

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

*In the matter of an Application under Article
126 of the Constitution of the Democratic
Socialist Republic of Sri Lanka*

Vasudeva Nanayakkara
Attorney-at-Law
Advisor to His Excellency the President
Secretary, The Democratic Left Front
49 1/1, Vinayalankara Mawatha
Colombo 10.

Petitioner

No: SC /FR 209 /2007

Vs

1. K.N. Choksy P.C., M.P.
Former Minister of Finance
23/3, Sir Ernst De Silva Mawatha
Colombo 7.
2. Karu Jayasuriya, M.P.
Former Minister of Power & Energy
2, Amarasekera Mawatha
Colombo 5.
3. Ranil Wickremesinghe M.P.
Former Prime Minister
115, 5th Lane
Colombo 3.
4. Chandrika Bandaranaike Kumaratunga
Former President of Sri Lanka
Horagolla Walawwa
Horagolla.
5. Milinda Moragoda M.P.
Former Minister of Economic Reform
3/2, Allen Methiniyarama Road
Colombo 5.
6. Sripathy Sooriyachchi, AAL, M.P.
Former Minister, Public Enterprise Reforms
22, Niwasa Mawatha
Rilaula
Kadana.
7. Charitha Ratwatte
Former Secretary to the Treasury
16, Jawatte Road
Colombo 5.

8. P.B. Jayasundera
Secretary to the Treasury / Former
Chairman,
Public Enterprises Reform Commission
(PERC)
Secretariat
Colombo 1.
9. P. Weerahandi
Former Secretary
Ministry of Power & Energy
410/7, Baudhaloka Mawatha
Colombo 7.
10. Daham Wimalasena
Former Chairman
Ceylon Petroleum Corporation
Member, Technical Evaluation Committee
22/11, Subadra Mawatha
Madiwela.
11. Upali Dahanayake
Former Director, Ministry of Finance
Member, Technical Evaluation Committee
32, Peiris Avenue, Idama
Moratuwa.
12. A.W.C. Perera
Former Addl. Secretary
Ministry of Economic Reforms
Member, Technical Evaluation Committee
57/2, Rajamaha Vihara Road
Pita Kotte.
13. Shamalee Gunawardene
Attorney-at-Law
Former Director Legal, PERC
500/111, Thimbirigasyaya Road
Colombo 5.
14. DFCC Bank
73/5, Galle Road
Colombo 3.
15. Commissioner of Lands
Land Commissioner's Department
7, Gregory's Avenue
Colombo 7.
16. Sri Lanka Ports Authority
19, Church Street
Colombo 1.

17. Ceylon Petroleum Corporation
109, Rotunda Tower
Galle Road
Colombo 3.
18. John Keells Holdings Ltd.
130, Glennie Street
Colombo 2.
19. Lanka Marine Services Ltd.
69, Walls Lane
Colombo 15.
20. Susantha Ratnayake
Chairman
John Keells Holdings Ltd.
130, Glennie Street
Colombo 2.
21. V. Lintotawela
Former Chairman
John Keells Holdings Ltd.
55, Abdul Caffoor Mawatha
Colombo 3.
22. Nihal Sri Ameresekere
Former Chairman, PERC
167/4, Vipulasena Mawatha
Colombo 10.
23. W.M. Bandusena
Former Chairman, PERC
XB 1/2/2, Edmonton Houses
Kirulapona
Colombo 5.
24. W.A.S. Perera
Chairman, PERC
West Tower, 11th Floor
World Trade Center
Colombo 11
25. Channa De Silva
Director General
Securities & Exchange Commission of Sri
Lanka (SEC), Level 11-01, East Tower
World Trade Center
Echelon Square
Colombo 1.
26. Lalith Weeratunga
Secretary to His Excellency the President
Presidential Secretariat
Colombo 1.

27. Wijeyadasa Rajapakse P.C., M.P.
Chairman, Parliamentary Committee on
Public Enterprises (COPE)
17, Wijeba Mawatha
Off Nawala Road
Nugegoda.
28. Inspector General of Police
Police Headquarters
Colombo 1.
29. Deputy Inspector General of Police
Criminal Investigation Department
4th Floor, New Secretariat Building
Colombo 1.
30. Chairman
Commission to Investigate Allegations of
Bribery or Corruption
36, Malalasekera Mawatha
Colombo 7.
31. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondents

**TO: HIS LORDSHIP THE HONOURABLE CHIEF JUSTICE AND THEIR LORDSHIPS AND
LADYSHIPS THE OTHER HONOURABLE JUSTICES OF THE SUPREME COURT OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

On this 28th day of June 2007

The **Petition** of the Petitioner above-named appearing by Razmara Abdeen practising under the name, style and firm of **ABDEEN ASSOCIATES**, and his Assistants, Bushra Muheesa Hashim, Manjula Pasquel and Asirinie Wanniarachchi, their Attorneys-at-Law, states as follows:

1. The Petitioner is an Attorney-at-Law and the Secretary, The Democratic Left Front, Advisor to His Excellency the President, Leader of the Opposition, Colombo Municipal Council and former Member of Parliament.
2.
 - a) 1st Respondent was the Minister of Finance at times material to the transaction in issue.
 - b) 2nd Respondent was the Minister of Power & Energy at times material to the transaction in issue.
 - c) 3rd Respondent was the Prime Minister and the Chairman of the Cabinet Sub-Committee on Economic Affairs at times material to the transaction in issue.
 - d) 4th Respondent was the President of Sri Lanka at times material to the transaction in issue.
 - e) 5th Respondent was the Minister of Economic Reform at times material to the transaction in issue.
 - f) 6th Respondent was the Minister of Public Enterprise Reforms at times material to the transaction in issue

- g) 7th Respondent was the Secretary to the Treasury at times material to the transaction in issue.
- h) 8th Respondent is Secretary to the Treasury and was the Chairman PERC at times material to the transaction in issue.
- i) 9th Respondent was the Secretary, Ministry of Power & Energy at times material to the transaction in issue.
- j) 10th, 11th and 12th Respondents were Members of a Technical Evaluation Committee, who had evaluated the Expressions of Interest and the Final Bids for the Sale of 90% Shares of the 19th Respondent.
- k) 13th Respondent was the Director Legal, PERC at times material to the transaction in issue.
- l) 14th Respondent is a duly incorporated Bank that rendered services to carry out a business valuation of the 19th Respondent for the purpose of Sale of 90% Shares of the 19th Respondent.
- m) 15th Respondent is the Commissioner of Lands
- n) 16th Respondent is the Sri Lanka Ports Authority, a duly established Statutory Authority of the Government of Sri Lanka.
- o) 17th Respondent is the Ceylon Petroleum Corporation, a duly established State Corporation in terms of the law.
- p) 18th Respondent, John Keells Holdings Ltd., (herein sometimes referred to as '**John Keells**') is a listed public company duly incorporated in Sri Lanka, with large financial resources.
- q) 19th Respondent, Lanka Marine Services Ltd., (sometimes herein referred to as '**LMSL**') is a Company duly incorporated in Sri Lanka and is a subsidiary of John Keells (18th Respondent).
- r) 20th Respondent is the Chairman of the 18th Respondent and was Deputy Chairman at times material to this transaction in issue and subsequently is the Chairman of LMSL.
- s) 21st Respondent was the Chairman of the 18th Respondent and subsequently the Chairman of LMSL at times material to this transaction in issue.
- t) 22nd Respondent was the Chairman, PERC at times material to the transaction in issue.
- u) 23rd Respondent was the Chairman, PERC at times material to the transaction in issue.
- v) 24th Respondent is the Chairman, PERC.
- w) 25th Respondent is the Director General, SEC, and in terms of PERC Act No. 1 of 1996 is an *ex-officio* Member of PERC, and ought to be concerned with the investigation into the transaction in issue; the SEC, as a *quazi* judicial body, is statutorily mandated to investigate into the conduct of affairs of listed public companies.
- x) 26th Respondent is Secretary to His Excellency the President.
- y) 27th Respondent is the Chairman, COPE, which has carried out investigations into the transaction in issue.
- z) 28th, 29th and 30th Respondents are relevant law enforcement authorities.

- aa) 31st Respondent is the Hon. Attorney General of Sri Lanka, who had already expressed opinion on the wrongful and unlawful monopoly granted to the Lanka Marine Services Ltd., (19th Respondent), and which monopoly has been subsequently impugned by the Court of Appeal.
3. The Petitioner
- a) has dedicated his entire life to work tirelessly, as a national politician and social worker, striving hard to achieve equitable social justice and the upliftment of the multitude of the poor down trodden masses of the country.
- b) has sustainedly espoused the cause of combating the pillage and plunder of public resources, misuse and waste of public property, denouncing fraud and corruption.
- c) files this Application
- i) for himself and for and on behalf of all citizens of the country, who own the Consolidated Fund and all public property, which should not be plundered from them.
- ii) in the national and public interest representing the rights of the citizens of the country, to enforce the fundamental rights to equality before the law, which has been denied by unjust, wrongful, unlawful, unreasonable, arbitrary, capricious and mala-fide administrative and executive actions.
4. The Petitioner respectfully
- a) invokes the jurisdiction of Your Lordships' Court in terms of Article 126, read with Articles 3, 4 and 17 of the Constitution, to examine the transaction in issue set out herein and to make requisite Orders, upholding the Directive Principles of State Policy and Fundamental Duties enshrined in Chapter VI of the Constitution, to protect and safeguard public property that belongs to the People, and which property is held in trust for the People, and any brazen abuse of power to wrongfully alienate or misappropriate the benefit of such public resources, conferring undue and unjust benefit or gain on a privileged few, to the loss and detriment of the People, is an infringement of the fundamental right to equality before the law guaranteed by Articles 12 (1) and 12 (2) of the Constitution, and any such act, if unchecked, uncorrected and not denounced, would render such Constitutional guarantee of equality before the law meaningless.
- b) states that Your Lordships' Court exercising such jurisdiction, delivered Judgment recently in S.C. (F.R.) Application No. 503/2005, upholding that good governance and transparency characterise Democracy and the Rule of Law, and where an infringement of equality before the law is alleged by the wrongful and unlawful grant of facilities and benefits at the highest level of the executive, strict rules of pleadings cannot be insisted upon; also citing also "Sed quis custodiet ipsos Custodes ?" i.e. "but who is to guard the guards themselves ?"; and that Cabinet of Ministers were the custodians of public property and public funds, and such property and funds will have to be dealt with according to law for the benefit of the People, and that therefore the law itself is the instrumentality through which custodians are guarded, which is the basic postulate of the Rule of Law.
- c) states that Your Lordships' Court further held that "Nemo debet sua iudex" is a principle of natural justice, which has now permeated the area of corporate governance as well, and that power is exercised in trust for the People, and where in the purported exercise of such power a benefit or advantage is wrongfully secured there is an entitlement in the public interest to seek a declaration from Your Lordships' Court, as to the infringement of the fundamental right to equality before the law, and that the respective organs of government are reposed power as custodians for the time being to be exercised for the People, as laid

down by a 7 Member Bench of Your Lordships' Court in the Determination in regard to the proposed 19th Amendment to the Constitution.

- d) states that Your Lordships' Court also cited – "If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon a judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers".
5. a) Cabinet on 17.8.2000 had approved Cabinet Memorandum of 1.8.2000 to liberalise the bunkering sector, which is the sale of fuel to ships.
- b) The Cabinet Memorandum of 1.8.2000, noting that the magnitude of bunkering sector in Singapore was as large as Singapore Dollars 17 billion, had recommended;
- i.) **to liberalise the bunkering sector and to permit a limited number of parties to operate bunkering services**
 - ii.) **that the monopoly given to LMSL to be restricted to one year, within which period privatisation of LMSL to be completed**
 - iii.) **new entrants to the bunkering sector to sell bunkers within the territorial waters of Sri Lanka, including the immediate vicinity of Port of Colombo**
 - iv.) **Government to charge licence fees from the selected operators**
 - v.) Ministry of Shipping to regulate and monitor bunker operators in terms of Merchant Shipping Act No. 52 of 1971
 - vi.) PERC to seek offers through an open tender process from investors, with necessary technical and financial ability and experience in bunkering
 - vii.) PERC to initiate action and make further recommendations to Cabinet on the process to be followed

True copies of the Cabinet Memorandum dated 1.8.2000 and the Cabinet Approval of 17.8.2000 are annexed hereto marked P1(a) and P1(b) respectively, pleaded as part and parcel hereof

6. To facilitate the granting of such Licences to liberalise the petroleum sector, Parliament enacted Petroleum Products (Special Provisions) Act No. 33 of 2002, empowering the Minister to grant Licences, on the recommendation of the Energy Supply Committee.
7. a) On or about 28.10.2001 PERC had advertised for Expressions of Interest (EOIs) for the 'Liberalisation of Bunkering', calling for applications from interested parties for the issuance of Licences, **stating that there will be no restriction of the number of Licences to be issued.**
- b) Interested parties had been requested to collect from PERC, Request for Proposals (RFPs), which had set out the selection process and the specimen Application Forms.

- c) On or about 8.2.2002 and 11.2.2002 PERC had advertised calling for EOIs for the 'Sale of 90% Shares of LMSL', disclosing that it has a storage facility capacity of 31,000 MT at Bloemendal Road, with 3 Pipelines to the South Jetty at the Colombo Port, and intimating that the Guidelines for EOIs are available at PERC, and that completed EOIs must be submitted by 28.2.2002.
- d) LMSL(19th Respondent) had been a fully owned subsidiary of CPC (17th Respondent), a Corporation fully owned by the Government, and it was the Shares held by CPC in LMSL that were to be sold.

True copies of PERC Advertisements dated 28.10.2001, 8.2.2002 and 11.2.2002 are annexed hereto marked P2(a), P2(b) and P2(c) respectively, pleaded as part and parcel hereof

- 8. a) On or about 28.2.2002, the 8th Respondent, as then Chairman PERC had addressed a Letter to 7th Respondent, as the Secretary, Ministry of Finance, recommending the appointment of the following persons, as Members of a Technical Evaluation Committee (TEC) **to evaluate both EOIs and Final Bids for the Sale of 90% Shares of LMSL.**

- i) Daham Wimalasena (10th Respondent), Chairman, CPC
- ii) Upali Dahanayake (11th Respondent), Director, National Planning Department
- iii) A.W.C. Perera (12th Respondent), Addl. Secretary, Ministry of Economic Reforms

- b) Since the request to appoint a TEC had been made on 28.2.2002 by then PERC Chairman (8th Respondent), the PERC advertisements calling for EOIs for the 'Liberalisation of the Bunkering' on 28.10.2001, and the 'Sale of 90% Shares of LMSL' on 8/11.2.2002, and the respective RFP and EOI Guidelines had not been formulated and approved by the TEC, **which had purported to also function as the Cabinet Appointed Tender Board (CATB).**
- c) **In the context of normal procedure to appoint a CATB and a separate TEC to handle a privatisation, suspicion is raised as to why there was only a TEC, recommended to be appointed by the 8th Respondent to evaluate both EOIs and the Final Bids.**
- d) TEC and a separate CATB should have been appointed, after obtaining Cabinet Approval, for this major privatisation having complex implications.
- e) The TEC in fact had been appointed presumably by the then Secretary to the Treasury (7th Respondent) to whom the said Letter dated 28.2.2002 nominating a TEC to be appointed had been addressed by the 8th Respondent, as then Chairman PERC.
- f) **The 7th Respondent could not have so appointed a TEC, also to carry out the duties and functions of a CATB, without the knowledge and approval of the 1st Respondent, as the then Minister of Finance.**

A true copy of Letter dated 28.2.2002 is annexed marked P3 pleaded as part and parcel hereof

- 9. a) At the 'Pre-Bid Conference' held on 30.4.2002, the 8th Respondent as then Chairman, PERC, among other matters, had confirmed the following;
 - i) **"LMS will not have a monopoly on the import and sale of bunkers subsequent to the sale of Lanka Marine Services Ltd." – (As per Item 1 of the Minutes (P4))**

- ii) "The Government cannot takeover Court Cases. The court proceedings and clarifications may be obtained from the Chief Legal Officer, CPC. The purchaser may quantify potential liability from the Court Cases and discount the bid price accordingly" – (As per Item 15 of the Minutes (P4))
- iii) "**Land – within one year of the closing date. PERC to revert by 7th May 2002 regarding the terms of the transfer including any payments that would have to be made by LMSL.**" – (As per Item 5(b) of the Minutes (P4))
- iv) "SLPA have indicated price of \$ 10/MT for the use of pipe line ... There was a unanimous request that the present rate of \$ 2.76/MT be maintained. PERC agreed to revert by Tuesday, May 7th on the proposed arrangement with regard to the pipelines and a revised fee from SLPA along with a draft throughput agreement relating to the pipelines" - (As per Items 2 of the Minutes (P4)).

A true copy of the Minutes of the Pre-Bids Conference held on 30.4.2002 is annexed marked P4, pleaded as part and parcel hereof

- b) In the RFP at Section 4.5.2 it had been stated;

"The Dolphin Pier is presently not available for the sale of bunkers since it is fully utilised by the CPC. The SLPA have indicated a rent of 10 \$ / MT for the use of the Dolphin Pier and the pipelines upto the Bloemendhal Installation. A formal Agreement between SLPA and LMSL will have to be entered into in this regard."

- c) Furthermore, at Section 4.5.1 of the RFP it had been stated;

"The SLPA proposes to develop the South Jetty as a common user facility and have indicated a fee of 3 \$ / sq. ft. for the office space."

- d) The RFP had cautioned and put the prospective Bidders on notice thus:

"Bidders shall conduct and are solely responsible for conducting their own independent researchBidders shall conduct and are solely responsible for conducting their own due diligenceNo written or oral information provided shall be considered legally binding by the Bidders"

A true copy of the RFP is annexed marked P5, pleaded as part and parcel hereof

- 10. a) Chief Valuer on 2.7.1993 had valued LMSL (19th Respondent) at Rs. 342,000,000/-, placing a value of Rs. 82,866,000/-, on the 8A 2R 21.44P at Bloemendhal Road, on which the Oil Storage Facility used by LMSL was situate, which Land however had not been owned by LMSL.
- b) In response to a request by the 8th Respondent, as PERC Chairman, the Chief Valuer by Letter dated 7.5.2002 had confirmed **that the Assets Valuation of LMSL (19th Respondent) had been completed and could be finalised within a week, and that the Business Valuation was to be commenced.**
- c) PERC by Letter dated 16.5.2002 had required the Chief Valuer to complete his updated valuation by 28.5.2002.

- d) **Questionably, by Letter dated 15.5.2002, PERC also required the DFCC Bank (14th Respondent) to do a Business Valuation of LMSL.**
- e) **PERC had not adhered to the Government normal selection process of calling for at least 3 competitive quotations in selecting DFCC Bank (14th Respondent) and confirming a Fee of Rs. 750,000/- + Taxes.**
- f) **This is even more baffling, since the Chief Valuer had confirmed that such a valuation was underway.**
- g) Subsequently on 10.6.2002, the 14th Respondent, DFCC Bank (14th Respondent) had forwarded a Business Valuation of LMSL.
- h) The Assets Valuation and the Business Valuation of LMSL (19th Respondent) by the Chief Valuer had questionably not been pursued with.
True copies of Chief Valuer's Report of 2.7.1993, and his Letter dated 7.5.2002, PERC's Letters dated 6.2.2002, 15.5.2002, 16.5.2002, 21.5.2002, 5.6.2002, DFCC Bank's Letters dated 20.5.2002, 24.5.2002 are annexed marked P6(a), P6(b), P7(a), P7(b), P7(c), P7(d), P7(e), P8(a), P8(b) respectively, pleaded as part and parcel hereof
11. The Business Valuation of LMSL (19th Respondent) prepared by DFCC Bank (14th Respondent) appears to be erroneous, in that,
- a) The discounted Cash Flow had erroneously reckoned the Assets of LMSL (19th Respondent) including the Bloemendhal Land 8A 2R 21.44P at a present value of Rs. 29,000,000/- to Rs. 49,000,000/- at discount rates of 22% p.a. and 18% p.a., respectively, whereas the Chief Valuer, as far back as July 1993, had valued the Assets of LMSL at Rs. 342,000,000/- including the said Land valued at Rs. 83,000,000/-.
- b) On the basis of earnings of 8-years and 10-years, the Business Valuation of LMSL (19th Respondent) had been given to be of Rs. 1,400,000,000/- and Rs. 1,750,000,000/-, whereas LMSL (19th Respondent) Profits for the 4 years to 31.3.2006 is reported to be a total of Rs. 2,300,000,000/-.
- c) **Market value of the uniquely situate and valuable Bloemendhal Land 8A 2R 21.44P had not been taken into reckoning.**
- d) **In valuing an ongoing business, both the Market Value of its Assets, as well as a Business Valuation is carried out, prior to placing a value for the Sale of such business.**
- True copies of DFCC Bank's Business Valuation of 10.6.2002 and LMSL Annual Report and Audited Accounts for the Financial Years ended 31.3.2005 and 31.3.2006 are annexed marked P9, P10(a) and P10(b), respectively, pleaded as part and parcel hereof*
12. a) The TEC having completed the process of evaluation of the EOIs submitted by 17 parties for the purchase of 90% Shares of LMSL (19th Respondent) on 6.6. 2002 had short listed 5 parties, who were to be allowed to place financial bids on the Colombo Stock Exchange for the purchase of the said 90% Shares.
- b) **In the TEC evaluation process, one party, Sri Lanka Shipping Co. Ltd., had been disqualified, since their 'consortium' had requested a monopoly for LMSL (19th Respondent) for a limited period of 8 years.**

- c) **Granting a monopoly even for a limited period of 8 years had been unacceptable to the TEC, since it had not been a condition set out in the RFP.**

A true copy of TEC Report dated 6.6.2002 is annexed marked P11, pleaded as part and parcel hereof

13. a) Consequently, the 2nd Respondent, as then Minister of Power & Energy had submitted a Cabinet Memorandum dated 21.6.2002 for the Sale of 90% Shares of LMSL (19th Respondent) on the basis of a 'benchmark / floor price' of Rs. 1,200,000,000/- **on a bidding process on the Colombo Stock Exchange.**
- b) Cabinet Memorandum of 21.6.2002 had also recommended that charges applicable for the use of the Common User Facilities (CUF) be maintained at US \$ 3/MT, to be revised every 3 years.
- c) **Cabinet Memorandum of 21.6.2002 had not expressly disclosed the extent of the Bloemendhal Land 8A 2R 21.44P, not owned by LMSL, and its Market Value.**
- d) By the Cabinet Memorandum of 21.6.2002, approval had been sought for the following:
- i). authorise CPC to sell 90% Shares of LMSL to successful bidder on the process identified, and terms and conditions stipulated in the Share Sale & Purchase Agreement and the Common User Facility Agreement, and to gift the balance 10% Shares to the employees of LMSL.
 - ii). **authorise the sale of 90% Shares of LMSL at or about the 'benchmark / floor price' of Rs. 1,200,000,000/-, which would be introduced for bidding on the Colombo Stock Exchange**
 - iii). authorise the Secretary to the Treasury, CPC and SLPA to enter into the Share Sale & Purchase Agreement, Common User Facility Agreement and any other ancillary agreements
 - iv). authorise SLPA, in association with the CPC, to acquire and manage the Common User Facilities, until the formation of the proposed terminal company.
 - v). authorise allocation of funds required for upgrading the Common User Facilities to be multi-user capable from the sale of 90% Shares of LMSL, and CPC or any other party to carry out such works

A true copy of the Cabinet Memorandum dated 21.6.2002 is annexed marked P12 pleaded as part and parcel hereof

14. a) Cabinet Approval for the Cabinet Memorandum of 21.6.2002 had been given only on 14.8.2002, and the Cabinet Decision had been confirmed by the Secretary to the Cabinet only on 21.8.2002.
- b) **Therefore, between 21.6.2002 date of Cabinet Memorandum and 21.8.2002 date of confirmation by Secretary to the Cabinet, of Cabinet Approval, no action, whatsoever, could have taken on this matter.**
- c) 4th Respondent, as the then President, on 7.8.2002 had made the following observations to Cabinet;

"I observe that the proposals in the Memorandum envisaged the privatisation of a major asset of the Government and the transaction involves a minimum of Rs. 1.2 billion. In addition, they have implications on the operation of several other state sector institutions, including the Ceylon Petroleum Corporation. I would like to consider all these matters and make my observations on the proposals contained in this Memorandum"

True copies of the Cabinet Approval confirmed on 21.8.2002 and the said Observation to Cabinet of the 4th Respondent dated 7.8.2002 are annexed marked P13 and P14, respectively, pleaded as part and parcel hereof

15. a) **However, before the Cabinet Approval confirmed on 21.8.2002, 8th Respondent, as then Chairman, PERC, on 12.7.2002 had written to John Keells (18th Respondent), stating;**

"Reference the Undertaking to Pay forwarded by you to purchase the above shares in terms of the provisions contained in the relevant Request for Proposal document (RFP). We are pleased to inform you that as per the provisions contained in the RFP, you have been qualified to bid. Since you are the sole qualified party, the bidding process that was envisaged is not warranted. As such it is proposed to conclude the transaction upon the payment of the purchase consideration by you excluding the amount that would be drawn down on your Undertaking to Pay and signing the relevant agreements by July 24th 2002. Please confirm receipt of this letter".

- b) **On the very same day 12.7.2002, by Letter signed by the 20th Respondent, John Keells (18th Respondent) replied the 8th Respondent, then Chairman PERC, stating;**

"Thank you for your letter of award dated 12th July 2002, confirming that John Keells Holdings is the successful bidder for the above transaction. We are willing to conclude the transaction as set out in your letter dated 12th July, 2002".

- c) The 'award' of the Sale of 90% Shares of LMSL (19th Respondent) to John Keells (18th Respondent) on 12.7.2002 had been made on the basis that they had been the only party, who had submitted a 10% Bid Bond for the 'benchmark / floor price' of Rs. 1,200,000,000/-, as had been required of the potential Bidders by Letter dated 25.6.2002 by the then Chairman PERC (8th Respondent), requiring such Bid Bond to be submitted by 10.7.2002 i.e. within a period of two weeks.
- d) **The foregoing questionable 'sudden requirement' for a Bid Bond in a very short time, and the exclusive 'award' to John Keells (18th Respondent), had been alleged by the other Bidders to have been 'foul play', as per the Newspaper Reports in July 2002.**
- e) **Such action could not have been taken before Cabinet Approval on 21.8.2002.**
- f) **In any case, the result of a 'sole party' should have been reported to Cabinet to have been considered and decided upon.**

True copies of 8th Respondent's Letters dated 12.7.2002, 25.6.2002 and 18th Respondent's Letter dated 12.7.2002 and the said Newspaper Reports of July 2002 are annexed marked P15(a), P15(b) , P16 and P17 respectively, pleaded as part and parcel hereof

16. a) **Also before such Cabinet Approval confirmed on 21.8.2002, John Keells (18th Respondent) had addressed Letter dated 31.7.2002 to PERC, listing certain issues that need to be resolved urgently.**

- b) **A Minute on the said Letter dated 31.7.2002 had noted – “Chairman met with JKH on 2.8.02”**
- c) Consequently, John Keells (18th Respondent) by Letter of 2.8.2002 signed by the 20th Respondent, addressed to the 8th Respondent, then Chairman, PERC, had confirmed the Meeting had with the 8th Respondent on the same day 2.8.2002, and **had thanked for agreeing to address the issues outlined in their said Letter dated 31.7.2002 in finalising the Agreements.**
- d) One of the issues set out in the Letter dated 31.7.2002 of John Keells (18th Respondent) had been;

"Confirmation that all marine fuels / bunkers handled and transported within the Port of Colombo are so handled and transported using the Common User Facility as defined in the CUF Agreement."

- e) Consequently, the CUF Agreement signed on 20.8.2002 had included the following new Clause 8.2, which had not been there previously:

"8.2 GOSL / SLPA / CPC shall ensure that all bunkers / marine fuels handled and transported within the Port of Colombo would be handled and transported using the CUF"

- f)
 - i) The TEC (**P11**) had disqualified one party, Sri Lanka Shipping Co. Ltd., because their 'consortium' had requested a monopoly for LMSL (19th Respondent) for a limited period of 8 years, since it had not been a condition set out in the RFP (**P5**).
 - ii) At the 'Pre-Bid Conference' (**P4**), the 8th Respondent as then Chairman, PERC had confirmed that - "LMS will not have a monopoly on the import and sale of bunkers subsequent to the sale of Lanka Marine Services Ltd." – (*As per Item 1 of the Minutes (P4)*)
 - iii) The Cabinet Approval for Cabinet Memorandum of 1.8.2000 (P1(a) / P1(b) spelling out Government policy had specifically stated - that the monopoly given to LMSL to be restricted to one year, within which period privatisation of LMSL to be completed.
- g) **To have surreptitiously granted a monopolistic status to LMSL on the request of John Keells, without the knowledge and approval of the Cabinet was blatantly a violation of the foregoing.**

*True copies of Letters dated 31.7.2002 and 2.8.2002 of the 18th Respondent are annexed marked **P18(a)** and **P18(b)** respectively, pleaded as part and parcel hereof*

- 17. a) Cabinet Approval for the Cabinet Memorandum of 21.6.2002 (**P12**) had been confirmed by Secretary to the Cabinet on 21.8.2002 (**P13(a)**), *inter-alia*,
 - i). authorising the signing of the draft CUF Agreement that had been submitted with the Cabinet Memorandum of 21.6.2002, which did not have the above new Clause 8.2.
 - ii). signing of the draft Shares Sale & Purchase Agreement for the Sale of 90% Shares of LMSL with the highest bidder on the Colombo Stock Exchange.
- b) **The aforesaid Agreements had been signed on 20.8.2002, whereas confirmation of the Cabinet Approval had been on 21.8.2002.**

- c) The Petitioner verily believes that the aforesaid Agreements had been drafted and finalised by the 13th Respondent, then Director Legal, PERC.
- d) i) The CUF Agreement (**P19(a)**) had been signed on 20.8.2002 by the 7th Respondent, as then Secretary Treasury, witnessed by the 8th Respondent, then Chairman PERC, SLPA (16th Respondent) by then Managing Director, Mahinda Colonne, the CPC (17th Respondent) by it's then Chairman the 10th Respondent and its then Director N. Pathmanathan, then Deputy Secretary Treasury and LMSL (19th Respondent) by the 20th and 21st Respondents.
- ii) Thereafter, on 2.9.2002 then Chairman SLPA, Parakrama Dissanayake appears to have placed his signature on a copy of the CUF Agreement. (**P19(b)**)
- iii) Share Sale & Purchase Agreement (**P19(c)**) had been signed on 20.8.2002 by the 7th Respondent, as then Secretary Treasury, witnessed by the 8th Respondent, then Chairman PERC, the CPC (17th Respondent) by it's then Chairman the 10th Respondent and its then Director N. Pathmanathan, then Deputy Secretary Treasury and John Keells (18th Respondent) by the 20th and 21st Respondents.
- e) The CUF Agreement (**P19(a)**) had been signed on 20.8.2002 by Mahinda Colonne, then Managing Director of SLPA, and thereafter on 2.9.2002 Parakrama Dissanayake, then Chairman SLPA had signed a copy of the same (**P19(b)**).
- f) The Petitioner verily believes that said 2 persons had been coerced to place their signatures on CUF Agreement.
- g) **For the SLPA (16th Respondent) and CPC (17th Respondent) to have signed the said Agreements, the dafts of the said Agreements should have been approved for signature by the respective Board of Directors of SLPA and CPC.**

*True copies of the signed CUF Agreement dated 20.8.2002, Page 11 thereof showing the subsequent signature of then Chairman SLPA on 2.9.2002 and the Share Sale & Purchase Agreement dated 20.8.2002 are annexed marked **P19(a)**, **P19(b)** and **P19(c)** respectively, pleaded as part and parcel hereof*

18. a) **Before the Cabinet Approval confirmed on 21.8.2002**, 8th Respondent, then Chairman PERC had addressed a Letter on 15.8.2002 on the subject "LMSL – Draft Agreements" to Parakrama Dissanayake, then Chairman SLPA, (16th Respondent), with copies to R. Paskaralingam, Advisor to the Prime Minister (3rd Respondent), Secretary to the Treasury (2nd Respondent), Chairman, CPC (10th Respondent), in response to a Letter dated 13.8.2002 from the said SLPA Chairman.

*A true copy of 8th Respondent's Letter dated 15.8.2002 is annexed marked **P20**, pleaded as part and parcel hereof*

- b) PERC came under the purview of the 5th Respondent, as the then Minister of Economic Reforms, and therefore he ought to have had knowledge and given approval for the foregoing.
- c) **Secretary Treasury (7th Respondent) would not have signed the aforesaid Agreements, without the knowledge and approval of the then Minister of Finance (1st Respondent).**
- d) **Petitioner verily believes that the John Keells (18th Respondent) has been a Client of the 1st Respondent.**

- 19 (a) **2nd Respondent, who as then Minister of Power & Energy had submitted the Cabinet Memorandum of 21.6.2002 (P12), ought to have had knowledge that the foregoing had been executed, contrary to the Cabinet Approval (P13).**
- b) **2nd Respondent had made public statements that the said transaction, among other transactions, had been given effect to under the direction of an Economic Sub-Committee of the Cabinet chaired by the 3rd Respondent, as then Prime Minister.**
20. a) The surreptitious inclusion of the aforesaid Clause 8.2 affording a 'monopoly' to LMSL (19th Respondent), after purchase by John Keels (18th Respondent), had been blatantly contrary to and violative of Government Policy, that had been approved by the Cabinet on 17.8.2000, as per the Cabinet Memorandum of 1.8.2000, with the subsequent enactment of Petroleum Products (Special Provisions) Act No. 33 of 2002 for the liberation of the petroleum sector.
- b) Also it had been a fundamental breach, in that, one of the parties Sri Lanka Shipping Co. Ltd., had been disqualified by the TEC, because they had stipulated a requirement for a monopoly for a limited period of 8 years for LMSL, since it had not been a condition set out in the RFP.
- c) In the given circumstances, SLPA (16th Respondent) resisting the grant of Licenses to other parties to enter the bunkering sector, the Hon. Attorney General (31st Respondent) by Letter dated 3.3.2004 *inter-alia* had opined:
- "It is therefore submitted that any refusal to permit other barge owners to transport bunker fuel by barge would be a violation of Article 12(1) and 14(1) of the Constitution. In the circumstances, Clause 8.2 (*i.e. of the CUF Agreement*) cannot be interpreted to mean that such Clause cast an obligation on the Government to refuse to allow barges to transport bunker fuel within the Port of Colombo if they do not use the CUF, as such a refusal would be contrary to law".
- d) Since, SLPA (16th Respondent) had not acted in conformity with the Opinion of, Hon. Attorney General (31st Respondent), it had resulted in the following 2 Cases;
- i) CA (Writ) Application No. 1534/04 – Lanka Bunkering Services Ltd., Sri Lanka Shipping Co. Ltd., Lanka Maritime Services Ltd., Vs. SLPA, Ministry of Power & Energy and Hon. Attorney General.
- ii) CA (Writ) Application No. 2173/04 – Lanka Maritime Services Ltd., Vs. SLPA, Ministry of Power & Energy and Hon. Attorney General.
- e) i). In such predicament, LMSL (19th Respondent) owned and controlled by John Keells (18th Respondent) on 25.5.2005 had filed a Writ Application No. 829/2005 vs. SLPA (16th Respondent), Secretary to the Treasury, CPC (17th Respondent), Lanka Bunkering Services (Pvt) Ltd., Lanka Maritime Services Ltd., Minister of Power & Energy, BOI and, Hon. Attorney General (31st Respondent).
- ii). The Court of Appeal refusing to issue Notice had delivered Order on 1.8.2005, *inter-alia*, stating:
- "The powers of 6th Respondent (*i.e. Minister of Power & Energy*) as contained the said Act (*i.e. Petroleum Product (Special Provisions) Act No. 33 of 2002*) cannot be taken away by the CUF Agreement In other words, the rights of parties in the

CUF Agreement cannot override the statutory powers of the 6th Respondent (i.e. Minister of Power & Energy) contained in the Act No. 33 of 2002..... Having regard to the established principles, the statute being superior, reflects the will of the legislature and takes priority over the CUF Agreement. It is an authentic expression of the legislative will and the function of the Court is to interpret the statute according to the intent of Parliament. The responsibility of this Court is to construe and enforce the laws of the land as they are and not to legislate social or government *policy on the basis of the CUF Agreement* *Notice is therefore refused.*"

True copies of Hon. Attorney General's Letters dated 3.3.2004 and Court of Appeal Order dated 1.8.2005 are annexed marked P21 and P22 respectively, pleaded as part and parcel hereof

21. a) By Letter dated 30.10.2003 the Energy Supply Committee had required Director Legal PERC (13th Respondent) to forward a copy of the CUF Agreement, together with clearance thereof of Hon. Attorney General (31st Respondent).
- b) By Letter of the same date i.e. 30.10.2003, Director Legal PERC (13th Respondent), had forwarded copy of the CUF Agreement, drawing attention to the 'monopoly Clause 8.2', and the Opinion dated 20.8.2002 of Hon. Attorney General' (31st Respondent).
- c) The provisions of the Petroleum Products (Special Provisions) Act No. 33 of 2002, would have warranted that such Agreement ought to have received prior approval of the Energy Supply Committee.

True copies of said 2 Letters dated 30.10.2003 are annexed marked P23(a) and P23(b) respectively, pleaded as part and parcel hereof

22. a) Petitioner understands that when COPE had confronted DFCC Bank (14th Respondent) with the issue of the 'monopoly clause' having been granted to LMSL (19th Respondent), after the Business Valuation of LMSL (19th Respondent) had been submitted on 10.6.2002, DFCC Bank had reneged on the said 'Business Valuation', which had been based on the premise of a liberalised competitive market and **had submitted a new Report stating that given such a monopoly their Business Valuation would have indicated a 'benchmark / floor price' of Rs. 2,400,000,000/-, and not Rs. 1,200,000,000/- for bidding of 90% of LMSL (19th Respondent).**
 - b) **Furthermore, DFCC Bank (14th Respondent) had intimated that had they been required to give an 'Assets Valuation' of LMSL (19th Respondent), that they would have engaged the services of a professional Valuer for such purpose.**
23. a) Central Bank's Annual Report 2004 at page 64 has stated;

"The high cost of bunkering fuel has been discouraging the fleet of vessels arriving at Colombo for bunkering. The privatisation of Lanka Marine Services Ltd., has not yielded the required low prices and competition, indicating the need for further reforms in this sector".

A true copy of Central Bank's Annual Report 2004 Page 64 is annexed marked P24, pleaded as part and parcel hereof

- b) Feeder Operators had published a press Notice in May 2005 to the trade, captioned 'Bunker Price Crisis' stating;

"Feeder Operators remain extremely concerned with the current high level of Bunker Prices being charged in Colombo as the competitive position of Sri Lanka as a container transshipment facility is being questioned.

"As of date rates for IFO 180 remain in the region of US \$ 350/ ton (which is approximately US \$ 80 / ton more than Singapore / Dubai prices) and represents an increase of US \$ 110/ ton more than last year's monthly average."

A true copy of Press Notice is annexed marked P25, pleaded as part and parcel hereof

- c) **Hence the manner of divestiture of LMSL (19th Respondent) had not only caused loss to the Government, but also had been detrimental to the national economy.**
24. a) At the 'Pre-Bid Conference' held on 30.4.2002 (P4), the 8th Respondent, then Chairman, PERC, had confirmed as follows;
- a. "The Government cannot takeover Court Cases. The court proceedings and clarifications may be obtained from the Chief Legal Officer, CPC. The purchaser may quantify potential liability from the Court Cases and discount the bid price accordingly" – *(As per Item 15 of the Minutes (P4))*
- b) However, in the Share Sale & Purchase Agreement (P19(c)) signed with John Keells (18th Respondent), a Claim against LMSL (19th Respondent) had been taken over by the Government as per Clause 3.5 (d) of the said Agreement;
- 'The following payments which may arise shall be the responsibility of GOSL;
- Any liabilities which may arise pursuant to any claim made by Oxford Jay International (Pte) Ltd. Blk 2, Kitchener Road # 01-81, Singapore 200002, arising out of the subject matter of FR Application No. 954/97 or any amount which may become payable consequent to any judgment / order in a Court case which may be filed arising out of a breach of contractual obligations connected to the subject matter of the aforementioned FR Application No. 954/97, including any cost of litigation."
- c) The RFP (P5) at Section 4.8 Litigations, among other Cases, had disclosed this Case;
- "4.8.1 Juno Case – This case is with regard to the suspension of a barge operator, Oxford Jay International (Pvt) (OJI) Ltd. for carrying out unauthorized bunker deliveries outside Colombo Port limits. The case has been filed by OJI claiming damages for suspension."
- d) Oxford Jay International (Pte) Ltd. Singapore had made a Claim of US \$ 9.2 Mn. in ICC Arbitration Proceedings, which the Hon. Attorney General (31st Respondent), had successfully resisted, but the Government had incurred considerable costs, having paid advances of US \$ 170,000/- .
- 25.a) The draft Share Sale & Purchase Agreement issued with the RFP by PERC in April 2002 for the Sale of 90% Shares of LMSL (19th Respondent), Clause 3.2(a) had stated;
- "The Vendor (*i.e. CPC*) agrees to transfer freehold title of the premises located at No. 69, Walls Lane, Colombo 15 to the Company (*i.e. LMSL*) within a period of 1 year from the Closing Date."
- b) The above could not by any means have committed the transfer of the Bloemendhal Land 8A 2R 21.44P 'free of valuable consideration' for the 'unjust enrichment' of a buyer (18th Respondent) of LMSL (19th Respondent).

- c) At the 'Pre-Bid Conference' held on 30.4.2002, 8th Respondent, then Chairman, PERC, had confirmed ;

"Land – within one year of the closing date. PERC to revert by 7th May 2002 regarding the terms of the transfer including any payments that would have to be made by LMSL." – [As per Item 5(b) of the Minutes – (P4)]

- d) The RFP (P5) at Section 4.4.1 had stated;

"CPC presently holds freehold title to this land and has obtained Cabinet Approval to transfer this land to LMSL. CPC is currently in the process of transferring title to this land to LMSL"

- e) 10th Respondent then Chairman CPC by Letter dated 12.7.2002 to the 8th Respondent, then Chairman PERC, had stated thus;

"Regarding title to the land at Bloemendhal which is 8A 2R 21.44P in extent please note that we have still not obtained Cabinet Approval for the purpose of obtaining state grants in favour of CPC even though it is confirmed that CPC has paid to the Treasury the value of certain assets of oil facilities taken over by the CPC from the former Port Commission"

A true copy of said Letters dated 12.7.2002 is annexed marked P26 pleaded as part and parcel hereof

- f) As per Letter dated 31.7.2002 (P18(a)), John Keells (18th Respondent), addressed to PERC, Stamp Duty payable on the transfer of the Bloemendhal Land was required to be borne by the Government / CPC, which the 8th Respondent, then Chairman PERC had agreed to, as confirmed by Letter dated 2.8.2002 of John Keells (P18(b)).
- g) Cabinet Memorandum of 21.6.2002 (P12) has not expressly disclosed the extent of this Bloemendhal Land 8A 2R 21.44P and its Market Value in 2002, and **no approval had been given by the Cabinet for the Sale and transfer of the said Land.**
- h) **However, Agreement No. 538 had been signed by the 7th Respondent, as then Secretary Treasury and by the 10th Respondent, then Chairman CPC, with LMSL (19th Respondent), witnessed by the 8th Respondent, then Chairman PERC.**

A true copy of the said Agreement is annexed marked P27, pleaded as part and parcel hereof

- i) i) Then Chairman CPC, Jaliya Medagama, by his Letter dated 24.5.2004 addressed to then Secretary, Ministry of Power & Energy had, *inter-alia*, stated;

"The value of the land could be assessed by the Chief Valuer and the Land Commissioner has mentioned that he could obtain the valuation from Chief Valuer"

- ii) PERC by Letter dated 5.10.2004 had queried the Valuation of the said Land from the 14th Respondent DFCC Bank.

True copies of the said Letters dated 24.5.2004 and 5.10.2004 are annexed marked P28(a) and P28(b), respectively, pleaded as part and parcel hereof

26. a) John Keells (18th Respondent), following up on a telephone conversation of the same day, had forwarded Letter dated 3.11.2004 to the Ministry of Power & Energy, requiring the said Bloemendhal Land 8A 2R 21.44P to be transferred.
- b) **On the very same day 3.11.2004**, 9th Respondent, then Secretary, Ministry of Power & Energy, after a telephone conversation had with Addl. Secretary to the President, Ms. C. Athurugiriya had addressed Letter dated 3.11.2004 forwarding John Keells (18th Respondent) Letter of 3.11.2004.
- c) Responding to Letter dated 5.11.2004 from the Addl. Secretary to the President, Ms. C. Athurugiriya, 15th Respondent, Commissioner of Lands **by Letter of same date 5.11.2004** had recommended the transfer of this Bloemendhal Land 8A 2R 21.44P to LMSL (19th Respondent) instead of to John Keells (18th Respondent).
- d) By Letter dated 11.1.2005 addressed to the then Secretary to the President, Addl. Secretary, Ministry of Lands, W.M. Jayathilake has stipulated that the Secretary to the President had informed the Lands Commissioner that the 4th Respondent, then President has approved the vesting of this Land to LMSL, after recovering the purchase consideration of Rs. 1,199,362,500/-

True copies of the said Letters dated 3.11.2004, 3.11.2004, 5.11.2004, 5.11.2004, 11.1.2005 are annexed marked P29(a), 29(b), 29(c), 29(d) and 29(e) respectively, pleaded as part and parcel hereof

27. **On 19.1.2005, 4th Respondent, then President had placed her signature on the Instrument of Grant, which had recorded the acknowledgement of the receipt by the Government of Rs. 1,199,362,500/- as paid by LMSL (19th Respondent) to the Government, and which Instrument of Grant had been registered on 1.2.2005.**

A true copy of said Instrument of Grant is annexed marked P30, pleaded as part and parcel hereof

28. a) By Letter dated 21.3.2006 addressed to the 8th Respondent, as the Secretary Treasury, the 23rd Respondent, then Chairman, PERC, had sought confirmation, as to whether the Government had received the purchase consideration, as stated in the Instrument of Grant (P30).
- b) **After a lapse of 5 Months the Director General, Department of Treasury Operations, by Letter dated 18.8.2006 had confirmed that the Government had not received any money for the transfer of this Land, though the Instrument of Grant (P30) had stated that the Government had received Rs. 1,199,362,500/- from LMSL (19th Respondent).**
- c) **Furthermore, Accounts of LMSL (19th Respondent) for the Financial Year ended 31.3.2005 (P10(a)) had not disclosed that LMSL (19th Respondent) has made a payment of Rs. 1,199,362,500/- to the Government for the Bloemendhal Land 8A 2R 21.44P.**

True copies of the said Letters dated 21.3.2006 and 18.8.2006 are annexed marked P31(a) and 31(b), respectively, pleaded as part and parcel hereof

29. a) Thus the Bloemendhal Land 8A 2R 21.44P had been purported to be 'transferred' by the Government to LMSL (19th Respondent) 'without receipt of any consideration', in January 2005, for a 'purported payment' of Rs. 1,199,362,500/- .
- d) Therefore, the said Instrument of Grant (P30) is a 'fraudulent document' and a 'fiction', in that, no payment had been made by LMSL (19th Respondent), as acknowledged in the said Instrument of Grant, as having been paid by LMSL (19th Respondent) and received by the Government, for the transfer by the Government of the Bloemendhal Land 8A 2R 21.44P to LMSL (19th Respondent).

- e) Hence, there could not have be a legal transfer of the Bloemendhal Land 8A 2R 21.44P, inasmuch as the Instrument of Grant (P30) was *ex-facie* fraudulent and a 'fiction'.
30. 22nd Respondent, then Chairman, PERC, by Letter dated 1.7.2005 addressed to the 21st Respondent, then Chairman John Keells (18th Respondent), with copy, among others to the 4th Respondent, then President, then Chairman SLPA (16th Respondent) and the 31st Respondent, Hon. Attorney General, *inter-alia*, had stated;

"4. As regards the purchase consideration of Rs. 1,200,000/-, you have referred to: this as per the records available had been based on a valuation, which had been done by DFCC on a basis of a 'discounted cash flow'. On a question raised by the Chairman CPC, as to whether this valuation had included the Market Value of the Land at Bloemendhal 8A 2R 21.44P that had been agreed to be transferred to Lanka Marine Services (Pvt) Ltd., it has been disclosed that the Market Value of such an extent of land had not been taken into reckoning"

A true copy of the said Letter dated 1.7.2005 is annexed marked P32, pleaded as part and parcel hereof

31. a) **The said Bloemendhal Land 8A 2R 21.44P had been Scheduled as Land coming within the Port of Colombo, in terms of an Order made by the Minister under Section 2 of the Sri Lanka Ports Authority Act No. 51 of 1979, as published in Gazette Extraordinary No. 396/9 of 9.4.1986.**
- b) **In terms of Section 23 of the Sri Lanka Ports Authority Act No. 51 of 1979, the right and title to the said Bloemendhal Land 8A 2R 21.44P having been held by the former Colombo Port Commission, was vested in the SLPA (16th Respondent).**
- c) **Hence, the SLPA having the right and title to the said Bloemendhal Land 8A 2R 21.44P, the Land Commissioner (15th Respondent) could not have purported to transfer the said Bloemendhal Land 8A 2R 21.44P, as Government Land.**
- d) **Thus, the purported Instrument of Grant (P30) is a fraud.**

A true copy of the said Gazette Extraordinary is annexed marked P33 pleaded as part and parcel hereof

32. a) The 23rd Respondent, then Chairman PERC, under the direction of the 6th Respondent, then Minister in charge of PERC, had submitted on or about 27.10.2006 to COPE an Investigation Report on this transaction in issue.
- b) 22nd Respondent, then Chairman PERC, who had been examined on this transaction in issue by COPE, chaired by the 27th Respondent, had forwarded a Letter dated 5.1.2007 on the matter of this transaction in issue.

A true copy of the said Letter dated 5.1.2007 is annexed marked P34, pleaded as part and parcel hereof

33. a) It has also been reported in the media that COPE, chaired by the 27th Respondent, had been carrying out investigations into the transaction in issue.
- b) **Hansard of 12.1.2007 contains a Report by COPE on several investigations carried out by it, including an Interim Report on the transaction in issue in its Columns 358 to 362, as quoted below:**

"Sale of 90% Shares of Lanka Marine Services Ltd. (LMSL)

1. Cabinet on 17.8.2000 decided to liberalise the bunkering business on the following lines:
 - to liberalise the bunkering sector and to permit a limited number of parties to operate bunkering services
 - that the monopoly given to LMSL to be restricted to one year, within which period privatisation of LMSL to be completed
 - new entrants to the bunkering sector to sell bunkers within the territorial waters of Sri Lanka, including the immediate vicinity of Port of Colombo
 - PERC to seek offers through an open tender process from investors. PERC to initiate action and make recommendations to Cabinet on the process to be followed

To facilitate the above, the Government enacted Petroleum Products (Special Provisions) Act No. 33 of 2002.
2. PERC on 28.10.2001 called for Expression of Interest (EOIs) to issue Licences for bunkering and on 8.11.2002 called for EOIs for the Sale of 90% Shares of LMSL, with a closing date of 28.2.2002, giving only 3 weeks.
3. On 28.2.2002 Chairman PERC, P.B. Jayasundera caused Secretary to the Treasury, Charitha Ratwatte to appoint a TEC to evaluate both EOIs and final Bids. No Cabinet Appointed Tender Board was appointed. Since TEC was appointed after 28.2.2002, calling for EOIs and the relevant Documents had not been approved by the TEC.
4. At the 'Pre-Bid Conference' on 30.4.2002, PERC Chairman, P.B. Jayasundera, confirmed;
 - "LMS will not have a monopoly on the import and sale of bunkers subsequent to the sale of Lanka Marine Services Ltd."
 - "The Government cannot takeover Court Cases.
 - "Land – within one year of the closing date. PERC to revert by 7th May 2002 regarding the terms of the transfer including any payments that would have to be made by LMSL."
5. The RFP has stated;
 - "The SLPA have indicated a rent of 10 \$ / MT for the use of the Dolphin Pier and the pipelines upto the Bloemendhal Installation.
 - "The SLPA proposes to develop the South Jetty as a common user facility and have indicated a fee of 3 \$ / sq. ft. for the office space."
 - "Bidders shall conduct and are solely responsible for conducting their own independent researchBidders shall conduct and are solely responsible for conducting their own due diligenceNo written or oral information provided shall be considered legally binding by the Bidders"

6. PERC Chairman P.B. Jayasudera forwarding Chief Valuer's 1993 Valuation of LMSL, had called for an updated valuation of LMSL from the Chief Valuer, who had confirmed that the 'assets valuation' was completed and the 'business valuation' is to be started.
7. Questionably abandoning the Chief Valuer's valuation, DFCC Bank had been selected by PERC without competitive offers to do a 'business valuation' of LMSL. DFCC Bank has placed the 'floor price' of the 'business valuation' for bidding at Rs. 1,200,000,000/-, on the basis that LMSL was not to have a monopoly. DFCC Bank's valuation had also been erroneous.

DFCC Bank has not valued the Net Assets of LMSL particularly Bloemendhal Land of 8A 2R 21.44P, which the Chief Valuer had confirmed had been completed, but PERC had questionably avoided. Chief Valuer had valued this land in 1993 at Rs. 82,866,000/-.

Normally the 'net assets valuation' and the 'business valuation' are both taken into reckoning in placing a valuation on an ongoing business.

8. The Minister of Power & Energy, Karu Jayasuriya has submitted Cabinet Memorandum on 21.6.2002, as per the TEC recommendations for the Sale of 90% Shares of LMSL on the basis of a 'floor price' of Rs. 1,200,000,000/-, (The 'net assets valuation', particularly the Land, had not been taken into reckoning) on a bidding process on the Colombo Stock Exchange, and sought the following Cabinet Approvals:
 - authorise CPC to sell 90% Shares of LMSL to successful bidder on the process identified, and terms and conditions stipulated in the Share Sale & Purchase Agreement and the Common User Facility Agreement, and to gift the balance 10% Shares to the employees of LMSL.
 - authorise the sale of 90% Shares of LMSL at or about the 'benchmark / floor price' of Rs. 1,200,000,000/-, which would be introduced for bidding on the Colombo Stock Exchange.
 - authorise the Secretary to the Treasury, CPC and SLPA to enter into the Share Sale & Purchase Agreement, Common User Facility Agreement and any other ancillary agreements
 - authorise SLPA, in association with the CPC, to acquire and manage the Common User Facilities, until the formation of the proposed terminal company.
 - authorise allocation of funds required for upgrading the Common User Facilities to be multi-user capable from the sale of 90% Shares of LMSL, and CPC or any other party to carry out such works

Cabinet Memorandum of 21.6.2002 had not expressly disclosed the extent of Government Land of 8A 2R 21.44P at Bloemendhal Road and its Market Value.

9. Cabinet Approval for the Cabinet Memorandum of 21.6.2002 has been given only on 14.8.2002, and has been confirmed and notified on 21.8.2002. Hence, between 21.6.2002 and 21.8.2002, no action, whatsoever, could have been taken on this matter.

10. Before confirmation and notification of Cabinet Approval on 21.8.2002, PERC Chairman, P.B. Jayasundera;
- i) on 12.7.2002 on exchange of Letters with John Keells Holdings Ltd., had made the 'award' for the Sale of 90% Shares of LMSL to John Keells Holdings Ltd.
 - ii) The 'award' to John Keells Holdings Ltd., had been made on the basis that John Keells Holdings Ltd., had been the only party, who had submitted a 10% Bid Bond on the 'floor price' of Rs. 1,200,000,000/-, as required by letter dated 25.6.2002 to be submitted by 10.7.2002. This has been alleged by the other Bidders as 'foul play'.
 - iii) On 2.8.2002 on exchange of Letters with John Keells Holdings, PERC Chairman, P.B. Jayasundera has agreed to grant a 'monopoly' to LMSL after John Keells Holdings purchases 90% Shares of LMSL. Previously the TEC had rejected the Bid of Sri Lanka Shipping Co. Ltd., for requesting a monopoly for 8 years for LMSL.
 - iv) On 20.8.2002 PERC Chairman, P.B. Jayasundera, Secretary to the Treasury Charitha Ratwatte and Director Legal PERC, Shamalee Gunawardene, acting in concert had signed the Share Sale & Purchase Agreement and CUF Agreement with John Keells Holdings Ltd. CUF Agreement included the following new Clause 8.2, which was not there previously:

"8.2 GOSL / SLPA / CPC shall ensure that all bunkers / marine fuels handled and transported within the Port of Colombo would be handled and transported using the CUF"

The above acts have been prior to confirmation and notification of Cabinet Decision on 21.8.2002 and are therefore bad in law and invalid, null and void.
11. The Court of Appeal has held that the inclusion of the above 'monopoly' clause has been *ultra-vires* Petroleum Products (Special Provisions) Act No. 33 of 2002.
12. Consequently, being confronted with the above monopoly clause, DFCC Bank reneged on their 'business valuation' of LMSL of Rs. 1,200,000,000/- and confirmed in writing that on the basis of a 'monopoly' their 'business valuation' is Rs. 2,400,000,000/-, confirming that had they been required to give a 'net assets valuation' they would have engaged the services of a professional real estate valuer for the Land 8A 2R 21.44 P.
13. Central Bank's Annual Report 2004 stated;
- "The high cost of bunkering fuel has been discouraging the fleet of vessels arriving at Colombo for bunkering. The privatisation of Lanka Marine Services Ltd., has not yielded the required low prices and competition, indicating the need for further reforms in this sector".
14. Though the RFP had disclosed the following Case and stated that the Government would not takeover Cases of LMSL, which had been confirmed by PERC Chairman, P.B. Jayasundera at the Pre-bid Conference, but in the Share Sale & Purchase Agreement signed with John Keells Holdings Ltd., the Claim by Oxford Jay International (Pte) Ltd., Singapore of US \$ 9.2 Mn. had been takeover by the Government. The Government has paid advance costs of US \$ 170,000/- .

15. The draft Share Sale & Purchase Agreement issued with the RFP has stated;

"The Vendor (*i.e.* CPC) agrees to transfer freehold title of the premises located at No. 69, Walls Lane, Colombo 15 to the Company (*i.e.* LMSL) within a period of 1 year from the Closing Date."

The above could not by any means have committed the Government to transfer the Land in extent 8A 2R 21.44P 'free of valuable consideration' for the 'unjust enrichment' of a buyer of LMSL.

At the 'Pre-Bid Conference' PERC Chairman, P.B. Jayasundera had confirmed;

"Land – within one year of the closing date. PERC to revert by 7th May 2002 regarding the terms of the transfer including any payments that would have to be made by LMSL." – (*As per Item 5(b) of the Minutes*)

16. Secretary, Ministry of Power & Energy, P. Weerahandi has initiated action on 3.11.2004 to have this Land transferred to LMSL. Consequently by Letter dated 11.1.2005, Addl. Secretary, Ministry of Lands, W.M. Jayathilake has stated that the Secretary to the President has informed the Land Commissioner that the President has approved the vesting of this Land to LMSL, after recovering the purchase consideration of Rs. 1,199,362,500/-.
17. Though the Instrument of Grant dated 19.1.2005 has stated that the Government has received Rs. 1,199,362,500/- from LMSL, Director General, Department of Treasury Operations, by Letter dated 18.8.2006 has confirmed that the Government has not received any money for the transfer of this Land, in response to Letter dated 21.3.2006 addressed to the Secretary Treasury, P.B. Jayasundera by Chairman, PERC, W.M. Bandusena, seeking confirmation as to whether the Government has received the purchase consideration as stated in the Instrument of Grant.

LMSL Accounts for the Financial Year ended 31.3.2005 do not disclose that LMSL has made a payment of Rs. 1,199,362,500/- to the Government for this Land in extent 8A 2R 21.44P.

In fact, the payment of Rs. 1,199,362,500/- is the payment made in August 2002 by John Keells Holdings Ltd., to CPC for the Sale of 90% Shares of LMSL, to be paid to the Secretary Treasury, and this could not be interpreted or construed to be a payment made in January 2005 by LMSL to the Secretary to the Treasury for the Land.

18. Therefore, this Government Land has been purported to be 'transferred' to LMSL 'without receipt of any consideration', in January 2005, for a 'purported payment' of Rs. 1,199,362,500/-

Hence, the Instrument of Grant is a 'fraudulent document' and a 'fiction', in that, no payment had been made by LMSL and has been received by the Government, as acknowledged in the Instrument of Grant for the transfer of the Government Land at Bloemendal in extent 8A 2R 21.44P to LMSL. Therefore, there could not be a legal transfer of this Land, inasmuch as this Instrument of Grant is *ex-facie* fraudulent and a 'fiction'.

19. A Valuation by the Chief Valuer and a professional private Valuer will disclose the Market Value of this Land in August 2002 i.e. when the Share Sale & Purchase Agreement was executed.
20. The 'business valuation' in June 2002 by DFCC Bank for LMSL on an 'earnings basis' reckoned for the Financial Year 2002/03, at a multiple of 8 had been given as Rs. 1,405 Mn. and at a multiple of 10 had been given as Rs. 1,757 Mn.

However, LMSL's Net Profits after Tax for the following Financial Years have been:
Rs.

Financial Year 2002/03	402,733
Financial Year 2003/04	235,876
Financial Year 2004/05	574,062
Financial Year 2005/06	1,089,393

The above Net Profits are after John Keells Holdings Ltd., having recovered whatever charges and costs from LMSL.

21. This transaction had been executed blatantly without Cabinet Approval, with several flaws causing loss and detriment to the Government, and demonstrating it to be a questionable 'fix', and is therefore *ab-initio* bad in law, null and void."

A true copy of Hansard Columns 358 to 362 of 12.1.2007 is annexed hereto marked P35, pleaded as part and parcel hereof

34. The Petitioner respectfully states that;
 - a) the conduct and actions of some of the Respondents as aforesaid, in the perpetration of the transaction in issue are executive and administrative actions within the meaning of Article 17, read with Article 126 of the Constitution, which said acts have infringed and continue to infringe the fundamental rights of the Petitioner and the citizens of the country, guaranteed under Articles 12 (1) and 12(2) of the Constitution.
 - b) from the foregoing facts, it is abundantly clear that the Government had been misled and had been taken for a ride, with a deliberate intentional pre-designed 'fix', causing grave loss and damage and mischief to the Government, that is the public, wrongfully and unjustly causing the alienation / alienating and/or unjustly causing misappropriation / misappropriating the property of the public held in trust, with the deliberate intent of conferring unjust, wrongful and unlawful enormous benefit on a privileged few, in blatant violation of the constitutional safeguards.
 - c) the transaction in issue has caused enormous loss and detriment to the Petitioner and the citizens of the country, and continues to cause enormous loss and detriment, conferring unjust, wrongful and unlawful benefit and enrichment to a privileged few, impoverishing the millions of the poor of the country.
 - d) he reserves the right to add any other Respondents, as and may be necessary, and/or to adduce any further facts and documents, as may become available to the Petitioner.
 - e) he came to be aware of this despicable, deplorable and shameless transaction in issue, only through recent media reports on the investigations by COPE, a Parliamentary Committee.
 - f) thereupon he in the public interest being concerned of the matter, more particularly in his role to expose fraud and corruption of public resources and to protect the interest of the poor and the fundamental rights of the people, sought and obtained from colleagues, who are

Ministers and Members of Parliament and from the Report to Parliament on the privatisation of LMSL, Documents referred to herein, and the averments herein contained are based upon such Documents and information gathered therefrom.

- g) the averments contained herein, supported by the Documents annexed herewith, disclose an obnoxious, wrongful, unlawful and fraudulent transaction, causing enormous loss and detriment to the Government and the public, including the Petitioner, wrongfully, unlawfully and fraudulently brazenly conferring unjust enrichment on a privileged few, violating the Rule of Law, with misuse and abuse of power in breach of the trust of the People.
 - h) he by no means advocates policies of such liberalisation, and that this is a 'classic case', where in the name of such liberalisation, very valuable and profitable assets of the State, which belong to the people, have been fraudulently pillaged and plundered by a privileged few, causing enormous loss and detriment to the State and the citizens of this country, further burdening them with the rise in their cost of living.
35. In the premises, the Petitioner respectfully states that he is entitled to invoke the jurisdiction of Your Lordships' Court for the reliefs prayed for herein.
36. The Petitioner has not invoked jurisdiction of Your Lordships' Court previously in this matter.
37. The Affidavit of the Petitioner in support of the averments herein contained is annexed hereto.

WHEREFORE the Petitioner respectfully prays that Your Lordships' Court be pleased to:

- a. grant Leave to Proceed with this Application in the first instance,
- b. make Order declaring that the fundamental rights guaranteed under Articles 12(1) and 12(2) of the Constitution of the Petitioner and the citizens of Sri Lanka have been infringed,
- c.
 - i) direct the 8th Respondent , 15th Respondent, 16th Respondent, 17th Respondent, 24th Respondent and 26th Respondent to adduce relevant facts and to submit all documents and records pertaining to this transaction in issue in their possession and/or control to Your Lordships' Court for the due and proper adjudication of this matter,
 - ii) direct the 31st Respondent, Hon. Attorney General to obtain and submit to Your Lordships' Court the Minutes of the Economic Sub-Committee of the Cabinet, pertaining to this transaction in issue,
 - iii) direct any one or more of the other Respondents to adduce relevant facts and to submit all documents and records in their possession and/or control, which Your Lordships' Court shall or may deem necessary at any stage of these proceedings, for the due and proper adjudication of this matter
- d. make Order declaring that the Sale of 90% Shares of Lanka Marine Services Ltd., (19th Respondent) owned by Ceylon Petroleum Corporation (17th Respondent) to John Keels Holdings Ltd. (18th Respondent), had been carried out in a wrongful, unlawful and irregular manner,
- e. make Order declaring that the Sale of 90% Shares of Lanka Marine Services Ltd., (19th Respondent) owned by Ceylon Petroleum Corporation (17th Respondent) to John Keels Holdings Ltd. (18th Respondent), is *ab-initio* invalid, null and void and of no force or avail in law,
- f. make Order cancelling, annulling and making void the CUF Agreement (**P19(a)**), the Sale & Purchase Agreement (**P19(c)**) and Agreement No. 538 (**P27**) all dated 20.8.2002, pertaining to the

- Sale of 90% Shares of LMSL (19th Respondent) owned by Ceylon Petroleum Corporation (17th Respondent) to John Keells Holdings Ltd. (18th Respondent), and restoring the ownership of all the Shares of Lanka Marine Services Ltd., (19th Respondent) to Ceylon Petroleum Corporation (17th Respondent),
- g. make Order declaring that the execution of the Instrument of Grant (**P30**) purporting to transfer the Bloemendhal Land 8A 2R 21.44P to Lanka Marine Services Ltd., (19th Respondent) had been carried out in a wrongful, unlawful and fraudulent manner,
 - h. make Order declaring that the execution of the Instrument of Grant (**P30**) purporting to transfer the Bloemendhal Land 8A 2R 21.44P to Lanka Marine Services Ltd., (19th Respondent) is fraudulent and *ab-initio* invalid, null and void and of no force or avail in law,
 - i. make Order cancelling, annulling and making void the Instrument of Grant (**P30**) purporting to transfer the Bloemendhal Land 8A 2R 21.44P to Lanka Marine Services Ltd., (19th Respondent)
 - j. make Order declaring that all right, title and ownership to the said Bloemendhal Land 8A 2R 21.44P stands rightfully and lawfully absolutely vested in Sri Lanka Ports Authority (16th Respondent),
 - k. make Order removing the present Directors of the Board of Directors of Lanka Marine Services Ltd., (19th Respondent), and directing the Secretary to the Treasury, with the approval of the Hon. Minister of Finance, to appoint Directors to constitute a new Board of Directors of Lanka Marine Services Ltd., (19th Respondent),
 - l. make Order directing the Secretary to the Treasury to obtain a realistic valuation of the Assets and Liabilities of Lanka Marine Services Ltd. (19th Respondent) as at 20th August 2002,
 - m. make Order directing the Secretary to the Treasury to obtain a Report from the Auditor General of all monies and/or assets appropriated by John Keells Holdings Ltd., (18th Respondent) and/or its agents, servants and nominees and all those holding under it from the Lanka Marine Services Ltd., (19th Respondent) after 20th August 2002,
 - n. make Order directing John Keells Holdings Ltd., (18th Respondent) and/or its agents, servants and nominees and all those holding under it to re-pay and/or return those monies and/or assets appropriated as referred to in prayer m) above, to the Ceylon Petroleum Corporation, (17th Respondent),
 - o. make Order declaring that in the absence of specific and express Cabinet Approval, the 7th Respondent and/or the 8th Respondent and/or the 10th Respondent and/or the 13th Respondent and/or any other person/s whomsoever, had no lawful power or authority, whatsoever, to have agreed to sell and/or to have caused to sell 90% Shares of Lanka Marine Services Ltd., (19th Respondent) to John Keells Holdings Ltd. (18th Respondent) in any manner, howsoever,
 - p. make Order declaring that in the absence of specific and express Cabinet Approval, the 1st Respondent and/or the 2nd Respondent and/or the 5th Respondent and/or any other person/s, whomsoever, had no lawful power or authority, whatsoever, to have approved to sell and/or to have caused to sell 90% Shares of Lanka Marine Services Ltd., (19th Respondent) to John Keells Holdings Ltd. (18th Respondent) in any manner, howsoever,
 - q. make Order declaring that, the Bloemendhal Land 8A 2R 21.44P rightfully and lawfully belonging to the Sri Lanka Ports Authority (16th Respondent), in the absence of specific and express Cabinet Approval, that the 4th Respondent and/or the 8th Respondent and/or 9th Respondent and/or 13th Respondent and/or 15th Respondent had no power and authority, whatsoever, to have committed

to sell and/or to have caused to sell the said Bloemendhal Land 8A 2R 21.44P that too, without a valuation thereof, and without due and proper consideration therefor,

- r. make Order declaring the conduct and actions of the 1st Respondent and/or 2nd Respondent and/or 3rd Respondent and/or 4th Respondent and/or 5th Respondent and/or 7th Respondent and/or 8th Respondent and/or 9th Respondent and/or 10th Respondent and/or 13th Respondent and/or 15th Respondent and/or 20th Respondent and/or 21st Respondent have caused loss and damage to the Government and the citizens of Sri Lanka, conferring unjust and unlawful benefit to a few and/or unto themselves,
- s. make Order directing the 25th Respondent to conduct investigations and take warranted action in terms of the Securities & Exchange Commission Act, as amended, for the wrongful, unlawful and fraudulent conduct of affairs of John Keells Holdings Ltd., (18th Respondent) and its subsidiary, Lanka Marine Services Ltd., (19th Respondent),
- t. make Order directing the 28th and 29th Respondents to take action in terms of the law, including under the Offences Against Public Property Act No. 12 of 1982 against all those persons, whether any of the above Respondents or otherwise, who have acted wrongfully and/or unlawfully and/or fraudulently in the Sale of 90% Shares of Lanka Marine Services Ltd., (19th Respondent) owned by Ceylon Petroleum Corporation (17th Respondent) to John Keells Holdings Ltd. (18th Respondent); and in the fraudulent purported transfer of the Bloemendhal Land 8A 2R 21.44P by the Instrument of Grant (P30) to Lanka Marine Services Ltd., (19th Respondent),
- u. make Order directing the 30th Respondent to take action in terms of the law, more particularly under the provisions of the Bribery Act, against all those persons, whether any of the above Respondents or otherwise, who have acted wrongfully and/or unlawfully in the Sale of 90% Shares of Lanka Marine Services Ltd., (19th Respondent) owned by Ceylon Petroleum Corporation (17th Respondent) to John Keells Holdings Ltd. (18th Respondent), and in the fraudulent purported transfer of the Bloemendhal Land 8A 2R 21.44P by the Instrument of Grant (P30) to Lanka Marine Services Ltd., (19th Respondent),
- v. make Order directing the 31st Respondent to take action or cause action to be taken in terms of the law, including under the Offences Against Public Property Act No. 12 of 1982 against all those persons, whether any of the above Respondents or otherwise, who have acted wrongfully and/or unlawfully and/or fraudulently in the Sale of 90% Shares of Lanka Marine Services Ltd., (19th Respondent) owned by Ceylon Petroleum Corporation (17th Respondent) to John Keells Holdings Ltd. (18th Respondent); and in the fraudulent purported transfer of the Bloemendhal Land 8A 2R 21.44P by the Instrument of Grant (P30) to Lanka Marine Services Ltd., (19th Respondent),
- w. grant costs, and
- x. such other and further relief as to Your Lordships' Court shall seem meet.

Abdulla Assarath

Attorneys-at-Law for the Petitioner