Clients&FriendsMemo

The UK Serious Fraud Office's Extraterritorial Powers Are Clarified

24 February 2021

After three years of uncertainty over the Serious Fraud Office's ("**SFO**") powers to obtain documents located overseas, the UK Supreme Court has clarified the extraterritorial effect of the legislation facilitating that power domestically. The Supreme Court held that KBR, Inc., the U.S. engineering, procurement and construction company, was not required to provide the SFO with documents that were located overseas during a criminal investigation into its UK subsidiary, KBR Ltd.

The overturning of the High Court's decision is significant in that it negates the misplaced request made by the SFO pursuant to section 2(3) of the Criminal Justice Act 1987 (the "**CJA**"). However, it may have little practical effect for companies under investigation. The KBR case was fact specific. Although KBR Ltd. and Inc. clearly worked closely together within the same group, they are separate legal entities. One could not compel the other to act. The decision in question concerned a scenario where documents are requested from:

- A foreign registered company;
- Not registered or carrying on business in the UK; and
- The documents are held abroad within the foreign registered company.

Notwithstanding this decision, the SFO continues to engage with tools, both new and old, to procure evidence, documentary and otherwise, from multi-national companies that it is investigating.

Background

The Supreme Court's judgment stemmed from a notice that was issued by the SFO in furtherance of its investigation into KBR Ltd. in 2017. The notice was issued pursuant to Section 2(3) of the CJA, a powerful tool in the SFO's armoury as it compels a person under investigation, or any other person, to produce specified documents which appear to the SFO to relate to any matter relevant to an investigation.

At the time, KBR Ltd. was under investigation by the SFO following its provision of consultancy services to Unaoil, a Monaco based oil and gas consultancy company which was itself under

investigation by the SFO for suspected briberous conduct. KBR Ltd. complied with the Section 2(3) notice; however, when the SFO discovered that its parent company was involved in approving payments to Unaoil, it invited representatives from KBR, Inc. to meet with it in London. During that meeting, the SFO served a Section 2(3) notice on KBR, Inc. The notice requested documents that were held by KBR, Inc. in the US. KBR, Inc. judicially reviewed the SFO's decision to serve the notice on the basis that Section 2(3) of the CJA has no extraterritorial effect.

In 2018 the High Court held that Section 2(3) of the CJA had extraterritorial application in respect of companies overseas where there was a "sufficient connection" between the company and the UK. The High Court determined that there was such a sufficient connection in the present case because relevant payments with which the SFO was concerned were approved by KBR, Inc. and a senior executive of KBR, Inc. was based in the KBR Group's UK office and appeared to carry out his functions within the jurisdiction.

The following year, KBR, Inc. was granted leave to appeal that decision. Despite the fact that the SFO, as well as the Department of Justice's, investigation into KBR, Inc. had since been withdrawn, oral arguments in relation to the Supreme Court appeal were heard virtually in October last year. The Supreme Court held that in observing the requirements of international law and the comity principle, the starting point is that there is a presumption that UK legislation "*is generally not intended to have extra-territorial effect*". That presumption applied in the present case as KBR Inc. "*has never carried on business in the United Kingdom or had a registered office or any other presence here*". The Supreme Court then went on to consider whether Parliament intended that the provision had extra-territorial application. It held that the legislative history of the CJA demonstrates that it did not, and there was no basis upon which a "*sufficient connection*" test could be inferred into Section 2(3) of the CJA. The Court noted that the SFO has other powers to use which were created for the purpose of obtaining documents located in overseas jurisdictions, such as mutual legal assistance ("**MLA**"), which included built-in safeguards.

Analysis

As stated above, the judgment will be welcomed by defence practitioners as it has provided some much needed clarity in respect of the SFO's powers. However, it may suggest that the legislation in this area has failed to keep apace with the increasingly global manner in which companies now conduct themselves, and therefore the multi-jurisdictional scope that a growing number of the SFO's investigations embody. Nevertheless it is not for the courts to remedy this lacuna; it is for Parliament to provide the SFO with clear powers in that respect. Overseas production orders ("**OPO**") are one step in that direction. The Crime (Overseas Production Orders) Act 2019 permits investigative agencies, such as the SFO, to apply to a Crown Court judge for the production of electronic data that is stored overseas in cases relating to indictable offences. However, OPOs can only be made in circumstances where there exists a designated international co-operation arrangement. At present, the UK has only entered into such an arrangement with the U.S. Additionally, as set out in the Supreme Court's judgment, the SFO

continues to have available to it the ability to make MLA requests. However, owing to the relatively tedious process of making such requests, it can take months, even years, to obtain information in that way; therefore, the MLA route is not always the most effective for the SFO to obtain documents located overseas.

Will the decision in this case lead some companies to consider altering their corporate structures so as to avoid falling within the jurisdiction of the CJA? Will it lead companies to carefully consider where documents, whether paper or electronic, are held, and who maintains possession of them? Maybe. Although in reality those kinds of decisions are unlikely to have a considerable impact on the SFO's ability to obtain the documents that it requires in other jurisdictions. The SFO is likely to continue working very closely with its overseas counterparts in relation to its investigations, and companies that are already well-organised are likely to constructively interact with the SFO in any event, not least to reap the benefits of such cooperation.

U.S. Perspective

The U.S. has considered similar challenges to the KBR case. For the most part, U.S. prosecutors are encouraged and expected to follow traditional bilateral MLAT procedures to obtain foreign evidence. However, in reality U.S., prosecutors have significant ability to obtain foreign-based evidence by unilateral process served on U.S. entities with foreign parents or subsidiaries. When those unilateral processes have been challenged however, most have been rejected by the federal courts provided the domestic company subpoenaed has sufficient contacts with the U.S. In fact, Courts have even required companies to produce records located abroad even where doing so would violate foreign law. And of late, legislation has cemented the authority of U.S. regulators to obtain relevant evidence from domestic companies regardless of where they are located.

Constructive Presence

In the early 1980's several federal courts determined that the U.S. government had authority to serve a subpoena on a U.S. branch of a foreign entity and obtain relevant records, even if those records were located abroad. These cases were based on the notion that the foreign entity was voluntarily present in the U.S. and had consented to its jurisdiction. The physical location of the evidence sought was held to be of no import in such cases [*see, e.g., In re Grand Jury Proceedings (Bank of Nova Scotia*) 691 F.2d 1384 (11th Cir. 1982); *In re Grand Jury Subpoena Directed to Marc Rich & Company A.G.*, 707 F.2d 663 (2d Cir. 1983)].

Patriot Act Subpoenas

The USA Patriot Act, 31 USC 5318(k) (3)(A), which was enacted as part of the Bank Secrecy Act designed to prevent money laundering, allows the government to seek records from a U.S. bank that holds a foreign bank's correspondent account "including records maintained outside of the [U.S.] relating to the deposit of funds into the foreign bank" via a "Patriot Act Subpoena".

This law has been interpreted expansively, allowing access to records held by foreign banks that use U.S. correspondent accounts, including records of transactions that do not themselves pass through a U.S. correspondent account [*see, e.g., In Re Sealed Case*].

Recent Legislative Developments

The U.S. Congress has sought to codify U.S. prosecutors' ability to access documents located abroad. For example, in March 2018 the U.S. Congress passed the Clarifying Lawful Overseas Use of Data Act, or "CLOUD Act." In pertinent part, the CLOUD Act makes explicit in U.S. law the long-established U.S. and international principle that a company subject to a country's jurisdiction can be required to produce data the company controls, regardless of where it is stored at any point in time. 18 U.S.C. § 2713. In January 2021, the U.S. Congress amended the U.S. Bank Secrecy Act and significantly expanded the scope of Patriot Act Subpoenas. The new law now permits the U.S. government agencies to subpoena a foreign bank's foreign-located bank records from its U.S. correspondent bank without regard to whether the correspondent account was used as part of the potential violation of U.S. law. This new authority is not limited to violations of the Bank Secrecy Act. Rather, it can be used in any investigation of a violation of any federal criminal law, in addition to investigations conducted under the Bank Secrecy Act / anti-money laundering laws and regulations.

Outlook for 2021

We are likely to see more investigations in 2021 with Joe Biden taking presidential office, the UK leaving the European Union and the COVID-19 pandemic appearing to be brought under control. Within that context, the UK and U.S., in particular, will likely continue its cooperation in this area; indeed the Director of the SFO has previously commented on the strength of the collaboration that exists between UK and U.S. prosecutorial agencies. And of course, there is now welcome certainty on the jurisdictional reach of one of the SFO's most significant powers.

* * *

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Jodi Avergun	+1 202 862 2456	jodi.avergun@cwt.com
Mark Beardsworth	+44 (0) 20 7170 8570	mark.beardsworth@cwt.com
Kevin Roberts	+44 (0) 20 7170 8590	kevin.roberts@cwt.com
Shruti Chandhok	+44 (0) 20 7170 8693	shruti.chandhok@cwt.com
Charlotte Glaser	+44 (0) 20 7170 8628	charlotte.glaser@cwt.com