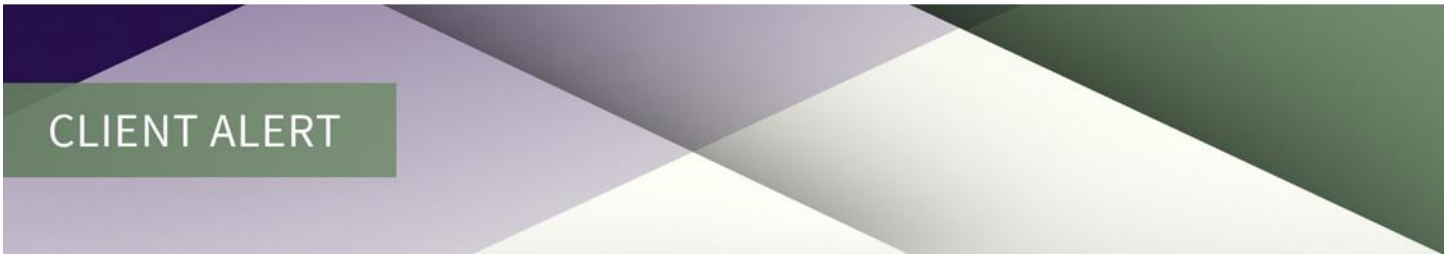

UK Supreme Court Unanimously Rules that the Serious Fraud Office Does Not Have Power to Compel Documents from Foreign Companies Outside the UK

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In a blow to the UK Serious Fraud Office (the "**SFO**"), the UK Supreme Court has unanimously ruled that the SFO cannot compel foreign companies to provide documents held outside of the UK by using its powers under section 2(3) of the Criminal Justice Act 1987 (the "**Section 2 Notice Regime**").[1]

Pursuant to the Section 2 Notice Regime, 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**").

As reported in our previous client alert, in 2018, the High Court found that the SFO's power under the Section 2 Notice Regime extended territorially to foreign companies in respect of documents held outside of the UK where there was a *sufficient connection* between the company and the UK.[2] However, the Supreme Court has unanimously ruled that the Section 2 Notice Regime is not extraterritorial.

1 *R (on the application of KBR, Inc.) (Appellant) v Director of the Serious Fraud Office (Respondent)* [2021] UKSC 2

2 *R (on the application of KBR, Inc.) v Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin)

With Brexit meaning the SFO no longer has direct access to the EU's information exchange databases, and can no longer issue European Investigation Orders ("**EIOs**") to the member states, it will have to resort in most cases to the rigid, slow and cumbersome mutual legal assistance ("**MLA**") regime to acquire documents of foreign companies held abroad.

Background

In 2017, the SFO commenced a bribery and corruption investigation into KBR Ltd, the UK subsidiary of KBR, Inc., in relation to its ongoing investigation into the activities of Unaoil.

In response to a Section 2 Notice issued to KBR Ltd, KBR Ltd produced various materials to the SFO and made clear that certain requested material, if and to the extent it existed, was held by KBR, Inc. in the US.

A meeting was scheduled to take place in London to discuss the investigation. The SFO insisted that officers of KBR, Inc. should attend, and accordingly they did so. During that meeting, the SFO provided an officer of KBR, Inc. with a Section 2 Notice.

KBR, Inc. refused to comply with the Section 2 Notice and sought to challenge it by way of judicial review on three grounds:

1. The Section 2 Notice provided to KBR, Inc. was ultra vires, as it requested material held outside of the jurisdiction from a company incorporated in the US;

2. It was an error of law by the Director of the SFO to seek to exercise his Section 2 powers despite his power to seek MLA from the US authorities; and

3. The Section 2 Notice was not effectively served by the SFO handing it to a senior officer of KBR, Inc., who was temporarily present in the jurisdiction.

At first instance, KBR, Inc. failed on all three grounds and the application was dismissed. Only the first issue was appealed to the Supreme Court.

On this issue, the High Court considered that 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. It determined that the Section 2 Notice Regime would extend to foreign companies in respect of documents held outside of the jurisdiction "*where there is a sufficient connection between the company and the jurisdiction*" (the "**Sufficient Connection Test**").

Decision of the Supreme Court

The Supreme Court's starting point was that there is a presumption in English law that legislation is not intended to have extraterritorial effect. This case did not concern a UK registered company, or a company that carried on business or had a presence in the UK.

The question for the Supreme Court was therefore whether Parliament intended to confer on the SFO the power to compel a foreign company to produce documents held abroad, which involved consideration of the wording, purpose and context of the legislation in light of domestic principles of interpretation and principles of international law and comity.

The Supreme Court considered that the implication of the Sufficient Connection Test would exceed the appropriate bounds of interpretation and usurp the function of Parliament, and to do so would involve illegitimately rewriting the statute. It also considered that a statutory rule which empowers the SFO to demand the production of documents by foreigners outside of the jurisdiction without defining what would constitute such a connection would be inherently uncertain.

The Supreme Court further decided that there was no warrant for such a broad reading of Section 2, in particular as such a reading would be inconsistent with Parliamentary intention: the Section 2 power is a power conferred on the SFO, not on a court, and so there was no scope for limiting the operation of a broad interpretation or safeguarding against exorbitant claims of jurisdiction by the exercise of judicial discretion.

Practical Considerations

A significant number of the SFO's investigations are cross-border. Documents relevant to those investigations are frequently held in jurisdictions outside the UK. This is particularly the case where there are multi-jurisdictional corporate structures, with group-level compliance and treasury functions. The Supreme Court's decision has therefore compounded the difficulties faced by the SFO in obtaining information and materials relevant to its cross-border investigations.

As a result of Brexit, the SFO faces a further setback in that it (as well as other enforcement agencies, such as the National Crime Agency and the Financial Conduct Authority) can no longer issue EIOs to EU member states. EIOs are requests for investigative assistance and the transfer of evidence, and provide a simpler, more efficient alternative to the notoriously slower MLA regime. This will come as a real blow to the SFO, as it also no longer has direct access to the EU's information exchange databases. Whilst there is agreement to share information in relation to criminal investigations, there is now a lack of direct real-time access to that data.

The Crime (Overseas Production Orders) Act 2019 ("**COPOA**") is now in force, which provides an alternative to the MLA regime and gives enforcement agencies the power to apply for an Overseas Production Order to obtain electronic data directly from foreign companies or individuals for the purposes of criminal prosecution and investigations. Our client alert

in respect of the COPOA can be found here. However, the COPOA is predicated on international cooperation agreements between the UK and the foreign country in which the company or individual is based. Presently, there is only one such arrangement, which was entered into between the UK and the US in October 2019.

In a nutshell:

- The SFO can use the Section 2 Notice Regime to compel the production of documents held in the UK;
- The SFO must use the MLA regime or the COPOA (subject to the relevant international cooperation agreement) to obtain documents held abroad by a foreign company;
- The SFO may still be able to use the Section 2 Notice Regime to compel the production of documents from a foreign company that has a UK registered office, a fixed place of business or that carries on business in the UK.

It remains to be seen whether the SFO will seek legislative change to widen the scope of its powers as a result of this decision.

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.

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