

Investigations, Compliance and Defense

Can the UK's Serious Fraud Office (SFO) Compel Documents from Companies When Those Documents Are Located Outside the UK?

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On 5 February 2021, the Supreme Court overturned the Divisional Court and found that the SFO was unable to use its powers under section 2(3) of the Criminal Justice Act 1987 to compel a foreign company to produce documents located outside the UK.^[1]

In this note, we set out the practical implications of the decision for three different categories of companies:

1. A foreign company with no direct presence in the UK;
2. A UK based company with documents held abroad; and
3. A foreign company with a direct presence in the UK.

KBR, Inc is a US incorporated entity. KBR, Inc's UK subsidiary, Kellogg Brown and Root Ltd (KBR UK), was under investigation by the SFO.

In April 2017, the SFO issued a Section 2 notice to KBR UK. KBR UK provided various documents but responded that it was unable to produce certain documents held abroad as they were not in its possession but were held by KBR, Inc in the US. KBR UK offered to meet with the SFO to discuss the investigation. At the SFO's insistence, KBR, Inc officers from the US also attended the meeting in London. It was at this meeting that the SFO served a Section 2 notice on KBR, Inc's officers in order to obtain the material held by KBR, Inc in the US. KBR, Inc then sought to quash the Section 2 notice in court. While the Divisional Court dismissed KBR, Inc's challenge of the Section 2 notice, the Supreme Court agreed with KBR, Inc and overturned the Divisional Court.

1. **A foreign company with no direct presence in the UK**

The Supreme Court's decision removed any doubt that foreign companies, such as KBR, Inc, with no direct presence in the UK (i.e. with no fixed place of business in the UK and which do not carry on business in the UK), can be compelled to produce documents held abroad.

The Supreme Court rejected the Divisional Court's view that a foreign company may be compelled to produce documents where there is "*a sufficient connection between the company and the [UK] jurisdiction*".

The fact that the SFO served a Section 2 notice on a representative of KBR, Inc in London, and the fact that KBR UK was under investigation by the SFO at that time did not alter the fact that the Section 2 notice could not be used to compel KBR, Inc to disclose documents held abroad.

Therefore, a foreign company with or without a UK subsidiary cannot be required to produce documents purely on the basis that there is some "*sufficient connection between the [foreign] company and the [UK] jurisdiction*".

In order for the SFO to be able to require a foreign company to produce documents, that company must "*carr[y] on business in the United Kingdom or have a registered office or any other presence here*".^[2]

However, this does not mean that such documents are out of the SFO's reach. Albeit time consuming and cumbersome for the SFO, the SFO can continue to rely on mutual legal assistance arrangements with other countries to obtain information held by foreign companies outside the UK.

2. A UK company with documents held abroad

A Section 2 notice can be used by the SFO to compel a UK company to produce documents that the company holds abroad (e.g. on an overseas server). This was common ground between the parties and the Supreme Court appears to accept this in its analysis.

As indicated earlier, KBR UK did not provide certain documents located in the US to the SFO. However, this was because the documents were held by KBR, Inc in the US and were therefore not in KBR UK's possession. It was immaterial that the documents were in the US; the issue was whether or not they belonged to KBR UK or KBR, Inc.

3. A foreign company with a direct presence in the UK (a foreign company which has a registered office or a fixed place of business in the UK or which carries on business in the UK)

The Supreme Court explicitly stated that this decision did not concern the position of a foreign company with a direct presence in the UK. Accordingly, the question remains as to whether a foreign company with a presence in the UK could be compelled to provide documents held abroad.

In this regard, the Supreme Court's analysis is instructive. The Supreme Court suggested that it is "questionable" whether the operation of Section 2 in respect of documents held abroad by a UK based company gives it any material extra-territorial effect. Rather, a Section 2 Notice would be a request for a UK company (which is within the UK's jurisdiction) to bring documents into the jurisdiction in order to produce them.

The same could be said about documents held abroad by foreign companies with a direct presence in the UK. Given the view of the Supreme Court, we consider it unlikely that a successful challenge could be made by a foreign company with a direct UK presence, to a Section 2 request for documents held or controlled by that company abroad. Therefore, a foreign company with a direct presence in the UK should assume that the SFO could request any document it holds abroad.

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

[2] Para 26 of the judgement of R (on the application of KBR, Inc) v Director of the Serious Fraud Office [2021] UKSC

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