CORPORATE CRIME BRIEFING NOTE

The not so long arm of the law - the Supreme Court's decision in R (on the application of KBR, Inc) v Serious Fraud Office [2021] UKSC 2

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1. In a long-awaited judgment, the Supreme Court has unanimously rejected the Serious Fraud Office's ("**SFO**") claim that its powers under s.2(3) of the Criminal Justice Act 1987 ("**CJA**") could compel, under penal sanction, an overseas company to produce documents held outside of the jurisdiction. It is a ruling to be welcomed by both corporations and their legal advisers as it firmly rejects the inherently uncertain "sufficient connection" test invented by the lower court and exhibits a respect for the formal mutual legal assistance ("**MLA**") process and the principle of comity of nations.

Background

2. On 17 February 2017, the UK SFO commenced a criminal investigation into Kellogg Brown and Root Ltd ("**KBR UK**"), a UK subsidiary of a United States engineering and construction company KBR, Inc, concerning suspected offences of bribery and corruption.

3. On 4 April 2017, the SFO issued a notice pursuant to s.2(3) CJA to KBR UK, requiring the production of specified material. KBR UK provided various materials in response. However, they made it clear to the SFO that certain material was not in their control but, if and to the extent that it exists, was held by KBR, Inc in the United States.

4. On 25 July 2017, representatives from KBR, Inc voluntarily attended a meeting with the SFO in London to discuss this issue. During the course of the meeting, the SFO asked whether the outstanding material requested in the April notice, not yet provided on the basis that it was located outside the United Kingdom, would be provided. In response, the SFO was told that the Board of KBR, Inc required time to consider the position. Dissatisfied with this response, the SFO served a s.2(3) notice on an officer of KBR, Inc requiring the company to produce the same material specified in the previous notice, as well as further additional material.

5. KBR, Inc applied, by way of judicial review, to challenge the July s.2 notice on three grounds: (1) the July notice was *ultra vires* as it requested material held outside the jurisdiction from a company incorporated in the USA; (2) the Director of the SFO made an error of law in issuing

the July s.2 notice instead of using its power to seek mutual legal assistance from the US authorities; and (3) the July s.2 notice was not properly served on KBR, Inc under the CJA.

The Decision of the Divisional Court:

6. The Divisional Court rejected the application on all three grounds. It held that in relation to UK companies with documents outside of the UK:

> *"[Section 2(3) of the CJA] must have an element of extraterritorial application. It is 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. In this regard, were a UK company in a position to forestall a serious fraud investigation by transferring documents abroad (in a manner circumventing s.2(16), CJA 1987), it would be in the highest degree unfortunate…"*

7. The question was, therefore, one of the extent rather than the existence of the extra-territorial reach of this section. As regards documents held by foreign companies outside of the UK, the court held that s.2(3) will extend to some foreign companies in respect of documents held abroad when there is a *"sufficient connection between the foreign company and the jurisdiction"*. The test appeared to be a pure construct of judicial legislating and was necessarily fact specific.

8. The Divisional Court certified the following two points of law were of general public importance and KBR, Inc were given permission to appeal:
   i. Does s.2(3) of the 1987 Act permit the Director of the SFO to require a person to produce information held outside England and Wales?
   ii. If so, does the Director of the SFO have power to do so by reference to the "sufficient connection test"?

Supreme Court's ruling

9. The Supreme Court unanimously allowed the appeal. Delivering judgment, Lord Lloyd-Jones confirmed that the starting point is the presumption that in domestic law, legislation is not generally intended to have extra-territorial effect. This presumption is, in part, grounded in the requirements of international law that one State should not infringe the sovereignty of another in breach of the rules of international law. However, the rationale and resulting scope of the presumption are also rooted in the concept of comity of nations. As a result, the principle is broader and reflects States acting out of mutual respect and the expectation of reciprocal advantage.

10. The next question was, logically, whether the presumption was rebutted by the express terms of the statute, and in that sense whether Parliament intended to confer on the SFO the power to compel a foreign company to produce documents held abroad, on pain of a criminal penalty in this jurisdiction. The Court drew particular attention to s.12 of the Bribery Act 2012, which

criminalises conduct outside the UK in certain circumstances where there is a close connection with the UK, as an example of such express statutory language displacing the presumption. No such express wording appeared within s.2(3) CJA.

11. The Supreme Court concluded that the intention of Parliament to give extra-territorial effect to s.2(3) CJA may sometimes be implied from the scheme and context of the legislation. An argument advanced by the SFO was that such an intention may be implied if the purpose of the legislation could not be effectively achieved without such effect. In particular, the SFO claimed that there is significant public interest in s.2 notices having extra-territorial reach due to the fact that virtually all modern complex criminal investigations involve multinational corporations and evidence stored on digital cloud platforms. However, this argument failed adequately to address the crucial question of why Parliament had continued to develop and enhance the structure of MLA in domestic law if it had always intended s.2 to have such extra-territorial reach. One may consider that what the SFO was in fact attempting to do was retrospectively to construct arguments to justify aggressive prosecutorial tactics. One may be forgiven for suspecting that the recourse to the far-reaching s.2 powers (which are not subject to prior judicial oversight) may have been influenced by perceived inefficiencies in the alternative MLA framework.

12. The Supreme Court concluded that it was *"inherently improbable that Parliament should have refined this machinery as it did, while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the SFO, without any recourse to the courts or authorities of the State where the evidence was located and without the protection of any of the safeguards put in place under the scheme of mutual legal assistance."*

13. In reaching its conclusion that s.2(3) did not have extra-territorial effect to the extent that it could compel an overseas company to produce documents held abroad, the Supreme Court drew comfort from the decision in *Serious Organised Crime Agency v Perry [2012] UKSC 35* (while simultaneously rejecting the analogy between the insolvency cases advanced by the SFO). *Perry* concerned proceedings in England for a civil recovery order against an individual convicted of a number of fraud offences in Israel. Pursuant to s.357 of the Proceeds of Crime Act 2002 ("POCA"), the Serious Organised Crime Agency obtained a disclosure order against Perry, his wife and two daughters, none of whom was resident or domiciled in the jurisdiction. However, the Supreme Court in that case unanimously held that s.357 POCA did not authorise the imposition of a disclosure order on persons outside the jurisdiction. The Divisional Court in this case had, rather creatively, distinguished *Perry* despite the striking similarities between the statutory regimes. By contrast, the Supreme Court in this ruling concluded that the similarities were such that *Perry* is "strongly supportive" of the view that s.2(3) CJA was not intended to confer power to require disclosure by a foreign company, of documents held outside the jurisdiction.

14. Finally, with quite some rigour the Supreme Court also rejected the "sufficient connection test" espoused by the Divisional Court. In doing so, it remarked that such a test was inherently uncertain and *"would exceed the appropriate bounds of interpretation and usurp the function of Parliament."*

Analysis

15. This judgment is a victory for common sense in terms of both legal reasoning and practical impact. Whilst the investigation of serious fraud and corruption is an extremely important international objective, prosecutors must operate within the confines of the existing legal domestic framework available to them. Tackling the international nature and technological complexity of modern investigations is a matter for Parliament to consider taking into account both the objectives of prosecution, and the important diplomatic considerations around the principle of comity.

16. Interestingly, some commentators have already suggested that the SFO should now petition Parliament to address this so called "gap" and bring the legislation up to date with the practical and technological realities of prosecuting complex fraud and international corruption. However, it is far from certain that Parliament would be responsive to any such petition.

17. Extending the reach of the SFOs powers to compel production of documents held outside of the jurisdiction by overseas companies, without prior judicial oversight, is likely to significantly undermine the principle of comity. The prosecution of serious fraud and corruption, particularly by corporations, is a growing issue of international import. The advent of Deferred Prosecution Agreements in many jurisdictions has also meant that the investigation and prosecution of companies can result in significant sums being paid into treasury coffers. There is much at stake for national prosecutors and, as a result, there is likely to be sensitivity around other countries' legislation which impinges on their role, particularly where arguably softer channels of MLA are available.

18. Furthermore, delays and inefficiencies in the MLA process should not be cured by recourse to aggressive prosecutorial tactics of reading extra-territoriality into its existing powers. Far more sensible, fair and attractive a way forward would be for the SFO to assist Parliament in strengthening and enhancing the current MLA framework.

19. Whilst the Supreme Court's decision is highly specific to s.2(3) CJA, similar regimes exist under s.26 of Competition Act 1988 (to compel the production of documents and an explanation regarding the document) and under the Financial Services and Markets Act 2000 (FSMA) (to compel compliance with its investigations by interviewing company officials and directors or requiring the production of documentation). Following this ruling, it is hoped that in cases which require material from overseas, these other prosecutorial agencies will utilise the process of MLA ensuring that the necessary safeguards are made available to companies and individuals under investigation and further, that any inquiries undertaken are compatible with the law operating in the requested State.

This case comment was produced by Jason Mansell and Kathryn Hughes. This article should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist

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