SFO issued a Section 2(3) Notice to KBRL requiring the production of 21 categories of documents (the "April Notice").[6]

Although the KBR Group initially purported to co-operate with the SFO's investigation (including by: (i) seeking the transfer to KBRL of material held by KBRI outside the U.K.; and (ii) the "*voluntary*" production of material located outside the U.K., and held by KBRI, which had been produced to the U.S. authorities), the SFO subsequently became concerned that the KBR Group was "*seeking to draw a distinction between documents held by or under the control of [KBRL] and documents outside of the jurisdiction and beyond [KBRL's] control*".[7]

A meeting was arranged between the SFO and the KBR Group's lawyers. At the insistence of the SFO, two representatives of the KBR Group attended the meeting, namely, KBRI's Executive Vice President, General Counsel and Corporate Secretary ("Ms A"), and KBRI's Chief Compliance Officer ("Ms S").[8]

Before the meeting, the SFO prepared a draft of a further Section 2(3) Notice, which was intended to be issued to KBRI "*in the event that a satisfactory response was not received as to [KBRI's] willingness to provide the outstanding materials sought in the April Notice*". The draft of the further Section 2(3) Notice (the "July Notice") sought, among other items, the same 21 categories of documents contained in the April Notice.[9]

During the meeting, the SFO asked whether outstanding material requested in the April Notice would be provided. The SFO was told that KBRI's board of directors would require time to consider the position. In response, the SFO inserted Ms A's name into the draft of the July Notice and handed it to Ms A.

[2] *Section 2(3), Criminal Justice Act 1987*
[3] *Section 2(13), Criminal Justice Act 1987*
[4] *Section 2(9), Criminal Justice Act 1987*
[5] *Section 2(13), Criminal Justice Act 1987*
[6] *KBR Inc. v SFO, ¶ 12*
[7] *KBR Inc. v SFO, ¶ 14*
[8] *KBR Inc. v SFO, ¶ 14*
[9] *KBR Inc. v SFO, ¶ 15*

In the event, KBRI refused to comply with the July Notice, and brought judicial review proceedings challenging the validity of the SFO's actions.[10]

The Grounds of Challenge

Before the High Court, KBRI challenged the July Notice on the following three grounds:

1. The July Notice was unlawful as it requested material held outside the U.K. from a U.S. company (i.e. KBRI) (the "Jurisdiction Issue");

2. It was unlawful for the SFO to issue a Section 2(3) Notice in circumstances where it had the power to seek MLA from the U.S. authorities (the "Discretion Issue"); and

3. The July Notice was not effectively "*served*" by the SFO handing it to a "*senior officer*" of KBRI who was temporarily present within the jurisdiction (the "Service Issue").[11]

In essence, KBRI argued that Section 2(3) does not operate extraterritorially and, consequently, that material it holds outside the U.K. is not required to be produced to the SFO in response to a Section 2(3) Notice. Conversely, the SFO argued that there was no territorial limit on the material that it can request through a Section 2(3) Notice.

The High Court's Judgment

- *The Jurisdiction Issue*

In the course of its ruling on the Jurisdiction Issue, and of particular importance to U.K. companies which store data overseas, the Court observed that it was "*scarcely credible*" that a U.K. company could resist an otherwise lawful Section 2(3) Notice on the ground that the documents requested were located on a server outside the U.K., and opined that a U.K. company could therefore be required by the SFO to produce material held by it outside the U.K..[12]

In this connection, the High Court took note of the *Microsoft* litigation,[13] in which the United States Court of Appeals for the Second Circuit held that the Stored Communications Act (the "SCA") did not apply extraterritorially and accordingly, a U.S. based service provider could not be compelled to produce to the government electronic communications stored on a server outside the United States.[14] The High Court suggested that the holding in *Microsoft* was cabined to the unique issue and legislation in question.[15] The Second Circuit had concluded that the SCA's focus on protecting the privacy of users' stored data held by service providers compelled a different result for an SCA warrant than a subpoena, which may require the production of documents stored overseas.[16] While the Second Circuit decision was on appeal to the U.S. Supreme Court, the U.S. Congress amended the SCA by the Clarifying Lawful Overseas Use of Data Act (the "CLOUD Act"), to state that obligations to comply with the SCA applied to communications, records, or other information within a service provider's possession, custody, or control, regardless of whether the information was located within or outside of the United States.[17] The CLOUD Act rendered the appeal moot, offering a legislative resolution to the issue of extraterritoriality with which the High Court similarly grappled.[18]

On the Jurisdictional Issue itself, which concerned the extent to which an overseas company could be

[10] *KBR Inc. v SFO*, ¶ *18*
[11] *KBR Inc. v SFO*, ¶ *2*
[12] *KBR Inc. v SFO*, ¶ *64*
[13] *Microsoft Corp. v. United States*, 829 F.3d 197 (2d Cir. 2016)
[14] *KBR Inc. v SFO*, ¶ *60-62, 64*
[15] *KBR Inc. v SFO*, ¶ *64*
[16] *Microsoft Corp. v. United States*, 829 F.3d at 214
[17] *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1187-88 (2018).
[18] *United States v. Microsoft Corp.*, 138 S. Ct. at 1188

compelled to produce material held outside the U.K., the High Court concluded that a Section 2(3) Notice extends extraterritorially to non-U.K. companies in respect of documents held outside the U.K. where there is "*sufficient connection*" between the company and the U.K..[19] The Court opined that this test strikes a "*careful balance between facilitating the SFO's investigation of serious fraud with an international dimension and making excessive requirements in respect of a foreign company with regard to documents abroad*".[20]

On the facts, the Court was "*amply satisfied*" that there was a sufficient connection between KBRI and the U.K. so as to fall within the jurisdictional reach of Section 2(3).[21] In support of this conclusion, the Court said that it was "*impossible*" to distance KBRI from the transactions which are central to the SFO's investigation. This finding was made on the basis that payments central to the SFO's investigation of KBRL, and KBRL's contracts or arrangements with Unaoil, required the approval of KBRI, and were paid by KBRI through its U.S. based treasury function (a process which involved Ms A and Ms S). In the circumstances, KBRI's "*own actions*" made good a sufficient connection between it and the U.K..[22]

In passing, the Court noted that a senior employee of KBRI was based in a U.K. office of the KBR Group, and "*appeared to carry out his functions from the UK*". The Court suggested that this factor was not sufficient, in itself, to satisfy the "*sufficient connection*" test, but provided "*further support*" for the conclusion which had been reached.[23]

In addition to specifying the factors which did satisfy the "*sufficient connection*" test, the Court also noted certain factors which did not assist the SFO in establishing a "*sufficient connection*":

- KBRI is the parent company of KBRL. The Court noted that applying such a broad test would "*ensnare sundry parent companies of multinational groups without adequate justification*".

- KBRI co-operated with the SFO. The Court noted that KBRI had previously offered to apply search terms (specified by the SFO) across data held outside the U.K.. The Court highlighted that voluntary cooperation should be encouraged and should not give rise to deemed acceptance of a sufficiently close connection with the U.K..

- The fact that Ms A attended the meeting with the SFO in July 2017. In a similar vein, the Court was minded to avoid punishing cooperative conduct with deemed acceptance that the sufficient connection test had been satisfied.[24]

➢ *The Discretion Issue*

On the Discretion Issue, KBRI argued that the SFO was required to consider the background and availability of MLA in deciding whether to issue the Section 2(3) Notice, and that the failure to do so was an error of law. Conversely, the SFO argued that the power to seek MLA was separate and distinct from the power to issue a Section 2(3) Notice, and that the power to seek MLA was not to be confused with an obligation to do so.

The Court concluded that KBRI had failed to demonstrate any error of law by the SFO in the exercise of its discretion to issue the July Notice.[25] The Court added that even where MLA might be

[19] *KBR Inc. v SFO,* ¶ *71*
[20] *KBR Inc. v SFO,* ¶ *72(ii)*
[21] *KBR Inc. v SFO,* ¶ *79*
[22] *KBR Inc. v SFO,* ¶ *82*
[23] *KBR Inc. v SFO,* ¶ *83*
[24] *KBR Inc. v SFO,* ¶ *80*
[25] *KBR Inc. v SFO,* ¶ *93*

available, there may be "*good practical reasons*" why the SFO may, in any event, proceed with the issuance of a Section 2(3) Notice instead of pursuing MLA.[26] Such reasons were said to include delay by the recipient state, the risk of a request being ignored by the recipient state, and the burden on the recipient state of dealing with a request when a direct approach to the holder of the information would be much simpler.

It had not been suggested that there was any complexity or difficulty under U.S. law in requiring KBRI to comply with the July Notice. The Court noted that, where any such complexity, difficulty or conflict of duties arises, or where assistance was required from the U.S. authorities, the position would be different, and may militate in favour of using MLA rather than a Section 2(3) Notice.[27]

- *The Service Issue*

On the Service Issue, KBRI sought to persuade the Court that Section 2(3) required it to be present in the U.K. to be validly served with a Section 2(3) Notice. To support this argument, KBRI sought to draw an analogy with the service principles under the Civil Procedure Rules ("CPR") , which require "*presence*" in the jurisdiction for an entity to be validly served with proceedings. KBRI claimed that it could not be considered to be "*present within the jurisdiction*", in the CPR sense, merely through Ms A's presence at the meeting in July 2017.

The Court rejected KBRI's analogy with the CPR service provisions and held that Ms A's presence in the U.K. to attend the meeting, in which she represented KBRI (as opposed to being on some "*personal frolic*") was sufficient to bring KBRI within the U.K. such that it could be validly served with a Section 2(3) Notice.[28] In making this finding, however, the Court observed that there were "*unappealing features*" of the SFO's decision to give the July Notice to Ms A in the course of attending a meeting to discuss the investigation.[29]

Parallels to U.S. Federal Court Decisions

In connection with criminal investigations, the U.S. Department of Justice ("DOJ") may issue grand jury subpoenas compelling the production of documents. The DOJ's internal policies generally require prior written approval from its Office of International Affairs before the issuance of subpoenas for records located abroad.[30] Federal courts in the U.S. have enforced grand jury subpoenas directing the production of documents held overseas that are in the possession or control of a subpoena recipient. The courts have asserted that so long as they have personal jurisdiction over a subpoena recipient, they have the power to enforce the subpoena.[31] The jurisdictional analysis is somewhat akin to the "*sufficient connection*" test employed by the High Court in KBR. The inquiry is fact-intensive and considers the subpoena recipient's "*minimum contacts*" with the U.S. as well as the effects of its conduct in the U.S..[32] A federal appeals court conducting this analysis has upheld the enforcement of a grand jury subpoena against a Swiss company, with no U.S. offices, that was under criminal investigation in the U.S. for alleged tax evasion.[33] While the Swiss company did not challenge the manner of service, the court suggested that service of the subpoena on the

[26] *KBR Inc. v SFO,* ¶ *94*
[27] *KBR Inc. v SFO,* ¶ *94*
[28] *KBR Inc. v SFO,* ¶ *99-100*
[29] *KBR Inc. v SFO,* ¶ *100*
[30] U.S. Dep't of Justice, Justice Manual: Criminal Resource Manual § 279 (2018).
[31] *United States v. First Nat. City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968); *Matter of Marc Rich & Co., A.G.*, 707 F.2d 663, 667 (2d Cir. 1983).
[32] *In re Sealed Case*, 832 F.2d 1268, 1274 (D.C. Cir. 1987), abrogated on other grounds by *Braswell v. United States*, 487 U.S. 99 (1988); *Marc Rich*, 707 F.2d at 667; *United States v. Chitron Elecs. Co.*, 668 F. Supp. 2d 298, 303 (D. Mass. 2009).
[33] *See Marc Rich*, 707 F.2d 663.

company's officers within the U.S. would be sufficient.[34] The court also affirmed that a subpoena recipient's possession or control of documents, rather than their location, is determinative.[35]

The courts have applied a balancing test to assess whether compliance with subpoenas should be excused in the interest of comity because conflicting laws impose inconsistent obligations.[36] The test looks to factors such as the competing interests of the countries whose laws are in conflict and the hardship the subpoena recipient would suffer from complying with the subpoena.[37] Courts applying the test have given significant weight to the interest of the United States in investigating and prosecuting violations of its criminal laws.[38]

Similar to the High Court's ruling in KBR, a federal appeals court in the U.S. has rejected arguments that the authorities must obtain evidence through MLA where available.[39]

Practical Implications of KBR

The High Court's rulings in KBR contain a number of noteworthy features which will be of interest to multinational organizations with operations or business interests in the U.K..

First, the High Court's ruling confirms that a U.K. company may, pursuant to a Section 2(3) Notice, be compelled to produce to the SFO documents that are held by the organization outside the U.K.. Whilst in some cases (and, particularly, where an organization wishes to adopt a co-operative stance with the SFO) a company incorporated in the U.K. may be prepared to voluntarily disclose the company's overseas documents to the SFO, in other cases, such disclosures may be prohibited under local law (for instance, as a result of data privacy or bank secrecy laws). Where a U.K. company is prohibited from producing to the SFO documents that it holds overseas in these (or any) circumstances, the recipient of the Section 2(3) Notice risks prosecution by the SFO for failing to comply with the notice. As noted above, aside from privilege, the only ground upon which a Section 2(3) Notice recipient is permitted to withhold disclosure of responsive documents is where the recipient can establish that it has a "*reasonable excuse*" for not producing the documents. As a result of the High Court's ruling, a company which is prohibited under foreign law from disclosing to the SFO documents requested in a Section 2(3) Notice which are held outside the U.K. may be forced to rely on the "*reasonable excuse*" defence to justify its refusal to produce the documents. Whether such a defence would succeed will depend on the facts but in our experience the SFO will examine such a defence rigorously.

Second, there is no indication in the judgment that the SFO attempted to enforce the April Notice against KBRL for its failure to provide documents held overseas by KBRI. Rather, the SFO sought to secure the presence within the U.K. of a senior KBRI employee upon whom a Section 2(3) Notice could be served. Consequently, the case is not authority for the position that a U.K. company served with a Section 2(3) Notice requesting material held overseas by an overseas affiliate must procure the production to the SFO of that material.

Third, the introduction of the "*sufficient connection*" test for a Section 2(3) Notice served on a person outside the U.K. in respect of

[34] *Marc Rich*, 707 F.2d at 668.
[35] *Marc Rich*, 707 F.2d at 667; *see also In re Grand Jury Subpoena dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 555-56 (S.D.N.Y. 2002).
[36] *See In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984); *First Nat. City Bank*, 396 F.2d 897.
[37] *Bank of Nova Scotia*, 740 F.2d at 827.
[38] *In re Grand Jury Subpoena dated Aug. 9, 2000*, 218 F. Supp. 2d at 554.
[39] *In re Grand Jury Subpoena*, 646 F.3d 159, 165 (4th Cir. 2011); *see also Chitron*, 668 F. Supp. 2d at 306-07.

documents held overseas represents a new legal development. Whilst the Court helpfully sought to explain the factors underpinning its finding that the "*sufficient connection*" test was satisfied on the facts (including by explaining the factors which did not satisfy the test), the fact-specific nature of the test is likely to lead to uncertainty and, in some cases, debate between the SFO and recipients of Section 2(3) Notices regarding whether the test is satisfied in any particular case.

Fourth, the High Court's ruling that the July Notice was validly served on Ms A, by virtue of her presence in the U.K. as a representative of KBRI, will undoubtedly be concerning for overseas organizations faced with a request to attend a meeting in the U.K. with the SFO, and may lead to a reluctance on the part of some overseas companies to engage directly with the SFO.

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