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The SFO and KBR: UK Supreme Court limits extraterritorial effect of SFO powers

Introduction

In *R (on the application of KBR, Inc) (Appellant) v Director of the Serious Fraud Office (Respondent)* [2021] UKSC 2[1] the Supreme Court held that the Serious Fraud Office ("**SFO**") may not compel a foreign company to produce documents held overseas under section 2(3) of the Criminal Justice Act 1987 ("**CJA 1987**").

The Supreme Court's judgment has been reported as a significant setback for the SFO, limiting its powers to obtain evidence from overseas. However, with regard to the specific facts of the KBR case, and the existence of alternative means to secure evidence that are available to the SFO, it is unlikely that the Supreme Court's decision will have a significant detrimental impact on the SFO in the vast majority of the cases it investigates.

Background

KBR, Inc. is a US engineering, procurement and construction company. It has never carried on business, nor had a fixed place of business, in the UK.

On 28 April 2017, the SFO announced that it had opened an investigation into UK subsidiaries of KBR, Inc, their officers, employees and agents, in relation to suspected bribery and corruption offences.

The SFO served a section 2 Notice on one of those UK subsidiaries – Kellogg Brown & Root Limited ("**KBR Ltd**") – on 4 April 2017. In its response, KBR Ltd noted that certain of the material requested was held by KBR, Inc. in the US.

A second section 2 Notice was served on the company secretary of KBR, Inc. on 25 July 2017, whilst she attended a meeting at the SFO's offices in London (the "**July s.2 Notice**"). The July s.2 Notice requested production of documents held by KBR, Inc. in the US.

KBR's challenge to the July s.2 Notice

KBR, Inc. challenged the July s.2 Notice by way of judicial review, on three grounds:

- It was *ultra vires* as it requested material held outside the UK from a US-incorporated company;
- It was an error of law on the SFO's part to exercise section 2 CJA 1987 powers despite the power to seek Mutual Legal Assistance from the US authorities; and
- It was not in any event effectively served by the SFO handing it to KBR, Inc.'s company secretary, who was temporarily in the UK at the time.

KBR, Inc. failed on all three grounds and the application was dismissed by the Divisional Court (see [2018] EWHC 2368 (Admin), and our analysis here). The Divisional Court concluded that section 2(3) CJA 1987 should apply "*extraterritorially to foreign companies in respect of documents held outside the jurisdiction where there is a sufficient connection between the company and the jurisdiction*".[2] KBR, Inc. was granted permission to appeal to the Supreme Court on the first ground, as set out above.

[1] https://www.supremecourt.uk/cases/docs/uksc-2018-0215-judgment.pdf

[2] At [71].

The Supreme Court decision

The Supreme Court allowed KBR's appeal, and in doing so found that the SFO has no statutory power to "*unilaterally compel, under threat of criminal sanction, the production here of documents held abroad by a foreign company*".[3]

The starting point of the Supreme Court's analysis was the presumption that legislation is not intended to have extra-territorial effect. It was the SFO's task to rebut that presumption, with reference to the wording, purpose and/or context of the statute.

As regards wording: section 2(3) contains no expression provision as to extra-territoriality. That absence is notable: "*when legislation is intended to have extra-territorial effect*", the Supreme Court noted, "*Parliament frequently makes express provision to that effect*."[4] Section 12 of the Bribery Act 2010 is one such example. That provision explicitly denotes the extra-territorial scope of the statute.

As regards purpose: the SFO contended that section 2(3) must be considered in light of the public interest in the effective investigation of serious fraud, and that to deny the statute extra-territorial effect would frustrate this guiding purpose. The Supreme Court acknowledged the force of this argument but noted that, in order for this to rebut the presumption, support for it must also be found in the legislative context and history. That support was not forthcoming.

The SFO's reliance on authorities in relation to analogous statutory regimes also gained little favour with the Supreme Court. It was noted, for example, that the parallels drawn with the Insolvency Act 1986 (which contains provisions affording the power to wind up overseas companies) were futile in this context: there was "*no sufficiently close analogy between the insolvency cases and the present case*" and the Supreme Court was "*unable to derive any assistance from them*".[5]

The Supreme Court preferred KBR, Inc.'s reliance on the decision of the same court in *Serious Organised Crime Agency v Perry*.[6] That case concerned a disclosure order under section 357 of the Proceeds of Crime Act 2002 ("**POCA**"). It was held that section 357 POCA did not authorise the imposition of a disclosure order on persons out of the jurisdiction. The Supreme Court in the present case acknowledged the "*striking*"[7] similarities between the relevant provisions in POCA and the CJA 1987, and the public interest considerations underpinning them. Those similarities "*[are] such that the reasoning of Perry is strongly supportive of the view that section 2(3) of the 1987 Act was not intended to confer a power to require disclosure by a foreign person abroad*".[8]

Sufficient connection test

As noted above, the Divisional Court had concluded that section 2(3) CJA 1987 could be used to require the production of documents held outside the jurisdiction by a foreign company, but only if there was a "*sufficient connection*" between the company and the jurisdiction.

The Supreme Court highlighted a number of issues with a "sufficient connection" test, namely:

1. There is no basis on which to imply such a limitation. Any attempt to do so would "*exceed the appropriate bounds of interpretation and usurp the function of Parliament*";[9]
2. Section 2(3) confers powers on the SFO, not a court. As such, there is "*no scope…for limiting the operation of a broad interpretation or safeguarding against exorbitant claims of jurisdiction by the exercise of judicial discretion*"[10]; and
3. In the absence of a definition of what would constitute a "sufficient connection", there would be unacceptable levels of uncertainty.[11]

Comment

To herald the judgment in *KBR* as a significant curtailment of the SFO's investigative powers is to overstate its impact.

The judgment of the Supreme Court emphasised the narrowness of the issue which it was required to determine, noting that:

"it was common ground between the parties that if the addressee had been a British registered company section 2(3) would have authorised the service of a notice to produce documents held abroad by that company. Similarly, we are not concerned with the position of a foreign company which has a registered

[3] Lord Lloyd-Jones gave the leading judgment, with which Lord Briggs, Lady Arden, Lord Hamblen, and Lord Stephens agreed.
[4] At [28].
[5] At [63].
[6] [2012] UKSC 35.
[7] At [52].
[8] At [53].
[9] At [65].
[10] At [65].
[11] At [65].

office or a fixed place of business in this jurisdiction or which carries on business here."[12]

The Supreme Court contrasted the position of the hypothetical UK-registered company, which held documents overseas, with "*the very different circumstances of the present case where the addressee of the notice is a foreign company which has never carried on business here and has no presence here".*[13]

It follows that the judgement of the Supreme Court in KBR does not inhibit, in all circumstances, the SFO from serving a section 2 Notice that seeks the production of evidence held overseas. Where such a Notice is served on a UK-based Company, or a foreign company with a "fixed business presence" in the UK, the ratio of *KBR* will not apply to inevitably render such a Notice *ultra vires*.

Furthermore, where the SFO seeks evidence from a foreign company, and where such evidence is held overseas, there remain avenues by which the SFO might seek and obtain such evidence.

In its judgment, the Supreme Court noted that Parliament had "*refined the machinery*" of Mutual Legal Assistance over many years, in order to accommodate the growing need of law enforcement agencies to seek evidence beyond borders.

Another, more recent, avenue, is an Overseas Production Order ("**OPO**"). OPOs, a creature of the Crime (Overseas Production Orders) Act 2019, enable UK Courts to compel the disclosure of electronic data stored overseas (provided the host country has signed an international co-operation agreement). Only one such co-operation agreement has been signed to date, with the USA, which came into force in July last year. Whilst currently in their infancy, OPOs will in time offer the SFO a streamlined, expeditious mechanism to obtain material held overseas and avoid the cumbersome MLA process.

Voluntary co-operation also remains a key tool in the SFO's armoury when it comes to document production. The SFO has emphasised[14] the importance of the timely provision of material by firms under investigation in the context of assessing levels of co-operation and, in turn, deciding whether to enter into a Deferred Prosecution Agreement.

Whilst it remains the case that foreign companies can be investigated and prosecuted by the SFO, and can be required to produce documents to it, for example pursuant to a request for Mutual Legal Assistance made to their home state, such companies can draw comfort from the fact that there should be no future risk of "ambush", as happened in *KBR*, and no service of section 2 Notices on corporate officers, who happen to be visiting the UK.

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[12] At [26].
[13] At [30].

[14] In guidance published in relation to corporate co-operation in August 2019 and Deferred Prosecution Agreements in October 2020.