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CLIENT ALERT

High Court Finds that the SFO Can Use Section 2 Notices to Compel Foreign Companies to Produce Material Held Abroad

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AUTHOR

Peter Burrell

Following the SFO's recent loss in the Court of Appeal in *SFO v ENRC*,[1] the SFO was successful in dismissing a judicial review challenge as to the extraterritoriality of its document production powers in *R (on the application of KBR Inc.) v. SFO*[2]. The High Court held, for the first time, that the SFO's compulsory document production powers had extraterritorial application.

Pursuant to section 2(3) of the Criminal Justice Act 1987 (the "**CJA**"), the SFO may issue a notice requiring a person or entity under investigation, or any other person, to produce documents which appear to relate to any matter relevant to an SFO investigation (a "**Section 2 Notice**").

The issue before the Court in *R (on the application of KBR Inc.) v. SFO* was whether a Section 2 Notice could require a U.S. company (KBR Inc.) to produce documents held by it outside of the UK. The Court held that the SFO's power to compel the production of documents "*extends extraterritorially to foreign companies in respect of documents held outside the jurisdiction when there is a sufficient connection between the company and the jurisdiction*" (our emphasis). The Court also confirmed that a Section 2 Notice was capable of extending to documents held overseas by UK entities.

1 [2018] EWCA Civ 2006

2 [2018] EWHC 2368 (Admin)

Importantly, however, the Section 2 Notice does need to be given to the person or entity within the jurisdiction.

Background

In February 2017, the SFO commenced a criminal investigation into KBR Ltd (incorporated in the UK) concerning suspected bribery and corruption. KBR Ltd is a subsidiary of KBR Inc. (incorporated in the U.S.), the ultimate parent company of the KBR Group of companies. KBR Inc. did not carry out, or have a fixed place of business in the UK.

The SFO first issued a Section 2 Notice to KBR Ltd only. In response, the KBR Group (including KBR Inc. and KBR Ltd) expressed an intention to cooperate with the SFO and provided the following documents:

i) Responsive documents in KBR Ltd's custody or control *in the UK*;

ii) Responsive documents *located outside of the UK* and sent to KBR Ltd at KBR Inc.'s direction to forward to the SFO; and

iii) On a "voluntary basis", documents *located outside of the UK* which KBR Inc. had disclosed to the US authorities (as part of an investigation by them into KBR Inc.).

The SFO had, however, become concerned that the KBR Group was seeking to distinguish between documents held or under the control of KBR Ltd, and documents outside of the jurisdiction beyond KBR Ltd's control. Around this time, KBR Ltd was seeking to meet with the SFO to discuss the progression of the investigation. This meeting took place in the UK in July 2017. A representative of KBR Inc. attended the meeting at the SFO's request. During that meeting, the SFO provided the representative of KBR Inc. with a Section 2 Notice. It was similar to the first Section 2 Notice issued to KBR Ltd, save that it requested material held by KBR Inc. instead of KBR Ltd.

KBR Inc. refused to provide the documents and challenged the Section 2 Notice by way of judicial review. One of the grounds of challenge was that the Section 2 Notice regime did not operate extraterritorially.

Scope of a Section 2 Notice

Unless the contrary intention appears, statutes have territorial, but not extraterritorial, application. The CJA contained no express words of limitation as regards the person or entity from whom production can be sought, save that they must be relevant to the investigation.

The Court nonetheless considered that s. 2(3) must have an element of extraterritorial application because it was, in its view, "*scarcely credible*" that a UK entity could resist a Section 2 Notice on the ground that the documents in question were held on an overseas server. Whilst the CJA was enacted before the existence of the internet, there was "*no difficulty*" in applying s. 2(3) to new technology.

Turning to the application of the Section 2 Notice regime to foreign companies, the Court considered that whilst the international transfer of documents had been enhanced since the CJA was enacted, the international dimension of the SFO's mandate was not unknown or not appreciated when the CJA was enacted. Further, there would be a very real risk that the purpose of the Section 2 Notice regime would be frustrated if the SFO was precluded from seeking documents held abroad from a foreign company. The judge stated that the SFO investigates and prosecutes "*top-end fraud*", and there is a strong public interest in the regime having extraterritorial reach, provided that "*there is a sufficient connection between the company and the jurisdiction*" (our emphasis).

Requirement for a "sufficient connection"

Whilst the Court did not provide detailed guidelines as to the types of factors that would be relevant in demonstrating a "sufficient connection", it noted that this would be a fact-specific analysis. The Court considered the following factors as relevant to its finding that there was a "sufficient connection" in this case:

i) The payments central to the investigation, and KBR Ltd's contracts, required the approval of KBR Inc.

ii) The payments were paid by KBR Inc. through its U.S.-based treasury function.

iii) A corporate officer of KBR Inc. was based in a UK office and appeared to carry out his functions from there.

For these reasons, the Court considered it "*impossible to distance KBR Inc. from the transactions central to the*" SFO's investigation.

Importantly, the Court's view was that the voluntary cooperation provided by a non-UK entity to the SFO in respect of document requests was not enough to establish a "*sufficient connection*", as otherwise any voluntary cooperation with a SFO request would "*inevitably diminish*". The mere facts that KBR Inc. was the parent of the UK company being investigated or that a senior officer of KBR Inc. attended a meeting with the SFO were not, by themselves, enough to establish the requisite connection.

Provision of a Section 2 Notice to Foreign Entities

The Section 2 Notice was given to a senior representative of KBR Inc. when voluntarily attending the meeting with the SFO to discuss the investigation. The Court criticised the SFO's decision to do this, and stressed its "*unappealing features*", noting that it might impact the willingness of other parties to attend such meetings going forward. That did not, however, invalidate the issuance of the notice as the presence of the representative at the meeting on behalf of KBR Inc. was sufficient to establish its presence in the jurisdiction for the purposes of issuing the Section 2 Notice.

Conclusions

Given that almost all of the SFO's ongoing investigations have an international element, documents relevant to its investigations are likely to be held in foreign jurisdictions. Complex corporate structures (and often group-level compliance and treasury functions) increase the likelihood that foreign entities will hold documents relevant to an investigation.

This gives rise to a number of considerations for companies involved in international investigations.

First, foreign group companies need to consider balancing their interests: whilst they may consider restricting their representatives or officers entering the jurisdiction for business purposes to avoid being issued with a Section 2 Notice, they also need to consider that providing the SFO with documentation is a sign of cooperation. This is particularly pertinent where companies are, for example, seeking a Deferred Prosecution Agreement as a resolution for the investigation.

Secondly, the judgment did not consider how any conflict between a Section 2 Notice to produce overseas documents and local laws should be dealt with to comply with a Section 2 Notice, given the increased local-law scrutiny on transmission of data, for example the French Blocking Statute or local data privacy laws. This may be of particular concern given that failure to comply with a Section 2 Notice without reasonable excuse is a criminal offence. In certain civil cases, the Court has been disinclined to permit a local law, even with criminal ramifications, to trump the disclosure regime in English civil proceedings.[3] In respect of certain jurisdictions, the Mutual Legal Assistance regime still provides the SFO with a way to acquire documents in any event.

Finally, the approach taken by the Court is consistent with the Crime (Overseas Production Order) Bill 2018. Once enacted, enforcement agencies will be given the power to apply for an Overseas Production Order to obtain electronic data directly from foreign companies or individuals for the purposes of criminal prosecutions and investigations. A further update on the Crime (Overseas Production Order) Bill will be published in due course.

Willkie Farr & Gallagher has significant experience in advising companies on multi-jurisdictional investigations and navigating compliance with the Section 2 Notice regime with considerations of cooperation, data protection and other local laws.

[3] *See* for example, *Christopher Morris and others v Banque Arabe et Internationale d'Investissement SA* (1999) 2 ITELR 492; and *Secretary of State for Health v Servier Laboratories Ltd; National Grid Electricity Transmission PLC v ABB Ltd* [2013] EWCA Civ 1234.

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Peter Burrell
44 20 3580 4702
pburrell@willkie.com

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