UK Supreme Court: SFO Cannot Compel Foreign Companies to Produce Documents Held Outside the UK Under Section 2 Powers

by Sam Eastwood, Alistair Graham, Chris Roberts and James Ford at Mayer Brown.

On 5 February 2021, the UK Supreme Court (**"Court"**) unanimously held that the Serious Fraud Office (the **"SFO"**) cannot compel a foreign company not operating in the UK to produce documents pursuant to its powers under section 2(3) of the Criminal Justice Act 1987 (**"CJA"**).[1] As we reported in our previous Legal Update, in October 2018 the Divisional Court ruled that foreign companies must produce documents in response to a section 2 notice (**"Notice"**) if there is "sufficient connection" with the UK.[2] Overturning this decision, the Court found that implying the "sufficient connection" test into section 2(3) is inconsistent with the intention of Parliament, rejecting an extra-territorial reading of the SFO's section 2(3) powers. The practical effect of this decision is that, going forwards, foreign companies that do not operate in the UK, including foreign companies with UK subsidiaries, will no longer risk being subject to a Notice.

Key takeaways

- The Supreme Court has overturned a judgment of the Divisional Court, limiting the SFO's powers under section 2(3) of the CJA to compel foreign companies that have no presence in the UK to produce documents that are held abroad.

- The judgment does not inhibit the SFO from seeking documents held outside the UK jurisdiction in all circumstances. For example, the SFO may still compel foreign companies with a fixed place of business in the UK to produce documents held abroad under section 2(3) of the CJA. The SFO may also rely on alternative channels, such as mutual legal assistance or an overseas production order, to seek documents held abroad by foreign companies with no UK presence.

- It is possible that Parliament may respond to this judgment by introducing legislative reform that will reinforce the SFO's powers under the CJA and may expressly permit the use of the SFO's information gathering powers on foreign companies outside the UK in certain circumstances.

- Pending such legislative reform foreign companies with no presence in the UK will take comfort that they no longer risk being subject to a Notice.

1. Background

The appellant in the case, KBR, Inc. (**"KBR"**) was a US-incorporated company that has no fixed place of business in the UK and has never carried on a business in the UK although it has subsidiaries in the UK, including Kellogg Brown and Root Ltd (**"KBR Ltd"**). On 4 April 2017, the SFO issued a Notice to KBR Ltd in connection with an ongoing SFO investigation. In its responses to the Notice, KBR Ltd made it clear that some of the requested materials were held by KBR in the US, if and to the extent such materials existed. On 25 July 2017, officers of KBR attended a meeting with the SFO in London. At this meeting the SFO served a notice pursuant to section 2(3) CJA (**"the July Notice"**) on the Executive Vice President of KBR compelling the production of materials held by KBR outside the UK.

KBR applied for judicial review to quash the July Notice, arguing among other things that the July Notice was ultra vires because section 2(3) CJA does not permit the SFO to require a US-incorporated company to produce documents it holds outside the UK. The Divisional Court refused KBR's application and concluded that the CJA contained no express limitation on the persons from whom a document production could be sought. Notably, the Divisional Court ruled that section 2(3) was capable of having extra-territorial application "where there is a sufficient connection between the company and the jurisdiction"[3] (the **"Sufficient Connection Test"**). On the facts, the Divisional Court determined that there was sufficient connection between KBR and the UK, and so the July Notice was valid. KBR appealed.

2. The judgment

The Court noted that the starting point for a consideration of the scope of section 2(3) of the CJA is the presumption that UK legislation is generally not intended to have extra-territorial effect. This principle is rooted in international law and the concept of comity (i.e. mutual respect for the laws of other States).[4] The Court acknowledged that international law recognises the legitimate interest of States in legislating "in respect of the conduct of their nationals abroad"[5], but found that the presumption was clearly relevant in this case since KBR is not a UK company and has never had a registered office or carried on a business in the UK.

The Court then considered whether the presumption was rebuttable, that is whether Parliament had intended section 2(3) to confer on the SFO the power to compel a foreign company to produce documents it holds outside the UK. The SFO submitted that the

wording of section 2(3) CJA is "deliberately wide" and is not limited to documents in the possession or control of the recipient of a Notice.[6] The Court acknowledged the SFO's submissions in this respect, but noted that Parliament would normally make express provision where it intends to give extra-territorial effect to a statutory provision. Section 2(3) CJA has no such express provision.

However, the Court continued that it was possible for extra-territoriality of a statutory provision to be implied, including from the scheme, context and subject matter of the legislation. KBR argued that the CJA did not have extra-territorial effect as section 17 CJA provides that the Act "extends to England and Wales only".[7] The Court found that this provision did not assist KBR as it simply provided that the CJA formed part of the law of England and Wales, rather than dealing with issue of territoriality. The Court instead suggested that the practicality of enforcement was more relevant to identifying such implied terms.

The Divisional Court had agreed with the SFO's submission that section 2(3) CJA implied some extra-territorial scope because otherwise UK companies could resist Notices on the basis documents were stored on servers out of jurisdiction. However, in this judgment the Court held this example was not "a satisfactory basis for the reasoning"[8] because:

- It was questionable whether the legislation is given any material extra-territorial effect in this hypothetical situation;
- The presumption against extra-territoriality applies with much less force to legislation governing conduct abroad of a UK company; and
- This does not indicate the intention of Parliament for the very different circumstances of the present case, namely where the address of the July Notice is a foreign company that has never carried on a business in and has no presence in the UK.

Finally, the Court considered the SFO's further submission that extra-territorial effect may be implied where the purpose of the legislation cannot be achieved without such effect. The Court stated that the "question whether such a purposive reading is capable of rebutting the presumption against extra-territorial application will depend on the provisions, purpose and context of the relevant statute."[9]

3. Legislative history

The Court therefore examined the legislative history of the CJA, to determine whether it could be implied that a Notice had extra-territorial effect.

3.1 The Roskill Report

The CJA was enacted to give effect to the recommendations in a 1986 report of the Fraud Trials Committee, which was chaired by Lord Roskill (the **"Roskill Report"**), and led to the creation of the SFO. The Roskill Report had recommended that powers should be granted to the SFO in line with those of the then Department of Trade and Industry (**"DTI"**) under section 447 of the Companies Act 1985, to compel companies to produce documents. Whilst the Roskill Report did not deal with whether such powers should have extra-territorial effect, section 453 of the Companies Act 1985 provided that the DTI could exercise these powers in relation to foreign companies to the extent they were carrying on or had carried on business in Great Britain. However, no such equivalent provision was included in the CJA.

The Roskill Report did address the obtaining of foreign evidence for trials in England and Wales, and noted there was no power to compel someone out of jurisdiction to bring documents into the jurisdiction, and that evidence taken abroad was not admissible in criminal proceedings in England and Wales. It went on to recommend that legislation be sought to enable evidence to be taken abroad for use in criminal cases in England and Wales and that negotiations be set in train with other countries to provide for reciprocal arrangements on the taking and receipt of evidence, for example under mutual assistance treaties.

Ultimately, the Court found nothing in the Roskill Report recommending the creation of "a statutory power which would permit UK authorities unilaterally to compel, under threat of criminal sanction, the production of documents held out of [UK] jurisdiction."[10] On the contrary, the Court found that the Roskill Report emphasised the importance of establishing reciprocal arrangements for obtaining evidence from abroad.

3.2 The development of the CJA and subsequent legislation

The Court then considered the Criminal Justice Bill 1986/7 (the **"Bill"**) which became the CJA.

The Bill set out a court procedure for requesting assistance of foreign courts in obtaining evidence from abroad, echoing the assessment of the Roskill Report that existing informal procedures for obtaining such evidence through diplomatic channels tended to be ineffective. However, these provisions were removed prior to the CJA being enacted.

A similar provision setting out a procedure for requesting assistance from foreign courts was instead included in the Criminal Justice Act 1988, although this was directed at obtaining evidence for use in criminal trials and not for the investigation of crime in general. The Court found this was enough to show that Parliament intended evidence should be secured from abroad by international co-operation as envisaged in the Roskill Report, rather than by unilaterally compelling (under threat of criminal sanction) the production in the UK of documents held abroad by a foreign company.

The Court noted further subsequent legislation extended the UK's participation in international co-operation, adding weight to this assessment, including: the Criminal Justice (International Co-Operation Act 1990, the Criminal Justice and Public

Order Act 1994 and the Crime (International Co- Operation) Act 2003. The Court also noted that the UK and US have entered into international agreements relating to mutual legal assistance in both 1994 and 2003.

The Court concluded that successive Acts of Parliament had developed structures in domestic law which permit the United Kingdom to participate in international systems of mutual legal assistance in relation to both criminal proceedings and investigations. It noted that the safeguards and protections enacted by the legislation were of "critical importance" to the functioning of this international system. This included the regulation of the uses to which documentary evidence might be put and provision for its return.

The Court therefore held it was "inherently improbable"[11] that Parliament had intended for the SFO to have unilateral power to demand evidence from abroad without recourse to the Courts and without any of the safeguards put in place under the scheme of mutual legal assistance.

4. Serious Organised Crime Agency v Perry [2012] UKSC 35 (the "Perry Case")

KBR drew attention to the Perry Case as a helpful analogy to the case at issue. In the Perry Case, proceedings were brought under the Proceeds of Crime Act 2002 (**"POCA"**) by the Serious Organised Crime Agency (**"SOCA"**), which sought to deprive Mr Perry and his family of assets obtained in connection with his criminal conduct, namely a pension scheme fraud he had operated in Israel. The Judge in this matter made a disclosure order against Perry and his family under section 357 of POCA, and information notices were given to Perry and his daughters under this disclosure order by letter addressed to Perry's house in London. However the intended recipients were known by SOCA to be outside the jurisdiction of the UK. An application was made for the information notices to be set aside. The Supreme Court held unanimously that section 357 of POCA did not authorise the imposition of a disclosure order on persons out of the jurisdiction.

The Court noted that the similarity between a consideration of section 357 of POCA discussed in the Perry Case and the application of section 2(3) of the CJA in this case was "striking"[12], as were the public interest considerations in both cases. The Court also noted that Parliament responded to the Perry Case be amending POCA. These amendments did not confer on SOCA the power to demand information from abroad on pain of criminal penalties, but made provision for the mutual legal assistance procedure that respects international comity through international agreement, reciprocity and mutually agreed conditions.

5. The Sufficient Connection Test

Finally, the Court considered the Divisional Court's interpretation that section 2(3) of the CJA might confer upon SFO the power to require the production of documents held by a foreign company outside the UK provided there was a "sufficient connection" between the company and the jurisdiction of England and Wales.[13] The Court specifically considered how section 221 of the Insolvency Act 1986 (the **"IA 1986"**) has been interpreted by the courts as conferring "the widest of powers but have [also] provided a safeguard against the exorbitant exercise of those powers in the form of judicial discretion."

The Court found, however, that this broad interpretation of the IA 1986 did not provide a basis for the implication of a similar limitation on section 2(3) of the CJA. First, the safeguard of judicial discretion was only necessary due to the broad reading of the power under the 1986 Act, which was compelled by the language, purpose and context of the relevant provision. In contrast, the Court found no reason for such a broad reading of section 2(3) of the CJA and indeed indicated that such a reading would have been inconsistent with the intention of Parliament. Second, section 2(3) of the CJA confers a power on the SFO and not on a court, which means there is no scope to apply judicial discretion in interpreting this provision. Third, a statutory rule empowering the SFO to demand the production of documents by foreign companies outside UK jurisdiction when there is a "sufficient connection" would be "inherently uncertain".[14] Lastly, any attempt to imply such a limitation would exceed the appropriate bounds of interpretation and would involve "illegitimately re-writing the statute".[15]

6. Comment

This judgment is undoubtedly a setback for the SFO: it serves to limit the SFO's powers under section 2(3) of the CJA and notably restricts the SFO from unilaterally compelling foreign companies to produce documents that are held abroad where such foreign companies have no operations or presence in the UK. This setback is compounded by the fact that the UK has lost certain investigatory powers from which it previously benefitted when it was an EU member state. For example, in the post-Brexit world, the UK can no longer rely on tools such as European Investigation Orders, which previously enabled the SFO to obtain documents located in the EU expeditiously.

It is worth noting, however, that this judgment does not inhibit the SFO from seeking documents held outside UK jurisdiction in all circumstances. First, the SFO may still use its powers under section 2(3) of the CJA to compel a UK company or a foreign company with a fixed place of business in the UK to produce documents held outside the UK. Second, the SFO may still seek documents held abroad from foreign companies that have no presence in the UK through alternative channels, such as mutual legal assistance. This approach would rely on the cooperation of the SFO's international counterparts and would likely lead to a delay into its ongoing investigations.

In addition to mutual legal assistance, under the Crime (Overseas Production Orders) Act 2019, the SFO and other UK authorities, such as the Financial Conduct Authority, may be able to obtain certain electronic data pursuant to an Overseas Production Order (**"OPO"**) issued by the courts. The recipient of an OPO must provide data, usually within seven days, to the relevant UK agency. This tool provides a means for the SFO to obtain electronic data expeditiously in certain circumstances, but there are certain key limitations. First, the OPO regime is reliant on the entry of international agreements between the UK and other countries. To date, the United States is the only country to have entered such an agreement. Second, the OPO regime does not apply to hard copy and certain other materials, and so mutual legal assistance will remain a necessary route in many instances.

Despite the limitations this judgment imposes on the SFO's investigative powers, history suggests that legislative reform may follow this judgment both to clarify the intention of Parliament and to widen the scope of SFO's powers under section 2(3) of the CJA. As noted above, following the Perry Case, Parliament amended POCA to reverse the effect of the court's decision, in that case granting UK authorities an avenue to demand documents through mutual legal assistance. It is possible that Parliament may similarly respond by introducing legislative reform that will reinforce the SFO's powers under the CJA and potentially expressly permit the use of the SFO's information gathering powers on foreign companies outside the UK in certain circumstances.

It remains to be seen whether such legislative reform will be forthcoming, but for the time being, foreign companies with no presence in the UK will take comfort that they no longer risk being subject to a Notice when their representatives are physically present in the UK.

References

1. R (KBR Inc) v Serious Fraud Office [2021] UKSC 2
2. R (KBR Inc) v Serious Fraud Office [2018] EWHC 2012 (Admin)
3. Ibid. at paragraph 71
4. R (KBR Inc) v Serious Fraud Office [2021] UKSC 2, at paragraphs 21-22
5. Paragraph 23
6. Paragraph 28
7. Paragraph 29
8. Paragraph 30
9. Paragraph 32
10. Paragraph 36
11. Paragraph 45
12. Paragraph 52
13. Paragraph 64
14. Paragraph 65
15. Ibid.

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