

VIDEOCONFERENCE

COURT OF APPEAL SITTING

TERRITORY OF THE VIRGIN ISLANDS

Friday, 9th February 2018

APPLICATION AND APPEAL

Case Name:

Delco Participation B.V.

v

Green Elite Limited

[BVIHCMAP2017/0018]

Date:

Friday, 9th February 2018

Coram:

The Hon. Mr. Davidson Baptiste, Justice of Appeal

The Hon. Mde. Louise Esther Blenman, Justice of Appeal

The Hon. Mr. Mario Michel, Justice of Appeal

Appearances:

Appellant:

Mr. Matthew Hardwick, QC

Respondent:

Mr. Phillip Jones, QC with him Mr. Nicholas Brookes

Issues:

Extension of time to file notice of opposition – Relief from sanctions – Discharge order of a single judge – Forensic examination versus inspection of document – Whether rule 28.16 of the Civil Procedure Rules 2000 goes beyond the parameters of document inspection to permit forensic examination – Appropriateness of rules 28.18 and 17.1(1)(h) for requesting and conducting forensic examination of documents to determine authenticity of document – Rule 26.16, 28.28, 17.1(1)(h) and 62.16(A) of the Civil Procedure Rules 2000

**Type of Oral
Result / Order
Delivered
(if applicable):**

Oral Judgment or Decision

Result / Order:

[Oral delivery]

- 1. The order of the single judge below dated 19th December 2017 is discharged.**
- 2. The application filed on 6th December, 2017 is dismissed.**
- 3. Costs to be assessed if not agreed within 21 days and paid to the respondent to this application.**

Reason:

On 19th December 2017, a single judge of this Court granted an order on the application of Delco Participation BV that Greene Elite Limited make available for inspection and submission to forensic examination, the original of an undated letter said to have been sent by Greene Elite Limited to Mr. Gu Liyong on or around 8th March 2010 and to provide a forensic image of the hard drive of the computer on which the said letter was created.

Green Elite Limited applied for an order for extension of time to file a re-amended notice of opposition in response to the application for inspection and conceded that this was not necessary and we entirely agree with this position. They also sought relief from sanctions but no sanction was imposed by the rules in respect of being out of time in the filing of the opposition. It submits however that it did file its opposition within time.

Green Elite Limited also applied for an order to vary, discharge, revoke or set aside the order of the single judge on the grounds that a forensic examination which ultimately affects or alters the originality of a part or all of the item being inspected is out outside the scope of rule 28.16 of the Civil Procedure Rules 2000 ("CPR"), especially in circumstances where inspection had already been requested and given before the trial. It also stated that the examination sought is a fishing expedition and for any forensic evidence arising from the inspection which might be

thought to be introduced in the appeal would not satisfy the rule in *Lad v Marshall* ([1954] EWCA Civ 1) and would be inadmissible. Accordingly, the inspection sought is irrelevant and should not be allowed.

The inspection application was made pursuant to rule 28.16. The basis of the application was that the letter to Mr. Gu is a key document relied upon by Green Elite, both in the trial and the forthcoming appeal. Delco Participation BV has “very serious misgivings about the authenticity of the Gu letter and in the circumstances and in accordance with rule 28.16 Delco Participation BV is entitled to an order that the Gu letter be made available for inspection and submission to forensic examination”. Rule 62.16A provides that any order, direction, or decision made or given by a single judge maybe varied discharged or revoked by the full court. As stated earlier Green Elite Limited’s application was made under CPR 28.16. This rule provides for “a party to inspect and copy a document mentioned in an affidavit, expert report, or statement of case, a witness statement or the claim form. A party who wishes to inspect and copy such a document must give written notice to a party, who or whose witness mentioned the document. The party to whom notice was given must comply not more than 7 after the date on which the notice was served”.

In the oral submissions, counsel on behalf of Delco Participation BV, admitted that there was no express provision in rule 28.16 to make the order as requested. Counsel however relies on the court’s general powers of case management; this is important, because it is the contention of Mr. Jones, QC that the rule under which the application was made did not cloth the court with the authority to make the order requested. We are in full agreement with Mr. Jones’ submission.

Mr. Jones, QC also argued that it was open to Delco Participation BV to invoke rule 17.1.1(h) if they wanted an order for forensic examination and that would have been the appropriate rule to employ. Questions arose as to whether the forensic

examination was an experiment; this might be a choice of words, but importantly we are of the view that the rule invoked did not clothe the court with the authority to make an order for forensic examination. On that ground alone, we would have set aside the order of the learned single judge.

Another issue concerned the question of deeming the authenticity of the document. This brings us to rule 28.18(1), where “the party shall be deemed to admit the authenticity of any document disclosed to that party under this Part unless that party serves notice that the document must be proved at trial”. Rule 28.18(2) states that “a notice to prove a document must be served not less than 42 days before the trial”. No notice was served here. Delco Participation BV is deemed by virtue of this rule to have accepted the authenticity of the Gu letter. Counsel for Delco Participation BV submits that the matter at hand is not caught within parameters of rule 28.18 and, in fact circumscribe its application to matters dealing with conventional disclosure and not with linked documents.

A perusal of the rule does not support this limited interpretation which has been advised by Mr. Hardwick, QC on behalf of Delco Participation BV. We are not in agreement with the limited interpretation which he has advised. Mr. Hardwick, QC also stated that the issues of *Lad v Marshall* are new evidence and are not germane to the application before the Court. This might be relevant to future court hearings, but not on this application. Mr. Jones, QC had intimated that the application would not satisfy the *Lad v Marshall* test and that counsel ought to have made his entire case at the trial and cannot now be placed before the appeal court which properly ought to have been taken before the court below. In the present case, the Gu letter was referred to and exhibited in the affidavit of 18th May 2017 with the trial to take place on 5th July 2017. In the present application, Delco Participation BV characterises the Gu letter as a key document, and asserted that the existence of the trust was the central issue at the hearing. Mr. Erik Hammerstein in his affidavit indicated that he had and continues to have serious

misgivings about the authenticity of the Gu letter. It was observed however that at no point during the trial was it said on behalf of Delco Participation BV that it had serious misgivings about the authenticity of the Gu letter. As Green Elite Limited points out, it is unexplained as to why, if Delco Participation BV considered the Gu letter as a key document going to the central issue in the case and had serious misgivings about its authenticity, it did not immediately apply for a forensic examination to be conducted on the letter, pursuant to rule 17.1(1) (h), instead Delco Participation BV sought an inspection of the Gu letter pursuant to rule 28.16. Mr. Jones, QC submitted that this would be of no avail if Delco Participation BV had suspicions about the authenticity of the Gu letter, as a visual inspection of the Gu letter, by a lawyer, on behalf of Delco Participation BV would not be of any use in deciding the authenticity. Scientific examination of the Gu letter by a forensic expert was required. Delco Participation BV, it is submitted, should have immediately applied for such an examination and should have put the authenticity of the Gu letter in issue pursuant to rule 28.18; Delco Participation BV did neither.

At paragraph 5 of its application, Delco Participation BV sets out its justification for now wanting a forensic examination of the Gu letter. The paragraph states in part, "Further correspondence between the parties finally resulted in the Gu letter being inspected on 30th June 2017, only two working days before the start of the trial. It was therefore impossible for the letter to be subjected to forensic examination". As Green Elite Limited correctly points out, a visual inspection pursuant to rule 28.16 had nothing to do with the document being forensically examined by an expert. An inspection under rule 28.16 is not a pre-condition to or a necessary part of a forensic examination by an expert.

Mr. Jones, QC in his arguments pointed out that if Delco Participation BV had wanted to conduct a forensic examination but considered that there was insufficient time to do so, it had the option of making an application to the court seeking directions. If

Delco Participation BV considered that Green Elite Limited had been at fault in raising the trust issue at the stage it did, it was open to seek an order preventing Green Elite Limited from relying on the Gu letter and Delco Participation BV could also have sought an adjournment to enable a forensic examination to take place. Delco Participation BV did none of these; instead, it unilaterally decided that it would reserve the issue of authenticity of the Gu letter to some other occasion and then at the Court of Appeal seek to start the adversarial process that ought to have been started below to determine the authenticity of the Gu letter. Mr. Jones, QC pointed out that the trial was on all issues and Delco Participation BV could only reserve an issue for later argument by applying to the court for permission to do so. It did not do so. The authenticity of the Gu letter was as a matter of law admitted and conceded for the purpose of the trial by virtue of rule 28.18.