



5 February 2021

PRESS SUMMARY

R (on the application of KBR, Inc) (Appellant) v Director of the Serious Fraud Office (Respondent) [2021] UKSC 2
On appeal from [2018] EWHC 2368 (Admin)

JUSTICES: Lord Lloyd-Jones, Lord Briggs, Lady Arden, Lord Hamblen and Lord Stephens

BACKGROUND TO THE APPEAL

Under section 2(3) of the Criminal Justice Act 1987 (“the **1987 Act**”) the Director of the Serious Fraud Office (“**SFO**”) has the power to issue a notice requiring persons to produce documents and other information for the purposes of an SFO investigation into serious or complex fraud. Failure to comply is a criminal offence. The issue on this appeal is whether the SFO can use the power in section 2(3) to compel a foreign company to produce documents it holds outside the UK.

The appellant, KBR, Inc, is a company incorporated in the USA. It does not have a fixed place of business in the UK, and has never carried on business in the UK. However, it has UK subsidiaries, including Kellogg Brown and Root Ltd (“**KBR UK**”). The SFO invited this Court to proceed on the basis of the factual position at the date of the Divisional Court hearing on 17 April 2018, and we agree to do so. At that date, KBR UK was under investigation by the SFO.

On 4 April 2017, the SFO issued a notice under section 2(3) of the 1987 Act to KBR UK. KBR UK provided various documents to the SFO in response, but made it clear that some of the requested material was held by KBR, Inc in the USA, if and to the extent it exists. On 25 July 2017, officers of KBR, Inc attended a meeting with the SFO in London. During that meeting, the SFO handed the Executive Vice President of KBR, Inc a further notice under section 2(3) (“the **July notice**”). The July notice contains multiple requirements for the production of material held by KBR, Inc outside the UK.

KBR, Inc applied for judicial review to quash the July notice. Amongst other things, it argued that the July notice was *ultra vires* because section 2(3) of the 1987 Act does not permit the SFO to require a company incorporated in the USA to produce documents it holds outside the UK. The Divisional Court refused KBR, Inc’s application. It held that section 2(3) extended extra-territorially to foreign companies in respect of documents held outside the UK if there was a sufficient connection between the company and the UK. On the facts, there was a sufficient connection between KBR, Inc and the UK, so the July notice was valid.

JUDGMENT

The Supreme Court unanimously allows KBR, Inc’s appeal. Lord Lloyd-Jones gives the judgment, with which all members of the Court agree.

REASONS FOR THE JUDGMENT

When construing section 2(3) of the 1987 Act, the starting point is the presumption that UK legislation is generally not intended to have extra-territorial effect [21-22]. This presumption is rooted in both the requirements of international law and the concept of comity, which is founded on mutual respect between States [24-25].

The presumption against extra-territorial effect clearly applies in this case because KBR, Inc is not a UK company, and has never had a registered office or carried on business in the UK [26]. The question for the Court is, therefore, whether Parliament intended section 2(3) to displace the presumption to give the SFO the power to compel a foreign company to produce documents it holds outside the UK. The answer depends on the wording, purpose and context of section 2(3), considered in the light of relevant principles of interpretation and principles of international law and comity [27].

When Parliament intends legislation to have extra-territorial effect, it often makes this clear by including express wording in the statutory provisions. There is no such express wording in section 2(3) [28]. The other provisions of the 1987 Act do not provide any clear indication either for or against the extra-territorial effect of section 2(3) [29]. The fact that the SFO could use section 2(3) to compel a UK company to produce documents it holds overseas does not cast any light on whether the legislation can be used against a non-UK company in the very different circumstances of the present case [30].

The SFO submits that the extra-territorial 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 effectually achieved [31]. However, there is nothing in the legislative history of the 1987 Act which suggests that Parliament intended that section 2(3) should have extra-territorial effect. Rather, the legislative history indicates that Parliament intended that evidence of fraud should be obtained from abroad by establishing reciprocal arrangements for co-operation with other countries [33-39].

Since 1987, successive Acts of Parliament have developed the structures in domestic law which permit the UK to participate in international systems of mutual legal assistance to facilitate criminal proceedings and investigations. These systems are subject to protections and safeguards, including provisions which regulate how documentary evidence may be used and make provision for its return. These provisions are fundamental to the mutual respect between States and comity on which the system is founded. It is unlikely that Parliament would have intended them to operate alongside a broad unilateral power which permits the SFO to compel foreign companies to produce documents held outside the UK, under threat of criminal sanction and without the protection of any safeguards [40-45].

Judicial decisions concerning the extra-territorial effect of other statutory provisions should be approached with caution because they concern entirely different statutory schemes, often enacted for different purposes and operating in different contexts [46]. However, the reasoning in *Serious Organised Crime Agency v Perry* [2012] UKSC 35 is instructive by way of analogy. 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 UK. This supports the view that section 2(3) of the 1987 Act was likewise not intended to have extra-territorial effect, because there are close similarities between section 357 and section 2(3) [47-56]. The SFO relies on a number of other judicial decisions which it claims support its case that section 2(3) has extra-territorial effect. There is no sufficiently close analogy between the legislation considered in these cases and section 2(3), so the Court is unable to derive any assistance from them [57-63].

There is no basis for the Divisional Court's finding that the SFO could use the power in section 2(3) of the 1987 Act to require foreign companies to produce documents held outside the UK if there was a sufficient connection between the company and the UK. Implying a sufficient connection test into section 2(3) is inconsistent with the intention of Parliament and would involve illegitimately re-writing the statute [64-65].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>