IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128 (2) of the Constitution read with the Supreme Court Rules of 1990.

Timberlake International Pvt. Ltd.,
351 Pannipitiya Road,
Thalawathugoda.

PETITIONER

S.C. APPEAL NO: 06/2008
S.C. (SPL) L.A. NO: 04/2008
C. A. APPLICATION NO: 866/2007

VS.

1. M.P.A.U.S. Fernando,
   The Conservator General of Forests,
   Forest Department,
   P.O.Box 03,
   Sampathpaya,
   Battaramulla.

2. P.G. Wickramasinghe,
   Range Forest Officer,
   Forest Department,
   Nawalapitiya.

3. Divisional Forest Officer,
   Forest Department,
   Kandy.

4. Pussellawa Plantations Ltd.,
   Alfred Tower,
   16, Alfred House Gardens,
   Colombo 03.

RESPONDENTS

AND NOW BETWEEN

1. M.P.A.U.S. Fernando,
   The Conservator General of Forests,
   Forest Department,
   P.O.Box 03,
   Sampathpaya,
   Battaramulla.

2. P.G. Wickramasinghe,
   Range Forest Officer,
   Forest Department,
   Nawalapitiya.

3. Divisional Forest Officer,
   Forest Department,
   Kandy.

RESPONDENTS-PETITIONERS

VS.

1. Timberlake International Pvt. Ltd.,
   351 Pannipitiya Road,
   Thalawathugoda.

PETITIONER–RESPONDENT

2. Pussellawa Plantations Ltd.
   Alfred Tower,
   16, Alfred House Gardens,
   Colombo 03.

4TH RESPONDENT - RESPONDENT

BEFORE : R. A. N. G. Amaratunga, J.,
Saleem Marsoof, P.C., J., and
P. A. Ratnayake, P.C., J.

COUNSEL : A. Gnanathasan, P.C., Add. SG with S. Balapatabendi, SSC and N. Wigneswaran, SC for Respondent-Petitioners.

Manohara de Silva, P.C. with Arienda Wijesurendra instructed by Bandara Thalagune for Respondents

ARGUED ON : 26-01-2009

WRITTEN SUBMISSIONS : 06-03-2009

DECIDED ON : 02-03-2010

MARSOOF, J.

This is an appeal from the order of the Court of Appeal dated 28th November 2007 staying, until the final hearing and determination of CA Application No. 866/2007, the operation of the letter of the 2nd Respondent-Petitioner, the Range Forest Officer, Nawalapitiya, dated 3rd August 2007 (P28) addressed to the Petitioner-Respondent Timberlake International Pvt Ltd., (hereinafter referred to as "Timberlake IPLtd") intimating to the latter that the issue of permits for the transport of pine timber is suspended until further instructions are received from the 3rd Respondent-Petitioner, the Divisional Forest Officer, Kandy. By the said interim order, the Court of Appeal also directed the 1st Respondent-Petitioner, the Conservator-General of Forests and his subordinates, the said 2nd and 3rd Respondent-Petitioners (hereinafter sometimes collectively referred to as the "Forest Conservators") "to issue transport permits forthwith to enable the petitioner (Timberlake IPLtd) to transport the timber already felled from blocks G, U, V, W and X." The said blocks are depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002 made by P. Gnanapragasam, Licenced Surveyor, and referred to in the Agreement dated 31st August 2004 (P9) entered into between Timberlake IPLtd and the 4th Respondent-Respondent Pussellawa Plantations Ltd., (hereinafter referred to as "Pussellawa PLtd").

When the application for special leave to appeal against the said order of the Court of Appeal was supported before this Court on 21st January 2008, it granted special leave to appeal on the substantive questions of law set out in paragraph 14(a) to (k) of the Petition dated 5th January 2008, and was also pleased to grant interim relief as prayed for in prayers (e), (f) and (g) of the said Petition, which *inter alia* had the effect of staying the operation of the impugned order of the Court of Appeal dated 28th November 2007 until the final determination of this appeal. The substantive questions on which special leave to appeal was granted, are as follows:

(a) Did the Court of Appeal misdirect itself and err in law in its interpretation of the scope and objective of the Gazette Notification No. 1303/17 dated 28.08.2003 marked P1?

(b) Did the Court of Appeal misdirect itself and err in law in holding that the 1st Respondent-Petitioner was bound by the Gazette Notification marked P1 in so far as is relevant to the matters set out in the application?

(c) Did the Court of Appeal misdirect itself and err in law in holding that the 1st Respondent-Petitioner was bound to charge stumpage fees in accordance with P1?

(d) Did the Court of Appeal misdirect itself and err in law by failing to consider the fact that the Pine plantations in question were planted and maintained by the Department of Forest Conservation (hereinafter referred to as the "Forest Department") from public funds since the 1980s?

(e) Did the Court of Appeal misdirect itself and err in law in failing to consider that if the 1st Respondent-Petitioner had no authority to charge the stumpage fees then the entire transaction is null and void and cannot be sanctioned by Court?

(f) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent cannot approbate and reprobate the charging of stumpage fees as agreed upon?

(g) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent was entitled to seek relief before Their Lordships of the Court of Appeal, having agreed to a settlement in the High Court?

(h) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent should first seek to set aside the settlement arrived at in the High Court?

(i) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the transaction was amenable to writ jurisdiction?

(j) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner could have maintained the application, as only the 4th Respondent-Respondent (Pussellawa PLtd) had standing in this matter, if any?

(k) Did the Court of Appeal misdirect itself and err in law in failing to consider the serious lack of *uberrima fides* on the part of the Petitioner-Respondent?

Factual Matrix

Before examining the above questions in detail, it is necessary to outline in brief the facts from which the said questions may be considered to arise. In terms of the Indenture of Lease bearing No. 61 dated 5th November 1993 (P2) and attested by Oshadi

Jeewa Kottage, Notary Public, the 4th Respondent-Respondent Pussellawa Plantations Ltd., (Pussellawa PLtd) became the lessee of the Janatha Estate Development Board (JEDB) on a 99 year lease of the Delta Estate, situated in Pupuressa, within the Gampola Division in the Kandy District in the Central Province of Sri Lanka. In 2003, Pussellawa PLtd, which apparently believed that the said estate consisted of a *pinus carribaea* forestry plantation in addition to its tea plantation, submitted a detailed forestry management plan for harvesting the forest produce from the said forestry plantation through the Ministry of Plantation Industries to the Conservator-General of Forests. The Conservator-General of Forests, by his letter dated 3rd September 2003 (P4), indicated that he had no objection to the implementation of the said plan subject to certain guidelines, which included a condition that Pussellawa PLtd should obtain clearance under Section 21 of the National Environmental Act No. 47 of 1980, as subsequently amended, for such activities of the plan that may require environmental clearance, and that all clear felled areas, except coppice areas, should be replanted during the same year or the year following. Thereafter, by his letter dated 18th February 2004 (P5), the Managing Director of Pussellawa PLtd applied to the Conservator-General of Forests through the Director of the Plantation Management Monitoring Division (PMMD) of the Ministry of Plantation Industries for his approval for harvesting the *pinus* forestry plantation at Delta Estate, and the said letter was forwarded to the Conservator-General of Forests by the Director of PMMD with his letter dated 19th March 2004 (P6). The said letter reveals that the Director of PMMD too believed that "the extent of 74.15 hectares belongs to Delta Estate" and that Pussellawa PLtd is "paying lease rental covering this extent".

By his letter of 20th May 2004 (P7), the Conservator General of Forests informed Pussellawa PLtd that for the granting of permission for the harvesting of the pine plantation in question, the valuation of the plantation is essential, and this would require a "comprehensive enumeration" of the plantation to be carried out, but the process can be expedited through a "sample enumeration of the plantation". After the Director of Natural Resources of the Ministry of Environment and Natural Resources signified his approval for the harvesting of the *pinus* forestry plantation, and environmental clearance obtained, on 31st August 2004, Pussellawa PLtd entered into an Agreement with Timberlake IPLtd (P9) *inter alia* to facilitate the harvesting of the said pine plantation in an expeditious manner. Under and by virtue of the said Agreement (P9), Pussellawa PLtd sold to the purchaser Timberlake IPLtd approximately 42,438 *pinus* trees planted on the 25 blocks of land depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002 and made by P.Gnanapragasam, Licenced Surveyor, for a sum of Rs. 850 per tree "exclusive of dead, rotten, damaged trees or trees with a girth of less than 0.45 meters below the bark".

It is noteworthy in this context that the Agreement (P9) provided that the consideration for the 42,438 *pinus* trees sold thereby shall be paid by Timberlake IPLtd to Pussellawa PLtd in the manner set out in Clause 7 of the Agreement. Clause 7 provided that in addition to the sum of Rs. 1 million already paid by Timberlake IPLtd and

acknowledged in sub-paragraph (a) of the said clause, the latter shall pay Pussellawa PLtd a sum of Rs. 9 million at the time of execution of the Agreement, (clause 7 (b) of P9), a further sum of Rs. 10 million within 60 days of the execution of the said Agreement (clause 7 (c) of P9) and the balance consideration after the harvesting and removal of the trees as provided in detail in clause 7(e). These provisions did not give rise to any dispute, but what is in controversy in this case is the meaning of clause 7(d) of the Agreement P9, in which Timberlake IPLtd, as the "purchaser" of the trees from the vendor, Pussellawa PLtd, agreed to "pay the *stumpage fees* as stipulated by the Conservator-General of Forests for each block, *prior to the harvesting of each block*." It is significant to note that the under the above quoted clause, "stumpage" was payable by Timberlake IPLtd to the Conservator-General of Forests *through* Pussellawa PLtd. It is also significant to note that on the very same date the said Agreement P9 was entered into, namely 30th August 2004, the General Manager, Forestry of Pussellawa PLtd wrote the letter marked P10 to the Conservator General of Forests, in which he stated as follows:-

> "We particularly refer to the copy of the letter dated the 21st July 2004 from the Director, Natural Resources of the Ministry of Environment and Natural Resources, sent to you under cover of our letter of the 4th August 2004, wherein we received approval for harvesting and removal of the Pinus plantation of 74.15 hectares at Delta estate. We thank you for your concurrent approval.
>
> We are now pleased to inform you that we have in consequence, sold the said trees to the firm, Timberlake International Pvt Ltd of 351, Pannipitiya Road, Thalawatugoda, and the harvesting and removal of the said trees would be carried out by them in accordance with the attached harvesting schedule, as required by the Director Natural Resources.
>
> *We confirm that Timberlake International Pvt Ltd, will, on our behalf, make to you the stumpage payment for each block, on your enumeration and will harvest each block only after such payment and your approval.*
>
> We also advise that we have authorized Timberlake International Pvt Ltd to act on our behalf directly with your Department in relation to any matters pertaining to the harvesting, removal and transportation of the said trees from Delta estate" *(italics added).*

It is clear from the above that Timberlake IPLtd., having purchased approximately 42,438 *pinus* trees planted on the 25 blocks of land depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002, stepped into the shoes, so to speak, of Pussellawa PLtd as far as the *obligation to pay stumpage* to the Conservator-General of Forests was concerned. It is also apparent from the correspondence including the letter dated 29th July 2004 (P11 X1) addressed to Pussellawa PLtd by the Conservator-General of Forests that he himself was under the impression that the *pinus* plantation belonged to Pussellawa PLtd and

that the pine trees were planted by the Forest Department. On this basis, for the 1,146 *pinus* trees that stood *Block 01A* with total volume of 528.158 cubic meters as enumerated by him, he ordered that a sum of Rs. 753,755.62 be paid as stumpage. I quote below the last paragraph of the said letter which is most revealing.

> "Please make arrangements to pay this amount. However I request you to provide documentation to prove that this area has been released to you by LRC. Furthermore, as this activity amounts to clear felling of forest plantations in more than I hectare, Please obtain the environmental clearance as per the National Environmental Act before undertaking felling."

There is no material to show whether Pussellawa PLtd did produce any documentary evidence as to whether Block 01A of the forest plantation was released to Pussellawa PLtd, but that was not a stumbling block to the harvesting having proceeded with as contemplated by the said Agreement (P9). By the letters dated 7th November 2004, 22nd December 2004, 14th February 2005, 5th May 2005, 27th July 2005 and 13th October 2005 marked respectively as P11 X2 to X7, all addressed to Pussellawa PLtd., the Conservator-General of Forests determined the aggregate stumpage fees payable with respect to the pine trees to be removed from *blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P* of the pine plantation as set out in the following table embedded into paragraph 17 of the Petition filed in the Court of Appeal by Timberlake IPLtd:

Table I

Block No.	Volume in cubic meters (m^3)	Total Stumpage	Stumpage Rate
01 A	528.158	Rs. 753,755.62	Rs. 1,427.4
01 B	673.79	Rs. 690,253.40	Rs. 1,024.43
01 C	1082.381	Rs. 1,009,535.62	Rs. 932.70
17 Q	1453.959	Rs. 1,618,450.10	Rs. 1,113.13
04 D	1064.465	Rs. 1,200,147.06	Rs. 1,296.58
06 F	1659.599	Rs. 1,760,520.50	Rs. 1,060.81
16 P	1444.982	Rs. 1,671,524.45	Rs. 1,330.30
All 7 blocks	7907.334	Rs. 8,704,186.75	Rs. 1,169.30

According to Timberlake IPLtd the stumpage rate on the basis of which the stumpage in the third column of Table I was computed is the rate shown in the fourth column of the said Table and the average stumpage rate was Rs. 1,169.30 per cubic meter. This is a premise which is contested by the Forest Conservators and needs closer examination, but it is common ground that neither Pussellawa PLtd nor Timberlake IPLtd, disputed the said enumerated stumpage, which were paid in due course.

The first real dispute between the parties arose when by his subsequent letter addressed to Pussellawa PLtd dated 25th November 2005 (P14a), the Conservator General of Forests claimed an aggregate of Rs. 29,672,224.00 as advanced payment of stumpage for *a further 17 blocks*. It is revealed in this letter that the aforesaid amount was arrived at using a sampling method and it is also stated specifically in the letter that Pussellawa PLtd will be required "to pay the difference once the actual felled volumes are calculated after the felling of all trees." It is alleged by Timberlake IPLtd that the said stumpage was worked out at the much higher rate of Rs. 1,184.00 per cubic meter, which was higher than the average rate of Rs. 1,169.30, shown in Table 1, by Rs. 14.30 per cubic meter. Although Pussellawa PLtd by its letter dated 5th December 2005 (P14b) protested that the rate of Rs. 1,184.00 "seems to be high", it nonetheless agreed with the said stumpage unit price of Rs. 1,184.00, but sought permission to make the payments "block-wise" as in the past prior to harvesting each block, and not at once. In view of the issues that arise for decision in this case, it is important to note at this stage that the Conservator General of Forests in his response dated 26th January 2006 (P15a) sent to Pussellawa PLtd, reiterates very clearly that the timber volume of these 17 blocks was calculated *using sample data instead of total enumeration* as Pussellawa PLtd requested the estimates very urgently. It was also categorically stated that although the selling price of the State Timber Corporation had previously been used in the computation of stumpage fees on the assumption that it reflected the current market price, it has been revealed that the selling price fixed for pine logs by the State Timber Corporation is significantly lower than the prevailing market price for *pinus* timber. The Conservator General of Forests stated in this letter that the Forest Department is compelled to use the new methodology developed for stumpage calculation *based on the market price* for logs, and as a result of the above changes the stumpage value for remaining pine blocks will have to be revised, and will be intimated to Pussellawa PLtd in due course. The Conservator General of Forests further stated that as requested by Pussellawa PLtd the valuation will be done block-wise giving priority to the next block to be harvested.

It would also appear that the Conservator of Forests, considering an urgent request made by Pussellawa PLtd to harvest *block 01R*, having made a *very approximate estimate* of the "*timber volume*" of that block and using the test of "market price", computed the *estimated stumpage fee* for that block at Rs. 4,534,139.00 and requested Pussellawa PLtd to pay a sum of Rs. 5,214,259.85 inclusive of value added tax for the grant of permission to harvest that block. However, considering representations made on behalf of Pussellawa PLtd, this amount was subsequently revised by the Conservator-General of Forests using the "Timber Corporation sale rates", who requested Pussellawa PLtd by his letter dated 9th February 2006 (P17) to pay a stumpage of Rs. 1,405,850.00 *as an "interim payment" pending the enumeration of the block to ascertain the actual volume of timber*. Pussellawa PLtd while objecting to the computation on the basis that it was erroneous and not in accordance with the law, nonetheless paid a sum of Rs. 1,616,727.50 inclusive of value added tax, with respect to block 01R and commenced harvesting. However, when Pussellawa PLtd made default in the payment of the enumerated stumpage fees prior to harvesting each of the *17 blocks* referred to in the letter dated 25th November

2005 (P14a) in contravention of the promise it made in its letter of 5th December 2005 (P14b), matters came to a head. The result was the letter dated 6th April 2006 (P18) sent by the Conservator-General of Forests directed the General Manager – Forestry of Pussellawa PLtd to stop with immediate effect, the felling of pine trees "belonging to the Forest Department in Delta Estate, Pupuressa." It is this order that prompted Pussellawa PLtd and Timberlake IPLtd to invoke the writ jurisdiction of the Provincial High Court in this connection.

The High Court Writ Application

On 19th April 2006, Pussellawa PLtd and Timberlake IPLtd filed HC WA Application No. 07/06 in the High Court of the Western Province citing the Conservator-General of Forests and other officials as respondents, seeking in terms of Article 154P of the Constitution *inter alia* a writ of *certiorari* to quash the said decision of the Conservator-General of Forests contained in the letter dated 6th April 2006 (P18).

During the pendency of the said application, the parties had a number of discussions with a view to setting the dispute. Certain proposals were made in writing by the General Manager – Forestry of Pussellawa PLtd by his letter dated 6th July 2006 (P21) addressed to the Conservator-General, who responded with his letter in reply dated 27th July 2006 (P22) which suggested the following terms of settlement formulated with the advice of the Attorney-General:-

1. Pussellawa PLtd to pay stumpage for the excess volume of *pinus* timber already removed by Timberlake IPltd *prior to Block 01-R* on the basis of the rates already calculated. (*The excess volume will be calculated by using the measurements of logs indicated on the transport permits issued in this context)*;

2. Pussellawa PLtd to pay stumpage on the basis of *actual volume* once the felling of Block 1-R is completed;

3. Pussellawa to abide by the *new sale rates to be fixed by the Committee* appointed by the Secretary of the relevant Ministry, and until such time the current State Timber Corporation prices to be used for calculation of stumpage. *(italics added)*

Pussellawa PLtd and Timberlake IPLtd, having accepted the said settlement in respect of the felling of trees *up to block 01R*, withdrew the aforementioned writ application on 28th July 2006, and by his letter dated 16th August 2006 (P23), the Conservator-General of Forests allowed Pussellawa PLtd to re-commence harvesting block 01R subject to the conditions set out above.

Giving Effect to the Settlement

In pursuance of the settlement reached by the parties as aforesaid, the Conservator General of Forests calculated the *actual volume of timber removed from blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P* referred to in Table I based on the *actual measurements* of logs indicated on the relevant transport permits as contemplated by condition 1 of the terms of settlement set out in P22, and by his letter dated 7th November 2006 (P24) addressed to Pussellawa PLtd, demanded an aggregate of Rs. 9,836,853.61 as the balance stumpage payable with respect to these lots. The particulars relevant to this claim were set out in the said letter as tabulated below:

Table II

Block	Actual Value of Timber removed (m^3)	Estimated Volume of Timber for which stumpage is already paid (m^3)	Difference in Volume (m^3)	Stumpage for Actual Volume Rs.	Stumpage already paid Rs.	Stumpage to be paid Rs.
01 A	1,119.426	528.158	591.27	1,408,680.85	753,755.62	654,925.23
01 B	868.889	673.790	195.10	1,289,319.41	690,255.40	599,064.01
01 C	1,564.444	1,082.381	482.06	2,185,104.14	1,009,535.62	1,175,568.52
17 Q	2,115.773	1,453.959	661.81	2,840,167.92	1,618,450.10	1,221,717.82
04 D	1,687.582	1,064.465	623.12	2,394,652.42	1,200,147.06	1,194,505.36
06 F	2,268.729	1,659.599	609.13	3,941,235.83	1,530,887.40	2,410,348.43
16 P	2,267.731	1,444.982	822.75	4,252,248.69	1,671,524.45	2,580,724.24
Total	11,892.574	7,907.334	3,985.24	18,311,409.26	8,474,555.65	9,836,853.61

It is to be noted that the stumpage fees demanded by the said letter dated 7th November 2006 (P24) and set out in the above table were exclusive of value added tax. Pussellawa PLtd responded to this demand by its letter dated 20th November 2006 (P24a) and while not contesting the *volume figures, upon which the difference in the quantity of timber amounting to 3,985.24 cubic meters was arrived at* for the purpose of computing the aggregate amount of Rs. 9,836,853.61 demanded by P24, nevertheless conceded that only a sum of Rs. 4,778,573.00 was payable as balance stumpage for blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P. Pussellawa PLtd disputed the amount claimed by P24 mainly on the basis that the Conservator-General had used a *higher rate of stumpage* from what had been originally used, in violation of the law as well as the settlement reached in the High Court. In paragraph 44 of its Petition filed in the Court of Appeal, Timberlake IPLtd has alleged that "even though it was agreed to pay the *same rate* as before for the said blocks (vide P20, P21, P22), *the 1st Respondent (Conservator-General of Forests) has increased the unit price per cubic meter* for blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P in respect of the excess volume removed." In paragraph 44 of the Petition,

Timberlake IPLtd sought to highlight the *difference in the rate of stumpage* using the following table:

Table III

Block	Stumpage / m^3 (earlier rate)	Stumpage for the excess volume/ m^3	Difference
01 A	Rs. 1,427.4	Rs. 1,258.40	Rs. (168.74)
01 B	Rs. 1,024.43	Rs. 1,483.87	Rs. 459.44
01 C	Rs. 932.70	Rs. 1,396.73	Rs. 464.03
17 Q	Rs. 1,113.13	Rs. 1,342.38	Rs. 229.25
04 D	Rs. 1,296.58	Rs. 1,631.83	Rs. 335.25
06 F	Rs. 1,060.81	Rs. 1,997.78	Rs. 936.97
16 P	Rs. 1,330.30	Rs. 2,156.38	Rs. 826.08

In paragraph 45 of its Petition filed in the Court of Appeal, Timberlake IPLtd has referred to the several appeals alleged to have been made by Pussellawa PLtd against the stumpage computation in P24, and has stated that as the said appeals were turned down, a settlement was reached to pay the said sum of Rs. 9,836,853.61 in 12 monthly installments commencing January 2007 "notwithstanding the severe economic hardship" faced by Timberlake IPLtd. If the contention of Timberlake IPLtd is correct, this would result in an overpayment of Rs. 5,058, 280.61 as stumpage fees with respect to blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P. However, it needs to be observed that the contention of Timberlake IPLtd that as shown in Table III the Conservator-General of Forests had computed the sum of Rs. 9,836,853.61 as balance stumpage due with respect to the said blocks adopting a *higher rate of stumpage* is altogether unfounded, amounts to a gross misrepresentation of facts. It will be seen from Table IV below that the rate adopted with respect to each block has been the same, and the difference in the stumpage fees claimed with respect to each block in P11 X1 to X7 (as estimates set out in Table II) and P24 (on the basis of actual volume) has been *due to the difference in the volume of timber.*

Table IV

Block	Estimated Stumpage as per Table II			Actual Stumpage as per P24		
	Volume m^3	Rs.	Rate per m^3	Volume m^3	Rs.	Rate per m^3
1A	528.158	753,755.62	1427.140401	1119.426	1597577.62	1427.139999
2B	673.79	690,253.40	1024.434022	868.889	890115.96	1024.430002
3C	1082.381	1,009,535.62	932.700000	1564.444	1459156.92	932.700000
17Q	1453.959	1,618,450.10	1113.133245	2115.773	2355130.4	1113.133245
4D	1064.465	1,380,169.12	1296.584782	1687.582	2188085.07	1296.584782
6F	1659.599	1,760,520.50	1060.810774	2268.729	2406692.17	1060.810776
16P	1444.982	1,922,253.11	1330.295542	2267.731	3016752.44	1330.295542

Meanwhile, there had been some discussions in regard to the modalities of payment of stumpage, and it appears that in order to facilitate the harvesting of blocks 01R, 02S, 03T and 05E without disruption, by the letter dated 28th August 2006 (P25a) Pussellawa PLtd suggested to the Forest Department that it will deposit a sum of Rs. 2 million upfront with respect to each of the said block, and as the deposit is reduced as the logs are harvested and removed, it will "replenish the deposit back to Rs. 2mn." It was further stated in the said letter that "the transport permits issued by the forest officer at site will allow us to calculate the volume removed by us from the site." This was readily agreed to, as reflected in the response of the Conservator-General of Forests dated 7th September 2006 (P25b). It is important to note the sense of urgency in the last paragraph of the said letter in which the Conservator-General states as follows:-

> "Once the amount of Rs. 250,000 is reached, you have to replenish the deposit back to 2 million before continuing with the removal of logs. I shall inform you when the deposit reaches Rs. 250,000."

There is no dispute that the initial deposit of Rs. 2 million with respect to each block was duly made. However, It was the failure on the part of Pussellawa PLtd to consistently replenishing the initial deposit to Rs. 2 million as undertaken by its letter dated 28th August 2006 (P25a), while large quantities of the *pinus* timber from blocks 01R, 02S, 03T and 05E were being removed by Timberlake IPLtd, that prompted the Conservator-General to insist in his letter dated 2nd August 2007 (P27) addressed to Pussellawa PLtd that for harvesting the remaining *blocks of G, U, V and W*, a total of Rs. 12 million should be paid as deposit upfront.

This situation also led to the decision to suspend the issue of transport permits with immediate effect until further instructions in this regard are issued by the Divisional Forest Officer, Kandy, which was communicated to the Site Manager of Tiberlake IPLtd by the Range Forest Officer, Nawalapitiya by his letter dated 3rd August 2007 (P28). It was this decision to suspend the issue of transport permits to clear the harvested timber that was the immediate cause for the filing, by Timberlake IPLtd., of the writ application from which this appeal arises, seeking *inter alia* to quash by way of *certiorari* and stay the decisions contained in P28.

When the harvesting of *blocks 01R, 02S, 03T and 05E* were completed, the Conservator-General of Forests, by his letter dated 7th August 2007 (P26) initially demanded an aggregate of Rs. 33,343,620.05 as stumpage from Pussellawa PLtd., based on the market value prevailing in 2007. However, it appears that the Conservator-General of Forests took the initiative to revise the stumpage fees having realized that the harvesting of blocks 01R and 02S had taken place by the end of 2006. Accordingly, the stumpage claimed in regard to these blocks were reduced by applying the 2006 market value, and by his letter dated 6th September 2009 (P29), the Conservator-General claimed an aggregate of Rs 29,345,157.13 as stumpage fees for blocks 01R, 02S, 03T and 05E. After

setting off the total initial payments /deposits aggregating to Rs. 7,616,727.50 and adding to the balance due the applicable value added tax, the balance payment demanded by the Conservator-General of Forests was Rs. 26,130,203.20, a breakdown of which was given in the said letter as follows:

Table V

Block No	Extracted Volume in cubic meters	Stumpage Rs.	Initial Payment Rs.	Balance due Rs.
01R	1,623.91	7,640,670.97	1,616,727.50	6,023,943.47
02S	979.64	4,518,815.56	2,000,000.00	2,518,815.56
03T	1,565.40	10,152,570.96	2,000,000.00	8,152,570.96
05E	1,881.10	11,434,873.21	2,000,000.00	9,434,873.21
Total	6,050.05	33,746,930.70	7,616,727.50	26,130,203.20

It is necessary to observe that though Timberlake IPLtd has stated that to the best of its knowledge no committee has been appointed to implement the settlement reached before the High Court, it is pertinent to note that Timberlake IPLtd has not sought the enforcement of such settlement by seeking the appointment of such a committee to determine stumpage. Timberlake IPLtd has also failed to annex any letter by which it or Pussellawa PLtd addressed the Conservator-General of Forests challenging the stumpage rates on the grounds that it had not been determined by a committee as envisaged in the High Court settlement. In the light of the settlement reached before the High Court, if such committee had in fact not been appointed, it would be reasonable to expect that such non-appointment would be the first complaint that would be preferred by Timberlake IPLtd. It has also failed to go before the High Court to complain of such alleged reneging on the settlement arrived at. Furthermore, Timberlake IPLtd had consistently claimed that not only the Conservator-General of Forests, but other public officers also had intimated valuation and rates. In these circumstances, it is difficult to accept Timberlake IPLtd's position that no committee had in fact been appointed to advise the Conservator-General on the formula for valuation of stumpage fees as agreed in the High Court.

The Court of Appeal Writ Application

On 8th October 2007, Timberlake IPLtd filed CA Application No. 866/2007 against the Forest Conservators, citing Pussellawa PLtd also as 4th Respondent, seeking under Article 140 of the Constitution *inter alia* a writ in the nature of *certiorari* to quash the decisions relating to the payment of stumpage made by the Forest Conservators, a writ in the nature of *mandamus* directing the Conservator-General of Forests to charge stumpage for the pine wood harvested at a rate not exceeding Rs. 500 per cubic meter which is the "royalty" applicable to *pinus* timber under the law, and for certain interim relief to stay the operation of P28 and to compel the issue of transport permits. The basis

of this application was that in terms of the Notification issued by the Conservator-General dated 28th August 2003 by virtue of power vested in him under Regulation 5(2) of the Forest Regulations No. 1 of 1979 made under Section 8 of the Forest Ordinance (Cap. 451), as subsequently amended, and by Rule No. 20 of the Forest Rules, No. 1 of 1979 framed under Section 20 (1) of the Forest Ordinance, and published in the Gazette Extraordinary bearing No. 1303/17 dated 28th August 2003 (P1) the royalty prescribed for *pinus* timber under the category of "Class II Timber" was Rs 500 per cubic meter. It was expressly averred by Timberlake IPLtd in paragraph 5 of the application filed in the Court of Appeal that the royalty prescribed in P1 "apply in respect of Reserved Forests and *any other forest* other than Reserved or Village Forests." In paragraph 7 of the said Petition, Timberlake IPLtd claimed that "the calculation and demand of stumpage in excess of the prescribed rate is unlawful." In other words, the basis of the writ application was that the action of the Conservator-General of Forests in imposing and demanding stumpage fees inconsistent with or exceeding such royalty was *ultra vires* his powers under the Forest Ordinance and regulations and rules made thereunder.

When the application was supported in the Court of Appeal on 18th October 2007, learned President's Counsel appearing for Timberlake IPLtd contended that the two terms "royalty" and "stumpage" were synonymous and that it was illegal to charge any stumpage inconsistent with or exceeding such royalty prescribed in P1, while the learned Deputy Solicitor-General argued that "stumpage" was distinct and different in nature and character from "royalty" and that unlike the latter, the former was a proprietary charge that can be imposed based on the market value of the timber less certain expenses. After hearing the submissions of learned Counsel, the Court granted interim relief by staying the operation of P28, the letter by which Timberlake IPLtd was intimated of the decision to temporarily suspend the issue of permits to transport *pinus* timber from the site at Delta Estate, Pupuressa.

Thereafter, on 26th November 2007 the Court of Appeal took up for inquiry the motion dated 9th November 2007 filed by Timberlake IPLtd seeking further interim relief directing that the Forest Conservators to issue permits to enable Timberlake IPLtd to transport timber from blocks G, U, V, W and X of the pine plantation without any further payment of stumpage. The Court of Appeal, having heard submissions of learned Counsel, made the impugned order on 28th November 2007 holding *inter alia* that in terms of the Notification P1, the Conservator-General of Forests is empowered to prescribe the fees, royalties or other payments in respect of the collection of forest produce; that the royalty so prescribed in P1 for *pinus* timber is Rs. 500 per cubic meter; and that it is expressly provided in Article 148 of the Constitution that no public authority can impose taxes, rates or any other levy except by or under the authority of a law enacted by Parliament. Referring to submissions made by the learned Deputy Solicitor-General who appeared for the Forest Conservators, the Court observed as follows-

> "Learned DSG urged that stumpage fee is paid for the right to severe the trees from their stumps and to remove them from the forest. Thus, the learned DSG argued that the rules framed under Section 20(1) of the Forest Ordinance do not apply to the Petitioner and that stumpage fee is determined by the 1st Respondent as shown in P27.
>
> It is to be observed that when the status imposes a pecuniary burden on a citizen, it has to be interpreted on the basis of the language used therein, and according to the proper meaning and intent of the Legislature. Between a tax and a fee, there is no generic difference because in a sense both are compulsory extractions of money from a citizen. Such power of imposition of a tax or a fee must be very specific and there is no scope of implied authority for recovering such tax or fee. The 1st Respondent must act strictly within the parameters of the authority given to him under the Forest Ordinance and it will not be proper to bring the theory of implied intent or the concept of incidental or ancillary power in exercising such authority.

Accordingly the Court concluded that the rules framed under the existing law do not permit the Conservator-General of Forests to impose a stumpage fee that exceeds the royalty prescribed in P1, and that the stumpage fees set in P26, P27 and P29 was illegal, unreasonable and *ultra vires*. On this basis the Court of Appeal made order staying, until the final hearing and determination of the case, the operation of the letter of the Range Forest Officer, Nawalapitiya, dated 3rd August 2007 marked P28 purporting to suspend the issue of permits for the transport of pine timber, and further directed the Conservator-General of Forests and his subordinate officers to issue transport permits forthwith to enable Timberlake IPLtd to take away the timber already felled from blocks G, U, V, W and X of Plan Nos. 7115 and 7116 dated 22nd October 2002. It is this order of the Court of Appeal that is the subject matter of this appeal, in regard to which special leave to appeal has been granted.

The Question of Standing

In regard to the numerous questions on which special leave to appeal has been granted by this Court, it needs to be observed that there are two which are rather preliminary in nature, and should therefore be considered first. The first amongst them is the question of *locus standi*, which has been raised as question (j) in the following manner:

> (j) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner could have maintained the application, as only the 4th Respondent-Respondent (Pussellawa PLtd) had standing in this matter, if any?

Learned Additional Solicitor General has submitted that since it was Pussellawa PLtd that had submitted a forestry management plan and obtained permission to harvest the forestry plantation in question, and since Timberlake IPLtd had entered the arena as a purchaser of the timber intended to be harvested on the basis of a purely commercial

relationship embodied in the Agreement dated 30th August 2004 (P9) which had been entered into between Pussellawa PLtd and Timberlake IPLtd, the latter had no legal standing to have and maintain the application filed in the Court of Appeal. The gist of his submission was that insofar as Pussellawa PLtd has agreed to pay the stumpage as stipulated by the Conservator-General of Forests, Timberlake IPLtd, being a mere purchaser of the trees, had no standing to question such arrangement.

Learned President's Counsel for Timberlake IPLtd has responded to these submissions by inviting the attention of Court to Clause 7(d) of the Agreement P9, wherein it is expressly provided that Timberlake IPLtd, as the purchaser of the *pinus* trees from the vendor, Pussellawa PLtd, should pay the "stumpage fees" to be stipulated for each block to the Conservator-General of Forest *through* Pussellawa PLtd. He also emphasized that as contemplated by clause 08 of the Agreement P9, on the very day P9 was executed, Pussellawa PLtd sent the letter dated 30th August 2004 (P10) to the Conservator-General of Forests informing him that Timberlake IPLtd has been authorized to deal with the Forest Department for and on behalf of Pussellawa PLtd "in relation to the subject matter of this Agreement". The following passage from the said letter is worthy of note:-

> "We confirm that Timberlake International Pvt Ltd, will, on our behalf, make to you the stumpage payment for each block, on your enumeration and will harvest each block only after such payment and your approval. *We also advise that we have authorized Timberlake International Pvt Ltd to act on our behalf directly with your Department in relation to any matters pertaining to the harvesting, removal and transportation of the said trees from Delta estate." (italics added)*

It will be seen that Timberlake IPLtd is not a mere purchaser of trees, and it has also been authorized to act on behalf of Pussellawa PLtd in relation to any matters pertaining to the harvesting, removal and transportation of the trees from Delta Estate. Apart from this, it is also relevant to note that the letter dated 3rd August 2007 (P28) by which the Range Forest Officer, Nawalapitiya intimated his decision to suspend the issue of permits for the transport of *pinus* timber was in fact addressed to the Site Manager, Timberlake IPLtd, and this is clearly because even the officials of the Forest Department were aware that any suspension of the issue of transport permits would directly affect the rights of Timberlake IPLtd.

Although the learned Additional Solicitor-General chose to argue the question of standing on first principles and did not cite any case law, he could easily have relied on the classic decision in *Durayappa v. Fernando* 69 NLR 265, in which the Privy Council held that the Mayor of a Municipal Council does not have standing to seek redress from the courts with respect to a legal wrong or injury caused to a Municipal Council. However, the Learned President's Counsel for Timberlake IPLtd has submitted that our law relating to *locus standi* has developed a great deal from the days of *Durayappa v. Fernando,* and in view of the liberal attitude towards standing adopted by the courts,

Timberlake IPLtd has standing to have and maintain the writ application filed by it. He submitted that the law has moved forward and become progressive, and relies on the following *dictum* of Lord Denning, in *R v Paddington Valuation Office* [1966] 1 QB 380-

> "The Court would not listen, of course to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done. "

As H. W. R. Wade and C. F. Forsyth note in their celebrated work *Administrative Law* Ninth Edition, page 684, "prerogative remedies, being of a 'public' character as emphasized earlier, have always had more liberal rules about standing than the remedies of private law." Sri Lankan courts have shown an increasing willingness to open out their jurisdiction to whoever whose interests are affected by administrative action, and in *Premadasa v. Wijewardena and others* [1991] 1 Sri LR 333 at 343 Tambiah, C.J. observed that –

> "The law as to *locus standi* to apply for *certiorari* may be stated as follows: The writ can be applied for by an aggrieved party who has a grievance or by a member of the public. If the applicant is a member of the public, he must have sufficient interest to make the application."

There can be no doubt that Timberlake IPLtd is not a mere busy body, and its interests are indeed affected by the actions of the Forest Conservators. I therefore hold that Timberlake IPLtd had standing to invoke the jurisdiction of the Court of Appeal in regard to this matter, and proceed to answer question (j) in the negative.

Commercial Nature of the Transaction and its Amenability to Writ Jurisdiction

The other question which has the character of a preliminary objection is the question of the amenability of the transaction embodied in P9 to writ proceedings. This question takes the following form:

> (i) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the transaction was amenable to writ jurisdiction?

The main thrust of the submissions of the learned Additional Solicitor-General on this question was that since the transaction between Pussellawa PLtd and Timberlake IPLtd was purely commercial in nature, it was not amenable to the writ jurisdiction of the Court of Appeal. In other words, this contract was in the realm of private law and did not attract public law remedies such as the writ of *certiorari* or *mandamus*. As against this, learned President's Counsel for Timberlake IPLtd has pointed out that neither the Conservator-General of Forests nor any other governmental agency was party to the Agreement P9 which has been an agreement between Pussellawa PLtd and Timberlake IPLtd only, and that as far as the Forest Department is concerned, there has been absolutely no contractual nexus. This is not entirely correct, since as learned Additional

Solicitor General has ventured to stress, the Conservator-General of Forests is entitled, under our common law principle of *stipulatio alteri*, to benefit from any stipulation contained in a contract between two other persons. As Keuneman, J. observed in *De Silva v Margaret Nona* 40 NLR 251 at page 253, a person is "entitled under the Roman-Dutch law to enforce by action the pact in his favour, although he was not one of -the contracting parties (*vide* ***Perezius on Donations, Bk. VIII; tit. 55,*** s, 5)." Learned Presdient's Counsel for Timberlake IPLtd, has however contended that the writ application from which this appeal arises was filed by Timberlake IPLtd in the Court of Appeal to challenge the validity of the "stumpage fee" sought to be levied by the Conservator-General of Forests on the basis that it was far in excess of the royalty that can be lawfully levied in terms of the Notification bearing No. 1303/17 dated 28th August 2003 (P1) made by the Conservator-General of Forest, and the wrongful action taken by the Range Forest Officer, Nawalapitiya to suspend the issue of transport permits to take out the harvested timber.

As Wade and Forsyth observe in their work *Administrative Law* Ninth Edition, page 668 "contractual and commercial obligations are enforceable by ordinary action and not by judicial review." While this principle is illustrated by many judicial decisions such as *University Council of Vidyodaya University v. Linus Silva* 66 NLR 505, which have had the effect of excluding contractual disputes from the pale of judicial review through prerogative remedies, our courts have nevertheless provided relief through prerogative remedies in statutory contexts where the contractual or commercial character of a particular transaction is overshadowed by some administrative or regulatory malady that needs to be remedied.

In the writ application filed by Timberlake IPLtd, what was sought to be remedied are the allegedly wrongful actions of the Conservator-General of Forests and his subordinates in the context of their regulatory functions. The writ application from which this appeal arises was filed by Timberlake IPLtd in the Court of Appeal to challenge the validity of the "stumpage fee" sought to be levied by the Conservator-General of Forests on the basis that it was far in excess of the royalty that can be lawfully levied in terms of the Notification bearing No. 1303/17 dated 28th August 2003 (P1) made by the Conservator-General of Forest, by virtue of power vested in him under Regulation 52 of the Forest Regulations No. 1 of 1979 and Rule No. 20 of the Forest Rules, No. 1 of 1979. The writ application was prompted by the action taken by the Range Forest Officer, Nawalapitiya by his communication dated 3rd August 2007 (P28), which had the effect of suspending the issue of transport permits for the transport of the harvested timber which was required in view of the provisions of Section 25 of the Forest Ordinance read with Regulation 2 of the Forest Regulations, No. 01 of 2005 made by the Minister of Environment and Natural Resources in terms of Section 24 of the Forest Ordinance and published in the Gazette Extraordinary bearing No. 1380/30 dated 18th February 2005. Since, *pinus* timber has not been specifically excluded by Column II of the Schedule to the said Regulation, the transport of the harvested timber without a permit, out of the Administrative District of Kandy, within which Delta

Estate is situated, was a punishable offence. In all these circumstances, I have no doubt that the Court of Appeal did not misdirect itself or err in law in seeking to exercise its beneficial writ jurisdiction in the circumstances of this case, and therefore answer question (i) in the negative.

Authority to Recover Stumpage

Questions (a) to (e) upon which special leave to appeal has been granted by this Court relate to the alleged authority of the Conservator-General of Forests to charge and recover "stumpage" for the *pinus* timber sold by Pussellawa PLtd to Timberlake IPLtd by the Agreement marked P9. It has been contended by the learned Additional Solicitor-General that the *pinus carribaea* forestry plantation in Delta Estate, Pupuressa is State owned, and was in any event not included in the extent of land leased out by the JEDB to Pussellawa PLtd by the Indenture of Lease bearing No. 61 dated 5th November 1993 (P2). He submitted that as explicitly stated in the letter dated 19th March 2004 sent by the Director of the Plantation Management Monitoring Division of the Ministry of Plantation Industries with copy to the Managing Director of Pussellawa PLtd, the *pinus* trees of the said plantation "were planted by the Forest Department in the early 80s, whilst the estate was under the management of JEDB".

Learned Additional Solicitor-General has submitted that the "stumpage" in question was claimed in terms of the provisions of the Agreement (P9) entered into between Pussellawa PLtd and Timberlake IPLtd, Clause 7 (d) of which contemplated the payment of such "stumpage" to the Conservator-General of Forests as the trees in question from which the timber was produced belonged to the State. He stressed that the Notification bearing No. 1303/17 dated 28th August 2003 (P1) had no application in this case, and in any event, the Forest Conservators were not bound in law to compute "stumpage" on the basis of the rates set out in the said notification. He argued with great force that the "stumpage" claimed by the Forest Department was distinguishable from "royalty" chargeable in terms of P1 which he stressed was not applicable to the matter in dispute in this appeal. He submitted therefore that the Court of Appeal had misdirected itself and erred in law in its interpretation of the scope and objective of P1 and had misdirected itself in holding that the Conservator-General of Forests was bound by it in giving effect to Clause 7(d) of P9.

Learned President's Counsel for Timberlake IPLtd contested the position that the forestry plantation in Delta Estate belonged to the State, and pointed out that in the recital to the Agreement (P9) for the sale of the pine trees in question it was expressly stated that Pussellawa PLltd "is the title holder and is well and sufficiently seized and possessed of or otherwise well and truly entitled to the *pinus carribaea* cultivation at Delta Estate in Pupuressa and containing in extent 74.15 hectares". He submitted that even if the trees had been planted by the Forest Department, the common law principle encapsulated in the maxim *superficies solo cedit* (Gaius, II.73) had the effect of conferring the ownership of the trees to the owner of the land, that "stumpage" is a proprietary

charge available by virtue of ownership of the trees, and in the absence of such ownership, the only payment the Conservator-General of Forests and his subordinates are entitled to is the "royalty" computed at the rate of Rs. 500 per cubic meter applicable to Class II Timber under the Notification P1. Learned President's Counsel for Timberlake IPLtd submitted with great respect that the Court of Appeal was correct in holding that "stumpage" sought to be recovered from Pussellawa PLtd is in essence a compulsory extraction of money by the State which in terms of Article 148 of the Constitution, can only be imposed under the authority of a valid law. Accordingly, he argued that the much higher rates of "stumpage" claimed by the Forest Conservators is *ultra vires* the powers of the said Conservators, and that the decision to suspend the issue of permits for the transport of pine timber harvested under and by virtue of the Agreement (P9) by Timberlake IPLtd from the said forestry plantation, is unlawful.

The most fundamental issue this Court has to address is in regard to the nature and character of the stumpage fee sought to be recovered by P26, P27 and P29. An important question in this context is whether "stumpage", which is not mentioned anywhere in the Forest Ordinance or in any regulation made thereunder, is in essence a tax, as contended by Timberlake IPLtd., or a proprietary charge sought to be imposed under a contract, as urged by the Appellants. Learned Additional Solicitor-General for the Appellants submitted that "stumpage" is a payment made to the owner of the forest land, irrespective of whether it is State owned or owned privately, as the consideration for purchase of the timber. He has invited the attention of Court to the following passage from William A. Leuschner's work *Introduction to Forest Resource Management* page 67:

> "Stumpage is defined as the trees, standing on the forest, unsevered from their stumps. The stumpage price is the price paid for the right to sever the trees from their stumps and remove them from the forest. Stumpage is valued by estimating its market value."

No doubt, this is in accord with the natural meaning of the term "stumpage" which has been defined in *Black's Law Dictionary*, 6th Edition at page 1424, as "the sum agreed to be paid to an owner of land for trees standing (or lying) upon his land." It is essentially in this sense that the word "stumpage" has been used in the legislation and regulations of other jurisdictions where forest resources have been prudently managed and carefully exploited. For instance, Section 2(q) of the Nova Scotia Crown Lands Act. R.S., c. 114, s. 1, provides that "stumpage" means "the amount….which is payable to the Crown for timber harvested on Crown lands", and the New York Environmental Conservation Law § 71-0703, Section 6 (c) defines "stumpage value" as the "current fair market value of a tree as it stands prior to the time of sale, cutting, or removal." While it is clear from the foregoing that "stumpage" is a proprietary charge and not a tax, it must also be remembered that stumpage payments can also give rise to tax liability, as for example, under Section 5 of the New York Real Property Tax Law, § 480-A, which imposes a tax

of 6 per centum of the "certified stumpage value of the merchantable forest crop" proposed to be felled by the owner of the forest land.

Learned President's Counsel for Timberlake IPLtd has submitted that only an owner of the trees is entitled to claim stumpage, and has argued with great force that the fee sought to be recovered by P26, P27 and P29 cannot be regarded as a proprietary "stumpage fee" as the forest plantation from which the timber was cut belongs to Pussellawa PLtd., and not to the State. Unfortunately, Timberlake IPLtd which filed HC WA Application No. 07/06 in the High Court of the Western Province, jointly with Pussellawa PLtd, has chosen not to file the application from which this appeal arises in the Court of Appeal jointly with Pussellawa PLtd, and instead cited the latter as a Respondent. While Pussellawa PLtd had no opportunity of filing objections in the Court of Appeal, it has not appeared before this Court at any stage in the course of this appeal, though noticed. While the learned President's Counsel for Timberlake IPLtd has heavily relied on the recital in P9 which claims that Pussellawa PLtd is the title holder to the *pinus carribaea* cultivation at Delta Estate, the learned Additional Solicitor-General has submitted that the Conservator-General of Forests and the State, not being parties to the said Agreement, cannot in law be bound by it. The question arises as to what extent the State can disassociate itself from the statement regarding title found in P9 while at the same time claiming the benefit of the "stumpage fee" stipulated therein.

However, it is not necessary to answer this question as it is manifest from the early correspondence such as P7 which led to the Agreement P9 and the provisions of Clause 7(d) and (e) of the Agreement P9 itself that the arrangement to pay stumpage is in effect an acknowledgement of State title to the said plantation and its trees. It is significant that the "stumpage fee" sought to be recovered has been claimed in terms of clauses 7(d) and (e) of the said Agreement, which are quoted below:

> "The *consideration for the sale* of the aforesaid trees shall be paid by the Purchaser (Timberlake IPLtd) to the Vendor (Pussellawa Pltd) in the following manner:
>
> (a)……
>
> (b)……
>
> (c)…….
>
> (d) The purchaser agrees to also pay the *stumpage fees* as stipulated by the Conservator-General of Forests for *each block*, prior to the harvesting of each block. *The purchaser will pay such stumpage fees through the vendor*."
>
> (e) *Balance consideration* will be paid by the Purchaser to the Vendor in the following manner:

> The purchaser shall proceed with the harvesting and the removal of the said trees from *each block* after the confirmation of payment of stumpage fees to the Forest Department for each block by the purchaser. A copy of the receipt of payment of stumpage will be handed over to the vendor by the purchaser and the purchaser shall proceed to harvest and remove the said trees within fourteen (14) days from date hereof." *(italics added by me)*

It is clear from the above quoted clauses of the Agreement that the "stumpage fee" was envisaged as *part of the consideration* for the sale of the trees in question, and it is also noteworthy that the said clauses sought to create a *contractual obligation* on the part of Tiberlake IPLtd to pay to the Conservator-General the stumpage fees for *each block* to be stipulated by him. I am firmly of the opinion that Timberlake IPLtd, which has agreed to these clauses and to the stipulation for the payment of stumpage fees, cannot now rely on the recital in the said Agreement to dispute the title of the State to the timber in question. It is trite law that where a recital to a contract is in conflict with one or more of its operative clauses, the operative clause or clauses will override the recital. *See, Senathiraja v Brito* 4 C. L. Rec. 149; *Kumarihamy v. Maitripala* 44 NLR 153. In fact, the conduct of the parties in the course of implementing the Agreement P9 and the settlement reached by the parties in the Provincial High Court based on the terms contained in the letter in reply dated 27th July 2006 (P22) would appear to be rational only if one assumes that the forestry plantation in question as well as its produce belonged to the State or a State agency. Such an assumption will be consistent with the presumption contained in Section 52 of the Forest Ordinance that in proceedings taken under the said Ordinance or in consequence of anything done under the Ordinance any "timber or produce shall be presumed to be the property of the Crown until the contrary is proved."

It is also important to observe in this context that it appears from the order dated 15th February 1982 made by the Minister of Agricultural Development and Research under Section 27A read with Section 42H of the Land Reform Law No. 1 of 1972, as subsequently amended, and published in the Gazette bearing No. 183/10 dated 12th March 1982, that the entirety of Delta Estate in extent 724.94 hectares was vested thereby in the JEDB. It needs to be mentioned that a copy of the said Gazette was made available to this Court marked X4, only with the written submissions of the Conservator-General of Forests, but since it is a public document this Court takes judicial notice thereof. However, it is relevant to note that under the Indenture of Lease bearing No. 61 (P2), JEDB leased out to Pussellawa PLtd only an extent of 639.8 hectares out of the extent of 724.94 hectares of the said Estate. It is evident from the Schedule to the said Indenture of Lease that the discrepancy in the land extent was caused by the exclusion from the purview of the lease, "the land given to the Forest Department and Janasaviya project". It is therefore manifest that the *pinus carribaea* forest plantation from which Timberlake IPLtd is seeking to remove the timber in question, in fact belongs to the JEDB. The reference to the Forest Department in the said Schedule also gives credence to the assertion made by the Director of the Plantation Management

Monitoring Division (PMMD) of the Ministry of Plantation Industries in his letter dated 19th March 2004 (P6) addressed to the Conservator-General of Forests with copy to Pussellawa PLtd that the *pinus* trees in question were "planted by the Forest Department in the early 80s". Even if the principle embodied in the maxim *superficies solo cedit* is applied to this situation, the resulting position would be that the pine trees belong to the JEDB, which is a State agency, and not to Pussellawa PLtd as asserted by Timberlake IPLtd.

However, learned President's Counsel for Timberlake IPLtd has contended that the only provision of law that authorizes the imposition of any levy to remove trees from their stumps in any reserved forest is Section 8(3) of the Forest Ordinance, and that in the case of a forest which is not a reserved or village forest, similar powers have been conferred by Section 20(1)(h) of the Forests Ordinance. He has submitted that the Notification marked P1 has been issued pursuant to Regulation 5(2) of the Forest Regulations No. 1 of 1979 and Rule No. 20 of the Forest Rules No. 1 of 1979 framed in terms of the aforesaid sub-sections of the Forest Ordinance, and by the said Notification the royalty for various types of timber has been prescribed, but there is no provision therein to charge "stumpage fees", or any other such levy. It is his contention that in view of Article 148 of the Constitution, which precludes the imposition of any tax rate or any other levy "except by or under the authority of a law passed by Parliament or of any existing law", the Conservator-General of Forests cannot in law demand any payment for the felled *pinus* trees in excess of Rs. 500 per cubic meter, which is the applicable royalty for Class II timber under the said Notification. He has further submitted that even if it be the case that the "stumpage" fee sought to be recovered by P26, P27 and P29 is proprietary in nature, still the amount that can be recovered cannot exceed Rs. 500 per cubic meter in view of P1.

It is therefore necessary to examine at the outset whether there is statutory authority to charge a "stumpage fee", particularly with respect to timber harvested from the *pinus carribaea* forestry plantation at Delta Estate. In the absence of any material to show that the said forestry plantation was part of a reserved forest, and in view of the uncontradicted averment in paragraph 5 of the Petition filed by Timberlake IPLtd in the Court of Appeal that the said forestry plantation has not been declared as a village forest under Section 12 of the Forest Ordinance, it is safe to presume that the said forestry plantation is governed by the Forest Rules, No. 1 of 1979, which apply to "forests not included in a reserved or village forest". It is important to note that the said Rules seek to prohibit or regulate activities such as felling, cutting, girdling, lopping, tapping, sawing, converting, damaging, collecting, removing and transporting trees or forest produce in *any forest not being a reserved forest or village forest.* The Rules also authorize such activity to be carried out in accordance with the conditions of a permit (Rule 7) and also allow villagers to *collect* "dead or fallen sticks"(Rule 19) or other forest produce in certain circumstances. In the Notification P1, the Conservator-General of Forests has prescribed the royalty for various types of timber and other forest produce

as a rate per cubic meter or kilogram, and at the very end of the notification it is stated that-

> "The Royalty rates given above are a privilege *allowed to the villagers* who have the *rights of collection* of these materials from the forests."

It is obvious that the royalty rates set out in P1 are *ex facie* not applicable to the transaction relevant to this appeal, as Timberlake IPLtd and Pussellawa PLtd have been involved in the commercial felling of *pinus* trees, and neither of these companies can claim any privilege conferred to villagers who have the right of collection of timber produce from the forest under the said Forest Rules. The rates of royalty prescribed in P1 are clearly inapplicable to the commercial exploitation of timber of the magnitude envisaged by P9.

It is also significant to note that the Forest Rules No. 1 of 1979 have been framed under Section 20(1)(h) of the Forests Ordinance, which *inter alia* empowers the Minister to make rules to-

> "h) prescribe, or *authorize any forest officer to prescribe*, subject to the sanction of the Minister, *the fees, royalties, or other payments* for such timber or other forest produce, and the manner in which such fees, royalties or other payments shall be levied whether in transit, partly in transit or otherwise." *(Italics added)*

It is noteworthy that Rule 20 of the Forest Rules No. 1 of 1979, provides as follows:-

> "The Conservator-General of Forests may, with the sanction of the Minister, *prescribe the fees, royalties, or other payments* in respect of the collection of forest produce and the manner in which such fees, royalties or other payment shall be made."

In terms of Regulation 3 read with the Schedule of the Forest Regulations, No. 4 of 1979 published in the Gazette Extraordinary bearing No. 68/14 dated 26th December 1979, the power to prescribe fees, royalties and other payments as specified in Section 20(1)(h) of the Forests Ordinance has been conferred on the Conservator-General of Forests as well as on the Deputy Conservators-General of Forests and the Senior Assistant Conservators-General of Forests.

The fact that in the Notification P1 the Conservator-General of Forest has prescribed royalty that can be recovered from villagers who have the right to collect forest produce as a matter of privilege, does not preclude him from seeking to prescribe *other payments* in accordance with the procedure laid down by law for this purpose. Although neither the Forest Ordinance nor any regulation or rule made thereunder contain any provision as to how any such fees, royalties or other payments may be prescribed, by the Conservator-General of Forests, it is expressly laid down in Section 2(f) of the Interpretation Ordinance No. 21 of 1901 as subsequently amended, that in "every

written law, whether made before or after the commencement of this Ordinance, unless there be something repugnant in the subject or context, "prescribed" shall mean prescribed by the enactment in which the word occurs or *by any rule, regulation, by-law, proclamation or order* made thereunder". It is in this connection, necessary to consider whether the method by which the royalty was prescribed in the Notification P1 has necessarily to be followed in stipulating "stumpage fees" as contemplated by Clause 7(d) and (e) of the agreement marked P9.

It is clear from Section 2(f) of the Interpretation Ordinance that where anything that could lawfully be prescribed is not prescribed in the relevant enactment itself, then it may be prescribed *by any rule, regulation, by-law, proclamation or order* made thereunder. This provision has to be understood in the context of Section 17(1)(e) to (f) and 17(2) of the Interpretation Ordinance which are quoted below :

> 17 (1) Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such rules :-
>
> (a) to (d) …….
>
> (e) all rules shall be published in the Gazette and shall have the force of law as fully as if they had been enacted in the enactment of the Legislature; and
>
> (f) the production of a copy of the Gazette containing any rule, or of any copy of any rule purporting to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such rule.
>
> (2) *In this section the expression "rules" includes rules and regulations, regulations, and by-laws*. (*italics added)*

Applying the above provisions to the question of the method by which stumpage fees may be prescribed, it is very clear that if they are prescribed by regulations, rules, or by-laws, such regulations, rules and by-laws must be published in the Gazette. However, if such stumpage fees are to be prescribed by a *mere order* made by the Conservator-General of Forests, his deputy or senior assistant, as contemplated by Section 2(f) of the Interpretation Ordinance, then the requirement of publishing the same in the Gazette would not apply.

Accordingly, it may be concluded that the stumpage fees stipulated in the letters of the Conservator-General of Forests in marked P26, P27 and P29 as contemplated by Clause 7(d) and (e) of the Agreement P9, have been lawfully enumerated, computed and prescribed as a proprietary charge based on the value of the timber. In this context it is useful to refer to the recent decision of the Court of Appeal for Ontario in *Boniferro Mill*

Works ULC v. Ontario [2009] ONCA 75 in which an argument similar to the one made in this case by Learned President's Counsel for Timberlake IPLtd was made to the effect that even a proprietary charge may in essence be a tax. That was an appeal from a decision of the Superior Court of Justice holding that a charge imposed on timber based on the value of timber in terms of the Crown Forestry Sustainability Act, 1994, S.O. 1994, c. 25 is a tax. In arriving at this decision, the Superior Court of Justice was influenced by the decision of the Supreme Court of Canada in *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545 *(CIGOL)* holding that a royalty surcharge was in effect a tax. In overruling the decision of the Superior Court of Justice, the Court of Appeal for Ontario stressed the proprietary nature of the impugned charge. Justice MacFarland, J.A. sought to distinguish the Canadian Supreme Court decision in *CIGOL* by pointing out that in that case the court was concerned with a royalty surcharge, imposed not only on those producers who had existing leases with the Crown but also on those who were producing on private lands and whose rights in that regard were expropriated by the same legislation. Justice MacFarland had no doubt that proprietary charges are different from regulatory charges or taxes, and quoted the following *dicta* of Rothestein, J. in *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] S.C.C. 7 at para. 49:

> "I agree that proprietary charges for goods and services supplied in a commercial context are distinct from either regulatory charges or taxes and may be determined by market forces. As explained by Professor Hogg in *Constitutional Law of Canada* (5th ed. 2007) at pp. 870-71:
>
> > "Proprietary charges are those levied by a province in the exercise of proprietary rights over its public property. Thus, a province may levy charges in the form of licence fees, rents or royalties *as the price for the private exploitation of provincially-owned natural resources;* and a province may charge for the sales of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way."

Though the provincial context of the above quoted *dicta* may not fit the Sri Lankan scenario, they are of immense persuasive value in understanding the nature and character of a "stumpage fee" such as the one stipulated by the orders of the Conservator-General of Forests in the letters P26, P27 and p29 as contemplated by Clause 7(d) and (e) of P9, which is entirely proprietary in nature, and for the purpose of distinguishing such a fee from a revenue measure that may be imposed as a levy on timber or other forest produce harvested from a private forest. I am of the opinion that since the stumpage fee is not such a levy, its quantum is not subject to the rates specified in the Notification P1, and Article 148 of the Constitution has no relevance. I therefore, hold that the Court of Appeal of Sri Lanka misdirected itself in this case in failing to appreciate the proprietary nature of the said stumpage fee and the vital distinction between a proprietary charge and a tax or other revenue levy.

Learned President's Counsel for Timberlake IPLtd has not been able to cite any provision of the Forest Ordinance or any regulation or rules made there under that may not have been complied with in determining the aforesaid stumpage fee, nor did he take up the position that the stumpage fees in question had been prescribed without the sanction of the relevant Minister. In my opinion, the rates of royalty set out in P1 cannot, and were not intended to, apply to a commercial exploitation of the forest plantation by an export oriented company, and there is nothing in the Forest Ordinance and the regulations and rules made there under which render the stumpage fees sought to be charged on the basis of a commercial transaction such as Clause 7(d) and (e) of the Agreement P9 *ultra vires* the powers of the Conservator-General of Forests. This position is buttressed by the relevant budget estimates tendered by the Additional Solicitor General, which specify under the "Non-Tax Revenue" category that the Forest Conservator is the Revenue Accounting Officer for "Rent on Crown Forests" (vide Code 20.02.10.02). The Sinhala version of the budget estimates, which use the phrase "rcfha le,E j,ska Wmhk wdodhu", clearly shows that the word "rent" in the English version is used in the sense of revenue or income

Accordingly, I answer questions (a) to (e) on which special leave to appeal has been granted in the affirmative, and hold that the Court of Appeal has misdirected itself and erred in law in its interpretation of the scope and objective of the notification P1, in deciding that the Conservator General of Forests was bound by it, to charge stumpage fees in accordance with it. I am of the opinion that the Court of Appeal misdirected itself and erred in law by failing to consider the fact that the *pinus* forestry plantation at Delta Estate was planted and maintained by the Forest Department since the 1980s. I also hold that the Court of Appeal misdirected itself and erred in law in failing to consider that by its decision that the Conservator-General of Forests had no authority to charge the stumpage fees, it nullified the transaction in P9 in so far as it related to the stumpage fees referred to in Clause 7(d) and (e) which constituted part of the consideration for the said transaction.

Conduct of Timberlake IPLtd

Questions (f) to (h) and (k) relate to the conduct of Timberlake IPLtd in relation to the matters that are relevant to the application for the writs of *certiorari* and *mandamus* filed by it in the Court of Appeal. They are of great relevance because such writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of court. It is trite law that such discretionary relief may be withheld where a party has "disentitled himself to the discretionary relief by reason of his own conduct"(*per* Sharvananda, J. in *Biso Menika v Cyril de Alwis* [1982] 1 Sri LR 368 at page 377). A party seeking prerogative relief must come to court "with clean hands"(*ibid.,* page 381) and the sanction for the failure to do so is the dismissal *in limine* of the application for relief without going into the merits of the case. *See, Alphonse Appuhamy v. Hettiarachchi,* 77 NLR 131. As Bandaranayake, J. observed in *Finnegan v. Galadari Hotels (Lanka) Ltd.*,

[1989] 2 Sri LR 272 at page 278, this is a "rule based on public policy designed to prevent abuse of procedure of court when court was dealing with a matter *ex parte*."

Timberlake IPLtd derives its right to harvest timber from the Agreement P9 which it has entered with Pussellawa PLtd, and in fact has stepped into "its shoes" in its dealings with the Forest Department. It is necessary to observe that the forestry plantation from which the timber was harvested belonged to the JEDB, which is an agency of the State, though Pussellawa PLtd had stated the contrary in a recital to P9. Furthermore, it appears from Clause 2(a) of the Indenture of Lease marked P2 that the rent paid by the Pussellawa PLtd for the lease of the tea plantation of Delta Estate was a meager Rs.500 per annum for the entire 639.8 hectares (which did not include the forestry plantation in question). It would have been inimical to all notions of justice, and a substantial loss of revenue for the State, if this paltry sum could be said to permit Pussellawa PLtd to dispose of extremely valuable *pinus* timber, without any consideration of the fact that these plantations were made and maintained by the Forest Department using public funds. This in fact is the justification for the imposition of the stumpage fees in question.

This Court is not unmindful of the fact that Timberlake IPLtd has paid substantial amounts of money to Pussellawa PLtd to acquire the right to harvest the timber, and the payment of stumpage fees to the Conservator-General of Forests was only part of the consideration. Unfortunately, in my opinion, the conduct of Timberlake IPLtd, has fallen short of what is expected of a deserving litigator seeking prerogative relief. After entering into the Agreement P9 in which it expressly agreed with Pussellawa PLtd to pay the entire stumpage fee on the basis of actual enumerated volume of timber *prior to harvesting* (clause 7(d) of P2), it questioned the "interim payment" of Rs. 1,616,727.50 claimed by the Conservator-General of Forest by P17 with respect to block 01R and delayed the payment of the full stumpage fee based on actual volume amounting to Rs. 7,640,670.97 (*vide supra* Table V) with respect to the said block, even after removing the timber from the forest plantation. When by P18, the felling of trees was sought to be suspended, it joined hands with Pussellawa PLtd to challenge that decision in HC WA Application No. 07/06 filed in the High Court of the Western Province. After settling this case on the basis of certain and clear terms, it went back on the settlement, and filed the writ application in the Court of Appeal from which this appeal arises, again challenging the legality of the stumpage fees which it had expressly agreed to pay not only in the Agreement P9 but also in the settlement reached in the High Court. As Scrutton, L.J. observed in *Verschures Creameries v. Hull & Netherland Steamship Co. Ltd.* [1921] 2 KB 608 at 612)-

> "A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. This is to approbate and reprobate the transaction."

In *Visuvalingam v. Liyanage* [1983] 1 Sri LR 203 at page 227, Samarakoon, C.J. using more descriptive language to bring home the essence of denying parties the freedom to "approbate and reprobate", commented that one "cannot blow hot and cold." As Sharvananda, C.J. observed in *Ranasinghe v. Premadharma* [1985] 1 Sri LR 63 at page 70, the concept has "stood the test of time and has been accepted as part of our law."

Based on its own prior performance, the well established principles of estoppel applied in the context of basic principles of contract law, would deem Timberlake IPLtd as being barred from claiming relief in a manner that is starkly opposite to its manner of conduct at prior times and from which it gained pecuniary and other benefits. There is in effect a legitimate expectation created not only in the other party to the contract, namely Pussellawa PLtd, but also in the Conservator-General of Forests on whose behalf the stipulations contained in Clause 7(d) and (e) of the Agreement P9 were made, that Timberlake IPLtd has wholly accepted the contractual obligations as well as subsequent undertakings such as those flowing from the settlement reached in connection with the matter before the High Court of the Western Province, and intends to act accordingly. This court cannot in its binding commitment to doing equity deny the realization of such rights.

In addition to the conduct described above, which itself demonstrates the lack of *bona fides* in Timberlake IPLtd's conduct, I find it has also misrepresented material facts in its Petition to the Court of Appeal. It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show *uberrima fides* or ultimate good faith, and disclose all material facts to this Court to enable it to arrive at a correct adjudication on the issues arising upon this application. As observed previously, even though the Petition in paragraph 44 seeks to demonstrate a difference in the stumpage charged in respect of Blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P (vide Table III), the change in the aggregate stumpage charged is due to the difference in the volume of timber and not the rate charged. This is evident on a perusal of Table IV included in this judgement above. Timberlake IPLtd has sought to portray in its Petition to the Court of Appeal a difference due to the actual volume of timber extracted as an arbitrary change of rate, which is altogether misleading. Furthermore, the fact that Timberlake IPLtd did not go back to the High Court despite alleging a reneging on the settlement reached before that court further undermines its *bona fides*. In my considered opinion, the circumstances outlined above alone would be sufficient to disentitle Timberlake IPLtd to any discretionary relief, even if it was otherwise entitled to such relief.

I therefore hold that questions (f), (g), (h) and (k) must be answered in the affirmative. I am of the opinion that the Court of Appeal has misdirected itself and erred in law in failing to consider whether Timberlake IPLtd can be permitted to approbate and reprobate and go back on its obligation to pay stumpage fees as stipulated by the orders of the Conservator-General of Forests in the letters P26, P27 and P29 as contemplated by Clause 7(d) and (e) of the Agreement P9. It is also my considered opinion that the

Court of Appeal misdirected itself and erred in law in failing to consider whether Timberlake IPLtd was entitled to invoke the writ jurisdiction of the Court of Appeal, having settled HC WA Application No. 07/07 in the High Court of the Western Province on 28th July 2006, in a manner grossly inconsistent with the said settlement. I also hold that the Court of Appeal misdirected itself and erred in law in failing to consider the serious lack of *uberrima fides* on the part of Timberlake IPLtd. In my considered opinion, the conduct of Timberlake IPLtd in this case has been such that it was not entitled to any form of discretionary relief, and in all the circumstances of this case, the Court of Appeal should have dismissed its application *in limine*.

Conclusion

For the aforementioned reasons, I answer questions (i) and (j) on which special leave to appeal was granted in the negative, and questions (a) to (h) and (k) in the affirmative. Accordingly, I allow this appeal and vacate the order of the Court of Appeal dated 28th November 2007, and further hold that the application filed by Timberlake IPLtd in the Court of Appeal should stand dismissed. I do not make an order for costs, in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

HON. AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

HON. RATNAYAKE, J.

I agree

JUDGE OF THE SUPREME COURT