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Page

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 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 settling 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 Timber removed (m^2)	Estimated Volume of Timber for which stumpage is already paid (m^3)	Difference in Volume (m^3)	Stumpage for Actual Volume Rs.	Stumpage to be paid Rs.	Stumpage already paid Rs.
01A	1,119.426	528.158	591.27	1,408,680.85	753,755.62	654,925.23
01B	868.889	673.790	195.10	1,289,319.41	690,255.40	599,064.01
01C	1,564.444	1,082.381	482.06	2,185,104.14	1,009,535.62	1,175,568.52
17Q	2,115.773	1,453.959	661.81	2,840,104.14	1,009,535.62	1,175,568.52
04D	1,687.582	1,064.465	623.12	2,394,652.42	1,200,147.06	1,194,505.36
06F	2,268.729	1,659,599	609.13	3,941,235.83	1,530,887.40	2,410,348.43
16P	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 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
01A	Rs. 1,427.4	Rs. 1,258.40	Rs. (168.74)
01B	Rs. 1,024.43	Rs. 1,483.87	Rs. 459.44
01C	Rs. 932.70	Rs. 1,396.73	Rs. 464.03
17Q	Rs. 1,113.13	Rs. 1342.38	Rs. 229.25
04D	Rs. 1,296.58	Rs. 1,631.83	Rs. 335.25
06F	Rs. 1,060.81	Rs. 1,997.78	Rs. 936.97
16P	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 has 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	673.790	690,253.40	1024.434022	868.889	890115.96	1024.430002
3C	1,082.381	1,009,535.62	932.700000	1564.444	1459156.92	932.700000
17Q	1,453.959	1,618,450.10	1113.133245	2115.773	2355130.4	1113.133245
4D	1,064.465	1,380,169.12	1296.584782	1687.582	2188085.07	1296.548782
6F	1,659,599	1,760,520.50	1060.810774	2268.729	2406692.17	1060.810776
16P	1,444.982	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 blocks, 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 replenish 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 Timberlake 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	Extract Volume in cubic meters	Stumpage Rs.	Initial Payment Rs.	Balance due Rs.
01A	1623.91	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 that 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 Conservations, 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 statute 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*(1), 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 had submitted that our law relating to *locus standi* has developed a great deal from the days of *Durayappa v. Fernando, (supra)* and in view of the liberal at titude 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 Officer*(2) –

> "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* [3] 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 *stipulation alteri*, to benefit from any stipulation contained in a contract between two other persons. As Keuneman, J. observed in *De Silva v. Margaret Nona* at 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 President'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 teems of the Notification bearing No. 1303/17 dated 28th August 2003 (P1) made by the Conservator-General of Forests, 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, 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 Forests, 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 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 of 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 PLItd "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 cred-it* (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 Forest 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 Timberlake 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*; *Kumarihamy v. Maitripala*. 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 proceeding 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 date 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 Forest 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