ALL PEOPLE'S CONGRESS v NATIONAL ACTION FOR SOCIAL MOBILIZATION SECRETARIAT (NASMOS) & ANOTHER

SC

SUPREME COURT OF SIERRA LEONE, Miscellaneous Application 4 of 1999, Hon Mr Justice DE Luke CJ, Hon Mr Justice AB Timbo JSC, Hon Mr Justice HM Joko-Smart JSC, Hon Mrs Justice VAD Wright JA, Hon Mr Justice MET Thompson JA, 26 October 1999

[1] Constitutional Law – Claims against Government – Petition of right – Whether petition of right process abolished by 1991 Constitution – Whether s 133(1) inoperative until effected by s 133(2) – Whether procedure set out in Petitions of Right Act 1960 ss 6-8 still operative – Preservation of individual rights – Constitution of Sierra Leone s 133(1), (2)

[2] Civil Procedure – Claims against Government – Liability of Crown at common law explained – Petition of right process abolished – Constitution of Sierra Leone s 133(1), (2) – Petitions of Right Act 1960

[3] Statutory Interpretation – Constitution – Literal and purposive approach – Preservation of remedies against Government – Constitution to be read as a whole – Constitution of Sierra Leone s 133(1), (2)

[4] Words and Phrases – "Government of Sierra Leone"

On 9 April 1996, the plaintiff, a political party recognized in the Parliament of Sierra Leone, made a claim in the High Court against the defendants, the National Action for Social Mobilization Secretariat (NASMOS) and the Ministry of Social Welfare, Youth and Sports, for possession of premises and a number of related claims. The defendants submitted that the claim be set aside for irregularity in that it failed to comply with the Petitions of Right Act (Cap 23) 1960 which prescribed the manner in which an action against the Government could be commenced. The plaintiff argued that s 133(1) of the 1991 Constitution abolished the requirement for a fiat or process of petition of right. Nylander J referred the question to the Supreme Court pursuant to s 124(2) of the Constitution. The main question was whether s 133(1) of the Constitution was inoperative until s 133(2) was effected by Parliament.

Held, per Joko-Smart JSC, Wright JA, Timbo JSC & Desmond Luke CJ concurring, that the procedural requirement for a fiat or petition of right to commence proceedings against the Government had been abolished by s 133(1) of the Constitution:

1. The Interpretation Act 1971 defines government as "the Government of Sierra Leone (which shall be deemed to be a person) and includes, where appropriate, any authority by which executive power of the State is duly exercised in a particular case". There was no doubt that the second defendant is part of the Government of Sierra Leone as it exercises some executive power of the State under the Constitution.

2. Two rules of statutory construction must be considered in the interpretation of s 133(1) and (2) of the Constitution. One is the literal rule and one is the purposive rule. If the words of a statute are themselves precise and unambiguous then no more is necessary than to expound these words in their natural and ordinary sense. Where the ordinary words in themselves may be misleading and in order to make assurance doubly sure, it might be necessary to examine the context including the subject matter, the scope, purpose and, if need be, the background of the legislation in order to give effect to the true purpose of the legislation. *The Sussex Peerage Case* (1844) 11 Cl & F 85; 8 ER 1034; *Charles Leader & Anor v George Duffey & Anor* (1888) 13 AC 294; *Pepper v Hart* [1993] 1 All ER 42; *Oliver Ashworth (Holdings) Ltd v Ballard (Kent)*

Ltd [1999] 2 All ER 791 followed; *Canada Sugar Refining Company Ltd v The Queen* [1898] AC 735 distinguished.

3. The language of s 133(1) of the Constitution is plain and could be read literally. It was clear from s 133(1) that the Sierra Leone Parliament intended to make the Government answerable to persons for all wrongs as if the Government was any other person. This recognized the fact that a Government in a Republic with a written Constitution does not enjoy any more rights than those conferred by the Constitution, thus curtailing the common law prerogatives of the sovereign.

4. Section 133(2) of the Constitution was also clear and could be read literally. The purpose of the legislature was to abolish the petition of right process. There was no inconsistency or ambiguity between s 133(1) and (2) or any words to suggest that both subsections were linked contemporaneously or that one was dependent on the other. Therefore, ss 3, 4 and 5 of the Petitions of Right Act 1960 were inconsistent with s 133(1) of the Constitution and were now void. *Magor & St Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226 applied.

5. The Constitution did not repeal the Petitions of Right Act in its entirety; it repealed the substantive law provision in s 3 and only the fiat and its concomitant process in ss 4 & 5. This was what was accomplished by s 133(1). The procedure under ss 6, 7 & 8 remains untouched and it is the procedure to follow in the presence of parliamentary inactivity. Sections 6, 7 and 8 of the Petitions of Right Act 1960, which deal with aspects of the procedure to be followed in an action against the Government, had not been expressly or impliedly repealed by s 133(1) of the Constitution. In the absence of an Act of Parliament pursuant to s 133(2), the existing law as to procedure must be followed. Parliament has not as yet passed legislation to provide for a new jurisdiction governing actions by persons against the Government but that does not mean that private citizens are to be deprived of remedy against the Government with the abolition of the fiat and the petition of right procedure. *Attorney General of Canada v Hallett & Carey Ltd* [1952] AC 427 applied.

Per Wright JA:

6. The purpose of s 133(2) stating that Parliament should make such provision was merely to give assurance of a systemized approach as to the practice and procedural steps for taking action against the Government.

Per Timbo JSC:

7. As a general rule of construction, a Constitution, like a statute, must be read as a whole. In other words, the entire Constitution should be examined for the purpose of determining the intention of each section or part. This is what is often referred to as the principle of harmonious construction. Its aim is to reconcile different provisions of the Constitution.

Cases referred to

Adegbenro v Akintola [1963] AC 614
AK Gopalan v The State of Madras (1950) SCR 88
Attorney General v De Keyser's Royal Hotel [1920] AC 508
Attorney General of Canada v Attorney General of Ontario and others [1931] UKPC 93
Attorney General of Canada v Hallett & Carey Ltd [1952] AC 427
Attorney General (Cth) v Colonial Sugar Refining Company Ltd [1914] AC 237
Attorney General for New South Wales v Brewery Employees' Union of NSW (1908) 6 CLR 469
Bank of Toronto v Lambe (1887) 12 App Cas 575
British Coal Corporation v The King [1935] AC 500

Canada Sugar Refining Company Ltd v The Queen [1898] AC 735
Charles Leader & Anor v George Duffey & Anor (1888) 13 AC 294
Churchward v R [1865] 1 QB 173
Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531
Cooper v Hawkins [1904] 2 KB 164
Curtis v Stovin (1889) 22 QBD 512
Dunn v The Queen [1896] 1 QB 117
Edwards v Attorney General for Canada [1930] AC 124
Ellis v Home Office [1953] 2 QB 135
Feather v The Queen (1865) 6 B&S 257
Homsey Urban District Council v Hennell [1902] 2 KB 73
Leader v Duffey (1888) 13 App Cas 294
Leaman v The King [1920] 3 KB 663
M'Culloch v State of Maryland 17 US (4 Wheaton) 316 (1819)
Magor & St Mellons Rural District Council v Newport Corporation [1950] 2 All ER 1226
Minister of Pensions v Robertson [1949] 1 KB 227
Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd [1999] 2 All ER 791
Pepper v Hart [1993] 1 All ER 42
Qureshi v State of Bihar (1959) SCR 629
Rederiaktiebolaget Amphitrite v The King [1921] 3 KB 500
State of Bombay v Bombay Education Society (1955) SCR 568
State of Madras v Champakam (1951) SCR 525
State of Punjab v Ajaib Singh (1953) SCR 254
The Sussex Peerage Case (1844) 11 Cl & F 85; 8 ER 1034
Thomas v The Queen (1874) LR 10 QB 31
Warburton v Loveland (1828) 1 H & B 623

Legislation referred to
British North America Act 1867 [UK]
Constitution of Sierra Leone (1991) ss 21, 28, 53(1), (5), 108(3), 122, 124(1), (2), 133(1), (2), 171(15), 176, 177(1), (2)
County Courts Act 1888 s 65 [UK]
Court Acts (Cap 7)1960 (repealed)
Courts Act 1965
Crown Proceedings Act 1947 s 1[UK]
Customs Act 1896 s 150 [Canada]
Interpretation Act 1971
Law (Adaptation) Act 1972
Limitation Act 1939 [UK]
National Emergency Transitional Powers Act 1945 s 2(1) [Canada]
Petitions of Right Act (Cap 23) 1960 ss 3, 4, 5, 6, 7, 8
Petitions of Right Act 1860 [UK]

Other sources referred to:
Craies on Statutes, 7th Edition, 1985 at pp 203, 366
The Two Gentlemen of Verona (Act 2 scene 5)

Appeal
This was a constitutional reference to the Supreme Court made by Nylander J sitting as judge in the High Court pursuant to s 124(2) of the Constitution of Sierra Leone Act No 6 of 1991

seeking the Supreme Court's interpretation of s 133 of the Constitution. The background to the reference appears sufficiently in the following judgment of Joko-Smart JSC.

Mr AF Serry-Kamal for the plaintiff.
Mr JG Kobba for the defendants.

JOKO-SMART JSC: This is a constitutional reference to the Supreme Court made by Nylander J sitting as judge in the High Court pursuant to s 124(2) of the Constitution of Sierra Leone (1991) Act No 6 of 1991 which reads:

> "Where any question relating to any matter or question as is referred to in subsection (1) arises in any proceeding in any court, other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

Section 124(l) (a) vests original jurisdiction in the Supreme Court to determine the matter raised in s 124(2). It provides as follows:

> "The Supreme Court shall, save as otherwise provided in section 122 of this Constitution, have original jurisdiction, to the exclusion of all Courts:
>
> (a) in all matters relating to the enforcement or interpretation of any provision of this Constitution."

The main thrust of this reference is the interpretation of s 133 of the Constitution which states:

(1) Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right.

(2) Parliament shall, by an Act of Parliament, make provision for the exercise of jurisdiction under this section.

The background to the reference

An action was begun in the High Court between the plaintiff, the All People's Congress, and the defendants, the National Action for Social Mobilization Secretariat (NASMOS) and the Ministry of Social Welfare, Youth and Sports by writ of summons dated 9 April 1996. In the action, the plaintiff's claims against the defendants were, *inter alia*:

1. Recovery of possession of premises known as 39 Siaka Stevens Street, Freetown.
2. Mesne profits at the rate of Le4,000,000 per annum from 29 April 1992 until possession is yielded up.
3. Damages for trespass.
4. A perpetual injunction to restrain the defendants whether by themselves, their servants or agents howsoever called from entering or remaining on the said property.
5. Damages for conversion of air conditioners.
6. Malicious damage
7. Interest.

On 30 April 1996 the defendants filed a motion in the High Court praying for the following orders:

1. That the said writ of summons be set aside for irregularity and for informality on the grounds that the plaintiff failed to comply with the provisions of the Petitions of Right Act (Cap 23) 1960 of the laws of Sierra Leone, in that the plaintiff issued a writ of summons against NASMOS and the Ministry of Social Welfare Youth and Sports.

2. That the plaintiff pays the costs of the application.

At the hearing of the application, counsel for the defendants submitted that the court had no jurisdiction to try the case because the plaintiff had failed to comply with the Petitions of Right Act (Cap 23), articulating that s 4 of the said Act prescribed the manner of commencement of a suit against the Government and that s 5 of the Act made provision for a fiat to be obtained before an action could be commenced against the defendants. In answer, Counsel for the plaintiff referred to s 133(1) of the Constitution submitting that the plaintiff did not require a fiat or process by petition of right and that that process had been abolished from the date that the Constitution came into force. In reply to the plaintiff counsel's counter submission, counsel for the defendants stressed that Parliament has not as yet passed an Act for the conferment of jurisdiction as provided for under s 133(2) of the Constitution, and he urged the court to rule that s 133(1) becomes operative only when s 133(2) has been complied with.

It is against this background that Nylander J saw a need for the interpretation of the two subsections of s 133 and stayed proceedings and made this reference in accordance with s 124(2) of the Constitution posing the following questions for determination:

1. Is s 133(1) of the Constitution inoperative until s l33(2) is effected by Parliament?

2. If the answer is in the negative, can the High Court Rules apply to put in operation s 133(1) in the absence of Parliament effecting s 133(2)?

3. What is the state of a party's right as at present in relation to s 133(1)?

In order to illuminate the process of interpretation of the two subsections of s 133 I find it necessary first to outline the law on the type of rights for which a person could sue the Government before the passage of the 1991 Constitution.

Proceedings against Government prior to 1991

The home-grown legislation was the Petitions of Right Act (Cap 23) 1960 of the Laws of Sierra Leone. Section 3 of the Act provided:

> "All claims against the Government of the Colony or against the Government of any other Colony, being of the same nature as claims which might have been preferred against the Crown in England before the enactment of the Crown Proceedings Act 1947, by petition, manifestation, or plea of right, may, with the consent of the Governor be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff against the Attorney General as defendant, or such other officer as the Governor may from time to time designate for that purpose".

For clarity of purpose, it should be born in mind that under the Interpretation Act 1971 and the Law (Adaptation) Act 1972, Sierra Leone, the Attorney General and the High Court replaced the Colony, Governor and Supreme Court *mutatis mutandis* in the Petitions of Right Act.

What s 3 of the Act achieved was to transplant to Siena Leone English law on the rights inherent in private citizens against the sovereign when they suffered wrongs at his hands. As an aid to the complete understanding of the issue before us I find it relevant to ascertain, even in broad outline, what the law was on suing the Crown.

Under the common law, there were two main rules governing the liability of the Crown and its servants. One was a substantive rule of law and the other was procedural. I shall deal with the

latter in due course but for now I will adumbrate the former. The substantive rule was that the King can do no wrong expressed in the Latin maxim *rex non potest peccare*. It was an ancient and fundamental principle of the unwritten English Constitution. Though in a personal sense the King was deemed to be incapable of doing wrong, yet some of his acts could in themselves be contrary to law, and on that account, the law could step in and set them aside. The King was considered as a benevolent lord who when it came to certain rights of his subjects in some respects would not be seen to trample upon them with impunity.

With the emergence of government departments when the Crown, through its servants acting on its behalf, descended into the commercial arena, it became essential that the Crown should at least be made liable to its subjects for contracts into which it entered with them. (See *Thomas v The Queen* (1874) LR 10 QB 31; *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 at p 503 per Rowlatt J). But it was not for every type of contract that redress was available to the subject for its breach; liability depended on the terms of the contract as the case may be. If, for example, the contract provided for money to be paid out of funds voted by Parliament and no vote was made there was no remedy (see *Churchward v R* [1865] 1 QB 173).

There was also liability for compensation for property of the subject taken by the Crown either arbitrarily or under statute (see *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; *Feather v The Queen* (1865) 6 B&S 257). In this regard, for the Crown to be liable under statute, the statute must impose an obligation on it expressly or by implication (see *Cooper v Hawkins* [1904] 2 KB 164; *Homsey Urban District Council v Hennell* [1902] 2 KB 73).

Outside these two grey areas, the Crown's subjects did not have recourse against the Crown for its wrongs. I will briefly mention some of these areas of disadvantage. One was the defence of executive necessity which was available to the Crown for its future action if it was dictated by the needs of the community. Under this defence the Crown could not by contract hamper its freedom of action in matters which concerned the welfare of the state. Thus in the *Amphitrite* case, *supra*, Rowlatt J held that an undertaking given by the British Government to neutral ships during World War I that if they sent their ships to British ports with a particular cargo they would not be detained, was not binding on the government and that it was free to withdraw the undertaking and refuse clearance on the ground that the Crown was not competent to make a contract which would have the effect of limiting its power of executive action in the future. Rowlatt J, however, made a reservation that the defence would not be applicable to ordinary commercial contracts (see at p 503). Denning J (as he then was), commenting on the stance of Rowlatt J, placed limitations on the defence holding that it only availed the Crown where there was an implied term in a contract to that effect or that it was the true meaning of the contract that the defence should apply (see *Minister of Pensions v Robertson* [1949] 1 KB 227 at p 231). Further, there was no remedy at common law for wrongful dismissal by the Crown of its servants (see *Dunn v The Queen* [1896] 1 QB 117 per Lord Herschell at p 120; and Acton J in *Leaman v The King* [1920] 3 KB 663). No mesne profit was payable by the Crown for the recovery of possession of property unless there was a contract for such payment or statute provided as such (see *Attorney General v De Keyser's Royal Hotel* [1920] AC 508). There could also be no order for the restitution of property although the court could make a declaration that the subject/plaintiff was entitled to the property as against the Crown. Furthermore, equitable remedies like injunction and decree of specific performance were not available against the Crown nor could there be discovery of documents against it if to do so would be injurious to the interest of the public (see *Ellis v Home Office* [1953] 2 QB 135). There was no period of limitation for actions by the Crown except that for the recovery of land the period was 60 years reduced to 30 years by the Limitation Act 1939 instead of the ordinary period of 12 years. Finally, the most frequent wrongs that were suffered by the subject were tortious for which there was no remedy (see *Attorney General v De Keyser's Royal Hotel* [1920] AC 508 per Lord Dunedin at p 522 and per

Lord Atkinson at p 532; Cockburn CJ in *Feather v The Queen* (1865) 6 B&S 257, ER 1191 at p 1205.)

Now to the procedural rule. So far as this was concerned, the party aggrieved by the Crown did not go straight to court as the King could not be sued in his own courts but had to use the process of petition of right. The procedure was regulated by the Petition of Right Act 1860 which was enacted only to simplify the process and not to create new rights which the subject did not enjoy before. This was the preliminary step in the commencement of an action after which the normal process of litigation in a court of civil jurisdiction followed.

After this historical background it is appropriate at this stage to determine what "government" is, as it is claimed by the defendants herein that they are arms of the Government of Sierra Leone.

Government of Sierra Leone

The Interpretation Act 1971 defines government as "the Government of Sierra Leone (which shall be deemed to be a person) and includes, where appropriate, any authority by which executive power of the State is duly exercised in a particular case". There is no doubt that the second defendant is part of the Government of Sierra Leone as it exercises some executive power of the State under the Constitution (see s 53(1) and s 53(5) of the Constitution). I have taken the pains to go into this definition in order to draw attention to the identities of the defendants. While I am satisfied that the second defendant answers to that description, I am not sure about the first defendant. This and the question whether the proper parties are before the Court as defendants are matters for the trial Court. [*Editor's note*: for another Sierra Leone Supreme Court decision which examines the meaning of "Government" see *Fornah & 14 Ors v The State* [1974-1982] SLBAR 48, per Livesy Luke JSC.]

The main issues in this reference

Before this Court, counsel for the defendants made two contentions. One is that ss 3, 4 and 5 of the Petitions of Right Act 1960 have been violated by the plaintiff. The other is that s 133(1) and s 133(2) of the Constitution should be read conjointly to such an extent as to reach the conclusion that s 133(1) becomes operative only when Parliament has complied with s 133(2). He submitted that there will be an ambiguity if the sections are to be read independently and he cited authorities in support. I shall presently deal with the second contention.

One of the cases counsel relied upon is *Canada Sugar Refining Company Ltd v The Queen* [1898] AC 735. This was an appeal from the Canadian Court of Appeal to the Privy Council. In this case the Attorney General of Canada instituted an action against the Canadian Sugar Refining Company to recover customs duty on sugar imported by the company into Canada by a steamship called the *Cynthiana*. The principal question before the courts was the date of importation of the sugar into the country. The ship had set out from Antwerp in Holland bound for Montreal. Its first call in Canada was at the port of North Sydney in Cape Breton on 29 April 1895 where it stopped allegedly to coal before proceeding to Montreal. At port North Sydney the shipmaster made two reports for entry and exit of the ship on the same day that the ship entered and left and he received a customs certificate of clearance. Eventually, when the ship reached its final destination the Collector of Customs charged duty as from the date of entry into Montreal which was 3 May 1895 and cancelled the clearance certificate issued at the intermediate port. The contention of the Sugar Company was that duty ought to have been levied up to the date of entry into the country at port North Sydney and that between that entry and the final destination the goods should have been cleared duty free. The whole issue revolved on the interpretation of s 150 of the Canadian Customs Act 1896 as to the ascertainment of the precise date of importation. The section provided:

> "Whenever, on the levying of any duty, or for any other purpose, it becomes necessary to determine the precise time of the importation or exportation of any goods, or of the arrival or

> departure of any vessel, such importation, if made by sea, coastwise or by inland navigation in any decked vessel, shall be deemed to have been completed from the time that the vessel in which such goods were imported came within the limits of the port at which they ought to be reported, and if made by land or by inland navigation in any undocked vessel, then, from the time such goods were brought within the limits of Canada".

The respondent company further submitted that having regard to the context and other sections of the Act, the words "the port at which they ought to be reported" in s 150 meant the port at which the effective report was to be made for the purpose of importation. Dismissing the contention of the respondent, the Privy Council held that upon interpretation of s 150, the port of importation was Montreal and not port North Sydney. It was then that Lord Davey made the following remark on statutory interpretation on which Counsel for the defendants herein has placed much premium:

> "Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so far as possible to make a consistent enactment of the whole statute or series of statutes relating to the subject matter" (at p 741).

Much as I regard this as a very persuasive statement of law, I do not see how it can be of assistance to the defendants herein in support of their contentions put before this court. The Privy Council in the Canadian case was concerned with the precise interpretation of the words "the port at which they ought to be reported" and from the spirit and intendment of the Customs Act and all the regulations on customs duty they reached the conclusion that the port of importation must be the port of the final discharge of the cargo. The factual situation is not the same as the case before this court.

The defendants' second case in support is *Curtis v Stovin* (1889) 22 QBD 512. In this case the English Court of Appeal was faced with the task of interpreting s 65 of the County Courts Act 1888 which made the following provision:

> "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed £100 it shall be lawful for either party to the action at any time to apply to a judge of the High Court to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto, and on the hearing of the application the judge shall order such action to be tried accordingly."

In construing this section, Lord Esher held the view that the legislature had misdescribed the court to which the transfer was to be made and that the legislature did it in such a way as to show that there was a misdescription of the court. Nevertheless, he thought that the alternative clause which followed "or in any court convenient thereto" was helpful in the construction inasmuch as it referred to a locality which must be the county court in the district in which the parties were resident (at p 517). Bowen LJ in the same case applied the *ut res magis valeat quam pereat* rule [*Editor's note*: It is better for a thing to have effect than to be made void], and stressed that "if we were to hold that under s 65 the judge has no power to order that an action shall be tried in a county court unless it is an action which as regards the amount claimed, might have been commenced in a county court, we should be making nonsense of the section." "We must avoid such a construction, if the language will admit of our doing so", he emphasised. As will be seen in due course, these dicta, to say the least, are of no assistance to the defendants in the interpretation of the subject matter before us.

Charles Leader & Anor v George Duffey & Anor (1888) 13 AC 294 is another authority on which counsel for the defendants based his argument. In that case the Privy Council was asked to interpret a clause in a settlement which gave property "unto or for the benefit of all and every or anyone or more child or children, or any grandchild or grandchildren, or other issue then in being of the said intended marriage". The bone of contention was whether the word "then" applied to

persons in being at the time of the death of the tenant for life or to persons in being at any time that the settlement took effect. Lord Herschell gave the precise meaning of the word "then in being" to be equivalent to "*in esse*", that is to say, born or about to be born, and he concluded that the words were, according to the natural construction of the language used, connected only with the words which immediately preceded them and not with the earlier limb of the sentence (at p. 305). On the construction of instruments generally, Lord Halsbury LC at page 301 of the report emphatically observed that "whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained but the whole instrument must be looked at to ascertain what is the meaning of the instrument taken as a whole in order to give effect to the intention of the framer of it". This is what I intend to do when I come to the interpretation part in this judgment, but I do not think that it will also be helpful to the defendants.

The next case for review is *Attorney General of Canada v Hallett & Carey Ltd* [1952] AC 427 in which the respondents before the Privy Council challenged the validity of the order-in-council of the Governor of Manitoba which resulted in the compulsory acquisition of his barley during the Second World War. The National Emergency Transitional Powers Act 1945 provided by its s 2(1) that:

> "The Governor in Council may do and authorize such acts and things and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of (a) monitoring, controlling and regulating supplies and services, prices, transportation use, and (b) occupation of property rentals, employments, salaries and wages to ensure economic stability and an orderly transaction to conditions of peace".

In exercise of the powers conferred by s 2(1) of the 1945 Act, the Order-in-Council in question was made providing that "all oats and barley in commercial positions in Canada with certain specified exceptions are hereby vested in the Canadian Wheat Board". Delivering the judgment of the Privy Council Lord Radcliffe held that for the expropriation order to be invalid in law it must be attacked by showing that the Act truly interpreted did not give the Governor the power to carry out what he had purported to achieve. His Lordship first questioned the interpretation given to the Order-in-Council by the trial court in Manitoba and by the Court of Appeal to the effect that the Act allowed the continuance of existing powers only and that there was no portion in it giving power to extend the controls as propositions which imposed a construction that flew in the face of the words of the Act (at p 446). In this case Lord Radcliffe raised an issue which is very relevant to the matter before this Court and to which I will return when dealing with s 133(2) of our Constitution specifically. It is this: "Where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed" (at p 450).

The last case that counsel for the defendants urged us to accept as authority for his propositions is *Magor & St Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226. I do not find much in this case to merit a detailed treatment. But I am inclined to agree with the dissenting judgment of Denning LJ (as he then was) when he said: "We do not sit here to pull the language of Parliament to pieces and make nonsense of it. This is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and carry it out, and we do this better by filling in the gaps and making sense of the enactment than opening it up to destructive analysis" (at p 1236).

I am deeply influenced by this statement of Denning LJ and I see no reason why I should not follow it in this Court.

The interpretation of s 133(1) and s 133(2)

Next the crux of the reference. Two rules of statutory construction must, in my judgment, be considered in this case. One is the literal rule and the other the purposive rule. If the words in a statute are themselves precise and unambiguous then no more can be necessary than to expound these words in their natural and ordinary sense (see *The Sussex Peerage Case* (1844) 11 Cl & F 85; 8 ER 1034). But it sometimes happens that the ordinary words in themselves may be misleading and in order to make assurance doubly sure, it might be necessary to examine the context including the subject matter, the scope, purpose and, if need be, the background of the legislation in order to give effect to the true purpose of the legislation (see *Pepper v Hart* [1993] 1 All ER 42 at p 50 per Lord Griffith). This, I apprehend, is the current trend in statutory interpretation and it is encapsulated in the judgment of Laws LJ in the English Court of Appeal case of *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791 with which I cannot agree more. This was what he said:

> "It is nowadays misleading – and perhaps it always was – to seek to draw a rigid distinction between literal and purposive approaches to the interpretation of Acts of Parliament. The difference between purposive and literal construction is in truth one of degree only. On received doctrine we spend our professional lives construing legislation purposively, in as much as we are enjoined at every turn to ascertain the intention of Parliament. The real distinction lies in the balance to be struck, in the particular case, between the literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other. Frequently there will be no opposition between the two, and then no difficulty arises. Where there is a potential clash, the conventional approach has been to give at least very great and often decisive weight to the literal meaning of the enacting words. I will not here go into the details, or merits of the shift of emphasis, save broadly to recognize its virtue and its vice. Its virtue is that the legislator's true purpose may be more accurately ascertained. Its vice is that the certainty and accessibility of the law may be reduced or compromised. The common law, which regulates the interpretation of legislation, has to balance these considerations (at p 805)."

Thus, ambiguity may arise when a word has an ordinary meaning but it also has a latent meaning known only to the person who utters it within a particular context in which he uses it. In this case the context determines the real meaning. Shakespeare affords us with a light-hearted example in the following conversation between two of his characters in *The Two Gentlemen of Verona* (Act 2 scene 5).

> *Launce*: I'll but lean, and my staff understands me.
>
> *Speed*: It stands under thee indeed.
>
> *Launce*: Why, stand-under and under-stand is all one.

Still on ambiguity, Laws LJ gave classic examples of how it can create difficulties:

> "This concept of ambiguity is not, to my mind, free of difficulty, an expression is strictly ambiguous when, entirely shorn of their context, the words in question are equally capable as a matter of language of meaning at least two different things. In Marlowe's *Edward II* there is the message 'Edward to kill fear not to do the deed is good'. With a comma after 'fear', it tells the recipient not to kill the King; if the comma is after 'not', it commends his murder. With no comma at all, it is in the true sense ambiguous. But this kind of strict ambiguity cannot be the whole reach of what their Lordships meant in *HRH Prince Ernest Augustus of Hanover's* case, since they considered that it is always necessary to look at the context of the Act in every case; and it is by no means in every case that such a strict or internal ambiguity arises. There is however a different sense of ambiguity. It arises where although the words as a matter of language are clear enough, there may be a question as to the scope or subject matter of their intended reference. In the sixth century BC King Croesus of Lydia sent to the Oracle at Delphi

to divine his likely fortunes if he crossed the river Halys, the boundary of his own kingdom, and attacked the Persian Empire. Herodotus in Book 1 of the *Histories* tells us that the Oracle sent back the answer, 'If you cross the Halys you will destroy a great realm'. Thinking this is a good portent Croesus crossed it. But the realm he destroyed was his own; he was utterly defeated by King Cyrus of Persia, and his capital, Sardis, was taken" (at p 807).

I have gone into great length in quoting these passages from the judgment of Laws LJ which I fully endorse and adopt in order to help determine whether there is any ambiguity in s 133(1) and s 133(2) of the Constitution taking them singularly or conjointly. Counsel for the defendants conceded that s 133(1) conferred upon citizens unlimited rights to sue Government outright if these rights are infringed; his contention was that the enjoyment of these rights is postponed until Parliament passes a jurisdictional Act as contemplated by s 133(2). To resolve this, I will go back first to the English Crown Proceedings Act 194 7. Section 1 of this Act restated that only those rights which the subject possessed at common law for which he could sue the Crown by a petition of right were now suable as of right without the process of a petition of right. It reads:

"Where any person has a claim against the Crown after the commencement of this Act, and if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for the purpose in accordance with the provisions of this Act." (emphasis mine).

It is clear from the words underlined that the section did not confer any additional rights on a person other than those that he possessed under the common law. The section merely abolished the petition of right process. In order to confer more rights on the subject, for example, the right to sue in tort, provisions were made in other sections of the Act. It is certain from the omission from s 133(1) of the Constitution of the underlined words in section 1 of the Crown Proceedings Act, that the Sierra Leone Parliament intended to make the Government answerable to the subject for all wrongs as if the Government was any other person. This may be in recognition of the fact that a Government in a Republic with a written Constitution does not enjoy any more rights than those conferred by the Constitution thus curtailing the common law prerogatives of the sovereign. No wonder Mr Kobba, counsel for the defendants, did not go into the question as to what rights were recognized by s 133(1), but accepted the section as a fait accompli merely arguing that the section comes into operation only when a jurisdictional Act has been passed by Parliament. In bringing this action without using the petition of right process, Mr Kobba argued that the plaintiff violated ss 3, 4 & 5 of the Petitions of Right Act. These are the sections that incorporated the petition of right process into the Sierra Leone legal system and dealt with the preliminary process of obtaining the fiat and filing of a statement of claim. It is a fact that the plaintiff has not gone through this process, its contention being that that process has been abolished by s 133(1) of the Constitution. Mr Serry-Kamal, counsel for the plaintiff, submitted that s 133(1) came into full force on 1 October 1991 when the whole Constitution came into force. Unless I find a reservation in the Constitution that this particular subsection should be postponed to another date for its life, I see no reason why I should disagree with Mr Serry-Kamal on this point. The language of s 133(1) is plain and I have read it literally. Section 133(2) too is clear which again I have read literally. The purpose of the legislature was to abolish the petition of right process. Having found this and taking both sections together, I am unable to see any inconsistency or ambiguity between them in order to sit here and help counsel for the defendants pull the language of the Constitution into pieces and make nonsense of it, if I may borrow that expression once more from Denning LJ (as he then was) (see *Magor & St Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226 at p 1236). It seems to me that Mr. Kobba's argument that the coming into force of s 133(1) is postponed until Parliament has

performed the duty imposed upon it by s 133(2) might have had some weight if there were words in s 133(1) to suggest that both subsections were linked contemporaneously and that the one was dependent on the other, for example, words like "subject to the provisions of subsection (2)" prefacing s l33(1). But I do not find such words in order to persuade me to lean on the side of the defendants.

Mr Serry-Kamal further submitted that ss 3, 4 & 5 of the Petition of Right Act are inconsistent with s 133(1) of the Constitution which I hold is now in force, basing his argument on s 171(15) of the Constitution which provides:

> "The Constitution shall be the supreme law of Sierra Leone and any other law found to be inconsistent with any provisions of this Constitution shall, to the extent of the inconsistency, be void and of no effect."

On the basis of my finding that s l33(1) is now in force, I hold that ss 3, 4 & 5 of the Petitions of Right Act are inconsistent with it and are therefore now void. The next issue is to determine the fate of the subsequent provisions of the Petitions of Right Act. Have these provisions also been repealed by s 133(1) of the Constitution? I apprehend that ss 6, 7 & 8, the remaining sections of Cap 23 have not been expressly repealed by s 133(1). If that is so, have they been repealed by implication? On implied repeal of statutes, *Craies on Statutes*, 7th Edition, 1985 at p 366 had this to say:

> "Where two Acts are inconsistent or repugnant, the latter will be read as having impliedly repealed the earlier. The court leans against implying repeals unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. Special Acts are not repealed by general Acts unless there is a necessary inconsistency in the two Acts standing together. Before coming to the conclusion that there is a repeal by implication the court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can, from the language of the latter, imply the repeal of an express prior enactment; i.e., the repeal must, if not express, flow from necessary implication."

I accept this statement as the correct principle of law and I adopt it. In my judgment, the Constitution has not expressly repealed the Petitions of Right Act. Sections 3, 4 & 5 have been repealed by implication because they were found to be inconsistent with s 133(1). Can the same thing be said of ss 6, 7 & 8? They read:

(6) All documents, which, in a suit of the same nature between private parties, would be required to be served upon the defendants, shall be delivered at the office of the Attorney General, or other officer designated as aforesaid.

(7) Whenever in any suit, a decree shall be made against the Government, no execution shall issue thereon, but a copy of such decree under the seal of the Court shall be transmitted by the Court to the Governor, who, if the decree shall be for the payment of money, shall by warrant under his hand direct the amount awarded by such decree to be paid, and, in the case of any other decree under the seal of the Court shall be transmitted by the same to be carried into effect; or, in case he shall think fit, he may direct that any competent appeal shall be entered and prosecuted against any decree.

(8) So far as the same may be applicable, and except in so far as may be inconsistent with this Ordinance, all the powers, authorities and provisions contained in the Courts Ordinance, or in any enactment extending or amending the same, and the practice and course of procedure of the Supreme Court, shall extend and apply to all suits and proceedings by or against the Government, and in all such suits costs may be awarded in the same manner as in suits between private parties.

Are these sections inconsistent with s 133(1) and/or s 133(2)? I do not think so. I hold that they have not been repealed either expressly or by implication. In the absence of an Act of Parliament pursuant to s 133(2), in my judgment, the existing law must be resorted to. As can be seen from the Petitions of Right Act, s 6 merely nominates the person on whom documents should be served; s 7 establishes the process of levy of execution and s 8 provides the procedure to follow after the subject had obtained the fiat when he should avail himself of the normal procedure in civil litigation. The Courts Act (Cap 7) of the Laws of Sierra Leone 1960 referred to in s 8 has now been replaced by the Courts Act 1965 (31/1965) which makes provision for trial in the courts of judicature. The framers of the Constitution must have had at the back of their minds that there cannot be a vacuum in the law when they made transitional provisions in the Constitution. The Constitution states:

> **Section 177(1)** The existing law shall, notwithstanding the repeal of the Constitution of Sierra Leone Act 1978, have effect after the entry into force of this Constitution as if they had been made in pursuance of this Constitution and shall be read and construed with such modification, adaptation, qualification and exceptions as may be necessary to bring them in conformity with this Constitution.
>
> **Section 177(2)** Where any matter that fails to be prescribed or otherwise provided for under this constitution by parliament or by any other authority or is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or otherwise prescribed or provided for immediately before the commencement of this Constitution by or under the existing Constitution, that prescription or provision shall as from the commencement of this Constitution have effect with such modifications, alterations, qualification and exceptions as may be necessary to bring it into conformity with this Constitution as if it had been made under this Constitution by Parliament or as the case may be, by the other authority or person.

The Constitution by its s 176 defines "existing law" as "any Act, rule, regulation, order or other such instrument made in pursuance of, or continuing in operation under, the existing Constitution and having effect as part of the laws of Sierra Leone or of any part thereof immediately before the commencement of this Constitution."

Conclusion

In a democratic society the Constitution of a state is the grundnorm of its legal system and all other laws derive their validity and efficacy from it. The Constitution is usually a small instrument which does not embrace the details of all the laws governing the state. At most it deals with specific matters like the operation of the three arms of "government" in the wider context – the legislature, the executive and the judiciary – leaving details of laws in other respects to specific Acts of Parliament and subsidiary legislation. A new Constitution in many instances only engenders changes in the existing Constitution to accommodate the political dictates of the day but leaves the bulk of the existing law untouched. It does not intend to create a vacuum in the law and so the making of transitional provisions maintaining the status quo ante in areas not specifically altered. The framers of the 1991 Constitution must have been aware of this principle when they enacted Chapter XIV of the Constitution which contains ss 176 and 177. Indeed, Parliament has not as yet passed legislation to provide for a new jurisdiction governing actions by persons against government but that does not mean that private citizens are to be deprived of remedy against government with the abolition of the fiat and the petition of right procedure.

I have earlier in this judgment referred to the dictum of Lord Radcliff in *Attorney General of Canada v Hallett & Carey Ltd* [1952] AC 427 at p 450 that "where the import of some instrument is inconclusive the court may properly lean in favour of an interpretation that leaves private rights undisturbed". I adopt and apply it to this case. In my judgment, the Constitution did not repeal the Petitions of Right Act in its entirety; it repealed the substantive law provision in s 3 and only the fiat

and its concomitant process in ss 4 & 5. This was what was accomplished by s 133(1). The procedure under ss 6, 7 & 8 remain untouched and it is the procedure to follow in the presence of parliamentary inactivity. These sections prescribe the procedure under the existing law and in my judgment they are applicable to this case which is the *fons et origo* of this reference.

I will now answer the questions which Nylander J posed for directions from this Court.

1. The answer to question 1 is in the negative.
2. The answer to question 2 is in the affirmative.
3. The party has all the rights available to him as if he were suing another private person. I order that these answers be sent to the trial Court for the appropriate step to be taken.

WRIGHT JA: This is a constitutional reference by way of case stated to the Supreme Court made by Nylander J sitting in the High Court in which he referred the following questions:

(1) Is s 133(1) of the 1991 Constitution inoperative until s133(2) is effected by Parliament?

(2) If the answer is in the negative can the High Court Rules apply to put into operation s 133(1) in the absence of Parliament effecting s 133(2)?

(3) What is the state of the parties' right as at present in relation to s 133?

I have had the advantage of reading some of the judgments delivered by my learned brothers so I shall not go into the background of the case or the arguments raised by counsel on both sides.

The Interpretation Act No 8 of 1971 defines government as "the Government of Sierra Leone (which shall be deemed to be a person) and includes where appropriate any authority by which executive power of the state is duly exercised in a particular case". I am of the opinion that both defendants answer to that description see s 53(1) and s 53(5) of the Constitution, although this is not before the court.

The gravamen of this matter is the interpretation of s 133(1) and s 133(2) of the Constitution of Sierra Leone Act No 6 of 1991.

I hold the view that sections 3, 4 and 5 of the Petitions of Right Act are void and inconsistent with s 133(1) of the Constitution which is now in force considering s 171(15) of the Constitution which provides "The Constitution shall be the supreme law of Sierra Leone and any other law found to be inconsistent with any provisions of this Constitution shall, to the extent of the inconsistency, be void and of no effect".

I also hold that sections 6, 7 and 8 of the Petitions of Right Act have not been repealed by implication by s 133(1) and so is not inconsistent with the Constitution, and is still applicable.

Section 177(1) of the Constitution states: "The existing law shall, notwithstanding the repeal of the Constitution of Sierra Leone Act, 1978, have effect after the entry into force of this Constitution as if they have been made in pursuance of this Constitution and shall be read and construed with such modifications adaptations, qualifications and exceptions as may be necessary to bring them in conformity with this Constitution."

Section 177(2) states "Where any matter that fails to be prescribed or otherwise provided for under this Constitution by parliament or by any other authority or is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or otherwise prescribed or provided for immediately before the commencement of this Constitution by or under the existing Constitution, that prescription or provision shall as from the commencement of this Constitution have effect with such modifications, alterations, qualifications and exceptions

as may be necessary to bring it into conformity with this Constitution as if it had been made under this Constitution by Parliament or as the case may require, by the other authority or person."

The Constitution by its s 176 defines "existing law" as: "any Act, rule, regulation, order or other such instrument made in pursuance or continuing in operation under, the existing Constitution and having effect as part of the laws of Sierra Leone or any part thereof immediately before the commencement of this Constitution …".

As I said earlier the procedure under sections 6, 7 and 8 of the Petitions of Right Act have not been repealed and so prescribe the procedure under the existing law which is applicable in this case. I have perused several authorities including *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791, *Attorney General of Canada v Hallett & Carey Ltd* [1952] AC 427, *Canada Sugar Refining Company Ltd v The Queen* [1898] AC 735 in deciding whether s 133(1) and s 133(2) of the Constitution should be read singularly or conjunctively and to decide whether s 133(1) is inoperative until s 133(2) is effected by Parliament. In *The Sussex Peerage Case* (1844) 11 Cl & F 85; 8 ER 1034 the judges said: "If any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid and the ground and cause of making the statute, and to have recourse to the preamble, which is a key to open the minds of the makers of the Act and the mischiefs which they intended to redress," quoted and approved by Lord Halsbury LC in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531. See also *Craies on Statutes*, 7th Edition p 203. In *Magor & St Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226 Lord Denning LJ said: "I confess that I find it difficult to deal with these questions of interpretation in the abstract. I like to see their practical application."

In my view it was obvious that the intention of the Constitution was that the claims could be brought against the Government as considered necessary in accordance with s 133(1) of the constitution which reads: "Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as petition of right."

The fact that the Constitution further goes on to say in s 133(2) "Parliament shall by an Act of Parliament make provision for the exercise of jurisdiction under this section" does not preclude actions in claim against the Government being taken, nor is there any express intention that the taking of such action is dependent on Parliament making such provision. It is my view that the section stating that Parliament should make such provision is merely to give assurance of a systematized approach as to the practice and procedural steps for taking such action.

In answer to the questions which Nylander J posed for directions to the Supreme Court:

1. To question 1 the answer is in the negative.
2. The answer to question 2 is in the affirmative.
3. The party has all rights available to him as when he is suing another private person.

TIMBO JSC: The plaintiff, the All People's Congress, issued a writ of summons against what was then known as NASMOS and the Ministry of Social Welfare, Youths and Sports. NASMOS was the shortened same of National Action for Social Mobilization Secretariat. It was an appendage of the said Ministry during the reign of the National Provisional Ruling Council.

The plaintiff claimed against the defendants:

1. Recovery of possession of premises known as 39 Siaka Stevens Street, Freetown.
2. Mesne profits at the rate of Le4,000,000 per annum from 29 April 1992 until possession is yielded up.

3. Damages for trespass.
4. A perpetual injunction to restrain the defendants whether by themselves, their servants or agents howsoever called from entering or remaining on the said property.
5. Damages for conversion of air conditioners.
6. Malicious damage
7. Interest.

On 30 April 1996, the defendants filed a motion in the High Court seeking the following orders:

1. That the said writ of summons be set aside for irregularity and for informality on the grounds that the plaintiff failed to comply with the provisions of the Petitions of Right Act (Cap 23) 1960 of the laws of Sierra Leone, in that the plaintiff issued a writ of summons against NASMOS and the Ministry of Social Welfare Youth and Sports.
2. That the plaintiff pays the costs of the application.

The plaintiff was represented by Mr AF Serry-Kamal while state counsel JG Kobba acted for the defendants. When the motion came up for hearing Mr Kobba submitted that the court had no jurisdiction to try the matter because the plaintiff had failed to comply with the requirements of ss 3, 4 & 5 of the Petitions of Right (Cap 23) 1960.

Section 3 confers on private individuals the right to sue the State but only after first obtaining the fiat of the Attorney General. Section 4, on its part, lays down the mode of commencement of such proceedings. This only requires the filing of a statement of claim, while section 5 deals with the method of transmission of the statement of claim and the endorsement of the fiat of the Attorney General thereon. Because of such non-compliance, counsel for the defendants urged the court to set aside the writ of summons.

Mr Serry-Kamal, on the other hand, maintained that the application should be dismissed because not only had s 133(1) of the Constitution impliedly repealed ss 3, 4 & 5 of Cap 23, but it had also made it no longer necessary for a claimant to obtain the prior consent of the Attorney General before the institution of proceedings against the State.

More specifically, section 133(1) provides:

> "Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right".

The motion was adjourned for state counsel to reply to Mr Serry-Kamal's submission when the court resumed. Mr Kobba, while conceding that s 133(1) of the Constitution gave litigants the right to sue the Government without first getting or obtaining the fiat of the Attorney General, argued that the exercise of such right was limited by the provisions of s 133(2) which stipulates that, "Parliament shall, by an Act of Parliament, make provision for the exercise of the jurisdiction under this section".

So, Mr Kobba contended that until such time as Parliament takes the necessary steps to implement s 133(2) the commencement of all claims against the State must conform with the requirements of the provisions of Cap 23 ss 3, 4 & 5.

At this junction, and being a question of law, the court suspended the proceedings as demanded by s 124(2) of the Constitution and referred the matter to the Supreme Court.

According to s 124(2):

"Where any question relating to any matter or question as is referred to in sub-section (1) [interpretation of the Constitution] arises in any proceedings in any Court, other than the Supreme Court, that Court shall stay proceedings and refer the question of law involved to the Supreme Court for determination; and the Court in which the question arose shall dispose of the matter in accordance with the decision of the Supreme Court".

The learned trial judge then posed the following three questions for the consideration of the Court:

(1) Is s 133(1) of the 1991 Constitution inoperative until s133(2) is effected by Parliament?

(2) If the answer is in the negative can the High Court Rules apply to put into operation s 133(1) in the absence of Parliament effecting s 133(2)?

(3) What is the state of the parties' right as at present in relation to s 133?

In the Supreme Court we invited counsel on both sides to file their case in writing and thereafter, they more or less repeated their arguments and submissions in the High Court.

Since this is the first time the interpretation of s 133(1) has come before the Court, it is important that one does more than merely give straight-forward answers to the questions referred to us. I hope I will be forgiven for making extensive references to other jurisdictions than might otherwise be necessary.

The immediate consideration that comes to mind is, what approach should the Court adopt in interpreting a constitutional as opposed to a statutory provision?

There is certainly no unanimity in practice here. The approaches seem to vary from jurisdiction to jurisdiction and sometimes, like Canada, even from period to period.

The conflict has always centred around the question whether the Constitution is to be treated as an ordinary statute to be interpreted in accordance with the ordinary (restrictive) rules of statutory construction or whether it is something more – a "Constitutional statute" and therefore deserves a more "beneficial" interpretation.

The Privy Council's construction of the British North America Act 1867 in *Attorney General for Canada v Attorney General of Ontario and others* [1931] UKPC 93, [1932] AC 54 vividly demonstrated that body's often reluctant attitude towards differentiating between constitutional and statutory documents.

Again, in *Attorney General (Cth) v Colonial Sugar Refining Company Ltd* [1914] AC 237; (1913) 15 CLR 182 the Privy Council observed that the Canadian Constitution is just another piece of British legislation. See also *Bank of Toronto v Lambe* (1887) 12 App Cas 575.

Chief Justice Marshall on his part seemed to suggest a different standard ought to apply in construing constitutional provisions when he said in *M'Culloch v State of Maryland* 17 US (4 Wheaton) 316 (1819) at p 136 "we must not forget that it is the Constitution we are expounding". Lord Sankey in his famous dictum in *British Coal Corporation v The King* [1935] AC 500 expressly recognized that:

"In interpreting a Constitution or organic statute such as the British North America Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted".

Five years earlier in 1930, he had declared in *Edwards v Attorney General for Canada* [1930] AC 124 that:

"The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire

— to read down the provisions of the Act by a narrow and technical construction: but rather to give it a large and liberal interpretation".

And in the celebrated Indian case of *AK Gopalan v The State of Madras* (1950) SCR 88, while adopting the language of an Australian decision (*Attorney General for New South Wales v Brewery Employees' Union of NSW* (1908) 6 CLR 469), Chief Justice Kania observed that,

"Although we are to interpret words of the Constitution as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting – to remember that it is a Constitution, a mechanism under which laws are made and not a mere Act which declares what the law is to be".

In *Adegbenro v Akintola* [1963] AC 614 the Nigerian Supreme Court displayed far greater imagination than the Judicial Committee of the Privy Council in regarding the Constitution as something more than a British Government law.

I will next come to what I believe is the thrust of Mr Kobba's argument that s 133(1) and (2) of the Constitution should be read conjunctively and not in isolation of each other.

I do accept that as a general rule of construction a Constitution, like a statute, must be read as a whole. In other words, the entire Constitution should be examined for the purpose of determining the intention of each section or part. This is what is often referred to as the principle of harmonious construction. Its aim is no doubt, to reconcile different provisions of the Constitution.

Thus in *State of Madras v Champakam* (1951) SCR 525 and *Qureshi v State of Bihar* (1959) SCR 629 the Indian Supreme Court held that the Directive Principles of State Policy enshrined in the Constitution have to be construed and implemented in such a manner as not to take away or abridge the fundamental rights of the individual. Likewise, the Indian Supreme Court has ruled that although Hindi is the national language and Article 351 of the Indian Constitution makes special provision directing the State to promote the spread of Hindi, such object cannot be achieved by any means which violate the protection of the interests of minorities guaranteed by Articles 29 and 30; see *State of Bombay v Bombay Education Society* (1955) SCR 568.

However, it is a cardinal principle of construction too that where the words of a section are clear, "the rule of construction can require that … it shall be necessary to introduce another part of the statute which speaks with less perspective and of which the words may be capable of such construction as by possibility to diminish the efficacy of the provisions of the Act"; see *Warburton v Loveland* (1828) 1 H & B 623.

And finally, in the words of the Supreme Court of India, "If two constructions are possible, then the court must adopt that which will ensure the smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory"; *State of Punjab v Ajaib Singh* (1953) SCR 254.

Mr Serry-Kamal in his submission appealed to the Court not to read s 133(1) together with s 133 (2). He said the two subsections should be treated separately. He further submitted that in so far as Cap 23 is concerned it is only section 3, 4 & 5 therefore that are inconsistent with the provisions of section 133(1), and to the extent of that inconsistency they are rendered void by s 171(15) of the Constitution. The rest of the provisions in Cap 23 according to him remain valid and operational, more particularly, s 8 which provides that:

"So far as the same may be applicable, and except in so far as may be inconsistent with this Act, all the powers, authorities and provisions contained in the Courts Act, or in any enactment extending or amending the same and the practice and course of procedure of the High Court,

shall extend and apply to all suits and proceedings by or against the Government and in all such suits, costs may be awarded in the same manner as in suits between private persona".

I find Mr Serry-Kamal's argument attractive and I will agree with him that s 133(1) of the Constitution has impliedly repealed and replaced sections 3, 4 & 5 of Cap 23. It is my further view that until such period as Parliament brings into operation the provisions of s 133(2) the correct procedure applicable to suits brought under s 133(1) is that prescribed under the existing law i.e., s 8 of Cap 23. Under the English Crown Proceedings Act 1947, in principle it is the normal procedure in civil litigation that applies.

To hold otherwise will, I believe, work great hardship on would-be litigants who may have legitimate claims against the State and are eager to pursue them. I beg to differ with counsel for the defendants' contention that claimants against the Government have to pursue their rights by means of the laborious and long-winded process under sections 3, 4 & 5 of the Petition of Right requiring, among other things the prior consent of the Attorney General. What happens if the fiat of the Attorney General is not forthcoming? Would that not surely leave the poor litigant in limbo?

To all intents and purposes s 133(1) has for the first time conferred a new right – that of being able to commence an action against the Government without having previously obtained the Attorney General's fiat. That right must not be fettered simply because Parliament has not over a period of nine years or so thought it worth the while to prescribe rules and regulations for the exercise of jurisdiction under s 133(2).

Let me now examine the position of the "existing law" vis-a-vis the Constitution. Section 170(1)(d) of the Constitution states that the laws of Sierra Leone shall comprise "the existing law" and by s 176 "existing law" is defined as:

> "Any Act, rule, regulation or other such instrument made in pursuance of, or continuing in operation under, the existing Constitution and having effect as part of the laws of Sierra Leone or of any part thereof immediately before the commencement of this Constitution (or any Act of the Parliament of the United Kingdom or Order of Her Majesty in Council so having effect and may be continued with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution as if it had been made under this Constitution".

Section 177(1) then goes on to say:

> "The existing law shall, notwithstanding the repeal of the Constitution of Sierra Leone Act 1978, have effect after the entry into force of this Constitution as if they had been made in pursuance of this Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution".

The Constitution having this clearly and copiously explained the position of the existing law, I do not see the reason why this court cannot apply that part of Cap 23 which has not been either expressly or impliedly revoked, such as section 8 in particular, to give meaning and teeth to the provisions of s 133(1).

As an exponent of the liberal approach myself, I hold the view that s 133(2) of the Constitution must be interpreted in a manner that will not impede the fulfilment of the right granted by s 133(1). It could hardly have been in the contemplation of the makers of the Constitution that what they had given by the right hand they had taken away with the left. Moreover, when one reads s 133(1) side by side with the provisions of s 21, dealing with the protection from deprivation of property and s 28, the enforcement section, the case for giving effect to s 133(1) in spite of s 133(2) becomes even more compelling. The main complaint here is that the plaintiff's property had been compulsorily

acquired by the defendants. Indeed, the plaintiff could have applied to the Supreme Court by motion under s 28 for redress. The fact that they had chosen to proceed under s 133(1) should not prejudice their chances of success simply because Parliament had failed to pass the necessary legislation under s 133(2).

I will end by reverting to the specific questions posed by Nylander J:

1. Is s 133(1) of the Constitution inoperative until s l33(2) is effected by Parliament? My answer is No.
2. If the answer is in the negative, can the High Court Rules apply to put in operation s 133(1) in the absence of Parliament effecting s 133(2)? My answer is Yes.
3. What is the state of a party's right as at present in relation to s 133(1)? This question is by no means clear. In any case because of what I have already said in 1. & 2. above, I do not think I need to answer it.

DESMOND LUKE CJ: This is a Constitutional reference by way of case stated by Nylander J, a judge of the High Court, pursuant to s 124(2) of the Constitution of Sierra Leone Act No. 6 of 1991.

Section 124(2) provides as follows:

"Where any question relating to any matter or question as is referred to in subsection (1) arises in any proceeding in any court, other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

The plaintiff, one of the recognized political parties represented in our Parliament, initiated this action by a writ of summons dated the 9th day of April 1996 against the defendants herein. The first defendant is an organization set up by the then military government known as the National Action for Social Mobilization Secretariat. The second defendant is one of the Ministries in existence at the time. The plaintiff's claim against the defendants were:

1. Damages for trespass.
2. Recovery of possession of the premises known as 39 Siaka Stevens Street, Freetown.
3. Mesne profits at the rate of Le4,000,000/00 per annum from 29 April 1992 until possession is yielded.
4. Damages for conversion of air conditioners: Le10,000,000/00.
5. Damages for malicious damage.
6. Cost of restoring premises: Le16,000,000/00.
7. Interest on the aforesaid amounts and damages at the rate of 32% per annum until payment.
8. A perpetual injunction to restrain the defendants whether by themselves or their servants or agents howsoever called from entering or remaining on the property known as 39 Siaka Stevens Street, Freetown or any part thereof.
9. Any further or other relief.
10. Costs.

Mr JG Kobba, Esq., State Counsel for the defendants by an action dated 30 April 1996 sought to set the said writ "aside for irregularity and/or informality on the ground that the plaintiff herein failed to comply with the provision of Petitions of Right Act 1960, Cap 23 of the Laws of Sierra

Leone, in that he issued a writ of summons against NASMOS and the Ministry of Social Welfare, Youth and Sports". At the hearing of the motion, counsel representing the defendants submitted that the honourable court had no jurisdiction to try this matter because the plaintiff had failed to comply with Cap. 23 of the Laws of Sierra Leone 1960. Section 4 of the said legislation makes provision for how the suit is to commence and s 5 makes provision for fiat before prosecution. Counsel read out and explained the relevant sections in support of his argument that the present writ was irregularly issued. Counsel urged the court therefore to set aside the writ as prayed.

In answer to this application, Mr Serry-Kamal, Esq. counsel representing the plaintiffs referred the court to s 133(1) of the Constitution of Sierra Leone 1991. This section reads as follows:

> "Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right".

Counsel rested his argument on this sub-section and asked the court to dismiss the application. Counsel for the defendants then asked for an adjournment to prepare his reply.

At the resumed hearing defendants' counsel submitted that s 133(1) of the 1991 Constitution provides certain rights which are not in dispute. But s 133(2) states that Parliament shall make provision for the exercise of such rights. This sub-section reads as follows: "Parliament shall, by an Act of Parliament, make provision for the exercise of jurisdiction under this section".

Counsel pointed out that s 133(1) is not operative until s 133(2) is effected by Parliament. In the interim, all claims against the Government must comply with Cap 23 of the Laws of Sierra Leone. Counsel urged the Court to grant his application as prayed.

Whereupon the learned trial judge ruled as follows:

"The legal interpretation in my view spins around the present effect of s 133(1) of the 1991 Constitution and what effect s 133(2) has on it presently. As this to my mind touches on the interpretation of s 133 as a whole. Presently, I hereby invoke s 124(2) of the 1991 Constitution which reads as follows: 'Where any question relating to any matter or question as is referred to in subsection (1) (Interpretation of the Constitution) arises in any proceedings in any court, other than the Supreme Court, that court shall stay proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which, the question arose shall dispose of the case in accordance with the decision of the Supreme Court.' I therefore pose the following question for the Supreme Court:

1. Is s 133(1) of the Constitution inoperative until s l33(2) is effected by Parliament?
2. If the answer is in the negative, can the High Court Rules apply to put in operation s 133(1) in the absence of Parliament effecting s 133(2)?
3. What is the state of a party's right as at present in relation to s 133(1)?

This matter before this court is stayed until the Supreme Court's decision is received. Proceedings stayed."

(Sgd.) Nylander J.

Before seeking to answer the questions posed by the learned trial judge, it seems to me that it would be helpful to consider the position of claims by private parsons against the Government prior to 1 October 1991 when the present Constitution of Sierra Leone Act No 6 of 1991 came into being.

The existing law prior to 1 October 1991 is to be found in Cap. 23 of the Laws of Sierra Leone 1960 ss 3, 4, and 5, which read as follows:

(3) All claims against the general Government of the Colony, or against the Government of any other Colony, being of the same nature as a claim which might have been preferred against the Crown in England before the enactment of the Crown Proceedings Act 1947, by petition, manifestation, or plea of right, may, with the consent of the Governor, be preferred in the Supreme Court in a suit instituted by the claimant as plaintiff, against the Attorney General as defendant, or such other officer as the Governor any from time to time designate for that purpose.

Section 4 makes provision for how the suit is to commence:

(4) The claimant under his Ordinance shall not issue a writ of summons, but the suit shall be commenced by the filing of a statement of claim in the Supreme Court, and the delivering of a copy thereof at the office of the Attorney General, or other officer designated as aforesaid, and no fee shall be payable on filing or delivering such statement.

And Section 5 makes provision for the fiat before prosecutions:

(5) The Registrar shall forthwith transmit the statement of claim to the Attorney-General, and the same shall be laid before the Governor. In case the Governor shall grant his consent as aforesaid, the statement of claim shall be returned to the Supreme Court, with the fiat of the Governor endorsed thereon, and the claim shall be prosecuted in the Supreme Court.

It is to be noted:

Firstly, that only claims being of the same nature as claims which might have been preferred against the Crown in England before the enactment of the Crown Proceedings Act 1947, by petition, manifestation or plea of right could with the consent of the appropriate officer be preferred.

Secondly, that such claims were severely restricted and applied mainly to some contracts which the Crown by itself, its servants or agents had entered into as well as to some compensation for property of the subject taken by the Crown either arbitrarily or under Statute (see *Attorney General v De Keyser's Royal Hotel* [1920] AC 508; *Feather v The Queen* (1865) 6 B&S 257.

Thirdly, that in tort the party aggrieved had no remedy against the Crown: *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

And fourthly, that the grant of a fiat or the use of the process known as Petition of Right was required.

How did s 133 of the Constitution of Sierra Leone Act No 6 of 1991 s 133(1) and (2) affect this position? Section 133 reads:

(1) Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose, without the grant of a fiat or the use of the process known as Petition of Right.

(2) Parliament shall, by an Act of Parliament, make provision for the exercise of jurisdiction under this section.

Whereas possible claims against the Government prior to 1 October 1991 were severely restricted as outlined above and were further encumbered with the procedure of use of the process known as Petition of Right and the grant of a fiat, to my mind the plain and unambiguous words of s 133(1) undoubtedly remove all such restrictions and encumbrances as existed prior to October 1 1991.

However, s 133 consists not only of subsection (1) but also of subsection (2) which reads: "Parliament shall, by an Act of Parliament, make provision for the exercise of jurisdiction under this section." Parliament has not to date passed any such legislation, which raises the question what

happens to the unrestricted rights granted by s 133(1) in the absence of legislation envisaged by s 133(2).

In construing s 133, I intend to be guided by the following considerations:

Section 133 is to be construed as a whole. We cannot construe s 133 as if subsection (2) were not there. Otherwise we would not be interpreting the Constitution, we would be rewriting it. And even Parliament the law makers cannot rewrite s 133 without the people's consent since s 133 is an entrenched clause; see s 108(3) of the Constitution. I intend to be further guided by *the modern view* as regards construction of instruments so eloquently stated by Lord Halsbury LC in 1888 in the case of *Leader v Duffey* (1888) 13 App Cas 294 at 301:

> "All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view – which is I think in accordance with reason and common sense – that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and having made that fallacious assumption to bend the language in favour of the assumption so made."

This "reason and common sense" approach to documentary interpretation is still to be found in the words of Laws LJ in the case of *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791 when discussing the distinction between literal and purposive approaches to the interpretation of statutes. This is what he says:

> "It is nowadays misleading – and perhaps it always was to seek to draw a rigid distinction between literal and purposive approaches to the interpretation of Acts of Parliament. The difference between the purposive and literal construction is in truth one of degree only … the real distinction lies in the balance to be struck, in the particular case, between the literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other".

In this matter, by s 133(1) Parliament enacted that "Where a person has a claim against the Government, that claim may be enforced as of right …". My quotation stops at this point in the text because in s 133(1) the substantive enactment is that a claim against the Government may be enforced as of right. The words "as of right" are followed by these words: "by proceedings taken against the Government for that purpose, [without the grant of a fiat or use of the process known as 'Petition of Right']".

The words in square brackets indicate the previous Crown Proceedings restrictions or fetters on claims against the Crown are abolished. This is necessarily so if enforcement of a claim against the Government is as of right.

Then this new right unfettered by any restrictive discretion is to be enforced "by proceedings taken against the Government for that purpose".

Thus, unless the Constitution itself indicated expressly or by necessary implication that the new unrestricted right is to be effecttive only as from some future date or after some farther condition has been satisfied, then that new right comes into being on 1 October 1991, the date the Constitution came into operation.

Does s 133(2) expressly or by necessary implication delay the coming into effective operation of the new unrestricted right? What s 133(2) says is "Parliament shall by an Act of Parliament make provision for the exercise of the jurisdiction under this section".

Such provision might for example have been to the effect that claims to enforce the new unfettered right were to be considered by a specially constituted court. For example, it might have been thought appropriate to set up a court like the US Federal Court of Claims with exclusive jurisdiction to try some or all of such claims and to make special provision about appeals from that court, or the jurisdictional statute sight have said that all such claims should be tried in the Supreme Court but by 3 Judges of that court sitting together. But Parliament could not take away nor in any other way derogate from the new unrestricted rights created by s 133(1), an entrenched clause of the Constitution. Parliament may say what courts are to have jurisdiction to hear and determine claims to enforce the now unrestricted rights, and it is, of course, open to Parliament to prescribe by statute procedural rules which are to apply; but an ordinary alternative is for rules of court, and not an Act of Parliament, to spell out the procedure in the court for bringing the proceedings. That ordinary alternative is not excluded by anything in s 133 or elsewhere.

I am therefore unable to find in 133(2) any express or implied condition postponing the availability of the new unrestricted rights until Parliament has enacted a further statute prescribing which court or courts are to exercise jurisdiction to hear and determine claims for enforcement of the new unrestricted rights.

Parliament has failed to enact a definitive statute specifying which courts are to exercise jurisdiction over claims to exercise the new unrestricted rights and has not imposed any delaying or suspensory condition postponing the enforcement of the claims.

In my judgment therefore, the courts must hear and determine any claim to the new unfettered rights granted by the Constitution under s 133(1). Parliament has not yet enacted any restriction upon the courts or constituted any Court which may exercise the jurisdiction and unless and until it does, the claims must be heard and determined in the ordinary Courts of the land in the ordinary manner. Such proceedings are in the language of s 133(1) "proceedings taken against the Government" for the enforcement as of right of the claims referred to in s 133(1). For the Courts to refuse to entertain such proceedings would be to deny the new unrestricted rights conferred by the Constitution in s 133(1).

For the aforestated reasons, it is my opinion that:

The answer to the first of the questions posed by the learned trial Judge is No.

The answer to the second question is Yes.

The answer to the 3rd question is provided by s 133(1) of the Constitution. That right "may be enforced as of right by proceedings taken against the Government for that purpose".

Reported by Junisa P Bangali