ALERT MEMORANDUM

U.K. Supreme Court Limits the Extraterritorial Powers of the Serious Fraud Office

11 February 2021

The U.K. Supreme Court has handed down an important decision[1] limiting the scope of the U.K. Serious Fraud Office's (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)").

Overturning the first instance decision of the High Court[2], the Supreme Court[3] unanimously held that the lower court was wrong to find that Section 2(3) empowers the SFO to compel foreign companies to produce documents held overseas when there is a "*sufficient connection*" between the company and the U.K.

The SFO is therefore not entitled to seek compulsory production of documents held overseas by a foreign company with no business or presence in the U.K. Requests for such documents should be pursued by the SFO through international cooperation channels, such as letters of request and mutual assistance processes.

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[1] *R (on the application of KBR, Inc) (Appellant) v The Director of the Serious Fraud Office (Respondent)* [2021] UKSC 2
[2] *R (on the application of KBR, Inc) v The Director of the Serious Fraud Office* [2018] EWHC 2012 (Admin)
[3] The Supreme Court's decision followed a rare "leapfrog" appeal directly from the High Court after the High Court certified that the appeal involved two points of law of "general public importance" (as required by Section 12 of the Administration of Justice Act 1969).

The Section 2(3) Power

Section 2(3) 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*…[]"[4].

A failure to comply with a notice under Section 2(3) (a "Section 2(3) Notice") is punishable by criminal sanction[5]. The Criminal Justice Act 1987 (the "1987 Act") prescribes two bases on which a recipient of a Section 2(3) Notice may resist disclosure of responsive documents, namely, where:

— the documents are privileged[6]; or

— where the notice recipient has a "*reasonable excuse*" for failing to comply with the Section 2(3) Notice[7].

Factual Background

On February 17, 2017, the SFO opened an investigation into KBR Ltd ("KBR UK"), a U.K. subsidiary of US-incorporated KBR Inc. ("KBR US"). Both KBR UK and KBR US form part of the "KBR Group", of which KBR US is the ultimate parent. The SFO's investigation related 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 KBR UK requiring the production of 21 categories of documents (the "April Notice").

Initially, the KBR Group purported to cooperate with the SFO's investigation, including by:

— seeking the transfer to KBR UK of material held by KBR US outside the U.K.; and

— the "*voluntary*" production of material located outside the U.K., and held by KBR US, which had been produced to the U.S. authorities.

However, the SFO formed the view that the KBR Group was seeking to draw a distinction between documents held by or under the control of KBR UK, and documents outside of the jurisdiction and beyond KBR UK's control.

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, KBR US's Executive Vice President, General Counsel and Corporate Secretary ("Ms Akerson") and KBR US's Chief Compliance Officer.

Before the meeting, the SFO prepared a draft of a further Section 2(3) Notice, which was intended to be issued to KBR US "*in the event that a satisfactory response was not received as to* [KBR US's] *willingness to provide the outstanding materials sought in the April Notice*"[8]. 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.

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

In the event, KBR US challenged the validity of the July Notice and brought judicial review proceedings in the High Court seeking to quash the July Notice. The High Court found that KBR US must comply with the July Notice, holding that:

— a U.K. company could be compelled by a Section 2(3) Notice to produce documents it holds overseas;

— 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.;

[4] Section 2(3), Criminal Justice Act 1987
[5] Section 2(13), Criminal Justice Act 1987
[6] Section 2(9), Criminal Justice Act 1987
[7] Section 2(13), Criminal Justice Act 1987
[8] *KBR Inc. v SFO*, [2021] UKSC 2, ¶ 6

— there was a sufficient connection between KBR US and the U.K. because KBR US appeared to have been involved in approving and processing some of the payments under investigation;

— the SFO was permitted to issue a Section 2(3) Notice to a foreign company despite having the power to seek mutual legal assistance from overseas authorities to receive the same information; and

— 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 Supreme Court's Judgment

KBR US appealed to the Supreme Court in relation to the SFO's power to compel production of documents held outside the jurisdiction from a company incorporated in the United States of America.

The Supreme Court's starting point in construing Section 2(3) was to note the presumption that U.K. legislation is not generally intended to have extraterritorial effect. This presumption is rooted in both the requirements of international law and the concept of comity, which is founded on mutual respect between States.

The key question which the Supreme Court sought to resolve was therefore whether Parliament intended Section 2(3) to displace the presumption against extraterritorial effect, so as to give the SFO the power to compel a foreign company to produce documents it holds outside the U.K. The answer to that question lay in the wording, purpose and context of Section 2(3), which the Court went on to consider in light of the relevant principles of interpretation and principles of international law and comity.

As to the wording of Section 2(3), the Supreme Court noted that where legislation is intended to have extra-territorial effect, Parliament often makes express provision to that effect. Section 2(3) includes no such express provision. Additionally, the Supreme Court considered that the remaining provisions of the 1987 Act did not contain any clear indications either for or against the extraterritorial effect of Section 2(3).

The High Court had found that Section 2(3) must have at least an element of extraterritorial application, because it was "*scarcely credible*"[9] 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. The Supreme Court rejected this reasoning in the context of a broader extraterritorial application because:

— a U.K. company which is required to produce in the U.K. a document which it holds abroad, is simply required to bring that document into the jurisdiction. The Supreme Court was doubtful that Section 2(3) has any material extraterritorial effect in these circumstances;

— the presumption against the extraterritorial effect of U.K. legislation applies with much less force to legislation governing the conduct abroad of a U.K. company (compared to a non-U.K. company). This is because international law recognises a legitimate interest of States in legislating in respect of the conduct of their nationals abroad; and

— the question of whether Section 2(3) requires a U.K. company to produce documents it holds outside the U.K. casts no light as to whether the provision should apply in the circumstances where the addressee of a Section 2(3) Notice is a foreign company like KBR US which has never carried on business in the U.K. and has no presence there.

The Supreme Court thought there was greater force in the submission that an intention to give a statute extraterritorial effect may be implied if the purpose of the legislation could not be achieved without it. To this end, the SFO argued that the extraterritorial effect of Section 2(3) must be implied because its purpose (to facilitate the investigation of serious fraud, which often has an international dimension) could not otherwise be effected.

However, upon examining the legislative history of the 1987 Act, the Supreme Court found there was

[9] *KBR Inc. v SFO*, [2021] UKSC 2, ¶ 19

nothing which recommended the creation of a statutory power which would permit U.K. authorities unilaterally to compel, under threat of criminal sanction, the production in the U.K. of documents held out of the jurisdiction by a foreign company. On the contrary, the legislative history revealed that Parliament intended for, and has developed, alternative structures which permit the U.K. to participate in international systems of mutual legal assistance in relation to both criminal proceedings and investigations (such as letters of request or mutual legal assistance agreements). The Supreme Court found it "*inherently improbable*"[10] that Parliament should have developed this machinery (which contains important safeguards regarding, for example, the uses to which evidence can be put and provides for its return) whilst also intending for the SFO to unilaterally obtain evidence from abroad under a parallel system which did not have any comparable safeguards.

Both parties attempted to persuade the Supreme Court that the extraterritorial effect of certain other statutes was instructive by way of analogy. In the main, the Supreme Court rejected these arguments, cautioning that different statutes are concerned with entirely different statutory schemes, often enacted for different purposes and operating in different contexts. However, the Supreme Court did accept that there are close similarities between s357 of the Proceeds of Crime Act 2002 (by which a U.K. enforcement authority can seek a disclosure order in civil recovery proceedings) and Section 2(3). Consequently, it considered that the reasoning in a previous Supreme Court decision dealing with the s357 of the Proceeds of Crime Act 2002 (*Serious Organised Crime Agency v Perry*[11]) was strongly supportive of the view that Section 2(3) was not intended to confer a power to require disclosure by a foreign person abroad. In *Perry*, the Supreme Court held that section 357 of the Proceeds of Crime Act 2002 did not permit a disclosure order to be imposed on persons outside the U.K., and that do so would have been a "*particularly startling breach of international law*[12]".

The High Court had distinguished *Perry* as, amongst other reasons, *Perry* concerned the giving of a notice to a person outside the jurisdiction, whereas the July Notice was served on KBR US via a senior officer (Ms Akerson) who was temporarily present in the U.K. In the view of the Supreme Court, however, the fact that the July Notice was served on Ms Akerson when she was induced to travel to the U.K. to attend a meeting with the SFO in London was not a material distinction between the cases. The intended recipient of the notice was KBR US and, despite Ms Akerson's temporary presence in the U.K., it remained the case that the SFO was seeking disclosure of documents situated abroad from a company incorporated in the United States which had no fixed place of business in the U.K. and has not carried on business there.

Finally, the Supreme Court considered whether the High Court was right to impose a test of "*sufficient connection*", such that a Section 2(3) Notice extends extraterritorially to foreign companies in respect of documents held overseas where there is a "*sufficient connection*" between the company and the U.K. The Supreme Court decisively dismissed the application of this test on the grounds that:

— there is no warrant for such a broad reading of Section 2(3) which would be inconsistent with the Parliamentary intention as evidenced by the scheme and history of the legislation;

— it is true that in some contexts courts have refused to exercise their powers under certain legislation unless a sufficient connection with the U.K. is shown. This is the courts' safeguard against the exorbitant exercise of those powers in the form of judicial discretion. However, that provides no basis for the implication of a similar limitation on Section 2(3), which confers a power on the SFO, not on a court. As a result, there is no scope for safeguarding against exorbitant claims of jurisdiction by the exercise of judicial discretion;

[10] *KBR Inc. v SFO*, [2021] UKSC 2, ¶ 45
[11] [2012] UKSC 35
[12] *KBR Inc. v SFO*, [2021] UKSC 2, ¶ 50

— the meaning of "*sufficient connection*" is inherently uncertain; and

— any attempt to imply such a limitation on Section 2(3) would exceed the appropriate bounds of interpretation, usurp the function of Parliament and would involve illegitimately re-writing the statute.

Practical Implications

Whilst the decision is a high-profile setback for the SFO – its actions having been ruled unlawful by the Supreme Court – it is important to note that the decision does not affect the SFO's powers in relation to U.K. companies (wherever their documents may be held) or documents held in the U.K. by foreign companies.

It is also important to note that the SFO has alternative routes to obtain evidence held abroad by foreign companies via mutual legal assistance agreements and letters of request, albeit they are more complex and long-winded processes. It will also be interesting to monitor the SFO's use of Overseas Production Orders (introduced in 2019) to secure electronic data held overseas where a co-operation treaty exists between jurisdictions.

Subjects of SFO investigations should also be mindful of the tenor of the SFO's recent Corporate Co-operation Guidance. That guidance sets out that a company's cooperation "*will be a relevant consideration in the SFO's charging decisions*" and that cooperation "*means providing assistance to the SFO that goes above and beyond what the law requires*"[13]. We would anticipate that, in an appropriate case, the SFO would expect a "cooperative" subject of an investigation to assist the SFO by requesting documents from its overseas affiliates.

There is also some uncertainty as to the scope of the decision. KBR US never carried on business in, nor had a registered office or any other presence in, the U.K. The Supreme Court's judgment does not foreclose the possibility of a foreign company being the subject of a Section 2(3) Notice where the company is present in the U.K.

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[13] https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/corporate-co-operation-guidance/