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

NIHAL SRI AMERESEKERE
167/4, Sri Vipulasena Mawatha,
Colombo 10, Sri Lanka.

PLAINTIFF-APPELLANT

S. C. APPEAL
No: 33/92

D. C. COLOMBO
CASE No: 3155/SPL

-Vs-

1. **MITSUI AND COMPANY LIMITED**
   2-1, Ohtemachi 1-Chome,
   Chiyoda-Ku, Tokyo, Japan.

2. **TAISEI CORPORATION**
   25-1, Nishi-Shinjuku 1-Chome,
   Shinjuku-Ku, Tokyo, Japan.

3. **KANKO KIKAKU SEKKEISHA YOZO SHIBATA & ASSOCIATES**
   9, Mori Building 1-2-2, Atago,
   Minato-Ku, Tokyo, Japan.

4. **HOTEL DEVELOPERS (LANKA) LTD.**
   16, Alfred Place, Colombo 3. Sri Lanka.

AND

7 OTHERS, THE DIRECTORS OF
HOTEL DEVELOPERS (LANKA) LTD.

DEFENDANTS - RESPONDENTS

WRITTEN SUBMISSIONS OF THE PLAINTIFF

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

S.C. APPEAL NO.33/92

D.C. COLOMBO CASE NO.3155/SPL

WRITTEN SUBMISSION OF THE PLAINTIFF - RESPONDENT - PETITIONER - APPELLANT.

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

NIHAL SRI AMERESEKERE, of
No.167/4, Sri Vipulasena Mawatha,
Colombo 10.

PLAINTIFF-RESPONDENT-PETITIONER-APPELLANT

S.C. Appeal No. 33/92
S.C. Special Leave to Appeal Application No.18/92
Court of Appeal Leave to Appeal Application No.206/91
D.C.Colombo Case No.3155/Spl.

- Vs -

1. **MITSUI AND COMPANY LIMITED, a Company organized and existing under the Laws of Japan and having the Principal Place of business at 2-1, Ohtemachi 1-Chome, Chiyoda-Ku, Tokyo, Japan and having a Liaison office and/or a Place of business in Sri Lanka at No.315, Vauxhall Street, Colombo 02.**

2. **TAISEI CORPORATION, a Company organized and existing under the Laws of Japan and having the Principal place of business at 25-1, Nishi-Shinjuku 1-Chome, Shinjuku-ku, Tokyo, Japan and having a Liaison Office and/or Place of business in Sri Lanka formerly at No.65, High Level Road, Maharagama and presently at Hilton Hotel Colombo.**

1ST & 2ND DEFENDANT-PETITIONER-APPELLANT-RESPONDENTS

3. **KANKO KIKAKU SEKKEISHA YOZO SHIBATA & ASSOCIATES, Architects & Designers, a corporation duly organized under the Laws of Japan and having the Principal Place of business at No.9, Mori Building 1-2-2, Atago, Minato-ku, Tokyo, Japan.**

4. **HOTEL DEVELOPERS (LANKA) LIMITED, formerly known as LANKA-JAPAN HOTELS LIMITED, of No.16, Alfred Place, Colombo 03.**

5. **CORNEL LIONEL PERERA, Chairman/Managing Director, Hotel Developers (Lanka) Limited, of 16, Alfred Place, Colombo 03.**

6. **FREDERICK GERMAIN NOEL MENDIS, Director, Hotel Developers (Lanka) Limited, and of No.51/3, Dharmapala Mawatha, Colombo 03**

7. **KAIRSHASP NARIMAN CHOKSY, Director, Hotel Developers (Lanka) Limited, and of 23/2, Sir Ernest de Silva Mawatha, Colombo 07.**

8. **DON PETER SEVERINUS PERERA, Director, Hotel Developers (Lanka) Limited, and of No.696/2, Havelock Road, Colombo 06.**

9. **KAZUTAKA KOBOI, Director of Hotel Developers (Lanka) Limited, and of 6-38, Fujimicho, Chigasaki, Kasagawa, Japan.**

10. **KANAPATHIPILLAI SHANMUGALINGAM, Director, Hotel Developers (Lanka) Limited, and of No.4, Ramakrishna Avenue, Colombo 06 and presently of 75, Issipatana Mawatha, Colombo 5.**

11. **KOJI ITO, Director of Hotel Developers (Lanka) Limited, and presently of No.315, Vauxhall Street, Colombo 02.**

3RD TO 11TH DEFENDANT-RESPONDENT-RESPONDENTS

TO:

HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS THE OTHER JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

May it please your Lordships.

WRITTEN SUBMISSIONS OF THE PLAINTIFF-RESPONDENT-PETITIONER-APPELLANT

PREAMBLE

1. INTRODUCTION

i. **In this Appeal the Plaintiff-Respondent-Petitioner-Appellant abovenamed (hereinafter sometimes called and referred to as the Plaintiff) seeks inter-alia, to set aside the Orders dated 17.01.'92 and 31.01.'92 of Their Lordships of the Court of Appeal, in granting Leave to Appeal, to the abovenamed 1st & 2nd Defendant-Petitioner-Appellant-Respondents (hereinafter sometimes called and referred to as the 1st & 2nd Defendants, jointly and/or severally), against the Interim Injunction granted by the District Court on 09.09.'91.**

After hearing the submissions of Counsel of the necessary Parties, Your Lordships Court on 27.05.'91 granted Special Leave to Appeal to the Plaintiff and framed the Issue to be argued in this Appeal as follows:

"Whether the granting of Leave by the Court of Appeal against the Interim Injunction granted by the District Court on 09.09.'91 is sustainable in Law"

ii. **Significantly, one of the grounds amongst other, averred of by the Plaintiff, in seeking to set aside the aforesaid Order of the Court of Appeal, was the irregular procedure followed by Their Lordships of the Court of Appeal, in permitting the 4th Defendant - Respondent-Respondent abovenamed (hereinafter sometimes called and referred to as the 4th Defendant Company) and the 7th Defendant-Respondent-Respondent abovenamed (hereinafter sometimes called and referred as the 7th Defendant) to participate and make submissions, both on fact and law, at the hearing before the Court of Appeal whereas;**

a) the 4th Defendant Company, on whose behalf and in whose right this Action had been instituted as a Derivative Action, had not Objected to the issuance in this same Action, of a separate Interim Injunction against it, and accordingly, had not Appealed against such Order to the Court of Appeal; however, notwithstanding such failure, Counsel appearing for the 4th Defendant Company as a party noticed in the said Leave to Appeal Application made by the 1st & 2nd Defendants, against the separate Interim Injunction issued against them, sought to impugn the said Order.

b) the 7th Defendant, against whom no relief had been claimed in this Action, and whose Counsel admitted at the commencement of the hearing before the Court of Appeal on 17.01.92, that the Order to be made by the Court of Appeal would not affect him and that accordingly he would not be making any submissions, subsequently however on 20.01.92, resiled from the position previously taken, participated at the said hearing, as morefully set out in the aforesaid Order of the Court of Appeal dated 31.01.92, for the sole purpose of having this Action dismissed.

iii. Similarly, at the hearing into the granting of Special Leave to Appeal,in Your Lordships Court on 21.05.92, the Counsel for the 4th Defendant Company and the 7th Defendant, attempted to make submissions and on Counsel for the Plaintiff objecting to the same, Your Lordships Court ruled, that they have no right or status, to participate or be heard, and accordingly at the hearing of the application for Special Leave to Appeal the said Counsel were not permitted to participate or address Your Lordships' Court.

iv. The Plaintiff, as a Shareholder of the 4th Defendant Company, has instituted this instant Action, in the nature and style of a Derivative Action, under circumstances which disclose "wrong-doer control", by the 1st & 2nd Defendants and the 3rd Defendant-Respondent-Respondent abovenamed (hereinafter sometimes called and referred to as the 3rd Defendant), who having acted jointly and severally in collusion, with the active support of certain Directors of the 4th Defendant Company, have perpetrated a fraud on the 4th Defendant Company and its Shareholders; the Plaintiff by this instant Action has sought to prevent the 1st & 2nd Defendants and 3rd Defendant from claiming monies under the fraudulent contracts/agreements, by and between the 1st, 2nd, 3rd Defendant and the 4th Defendant Company and to further prevent the 1st & 2nd Defendants from making claims under State Guarantees, that had been obtained by them under fraudulent misrepresentations, allegedly amounting at present to about US $ 175.0 Mn. i.e. S.L. Rs. 7250.0 Mn., which the 4th Defendant Company is unable to reimburse, in the context of its bankrupt and insolvent position, caused by the said fraud perpetrated on it and a direct consequence thereof.

CHRONOLOGICAL STATEMENT OF RELEVANT FACTS

2. **THE PLAINTIFF**

i. The Plaintiff is a Fellow Member of the Institute of Chartered Accountants of Sri Lanka, having been a Council Member thereof, and a Fellow Member of the Institute of Chartered Management Accountants of the United Kingdom, and the Managing Director of Comindtax Management Service Ltd., a limited liability Company registered under the Companies Act No.17 of 1982 and having its Registered Office at No.167/4, Sri Vipulasena Mawatha, Colombo 10.

vide Para 1(a) of the Plaint

ii. **The Plaintiff is practising as a Business and Management Consultant and has a prestigious Clientele and is also the Lead Consultant to the World Bank Funded, Transport Sector Restructuring Project in Sri Lanka.**

vide Para 1(b) of the Plaint

iii. **The Plaintiff was a Subscriber to the Memorandum and Articles of Association of "LANKA-JAPAN HOTELS LIMITED", holding 70,000 Ordinary Shares of Rs.10.00 each and a Director of the said Company, which Company on 20.10.83, changed its name to "HOTEL DEVELOPERS (LANKA) LIMITED " the 4th Defendant Company. The said 4th Defendant Company, was formed for the promotion and development of the Colombo Hilton Hotel Project.**

vide Para 1(c) of the Plaint - Document P1

iv. **The Plaintiff had been closely associated, from the very inception in 1979, with the said Colombo Hilton Hotel Project and accordingly was a Subscriber, Shareholder and Director of the 4th Defendant Company and a Signatory to the Prospectus published by the 4th Defendant Company for the Public Issue of its Shares.**

vide Para 1(c) & 8)b) of the Plaint

3. **<u>THE DEFENDANTS.</u>**

i. a) **The 1st & 2nd Defendants, Mitsui & Co Ltd. and Taisei Corporation of Japan, internationally known Contractors, amongst others, were the main Promotors of the Colombo Hilton Hotel; being its Sole Contractor, Sole Supplier, Sole Lender, and Shareholders(30%) and Directors of the 4th Defendant Company.**

vide Para 4(a) of the Plaint - Documents P5

b) **The 1st & 2nd Defendants' Representative on the Board of Directors of the 4th Defendant Company, at all times material to this Action, functioned as the full-time Resident Excecutive Director of the 4th Defendant Company, responsible for its the day to day management & administration.**

vide Para 4(b) of the Plaint

ii. **The 3rd Defendant, Kanko Kikaku Sekkeisha Yozo Shibata & Associates, of Japan, was responsible for the Design and Supervision of the Colombo Hilton Hotel, from its very inception, as its Architects.**

vide Para 5 of the Plaint

iii. **The 4th Defendant Company, Hotel Developers (Lanka) Ltd. was promoted, amongst others, by the 1st & 2nd Defendants, Cornel & Co. Ltd. and the Government of Sri Lanka, as per the Investment Agreement (P09) entered into on 31.01.'84., between the said parties.**

vide Para 11 of the Plaint - Document P(09)

iv. **The 5th Defendant-Respondent-Respondent abovenamed, Cornel L.Perera (hereinafter sometimes called and referred as the 5th Defendant), Chairman & Managing Director of the aforesaid Cornel & Co Ltd., at all times material to this Action, has been the Chairman & Managing Director of the 4th Defendant Company. Since its inception.**

vide para 6(d) of the Plaint - Document P4(c)

v. **The 6th Defendant-Respondent-Respondent abovenamed, F.G.N. Mendis (hereinafter sometimes called and referred to as the 6th Defendant), Chairman of Delmage Forsyth & Co. Ltd., was a Director of the 4th Defendant Company, since in inception upto 22.12.'90. Delmege Forsyth Co. Ltd. was also a Promotor named in the Prospectus of the 4th Defendant Company.**

vide Para 6(d) of the Plaint - Document P4(c)

vi. **The 7th Defendant, has been a Director of the 4th Defendant Company since 19.12.86.**

vide Para 6(d) of the Plaint - Document P4(c)

vii. **The 8th & 10th Defendant-Respondent-Respondents, (hereinafter sometimes called and referred to as the 8th & 10th Defendants respectively) have been and are Directors of the 4th Defendant Company, representing the Government of Sri Lanka.**
vide para 6(d) of the Plaint - Document P4(c)

viii. **The 9th & 11th Defendant-Respondent-Respondents abovenamed - (hereinafter sometimes called and referred to as the 9th & 11th Defendants respectively) have been and are Directors of the 4th Defendant Company, representing the 1st & 2nd Defendants.**
vide Para 6(d) of the Plaint - Document P4(c)

4. **PROMOTION OF THE COLOMBO HILTON HOTEL PROJECT**

i. **The 3rd Defendant, as Architects were commissioned to formulate the Plans for the then proposed Colombo Hilton Hotel, and they, thereafter developed and completed such Architectural Plans for the said Colombo Hilton Hotel in July'80 (P08).**
vide Para 9(c) of the Plaint - Document P(08)

ii. **The 4th Defendant Company was promoted, amongst the others, by the 1st & 2nd Defendants, to construct the said Colombo Hilton Hotel, according to the said Architectural Plans (P08), which was to comprise in the first phase, of two Towers, going upto 22 Floors, of which 19 Floors was to contain 456 Guest Rooms and in addition a Mezzanine Floor and two Basements, going down 36 feet below ground level, having Parsons Road as datum providing covered car parking for 400 Vehicles, with Recreational Facilities etc, as a fully furnished and equipped international 5 Star-Class Hotel.**
vide Para 20 of the Plaint - Document P5

iii. **The aforesaid Colombo Hilton Hotel was to be fully-built and equipped by the 1st & 2nd Defendants on a fixed-price turnkey basis, with no provisions for cost escalations, in accordance with the said Architectural Plans of July'80 (P08) prepared and submitted by the 3rd Defendant and was to be managed by Hilton International, New York, USA.**
vide Para 9(c) of the Plaint - Document (P08)

iv. **Thereafter, in or about August'81 Hilton International prepared, and submitted a 10- Year Forecast of Income and Expenses for this 456 Guest Roomed Hotel as aforesaid (P7(b)) based on the said July'80 Plans (P08) of the 3rd Defendant.**
vide Para 10 of the Plaint - Document P7(b)

v. a) **Accordingly a Preliminary Agreement was entered into on 30.03.83 with 1st & 2nd Defendants for the turnkey construction of the aforesaid Colombo Hilton Hotel, on the basis of agreed fixed prices stipulated therein. On the aforesaid basis and as acknowledged on the said Preliminary Agreement the 1st & 2nd Defendants were issued on the same said 30.03.83 the Letter of Award for Construction of the aforesaid Colombo Hilton Hotel.**
vide Para 9(a) of the Plaint - Document P6

b) **On 31.03.83, i.e. the day immediately following the execution of the aforesaid Preliminary Agreement and the issuance of the Letter of Award for Construction, Hilton International, addressed their Letter dated 31.03.83 (P07(a) confirming their aforesaid Forecast of Income and Expenses of August '81, for the 456 Guest Room Hotel, which was based on the aforesaid Architectural Plans (P08), except for making an upward revision of the 1st Year's Guest Room Tariff as stated therein.**
vide Para 10(a) of the Plaint - Document 10(a)

c) **The 1st Defendant prepared and submitted Profitability Forecasts & Cash Flow Projections for the aforesaid Colombo Hilton Hotel in March'83 and again in October'83, strictly in conformity with the aforesaid Forecast of Income & Expenses of Hilton International, for 456 Guest Rooms based on the aforesaid July'80 Plans of the 3rd Defendants.**

vi. On or about 19.10.83 detail Architectural Plans, in conformity with the requirements of the Urban Development Authority, for the aforesaid Colombo Hilton Hotel, consisting of 456 Guest Rooms as aforesaid, prepared and finalised by the 3rd Defendant was submitted to the Urban Development Authority for Approval (P19) by the 4th Defendant Company.

vide Para 22(b) of the Plaint - Document P19

vii. a) Thereafter, the 1st Defendant formulated and submitted the final Profitability Forecasts and Cash Flow Projections dated 26.12.83 for the Colombo Hilton Hotel Project. The said Profitability Projections had been computed on the basis of 452 Guest Rooms. Of the 456 Guest Rooms as aforesaid, Room Revenue was not computed on 4 Guest Rooms, since they were allocated as the Resident Manager's Apartment.

b) The said Profitability Forecasts of the 1st Defendant of 26.12.83 (P16) was also in strict conformity with Hilton International's Forecast of Income & Expenses of August'81 for 456 Guest Rooms, as confirmed by their Letter of 31.03.83 as aforesaid, which was based on the aforesaid Architectural Plans (P08) of July'80 of the 3rd Defendant, except for a marginal aforesaid revision in the average Guest-Room Tariffs.

5. BOARD APPROVAL OF THE 4TH DEFENDANT COMPANY

i. At the Meeting of the Board of Directors of the 4th Defendant Company held on 7th January 1984 (P18(a), a complete set of Architectural Plans together with Construction Drawings provided by the 3rd Defendant was tabled and the Board of Directors noted, as recorded in the Board Minutes, that the proposed Colombo Hilton Hotel was to comprise of 452 Guest Rooms. Further the Final Profitability Forecast and Cash Flow Projections dated 26.12.83 made prepared and forwarded by the 1st Defendant too was tabled and noted at the said Meeting.

vide Para 19(c), 19(d) & 19(e) of the Plaint - Document P18(a)

ii. At the Meeting of the Board of Directors of the 4th Defendant Company held on 31.01.84 (P18(b)) all relevant Legal Agreements set out herein below, finalised to implement the Colombo Hilton Hotel Project, were tabled and approved (P18(b)).

vide Para 19(b) of the Plaint - Document P18(b)

6. INVESTMENT AGREEMENT WITH THE GOVERNMENT OF SRI LANKA & THE STATE GUARANTEES ISSUED TO THE 1ST & 2ND DEFENDANTS

The Investment Agreement (P09) dated 31.01.84.- By and between the Government of Sri Lanka, the 1st & 2nd Defendants and Cornel & Co. Ltd., to implement the Colombo Hilton Hotel Project, as agreed upon in the aforesaid Preliminary Agreement entered into on 30.03.83, which Preliminary Agreement became a part and parcel of the said Investment Agreement; on the basis that the Government of Sri Lanka would issue State Guarantees as collateral for the Loans being provided by the 1st & 2nd Defendants to construct, equip and furnish the said Colombo Hilton Hotel; and accordingly two State Guarantees had been issued on or about 17.02.84 by the Government of Sri Lanka in favour of the 1st & 2nd Defendants for a sum of Jap. Yen Twelve Thousand Three Hundred Million (JY. 12,300,000,000) together with all interests thereon.

vide Para 11 of the Plaint - Document P9
vide Para 18 of the Plaint - Document P17(a) & 17(b)

7. AGREEMENTS & CONTRACTS EXECUTED WITH THE 1ST, 2ND & 3RD DEFENDANTS

i. Loan Agreement (P15) dated 31.01.84 - by and between the 1st & 2nd Defendants as Lenders and the 4th Defendant Company as Borrower, in a sum of Japanese Yen Twelve Thousand Three Hundred Million (JY

12,300,000,000) to facilitate the 4th Defendant Company to construct, own, operate and manage the aforesaid Colombo Hilton Hotel.

vide Para 16(a) of the Plaint - Document P15

ii. Construction Agreement (P11) dated 31.01.84 - by and between the 4th Defendant Company and the 1st & 2nd Defendant, counter signed by the 3rd Defendant - for the construction of the aforesaid Colombo Hilton Hotel, for a total lump sum of Japanese Yen Eleven Billion Nine Hundred and Fifty Two Million (JY 11,952,000,000). The aforesaid Architectural Plans formed part and parcel of the Construction Agreement.

vide Para 13 of the Plaint - Document P11

iii. Contract for the Supply of Furnishings, Fixtures and Equipment (P13) dated 31.01.84 - by and between the 4th Defendant Company and the 1st Defendant, for the supply of Furnishings, Fixtures and Equipment for the said Colombo Hilton Hotel for a sum of Japanese Yen One Thousand Eight Hundred and Sixty Million (JY 1,860,000,000). The scope of such Supplies were described in Exhibit "A" attached the said Supplies Contract.

vide Para 14(a) & 14(b) of the Plaint - Document P13

iv. Contract for the Design & Supervision (P14) dated 31.01.84- by and between the 4th Defendant Company and the 3rd Defendant to perform the services under the said Contract, for the Design & Supervision works for the construction of the aforesaid Colombo Hilton Hotel, for a sum of Japanese Yen Four Hundred Million (JY 400,000,000).

vide Para 15 of the Plaint - Document P14

8. <u>ALL AGREEMENTS/CONTRACTS EXAMINED BY JAPANESE LAWYERS & THE ATTORNEY GENERAL</u>

All the aforesaid Agreements/Contracts were examined and finalised on behalf of the Government of Sri Lanka by Hamada & Matsumoto, Attorneys-at- Law in Tokyo <u>and the Attorney-General of Sri Lanka</u>.

vide Para 19(b) of the Plaint

9. <u>PROSPECTUS PUBLISHED BY THE 4TH DEFENDANT COMPANY</u>

i. On 6th March 1984, the 4th Defendant Company published a Prospectus (P05)
as required under the provisions of the Companies Act, No.17 of 1982, soliciting public funds, requiring the public to invest in the Company, which was to build and operate inter-alia a 452 Guest Roomed, Tower concept 5-Star Class International Hotel, going upto 22 Floors, with covered (basement) car parking for 400 vehicles and recreational facilities etc.

vide Para 20(a) & 20(c) of the Plaint

ii. As required by the provisions of the said Companies Act, amongst others, the Plaintiff too subscribed his Signature to the said Prospectus as a Director of the 4th Defendant Company and thereby vouched to the Statements referred to therein as true statements and bound himself in law and fact to uphold such Statements.

vide- Document P5

10. <u>1ST & 2ND DEFENDANTS' STRANGLEHOLD ON THE 4TH DEFENDANT COMPANY & THEIR MANY ROLES</u>

i. Representatives of the 1st & 2nd Defendants on the Board of the 4th Defendant Company <u>always functioned as the full-time Resident Executive Director of the 4th Defendant Company,</u> responsible for the day to day management and administration of the 4th Defendant Company.

vide Para 4(b) of the Plaint

These Representatives of the 1st & 2nd Defendants, who functioned as the Executive Director, of the 4th Defendant Company, was in actual fact the person, <u>who co-ordinated with and supervised the work of the Japanese Architect, who in turn, was responsible to</u>

check and supervise the very construction work of the 1st & 2nd Defendants!

ii. Further, as referred to herein before the many roles played by the 1st & 2nd Defendants, in this `turnkey' construction included being:

i. Main Promoters
ii. Collaborators
iii. Shareholders/Investors
iv. Promoters named in and Signatories to the Prospectus
v. Sole Contractors
vi. Sole Suppliers - 1st Defendant
vii. Lenders
viii. Representatives on the Board of Directors of the 4th Defendant Company, with right of veto over the Board Decisions and Actions.

iii. the 1st & 2nd Defendants had a stranglehold on the 4th Defendant Company's ability to make decisions and act, by having a right of veto over all Board Decisions at the Board of Directors of the 4th Defendant Company.

Article 129, of the Articles of Association
P01 page 25 = P10(a) page 23

"129. Questions arising at any Meeting shall be decided by a majority of votes, and in case of an equality of votes, the Chairman shall have a second or casting vote.

Provided however that no resolution shall be deemed to be passed by the Directors unless a Director appointed by the Foreign Collaborators shall have voted in favour of such resolution.

Provided, further that the above proviso shall cease to have effect upon the Loan being repaid by the Company."
vide - Document P1 & P10(a)

iv. Furthermore, the 4th Defendant Company was unable to even constitute a Board Meeting or a Shareholders Meeting without the presence of the Representative of the 1st & 2nd Defendants.

Article 127, of the Articles of Association.
P01 page 25 = P10(a) page 23

"127. So long as at least one of the Foreign Collaborators shall be a member of the Company, the quorum necessary for the transaction of the business of the Directors shall be three Directors personally present or their Alternate at the meeting including at least one Director nominated by the Foreign Collaborators."
vide - Document P1 & P10(a)

Article 79, of the Articles of the Association.
P01 page 18 = P10(a) page 70

"79. No business shall be transacted at any General Meeting unless a quorum is present when the meeting proceeds to business. Save as herein otherwise provided so long as at least one of the Foreign collaborators shall be a member of the Company, three members including one Foreign collaborators present in person, or by proxy or attorney or in the case of a corporation by an authorised representative shall be a quorum for all purposes."
vide - Document P1 & P10(a)

11. CONSTRUCTION OF THE COLOMBO HILTON HOTEL

i. The Architectural Plans submitted to the Urban Development Authority on 19.10.83 as referred to hereinbefore were approved by the Urban Development Authority on 23rd March 1984 (P20(b))

and as is evidenced by the Urban Development Authority's Letter dated 19.01.1984 (P20(a)), addressed to the Fire brigade the said Architectural Plans had comprised of 27 Sheets. Accordingly, in or about March 1984 the 1st & 2nd Defendants commenced the construction of the Colombo Hilton Hotel after a Ground-Breaking Ceremony held in March 1984.

vide Para 22(b), 22(c), 22(d) & 22(e) of the Plaint - Document P20(a) & P20(b)

ii. While the construction work of the Colombo Hilton Hotel was in progress, as a matter of professional routine, the Plaintiff required the Board of Directors of the 4th Defendant Company, in June 1985 and July 1985 and more particularly by his letter dated 22.07.85 (P21(a)) to call for Reports, Documentations/Informations, particularly showing the progress of construction monitored against projected construction, from the 1st & 2nd Defendants and the 3rd Defendant and to make them available to the Directors. Neither the Plaintiff nor the other Directors received such Reports, Documentations/Informations called for at that time.

vide Para 23 of the Plaint - Document P21(a)

iii. Shortly thereafter, very significantly the Executive Director of the 4th Defendant Company, A. Naka, representative of the the 1st & 2nd Defendants, reported on or about 30.10.85 (P22(b)) that a Fire had occurred at the the 1st & 2nd Defendants Site Office located at the said Colombo Hilton Hotel Project. The Report expressly states that all Drawings and Documents had got burnt and that Principals of the 1st & 2nd Defendants in Tokyo had despatched copies of all Drawings and Documents and that the construction work on the Colombo Hilton Hotel Project had recommenced.

vide Para 24 of the Plaint - Document P22(b)

iv. On or about 08.06.87 (P23) the 5th Defendant, Cornel L. Perera, Chairman and Managing Director of the 4th Defendant Company, reported to the Board of Directors of having handed over the keys of the said Colombo Hilton Hotel to the managing Company Hilton International New York on 30.04.87, and thereafter the Colombo Hilton Hotel was opened for operations on 01.07.87.

vide Para 25 of the Plaint - Document P23

12. 1ST DEFENDANT'S PROFITABILITY FORECAST & CASH FLOW PROJECTIONS EVEN AFTER THE HOTEL OPENED FOR OPERATIONS WAS ON THE BASIS OF 452 GUEST ROOMS

After the opening of the Colombo Hilton Hotel for operations on 01.07.87 the 1st Defendant sent its Representative, one M. Kubota, specially to Colombo with the Revised Profitability Forecasts and Cash Flow Projections for the Colombo Hilton Hotel dated 26.06.87 (P25(b)) and he attended the Board Meetings of the 4th Defendant Company held on 15.07.87, 12.11.87 and 18.11.87 (P24(a), P24(b) & P24(c)) in respect of such Revised Profitability Forecasts and Cash Flow Projections and the same had been computed on the basis of the 452 Guest Rooms, consistent with the previous Profitability Forecasts & Cash Flow Projections that were forwarded by the 1st Defendant, as referred to hereinbefore.

vide Para 26(a), 26(b) & 26(c) of the Plaint - Documents P24(a), P24(b), P24(c) & P25(b)

13. INITIAL DISCOVERY OF DISCREPANCY IN THE NUMBER OF HOTEL GUEST ROOMS BY THE PLAINTIFF IN 1987

Whilst studying and reviewing the said revised Profitability Forecasts and Cash Flow Projections forwarded by the 1st Defendant as aforesaid, and when comparing the said figures with the actual performance of the Colombo Hilton Hotel, as indicated by the Hilton Monthly Reports for the first few months of the Colombo Hilton Hotel operations, the Plaintiff noticed, that whilst the 1st Defendant had computed the Profitability Projections on the basis of the 452 Guest Rooms as aforesaid, the Hilton Monthly Reports had reflected only 387 Guest Rooms. The said M.Kubota, Representative of the 1st Defendant could not explain the discrepancy in the number of Guest Rooms, when the Plaintiff queried the same, but however immediately thereafter, forwarded a further Revised Profitability Forecast and Cash Flow Projections dated 21.12.87 (P25(c)), recomputed on

the basis of only 387 Guest Rooms.

vide Para 26(d) & 26(e) of the Plaint - Document P25(c)

14. PLAINTIFF COMPLAINED OF DISCREPANCY IN THE NUMBER OF HOTEL GUEST ROOMS TO THE BOARD OF DIRECTORS OF 4TH DEFENDANT COMPANY IN 1987

Plaintiff brought this discrepancy to the notice of the Board of Directors and submitted a Board Paper on 30.12.1987 (P26(d) particularly pointing out the discrepancy in the number of Guest Rooms, which would make it impossible to repay the total Debt on the basis of 387 Guest Rooms, even at a 100% Room Occupancy and even at an Average Room Rate of US$100/- per Guest Room per Day.

vide Para 27(a) of the Plaint - Document P26(d)

15. 1ST & 2ND DEFENDANTS ADMISSION OF A LESSER NUMBER OF HOTEL GUEST ROOMS

i. **On the basis of the above, the Board of Directors decided to send a Letter dated 14.01.88 (P26(f)), drafted by the Plaintiff, which letter included the discrepancy in the number of Guest Rooms i.e. 387 Guest Rooms and the impossibility of servicing the aforesaid Debt on the basis of 387 Guest Rooms. the 1st & 2nd Defendants replied the said Letter by a telex dated 29.01.88 (P27) which was confusing and did not clarify the matter and stated that there was no change in the number of Rooms and that there were 452 Guest Room Bays.**

vide Para 27(c) & 27(e) of the Plaint - Document P26(f)
vide Para 28(a) of the Plaint - Document P27

ii. **It is common ground that a "Bay" or a "Module" is in fact an one unit of a standard size guest room. This is admitted by the 3rd Defendant in its Objections filed in the District Court (Paragraph 10) and further confirmed by Shelton Wijayaratna, Chartered Architect, in his Report. Shelton Wijayaratna's said Report is annexed to the Plaint marked as P32.**

vide Para 32 of the Plaint - Document P32(a)

iii. **Thereafter the 1st Defendant forwarded a Revised Profitability Forecast and Cash Flow Projection dated 01.02.88 (P28) clearly indicating, that the said Profitability Forecasts and Cash Flow Projections were based only on 387 Guest Rooms. Thus, the 1st & 2nd Defendants in fact has admitted that the said Colombo Hilton Hotel consisted of only 387 Guest Rooms and not 452 Guest Rooms as had been held out by them and contracted for.**

vide Para 28(b) of the Plaint - Document P28

16. WHAT DID THE DIRECTORS OF THE 4TH DEFENDANT COMPANY DO?

INDEPENDENT ENGINEERING INSPECTION & EXAMINATION CALLED FOR BY THE GOVERNMENT NOMINEE DIRECTOR, M.T.L. FERNANDO CHARTERED ACCOUNTANT, PRECEDENT PARTNER ERNST & YOUNG, OPPOSED BY THE 1ST & 2ND DEFENDANTS SUPPORTED BY THE 7TH DEFENDANT K.N. CHOKSY & 5TH DEFENDANT CORNEL L. PERERA, CHAIRMAN & MANAGING DIRECTOR OF THE 4TH DEFENDANT COMPANY.

ACCORDINGLY INDEPENDENT ENGINEER WAS NOT APPOINTED

i. **M.T.L. Fernando, a Senior Chartered Accountant and Dr. A.C. Randeni, the then Director Economic Affairs, Ministry of Finance, both of whom were the then Government Nominee Directors on the 4th Defendant Company, supported the doubts raised by the Plaintiff with regard to the number of Guest Rooms, and the said M.T.L. Fernando, suggested at the Board Meeting on 25.05.88 (P29) that it would be prudent to retain the services of an independent Engineer for the purpose of an examination, of the said Colombo Hilton Hotel building and the Plant & Machinery installed therein and to report thereon, commenting further that the 3rd Defendant, was more or less connected with the 1st & 2nd Defendants.**

vide Para 29(a) & 29(b) of the Plaint - Document P29

ii. **The then Executive Director, H. Ogami, Representative of the 1st & 2nd Defendants objected to the appointment of such independent Engineer; it had then been suggested to obtain the advice of the 7th Defendant K.N. Choksy, whose Note dated 08.08.88 (P30(a)) on the said question was tabled by the 5th Defendant Cornel L. Perera, Chairman & Managing Director of the 4th Defendant Company at the Board Meeting held on 12.08.88 (P30(b).**

The said Note of the 7th Defendant K.N. Choksy dated 08.08.88, inter-alia, stated:

"..... The Board desires to know the advisability for the Board to have an examination and report on the building done by an independent architect or engineer not connected with the construction, with a view to ensuring that the construction is in conformity with the contract and sound etc: In other words, whether the Board is obliged to do this for the protection of its own interests and/or the interests of the shareholders.

In my view, this does not appear to be necessary .....

It is only if the Board has some good reason or cause to doubt the Architect's competence or integrity would the Board be under a duty by shareholders to obtain an independent report. Otherwise, the Board will not only be under no requirement to do so but will also not be justified in incurring further expenditure to obtain a separate Report. Furthermore, so far as the contractors are concerned, they will not be bound by such a Report".

vide Para 29(c) & 30(b) of the Plaint - Document P30(a) & P30(b)

iii. a) **Accordingly, the suggestion to appoint an independent Engineer to do an inspection and examination of the Colombo Hilton Hotel Building and the Plant & Machinery installed therein, as aforesaid, before the issuance of the Final Certificate was objected to and not supported by the Board of Directors, notwithstanding the fact that the Board was duty bound by the Shareholders to obtain an independent Report on the Hotel Building, in the context of the serious issue raised by the Plaintiff and further that the Company and its Directors were duty bound to uphold in law as true, the Statements made in the Prospectus.**

vide Para 30(c) of the Plaint

b) **Even though the Final Inspection had been carried out by the 3rd Defendant on 24th and 25th March 1988, the Final Certificate had been issued only after the 7th Defendant K.N. Choksy issued his aforesaid Note dated 08.08.1988 to the Board Meeting held on 12.08.88, where the decision was made not to retain the services of an independent Engineer as aforesaid.**

vide Para 33(a),33(b) & 33(c) of the Plaint - Document P31(b)

c) **The result of the 7th Defendant, K.N. Choksy's aforesaid advice, only brought about the issuance of the Final Certificate, by the 3rd Defendant which could not have been issued otherwise, if the independent examination that was called for, had been carried out at that time.**

vide Para 33(d) of the Plaint

17. CONSTRUCTION WORK WAS NEVER CERTIFIED BY THE 3RD DEFENDANT WHEN INTERIM PAYMENTS WERE DRAWN BY THE 1ST & 2ND DEFENDANTS UNDER THE LOAN AGREEMENT

SUCH PAYMENTS WERE ON PRE-DETERMINED SCHEDULES BASED ON THE AFFLUXION OF TIME & NOT ON ANY MEASUREMENT OF WORK

i. **Payments to the 1st & 2nd Defendants and the 3rd Defendant had been effected in Japan, through a Special Bank Account, maintained in the name of the 4th Defendant Company at the Fuji Bank, Japan, all matters in connection with which, Bank Account, was handled by the Representatives of the 1st & 2nd Defendants, who at all times functioned as the Executive Director of the 4th Defendant Company.**
vide Para 17 of the Plaint

ii. **To enable periodic payments to themselves, the 1st & 2nd Defendants made Deposits, recorded as Loans, as per the said Loan Agreement (P15), to this Fuji Bank Account, Japan, thereby effectively paying themselves, from their own funds through this mechanism. Such payments were automatic and not based on any Certifications of work by the 3rd Defendant and did not require deliberated and considered approval of the Board of Directors of the 4th Defendant Company, at the time of effecting such automatic payments; which were related purely to the affluxion of time as per the pre-determined schedules, attached to the relevant Agreements/Contracts.**

iii. **The above mechanism of "automatic payments", as per the pre-determined Schedules, attached to the relevant Agreements/Contracts, which were based purely on the affluxion time, was the very reason, that a fully and properly documented comprehensive, Final Inspection and Examination, with Specified Bills of Quantities and Final Measurements was absolutely very necessary, to verify the correctness of the Hotel Construction and the Supplies; now moreso particularly in the light of the facts disclosed in this Action.**

18. COMPLETION & FINAL CERTIFICATES ARE NOT ARCHITECTURAL PROPER CERTIFICATES ADMITS THE 3RD DEFENDANT.

i. **The Completion Certificate (P31(a)) had been issued by the 3rd Defendant on 30.04.87.**
vide Para 33(a) of the Plaint - Document P31(a)

ii. **The final inspection of the Colombo Hilton Hotel Building together with the Plant & Machinery installed therein, had been carried out on 24th and 25th March 1988, as reported at the Meeting of the Board of Directors of the 4th Defendant Company held on 25.05.88 (P29).**
Vide Para 33(c)

iii. **However, the Final Certificate (P31(b)) significantly dated 25.08.88, from the 3rd Defendant, was tabled at the Meeting of the Board of Directors on 04.10.88 (P33), and that too at the request of the Plaintiff.**
vide Para 33(b) of the Plaint - Document P33

iv. **The said Completion and Final Certificates are merely "Medical Certificate" type Letters with no Documentations such as Priced Specified Bills of Quantities and Final Measurements to support them; and such Certificates, significantly made no disclosure whatsoever, of the very material fact. that the originally approved and contracted Architectural Plans had in fact been amended midstream during construction.**
vide Para 38(b) of the Plaint

v. **In fact, the said Completion and Final Certificates admittedly have no supportive Documentations, such as Priced Specified Bills of Quantities and Final Measurements, contravening both professional and contractual obligations and responsibilities of the 3rd Defendant as clearly set out in Articles 6.01; 6.04; 6.05 and 6.12 of the Design & Supervision Contract (P14).**

" 6.01 Responsibilities of the Architect

(a) The Architect shall carry out the services with due diligence and efficiency and in comformity with sound engineering and administrative practices.

(b) The Architect shall be fully acquainted with all terms and conditions of the Construction Contract.

(c) ***Whenever by this Contract, the Architect is required to exercise his discretion for a decision, opinion, consent or to express satisfaction or approval, or to determine value or otherwise take action which may affect the rights and obligations of either the Employer or the Consortium, the Architect shall exercise such discretion fairly within the terms of this Contract and having regard to all the circumstances.***

6.04 Records

The Architect shall keep accurate and systematic records and accounts with respect to the Services in such form and detail acceptable to the Employer.

6.05 Information

The Architect shall furnish the Employer with such information relating to the Services as the Employer may from time to time request.

6.12 Proprietary Rights of the Employer in Reports and Records

All reports and relevant data such as maps, diagrams, plans, statistics and supporting records or materials compiled or prepared in the course of the Services shall be the absolute property of the Employer. The Architect agrees to deliver all these materials to the Employer upon completion of this Contract. The Architect may retain a copy of such data but shall not use the same for purposes unrelated to this Contract without the prior written approval of the Employer."

vi. **The 3rd Defendant, now admits, that the said Completion & Final Certificates relate to an unauthorised Amended Plan, which accordingly was not the Plan that formed a part and parcel of the Construction Agreement and therefore in fact and in law the Construction Agreement stands uncertified.**

vii. **Rs. 1,010,682.69 was shown as due to the 3rd Defendant in the Audited Balance Sheet as at 31.03.89 of the 4th Defendant Company, which was the last set of the Audited Annual Accounts of the 4th Defendant Company, that was available to the Plaintiff at the time he initiated this instant Action on 13.09.90.**

viii. **The 3rd Defendant has however, stated in its Statement of Objections filed in the District Court, that it had been fully settled in 1987; that is long prior to even the Final Inspection of the Colombo Hilton Hotel carried out by them in March'88 and the issuance of the Final Certificate on 25.08.88. No wonder that they have issued a "Medical Certificate" type Final Certificate, in a very unprofessional and irresponsible manner, that too, without the requisite supporting Documentations and now state, contravening the provisions of the Design and Supervision Contract (P14), that the Architect Certificates issued by them *"are not Architectural proper Certificates"* as per Paragraph 14(c) of their said Statement of Objections and further that supporting Documentations such as Priced Specified Bills of Quantities and Final Measurements are not available and are not necessary, is this position teneble?**

19. **AGREEMENTS EXECUTED SURREPTITIOUSLY TO MORTGAGE THE COLOMBO HILTON HOTEL TO THE 1ST & 2ND DEFENDANTS BY THE 5TH DEFENDANT CORNEL L. PERERA CHAIRMAN & MANAGING DIRECTOR OF THE 4TH DEFENDANT COMPANY AND THE 1ST & 2ND DEFENDANTS THEMSELVES**

SECRETARY MINISTRY FINANCE MISLED & INSTRUCTS IMMEDIATE DELETION.

i. **The 1st & 2nd Defendants postponed the re-payment of Loan instalments falling due to a given date 11.03.90 and the Plaintiff, inter-alia, repeatedly pointing out the short-fall in the availability of number of Guest Rooms, which materially affected the Profitability and Cash Flow and consequently the debt service ability, reiterated that it was impossible for the 4th Defendant Company to make such consolidated payment on the said given date 11.03.90.**

vide Para 34 of the Plaint

ii. **In the context of such postponement, the 1st & 2nd Defendants submitted Draft Debt Rescheduling Agreements (P34(a)) with a stipulation requiring a commitment to Mortgage the Colombo Hilton Hotel property to themselves. On objections raised by the Plaintiff, that the 1st & 2nd Defendants could not have both the State Guarantees and a Mortgage, the Board agreed to exclude the said Mortgage Clause.**

vide Para 35(a), 35(b) & 35(c) of the Plaint - Document P34(a)

iii. **However, the said Agreements had been executed surreptitiously in July 1989, including the said Mortgage Clause. On Plaintiff's discovery of same and Objection thereto, the Secretary, Ministry of Finance by his Letter dated 20.11.89 (P34(c)) required that immediate steps be taken to delete the said Mortgage Clause and the said Mortgage Clause was deleted on the repeated insistence of the Plaintiff, only on 17.05.90,(P35) one year later.**

vide Para 35(d), 35(e) & 35(f) of the Plaint - Document P34(c) & P35

20. **PAYMENTS MADE TO THE 1ST & 2ND DEFENDANTS DISREGARDING THE PLAINTIFF'S WRITTEN OBJECTIONS, IN THE ABSENCE OF PROPER DOCUMENTATIONS, CALLED FOR FROM THE 3RD DEFENDANT.**

i. **In the absence of proper documentations to support the "Medical Certificate" type Certificates of the 3rd Defendant, the Plaintiff by his Memoranda dated 27.11.89 and 13.12.89, (P38 (a) & P38(b)) tabled at the Board Meetings and circulated to all Directors of the 4th Defendant Company stated that it would be imprudent to make any payment to the 1st & 2nd Defendants and suggested that the Public Shareholders be refunded their Share Capital, rather than apply any funds to make any part payment to the 1st & 2nd Defendants, stating further that until such time as the Plaintiff receives satisfactory clarifications in categorical terms from the 3rd Defendant, that the Plaintiff could not agree to the 4th Defendant Company making any payment to the 1st & 2nd Defendants on account of retention and/or balance construction monies as claimed by them, particularly in the absence of proper certification by the 3rd Defendant.**

vide Para 39 of the Plaint - Document P38(a) & P38(b)

ii. **In fact and in law the Plaintiff was entitled to so demand of the 4th Defendant Company as set out in the said two Memoranda, as a Director and a Shareholder thereof and also as a Signatory to the Prospectus, to safeguard the interests of the Company and its Shareholders.**

iii. **Notwithstanding the Plaintiff's aforesaid Memoranda and Objections, and without the prior knowledge, approval and consent of the other Directors, on or about 26.01.90, the 7th Defendant K.N. Choksy, the 5th Defendant Cornel L. Perera, and H. Ogami, Representative of the 1st & 2nd Defendants, together with Officials of the 1st & 2nd Defendants, who had arrived from Japan, held discussions with the Officials of the Ministry of Finance; and as a consequence thereof the Secretary, Ministry of Finance, confirming such discussions, had intimated that it has been proposed at such discussions that a token payment of US $ 2.0 Mn (equivalent to Rs.80.0 Mn) be made to the 1st & 2nd Defendants, as a basis for negotiations, before the said due date 11.03.90.**

vide Para 40(a) & 40(b) of the Plaint

iv. **At a Board Meeting of the 4th Defendant Company held on 28.02.90 (P39 (c)) the Plaintiff reiterated that the said US $ 2.0 Mn payment should be made, only in the context of a fully agreed final rescheduling with the 1st & 2nd Defendants, after clarification of all discrepancies and queries raised. The said payment of US$ 2.0 Mn had been made on 08.03.90. However, notwithstanding the protests made by the Plaintiff and the stipulation made by the Ministry of Finance, the said payment had been appropriated towards the balance construction dues and interests thereon, which are not covered by the Government Guarantees in issue. Of the said US $ 2.0 Mn., US $ 1.0 Mn was paid by the Treasury from the Consolidated Fund.**

vide Para 40(d) & 40(e) of the Plaint - Document P39(c)

v. **Notwithstanding the discrepancies and issues that had been raised by the Plaintiff on the construction, the 4th Defendant Company paid the said sum of US $ 2.0 Mn. i.e. Rs.80.0 Mn to the 1st & 2nd Defendants, without having carried out a correct examination of the Hotel construction by an independent Engineer, and without clarifications and explanations on the discrepancies that had been raised by the Plaintiff, and further without having adequate Documentations such as Specified Bills of Quantities, Final Measurements etc. to support the "Medical Certificate" type Architects Certificates of the 3rd Defendant.**

vide Para 40(b) & 40(c) of Plaint

21. **7TH DEFENDANT K.N. CHOKSY OBSTRUCTED THE PLAINTIFF, A PROFESSIONAL ACCOUNTANT & RECKLESSLY STATES THAT THE OWNER IS JUSTIFIED IN MAKING PAYMENTS.**

i. **The 7th Defendant K.N. Choksy, again by his Letter dated 28.02.90 (P40) addressed to H. Ogami, representative of the 1st & 2nd Defendants, Executive Director, of the 4th Defendant Company specifically in relation to the Plaintiff's aforesaid Memorandum dated 13.12.89, wherein the Plaintiff had objected to any payment whatsoever being made to the 1st & 2nd Defendants, until such time as satisfactory and categorical clarifications, confirmations and properly documented Certifications are received from the 3rd Defendant, stated, inter-alia, that the two Certificates of the 3rd Defendant (mere "Medical Certificate" type Letters) were adequate coverage that the Hotel construction work is in conformity with all the stipulations in the contract, and that the Owner would be justified in making the balance payment to the contractors i.e. the 1st & 2nd Defendants in pursuance of the said two certificates**

vide Para 40(a), 40(b) & 40(c) of the Plaint - Document P38(d) & P40

The said Letter dated 28.02.90 from the 7th Defendant K.N. Choksy, inter-alia, stated:

"H. Ogami, Executive Director ...

I have considered your letter to me dated 21st February, 1990 giving cover to the Memorandum dated 13.12.89, submitted to the

Board by Mr. Nihal Sri Ameresekere (Director).

I have considered the Certificate of Practical Completion dated 10/04/1987 and the Completion Certificate (Final Certificate) dated 25/08/88 .....

..... The two Certificates are adequate coverage that the Hotel construction work is in conformity with all the stipulations of the Contract, and the Owner will be justified in making the balance payment to the contractor in pursuance of these Certificates.

In regard to the necessity/advisability of obtaining a Completion Certificate from a third-party Architect, I have already advised by letter dated 8th August 1988 that this is not necessary.
Please table this letter at today's Board Meeting"
vide Document P40

ii. **The aforesaid Letter was tabled at the Board Meeting of the 4th Defendant Company held on the same said date as the aforesaid Letter i.e. 28.02.90. The Plaintiff objected to the contents of the said Letter and the 7th Defendant, K.N. Choksy responded, that his aforesaid Letter was written on matters placed before him by H. Ogami, Representative of the 1st & 2nd Defendants and that he would consider revising his opinion, if necessary; but be never did so thereafter and the said payment was made. Let alone revising his aforesaid opinion the 7th Defendant K.N. Choksy thereafter failed and neglected even to respond to several Memoranda/Letters addressed by the Plaintiff to the Directors of the 4th Defendant Company including K.N. Choksy in relation to the said several matters subsequently discovered and referred to herein.**
vide Para 41(a) & 41(d) of the Plaint - Document P39(c)

iii. **The 7th Defendant, K.N. Choksy had no expertise and experience whatsoever, in the Hotel Construction and Engineering Industry to have proffered such an opinion and he was not professionally competent to do so. It was the Plaintiff's professional prerogative as a Chartered Accountant, to have called for and examined all requisite documentations, to satisfy on the correctness of payments, and not that of the 7th Defendant K.N. Choksy, who had only obstructed the Plaintiff in the discharge of his professional duty and responsibility.**

22. **FINANCE MINISTRY DISCUSSIONS & NEGOTIATIONS. DEMANDS MADE UNDER THE STATE GUARANTEES BY THE 1ST & 2ND DEFENDANTS.**

i. **In February 1990, at a Meeting held at the Ministry of Finance, the Plaintiff was requested by R. Paskaralingam, Secretary, Ministry of Finance to assist K. Shanmugalingam, Addl. Deputy Secretary, Treasury and Mrs. V.M.Y. Cassie Chitty, Director Economic Affairs, to have discussions and negotiations with Representatives of the 1st & 2nd Defendants.**
vide Para 42(a) of the Plaint

ii. **The Plaintiff participated at a number of Meetings with the said Finance Ministry Officials, at which Meetings the Representatives of the 1st & 2nd Defendants too were present. The Plaintiff submitted various Notes Schedules and Computations and again raised the question on the number of Guest Rooms and its impact on the Profitability Forecast and Cash Flow Projections, stating that the State Guarantees had been issued on the basis of such Profitability Forecasts and Cash Flow Projections computed on the basis of 452 Guest Rooms and not on the basis of 387 Guest Rooms. Even at this stage the 1st & 2nd Defendants deliberately made false representations, and did not disclose that they had in fact amended the originally approved Plan. Nevertheless the said discrepancy in the number of Guest Rooms was pointed out in a Letter drafted by the Ministry of Finance, requiring the 4th Defendant Company to submit the same to the 1st & 2nd Defendants in March '90 (P56(c)).**
vide Para 42(b), 42(c) & 43(a) of the Plaint - P56(c)

iii. **As Executive Directors of the 4th Defendant Company, being fully aware that the 4th Defendant Company was totally unable to service the Debts as claimed by them, the 1st & 2nd Defendants began**

demanding for payment of monies from the Guarantor, the Government of Sri Lanka, because of the State Guarantees that had been issued, by way of Letters copied to Secretary, Ministry of Finance and representation made at the aforesaid discussions at the Ministry of Finance, as evidenced by the Ministry of such discussions. (P56(c))

23. SHOCKING DISCOVERY OF UNAUTHORISEDLY SUBSTITUTED PLANS FILED WITH THE URBAN DEVELOPMENT AUTHORITY BY THE 1ST, 2ND & 3RD DEFENDANTS ACTING IN FRAUDULENT COLLUSION WITHOUT THE APPROVAL OF THE 4TH DEFENDANT COMPANY

THIS WAS DELIBERATELY SUPPRESSED FROM THE BOARD OF DIRECTORS OF THE 4TH DEFENDANT COMPANY CONTRAVENING SPECIFIC BOARD DECISIONS MADE AT THE PLAINTIFF'S INSTANCE AT THAT VERY SAME POINT OF TIME

i. **Since the Plaintiff wished to probe the discrepancy in the number of Guest Rooms, he requested at the Ministry of Finance, that a set of the Approved Architectural Plans be obtained from the Urban Development Authority. This the Ministry of Finance did, and when the Plaintiff perused the said set of Architectural Plans brought from the Urban Development Authority in March'90 he was shocked and surprised to discover, that these were a set of Amended Architectural Plans prepared by the Architects dated 15th July'85 (P32(b)) and for which Approval had been given as Amended Plans, by the Urban Development Authority only on 29th April 1986.**
vide Para 44(a) of the Plaint - Document P32(b)

ii. **The Hotel Construction had commenced in March'84, the original Architectural Plans having been lodged with the Urban Development Authority in October'83, and approved in March'84. The Construction of the Hotel was completed in April 87.**

iii. **Such surreptitious substitution by an Amended Architectural Plan actually a new set of Architectural Plans, had no approval whatsoever, from the Board of Directors of the 4th Defendant Company, nor did the Board of Directors have any knowledge thereof. Furthermore any such Amendment should have been entered into in writing as per Article 6.01 (iv)(f) and Article 12.02 of the Investment Agreement, between all parties thereto, including the Government of Sri Lanka, as well as further provided for in the Construction Agreement, Supervision Contract, and the Design & Supervision Agreement.**
vide Para 44(b) of the Plaint

iv. **Since as evidenced by the said set of "Amended" Architectural Plans, the same had in fact been prepared by the said 3rd Defendant with the full knowledge and collusion of the 1st & 2nd Defendants, since the then Executive Director A. Naka, Representative of the 1st Defendant/ Taisei, was in full time charge of the the 4th Defendant Company's, Office in Colombo, responsible for all directions to and communications with the 3rd Defendant.**
vide Para 44(c) of the Plaint

v. **It is very clear that this set of "Amended" Architectural Plans had been arranged for, obtained and submitted to the Urban Development Authority with the full knowledge and direction of the said Executive Director, A. Naka, the representative of the 1st & 2nd Defendants. The said 3rd Defendant had no proper written express authority from the 4th Defendant Company to redraw a new set of Architectural Plans, as required under the terms of the aforesaid Design & Supervision Contract the 4th Defendant Company had with them.**
vide Para 44(c) of the Plaint

vi. **As evidance by the Minutes of the Site Meetings at the Hotel Construction site, the 5th Defendant Cornel L. Perera, had chaired such Meetings and therefore would have had knowledge of such surreptition substitution of the originally approved Architectural Plans. He had deliberately suppressed the same from the Board of Directors and the 4th Defendant Comapny.**
vide Para 44(c) of the Plaint

24. COINCIDENT FIRE CONVENIENTLY & SIGNIFICANTLY DESTROYS ALL DOCUMENTS, POINTEDLY AT THE VERY SAME TIME OF AMENDMENT OF THE ORIGINAL ARCHITECTURAL PLANS, BY THE 1ST & 2ND DEFENDANTS & 3RD DEFENDANT ACTING IN FRAUDULENT COLLUSION AND DELIBERATELY SUPPRESSING THE SAME FROM THE BOARD OF DIRECTORS OF THE 4TH DEFENDANT COMPANY

i. A Fire had entered the stage on 18.10.85 as reported by the 1st & 2nd Defendants, destroying all original Plans and Documents, significantly after the Plaintiff's Letter dated 22.07.85 (P21(a)) to the Board of Directors of the 4th Defendant Company, following his observations made at the previous Board Meeting held on 27.06.85, wherein the Plaintiff had, inter-alia, required;

i) Progress Reports on the Construction, monitored against Projected Construction.

ii) Reports from the 3rd Defendant and the 1st & 2nd Defendants

The Plaintiff's said requirements amongst other requirements had been recorded in the Minutes of Board Meeting of 25.07.85, whereat the Plaintiff's aforesaid Letter had been tabled.

vide Para 23(a) & 24 of the Plaint - Document P21(a) & P21(b)

ii. Ironically and pointedly the unauthorisedly substituted "Amended" Plans (P54) dated 15.07.85 had been prepared and submitted by the 1st & 2nd Defendants and the 3rd Defendant, acting jointly and severally, to the Urban Development Authority on 08.08.85 deliberately without any intimation to and/or express authority and/or approval from the Board of Directors of the 4th Defendant Company, at the very same time of the Plaintiff making the aforesaid observations at the Board Meetings of 27.06.85 and 25.07.85, and his aforesaid Letter dated 22.07.85. *This alone demonstrates fraudulent intent; significantly the aforesaid Fire entered the stage thereafter on 18.10.85.*

25. NONE OF THE AUTHENTICATED COPIES OF THE ORIGINAL PLANS ARE AVAILABLE OR HAVE BEEN PRODUCED

SETS OF ORIGINAL PLANS AVAILABLE AT COMMENCEMENT

i. a) The original Plans, submitted to the Urban Development Authority in October '83, and approved by them in March'84, would have borne the Seal & Singnature of the Owner i.e. the 4th Defendant Company and the Official Approving Stamp/Seal & Signature of the Urban Development Authority itself.

vide Para 22(b) & 22(c) of the Plaint - Document P20(b)

b) Copy of the original Plan, forming part and parcel of the Construction Agreement, executed by and between the 1st & 2nd Defendants and 4th Defendant Company, and also countersigned by the 3rd Defendant, would have borne the Signatures of all the said parties to the said Construction Agreement.

vide Para 13(d) & P13(b) of the Plaint - Document P11

1ST, 2ND & 3RD DEFENDANTS, FAIL TO PRODUCE THEIR COPIES OF THE ORIGINAL PLANS

ii. a) The 1st & 2nd Defendants, being Contractors and Signatories to the said Construction Agreement have failed to produce an authenticated copy of either of the aforesaid original Plans, bearing such identifying Seals and Signatures.

vide Para 50iii of the Plaint

b) The 3rd Defendant, being the Architects and also a Signatory to the Construction Agreement, have failed to produce an authenticated copy of either of aforesaid original Plans, bearing, such identifying Seals and Signatures.

vide Para 50v of the Plaint - Document P48(a) & P48(b)

4TH DEFENDANT COMPANY FAILS TO PRODUCE EVEN THE OWNER'S COPY OF THE ORIGINAL PLANS AND PROFFERS HIGHLY QUESTIONABLE EXPLANATORY NOTE

iii. a) The 4th Defendant Company, being the Owner and a Signatory to the Construction Agreement have failed to produce, its own "Owners Copy" of either of the aforesaid original Plans, bearing such identifying Seals and Signatures; whilst such original documents had been kept at the Registered Office of the 4th Defendant Company, situated at 16, Alfred Place Colombo 3, also the Office of Cornel & Co Ltd., that of the 5th Defendant - Vide Para 4 of the 4th Defendant Company's Letter dated 05.09.'90 (P49

vide Para 50i & 50ii of the Plaint

b) Coincidently and very significantly, the aforesaid Letter dated 05.09.'90 of the 4th Defendant Company, also affirms the non - availability of the Exhibit "A" to the Supplies Contract entered into with the 1st Defendant, which defined the Scope of Supplies of Furnishings, Fixtures & Equipment to the said Colombo Hilton Hotel by the 1st Defendant.

vide Para 51(c) of the Plaint - Document P49(b)

iv. a) The General Manager of the 4th Defendant Company, unable to produce any one of the aforesaid original Plans to the Plaintiff, produced a questionable "hand written note" in a folio in a File, stating that the 4th Defendant Company's copy of the original Plan approved by the Urban Development Authority, had been taken by the 3rd Defendant and had *"got burned in the fire that occurred in the site Office in 1984"*, whereas the actual Fire took place in October 1985. Significantly the 1st & 2nd Defendants in their Statement of Objections deny that they had at any time borrowed the 4th Defendant Company's copy of the original Plan; whilst the 3rd Defendant in their Statement of Objections have denied any knowledge thereof.

vide Para 50(ii) of the Plaint - Document P47

b) The questionable act referred to in vi. a) above is a clear, futile, deliberate and fraudulent attempt by the 4th Defendant Company, to falsely explain the absence of its own copy of the original Plan, approved by the Urban Development Authority. It is however silent about its other copy of the original Plan, that formed a part & parcel of the Construction Agreement, that would have borne the identifying Signatures of all the parties to the said Construction Agreement.

vide Para 50(iii) of the Plaint

26. URBAN DEVELOPMENT AUTHORITY ALSO ADMITS THE NON-AVAILABILITY OF THE ORIGINAL ARCHITECTURAL PLANS AFTER AN ABORTIVE ATTEMPT BY THEM TO SUBSTITUTE ANOTHER SET OF PLANS AS THE ORIGINAL PLANS

i. On the occasions the Officer from the Urban Development Authority who brought the "Amended" Architectural Plans in March'90 to the Ministry of Finance as aforesaid stated that there were no other Plans at the Urban Development Authority and that he was unable to trace a copy of the original Architectural Plans at the Urban Development Authority.

vide Para 44(d) of the Plaint

ii. However, thereafter, by Letter dated 3rd May 1990, the Urban Development Authority submitted to the Ministry of Finance (P43(b)) a set of Architectural Plans, purported to be a set of the Original Architectural Plans. When at the request of the Ministry of Finance, the Plaintiff examined this set of Architectural Plans, he observed that they did not bear the Official Seal of Approval of the Urban Development Authority, identifying the said Sheets as Approved Plans and further the Plaintiff, on a count made of the number of Sheets, thereof observed that this set of the Architectural Plans had only 21 Sheets, whilst the original set of the Architectural Plans had comprised of 27 Sheets as per the Urban Development Authority's own Letter dated 19th January'84, as referred to hereinbefore. These discrepancies were pointed out by the Plaintiff to the Ministry of Finance.

vide Para 44(e) of the Plaint - Document P43(b)

iii. **Thereafter in June 1990, the Urban Development Authority had informed the 4th Defendant Company, that they do not have a set of the originally Approved Architectural Plans, as confirmed by the Letter dated 05.07.90 addressed to the Plaintiff by the General Manager (P43(c)), of the 4th Defendant Company. However, the Urban Development Authority's own Letter dated 23rd March 1984 had confirmed the Approval of the said original Architectural Plans by them.**

vide Para 44(f) of the Plaint - Document P43(c)

27. PLAINTIFF REPORTED THE DISCOVERY OF THE UNAUTHORISEDLY SUBSTITUTED "AMENDED" PLANS,TO THE BOARD OF DIRECTORS OF THE 4TH DEFENDANT COMPANY, AND URGED THAT ACTION BE TAKEN THEREON

K. SHANMUGALINGAM, GOVERNMENT NOMINEE DIRECTOR, ADDL. DEP. SECRETARY TREASURY, CONCURRED WITH THE PLAINTIFF

PLAINTIFF AUTHORISED TO PROBE WITH ASSISTANCE OF LOCAL ARCHITECT/ENGINEER ON SUGGESTION OF K. SHANMUGALINGAM

i. **The Plaintiff addressed a Letter dated 24th April'90 (P44(c)) to the Executive Director, H. Ogami, representative of the 1st & 2nd Defendants in relation to the Letters exchanged by the Plaintiff and the said H. Ogami, dated 12th April 1990 and 18th April 1990 (P44(a) & P44(b)). In the said letter the Plaintiff, inter-alia, stated, that the said H. Ogami notwithstanding the conflicting interests, in representing an interested party i.e. the 1st & 2nd Defendants, had made endeavors to influence the deliberations and decision making of the Board of the 4th Defendant Company, pointing out also the matter of the surreptitious inclusion of the Mortgage Clause previously, referred to hereinabove.**

vide Para 45(a) of the Plaint - Document P44(a), P44(b) & P44(c)

ii. **In the said Letter the Plaintiff had further stated, that the relevant Certificates issued by the 3rd Defendant, as well as the Certificate of Conformity issued by the Urban Development Authority had no meaning or validity since they relate to an Amended set of Architectural Plans that had been substituted in August 1985, without the Approval of the 4th Defendant Company, after the construction had commenced in March 1984, based on a set of Architectural Plans that had been approved by the Urban Development Authority in March 1984 and also by the 4th Defendant Company, further noting that such original Architectural Plans, Drawings and Specifications had formed a part and parcel of the Construction Agreement entered into by the said the 4th Defendant Company on 31st January 1984.**

vide Para 45(b) of the Plaint

iii. **The Plaintiff received no reply, to the aforesaid Letter, which only proves that the 1st & 2nd Defendants are at fault and that they were unable to explain and afford the necessary informations and clarifications demanded by the Plaintiff as a Director of the 4th Defendant Company.**

vide Para 45(c) of the Plaint

iv. **The Certificate of Conformity dated 27.04.87 was only received by the Plaintiff in response to the request made for the same by the Plaintiff's Letter dated 12th April'90. The Certificate of Conformity has only certified that the Hilton Hotel had been constructed as per the Amended Architectural Plans approved in 1986. The said Amended Architectural Plans had been an unauthorised set of Architectural Plans that did not form a part and parcel of the Construction Agreement entered into between the 4th Defendant Company and the 1st & 2nd Defendants and that accordingly the Construction Contract remained uncertified.**

vide Para 45(d) of the Plaint - Document P44(b) P44(b)

v. **The Plaintiff immediately brought this serious matter to the notice of the Board of Directors of the 4th Defendant Company at the Board Meeting held on or about 7.03.1990 (P41) and on the Plaintiff's insistence, the Board authorised the Plaintiff to write directly to the 3rd Defendant in such regard.**

vide Para 46(a) of the Plaint - Document P41

vi. **K. Shanmugalingam, Addl. Dep. Secretary Treasury and Government Nominee Director observed this to be a very serious matter, from the Shareholders point of view and that any amendments should have been correctly reported. K. Shanmugalingam suggested that the Plaintiff be assisted by a local Architect or Engineer and that the said original Architectural Plans and the copy of the Bills of Quantities be obtained from the 3rd Defendant, stating further that the State Guarantees had been issued on the basis of the original Architectural Plans providing for 452 Guest Rooms.**

vide Para 46(b) of the Plaint

vii. **Consequently, the engagement of the services of a local Chartered Architect completely vindicated the position taken by the Plaintiff.**

vide Para 46(c) of the Plaint

viii. **The aforesaid Certificate of conformity from the Urban Development Authority dated 27.04.87 had been addressed to 16, Alfred Place, Colombo 3 the Office of the 5th Defendant, Cornel L. Perera, Chairman & Managing Director of the 4th Defendant Company. Accordingly he would have been aware of the substitution of the originally Approved Architectural Plans, but had deliberately suppressed the same from the Board of Directors of the 4th Defendant Company.**

vide Para 45(d) of the Plaint - Document P44(b)

28. PLAINTIFF CALLS FOR ARBITRATION STATING THAT THE CONSTRUCTION IS DIFFERENT

At the Board Meeting held on 24.04.90 (P45(a) the Plaintiff submitted a Memorandum dated also 24.04.90 (P45(b) on the aforesaid serious subject matter, setting out the salient facts and, inter-alia, made the following submissions:

vide Para 47(a) of the Plaint

i) **That the Certifications given by the 3rd Defendant and the Certificate of Conformity given by the Urban Development Authority referred to another set of Plans, Drawings and Specifications, which did not form a part and parcel of the Construction Agreement executed by the said the 4th Defendant Company, on 31st January 1984, on the basis of the Preliminary Agreement entered into on 30.03.83 on the execution of which Preliminary Agreement, the Letter of Award for Construction had been issued on the same said date 30.03.83 to the 1st & 2nd Defendants, as acknowledged in the said Preliminary Agreement.**

vide Para 47a(i) of the Plaint

ii) **Accordingly, the Plaintiff had submitted that the Construction Agreement has remained uncertified, since the issued Certifications referred to another set of Plans, Drawings and Specifications which did not form a part and parcel of the Construction Agreement. Therefore, no payment, whatsoever would be due in the absence of the stipulated and required Certifications from the 3rd Defendant, which Certification should have been based on the originally Approved Architectural Plans.**

vide Para 47a(ii) of the Plaint

iii) **The Plaintiff had concluded that this was a very serious matter and would need thorough examination and clarifications and that all payments to the 1st & 2nd Defendant should be suspended till the above matters are thoroughly examined, satisfactorily clarified and resolved and if not, referred to Arbitration.**

vide Para 47a(iii) of the Plaint

iv) **K. Shanmugalingam, the Addl. Dep. Secretary Treasury, a Government Nominee Director, concurred with the views expressed by the Plaintiff, at the said Board Meeting, reiterating the suggestion that the Plaintiff be assisted with the services of a Local Architect and/or Engineer to obtain a proper and comprehensive Report.**

vide Para 47 of the Plaint - Document P45(a) & P45(b)

29. ANY AMENDMENT REQUIRED WRITTEN AGREEMENT TO ALL AGREEMENTS/CONTRACTS BY ALL PARTIES INCLUDING THE GOVERNMENT OF SRI LANKA
IN ADDITION THE 3RD DEFENDANT REQUIRED WRITTEN AUTHORITY/APPROVAL FROM THE 4TH DEFENDANT COMPANY

i. **Subsequent to the discovery in March'90 of the unauthorisedly amended and substituted Architectural Plans of July '85, the 1st & 2nd Defendants gave up their right to have a full-time Executive Director stationed in Colombo from May'90, managing and in control of the day to day administration and affairs of the 4th Defendant Company. Such change was effected by the amendment of Article 11.05 of the said Investment Agreement (P09) as required in a writing dated 30.04.90 entered into by all parties to the said Investment Agreement, including the Government of Sri Lanka, as clearly evidenced by (P46)**

vide Para 48(a) of the Plaint

ii. **The aforesaid proves that any Amendment to the Investment Agreement, as well as to all other Agreements, which were stipulated therein, including the Construction Agreement (P11), Supplies Contract (P13), Design & Supervision Contract (P14) and Loan Agreement (P15), required Agreement in writing between all parties which included the Government of Sri Lanka as per Articles 6.01 (iv)(f) and 12.02 of the Investment Agreement.**

vide Para 48(b)i & 48(b)ii of the Plaint

iii. **In addition to such written agreement, giving effect to any amendment, the 3rd Defendant, should have had written express authority and direction from the 4th Defendant Company , as the owners to carry out any amendments to the originally approved and contracted Architectural Plans, which formed a part and parcel of the Construction Agreement (P11). However no such written express authority and/or approval had been given by the 4th Defendant Company, to the 3rd Defendant.**

vide Para 48(c) of the Plaint

30. ALL COPIES OF ORIGINAL ARCHITECTURAL PLANS DESTROYED AND/OR SUPPRESSED. SIGNIFICANTLY EXHIBIT `A' TO THE SUPPLIES CONTRACT ALSO MISSING.

NO PROPER INVENTORY OF FURNISHINGS, FIXTURES & EQUIPMENT

i. **The Plaintiff's efforts to obtain a copy of the approved Original Architectural Plans from the 4th Defendant Company, the Urban Development Authority and the 3rd Defendant proved futile, since all of them have been unable to produce an authenticated copy of the originally approved Architectural Plans.**

vide Para 50(i) of the Plaint

ii. **Further, Exhibit "A" to the Supplies Contract (P13) defining the Scope of Supplies of Furnishings, Fixtures & Equipment that was to be supplied by the 1st Defendant, for the Colombo Hilton Hotel of 452 Guest Rooms etc. is also admitted by the 4th Defendant Company to be missing; further admitting that there is not even a proper reconciled inventory of such Supplies of Furnishings, Fixtures & Equipment made by the 1st Defendant, to verify the correctness of such supplies.**

vide Para 51 of Plaint - Document P49(b)

31. THE PLAINTIFF PROBED WITH THE SERVICES OF A LOCAL CHARTERED ARCHITECT, SHELTON WIJAYARATNA, F.I.A.,A.R.I.B.A.,A.A.DIP.LON. A.I. ARB.

i. Therefore in accordance with the suggestion made by K. Shanmugalingam, Government Nominee Director, Addl. Dep. Secretary Treasury , and as authorised by the Board of Directors of the 4th Defendant Company, for the Plaintiff to obtain the services of a local Architect/Engineer, by way of assistance to probe this matter further, the Plaintiff engaged the services of Shelton Wijayaratna, F.I.A., A.R.I.B.A., A.A. Dip (Lond) A.I. Arb. Shelton Wijayaratna who was a Senior Chartered Architect and who had also been a one time President of the Institute of Chartered Architects of Sri Lanka and has had a very wide and varied experience in the Hotel Construction Industry.

vide Para 31(a) of the Plaint

ii. Since the Plaintiff's efforts to obtain a set of the Original Architectural Plans, that had been submitted to the Urban Development Authority in October'83 and approved in March'84, as set out hereinabove had not borne any results, the Plaintiff, proceeded to probe the subject matter further, on the basis of the Original Architectural Plans finalised and submitted in July 1980 by the 3rd Defendant and affirmed to in March '83 at the time of the execution of the Preliminary Agreement on 30.03.83 with the 1st & 2nd Defendants and the issuance of the Letter of Award for Construction to the 1st & 2nd Defendants on the same said date 30.03.83.

vide Para 31(b) & 31(c) of the Plaint

iii. As already set out hereinabove Hilton International's Forecast of Income and Expenses submitted in August'81 had been based on the said Architectural Plans of July'80, which had, inter-alia, provided for 456 Guest Rooms 22 Floors Basements, 19 Guest Rooms Towers etc; the said Forecast of Income & Expenses had been confirmed by Hilton International's letter dated 31st March 1983, after the execution of the aforesaid Preliminary Agreement which Letter had also been copied to the 1st Defendant.

vide Para 10(b) of the Plaint

iv. The subsequent Profitabilities Forecast a Cash Flow Protections prepared and submitted by the 1st Defendant in March'83, October'83 and December'83 was strictly in conformity with the aforesaid Forecast of Income & Expenses of Hilton International based on the aforesaid July'80 Plans.

vide - Document P16

v. The Plaintiff required the said Shelton Wijayaratna to examine the said original Architectural Plans of July'80 and compare the same with the set of the unauthorisedly substituted"Amended" Architectural Plans dated July'85 and approved by the Urban Development Authority as "Amended" Plans in April'86.

vide para 31(d) of the Plaint

32. LOCAL CHARTERED ARCHITECT'S REPORT.

Shelton Wijayaratna, F.I.A.,A.R.I.B.A.,A.A. Dip.Lon. A.I. Arb. Chartered Architect has issued a Report dated 22nd August 1990 (P32(a)) addressed to the Plaintiff in such regard. The main discrepancies pointed out in the said Report, by Shelton Wijayaratna are as follows:

i) the height of the building as per the said original Architectural Plan, had been 274.6 feet whilst, as per the unauthorisedly Amended Architectural Plan the height of the building is 233.9 feet.

ii) the number of Floors in the said original Architectural Plan including a Mezzanine Floor and the Ground Floor has been 23 floors whilst the unauthorisedly Amended Architectural Plan has only 20 Floors including the Ground Floor and has no Mezzanine Floor in the main building.

iii) **the said Original Architectural Plan had provided for 19 Floors of Guest Rooms whilst the said unauthorisedly Amended Architectural Plan has provided for only 17 Floors of Guest Rooms.**

iv) **the said Original Architectural Plan had provided for 456 Guest Room "Bays", whilst the said unauthorised Amended Architectural Plan had provided for only 408 Guest Room "Bays" plus a further 17 Guest Room "Bays" depicted on earlier lobby areas, which would require physical verification.**

v) **the said original Architectural Plan had provided Basement Levels going down to a 30.5 feet below the Ground Level taking Parsons Road, as a datum, whilst the unauthorisedly amended Architectural Plan does not have a Basement and the Ground Floor is stated to be partly sunken at certain sections upto 4.1 feet below the ground level taking Parsons Road, as a datum.**

- **The covered car parking for 400 vehicles, as stipulated in the Prospectus was to be in such Basement area and not on Ground Floor and upper Ground Floor areas, which are very valuable in the said Fort area and could be utilised for high income generation and profitable commercial usage.**

vi) **Shelton Wijayaratna's Report has also pointed out that in the absence of the Basement in the unauthorisedly Amended Architectural Plan, as opposed to the Basement provided in the said Original Architectural Plan, the two Foundations too could differ.**

vii) **The said Shelton Wijayaratna had also examined a Schedule of Amendments dated 15th July 1985 prepared by the 3rd Defendant, referring to the said unauthorisedly Amended Architectural Plans, also dated 15th July'85, that had been filed in August 1985 referred to hereinabove and the said Shelton Wijayaratna has expressed opinion, *that the differences between the two sets of Architectural Plans examined by him are more or less as set out in the Amendments in the said Schedules.***

vide Para 32 of the Plaint - Document P32(a)

This clearly reveals that the said Amendments Scheduled by the 3rd Defendant themselves as amendments effected to the original Architectural Plans, discloses and reconciles the actual difference between the original Architectural Plans (P08) July'80 and the unauthorisedly Amended Architectural Plans of July '85 proving the Plaintiff's very Case.

33. **1ST & 2ND DEFENDANTS & 3RD DEFENDANT ADMITS THAT THE HOTEL COMPRISES OF 20 STOREYS & NOT 22 STOREYS AS STIPULATED IN THE CONSTRUCTION AGREEMENT**

i. **Whilst further probing at the 4th Defendant Company's Office, and examining copies of Monthly Reports certified and furnished by the 1st & 2nd Defendants and the 3rd Defendant, the Plaintiff discovered that such Monthly Reports had confirmed and certified that the Colombo Hilton Hotel had comprised of only 20 Storeys i.e. Floors.**

vide Para 55(b) of the Plaint - Document P53(a) & P53(b)

ii. **The Construction Agreement had clearly stipulated, that the Colombo Hilton Hotel was to comprise of 22 Storeys i.e. Floors; and so did the Prospectus.**

vide Para 13(a) of the Plaint - Document P11

iii. **This is a self-admitted violation, contravention and a deliberate breach of the Construction Agreement, and also the Prospectus under the very hand of the 1st & 2nd Defendants and the 3rd Defendant themselves estopping them from now denying the same.**

iv. **Further, this undisputedly corroborates the Report of Shelton Wijayaratna, Chartered Architect referred to hereinabove.**

vide - Document P32(a)

34. "BAYS" WHAT IS IT?

i. The 3rd Defendant, being the Architect of the Colombo Hilton Hotel Project, in its Affidavit dated 20.11.90 filed through Kenzo Watanabe, Architect, its Executive Director has Affirmed at paragraph 12 therein that.

This defendant further states that a "Bay" (or a "Module" as it is sometimes referred to) is a construction unit of a standard size room. The Guest Room Floors of the hotel are at the initial planning stages divided into such "Bays" Guest Rooms of a Hotel comprise of standard size Rooms as well as Suites. Suites are of various sizes and can comprise of several bays.

ii. Accordingly, the term "Bay" and/or "Bays" referred to in all the Agreements/Contracts, pertaining to the said Colombo Hilton Hotel, would only mean and include "a construction unit of a standard size room" and/or "construction units of standard size rooms"

iii. The local Chartered Architect Mr. Shelton Wijayaratna as per his aforesaid Report (P32(a)) dated 22.08.90, had also defined a "Bay" as follows

A ROOM BAY IS EXPLAINED AS FOLLOWS

Guest Rooms areas in First Class Hotel such as this are designed on the basis of standard Room Bays, sometimes referred to as Room Modules, which are normally sold as standard double occupancy Guest Rooms. Therefore one Room is in actual practice one standard Guest Room. However, two or more Room Bays are combined to form and provide for Junior and Senior Suites which are referred to as Suites as opposed to standard Guest Rooms.

iv. Since "Suites" comprise of a multiple of two or more of such standard size "Bays" i.e. standard size rooms, generally Profitability Forecasts in respect of International Hotels are prepared, computing Room Revenue on the total of such standard size Rooms i.e. "Bays", considered at the Average Standard Room Tariff as in this instant case, without adjusting for premiums charged for Suites. i.e. Room Income on a Suite comprising of 3 standard size Rooms/i.e."Bays" would get computed on the basis of 3 Rooms at the Average Room Tariff of say, US $ 50.0 per day i.e. therefore at a total of US $ 150.0. Whilst such Suite would generally be sold at a premium price, such as US $ 175.0. or more in such extra premium of US $ 25.0 or more on the 3 Rooms/i.e."Bay" is thus ignored for facilitating convenient computation of Room Revenues in the preparation of Profitability Forecasts as aforesaid. Sometimes the same Suite would be sold as 3 separate Rooms, locking the connecting Doors, being generally so by designed.

vide Para 32 of the Plaint - Document P32(a)

35. THE UNBELIEVABLE FASCINATING COST OF THE COLOMBO HILTON HOTEL

i. The Government of Sri Lanka had already afforded an Import Duty Exemption on all Imports made for the construction, equipping and furnishing of this Colombo Hilton Hotel, estimated to have costed the Government over Rs.650.0 million on such Exemption alone.

ii. In the context of the Claims made in their Statements of Objections for the Cost of the Hotel, by the 1st & 2nd Defendants as at September'90 of purported dues of about Rs.6000.0 Mn. today amounting to about US $ 175.0 Mn. i.e. S.L. Rs. 7250.0 Mn, the cost of development of this Colombo Hilton Hotel, at todays value claimed, averages out to nearly Rs.20.0 million per average cost of a Guest Room and Rs.19,000/- as average cost per sq.ft., that too also subject to physical verification and conformation of the correctness of the square foot areas.

36. WHAT WAS HELD OUT TO THE PUBLIC IN THE PROSPECTUS CANNOT BE VARIED

i. The prospectus published by the 4th Defendant Company (P05) invited the Public to invest in Shares of the 4th Defendant Company on the basis of 22 Floors, 452 Rooms, in 2 Towers and covered i.e. basement car parking for 400 Vehicles, Recreational Facilities etc, and the public investors were made to believe *"that they could expect to receive a reasonable return on their investments within a reasonable period of time..."* vide pages 8 & 16 of (P05). The said Prospectus has been signed, amongst others, by the 1st & 2nd Defendants, Cornel & Co. Ltd., and the Government of Sri Lanka, all of whom were the Parties to the Investment Agreement (P09); vide page 26 of (P05). Further more 1st & 2nd Defendants, Cornel & Co. Ltd. and Delmege Forsyth & Co. Ltd., were Promoters named in the Prospectus.

vide Paras 11 & 20 - Documents P05 & P09

ii. In this regard the attention of Your Lordships' Court is drawn to the following Sections of the Companies Act No: 17 of 1982:

Section 40: Specific requirements as to particulars in the Prospectus inter-alia, includes the matters set out in Part I of the Third Schedule to the said Act, i.e.

"The primary objects of the Company, that is to say, the objects which the subscriber or promoters intend that the Company should carry out during the period of five years from the date of the commencement of the business by the Company."

In this case the primary object was to own and operate a International 5 star class Hotel of 452 Guest Rooms etc. as set out in the Prospectus.

Section 41: Experts consent to issue of Prospectus containing statement by him.

Section 43: Registration of Prospectus

Section 44: Restrictions of alteration of terms mentioned in Prospectus

Section 45: Civil Liability for mis-statements/untrue statements in Prospectus

Section 46: Criminal Liability for mis-statement/untrue statements in Prospectus

iii. Since, the 1st & 2nd Defendants, now admit, that the said Hotel is not in accordance with the stipulations in the said Prospectus, being Signatories thereto and Promoters named therein, as per Section 46, of the said Act, they would be liable for prosecution: i.e.

46(i) "Where a Prospectus issued on or after the appointed date includes any untrue statement, any person who authorised, the issue of the Prospectus shall be guilty of an offence and shall be liable to a fine not exceeding five thousand rupees or to imprisonment of either, description for a term not exceeding two years or to both such fine and imprisonment...."

37. UNDER CIRCUMSTANCES OF FRAUD GUARANTEES ARE NOT VALID & COULD BE SET ASIDE BY COURT

i. The Government of Sri Lanka guaranteed the repayment of the Loans, provided by the 1st & 2nd Defendants for the construction and equipping of a 456 Guest Room (4 Rooms allocated as the Manager's Apartment), international 5 Star Class Hotel, with 22 Storeys i.e. Floors, in 2 Towers and basement parking for 400 Vehicles and Recreational Facilities etc. As per the Profitability Forecasts & Cash Flow Projections of the 1st Defendant, the said Loans, were to be serviced from the would be income generated from 452 Guest

Rooms (i.e. excluding the 4 Rooms as allocated for the Manager's Apartment); and other Commercial, Recreational, Public and Service facilities and areas. The said Government Guarantees were obtained on the premise as such representations by the 1st & 2nd Defendants.

vide Para 20 of the Plaint

ii. **The 4th Defendant Company's published Accounts reveal, that the annual interest cost incurred, alone exceeds its annual turnover, demonstrating the impossibility of such debt service. Accordingly the 1st & 2nd Defendants have sought recourse to the Government of Sri Lanka for payments under the said State Guarantees, which payments if made would have to be ultimately reimbursed to the Government of Sri Lanka as the Guarantor by the 4th Defendant Company.**

iii. **Since such a Hotel as had been held out and represented by the 1st & 2nd Defendant has in fact not been constructed by them, the said Government Guarantees cannot be enforced and a claim under the said Guarantees will be fraudulent and no payment need be made.**

iv. **In the above context it is submitted on behalf of the Plaintiff, that in Edward Owen Engineering Ltd. Vs Barclay's Bank International Ltd. (1978) Q.B. 159 at 171.**

Lord Denning M.R. observed:

> ***"All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer: nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice"***

The same principle enunciated in Edward Owen's case has been applied and followed in the following cases:

United City Merchants (Investments) Ltd. Vs Royal Bank of Canada and Others - (1982) 2 All E.R. 720 (H.L.)

United Trading Corporation S.A. Vs Allied Arab Bank Ltd. - (1985) 2 Lloyd's Reports 554 (C.A.)

Reference is also drawn to the Article on Bank Guarantees, in Sri Lanka - Bar Association Law Journal (1988) Vol II Part II Page 45.

Therefore in the given circumstances of fraud, the said State Guarantees in question are invalid and should be set aside. Accordingly, the 1st & 2nd Defendants would not have a right to claim under the said State Guarantees, having perpetrated a fraud on the 4th Defendant Company and from being paid from Public funds under such State Guarantees; they would be further liable for projection for fraudulent misrepresentation obtaining State Guarantees on false pretences and cheating.

v. **The Hon. Attorney-General appearing for the 4th Defendant Company significantly did not object to the issuance of the Interim Injunctions and nor did the Hon. Attorney-General seek Leave to Appeal, against the Order of the learned District Judge, granting the said Interim Injunctions.**

38. **GRAVITY AND CONSEQUENCES OF NOT APPOINTING AN INDEPENDENT ENGINEER IN MAY 1988, ON THE BASIS OF 7TH DEFENDANT K.N. CHOKSY'S NOTE DATED 08.08.88**

i. **Even though the Final Inspection is stated to have been carried out by the 3rd Defendant on 24th and 25th March 1988, the Final Certificate had been issued by the 3rd Defendant only after the**

Board Meeting held on 12.08.1988, where at the Decision had been made, not to retain the services of an Independent Engineer, on the basis of the Note dated 08.08.88 submitted by the 7th Defendant K.N. Choksy.

vide Para 33(c) of the Plaint

ii. The Decision not to appoint an Independent Engineer at that point of time in early 1988, prior to the issuance of the Final Certificate dated 25.08.1988 as aforesaid is now shown to be wrong and detrimental to the interests of the 4th Defendant Company and its Shareholders.

vide Para 33(d) of the Plaint

iii. Had an Independent Engineer been appointed as demanded for in early 1988, the 4th Defendant Company would not have been prevented from ascertaining the truth and finding out the actual and factual position as has now been discovered, with much effort and endeavor as set out herein.

vide Para 33(d) of the Plaint

39. THE 1ST & 2ND DEFENDANTS HAVE A 5-YEAR LIABILITY PERIOD FROM 25.08.88

i. The Clause 17(6) of the General Conditions of Contract for Construction entered into by and between the 1st & 2nd Defendants and the 4th Defendant Company provides as follows;

17(6) LIABILITY AFTER THE FINAL CERTIFICATE.

"Unless otherwise provided herein under, the Consortium shall be under no liability in respect of defects in or damages to the Works or any part thereof or damages or losses resulting therefrom to the Employer or any other party appearing or occurring after the Final Certificate for the Works or any Section thereof has been issued.

Provided, however, that if such defects, damages or losses were caused or incurred due to latent defects in the works or any part thereof found within five (5) years after the issuance of the Final Certificate and such latent defects were attributed to the malicious intent or gross negligence of the Consortium in execution of the Works hereunder, The Consortium shall be liable to the Employer in respect of such defects, damages or losses"

vide Para 56 of the Plaint - Document 12

ii. Accordingly, since the Final Certificate of the 3rd Defendant was issued on 25.08.88, the Plaintiff was well within this 5-Year Liability Period stipulated, having even raised queries, previously and pointing out discrepancies even before such Final Certificate was issued, in filing this Derivative Action on 13.09.90.

40. WRONG-DOER DIRECTORS NEGLECT AND FAIL TO TAKE ACTION NOTWITHSTANDING THE PLAINTIFF'S URGINGS TO DO SO

i. In the above context, the Plaintiff made every effort to resolve the above issue at the Board of Directors of the 4th Defendant Company and at the Ministry of Finance, but failed to achieve any results, due to the fact that the other Local Directors, who were exercising the influence that they had gained in Society and who were also moving very closely with the upper echelons of Government, being both politically and financially very influential, did nothing and were not supportive and even obstructed the Plaintiff in his efforts, except for the Government Nominee Director Addl. Dep. Secretary Treasury, K. Shanmugalingam. Similarly the 1st & 2nd Defendants too, having carried out other prestigious Governmental Projects were similarly very influential and powerful, in influence peddling and lobbying.

vide Para 54(a) of the Plaint

ii. Several Memoranda/ Correspondence dated 12.04.90 (2) 24.04.90 (2) (P44(a) & P44(b)) 31.05.90, 29.06.90 and 04.07.90 (P52(a), P52(d) & P52(e)) were submitted by the Plaintiff, to all the Directors of the 4th Defendant Company, after the discovery in March '90 of the surreptitiously introduced substituted set of Architectural Plans,

reiterating the seriousness of the matter and urging that proper action be taken thereon; shockingly, mysteriously and regretfully this did not bear any results except for a silent indifference. The Directors had even neglected and failed to take up the said several matters and breaches in writing, with the 1st & 2nd Defendants, when the Plaintiff had required them to do so.

vide Para 45 of the Plaint - Document P44(a) & P44(c)
vide Para 54(b), 54(c) & 54(d) - Document P52(a), P52(d) & P52(e)

iii. **According to the established principles and norms, for the proper conduct of Society, the several serious breaches, questionable conduct and actions referred to herein, normally and correctly should have been promptly subjected to proper inquiry, investigative action and prosecution by the appropriate law enforcement authorities of the Country, purely on the basis of virtual complaint and prima-facie evidence, irrespective of the status of the parties concerned, upholding that the rule of the law is above all.**

iv. **A Court of law has now upheld the said prima-facie evidence, after having conducted an Inquiry there into, and has judiciously deemed that the matter needs further investigations, since the given circumstances is a clear case of acting in fraudulent collusion detrimental and adverse to the interests of the 4th Defendant Company and its Shareholders.**

41. PLAINTIFF FILES DERIVATIVE ACTION IN THE RIGHT OF & ON BEHALF OF THE 4TH DEFENDANT COMPANY

ALL RELIEFS CLAIMED ARE IN THE INTEREST OF & FOR THE BENEFIT OF THE 4TH DEFENDANT COMPANY & ITS SHAREHOLDERS

In this background the Plaintiff, as a Shareholder of the 4th Defendant Company, instituted a Derivative Action, on behalf of and in the right of the 4th Defendant Company, on 13th September'90, against the Defendants and sought the following reliefs against the 1st, 2nd & 3rd Defendants on one hand , and the 4th Defendant Company on the other. All reliefs prayed for have been in the interest of and for the benefit of the 4th Defendant Company and its Shareholders. The Plaintiff has sought;

a) ***for a declaration that the 1st and 2nd Defendants are not entitled to any payments,whatsoever under and in terms of and according to the tenor of the said Construction Agreement referred to herein.***
vide prayer (a) of the Plaint

b) ***for a declaration that the 1st Defendant is not entitled to any payment, whatsoever under and in terms of and according to the tenor of the said Supplies Contract referred to herein.***
vide prayer (b) of the Plaint

c) ***for a declaration that the 3rd Defendant is not entitled to have received any payments, whatsoever under and in terms of and according to the tenor of the Design & Supervision Contract referred to herein.***
vide Prayer (c) of the Plaint

d) ***for a declaration that the said 1st & 2nd Defendants abovenamed are not entitled to make any claim, whatsoever under the said Loan Agreement referred to herein and therefore precluded from claiming under or enforcing the said Guarantees referred to herein.***
vide Prayer (d) of the Plaint

e) ***for a declaration that the 4th Defendant Company is not under any obligation to make any further payment, whatsoever to the 1st and/or 2nd and /or 3rd Defendants abovenamed under the said contracts and agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract and the said Loan Agreement.***
vide prayer (e) of the Plaint

f) for a declaration that the 4th Defendant Company is entitled to the reimbursement of all monies paid and received by the 1st and/or 2nd and/or the 3rd Defendants abovenamed, to date.

vide prayer (f) of the Plaint

g) for an Interim Injunction restraining the said 1st, & 2nd Defendants and the 3rd Defendant respectively, by themselves their representatives, servants and agents or otherwise howsoever,from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two Guarantees and referred to in the plaint, until the final determination of this action.

vide prayer (g) of the Plaint

h) for an Interim Injunction restraining the 4th Defendant Company by itself, its Directors, Servants and Agents or otherwise, howsoever, from entertaining any demand and/or claim from the 1st and/or the 2nd and/or the 3rd Defendants abovenamed in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint until the final determination of this action.

vide prayer (h) of the Plaint

i) for a Permanent Injunction restraining the said 1st & 2nd Defendants and the said 3rd Defendant respectively, by themselves, their representatives, servants and agents or otherwise, howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever, in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two guarantees referred to in the plaint.

vide prayer (i) of the Plaint

j) for a Permanent Injunction restraining the 4th Defendant Company by itself, its Directors, servants and agents or otherwise howsoever, from entertaining any demand and/or claims, whatsoever, from the 1st and/or 2nd and/or 3rd Defendants abovenamed in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint.

vide prayer (i) of the Plaint

42. DISTRICT COURT ISSUES ENJOINING ORDERS

The learned District Judge, having satisfied himself, on 18th September 1990, issued Enjoining Orders, in terms of, prayer "g" aforesaid against the 1st, 2nd & 3rd Defendants on one hand, and in terms of prayer "h" aforesaid against the 4th Defendant Company on the other, and also directed the Issue of Notices of the Interim Injunctions respectively, and Summons on the said Defendants.

43. DEFENDANT DIRECTORS UNABLE TO CONTROVERT THE PLAINTIFF'S AVERMENTS IN WRITING

i. The Directors of the 4th Defendant Company, too were made Defendants for the purpose of Notice and no reliefs were claimed against them in the aforesaid Action, in conformity with the nature and style of a Derivative Action. All reliefs prayed for in such Action, have been for the benefit and the interest, of the 4th Defendant Company and its Shareholders. The 1st & 2nd Defendants were also prevented from claiming and receiving any monies under the State Guarantees; any payments under which, would have had to be reimbursed to the Government of Sri Lanka by the 4th Defendant Company.

ii. **Plaintiff thereafter submitted a Memorandum dated 20.12.90 challenging the Directors and exhorting them to individually, deny in writing, the said several matters pertaining to this massive fraud and also to file Answer in Court, and controvert if they could, the matters averred of in the Plaint, as they as Directors, had been named as Defendants in the said legal Action. None of the Directors responded to the Plaintiff or filed Answer in Court, controverting the said several facts, except the 9th & 11th Defendants, the Representatives of the 1st & 2nd Defendants, who filed Answer, together with the 1st & 2nd Defendants. Immediately after the aforesaid Memorandum dated 20.12.90, on 22.12.90, the Plaintiff was removed as a Director of the 4th Defendant Company.**

iii. **Notwithstanding the aforesaid challenge and exhortation made by the Plaintiff, the 7th Defendant K.N. Choksy, who was represented by his own separate Counsel in Court, amongst other Directors, failed to file Answer, on such a matter of public interest, neglecting the fiduciary duties & responsibilities of a Director and, further notwithstanding that a number of averments in the Plaint, specifically referred to his own conduct and actions, and which conduct and actions specifically prevented and obstructed a correct examination being carried out, evidently endeavouring to suppress the discovery and disclosure of this fraud; and further preventing the matter being probed by the Board of Directors, for proper action to have been taken thereon, against the fraudulent and miscreant parties.**

iv. **The material evidence supported by Documents adduced by the Plaintiff were so strong, that the 4th Defendant Company was unable to controvert such documents and evidence by filing an Affidavit through its Officers, more particularly through its Chairman & Managing Director, Cornel L. Perera, who actively participated in the Colombo Hilton Project from its inception, and Director K.N. Choksy, who had given written opinions in this regard, preventing a correct examination and who had intervened to make payments to the 1st & 2nd Defendants disregarding the Plaintiff's objections. Therefore, the 4th Defendant Company did not file any Affidavit or Objections against the issuance of the Interim Injunctions prayed for by the Plaintiff; and accordingly the 4th Defendant Company did not and could not petition the Court of Appeal to set aside the Order of the Learned District Judge.**

44. **OBJECTIONS TO THE ISSUANCE OF THE INTERIM INJUNCTIONS.**

4TH DEFENDANT COMPANY DOES NOT OBJECT. NONE OF THE LOCAL DIRECTORS OBJECT

i. **Objections to the grant of the Interim Injunction, in terms of prayer "g" aforesaid were filed only by the 1st, 2nd & 3rd Defendants, and the 9th & 11th Defendants joining the 1st & 2nd Defendants.**

ii. **Significantly, the 4th Defendant Company did not file Objections to the granting of the Interim Injunction against it, in terms of prayer "h" aforesaid and nor did any of its Directors.**

iii. **None of the Defendants sought to vacate the Enjoining Orders that had been issued.**

iv. **Except the 8th Defendant, who failed to file Proxy, the 4th Defendant Company and the 5th, 6th, 7th & the 10th Defendant, who were present through their Attorneys-at-law at the Inquiry into the Objections of the 1st, 2nd & 3rd Defendants, to the granting of the Interim Injunction against them in terms of prayer "g" aforesaid, did not make any objections thereto and/or any submissions thereon.**

45. **ANSWERS FIELD BY THE DEFENDANTS. LOCAL DIRECTORS DO NOT FILE ANSWERS**

i. **The 1st & 2nd Defendants, together with the 9th & 11th Defendants filed joint Answer, and the 3rd Defendant filed a separate Answer, in which Answer they prayed for the dismissal of the Plaintiff's Action.**

ii. **The 5th, 6th & 7th Defendants, having previously obtained dates to file Answers, however on 11.03.91. filed Motion stating that they were not filing Answers.**

iii. **The 4th Defendant Company, appearing by the Addl. Solicitor General Shibly Aziz P.C., having previously obtained dates to file Answer, on 11.03.91, the final date for Answer, made Application for further time to file its Answer, and the District Judge refusing such Application, filed its Answer later in the day, with the permission of Court.**

iv. **The 10th Defendant, K. Shanmugalingham, Government Nominee Director, Add. Dep. Secretary Treasury, did not file Answer. The 8th Defendant, the other Government Nominee Director had not even filed Proxy.**

46. **PLAINTIFF FILES FURTHER PLEADINGS ON THE 4TH DEFENDANT COMPANY'S ANSWER.**

4TH DEFENDENT COMPANY'S ANSWER VAGUE & EVASIVE

i. **Since the 4th Defendant Company's Answer had failed to plead to several serious and material Averments referred to in the Plaint, as required by Section 75(d) of the Civil Procedure Code, and further since the said Answer had not expressly traversed several Averments and in many instances had evasively pleaded unawareness falsely asserting in certain instances that certain averments in the Plaint were mere speculation and conjecture in an attempt to conceal the real issues between the Parties, the Plaintiff was compelled to file Further Pleadings in this Action, under Section 79 of the Civil Procedure Code, to enable the Court to effectually and completely adjudicate upon and settle all relevant issues pertaining to this Action.**

ii. **Upon the District Court misdirecting itself and prima-facie refusing to accept such Further Pleadings, without any Inquiry thereto, on a subsequent direction by the Court of Appeal, on an Application made by the Plaintiff, the District Court upon Inquiry into the said Further Pleadings, accepted the same which is filed of record now.**

iii. **The said Answer of the 4th Defendant Company, did not contain any express prayer as normally required in Law, but contained only a Statement at the end, inter-alia, stating as follows:**

"More over this Defendant states that in the event that this Court finds that the averments made by the Plaintiff are legitimately entitled to succeed this defendant, will as a matter of course take immediate action to protect its interest and those of its Shareholders as circumstances would deem fit".

4TH DEFENDANT COMPANY DEFENDS WRONG-DOER DIRECTORS WITHOUT PROPER INQUIRY

iv. **Furthermore, the said Answer of the 4th Defendant Company, had been filed without having conducted a proper inquiry and /or investigation, into the said several matters, to ascertain the truth thereof and had further made specific endeavour to defend, deny, explain and answer, certain Averments in the Plaint, which referred to the conduct and actions of the "wrong-doer" Directors, without any inquiry and/or investigation thereinto and without personal knowledge thereof, and further without Proxy to do so, whilst the said Directors were represented by their own separate Counsel; and whilst the 5th, 6th & 7th Defendants filed Motion stating that they were not filing Answer.**

4TH DEFENDANT COMPANY'S DRAFT ANSWER GIVEN TO 1ST & 2ND DEFENDANTS FOR COMMENTS PRIOR TO FILING IN COURT

v. **The Plaintiff has subsequently shockingly discovered, that the Draft Answer of the 4th Defendant Company, prepared by the Attorney General's Department, had been given to the 1st & 2nd Defendants for their comments, prior to being filed in Court on 11.03.'91., notwithstanding the fact that this Action had been instituted in**

the right of the 4th Defendant Company and in its very interest. This has been further notwithstanding the grave fact, that the said 1st & 2nd Defendants are the very fraudulent parties, amongst other, against whom reliefs have been claimed in this Action in the very interest and benefit of the 4th Defendant Company and its Shareholders and further disregarding that the said 1st & 2nd Defendant conduct and actions have been detrimental and adverse to the very interests of the 4th Defendant Company and its Shareholders, whilst the said Defendant had filed their own Answer through separate Counsel.

47. DIRECTORS ENDEAVOUR TO JEOPARDISE PLAINTIFF'S DERIVATIVE ACTION BY ATTEMPTING TO ADOPT FRAUDULENT ANNUAL ACCOUNTS OF MARCH '90, ON THE PROMPTING OF THE 7TH DEFENDANT K.N. CHOKSY

i. At the Board Meeting held on 30.10.90, i.e. after the institution of the aforesaid Derivative Action, when the Plaintiff disputed and objected to the adoption of the Annual Accounts of the 4th Defendant Company for the Year Ended 31.03.90, the 7th Defendant K.N. Choksy, prompted the Representative of the 1st & 2nd Defendants, drawing attention to Article 129 of the Articles of Association of the Company, which Article afforded the right of veto over Board Decisions to the 1st & 2nd Defendants, to take undue advantage and cover under such provision, and thereby to adopt a fraudulent set of Annual Accounts, with a view to deliberately jeopardising the Derivative Action pending in Court, which Action had been filed in the very interest of the 4th Defendant Company and its Shareholders.

3231/spl. vide Para 6 of the Plaint

ii. Notwithstanding the fact, that the Plaintiff pointedly had stated, that he had instituted the said Action in Court, as a Derivative Action, in the right of the 4th Defendant Company, and in its very interest and that of its Shareholders, the 7th Defendant K.N. Choksy , required the Plaintiff to leave the Board Meeting, at the Board Meeting held on 22.11.90 to adopt the aforesaid Annual Accounts, and further notwithstanding the serious implications of the matters disclosed in the said Action, vis-a-vis the conduct and actions of the 1st & 2nd Defendants, the Board continued to have deliberations on the subject matter of the said Action, with the presence and participation of the 1st & 2nd Defendant's Representative, notwithstanding their conflicting interests, and disregarding the interest of the 4th Defendant Company and its Shareholders, in sheer disregard of the specific recorded objection to the same by the Plaintiff, made prior to leaving such Board Meeting, as a consequence of the 7th Defendant K.N. Choksy's aforesaid request; thereby deliberately misleading and coercing the Government nominee Directors thereon.

48. PLAINTIFF FILES ANOTHER ACTION. DISTRICT COURT ENJOINS THE 4TH DEFENDANT COMPANY FROM ADOPTING THE ANNUAL ACCOUNTS OF 31.03.90

By a further Legal Action DC Colombo 3231/Spl., instituted on 11.01.91 the Plaintiff has restrained and enjoined the 4th Defendant Company, from tabling and adopting the Annual Accounts of March '90, which had been hastily adopted by the Board, at a Board Meeting held on 27.11.90 with mere 24-hour notice, under the cover of the aforesaid Article 129 of the Articles of Association, disregarding the rejection of the said Annual Accounts by the Plaintiff, a Fellow Chartered Accountant, and deliberately in contravention and in contempt of the terms of the Enjoining Orders issued in this Action; and further disregarding the direction that had been given by the Secretary Ministry of Finance, in such regard.

49. THE CONDUCT & ACTIONS OF "WRONG-DOER" DIRECTORS

i. a) The Board of Directors of the 4th Defendant Company, failed and neglected to take cognisance of the wrong-doings of certain Directors and take any action whatsoever thereon, or even to conduct any inquiries and/or investigations into such wrong doings, which were detrimental to the interests of the 4th Defendant Company and its Shareholders.

b) **Furthermore, the 4th Defendant Company, being a Public listed Company quoted in the Colombo Stock Exchange, the said wrong-doing conduct and actions of the Directors under reference, are breaches of the fiduciary duties and responsibilities of Directors of Public listed Companies, towards the Company and its Shareholders.**

c) **Such wrong-doing conduct and actions of the Directors under reference, are separately set out hereinbelow.**

EXECUTIVE DIRECTOR - A. NAKA, REPRESENTATIVE OF THE 1ST & 2ND DEFENDANTS

ii. **Wrong-doing conduct and actions of A. Naka, Representative of the 1st & 2nd Defendants, who functioned as the full-time Resident Executive Director of the 4th Defendant Company from 06.03.'84.to 24.11.86. in charge of the day to day administration and management, of the 4th Defendant Company;**

a) **in contravention and in violation of the various Agreements/Contracts referred to herein, arranged for and obtained a new set of Architectural plans dated 15.07.85, described as "Amended" plans, without any notice to and /or approval and/or authority from the Board of Directors of the 4th Defendant Company,**

b) **acted in gross violation and in insubordination, of the Board Decisions made at that very same point of time on 25.06.85. and 25.07.85; which Board Decisions inter-alia required, copies of Progress Reports and other relevant documents from the 1st & 2nd Defendants and the 3rd Defendant, to be forwarded to the Board of Directors of the 4th Defendant Company; such Board Decisions were made at the Plaintiff's specific instance and further documented by the Plaintiff, by his Letter dated 22.07.85, forwarded to the Board of Directors of the 4th Defendant Company,**

c) **specifically and deliberately acted in blatant violation of the said Board Decisions, in suppressing the aforesaid new set of Architectural Plans so introduced, described as a"Amended Plans, from the Board of Directors of the 4th Defendant Company,**

d) **arranged for the forwarding of the aforesaid new set of Architectural Plans of 15.07.85, together with certain Schedules of Amendments, to the Urban Development Authority with a letter dated 08.08.'85 signed by an employee of the 4th Defendant Company, who was directly his subordinate and whose scope of duties did not warrant such an act, without any notice to, and/or approval and/or authority from the Board of Directors of the 4th Defendant Company,**

e) **caused to obtain the Urban Development Authority's Approval in or around 24.04.86, for the aforesaid new set of Architectural Plans of 15.07.85, substituted described as "Amended " Plans aforesaid, and further suppressed the said matter from the Board of Directors of the 4th Defendant Company, acting as the agent of the 1st & 2nd Defendants, in collusion with the 3rd Defendant, solely for their interest and benefit, surreptitiously amending the originally approved Architectural Plans of October '83, which formed a part and parcel of the Construction Agreement and on which the construction of the Colombo Hilton Hotel had commenced long before previously in March '84, with the approval of the Board of Directors of the 4th Defendant Company in January '84 and the approval of the Urban Development Authority in March '84.**

f) **in the course of the aforesaid conduct and actions, he further contravened the provisions of the several Agreements/Contracts referred to herein, which stipulated that any such amendments and/or changes, had to be entered into in writing with unanimous approval of all parties to such Agreements/Contracts, including the Investment**

Agreement, to which the Government of Sri Lanka, was also a party and signatory.

g) suppressed and/or has destroyed the 4th Defendant Company's authenticated copies of the original Architectural Plans that were in his custody, as the Executive Director of the 4th Defendant Company.

EXECUTIVE DIRECTOR - H. OGAMI REPRESENTATIVE OF THE 1ST & 2ND DEFENDANTS

iii. Wrong-doing conduct and actions of H.Ogami, Representative of the 1st & 2nd Defendants, who functioned as the full-time Resident Executive Director of the 4th Defendant Company from 24.11.86 to 30.04.90, in charge of the day to day administration and management of the 4th Defendant Company;

a) being aware of the substitution of the original Plans as aforesaid, continued to deliberately suppress from and mislead the Board of Directors of the 4th Defendant Company of such matter, notwithstanding the specific queries repeatedly raised by the Plaintiff at the Board Meetings of the 4th Defendant Company and elsewhere, in relation to the discrepancy in the number of Guest Rooms, Floors and the Basements for covered car parking,

b) when the discrepancy of the number of Guest Rooms was queried by the Plaintiff, willfully amended and reformulated the Profitability and Cash Flow Projections, prepared and submitted previously by the 1st Defendant, both before construction and after the commencement of the Colombo Hilton Hotel, reducing the number of Guest Rooms therein, without any rational explanations thereto, through it materially affected the Turnover and Profitability of the Colombo Hilton Hotel,

c) notwithstanding the conflict of interest as a Representative of the 1st & 2nd Defendants, objected to the Government Nominee Director M.T.L. Fernando's (Fellow Chartered Accountant, Precedent Partner Ernst & Young) suggestion, to appoint an independent Engineer, to examine the constructed Colombo Hilton Hotel, in the background of the queries raised by the Plaintiff, prior to the issuance of the Final Certificate by the 3rd Defendant, and thereby deliberately prevented the 4th Defendant Company from ascertaining the factual position and the truth, in relation to the substitution of the original Plans as aforesaid and the fraud perpetrated on the 4th Defendant Company,

d) notwithstanding the discrepancies queried by the Plaintiff and the suggestion at the Board, to appoint an independent Engineer to carry out an examination, which was objected to by him, arranged for and obtained from the 3rd Defendant the Final Certificate dated 25.08.88, without disclosure whatsoever to the Board of Directors of the 4th Defendant Company, that such Certificate related to the surreptitiously substituted new set of Architectural Plans of 15.07.85 described as "Amended" Plans and not to the originally approved Architectural Plans of October '83, which formed a part and parcel of the Construction Agreement and based upon which Construction had commenced in march '84, as approved by the Board of Directors of the 4th Defendant Company in January '84, and approved by the Urban Development Authority in March '84,

e) failed to disclose that there were no Priced Specified Bills of Quantities and Final Measurements and/or any other requisite Documentations to support the Completion and Final Certificates of the 3rd Defendant, notwithstanding the doubts and querries that had been raised by the Plaintiff,

f) **neglected and failed to make and keep a proper accounting and inventory of the Furnishings, Fixtures and Equipments supplied by his own Principal, the 1st Defendant, to be in conformity with Exhibit `A' to the Supplies Contract, and further failed to disclose to the Board of Directors of the 4th Defendant Company, that Exhibit "A" defining and specifying such Supplies to be made by the 1st Defendant, forming part and parcel of the Supplies Contract, itself had been destroyed and/or is missing,**

g) **notwithstanding the conflict of interest as a Representative of the 1st & 2nd Defendants, without notice to and/or approval and/or authority from the Board of Directors of the 4th Defendant Company, personally attended together with the 5th Defendant, Cornel L. Perera, and arranged for the take over of the said Colombo Hilton Hotel from his own Principals, the 1st & 2nd Defendants and handed over the same to Hilton International, the Hotel Operator,**

h) **contrary to requirements agreed to at the Board of Directors of the 4th Defendant Company, arranged for the surreptitious execution of the Debt Rescheduling Agreements, including a Clause committing to Mortgage the said Colombo Hilton Hotel to his own Principals, the 1st & 2nd Defendants, for their own interest and benefit, in addition to the collateral of the State Guarantees that had been issued to them by the Government of Sri Lanka,**

i) **when the substitution of the original Plans as aforesaid was discovered at the Ministry of Finance and reported to the Board of Directors of the 4th Defendant Company, failed to give any rational explanation, whatsoever, in this regard, and deliberately further suppressed from the Board of Directors of the 4th Defendant Company, the circumstances of such fraudulent act that had been perpetrated,failing also to report that all authenticated copies of the original Architectural Plans with the 4th Defendant Company, were missing,**

j) **notwithstanding the conflict of interest as a Representative of the 1st & 2nd Defendants, continued to participate at the Meetings of the Board of Directors of the 4th Defendant Company, when the matters referred to herein were discussed and endeavored to influence the Board of Directors in such regard, further deliberately misleading the Board thereon.**

CHAIRMAN & MANAGING DIRECTOR - CORNEL L. PERERA, 5TH DEFENDANT

iv. **Wrong-doing conduct and actions of the 5th Defendant Cornel L. Perera, who functioned as the Chairman & Managing Director of the 4th Defendant Company from its inception, and was the person who directly co-ordinated and dealt with the 1st & 2nd Defendants, in relation to the implementation of the Colombo Hilton Hotel;**

a) **as the Chairman and Managing Director of the 4th Defendant Company failed and neglected to hold the 1st & 2nd Defendants and their Representatives, who had functioned as the Executive Director of the 4th Defendant Company, accountable and responsible for their aforesaid wrongful conduct and actions,**

b) **without notice to and/or approval and/or authority of the Board of Directors of the 4th Defendant Company, personally attended and took over the said Colombo Hilton Hotel, from the 1st & 2nd Defendants and handed over the same to Hilton International, the Hotel Operator, without proper, requisite and satisfactory documentations in such regard and further failed, to cause a proper accounting and inventory to be made of the Furnishings, Fixtures an Equipment, supplied by the 1st Defendant under the Supplies Contract and to check whether such Supplies were in conformity with Exhibit `A' to the Supplies Contract that defined and specified such Supplies.**

c) **prevented the 4th Defendant Company, from appointing an independent Engineer, to examine the said constructed Colombo Hilton Hotel, prior to the issuance of the Final Certificate by the 3rd Defendant, which independent examination was suggested by the then Government Nominee Director M.T.L.Fernando (Fellow Chartered Accountant and Precedent Partner Ernst & Young), and further thanked the 7th Defendant K.N.Choksy, for supporting the view that such examination was not necessary as per his written opinion dated 08.08.88, and thereby deliberately prevented the 4th Defendant Company from ascertaining the factual position and the truth, in regards the fraud perpetrated on it,**

d) **when queries were raised by the Plaintiff, at the Board of Directors of the 4th Defendant Company, in regard to configurations of Numbers of Guest Rooms, Floors & Basements and Priced Specified Bills of Quantities and Final Measurements, as the Chairman & Managing Director, failed to afford any rational explanations and/or accountability, whatsoever, in such regard, disregarding the financial consequences to the 4th Defendant Company,**

e) **according to Documents marked by the 3rd Defendant in this instant Action, he had Chaired the Progress Meetings on the construction of the Colombo Hilton Hotel and in such circumstances, would have had full knowledge of the total circumstances of the fraud referred to herein and the surreptitious substitution of a new set of Architectural Plans of 15.07.85 describe as "Amended" Plans; and had further deliberately suppressed the said matters from the Board of Directors of the 4th Defendant Company, notwithstanding the discrepancies and queries that were raised by the Plaintiff,**

f) **when the matter of the discovery, at the Ministry of Finance, of the surreptitiously substituted Architectural Plans of 15.07.85 described as "Amended" Plans, was reported to the Board of Directors, as Chairman and Managing Director of the 4th Defendant Company failed to afford any rational explanation and/or accountability, and further deliberately neglected and failed to take any action whatsoever thereon, or even to hold the 1st, 2nd & 3rd Defendants accountable thereto,**

g) **notwithstanding the Objections at the Board of Directors of the 4th Defendant Company, particularly by the Plaintiff against the inclusion of a Clause to Mortgage the said Colombo Hilton Hotel, to the 1st & 2nd Defendants, in the Debt Rescheduling Agreements, executed the said Debt Re-scheduling Agreements including the commitment to Mortgage the said Colombo Hilton Hotel, in addition to the collateral of the State Guarantees that had been issued to the 1st & 2nd Defendants and did not render any rational explanation whatsoever, when this matter was subsequently discovered, and the said Clause deleted from the said Agreements, on the instruction of the Secretary, Ministry of Finance,**

h) **without notice to and/or approval and/or authority of the Board of Directors of the 4th Defendant Company, accompanied the 1st & 2nd Defendants, to a Meeting at the Ministry of Finance and obtained the concurrence of the Secretary, Ministry of Finance and arranged for the payment of US $ 2.0 Mn., notwithstanding the Plaintiff's specific objections, made previously by Memorandum dated 13.12.89 to the Board, which was unopposed at the Board of Directors of the 4th Defendant Company,**

i) **permitted deliberations at the Board Meetings of the 4th Defendant Company, with the presence and participation of the Representatives of the 1st & 2nd Defendants, on matters of conflicting interest and moreso particularly, this instant Action, which had been instituted against them in the very**

interest of the 4th Defendant Company and its Shareholders,

j) notwithstanding the discrepancies raised by the Plaintiff and the discovery of the unauthorisedly and surreptitiously substituted Architectural Plans of 15.07.85, described as "Amended" Plans, and further notwithstanding the objection made thereto by the Plaintiff, on or about 27.11.90, as Chairman & Managing Director of the 4th Defendant Company, arranged for the tabling and adoption of the Accounts of the 4th Defendant Company for the Year Ended 31.03.90, disregarding the financial consequences thereof to the 4th Defendant Company,

k) failed and neglected to respond to the Plaintiff's Memorandum dated 20.12.90 specifically addressed to the Directors of the 4th Defendant Company, which had set out the said several matters referred to herein and thereby has been unable to controvert the contents therein, even though specifically exhorted to do so by the Plaintiff, and take any action thereon in the interest of the 4th Defendant Comapny and its Shareholders; on the contrary he caused the removal of the Plaintiff as a Director of the 4th Defendant Company,

l) failed and neglected to respond to the several Memoranda/ Letters dated 12.04.90 (2), 24.04.90 (2), 31.05.90, 29.06.90 and 04.07.90, forwarded to the Board of Directors of the 4th Defendant Company by the Plaintiff with copies to all Directors, after the discovery in March '90 of the substitution of the original Plan as aforesaid described as "Amended" Plans; and as the Chairman & Managing Director of the 4th Defendant Company failed and neglected to take any action whatsoever thereon.

m) as the Chairman & Managing Director of the 4th Defendant Company failed and neglected to produce the authenticated copies of the original Architectural Plans, and Exhibit `A' to the Supplies Contract, that defined and specified the Supplies of Furnishings, Fixtures & Equipment to the Colombo Hilton Hotel, eventhough all original Contracts/Agreements and Documents had been kept at the Registered Office of the 4th Defendant Company, which was situated at the Office of Cornel & Co Ltd, 16, Alfred Place, Colombo 3, the Office of the 5th Defendant himself.

n) the Certificate of Conformity from the Urban Development Authority dated 27.04.87, which specifically related to the aforesaid "Amended" Plans, had been addressed to the aforesaid Registered Office of the 4th Defendant Company, also the address of the 5th Defendant as aforesaid, whereas the matter of the surreptitious substitution of the original Plans as aforesaid, had been deliberately and knowingly suppressed from the Board of Directors of the 4th Defendant Company,

DIRECTOR K.N. CHOKSY, 7TH DEFENDANT

v. Wrong-doing conduct and actions of the 7th Defendant, K.N.Choksy, Director of the 4th Defendant Company from 19.12.86;

a) supported the 1st & 2nd Defendants, in their Objections, to the suggestion made by the then Government Nominee Director, M.T.L. Fernando, (Fellow Chartered Accountant and Precedent Partner Ernst & Young), to appoint an independent Engineer, to examine the constructed Colombo Hilton Hotel, in the background of the discrepancies raised by the Plaintiff, prior to the issuance of the Final Certificate by the 3rd Defendant, and thereby prevented the 4th Defendant Company from ascertaining the factual position and the truth of the fraud perpetrated on it and its Shareholders, as discovered thereafter, by giving in writing, his opinion dated 08.08.88, disregarding the discrepancies and queries that had been raised by Plaintiff, also a Chartered Accountant,

b) without any notice to and/or approval and/or authority from the Board of Directors of the 4th Defendant Company accompanied the Representatives of the 1st & 2nd Defendants and arranged for a payment of U.S. $ 2.0 Mn. obtaining the concurrence of the Secretary, Ministry of Finance, notwithstanding the written Objections submitted to the Board of Directors of the 4th Defendant Company by the Plaintiff, by way of a Memorandum dated 13.12.89, which stood unopposed at the said Board Meeting,

c) in the absence of Specified Bills of Quantities and Final Measurements, purely on the basis of two simple "Medical Certificates" type Letters, of Completion and Final Certificates, given by the 3rd Defendant, and further notwithstanding the specific discrepancies raised by the Plaintiff by the Memorandum dated 13.12.89 and the specific clarifications called for therein from the 3rd Defendant, submitted a letter dated 28.02'90 to the Board of Directors of the 4th Defendant Company, stating, that, the aforesaid two Certificates *"are adequate coverage that the Hotel Construction Work is in conformity with all stipulations of the contract"* and that the 4th Defendant Company will be justified in making the balance payments; such Letter had been issued at the instance of the 1st & 2nd Defendants' Representative, without any deliberations at the Board in such regard; disregarding the financial consequences to the 4th Defendant Company, and further notwithstanding the fact he had no professional experience and/or expertise in the Hotel Construction and Engineering Industry, to have preferred such opinion,

d) in issuing such aforesaid Letter dated 28.02.90, he misleading the Board, recklessly and deliberately neglecting and failing to take cognisance of the duties and responsibilities of the 3rd Defendant, professional Architects, as further stipulated in the Design & Supervision Contract by and between the 3rd Defendant and the 4th Defendant Company; and thereby clearly endeavored to prevent the probing of this matter and further to cover up the action of obtaining the concurrence for the payment of U.S. $ 2.0 Mn., notwithstanding the specific Objections by the Plaintiff previously at the Board of Directors of the 4th Defendant Company,

e) having given two written opinions as a Director of the 4th Defendant Company, as aforesaid, clearly in support of the 1st & 2nd Defendants, in their endeavour to cover up this massive fraud, did or said or wrote nothing whatsoever, when the surreptitiously and unauthorisedly substituted new set of Architectural Plans described as "Amended" Plans, was discovered at the Ministry of Finance and reported to the Board of Directors of the 4th Defendant Company; further failed to give any explanations whatsoever, of his aforesaid conduct and actions, which included the prevention of the 4th Defendant Company, from ascertaining the aforesaid matter, prior to the issuance of the Final Certificate by the 3rd Defendant,

f) notwithstanding, being a Government Member of Parliament, continued to be a Member of the Board of Directors of the 4th Defendant Company, having a Shareholding by the Government and also having a contractual relationship with the Government of Sri Lanka,in the context of the State Guarantees that had been issued, for and on behalf of the 4th Defendant Company, and thereby exerted undue influence and pressure, styming the Government Officials, from taking proper and requisite actions independently, in regard to this fraud perpetrated on the 4th Defendant Company, and its Shareholders,

g) at a Board Meeting of the 4th Defendant Company, when the Plaintiff disputed and objected to the adoption of the Accounts for the Year Ended 31.03.'90, supported the

Representative of the 1st & 2nd Defendants, specifically drawing the attention to Article 129 of the Articles of Association of the Company, which Article afforded the right of veto over Board Decisions, to the 1st & 2nd Defendants, thereby prompting the said 1st & 2nd Defendants to take undue advantage and cover under such provisions in the Articles of Association, to adopt the said Annual Accounts, disregarding the fraud perpetrated in the 4th Defendant Company and its Shareholders,

h) disregarding the fact, that the Plaintiff pointedly stated that he had instituted this instant Action, as a Derivative Action, in the interest of the 4th Defendant Company and its Shareholders, required the Plaintiff to leave the Board Meeting held on 22.11.90, and further notwithstanding the implications of the matters disclosed in this instant Action, vis-a-vis the conduct and actions of the 1st & 2nd Defendants, continued to have deliberations at the said Board Meeting on the subject matter of the said Action, with the presence and participation of the 1st & 2nd Defendants' Representatives, notwithstanding the conflict of interest, and jeorpardising the interest of the 4th Defendant Company and its Shareholders' further notwithstanding the specific recorded objections thereto, made by the Plaintiff, prior to leaving such Board Meeting,

i) failed and neglected to respond to the several Memoranda/ Letters dated 12.04.90 (2), 24.04.90 (2) 31.05.90, 29.06.90 and 04.07.90 forwarded to the Board of Directors of the 4th Defendant Company by the Plaintiff and copied to all the Directors, after the discovery in March '90 of the surreptitiously and unauthorisedly substituted new set of Architectural Plans, described as "Amended" Plans,

j) failed and neglected to respond to the Plaintiff's Memorandum dated 20.12.90 specifically addressed to the Directors of the 4th Defendant Company, which had set out the said several matters referred to herein and thereby has been unable to controvert the contents therein, eventhough specifically exhorted to do so by the Plaintiff, and take any action thereon, in the interest of the 4th Defendant Company and its Shareholders,

vi. The aforesaid wrong-doing conduct and actions, jointly and/or severally by the aforesaid Directors of the 4th Defendant Company perpetrated an unconscionable act of fraud on the 4th Defendant Company and its Shareholders, and/or aided and abetted and/or endeavoured to suppress the same and/or obstructed the probing thereinto, causing irreparable and irremediable loss and damage to the 4th Defendant Company and its Shareholders, which include the Public; as a consequence of which the 4th Defendant Company is bankrupt and insolvent, resulting in its inability to reimburse the Government of Sri Lanka, for payments demanded by the 1st & 2nd Defendants under the said State Guarantees, thereby also affecting the Public of Sri Lanka, particularly moreso, in view of the sum of money concerned, at present amounting to about US $ 175.0 Mn. i.e. S.L. Rs. 7250.0 Mn.

50. <u>DISTRICT COURT ISSUES INTERIM INJUNCTIONS IN THIS ACTION AFTER INQUIRY</u>

The learned trial Judge having considered all the material placed and adduced before him, namely the Pleadings and Documentations of the parties and of their Oral and Written Submissions and citations of authorities in support thereof, granted by his Order dated 09.09.91 and delivered by his successor on 28.10.91, the Interim Injunction prayed for against the 1st, 2nd, & 3rd Defendants in terms of the aforesaid prayer "g" of the Plaint on one hand and the Interim Injunction prayed for against the 4th Defendant Company, without Objections thereto, in terms of the aforesaid prayer "h" of the Plaint on the other.

51. OBSERVATIONS MADE BY THE LEARNED DISTRICT JUDGE IN HIS ORDER

The learned District Judge in his Order issuing the aforesaid Interim Injunction had observed:

i. that, there is no acceptable basis, at present, for making payments to the 1st & 2nd Defendants,

ii. that, the main issues are, the basis for the payment of monies and the question, as to whether, in relation to such issue, the volume of work had not been actually carried out, according to the contractual Agreements,

iii. that, the other Defendants named in the case, i.e. the Directors, as persons having connections and showing interest concerning the Company, having intervened therein, in such matter, acting to obtain monies,had not readily acted to conduct a correct examination,on the basis of matters, that had arisen as referred to in a) and b) above,

iv. that, the said persons, having prevented such correct examination were attempting to, howsoever, effect the payment of monies,

v. that, whether, the said persons are exercising the influence, that they have gained in Society, to prevent the raising of the questions concerning, the matters of work in connection with the contracts, the Prospectus, the payments of the Company, and whether the contracts have been properly performed,

vi. that, the collaboration of the said persons, was adverse to the interest of the Shareholders of the Company and that they were acting through such collaboration, in a manner amounting to defeat the interests of the Shareholders of the Company,

vii. that, whether, the payment of monies, is a devious method of siphoning out, a large scale of foreign exchange from this Country,

viii. that, the significance that is shown, is that, generally the Company which has to pay money, would be raising questions in respect of such situation and would not allow other parties to act arbitrarily,

ix. that, if the position, that explains this is correct,then, this actually is an instance of acting in fraudulent collusion, concerning a large sum of money, and an attempt to obtain a larger sum of money, having performed a lessor volume of work,

x. that, in such circumstances, a party who is seeking justice through the legal process, to prevent the same, should be allowed to do so.

"Therefore, in taking into account these matters as a whole, i am of the view, that, a necessity lies to issue the Interim Injunctions, rather than to dissolve the Enjoining Orders already issued.

Having such a view foremost in my mind, in considering the loss and inconvenience that may be caused to the parties, due to the issuance of the said Interim Injunctions, I am of the view, that, if the said Interim Injunctions are not issued, that the means of remedying, the recovery of the said monies, after the payment of such monies by the Company and after the siphoning off of the said monies from the Country and the extensive loss that would be caused in common to this Country and also to the Plaintiff, who is an accepted investor of this Country, would be rare.

In considering the matter, concerning the 1st, 2nd and 3rd Defendants' right to receive money, which has to be compared against the above position, then, even if the Interim Injunctions are issued as applied for by the Plaintiff, there will be no bar to their right to receive the said monies, except for a delay to receive such money, even, if, they are entitled to receive, any money. Such a delay could be remedied by paying adequate interest.

Accordingly, in considering the inconvenience and loss, that may be caused to both parties, by such an Order, I am of the view, that more weight thereof, is in the favour of the issuance of the Interim Injunctions as applied for by the Plaintiff. I, therefore, rejecting the objections adduced, issue the Interim Injunctions, as prayed for under prayers (g) and (h) of the Plaint."

52. PLAINTIFF'S APPLICATION TO THE DISTRICT COURT FOR A PHYSICAL INSPECTION & EXAMINATION BY THE LOCAL CHARTERED ARCHITECT, SHELTON WIJAYARATNA F.I.A., A.R.I.B.A., A.A. DIP.LON.,A.I. ARB.

i. The Plaintiff on 03.03.92 had made Application to the District Court under Section 428 of the Civil Procedure Code, for the issue of a Commission by Court to Mr.Shelton Wijayaratna, Chartered Architect, who had earlier issued his Report, (filed of record in this instant Action), on the examination of relevant documentations only, upon the authority that had been previously granted to the Plaintiff by the Board of Directors of the 4th Defendant Company, now to physically inspect and examine the Colombo Hilton Hotel Building and the Fixed Assets therein and to Report thereon.

ii. The 1st, 2nd & 3rd Defendants having objected to such physical inspection and examination, a legitimate and independent right of any Owning Company to normally and ordinarily verify and satisfy itself of its own properties, the learned District Judge upon Inquiry, reserved his Order, which is now due for 13.07.'92.

iii. The Counsel for the 4th Defendant Company, Shibly Aziz P.C. Addl. Solocitor General, too opposed such physical inspection and examination, without having proper instructions and authority to do so from the Board of Directors of the 4th Defendant Company; and which matter has consequently been raised by the Plaintiff with the relevant authorities.

53. PLAINTIFF'S APPLICATIONS TO THE DISTRICT COURT FOR INTERROGATORIES, INSPECTION & DISCOVERY OF DOCUMENTS

i. The Plaintiff on 06.03.92 made Applications to the District Court to interrogate, the 1st & 2nd Defendants, the 3rd Defendant and the 4th Defendant Company, under Section 94 of Civil Procedure Code. The District court having issued Notice, the same have been served on the respective Registered Attorneys of the Parties, under Section 95 of Civil Procedure Code.

ii. The 1st & 2nd Defendants, and the 4th Defendant Company without tendering proper Affidavit, having objected to the said Interrogatories, inter-alia, on the premise of its service on the Registered Attorneys and not on the Company, the District Court upon Inquiry into the same, reserved Order, which is now due for 13.07.'92.

iii. The 3rd Defendant however, having moved for a date to Answer the said Interrogatories, has now been granted extended time till 13.07.'92. to file such Answers.

iv. The said Interrogatories, served on the 1st & 2nd defendants and the 4th Defendant Company, contained amongst other Interrogatories relating to, entering into an undisclosed written Agreement abroad, for the payment of monies amounting to Japanese Yen 340,000,000 now amounting to S.L. Rupees 120.0 Mn. to a Bank Account in Hong Kong by the 1st Defendant, for procuring conditionalities such as the State Guarantees, Import Duty Exemptions, Attorney General's Opinion as per the Loan Agreement, Tax Exemptions etc, which are conditionalities stipulated in Article 17.01 of the Investment Agreement, whereas under the said Investment Agreement, being a party thereto, the Government of Sri Lanka had undertaken to afford such conditionalities and accordingly the interrogatory as to why, how and to whom such payments were made abroad by the 1st Defendant.

v. **The Plaintiff has on 10.03.92 made Applications to the District Court also under Sections 102 & 104 of the Civil Procedure Code for the Inspection & Discovery of Documents. The District Court having served Notice, the 1st & 2nd Defendants, 3rd Defendant and the 4th Defendant Company, having objected thereto, upon Inquiry, the District Court reserved Order, which is now due for 13.07.92.**

54. **LEAVE TO APPEAL SOUGHT BY THE 1ST, 2ND & 3RD DEFENDANTS ON THE INTERIM INJUNCTION ISSUED AGAINST THEM BY THE DISTRICT COURT**

i. **The 1st & 2nd Defendants and the 3rd Defendant sought Leave to Appeal from the aforesaid Order of the learned District Judge, issuing the Interim Injunction prayed for in terms of the aforesaid prayer "g" of the Plaint, in two separate Applications.**

ii. **The Plaintiff's Action was a Derivative Action on the basis of "wrong-doer control" the factuality of which was disclosed and demonstrated in the Plaint supported by and Affidavit and further supported by 105 Marked Documents, all of which were the Documents of the 4th Defendant Company and/or the 1st, 2nd & 3rd Defendants themselves. However in the Leave to Appeal Application lodged by the 1st & 2nd Defendants, they had picked and chosen only 8 of those Documents, for reasons best known to them, to be submitted with their aforesaid Leave to Appeal Application to the Court of Appeal.**

iii. **The said two Applications were supported before Their Lordships W.N.D. Perera, J. and Weerasekera, J. of the Court of Appeal on 19.11.91 and upon the Counsel being heard, Their Lordships made the following Order in both Applications.**

> ***"Counsel heard in support. Issue notice on the respondent returnable 10.12.91. Mention on 10.12.91"***

iv. **Notwithstanding the said Order dated 19.11.91, the Notice of the said Applications for Leave to Appeal, had been issued on all the parties named in the District Court Case, including the 4th Defendant Company, which had not Objected in the District Court to the issuance of the Interim Injunction against it in terms of the said separate Prayer "h" of the Plaint.Such Notice had been issued at the instance of the 1st, 2nd & 3rd Defendants, contrary to the aforesaid Orders of the Court of Appeal dated 19.11.91.**

v. **On the said Notice returnable date; i.e. on 10.12.91 the Plaintiff was represented by his Counsel, and the 5th, 6th & 7th Defendants, against whom the Plaintiff had not claimed any relief in the said Action, were represented by their own Counsel and Their Lordships Wijeyaratne, J. and Edrisuriya, J. fixed the Leave to Appeal Inquiry for 17.01.92.**

vi. **Significantly, the 4th Defendant Company did not appear on the said 10.12.91, the Notice returnable date, before Their Lordships' of the Court of Appeal, either through, its representative or Counsel, as clearly evident from the Minutes of the said 10.12.91.**

vii. **The Plaintiff filed his Statement of Objections to the said Petitions for Leave to Appeal and, inter-alia, also Objected to the grant of Leave itself.**

55. **LEAVE TO APPEAL HEARING**

4TH DEFENDANT COMPANY AND 5TH,6TH &7TH DEFENDANTS ERRONEOUSLY PERMITTED TO PARTICIPATE.

i. **The Leave to Appeal Inquiry came up before Their Lordships' K. Palakidnar, J. (President, Court of Appeal) and Dr. A. de Z. Gunawardena, J. on 17.01.92 and continued on 20th, 21st and 22nd January 1992. The Plaintiff was present in Court throughout the hearing on all the said dates.**

ii. **On 17.01.92 apart from Counsel appearing for the 1st, 2nd & 3rd Defendants as Petitioners and the Plaintiff as Respondent,**

appearance was sought to be marked on behalf of the 4th Defendant Company and the 5th, 6th & 7th Defendants.

iii. Counsel for the 4th Defendant Company submitted, inter-alia, that there were matters on which, he can be of assistance to Court in determining the matter at issue, and that he will be affected by any Order made by the Court of Appeal.

iv. Counsel for the 5th, 6th & 7th Defendants said that he was not making any submissions on behalf of his Clients, as his Clients will not be affected by any Order made by the Court of Appeal.

v. Counsel for the Plaintiff raised a Preliminary Objection to the participation of the 4th Defendant Company, and the 5th, 6th & 7th Defendants, inter-alia, on the basis:

a) that, it was only that morning that he became aware, when appearances were marked for the 4th Defendant Company, that it had also been erroneously Noticed by the Court of Appeal,

b) that, only persons who can properly participate in the proceedings before Their Lordships of the Court of Appeal were the 1st & 2nd Defendants, the 3rd Defendant and the Plaintiff,

c) that, the other Defendants have no right to be heard in the said proceedings and if, the 1st & 2nd Defendants had made them parties, that was a procedural irregularity and if Their Lordships of the Court of Appeal had issued Notice on them, such issue was made per incuriam. It is now clear from the record, that Their Lordships in issuing Notice on 19.11.91, in both the said Applications, had directed the issue of notice only on the Respondent i.e. the Plaintiff,

d) that, the 4th Defendant Company, did not seek to vacate the Enjoining Order, and neither did it file Objections to the grant of the Interim Injunction against it in terms of prayer "h" of the Plaint, nor in any other manner, objected to any injunctive relief being granted against it,

e) that, having failed to challenge the grant of the Interim-Injunction in the District Court, the 4th Defendant Company cannot seek to challenge the said Order in the Court of Appeal, and accordingly could not participate in any manner whatsoever, in the proceedings before the Court of Appeal, and to permit the 4th Defendant Company to do so would be a grave procedural impropriety and illegal.

vi. It was further submitted that the 5th, 6th & 7th Defendants, persons against whom no relief was claimed in the said Action, who had also not participated in any proceedings in the District Court, other than filing Proxy, were not necessary parties and had no legal right or status to appear in the said Leave to Appeal proceedings. The citation of Sadhwani V Sadhwani (1982) 2 SLR 647 was made on this point.

vii. However, the Court of Appeal overruled the aforesaid Preliminary Objection raised on Friday 17.01.92 and allowed the participation of the 4th Defendant Company and the 5th, 6th & 7th Defendants, on the basis that they are necessary parties, and further ordered the resumption of the argument day to day, from Monday 20.01.92.

56. **LEAVE TO APPEAL HEARING**

SUBMISSIONS BY COUNSEL FOR 1ST & 2ND DEFENDANTS

Further argument commenced on 20th January'92 (Monday) with Counsel for the 1st & 2nd Defendants in CA/LA/206/91 addressing Their Lordships. The submissions of the 1st & 2nd Defendants were along the lines of the Statement of Objections filed in the District Court and principally were that:

a) the Plaintiff was not a party to the contracts P11, P13, P14, P15 & P17 and therefore had no right to file this Action or seek Injunctive relief under Sec: 54 of the Judicature Act.

b) that the Plaint did not disclose a cause of action.

c) that it did not disclose a prima-facie right in the Plaintiff.

d) that the rule in Foss V Harbottle precluded the Plaintiff from bringing this Action.

e) that if there was any right, it was with the Company, in respect of breach of contract, for which only the Company could sue and that too for damages only, and further, when the Company is quiet the shareholder has no right.

f) further submissions were made on questions of fact, by reference to the Statement of Objections, more particularly to certain amended Plans referred therein. In response to questions raised by Their Lordships, the said Counsel admitted that all copies of the original Architectural Plans were missing and that it was their only defect.

g) these submissions were made without having read or drawn the attention of Court to any of the averments in the Plaint.

57. LEAVE TO APPEAL HEARING

FACTS ERRONEOUSLY CONSIDERED IRRELEVANT IN DERIVATIVE ACTION

The Plaintiff states that at this stage, Their Lordships' Court adjourned for a short recess and after the hearing resumed, His Lordship K. Palakidnar, J. informed parties, that it was not necessary to go into the facts and the non-availability of the Plans and that Their Lordships had decided to limit the hearing, only to the question as to, what status the Plaintiff had to proceed with the Action i.e. the Plaintiff's status and Locus Standi..

58. LEAVE TO APPEAL HEARING

***SUBMISSIONS BY COUNSEL FOR THE 3RD DEFENDANT*.**

i. Submissions were then made by the Counsel for the 3rd Defendant, wherein he associated himself with the submissions made by the Counsel for 1st & 2nd Defendants, and inter-alia, submitted:

   a) that, the 3rd Defendant has been fully paid,

   b) that, the Plaintiff had no right to the Injunction, and

   c) made further submissions on the facts, by reference to the Objections and to the Written Submissions filed in the District Court.

ii. Both Counsel for the 1st & 2nd Defendants and the 3rd Defendant submitted to Court, that the learned District Judge has not considered in his Order, the Objections raised by them at the District Court Inquiry.

59. LEAVE TO APPEAL HEARING

SUBMISSIONS BY COUNSEL FOR THE 4TH DEFENDANT COMPANY & THE 7TH DEFENDANT.

i. At this stage, the Counsel for the 4th Defendant Company stated, that he wished to consider over the day, the making of submissions on questions of fact and that he would not contest the question of the Plaintiff's legal status to bring such an Action, whereupon, His Lordship K. Palakidnar, J. observed that "it would strengthen our hands".

ii. **Thereafter, the Counsel Mr. Nihal Fernando, who had on 17.01.92 marked appearance for the 5th, 6th & 7th Defendants, and who had at that stage said *"that he is not making any submissions in this Application as his Clients will not be affected by the Order made in this Application",* however, stated that the 7th Defendant had required him to make submissions and also to request Court to expunge certain comments made by the learned District Judge in His Order. Thereupon, Dr. A. de Z. Gunawardena, J. observed, that such Application was premature, since the only question to be argued was whether Leave shall be granted or not. Further proceedings were to be resumed on Tuesday 21.02.92.**

iii. **On 21st January 1992, the learned Counsel for the 4th Defendant Company addressed Court both on the facts and the law, impeaching the Order of the learned District Judge and inter-alia:**

a) **submitted that a Derivative Action is available only as an exception to the Rule in Foss V Harbottle, in the case of fraud on the minority and/or wrong-doer control and that there was no fraud on the minority and/or wrong-doer control in this instance and therefore there could be no Derivative Action.**

b) **disregarding the local Chartered Architect's certified Report filed of record in this Case by the Plaintiff, the said Counsel tendered to Court three unauthenticated and uncertified typed statements containing numerical data, on questions of certain figures and submitted that those unauthenticated and uncertified statements showed, that there was no fraud. The said statements were produced in Court notwithstanding Objections raised by the Plaintiff's Counsel thereto.**

iv. **the same said Counsel, who was present throughout the District Court Inquiry, having not filed any Objections, did not make such submissions, nor produce such Statements at the said Inquiry.**

v. **The 4th Defendant Company in its Answer filed in the District Court has, inter-alia admitted to**

a) **the non-availability of the original Architectural Plans**

b) **the non-availability of the Exhibit `A' to the Supplies Contract, that defined the Scope of Supplies of Furnishings, Fixtures & Equipment to the said Colombo Hilton Hotel.**

c) **the non-availability of Specified Bills of Quantities and Final Measurements.**

d) **the non-availability of a properly accounted inventory of the Furnishings, Fixtures & Equipments.**

vi. **Mr. Nihal Fernando, Counsel for the 7th Defendant, stating that *"the 7th Defendant wanted me to inform Court"* submitted that:**

a) **a Derivative Action is not part of the law of Sri Lanka, even though such right existed in England.**

b) **the Companies Act 17 of 1982 is comprehensive in respect of all rights of a shareholder and that such rights are today limited only to Sections 210 & 211 of the said Companies Act.**

c) **the Plaintiff did not have the requisite 5% shareholding to bring an Action, as required under Sections 210 & 211 of the said Companies Act.**

d) **therefore the Plaintiff had no right or status to have brought the Action in the first instance.**

60. LEAVE TO APPEAL HEARING

SUBMISSIONS BY COUNSEL FOR THE PLAINTIFF

i. The Court then invited Counsel for the Plaintiff to address, firstly on the nature of a Derivative Action. Accordingly Counsel for the Plaintiff commenced his submissions and stated:

a) that the ambit and scope of the provisions in Sections 210 & 211 of the Companies Act, were different and that they did not contemplate the principle of Derivative Action and that Derivative Action is a substantive right, distinct and different from what is laid down in Sections 210 & 211 of the Companies Act.

b) that a Derivative Action is distinct and different to a complaint by a Minority Shareholder, and is an action instituted by a Shareholder though in his personal name, actually on behalf of the Company and in the right of the Company, where the Company being under "wrong-doer" control could not take action to safeguard its interests; the reliefs claimed being only in the interest of and for the benefit of the Company and its Shareholders.

ii. a) Plaintiff's Counsel referring to the legal basis of the Plaintiff's action, made further submissions on the question of Derivative Action citing the case of Wallersteiner V Moir, (1975) 1 AER Pages 849 and 857 (Lord Denning) and also Gower 4th Edition, in support of his contention and submitted that the Plaintiff had the right to bring such Derivative Action.

b) Counsel further submitted, that a Derivative Action is brought, by a member of a Company, where "wrong-doers" are in control, who prevent the company itself from suing, and where such Action is brought, the entire benefit of the Action would go to the Company and not to the Shareholder, who brings such Action and that the action instituted by the Plaintiff is such an Action.

c) Counsel also informed Court, that within 3 months of the Plaintiff instituting such Derivative Action, he was removed from the Board of Directors, further to stifle such Action.

COURT OF APPEAL CONCEDES AVAILABILITY OF DERIVATIVE ACTION

iii. At this stage his Lordship Dr. A. de Z. Gunawardena, J. after consultation with his Lordship Palakidnar, J. informed Plaintiff 's Counsel that they accept his contention with regard to the availability of a Derivative Action.

iv. a) It was then submitted by Plaintiff's Counsel, that when the Petitioners allege that the Plaint does not disclose a cause of action, then as a matter of law, it is assumed that the averments in the Plaint are true and on that basis, determine whether a cause of action is disclosed and that, on that basis the allegations in the Plaint warranted a Derivative Action and that therefore there was a prima-facie case under Sect: 54 of the Judicature Act to injunctive relief. Attention of Court was drawn to paragraphs in the Written Submission of the Plaintiff on all of the above matters, in the District Court.

b) It was also submitted, that the Petitioners were not entitled in law, to impeach the Order on this basis, when they have failed to address Court on the averments in the Plaint and to point out why, admitting them to be true, no cause of action was disclosed.

c) Submissions were also made, by reference to paragraph 78 of the Statement of Objections of the Plaintiff in C.A. L/A 206/91, that the 1st & 2nd Defendants had deliberately and deceitfully suppressed material documents relevant to the Plaintiff's cause of action and which documents were annexed

to the Plaint and that therefore their Leave to Appeal Application should be dismissed in limine on that ground alone. In fact out of 105 Documents to the said Plaint, the said Petition of the 1st & 2nd Defendants had annexed only 8 Documents.

d) In regard to 3rd Defendant's contention, that all monies due to it had been paid in 1987 and that therefore, no Injunction could be granted restraining it from receiving payments; it was brought to Their Lordships attention that the Audited Statement of Accounts in the Annual Report of March '89 published by the 4th Defendant Company, being the latest Accounts available to the Plaintiff at the time of instituting this Action, showed that as at 31.03.88 Rs.1,010,682.69 Mn. was owed and that as at 31.03.89 Rs.935,483.28 Mn. was owed to the 3rd Defendant from the 4th Defendant Company.

e) Plaintiff's Counsel was then directed to address, on the question raised by the Counsel for the 7th Defendant, namely the reception of the English Law concept of a Derivative Action in the Law of Sri Lanka. Proceedings were directed to be resumed on Wednesday 22nd January 1992, for this purpose.

v. a) When proceedings resumed on Wednesday 22.01.92 Plaintiff's Counsel addressed Their Lordships on the availability of Derivative Action in the Law of Sri Lanka, inter-alia citing Sect: 3 of the Civil Law Ordinance and the Case of De Costa V Bank of Ceylon 72 NLR 457.

b) Plaintiff's Counsel was thereupon asked to justify the Order of the learned District Judge, though none of the other Counsel had either read or dealt with the judgement or referred to the contents thereof, though the Leave to Appeal was sought from the said Order.

c) Submissions were then made as to why the Order should stand and no Leave be granted.

d) It was submitted, that reading the Judgement as a whole, it was clear that the learned Trial Judge had considered all relevant matters, including the right of the Plaintiff and the balance of convenience of parties, on the basis of the assumption that the averments in the Plaint are true and further that he had examined from that point of view, the existence of a cause of action and the right of the Plaintiff to bring the said Action.

The case of Balasunderam V Raman 79(1) NLR 361 was cited in support of the manner of evaluation and appreciation of the judgement of the District Judge.

61. LEAVE TO APPEAL HEARING

APPEAL COURT ERRONEOUSLY CONSIDERED THAT NORMALY LEAVE IS GRANTED IN MOST CASES.

At this stage his Lordship K. Palakidnar, J. told Counsel for the Plaintiff, that it was not necessary to go into other areas, and also told, that it was not necessary to address Court on questions of fact referred to by opposing Counsel, at this Leave to Appeal stage, and that normally, Their Lordships' Court granted Leave in most Cases.

62. LEAVE TO APPEAL HEARING

FURTHER SUBMISSIONS BY COUNSEL FOR 1ST ,2ND & 3RD DEFENDANTS

But further submissions however were thereafter permitted to be made by Counsel for the 1st, 2nd & 3rd Defendants on questions of fact and at the conclusion of the proceedings on 22.01.92, Their Lordships reserved Order for 31.01.92.

63. LEAVE TO APPEAL GRANTED TO THE 1ST & 2ND DEFENDANTS AND 3RD DEFENDANT

Their Lordships delivered Their Order on 31.01.92 and had proceeded on the basis:

i. that, the Plaintiff has brought this Action against the 4th Defendant Company, as the Company has acted in fraud of the shareholders, in accepting and making payments to the 1st, 2nd & 3rd Defendants in respect of the construction of the Colombo Hilton Hotel,

ii. that, the Plaintiff sought an injunction restraining the 4th Defendant Company from making any further payments to the 1st, 2nd & 3rd Defendants,

iii. that, the District Court first made an Enjoining Order restraining the 4th Defendant Company from making further payments to the 1st, 2nd & 3rd Defendants,

iv. that, thereafter, the Interim Injunction was granted for the same purpose,

v. that, this Leave to Appeal Application is against the said Order,

vi. that, it is not clear from the Order of the learned District Judge, that, he has addressed his judicial mind to the question, whether the Plaintiff has adduced sufficient evidence to make out a prima-facie case,

vii. that, Counsel for the 1st & 2nd Defendants submitted, that the Plaintiff has no locus standi to bring the said Action, and that the facts urged did not disclose a cause of action, as also that, the Plaintiff does not have a right to bring a Derivative Action,

viii. that, Counsel for the 7th Defendant submitted, that a right to bring a Derivative Action does not exist in the Sri Lanka Law, and that the rights of a Shareholder are limited to Sections 210 & 211 of the Companies Act with a minimum of 5% Shareholding,

ix) that, in their view these are fit questions of Law to be decided in an Appeal and accordingly granted Leave to Appeal.

64. "MEDICAL CERTIFICATE" TYPE - ARCHITECTS' CERTIFICATES OF THE 3RD DEFENDANT

i. The 3rd Defendant issued a Completion Certificate on 30.04.87 and a Final Certificate on 25.08.88, which Certificates were mere *"Medical Certificate"* type Letters; Photocopies of which are appended hereinbelow. The said Certificates had deliberately failed to disclose that they in fact referred to an "Amended" Plan. The 1st & 2nd Defendants' Liability Period is 5-Years from the said Final Certificate dated 25.08.88 as per Clause 17(6) of the General Conditions of Contract, as set out in Paragraph 39 hereinabove.

ii. The said "Medical Certificate" type Letters, i.e. the Completion and Final Certificates of the 3rd Defendant, had no Priced Specified Bills of Quantities and/or any Final Measurements to support them; nor were any other Documentations in such support thereof, made available by the 3rd Defendant, contrary to normal Professional standards and practice of Architects, and furthermore, specifically in contravention of stipulations in the Design and Supervision Contract (P14), that required, that the Architect shall carry out the services with due diligence and efficiency and in comformity with sound engineering and administrative practices, and shall also keep accurate and systematic records and accounts with respect to the services, in such form and detail acceptable to the 4th Defendant Company, as morefully set out in Paragraph 18(v) hereinbefore.

iii. **No Measurements of Work was ever Certified by the 3rd Defendant, when interim payments were drawn by the 1st & 2nd Defendants, under the Loan Agreement (P15), as more fully set out in Paragraph 17 hereinbefore; which is the very reason, why a properly and comprehensively documented Final Certificate is required; particularly moreso, in the given background, that the original Plans had been unauthorisedly and surreptitiously substituted by a new Plan, described as an "Amended" Plan, whilst all copies of the originally approved and contracted Plans have been suppressed and/or destroyed, and so also Exhibit `A' to the Supplies Contract (P13), that defined the Supplies of Furnishings, Fixtures & Equipment to the said Colombo Hilton Hotel; and furthermore in the background, as now undisputedly admitted, that the said Colombo Hilton Hotel does not have 452 Guest Rooms, as provided for in the Prospectus, Profitability & Cashflow Forecasts and the several Agreements/Contracts.**

iv. **How could it be ever accepted, that an international 5-Star Class Hotel, constructed by such Contractors of international repute, supervised by such international Architects, has no Priced Specified Bills of Quantities and Final Measuments and/or any other records and documentations, for the for the 4th Defendants Company's i.e. the Owner's satisfaction, that such "Medical Certificate" type Letters have been issued, after properly documented varification of the correctness of such Construction & Supplies?**

v. **Can any honest and sensible person, let alone the Plaintiff, a Professional Accountant, accept such mere Letters as given below, as acceptable and satisfactory Documentations, to effect payments demanded, amounting to US $ 175.0 Mn. i.e. Rs. 7250.0 Mn. and particularly moreso in the given background of missing Plans, Inventories and other questionable irregularities referred to hereinbefore?**

KANKO KIKAKU SEKKEISHA

Y. SHIBATA & ASSOCIATES ARCHITECTS & DESIGNERS

P31(a)

30th April 1987

Mitsui Taisei Consortium,
Hilton International Colombo Project,
Galle Road,
Colombo 3,
Sri Lanka.

Dear Sirs,

COMPLETION CERTIFICATE
HILTON INTERNATIONAL, Colombo

This is to certify that the work stipulated in the Agreement for construction of Hilton International Colombo, by and between Hotel Developers (Lanka) Limited, Colombo, Sri Lanka and the Consortium comprised of Mitsui & Co. Limited, Tokyo, Japan and Taisei Corporation, Tokyo, Japan, dated 31st January 1984, has been practically completed on 30th April 1987.

The Defects Liability Period shall be one year from the above practical completion date and shall be applicable to all work executed under the contract.

Yours faithfully,

KANKO KIKAKU SEKKEISHA
Y. SHIBATA & ASSOCIATES
ARCHITECTS & DESIGNERS

Yozo Shibata
ARCHITECT

RECEIVED
30 APR 1987
(3)

cc: Hotel Developers (Lanka) Limited,
16, Alfred Place,
Colombo 3,
Sri Lanka.

KANKO KIKAKU SEKKEISHA

Y. SHIBATA & ASSOCIATES ARCHITECTS & DESIGNERS

P31(b)

August 29, 1988

MITSUI TAISEI CONSORTIUM
Hilton International Colombo Project
Lotus Road
Colombo 1
SRI LANKA

Dear Sirs:

FINAL CERTIFICATE (Called for in paragraph (3), clause 16 of General Condition of Contract for Construction of Hilton International Colombo.)

HILTON INTERNATIONAL COLOMBO

This is to certify that all necessary *defect works has been executed during the liability period (One year from the practically completed on April 30, 1987), according to the agreement for construction of Hilton International, Colombo, by and between Hotel Developers (Lanka) Limited, Colombo, Sri Lanka; and the consortium comprised of Mitsui & Co. Limited, Tokyo, Japan and Taisei Corporation, Tokyo, Japan.

((3) Final Certificate of Clause 16 - Completion Certificate)

Yours faithfully,

KANKO KIKAKU SEKKEISHA
Y. SHIBATA & ASSOCIATES
ARCHITECTS & DESIGNERS

Yozo Shibata
ARCHITECT

*Note: defect works has been executed except the resurface of tennis court which is scheduled as the attached letter dated August 29, 1988 by Mitsui Taisei Consortium.

cc: Hotel Developers (Lanka) Limited
16 Alfred Place
Colombo 3
Sri Lanka

QUESTIONS OF LAW AND MATTERS WHICH ARE IN ISSUE IN APPEAL

65. ISSUE FRAMED BY YOUR LORDSHIPS' COURT IN GRANTING SPECIAL LEAVE TO APPEAL

It is respectfully submitted on behalf of the Plaintiff, that in the background of the submissions herein contained, in determining the issue framed by Your Lordships Court,

"whether granting of Leave by the Court of Appeal against the interim injunction granted by the District Court on 09.09.'91 is sustainable

in Law",

substantial questions of law, set out hereinbelow, arise, which are not only fit for review by Your Lordships' Court, but are also of general and public importance, in the matter of the due administration of justice.

66. <u>PARTIES WHO DID NOT PARTICIPATE IN THE ORIGINAL COURT & WHO ARE NOT AFFECTED BY THE ORDER OF THE APPEAL COURT, PERMITTED TO PARTICIPATE IN PROCEEDINGS THEREIN</u>

i. Whether a party Defendant, in this instance the 4th Defendant Company, who had a separate Enjoining Order operating against it issued in the same Action and a separate Notice of Interim Injunction having been served upon it also in the same Action, and having appeared in the said Action, and despite having been granted the opportunity to challenge the continuance of the Enjoining Order and the grant of an Interim Injunction against it, and having failed to so challenge and object to either, and having merely stood by and watched, with its Counsel present at the proceedings into the grant of the said Interim Injunctions, and accordingly having permitted the Court to grant such Interim Injunction against it, without Objection of any kind whatsoever thereto is;

a) entitled to be made a party to a Leave to Appeal Application proceedings by other Defendant/Defendants, who had Objected to and contested the grant of a separate Interim Injunction against it, in the very same Action,

b) entitled to be Noticed in such circumstances by an Appellate Court in such proceedings,

c) entitled to appear and be heard to challenge and impeach the Order granting such separate Interim Injunction against the other Defendants as aforesaid, and

d) entitled to tender fresh evidence, <u>for the very first time, in this Action</u>, before the Court of Appeal, <u>in a manner not provided for in law</u>,in the disposal of the said Leave to Appeal Application by the other Defendants, on such separate Interim Injunction issued against them, as aforesaid.

ii. Whether to have Noticed such a Defendant, and/or to have permitted any one or more or all, of the matters referred to in i.) above, is a procedural irregularity/illegality,which vitiates the proceedings, in which such participation was permitted and renders such proceedings null and void and also the Order made thereat.

iii. Whether a Defendant/Defendants made parties for purposes of Notice only, and against whom no relief, Interim or otherwise has been sought or granted in the original Court, in the instant Case, 5th, 6th and *more particularly the 7th Defendant who had previously in the Court of Appeal itself, had admitted that the Order in this Application does not affect them*, is or are entitled to;

a) be made a party respondent and/or party respondents in a Leave to Appeal Application proceedings, that had been instituted by other Defendant/Defendants, against whom an Interim/Final Order/Judgement has been made/entered,

b) be Noticed in such circumstances, by an Appellate Court in such proceedings,

c) appear and be heard to challenge and impeach an Order/Judgement granted against such other Defendant/Defendants as aforesaid, which Order, as admitted by they themselves, does not affect them, and

d) raise or be permitted to raise in such circumstances, any question of fact or law, for the determination of the Appellate Courts, in such proceedings, for the purposes of the grant of Leave to Appeal to such other Defendant/Defendants as aforesaid, or for any other purpose.

iv. Whether, in the aforesaid circumstances, to have Noticed such a Defendant/Defendants aforesaid and/or to have permitted, any one or more or all of the matters referred to in iii) above, is a procedural irregularity/illegality, which vitiates the proceedings, at which such participation was permitted and renders null and void an Order made thereat.

67. RULING BY YOUR LORDSHIPS' COURT ON THE RIGHT OF PARTICIPATION BY THE 4TH DEFENDANT COMPANY & THE 7TH DEFENDANT

NOT PERMITTED TO PARTICIPATE IN THE SUPREME COURT

Similarly, at the hearing on 21.05.92, into the granting of Special Leave to Appeal to the Plaintiff in Your Lordships Court, the Counsel for the 4th Defendant Company and the 7th Defendant attempted to make submissions and upon the, Counsel for the Plaintiff Objecting to the same, Your Lordships Court, correctly ruled, that they have no right or status, to participate or be heard, and accordingly the said Counsel were not permitted to address Your Lordships' Court in the said proceedings.

68. COURT OF APPEAL MISDIRECTS ITSELF & ERRONEOUSLY ASSUMES THAT THE LEAVE TO APPEAL APPLICATION WAS FROM THE INTERIM INJUNCTION GRANTED AGAINST THE 4TH DEFENDANT COMPANY

i. Whether it was in fact and law, correct and proper for Their Lordships of the Court of Appeal to have purported to grant Leave to Appeal to the 1st & 2nd Defendants and 3rd Defendant, whereas Their Lordships of the Court of Appeal had gravely misdirected themselves and erroneously assumed that;

a) the Plaintiff has brought this Action against the 4th Defendant Company, as the Company has acted in fraud of the Shareholders, in accepting and making payments to the 1st, 2nd & 3rd Defendants in respect of the construction of the Colombo Hilton Hotel,

b) the Plaintiff sought an injunction restraining the 4th Defendant Company from making any further payments to the 1st, 2nd & 3rd Defendants,

c) the District Court first made an Enjoining Order restraining the 4th Defendant Company from making further payments to the 1st, 2nd & 3rd Defendants

d) thereafter, the Interim Injunction was granted for the same purpose,

e) this Leave to Appeal Application is against the said Order,

ii. Whether it was open to the Court of Appeal to purport to grant Leave to Appeal to the 1st & 2nd Defendants and the 3rd Defendant, on the Interim Injunction that had been granted against them, under prayer `g' of the Plaint, whilst Their Lordships of the Court of Appeal had gravely misdirected themselves and had erroneously assumed, as set out in the aforesaid Order dated 31.01.92, that the Leave to Appeal Application before Their Lordships was against the Interim Injunction granted against the 4th Defendant Company under the separate prayer `h'of the Plaint.

69. MISDIRECTION BY THE COURT OF APPEAL

i. Whether it is open to an Appellate Court, to have granted Leave from an Order of an original Court, on the basis, that it was not clear whether the Trial Judge has addressed his judicial mind, to the question, whether the Plaintiff had sufficient evidence to make out a prima-facie case, for the grant of an injunctive relief, eventhough the Court of Appeal had misunderstood and misconstrued the nature and basis of the Plaintiff's Action itself, by a misdirection on the facts, pleaded and relied upon by the Plaintiff

for his Action.

ii. Whether such an approach to the grant of the said Leave is ultra-vires its powers and is a misdirection which vitiates such Order.

70. GRANTING OF LEAVE SPECIFICALLY ON THE SUBMISSIONS OF THE 7TH DEFENDANT

i. Whether it was open to the Court of Appeal, to have purported to grant Leave in the aforesaid circumstances, on the question raised by the 7th Defendant, from the aforesaid Order of the District Judge against the other Defendant/Defendants as aforesaid, as arising from the Order, complained of, when the said point was never taken up before the original Court by any party, and the Plaintiff's Action was never contested, on such point by any party, and accordingly could not have and did not engage the judicial mind of the Trial Judge.

- **Whereas, on the contrary, the 1st & 2nd Defendants' and the 3rd Defendant's Counsel, analysing the features and characteristics of the Plaintiff's Action conceded the right and availability of such Derivative Action to the Plaintiff, vide Pages 12 & 13 Paragraph 9 of the Written Submission filed by the 3rd Defendant in the District Court, which was also specifically adopted by the 1st & 2nd Defendants in their own Written Submissions at Page 17 Paragraph 6 filed in the District Court.**

- **The 3rd Defendant's Written Submission inter-alia, reads as follows; i.e.**

"Derivative Action:

9. The Plaintiff has filed this action for an on behalf of the 4th Defendant Company - Vide: the reliefs claimed in the prayer to the Plaint. This action purports to be what is known as a derivative action where the Plaintiff is seeking not the enforcement of his own right of action but a right of action vested in or derived from the Company."

- **The 1st & 2nd Defendants Written Submission, inter-alia, reads as follows; i.e.**

"6. It was suggested orally in reply, and in the counter affidavit of the third defendant (filed without the permission of Court)that the plaintiff's action is a derivative action. It is submitted respectfully that this is not an action that falls within the exceptions to the well rule laid down in the case of FOSS-V-HARBOTTLE. Reference is kindly requested to paragraph 9 of he written submissions of the third defendant at page 13 which these defendants adopt."

ii. Whether it was correct and proper in Law, for Their Lordships of the Court of Appeal, in the given circumstances to have determined by entertaining the Submissions made by the Counsel for the 7th Defendant as a fit question of law, the availability of a derivative action in our law, and after His Lordship Dr.A.de Z. Gunawardena J, in consultation with His Lordship K. Palakidnar J, had previously informed Plaintiff's Counsel, that they accept his contention with regard to the availability of a Derivative Action in the Law of Sri Lanka.

71. QUESTIONS OF LAW NOT FORMULATED BY THE COURT OF APPEAL

i. Whether it is permissible and/or correct for the Court of Appeal to have purported to have granted Leave to Appeal, on supposed fit questions of law without formulating such questions of law.

ii. Whether it is obligatory on the Court of Appeal, to specifically deal with the Order, from which Leave is sought and the supposed errors in law, which necessitates the grant of Leave and to formulate in precise terms the substantial questions of law.

72. GRANTING OF LEAVE IN AN INTERLOCUTORY APPEAL

i. Whether Leave to Appeal, being an interlocutory Appeal, ought to be granted only on substantial questions of law, which go to the root of the Action and not on any questions of law, which cannot help to dispose of the Action, without proceeding to trial;

Whereas the 1st & 2nd Defendants themselves, in their Written Submissions filed in the District Court at Page 17 Paragraph 6 have stated as follows specifically in this regard.

- ***" In any event this is a disputed question of law fundamental to the maintainability of the Action, which must await the final determination at the trial and is not a question that could he decided at this stage"***

ii. Whether questions of law, arising in interlocutory proceedings, which do not go to the root of the Action, should be gone into at the trial and not in Leave to Appeal proceedings.

73. DENIAL OF RIGHT OF REPLY TO THE PLAINTIFF

i. When an objection is taken, on the locus standi of a Plaintiff to bring an Action, on the basis that the Plaint does not disclose a cause of action, whether the averments in the Plaint should be accepted as true in the first instance, before it can be said, that the averments in the Plaint do not disclose a cause of action or whether it is open to a party Defendant to controvert the averments of fact in the Plaint and assert, that therefore the Plaint does not disclose a cause of action, as was permitted in the Court of Appeal in this instant Action.

ii. Whether having permitted the Defendants to do as aforesaid in the instant Action, and having specifically denied the Plaintiff the right to address the Court of Appeal and counter such contravention by the Defendants of the factual averments in the Plaint, it is permissible for the Court of Appeal, to have granted Leave to Appeal, on such basis, that it is a fit question of law to be decided in Appeal, whether the Plaintiff has a locus standi.

iii. Whether such a denial is a denial of the rules of natural justice and of a fair hearing for the Plaintiff.

74. GRANTING OF LEAVE FOR MERE CONVENIENCE

i. Whether it is open to an Appellate Court, to have granted Leave, on the premise of mere convenience, that the Court of Appeal normally grants Leave in most cases, as observed by His Lordship K.Palakidnar J referred to at paragraph 30 of the Petition to Your Lordships Court and the corresponding Affidavit filed therewith.

ii. Whether the grant of Leave on the grounds that it is usually done by the Appellate Court is contrary to acceptable judicial criteria, and therefore, whether such grant was bad in Law and therefore null and void.

ERRORS COMMITTED BY THE COURT OF APPEAL, THE JUDGEMENT OF WHICH IS UNDER APPEAL

75. ISSUE FRAMED BY YOUR LORDSHIPS' COURT IN GRANTING SPECIAL LEAVE TO APPEAL

It is respectfully submitted on behalf of the Plaintiff, that the said Orders of the Court of Appeal dated 17.01.92 and 31.01.92, are in error, on the substantial questions of Law, and facts as presented to Court, set

out hereinbelow, which are matters that are fit for review by Your Lordships Court, in determining the issue framed by Your Lordships Court,

> ***" whether granting of Leave by the Court of Appeal against the interim injunction granted by the District Court on 09.09.'91 is sustainable in Law",***

and are also matters of general and public importance in the matter of the due administration of justice.

76. <u>ERRORS IN COURT OF APPEAL ORDER DATED 17.01.92</u>

The aforesaid Order dated 17.01.92 on the Preliminary Objection is contrary to Law and the facts as presented to Court, and has occasioned a grave miscarriage of justice, in that:

i. The rule established by law and authority, is that a party to a suit, who does not object to the grant of a relief against it, cannot thereafter seek to challenge or impeach the Order in any other judicial forum;

ii. The Court of Appeal misdirected itself in law in holding, that the 4th Defendant Company and the 5th, 6th & 7th Defendants were necessary parties, inter-alia, misconceiving that they would be affected by any Order of the Court of Appeal; <u>whereas, the 4th Defendant Company had not objected to the issuance of a separate Interim Injunction against it under prayer `h' of the Plaint in the same Action and accordingly had not Appealed against such order to the Court of Appeal, whilst no reliefs had been claimed against the 5th, 6th & 7th Defendant in this Action.</u>

iii. To have permitted the 4th Defendant Company, not only to appear, but also to make submissions, was a misdirection in law and vitiates the Order complained of; particularly more so in a Leave to Appeal Application made by other Defendant/Defendants on an interim injunction issued specifically against them.

iv. The 5th, 6th and 7th Defendants did not have any right or status to appear and/or be heard in these proceedings before the Court of Appeal; they themselves having previously admitted, that the said Order of the Court of Appeal does not afect them.

v. It is submitted that the permission granted to the 4th Defendant Company, and the 5th, 6th and 7th Defendants to be heard through Counsel, in a Leave to Appeal Application of other Defendant/Defendants, was in effect the grant of right of Leave to Appeal on such Appeal, to parties, who had not participated at the hearing in the original Court even though they were present therein through their own respective Counsel, and who had never filed any pleading canvassing the correctness of the said Order of the learned District Judge, having not objected to the granting of the Interim Injunctions either against the 1st, 2nd & 3rd Defendants on one hand or against the 4th Defendant Company on the other.

vi. The Court of Appeal also misdirected itself in law in holding that the 8th, 9th, 10th & 11th Defendants were also necessary parties and thereby occasioned a grave procedural irregularity and illegality vitiating the said Order of the Court of Appeal; the 8th Defendant had failed even to file Proxy in the original Court, whilst the 10th Defendant did not object to the granting of the Interim Injunctions either against the 1st, 2nd & 3rd Defendants on one hand or against the 4th Defendant Company on the other.

77. ERRORS IN COURT OF APPEAL ORDER DATED 31.01.92

The aforesaid Order of the Court of Appeal dated 31.01.92 granting Leave to Appeal, is contrary to Law and the facts as presented to Court, in that:

COURT OF APPEAL MISDIRECTS ITSELF & ERRORNEOUSLY MISCONCEIVES THAT THE LEAVE TO APPEAL APPLICATION WAS FROM THE INTERIM INJUNCTION GRANTED AGAINST THE 4TH DEFENDANT COMPANY

i. **It is respectfully submitted, that the Court of Appeal misdirected itself on the facts, in its analysis of the Plaintiff's Action and of the Order, from which Leave to Appeal had been sought, only by the 1st, 2nd & 3rd Defendants and not by the 4th Defendant Company.**

ii. **It is respectfully submitted, that the Court of Appeal misdirected itself and erroneously misconceived that;**

   a) **the Plaintiff has brought this Action against the 4th Defendant Company, as the Company has acted in fraud of the Shareholders, in accepting and making payments to the 1st, 2nd & 3rd Defendant in respect of the construction of the Colombo Hilton Hotel,**

   b) **the Plaintiff sought an injunction restraining the 4th Defendant Company from making any further payments to the 1st, 2nd & 3rd Defendant,**

   c) **the District Court first made an Enjoining Order restraining the 4th Defendant Company from making further payments to the 1st, 2nd & 3rd Defendant,**

   d) **thereafter, the Interim Injunction was granted for the same purpose,**

   e) **this Leave to Appeal Application is against the said Order,**

iii. **It is respectfully submitted that, the Court of Appeal has misunderstood and misconceived that, the proceedings before them, as involving an impeachment of the Injunction granted in terms of prayer "h" of the Plaint, against the 4th Defendant Company, from paying monies to the 1st, 2nd & 3rd Defendants, when in fact, the 1st, 2nd & 3rd Defendants sought to impeach the Interim Injunction granted specifically against them, only in terms of prayer "g" of the Plaint, preventing them from claiming any monies from the 4th Defendant Company *and/or the Government of Sri Lanka under the State Guarantees that had been issued to them.***

iv. **It is respectfully submitted, that the Court of Appeal misdirected itself, by reason of a non direction, on which of the two Interim Injunctions was being challenged in the Petition before it, in so far as the Interim Injunction granted in terms of prayer "g" of the Plaint against the 1st, 2nd & 3rd Defendants, not only restrained them from claiming etc, from the 4th Defendant Company but also restrained the 1st & 2nd Defendants from claiming etc. *under the State Guarantees issued by to them the Government of Sri Lanka, guaranteeing the payments of the alleged loans, which today stands around U.S.$ 175.0 Mn i.e. Rs.7,250.0 Mn*, as claimed from the 4th Defendant Company by the 1st & 2nd Defendants. If payment is made under the said State Guarantees by the Government of Sri Lanka, it would also become a debt burden of the 4th Defendant Company itself, repayable to the Government of Sri Lanka.**

v. **It is respectfully submitted, that the 1st, 2nd & 3rd Defendants had only challenged the Interim Injunction granted against them in terms of prayer "g" to the Plaint and therefore for the Court of Appeal to have come to the conclusion that the Leave to Appeal is**

against the Interim Injunction granted against the 4th Defendant Company in terms of prayer "h", is a misdirection, which goes to the root of the Order granting Leave, upon the supposition of a fact situation, which was non-existent before the Court of Appeal. The said misdirection vitiates the said Order; whereas the 4th Defendant Company itself had not objected to the granting of the said Interim Injunction against it and nor had it sought to set aside the said Order by an Appeal.

vi. It is manifestly clear, that the Court of Appeal has been under the erroneous belief that the Interim Injunction granted against the 4th Defendant Company, which never objected to the grant of the same in the original Court, was before them and has granted Leave on that basis; this is a misdirection in law which vitiates the said Order.

COURT OF APPEAL MISDIRECTS ITSELF & FAILS TO RECOGNISE THAT THE PLAINTIFF'S ACTION IS A DERIVATIVE ACTION IN THE CIRCUMSTANCES OF "WRONG-DOER CONTROL" AS EVIDENCED BY THE PLAINT

vii. It is respectfully submitted, that the Court of Appeal has grievously misdirected itself in taking the view, that the Plaintiff's Action was on the basis that the Company has acted in fraud of its Shareholders, whereas the basis of the Plaintiff's Action was a Derivative Action in the circumstances of "wrong-doer control" instituted in the interest of the Company itself and instituted on behalf of the Company and in its right;

- **Infact the 1st & 2nd Defendants' and the 3rd Defendant's Counsel, analysing the features and characteristics of the Plaintiff's Action conceded the right and availability of such Derivative Action to the Plaintiff, vide pages 12 & 13 Paragraph 9 of the Written Submission filed by the 3rd Defendant in the District Court, which was also specifically adopted by the 1st & 2nd Defendant in their own Written Submissions at Page 17 Paragraph 6 filed in the District Court.**

- **The 3rd Defendant's Written Submissions inter-alia, reads as follows; i.e. Quote;**

  "Derivative Action:
  9. The Plaintiff has filed this action for an on behalf of the 4th Defendant Company - Vide: the reliefs claimed in the prayer to the Plaint. This action purports to be what is known as a derivative action where the Plaintiff is seeking not the enforcement of his own right of action but a right of action vested in or derived from the Comapny."

- **The 1st and 2nd Defendants Written Submissions, inter-alia, reads as follows; i.e.**

  "6. It was suggested orally in reply, and in the counter affidavit of the third defendant (filed without the permission of the Court)that the plaintiff's action is a derivative action. it is submitted respectfully that this is not an action which falls within the exceptions to the well settled rule laid down in the case of FOSS-V-HARBOTTLE. Reference is kindly requested to paragraph 9 of the written submissions of the third defendant at page 13 which these defendants adopt."

MISDIRECTION ON THE DISCLOSURE OF A CAUSE OF ACTION IN THE PLAINT. PLAINTIFF DENIED OPPORTUNITY TO ADDRESS COURT ON IT.

viii. It is respectfully submitted, that this misdirection vitiates the Order complained of, as it has denied the Plaintiff the substance

of a fair and proper judicial hearing, specifically in the background of having been denied the opportunity of addressing the Court of Appeal, on the facts as pleaded in the Plaint, constituting the cause of action of the Plaintiff, eventhough Leave was being sought on the grounds that the Plaint did not disclose a cause of action and that the Trial Judge had not addressed his mind to this question of the Plaintiff's Case as set out in the Plaint. As pointed out hereinbefore, the Plaint was not even read by the Counsel for the Defendants, to apprise Court of the facts constituting the Plaintiff's cause of action and nor the Order of the District Judge, from which Leave was sought.

ix. **It is respectfully submitted that to have permitted the Defendants to have controverted the averments of facts in the Plaint and to have specifically denied the Plaintiff the right to address the Court of Appeal and counter such contravention by the Defendants of the factual averments in the Plaint, and to have granted Leave to Appeal, on such basis, that is a fit question of law to be decided in Appeal, whether the Plaintiff has a locus standi, is a grave error which vitiates the Order complained of and is a denial of the rules of natural justice and of a fair hearing for the Plaintiff.**

x. **It is respectfully submitted that, the question whether the facts urged by the Plaintiff, discloses a cause of action, and whether the Plaintiff has a right to bring a Derivative Action, has been viewed by the Court of Appeal on a wrong supposition of facts and not from a point of view of the case presented by the Plaintiff and as emerging from its pleadings, which was before the Court of Appeal. It is therefore respectfully submitted, that it cannot form the basis of the judgment purporting to grant Leave to Appeal, on supposed questions of law, fit to be determined and not formulated by the Court of Appeal. This is a grave error which vitiates the Order complained of.**

COURT OF APPEAL ERRS ON THE ISSUE OF A DERIVATIVE ACTION PURELY ON THE BASIS OF THE SUBMISSIONS MADE BY THE 7TH DEFENDANT WHEREAS THE 1ST, 2ND & 3RD DEFENDANTS CONCEDE AVAILABILITY OF A DERIVATIVE ACTION WITHOUT DEMUR

xi. **It is respectfully submitted that the Court of Appeal has misdirected itself on the question of the availability of the Derivative Action, purely based on the submissions made by the Counsel for the 7th Defendant, who was not an effected party to the said Order on his own admission, and who had further not participated in the original Court proceedings, even though present therein through Counsel: and such participation in the Court of Appeal was improper and irregular, inasmuch as the affected parties the 1st, 2nd & 3rd Defendants had conceded as aforesaid in the District Court to the availability of a Derivative Action recognising that the Plaintiff's Action was in the nature of a Derivative Action.**

xii. **It is respectfully submitted that the Court of Appeal misdirected itself in determining, that the matter of the Derivative Action is a fit question of law, inasmuch as previously His Lordship Dr. A.de Z. Gunawardene J, after consultation with His Lordship Palakidnar J, informed Plaintiff's Counsel, that they accept his contention with regard to the availability of the Derivative Action, which fact as set out in Paragraph 27 of the Petition to Your Lordships' Court was not denied by the 1st, 2nd & 3rd Defendants before Your Lordships' Court.**

IN VIEW OF ITS OWN ERRONEOUS APPRECIATION OF THE PLAINTIFF'S ACTION APPEAL COURT ERRS IN ITS EXAMINATION OF THE DISTRICT COURT ORDER

xiii. It is respectfully submitted, that when the Court of Appeal complains, that it does not appear from the Order of the learned District Judge, that he had addressed his judicial mind to the question before him, it is clear from the foregoing that the Court of Appeal was examining the Order of the learned District Judge, from the point of view of its own erroneous appreciation and understanding of the Plaintiff's Action as referred to hereinbefore.

xiv. It is respectfully submitted, that the Court of Appeal has not addressed its judicial mind to the issues before it and therefore has misdirected itself on the facts in granting Leave to Appeal to the 1st, 2nd & 3rd Defendants. The said Court of Appeal Order is therefore bad in law.

PARTICIPATION OF 4TH DEFENDANT COMPANY & THE 7TH DEFENDANT ALONE VITIATES APPEAL COURT ORDER

xv. It is respectfully submitted, that the Court of Appeal has grievously misdirected itself in law, in permitting and considering as a fit question of law, upon which Leave could be granted, the point raised by the 7th Defendant, when the said Defendant did not participate in the original Court proceedings before the learned District Judge and when the 7th Defendant had no right nor status to be noticed, recognised or be heard in the Court of Appeal proceedings, in any manner whatsoever and as a matter of law; *the 7th Defendant himself having previously admitted in the Court of Appeal itself, that the said Order in this Application does not affect him,*

- **At the hearing on 21.05.92 into the granting of Special Leave to Appeal to the Plaintiff in Your Lordships Court the Counsel for the 4th Defendant Company and the 7th Defendant attempted to make submission and the Counsel for the Plaintiff objecting to the same, Your Lordships Court, correctly ruled, that they have no right or status, to participate or be heard, and accordingly the said Counsel were not permitted to address Your Lordships' Court in the said proceedings.**

xvi. The Court of Appeal has not differentiated between the grounds urged by the Counsel for the 1st, 2nd & 3rd Defendants for the grant of Leave, and those urged by the Counsel for the 4th Defendant Company and those urged by the Counsel for the 7th Defendant and accordingly the said Order Granting Leave is bad in Law; furthermore the very participation of the 4th Defendeant Company and the 7th Defendant is bad in law.

xvii. It is respectfully submitted that the purported grant of leave on this ground alone vitiates the Order of the Court of Appeal,

COURT OF APPEAL ERRS AND FAILS TO PRECISELY FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW

xviii. It is respectfully submitted that the Court of Appeal to have purported to have granted Leave to Appeal, on supposed fit questions of law without formulating in precise terms the substantial questions of law specifically dealing with the Order, from which Leave is sought and the supposed errors in law, which necessitates the grant of Leave, in itself vitiates the Order of the Court of Appeal, complained of.

COURT OF APPEAL ERRS IN AN INTERLOCUTORY APPEAL, ON A QUESTION OF LAW THAT MUST AWAIT TRIAL

xix. It is respectfully submitted that being an interlocutory Appeal, Leave to Appeal ought to have been granted only on substantial questions of law, which go to the root of the Action and not on any questions of law, which cannot help to dispose the Action, without proceeding to trial and that the Court of Appeal erred in such regard; whereas the 1st & 2nd Defendants themselves, in their Written Submissions filed in the District Court at page 17 paragraph 6.00 have stated as follows specifically in such regard: i.e.

> ***"In any event this is a disputed question of law fundamental to the maintainability of the Action, which must await the final determination at the trial and is not a question that can be decided at this stage"***

COURT OF APPEAL ERRONEOUSLY GRANTS LEAVE FOR MERE CONVENIENCE

xx. It is respectfully submitted that the Court of Appeal to have purported to have granted Leave, on the premise of mere convenience, that the Court of Appeal normally grants Leave in most cases, as observed by His Lordship K. Palakidnar J. referred to at paragraph 30 of the Petition to Your Lordships' Court and the corresponding Affidavit filed therewith, without having granted Leave, on acceptable judicial criteria in accordance with established Case Law, in itself vitiates the validity of the entire Court of Appeal Order complained of.

IRREGULARITIES AND/OR ILLEGALITIES VITIATES ENTIRE APPEAL COURT ORDER

xxi. It is respectfully submitted, that all the aforesaid irregularities and/or illegalities complained of in the two Orders of the Court of Appeal, negates and vitiates the validity of the entire Order itself, complained of and renders it not sustainable in law.

REFERENCES TO AND DISCUSSION OF AUTHORITIES RELIED ON

78. DERIVATIVE ACTION

i. a) The material facts placed before Court, discloses the fact, that the Plaintiff's Action is what is known as a Derivative Action. Where wrong-doers control a Company, trying to fraudulently derive benefit for themselves, an Action can be brought, on behalf of the Company by a minority Shareholder or Shareholders, as its Representative to obtain redress for and on behalf of the Company. This type of Action has been given the name "Derivative Action" recognising that its true nature, is that the individual member sues on behalf of the Company to enforce rights derived from it. In this Action, wrong-doing Directors, the 1st & 2nd Defendants acting, jointly and severally with the 3rd Defendant, are wrongfully and unlawfully defrauding the 4th Defendant Company.

b) Often the suspect transactions are of a complicated financial nature, which the Shareholder cannot easily unravel. It may be difficult, therefore, to establish precisely what the transactions involve and ascertain who the beneficiaries are. The Board, if questioned closely at the General Meeting, will usually refuse to disclose any information on the basis that the matter is confidential. The non-wrong-doing Directors, far from adopting an active policing role, are often quite content to take a back seat and refuse to question the conduct of the other Directors. In this background the conduct of the Plaintiff is laudable as he has brought to light, as a Shareholder of a Public Listed Company, and to

the attention of Court, the wrong doing, of that part of the Board, which had full control of the day to day administration of 4th Defendant Company - namely, and principally the representatives of the 1st & 2nd Defendants on the Board of Directors of the 4th Defendant Company, actively supported by certain other Directors.

ii. a) **In the aforesaid circumstances, the Plaintiff was well within the established right and law, to have instituted this instant Action, on behalf of the 4th Defendant Company and in its interest. Lord Denning MR in Wallersteiner V Moir (No.2) (1975) 2 AER 857, 858 ;**

> ***"..... the principal is that, where the wrong doers themselves control the Company, an action can be brought on behalf of the Company by the minority Shareholders, on the footing that they are its representatives, to obtain redress on its behalf ..... this principle well stated by Professor Gower in his book on Companies ....."***
>
> ***"..... this type of action has been given the name of a "derivative action", recognizing that its true nature is that the individual member sues on behalf of the Company to enforce rights derived from it".***

b) **It is an established principle in law that, wrong-doing Directors cannot make a present of corporate assets to themselves. <u>This is fraud</u>;**

- **Cook v Deeks (1916) 1 AC 554 at 564**
- **Daniels v Daniels (1978) 2 AER 89**
- **Menier v Hoopers Telegraph Works 1874 9 Ch App.350**

c) **Where Directors act other than in the bona-fide interests of the Company as a whole or for collateral purposes, it is an abuse of power and supports a Derivative Action, because such a mala-fide exercise is not rectifiable;**

- **Cook v Deeks (Supra)**
- **Daniels v Daniels (1978) 2 AER 89 at 96**

d) **This "wrong-doers' control" is a fraud on the minority, which in the Derivative Action situation, is more appropriately fraud on the Company, because the wrong doers' control, prevents the Company itself bringing an Action in its own name <u>and a demurrer on the ground that the suit is not in the proper form cannot be sustained</u>.**

> **Mason v Harris 1879 Vol XI Ch D 97 at 107, 108 per Jessel M.R.**
>
> ***"Is it reasonable to say to a minority of shareholders who are defrauded by the majority, that they must apply to the company to institute proceedings? Even independ - ently of the authorities, I should be prepared to say no. Facts are alleged which show it to be impossible to get the Company to impeach the acts complained of. On demurrer the truth of these allegations is admitted, and a demurrer on the ground that the suit is not in the proper form cannot be sustained."***

iii. The circumstances that warrant the institution of a "Derivative Action", sometimes also described to as "Representative Action", have been clearly set out by a number of well accepted authorities

on law, based on established Case Law. For this discussion, reference is drawn to Gower's Principles of Modern Company Law 4th Edition published by Stevens, Chapter 26 "The Enforcement of Corporate Duties" and Pennington's Company Law 5th Edition published by Butterworth, Chapter 18 "The Principle of Majority Rule"

Gower – Ch. 26 Page 641

THE ENFORCEMENT OF CORPORATE DUTIES

When, however, the directors or controllers of an incorporated company are breaking their duties, the other members of the company normally have no *locus standi*. The duties are owed not to them but to the company itself; and therefore it is the company itself which should sue. But those against whom the action is to be brought may themselves be the appropriate organ for instigating proceedings in the company's name. Hence some alternative means of enforcement have been made available in certain circumstances as a result of intervention both by the equity courts and the legislature.

Pennington – Ch. 18 Pages 727, 729, 730

REPRESENTATIVE AND DERIVATIVE ACTIONS

In certain circumstances an individual member may bring an action to remedy a wrong done to his company or to compel his company to conduct its affairs in accordance with its constitution and the rules of law governing it, even though no wrong has been done to him personally, and even though the majority of his fellow members do not wish the action to be brought. The form of his action in these exceptional cases is peculiar, because the plaintiff does not sue in his own right alone, but on behalf of himself and all his fellow members other than those, if any, against whom relief is sought. If the member sues for relief against the company, it must, of course, be made a defendant; if he seeks to enforce a corporate claim against other persons, the company must still be joined as a co-defendant so that it may be bound by the judgment, and so that it may enforce any order giving relief against the substantive defendants.[19]

The individual member's action in these exceptional cases may be described as representative, because it is brought on behalf of himself and persons other than himself. When relief is sought against third parties for the company's benefit, the action may also be described as derivative, because the individual member sues to enforce a claim which belongs to the company, and his right to sue is derived from it.

'The court will only allow a derivative action to proceed if it is brought for the benefit of the company,

Furthermore, the plaintiff may join a personal claim of his own in the representative action,[8] unless the two claims arise out of different transactions.[9] On the other hand, all the persons on whose behalf a representative action is brought are bound by the judgment given in it,

iv. If the Plaintiff Shareholder discontinues the Derivative Action before Judgement or he does not conduct the Case properly, the Court may substitute one of the other persons, on whose behalf the

Action is brought as the Plaintiff, which in such instance would include the Company itself, i.e. in this instant case the 4th Defendant Company. The underlying principle therefore being, that the Court would intervene to ensure a proper judicial inquiry into the wrong and fraud complained of, since the Derivative Action is instituted really in the interest of the Company and on its behalf. Accordingly since a Derivative Action is instituted on behalf of a Company and in its interest, the Plaintiff is entitled to the reimbursement of Costs.

Pennington - Ch. 18 Pages 729, 730

> Moreover, if the plaintiff discontinues the action before judgment, or does not conduct his case properly, the court may substitute one of the other persons on whose behalf the action is brought as plaintiff.[14]
>
> The derivative character of a representative action brought by a member to enforce a right vested in the company is shown by the fact that judgment is given in favour of the company, so that the plaintiff obtains no personal benefit from the judgment directly,
>
> A derivative action commenced by a member may not be continued by him if he ceases to be a member, although the court may allow it to be continued by some other member, who is substituted as plaintiff, and that member will take up the action from the point it has reached, and will be bound by the pleadings which have been delivered and the interlocutory proceedings which have already taken place.[18] Because the plaintiff in a derivative action seeks to enforce a cause of action which belongs to the company, the court can in its discretion at any time after the commencement of the action order the company to indemnify him for his costs on a common fund basis (and not merely to meet the party and party costs recoverable by him from the substantive defendants), and this discretion can be exercised in his favour whether the derivative action is successful or not.

Gower - Ch. 26 Page 652

> However, the Court of Appeal's recent decision in *Wallersteiner* v. *Moir* (*No. 2*)[69] has provided a highly significant and welcome solution to this dilemma, holding that it is open to the court to order that the company, since it is in reality the true plaintiff, should indemnify the plaintiff shareholder against the costs incurred in the action,[70] whether or not the action succeeds.

v. **Exceptions to the established Foss v Harbottle Rule is a complexity, with the Courts having dealt with each Case on its merits, primarily to prevent a fraud being perpetrated on a Company and its Shareholders by Directors and Shareholders, who themselves are committing the wrong and preventing proper action being taken by the Company itself, by the exercise of such "wrong-doer control". In such an instance the Shareholder, to prevent such wrong-doing and fraud, sues on behalf the Company and also on behalf of the Shareholders, which also prevents a multiplicity of actions by different Shareholders, on the same matter, as contemplated in Foss v Harbottle.**

The Company is named a Defendant and could either be a real Plaintiff or a real Defendant, inaccordance with the circumstances of each case. Where the Company is being wronged, the relief is in favour of the Company; whilst where the Company is doing wrong, the relief will be against the Company. Injunctive relief is available to prevent the wrong being done. In either case, the benefit is for the Company and not to the Shareholder, who institutes the Action, except a sense of satisfaction and perhaps the appreciation in the value of his Shares, with future prospects for the Company.

When can a shareholder sue?

It is generally stated that a suit by a shareholder instead of by the company is allowed in four circumstances:[24]

(i) When it is complained that the company is acting or proposing to act *ultra vires*.[25]

(ii) When the act complained of, though not *ultra vires* the company, could be effective only if resolved upon by more than a simple majority vote;[26] *i.e.* where a special or extraordinary resolution is required and (it is alleged) has not been validly passed.[27]

(iii) Where it is alleged that the personal rights of the plaintiff shareholder have been infringed or are about to be infringed,[28] at any rate if the wrong to the plaintiff could not be rectified by an ordinary resolution of the company.

(iv) Where those who control the company are perpetrating a fraud on the minority[29] *i.e.* an act of the type defined in Chapter 25.

As will be seen from the citations in the footnotes there is ample authority for each of these exceptions. There are also certain judicial dicta[30] which would add a further exception:

(v) Any other case where the interests of justice require that the general rule, requiring suit by the company, should be disregarded.

Apart from this fifth exception, in so far as it exists, all these exceptions could be reduced to one by saying that an individual shareholder can always sue, notwithstanding the rule in *Foss* v. *Harbottle*, when what he complains of could not be validly effected or ratified by an ordinary resolution. This formulation covers alleged *ultra vires* acts, which cannot be effected by any resolution or even by unanimous consent of all shareholders.[31] It clearly covers the second exception (indeed, it is the second exception), and likewise the fourth, for, as we have seen,[32] no resolution can justify fraud on the minority. It also covers the third if, as appears to be the case,[33] a shareholder cannot sue to protect his personal rights if what has been done or is proposed is an internal irregularity which could be put right by an ordinary resolution of the company.

Gower – Ch. 26 Pages 647, 648, 651

If anyone other than the company is allowed to appear as plaintiff it is an anomaly allowed only as a matter of grace to prevent a serious wrong from going unremedied because the wrongdoers control the company. Where such an action is allowed the member is not really suing on his own behalf or on behalf of the members generally, but on behalf of the company itself. Although, as we shall see, he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs. The plaintiff shareholder is not acting as a representative of the other shareholders but as a representative of the company, and the action will necessarily present features quite different from those in the normal representative action. This has been less clearly recognised here than in the United States, where such actions have been infinitely more frequent and the appropriate rules elaborated to an extent unknown here. And there this type of action has been given the distinctive name of a "derivative action," recognising that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it. Here it is proposed to adopt this illuminating nomenclature, which has recently received belated judicial recognition in this country.[40]

The English courts have recognised that a derivative action may sometimes be brought by an individual member where it is impracticable for the company to do so.

A shareholder then started a new action in the name of himself and all other members except the fraudulent directors. It was held that, notwithstanding *Foss* v. *Harbottle*, the court would allow an action framed in this way, since otherwise it would be impossible to set aside the fraud.[42]

A minority shareholder consequently stands to gain nothing, apart from a sense of satisfaction in seeing justice done and some appreciation in the value of his shares reflecting the amount recovered from the wrongdoers.

Pennington – Ch. 18 Pages 730, 731, 733

THE EXCEPTIONS TO FOSS v HARBOTTLE

The exceptional cases where a member may sue by a derivative action to compel a company to conform to its constitution and the rules governing the conduct of its affairs, or to enforce a claim belonging to the company, fall into two groups, namely: (a) cases where the members cannot remedy the defect complained of or forgo the company's right to sue by passing an ordinary resolution in general meeting; and (b) cases where the court has excluded the rule in *Foss v Harbottle* because it would work unfairly.

Moreover, it has been held by the Court of Appeal that if an application is made to the court to strike out a derivative action before it is tried on the merits, the court should allow the action to proceed only if the statement of claim sets out allegations of fact which, if true, would entitle the plaintiff to bring a derivative action and the plaintiff tenders prima facie proof of those facts.

But if the facts alleged in the statement of claim are not disputed or are clear (e g where the issue turns on the meaning or effect of the company's memorandum or articles), the court will allow the derivative action to proceed if the plaintiff has an arguable case in law.

If the action is designed to prevent a threatened ultra vires act, the plaintiff may bring either a personal or a representative action against the company, and the directors may be joined as co-defendants so that an injunction may be made against them too;

It will be noticed that in the last five cases the plaintiff may only sue for a declaration or for an injunction to restrain a threatened act or to compel the carrying out of an act which should be done; the plaintiff cannot seek to remedy an improper act which has already been done.

vi. **In this instant Action, of the two separate Interim Injunctions, one is against the "wrong-doers", whilst the other is against the Company. The Action has been instituted on the premise of fraud on the Company and its Shareholders, a well recognised exception to the Foss v Harbottle Rule. The reliefs claimed, attempt to prevent the wrong-doers, who control the 4th Defendant Company, from fraudulently siphoning out funds from the 4th Defendnat Company and this Country, on purported and fraudulent Contracts/Agreements; and in the given circumstances, preventing them also, from obtaining such monies under the State Guarantees, that had been obtained by the 1st & 2nd Defendants, from the Guarantor, the Government of Sri Lanka, on behalf of the 4th Defendant Company; such State Guarantees having been obtained on fraudulant misrepresentations made by the 1st & 2nd Defendants themselves.**

Fraud need not amount to a tort at common law, but it must involve an unconscionable use of the majority's power resulting, or likely to result, in financial loss or in unfair or discriminatory treatment of the minority.

(i) Not every wrong to the company will justify a derivative action to remedy it. Normally the wrong complained of must be such as to involve a fraud on the minority, which could not be validly waived by the company in general meeting. What constitutes such conduct has been discussed in Chapter 25. Briefly to recapitulate, it appears to cover conduct of the following types:[46]

(a) Expropriation of the property of the company or, in some circumstances, that of the minority,
(b) Breach of the directors' duties of subjective good faith, and
(c) Voting for company resolutions not bona fide in the interests of the company as a whole.[47]

It will be observed that all these cases involve either misappropriation of property or some element of fraud in the sense of an improper motive.

However, in the later case of *Heyting* v. *Dupont*[49] the Court of Appeal left open the question whether there might not be cases where, in the interests of justice, an action would be allowed in respect of misfeasance without fraud. The recent case of *Daniels* v. *Daniels*[50] at first glance appears to be an example, but, properly understood, merely illustrates that "fraud on the minority" covers more than fraud in the strict sense. There, in contrast with *Pavlides* v. *Jensen*, the sale of a corporate asset at an alleged gross undervaluation,[51] had not been to a third party, but to one of the directors and controlling shareholders. The allegation, therefore, was that the directors and controllers were expropriating to themselves the property of the company. The fact that they had not intended to defraud the company was irrelevant. Nevertheless the principle which Templeman J. gleaned from the cases, namely that "a minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company,"[52] would appear to cover all breaches of the directors' objective duty not to benefit from use of corporate property, opportunity or information[53] so long as the breach in addition to benefiting themselves injures the company.

Pennington – Ch. 18 Pages 734, 735

Fraud or oppression

Where the persons who control a majority of the votes which can be cast at a general meeting use their power of control to defraud or oppress minority shareholders, the court will interfere at the instance of the minority, and will upset the majority's machinations.[13] The fraud or oppression need not amount to a tort at common law, but it must involve an unconscionable use of the majority's power resulting, or likely to result, either in financial loss or in unfair or discriminatory treatment of the minority, and it must certainly be more serious than the failure of the majority to act in the interest of the company as a whole, which will induce the court to annul a resolution altering the company's memorandum or articles.

The leading example of the kind of fraud or oppression of this kind is found in *Menier v Hooper's Telegraph Works Ltd.*

It was held that Hooper's machinations amounted to an oppressive expropriation of the minority shareholders, and that a derivative action would therefore lie against it. Sir W M James L.J. said:[14]

> 'The defendants, who have a majority of shares in the company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages.... The minority of the shareholders say in effect that the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged in the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the court can do it, and given to them.'

Menier v Hooper's Telegraph Works Ltd was a blatant case of both fraud and oppression, but a lesser degree of moral guilt on the part of the majority may also warrant the intervention of the court. Thus, if the majority shareholders deliberately resolve that the company shall sell its undertaking at an undervalue so that their capital may be returned to them in cash without the delay which would be necessary to obtain a full market price, the court will restrain the company and its directors from carrying out the sale.

vii. The 1st & 2nd Defendants were Promoters named in the Prospectus and are major Shareholders (30%), without whose presence the 4th Defendant Company cannot even constitute a valid Shareholders or Directors Meeting (Articles 79 & 127), whilst in addition the 1st & 2nd Defendants have a right of veto over all Board Decisions, where the 4th Defendant Company cannot even pass a Directors' Resolution without the affirmative vote of the 1st & 2nd Defendants (Article 129). In such circumstances, the 1st & 2nd Defendants have, as Shareholders exercising such wrong-doer control, perpetrated a fraud on the 4th Defendant Company and its Shareholders, which warranted this Derivative Action, as a well recognised exception to the Foss v Harbottle Rule.

Gower – Ch. 26 Pages 649, 650

(ii) It must be shown that the alleged wrongdoers control the company.[54] The clearest way of doing this will be to show that both the directors and a general meeting have been invited to institute proceedings in the name of the company and have refused to do so, and that the refusal was because of the votes cast by the wrongdoers.[55] This, in effect, was what had occurred in the case of the *East Pant Du Lead Mining Co.*[56] referred to earlier. However, the English cases recognise that there is no point in formally asking the directors to institute the proceedings if they are to be the defendants, and that it is not necessary to convene a general meeting and to invite it to resolve upon proceedings in the company's name, provided that the court can be satisfied *aliunde* that the wrongdoers are in effective control.[57]

Pennington – Ch. 18 Pages 736, 737, 739, 740

Breach of directors' and promoters' fiduciary duties

Fiduciary duties

A derivative action may be brought against directors and promoters who have been guilty of a breach of their fiduciary duties to the company, if they are able to prevent the company from suing them in its own name because they control a majority of the votes at a general meeting, or because they are otherwise able to prevent a general meeting from resolving that the company shall sue them. Thus, derivative actions have been permitted against directors who were in control of the company for misappropriating the company's property[1] or misapplying it in breach of the Companies Act,[2]

Likewise, derivative actions have been permitted against promoters who were in control of the company to rescind contracts made between them and the company when they had been guilty of misrepresentations,[7] or had failed to disclose a secret profit which they obtained from the transaction,[8] and in those cases the court ordered the promoters to repay to the company all money received by them under the contracts.

The element of control

It has repeatedly been held that a derivative action against directors or promoters for breaches of fiduciary duty may only be brought if they have the power to prevent an action being brought against them in the company's name pursuant to a resolution passed in general meeting. This power may arise from their ownership of shares carrying voting rights, or from such shares being vested in their nominees who vote as they are instructed,[19] or from the directors or promoters also being the directors of another company which owns sufficient shares in the first company to control the voting at its general meetings.

In yet another case[19] Jessel MR, held that proof of control by the directors is merely one of several alternative qualifications for bringing a derivative action against them. A derivative action lies, he said:[20]

> '... if it can be shewn either that the wrongdoer has command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue.'

viii. This instant Action has been instituted as a Derivative/Representative Action, in the given circumstances of "wrong-doer control", against the 1st & 2nd Defendants, as major Shareholders having effective control over the 4th Defendant Company, and where under such circumstances, the 1st & 2nd Defendants, as controlling Shareholders & Directors and acting jointly and severally with the 3rd Defendant have perpetrated a fraud on the 4th Defendant Company and its minority Shareholders. This is a well recognised exception to the Foss v Harbottle Rule i.e. the premise of fraud on the Company and its minority Shareholders.

This instant Action has been instituted on behalf of the 4th Defendant Company and its Shareholders to prevent such fraud. The Injunctive Reliefs and the Declarations prayed for in the Plaint, are to prevent and arrest the wrong-doing and fraud and the consequential irrepaiable loss and damage that would be caused to the 4th Defendant Company, that is controlled by the wrong-doers. Hence the two separate Injunctions and Reliefs, having the characteristics of both Derivative & Representative nature as aforesaid.

The Reliefs prayed for, have sought to prevent the irreparable loss and damage to the 4th Defendant Company and its Shareholders, and to anull and set aside the fraudulent contractual arrangements, by which large sums of monies are being attempted to be siphoned out of the 4th Defendant Company and this Country, to the grave and irreparable loss and detriment of the 4th Defendant Company and its Shareholders; otherwise the 4th Defendant Company is bankrupt and insolvent as a consequence of the said fraud perpetrated on it.

Gower – Ch. 26 Pages 651, 652, 653,654

(iii) The company must be made a defendant in the action.[66] As already pointed out, the company is the true plaintiff, and if a money judgment is recovered against the true defendants—the wrongdoing directors or other controllers—this will be in favour of the company and not in favour of the individual shareholder who is nominal plaintiff. The company cannot, in fact, be the plaintiff, because neither of its organs—the board of directors and the general meeting—will authorise suit by it. As the next best thing the court insists upon its being made the nominal defendant. So long as the company is a party, judgment can be given in its favour, and any decision in the case becomes *res judicata* so far as the company is concerned, precluding it from bringing a subsequent action on the same cause if there is a later change in control.

(iv) The plaintiff shareholder should sue in a representative capacity on behalf of himself and all the other members other than the real defendants.[72] On the face of it this seems anomalous. As we have already pointed out, the plaintiff is not really suing on behalf of the shareholders, but on behalf of the company. But the requirement fulfils a useful purpose, for it ensures that all the other shareholders are also bound by the result of the action. If, therefore, judgment is given for the defendants a second derivative action cannot be brought by another member, for the matter will be *res judicata* as regards all of them. This requirement, coupled with the third, therefore preserves so far as possible the advantage of the *Foss* v. *Harbottle* rule that multiplicity of actions is avoided.

The derivative action, explained in (a) above, lies where a wron has been done *to* the company. Where, however, a wrong is bein done or threatened *by* the company different considerations apply The company then is not merely a nominal defendant but the rea defendant, because judgment is required against it, not for it. An the proper plaintiff is anyone who has a personal right against th company which is being infringed. The reason why the decisions ar so confused and confusing on the question whether the action shoul primarily be by the company or against it, is because the same fact will often give rise to both possibilities. If the company is pro posing to do something *ultra vires* or which infringes its articles, a shareholder may properly sue to restrain it.] But, alternatively, the company itself may proceed against its directors to restrain them from taking the proposed action. If the first alternative is adopted the company is properly a defendant, though not necessarily the only one, for the directors may be joined as co-defendants so that they personally are bound by the order of the court. If the second course is adopted, the company is properly the plaintiff, and the directors are the defendants. But the fact that this second alternative is a possible one is no reason for refusing to allow a member to sue the company if he has an independent right to do so.

Thus, it is clear that an action to restrain the company from acting *ultra vires*[82] may be brought by any member[83] as plaintiff in his own right against the company as defendant.[84]

ix. The Plaint discloses a factual situation, of fraud on the 4th Defendant Company and its minority Shareholders, perpetrated by the 1st & 2nd Defendants, acting jointly and severally with the 3rd Defendant, and actively supported by certain other Defendants, in the given circumstances of wrong-doer control, by the 1st & 2nd Defendants, who are controlling Shareholders and Directors; and also the blatant unwillingness and inability of the Board of Directors of the 4th Defendant Company to take any action whatsoever thereon.

Therefore a Derivative/Representative Action, by the Plaintiff as a Shareholder, should be allowed to proceed to prevent such massive fraud on the 4th Defendant Company and its Shareholders, which include the Public and the Government of Sri Lanka, who in addition have issued State Guarantees on behalf of the 4th Defendant Company, committing public funds, on which State Guarantees monies would be fraudulently claimed by the 1st & 2nd Defendants, and any payments by the Government of Sri Lanka, under such State Guarantees, would be reimbursable by the 4th Defendant Company, which is unable to do so, in the context of its bankrupt and

insolvent position, caused by the fraud perpetrated on it by the 1st & 2nd Defendants and the 3rd Defendant, acting jointly and severally in fraudulent collusion, supported by some of the Directors of the 4th Defendant Company.

Reference is drawn to Paragraphs 57, 58 & 59 of the Plaint; i.e.

"57. The Plaintiff states that the said Completion and Final Certificates refer to an unauthorised set of Plans not forming a part and parcel of the said Construction Agreement and General Conditions of Contract for Construction referred to hereinbefore and that the issue of the Completion Certificate and the Final Certificate in the background of the averments contained herein are fraudulent, null and void and of no force and avail in law. The Plaintiff further states that the said issue of the said Certificates was mala fide and with intent to defraud the said Hotel Developers, the 4th Defendant Company and to fraudulently benefit the said Mitsui/Taisei Consortium, the 1st and 2nd Defendants and the said Architect the 3rd Defendant.

58.a) The Plaintiff states that though he is only a member of the Board of Directors of the said Hotel Developers, the 4th Defendant Company without executive powers, he has spent considerable and valuable personal time and effort on behalf of Hotel Developers, the 4th Defendant Company, its shareholders and of himself qua shareholder and in the public interest, in investigating and exposing this fraud perpetrated by the 1st, 2nd & 3rd Defendants abovenamed on the said Hotel Developers, the 4th Defendant Company abovenamed and its shareholders.

b) The Plaintiff states that unless the reliefs prayed for hereinafter are granted, irremedial mischief and irreparable loss, damage and detriment will be caused to the said Hotel Developers, the 4th Defendant Company abovenamed, its shareholders including the Plaintiff and the general public.

59. In the premises aforesaid a cause of action has accrued to the Plaintiff to seek the following reliefs....."

x. The contentions in the District Court, of both the 1st & 2nd Defendants and the 3rd Defendant, conceded that, if this Action of the Plaintiff, is in fact a Derivative Action, then it is maintainable, which means that the Plaintiff as a Shareholder can maintain an Action in his name, in respect of an injury done to the Company, of which he is a Shareholder, deriving such right of the Company. This much has to be conceded as a matter of law and has been conceded by the said Defendants. What these Defendants do say, is that this is not a Derivative Action i.e. an exception to the Foss v Harbottle Rule, apparently since it is not so described and merely stating that the facts do not disclose such a basis, <u>without being able to substantiate and prove such an assertion</u>.

- **The 1st & 2nd Defendants in their Written Submissions filed in the District Court, stated as follows in this regard:**

"6:00 It was suggested orally in reply, and in the counter affidavit of the third defendant (filed without the permission of Court) that the plaintiff's action is a derivative action. It is submitted respectfully that this is not an action which falls within the exceptions to the well settled rule laid down in the case of <u>FOSS-V-HARBOTTLE.</u> Reference is kindly requested to paragraph 9 of the written submissions of the third defendant at page 13 which these defendants adopt."

The 1st & 2nd Defendants thereby, and by adopting, as aforesaid the relevant Written Submission of the 3rd Defendant, as set out hereinbelow, conceded the availability to the Plaintiff of the exception to the Rule in Foss v Harbottle; however the 1st & 2nd Defendants merely stated without reason, that the Plaintiff's Action is not a Derivative Action.

- **The 3rd Defendant in its Written Submissions filed in the District Court, stated as follows in this regard:**

"Derivative Action:

9. The Plaintiff has filed this action for an on behalf of the 4th Defendant Company - Vide: the reliefs claimed in the prayer to the Plaint. This action purports to be what is known as a derivative action where the Plaintiff is seeking not the enforcement of his own right of action but a right of action vested in or derived from the Company.

9.2 In Foss Vs Harbottle it was stated that where a wrong has been done to a Company, then the proper plaintiff is the Company itself. However, in the event of a Company for whatever reason not filing such action, there are certain exceptional circumstances when a shareholder may file an action in respect of the wrong done to the Company. These exceptions to the rule in Foss Vs Harbottle arises where -

(1) the act is ultra vires of the Company or;

(2) the act constitutes a fraud against a minority and the wrongdoers themselves are in control of the Company;

(3) an irregularity in passing a resolution which requires qualified majority;

(4) an act which infringes the personal rights of an individual shareholder.

The only relevant exception under which the Plaintiff could bring this action would be under the exception (2) above since the Plaintiff is not complaining in this action of an infringement of his personal rights as a shareholder. The reliefs in this case prayed for by the Plaintiff are not reliefs which he seeks himself but for the 4th Defendant Company."

9.1 If the Plaintiff seeks to fall within exception (2) above he must first establish -

(a) fraud against the minority and;

(b) that the wrongdoers are themselves in control of the Company and that it is for this reason that the Company is not filing the action.

The 3rd Defendant, whilst conceding that the Plaintiff's Action purports to be a Derivative Action, conceded that it would be so, if the Plaintiff establishes the perpetration of fraud, and that the wrong-doers themselves are in control. The Plaint and the Documents

filed therewith amply discloses this position, and particularly paragraphs 57 & 58 of the Plaint underlines the fraud perpetrated on the 4th Defendant Company, by the 1st & 2nd Defendants and the 3rd Defendant acting jointly and severally; this allegation of fraud is conceded to by the 3rd Defendant, in paragraph 9.2 of its Written Submission, as set out hereinabove.

On the matter of the issue raised by the 7th Defendant, who was not a necessary and affected party, and whose such participation was irregular and improper, on the availablility of the Derivative Action, in Sri Lanka, which matter had not been contested or put to issue by the affected parties themselves, i.e. the 1st, 2nd & 3rd Defendants; the Plaintiff's Counsel, in response to clarifications sought by the Court of Appeal, cited Section 3 of the Civil Law Ordinance and Case of De Costa v. Bank of Ceylon 72 NLR 547. It is respectfully submitted that it was incorrect and improper in Law, for Their Lordships of the Court of Appeal, in the given circumstances, to have determined by entertaining the Submissions made by the Counsel for the 7th Defendant as a fit question of Law, the matter of the availability of a Derivative Action in our Law.

It is therefore submitted on behalf of the Plaintiff, that in the given context, that the Plaintiff can maintain an Action in his name, in respect of an injury done to the Company, of which he is a Shareholder, deriving such right of the Company. Such then is a right in the Plaintiff, which is recognised in law and is a right for the protection and enforcement of which, the Plaintiff can institute an action in a Court of law and seek a judgement enforceable at law; so also can be seek an Injunction in the protection of that right under Section 54(i) of the Judicature Act. When a legally enforceable right is recognised and conceded, the right to an Injunction follows. In this context the learned District Judge has correctly held in his Order that *"in such circumstances a party who is seeking justice through the legal process, to prevent the same, should be allowed to do so"*.

79. CAUSE OF ACTION/LOCUS STANDI/PRIMA-FACIE CASE

i. The 1st and 2nd Defendants and the 3rd Defendant have urged, that the Plaintiff has no cause of action, no status and no prima-facie Case. It all means the same thing, that the Plaint does not disclose a Cause of Action, or that it does not disclose material averments showing, that the Plaintiff has the right to bring this Action. This of course is only on the basis of the said Defendants' premise, that the Plaintiff's Action does not fall within the exceptions to the well accepted Rule in Foss v Harbottle.

ii. Such a contention by the said Defendants, can only be made on the basis, that the Averments relied upon by the Plaintiff are true. A Preliminary Objection in Law, assumes as true, the facts alleged by the other party, and declares that those facts are not sufficient to raise the legal inference, or to afford the ground of relief, for which the other party contends.

- Halsbury's Laws of England (4th Edition) Volume 36 Paragraph 35.

> ***"35. Objection in point of law. A party may by his pleading raise any point of law. A point of law so taken is called "an objection in point of law". It assumes as true the facts alleged by the other party and declares that those facts are not sufficient to raise the legal inference, or to afford the ground of relief, for which the other party contends. It differs from a confession and avoidance in that it does not seek to draw from the facts alleged, or to prove additional facts in support of, some fresh inference other than that on which the party whose pleading is objected to relies, but merely declares that that party's own allegations are in sufficient to support the contention which he puts forward.***

Objection in point of law replaces the old system of demurrer. Such an objection is disposed of at the trial unless otherwise ordered."

- **Supramani Ayer v Changarapillai - 2 NCR 17, per Bonser C.J.,**

  "The first issue in this case was whether the Plaint disclosed any Cause of Action, that is, assuming that all the facts were proved, whether they constituted any Cause of Action".

- **S.T. Alexander Vs S. Thilakar - C.A. (L.A) 59/81, DC Jaffna 732/2 & C.A. Minutes 30.07.82**

iii. **An action according to the legal meaning of the term in the English Law, is considered a proceeding by which one party seeks in a Court of Justice to enforce some right against, or to restrain the commission of some wrong by another party. More concisely, it is said to be the "legal demand of a right", or the mode of pursuing a right to judgment - Halsbury's Laws of England (Vol 11) Page 1.**

- **Lord Watson in Chand Kour vs Partab Singh. ILR 16 at 98 103 followed by S.C. in F.B. - 16 NLR - 261.**

  "The cause of action has no relation whatever to the defence which may be set up, by the defendant, nor does it depend upon the character of relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour";

- **Darley Buttler & Co. Ltd. v Lion Soon Shipping & Trading Co. (Pte) Ltd. C.A. (L.A) 112/81, D.C. Colombo Case No.84530/M & C.A. Minutes 15.03.82 per Atukorale J,**

  "In our view, it is not necessary that the Plaint should contain a specific averment that the Court has jurisdiction to hear and determine the Action. If the averments of facts contained in the Plaint describes that the Court has jurisdiction to hear and determine the Action, there is compliance with section 45"

- **Ashby v White - 3 LD. RAYM 320 9 LWR 121**

  Plaint need do more than set out the right on which the plaintiff claims, his cause of action against the defendant and the relief claimed

iv. **Ubi jus, ibi remdium - wherever there exists a "right" recognised by the law, there exists also a remedy for any infringement of such right, infringement of a legal right imports a damage in the nature of it, though there be no pecuniary loss or damage; where a private right and its infringement are proved, it is unnecessary to show actual damage in order to maintain action.**

- **Pereira J. in Lowe v Fernando at 16 NLR at 398 402 - also 55 NLR at 426, in relation to the definition of cause of action;**

  "The expression `denial of a right'as used here does not mean the mere verbal denial of a right. The word `denial' here is used in the secondary sense of a withholding or refusal to grant as the word `deny' is used in the phrase `to deny bread to the hungry"

v. **If the Action is designed to prevent a threatened ultra-vires or an illegal act, the Plaintiff may bring an Action in his personal name**

against the company, and the Directors may be joined as co-defendants so that an injunction may be made against them too; It must be shown that the alleged "wrong-doers" control the company.

- **Simpson v Westminister Palace Hotel Co. (1860) 8 HL Cas 712 per Lord Campbell J.**

  "If an attempt to do so is made, this act is ultra-vires, although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction".

- **Hoole vs Great Western Rly Co. (1867) 3 Ch. App. 262, per Sir John Rolt L.J;**

  "It appears to me upon the merits that the order overruling the demurrer, and the order granting an injunction, are quite right. I do not think it necessary to enter at length into the question of parties: if the act complained of is illegal, as I think it is, I do not at present see why any single shareholders should not be at liberty to file a bill to restrain the company from exceeding their powers."

- **Atwood vs Merryweather 1867 LR 56q. 464n. per Page Wood V.C.**

  "I think that, upon principle, a contract of this kind cannot stand and that there is no such a defect in the constitution of the suit as would be settled according to the authority of Foss v Harbottle..... Upon such a transaction the court will hold that a whole contract is a complete fraud ..... But here it is a simple fraud, and nothing else"

- **Lord Denning MR in Wallersteiner V Moir (No.2) (1975) 2 AER 857 at 857 -**

  "..... the principle is that, where the wrong-doers themselves control the company, an action can be brought on behalf of the company by the minority shareholders, on the footing that they are its representatives, to obtain redress on its behalf ..... this principle well stated by Professor Gower in his book on Companies ....."

  "..... This type of action has been given the name of a "derivative action", recognising that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it".

vi. a) **Plaintiff in such an Action, referred to as a Derivative Action, seeks to enforce a cause of action, which belongs to the Company; the Court can in its discretion, at any time after the commencement of the Action, order the Company to indemnify the Plaintiff for his Costs; and this discretion can be exercised in his favour, whether the Derivative Action is successful or not. - Wallersteiner v Moir (no.2) (1975) Q.B. 393 508 n. (1975) 1 AER 849.**

b) **The Court will allow the Derivative Action to proceed if the Plaintiff has an arguable case in law -**

<u>Estmanco.(Kilner House) v G.L.C</u>(1982) 1AER 437 (1982) 1WLR 2

It was held that the exception to the rule that a member of a Company could not maintain an action on behalf of the Company for a wrong done to the Company which permitted a member to sue where there was a fraud on a minority of Shareholders extended beyond fraud at common law and included an abuse or

misuse of power by the majority, whether acting as Directors or Shareholders.

- per Sir Robert Megarry V.C.

"All that I need say is that in my judgment the exception usually known as `fraud on a minority' is wide enough to cover the present case, and that if it is not, it should now be made wide enough."

c) If the Plaintiff discountinues the Action before the judgement, or does not conduct his Case properly, the Court may substitute one of the other persons, on whose behalf the Action is brought as the Plaintiff, including the Company itself.

- Service Club Estate Syndicate Ltd. (1930) 1 ch.78

vii. If the Shareholder sues for Relief against the Company, it must, of course, be made a Defendant, if on the other hand, he seeks to enforce a corporate Claim against other parties, the Company must still be joined as a co-Defendant, so that it may be bound by the judgement made, and so that it may also enforce any given relief, against the substantive defendants

- Spokes vs Grosvner Hotel Co. (1897) 2 Q.B. 124

per A.L. SMITH L.J.

"The action is brought by a shareholder, on behalf of himself and other the shareholders in the hotel company against its directors and certain tradesmen of the company, to recover for the company the damages they are said to have sustained by reason of their directors and the tradesmen having, as it is alleged, conspired together to cheat and defraud the company whereby the company have been damnified.

The proper plaintiffs in such an action would obviously be the company; but in the circumstances existing this is not possible, for the impeached directors who have the controlling power in the company do not assent to the company being made plaintiffs, and without that assent the company cannot be made plaintiffs.

To obviate this difficulty it has for many years been the practice of the Court of Chancery, in circumstances such as the present, to make the company parties to the action as defendants, in which action the plaintiff shareholder asks for an order not that the damages recovered should be paid to him but to the defendant company; and in this way the otherwise insuperable difficulty of maintaining the action is got over".

per CHITTY L.J.

"The action is brought by a shareholder on behalf of himself and other the shareholders in the company. It is founded on an alleged wrong done to the company. For such a wrong the company alone can sue at law, and the general rule is the same in equity (see MacDougall v. Gardiner (1)). But equity has admitted certain exceptions to the general rule, one of which is that where a fraud is committed by persons commanding a majority of votes the minority can sue by a shareholder. the principle of the exception is well illustrated by such cases as Atwool v. Merryweather (2), decided by Wood V.C. in 1867 Menier v. Hooper's Telegraph Works (3), decided by James and Mellish L.JJ., and Mason v. Harris (4), decided by the Court of

Appeal. As was said by Sir G. Jessel in the last mentioned case, the reason for the exception is plain, for, unless it were allowed, it would be in the power of the majority to defraud the minority with impunity. On the allegations made in the statement of claim this case falls within Mason v. Harris (4). The substance of the case set up in a conspiracy on the part of the directors of the company and the manager and certain tradesmen to defraud the company by commissions, excessive charges for goods supplied, charges for goods not supplied, and other means; that the company have in fact been thereby defrauded; and that the persons implicated in the fraud have obtained the control of the company and a majority of votes, rendering it imposible to bring the action in the name of the company. The directors and others charged with the fraud are defendants. To such an action as this the company are necessary defendants."

viii. a) In this instant Action, what then are the Averments in the Plaint and what do they disclose? For the exercise of determining, whether the Plaint discloses a cause of action, none of the Defendants can be permitted to canvass the truth of the facts thereof.

b) The Choronological Statements of Facts set out hereinbefore, inter-alia, contains the Plaintiff's Case as disclosed from the Averments in the Plaint, which was morefully set out in the Written Submission of the Plaintiff to the District Court, filed also with the Petition to Your Lordships' Court, marked A4, and Charts I, II & III therein, set out the correlation of the Events and the Documents filed with the Plaint.

c) The facts disclose that a fraud has been perpetrated on the 4th Defendant Company by the 1st & 2nd Defendants, acting jointly and severally in fraudulent collusion, with the 3rd Defendant, in circumstances of "wrong-doer control" exercised by the 1st & 2nd Defendants, actively supported by other Directors; the Board of Directors deliberately neglecting and failing to take any action thereon, notwithstanding the Plaintiff's urgings to do so.

d) Accordingly the facts disclosed by the Plaintiff in his Plaint reveal, that the Plaintiff's Averments clearly discloses the cause of action, and that the Plaintiff's Action is what is called a Derivative Action in Law, as referred to hereinabove and, as morefully set out in Paragraph 76 hereinbefore.

ix. The Written Submissions of both the 1st and 2nd Defendants and the 3rd Defendant, conceded that, if this Action of the Plaintiff is in fact a Derivative Action, then it is maintainable; which means that the Plaintiff, as a Shareholder, can maintain an Action in his name, in respect of an injury done to the Company, of which he is a Shareholder, deriving such right of the Company as morefully set out hereinbefore. Both the 1st & 2nd Defendants and the 3rd Defendant merely state without proof and without substantiating the same, that the Plaintiff's Action does not fall within the categories of exceptions to the well accepted Rule in Foss V Harbottle.

Infact the 1st & 2nd Defendants' and the 3rd Defendant's Counsel, analysing the features and characteristics of the Plaintiff's Action conceded the right and availability of such Derivative Action to the Plaintiff, vide Pages 12 & 13 Paragraph 9 of the Written Submissions filed by the 3rd Defendant in the District

Court, which was also specifically adopted by the 1st & 2nd Defendants in their own Written Submissions at Page 17 Paragraph 6 filed also in the District Court.

The 3rd Defendant's Written Submissions, inter-alia, reads as follows; i.e.

> ***"Derivative Action***
> ***9. The Plaintiff has filed this action for an on behalf of the 4th Defendant Comapny - Vide: the reliefs claimed in the prayer to the Plaint. This action purports to be what is known as a derivative action where the Plaintiff is seeking not the enforcement of his own right of action but a right of action vested in or derived from the Company...."***

The 1st and 2nd Defendants Written Submissions, inter-alia, reads as follows; i.e.

> ***"6. It was suggested orally in reply, and in the counter affidavit of the third defendant (filed without the permission of the Court) that the Plaintiff's action is a derivative action. It is submitted respectfully that this is not an action which falls within the exceptions to the well settled rule laid down in the case of FOSS-V-HARBOTTLE. Reference is kindly requested to paragraph 9 of the Written Submissions of the third defendant at page 13 which these defendants adopt."***

x. A summary of the facts disclosed by the Plaintiff are as follows;

a) The 1st & 2nd Defendants were Promotors named in the Prospectus, Shareholders & Directors of the 4th Defendant Company.

b) The 4th Defendant Company could not even constitute a Meeting its Shareholders or its Board of Directors, without the presence of the 1st & 2nd Defendants.

c) The 1st & 2nd Defendants had veto power over Board Desisions of the 4th Defendant Company, who could not even pass a Board Resolution without the affirmative vote of the 1st & 2nd Defendants.

d) The 1st & 2nd Defendants acting jointly and severally with the 3rd Defendant contracted for the development of an international 5 Star Class Hotel for the 4th Defendant Company, on a turnkey fixed-price basis.

e) The 1st & 2nd Defendants in the aforesaid circumstances acted as Sole Contractors, Sole Suppliers, and Sole Lenders of the 4th Defendant Company, obtaining State Guarantees, on behalf of the 4th Defendant Company, from the Government of Sri Lanka.

f) The 1st & 2nd Defendants, through their Representatives, functioned as the full-time resident Executive Director of the 4th Defendant Company, managing its day to day affairs and administration, more particularly, the construction and delivery of the said Hotel to be built by themselves.

g) The 1st & 2nd Defendants had fraudulently made material mispresentations, and acting together with the 3rd Defendant in fraudulent collusion had not built the said Hotel, that was held out by them to be built, and had fraudulently suppressed the same from the Board of Directors of the 4th

Defendant Company, even when queries had been raised by the Plaintiff as a Director of the 4th Defendant Company.

h) the Board of Directors of the 4th Defendant Company had neglected and failed to take any action, whatsoever in such regard, when the Plaintiff had persistently wanted them to do so, submitting many a Memorandum to the Board. Certain Directors had even actively supported the 1st & 2nd Defendants and had obstructed the Plaintiff in the discharge of his professional and fiduciary duties as a Director of the 4th Defendant Company.

i) The 4th Defendant Company as a consequence is bankrupt and insolvent, as a result of this fraud perpetrated on it, as aforesaid, and as morefully set out hereinbefore.

j) Accordingly, the Plaintiff instituted this instant Action, as a Derivative Action, on behalf of the 4th defendant Company and its Shareholders and in its interest. <u>All Reliefs prayed for are in the interest of the 4th Defendant Company only</u>.

xi. Paragraphs 57,58 and 59 of the Plaintiff's Plaint reads as follows:

"57. The Plaintiff states that the said Completion and Final Certificates refer to an unauthorised set of Plans not forming a part and parcel of the said Construction Agreement and General Conditions of Contract for Construction referred to hereinbefore and that the issue of the Completion Certificate and the Final Certificate in the background of the averments contained herein are fraudulent, null and void and of no force and avail in law. The Plaintiff further states that the said issue of the said Certificates was mala fide and with intent to defraud the said Hotel Developers, the 4th Defendant Company and to fraudulently benefit the said Mitsui/Taisei Consortium, the 1st and 2nd Defendants and the said Architect the 3rd Defendant.

58.a) The Plaintiff states that though he is only a member of the Board of Directors of the said Hotel Developers, the 4th Defendant Company without executive powers, he has spent considerable and valuable personal time and effort on behalf of Hotel Developers, the 4th Defendant Company, its shareholders and of himself qua shareholder and in the public interest, in investigating and exposing this fraud perpetrated by the 1st, 2nd & 3rd Defendants abovenamed on the said Hotel Developers, the 4th Defendant Company abovenamed and its shareholders.

b) The Plaintiff states that unless the reliefs prayed for hereinafter are granted, irremedial mischief and irreparable loss, damage and detriment will be caused to the said Hotel Developers, the 4th Defendant Company abovenamed, its shareholders including the Plaintiff and the general public.

59. In the premises aforesaid a cause of action has accrued to the Plaintiff to seek the following reliefs. ....."

xii. a) Such then is a right in the Plaintiff, which is recognised in Law and is a right for the protection and enforcement of which, the Plaintiff can institute an Action in a Court of Law and seek a judgement enforceable at Law.

b) **So also can he seek an Injunction in the protection of that right under Section 54 (i) of the Judicature Act; when a legally enforceable right is recognised and conceded, the right to an Injunction follows.**

c) **Accordingly this much has to be conceded as a matter of law and is conceded by the Defendants. What the Defendants do say, is that this is not a Derivative Action, apparently since not so "described" and merely to state that the facts do not disclose such a basis, without a proper premise for such assertion or substantiating the same.**

- **In the Case of Mrs. A.R.S. Hameed v R. Weerasinghe & Others S.C. N 13/86, D.C. Matara 3433/L, S.C. Minutes of 16.03.89, G.P.S. de Silva,J,held;**

  "Section 40 of the Civil Procedure Code sets out the requisites of a Plaint. It provides inter-alia, that the Plaint shall contain "a plain and concise statement of the circumstances constituting each cause of action, and where and when it arose....." (Section 40(d)). Thus it is clear that under our procedural law, there is no need to categorise the cause of action as being based on a particular form of action. All that is required is to plead the relevant facts constituting the cause of action.

  The question that arises on this appeal is whether this action cannot be maintained for the reason that the Plaint does not disclose a cause of action. On a scrutiny of the Plaint, I am of the view that it discloses a cause of action based on trespass."

d) **All parties have agreed on the Law on the subject. The only question that remains to be addressed is, whether the Plaintiff has set out in the Plaint, material averments disclosing the cause of action.**

On the above submissions, both on the facts and the Law, it is respectfuly submitted that there can be no doubt whatsoever, that the Plaint filed by the Plaintiff in this instant Action, does disclose a cause of action based on "Derivative Action".

80. **OTHER QUESTIONS OF LAW & ISSUES**

GUIDELINES FOR GRANTING LEAVE TO APPEAL

i. **a) Decided Cases, have laid down certain guidelines for the grant of Leave to Appeal;**

- **Wethasinghe v Nimal Weerakkody & others 1981 2SLR 423 at 426 per Soza J,**

  "The attitude of the Court will no doubt depend on the circumstances of each case. Yet from the decided cases to which we were referred the following guidelines could be deduced;

  1) The Court will discourage appeals against incidental decisions when an appeal may effectively be taken against an order disposing of the matter under consideration at its final stage (Fernando v Fernando (2),Balasubramaniam v Valliappar Cheettiar (3),Girantha v Maria (4) and Gunawardene v De Saram (5)).

  2) Leave to Appeal will not be granted from every

incidental order relating to the admission or rejection of evidence for to do so would be to open the flood gates to interminable litigation (Balasubramaniam v Valliappar Chettiar (supra) (3) at p.560). But if the incidental order goes to the root of the matter and it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage then have to appeal will be granted (Arumugam v Thampu (6) and Girantha v Maria (supra)(4) at p.521).

3) Another test is, will a decision of the Appellate Tribunal on the incidental order obviate the necessity of a second trial? (Arumugam v Thampu (supra)(6) at p 255: Girantha v Maria (supra) (4) p.521, Gunawardene v De Saram (supra) (5) p.152).

4) The main consideration is to secure finality in the proceedings without undue delay or unnecessary expense (Girantha v Maria (supra) (4) at p.521)."

- **Ceylinco Travels v Grindlays Bank, 1987 2SLR 26 at 29 per Goonewardene J,**

"It is appropriate however for the sake of completeness, and perhaps useful, to refer to the circumstances under which leave to appeal is generally granted. One can do no better than quote from the judgment of Soza J in Wettasinghe v Nimal Weerakody and Others (1), where he said thus;...

[Quoted Soza J. as above]

In my view the present application does not fall within any of the grounds so contemplated."

b) In the aforesaid background for the Court of Appeal to have purported to have granted Leave, on the premise of mere convenience, that the Court of Appeal normally grants Leave in most cases, as observed by His Lordship K. Palakidnar J. referred to at paragraph 30 of the Petition to Your Lordships' Court and the corresponding Affidavit filed therewith, without having granted Leave, on the aforesaid judicial guidelines, in conformity with decided Cases in itself vitiates the validity of the entire Order of the Court of Appeal, complained of.

c) Accordingly being an interlocutory Appeal, Leave to Appeal ought to have been granted by the Court of Appeal only on substantial questions of Law, which go to the root of the Action and not on any questions of Law, which cannot help to dispose the Action, without proceeding to trial and that the Court of Appeal erred in such regard; whereas the 1st & 2nd Defendants themselves, in their Written Submissions filed in the District Court at page 17 paragraph 6.00 have stated as follows, <u>specifically in such regard</u>: i.e.

"In any event this is a disputed question of law fundemental to the maintainability of the Action, which must await the final determination at the trial and is not a question that can be decided this stage"

- **Sadhwani v Sadhwani, 1982 2 SLR 647 at 654 per Tambiah J.**

"Interim injunction proceedings are incidental proceedings and the application for leave to appeal is from incidental order, made in the course of incidental

proceedings, refusing a discharge of the interim injunctions issued.

d) Furthermore in granting Leave to Appeal the Court of Appeal erred in not formulating in precise terms and specifying in the Order granting Leave to Appeal, the substantial question of Law on which such Leave to Appeal was granted.

NECESSARY PARTIES TO A LEAVE TO APPEAL HEARING

ii. a) A party against whom no order is sought by the Appellant need not be named as a Respondent;

- Sadhwani v Sadhwani, 1982 2 SLR 647 at 654 per Tambiah J.

"Interim injunction proceedings are incidental proceedings and the application for leave to appeal is from an incidental order, made in the course of incidental proceedings, refusing a discharge of the interim injunctions issued. It appears to me that the defendants-petitioners-appellants need only make the four plaintiffs-respondents, as respondents to their applications for leave to appeal, as they are the only persons who would be affected, if the interim injunctions are discharged or set aside by this Court.

`The Civil Procedure Court does not require a party appellant to name as respondent to an appeal every party to the proceedings in the lower Court. A party against whom no order is sought by the appellant need not be named as respondent'

(Basnayake, G.J. in Talavaratne v Talavaratne (1))."

b) The 7th Defendant had admitted that the said Court of Appeal Order does not affect him, as specifically recorded in the very Order of the Court of Appeal itself of 17.01.92, i.e.

"Counsel for the 5th 6th and 7th respondents states that he is not making any submissions in this application as his clients will not be affected by the order made in this application."

However, thereafter on 21.01 92, the said Counsel for the 7th Defendant was permitted to participate at the hearing of the Court of Appeal and support the granting of the said Leave to Appeal Order, having admitted that the said Order does not affect him; the 7th Defendant also questioned the availability of the Derivative Action in Sri Lanka.

c) The Court of Appeal erred in granting Leave to Appeal taking cognisance of the Submissions made by the 7th Defendant as *"fit questions of Law to be decided in appeal and we accordingly grant Leave to Appeal"*

Whilst the 7th Defendant, admittedly an unaffected party raised the question of availability of the Derivative Action in Sri Lanka, the affected parties however i.e.- Infact the 1st & 2nd Defendants' and the 3rd Defendant's Counsel, analysing the features and characteristics of the Plaintiff's Action conceded the right and availability of such Derivative Action to the Plaintiff; vide pages 12 & 13 Paragraph 9 of the Written Submissions filed by the 3rd Defendant in the District Court, which was also specifically adopted by the 1st & 2nd Defendant in their own Written Submissions at Page 17 Paragraph 6 filed in the District Court.

- The 3rd Defendant's Written Submissions inter-alia, reads as

follows; i.e.

"<u>Derivative Action</u>:

9. The Plaintiff has filed this action for an on behalf of the 4th Defendant Company - Vide: the reliefs claimed in the prayer to the Plaint. This action purports to be what is known as a derivative action where the Plaintiff is seeking not the enforcement of his own right of action but a right of action vested in or derived from the Company."

- The 1st and 2nd Defendants Written Submissions, inter-alia, reads as follows; i.e.

"6. It was suggested orally in reply, and in the counter affidavit of the third defendant (filed without the permission of the Court)that the plaintiff's action is a derivative action. It is submitted respectfully that this is not an action which falls within the exceptions to the well settled rule laid down in the case of <u>FOSS-V-HARBOTTLE.</u> Reference is kindly requested to paragraph 9 of the written submissions of the third defendant at page 13 which these defendants adopt."

d) The 7th Defendant had been named as a Defendant in this instant Action, only as a Director of the 4th defendant Company, in the nature and style of a Derivative Action and no reliefs had been claimed against him. Though he was present through Counsel in the District Court Inquiry into the granting of the two separate Interim Injunctions, one against the 1st, 2nd & 3rd Defendants and the other against the 4th Defendant Company itself, he did not object to the issuance of either of the said two Interim Injunctions, nor did he file Answer in the said Action.

e) The 4th Defendant Company, against whom a separate Interim Injunction as aforesaid was granted also in this instant Action, preventing the 4th Defendant company from making any payments to the 1st, 2nd & 3rd Defendants, though present through Counsel at the aforesaid District Court Inquiry, <u>did not object to the issuance of the Interim Injuction either against it or the Interim Injunction against the 1st, 2nd & 3rd Defendants as aforesaid.</u>

f) <u>Accordingly, neither the 7th Defendant nor the 4th Defendant Company could have been permitted to participate as a necessary party in the Leave to Appeal Applications made by the 1st, 2nd & 3rd Defendants; this position was upheld by Your Lordships Court, wherein the said 7th Defendant and the 4th Defendant Company were not permitted to participate in the Special Leave to Appeal hearing in Your Lordships Court on 21.05.'92.</u>

<u>GRANTING OF INTERIM INJUNCTIONS.</u>

iii. a) In praying for the Interim Injunctions and obtaining the grant of same, the Plaintiff, who had instituted this instant Action, as a Derivative Action, in the circumstances of "wrong-doer control", on behalf of the 4th Defendant Company and in its right, has prevented and arrested an unconscionable act, in the form of a massive fraud being perpentrated on the 4th Defendant Company and its Shareholders, by the 1st & 2nd Defendants.

b) The Interim Injunctions prevent the 1st & 2nd Defendants and the 3rd Defendant, all of whom are non-resident parties being domiciled in Japan, from obtaining monies from the 4th Defendant Company on the basis of this fraud perpetrated on

it, by the said foreign parties, having acted in fraudulent collusion, jointly and/or severally, actively supported by certain Directors of the 4th Defendant Company.

Though the 3rd Defendant has stated that it has received all payments in 1987, however Rs 1,010,682.69 was shown as due to the 3rd Defendant in the Audited Balance Sheet as at 31. 03.'89 of the 4th Defendant Company, which was the last set of Audited Annual Accounts of the 4th Defendant Company, that was available to the Plaintiff at the time he initiated this instant Action 13.09.'90.

c) **The said Interim Injunctions, further prevented the 1st & 2nd Defendants from obtaining monies from the Government of Sri Lanka, under the State Guarantees that had been issued, on behalf of the 4th Defendant Company, on the basis of the fraud perpetrated on the 4th Defendant Company, under which circumstances of fraud the said State Guarantees could be set aside by Court; As a consequence of the aforesaid fraud perpetrated on it, the 4th Defendant Company is bankrupt and insolvent and would be unable to reimburse the monies, to the Government of Sri Lanka, if paid by the Government of Sri Lanka, on behalf of the 4th Defendant Company, under the said State Guarantees to the 1st & 2nd Defendants, whose demands from the Government of Sri Lanka, under the State Guarantees at present amount to US $ 175.0 Mn. i.e. S.L.Rs. 7250.0 Mn. Such monies if paid, will be siphoned out of the Country to Japan or elsewhere, by the 1st & 2nd Defendants, who are both non-resident Companies, with a multi national operational network.**

d) **In such circumstances, in a Derivative Action to prevent such fraud being perpetrated by "wrong-doer control" and to prevent the obtaining of monies, on the very basis of such fraud perpetrated by the "wrong-doers" themselves, and to prevent the siphoning of such monies from the 4th Defendant Company and this Country, the Plaintiff was entitled to seek the Interim injunctions, which the District Court, in the given circumstances has correctly issued.**

e) **Whilst in the Derivative Action, a Shareholder invariably intervenes, on behalf of a Company, to stop an unconscionable wrong being done to a Company, by those who control it, injunctive relief in most cases is also invariably available to stop and arrest such wrong, till the matter is finally examined and determined by Court, particularly to prevent the damage being caused and the wrong complained of, continuing to be perpetrated. Furthermore in this instance, the monies being obtained on the basis of a fraud perpetrated would be siphoned/repatriated out of this country, making its recovery practically an impossibility.**

f) **It is evidently clear, that the District Judge in issuing the Interim Injunction in this instant Action had also considered the following tests, that Soza J. had observed in Bandaranayaka v. State Film Corporation (1981) 2 SLR at 287.**

i. Has the Plaintiff made out a strong prima-facie case?

ii. In whose favour is the balance of convenience- the main factor being the uncompensatable disadvantage or irreparable damage to either party?

iii. As the Injunction is an equitable relief granted in the discretion of the Court, do the conduct and dealings of the parties justify the grant of the injunction?

g) **Rs 1,010,682.69 was shown as due to the 3rd Defendant in the**

Audited Balance Sheet as at 31.03'89 of the 4th Defendant Company, which was the last set of the Audited Annual Accounts of the 4th Defendant company, that was available to the Plaintiff at the time he initiated this instant Derivative Action on 13.09 '90.

The 3rd Defendant has however stated in its Statement of Objections pleaded in the District Court, that it had been fully settled in 1987; i.e. that is long prior to the Final Inspection of the Colombo Hilton Hotel carried out by them in March '88 and the issuance of the Final Certificate on 25.08.'88. No wonder that they have issued a "Medical Certificate" type Final Certificate, in a very unprofessional and irresponsible manner, that too, without the requisite supporting Documentations and now state, contravening the provisions of the Design & Supervision Contract (P14), that the Architects Certificates issued by them *"are not Architectural proper Certificates"* as per Paragraph 14(c) of their aforesaid Statement of Objections and futher that supporting Documentations such as Priced Specified Bills of Quantities and Final Measurements are not available and are not necessary. Is this position tenable?

The 3rd Defendant's mere "Medical Certificate" type letters, refer to a surreptitiously substituted Plan, described as an" Amended" Plan, whilst all authenticated copies of the original Plan are significantly missing; Exhibit `A' to the Supplies Contract is also coincidently and significantly missing; there is no proper accounting or inventory of the Furnishings, Fixtures & Equipment; an independent examination and verification had been prevented by the 1st & 2nd Defendants themselves.

h) **No proper independent physical inspection and examination has been carried out on behalf of the 4th Defendant Company, to verify the correctness of the Construction and the Supplies of Furnishings, Fixtures & Equipment. Such independent Inspection and Examination was objected to and prevented as aforesaid. The Plaintiff has now made an Application to the District Court to issue a Commission for such physical Inspection and Examination; the Order on which is now due for 13.07.92.**

i) **In addition to the circumtances of "wrong-doer control" and the "wrong-doers" themselves, attempting to obtain monies fraudulently, in this instant Action, as aforesaid the Learned District Judge had, inter-alia, observed as follows, in granting the Interim Injunctions, considering also the test set down by Soza J, as aforesaid.**

> ***"In such a circumstance, a party who, is seeking justice, through the legal process, to prevent the same, should be allowed to do so. Therefore, in taking into account these matters as a whole, i am of the view, that, a necessity lies to issue the Interim Injunctions, rather than to dissolve the Enjoining Orders already issued.***
>
> > ***Having such a view foremost in my mind, in considering the loss and inconvenience that may be caused to the parties, due to the issuance of the said Interim Injunctions, I am of the view, that, if the said Interim Injunctions are not issued, that the means of remedying, the recovery of the said monies, after the payment of such monies by the Company and after the siphoning off of the said monies from the Country and the extensive loss that would be caused in common to this Country and also to the Plaintiff, who is an accepted investor of this Country, would be rare.***
> >
> > ***In considering the matter, concerning the 1st, 2nd and***

3rd Defendants' right to receive money, which has to be compared against the above position, then, even if the Interim Injunctions are issued as applied for by the Plaintiff, there will be no bar to their right to receive the said monies, except for a delay to receive such money, even, if, they are entitled to receive, any money. Such a delay could be remedied by paying adequate interest.

Accordingly, in considering the inconvenience and loss, that may be caused to both parties, by such an Order, I am of the view, that more weight thereof, is in the favour of the issuance of the Interim Injunctions as applied for by the Plaintiff. I, therefore, rejecting the objections adduced, issue the Interim Injunctions, as prayed for under prayers (g) and (h) of the Plaint."

j) Further observations made by the Learned District Judge, referred to before include;

i. that, there is no acceptable basis, at present, for making payments to the 1st & 2nd Defendants,

ii. that, the main issues are, the basis for the payment of monies and the question, as to whether, in relation to such issue, the volume of work had not been actually carried out, according to the contractual Agreements,

iii. that, the other Defendants named in the case, i.e. the Directors, as persons having connections and showing interest concerning the Company, having intervened therein, in such matter, acting to obtain monies,had not readily acted to conduct a correct examination,on the basis of matters, that had arisen as referred to in a) and b) above,

iv. that, the said persons, having prevented such correct examination were attempting to, howsoever, effect the payment of monies,

v. that, whether, the payment of monies, is a devious method of siphoning out, a large scale of foreign exchange from this Country,

vi. that, if the position, that explains this is correct,then, this actually is an instance of acting in fraudulent collusion, concerning a large sum of money, and an attempt to obtain a larger sum of money, having performed a lessor volume of work,

k) The manner of evaluation and appreciation of a judgement is clearly set out in;

- Balasundaram v Raman vol.79 (1) NLR 361, per Pathirana J.

"A judgement of a court must be a judicial pronouncement in which at least the trial judge should

deal with all the points in issue in the case and pronounce definite findings on the issues. Even though the judgement may not on a reading on the face of it disclose that the trialjudge has considered and subjected to examination and critical analysis the evidence of witnesses, but has chosen to act only on the documentary evidence, an Appellate Court can still uphold such a judgment if it is satisfied that the reasons, however brief, and conclusions reached have been on the hypothesis that there had been a rational examination and analysis in his mind of relevant evidence and the rejection of what is irrelevant. Adopting this test I am satisfied that although the judgement in the present case does not disclose a recital even of the main points of the evidence of the witnesses, an analysis of the evidence, an adjudication on the belief and the disbelief of the witnesses, nevertheless implicit in the logical conclusions reached by the trial judge, the reasons and answers he has given to the main points in issue and his findings generally is that this can only be on the hypothesis that he has done so after a rational examination and analysis of the main points of the relevant evidence in the case although he has chosen not to give expression to them explicitly in his judgment, which he might have done,"

l) It is therefore respectfully submitted that, the Learned District Judge has correctly found, that *"at present there is no acceptable basis for making any payments",* and granted the Interim Injunctions prayed for. The matter must now necessarily proceed to trial to resolve all questions of fact.

CONCLUSION AND THE RELIEFS WHICH THE APPELLANT CLAIMS

81. SUMMARISED CONCLUSIONS:

i. It is respectfully submitted on behalf of the Plaintiff, that;

a) the Plaintiff has ex-facie established a very strong prima-facie case on the facts and in law. If one takes into account the material adduced by the 1st, 2nd & 3rd Defendants in their Affidavits, the Plaintiff's case is stronger, as its contents have overwhelming corroborative material and admission in support of the Plaintiff's Action as set out herein. The Plaintiff relies on documents, the majority of which are under the very hands of the 4th Defendant Company and the 1st, 2nd & 3rd Defendants themselves,

b) in the given circumstances of fraud, in accordance with established law, the State Guarantees, in question, are invalid and could be set aside by Court,

c) the 1st & 2nd Defendants would not have a right to Claim under the said State Guarantees, having perpertrated a fraud on the 4th Defendant Company and from being paid from public funds under such State Guarantees,and

d) this is the very reason, that the 1st & 2nd Defendants be restrained, from claiming and obtaining any money whatsoever from the Government of Sri Lanka, under the said State Guarantees, in term of the Interim Injunction issued specifically against them, under prayer 'g' of the Plaint, on which the Court of Appeal erroneously granted Leave to Appeal as aforesaid; moreso particularly in the given circumstances

of fraud, whereby the very validity of such State Guarantees are now in issue, and further, wherein as a consequence of such fraud perpetrated on it, the 4th Defendant Company, being bankrupt and insolvent, is unable to pay or service such fraudulent alleged claims of the 1st & 2nd Defendants, from its own earnings.

ii. It is respectfully further submitted on behalf of the Plaintiff that;

a) the 4th Defendant Company has been "controlled by wrong-doers" who have acted in fraudulent collusion and accordingly, the Plaintiff has the right to have and maintain,this Action, as is presently constituted as a Derivative Action, on behalf of the 4th Defendant Company and in its right, and accordingly apply for the Interim Injunctions,

b) the Learned Trial Judge having been satisfied, when the Application for the Interim Injunctions, was supported by the Plaintiff's Counsel on the premise of fraud perpetrated on the 4th Defendant Company in the given circumstances of "wrong-doer control", that the Defendants ought to be heard prior to the issue of the Interim Injunctions, ordered the issue of Enjoining Orders and the Notices of Interim Injunctions,

c) the 4th Defendant Company did not at any stage seek to have the separate Enjoining Order issued against it, vacated on the ground that the averments in the Plaint concerning the affairs of the 4th Defendant Company were mis-represented by the Plaintiff, or that there has been a suppression of material facts. Neither did the 1st & 2nd Defendants, nor the 3rd Defendant seek to vacate the other Enjoining Order issued against them,

d) the 4th Defendant Company, on whose behalf and in whose very interest this Derivative Action was brought, by the Plaintiff, also did not file any papers opposing the grant of an Interim Injunction against itself and impliedly against its own Directors and the grant of a separate Interim Injunction against the 1st & 2nd Defendants and the 3rd Defendant,

e) prima-facie therefore, the 4th Defendant Company has accepted and admitted the material averments in the Plaint as correct, on the basis of which Injunctive relief was sought, against itself, impliedly against its own Directors, and against the 1st & 2nd Defendants and 3rd the Defendant; nor did the 4th Defendant Company and/or any of its local Directors, including the said Government Nominee Directors, seek to challenge the right and status of the Plaintiff to institute this Derivative Action and obtain the Injunctive reliefs prayed for,

f) the 1st & 2nd Defendants filed papers objecting to the Issue of the Interim Injunctions against them, so did the 3rd Defendant adducing documentation in support thereof, and

g) the Plaintiff submitted extensive Written Submissions and Authorities; the 1st & 2nd Defendants and 3rd Defendant also filed their Written Submissions and citations and in their Written Submissions, as aforesaid, did not contest the availability of a Derivative Action, recognising that the Plaintiff's Action was a Derivative Action.

h) It is clear from the Order of the Learned District Judge, that having considered the material as appearing in the

Affidavits of the parties concerned, and the Oral and Written Submissions, that he has come to the view that sufficient grounds existed for the grant of the said Interim Injunctions and that a prima-facie case was disclosed entitling the Plaintiff to such Interim Relief.

i) The Learned District Judge has also considered, the question of the law and the serious issues, which arise, to be tried at the hearing, and has also considered that the balance of convenience favoured the granting of the Interim Injunctions.

iii. It is respectfully further submitted on behalf of the Plaintiff, that the Order dated 09.09.'91 of the Learned District Judge is a correct judicial pronouncement. The conclusion reached by the Learned District Judge clearly demonstrates that there has been a rational examination and analysis of all relevant material. This is implicit in the conclusion reached by the Learned District Judge recognising the question of status of the Plaintiff to bring this Derivative Action and of the necessity for the grant of the Interim Injunctions, pending the determination of several material issues of fact involving volumes of evidence, oral and documentary before final pronouncement can be made on the permanent Reliefs sought by the Plaintiff. The failure of the 4th Defendant Company, itself, to Object to the granting of the Interim Injunction against it, restraining it from making any payments to the 1st & 2nd Defendants and the 3rd Defendant, until the conclusion of the trial, is in itself cogent and sufficient reason why such Interim Relief, in the facts and circumstances of the case disclosed to Court, ought to have been made against the 1st & 2nd Defendants and the 3rd Defendant on the principle of balance of convenience. That is why the Learned District Judge has determined that any delay in payment, if any, can be compensated by payment of interests, whilst if the payment is not now restrained, that the eventual judgement in this case may be rendered nugatory.

iv. It is respectfully further submitted on behalf of the Plaintiff, that the number of irregularities and/or illegalities complained of, on the purported grant of Leave to Appeal by the Court of Appeal to the 1st & 2nd Defendants and 3rd Defendant, against the Interim Injunction granted by the District Court on 09.09.91 as morefully referred to hereinabove, negates and vitiates the validity of the aforesaid Orders of the Court of Appeal, thereby rendering such Orders not sustainable in law.

SUMMARY OF THE GROUNDS ON WHICH IT IS CONTENDED THAT THE GRANT OF LEAVE TO APPEAL TO THE COURT OF APPEAL IS NOT SUSTAINABLE

v. The Court of Appeal had erred in granting Leave to Appeal on the basis of supposed errors in the judgement of the District Court, which related to the following matters;

a) The averments in the Plaint, supported by the Plaintiff's Affidavit and the Documents produced, afforded sufficient material, upon which a prima-facie case was established for the grant of Interim Injunctions against the 1st & 2nd Defendants, 3rd Defendant and the 4th Defendant Company. The material adduced was ample proof that there was a serious matter, which needed investigation by the Court, that irremediable damage would ensue unless the said Defendants were immediately restrained in the manner sought. This was therefore not a matter, on which the grant of leave was warranted.

b) The Court of Appeal erred in taking the view, that there was doubt as to the locus standi of the Plaintiff to bring the action. Since it was framed as a Derivative Action, it is clear that the averments disclose, inter-alia, that the Plaintiff, who was a Shareholder/Member, a Subscriber to the Prospectus and a Director of the 4th Defendant Company had repeatedly questioned the legality and/or justification of

the acts of certain members of the Board of Directors, in respect of the matters alleged in the Plaint. There was therefore no error made by the District Court in coming to the view, that there was sufficient locus standi for the purpose of a Derivative Action to bring the action. It was wrong to seek to determine this question by asserting, that the Plaintiff could not bring the action in respect of a wrong done to the 4th Defendant Company, having regard to the allegation of "wrong-doer control" of the 4th Defendant Company, which was the basis of the Derivative Action.

c) The Court of Appeal also erred in granting Leave on the ground, that the acts urged did not disclose a cause of action, because the Court of Appeal did not address its mind to the question, what the relevant facts were for the institution of a Derivative Action, which was a fraud sought to be perpetrated on the 4th Defendant Company and the failure of the Board of Directors in control, to take the necessary remedial action to safeguard the interests of the Company and its Shareholders. The contention, that the facts urged did not disclose a cause of action, could only be advanced on the assumption, that the facts were true and cannot be a ground of enquiry into the question, whether they were capable of being proved or as to their authenticity.

d) The Court of Appeal was not justified in granting Leave on the question, whether the Derivative Action was available under the Law of Sri Lanka;

(i) having informed Counsel for the Plaintiff-Appellant, that they accepted his submissions on this question,

(ii) because it was not urged as a ground for the grant of Leave by either the 1st & 2nd Defendants or the 3rd Defendant, who alone sought relief against the Order of the Learned District Judge,

(iii) since it was intimated to Court as a ground for impugning the Order of the Learned District Judge by Counsel for the 7th Defendant, who had not appealed against the said Order and who could not have been permitted at the hearing to lend support to the 1st & 2nd Defendants and/or the 3rd Defendant to procure a dismissal of the Action.

vi. The Court of Appeal misconceived the scope of its own general jurisdiction in exercising its powers to grant Leave to Appeal, from an Order made by an original Court in a pending proceeding;

a) The Court erred in thinking, that notwithstanding the absence of any demonstrable error on the part of the trial judge, Leave to Appeal may be granted as a matter of course or as a matter of convenience or customary practice, when Application is made to it.

b) The Court having expressed the view, that the Derivative Action was available in Sri Lanka, there was no other question left, which went to the root of the controversy between the Plaintiff and the 1st & 2nd Defendants and the 3rd Defendant, which warranted the grant of Leave.

c) The Court of Appeal in deciding to grant Leave to Appeal, failed to appreciate, that the 4th Defendant Company not having denied or contested the essential facts pleaded by the Plaintiff in the original Court, or Appealed therefrom, that the public interest required an expeditious trial and an early determination of the allegations, which if not true would have obliged the Government of Sri Lanka, as Guarantor, to make immediate payment in foreign currency in a sum of nearly US $ 175.0 Mn. i.e. Rs. 7250.0 Mn.

Authorities re Principles governing grant of Leave to Appeal.

Anushka Wettasinghe v Nimal Weerakkody 1981 (2) SLR 423
Fernando v Fernando (1920) 8 CWR 43
Balasuppramaniam v Valiappa Chettiar (1938) 39 NLR 553, 560
Girantha v Maria (1948) 50 NLR 519, 521
Goonewardene v de Saram 64 NLR 145, 151
Arumugam v Thampu (1912) 15 NLR 253, 255

82. RELIEFS CLAIMED

It is respectfully submitted on behalf of the Plaintiff that, in the above circumstances the Plaintff's Appeal be allowed and Your Lordship's Court be pleased to make Order granting the Plaintiff the following reliefs, as is set out in the Petition to Your Lordships' Court;

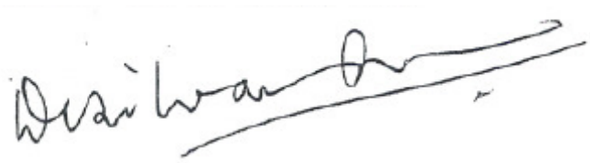
i. set aside the said Orders of the Court of Appeal dated 17.01.'92. and 31.01.'92.

ii. affirm the Order of the learned District Judge of Colombo dated 09.09'91 and delivered on 28.10.'91 and direct the Action to proceed to Trial.

iii. grant costs and,

iv. such other and further reliefs as to Your Lordships Court shall seem meet.

Colombo, on Sixth day of July, 1992



ATTORNEYS-AT-LAW FOR PLAINTIFF-RESPONDENT-PETITIONER-APPELLANT

Settled by:-

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