

CLIENT ALERT

SFO Investigation Powers Over Foreign Companies Limited by U.K. Supreme Court Decision

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On 5 February 2021, the U.K. Supreme Court unanimously ruled that the Serious Fraud Office (SFO) does not have the power to compel a foreign company that has no registered office or fixed place of business in the U.K. to produce documents held outside the U.K. under section 2(3) Criminal Justice Act 1987 (CJA). This means that where the parent of a U.K. company is a foreign company which has no presence in the U.K., the SFO will not be able to require it to produce documents held outside the U.K. even if those documents are sought in connection with an investigation relating to its U.K. subsidiary. The decision may act as a brake on the SFO's powers of investigation at a time when fraud is increasingly cross-border and the alternative routes for gathering evidence are slower and more cumbersome.

Under section 2(3) of the CJA, the SFO may by notice require a person under investigation or any other person to produce documents which appear to relate to any matter relevant to an investigation or any documents of a specified description which appear so to relate. The wording of section 2(3) begged the question as to whether it could have extra-territorial effect.

The case of R (on the application of KBR Inc) v The Director of Serious Fraud Office [2021] UKSC 2 involved a U.S. engineering services company KBR Inc, whose British subsidiary, KBR UK, was under an SFO investigation for suspected bribery and corruption. The SFO issued a notice to KBR Inc—the U.S. parent—under section 2(3) CJA to produce documents held *outside* the U.K. that related to the investigation. KBR Inc had no fixed place of business in the U.K. and had never carried on business here. KBR Inc refused to comply with the notice.

The Divisional Court ruled that the CJA implied a power to the SFO to compel production of documents held outside the U.K. provided there was a sufficient connection between the overseas company and the U.K. On this basis, the court ruled that section 2(3) could be used to compel KBR Inc to produce the foreign documents.

The case was appealed and the decision was overruled by the Supreme Court. The three main arguments against extending the power under section 2(3) to have an extra-territorial effect were:

- The presumption in English law that a statute does not have extra territorial effect. It was considered a violation of the international law principles of state sovereignty, and the principle that one country cannot enforce an act which carries a criminal penalty in another country, against another country's citizens without seeking permission.
- The wording of section 2(3) CJA is silent on it applying outside the U.K. and there was no legislative indication to suggest the power was intended to apply overseas.
- The Divisional Court was wrong to argue there was a sufficient connection test, this was seen as going beyond interpretation to writing legislation, which is the role of Parliament and not the courts.

On that basis, the Supreme Court allowed the appeal.

The judgment also was helpful in appearing to clarify that U.K. companies which hold documents abroad can be compelled to produce those documents under section 2(3).

The timing of this decision is unfortunate; post-Brexit, the SFO has also lost investigatory powers to obtain documents located in the EU by no longer being a member of the European Investigation Order. Therefore, the SFO's options going forward are limited to relying on the mutual legal assistance principle, which is a slow and less efficient route, or on the Crime (Overseas Production Orders) Act 2019. However, this Act is still in its infancy.

The decision is a setback for the SFO. Fraud and financial crime are taking place on an increasingly international level and its power of investigation do not reflect this. The question needs to be asked: are the investigation powers provided by the CJA suited for modern day investigations and will the decision invite a legislative solution?

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