

**IN THE HIGH COURT OF THE WESTERN PROVINCE
SITTING IN COLOMBO
IN THE EXERCISE OF ITS CIVIL JURISDICTION**

*In the matter of an Application under
and in terms of Part X of the
Companies Act No. 7 of 2007*

Consultants 21 Ltd.
167/4, Vipulasena Mawatha
Colombo 10.

Petitioner

Case No: HC (Civil) 52/2010/CO

Vs.

1. Hotel Developers (Lanka) PLC
Echelon Square
Colombo 1.
2. The Secretary to the Treasury
The Secretariat
Colombo 1.
3. Nihal Sri Ameresekere
167/4, Vipulasena Mawatha
Colombo 10.
4. Mitsui & Co. Ltd.
2-1, Ohtemachi 1-Chome, Chyoda-
Ku, Tokyo, Japan and of No. 12-01,
and of East Tower, World Trade
Center, Echelon Square, Colombo 1.
5. Taisei Corporation
25-1, Nishi-Shinjuku, 1-Chome,
Shinjuku-Ku, Tokyo, Japan and of
No. 122, Agro Marine Group
Building, Kew Road, Colombo 2.
6. Cornel & Co. Ltd.
188, Vauxhall Street
Colombo 2.

Respondents

On this 8th day of November 2011

The **Petition** of the **Petitioner** above-named appearing by Yamuna Balasuriya and Vijayalakshmi Deepani Niroshini Wijesekera, Attorneys-at-Law, practising under the name, style and firm of **V.W. KULARATNE ASSOCIATES** states as follows:

1. Petitioner is a Shareholder of Hotel Developers (Lanka) Ltd., (hereinafter sometimes referred to as “HDL”) and is entitled to seek Leave of Your Honour’s Court in terms of Section 256(i)(c) of the Companies Act No. 7 of 2007, to make and proceed with this Application, under and in terms of Part X of the said Act.

A true copy of the confirmation of the Petitioner’s Shareholding in HDL is annexed marked ‘A1’, pleaded as part and parcel hereof

2. (a) 1st Respondent is a public limited liability company incorporated on 15.3.1983 under the then Companies Act No. 17 of 1982, having its Registered Office at the aforementioned address, within the jurisdiction of Your Honour’s Court, and is the owning Company of the Colombo Hilton Hotel, and is an existing Company under Companies Act No. 7 of 2007.
- (b) 2nd Respondent is the Secretary to the Treasury, who is a Shareholder of HDL and has issued Guarantees on behalf of HDL to the 4th and 5th Respondents, with monies paid thereunder.
- (c) i) 3rd Respondent was a Subscriber and a first Director, and one time Chairman of HDL.
- ii) On 13.9.1990 / 11.1.1991 he instituted derivative actions in law, D.C. Colombo Cases Nos. 3155/Spl., and 3231/Spl., respectively, in the right and interest of HDL.
- iii) On 28.6.1995 he obtained from the 4th and 5th Respondents a write-off of Jap. Yen 17,586 Mn. (then equivalent to SL Rs. 10,200 Mn.) on their stated Claims from HDL, and the Government of Sri Lanka, as its Guarantor
- iv) 4th and 5th Respondents agreed to reschedule the balance debt for a further period of 15-years up to 2010, with a grace period of one year to further financially restructure HDL, (*originally fully payable by 1999*) at a reduced rate of 5.25% p.a interest (*originally 6% p.a*) , **which immensely benefited HDL and the Government of Sri Lanka, as the Guarantor.**

A true copy of HDL’s Board Paper dated 28.6.1995 setting out the details of the said write-off and rescheduling is annexed marked ‘A2’, pleaded as part and parcel hereof

- v) At an average interest of 12% p.a. such write-off of Rs. 10,200 Mn., in June 1995, would today amount to a colossal sum of **Rs. 70,033 Mn.**, thereby making the 3rd Respondent a **substantial stakeholder.**
 - (d) 4th and 5th Respondents are original Shareholders of HDL, with a right to nominate one Director each and had been responsible for the construction and development of the Hilton Hotel of HDL.
 - (e) 6th Respondent is a Shareholder of HDL, and had been a main promoter thereof, with the right to nominate two Directors.
 - (f) **The Minister of Finance, was and is entitled from 21.12.1990, to nominate 6 Directors to the 11 Member Board of Directors of HDL, and thereby the Minister of Finance exercised management and control over HDL.**
3. At the behest of the Government of Sri Lanka, to settle the two derivative actions in law of the 3rd Respondent referred to above, then Attorney General finalised 5 Settlement Agreements, which were executed on 28.6.1995.

True copies of the said 5 Settlement Agreements are annexed hereto respectively marked 'A3(a)', 'A3(b)', 'A3(c)', 'A3(d)' and 'A3(e)', pleaded as part and parcel hereof

4. a) **The Settlement Agreements of June 1995 contained the following conditions, with the view to further financially restructuring HDL, to enhance its financial viability to service its balance debts.**

"14. HDL shall and will explore the feasibility of building the 3rd Tower of Hotel Rooms at the Hotel and consider financing the cost of same, through a Rights and/or a new Issue of its Shares or otherwise, as considered feasible, to enhance HDL's profitability and debt service ability, to enable the repayment of the said Loans to Mitsui and Taisei and/or to the Government as aforesaid.

15. HDL shall and will cause its profitability and cash flow projections required for the purpose of this Agreement and the said Agreement No. 1 to be formulated by Hilton International, the Managers of the Hotel and/or the Auditors of HDL."

- b) i) However, then Minister of Justice & Deputy Minister of Finance, intervened in July 1995 to wrongfully and unlawfully suspend the Settlement Agreements, thereby preventing / frustrating the further financial re-structuring of HDL.
- ii) In the circumstances, the 3rd Respondent filed an action D.C. Colombo Case No. 21819/MR, against the then Minister of Justice & Deputy Minister of Finance, claiming damages caused by him to HDL. *The said Case is pending.*

True copies of Letters dated 24.7.1995 are annexed hereto marked 'A4(a)' and 'A4(b)' pleaded as part and parcel hereof

5. a) **Thereafter, in October 1996, the Government of Sri Lanka required and caused the Settlement Agreements to be given effect to, with an Addendum finalised by the then Attorney General and signed in October 1996 to the Settlement Agreements of June 1995, excluding only the condition, which had adversely affected then Minister of Justice & Deputy Minister of Finance.**

True copy of Addendum of October 1996, together with attachments thereto is annexed marked 'A5', pleaded as part and parcel hereof

- b) **The foregoing suspension precipitated the dire financial straits of bankruptcy of HDL, and as a consequence, the Government of Sri Lanka had to advance considerable sums of monies to HDL to make the balance payments to 4th and 5th Respondents.**
6. a) 25,089,750 Shares of HDL having a value of Rs. 250.9 Mn., had been allotted to the 6th Respondent as consideration for a 99-year under-lease by it of approximately 7 Acres of UDA Land, on which the Hilton Hotel was built.
- b) In July 1999, as per the Surrender of Special Grant Instruments Nos. 673 and 674, the UDA surrendered the ownership of the said Lands back to the Government of Sri Lanka, in terms of the State Land Ordinance. (*vide P2(a) / P2(b) of A7*)
- c) Consequently in March 2011, the Government of Sri Lanka declared the taking over of the physical possession of the said Lands, *rendering HDL to be an illegal squatter of State Lands.*

- d) Thereby the consideration for the allotment of 25,388,463 Shares of HDL became frustrated and the said Shares stood **as not paid for**.
- e) Thus the fully paid-up Shares of HDL stood as follows:

| | No. of Shares | Rs. Mn. |
|---|-------------------|------------|
| HDL's Shares, allotted for a 99-Year Land Lease | 25,089,750 | Nil |
| HDL's Shares, allotted to 6 th Respondent for payment, and Shares - transferred to the Secretary to the Treasury | 298,713 | 3 |
| HDL's Shares paid for by the Government of Sri Lanka | 4,000,000 | 40 |
| HDL's Shares held by 4 th & 5 th Respondents + their Nominees | 12,445,325 | 124 |
| HDL's Shares held by public | <u>3,392,353</u> | <u>34</u> |
| Total | <u>45,226,141</u> | <u>201</u> |

7. **As per the Settlement Agreements 'A3(a)', 'A3(b)', 'A3(c)', and 'A3(d)', the Land is committed to be directly leased by the Government of Sri Lanka to HDL.**
8. a) During the years 2004 / 2005, when the 3rd Respondent functioned, as Chairman of HDL, endeavour was made to financially restructure HDL, as per proposal formulated by a Cabinet Appointed Negotiating Committee – (*vide* 'P11' of 'A7')
- b) In conformity therewith, then Minister of Finance, submitted Cabinet Memorandum dated 5.10.2005, which was approved on 13.10.2005

True copies of the Cabinet Memorandum and Approval are annexed respectively marked 'A6(a)' and "A6(b)' pleaded as part and parcel hereof

9. With the foregoing restructuring not materialising, in the context of HDL;
- a) being hopelessly bankrupt with its paid-up Share Capital of Rs. 201 Mn., having been completely eroded and wiped out
- b) facing an accumulated Loss of Rs. 6,351.5 Mn., as at 30.6.2005 with further impending deterioration
- c) having defaulted as at 30.6.2006 enormous debts to the Government of Sri Lanka, both Capital (Rs. 2,991,482,954/-) and Interest (Rs. 2,575,397,443/-), a total of Rs. 5,566,880,397/-, with further debts of Rs. 2,386,551,716/- as at 30.6.2005 to be paid to the 4th and 5th Respondents, with interest of 5.25% p.a., under the State Guarantees.

the 3rd Respondent on 17.11.2006 filed a Petition to wind-up HDL in D.C. Colombo Case No. 217/CO, under the provisions of the Companies Act No. 17 of 1982.

True copies of the Winding-up Petition dated 17.11.2006, together with Documents marked 'P1' to 'P14' thereto is annexed compendiously marked 'A7', pleaded as part and parcel hereof

10. The draft Balance Sheet of HDL as at 30.6.2005 stood as follows:

| | Rs. Mn |
|---|----------------|
| Fixed Assets | 2,139 |
| Current Assets | 744 |
| Current Liabilities | <u>271</u> |
| | 473 |
| | ----- |
| Net Assets | <u>2,612</u> |
| Share Capital - Paid-up | 201 |
| - Not-paid-up allotted for Land Lease frustrated | 251 |
| Reserves | 861 |
| (Accumulated Loss) | <u>(6,351)</u> |
| | (5,038) |
| Long Term Liabilities | 7,650 |
| | ----- |
| Sources of Funds | <u>2,612</u> |

11. a) Notwithstanding the foregoing precarious situation, on the advice of Secretary to the Treasury, the Minister of Finance had submitted Cabinet Memorandum dated 21.1.2007, to oppose the winding-up of HDL and to indicate to Court, as an option, the restructuring of HDL, which had been approved on 26.1.2007.

True copies of the Cabinet Memorandum and Approval are annexed respectively marked 'A8(a) and 'A8(b)', pleaded as part and parcel hereof

- b) In the circumstances the Attorney General by Letter dated 16.9.2010 had called for a Meeting to explore the possibility of a settlement. **Nevertheless no such discussion ever took place.**

A true copy of the said Letter dated 16.9.2010 is annexed marked 'A9', pleaded as part and parcel hereof

12. a) In the given facts and circumstances of HDL, Section 219 of the Companies Act No. 7 of 2007 mandated the winding-up of HDL and made Directors personally liable for the debts of HDL, whether to the Government or otherwise, for having opposed the winding-up of HDL.
- b) The Chairman HDL, Nawaz Rajabdeen appointed by the Minister of Finance, *even prior to the above Cabinet Decision of 26.1.2007*, by Affidavit dated 8.12.2006 opposed the winding-up of HDL.
- c) In addition, Section 375 of the Companies Act No. 7 of 2007 prohibits the fraudulent trading by a Company, making Directors personally liable for its debts, be it to the Government or otherwise.
- d) In circumstances of serious loss of capital, where 50% of the Share Capital of a Company is eroded, in terms of Section 220 of the Companies Act No. 7 of 2007, the Directors are bounden in duty to call for an Extra-ordinary General Meeting, to *inter-alia* explain the extent of losses, causes therefor, and steps being taken to recoup the losses.

- e) In the case of HDL, the entire Share Capital had been eroded, but nevertheless its Directors had failed to comply with the mandatory Section 220 of the Companies Act No. 7 of 2007.
- f) **Section 188 of the Companies Act No. 7 of 2007 prohibits a Director from acting or agreeing to act in contravention of any provisions of the said Act.**
- g) Hence, the Government Directors of HDL, who opposed the Winding-up of HDL and acted in blatant violation of the Companies Act No. 7 of 2007 are not fit and proper persons to be Directors of listed public companies.
- h) In terms of Section 277 of the Companies Act No. 7 of 2007, **the winding-up of a Company shall be deemed to have commenced at the time of presentation of the Petition for winding-up.**
13. a) Directors of HDL appointed by the Minister of Finance, who held Office after the winding-up Petition was filed on 17.11.2006 had been as follows
- T. Nadesan, Chairman, from 12.5.2010
 - N. Rajabdeen, Chairman, resigned on 21.5.2010
 - V. Kanagasabapathy
 - K.V.N. Jayawardene
 - T. Wickramasuriya
 - N. Warusuvitharana
 - K. Wickramanayake
- b) **As per the definition of Directors specified in Section 529 of the Companies Act No. 7 of 2007 in respect of certain specific provisions therein, particularly Sections 187, 188, 189, 190, 197, 374, 375, including also Sections 191 to 195, persons in accordance with whose directions or instructions, Directors of a Company would act, are also deemed to be Directors of a Company.**
- c) **It is indeed appalling that the statutory law of the land had been blatantly violated.**
14. As per the Financial Statements, the consequent further eroded Balance Sheet of HDL as at 31.3.2010 has been stated to be as follows:

| | Rs.Mn. | | Rs.Mn. |
|---------------------------------|---------------------|-----------------------------|---------------------|
| Shareholders' Equity | | Non-Current Assets | |
| Stated Capital | 452 | Property, Plant & Equipment | 6,127 |
| Revaluation Reserve | 4,706 | Pre-paid Lease Rental | <u>185</u> |
| FF&E Reserve | 371 | | 6,312 |
| Accumulated Loss | <u>(10,302)</u> | | |
| Deficit | (4,773) | | |
| Non-Current Liabilities | | Current Assets | |
| Interest bearing Loans | 10,268 | Inventories | 49 |
| Retiring Benefit Obligations | <u>69</u> | Receivables | 208 |
| | 10,337 | Short Term Investments | |
| Current Liabilities | | - Treasury Bills | 688 |
| Trade and Other Payables | 371 | - Bank Deposits | <u>114</u> |
| Interest bearing Loans (1 Year) | 1,457 | Cash & Bank | <u>24</u> |
| Bank Overdraft | <u>3</u> | | 1,083 |
| | 1,831 | | |
| Total Liabilities | <u>12,168</u> | | |
| Liabilities Less Deficit | <u><u>7,395</u></u> | Total Assets | <u><u>7,395</u></u> |

15. a) By Letter dated **3.5.2011** the Government of Sri Lanka had required HDL to repay the Loans advanced to HDL, stated to amount to Rs. 12,098,634,769/77 to make payments to the 4th and 5th Respondents.
- b) By Letter dated **6.5.2011** HDL had forwarded a proposal to repay the Loans to the Government of Sri Lanka over a period of 18 years.
- c) By Letter dated **10.5.2011** the Government of Sri Lanka had refused to accept the repayment proposal by HDL and had required HDL repay the outstanding amount claimed of Rs. 12,098,634,769/77, **within a period of 2 years on a monthly instalment basis**.
- d) **With the Government Directors having been in full management control of HDL, the above exchange of correspondence is indeed a tragi-comedy.**

True copies of Letters dated 3.5.2011, 6.5.2011 and 10.5.2011 are annexed respectively marked 'A10(a)', 'A10(b)', and 'A10(c)', pleaded as part and parcel hereof

16. a) The Capital of the Loans advanced by the Government of Sri Lanka to HDL, as set out below had amounted to only Rs. 3,949,888,916/- (*vide* **'P13(a)'** to **'P13(h)'** of **'A7'**).

| Date of Loan | Amount Rs. | Int. Rate |
|--------------|----------------------|-----------|
| 01.07.97 | 288,567,631 | 12.50% |
| 07.07.99 | 469,742,070 | 12.50% |
| 03.07.00 | 464,427,826 | 12.50% |
| 03.07.01 | 360,618,876 | 18.56% |
| 03.07.02 | 446,803,874 | 12.50% |
| 01.07.03 | 340,024,378 | 9.40% |
| 01.07.04 | 395,658,959 | 8.59% |
| 30.06.05 | 225,639,338 | 10.28% |
| 30.06.06 | 157,555,617 | 11.61% |
| 30.06.07 | 344,772,738 | 18.77% |
| 30.06.08 | <u>456,077,609</u> | 20.59% |
| Total | <u>3,949,888,916</u> | |

- b) No re-payments, whatsoever, have been made to the Government of Sri Lanka by HDL on account of either any Interest or Capital.
- c) The aforesaid Balance Sheet of HDL as at 31.3.2010 had included interest at the aforesaid rates, *compounded annually*.
- d) **Section 5 of the Civil Law Ordinance mandates that the Interest shall not exceed the Capital.**
- e) Hence, the interest stated in the HDL Accounts of 31.3.2010 is *wrongfully* and *unlawfully overstated*.
- f) HDL and/or any one or more of its Shareholders would be entitled to raise investments and to repay the Government of Sri Lanka its lawful dues, as demanded to be paid **within the period of 2 years.** (*vide* **A10(c)**)
17. a) In terms of Section 364, read with Section 277 of the Companies Act No. 7 of 2007, no interest is payable by and/or chargeable from HDL, *after the Petition for Winding-up of HDL had been presented on 17.11.2006.*
- b) **Hence, no interest is chargeable by or payable to the Government of Sri Lanka after 17.11.2006.**
- c) Likewise, it was wrongful and unlawful for interest to have been paid to the 4th and 5th Respondents in March 2011 on the 14th and 15th Instalments, **after the Winding-up Petition was filed on 17.11.2006.**

True copy of Letter dated 23.3.2011 from the 4th and 5th Respondents is annexed marked 'A11', pleaded as part and parcel hereof. Attention is also drawn to Letter dated 3.5.2011 (A10(a)).

18. **Those persons, who have transgressed the law and caused the foregoing losses to the Government of Sri Lanka, ought be held accountable and responsible therefor.**

19. a) The foregoing reveals that HDL, which has been managed and controlled by the majority Directors, nominated by the Minister of Finance had been recklessly mismanaged.
- b) **They have been paying themselves emoluments, allowances and enjoying other perquisites, whilst HDL has been *languishing* in losses and has been in dire financial straits.**
- c) As per reliable information received, notwithstanding the dire financial predicament of HDL at a recent Board Meeting of HDL it had been decided to purchase a BMW SUV or a similar vehicle reckoned to be at a cost in the region of Rs. 25 Mn. to 30 Mn for the Chairman of HDL, T. Nadesan *viz:*

“3. Purchase of vehicle for the Chairman

The Board paper on this was tabled. It was decided to purchase a BMW SUV or a similar vehicle for the Chairman of HDL Board also granted approval to sell the Hyundai vehicle presently used by the Chairman”

True copy of the Board Minutes subject to its verification is annexed marked ‘A12’ pleaded as part and parcel hereof

20. The proposed arrangement and compromise are set out below:
- a) to raise funds from an investor on the allotment of Shares of HDL to repay the Government of Sri Lanka the Capital of the Loans and the lawful interest thereon
- b) to annul and cancel the 25,089,750 Shares of HDL, which had been allotted for the under-lease of the UDA Lands, which is now frustrated and the Shares not paid for
- c) for HDL to obtain the said Lands directly on leases from the Government of Sri Lanka, with a down payment made by an investor and the balance paid in agreed instalments
- d) to raise funds by the allotment of HDL Shares or otherwise to complete the 3rd Tower of Hotel Rooms, and also to re-develop the 2½ Acre recreational area, with an ultra-modern development complex.
21. a) In the circumstances of HDL, good, sufficient and valid causes have arisen to the Petitioner to make this Application under Part X of the Companies Act No. 7 of 2007 for a re-arrangement and compromise of HDL.
- b) The financials of HDL for the Year ended 31.3.2010, having not been released, was received by the Petitioner as a Shareholder only on **2.11.2011**.
- c) In the circumstances the Petitioner respectfully reserves the right to tender any further facts and/or documents, which may be deemed to be necessary to assist Your Honour’s Court in this matter.

WHEREFORE the Petitioner respectfully prays that Your Honour’s Court be pleased to;

- a) grant Leave to Proceed with this Application,
- b) issue Notice of this Application on the Respondents,

- c) make order requiring a report on the proposed arrangement and compromise be prepared by a competent person specified by Your Honour's Court,
- d) make order declaring that HDL and/or anyone or more of its Shareholders shall be entitled to raise funds from an investor and invest in Shares of HDL to repay the lawful owings to the Government of Sri Lanka,
- e) make order annulling the 25,089,750 Shares of HDL allotted for the frustrated Lease of the Lands,
- f) make order declaring that HDL is entitled to obtain a direct Lease of the Lands from the Government of Sri Lanka in terms of the Settlement Agreements 'A3(a)', 'A3(b)', 'A3(c)' and 'A3(d)' entered into by the Government of Sri Lanka,
- g) make order declaring that the arrangement and compromise aforesaid shall be binding on HDL and on all other relevant persons,
- h) make order directing that all legal proceedings pertaining to HDL be discontinued,
- i) make order granting such other and further reliefs as Your Honour's Court shall seem meet.

V.W.Kularatne Associates.
Attorneys-at-Law for the Petitioner