

# KIRKLAND & ELLIS

Kirkland Alert

## UK Supreme Court Rejects Over-Expansive Use of SFO's Compulsory Powers Against Non-UK Companies

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On 5 February 2021, the UK Supreme Court handed down its judgment in *R (on the application of KBR Inc.) v. the Director of the Serious Fraud Office*. In a reversal of the decision at the Court of Appeal, the Supreme Court has reaffirmed the status quo that the Serious Fraud Office ("SFO") does not have the power to compel the production of overseas documents from a foreign company under a s.2(3) notice of the Criminal Justice Act 1987 (a so-called Section 2 notice).<sup>1</sup> Instead, applications under mutual legal assistance treaties are to remain the *modus operandi* by which the SFO will obtain documents held abroad by a foreign company.

### The Global Reach of SFO Investigations

In recent years, the SFO's workload has becoming increasingly international in nature as shown by several recent investigations such as those conducted against Airbus (relating to criminal conduct in Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana) and Rolls-Royce (relating to criminal conduct in Indonesia, Thailand, Russia, India, Nigeria, China and Malaysia). With this, it has become increasingly common for the SFO to seek relevant documents held abroad, including by foreign companies. Historically, to do this, the SFO has had to seek such documents pursuant to a mutual legal assistance request made to the country in which the documents are located. At a time when the SFO is emphasising a desire to speed up its investigations, such requests are often time consuming.

The SFO's Streamlined Approach in *R (KBR Inc.) v. the Serious Fraud Office*

This ultimately led the SFO to pursue a novel way of seeking to obtain documents outside of the mutual legal assistance request. In *R (on the application of KBR Inc.) v. the Director of the Serious Fraud Office*, the SFO intended to request documents from KBR Inc., the US parent of a UK company (KBR UK) that was under investigation by the SFO. Instead of proceeding through an application for assistance from the US authorities under a mutual legal assistance request, the SFO invited officers of KBR Inc. to a meeting with the SFO on 25 July 2017. At this meeting, the SFO handed a Section 2 notice to those officers seeking to compel the production of documents held by KBR Inc. outside the UK or to face criminal sanctions.

## Challenge at the Court of Appeal

KBR Inc. challenged the notice on the grounds that the SFO did not have the power to compel the production of documents held outside of the UK by a foreign company.

As noted in our [Kirkland Alert of 14 September 2018](#), KBR Inc. lost at the Court of Appeal as the court held that Section 2(3) had an “element of extraterritorial application” that granted the SFO the power to compel foreign companies to produce documents held overseas where that company had a sufficient nexus to the UK. This would have had potentially huge ramifications, with foreign companies at risk of criminal sanctions if they did not provide documents held outside the UK for the purpose of SFO investigations in the UK. This would have been particularly relevant for foreign entities with subsidiaries in the UK, which often hold potentially relevant documentation on behalf of those UK subsidiaries.

## Ruling of the Supreme Court

The Supreme Court, however, has unanimously allowed KBR Inc.’s appeal. The judgment held that one could not read extra-territoriality into the effect of Section 2(3), as there was no suggestion that Parliament intended for it to have such extra-territoriality. Further, they noted that Parliament had developed mutual legal assistance to facilitate international investigations and prosecutions. The Supreme Court pointed out that the use of mutual legal assistance, rather than allowing the SFO the recourse to compel the production of documents directly from foreign companies, was “fundamental to the mutual respect between States”.

# Consequences of the Ruling

The Supreme Court's ruling provides clarity in its reaffirmation of the status quo regarding the provision of overseas documentation held by foreign entities. Foreign entities will not be sprung with Section 2 notices for the provision of documentation under the threat of criminal sanctions when visiting UK soil. Instead, the official channels of mutual legal assistance (with the safeguards and protections that entails) are to remain the route through which the SFO will need to request for provision of overseas documentation held by foreign entities.

*\*Trainee solicitor Richard Birch was also a contributing author to this publication.*

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1. A notice issued pursuant to Section 2(3) of the Criminal Justice Act 1987 requiring a person or entity under investigation or any other person to produce documents which appear to the SFO to relate to any matter relevant to the investigation.↔

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