

SFO's overseas powers limited in Supreme Court defeat

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On 5 February 2021, the Supreme Court found against the Serious Fraud Office (**SFO**) in *R (on the application of KBR, Inc) v Director of the Serious Fraud Office [2021] UKSC 2*. The five judges unanimously held that the SFO could not use section 2(3) of the Criminal Justice Act 1987 to compel a foreign company to produce documents held overseas. The SFO's investigations frequently involve international companies, and section 2(3) has been a useful means of procuring evidence from overseas held by foreign companies. The SFO must now rely on mutual legal assistance instead, working with overseas agencies to obtain evidence. This may slow the pace of investigations.

1. The SFO's interpretation of section 2(3) of the Criminal Justice Act 1987

The relevant provision of the Criminal Justice Act 1987 (the **1987 Act**) reads:

(3) The Director may by notice in writing require the 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 Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate.

There are criminal consequences attached to a failure to comply.

The SFO has historically interpreted this provision broadly, insisting that it gives a wide-ranging power to compel any person to produce evidence connected to an investigation, whether that person is within the UK or not. There is however no explicit wording in the statute to give it extra-territorial effect.

2. The SFO's investigation into KBR and the notice in question

In 2017, the SFO began to investigate suspected bribery and corruption offences at KBR Ltd, a UK-based engineering and technical consulting company. This was linked to an investigation into Unaoil, two of whose executives have been convicted of making corrupt payments to Iraqi officials for oil services contracts after the fall of Saddam Hussein.

In April 2017, the SFO issued a section 2(3) notice to KBR Ltd, requiring it to produce specified documents and information. KBR Ltd provided various documents that were under its control. Other information was however missing, and KBR Ltd made it clear to the SFO that, to the extent that certain other documents existed, they would be held by KBR, Inc in the United States. KBR Ltd is a UK subsidiary of US-based KBR, Inc.

The SFO arranged a meeting in London in July 2017 to discuss the case and insisted that officers of KBR, Inc should attend. The SFO prepared a draft section 2(3) notice to hand to one of these officers "in the event that a satisfactory response was not received as to [KBR, Inc's] willingness to provide the outstanding materials". At the meeting, the SFO was told that KBR, Inc needed time to consider its position. An SFO representative then inserted the name of one of the officers present into the notice and handed it to her.

KBR, Inc applied to quash this notice. The High Court dismissed the appeal on all three grounds. KBR accepted the

decision on two of the grounds: that the notice was not effectively served, and that the SFO made an error of law in using 1987 Act powers rather than requesting mutual legal assistance from US authorities.

KBR appealed to the Supreme Court on the first ground only, that of jurisdiction. The Supreme Court thus considered whether the July notice was ultra vires, as it requested material held outside the jurisdiction from a company incorporated in the USA.

3. The decision of the Supreme Court

3.1 General presumption against extra-territorial effect

The Supreme Court first acknowledged the presumption in domestic law that legislation is generally not intended to have extra-territorial effect. KBR, Inc had never carried on business in the UK or had a presence here, so was certainly outside the UK jurisdiction.

3.2 Parliamentary intention and mutual legal assistance

The Supreme Court looked at the language of section 2(3) and the history of the legislation to consider whether an extra-territorial effect was intended. It found nothing to indicate that Parliament meant to permit UK authorities unilaterally to compel, under threat of criminal sanction, the production of documents held out of the jurisdiction by a foreign company. It noted that a report which led to the 1987 Act had emphasised "the importance of establishing reciprocal arrangements for obtaining evidence from abroad", and that Parliament had indeed developed this system of mutual legal assistance, enacting safeguards and protections. It seemed improbable that Parliament had created one set of refined machinery to obtain overseas evidence, while intending to leave the SFO a "parallel system" which operated through "unilateral demand".

3.3 Sufficient connection

The High Court had adopted a new reading of section 2(3): the power could be used to compel a foreign company to provide overseas documents provided that there was a **sufficient connection** between the company and the jurisdiction. The Supreme Court considered that this was inconsistent with the Parliamentary intention behind the legislation. Stretching the legislation in this way would "exceed the appropriate bounds of interpretation and usurp the function of Parliament".

4. Conclusion

This decision provides useful clarity on the extent of the SFO's powers. It will however be very unwelcome to the agency as it faces an increase in complex cross-border financial crime, with an accompanying increase in the difficulties of evidence gathering. The Unaoil investigation, for example, involved multinational companies and activities in the US, Monaco and Iraq. The 1987 Act did not contemplate investigations on this scale, with globalised companies with complex structures holding documents in electronic form on servers in foreign jurisdictions, and the SFO will need to adapt its methods accordingly.

With thanks to Elizabeth Duncan for her help in writing this update.

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