UK Supreme Court Rules That SFO Cannot Require Foreign Companies to Produce Documents Held Overseas

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On 5 February, the UK Supreme Court handed down a highly-anticipated judgment, holding that the Serious Fraud Office ("SFO") cannot issue a notice (a "section 2 Notice") under s2(3) of the Criminal Justice Act 1987 ("CJA") requiring a foreign company with no UK presence to produce material.[1] Basing its decision on international comity, the construction of the CJA and subsequent legislative developments, including the adoption of mutual legal assistance agreements, the UK Supreme Court confined the use of section 2 Notices to UK companies and (possibly) foreign companies established or carrying on business in the UK.

Background. In February 2017, the SFO commenced a criminal investigation into Kellogg Brown & Root Ltd ("KBR UK") concerning potential bribery and corruption in connection with Unaoil, the Monaco-based oil consultancy. KBR UK is a subsidiary of KBR Inc., which is the US-incorporated parent company of the KBR Group. The SFO identified suspected corrupt payments by KBR UK to Unaoil worth over $23 million.

As part of its investigation, the SFO sought to compel the production of documents from KBR UK using a section 2 Notice. KBR UK initially cooperated, including by disclosing responsive documents forwarded by KBR Inc to KBR UK, as well as (on a voluntary basis) those held by KBR Inc. outside the UK. However, the SFO became concerned with the KBR Group's overall cooperation, as it began to draw a distinction between documents held by KBR UK and documents outside the UK.

Senior officers of KBR Inc. subsequently attended a meeting with the SFO in London where they were served with a section 2 Notice requiring KBR Inc. to provide the outstanding documents held outside the UK. KBR Inc. applied for judicial review of the section 2 Notice. The High Court dismissed the application, finding that CJA section 2 has extraterritorial application and can apply to foreign companies if they have a "sufficient connection" to the UK. On these facts, the Court held that the processing of payments by KBR Inc.'s treasury function and approvals of the suspected corrupt

[1] *R (on the application of KBR, Inc. v Director of the Serious Fraud Office* [2021] UKSC 2, available at https://www.supremecourt.uk/cases/docs/uksc-2018-0215-judgment.pdf

payments given by its corporate officers amounted to a "sufficient connection", bringing it within the reach of the section 2 Notice.[2]

The Supreme Court's Key Findings. As a starting point for considering the extra-territorial scope of a section 2 Notice, it is presumed that UK legislation is generally not intended to have extra-territorial effect, based on international law, and in particular, international comity. This presumption may however be displaced by the wording, purpose and context of the relevant legislation, in this case the CJA, as well as its legislative history. Given that KBR Inc. was a US-incorporated company, did not have a registered office in the UK, and did not carry on business in the UK, the Supreme Court determined that presumption against extra-territorial effect clearly applied. The Court therefore considered whether the circumstances of the case caused the presumption to be displaced.

The Court found that there is no express wording in CJA section 2(3), or the Act as a whole, which indicates that Parliament intended for it to have extra-territorial effect. The Court also determined that extraterritoriality should not be implied. It dismissed the SFO's argument that a UK company that holds relevant documents overseas could otherwise resist a section 2 Notice request. In such circumstances the UK company would simply be ordered to bring those documents into the UK.

The Court found greater force in the SFO's submission that the purpose of the CJA, to facilitate the investigation of serious fraud, would be frustrated without implying extra-territorial effect into section 2(3). Nevertheless, the Court found that the history of the CJA and subsequent legislative developments indicated that Parliament intended UK authorities to rely on international mutual legal assistance mechanisms (with the safeguards and protections they involve) to obtain documents held overseas by foreign companies for use in criminal investigations.

Notably, the Court considered *Serious Organised Crime Agency v Perry*[3], which found that s357 of the Proceeds of Crime Act 2002 did not permit a disclosure order to be imposed on individuals outside the UK, subject to criminal sanction in the event of non-compliance, as this would be a breach of international comity. Given the similarities between the wording of that provision and CJA section 2(3), the Court held that this case was further evidence that CJA s2(3) was not intended to have extra-territorial effect.

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[2] *The Queen on the Application of KBR Inc. v The Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin), available at http://www.bailii.org/ew/cases/EWHC/Admin/2018/2368.html . See our FCPA Update, 'KBR's Judicial Review Challenge: Beware the Extraterritorial Powers of the U.K. Serious Fraud Office' (October 2018), available at https://www.debevoise.com/insights/publications/2018/10/fcpa-update-october-2018.

[3] *Serious Organised Crime Agency v Perry* [2012] UKSC 35, available at https://www.supremecourt.uk/cases/docs/uksc-2010-0182-judgment.pdf.

Finally, the Court rejected the High Court's proposed "sufficient connection" test. It noted that there was no basis for implying such a test in the light of its interpretation of CJA section 2(3), and applying the test created inherent uncertainty.

Implications. The Supreme Court's decision provides some welcome clarity regarding the application of section 2 Notices. While multinational groups will be well advised to continue to assess and monitor how they undertake payment processing and approvals for UK financial transactions, following the rejection of the High Court's "sufficient connection" test, the risk of those processes creating a sufficient nexus for the SFO to order the production of documents from foreign-incorporated companies without tangible presences in the UK has been significantly reduced.

However, it is important to bear in mind that documents held overseas by UK companies can still be subject to a section 2 Notice. Further, the Court was not asked to decide whether a foreign company that has a registered office or a fixed place of business in the UK, or that carries on business in the UK, can be validly served with a section 2 Notice. Consequently, multinational companies under criminal investigation should be alive to this risk, particularly if they are considering whether to establish a presence in the UK.

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