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U.K. Supreme Court Clarifies the Scope of Section 2(3) of The Criminal Justice Act 1987 by Holding that a Foreign Company cannot be compelled to Produce Documents Held Abroad

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In the eagerly awaited judgment in [R \(on the application of KBR, Inc.\) \(Appellant\) v Director of the Serious Fraud Office \(Respondent\)](#) [2021]¹, the U.K. Supreme Court has reversed the High Court's decision to allow the Serious Fraud Office (the "SFO") to use its powers to require the production of documents and information under section 2(3) of the Criminal Justice Act 1987 (the "Act") from a company domiciled abroad, KBR, Inc.

In a judgment that has been widely welcomed by the corporate criminal defence community, the Supreme Court clarified that section 2(3) of the Act does not apply extra-territorially. This means that documents or information that are: (i) not controlled by a company based in the United Kingdom; or (ii) held and controlled by foreign companies which do not have a presence in the United Kingdom are beyond the reach of the SFO's powers under section 2(3) of the Act.

Background

The Act confers on the SFO the power to "investigate any suspected offence which appears...on reasonable grounds to involve serious or complex fraud".²

Once the SFO has formally opened a case and is investigating, it has two key powers of compulsion at its disposal under section 2 of the Act. To recap briefly, those powers are by means of a notice in writing (a "section 2 notice"): (i) to compel persons to answer questions or provide information to the SFO, either at a specified time and place or forthwith (in essence, participate in an interview);³ and (ii) to compel the production of documents or other information, either at a specified time and place or forthwith⁴ (together, the "section 2 powers").⁵

Importantly, when exercising these powers, the SFO does not require permission from a court and can use materials or evidence obtained under its section 2 powers as evidence in court (albeit that the material cannot be used in a prosecution of the respondent a section 2 notice for the offence under investigation). A failure to answer questions or to provide information or documents, or providing false or misleading information in response to a section 2 notice is a criminal offence.⁶

As the case turned specifically on the interpretation of section 2(3) of the Act, it is useful to examine that section in more detail. Section 2(3) provides that the Director of the SFO:

"...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 times as may be 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 [the SFO] to relate to any matter relevant to the investigation..."

However, the Act is silent on whether the section 2 powers are intended to have extra-territorial effect.

The Facts

KBR, Inc is incorporated in the U.S. but has U.K. subsidiaries, including one that was under investigation by the SFO ("KBR U.K.") in relation to the activities of a non-group company, Unaoil. In April 2017, the SFO served a notice on KBR U.K. under section 2(3) of the Act requiring it to produce the documents and information specified in the notice. The specified documents included documents that were held by or under the control of KBR, Inc outside the U.K.

KBR U.K. sought to comply with the section 2 notices by providing certain of the requested documents and information but explained that other documents were held by KBR, Inc and were, therefore, not under KBR U.K.'s control and could not be produced to the SFO in response to the notice.

In July 2017, at the SFO's request, KBR, Inc.'s General Counsel and Chief Compliance Officer flew from the U.S. to attend a meeting in order to discuss the SFO's request for information. During the course of the meeting, the SFO asked whether the materials held by KBR, Inc would be handed over and, upon being told that KBR, Inc would have to consider the position, the SFO served a section 2 notice on KBR, Inc's General Counsel requiring the production of the documents in question (the "July Notice").

KBR, Inc subsequently challenged the July Notice, arguing that it was unlawful on the basis that: (i) it required production of documents held outside the U.K. by a company incorporated outside the U.K.; and (ii) it had not been validly served on KBR, Inc. The SFO was of the view that the July Notice had been validly served and declined to withdraw it.

First instance decision

KBR, Inc applied for judicial review to quash the decision to issue the July Notice and the July Notice itself on three grounds:

- the July Notice was *ultra vires* as it requested material held outside the jurisdiction from a company incorporated outside the jurisdiction;
- it was an error of law on the part of the SFO to exercise powers under section 2(3) of the Act instead of seeking mutual legal assistance ("MLAT") from the U.S. authorities; and
- the July Notice was not properly served by the SFO by handing it to a senior officer who was only temporarily present in the jurisdiction.

The Court ruled against KBR, Inc on all three grounds.

The Court agreed with the SFO that section 2(3) of the Act gave the SFO the power to compel the production of documents held outside the jurisdiction by a foreign company, where a "sufficient connection" existed between that company and the U.K. In this case, the presence of the KBR, Inc's General Counsel in the U.K. was considered to provide a sufficient connection.

Supreme Court decision

KBR, Inc's appeal against the decision of the Divisional Court was heard under the so-called "leap-frog" procedure, under which the appeal was referred directly to the Supreme Court without the Court of Appeal having first heard the matter.

The Supreme Court agreed with KBR, Inc and quashed the July Notice. In broad terms, this was on the basis that the Act does not confer extra-territorial powers on the SFO and that the SFO was required to use the MLAT process for obtaining evidence from overseas. The Court noted that it was clear from the legislative history of the Act that it was not intended to have extra-territorial effect and that, unless there was clear provision to the contrary, U.K. legislation applies only territorially and not extra-territorially.

The basis of the Supreme Court's decision was the principle, set out in the case of *R (Al-Skeini) v Secretary of State for the Defence*,⁷ that, unless the contrary intention appears, U.K. legislation is not intended to apply "to any territory outside the United Kingdom". The Supreme Court re-affirmed this principle. However, the Supreme Court did not rule out the possibility of the extra-territorial application of U.K. laws, which is consistent with the legitimate interests of states to legislate in respect of the conduct of their nationals abroad.⁸

On the basis that the powers under section 2 do not apply extra-territorially, the Supreme Court found that there was insufficient territorial nexus to the U.K. for the powers to be invoked in the case of KBR, Inc. This was on the basis that the company was not a U.K. registered company, nor had it ever carried out business in the U.K. In taking this view, the Supreme Court dismissed the SFO's arguments that the breadth of the language used in section 2(3) of the Act rebutted the presumption against extra-territorial application of U.K. laws. Unsurprisingly, the Supreme Court noted that U.K. companies are required to produce documents held overseas that are within their control. However, where documents are in the control of a separate legal entity which is established and operates outside the jurisdiction, different considerations apply.

The SFO also argued that the extra-territorial scope of section 2(3) must be considered in light of the public interest in the effective investigation of serious fraud. The Supreme Court accepted the contention that the Act was to enable the SFO to carry out investigations into serious fraud, often with an international component; however, on examining the legislative history, it found nothing to rebut the presumption against extra-territorial reach. Instead, the U.K. had put MLAT processes in place specifically to aid criminal proceedings and investigations. As such, the Supreme Court concluded that it was "inherently improbable" that it was the intention of the legislature that the SFO's powers under section 2(3) should apply extra-territorially in circumstances where MLAT systems were in place (a system that had been designed to protect international comity through international agreement, reciprocity and mutually agreed conditions).

The Court also clarified that the fact that an officer of KBR, Inc had been served with the July Notice whilst in the jurisdiction did not make a difference as it remained the fact that the SFO was seeking disclosure of documents held by a foreign company.

What does this mean?

The Supreme Court's decision is an important marker in defining and limiting the scope of the SFO's powers. The fact that the documents subject to the section 2 notice were held abroad by a foreign company that did not have its own operations in the U.K. (although a subsidiary was based here) were clearly important factors in demonstrating that the SFO was seeking to use its powers extra-territorially, something that the law did not permit it to do. However, different facts may lead to different outcomes; for example, where a company incorporated overseas does have operations in the U.K.

In circumstances where cooperation with European enforcement agencies has been made considerably harder due to Brexit, the impact of this judgment will be keenly felt by the SFO. The practical effect is that the SFO must now rely on other routes to obtain documents held by foreign companies abroad. These include:

- MLAT;
- Overseas Production Orders;⁹
- international co-operation between enforcement agencies; and
- voluntary cooperation by the company.

Whilst these tools are available to the SFO, experience shows that they are not as quick or effective as section 2 notices have proved to be. At a time when the SFO has placed a strong focus on the rapid investigation and prosecution of cases, the effect of this ruling will inevitably be to slow things down, but it may also prompt calls for a change in the legislation.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

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¹ UKSC 2.

² Section 1(3), 1987 Act.

³ Section 2(2), 1987 Act.

⁴ Section 2(3), 1987 Act.

⁵ Section 2(4), 1987 Act.

⁶ Section 2 (13) – (17), 1987 Act

⁷ [2007] UKHL 26.

⁸ Oppenheim's International Law, vol 1: Peace, 9th ed (1992), Part I, para 138.

⁹ Under the provisions of the Crime (Overseas Productions Orders) Act 2019 where a designated international co-operation arrangement exists between the U.K. Government and the government of the country where the electronic information is located or from where it is controlled