IN THE HONORABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA
SITTING IN ITS MARCH TERM, A. D. 2018

BEFORE HIS HONOR: FRANCIS S. KORKPOR, ...CHIEF JUSTICE
BEFORE HIS HONOR: KABINEH M. JA'NEH ....ASSOCIATE JUSTICE
BEFORE HER HONOR: JAMESETTA HOWARD-WOLOKOLIE......ASSOCIATE JUSTICE
BEFORE HIS HONOR: PHILIP A.Z. BANKS, III ....ASSOCIATE JUSTICE
BEFORE HER HONOR: SIE-A-NYENE G. YUOH ....ASSOCIATE JUSTICE

Liberia Cement Corporation, by and thru its General Service Manager, Attorney James D. Gibson, of the City of Monrovia, Liberia..................................Appellant

VERSUS

M/V Blue Lady, Common Carrier, represented by African Marine Services, by & thru its General Manager, Mr. Korklo Anderson, also of the City of Monrovia, Liberia..1st Appellee

AND

British Marine Luxemburg S.A., represented by African Marine Services (Lib) Ltd, represented by Mr. Henry N. Brunson, also of the city of Monrovia, Liberia ....2nd Appellee

APPEAL

GROWING OUT OF THE CASE:

Liberia Cement Corporation, by and thru its General Service Manager, Attorney James D. Gibson, of the City of Monrovia, Liberia...................................Libellant

VERSUS

M/V Blue Lady, Common Carrier, represented by African Marine Services, by & thru its General Manager, Mr. Korklo Anderson, also of the city of Monrovia, Liberia..1st Libellee

AND

British Marine Luxemburg S.A., represented by African Maine Services (Lib) Ltd, represented by Mr. Henry N. Brunson, also of the City of Monrovia, Liberia ....2nd Libellee

ACTION OF DEBT

HEARD: October 29, 2015.

DECIDED: August 6, 2018.

MR. JUSTICE BANKS DELIVERED THE OPINION OF THE COURT.

The parties herein are not in dispute as to the damages incurred by the libellant/appellant at the negligence of the 1st libellee/1st appellee. Rather, they are in disagreement as to monetary value of said damages. The libellant/ appellant believes that the full amount of damages was established with certainty, while the 1st and 2nd libellees/appellees are of the belief that further steps are required for the determination of any amount due. While this Court's resolution of these controversies would bring finality to the matter before us and render appropriate legal remedy to the injured party, we are compelled by customs and tradition to pause at this point and undertake a thorough review of the facts in a chronological sequence.

MV Blue Lady, a common carrier, the 1st appellee herein, received certain quantity of cement from a company called 'Scancen International Heidelberg Cement Group and agreed to transport and deliver the cement to the Liberia Cement Corporation (CEMENCO), the appellant herein, at the Free Port of Monrovia. On September 19, 2008, while discharging the cement, it began to rain and as a result of the rain, water entered hatches 2 & 5 of the 1st appellee's vessel and caused damage to certain quantity of the appellant's cement. The parties do not dispute that the entry of the water into the hatches and the damages thereof were occasioned by a breakdown in the hydraulic machine, hatches 2 & 5, of the 1st appellee prior to the rain, thereby making it impossible on the part of the 1st appellee to prevent the damage caused to the cement of the appellant.

On September 21, 2008, upon request of the appellant, CEMENCO, a joint survey was conducted for the purpose of verifying the cause and extent of the damaged cargo (bagged cement) in hatches 2 and 5 as a consequence of the rain. On September 24, 2008, the joint survey statement was produced, which confirmed that indeed certain quantity of cement in hatches 2 & 5 was damaged by the rain, and that the damage was caused by the breakdown in the hydraulic system of the 1st appellee during the pour of the rain on September 19, 2008. The joint survey statement however failed to expressly state the quantity of cement that was damaged and the monetary value thereof. Notwithstanding, all the parties agreed that the damaged bags of cement be discharged and transported to CEMENCO clinker's shed for separation and final count of the damaged bags. The joint survey statement being relevant to the disposition of the case, we quote same below to wit:

September 24, 2008
JOINT SURVEY STATEMENT
M/V "BLUE LADY"
his is to certify that a joint survey was attended on September 21, 2008 upon the request of the receiver, Messrs. CEMENCO on board M/V "BLUE LADY" for the purpose of verifying the cause and extent of damaged cargo (bagged cement) in hatch Nos. 2 and 5 affected by the rain water as a result of the hydraulic system breakdown during a down pour of rain
19, 2008 at 2315hrs.
In attendance: were the following surveyors:

1. Mr. Julius Cee	*Receiver Surveyor*
2. Mr. Roland F. Dakagboi	*P&I /Owners Surveyor*
3. Mr. Henry N. Brunson	*P&I /Owners Surveyor*
4. Capt. Ali Ocal	*Marine Superintendent/FT Maritime*
5. Capt. Yamak Isa	*Master*
6. Dilmen Banki	*Chief Officer*
7. Mr. Borj'e Thomsson	*CEMENCO Representative*
8. Michael Nimley	*Owners Tally Clerk*

The joint inspection in hatch No 2 portside commenced at 1450 hrs. and ended at 1502hrs.

<u>OBSERVATION</u>

During the joint inspection in hatch No 2 portside it was observed that lawyers of plastic sheets and tarpaulin were used to cover the Jumbo polyethylene sling bag packed with 30X50kg paper bags of cement which contained rain water that had entered the hatch.
The joint inspection in hatch No.5 commenced at 15:13hrs and ended at 1520hrs.
A few jumbo sling bags on the first tier were appearing caking and harden from rain water.

<u>CONCLUSION</u>

It was finally agreed by all parties that the alleged damaged/ hardened and cake bags will be discharged; transported to CEMENCO clinker's shed for separation and final count of alleged damaged/hardened bags.

Capt. Yamak Isa
M/V Blue Lady
Capt. Ali Ocal
Marine Superintendent/FT Maritime
Mr. Julius Cee
Receiver surveyor
Mr. Roland F. Dakagboi
P&I/Owners Surveyor
Henry N. Brunson
P & I /Owners Surveyor

Telephone +44(0)2077488 1024
Facsimile +44 (0)207481 1812
Socicie Anonyme RSC 71026
To: Cargo Owners,
Liberia Cement Corporation
and or their Assignees
Dater 13th October 2008
LETTER OF UNDERTAKING
Dear Sir,

Ship	*: "BLUE LADY"*
Voyage	*: Monrovia, Liberia on 21.08.2008*
Bill of Lading	*:B/L no. issued at Canakkale 21.08.2008*
Nature of claim	*: Alleged wet damaged*
Cargo	*:14299.500m/t of Bagged Cement in slings*
Our Ref	*: 2008001403*

In consideration and the Owners of and other parties entitled to sue in respect of the above mentioned claims concerning cargo referred to above (hereinafter together referred to as "Cargo Owners") refraining from taking action resulting in the arrest of the above-mentioned ship or any other ship in the same Ownership, associated Ownership or management for the purpose of funding jurisdiction and or obtaining security in respect of the above claims of the cargo owner concerning the cargo mentioned above and of the cargo owner refrain from commencing and/or persecuting legal arbitration proceedings in respect of the above claims (otherwise than before the court of tribunal referred to below) against TT Denizcilib San. ve Tic A.S. and TT Maritime Industry & Trading Inc., the Owners of the owner of the above name ship and/or the ship, we hereby undertake to pay you on demand on and such sums as may be adjudged from Owners of the above-mentioned ship and/or M/V "Blue Lady" to be due to cargo owners by award or order of a properly constituted London Arbitration Tribunal or a maybe agreed to be recoverable from the Owners of the above-named ship in respect of the said claims provided that the total of our liability shall not exceed the Sum of US180,000.00 one hundred eighty thousand United States Dollars) inclusive of the interest and costs. And for the consideration aforesaid:

1. We hereby warrant that we are informed by Owners of the above-named ship that the above-named ship was not demise chartered at any material time.

2. We further undertake that we will, within 14 days of the receipt from you of notice Of appointment of an arbitrator on behalf of the cargo owners appoint an arbitrator on behalf of vessel Owners. The two so chosen shall have the power to appoint an Umpire and in the event of a disagreement the decision of any two arbitrator to be deemed final. Failure on the part of the ship Owners to appoint an arbitrator within the 14 days specified shall leave cargo owners" appointed arbitrator as sole arbitrator. Those chosen all to be commercial men.

3. We confirm that the Owners of the above-named ship agree that the above mentioned claims shall be subject to English Law and the exclusive jurisdiction of the tribunal referred to above and to the and the supervisory jurisdiction of the English High Court.
4. We warrant that we have received irrevocable authority from the owners of the above named ship to appoint arbitrator as aforesaid and to give an undertaking in these terms.
This undertaking shall also be governed by and construed in accordance with English Law and we agree to submit to the exclusive jurisdiction of the English High Court of Justice for the purpose of any process for the enforcement hereof.
Yours faithfully
S. R. Kirk
For and on behalf of British Marine Luxembourg S. A.

The records do not reflect that the damaged bags of cement were immediately discharged and transported to the appellant's warehouse for sorting and determination of monetary value as recommended by the joint survey committee. Rather, we see from the records a communication between the parties regarding the obligation to pay for the transportation of the affected cement to the appellant warehouse for sorting and email exchanges indicating that in order for the 1st appellee's vessel to depart Liberia, a payment guarantee for the damaged cement upon sorting needed to be tendered by the 1st appellee. We hereunder reproduce three of those communications:

OCEAN GROUP OF COMPANIES (LIBERIA) INC
Ocean Group of Companies
131 Broad Street, Crown Hill — P. O. Box 10-31-1
1000 Monrovia 10 Liberia
Tel: +231-6-974319 EMAIL:oceangroup@consul.com
REP: Protest/04/BL/09/08
The Master
BLUE LADY
BMC Pier
Monrovia, Liberia
September 24, 2008
Greetings!
Receiver, is very concern about the absents of letter that we should have by now received from you as promised an Sunday, regarding cargo from match 1 and 5 that is being taken to receivers warehouse for sorting and tallying. Unfortunately, this has not happened.
In this regard, we acting on behalf of receiver, request said communication forthwith or stop discharge in the affected hatches — 1 and 5 and an invoice will be raised, for the present work done

in the transportation, etc. of the cargo to the ware houses by our principals for settlement by vessel.
Please take note and act accordingly.
Best regards.
D. Julius Cee
ATTENDING SURVEYOR
CC AGENT
RECEIVER"

On October 13, 2008, in consideration of the payment guarantee and in order to allow the 1st appellee's vessel depart the Republic of Liberia, the British Marine Luxemburg S.A., the 2nd appellee herein, tendered a letter of undertaking promising to pay the appellant an amount not exceeding US$180,000.00 (One Hundred Eighty Thousand United States Dollars) upon the appellant satisfactory sorting and determination of the damaged cement and the attending monetary value. The letter of undertaking also promised to pay the appellant such amount as may be adjudged by the 1st appellee to be due the appellant or on order of a properly constituted London Arbitration Tribunal or as may be agreed to be recoverable from the 1st appellee in respect of the damaged cement provided that the total amount of liability shall not exceed the Sum of US$180,000.00 (One Hundred Eighty Thousand United States Dollars). The letter of undertaking further stated that claims of the appellant for which the letter is tendered shall be exclusively governed by English Law; cognizable only before a Board of Arbitration in London and supervise by the English High Court.

The letter of undertaking being the basis of the appellant's claim, we herein quote same below, to wit:

LETTER OF UNDERTAKING
Dear Sir:
Ship : "BLUE LADY"
Voyage : Monrovia, Liberia on 21.08.2008
Bill of Lading :B/L no. issued at Canakkale 21.08.2008
Nature of claim : Alleged wet damaged
Cargo :14299.500m/t of Bagged Cement in slings
Our Ref : 2008001403
In consideration and the Owners of and other parties entitled to sue in respect of the above mentioned claims concerning cargo referred to above (hereinafter together referred to as "Cargo Owners") refraining from taking action resulting in the arrest of the above-mentioned ship or any other ship in the same Ownership, associated Ownership or management for the purpose of funding

jurisdiction and or obtaining security in respect of the above claims of the cargo owner concerning the cargo mentioned above and of the cargo owner refrain from commencing and/or persecuting legal arbitration proceedings in respect of the above claims (otherwise than before the court of tribunal referred to below) against TT Denizcilib San. ve Tic A.S. and TT Maritime Industry & Trading Inc., the owners of the above name ship and/or the ship, we hereby undertake to pay you on demand on and such sums as may be adjudged; from owners of the above-mentioned ship and/or M/V "Blue Lady" to be due to cargo owners by award or order of a properly constituted London Arbitration Tribunal or a maybe agreed to be recoverable from the Owners of the above-named ship in respect of the said claims provided that the total of our liability shall not exceed the Sum of US180,000.00 one hundred eighty thousand United States Dollars) inclusive of the interest and costs. And for the consideration aforesaid:

1. We hereby warrant that we are informed by Owners of the above-named ship was not demise chartered at any material time.
2. We further undertake that we will, within 14 days of the receipt from you of notice of appointment of an arbitrator on behalf of the cargo owners appoint an arbitrator on behalf of vessel owners. The two so chosen shall have the power to appoint an Umpire and in the event of a disagreement the decision of any two arbitrator to be deemed final. Failure on the part of the ship owners to appoint an arbitrator within the 14 days specified shall leave cargo owners" appointed arbitrator as sole arbitrator. Those chosen were all to be commercial men.
3. We confirm that the owners of the above-named ship agree that the above mentioned claims shall be subject to English Law and the exclusive jurisdiction of the tribunal referred to above and to the and the supervisory jurisdiction of the English High Court.
4. We warrant that we have received irrevocable authority from the owners of the above named ship to appoint arbitrator as aforesaid and to give an undertaking in these terms.

This undertaking shall also be governed by and construed in accordance with English Law and we agree to submit to the exclusive jurisdiction of the English High Court of Justice for the purpose of any process for the enforcement hereof.

Yours faithfully,

S. R. Kirk

For and on behalf of British Marine Luxembourg S. A.

On December 5, 2008, approximately three (3) months following the joint survey report recommending the sorting of the goods and about two (2) months after the letter of undertaking mentioned above, the appellant submitted its report on the separation and sorting of the cement alleged to have been damaged at the negligence of the 1st appellee. Like the joint survey report, the appellant's report fell short of mentioning any monetary value of the damaged bags of cement. The appellant's report simply stated the damaged bags of cement in metric tons and slings; that the loss determined to the cargo was at 1225.5 metric tons making 817 slings, affected by the rain. There is no indication in the report as to the monetary value of the '1225.5 metric tons making 817 slings.' As we did in regard to the joint survey report, we also reproduce the appellant's sorting report as follows:

"OCEAN GROUP OF COMPANIES (LIBERIA) INC.
M/V BLUE LADY
At Monrovia on Nov. 23rd— Dec. 4TH 2008
Discharge of Damaged 85,620 BAGS CEMENT
Stw 4281Mt. Tons
D. Julius S. Cee — Attending surveyor
131 Broad St./Crown-Hill —PO. Box 10-3191-- 1000 Monrovia, Liberia

We undersigned, D. Julius S. Cee, Surveyor acting at the request and on behave of CEMENCO (Receiver), duly attended on board and at the ware house the:

M/V BLUE LADY
CLINKER SHED
CEMENCO

While she lay safely afloat alongside the port of Monrovia, 20th Sept. 2008 and subsequent days in order to:

Carry out the caption rain affected cargo in hatches 2 and 5 amounting to 4281l metric tons 358 slings) 85,620 bags of 50kg cement transported to receiver's ware house:

Carryout survey and sorting of captioned cargo at the ware house of the receiver CEMENCO;

Determine by sample observation, opening of bags, feeling by hands the cause and extend of damage to the cargo;

Take photos

Issue a report there from

HEREAFTER DECLARE:

INTRODUCTION

As per information obtained from the ship's Command, from perusal of the documents and from our own observation, we learned and/or noted the following:

GENERAL INFORMATION

Ship's name	:M/V BLUE LADY"
Flag / Port of Registry	:Panama
IMO no / call sign	:7533109/H8HJ
Built	: 1977
Hatches covers type	:Ermans Steel Rolling
Cargo gears each	: 4 – cranes swl 20mt
Owners	: Viking Marine S. A.
Operators	:Priamos Maritime S. A.
Master	: Capt. Yamak Isa

Chief Officer	: Mr. A. Shataev
Agents / Stevedores Agency	: Atlantic Maritime
Date / Place of survey at receiver's ware house	: Nov. 23-4th Dec. 2008

Documents attached

- Ship's particulars	(1 page)
-Crew List	(1 page)

"M/V BLUE LADY"

PARTICULARS OF CARGO

DESCRIPTION AND APPORTION OF CEMENT BAGS

Bs/L no.	shippers	consignee	Cargo delivered to	Bags/weight (MT)	Description of goods
B/L No. -01	Akcansa Cimento SAN VETIC A. S. on behalf of H. C. Trading Malta Limited on behalf of Redventure Services Limited	Liberia Cement Corporation	Liberia Cement Corporation	50Kg or 4.281Mt Net	Ordinary gray Portland bags Cement 32.5 R CEM VA
Total	Bags 85,620 Net Mt. 4281				

Documents attached

Bill of lading (01 page)

Export Cargo Manifest (01 page)

DISPATCH OF THE CARGO IN HOLD AS PER STOWAGE PLAN

Hatch 2 - : 3217.5 Mt Net

Hatch 5 - : 1387.5 Mt. Net

Total : 4605 Mt. Net

Documents attached

Cargo plan (1page)

SURVEY ON BOARD VESSEL

On September 21st 2008, from 14:hrs to 15:20hrs, we performed a joint survey in the two hatches of the cargo in presence of:

Attending parties

- Vessel's Captain – Yamak Isa
- Marine Superintendent/FT Maritime – Capt./ Ali Ocal;
- Africa Marine Services – P – I Roland Dakagboi & Henry Brunson
- Ourselves, Receiver's surveyor

OUR FINDINGS

Cargo (50kg bags of cement) was found:

- loaded "50kg bags of Cement (Ordinary Portland) in the two hole water trace ingress/wet bags were observed during cargo survey;
- extra plastic covering with large quantity of water, with buckets and crew men dapping out water from the covering on the top of the slings was observed, during the vessel joint survey.

Document attached

Joint survey statement, vessel (3 pages)

SORTING/SURVEY PROCEDURES AT WAREHOUSE

November 23 — December 4, 2008

The affected consignment was discharged in the receiver's wale-house with assisting with the opening up, of bags and sorting of bags, for 12 hours daily hands and feeling for rocks and wetness of the cargo.

The cargo was packed in sling loads of 30 bags/ 1.5 Mt in the receiver's ware-house before being opened on the ground in the warehouse provided by receiver for that purpose and lifted by yellow machine, assisted by labourers.

The cargo was opened up from the sling laid on the ground in rolls of tens and cut opened searched for hard wetness, etc., by hands.

RESULTS AND EXTIMATED GAIN/LOSS

Breakdown of damages at ware house

Sound bags : 3055.5
Developing rocks : 200.0 - 10 - 25%
Partly caked : 500.0 - 25 - 50%
Fully Developed rocks : 885.5 - 50 - 100%

Total alleged damaged M/Tons discharged at ware house
4281 - Mt.Net
Total Sound
3055.5 - Mt.Net
Total Damage (General)
1225.5 - Mt.Net

Appraisal of loss rate

Having taken 25% of alleged damaged bags at random amongst all those presented and opened them so as to have an accurate idea of the average salvaged damage, we have been to determine cargo depreciated rate as follows:

Breakdown of Losses

	Number Metric Tons	Gross rate percentage
Sound bags	3055.5	-0-%
Stone Developing	200	40%
Partly harden/caked	500	60%
Harden caked	885.5	100%
Total bags	4281	

CAUSES OF DAMAGE TO THE CARGO

As a result of rain water entering the hatches on 20th September 2008, while discharging bags cement at the Port of Monrovia to the Liberia Cement Corporation.

CONCLUSION

Having sampled 10% (81.7) of 4281 metric tons of alleged damaged bags transported to the receiver's ware house, after survey and sorting, we firmly determine the loss to the cargo at 1225.5 metric

tons making 817 slings, affecting by rain water. The 1225.5 hard caked cement can only be used as filler.
In witness whereof this report is issued to, serve and avail where a whenever enquired without prejudice.
Issued at Monrovia, Liberia, December 5, 2008
The surveyor
By: D. Julius S. Cee

Almost eight (8) months following the above mentioned report, on July 28, 2009, the appellant's lawyer, Counsellor Nyenati Tuan, addressed a letter of demand to Mr. Henry N. Brunson, of the Africa Marine Services (Lib.) (Ltd), an agent of the 2nd appellee, British Marine Luxemburg S.A. In that letter, Counsellor Tuan claimed that the 2nd appellee was indebted to the appellant in the amount US$180,000.00 (One Hundred Eighty Thousand United States Dollars), the full amount stated in the letter of undertaking tendered by the 2nd appellee, and demanded payment of the amount within seven (7) days as of the receipt of the letter. Counsellor Nyenati Tuan's letter is quoted below:

"TWLF/NT/CLLR/350/09
July 28, 2009
Mr. Henry N. Brunson
Africa Maine Services (Lib.) LTD.
P & I Correspondent
80 Broad Street
Monrovia, Liberia
Dear Mr. Brunson:
INRE: MN "BLUE LADY" BERTHED ON THE 9.09.08 AT MONROVIA PORT
Our client, the Liberia Cement Corporation, a corporate entity duly organized and exiting under the Association Law of Liberia has brought to our attention that your institution represent British Marine as per photo copy of a Letter of understanding (LOU) dated the 13th day of October, A.D. 2008 and other documents delivered to us for our perusal, attention and subsequent action.
A review of the dossier shows that your principal, British Marine, insurer for TT Maritime Industry and Trading Inc. owner of the vessel M/V Blue Lady is indebted to our client, the Liberia Cement Corporation in the just sum of One Hundred Eighty Thousand United States Dollars (US$180,000.00) which amount is long overdue and has therefore instructed us to collect same.
Given the fact that insurance contracts is made between the insured and the insurer for the benefit of a third party against risk of loss, damages or liability arising from the occurrence of a specified contingency, we herewith demand payment of the amount of One Hundred Eighty Thousand United States Dollars (US$180,000.00) within Seven (7) days as of the receipt of this letter via our offices for our client's collection. Should your principal fail to comply, we

shall proceed forthwith to protect our client through the necessary Court action by attachment without further reference to you. We hope that this would not be necessary in that would do the needful.
Kind regards.
Very truly yours
Nyenati Tuan
COUNSELLOR-AT-LAW
CC: Client

On July 30, 2009, Mr. Brunson replied Counsellor Tuan's letter and requested the appellant to provide evidence of the alleged loss, e.g., copy of the appellant's survey report and a copy of the official out turn; evidence of the value of the alleged claim-e.g., a copy of the commercial invoice for the cargo and any other supporting documents as to the cause of the alleged damage and value of the claim. Mr. Brunson's letter of reply is also quoted below:

"AFRICA MARINE SERVICES (LIBERIA)
C/o Business Incubator Plaza - 80 Broad Street - P. O. Box 10-5697 - 1000 Monrovia 10 – Liberia
Tel.: (231) 226611- Fax; (231) 226204- Mobile: + (231) 6511 644, + (231) 6 513 423
+ (231)7511644&+ (231)6514606.
July 30, 2009
TUAN WREH LAW FIRM
Corner, Broad & Gurley Streets
P.O. Box 10 — 677
1000 Monrovia 10, Liberia
Your ref: TWLF/NT/CLLR/350/09
WITHOUT PREJUDICE
Dear Sirs,
RE: BLUE LADY - at Monrovia, Liberia September 2008 — Bagged cement claim USD 180,000
We thank you for your letter dated 28th July 2009. In order that we can deal with your clients' claim promptly, please supply the following documents by return:-
1. Evidence that cargo was carried on the vessel — e.g. Copies of Bills of Lading
2. Evidence of your alleged loss — e.g. a copy of your survey report and a copy of the official out turn.
3. Evidence of the value of your alleged claim - e.g. a copy of the Commercial Invoice for the cargo.
4. Any other supporting documents as to the cause of the alleged loss and value of your alleged loss.
We look forward to hearing from you as soon as possible. Upon receipt of the above documentation, we will consult our principals immediately and revert with their proposals.
Yours faithfully,
Henry n. Brunson

Africa Marine Services (Lib.) Ltd.
P & I Correspondent."

There is no indication in the records showing that the appellant or its counsel, Counsellor Nyenati Tuan, complied with the request of Mr. Brunson by producing the documents requested which would have settled the controversy. Instead we see from the records that on August 19, 2010, more than a year after the seven (7) day demand letter, the appellant filed a complaint of an action of debt by attachment in the Debt Court for Montserrado County, sitting in its September term, A. D. 2010, substantially alleging that by virtue of the letter of undertaking executed by the 2nd appellee, the appellant was entitled to recover the full amount of US$180,000.00 (One Hundred Eighty Thousand United States Dollars). We quote the appellant nine (9) counts complaint as follows:

"__LIBELLANT'S COMPLAINT__

Libellant in the above entitled cause of Action complains of Libellees in the form and manner to wit, follows:

1. Libellant and 1st Libellee, owners of M/V "Blue Lady", a common carrier with whom Scancen International Heidelberg Cement Group, principal of Libellant for and on behalf of Libellant entered into a marine contract by which means 1st Libellee M/v "Blue Lady" as per Invoice #60801613 received from Scancen International Heidelberg Cement Group and agreed to transport and deliver to the Liberia Cement Corporation at the Free Port of Monrovia, Fourteen Thousand, Two Hundred Ninety Nine point Fifty (14,299.50 MT) metric tons of ordinary gray Portland Cement in good condition and which were loaded on said vessel for Monrovia as would more fully appear from the said invoice hereto attached as Exhibit "P/1" forming a cogent part of this complaint.

2. That further as to count one (1) above, and in keeping with the original Bill of Lading issued on the 21st day of August, A.D. 2008 at Canakkale, Turkey, the total quantity of Fourteen Thousand, Two Hundred Ninety Nine point Fifty (14,299.50 MT) metric tons of ordinary gray Portland Cement was placed on board M/V "Blue Lady" at Canakkale, Turkey destined for the Free Port of Monrovia. Please find attached copy of said Original Bill of Lading as Exhibit "P/2" forming an integral part of this Complaint.

3. Libellant further maintains and says that upon the arrival of the subject vessel at the Free Port of Monrovia, and during the discharge of the cargo therein, employees of 1st Libellee were negligent coupled with the breakdown of the hydraulic, machine, hatches #2 &5 prior to the rain fall which resulted into a sizable quantity of cement in hatches #2 & 5 been damaged; that in furtherance of this development, a letter was written to the owners of M/V "Blue Lady" via Atlantic Marie Agency informing her of the damaged done to Libellant's cargo. Find herewith attached as

Exhibit "P/3", copy of said letter over the signature of the Managing Director of Libellant addressed to the owners.

4. And also as to count three (3) above, 2nd Libellee insurer for 1" Libellee in an effort to mitigate losses mutually agreed that the consignment of cement in hatches It 2 & 5 on board M/v "Blue Lady" be taken to Libellant's warehouse to conduct a survey for sorting. Find hereto attached copy of a joint survey statement conducted on the 24th day of September, A.D. 2008 as Exhibit "P/4" in bulk.

5. Libellant says that according to customs in International Trade through carriage of goods by sea, states that in the event that there is damage to goods brought by a vessel to a particular port, the parties should take the necessary action to protect their rights against the cargo under writer or the ship owners by the following a) calling the insurance surveyor for a joint survey with the owners or with the P&I representative, b) hold the master/owners liable for the damages; c) obtain a P&I guarantee from the ship owners covering the damages before the vessel sails. That in consequence of the damage done, the British Marine Luxembourg S.A. issued a Letter of Understanding on the 13th day of October, A.D. 2008 to pay unto Libellant the sum of One Hundred Eighty Thousand United States Dollars (US$180,000.00), all traced to the negligent and willful conduct of in Libellee's employees Find attached as Exhibit "P, 5" copy of said Letter of Understanding forming a component part of this complaint.

6. That further as to Count Five (5) above, surveyors of Libellant and P&I Club of British Marine conducted further independent surveys to verify and cross checked the authenticity which was proven correct. Fine herewith annexed as Exhibit "P/6" on bulk surveys conducted forming a component part of this complaint.

7. Libellant says that 1st Libellee has breached its obligation, duty under the Bill of Lading and under the general principle of law governing carriage of good by sea and that 2"d Libellee, insurer of 1" Libellee is indebted to Libellant in the amount of One Hundred Eighty Thousand United States Dollars (US$180,000.00) plus interest.

8. And also as to Count Six (6) above, Libellant says that due to the refusal of 2nd Libellee to honor her just and legal obligation on behalf of in Libellee to Libellant, a letter of demand was written by Libellant's representative, demanding the amount of One Hundred Eighty Thousand United States Dollars (US$180,000.00), find hereto attached copy of said Letter of demand as exhibit "L/6" and hereby gives notice that at trial a subpoena would be prayed fro the production of the original.

9. Libellant says that this action is one that calls for money judgment enforcement under subchapter B of Chapter 44 and that 1st Libellee is not a domiciliary but transacted business in Liberia; without an attachment final judgment could be ineffective and unenforceable. To enforce the attachment, Libellant has posted a bond of Two Hundred Seventy Thousand United States Dollars

(US$270,000.00) as requested by statute to indemnity 1st and 2nd Libellees of all cost and injuries arising out of this action of Debt by Attachment.

WHEREFORE AND IN VIEW OF THE FOREGOING, Libellant prays court to enter a judgment against 1st and 2nd Libellees in amount of One Hundred Eighty Thousand United States Dollars (US$180,000.00) plus Six (6%) percent interest and to grant unto Libellant any and all further relief that your Honor may deem just and equitable in the premises.

RESPECTFULLY SUBMITTED, the above
named Libellant, by & thru his Counsels:
TUAN WREH LAW FIRM,
P.O. Box 677, Monrovia, Liberia.
Counsellor-At-Law
Dated this 19th day
of August, A.D. 2010.

On the same day, August 19, 2010, Judge James E. Jones ordered the issuance of a writ of monition ordering the appellees to file their formal returns or appearance on or before the 29th day of August, A.D. 2010. Judge Jones also ordered the issuance of a writ of attachment against appellees to the amount of US$270,000.00 (Two Hundred Seventy Thousand United States Dollars), which according to him, accounted for the actual amount sued for and cost of the proceedings. The records show that the both writs of monition and attachment were served on the 1st appellee, by and thru its general manager, Mr. Korklo Anderson, and on the 2nd appellee, thru its agent/representative, Mr. Henry N. Brunson. However, none of the appellees, libellees below, filed answers to the complaint. Thus, on September 14, 2010, the appellant obtained a Clerk's Certificate indicating that the appellees had failed to file answers to the complaint.

On October 11, 2010, a notice of assignment was issued for the disposition of the law issues. The sheriff's returns shows that the notice of assignment was served on 1st and 2nd appellees but both of them refused to sign for same. At the call of the case for the disposition of the law issues on October 19, 2010, the appellant was represented by Counsellor Nyenati Tuan but no counsel appeared for the appellees. This precipitated the appellant's counsel to make the following submission:

> *"Counsel for Libellant begs leave of court to bring to Your Honor's attention that in view of the case file shows on the*

> *[19] 21st day of August, A.D. 2010, action of debt by attachment was filed, served and returned served in keeping with the court's file. That on the 14th day of September, A.D. 2010, a Clerk's Certificate was obtained for the failure of the 1st and 2nd Libellees to file their answers since they were bought under the jurisdiction of this court; consequently a Clerk's Certificate was obtained. Counsel further says that on the 11th day of October, A.D. 2010, a notice of assignment was prayed for and ordered issued and served on the parties for the disposition of law issues on the 19th day of October, A. D. 2010, at 11:00 A.M. The returns of the sheriff shows that the notice of assignment was served on the 1st and 2nd libellees but the 1st libellee refused to sign for and take delivery of same. Counsel therefore says that in keeping with rule 28 (a) of the Revised Rule of Court, at page 69 and 1 LCLR, chapter 42, sections 42.1 and 42.6, counsel prays court to have this matter ruled to trial, placing the defendants on a bare denial, granting unto libellant an imperfect judgment to be made perfect by the production of evidence. And submit"*

The trial court, being persuaded by the submission made by the appellant, granted same but with the modification that the appellant's plead for a default judgment is denied by ruling thus:

> *"The submission just spread on the minutes of this court is supported by the records in the case file. However and in the interest of greater transparency, the said submission for default judgment is hereby therefore denied. Accordingly, the said 1st and 2nd libellees are hereby ruled to a bare denial of the facts as are contained in libellant's complaint and the case ordered ruled to trial on its merits pending the issuance of regular notice of assignment. And it is hereby so ordered."*

Subsequently and in accordance the judge's ruling, a notice of assignment was issued for the commencement of trial on November 8, 2010. As was done at the service of the previous notice of assignment for the deposition of the law issues, the sheriff's returns show that the appellees refused to sign for the notice of assignment for the commencement of trial. Hence, at the call of the case and upon noticing that the appellees were absent without any excuse, the appellant resubmitted its prayer for default judgment but same was again denied by Judge Jones on similar reasons for which he denied the previous prayer for default judgment. Judge Jones however indicated on the records that failure for the appellees to appear upon any subsequent notice of assignment without excuse, he would grant a prayer for default judgment.

The next time the matter was again called for hearing was on March 28, 2011, at which time Cllr. Farmere J. Stubblefield appeared for the 2nd appellee. Upon the notification of representation by the court, counsel for the appellant requested the court to reject Cllr. Stubblefield's representation on grounds that the appellant and the court did not have notice that Cllr. Stubblefield was representing the 2nd appellee and that since the 2nd appellee did not file an answer which could have afforded the appellant of the opportunity to know of Cllr. Stubblefield's representation. This submission was resisted by Cllr. Stubblefield who stated that he had just been retained as a counsel for the 2nd appellee and had only learned about the proceeding on March 17, 2011 when he received copy of the notice of assignment.

The court denied the submission to reject Counsellor Stubblefield's representation by ruling that he having appeared in court with the precept served on the 2nd appellee and having informed court that said precept was delivered to him by the 2nd appellee, he was properly before the court. However, the matter was again postponed to afford the counsel for the 2nd appellee an opportunity to familiarize himself with the case file.

We applaud the judge for the manner in which he conducted the proceedings up to this stage, ensuring that justice is rendered in an equitable manner, especially guaranteeing the right to counsel at every stage of a proceeding.

The court having accepted his representation, Cllr. Stubblefield, on April 1, 2011, acting on behalf of the 2nd appellee, filed a nine count motion to dismiss the action of debt by attachment, contending *inter alia,* that the appellant failed to establish the sum certain or the amount sued for; that the two survey reports did not establish the monetary value of the damaged cement; and that the trial court lacked jurisdiction to entertain the action on grounds that the letter of undertaking vests jurisdiction in the courts of England in any dispute arising out of the claims for which the letter of undertaking was tendered. The 2nd appellee's nine (9) counts motion to dismiss is herein quoted below as follow:

"2nd Libellee's Motion to Dismiss Libellant's Action of Debt by Attachment

NOW COME 2nd Libellee, British Marine Luxembourg S. A. represented by Africa Marine Services (Lib) Ltd., praying Your Honor to dismiss I Liberia Cement Corporation's Action of Debt by Attachment against 2nd Libellee for the following reasons to wit:

1. That it is law and practice in this jurisdiction, hoary with age, that a party litigant can move a court of competent jurisdiction to dismiss a pending action for lack of territorial jurisdiction at anytime time before the final determination of an action.

2. That this court must take judicial Notice of its own records, the Respondent/Libellant's complaint, with attending Exhibits and affidavit, Applicatory Affidavit with attending Attachment Bond and Affidavit of Surety which substantially established and averred the following:

a. That while discharging the weight/volume of 14,299.50 MT net of Respondent's imported cement at the Freeport of Monrovia on the night of September 19, and the morning of September 20, 2008, rain water entered hatch 2 and 5 of M/V "Blue Lady", the 1st Libellee and sea carrier of the imported cement, allegedly damaging some of the cement.

b. That confirming Count 4 of the Libellant/Respondent's complaint through its Exhibit P/4, Movant in its capacity as insurer of the consignment of cement, in mutual concert with appropriate representatives of the Libellant/Respondent and the carrier/1st Libellee, agreed to take the full consignment of imported cement to Libellant/Respondent warehouse to sort out the quantity and monetary value of the damaged cement. That this Court must take judicial Notice of the conclusion in Libellant/Respondent's Exhibit P/4 in Count 4 of its complaint, which substantially states, "It was finally agreed by all the parties that the alleged damage/hardened cake bags will be discharge, transported to CEMENCO's clinker's shed for separation and final count of alleged damaged/hardened and cake bags."

c. That movant confirms the substantive portion of respondent/ libellant's averment made in count 5 of respondent/ libellant's complaint, that its Exhibit P/5 forms the premise for respondent/ libellant instituting its Action of Debt by Attachment against Movant in the Debt Court for Montserrado County, Republic of Liberia. A copy of respondent/libellant's Exhibit P/5 is hereto attached as Movant's Exhibit M/1 to form a cogent part of this Motion.

3. Respondent/Libellant's Exhibit P/5 is a Letter of Undertaking issued by Movant on October 13, 2008 to Respondent/Libellant, setting the perimeters and conditions for Respondent/Libellant to recover the value of Respondent/Libellant's damage cement, which will not exceed United States Dollars One Hundred and Eighty Thousand (US$180.000.00).

4. The Letter of Undertaking issued by Movant on October 13, 2008 to respondent/libellant explicitly states that respondent/libellant's

claims shall be subject to English Law and the exclusive jurisdiction of the tribunal referred to above and to the supervisory jurisdiction of the English High Court.

5. In closing, the Letter of Undertaking issued by Movant on October 13, 2008 to Respondent/Libellant explicitly states that "This undertaking shall be governed by and construed in accordance with English law and we agreement to submit to the exclusive jurisdiction of the English High Court of Justice for the purpose of any process for the enforcement hereof."

6. That Respondent/Libellant confessed and confirmed in Count 5 of its complaint that the Letter of Understanding issued by Movant on October 13, 2008 to Respondent/Libellant is in accordance "to customs in international trade through carriage of goods".

7. That in keeping with international trade and shipping practices, the Letter of Undertaking issued by Movant on October 13, 2008 restrict jurisdiction for the enforcement of damages for the loss of Respondent/Libellant's cement bags, exclusively to English law and English Courts.

8. Movant begs your Honor to take judicial Notice of the fact that all the incidents related to the loss of Respondent's cement occurred in 2008, and it was two (2) years later in 2010, that Respondent sought relief for the loss of its cements bags in this Court, instead of the applicable English Court, as provided for by the October 13, 2008 Letter of undertaking. Respondent application for a Writ of Attachment against the 2nd Libellee was a farce, because the 2m Libellee had departed Liberia since 2008, with the full approbation of the Respondent.

9. Movant also begs your Honor to take judicial Notice of Respondent's Complaint and its Exhibits, which fails to establish that any 2 of the 3 surveyors determined that Respondent's damage cement value even close to US$180,000.00.

WHEREFORE, and in view of the foregoing, movant respectfully moves Your Honor to dismiss respondent/libellant's entire Complaint, and vacate the writ of attachment issued by this Court, on grounds for lack of territorial jurisdiction for the purpose of any process for the enforcement of loss of respondent's damaged cement growing out of the Letter of Undertaking issued by movant on October 13, 2008 to respondent/libellant; and grant unto movant, all other relief that Your Honor may deem just and equitable under the circumstances.

Dated: April 1, 2011

Respectfully submitted, 2nd Libellee, British Marine Luxembourg S. A., represented by Farmere G. Stubblefield, Counsellor-At-Law

On April 14, 2011, the appellant filed its resistance contending that the 2nd appellee suffered waiver and laches by failing to file an answer at which time it could have filed a motion to dismiss; that a motion to dismiss on territorial grounds should be filed at the time of filing a responsive pleading;

that assuming that the motion was filed within the time required by law, same would have still been dismissible because the debt court has original jurisdiction over debt issues in matter arising of out transaction in Liberia and that Mr. Henry Brunson lacked the legal capacity to act for the 2nd appellee. The appellant also contended that the Letter of undertaking was not a contract; rather, it was a promise to pay appellant for the damaged cargo. Hence, the arbitration clause inserted therein cannot bind the parties in the intent of chapter 64, section 64.1 of the Civil Procedure Law, and that the Letter of Undertaking establishes the claim of the appellant. We similarly reproduce appellant's resistance as follows:

RESPONDENT/LIBELLANT'S RESISTANCE

> Respondent/Libellant says that the contention of Movants is highly insufficient to grant the relief sought for the following factual and legal reasons, to wit:
>
> 1. Respondent submits and says that Movant suffers waiver and laches in that after having been brought under the jurisdiction of Court by the services of summons, she refused and neglected to file a responsive pleading as provided by statute.
> 2. Still further as to Count One (1) above, Respondent avers and says that the filing of a Motion to Dismiss is a strange practice within our jurisdiction in that as a least pleader at the stop time of service of his responsive pleading a party may move for judgment dismissing one or more claims for relief asserted against him. Because of this fatal legal blunder, Movants' Motion should be denied, overruled and dismissed. Since the Motion was filed out of term, and not accompanied by an answer.
> 3. That as to Count Two (2) above, Mr. Henry Brunson lacks the legal capacity to act for British Marine as per letter written to Respondent inform her that the former principal had no further instruction from them. Find attached as Exhibit R/1 said letter over the signature of Mr. Brunson.
> 4. That as to Count One (1) of Movant's Motion, Respondent submits and says that the assertion of Territorial jurisdiction is false, misleading and want of proof in that the action subject of these Debt Action proceedings occurred within the Republic of Liberia and the Debt Court having exclusive jurisdiction over debt action as in the instant case has the authority to hear sais case. This makes the assertion dismissible as a matter of law.
> 5. Still further as to Count Four (4) above, Respondent submits and says that she is at a quandary in that consistent with Trial and Practice Procedure hoary with age in this jurisdiction, only subject matter jurisdiction can be raised at any stage of the proceeding. The issue of territorial jurisdiction is belated in that same should have been raised at

the time of the filing of a responsive pleading. The failure of Movant to raise same at the appropriate time, Movant suffers waiver and laches.

6. And also as to Count Five (5) above, Respondent avers and says that the Debt Court of Montserrado County acquires jurisdiction over Movant in that M/V Blue Lady, a Common Carrier transacted business within Liberia and since Movant insured Blue Lady to underwrite any insurance obligation, the Debt Court has acquired jurisdiction over the debt action. Jurisdiction is acquired by law and not by consent of the parties; therefore, Count One (1) of Movant's Motion should be set aside.

7. That as to Count Six (6) above, Respondent submits and says that Letter of Undertaking is a standard format and does not suggest that the parties would submit to arbitration. This is further evidenced by a communication addressed to Respondent's Counsel dated 30th July A.D. 2009 requesting Respondent to submit documents to have the claim settle. Find herewith annexed copy of a letter addressed to Respondent's counsel as Exhibit R/2.

8. That as to count Two (2) (a) of Movant's Motion, Respondent says that an averment in a pleading to which a responsive pleading is required are admitted when not denied in a responsive pleading. Movant concedes the fact that on the 19th day of September A.D. 2008 rain entered in hatches #s 2 and 5 thereby damaging Respondent's goods which is further evident by Respondent's Exhibit R/3 to form a cogent part of this Resistance.

9. That as to Count Two (2) (b) of Movant's Motion, Respondent says that the contention is baseless In that in furtherance of the Respondent's Exhibit P/4 in bulk, the consignment of affected cement was taken to Respondent's warehouse for sorting. <u>Movants' representatives Blue Cross-Africa P&I exhibit P/6 made it expressly clear that as a result of random sampling One Thousand (1000) slings (1,500) Mt was affected and there was no need for further survey.</u> This admission made by Movant's representative binds Movant. Therefore Court should not countenance said assertion as a matter of law.

10. That as Count Two (2) (c) of Movant's Motion, Respondent says that the assertion is false, misleading and want of proof in that consistent with Chapter 64 Section 64.1 page 270 of the 1LCLR it is expressly stated that a written agreement to submit to arbitration any controversy existing at the time of the making of the agreement or any controversy thereafter is valid, enforceable without regard to the justifiable character of the controversy, and irrevocable except upon such grounds as exist for the revocation of the contract. There exist no contract consummated by and between the parties to arbitration; consequently the assertion is without any legal basis.

11. That as to Count Three (3) of Movant's Motion, Respondent submits and says that there exist no privity of contract between the parties regarding the method of recovery. Furthermore, 1st Respondent says that the burden of proof rest on the party who alleges a fact. Movant's exhibit M/1 does not bear any signature or any form of obligation on the part of respondent as to the method of recovery, however, the basis for respondent's exhibit P/5 was to show the quantity of cement that Movant's representative obligates Movant to pay.

12. That as to Counts four (4) and Five (5) of Movants' Motion, Respondent confirms and affirms Count Nine (9) of these Resistance.

13. That as to Count Six (6) of Movant's Motion, Respondent submits and says that she has always insisted that the guarantee be counter signed by the bank if it is issuing the guarantee. Respondent was assured that this condition would be met. It is in furtherance of this that Respondent allowed the vessel to sail on the 13th day of October A.D. 2008 while the Letter of Undertaking (LOU) was delivered to Respondent which was different from the conclusion reached by the parties. Respondent herewith annexed copy of the e-mail and departure records as Exhibit R/4 in bulk for Court's attention.

14. Still further as to Count Twelve (12) above, Respondent submits and says that instead of Mr. Naji Eid of Blue Cross-Africa P & I delivering the Letter of Undertaking, Mr. Henry N. Bruson delivered a Letter of Undertaking (LOU) completely different on the 13th day of October A.D. 2009 when the vessel had departed. Court is requested to take judicial notice of the date on which Mr. Brunson signed the Letter of Undertaking (LOU).

15. That as to count seven (7) of movant's motion, respondent avers and says that at no time did 1st Respondent ever agreed to submit to the English Court regarding this claim, therefore, said Count should not be countenanced by Court as a matter of law.

16. And also as to Count Fourteen (14) above, our laws rely on receptive statute that is the English or American when our statute is silent on an issue. In the instant situation Chapter 64, section 64.1 page 270 of the 1 LCLR states how arbitration agreements are entered into. This condition was never complied with, therefore Count Seven (7) of Movant's Motion should be overruled and the entire motion set aside.

17. That as to count eight (8) of movant's motion, respondent confirms and affirms counts ten (10) and twelve (12) of these resistance.

18. That as to count nine (9) of movant's motion, respondent says that same is a sham pleading in that according to 1st respondent representative as evidence by Exhibit P/6 over the signature of Mr. Naji Eid he put the damage at One Thousand (1000) slings or One Thousand five Hundred (1,50OMT) Metric tons if the unit price per ton is One Hundred Fifty One (US$151.00), the debt obligation can be determined by multiplying the quantity damaged by the unit price, therefore the assertion lacks any legal basis.

19. Respondent denies every issue of law and fact not specifically traversed in these resistance.

WHEREFORE AND IN VIEW OF THE FOREGOING, respondent prays court to dismiss movant's motion, place him on bar denial of 1st respondent Complaint and grant unto Respondent any and all further relief that Your Honor may deem just and equitable in the premises.

RESPECTFULLLY SUBMITTED, the above named
Respondent, by and thru her Legal Counsels:
The Tuan Wreh Law Firm, P.O. Box 677,
Monrovia, Liberia

____

COUNSELLOR-AT-LAW

Dated this 14TH day of April, A.D. 2011.

On May 30, 2011, following argument *pro and con*, Judge Jones ruled denying the motion to dismiss on grounds that the letter of undertaking does not preclude the debt court of assuming jurisdiction over the case; that jurisdiction is conferred by statute and not by agreement of parties; and that the Letter of Undertaking which tends to divest the court of its jurisdiction was unilaterally done. The court also ruled that although the appellant did not file an answer, he could still file a motion to dismiss prior to the commencement of trial in the main suit. Judge Jones' ruling is herein produce below as follows:

"COURT's RULING ON MOTION TO DISMISS

The Respondent/Libellant Liberia Cement Corporation filed this action of Debt against the Movant/Libellee M/V/Blue Lady an ocean Carrier, and British Marine Luxembourg S.A., its Insurer, on August 19, 2010, claiming the amount of US$130,000.00 plus six (6) percent statutory interest.

The Facts as have been gathered from the pleadings are as follows:

The Liberia cement Corporation (Libellant) thru its Principal Heiderberg Cement Group, acting for and on behalf of Libellant, entered into a marine contract with 1st Libellee M/V/ Blue Lady an Ocean Carrier in or about 2008 by Invoice # 60801613 to transport to Monrovia 14,299.50 metric tons of ordinary gray Portland cement for Libellant.

At the arrival and unloading of the cement at the Freeport of Monrovia, a quantity of Libellant's cement got destroyed by rain due to either negligence, or incompetence of the 1st Libellee.

When the damage occurred, the second Libellee, British marine, Insurer for 1st Libellee M/V/BLUE LADY, requested that the cement which were so affected, be taken to Libellant's Warehouse for sorting.

The records further revealed that following the sorting, 2nd Libellee British marine issued Libellant a LETTER OF UNDERTAKING bearing the date 13 October 2008, agreeing to pay Libellant the maximum amount of US$180,000.00 for the damaged cement under certain conditions, one of which was that any claim under the contract be pursued in the English Court, making use of the English Law.

When Libellees failed to make payment of the US$180,000.00 to Libellant, Libellant filed this Action of Debt against Libellees with the Debt Court for Montserrado County, claiming with interest, the amount stated in the said Memorandum of Undertaking.

The Libellees failed to file answers, and the Libellant obtained a Clerk Certificate to that effect after the lapse of the period provided by law for the filing and serving of Answers.

On April 1, 2011, 2nd. Libellee British Marine filed a motion to Dismiss Libellant's Complaint for lack of Jurisdiction, alleging essentially the following. :

1. That the LETTER OF UNDERTAKING assigns the English Law as the governing Law, and the English High Court as venue for any complaint growing out of the matter.

2. That the application for attachment is a farce, since the ship left Liberia (with the knowledge of Libellant) in 2008 which is long time before the filing of the Complaint.

3. That the loss was not substantiated.

Libellant/Respondent filed Resistance on April 14, 2011, to the following effect.

1. That 2nd Libellee suffers larches because it should have questioned the Debt Court's Jurisdiction in its Answer, and not in a Motion, having failed to file an Answer.

2. That Mr. Henry Bronson lacks capacity to act for British Marine in view of a letter dated September 27, 2010 he (Bronson) wrote to Libellant informing Libellant that British Marine had instructed him to close the file on Libellant, and if Libellant still desired to communicate with them, Libellant should do so directly.

3. That the loss occurred in the Republic of Liberia, and as such, the Debt Court for Montserrado County has proper Jurisdiction to make a determination regarding it.

Although several issues are raised in Movant's Motion to Dismiss, and in Respondent's Resistance, not all of them are relevant to a Motion to dismiss when considering the relevant Statute i.e Section 11.2 of the Civil Procedure Law. The Court will therefore deal at this time only with those issues raised by the Parties that are actually relevant to a Motion to Dismiss.

The first question the Court has to answer is Whether or not Movant's failure to file an Answer bars Movant from filing this Motion to Dismiss Libellant's Complaint?

This Court says No.

Motions to Dismiss raise legal Issues which MUST be decided prior to Trial. By failing to file an answer, the Libellees have generally denied the veracity of allegations levied against them in Libellant's Complaint, without losing the right to raise legal issues prior to trial, which they have presently done in this case by questioning the propriety of the Liberian venue.

The second Question for this Court to answer is : WHETHER OR NOT, THE SERVING ON LIBELLANT BY LIBELLEE, OF THE MEMORANDUM OF UNDERTAKING WHICH ASSIGNS THE ENGLISH LAW AND COURT AS THE GOVERNING LAW AND VENUE FOR MATTERS ARISING OUT OF THEIR CARRIAGE BY SEA TRANSACTION WITH LIBELANT, DIVESTED THE LIBERIAN COURT OF ITS JURISDICTION TO DETERMINE A MATTER WHICH OCCURRED ATTHE FREEPORT OF MONROVIA IN LIBERIA?

In order to properly answer this question, the Court must first unveil the nature of the LETTER OF UNDERTAKING.

The Black's law Dictionary abridged eighth edition defines letter of undertaking thus: AN AGREMENT BY WHICH A SHIPOWNER—TO AVOID HAVING CREDITORS SEIZE THE SHIP AND RELEASE IT ON BOND - AGREES TO POST SECURITY ON THE SHIP AND TO ENTER AN APPEARANCE, ACKNOWLEDGE OWNERSHIP, AND PAY ANY FINAL DECREE ENTERED AGAINST THE VESSEL WHETHER IT IS LOST OR NOT. A LETTER OF UNDERTAKING IS OFTEN ISSUED BY THE SHIPOWNER'S LIABILITY INSURER.

In the mind of the Court, a Letter of Undertaking could remain just as the name states i.e. an undertaking or it could advance to the status of an agreement if the Creditor/would be libellant formally accepts it and its contents to govern their future relationship.

As can be clearly seen from the face of the document titled LETTER Of UNDERTAKING sent to the Libellant Liberia Cement Corporation by the Movant/Libellees, which is attached to the Motion as Movant's Exhibit "M/1", it is essentially a letter written and signed by the Libellees with no input nor acknowledgment whatsoever by Respondent/Libellant.

According to the Black's Law Dictionary, the purpose of the Instrument is to secure the freedom of the vessel (which has become liable to creditors) from seizure, by acknowledging ownership, by agreeing to post security on the ship, and to enter an appearance, and to pay any final decree entered against the vessel, whether it is lost or not.

The Court observes that in addition to the foregoing purpose for the instrument, Movant/Libellees proceeded to add what is not ordinarily included in a letter of undertaking i.e. the venue for the adjudication of matters arising out of the main controversy, otherwise referred to as Territorial Jurisdiction.

The same edition of the Black's law Dictionary defines JURISDICTION as a government's general power to exercise authority over all persons and things within its territory.

The Court opines that venue is excluded from the content of the Letter of Undertaking because in most jurisdictions (Liberia inclusive), venue/territorial jurisdiction is basically decided by law with regards to incidences/occurrences and locations and not by decision of a Party (as it appears in the present case), or agreement of the parties as would have been the situation had Libellant formally accepted or formally agreed to abide by the terms and conditions of Movants LETTER OF UNDERTAKING.

The Supreme Court of Liberia said in the Case Massaquoi vs. Massaquoi as reported in 38LLr. Syllabus 4 and on page 3 thereof, that "Territorial Jurisdiction is given by law and cannot be conferred by consent of the parties."

When this Ruling of the Honorable Supreme Court is applied to the present Case, then even if Libellant is said to have consented and/or agreed to the terms and conditions of Movant's Memorandum of Undertaking, it would still not alter the ruling of this Court regarding Territorial Jurisdiction because Jurisdiction cannot be decided by parties to a controversy but by law.

The second Libellee/British Marine question the propriety of a Liberian court to make determination in a matter which has been assigned to English Court.

To this contention, the Court says that there was only an attempt to assign the matter to an English Court by Libellees which has failed firstly because it was unilaterally done by Libellees and most importantly, because Liberia as a sovereign nation, will not allow parties whether by agreement or consent, to divest its Courts of their jurisdiction to hear and determine controversies growing out of occurrences within its Territory.

It is not contested, that the damage to Libellant's Cement occurred at the Freeport of Monrovia, the Capitol of Liberia. The locus of this occurrence confers general and specific jurisdiction on the Liberian Courts which properly includes the Debt Court for Montserrado County in matters regarding indebtedness.

Inspection of the Memorandum of Undertaking will reveal that it is the sole creation of the Libellees with no import whatsoever from Libellant To therefore hold Libellant responsible for its contents would be violative of a basic principle of contract law i.e. assent.

The Answer to the Second question is therefore NO. The serving of the letter of undertaking, assigning the English Law and Court as applicable law and venue for matters arising out of the transaction did not and could not divest the Liberian court of its Jurisdiction over the matter, since jurisdictions are determined by law and not by agreement of the parties.

With the resolution of this issue, other issues raised by the Parties abate.

Wherefore and in view of the foregoing, the Motion to Dismiss is hereby denied, and it is hereby so ordered.

Given under my hands and seal of Court this 30th day of May, A.D. 2011.

JAMES E. JONES
Judge

The appellant excepted to the above ruling and gave notice that it would take advantage of the law. While we are in agreement with Judge Jones' ruling denying the motion to dismiss, we are not persuaded by the reasons advanced therefor for two reasons. First, all pretrial motions present issues of law and must be decided at the disposition of law issue. This Court has held consistently that except for challenges to the jurisdiction of the court based on matters concerning the subject matter of the proceedings, all motions must be filed within the time allowed by statute. [CITATION]

The Civil Procedure Law on motion to dismiss provides, *inter alia,* at section 11.2 (1) thus:

> "*1. Time: grounds*: At the time of service of his responsive pleading, a party may move for judgment dismissing one or more claims for relief asserted against him in a complaint or counterclaim on any of the following grounds:
> (a) That the court has not jurisdiction of the subject matter of the actions;
> (b) That the court has not jurisdiction of the person;
> (c) That the court has not jurisdiction over a thing involved in the action;
> (d) That there is another action pending between the same parties for the same cause in a court in the Republic of Liberia;
> (e) That the party asserting the claim has not legal capacity to sue." [Our Emphasis]

The law further provides that a party seeking the dismissal of a suit on the grounds enumerated in section 11.1(1) above must do same at the time of filing his or her responsive pleading and failure to assert such defense is tantamount to a waiver of the defense, save in the case of the lack of subject matter jurisdiction, which can be raised at any stage of the trial and even up to the Supreme Court. This is how section 11.2(6) reads:

> "Waiver: A party waives any defense enumerated in paragraph 1 of this section which he does not present either by motion as hereinbefore provided or in his answer or reply, except that lack of jurisdiction over the subject matter is not so waived; but no defense is waived because another defense is asserted in the same motion or in the responsive pleading."

The 2nd appellee having failed to file an answer and the law issues having been disposed of and the case ruled to trial, a motion to dismiss on any other grounds, except for jurisdiction of the subject matter, was improperly before the court and therefore dismissible. The second reason we disagree with Judge Jones' rationale for denying the 2nd appellee's motion to dismiss is that a plead to dismiss an action on jurisdictional grounds is affirmative and the 2nd appellee having been ruled to bare denial was precluded from benefiting from any affirmative defense; rather, its role was to limit its examination on the evidence produce by the appellant and cross examine appellant's witnesses. This position of this Court finds backing in chapter 9, section 9.1(2), of the Civil Procedure Law, which states thus:

> "If a defendant appears within the time prescribed by section 3.62, his failure to interpose an answer shall be deemed a general denial of all the allegations in the complaint. At the trial, such a defendant may cross-examine plaintiff's witnesses and introduce evidence in support of his denial but he may not introduce evidence in support of any affirmative defense. "

The foregoing is clear, and as applied to the 2nd appellee, it having been ruled to a bare denial, it could not legally plead any affirmative defense intended to prove its case; rather, it was only required to prove its bare denial by rebutting the plaintiff's evidence and cross-examining the plaintiff's witnesses. The placement of a defendant on bare denial does not shift the burden of proof on the defendant; the dismissal of a defendant's pleadings and restricting the defendant to a bare denial of the facts alleged by the plaintiff do not shift the burden of proof. *Salami Brothers v Wahaab,* 15 LLR 32 (1962); *Goll v. SERVICETENIC,* 32 LLR 140 156 (1984). We should emphasize, however, that the burden of proof does not shift upon a judgment of default, for it is the duty of every party alleging the existence of any fact to prove it by a preponderance of evidence. *Twegbey and Teah v. Republic,* 11 LLR 295 (1952). Proof is sufficient if the party who has the burden of proof establishes his allegations by a preponderance of the evidence. Civil Procedure Law, Rev. Code 1:25.5

Given all of the above, it was the appellant, not the appellee, who carried the burden to establish the cause and the sole role of the appellee was to test the weight of the evidence produce by the appellant and not to introduce any affirmative plea or defense such as the jurisdiction of the court that did not go to the subject matter.

As earlier stated, the 2nd appellee's counsel excepted to the May 30, 2011, ruling of the trial judge and gave notice that he would pursue the requisite legal process to have the said ruling reviewed by an appellate court. The records before us are however void of any action taken by the 2nd appellee's counsel for review by this Court; there is no indication that he filed remedial process for the ruling to be reviewed by the Chambers Justice; and there is also no showing that he appealed the decision of the judge to the Supreme Court *En banc.* We see from the records that about one month after the judge's ruling, on July 7, 2011, Counsellor Stubblefield filed a motion to reconsider the judgment on the previous motion to dismiss requesting the judge to rescind his ruling and dismiss the complaint filed by the appellant. In his motion to rescind judgment, Counsellor Stubblefield raised the self-same affirmative defenses he had raised in the motion to dismiss that the Letter of Undertaking was issued in 2008, more than three (3) years before; that at the time the Letter of Undertaking was issued in 2008, the appellant did not seize the ship but allowed the ship to leave the territorial jurisdiction of Liberia, thereby actively and constructively accepting the contents and intent of the Letter of Undertaking; that to further confirm appellant's acceptance of the terms of the 2008 Letter of Undertaking, the same appellant produced as its primary evidence, the same 2008 Letter of Undertaking issued by the appellee to establish the alleged debt; and that denying the motion to dismiss based on a portion of the same 2008 Letter of Undertaking, which clearly states that disputes arising out of the agreement must be settle in the United Kingdom, is tantamount to an attempt to enforce a part of the note, while denying and/or rejecting the remaining portion of the same 2008 Letter of Undertaking.

On September 16, 2011, the appellant filed a ten (10) count resistance basically contending that the entire motion should be set aside as same was filed out of term time; that the reference made to the Letter of Undertaking was frivolous since the statute provides that an action of debt on a written instrument shall commence within seven (7) years; and that its approval to allow the appellee's vessel to depart Liberia was contingent upon the promise to pay the amount stipulated in the Letter of Undertaking.

On March 22, 2012, Judge Jones ruled and denied the motion to reconsider on the sole grounds that same was filed out of term time, contrary to the many Opinions of this Court. We are taken aback that Counsellor Stubblefield would file a motion to rescind the judge's decision not on the basis that the judge had inadvertently overlooked some facts which, had they been considered, would have yielded a different result. Rather, Counsellor Stubblefield raised the self-same issues raised in the motion to dismiss. We do not intent to repeat ourselves on the legal impropriety of raising such issues while on bare denial as we have already stated same herein above. The act of Counsellor Stubblefield cannot be viewed from anything else but a clear intention to baffle justice and delay the proceedings below. We wonder what did Counsellor Stubblefield seek to achieve; was he giving the impression that the appellant could not recover from the damages done to the cargo at the negligence of the appellees which his client has acknowledged when it executed the Letter of Undertaking? Or was it his contention that in as much as the appellant is entitled to recover, said recovery can only be done in London? Whatever his intentions were, we are not impressed by the conduct and sternly warn lawyers appearing before our courts to jealously uphold the construction of the Civil Procedure Law to promote the just, speedy, and inexpensive determination of every action. *Civil Procedure Law, Rev. Code 1:1(4).*

This is especially true since the facts revealed that a huge quantity of the appellant's cement was destroyed by rain at the negligence of his client as far back as 2008; that in the interest of the smooth facilitation of trade, a Letter of Undertaking was executed in order to allow his client's vessel to depart the Free Port of Monrovia to continue its course of business. But in light of all of these, he seems bent on defeating the ends of justice by filing those frivolous actions in an apparent bid to deny the appellant from recovering for the damages it sustained at the hands of his client.

But even in Counsellor Stubblefield's impression of being a master of the law controlling in this jurisdiction and contractual construction by courts, he failed to realize that a judgment can only be rescinded within the same term it was rendered. The judgment which Counsellor Stubblefield sought to have rescinded was rendered on May 30, 2011, and the debt court being a specialized court which operates on a monthly term, beginning on the second Tuesday of each month to the second Monday of the next month, the motion to reconsider or rescind judgment filed on July 7, 2011, was completely out of term.

Again, as was done following the ruling on the motion to dismiss, Counsellor Stubblefield excepted to the judge's ruling and gave notice that he would take advantage of the law provided and controlling. There is no showing in the records that any attempt was made for an appellate review of the judge's ruling. What the records do show is that following several notices of assignments, trial resumed on September 19, 2012, but that neither the 2nd appellee nor its counsel was present, even though the minutes reflect that the 2nd appellee's counsel was duly served with the notice of assignment for that day's hearing. The judge therefore proceeded with the trial and the appellant produced two witnesses, both of whom testified to the allegations in the complaint, the events emanating to the Letter of Undertaking, as well as the surveys conducted to verify the damages done to the appellant's cargo/cement. At the conclusion of both oral and documentary evidence by the appellant, the trial court ruled granting the appellant's claim of US$180,000.00 (One Hundred Eighty Thousand United States Dollars) on grounds that it was clear, from all indications, that the defendant/appellant is justly indebted to plaintiff/ appellant in the amount sued for and that the court had no other alternative but to enter judgment in plaintiff's favor.

As the first ruling made by Judge Jones was not made a subject of review in the present appeal before us, given that the said ruling was subsequently rescinded without the appellant taking any remedial or other action therefrom, this Court shall not belabor itself in addressing the said ruling.

On October 18, 2012, the 2nd appellee filed a motion to rescind the judgment of the trial court, basically contending that it did not have knowledge of the judgment until the bill of costs was presented to it; that the Letter of Undertaking did not establish a sum certain owed the appellant; and that the appellant failed to establish the debt amount due with certainty and precision. Counsellor Stubblefield resubmitted his contention on the jurisdiction of the court but having extensively addressed this claimed above, we shall say no more on it.

This is how the 2nd appellee presented his fifteen (15) counts motion to rescind final judgment:

2nd LIBELLEE'S MOTION TO RESCIND FINAL JUDGEMENT

NOW COME 2nd Libellee, British Marine Luxembourg S. A. represented by Africa Marine Services (Lib) Ltd., praying Your Honor to Re-consider and Rescind Your Judgment in the Action of Debt by Attachment against 2nd Libellee for the following reasons wit:

1. That Your Honor inadvertently overlooked the fact that the records in the above captioned case will evidence there have been several re-assignments for the hearing of this case due to the non-presence or no appearance of Your Honor, the respondent and not only the movant.

2. That Your Honor inadvertently overlooked the fact that all interlocutory ruling made by Your Honor in this case has been handed down in the absence of Movant's Counsel, beginning with Your Honor May 30, 20111 ruling denying Movant earlier motion to dismiss Respondent's complaint because this Court lacked territorial jurisdiction to finally determine this merits of this case; and the September 19, 2012 One (1) day hearing and final judgment made on the same day, denying Movant the opportunity for Movant to even know date about Your final Judgment until a Bill of Cost was presented to Movant for Movant's signature by the Sheriff office for the very first time in October of 2012.

3. That Your Honor inadvertently overlooked the facts and this court own records that the Respondent/ Libellant's complaint, with attending Exhibits and affidavit, Applicatory Affidavit with attending Attachment Bond and Affidavit of Surety substantially established and averred the following:

a. That while discharging the weight/volume of 14,299.50 MT net of Respondent's imported cement at the Freeport of Monrovia on the night of September 19, and the morning of September 20, 2008, rain water entered hatch 2 and 5 of M/V "Blue Lady", the 1st Libellee and sea carrier of the imported cement, allegedly damaging some of the cement.

b. That confirming Count 4 of the Libellant/Respondent's complaint through its Exhibit P/4, Movant in its capacity as insurer of the consignment of cement, in mutual concert with appropriate representatives of the Libellant/Respondent and the carrier/1st Libellee, agreed to take the full consignment of imported cement to Libellant/ Respondent warehouse to sort out the quantity and monetary value of the damaged cement. That *this Court must take judicial Notice of the conclusion in Libellant/ Respondent's Exhibit P/4 in Count 4 of its complaint, which substantially states. "It was finally agreed by all the parties that the alleged damage/ gardened cake bags will be discharge, transported to CEMENCO's clinker's shed for separation and final count of alleged damaged/hardened and cake bags."*

c. That in Keeping with-international trade and shipping practices, as substantially confirmed by Libellant in Count 5 of its complaint, Movant issued a Letter of Understanding which was accepted by the Respondent as the mode and mutual understanding for payment of the damage cement.

4. That Your Honor inadvertently overlooked the fact that Predicated on the October 13, 2008 LOU executed by S. R. Kirk, for and on behalf of British Marine Luxembourg SA., Movant filed a motion to dismiss Respondent Cemenco's complaint pending in the Debt Court for Montserrado County for lack of territorial jurisdiction. Our Motion was predicated on the contents of the October 13, 2008 LOU, which clearly stated that in the event disputes arise out of the LOU, the British Court will be the forum to hear and adjudge such disputes.

5. That Your Honor inadvertently overlooked the fact that the hearing for our motion to dismiss was initially schedule for Thursday, April 14, 2011, but Your Honor postponed the hearing on more than three different occasions. After the first hearing of our motion to dismiss, the Judge requested for, and we subsequently filed supporting documentations and legal references defining a Letter of Undertaking under Marine Insurance Parlance, based on Your Honor's request.

6. That Your Honor inadvertently overlooked the fact that Movant provided Your Honor with sufficient materials and documentations defiling and explaining the usage and meaning of a Letter of Undertaking, and then reiterated the fact that Cemenco exhibited the same October i3, 2008 LOU in its complaint as the evidence to establish a USS 180,000.00 debt.

7. That Your Honor inadvertently overlooked the fact that howbeit, Your Honor erroneously ruled that, British Marine unilaterally executed the LOU and because Cemenco's signature was not exhibited on the October 13, 2008 LOU, Cemenco was not bound by the unilateral LOU issued by British Marine. Your Honor also erroneously ruled in elect that parties to a contract cannot predetermine in the contract, the jurisdiction to settle disputes growing out of the contract.

8. That Yonr Honor inadvertently overlooked the fact that, A LOU is similar to a Promissory Note which is usually executed by one party.

9. That Your Honor inadvertently overlooked the fact that the LOU was issued in 2008, and by Cemenco allowing the ship to leave the territorial jurisdiction of Liberia in 2008. Cemenco actually and constructively acquiesced to the contents and meaning of the October 13, 2008 LOU issued by British Marine; and as such, Cemenco is bound by the 2008 LOU.

10. That Your Honor inadvertently overlooked the fact that, by Cemenco exhibiting the same 2008 LOU in its complaint as the primary evidence to established British Marine's indebtedness, it should also be quite evident to Your Honor that your final judgment relied on the same 2008 LOU you

have earlier dismissed and discarded as your only source to establish the debt judgment against Movant.
11. That Your Honor inadvertently overlooked the fact that it is a practice hoary with age in all common law jurisdictions, that parties to a legal contract can mutually agree on a particular jurisdiction to settle dispute growing out of the mutually agreed contract.
12. That Your Honor inadvertently overlooked the fact that in this case, Liberian Judge's duty is restricted to interpret the intent of the parties, and the meaning of the 2008 LOU contract. The Liberian courts cannot force jurisdiction in his court, when the parties constructively and expressly agreed in the contract, that English Court will settle all disputes growing out of the 2008 LOU.
13. That Your Honor inadvertently overlooked the fact that Your Honor cannot recognize a portion of the 2008 LOU granting the Respondent US$180,000:00, and disregard another portion of the same 2008 LOU expressly stating that disputes arising out of the contract should be settle in English Courts.
14.That Your Honor inadvertently overlooked the fact that Your Honor cannot recognize a portion of the 2008 LOU granting the Respondent US$180,000.00, and disregard another portion of the same 2008 LOU expressly stating that disputes arising out of the contract should be settle in English Courts.
15. That Your Honor inadvertently overlooked the fact that the OCTOBER 13, 2008 LOU EXPRESSLY PROVIDED THAT THREE (3) ARBITRATORS, ONE FROM THE MOVANT AND ONE FROM THE RESPONDENT, WHO WILL APPOINT AN UMPIRE, WILL DETERMINE THE COST OF THE DAMAGE CEMENT; BUT TN THE ABSENCE OF THE THREE (3) ARBITRATORS OR THE APPOINTED UMPIRE DETERMINING THE COST OF THE DAMAGED CEMENT, YOUR HONOR ALLOWED THE RESPONDENT TO UNILATERALLY DICTATE THE COST OF THE DAMAGED CEMENT.
WHEREFORE AND IN VIEW OF THE FOREGOING, MOVANT RESPECTFULLY PRAYS YOUR HONOR TO RECONSIDER AND RESCIND YOUR SEPTEMBER 19, 2012 JUDGEMENT AGAINST THE MOVANT IN THE NAME OF JUSTICE AND FAIRPLAY, IN AN EFFORT TO ENHANCE THE CREDIBILITY OF LIBERIAN COURTS IN THE TNTERNATIONAL COMMUNITY, AND GRANT UNTO MOVANTS ANY AND ALL OTHER RELEIF THAT YOUR HONOR MAY DEEM JUST, CREDIBLE AND LEGAL UNDER THE CIRCUMSTANCES.

Respectfully submitted: The above named
Movant, by & thru its Legal Counsel:
Stubblefield & Associates Inc.,
48 Gurley Street Monrovia, Liberia

____

Attorneys & Counsellors-At-Law
Dated this 18th day of October, A.D.2012
5.00 Revenue Stamps Affixed on the original

On October 23, 2012, the appellant filed a thirteen (13) count resistance contending that the motion was filed out of term time; that the grounds presented in the motion were not those for which a motion to rescind would lie;

and that the appellee having been placed on bare denial could not raise those claims as, according to the appellant, they were affirmative defenses. We also capture the appellant's thirteen counts resistance.

RESPONDENT'S/LIBELLANT'S RESISTANCE

Respondent in the above in the above entitled cause of action says that the contention of Movant Is highly insufficient to grant the relief sought for the following factual and legal reasons to wit:

1. Respondent submits and says that Movant is on bare denial of respondent's/Libellant's complaint of action of debt by attachment filed on the 19th day of August A.D. 2010. The court is requested to take judicial notice of the case file.

2. And also as to count one above respondent says that consistent with title one, chapter 9, section 9.2 Pages 105-106 of the 1LCLR, it is expressly stated that if a defendant appears within the prescribed section 3.62, his failure to interpose an answer shall be deemed a general denial of the allegation in the complaint. At trial, such defendant may cross examined plaintiff's witnesses and introduced evidence in support of his denial, but he may not introduce evidence in support of any affirmative Matter. See14LLR page 537, syllabus #1 text at page 541 & 40LLR page 624 syllabuses #1, text at page 630.

3. Respondent further says that recourse to the records of this Honorable Court, the final judgment was entered on the 19`" day of September A.D.2012 September term of the Debt Court. Movant elected to file His motion to rescind the final judgment on the 18`h day of October A.D.2012; the court is requested to Take Judicial Notice of the case file. The Supreme Court have held in the case 30LLR Myrtle Reeves et al VS Her Honor Gladys K. Johnson, Martha Stubblefield-Barnard et al syllabus #6 page 30 text a page 45 That the general rule is that after the expiration of the term all final judgments pass beyond the control of the court unless steps are taken during the term to set aside, modify or correct them. Respondent says that Movant's motion should be set aside as a matter of law.

4. That as to count one of Movant's Motions the assertion is irrelevant and immaterial in that Movant had notice of the trial by the signing of the notice of assignment but elected to stay away from the trial which constitutes abandonment on the part of the Movant, therefore same should not be countenanced by court.

5. That as to count two of Movant's motion assertions contained therein are not legal grounds for His Honor the judge to rescind his judgment that was rendered during the September term of the Debt Court, primarily because Court would not do for litigants that they fail to do for themselves.

6. That as to count three of Movant's motion respondent avers and says that said count present affirmative matter from which Movant is precluded by the mere fact that she is on bare denial of plaintiffs/ respondent's complaint.

7. That as to count four of Movant's motion same present affirmative matter and should not be entertained by court as a matter of fact that Movant is on bare denial of plaintiff's complaint.

8. And also as to cunt seven above respondent says that this issue had already been passed upon and cannot be resurrected, therefore count four of Movant's Motion should be dismissed and entire motion set aside as a matter of law.
9. That as to count five of Movant's Motion respondent says that the assertion contained therein is no ground for a Judge to rescind his ruling when in fact such request is without term time.
10. That as to count six, seven, eight, nine & ten of Movant's Motion respondent says that the issues were decided on the 22nd day of March A. D. 2012 when your Honor denied the Motion to dismiss, therefore said contention cannot resurfaced during the October term A. D. 2012. Said Court should be denied, over ruled and dismissed.
11. That as to counts eleven & twelve of Movant's Motion respondent says that according to chapter 64 of our civil procedure statute, parties to Arbitration must signed agreement. There exists no such contract. Secondly by our letter of the 28th day of July, A. D. 2009 and a subsequent reply thereto on the 30th day of July, A. D. 2009 is indicative of the fact that there exists no Arbitration Agreement. Movant is estopped from raising such contention. Find hereto attached as exhibit "R/1" in bulk copies of communications exchanged between the parties in substation of said count.
12. That as to counts thirteen, fourteen & fifteen of Movant's Motion respondent confirmed and affirmed counts one through four of these returns.
13. Respondent denies every issue of law and fact not specifically herein traversed in respondent's returns.
Wherefore and in view of the foregoing, respondent prays Your Honor and this Honorable Court to deny and dismiss Movant's Motion for been filed out of term time with cost of these proceedings, approved 1 the bill of cost and order the enforcement of judgment as made and provided by statute.

Respectfully submitted the above named
respondent by & thru her Counsel: Tuan Wreh
Law Firm, P. O. Box 67 Monrovia, Liberia
Nyenati Tuan
COUNSELLOR-AT-LAW
Dated this___ day of_____ A. D. 2012

On November 22, 2012, Judge Jones ruled and rescinded his ruling of September 19, 2012 on grounds that following a perusal of the records there was no unexcused absence of the appellee and that the judgment was rendered without appointing a counsel to take the judgment on behalf of the appellee which would have allow the appellee the opportunity to appeal. We quote herewith the ruling of the judge, to wit:

RULING ON MOTION TO RESCIND

The Liberia Cement Corporation (CEMENCO) filed this Action of Debt against Movant Blue Lady and British Marine insurer and reinsurer respectively of its cement consignment, for damaged that were allegedly damaged during the consignment, due to negligence handling of the consignment in a rainy situation.

That in consequence of the damage done, British Marine the 2nd Libellee issued a letter of understanding on 13th October 2008 promising to pay Libellant US$180,000.00 for the damaged cement.

When Libellant rested with the production of evidence on September 19, 2012, Libellees were absent from Court without leave, and the Court proceeded to render its Final Judgment against Libellees, adjudging them liable to Libellant in the amount of US$180,000.00 plus 6% legal interest.

2nd Libellee filed a Motion on 18th of October 2012 seeking to have Court rescind its default Judgment of 19th September for the following reasons:

1. That the Libellant has also been absent with no adverse action by the Court.

2. That Libellee/ Movant did not know a Judgment had been rendered against them until the Bill of cost was presented to them.

3. That Judgment is against the weight of evidence.

Regarding Court # 1, this Court says that there is no other recorded unexcused absence of Movant/ Libellee from Trial.

2. Regarding Court #2 this Court agrees with Movant/Libellee because no Lawyer was appointed by the Court to take the Court's Ruling on behalf of Movant/Libellee

3. The third issue is the main issue of fact which the Court cannot pass upon at this time.

This Court finally says that because there is no other recorded unexcused absence of Movant/Libellee from Trial, and because no lawyer was appointed to take the Final Judgment for Movant/Libellee, the Motion to rescind must be and is hereby granted.

The Judgment 19th September is hereby rescinded and the Case is hereby assigned for continuation of Trial on Wednesday, December 5, 2012 at 1:pm with Libellee taking the witness stand to produce evidence it may have against Libellant's claim, and it is hereby so ordered.

Given under my hand and Seal of Court this 22nd day of November A.D. 2012.

JAMES E. JONES
JUDGE

The Supreme Court has held thus:

"despite the fact that a party has failed to appear or plead, the trial court has a duty to have him notified of the trial proceedings, as a last or final chance to appear in the matter" Liberia Agricultural Company v. Reeves, 36LLR 867, 870 (1990); Bil-Clue et al., v. The Management of Mesurado Corporation, 41 LLR 241, 247 (2000).

Also,

"the essence of a court appointing attorney to represent a defaulting party at the rendition of final judgment is to fulfill the requirements of the statute which makes the granting of the right of appeal from every judgment mandatory, except that of the Supreme Court. The said statute [section 51.6 of the Civil Procedure Law] makes no distinction between a final judgment by default and a final judgment under regular proceedings

in which both parties are present. Therefore, since the right to appeal is only exercised in open court by announcement after the rendition of a final judgment the statute requires that in order that the right to an appeal is not lost to a defaulting party, an attorney be appointed by the court to represent said defaulting party, to move for a new trial, take exceptions to the final judgment, and to announce an appeal on behalf of the defaulter." LAMCO v. Bailey 33 LLR 461, 469-470 (1985); Mitchell v. The Intestate Estate of the late Robert F. Johnson, 39 LLR 467, 473 (1999)*; Gray v. Kaba,* 40 LLR 38, 47 (2000)*; United Logging Company v. Mathies,* 41 LLR 395, 401 (2003); *The Intestate of the late Alhaji Massaquoi v. A.M.E Church,* Supreme Court Opinion, October Term, A. D. 2014.

It is in consonance of the above holdings of this Court, and Judge Jones, realizing his error in failing to appoint a lawyer to take the ruling on behalf of the appellee and having realized that the absence of the appellee was due to an official excuse, that Judge Jones granted the appellee's motion and rescinded his judgment. We also do not see any exceptions taken by the appellant to the recession of the ruling and therefore we conclude that the appellant acquiesced with the rationale thereof.

Thereafter, trial of the case resumed and following the production of oral and documentary evidence by the appellant and the entertaining of argument *pro and con*, the trial judge, on March 14, 2013, rendered his final ruling in which he denied the appellant's claim and dismissed the complaint on grounds that the appellant failed to establish a sum certain for which an action in debt would lie. Judge Jones premised his ruling on the joint survey report and ruled that nowhere in said report was it stated that the quantity of cement destroyed by the rain amounted to 1225.5 tons as alleged by the appellant's first witness and that in the absence of a joint report stipulating the value of the cement damaged by the rain while being unloaded, any amount claimed by the appellant would be self-serving and speculative. Judge Jones' ruling being the central of the contention before this Court, we quote same verbatim:

COURTS FINAL JUDGMENT

Libellant the Liberia Cement Corporation (CEMENCO) filed this Action of Debt on August 19, 2010 claiming the amount of US$180,000.00 as money due Libellant as compensation for portion of its cement damaged by rain whilst being unloaded at the Freeport of Monrovia.

1st Libellee who was unloading the cement consignment had conveyed it from Turkey to Monrovia for Libellant under a Marine Contract.

According to Libellant CEMENCO, while its 14,299.50 Metric Tons of Cement were being

Unloaded at the Freeport of Monrovia, the negligence of employees of 1ST Libellee coupled With the breakdown of Libellee hydraulic machine caused rain to fall upon and damage portion of the cement that were contained in hatches #2 and #5.

Libellant further alleged that it sent a letter to 15L Libellee over the signature of its Managing Director Via Atlantic Marine Agency informing 1ST Libellee of the damage to its Cement.

Libellant also alleged that 2ND Libellee who is Insurer for 1ST Libellee in an effort to mitigate the loss, mutually agreed with Libellant, that the consignment of Cement in hatches #2 and #5 on board MV Blue Lady be taken to Libellant's warehouse to conduct a survey for the propose of determining the quantity of cement damaged by the rain.

Libellant attached copy of a joint survey report conducted on 24th September 2008 which is Preliminary in content, marked exhibit P/4 in bulk.

Libellant further alleged that British Marine Luxembourg insurer of 1st Libellee issued Libellant a Letter of undertaking on 13th October 2008 to pay Libellant the amount of US$180,000.00 as compensation for the damaged cement.

That Libellant's Surveyors and the P&I Club of 1st Libellee Insurer British Marine conducted further independent surveys to verify and cross check the authenticity of survey report which according to Libellant, was proven correct.

In support of this allegation, Libellant attached P/6

Libellant alleges that despite the promise to pay Libellant US$180,000.00 as per the Letter of undertaking, 2nd Libellee British Marine has refused to make any payment.

The Action was instituted by attachment, since according to the complaint, 1st Libellee MV Blue Lady is not domicile in Liberia.

There is no Returns to the Writ of Attachment, but during the argument, the Court understood that the Letter of undertaking was given to Plaintiff in avoidance of the effect of attachment which would have operated to prevent the carrier MV Blue Lady from sailing.

The signature of Mr. Henry Bronson of Africa Marine Services appears on the front of the writ of attachment, which the Court believes is intended to indicate that the Writ was served.

The Returns to the Writ of Summons indicates that it was served on all parties on 215tAugust 2010.

On 14th September 2010, Libellant obtained a Clerk's Certificate from the Clerk of the Debt Court for Montserrado County to the effect that the Libellees had failed to file an Answer or to appear in any other form or manner provided by Law.

By regular Notice of Assignment, Law Issues were disposed of on October 19, 2010 whereby the case was ruled to Trial as comprising mix issues of Law and facts and the Libellees simultaneously ruled to Bare Denial of Libellant's Complaint.

Having disposed of Law Issues and Motions, Trial commenced on Wednesday September 19, 2012.

Plaintiffs first witness James Doe Gibson testified that he is the General Services Manager of Libellant CEMENCO.

He informed the Court that the carrier MV Blue Lady began discharging CEMENCO's Cement on September 19, 2008 at the time there was a heavy down pour of rain in the Freeport of Monrovia, thereby causing damage to some of Libellant's Cement. Witness Doe Gibson also informed the Court that the loss was compounded by the crew's delay in closing the hatches upon arrival of the rain. The witness said that when the hatches i.e. hatch #2 and #5 were opened on September 20, 2008, it was discovered that a substantial amount of water had entered the two (2) hatches and damaged some of the Cargo in them. He further said that it was decided that the damaged slings be removed from the ship and taken to CEMENT for sorting. He also informed the Court that during the sorting process, it was found that 1,225.5 tons of Cement were damaged by the rain. According to the witness, it was a joint team of Surveyors who carried out the sorting. He concluded that the quantity of Cement damaged i.e. 1,225.5 tons were agreed to by all Surveyors in attendance, and that the value of the damaged Cement which was being claimed by CEMENCO is US$180,000.00.

Plaintiff's second witness Mr. Julius Cee said he is an Employee of the Ocean Group of Companies as Marine Surveyor. He confirmed Plaintiff's documentary evidence.

On September 19, 2012 when the Case was called for continuation of Trial, Counsel for Defendants was not present once more even though the Notice of Assignment was served and returned served on all Counsels of record.

The Counsel for Libellant moved the Court for Judgment by Default and asked the Court to allow Libellant produce its evidence. The Court agreed with Counsel for Libellant for two (2) reasons — Firstly, because it was not Unusual for Libellee's Counsel to be absent from scheduled hearings and more specifically, because when the Case was last scheduled for hearing i.e. on July 18, 2012, at 10:30PM, the 2117 Case could not be proceeded with due to the absence of Libellees Counsel Cllr. Farmere G. Stubblefiled from the Country.

This time, the Notice of Assignment for continuation of Trial on September 19, 2012 was signed for by Cllr. Stubblefield himself but he was absent from Court when the Case was called without notice to or excuse from the Court. The Court had no alternative but to allow the Libellant to proceed.

Following the Testimony of Libellants two witnesses, Atty. James Doe Gibson and Mr. Julius Cee, the Court rendered Final Judgment for Libellant, finding Libellee liable to Libellant in the amount of US$180,000.00 plus cost and interest.

Libellees once more filed a Motion to rescind Final Judgment alleging amongst other things that he developed sudden illness on the morning of the hearing i.e. September 19, 2013.

The Court granted the Motion and rescinded its Judgment with the Proviso that Libellees enter where they meet the Court i.e. to produce Libellees' own evidence since Libellant had already rested with the production of Evidence.

Saving set aside the Default Judgment, entered on September 19, 2012 against the Libellees, the Case was once more assigned for continuation of Trial on December 18, 2012.

At the call of the Case, Counsel for Libellees informed Court that he did not wish to introduce any evidence other than what was already before the Court.

By agreement of the Parties, January 8, 2013 was scheduled for Final Argument.

At the call of the Case for Final argument each counsel argued extensively for thirty (30) minutes and Final Judgment was reserved.

The Question to be answered now by the Court is whether or not Libellant CEMENCO has successfully established its claim of US$180,000.00 against the Libellees?

In order to answer the question, the Court must revert to the Pleadings and the Testimonies before it.

Libellant CEMENCO filed the Complaint against the Libellees claiming the amount of US$180,000.00 as cost of damaged Cement growing out of a Marine Contract entered into between Libellant and the Libellees to convey 14,299.5 metric tons of or Grey Portland Cement from Turkey to the Freeport of Monrovia.

According to Libellant's Complaint, when the Cement reached the Freeport of Monrovia and whilst offloading, there was a down pour of rain which caused cement in hatch #2 and hatch #5 to suffer damage due to faulty hydraulic system of the Ocean carrier MV Blue Lady, and the negligence of its Crew.

The Action was by Attachment but the Libellee issued Libellant an LOU (Letter of undertaking) to secure the ship's (MV Blue Lady) freedom.

According to the LOU, Libellant was not to take any action leading to the arrest of the carrier MV Blue Lady.

In return, Libellees were to pay Libellant any amount not to exceed US$180,000.00 that may be awarded Libellant by a properly constituted London Arbitration Tribunal.

Libellees also undertook to appoint an arbitrator who in cooperation with Libellant's arbitrator will choose an umpire for the purpose of assessing the damage to Libellant's Cement.

According to records before the Court a joint Survey was conducted by all parties on September 21, 2008 and a preliminary report dated September 24, 2008 signed by all parties was issued.

This report concluded that the damaged Cement will be transported to Libellant CEMENCO's Clinker shed for separation and counting. The Preliminary Report was signed by Representatives of all parties including Libellant CEMENCO.

See full text of the joint Survey Preliminary Report below:

AFRICA MARINE SERVICES (LIBERIA)
C/o Business incubator Piazza-80 Broad Street- P.O Box 10-5697-
1000 Monrovia 10 Liberia
Tel: (+231) 226611-Fax (231) 226204- Mobile +(231)6511644,
+(231)6513423
+(231); 511644 & +(231)6514606
September 24, 2008

JOINT SURVEY STATEMENT
M/V "BLUE LADY"

This is to certify that a joint Survey was attended on September 21, 2008 upon request of the receiver, Messrs CEMENCO on board M/V "Blue Lady" for the purpose of verifying the cause and extent of damaged cargo (bagged cement) in hatch 2 and 5 affected by rain water as a result of hydraulic system breakdown during a down pour of rain on September 19, 2008 at 2315hrs.

In attendance were the following Surveyors:

1. Mr. Julius Cee - Receiver Surveyor
2. Mr. Roland F. Dakagboi - P&I/owners Surveyor
3. Mr. Henry N. Brunson - P&I/owners Surveyor
4. Capt. Ali Ocal - Marine Superintendent/FT Maritime
5. Capt. Yamak Isa - Master
6. DilmenBanki - Chief Officer
7. Mr. Borj'e Thomson - CEMENCO Representative
8. Michael Nimley - Owner Tally Clerk

The joint inspection in hatch No. 2 portside commenced at 1450hrs and ended 1502hrs.

OBSERVATION

During the joint inspection in hatch No. 2portside it was observed that layers of plastic sheets and tarpaulin were used to cover the Jumbo polyethylene sling packed with 30x5okg paper bags of cement which contained rain water that had entered the hatch.

The Joint inspection in hatch No. 5 commenced at 15:13hrs and ended at 1520hrs.

A few jumbo sling bags on the first tier were appearing caking and harden from rain water.

CONCLUSION

It was finally agreed by all parties that the alleged damaged/hardened and caked bags will be discharged, transported to CEMENCO Clinker's shed for separation and final count of alleged damaged/hardened and caked bags.

Signature
Capt. Yamak Isa
MV "Blue Lady"

Signature
Capt. All Ocal
Marine Superintendent/FT Maritime

Signature
Mr. Julius Cee
Receiver Surveyor

Signature
Mr. Roland F. Dakagboi
P&I Owners Surveyor

Signature
Mr. Henry N. Brunson
P&I/Owners Surveyor

Nowhere in the foregoing Report did the Parties agree that 1225.5 tons of cement were destroyed by the rain; contrary to Plaintiff's first witness testimony.

The Court is at a loss, as to why the Joint Survey Team that conducted the preliminary assessment and decided to take the damaged slings to CEMENCO's Clinker shed for sorting and counting failed to conclude their joint survey, instead the parties resorted to individual and separate survey as follow:

Blue Cross —Africa P&I acting for Libellees wrote Ocean Group of Companies who represents Libellant on November 21, 2008, informing Ocean Group that from its own assessment 1000 slings were found to be partly affected, and that from random further assessment, the damage is worth US$40,000.00 which Libellant refused to accept.

Blue Cross also attributed the failure of the joint Survey to Ocean Group of Companies acting for LIBELLANT CEMENCO.

This allegation was not refuted. See Blue Cross Letter dated November 21, 2008 signed by Mr. Naji Eid and marked exhibit P/6.

Ocean Group of Companies, acting for Libellant also conducted its own independent survey and filed its own survey Report indicating the damage to be 1225.5 metric Tons.

Considering this departure the Parties have adopted,, the question is whether a Judgment on the merit is passible in the absence of a joint survey report, stipulating the quantity of cement damaged by the rain, and the value thereof?

This Court says NO. The Letter of Undertaking (LOU) which was given to Libellant at the time Libellees' Vessel MV Blue Lady was allowed to sale, provided for a joint assessment of the damage to Libellant's Cement consignment.

Libellant has riot established Libellees' fault for the failure of the conclusion of the joint assessment which was commenced whereby the parties agreed in writing to convey the affected slings to Libellant CEMENCIO Clinker Shed for sorting and counting.

For no clear reason, the Court sees the Libellant and Libellees conducting separate and independent assessment with separate conclusions as to what portion of the Cement consignment was damaged by the rain while being unloaded at the Freeport of Monrovia by libellees.

WHICH OF THE TWO CONCLUSIONS THE US$40,000.00 DAMAGE FOUND BY BLUE CROSS FOR LIBELLEES OR THE 1225.5 METRIC TONS DAMAGED AS FOUND BY OCEAN GROUP OF COMPANIES FOR LIBELLANT?

In the mind of the Court, Libellant has failed to prove its claim of US$180,000.00 against Libellees

It is well established that some damage was done to Libellant's Cement consignment while it was being unloaded at the Freeport of Monrovia as per the joint preliminary report signed by all parties and the Blue Cross Africa (Surveyor for Libellees) Report which assessed the damage cement to value US$40, 000.00.

What is not certain to this Court is what Quantity was actually damaged by the rain and the monetary value of the damage.

The quantity of Cement damaged by the rain, and the dollar value of that quantity, are indispensable to the judicial resolution of the controversy and must be determined by the parties working jointly and not individually.

SHE JOINT SURVEY IS PROVIDED FOR IN THE LETTER OF UNDERTAKING, AND WAS COMMENCED BY THE PARTIES AFTER WHICH THEY ISSUED A PRELIMINARY REPORT STATING THAT SOME DAMAGE WAS DONE BY THE RAIN, BUT DAMAGED SLINGS WOULD BE CONVEYED TO THE CLINKER SHED OF CEMENCO FOR SORTING.

THE JOINT SORTING WHICH WOULD HAVE MADE IT POSSIBLE FOR THE PARTIES TO JOINTLY CONCLUDE THE SURVEY AS TO BOTH QUANTITY AND VALUE WAS NEVER DONE, INSTEAD THE PARTIES RESORTED TO INDIVIDUAL/ INDEPENDENT ASSESSMENT.

In the absence of a joint survey report stipulating the value of the Cement damaged by the rain while being unloaded, any amount claimed by Libellant would be self-serving and speculative.

It is only the value of the damaged cement stated in a joint survey report that the Libellant may bring an Action of Debt to recover.

Unlike an Action in Damages which may be speculative and approximate in the pleading, an Action of Debt is actually an action to enforce the payment of a sum certain which the Debtor has consented to pay the creditor.

The Debtor in this case Libellees did not agree to pay Libellant US$180,000.00 for damage cement. Libellees agreed to pay Libellant what a joint assessment will find its liability to be up to the tone of US$180,000.00.

The Joint assessment was commenced but not concluded for reasons not made known to the Court.

For the court to award Libellant the US$180,000.00 which is the maximum amount agreed to by Libellees in the absence of a joint Survey Report would be presumptuous and void of Legal soundness.

The Court agrees that damage was done to a portion of Libellant's Cement by the rain while Libellees were unloading the Cement consignment at the Freeport of Monrovia, but in the absence of a joint survey Report stating the quantity and the value of the damage, an Action of Debt will not lie.

WHEREFORE AND IN VIEW OF THE FOREGOING, the Action of Debt is hereby dismissed without prejudice. And it is hereby so ordered.

Given under my hand and seal of Court this 14 day of March A.D 2013

James E. Jones

JUDGE

The appellant excepted to the above ruling and, as required by law, filed a bill of exceptions containing four counts, specifying errors alleged to have been made by the trial court, to form the basis for appellate review by this Court. The errors assigned by the appellant were that the judge's ruling was contrary to the weight of evidence; that the appellee admitted to the debt obligation by its several communications exchanged between the parties; and that the total amount sued for was established. We quote herewith the appellant's four-count bill of exceptions, as follows:

"APPELLANT'S BILL OF EXCEPTION

Appellant/Libellant in the above entitled cause of action being dissatisfied with your Honor's final judgment of the 14th day of March A. D. 2013 files in this Bill of Exception.

1. That Appellant says that your Honor's final judgment of the 14th of March A. D. 2013 is not supported by the facts adduced at trial and is a reversible error in that Appellant/Libellant successfully established the claim of United States One Hundred Eighty Thousand (US $180,000.00) Dollars for which an appeal is being sought to review and connect such erroneous errors.

2. That Debt Obligation was establish with certainty, precession and consistency by the Letter of Undertaking annexed to the pleading stating the Debt Obligation to United States One Hundred Eighty Thousand (US $180,000.00) Dollars.

3. That further the Debt Obligation is establish by the report of Blue Cross Africa P & I when on the 21st day of November 2008 when a random sampling was done on two thousand eight hundred fifty four 2,854 Shins (4281MT) when it discovered that one thousand 1000 shins (1,500 MT) was partly affected. If the cost of a metric ton less depreciation as usually done in the Marine Trade, the total Debt Obligation USD 180,000.00 would be established.

4. That the second sorting was done in the presence of Messrs. Rolland F. Dakasboi of African P & I club, Mr. Julius S. Cee Ocean Group of Companies, receives surveyor and Mr. Naji Eid of Blue Cross P & I when he suggested that the club paid USD $40,000.00 which was never supported by the record of the case file to warrant the dismissal of the action which is erroneous for-Which an appeal would lie to correct same.

WHEREFORE AND IN VIEW OF THE FORGOING, Appellant/Libellant excepted to your Honor's final Judgment of the 14`h day of March A. D. 2014 and hereby tenders this Bill of Exception for your Honor's approval so as to facilitate the review of this case by the Honorable Supreme Court of the Republic of Liberia sitting in its October term A. D. 2013.

Respectfully submitted
The above named Appellant
by &-thru her Counsel: Tuan Wreh Law Firm,
P. O. Box 677, Monrovia, Liberia

____

COUNSELLOR-AT-LAW
Submitted 22nd day of March A. D. 2013.

Having outlined the facts and circumstances attending this case, we have identified two issues which we deem to be dispositive of the case. They are:

1. Whether or not it was established by the records before this Court that the appellant's cargo was damaged as a result of the negligence of the appellees?

2. Whether or not the appellant establish a sum certain for which an action of debt may lie?

As to the first issue, whether or not it was established that the appellant's cargo damaged as a result of the negligence of the appellees, our careful review of the records lead us to answer in the affirmative. The undisputed facts are that MV Blue Lady, a common carrier, the 1st appellee herein, received certain quantity of cement from a company called 'Scancen International Heidelberg Cement Group and agreed to transport and deliver the cement to the Liberia Cement Corporation (CEMENCO); that on September 19, 2008, while discharging the cement, it began to rain and as a result of the rain, water entered hatches 2 & 5 of the 1st appellee's vessel and caused damage to certain quantity of the appellant's cement; that the entry of the water into the hatches and the damages thereof was occasioned by a breakdown in the hydraulic machine, hatches 2 & 5 of the 1st appellee prior to the rain thereby making it impossible on the part of the 1st appellee to prevent the damages caused on the cement of the appellant; that on September 21, 2008, upon a request of the appellant, CEMENCO, a joint survey was conducted for the purpose of verifying the cause and extent of damaged cargo (bagged cement) in hatches 2 and 5 affected by the rain; that on September 24, 2008, the joint survey statement was produced which confirmed that indeed certain quantity of cement in hatches 2 & 5 was damaged by the rain; and that the damage was caused by the breakdown in the hydraulic system of the 1st appellee during the pour of the rain on September 19, 2008.

These events were further buttressed by the fact that the 1st appellee initially offered to pay the amount of US$40,000.000, an amount it believed was the just cost to liquidate the damages caused to the appellant's cement. This was done through a communication dated November 21, 2008 which we produce below, as follows:

"BLUE CROSS-AFRICA P & I
Midtown Plaza
Carey Street
Monrovia, Liberia

November 21, 2008,
Ocean Group of Companies
131 Crown Hill, Broad Street
Opposite YMCA

Monrovia, Liberia
MV: Blue Lady
Re: your letter dated November 19, 2008, received November 21, 2008 @3:45 hours
Dear Sir:
We acknowledged receipt your above mentioned letter and we want to state clearly that the 2854 sling (4281MT) of cement claimed to be damaged was mixed with sound cargo. It was observed and declared by CEMENCO warehouse supervisor on the October 25, 2008 and after separation we found only 1000 sling (1500MT) partly affected.
In the presence of the parties listed below:
Blue Cross P & I Africa Naji Eid P & I Club
Africa Marine Services Rolland F. Dakagboi P & I Club
Ocean Group of Companies D. Julius S. Cee Receiver Surveyor
When I asked you on October 25, 2008 when we shall continue the exercise, you said I will call and inform you later. Until November 4, 2008 when you suggested 58% depression on the 1000 sling. I suggested that the club will pay US$40,000.00 to close the matter, which I think is a good offer and I also said that this offer stands for 7 days. At that time you told me that Mr. Pranod is out of the country but you will inform him. Later the answer was that Mr. Pramod disagreed. I said fine the only way is to take the matter to arbitration in London.
From the random samples selected on the below dates:
October 9, 2008 6 slings (180 bags) found 144 sound against 26 partly cake
October 13, 2008 3 slings (90 bags) found 78 sound against 12 partly cake
October 16, 2008 6 slings (180) bags found 142 sound against 38 partly cake
Based on our findings we would like to state that there is no need for further survey
Truly yours,
Naji Eid
For Africa P & I"

The above mentioned report and the offer by the 1st appellee to pay US$40,000.00 (Forty Thousand United States Dollars) clearly shows and we deem an admission that damage was substantially done to the appellant's cement and that the appellees acknowledged responsibility for the damage done to the appellant's cement. The only thing that was left to be done was to establish the actual amount of damage and to attach the attending financial costs for payment to the appellant. As noted from the date of the above communication, it came almost two months after the joint survey report which found that damages was done to the appellant's cement at the negligence of the appellee but recommended that the appellant conduct another survey for the sole purpose of sorting the damaged bags of cement and for the calculation of monetary value. As can also be seen from the above communication tendered by the 1st appellee, it is recognized that the findings contained therein were not final as the total amount number of damaged cement not only because it was done randomly but also because the surveyors recognized that it was simply a work in progress when they stated thus: *When I asked you on October 25, 2008 when we shall continue the exercise, you said I will call and inform you later. Until November 4, 2008 when you suggested 58% depression on the 1000 sling."*

We are of no doubt therefore that the appellant cement was damaged by the negligence of the 1st appellee and the 2nd appellee having tendered a letter of undertaking acknowledging the damage caused to appellant and committing itself to pay the appellant for the damaged cement upon determination of total quantity and monetary value of the damaged cement, cannot question the fact that the appellant's cement was destroyed at its behest and it also cannot disclaim liability or responsibility for the damage, and we so hold.

This brings us to the next issue which is whether or not the appellant establish a sum certain for which an action of debt may lie. The appellant contends that the appellees having acknowledged its indebtedness and tendered a letter of undertaking committing themselves to pay the appellant the amount not exceeding US$180,000.00, the court should adjudged the appellees liable in debt equal to the amount of US$180,000.00 stated in the Letter of Undertaking. In order to address this claim, we shall take recourse to the definition of a letter undertaking; its commercial purpose in admiralty and its legal implications relative to the settlement of claims by the undertaker and the conditions upon which the receiver is to receive payment thereunder. We shall also review the letter tendered by the 2nd appellee in order to ascertain whether it imposes an absolute or definite obligation of the undertaker to pay the amount stated therein without the showing of any proof for the receipt of payment and if the letter expresses certain prerequisites which must be met in order for the receiver to be entitled to payment, our review shall extend to the records to ascertain whether the receiver, the appellant herein, exhausted those pre-conditions for which it would be entitled to a fixed or stated amount.

A letter of undertaking is "an agreement by which a ship-owner to avoid having creditors seize the ship and release it on bond, agrees to post security on the ship, and to either an appearance, acknowledge ownership, and pay any final decree entered against the vessel whether it is lost or not." Black's Law Dictionary, 9th Edition. Great writers of contract and commercial law have described a letter of undertaking as an informal or extra-legal agreement which saves court cost and fees, avoid the annoyance of having the vessel even temporarily arrested and may well be cheaper than usual surety bond. *In Commercial Grain Co. v. Federal Barge Lines, Inc, US Supreme Court, 1960.* Other legal commentators stated that a letter of undertaking given by a ship owner would be treated as though, upon the libel being filed, the vessel had actually been seized, claim filed, a stipulation to abide by decrees with sureties executed and filed by claimant, and the vessel formally released. Any other course would imperil the desirable avoidance of needless cost, time and inconvenience to litigants, counsel, ship, clerks, marshals keepers and court personnel through the ready acceptance of such letters of undertakings. The informal agreement is treated as having the same effect as formal release under bond or stipulation, few questions relating to their use will ever have to be litigated. *Grant Gilmore & Charles L. Black Jr., The Law of Admiralty, section 9-89, 2nd edition, 1975* [Our Emphasis]

All of the authorities cited show that although a letter of undertaking establishes an obligation on the part of the undertaker or the ship owner to make some payment in lieu of any libel suit or complaint brought against the ship owner, it is clear that the amount offer therein is not a debt in itself, but rather it is a bond or stipulation recoverable only upon a decree or determination of the monetary value of the injury sustained by the libellant. Therefore, for courts to decree that a libellant is entitled to an amount stated in a letter of undertaking, it must be shown that the injury sustained by the libellant is equivalent to said amount or portion of that amount.

A review of the letter of undertaking show that same was tendered by the 2nd appellee as a bond to allow the 1st appellee's vessel leave the Free Port of Monrovia; that by the letter of undertaking, the 2nd appellee obligated itself to pay the appellant for its damaged cement upon determination through a survey, of the total amount of damaged cement and that any monetary amount assessed against the 2nd appellee shall not exceed US$180,000.00 (One Hundred Eighty Thousand United States Dollars). Here is how these conditions were expressly stated in the Letter of Undertaking:

> *"In consideration and the Owners of and other parties entitled to sue in respect of the above mentioned claims concerning cargo referred to above (hereinafter together referred to as "Cargo Owners") refraining from taking action resulting in the arrest of the above-mentioned ship or any other ship in the same Ownership, associated Ownership or management for the purpose of funding jurisdiction and or obtaining security in respect of the above claims of the cargo owner concerning the cargo mentioned above and of the cargo owner refrain from commencing and/or persecuting legal arbitration proceedings in respect of the above claims (otherwise than before the court of tribunal referred to below) against TT Denizcilib San. ve Tic A.S. and TT Maritime Industry & Trading Inc., the Owners of the owner of the above name. ship and/or the ship, we hereby undertake to pay you on demand on and such sums as may be adjudged; from Owners of the above-mentioned ship and/or M/V "Blue Lady" to be due to cargo owners by award or order of a properly constituted London Arbitration Tribunal or a maybe agreed to be recoverable from the Owners of the above-named ship in respect of the said claims provided that the total of our liability shall not exceed the Sum of US180,000.00 one hundred eighty thousand United States Dollars) inclusive of the interest and costs.."*

We are therefore convinced that by the intent of letters of undertaking and by the clear language of the quoted Letter of Undertaking tendered by the 2nd appellee and accepted by the appellant herein, the appellant can only claim the full amount of US$180,000.00 (One Hundred Eighty Thousand United States Dollars) or an amount not exceeding US$180,000.00 (One Hundred Eighty Thousand United States Dollars) upon the determination of the total monetary damage the appellant suffered as a result of the appellee's negligence.

We shall now review the joint survey report of September 21, 2008 and the appellant's individual sorting report of December 5, 2008 to ascertain whether these reports established that the damaged cement bags amounted to US$ US$180,000.00 (One Hundred Eighty Thousand United States Dollars) as is being claimed by the appellant.

As earlier stated, at the request of the appellant, CEMENCO, a joint survey was conducted for the purpose of verifying the cause and extent of damaged cargo (bagged cement) in hatches 2 and 5 affected by the rain; the joint survey statement was produced which confirmed that indeed certain quantity of cement in hatches 2 & 5 was damaged by the rain; and that the damage was caused by the breakdown in the hydraulic system of the 1st appellee during the pour of the rain on September 19, 2008. The joint survey statement however failed to expressly state the quantity of cement damaged and the monetary value thereof but all the parties agreed that the damaged bags of cement be discharged and transported to CEMENCO clinker's shed for separation and final count of the damaged bags. In fulfillment of the recommendation from the joint survey statement, the appellant conducted the sorting and submitted its report on the separation and sorting of the cement alleged to have been damaged at the negligence of the 1st appellee. However, like the joint survey report, the appellant's report also fell short of mentioning any monetary value of the damaged bags of cement. The appellant's report simply stated the damaged bags of cement in metric tons and slings; that the loss determined to the cargo was at 1225.5 metric tons making 817 slings, affected by the rain. There is no indication in the report as to the monetary value of the '1225.5 metric tons making 817 slings.'

Notwithstanding the above, the appellant insist that the judge should make a declaration awarding it the total amount stated in the letter of undertaking. We disagree and hold that in order for the appellant to recover any monetary amount from the appellees, the sorting report should have clearly stated the value, in dollars, of the cement that got damage by the rain.

An action of debt, as required by law, must state the sum or amount of debt due or alleged to be due with a degree of certainty, precision and consistency so as to enable the court to render final judgment thereon on demurrer or default, and that the necessity does not then exist for the taking of extensive evidence. Because, where this is not done, any matter showing the non-existence of a debt in a sum certain is a good defense. *Goll v.. Servicetecnic Corporation (SERVO),* 32 LLR 140, 150 (1984).

Mr. Justice Koroma, speaking for a unanimous Court, and reference C.J.S. exposé on debt action, espoused thus:

> "Debt is defined as a form of action which lies at law to recover a certain specific sum of money, or a sum that can readily be reduced to a certainty. The two essentials to an action of debt are (1) certainty of sum, and (2) medium of payment. The explanation given these essentials,

found in 26 C.J.S., is that an action of debt must be for a fixed and definite, either money or one that can readily be made fixed and definite, either from fixed data or agreement. Debt will lie where the contract of the parties provides a specific more of payment or its terms furnish the means of ascertaining the exact amount due for specific articles or services. For the action of debt to lie, the obligation must be of such a character that it is payable in money only. *26 C.J.S., Debt section 10(b) at 25.*

This Court continued that:

"Particular averments in an action of debt are: (1) the obligation, (b) the sum due, (c) the breach, (d) the demand, (e) special averments and (f) damage."

We have already addressed the obligation and held that the records clearly established that the appellees have an obligation to pay. They acknowledged such obligation and offered to pay, subject only to the condition that the amount not exceed US$180,000.00. What we have not found in the records is the exact sum due under the obligation undertaken. Hence, it is important that the report commissioned by the parties states with certainty the amount of due as will enable the court to render final judgment thereon with the certainty which the Supreme Court has said is cardinal. As there are no indications in the records that any amount has been paid as per the undertaking by the appellees, and as the appellees have made no such claim, the conclusion can be drawn that no amount has been paid as of the date of this Opinion. However, we emphasize that the form of the allegation of the breach must be governed by the nature of the appellees' obligation undertaken in the Letter of Undertaking. *Goll v. Servicetecnic Corporation (SERVO),* 32 LLR 140, 150 (1984); 26 C. J. S., *Debt, section 10(b).*

The words and terms of the Letter of Undertaking in the present case are unambiguous that the sum due can only be established by a survey, identification and sorting of the damaged cement and that the amount offer in the letter is payable only upon the determination of such sum due and which sum shall not exceed US$180,000.00. The appellant having failed to make a determination of the precise monetary value of the damaged cement, an action of debt for that amount cannot be awarded in the action of debt, and we so hold. We therefore remand the case, but for the sole purpose of having a determination made of the value which attached to the obligation undertaken by the appellees.

We note that this case has remained unsettled since 2008, a period of almost 10 years; that there is no dispute that the appellant cargo (cement) was destroyed at the fault of the appellees; that pursuant to the recommendation of the joint survey statement, the appellant has conducted the sorting of the damaged cement and submitted its report, albeit without indicating the total dollar value, and that the appellee is obligated by the Letter of Undertaking to make payment to the appellant up to the value of US$180,000.00, subject to the determination of the total monetary cost of the damages. Therefore, this Court orders that, in the interest of justice and given the acknowledgment by the appellees of responsibility for the damage done to the appellant's cement and obligation to compensate the appellant therefor once the value is determined, is ordered that the lower court retains jurisdiction over the case and that the parties be ordered to assess the monetary cost of the damaged cement within fifteen (15) days of the date of the reading of this Court Mandate by the trial court and submitted to the court for a final pronouncement thereon; provided however that the monetary value of the judgment shall not be in excess of the US$180,000.00 stated in the Letter of Undertaking.

Wherefore and in view of the foregoing this case is hereby remanded to the Debt Court for Montserrado County with the following instructions:

1. That upon receipt of this Opinion, the trial judge presiding therein cites the parties and directs that an the assessment of the monetary value of the total quantity of the cement reportedly damaged, as indicated in the joint report and the appellant's sorting report of December 5, 2008, be carried out and a monetary value placed thereon. The pricing of the cement shall be governed by the prevailing market price at the time the cement was damaged;

2. That upon the assessment and determination of the monetary value of the cement, the 2nd appellee shall make such payment through the Debt Court for the benefit of the appellant, subject only to the limitation of the monetary value stated in the Letter of Undertaking;

3. That the judge of the Debt Court for Montserrado County shall make returns to this Court within thirty (30) days of the date of this Judgment as to the enforcement of this Court's Mandate.

The Clerk of this Court is hereby ordered to send a mandate to the court below informing the judge presiding therein to resume jurisdiction over the case and give effect to this judgment. Costs are adjudged against the 2nd appellee. AND IT IS HEREBY SO ORDERED.