

English Supreme Court Limits Serious Fraud Office's Extraterritorial Reach

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02 / 11 / 21

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On 5 February 2021, the UK Supreme Court ruled that the Serious Fraud Office (SFO) could not force a foreign company to hand over material that it holds abroad through a notice issued under Section 2(3) of the Criminal Justice Act 1987 (the Act).

In *R (on the application of KBR, Inc) (Appellant) v Director of the Serious Fraud Office (Respondent)*, the appeal centred on the extraterritorial effect of Section 2(3) of the Act, which the SFO had sought to rely on to compel KBR, Inc, a US company, to produce documents that it held outside the UK. The Section 2(3) notice was issued in the course of the SFO's investigation into certain of KBR, Inc's UK subsidiaries, which were part of a wider investigation into the activities of Unaoil. The Supreme Court unanimously upheld KBR, Inc's appeal, ruling that in applying the rules of statutory interpretation, the UK Parliament could not have intended for the SFO to use Section 2(3) notices extraterritorially. The Supreme Court also dismissed the notion that a "sufficient connection" test could be implied into the Act.

For the SFO, the decision is a blow to the regulator's attempts to expand its foreign investigatory toolbox beyond the long-established, and often cumbersome, mechanisms of mutual legal assistance.

Background

For the purposes of an investigation, under Section 2(3) of the Act, the director of the SFO has the power to issue a notice requiring the production of documents and other information.

On 4 April 2017, the SFO issued a notice to the UK subsidiaries of KBR, Inc, which included Kellogg Brown and Root Ltd (KBR UK). In response, KBR UK provided various documents to the SFO but noted that certain of the requested material, if and to the extent it existed, was held by KBR, Inc in the US. On 25 July 2017, during a meeting between the SFO and officers of KBR, Inc, the SFO handed the executive vice president of KBR, Inc, a further notice explicitly requesting the production of material held by KBR, Inc outside of the UK (the July Notice).

KBR, Inc sought a judicial review to quash the July Notice on a number of grounds, including that it was *ultra vires* on the basis that Section 2(3) of the Act does not permit the SFO to require a foreign incorporated company to produce documents that are held outside the UK. In a judgment handed down on 6 September 2019, the UK Divisional Court refused KBR, Inc's application, holding that Section 2(3) of the Act extended extraterritorially to foreign companies in respect of documents held outside the UK, where there was a "sufficient connection" between the company subject to the notice and the UK.

The Supreme Court's Reasoning

On appeal, the Supreme Court's assessment began from the presumption that UK legislation is generally not intended to have extraterritorial effect. The matter for the Supreme Court was therefore whether Parliament had intended for Section 2(3) of the Act to displace the presumption against extraterritorial effect.¹

¹ Although not relevant to KBR, Inc's position, the Supreme Court also acknowledged that international law recognises a legitimate interest of states legislating in respect of conduct of their nationals abroad. In these circumstances, the strength of the presumption against extraterritoriality will be diminished.

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The SFO argued that the extraterritorial effect of the Act must be implied in light of the public interest to investigate serious fraud that regularly has an international dimension. The SFO's position was that the words used in Section 2(3) of the Act were deliberately wide and conferred power exercisable against "the person under investigation" or "any other person" and could relate to the production of "any specified documents" provided that the documents related to "any matter relevant to [an] investigation." Further, the SFO contended that the power under Section 2(3) was not limited to the production of documents that are in the possession or under the control of the recipient of the notice. Rather, the controlling factor is that if the recipient of the notice cannot directly or indirectly procure the production of the documents, he or she must have a reasonable excuse for not producing them.

Although the Supreme Court noted the breadth of these provisions, it found nothing in the legislative history of the Act that suggested that Parliament had intended for Section 2(3) to have extraterritorial effect (and to the contrary, noted that when legislation is intended to have extraterritorial effect, Parliament frequently makes an express provision to that effect). In relation to the Act, the legislative history indicates that Parliament had intended for fraud to be investigated through established systems of mutual legal assistance. Lord Lloyd-Jones stated that he considered it to be "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 of authorities of the State where the evidence as located without the protection of any of the safeguards put in place under the scheme of mutual legal assistance."

The Divisional Court had also adopted a reading of Section 2(3) of the Act, to the effect that the SFO could use it to require foreign companies to produce documents held outside the UK if there was a "sufficient connection" between the company and the UK. The Divisional Court had considered that on the evidence, it was impossible to distance KBR, Inc from the transactions central to the SFO's investigation of KBR UK and accordingly, KBR, Inc's own actions created a sufficient connection between it and the

UK. The Supreme Court dismissed this notion on the basis that there was no warrant for interpreting the provision so widely, and to do so would be inconsistent with the intention of Parliament and involve an illegitimate rewriting of the statute, resulting in an undefined principle that would be inherently uncertain.

Alternative Powers Available to the SFO To Obtain Information

The Supreme Court's ruling is a blow to the SFO's attempts to expand its foreign investigatory toolbox. The judgment of the Supreme Court firmly reiterates its commitment to upholding the forms of mutual legal assistance put in place through a long history of acts of Parliament.

Although traditional methods of mutual legal assistance have been widely criticised for being antiquated in the digital age, there is potential for change, brought about by the recent introduction of Overseas Production Orders (OPOs), facilitated by the Crime (Overseas Production Orders) Act 2019 (COPO).² COPO empowers enforcement agencies to compel disclosure from any individual or company operating or based abroad, provided that the UK has a designated international cooperation agreement with the country where the production order will be served. To date, the UK has only signed such an agreement with the US, and even this is not fully operational due to the US not yet passing all of the requisite reciprocal domestic legislation.

It remains to be seen how OPOs will be used and enforced in practice, but their introduction widens the scope of overseas materials that the SFO can one day seek to directly collect from foreign individuals and companies under investigation. However, until the OPO regime is up and running, this latest ruling from the Supreme Court makes it clear that the SFO will not be able to rely on its Section 2(3) powers to compel production of the same materials.

² See our 18 July 2019 article in *Global Investigations Review*, "[What Recent US and UK Reforms to Information Sharing Mean for Cross-Border Investigations.](#)"