Section 2 notices raise risk level for accountants

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Professional services firms, requests for documents and Section 2 notices under Criminal Justice Act 1987 could pose a risk for accountants and auditors as illustrated in the recent *Omers* case at the High Court, explains Andrew Wanambwa, partner at law firm Lewis Silkin

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Andrew Wanambwa

Partner at law firm Lewis Silkin

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Professional services firms often receive requests for disclosure of documents in their possession. Such requests may take many forms, including pre-action requests for disclosure, third party disclosure requests, Norwich Pharmacal (court order for disclosure of documents or information available in the UK) orders, data subject access requests and requests from regulatory bodies.

In the recent case of *Omers Administration Corporation v Tesco plc [2019] EWHC 109 (Ch)* the High Court had to consider documents provided to the Serious Fraud Office (SFO) pursuant to a request under section 2 of the Criminal Justice Act 1987 (CJA 1987).

The case provides an example of the kind of risks that can arise when professional services firms disclose their confidential documents to a third party.

Background - Section 2 Notices

Section 2 of CJA 1987 empowers the SFO to give notice in writing requiring a person under investigation or any other person believed to have relevant information to: (a) answer questions or furnish information; or (b) produce documents (Section 2 Notice).

Save for information and documents protected by legal professional privilege, the general rule is that any person who without reasonable excuse fails to comply with a Section 2 Notice is guilty of an offence.

Professional services firms who owe a duty of confidentiality to clients or employees sometimes ask for a Section 2 Notice to be served upon them before providing sensitive material to the SFO.

This is because the firm will wish to: (a) avoid allegations of breaching confidentiality; and (b) make it clear that they were compelled to co-operate.

Omers Administration Corporation v Tesco plc

In *Omers* the following events occurred:

· the SFO investigated Tesco plc and a subsidiary in connection with certain alleged accounting irregularities.

· as part of its investigation the SFO served Section 2 Notices on various third parties, whose identities were kept confidential in the case (the third parties), and thereby obtained confidential evidence from those parties (the SFO documents).

· the SFO provided Tesco with the SFO documents for the purpose of negotiations about a deferred prosecution agreement. It was made clear to Tesco that the SFO documents must be kept confidential.

· Tesco was then separately sued by two sets of claimants (the claimants) who sought compensation for losses allegedly caused by the above irregularities.

· it was accepted by all parties that the SFO documents in the possession of Tesco were relevant to the claimants' claim.

· certain of the third parties objected to Tesco's disclosure of the SFO documents to the claimants. The third parties objected on the basis that the SFO documents were provided by them under compulsion and in the reasonable expectation that they would be kept confidential.

Tesco was caught by two potentially conflicting obligations: the obligation of confidentiality to the SFO and third parties on the one hand, and the obligation to give full and proper disclosure to the claimants in the underlying claim.

The High Court found that the SFO documents in the hands of Tesco had to be disclosed to the claimants. Such disclosure was required because it was common ground that, although confidentiality should be taken into account, it does not of itself offer grounds for protection from disclosure.

Instead, all the circumstances of the case must be taken into account without any presumptions one way or the other.

The Court found that the question is whether the overriding objective of dealing with the case justly and at proportionate cost could be secured without production of the SFO documents. It decided that in cases such as this one it must consider whether the same information is available from another source and whether a restricted form of disclosure would suffice. But it was held that if a document was relevant that may well outweigh or take precedence over other considerations.

Conclusion

Although the *Omers* case did not concern the disclosure of privileged material, it nevertheless contains a valuable lesson for professional services firms: documents provided to the SFO pursuant to a Section 2 Notice may find their way into the hands of unexpected parties and can even be used in subsequent unrelated litigation.

Although the matter has not yet been tested, it must be assumed that the approach in *Omers* would apply where documents are compulsorily disclosed to regulatory bodies.

A copy of the judgment in *Omers* can be found here.

About the author

Andrew Wanambwa is a partner at law firm Lewis Silkin