

JDGMENT : Mr Justice Walker : Commercial Court. 14th May 2008

1. In June 2006 MV SAGA MERCHANT ("the vessel") arrived at Qingdao, China, and discharged a cargo of bleached eucalyptus kraft pulp ("the pulp"). The bill of lading for the pulp showed that it had been shipped to order by the second claimant on behalf of the third claimant at Barra do Riacho, Brazil, in apparent good order and condition. The first claimant ("Shandong") was named in the box marked "Notify Party" on the bill of lading.
2. On 20 June 2007 the claim form in this action was issued. It alleged breach of contract and/or duty and/or negligence in and about the loading handling custody care and discharge of the pulp. The first defendant ("Saga Forest") was the charterer of the vessel and was also the carrier for the purposes of the bill of lading. The second defendant ("Merchant") was the vessel's owner. The claim form was served on Saga Forest in Norway under the Civil Jurisdiction and Judgments Act. Service took effect on 20 October 2007 and under CPR 58.6(3) and CPR 6.22(2)(a) an acknowledgement of service ought to have been filed by Saga Forest no later than 12 November 2007. This did not happen and at the claimants' request an order for default judgment on liability was duly made by Flaux J on 3 December 2007.
3. Saga Forest's application dated 23 January 2008 to set aside that judgment pursuant to CPR 13.3 was argued before me on 11 April 2008. Oral argument took longer than had been expected, largely because of an application, eventually withdrawn, to rely upon a part of a letter headed "without prejudice". In any event I doubt whether the parties' time estimate made any adequate allowance for the time necessary to give judgment orally. The result was that judgment has had to be reserved. I now give my ruling and reasons.
4. At the hearing Mr Bovensiepen for Saga Forest maintained that it had a real prospect of successfully defending the claim both on the merits and on the basis of a time bar. In her skeleton argument Ms Hosking for the claimants objected to late service of a witness statement advancing the time bar defence. I have no hesitation in permitting Saga Forest to advance argument on the time bar: the delay in taking the point caused no prejudice to the claimants. Moreover the key document needed for the time bar point was a damaged cargo list dated 19 June 2006 which had already been put in evidence by the claimants. In oral argument Ms Hosking accepted that if there was a real prospect of establishing the time bar defence, and the application to set aside had been made promptly, then it was not necessary to investigate the merits at this stage.
5. In my view there is a real prospect of establishing the time bar defence. I reach that view on the basis of the evidential material before the court at this stage. Nothing in this judgment should be regarded as predetermining the outcome of any eventual trial.
6. It is common ground that Saga Forest was discharged from liability unless suit was brought within one year after delivery of the pulp, and accordingly if delivery occurred on 19 June 2006 then the claim form was issued too late. It is also common ground that – subject to an argument advanced by Saga Forest on the basis of a clause in the bill of lading similar to that described in *The "Beltana"* [1967] 1 Ll.L.R. 531 - whether delivery of the pulp occurred upon discharge from the vessel or at some later stage will depend upon the particular facts.
7. Mr Bovensiepen contended that the documentary material shows a reasonable prospect of establishing the following at trial:
 - a) Shandong's cargo agents presented the bill of lading to Saga Forest's agents at Qingdao on 12 June 2006, and obtained a delivery order in return.
 - b) The vessel arrived at Qingdao on 18 June, and completed discharging on 19 June 2006 by 09:30 hours local time (02:30 hours UK time).
 - c) The vessel sailed away at 14:00 hours (07:00 hours UK time) on 19 June 2006.
 - d) In accordance with the customs or practice of the port of Qingdao the discharged cargo was stored at a stockpile under the control of the port authority, which was responsible for informing Shandong when the cargo was ready for collection.
 - e) The cargo could have been collected on behalf of Shandong (and no one else) on presentation of the delivery order at any time following the discharge of the cargo on 19 June 2006.
8. I am satisfied that all these assertions have an apparently solid foundation in the documentary material. If they are made good at trial, then Mr Bovensiepen submitted that either the port authority was Shandong's agent or at least the cargo was from the time of receipt by the port authority under Shandong's direction and control as holder of the delivery order. Ms Hosking's response concentrated on an assertion that the port authority was the agent of the carrier, and did not deliver the pulp to Shandong until a date after 19 June 2006. That argument may or may not be right. The material before me dealing with the role of the port authority is sparse. At the present stage it seems to me strongly arguable that under the custom of the port, and in particular by giving up the bill of lading in exchange for the delivery order, Shandong made the port authority its agent to take delivery of the pulp on its behalf. I am quite unable to say that Ms Hosking's argument is so plainly right as to deprive Saga Forest of a real prospect of successfully defending on the basis of the time bar.
9. In those circumstances I do not need to deal with Mr Bovensiepen's additional argument on the clause in the bill of lading, nor with the question whether Saga Forest may have a real prospect of defending the claim apart from the time bar.
10. The only remaining issue of principle is whether Saga Forest's application fails for lack of promptness. CPR 13.3(2) expressly requires me to have regard to whether the application was made promptly. In all the

circumstances of the case I consider that it was. In a case where investigations were needed as to what happened in China it would be wrong to criticise Saga Forest's legal team for requiring several weeks in which to assemble the material necessary for the application. Ms Hosking's criticisms rightly focused on the period up to 4 January 2008 when solicitors were formally instructed by Saga Forest. This period, however, was interrupted by the Christmas and New Year holidays, prior to which there was inevitably some toing and froing among Saga Forest and Merchant and their P&I clubs. Ms Hosking complained of a lack of explanation on the part of Saga Forest, but the key points in my view emerge sufficiently from the evidence it has filed. In the circumstances that I have described, and looking at the period between 3 December 2007 and 23 January 2008 as a whole, the application was made promptly. Even if I had concluded that the application was not made promptly I would not have exercised my discretion adversely to Saga Forest, for a combination of the following reasons: the delay was not extreme, it caused no substantial prejudice to the claimants, and the claimants themselves had not brought the proceedings with expedition.

11. The claimants urged that the default judgment should only be set aside on terms requiring the payment of money into court. I decline to impose any such terms: this is a case where Saga Forest clearly have a real prospect of success and have applied promptly. There is no further factor in Saga Forest's conduct of the matter which would warrant imposing conditions other than as to costs.
12. As to costs and any other consequential orders I hope that the parties may be able to reach agreement, and I have given contingent directions in case this is not possible.

Ms Ruth Hosking (instructed by Clyde & Co, Guildford) for the claimants
Mr Daniel Bovensiepen (instructed by Swinnerton Moore LLP) for the defendants