He further submitted that the Hague and Hague Visby Rules have not been adopted and ratified in Sierra Leone therefore it is only the Hamburg Rules that are applicable. Counsel therefore relied on Articles 4 and 5 of the said Hamburg Rules in his submission that the period of responsibility of the carrier for cargo is at the port of loading during the carriage and at the port of discharge. He contended that in this case the Defendant was in control of the cargo from the port of Kakinada in India until the goods arrived at the Queen Elizabeth 11 Quay in Freetown.

Counsel further referred to the contract of purchase between the Plaintiff as buyer and **SEACOR COMMODITY TRADING LLC** as seller Exh BBB3 where the buyer guaranteed as part of the discharge terms to discharge at the rate stipulated in the said contract. He therefore argued that the period of responsibility for the carrier is when the goods arrived at the port. In this case the seller he submitted has agreed with the buyer that is the Plaintiff that the seller is responsible for the discharge of the cargo from the vessel. He therefore maintained that any damage that occurred whilst the cargo is being unloaded and whilst in the custody of the consignee is not the responsibility of the carrier.

The issue here is whether it is the Hague and Hague Visby or the Hamburg Rules which are applicable in this case.

Counsel for the Plaintiff in response to the submission made on behalf of the Defendant argued that the Hamburg Rules do not apply as they do not have the force of law in Sierra Leone since no date on which the Act should come into force has been fixed by the President by notice in the Sierra Leone Gazette as is required by the Constitution of Sierra Leone, 1991.

Alternatively, counsel for the Plaintiff argued that the court should not consider the said Hamburg Rules applicable as the Defendant in its statement of defence had pleaded that they relied on the Hague and Hague Visby Rules. He referred the court to Order 21 Rules 8(i) (b) and (c) of the High Court Rules 2007.

It is settled law that a party is bound by its pleadings. Counsel for the Plaintiff has relied on Order 21 Rules 8 (i) (b) which he submitted made it mandatory for a party to a cause in any pleading subsequent to a statement of claim to plead specifically any matter which if not specifically pleaded might take the other party by surprise or which raises issues of fact not arising out of the preceding pleading.

Counsel contended that the Plaintiff is taken by surprise by the Defendants reliance on the Hamburg Rules since they did not plead or rely on same in their statement of defence but rather had concurred with the Plaintiff that the Hague and Hague Visby Rules were applicable to the bills of lading.

The issue therefore is whether the Defendant's failure to plead that the Hamburg Rules are applicable to this case is fatal.

Clearly there is no doubt that the Defendants in their pleadings specifically relied on the Hague and Hague Visby Rules. Can the Defendants now in their submission depart from their pleadings and rely on a statute not pleaded thus taking the Plaintiffs by surprise and depriving them of the opportunity to meet the Defendant's case?

In answer to these submission, counsel for the Defendant referred the court to Order 21 rule 11 and submitted that it states a party may by his pleading raise any point of law. He argued that there is a difference between pleading a point of law and pleading a statute. He maintained that it is not imperative for the Defendant under the rules to have pleaded the statute.

With all due respect to counsel for the Defendant the main object of pleadings is for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the court to prove or defend. In as much as it is not imperative to plead a statute, in this case where the Defendant has specifically pleaded that he relies on a particular statute or statutory provision, he is bound by those pleadings. He cannot now at the trial submit that those provisions are not applicable.

In the circumstance the Hamburg Rules do not apply and the issue of notice as required under the Hamburg Rules is not necessary in this case. In any case there is no reference to the failure to give the required notice in the pleadings nor was the issue raised at the trial and only came up in counsel's written closing submissions.

Surely the said issue cannot now be seriously considered in the light of the fact that the parties had expressly agreed that the Hague and Hague Visby Rules should govern the contract between the parties.

The next issue for consideration is whether the Defendant is responsible for the loss and damage of the cargo in the quantum claimed by the Plaintiff.

There is no doubt that the Defendant has admitted responsibility for some of the loss and damage to the cargo. Counsel in his submission stated that it is their admission that the liability of the carrier is for the rice that short landed, the less in weight bags that were removed from the vessel when it has been reconditioned and the torn bags before handling. He denied that they were liable for torn bags during handling and shortage that occurred from the sound bags and the loss of quality claim.

The Defendants have also alleged that some of the Plaintiffs losses were as a result of stealing, pilfering and deliberate or negligent handling of the cargo of rice by the stevedores during discharge. Counsel for the Plaintiff stated that the theft and damage to the cargo during discharge are the responsibility of the Defendants in accordance with the Hague and Hague Visby Rules which both parties had agreed are applicable to the contract for the carriage of the Plaintiff's cargo.

Counsel referred to Article 3 clause 2 of the said Hague Rules which provides that

> *"Subject to the provision of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."*

Article III (2) of the Hague Visby Rules also makes similar provision. Counsel also referred the court to **Marine Cargo Claims** by **William Tetley Q.C** 2nd ed at page 249 where it states that

> *"Theft by the carrier or a crew member or other servant of an agent is the responsibility of the carrier by virtue of 4 (2)(q) ... "Stevedores" and other independent contractors are "agents" of the carrier and so the carrier is responsible for their theft as well."*

The law is therefore clear that stevedores are the agents of the carrier and any theft by them during discharge is the responsibility of the carrier. There is no evidence before the court that under the terms of the contract they are not liable for damage to the cargo of rice during discharge. Furthermore there is no evidence that the Plaintiffs were complicit in the theft of the rice by the stevedores as alleged by the Defendants.

Now there has been a lot of controversy about the figures shown in the several reports tendered before the court showing the number of bags short landed, torn bags before and during discharge, less weight bags and sound bags. Each party has sought to discredit the figures set out in the others report.

There is evidence that the Plaintiffs protested in writing to the Defendants on the 2nd February 2013 when during discharge a number of less weight bags were discovered and there followed an exchange of correspondence – See Exh BB to Exh DD. **ERGET** by letter dated 30th January 2013 also notified the Defendants of the discrepancy in weight of the cargo and they produced a report after completion of the discharge. See Exh EE [1-3] .

There is also evidence that the Plaintiff's solicitors wrote to the Defendants informing them that they intended to commence weighing the less weight bags and invited the Defendants to send a representative to witness and record the process –Exh HH. The Defendants declined the invitation but rather by letter dated 13th March, 2013 offered to pay the sum of US$ 200,000 by bank guarantee as security for the release of the vessel.

The Plaintiffs proceeded with the reconditioning of the rice which was done in the presence of the Defendants representatives. ERGET kept a daily report of the reconditioning - See Exh JJ to OO. Counsel for the Defendant has queried these daily reports and submitted that there is no differentiation in the said reports showing whether the reconditioning is for bags torn during handling or for bags torn before handling. He therefore submitted that it would be difficult to ascertain whether to treat the total number of torn bags before handling as complete loss or reconditioned.

However he admitted that the liability for the less weight bags that were delivered is with the carrier, the Defendant but that it is for the Plaintiff to show the court with certainty how many bags were recovered after the reconditioning, which ones were 5% broken, 25% medium and 25% long grain. He submitted that failure to so prove would amount to failure on the part of the Plaintiff to show the exact amount of damages to which it is entitled.

Counsel for the Plaintiff submitted that the reconditioning was done in the presence of ARPO the P & I club representatives of the Defendants and that the reports were countersigned by the said representatives as testified by the Defendants witness in cross-examination.

Counsel for the Plaintiff submitted that from the daily reports the Plaintiff produced a summary of its losses and damages suffered. These are contained in Exh PP1-5 and Exh QQ 1-5. The figures reflecting the number of bags of each category of rice short landed have not been controverted. Rather, it is the prices which have been and counsel for the Defendant has alleged that the cost of the rice per metric ton has been inflated. For instance, he states that according to Exh A6, the commercial invoice, the Plaintiff bought a metric ton of 5% broken rice at a cost of US$ 499 but the said price for that category of rice is stated in Exh PP1 as US$ 548. Exh A1 gives the cost for 25% medium grain at a cost of US$ 449 but in Exh PP2, the price is given as US$ 493 and the cost of 25% long grain is US$ 497 per metric ton. By his calculation he submitted that the Plaintiff is entitled to US$ 86, 446.6 for which the Defendant accept liability.

In answer to this submission, counsel for the Plaintiff contended that the Plaintiff is not claiming the purchase price of the cargo of rice and that he is entitled in law to the market price for the rice in Sierra Leone. He relied on **Payne & Ivamy's Carriage of Goods by Sea** 11th ed at pages 144 to 146 and Halsbury's Laws of England 3rd ed Vol. 35 paragraph 682 at page 679. He submitted further that the cost of rice in Sierra Leone is higher than the purchase price.

Let me say that there is evidence given by the Plaintiff's witness PW1 that the figures used are the insured value of the rice which is higher than the purchase price. Further that the insured price is the market price of the rice in Sierra Leone which has been accepted and paid by the insurers to the Plaintiffs. It is therefore reasonable for it to be used as the acceptable price.

With regards the Defendants defence that they are not responsible for the quantity and quality claims by the Plaintiff, counsel for the Defendant referred the court to the bills of lading, Exh E – K and submitted that in all of them "weight, measure, quality, quantity, condition, contents and value were unknown."

Counsel also referred to the certificates prepared by the Bureau Veritas Exhs L-R and submitted that in these certificates only the weight was certified after a random sample of 5% of the cargo of 9000 metric tons of rice was taken. He submitted that there is no evidence to show to the court that these bags which were delivered as sound were interfered with by the carrier.

He contended that the obligation of the carrier to deliver the goods as he received them absolves them of any liability because the said goods were received as sound. He went on further to say that the Plaintiff bought the rice on C.I.F and therefore any apparent loss is the duty of the insurers and not the carriers as the insurance policy is to protect the buyer against such loss. The carrier he submitted is not responsible to ascertain quantity and quality.

Counsel for the Plaintiff submitted that on the contrary, the certificates issued by Bureau Veritas who inspected the cargo in India did not disclose any deficiency in the said cargo. He referred to the testimony of PW1 that it was standard practice to take a random sample of 5% of the cargo in checking for defects and that this number is only increased if defects are discovered during the inspection of the 5%. As counsel for the Plaintiff submitted, this piece of evidence was not challenged or controverted, it is therefore accepted as the factual situation.

In the circumstance there is sufficient evidence before the court that the cargo was loaded on the Defendant's vessel in good order and condition with an average weight of 50.140 kgs.

Now the Plaintiff has relied on the doctrine of *res ipsa loquitur*. Since the cargo was handed over to the Defendants in good order and condition, they have failed to prove that they are not responsible for the damage to the cargo whilst in their custody.

Indeed the Plaintiff's witness testified to the observations made when they went on board the vessel before discharge commenced. He said the inspection was done in the presence of the Chief Officer and the Captain and they took photographs of the state of the cargo in the hatches. The photographs were tendered as Exh $S^{1-11}$ and Exh $T^{1-15}$. He described the condition of the rice in the hatches and it was clear from his testimony that some of the rice was not in good condition and had been interfered with. This testimony is also corroborated by the report of **ERGET SCT SARL** the representatives of the Plaintiff's insurers, Exh Z which stated inter alia "that the cargo was not in apparent good order and condition as they noted bags with less in weight, torn bags and few torn empties during surface inspection. Hatch covers and manholes closed without seals/padlocks. Lots of weevils noted and plenty of bags noted less in weight."

Furthermore there is evidence that the voyage from India to Sierra Leone was unreasonably long and no explanation was provided for this by the Defendants.

In sum the Defendants have failed to prove that they are not responsible for the loss and damage caused to the Plaintiff's cargo either whilst the said cargo was stored in the hatches and during discharge.

The Defendants have strenuously queried the figures shown in Exh $PP^{1-5}$ and QQ 1-5, the summary of the Plaintiff's losses and damages suffered. Counsel for the Plaintiff in his submission explained that Exh PP1-5 are a breakdown of the Plaintiffs claim for both the insured and the uninsured losses and that Exh PP5 is a summary of all the claims contained in Exh PP1-PP4.

Counsel for the Defendant submitted in respect of the said sound cargo that "Now assuming without conceding that the loss that was discovered is the responsibility of the carrier, it is my submission that the evidence in support of it is so inconsistent and full of discrepancies". Counsel went on to great lengths to query the figures in Exh PP1-5 and QQ 1-5. He contended that the Plaintiff is repeating his claim for marine claim with those of actual loss. He gave examples of this as follows

*"Marine claim in Exh QQ1 is the same as the claim for loss in Exh PP1 first three claims that is 541 bags, 269 bags and 866 bags*
*Marine claim in QQ4 is the same as Exh PP2. First three claims 1105,262 and 1336.*
*Marine claim Exh QQ5 is the same as PP5 first three claims 2137, 637 and 2150.*

*Exh QQ2 is the cost of reconditioning.*

*Exh QQ3 is recapitulation of the loss in 5% grain 25% grain and 25% long grain.*

*How can both constitute separate claim is incomprehensible because it is just a recapitulation of the loss stated in PP2 and 3. It really is not a fresh or different claim"*

Let me quote counsel for the Plaintiffs' response

> *"Exhibit PP1 to PP5 inclusive are a breakdown of the Plaintiffs claims for both insured and uninsured losses. Counsel would like to bring the court's attention to the fact that contrary to the submissions of counsel for the Defendant in his address:*
> *Exhibit PP1 is in respect of losses for premium long grain white rice 5% broken.*
>
> *Exhibit PP2 is in respect of long gain white rice 25% broken.*
>
> *Exhibit PP3 is in respect of losses for medium grain white rice 25% broken.*
>
> *Exhibit PP4 is in respect of the costs of reconditioning of the cargo of rice and*
>
> *Exhibit PP5 is a summary of all claims contained in Exhs PP1 to PP4 inclusive.*

The Plaintiff has divided his losses between those which are insured and those which are uninsured. In this regard counsel refers the court to the following exhibits.

> *Exhibit QQ3 is in respect of the insured losses which were suffered by the Plaintiff for which the Plaintiff has been paid the sum of US$236, 284.*

*Exhibit QQ1 is in respect of the uninsured losses suffered by the Plaintiff for premium long grain white rice 5% broken.*

*Exhibit QQ4 is in respect of the uninsured losses suffered by the Plaintiff for long grain white rice 25% broken*

*Exhibit QQ5 is in respect of the losses suffered by the Plaintiff for medium grain white rice 25% broken.*

*Exhibit QQ2 is the cost of reconditioning of the rice*

*Exhibit QQ3 is in respect of insured losses"*

The above is adequate answer to the queries raised by the Defendant's counsel.

It is my view that the Plaintiffs have provided sufficient evidence to support their claim for the loss and damage suffered by them to their cargo. They have also satisfactorily established that the responsibility for the said loss and damage is with the carrier, the Defendants.

There is evidence that the Plaintiffs have received compensation from the insurers in the sum of US$ 236, 284. A sum less than the amount claimed by the Plaintiff. The Plaintiffs are therefore entitled to recover the difference between the two amounts. The Plaintiffs have summarised their loss in Exh PP5 and it amount to US$ 867,881.28. The Plaintiffs are entitled to recover the difference between the two sums of US$ 867, 881.28 and US$ 236, 284 amounting to US$ 631,597.28.

Judgment is accordingly given in favour of the Plaintiff as follows

1 The Plaintiff is to recover damages for breach of contract for carriage of cargo of rice between the parties in the sum of US$ 631, 597.28.

2. Interest on the said damages at the rate of 5% per annum from 4th February 2013 the date of the writ of Summons until Judgment pursuant to the Law Reform (Miscellaneous Provisions) Act, Cap 19 of the Laws of Sierra Leone.

3. Costs to the Plaintiff to be taxed if not agreed upon.

A. Showers
10/4/2014

**A. SHOWERS**
**JUSTICE OF COURT OF APPEAL**