

HERBERT SMITH FREEHILLS PARTNER KATE MEAKIN RESPONDS TO SUPREME COURT DECISION ON EXTRA- TERRITORIAL REACH

05 February 2021 | London
News

Responding to news that the UK's Supreme Court has handed down a judgment which decided that the Serious Fraud Office (SFO) does not have the power to compel a foreign company to produce material that it holds overseas, Herbert Smith Freehills Partner [Kate Meakin](#) says:

“This is a welcome decision as it overturns the somewhat surprising decision of the Divisional Court, and restates the position as previously understood by multinationals and – it could be said – as previously applied by the SFO, which has in practice relied upon mutual legal assistance (MLA) in such circumstances, often with the cooperation of the UK and overseas companies involved, as well as overseas agencies.

“In particular, multinational corporates may in practice have faced difficult decisions about allowing officers of overseas group companies to travel to the UK, for fear of being served with section 2 notices. In addition, the use of an undefined “sufficient connection” test would have created real issues of uncertainty for corporates and their advisers, as to the practical reach of a section 2 notice.

“Companies facing investigation will no doubt continue to be mindful of the potential benefits in co-operating with the SFO to enable documents to be provided, in a timely and helpful manner to the SFO. However, they will continue to be able to do so within the safeguards of established MLA principles, and not subject to an undefined test of “sufficient connection”, to be applied by the SFO.”

Today's decision by the Supreme Court in *R (on the application of KBR, Inc) (Appellant) v Director of the Serious Fraud Office (Respondent)* [2021] UKSC 2 unanimously allowed the appeal on behalf of KBR against the decision of the Divisional Court that a section 2 notice served by the SFO on the officer of a US company while in the UK, required the production of material held overseas by that overseas incorporated company.

The Supreme Court determined that such broad extra-territorial effect could not be read into s2(3) Criminal Justice Act 1987: it was not express or implied in the language of the statute, nor was it intended in the purpose of the statute. The Supreme Court was also not attracted to the "sufficient connection" test created by the lower court, determining that there was no basis for use of such a test, that use of such an undefined test would create unacceptable uncertainty, and that the creation of such a test in the circumstances would be an illegitimate re-writing of statute by the Courts.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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