

IN THE DISTRICT COURT OF COLOMBO

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

PLAINTIFF

Case No. 3155/Special

- Vs -

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.

and

10 OTHERS.

DEFENDANTS

WRITTEN SUBMISSIONS OF THE PLAINTIFF

28.01.91

WRITTEN SUBMISSION OF THE PLAINTIFF

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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.
and

10 OTHERS

DEFENDANTS

May it please Your Honour

WRITTEN SUBMISSIONS OF THE PLAINTIFF

1. WHAT DOES THE PLAINTIFF SEEK ?

- (a) The Plaintiff seeks in this Action, as its principal and most important relief, an Injunction, restraining the 1st & 2nd Defendants, inter-alia from claiming and/or receiving any monies under and/or in terms of the following contracts/Agreements; as prayed for in Prayer (g) of the Plaint.

i.e. Construction Agreement	of	31/01/84	P11
Supplies Contract	of	31/01/84	P13
Loan Agreement	of	31/01/84	P15
Investment Agreement	of	31/01/84	P09
Letters of Guarantee	of	17/02/84	P17(a) P17(b)
Preliminary Agreement	of	30/03/83	P06

- (b) The Plaintiff also seeks in this Action, as a part of the said principal and most important relief, an Injunction, restraining the 4th Defendant Company, inter-alia from entertaining any claims and/or making any payments under and/or in terms of the abovementioned contracts/Agreements; as prayed for in Prayer (h) of the Plaint.

2. HOW DID IT ALL BEGIN?

We have the story from the following Documents:

P05 - The Prospectus of 06/03/84 -Pages 7, 8, 9, 13, 15, 16, 17, 18, 19, 20,21, 22, & 26.

P58 - Management Agreement for 750 Rooms with Hilton International of 19/01/80 by Cornel & Co. Ltd., a party to the Preliminary Agreement P06 and Investment Agreement P09.

- P08 - Architectural Plans of 3rd Defendant of July 1980 – Two Towers of 456 Rooms as Phase I.
- P07(b) - Preliminary Forecast by Hilton International of 21/01/80 - 450 Guest Rooms
Sheet 9 - (6 Rooms as Manager's Apartment) and Revised Forecast of August '81- For
Jan. ;81 the Total 456 Rooms, based on the July '80 Plans P08, of the 3rd Defendant.
Sheet 2 & 3
Aug. '81
- P(16) } Forecast of Profit and Cash Flow by 1st Defendant from 1981 to 1999 – all
Sheets 8 & 9 } 450 Guest Rooms (6 Rooms Manager's Apartment), in strict conformity with
= P59 } Hilton International's Preliminary Forecast of 21/01/80, P07(b) Sheet 9 which
had been based on the July '80 Plans P08 of the 3rd Defendant.
- P01) - 4th Defendant company's Incorporation as Lanka - Japan Hotels Ltd.
P02) - on 15.03.83.
- P06 - Preliminary Agreement of 30/03/83 between 1st & 2nd Defendants and
Cornel & Co. Ltd.
- P07(a) - Hilton International's Letter of 31/03/83 confirming August '81 Forecast for
Total 456 Rooms
- P60(a) - 1st Defendant's Profitability Forecast and Cash Flow Projections of March '83
for Total 456 Rooms in conformity with Hilton International's Forecast of
August '81 P07(b), Sheets 2 & 3 adjusted as per Hilton International's Letter
of 31.03.83 P07(a) and had been based on the July '80' Plans P08 of the 3rd
Defendant.
- On 30/03/83 Letter of Award Issued to 1st & 2nd Defendants for Construction
(see P06 Article 3.03 & P11 Preamble Paragraph 2 re confirmation of the
Issue of the Letter of Award) Contract Price Agreed upon on 30.03.83.
- P19 - 4th Defendant Company forwards Plans drawn to requisite scale based on all
P20(a) the July '80 Plans prepared for the purpose of UDA Approval by the 3rd
P20(b) Defendant – 27 sheets to the UDA on 18/10/83 and Approved on 23.03.84.
- P04(a) - 4th Defendant Company name changed to Hotel Developers (Lanka)
P04(b) Ltd. on 20.10.83.
- P60(b) - 1st Defendant's Profitability and Cash Flow Projections of 20.10.83 based on
Total 456 Rooms, consistent with that of March '83 P60(a) and in
conformity with Hilton International's Forecast of August '81, P07(b), Sheets
2 & 3 adjusted as per Hilton' Letter of 31.03.83 P07(a) and had been based
on the July '80 Plans P08 of the 3rd Defendant.
- P16=P60(c)- Final Profitability and Cash Flow Projections by 1st Defendant of 26/12/83,
based on 452 Guest Rooms + 4 Rooms Manager's Apartment (i. e. Total 456
Rooms).

This was consistent with that of March '83 P60(a) and October '83 P60(b) and in conformity with Hilton International's Forecast of August 1981, P07(b) Sheets 2 & 3, adjusted as per Hilton International's Letter of 31.03.83 P07(a) and had been based on the July '80 Plans P08 of the 3rd Defendant.

P18(a)- 4th Defendant's Board Approval on 07.01.84 for Hotel Project; noting 452 Guest Rooms. Plans prepared by 3rd Defendant and Profitability Forecast and Cash Flow Projections of Dec. '83 of 1st Defendant, P16 = P60(c) had been tabled and approved.

All Agreements/Contracts were also tabled and approved at the same Board Meeting of the 4th Defendant on 07.01.84.

P17(a)- Government Guarantees issued on 17.02.84 on the basis of the above.
P17(b)

3. WHAT THEN IS THE TRUE STORY?

(a) The Prospectus P05 issued under the hand of the Directors (see page 26) records the "History & Description" at page 7 with these words:

* "Mitsui & Co. Ltd. of Japan and Taisei Corporation of Japan together with Messrs Kanko Kikaku Sekkeisha, Yozo Shibata Associates, leading architects of Japan were commissioned to formulate the conceptual plans for the proposed Hilton International Colombo who have developed and completed the architectural and structural plans, construction drawings and all other technicalities for the turn-key construction of a fully furnished and equipped 5 Star Hotel on a fixed price basis, with no provisions for cost escalations."

* "Towards achieving the above, Cornel & Co. Ltd. successfully negotiated in 1980 with Hilton International, Co., New York to extend to the Colombo City their multi-national operations presently extending to 89 operations in 76 cities spread throughout the world."

* "On 15th March 1983, Lanka Japan Hotels a Public Limited Liability Company was incorporated under the Companies Act to take over and implement this Hotel Project hitherto developed by Cornel & Company Limited. On 20.10.1983, Lanka Japan Hotels Limited changed its name to Hotel Developers (Lanka) Ltd. under Section 20(3) of the Companies Act."

(b) Features of the Hilton International, Colombo at page 8 of the Prospectus P05, stipulated, inter-alia:

* "452 roomed tower concept construction going up to 22 floors, prestigiously located at the Echelon Square Complex, overlooking the heart of the city."

* "Recreational Facilities are to be located on an adjacent block of land behind the old Parliament with frontage to the Beira Lake for water sports etc."

- * "The public and service areas are designed to cater for 750 rooms, enabling an addition of another 300 rooms in the form of an additional tower as a second phase at a later date."
- * "covered car parking facilities providing up to 400 vehicles catering not only to the requirements of the Hotel but also to the requirements of the presently congested City and the Echelon Square complex."
- * "The construction is undertaken by a consortium comprising of Mitsui & Co. Ltd. and Taisei Corporation of Japan, on a turn-key fixed price basis with no provision for cost escalations."
- * "The Hotel is scheduled to open in late 1986."

(C) The Agreement with Hilton International is P58 of 19/01/80:

Management Agreement with Hilton International was executed on 19.01.80 by Cornel & Co. Ltd., one of the parties to the Preliminary and Investment Agreements P06 & P09 executed to form the 4th Defendant. Budgeted No: of Rooms: 750 Rooms. Paragraph 11 of the Plaintiff's Counter Affidavit dated 20.11.90.

(d) In July '80 3rd Defendant puts out its Document P08 :

Original Architectural Plans were prepared by the 3rd Defendant in July 1980 defining the Hotel Project, with all configurations and definitions, given in a printed book form

No. of Rooms: 684 Rooms in 3 Towers: i.e.

- * 12 Rooms per Guest Room Floor of each Tower X 19 Guest Room Floors = 228 Standard size Guest Rooms per Tower
- * 3 Towers X 228 Standard Size Guest Rooms per Tower = 684 Standard size Guest Rooms
- * Basement for Car Parking

1ST PHASE

- * 12 Rooms per Guest Room Floor of each Tower X 19 Guest Room Floors = 228 Standard Size Guest Rooms per Tower
- * 2 Towers X 228 Standard size Guest Rooms per Tower = 456 Rooms Standard Size Guest Rooms
- * Basement for Car Parking

(e) In Jan '81 - Hilton International's Forecast - P7(b) Sheet 9 :

Preliminary Forecast of Revenue & Expenses prepared by Hilton International for 450 Guest Rooms (6 Rooms considered as Manager 's Apartment) based on July '80 Plans P08 of the 3rd Defendant. Total 456 Rooms.

- (f) 1st Defendant also based its Forecasts of Profit and Cash Flow for Period 1981 - 1999 P16 (Sheets 8 & 9) = P59 on Hilton International's Preliminary Forecast of Jan '81, P7(b) Sheet 9:

1st Defendant forwarded Forecasts of Profit & Cash Flow for period 1981 1999, based on Hilton International's preliminary Forecast of Revenue & Expenses for 450 Guest Rooms of January '81: (6 Rooms Manager's Apartment = Total 456 Rooms)

- (i) Hilton International's Forecast Jan '81: P7(b) sheet 9

	1st Year	2nd Year	3rd Year
Total Revenue US\$ '000	14,647	16,901	19,316

- (ii) 1st Defendant's Profit/Loss & Cash Flow Forecasts: P16 Sheets 8 & 9 = P59

	1985	1986	1987
Revenue from Hotel US\$ '000	14,647	16,901	19,316

- (g) On 30th March '83, P06 Preliminary Agreement entered into between Cornel & Co. Ltd., and 1st & 2nd Defendants:

Attention is invited to the Recitals, reference to Hilton International, formation of New Company (Lanka-Japan Hotels Ltd.), lease of Land from UDA, Loan Agreement,(Article 2), Design & Supervision Contract (Article 5) with 3rd Defendant who had already put out the July '80 Plans P08, Article 2.04, Construction Contract (Article 3), Letter of Award for Construction Article 3.03, Supplies Contract (Article 4) and the Memorandum to the Agreement (last page).

ALL CONTRACTUAL PRICES HAD BEEN AGREED UPON ON 30.03.83

- (h) Hilton International's Letter of 31.03.83 P07(a):

On the 31/03/83 Hilton International, referred to in P06 Recital, confirms its August '81 Forecast P07(b) Sheets 2 & 3, which was on the basis of Total 456 Rooms and based on the July '80 Plans, P08 of the 3rd Defendant.

- (i) 1st Defendant's Profitability Forecast & Cash Flow Projection of March '83: P60(a)

The 1st Defendant's Profitability Forecast and Cash Flow Projection of March '83 are on the basis of the Total 456Rooms - P60(a), in conformity and in accordance with (h) above.

- (j) Letter of Award for Construction:

On 30/3/83 a Letter of Award for Construction is given to the 1st & 2nd Defendants for Construction of Hotel P06 (Article 3.03), with the Construction Price agreed upon, on the basis of the July '80 Plans, P08 of the 3rd Defendant; which was the only Plans available at that time.

(k) Construction of what ?

A Hotel with a Total 456 Rooms in 2 Towers going up to 22 Floors and with covered i.e. basement car parking for 400 Vehicles, and with provision for another Tower.

(l) Architectural Plans to UDA:

On 18/10/83, 21 sheets of Plans prepared to requisite scale by the 3rd Defendant for UDA Approval, are forwarded to UDA. Where are they now? What has happened to all four copies sealed and signed by the UDA?

(m) 1st Defendant's profitability Forecast & Cash Flow Projections of October '83: P60(b)

On 20/10/83 1st Defendant's Forecast is again on Total 456 Rooms P60(b). The Plans reflected this position P08 of July '80 of 3rd Defendant shows it very clearly.

This October '83 Forecast of 1st Defendant was consistent with Profitability Forecast of March '83 - P60(a) and was in conformity and in accordance with "h" above .

(n) 1st Defendant's Final Profitability Forecast and Cash Flow Projection of Dec. 83: P16 = P60(c)

The Final Profitability & Cash Flow Projection of 1st Defendant of 26/12/83 P16 = P60(c) is based on 452 Guest Rooms + 4 Rooms for Managers Apartment i.e. Total 456 Rooms and was in conformity with "h" above.

(o) No. of Rooms on which basis the 1st Defendant consistently calculated the income as referred to in (i), (m) and (n) above in strict conformity with "h" above are clearly illustrated from the following extracts of the relevant Documents:

(i) Hilton International's Forecast of August '81 P7(b) Sheets 2 & 3 - Total 456 Rooms

Year		1st	2nd	3rd
Total No.of Rooms (Room Days) Available (for Year)				
i.e. 456 Rooms x 365 Days	(A)	166440	166440	166440
Room Occupancy - %	(B)	65%	70%	75%
Average Room Rate - US \$	(C)	70.00	75.00	81.64
Room Revenue - US\$ '000 (A) x (B) x (C)		7573	8808	10191

(ii) 1st Defendant's Profitability Forecast & Cash Projection of March '83 P60(a)- Total 456 Rooms

Year		1st	2nd	3rd
No. of Rooms (Room Days) Available (for Year)				
i.e. 456 Rooms x 365 Days	(A)	166440	166440	166440
Room Occupancy - %	(B)	65%	70%	75%
Average Room Rate - US \$	(C)	73.00*	78.84	85.15
Room Revenue	-			
US\$ '000 (A) x (B) x (C)		7898	9185	10629
Net Funds Available				
US\$ '000		5180	6403	7651
Jap Yen '000				
(1 US\$ = 230 Jap. Yen)		1191400	1472690	1759730

Note:* 1st Year Room Rate changed to US \$ 73.0 from Hilton International's Forecast August '81 P07(b) Sheets 2 & 3 , given at (i) above of US \$ 70.0, as per Hilton International's Letter dated 31.03.83 P07(a) copied to 1st Defendant.

(iii) 1st Defendant's Profitability Forecast & Cash Flow Projection of Oct. '83 P69(b) - Total 456 Rooms

Year		1st	2nd	3rd
No. of Rooms (Room Days) Available (for Year)				
i.e.456 Rooms x 365 Days	(A)	166440	166440	166440
Room Occupancy - %	(B)	65%	70%	75%
Average Room Rate - US \$	(C)	73.00	78.84	85.15
Room Revenue -				
US\$ '000 (A) x (B) x (C)		7898	9185	10629
Net Funds Available				
US\$ '000		5180	6403	7651
Net Funds Available				
US\$ '000				
Jap Yen '000				
(1 US\$ = 230 Jan. Yen)		1191400	1472690	1759730

(iv) 1st Defendant's Final Profitability Forecast & Cash Flow Projection of December '83
P16 = P60(C) - 452 Guest Rooms

Year		1st	2nd	3rd
No. of Rooms (Room Days) Available (for Year)				
452 Rooms x 365 Days	(A)	164980	164980	164980
Room occupancy - %	(B)	65%	70%	75%
Average Room Rate - US \$ '000	(C)	73.65%*	79.53	85.90
Room Revenue - US \$ '000 (A) X (B) X (C)		7898	9185	10629
Net Funds Available				
US\$ '000		5180	6403	7651
Jap Yen '000 (1 US\$ = 230 Jan. Yen)		1191400	1472690	1759730

NOTE:* 1st Year Room Rate increased to US\$ 73.65 from US\$ 73.0 as above, to achieve same Net Funds Available for Debt Service, since Revenue from 4 Rooms had been excluded as Manager's Apartment.

IT IS CLEAR THAT FROM 1980, BOTH HILTON INTERNATIONAL & THE 3RD DEFENDANT AND THE 1ST & 2ND DEFENDANTS, CONTEMPLATED THE CONSTRUCTION OF A HOTEL WITH A TOTAL NUMBER OF 456 ROOMS IN 2 TOWERS (WITH PROVISION FOR ANOTHER TOWER), WITH 22 STOREYS AND COVERED CAR PARKING FOR 400 VEHICLES. i.e. BASEMENT. TOWARDS THIS END ALL DOCUMENTS AND PLANS WERE DRAWN UNDER THEIR HAND AND SUBMITTED TO THE 4TH DEFENDANT?

4. PLAINTIFF'S AFFIDAVITS FULLY SETS OUT THE ABOVE:

The above matters are fully dealt with in the Affidavit of the Plaintiff dated 12th September 1990 among other paragraphs, particularly in paragraphs 9(a) to 23(e) and in the Plaintiff's Counter Affidavit of 20th November 1990 paragraph 10 (pages 10, 11 & 12) paragraphs 11 and 12.

5. WHAT IS THE IRRESISTIBLE INFERENCE FROM THESE DIRECT FACTS DISCLOSED FROM THE POCUMENTS UNDER THE HANDS OF THE 1ST, 2ND & 3RD DEFENDANTS?

The only inference that these facts disclose, is that the 1st, 2nd and 3rd Defendants, jointly and severally, held out, promised and undertook throughout, to promote, formulate, plan, develop and build, for the 4th Defendant, an International 5 Star Class Hotel, with a total of 456 Rooms in 2 Towers in the 1st Phase, going up to 22 Floors, with covered i.e. basement car parking for 400 vehicles, on a turn-key fixed price basis, with no provision for cost escalations, on a loan basis, holding out consistently that the profits from such Hotel, could service such loans. In order to obtain the Government Guarantees.

6. WHAT HAPPENED IN 1984?

(a) On 07/01/84. 4th Defendant's Board Meeting held: P18(a)

The Board noted that the 4th Defendant was incorporated to take over and implement the proposed Hotel Project Hilton International Colombo, that had been promoted since 1979 by cornel & Co. Ltd. Party to the Preliminary & Investment Agreements P06 & P09.

The following documents were tabled and approved:

- (i) Complete set of Architectural Plans together with the construction Drawings, provided by 3rd Defendant.

Vide: P18(a) paragraph (iv)

- (ii) Final Cash Flow of Dec. '83 of the Hotel Project, provided by 1st Defendant: P16 = P60(c)

Vide: P18(a) paragraph (x)

- (iii) copies of Agreements/contracts and Documents:

- Preliminary Agreement	-	P06
- Investment Agreement	-	P09
- Loan Agreement	-	P15
- Construction Contract	-	P11
- Furniture, Fittings & Equipment Contract	-	P13
- Design & supervision Contract	-	P14
- Indenture for the Underlease of Land	-	P17(a)
- State Guarantee, Attorney General's Opinion	-	P17(b)

Vide: P18(a) paragraphs (xii) & (xiii)

- (iv) The 4th Defendant's Board had specifically noted 452 Guest Rooms, and that the construction would be on a turnkey fixed price basis, with no provisions for cost escalations.

Vide: P18(a) paragraphs (iii) & (ix)

(b) On 31.01.84 following Agreements/Contracts were entered into:

- (i) Investment Agreement P09:

Pursuant to the Preliminary Agreement P06, an Investment Agreement P09 was entered into on 31/01/84 between the 1st & 2nd Defendants, the Government of Sri Lanka, and Cornel & Co. Ltd., The Preliminary Agreement P06 formed a part & parcel of the Investment Agreement P09 and attached thereto.

Attention is drawn to Investment Agreement P09, the Recitals, inclusion of the Government of Sri Lanka to P06 (Article I), Special Covenants Article 6, Article 10, Article 11.05, Article 12.02.

WHAT WERE THEY AGREEING TO?

To construct, own, operate, manage an international 5 star Class Hotel with 452 standard size Guest Rooms/Bays (4 Rooms Manager's Apartment) and the Government of Sri Lanka on this basis Guaranteed the Loans provided for this purpose by the 1st & 2nd Defendants.

OTHER AGREEMENTS contemplated by the Preliminary Agreement P06 were also entered into as follows

- (ii) Construction Agreement of 31/01/84 – P11 and P12 between 4th, 1st, 2nd & 3rd Defendants.

Attention is drawn to Recitals, Letter of Award for Construction, 22 storeys, 452 'Bays'.

- (iii) Supplies Contract of 31/01/84 - P13 between 4th & 1st Defendants.

Attention is drawn to Recitals, 452 'Bays'! Article 1(2) Exhibit "A"

- (iv) Design & supervision Contract of 31/01/84 - P14 between 4th & 3rd Defendants.

Attention is drawn to Recitals, 452 'Bays'. Article 6.01. 6.04. 6.05 and 6.12.

- (v) Loan Agreement of 31/01/84 - P15 between 4th, 1st & 2nd Defendants.

Attention is drawn to Recitals, 452 'Bays', Article 9.

- (c) On 06.03.84 Prospectus P05 was published and issued for a Public Share Issue:

Prospectus signed amongst others by 1st & 2nd Defendants Page 26

3rd Defendant's role was fully disclosed in the Prospectus Pages 7, 8, 13, 18 & 21

1st & 2nd Defendants amongst others named as Promoters - Page 12

Configurations and stipulations of Hotel given at Page 8, 452 Roomed, 2 Towers, going up to 22 Floors, with covered i.e. basement car parking for 400 Vehicles (in conformity with the July '80 Plans P08) with provision for another Tower.

Financial Plan in conformity with 1st Defendant's Profitability Forecast & Cash Flow Projections of Dec. '83 P16 = P60(c) - Page 3, 9.

- (d) Construction Commenced:

Site handed over to 1st & 2nd Defendants and constructions activities commenced with a 'Ground Breaking' Ceremony in March '84.

IT IS IN THE AFORESAID BACKGROUND AND UPON THE AFORESAID FACTS THAT UDA APPROVAL WAS OBTAINED IN MARCH '84 AND CONSTRUCTION OF THE HOTEL BEGAN.

7. IS NOT 452 BAYS ACTUALLY 452 GUEST ROOMS?

All these Agreements/Contracts stipulated 452 'Bays' i.e. 452 size Guest Rooms - as confirmed in Profitability Forecasts and Cash Flow Projections provided by Hilton International and 1st Defendant consistently on the basis of the July '80 Plans P08 1st Defendant has not denied this. (452 Guest Rooms + 4 Rooms as Manager's Apartment = Total 456 Rooms)

From the Year 1980 the concept has been consistently clear and certain. It is noted that the 3rd Defendant, on its own admits, that a 'Bay' (or a 'Module') is in fact, "a unit of a standard size room".

Vide: paragraph 10 of 3rd Defendant's Statement of Objections

The independent Chartered Architect, Mr. Shelton Wijyaratna's explanation in this regard is as follows:

"One room bay is in actual practice one standard guest room"

Vide - P32(a) page 4 paragraph (vi)

Therefore quite correctly, as now admitted, 452 'Bays' would accordingly be, 452 units or numbers of standard size guest rooms. One unit of a standard size Guest Room is not a Suite. Two or more standard size Guest Rooms are combined to form a suite, to be marketed and sold as such.

8. WHAT DID THE CONSTRUCTION AGREEMENT STIPULATE?

The Construction Agreement PI1 was for the purpose of constructing a first class international Hotel of 22 Storeys containing 452 'Bays' i.e. 452 standard size Guest Rooms. (+ 4 Rooms for Managers Apartment) = Total 456 Rooms as per the July '80 Plans PO8.

9. WHAT DID THE GOVERNMENT OF SRI LANKA GUARANTEE? AND ARE THE GUARANTEES NOW VALID?

By P17(a) & PI7(b), the Govt. of Sri Lanka guaranteed the repayment of the Loans, for the construction of a 452 'Bays', i.e. 452 standard size guest room, international 5 Star Class Hotel with 22 storeys in 2 Towers and basement parking for 400 Vehicles.

As per the Profitability Forecast & Cash Flow Projections of the 1st Defendant, the said Loans, were to be serviced from the would be income generated from 452 guest rooms; which Profitability Forecasts were consistently prepared by the 1st Defendant on the basis of the July '80 Plans POB.

Since such a Hotel has not been constructed, can the said Guarantees be enforced? Definitely not. It will be fraudulent. A claim under the said guarantees will be fraudulent and no payment need be made.

In Edward Owen Engineering Ltd. Vs Barclay's Bank International Ltd.
(1978) Q.B. 159 at 171, ----- APPENDIX I

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 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.) -----APPENDIX II

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

See also Article on Bank Guarantees. in Sri Lanka - Bar Association
Law Journal (1988) Vol II Part II Page 45 -----APPENDIX IV

In the given circumstances of fraud, the said Guarantees in question are invalid and should be set aside.

Accordingly, the 1st & 2nd Defendants would not have a right of claim under the said Government Guarantees, having perpetrated a fraud and from being paid from public funds under such Government Guarantees.

10. WHAT WAS HELD OUT TO THE PUBLIC? CAN IT BE CHANGED?

The Prospectus P05 called for Public Shares on the basis of 22 floors, 452 Rooms, in 2 Towers and covered basement i.e. car parking for 400 Vehicles, 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 ... " see page 16 last paragraph of P05.

The 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; see page 26 of P05.

Attention is drawn particularly to the following Sections of the Companies Act No: 17 of 1982, which include mandatory requirements and Penal Clauses; i.e.

- 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 5 star class Hotel of 452 Guest Rooms etc. as above.
- 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-statements/untrue statements in Prospectus

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

- 46(i) "Where a Prospectus issued on or after the appointed date includes any untrue statement, any person who authorized, 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 "

1st, 2nd & 3rd Defendants on their own pleadings, ,have now admitted that the said Hotel has not been constructed in accordance with the specifications and configurations, more so particularly in regard to the Primary Object referred to in Part I of the Third Schedule of the said Act, and thereby have contravened, inter-alia, Section 46(i) therein. Accordingly, it is submitted on behalf of the Plaintiff, that the Court should take judicial notice of this breach and report this matter to the Hon. Attorney General for action. Vide Section 46(3) of the said Act.

11. WHAT DID THE 1ST, 2ND & 3RD DEFENDANTS - CONTRACTORS & ARCHITECTS ACTUALLY DO AND CONSTRUCT?

- (a) The 1st, 2nd & 3rd Defendants acting jointly and severally, surreptitiously and unauthorisedly amended the originally approved Architectural Plans, without the knowledge and approval of the Board of Directors of the 4th Defendant.
- (b) 1st & 2nd Defendants and the 3rd Defendant, in their Statement of Objections now admit, the amending of the Plans, but have failed:
 - (i) to submit evidence of authority and/or approval from the Board of Directors of the 4th Defendant for amending the Plans, together with the necessary Addenda to the Construction Agreement P11 and the Investment Agreement P09 as provided for therein
 - (ii) to submit a copy of the originally approved Plans; together with a copy of same depicting the Amendments thereon as would be normally required.
 - (iii) to explain why this matter of the amendment of the originally approved Plans was concealed even when queries were raised repeatedly.
 - (iv) to explain why they did not disclose the amending of the originally approved Plans in the Completion Certificate P31(a) and Final Certificate P31(b).
- (c) Accordingly. the 1st & 2nd Defendants acting in collusion with the 3rd Defendant. have admittedly constructed the Hotel. On the basis of this illegal and unauthorised amended Plans. P54.
- (d) An independent Chartered Architect Mr. Shelton Wijayaratna, has examined the unauthorised Plans P54 and the given List of Amendments P32(b) = 3R21, with the July '80 plans P08 and has set out his findings in Report P32(a); wherein he has inter-alia certified the relationship between the unauthorised Amended Plans P54 and the July '80 Plan P08 at page 6 Item (ix) as follows:

"We have also examined a Schedule (3 pages) dated 15th July 1985 and titled ALTERATIONS ITEMS AFTER THE APPLICATION FOR BUILDING PERMISSIONS prepared by KANKO KIKAKU SEKKEISHA YOZO SHIBATA & ASSOCIATES, TOKYO, JAPAN. In comparing the two sets of plans referred to herein we are of the opinion that the differences between these two plans are more or less as set out in the amendments listed in the said Schedule, particularly in the guest room floor layout. The Basement and the Mezzanine Floor are not referred to in this Amendment Schedules, in conformity with Plan "B" which has no Basement, Mezzanine Floor, but car park at ground level and mezzanine level."

Whilst it is possible to amend an Original Plan with a given Schedule of Amendments and draw a new Amended Plan, amending the Original Plan with such Amendments, quite obviously. the reverse of this is also possible i.e. the given Amended Plan can be examined and the Amended Plan can be adjusted with the given Schedule of Amendments, to ascertain as to what the Original Plan was!. 1st & 2nd Defendants expressly denied any amendments to the original agreements. Vide P36 (a) - P36(d).

- (e) By such amendments, inter-alia, the 1st, 2nd & 3rd Defendants have fraudulently endeavoured to fictitiously increase the number of Guest Room Bays on each Guest Room Floor, from the original 24 nos., to 26-1/2 nos., by depicting a Room Bay on an earlier Lobby Area and fictitiously describing a 1-1/2 Room Bay area, as a '3 - Room Bay' area, actually building only 408 standard size Guest Rooms; since 2 Guest Room Floors had been reduced.

Of the 408 standard size Guest Rooms, 5 standard size Guest Rooms have been allocated as the Manager's Apartment, and some units of standard size Guest Rooms have been combined together to form Suites (two or more standard size Guest Rooms forming a Suite) to give the configuration of 387 shown in the Monthly Reports of Hilton International P25(a), which is a count of the Suites (counting the two or more standard size Guest Rooms as one) and the balance standard size Guest Rooms, which are being marketed and sold as such.

Vide - P32(a) pages 3 & 4

- (f) The reduction of 2 Guest Room Floors is further corroborated by the Monthly Reports prepared and certified by 1st & 2nd Defendants and the 3rd Defendant, confirming that the said Hotel Building had only 20 Storeys, contravening the Construction Agreement PII, which stipulated 22 Storeys, originally as per the July '80 Plans P08.

Vide - P53(a), P53(b)

- (g) As clearly evident by the independent Chartered Architect, Mr. Shelton Wijayaratra's Report P32(a), by amending the originally approved Plans, the 1st, 2nd & 3rd Defendants had endeavoured to increase the number of Room Bays per Guest Room Floor from the original 24 to purportedly count 26-1/2, by showing an additional Room Bay on an earlier Lobby Area and increasing the Room Bay count fictitiously, by fraudulently describing a 1-1/2 Room Bay area as a 3 - Room Bay area. Therefore, if the number of Guest Room Floors had been the same as originally planned, the said Amendments to increase the number of Room Bays per Guest Room Floor from 24 to 26-1/2, should in effect, give an increase to the total number of Room Bays that was originally provided for of 456 Guest Rooms as per July '80 Plans P08 and accordingly should have been effectively increased as follows:

i.e. $456 \times 26\frac{1}{2} = 503\frac{1}{2}$, which is not so.

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The above purported increase in the number of room bays per Guest Room Floor, from 24 to 26-1/2, had been attempted, since the number of Guest Room Floors had been reduced from the original 19 as per July '80 Plans P08 to 17 in the unauthorised amended Plans P54, to make a surreptitious and futile attempt to maintain the same total Room Bay count. i.e. $26\frac{1}{2}$ per Guest Room Floor x 17 Guest Room Floors = $450\frac{1}{2}$, still short of the 456 Guest Rooms, as per the July '80 Plans P08.

- (h) Furthermore, two basement levels have not been constructed which was to have provided the 'covered' car parking for 400 vehicles as stipulated in the Prospectus P05

Vide P32 (a) pages 5 & 6

Presently there is provision for covered car parking of approximately 200 vehicles, as admitted by the 3rd Defendant, on the ground floor (partly sunken) and mezzanine floors above ground level, sacrificing commercially valuable space in the heart of the City of Colombo. which could have earned attractive commercial rents for the 4th Defendant particularly being in a 5 star Hotel premises.

- (i) The 1st, 2nd & 3rd Defendants have suppressed the Specified Bills of Quantities and Final Measurements; in the absence of which it is impossible to verify the correctness of quality, standards, configurations, specifications etc. of the Hotel Construction.
- (j) Furthermore, in addition to the originally approved Plans, Exhibit "A" to the Supplies Contract, P13 Article 1(2), giving an inventory of the Furnishings, Fixtures & Equipment Supplies is also mysteriously missing, whereby it is impossible to also verify the inventory of such Supplies, including the correctness of quality, standards and specifications etc. as originally contracted upon with the 1st Defendant for 452 Guest Rooms, 22 Storeys, etc. as per the July '80 Plans P08.

Vide P49(b)

12. HOW & WHO WAS TO MONITOR THE CONSTRUCTION? TURNKEY!

- (a) Representatives of 1st & 2nd Defendants always functioned as the full-time Resident Executive Director of the 4th Defendant, managing, handling and attending to the day to day administration of the 4th Defendant.

These Representatives of the 1st & 2nd Defendants, who functioned as the Executive Director, of 4th Defendant, was in actual fact the person who co-ordinated with and supervised the work of 3rd Defendant, who in turn, was responsible to check and supervise the very construction work of the 1st & 2nd Defendants! Turnkey!

- (b) Further, the many roles played by the 1st & 2nd Defendants, in this 'turnkey' construction included:

- I. Main Promoter
- 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 4th Defendant, with right of veto over the Board Decisions and Actions.

- (c) During the finalisation of the Project and the Construction of the Hotel many Japanese representatives/employees of the 1st, 2nd and 3rd Defendants were in Sri Lanka responsible for the Project formulation, planning, execution and monitoring of the Project.
- (d) Accordingly, it is submitted on behalf of the Plaintiff, that the 1st, 2nd & 3rd Defendants acted in collusion performing many roles and thus having a stranglehold on the Hotel Project of the 4th Defendant, perpetrated this fraud.

13. WAS THE WORK CERTIFIED WHEN PAYMENTS WERE DRAWN? DID THE 4TH DEFENDANT APPROVE?

Payments to the 1st, 2nd & 3rd Defendants had been effected in Japan, through a special Bank Account in the name of the 4th Defendant, maintained at the Fuji Bank, Japan, all matters in connection with which, was handled by the Representatives of the 1st & 2nd Defendants, who functioned as the Executive Directors.

To enable periodic payments, the 1st & 2nd Defendants made deposits, recorded as Loans, 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 and did not require the approval of the 4th Defendant when effecting such payments.

It is submitted on behalf of the Plaintiff, that the above mechanism of automatic payments as per given Schedules based on the effluxion time. is the very reason. that a fully and properly documented thorough final inspection, with Specified Bills of Quantities and Final Measurements is crucially very necessary to verify the correctness of the Hotel Construction and the Supplies; now more so particularly in the light of the facts disclosed in this case.

Vide - P06 Article 2.04, P09 Article 2.10, P15 Articles 3 & 4

14. WHAT WAS THE POSITION WITHIN THE BOARD OF DIRECTORS OF 4TH DEFENDANT?

(a) The Board of 4th Defendant comprised:

Government of Sri Lanka	- 65%	Shareholder	- 2 Directors
1st & 2nd Defendants	- 30%	Shareholder	- 2 Directors, One functioning as the full Time resident Executive Director
Cornel & Co. Ltd.) - 5%	Shareholder	- 3 Directors*
Public Shareholders)		- 1 Director

* Cornel L. Perera, 5th Defendant, was the Chairman & Managing Director of the 4th Defendant and also was the Chairman & Managing Director of Cornel & Co. Ltd. a Signatory to the Preliminary & Investment Agreement P06 & P09 and a Promoter named in the Prospectus P05 Page 10.

* The Plaintiff having been associated from the very inception of the Project in 1979 was a Subscriber, Member and Director of 4th Defendant when incorporated on 15.03.83 (P01, P02, P03) and later as per the arrangements of the Investment Agreement entered into on 31.01.84, to bring in the Government of Sri Lanka as a party to the Hotel Project, the Plaintiff consented to be a nominee of Cornel & Co. Ltd. for convenience of arrangements.

* The other nominee was F.G.N. Mendis, 6th Defendant, Chairman of Delmege Forsyth & Co. Ltd., which Company also was named as a Promoter in the Prospectus (P05 page 11)

(b) the management and administration of the 4th Defendant was by the Executive Director, representative of the 1st & 2nd Defendants and Cornel L. Perera, functioning as the Chairman & Managing Director, was at all times the person who was in close liaison and dialogue with the 1st, 2nd & 3rd Defendants, dialoguing at times in the Japanese language at Board Meetings. The other Board Members, including the Plaintiff were non-executive Directors, attending Board Meetings and assisting on relevant matters when required.

(c) In addition, the 1st & 2nd Defendants had a stranglehold on the company's ability to make decisions and act, by having a right of veto over the Board Decisions at the Board of Directors of the 4th Defendant.

i.e. Vide 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 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."

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

i.e. Vide: 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 Collaborator."

15. WHAT DID THE LOCAL DIRECTORS OTHER THAN THE GOVERNMENT DIRECTORS DO?

(a) Cornel L. Perera, Chairman & Managing Director

- As the Chairman & Managing Director had a close liaison and dialogue with the 1st, 2nd & 3rd Defendants on all matters relating to the Project.
- From the documents marked by the 3rd Defendant, 3R2 to 3R8 and 3R2(a) to 3R8(a) it is evident that he was aware of the financial matters pertaining to them.
- From the documents marked by the 3rd Defendant 3R31, 3R32 i.e. Minutes of Meetings on construction, it is evident that he had chaired these Meetings and had also participated at the taking over and handing over of the Hotel. Vide: P53(b).

- Thanked K.N. Choksy, 7th Defendant, for the opinion Opposing the Government Nominee director's Recommendation in 1988 to appoint an Independent Engineer, to inspect the construction work of the Hotel. Vide P30 (b) page 2.
- Notwithstanding objections at the Board, Cornel L. Perera, surreptitiously executed Debt Rescheduling Agreements, including Clause committing to Mortgage the Hotel to the 1st & 2nd Defendants, in addition to the existing Government Guarantees on the Loans. Subsequently this had to be deleted. Vide: P34(a), P34(b) paragraph 5 and P34(c).
- Notwithstanding the plaintiff's objections, not to pay the 1st & 2nd Defendants; without intimation to or approval from the Board of 4th Defendant, accompanied 1st & 2nd Defendants to a meeting at Ministry of Finance and arranged for a payment of U.S.\$ 2.0 Mn.

Vide: P39(a) page 1 paragraph 3, and P39(b) page 1 final paragraph and page 2 final paragraph and para 41(b) of the Plaintiff's Affidavit dated 12.09.90.
- When serious queries, discrepancies and the discovery of the unauthorised amended Plans were raised at the Board, as the Chairman & Managing Director, Cornel L. Perera said or did nothing about it.
- Cornel L. Perera's conduct and behaviour implies that he was in league with the 1st, 2nd & 3rd Defendants and that he had been aware of all what had transpired and which matters had been knowingly concealed from the Board of 4th Defendant, for reasons best known to him and the said 1st, 2nd & 3rd Defendants.

(b) K.N. Choksy, 7th Defendant. Sole Director elected by the Public Shareholders:

- When the Government Nominee Director, wanted an Independent Engineer to inspect the Hotel in 1988, K.N. Choksy gave an opinion stating that it was not necessary. Vide: P30(a)
- Notwithstanding the Plaintiff's objections, not to pay the 1st & 2nd Defendants; without intimation to or approval from the Board of 4th Defendant, accompanied 1st & 2nd Defendants to a meeting at the Ministry of Finance and arranged for a payment of U.S.\$ 2.0 Mn.

Vide: P39(a) page 1 paragraph 3, and P39(b) page 1 final paragraph and page 2 final paragraph and para 41(b) of the Plaintiff's Affidavit dated 12.09.90.
- Thereafter in response to request made by the Representative of 1st & 2nd Defendants, controverted Plaintiff's stipulations to call for Bills of Quantities, Final Measurements and other clarifications from the 3rd Defendant i.e. Vide: P38(b) of 13.12.89, by his Letter dated 28.02.90, after a lapse of over two months; stating inter-alia that the Hotel Building was in accordance with all stipulations. Vide: P40.

- When these serious queries, discrepancies and the discovery of the unauthorised amended Plans were raised at the Board of the 4th Defendant, did nothing.
- Though elected by the Public Shareholders his conduct and behavior implies that he was endorsing and supportive of the 1st, 2nd & 3rd Defendants.

16. WHAT DID THE PLAINTIFF DO?

- (a) When he found that the number of rooms given in the Hilton International's Monthly Reports P25(a), differ from the 1st Defendant's Profitability & Cash Flow Projections, given both before and after the Hotel opened for operations, he queried this and submitted a Memorandum to the Board of the 4th Defendant on 30.12.87 Vide P26(d) and insisted that 4th Defendant should write to the 1st & 2nd Defendants in this regard.
- (b) Accordingly, Letter P26(f) to 1st & 2nd Defendants was submitted, but the 1st & 2nd Defendants did not give satisfactory explanations. Even in their Objections 1st & 2nd Defendants marked this Letter 1D3 but have failed to mark their reply controverting the issues raised in P26(f).
- (c) On Plaintiff's expression of apprehension, the then Government Nominee Director, M.T.L. Fernando, Chartered Accountant, Precedent Partner, Ernst & Young, called for an Independent Engineer in 1988 to inspect the Hotel construction, expressing the view that the 3rd Defendant, was more or less connected with the contractors, i.e. 1st & 2nd Defendants, and that there may be queries by the Ministry of Finance. Vide: P29.
- (d) On the surreptitious inclusion of the Mortgage Clause in the Debt Rescheduling Agreements, Plaintiff, insisted it be deleted stating that the 1st & 2nd Defendants cannot have both a Mortgage and Government Guarantees on the same Loan. Vide: P34(b) page 2 paragraph 2.
- (e) In the context of the financial predicament of the Company the Plaintiff on 27.11.89, submitted a Memorandum to the Board of 4th Defendant, inter-alia, urging that the Public Shareholders' monies be refunded. Vide: P38(a) more particularly page 4 last paragraph.
- (f) Since the Completion & Final Certificates given by the 3rd Defendant, were totally unsatisfactory, particularly in the absence of Bills of Quantities and Final Measurements, the Plaintiff refused to agree to make any payments to the 1st & 2nd Defendants, till the relevant matters are satisfactorily clarified by the 3rd Defendant, by Memorandum submitted to the Board of the 4th Defendant dated 13.12.89.

Vide: P38(b) more particularly pages 2, 3 (Completion Certificate) and 5 (Final Certificate)

- (g) Since no satisfactory clarifications forthcame, plaintiff brought these matters to the notice of the officials of the Ministry of Finance, who then called for the Plans from the UDA; it is then only, when examining such Plans, at the request and in the Office of the Ministry of Finance, in March 1990, that the Plaintiff realised, that they were an Amended set of Plans.

- (h) Plaintiff brought this serious matter to the attention of the Board of the 4th Defendant on 07.03.90 and again on 24.04.90 and urged that this be referred to Arbitration, submitting Memorandum dated 24.04.90 to the Board of the 4th Defendant. P45 (b) .

But the Board took no action and was silent except for K. shanmugalingam, Nominee Director of the Government, who concurred with the Plaintiff and supported him.

Vide: P41 page 3 paragraph 5 continued to page 4 and Vide P45(a) page 2 item 5 paragraph 5 continued on page 3 and P45(b) and particularly last paragraph therein. re. Arbitration.

- (i) Since no satisfactory clarifications or actions forthcame at the Board of the 4th Defendant, the Plaintiff instituted this Action on 13.09.90.

17. WHAT DO THE 1ST & 2ND DEFENDANTS STATE?

- (a) 1st & 2nd Defendants have not pleaded to all the facts: The 1st & 2nd Defendants in their Statement of Objections do not plead to the entirety of the facts; but what they plead to is suppressio veri

Reference is made to the Plaintiff's Counter Affidavit dated 20.11.90.

- (b) 1st & 2nd Defendants admit amending Plans, without approval of 4th Defendant, violating Agreements. The 1st & 2nd Defendants now admit that the originally approved Plans, i.e. approved both by the Board of Directors of the 4th Defendant and the UDA, in fact had been amended by them and the 3rd defendant.

However, they have failed to produce any evidence whatsoever of any express instructions and/or authority and/or approval from the 4th Defendant, to amend the originally Approved Plans.

The amended Plans now before Court is a freshly redrawn set of new Plans which had substituted the originally Approved Plans. An Amendment Plan should depict the very amendments, usually in red colour. on a copy of the originally Approved Plans. In this instance clearly this is not so.

- (c) No Addenda to the Construction and Investment Agreements to amend Plans.

This admitted Amendment of the originally Approved Plans, is a serious violation, of the terms and conditions of both the Construction Agreement (P11) and the Investment Agreement (P09), to which Agreements both 1st & 2nd Defendants had been parties to.

Any such amendment should have been upon the Approval of the Board of the 4th Defendant and by an Addendum to each of such Agreements, signed by the Signatories to the said Agreements. more particularly by the Government of Sri Lanka the said Guarantor, in relation to the Investment Agreement P09.

- (d) Purported employee had no authority to submit amended Plans and was under direction and control of 1st & 2nd Defendants Representative.

The 1st & 2nd Defendants, have now taken, futile cover, under a letter, submitted to the UDA, with the said unauthorised amended Plans, purportedly signed by one C. Weerakoon, a female employee at that time of the 4th Defendant, by that name. However, such employee's scope of work and authority did not empower the submission of such amended Plans.

It is pointedly relevant to note that such employee, was directly under the direction and supervision of the then Representative, A. Naka of the 1st & 2nd Defendants, who functioned as the Executive Director, and as now admitted, this act had been with the full knowledge, participation and direction of the 1st & 2nd Defendants/Representative.

It is clear that the 1st & 2nd Defendants have perpetrated this fraudulent amendment of the originally approved Plans, by abusing and misusing their position as the 4th Defendant's, full-time resident Executive Director, responsible for the day to day administration and management of 4th Defendant.

- (e) 1st & 2nd Defendants deliberately concealed the Amendment of Plans

significantly it is now evident, that the 1st & 2nd Defendants had persistently and deliberately concealed this serious matter of the amendment of the originally approved Plans in July '85, notwithstanding the stipulated requirements by the Board of 4th Defendant in June '85 and July '85 itself P21(b) Item 2, for the tabling of Reports on the Hotel Construction and Progress, from the 1st, 2nd & 3rd Defendants as specifically required by the Plaintiff's Letter dated 22.07.85 P21(a).

Even when discrepancies and queries were raised in relation to the configurations of the Hotel i.e. No. of Guest Rooms, Floors, Basement Parking etc., the 1st & 2nd Defendants, even at that stage did not disclose the amendment of the originally approved Plans. This was only discovered at the Ministry of Finance, when this matter was being probed in March 1990 by the Plaintiff.

By the exchange of correspondence the 1st & 2nd Defendants expressly denied to the Plaintiff any amendments whatsoever to any of the originally executed Agreements/Contracts of 31.01.84. Vide; P36(a), P36(b), P36(c) & P36(d). Having persistently concealed this surreptitious and fraudulent amendment of the originally approved Plans, the 1st & 2nd Defendants' present admission of such fact is misleading and now not admissible in law and they are thus stopped from doing so.

- (f) 1st & 2nd Defendants had no Contract whatsoever with Hilton International.

Being unable to produce any evidence of express instruction and/or authority and/or approval from the 4th Defendant, the 1st & 2nd Defendants now plead, without any evidence, that they had amended such Plans, on instructions from Hilton International, who were only the Hotel operators. This is false and any how the 1st & 2nd Defendants had no contractual agreement whatsoever with Hilton International to do so.

The 1st & 2nd Defendants' mitigating plea at this stage, that the amendments are minor modifications and alteration is false and should be rejected. The reduction of inter-alia, 2 Guest Room Floors comprising 48 Room Bays and 2 sunken Basements may perhaps be minor modifications in the concrete jungles of Tokyo, but by Sri Lankan standards, in the City of Colombo, this is a massive unbelievable fraud, shamelessly executed: clipping two floors from the top and two floors from the bottom performing the traditional BONSAI Art!!

(g) 1st & 2nd Defendants have failed to produce copy of originally approved plans.

Further, the 1st & 2nd Defendants, have deliberately avoided to produce and have failed to produce, even now an authenticated copy of the originally approved Plans.

i. e. - a copy of the UDA Approved Plans bearing the official approval Seal and signature of the UDA

and/or

a copy of the Architectural Plans, approved by the 4th Defendant forming part & parcel of the Construction Agreement (P11) bearing the Signatures of the Signatories to such Construction Agreement.

Where are the copies of these Plans, which would have been in the possession of the 1st & 2nd Defendants, both as contractors and as signatories to the said Construction Agreement IP11) ???

(h) Copy of originally approved Plan not available with 4th Defendant's office & UDA is fact and truth:

It has been submitted on behalf of the 1st & 2nd Defendants that a copy of the originally approved Plans were available for inspection by the Plaintiff at the 4th Defendant's Office, in reference to P44(b). This submission is false and misleading. The actual facts in this regard are evident from the Documents.

* Vide: P44(a) Plaintiff's Letter: First Page last Paragraph:

"In the context of the above I shall be very grateful if you could kindly send me copies of the following:

ii. Copy of the Plans submitted originally in October '83 for the approval of the Hotel upon which building approval had been granted in March '84"

* Vide: P44(b) H. Ogami's Letter: Paragraphs (ii) & (iii):

“(ii) & (iii) The plans you have referred to are very large and kept in bound books running up to 12 volumes containing 574 drawings and also we have no facilities here to make out copies of these large drawings. They are available for your study any time in our office.”

* Vide: P44(c) Plaintiff's Letter: Paragraph (ii) & (iii)

"(ii) & I have noted your comments and shall be pleased to follow-up:

(iii) what is required is the set of the Approved Architectural Plans which I believe is not that voluminous, submitted to the UDA/Municipal Council for Approval; specifically the set of Architectural Plans that had been submitted to the UDA on 19.10.83 for which Approval had been granted in March '84."

* vide: P45(a) Page 3, paragraphs 1, 2 & 3: 4th Defendant's Board Minutes of 24.04.90.

"Mr. shanmugalingam concurring with the views expressed by Mr. Ameresekere inquired as to what the difficulty was to obtain the relevant clarifications and certifications from the Architects and stated that this matter should be satisfactorily clarified and cleared once and for all.

Mr. ogami when queried confirmed that the Company should have in its possession a set of Architectural Plans that formed part of the construction Agreement finalised in 1983, and which had been submitted to the UDA for approval in 1983. Mr. Ameresekera pointed out that according to a letter at the UDA this would constitute only 27 sheets.

In the circumstances the Board authorised Mr. Ameresekere to pursue with the H.D.L. Office and try to obtain all the necessary information and clarifications in this regard and to communicate with the Architects and Hilton International to obtain all necessary clarifications, explanations and certifications. On a suggestion made by Mr. Shanmugalingam the Board agreed that Hr. Ameresekere should be assisted with the services of a local Architect and/or an Engineer in this exercise to obtain a proper and comprehensive Report to the Board."

Accordingly, the Plaintiff visited the 4th Defendant's Office, to examine this but was shown P47, a note purporting fraudulently that the copies of the 4th Defendant's originally approved Plans had also been destroyed. Plaintiff also inspected the voluminous detail drawings referred to in P44(b) and found that these were not the originally approved Plans, the Plaintiff was looking for.

* vide: P43(c)

The General Manager of the 4th Defendant confirmed to the Plaintiff, as noted also by the Board of the 4th Defendant, that the copies of the originally approved Architectural Plans were not available both with the 4th Defendant and the UDA.

From the above it is abundantly clear that the submissions alleged by the learned Counsel for the 1st & 2nd Defendants absolutely false. Please see Paragraph 50 of the Plaint. This is misrepresentation by the 1st & 2nd Defendants.

- (i) Letter of Award for Construction on agreed Fixed Construction Price issued to 1st & 2nd Defendant on 30.03.83 on the basis of the July '80 Plans. 1st Defendant's Profitability Forecast of March '83 P60(a) and Hilton International's Letter of 31.03.83 P07(a) corroborate.

The Letter of Award for construction had been issued to the 1st & 2nd Defendants on 30.03.83 with the signing of the Preliminary Agreement P06 and the construction Price of Jap. Yen 11,952,000,00 having been agreed upon at that point of time on a fixed price turnkey basis.

The only Architectural Plan that existed at that point of the time i.e. March '83 was the said July '80 Plans P08, which fact has not been disproved by the 1st & 2nd Defendants, even though they endeavour to deny the commitment to such Plans.

Any Plans, whatsoever, drawn thereafter, in August '83 or otherwise, had necessarily to be in conformity with the said July '80 Plans, in accordance with the agreement entered into as per the said Preliminary Agreement P06 on 30.03.83, with the specific agreement on the said fixed price of construction and the Letter of Award for Construction having been issued on the same said date 30.03.83 to the 1st & 2nd Defendants.

It is very material to point out that in March '83 prior to the signing of the said Preliminary Agreement, the 1st Defendant prepared and forwarded Profitability Forecasts & Cash Flow Projections also in March '83 P60(a) for the total of 456 Rooms, in conformity with Hilton International's Forecast of August '81 P07(b) Sheets 2 & 3, which was on the basis of the said July '80 Plans P08, as further corroborated by Hilton International's Letter of 31.03.83 P07(a) copied to the 1st Defendant in this regard.

The 1st Defendant has not denied this very material fact and accordingly the 1st & 2nd Defendants are bound and committed to the said July '80 Plans, P08.

- (j) No Specified B.O.Q. and Final Measurements for project of this magnitude.

When discrepancies and queries have now arisen, with all copies of the originally UDA and 4th Defendant's Board approved Architectural Plans being either destroyed or suppressed, the 1st & 2nd Defendants plead that on such an international class large hotel construction that there are no specified Bills of quantities and Final Measurements. Is this believable? And acceptable? this is absolutely false and is a deliberate cover up to prevent the extent of fraud being determined and quantified.

A 'fixed lump sum price construction', only implies that the Contractors, in this instance, the 1st and 2nd Defendants, were not entitled to claim any price escalations for materials, labour expenses etc., but are however committed to construct and deliver the construction as was originally defined and agreed upon and which could only be confirmed and verified through the method and basis of Specified Bills of Quantities and Final Measurements etc., to ensure adherence to all specified configurations, qualities, measurements, specifications, quantities etc.

- (k) 1st defendant always gave Profitability Forecasts & Cash Flow Projections on the basis of total 456 Rooms based on the July '80 Plans P08

The 1st Defendant now pleads that the Hotel was not to be built having a total of 456 Rooms (452 Guest Rooms and 4 Rooms Manager's Apartment). This is absolutely false.

The 1st Defendant from the very inception having prepared and forwarded Profitability Forecasts & Cash Flow Projections on a total 456 Rooms, P16 = P60(c), P60(b), P60(a) has however not denied, the preparation and submission of the same in its statement of Objections. Further it was on this basis that the loans provided by the 1st & 2nd Defendants were to be paid and on the same basis the Government of Sri Lanka had guaranteed the said Loans.

(l) Definition of Room Bay and shortage of 2 Guest Room Floors

The 1st & 2nd Defendants agreed and undertook to construct and deliver a 456 Roomed Hotel (452 Guest Rooms + 4 Rooms Manager's Apartment) in 2 Towers, going up to 22 Floors, with basement car parking for 400 vehicles as evidenced by the numerous documents and as held out by them in the Prospectus to which they had been Signatories.

Now, however the 1st & 2nd Defendants, being unable to provide satisfactory documentation and evidence of the construction, plead that the Hotel was not to have 452 Guest Rooms but '452 Bays', endeavouring to explain a 'Bay' as an unspecified and undefined unit of floor space! This is false and is a deliberate attempt to mislead the Court to cover up this fraud.

The 3rd Defendant, the Architects, together with whom, jointly and severally the construction was carried out, however, define, in accordance with the norms in the Hotel Industry, at paragraph 10 in the 3rd Defendant's Statement of Objections, that a 'Bay' is a unit (i.e, one unit) of a standard size room, in total contradiction of and giving lie to the 1st & 2nd Defendants' pitiful plea!

Shelton Wijayaratra, Chartered Architect, in his Report P32(a) at page 4 Item (vi) also defines a 'Bay' as one standard guest room.

Therefore, undisputedly a 'Bay' is a standard size Guest Room and accordingly '452 Bays' are 452 standard size Guest Rooms. The Monthly Report P53(a) Page 13 of the 1st, 2nd & 3rd Defendants depicts photographically a Guest Room.

The standard size both in the July '80 original Plans and in the unauthorised amended Plans, of a 'Bay', has been certified by Mr. Shelton Wijayaratra, Chartered Architect, to be 33 sq.m and in the context of this Mr. Shelton Wijayaratra has pointed out that there are only 408 such Bays i.e. standard size Guest Rooms in the unauthorised amended plans; not counting the room depicted on a lobby area and the fictitious description of 1 1/2 Room Bay area as a '3 Room-Bay' area, on each Guest Room Floor on the unauthorised Amended Plan; thereby 2 Floors containing 2 x 24 = 48 standard size Guest Rooms being missing (408 + 48 = 456 the original total Room count)

The 1st & 2nd Defendants by their Monthly Reports of Nov. '86 P53(a) Sheet 7, 3rd line from the bottom and of April '87 P53(b) Sheet 5, 3rd line from the bottom, certified by themselves and also by the 3rd Defendant, admits that the Hotel Building has only 20 Storeys, which is not in conformity with the stipulation of 22 Storeys in the Construction Agreement P11 Preamble, which only proves the Plaintiff's position that 2 Guest Room Floors had not been constructed. The 1st & 2nd Defendants have not denied this in their Statement of Objections.

- (m) The 1st & 2nd Defendants for reasons best known to them have avoided to deny the averments in paragraph 51(c) of the Plaint, where the Plaintiff has pleaded that Exhibit "A" to the supplies Contract P13 is also not available at the 4th Defendant's Office as confirmed by the 4th Defendant's General Manager's Letter dated 05.09.90 Vide P49(a)

In the absence of Exhibit "A" to the supplies Contract, referred to in Article 1(2) therein, which had set out the scope of supply of the items of Furnishings, Fixtures and Equipment by the 1st Defendant, stipulating quantities, specifications and quality, It is not possible to have verified the correctness of such supplies, which are also not covered under the certification by the 3rd Defendant, as so admitted by them.

In as much as the originally approved Plans are missing this schedule of supplies is also coincidentally missing.

18. WHAT DOES THE 3rd DEFENDANT STATE?

- (a) 3rd Defendant's Responsibilities and Obligations:

The 3rd Defendant was professionally and contractually obliged and responsible to the 4th Defendant.

The contractual obligations have been set out in the Design & supervision contract P14, which, inter-alia, included:

Article 6.01 Responsibilities of the Architect

"The Architect shall carry out the services with due diligence and efficiency and in conformity with sound engineering and administrative practices."

Article 6.04 Records

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

Article 6.05 Information

"The Architect shall furnish the Employer information relating to the services as the Employer may from time to time request."

Article 6.12 Propriety Rights of the Employer in Reports & 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."

The Employer in this instance is the 4th Defendant

The 3rd Defendant in several ways, as set out herein below, now admit, that they have failed to conform to and have violated several contractual obligations and responsibilities set out above.

(b) The 3rd Defendant and the Prospectus:

The 3rd Defendant has been involved in this Project from its very inception and drew and submitted the Original Plans for the Hotel Project in July 1980 P08 and in its Statement of Objections at paragraph 11(a)(ii), the 3rd Defendant admits that the 1st & 2nd Defendants were involved in this Hotel Project from and around October 1980.

Attention is drawn to the Prospectus P05:

HISTORY AND DESCRIPTION (Page 7 of the Prospectus P05)

"Mitsui & Co. Ltd. of Japan and Taisei Corporation of Japan together with Messrs Kanko Kikaku Sekkeisha, Yozo Shibata Associates, leading Architects of Japan were commissioned to formulate the conceptual plans for the proposed Hilton International Colombo who have developed and completed the architectural and structural plans, construction drawings and all other technicalities for the turnkey construction of a fully furnished and equipped 5 star hotel on a fixed price basis, with no provisions for cost escalations."

MANAGEMENT OF THE COMPANY (Page 13 of the Prospectus P05)

Supervision

"The construction and implementation of this turnkey project would be supervised by Messrs Kanko Kikaku Sekkeisha, yozo Shibata Associates of Japan who have functioned as architects to the Project."

CAPITAL COMMITMENTS: (Page 18 of the Prospectus P05)

Contract for Design & Supervision signed on 31st January 1984 with Kanko Kikaku Sekkeisha, Yozo Shibata Associates of Tokyo, Japan. (Japanese Yen 400,000,000/00 converted at Rs.-/11116 to 1 Yen) RS.44,464,000.00

MATERIAL CONTRACTS (Page 21 of the Prospectus P05)

Agreement dated 31st January 1984 for the Designing and Supervision of the Hotel between the Company and Kanko Kikaku Sekkeisha, Yozo Shibata & Associates, Architects & Designers of 1-2-2 Atago, Minato-ku, Tokyo, Japan.

The Prospectus P05 was issued in March '84 with an extensive advertising and publicity campaign for the Public Share Issue and with the "Ground Breaking Ceremony" also held in March '84. The 3rd Defendant was very much present in Sri Lanka in connection with this work.

Further, the 1st & 2nd Defendants, as Promoters named in and signatories to the Prospectus, have confirmed and certified the full involvement of the 3rd Defendant, in this turnkey project.

However, the 3rd Defendant, now denies knowledge of the Prospectus P05 and at paragraph 16 in the 3rd Defendant's Statement of Objections admit that the Hotel actually built is not in conformity with the stipulations in the Prospectus i.e. 452 Rooms, 2 Towers going up to 22 Floors, and basement car parking for 400 Vehicles, which configurations are in conformity with the July '80 Plans P08.

The 3rd Defendant's denial of the Prospectus is false and the 3rd Defendant's admission of the Hotel not being in conformity with the stipulations in the Prospectus only goes to prove the Plaintiff's case.

(c) The 3rd Defendant admission that a 'BAY' is a GUEST ROOM:

The 3rd Defendant accordingly states at paragraph 15 of its Statement of Objections, that the Hotel was not to comprise of 452 Rooms, but was to comprise of 452 Bays, denying the stipulation of Rooms in the Prospectus P05 and at the 4th Defendant's Board on 07.01.84 P18(a). This also contradicts the 1st Defendant's Profitability Forecasts, that had consistently been prepared, on the basis of a total of 456 Rooms (452 Guest Rooms + 4 Rooms as Manager's Apartment)

The above denial is clearly a deliberate attempt to mislead the Court and cover up this fraud; however, the 3rd Defendant has miserably failed even in this denial, in that at paragraph 10 of its Statement of Objections, the 3rd defendant admits the factual truth by stating that

"a 'Bay' (or a 'Module' as it is sometimes referred to) is a construction unit of a standard size room." i.e. a 'Bay' is a unit of a standard size room

The dependent Chartered Architect, Shelton Wijayaratna, further certifies and corroborates in his Report P32(a) page 4 Item (vi) as follows:

"one room bay is in actual practice one standard guest room"

Therefore the correct position, as further corroborated by other evidence in this case, is admittedly and undisputedly that 452 Bays are 452 standard size rooms i.e. Guest Rooms. The Monthly Report P53(a) Page 13 of the 1st, 2nd & 3rd Defendants depicts photographically a Guest Room.

A Suite is not a standard size Guest Room, but would comprise of a multiple of such standard size Guest Rooms.

(d) Count of the Number of Standard Size Guest Rooms in the July '80 Plans P08 and Amended Plans P54.

- Mr. Shelton Wijayaratana, Chartered Architect, has confirmed that in the July '80 Plan (P08) and the Amended Plan P54, that the units i.e. "module" or "bay" meaning one standard size guest room (as opposed to a suite comprising a multiple of such standard size guest rooms) is of the same size of 33 sq.m. each in both the said Plans. Since the size of the standard size guest room is constant, the number of units of such standard size rooms, must necessarily be the same i.e. 456 (i.e. 452 Guest Rooms + 4 Rooms as Manager's Apartment)

Mr. Shelton Wijyaratna has confirmed and certified that there are only 408 such standard size guest rooms i.e. 'bays' in the amended Plans P54, which has been clearly set out in P32(a) pages 9 & 10.

The 3rd Defendant has failed to specifically deny Mr. Shelton Wijyaratna's computation and certification of this or demonstrate that such count is in error since it is the correct position.

- (e) The only Plans available at the time of signing of the preliminary Agreement was the 3rd Defendant's July '80 plans P08

The 3rd Defendant admits that the Letter of Award for construction, had in fact been issued, to the 1st & 2nd Defendants, on 30.03.83 with the Price for such "turnkey fixed price" construction, having been stipulated and agreed upon, as admitted and stipulated in the Preliminary Agreement P06 entered into on 30.03.83.

The July '80 plans P08 was the only Plan that existed as at 30.03.83, at the signing of the Preliminary Agreement P06. This has not been disproved by the 3rd Defendant.

Any Plans or Drawing made in August '83 or any other date what- so ever, naturally and necessarily would have been in accordance and in conformity with the Project definition and agreement that subsisted as at 30.03.83 as per the July '80 Plans P08.

The project definition that subsisted on 30.03.83 was as defined by the said July '80 Plans P08, of the 3rd Defendant, on which was based Hilton International's Forecast of August '81 P07(b), in relation to which Hilton had issued its letter dated 31.03.83 P07(a). The 1st Defendant's Profitability Forecast & Cash Flow Projections of March '83 P60(a) prior to signing of the Preliminary Agreement P06, was in strict conformity therewith.

The stipulations in the Prospectus P05 of March '84 of 452 Rooms, going up to 22 Floors in 2 Towers in Phase I, and basement car parking for 400 vehicles, with provision for a third tower, as Phase II, is lucidly and clearly in strict conformity with the said July '80 Plans P08 of the 3rd Defendant.

- (f) The 3rd Defendant now admits the unauthorised Amendment of the originally approved Plans having deliberately concealed same, and having avoided forwarding copies of the originally approved Plans when required to do so.

The 3rd Defendant, now admits, that the originally approved Plans had in fact been amended by them in July '85, 1 1/2 years after construction had commenced.

The 3rd Defendant has failed to submit any instructions and/or authority and/or approval from the 4th Defendant to carry out any amendments whatsoever, to the originally UDA and 4th Defendant's Board approved and contractually agreed Plans, in flagrant violation of the Design & Supervision Contract P14 between the 3rd & 4th Defendants and also the Construction Agreement P11 which had been countersigned by the 3rd Defendant.

Even when queries and discrepancies were directed to the 3rd Defendant at the Plaintiff's insistence the 3rd Defendant concealed this serious matter of having amended the originally approved Plans, in collusion with the 1st & 2nd Defendants.

Even in issuing the completion Certificate P31(a) and the Final Certificate P31(b), the 3rd Defendant, deliberately suppressed and concealed the matter of the amendment of the originally approved Plans; thereby misleading the 4th Defendant including the Government of Sri Lanka and the Plaintiff.

Accordingly the Completion and Final Certificates which the 3rd Defendant admits and acknowledges relate to the said illegal Plans are therefore by themselves not valid in Law; and thus the said Construction Agreement P11 stands uncertified.

Furthermore, contrary to all accepted professional norms and practices the 3rd Defendant deliberately refrained from and refused to furnish a copy of the originally approved Architectural Plans, when required to do so, as evident from the following Documents:

* Vide: P48(a) Plaintiff's Letter to the 3rd Defendant 05.06.90:

"Prior to forwarding you the relevant clarifications, we would be grateful if you would kindly furnish us, with a copy of the set of an original Architectural Plans, in accordance with which the Letter of Award had been issued to the Construction Consortium and it would have been this set of Architectural Plans that would have been submitted to the UDA in 1983 to receive Construction Approval in March '84. The HDL Office does not appear to have a copy of this set of Architectural Plans.

Could you also please furnish a copy of the Final Bill of Quantities & Measurements/Final Report

On receipt of the above documents we shall forward the relevant clarifications sought. Please furnish the above as a matter of urgency."

* vide:P48(b) 3rd Defendant's Letter to the Plaintiff 20.06.90:

"With reference to your letter dated June, 5, 1990. This assignment has been completed by us in terms of our agreement with HDL. We have duly submitted to you the Final certificate of Completion thereon.

Kindly note that we have fulfilled our all contractual responsibility with regard to this project."

* Vide: P48(c) Plaintiff's Letter to the 3rd Defendant 30.08.90:

"By our letter dated 5th June 1990, we requested you for a copy of the original Architectural Plans, submitted to the UDA in 1983, approval upon which construction commenced in March 1984 under your supervision. Please furnish us urgently a set of original Architectural Plans, as was primarily requested by our letter under reference.

It would be noted that the Letter of Award to Mitsui Taisei Consortium had been issued on 30th March 1983.

Since your Completion Certificate and the Final Certificate are mere letters, in the light of certain clarifications and queries that have now surfaced, a copy of the Final Bill of Quantities and Measurements/Final Report based upon which you have given such Certifications is required, together with a copy of the original Bill of Quantities and Measurements as per original Architectural Plans, based upon which the Letter of Award for construction had been issued."

* Vide: P55 3rd Defendant's Letter to te Plaintiff 20.09.90

"With reference to your letter dated 30th August 1990, we wish to inform you that we have nothing to further add to our letter to you dated 20th June, 1990."

(g) July '80 Plans P08 MINUS List of Amendment 3R21 / P32(b) = Amended Plans P54

The list of Amendments marked 3R21 is unsigned and uncertified and appears to have been directly addressed to the UDA by the 3rd Defendant themselves, as per the caption therein, which reads as follows:

"To: Urban Development Authority
From: Kanko Kikaku Sekkeisha"

The 3rd Defendant had no authority whatsoever to directly address the UDA, particularly in relation to the serious matter of the amendment of the Plans.

The said List of Amendments itself states that the Room Schedule had in fact been changed and has been clearly reported on by Shelton Wijayaratna, Chartered Architect, in his Report P32(a) page 6 item (ix), page 3 item (iv), page 4 item (v).

Shelton Wijayaratna's Report certifies that the Amendments given in .the List of Amendments, set out the differences between the July '80 Plans (P08) and the unauthorised Amended Plans P54, particularly in the Guest Room Floor layout, vindicating the correct position that prior to such said Amendments, the Plans had been the July '80 Plans.

Vide: P32(a) Page 6 Item (ix)

"We have also examined a Schedule (3 pages) dated 15th July 1985 and titled ALTERATIONS ITEMS AFTER THE APPLICATION FOR BUILDING PERMISSIONS prepared by KANKO KIKAKU SEKKEISHA YOZO SHIBATA & ASSOCIATES, TOKYO, JAPAN. In comparing the two sets of plans referred to herein we are of the opinion that the differences between these two plans are more or less as set out in the amendments listed in the said Schedule, particularly in the guest room floor layout. The Basement and the Mezzanine Floor are not referred to in this Amendment Schedules, in conformity with plan "B" which has no Basement, Mezzanine Floor, but car park at ground level and mezzanine level."

(h) The 3rd Defendant's 27 Sheet, part of 3R1, not an authentic copy of the originally approved Plans

Having refrained from forwarding and refusing to forward a copy of the originally approved Architectural Plans, the 3rd Defendant, has in its Statement of Objection in paragraph 11(b), referred to a document 3R1 titled "Contract Drawings" and on the Plaintiff's pointing out in Court that it has not in fact been, filed of record in Court, the 3rd Defendant has now tendered to Court 27 sheets therefrom.

The said 27 sheets of the document referred to as 3R1, purported to be copy of the originally approved Plans, bears no proof and/or identification to be accepted as such and should be rejected. A copy of the Plans approved by the 4th Defendant's Board on 07.01.84 and forming part and parcel of the Construction Agreement PII, would bear the Signatures of all the signatories to such Construction Agreement.

The said 27 sheets are merely a set of Plans certified by the Attorney-at-Law, for the 3rd Defendant, as Plans & Drawings approved by the UDA. A copy of the UDA Approved Plans, would bear the official Approval 'Seal' and Signature of the UDA. The said 27 Sheets do not bear this.

The tale of contradiction, by the 3rd Defendant, in its desperate endeavour to mislead this Court and suppress this fraud is further evidenced by the fact, that the 3rd Defendant, at paragraph 11(b) of its Statement of Objections, state that the document referred to as 3R1 is the "Contract Drawings" which is false, since no such nomenclature is referred to in the Construction Agreement PI1 and such description has been deliberately introduced to mislead the Court.

Furthermore, the Attorney-at-Law, for the 3rd Defendant, describes the 27 sheets, part of the document referred to as 3R1, as a copy of the 27 sheets of the original plans approved by the UDA, without any evidence whatsoever of certification of Approval by the UDA.

The said document is the property of the 3rd Defendant and therefore, it is respectfully submitted that the Attorney-at-Law for the 3rd Defendant is not competent to testify and certify that the said 27 sheets is a true copy of the original UDA Approved Plans, and cannot be so certified, without further having seen and verified an authentic copy of the original UDA Approved Plans.

The 1st & 2nd Defendants have not accepted that the said 27 sheets are in fact a copy of the original UDA Approved Plans.

Therefore. it is submitted that the said 27 sheets cannot be admitted as evidence and should be rejected.

Eventhough the 3rd Defendant admits at paragraph 18 of its Statement of Objections the submission in October '83 and Approval in March '84 of 4 Sets of Architectural Plans admitting that such Approved Plans did exist; None of the copies of this originally UDA Approved Plans are now available nor has the 3rd Defendant made available one of the 4 original copies certified and sealed by the UDA in March '84.

- (i) The 3rd Defendant admits that the Completion and Final Certificates are not architectural proper Certificates and had been issued without specified Bills of Quantities and Final Measurements:

It is clear from the 3rd Defendant's own averments, contained in paragraph 14(c), of the Statement of Objections, that the Completion and Final Certificates given are not architectural proper certificates. Articles 6.01, 6.04, 6.05, 6.12 of the Design & supervision Contract P14, inter-alia, sets out, contractually the duties, responsibilities and obligations of the 3rd Defendant, in addition thereto, there would arise the conventional norms that would be expected of Professional Architects, let alone international.

The 3rd Defendant is strictly professionally as well as contractually duty bound to have followed sound engineering and administrative practices, keeping accurate and systematic records, providing information to the Employer and delivering all supporting records to the Employer, which would include inter- alia specified Bills of Quantities and Final Measurements etc. The Employer in this instance being the 4th Defendant.

The 3rd Defendant's admission, in paragraph 31 of the Statement of Objections, that there are no specified Bills of Quantities and Final Measurements is not tenable. A fixed price contract only ensures that no price escalations are to be entertained by the owner. The specifications, configurations, qualities, quantities, measurements etc. have to be ensured to have been executed as had been originally agreed upon and contracted for, whether for a fixed price or otherwise. In the absence of Specified Bills of Quantities and Final Measurements how could this be confirmed and/or verified and/or certified?

The 3rd Defendant's explanation in this regard is unconventional, unprofessional and unbelievably baseless and furthermore meaningless. The very issues that have now arisen are specifically in this regard and in this very context and the 3rd Defendant is accountable and responsible.

Furthermore, the 3rd Defendant has apparently and self admittedly acted not in conformity with accepted professional norms and conduct and more over, accordingly also admit specifically that they have violated and contravened several provisions of the Design & Supervision Contract, particularly Articles 6.01, 6.04, 6.05, 6.12, thereof.

This humorous position on a project of this magnitude cannot be accepted and therefore should be totally rejected.

- (j) It is significantly noted that the 3rd Defendant admits at paragraph 13 of its Statement of Objections and confirms that its supervising duties did not cover the Supplies Contract. In fact as this is admittedly so, how and why then, had the 3rd Defendant submitted on 23.06.86 as confirmed by the General Manager of the 4th Defendant, as per his letter dated 05.09.90 P49(b) a List of Supplies items described as Exhibit 'A' to the said Supplies Contract, when the original Exhibit 'A' forming Part & parcel of such Supplies Contract is also reported as missing. Is this not surreptitiously to conform to the fraudulent amended Plans?
- (k) The 3rd Defendant admits, as per paragraphs 14(b) and 39 of its statement of Objections, that it had obtained all the monies due to them by 1987.

However, they have carried out the Final Inspection in March 1988 and have issued the Final Certificate in August '88. The last available Audited Accounts of the Company dated 09.11.89, that was available to the Plaintiff, at the time of filing of the Complaint, was for the Year Ended 31.03.89, which showed an amount of Rs.935,483.28 as currently due to KKS i.e. the 3rd Defendant; the corresponding amount as at 31.03.88 had been shown to be Rs.1,010,682.69. Vide: P61 page 13. P61(a), Annexure "A", hereto.

No payments were disclosed at the 4th Defendant's Board, to have been made to the 3rd Defendant, after 31.03.89, in settlement of the amount shown as due as at 31.03.89. The 4th Defendant is yet to file answer. Furthermore, retention monies are yet payable to the 1st & 2nd Defendants.

All payments to the 1st, 2nd & 3rd Defendants, had been made via a Special Bank Account in Fuji Bank, Tokyo, to which account, the 1st & 2nd Defendants deposited monies to pay themselves and the 3rd Defendant. These matters had been handled by the Representatives of the 1st & 2nd Defendants, who functioned as the Executive Director of the 4th Defendant and as evidenced by 3R2 to 3R8 and 3R2(a) to 3R8(a) had been with the knowledge and concurrence of the 5th Defendant, who functioned as the Chairman & Managing Director. Further, 3R14 to 3R20 show that the 3rd Defendant too had an account at the Fuji Bank, Tokyo, and the said payments had been in the nature of transfers to them from the Fuji Bank Head Office.

Since the 3rd Defendant, claims that they had been fully settled in 19B7, long prior to the Final Inspection in March '88 and the issue of the Final Certificate in August '88, no wonder they have issued a "Medical Certificate" type Final Certificate, in a very unprofessional and irresponsible manner, that too without supporting documentation, and now state, contravening the provisions of the Design & Supervision Contract P14, that such supporting documentation such as Final Specified Bills of Quantities and Final Measurements are not available and are not necessary. Is this acceptable?

Further, the Hotel having not been constructed according to the configurations originally agreed and contracted upon, inter-alia, the number of rooms and floors being lesser, the 3rd Defendant, was not entitled to have received Fees as agreed before and accordingly, have been over-paid and that too, before substantial work in relation to Final Inspection and Final Certification had been completed as they now state.

Accordingly, the Plaintiff has prayed in this Action, in prayer "f" of the Plaint, that the 4th Defendant, is entitled to the reimbursement of all the monies paid to and received by the 1st and/or 2nd and/or 3rd Defendant todate.

19. WHAT IS THE RELEVANCE OF THE JULY '80 PLANS - P08 ?

(a) 1st, 2nd & 3rd Defendants deny the July '80 Plans but not the 4th Defendant.

The 1st & 2nd Defendants and the 3rd Defendant deny that the Hotel was to be built in conformity with the July '80 Plans P08. Is this acceptable? The 4th Defendant however has not denied.

Nevertheless, having concealed right along, 1st, 2nd and the 3rd Defendants unreservedly now admit in Court, that the Hotel is not built in accordance with the originally approved Architectural Plans of March '84, but that the Hotel is in fact built in conformity with an unauthorised Amended Plan of July '85. P54. 1st & 2nd Defendants expressly denied any amendments to the original Agreements. Vide: P36(a) - P36(d).

(b) What were the originally approved Architectural Plans?

(i) 4 copies of Architectural Plans drawn to requisite scale, submitted to the UDA on 19.10.83 P19 and approved by the UDA on 23.03.84 P20(b) bearing the Approval Seal of the UDA with signature. The 3rd Defendant admits that there were such copies, and

(ii) copies of such Architectural Plans tabled and approved at the 4th Defendant's Board on 07.01.84. P18(a) and which formed a part and parcel of the Construction Agreement P11, executed on 31.01.84, bearing the signatures of all the Signatories to such Agreement; the Board noting that these were 452 Guest Rooms.

(c) Where are the authentic copies of the originally approved Architectural Plans?

None have been made available to the Plaintiff, as set out in Paragraph 50 of the Plaintiff and furthermore, surprisingly, the 1st & 2nd Defendants nor the 3rd Defendant has even produced in Court, one of the authenticated original copies, bearing the identifications referred to above.

The 27 sheets of 3R1 produced by the 3rd Defendant bears no such identification and is not one of the original copies referred to above. Whilst the 1st & 2nd Defendants have not produced a copy of the originally Approved Plans they have also not corroborated the 3rd Defendant, on the said 27 sheets, part of 3R1.

In the given circumstances, the Plaintiff has clearly stated, that in the absence of the copies of the originally approved Architectural Plans, referred to hereinabove, that the matter be examined and probed on the basis of the July '80 Plans P08. Paragraph 31(b) of the Plaintiff.

"Since the Plaintiff's efforts to obtain a set of the original Architectural Plans that had been submitted to the Urban Development Authority in 1983 and approved in March 1984, as set out herein above had not borne any results so far, the Plaintiff, proceeded to probe the subject matter further on the basis of the Original Architectural Plans and Drawings finalised and submitted in July 1980 by the Architects (3rd Defendant)"

(d) Why should the matter be examined and probed on the basis of the July '80 Plans P08?

- (j) The 1st Defendant prior to signing the Preliminary Agreement P06 on 30.03.83, consistently held out that the Hotel Project was to be on the basis of the July '80 Plans P08.
- (ii) At the time of signing of the Preliminary Agreement P06 on 30.03.83, the only Plan that was available on the Hotel Project was the July '80 Plans P08. This has not been disputed or proved otherwise.
- (iii) The configurations and the definitions of the Hotel Project that subsisted on 30.03.83 at the time of signing of the Preliminary Agreement P06, was therefore as defined by the said July '80 Plans. P08.

The Letter of Award for Construction was issued to the 1st & 2nd Defendants on the signing of the Preliminary Agreement on 30.03.83 on the above basis P06 Article 3.03.

Accordingly, the fixed price for the construction of the Hotel, was agreed with the Preliminary Agreement P06 at Jap. Yen 11,952,000,000, which is the Construction Price stipulated in the Construction Agreement P11 of 31.01.84. P06 Article 3 and P11 Clause 4.

- (iv) Prior to signing of the Preliminary Agreement the 1st Defendant, in March '83 prepared and submitted Profitability Forecast & Cash Flow Projections P60(a), in conformity with Hilton International's Forecast of August '81 P07(b) Sheets 2 & 3 which was on the basis of the July '80 Plans P08.

Hilton International's Letter dated 31.03.83, P07(a) copied to the 1st Defendant, corroborates this conclusively. This was just one day after the execution of the Preliminary Agreement P06.

The 1st Defendant in Dec. '83 again prepared and forwarded the Final Profitability Forecasts & cash Flow Projections P16 = P60(c), in strict conformity with the above, which was based on the said July '80 Plans P08.

- (v) The above confirms conclusively, that the agreement entered into with the signing of the Preliminary Agreement P06 on 30.03.83, and with the issue of the Letter of Award for Construction on the same said date 30.03.83 to the 1st & 2nd Defendants for the agreed fixed Construction Price of Jap. Yen 11,952,000,000, was for the Construction of the Hotel as defined by the said July '80 Plans P08.
 - (vi) The said Preliminary Agreement P06 was adopted as a part and parcel of the Investment Agreement P09, entered into on 31.01.84. P09 Preamble Paragraph 1.
 - (vii) The Construction Agreement P11 signed on 31.01.84, stipulated the same said Construction Price of Jap. Yen 11,952,000,000, as had been set out in the said Preliminary Agreement and further confirmed that the Letter of Award for Construction had been issued to the 1st & 2nd Defendants on the said date 30.03.83, the date of the Preliminary Agreement. P11 Preamble Paragraph 2 and Clause 4.
 - (viii) The Architectural Plans drawn to the requisite scales for submission to the UDA in October '83 and a copy of which was tabled and approved by the 4th Defendant's Board on 07.01.84 P18(a) was in conformity with the configurations and definitions of the Hotel Project, as was defined in the July '80 Plans P08; as evidenced and corroborated by the configurations of the Hotel Project stipulated in the Prospectus P05 issued on 06.03.84, under the signature of the 1st & 2nd Defendants, the Government of Sri Lanka, and others including the Plaintiff, having been approved by the 4th Defendant's Board.
 - (ix) The Plaintiff having been actively associated in the promotional work of the Hotel Project, and more particularly in the formulation of the Prospectus at that time, was fully aware that the said originally. Approved Architectural Plans, drawn to the requisite scales, was in conformity with the configurations and definitions of the July '80 Plans. It is on this basis that the Plaintiff prepared the draft Prospectus, for approval by the 4th Defendant's Board, Promoters named therein and the signatories thereto, who unreservedly concurred with the same and placed their signature thereto, and such parties are now estopped from claiming otherwise.
 - (x) Upon the examination of the unauthorised Amended Plans P54, together with the List of Amendments P32(b) = 3R21, the independent Chartered Architect, Mr. Shelton Wijayarathna, has certified, that when such listed Amendments, particularly in relation to the Guest Room Floor Layout are reversed/removed, the resultant Guest Room Floor Layout is identical to that of the July '80 Plans P08.
- (e) Accordingly the JULY '80 PLANS P08 are PROVENLY RELATED to
- i. Hilton International's Forecast of January '81 & August '81 - P07(b) Sheet 9 and Sheets 2 & 3.
 - ii. Mitsui's Profitability Forecast & Cash Flow Projections March '83 - P60(a)

- iii. Preliminary Agreement of 30.03.83 - P06
- iv. Letter of Award for Construction Issued to 1st & 2nd Defendants on 30.03.83 - P06, Article 3.03
- v. Fixed Construction Price agreed upon with the 1st & 2nd Defendants as per the Preliminary Agreement - P06, Article 3.
- vi. Investment Agreement 31.01.84, the Preliminary Agreement of 30.03.83 being part and parcel thereof P09, Preamble Para 1 and Article 1.
- vi. Construction Agreement of 31.01.84, which confirms the Issue of the Letter of Award for Construction to 1st & 2nd Defendants on 30.03.83 at the same Fixed Construction Price, as agreed upon in the Preliminary Agreement - P11 – Preamble Para 2 and Clause 4.
- viii. Detail Architectural Plans drawn to requisite scale in August '83 for submissions to UDA for Planning Approval and to the 4th Defendant's Board for Approval (DESTROYED/MISSING/SUPPRESSED)
- ix. Mitsui's Final Profitability & Cash Flow Projections of Dec. '83 submitted for the 4th Defendant'S Board Approval - P16 = P60(c)
- x. The Board Approval of the 4th Defendant on 07.01.84 P18(a)
- xi. The Prospectus of 06.03.84. - P05
- xii. The Government Guarantees of 17.02.84. P17(a) & P17(b)
- xiii. The unauthorised Amended Plans P54, when adjusted with the List of Amendments P32(b) = 3R21, particularly in the Guest Room Floor Layout

CAN THE 1ST, 2ND & 3RD DEFENDANTS DISPROVE ANY OF THE ABOVE? THEY HAVE EVEN FAILED TO DENY SOME OF THE ABOVE. THE 4TH DEFENDANT HAS NOT DENIED.

20. WHAT DID THE 1ST DEFENDANT HOLD OUT AND CONFIRM EVEN AFTER THE HOTEL OPENED FOR OPERATIONS IN JULY 1987?

- (a) M. Kubota of the 1st Defendant, came down from Japan and attended Board Meeting of the 4th Defendant on 15.07.87 P24(a) and forwarded a Profitability Forecasts & Cash Flow Projections dated 26.06.87 P25(b) prepared by the 1st Defendant for 452 Guest Rooms. Vide P24(a) Attendance & Item 2(c). This Profitability Forecasts & Cash Flow Projections of 26.06.87 P25(b) of the 1st Defendant was consistent and in conformity with the number of the Guest Rooms in P16 = P60(c), P60(b), P60(a), P16 Sheets 8 & 9 = P59, that the 1st Defendant had prepared and forwarded from the very commencement of the Hotel Project, based on the July '80 Plans P08.

- (b) Extracts from the 1st Defendant's Profitability Forecasts & Cash Flow Projections dated 26.06.87 P25(b) for 452 Guest Rooms (4 Rooms Manager's Apartment) given after the opening of the Hotel in July '87, are as follows:

Year		1 st	2 nd	3 rd
No. of Rooms (Room Days)				
Available (for Year)				
452 Rooms x 365 Days	(A)	164980	164980	164980
Room Occupancy - %	(B)	50%	55%	65%
Average Room Rate - US \$	(C)	50.00	54.00	73.65
U. S \$ '000(A) x (B) x (C)		4125	4900	7898

- (c) The said M. Kubota of the 1st Defendant, again visited Sri Lanka to attend Board Meetings of 4th Defendant on 12.11.87 and 18.11.87 to discuss the Profitability Forecasts & Cash Flow Projections dated 26.06.87 of the 1st Defendant P25(b) and did not disclose that the Hotel in fact had a lesser number of guest rooms than the 452 given in the profitability Forecasts & Cash Flow Projections P25(b). Vide P24 (b) & P24(c).
- (d) The Plaintiff discovered that Hilton International's Monthly Reports P25(a) did not reflect that the Hotel had 452 Guest Rooms, and only when the Plaintiff had queried this, that the representative of the 1st Defendant admitted for the very first time, having held out otherwise right along, that the Hotel in fact did not have 452 Guest Rooms.
- (e) Accordingly, Plaintiff submitted Memorandum dated 30.12.87 P26(d) to the 4th Defendant's Board in regard to this major discrepancy /shortfall and its implications on the 4th Defendant's Profit- ability and Finances; and had been pursuing this matter since.

21. OBJECTIONS IN LAW BY THE 1ST, 2ND & 3RD DEFENDANTS

- (a) Objections in Law of 1st & 2nd Defendants are:

- No Right accrues to the Plaintiff from the several Contracts/Agreements
- No personal Right of Plaintiff is violated.
- No Locus Standi
- No Cause of Action
- Misjoinder of Parties
- Plaint does not conform to Section 46(2) of the Civil Procedure Code
- Objection based on Arbitration Clause: but has now been abandoned.
- The Action is not a Derivative Action

Curiously 1st and 2nd Defendants do not want an investigation into the facts!

Hence all these objections - which is one and the same thing – No Cause of Action ex facie. Rest is mere verbiage and splitting the same hair.

(b) Objections in law of 3rd Defendant are:

- All monies have been paid in full by 1987. Therefore no Injunction can be granted. This is Misrepresentation and suppression.
- Misrepresentation that P08 of July '80 are Contract Drawings annexed to P11. Shelton's Report based on P08 as the originally approved Plans surreptitiously introduced: and is a fake and is a Misrepresentation.
- 452 ' Bays' not the same as 452 Guest Rooms Misrepresentation
- Arbitration Clause in P14 is a "Scott & Avery Clause"
- No status in the Plaintiff to bring this Action.
- The Action is not a Derivative Action.

22. SUBMISSIONS IN REPLY TO 1 ST, 2ND & 3RD DEFENDANTS' OBJECTIONS.

(a) Arbitration Clauses - both in P12 & P14.

- The Arbitration Clauses both in P12 and P14 are not Scott & Avery Clauses.
- The 1st & 2nd Defendants have abandoned this position in their written submissions.
- The submissions of 3rd Defendant on this is misconceived in law and calculated to mislead Court. The 3rd Defendant has cited the case of Cipriani V Burnett 148 LT at 148. This has no application to an Arbitration Clause. The decision turned on the "circumstances belonging to it" - namely that it was a horse racing case, thus at page 150 column 1 it is observed,

"Every contract must be determined according to the circumstances belonging to it. This is one of racing, and the universal practice has been, that, in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, namely, the judge or the stewards". Martin, B. at pp 717-8, said: "The judgment of the stewards in the case of a horse-race must necessarily be conclusive; they are expressly appointed to decide the matter, and there is no appeal from them. It is a condition precedent to the Plaintiff's right to recover, that he obtain the judgment of the stewards."

And later,

"Their Lordships accordingly read the condition on the ticket, having regard to "the circumstances belonging to it," as a condition precedent, the fulfillment of which is essential before any action for the stakes can be entertained by the courts. The respondent produces no decision in his favour by the stewards of the Trinidad Turf Club, by whose decision he contracted to be bound. Having thus failed to fulfil the condition

precedent of his right to sue, he cannot be heard to ask that the court instead of the stewards should decide the dispute which he has raised."

This authority must be rejected as misleading and irrelevant.

- See Hotel Galaxy & Mercantile Hotels Ltd. (1987) 1SLR/5
----- APPENDIX V
- Weerakoon Vs Hewamallika (1978 - 79) 2 SLR 97 at 103, 104,
105 ----- APPENDIX VI

(b) 452 'Bays' or 452 'Guest Rooms'?

- The submission of 3rd defendant on this is a mere casuistry and is fraudulent.
- In the Statement of Objections of the 3rd Defendant, at paragraph 10 line 3, and the corresponding paragraph of the related Affidavit, in explaining a "Bay" or "Module" the 3rd Defendant categorically states that:

"One room bay is a unit of a standard size room"

- Mr. Shelton Wijyaratna, Chartered Architect's opinion is identically the same in P32(a) at page 4.

"One room bay is in actual practice one standard guest room"

- Therefore simply and logically 452 'Bays' are 452 standard size rooms, i.e. Rooms for Guests, referred to as Guest Rooms.
- From 1980, the total count of the Rooms has been 456 Rooms for Phase I, i.e. (452 Rooms for Guests & 4 Rooms for Manager's Apartment) varyingly called "Rooms", "Guest Rooms", "Bays", "Modules".
- The Prospectus P05 called at page 7, "452 roomed tower concept"
- July '80 Plans P08. Plans of 3rd defendant states "two blocks with guest and service elevator cores consisting of 456 room modules will initially be built as the Phase I program". The Drawings of P08 show clearly that "Bays" = Rooms. (i.e. standard size guest rooms).
- The Monthly Report P53(a) Page 13 of the 1st, 2nd & 3rd Defendants depicts photographically a Guest Room.
- The 3rd Defendant is deliberately misleading Court on this.
- The Report of Mr. Wijyaratna P32(a) explains this.
- There is unanimity on this between both sides on admitted documents and as explained by the 3rd Defendant in paragraph 10 of the Statement of Objections ..
- The Affidavit of 3rd Defendant on this is contradictory and fraudulent, and must be tendered for cross examination.

(c) 1st, 2nd & 3rd Defendants merely deny the July '80 Plans P08.

- (i) The 3rd Defendant, together with the 1st & 2nd Defendants, merely deny that P08 the July '80 Plans, was not the Plans on which basis the Construction Agreement had been entered into.
- (ii) However, the 3rd Defendant, nor the 1st & 2nd Defendants, have produced even in Court, either an authenticated copy of the originally UDA Approved Plans of October '83 (approved in March '84) bearing the seal of UDA Approval or a copy of the plans forming part & parcel of the Construction Agreement. which would bear the signature of all the signatories to such Agreement.
- (iii) Mysteriously all copies of the above Plans are reported burnt and/or missing and/or are deliberately, for obvious reasons, being suppressed.
- (iv) The 4th Defendant has not controverted this matter as yet.
- (v) The 3rd Defendant together with the 1st & 2nd Defendants, now admit, after having been discovered, that the originally approved Plans had in fact been amended.
- (vi) However, they have failed to produce any express authority and/or approval from the 4th Defendant to do so, as required by the Construction Agreement (P11) and the Investment Agreement (P09). The 4th Defendant has not answered as yet.
- (vii) Attention of Court is drawn to Page 18. paragraph 32(b) of the Plaintiff's Affidavit dated 12.09.90. clearly therefore the submission that the Plaintiff has made. a misrepresentation in this regard is diabolically false and misleading. On the other hand it is clearly a misrepresentation by the 3rd Defendant.

"Since my efforts to obtain a set of the Original Architectural Plans that had been submitted to the Urban Development Authority in 1983 and approved in March 1984, as set out herein above had not borne any results so far, I proceeded to probe the subject matter further on the basis of the original Architectural Plans and Drawings finalised and submitted in July 1980 by the Architects (3rd Defendant)"

- (viii) The relevance of the July '80 Plans (P08) has been set out in the Plaintiff's Affidavit of 12.09.90 and more clearly herein particularly in Section 19, and further depicted in Chart 1 to these submissions, setting out the relevant facts and documents.
- (ix) The 3rd Defendant has marked a Document called "Contract Drawings" and filed in Court 27 Sheets, as a part thereof, forwarding a copy of same to the Plaintiff, which bears the following endorsement:

"True copy of the 27 Sheets of the original Plans & Drawings which were approved by the Urban Development Authority"
- (x) The above endorsement is signed by Mr. S.D. Yogendra, Attorney-at-Law, for the 3rd Defendant, but none of the said 27 Sheets bear the UDA Approval Seal and signature.
- (xi) The said document has been deliberately named "Contract Drawings" (no such nomenclature has been used in the Construction Agreement) to mislead Court, nor has the said document served on the Plaintiff been identified and affirmed to by the 3rd Defendant.

The said Documents. accordingly should be rejected.

(xii) The 1st & 2nd Defendants, deliberately deny, that the Hotel Project was to be built in accordance and in conformity with the July '80 Plans P08, as set out hereinabove; however they have failed to produce in Court a copy of the authenticated UDA Approved Plan and/or a copy of Plan signed by all signatories to the Construction Agreement, forming part & parcel thereof.

(xiii) Further the 1st & 2nd Defendants have not corroborated the 3rd Defendant on the so called "Contract Drawings" 3R1 or part thereof.

(d) All monies have been paid in full by 1987, claims the 3rd Defendant

- They therefore, state that the Injunction Application against the 3rd Defendant should be dismissed in limine. Is this the correct picture?

- The action was filed on 13/09/90, the 6th Annual Report for Year Ended 31/03/89, the last Audited Accounts available to the Plaintiff, issued on the 24th of November '89 showed at page 13. Vide: P61(a); Annexure "A" attached hereto.

"Current Liabilities"

	31/03/89	31/03/88
K.K.S. (3rd Defendant)	935,483.28	1,010,682.69

- How can this be, if all payments were made before 1987 as stated?

- This Statement of the 3rd Defendant is palpably false and is a matter which must await cross examination.

(e) P54, surreptitiously introduced by 1st, 2nd & 3rd Defendants

(i) At 4th Defendant's Board Meeting on 27.06.85 Plaintiff required Reports on the Progress of Construction from 1st, 2nd and 3rd Defendants to be forwarded to Board Meetings: Vide: P21(a) paragraph 1 and P21(b) Item 2 - Minutes

Plaintiff on 22.07.85 addressed Letter to Secretaries of 4th Defendant, setting out what exactly he had required at Board Meeting on 27.06.85, inter-alia.

Vide: P21(a) items 1 & 2.

"Progress of Construction monitored against projected construction."

"Reports from 3rd Defendant, 1st & 2nd Defendants"

(iii) At 4th Defendant's Board Meeting on 25.07.85 Plaintiff's Letter dated 22.07.85 P21(a) stipulating above requirements tabled and noted, by the Board of the 4th Defendant, particularly also by A. Naka, Representative of 1st & 2nd Defendants, as recorded in the said Minutes.

Vide: P21(b) Item 2 - Minutes

- (iv) Notwithstanding the above, P54, dated 15.07.85 i.e. the amended Plans, had been prepared and submitted by the 1st, 2nd & 3rd Defendants, acting jointly and severally to the UDA on 08.08.85 without intimation to and/or express authority and/or approval from the 4th Defendant's Board.
 - (v) Is not the above deliberate evidence of concealment? The intentions and act was to perpetrate a fraud on the 4th Defendant.
 - (vi) Thereafter, significantly a fire had entered the staged on 18.10.85 destroying all original Plans and Documents. How Sad !
- (f) completion & Final certificates:

- (i) The completion & Final Certificates are mere "Medical Certificate type" simple Letters and by no means conventional and professional certifications.

Vide: P31(a) and P31(b)

- (ii) 3rd Defendant, now admits, that these Certificates relate to the unauthorised Amended Plans, that were discovered only in March '90 and therefore it is admitted that they do not relate to the originally approved Plans. Completion & Final Certificates do not refer to configurations, specifications etc. and more importantly have deliberately concealed the fact that the originally approved Plans had been amended; thereby misleading the 4th Defendant including the Government of Sri Lanka and the Plaintiff,
- (iii) Further, the said Certificates would relate to the illegal, unauthorised amended Plans. Therefore in Law the Construction Agreement stands uncertified.
- (v) These Completion & Final certificates admittedly have no supportive documentation such as Specified Bills of Quantities and Final Measurements, contravening both professional and contractual obligations and appear therefore to have been issued on a mere visual, casual and cherry blossom friendly basis!.
- (vi) The obligations and responsibilities of the 3rd Defendant are clearly set out in the Design and Supervision Contract P14 and inter-alia has included, the following:

Article 6.01 Responsibilities of the Architect

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

Article 6.04 Records

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

Article 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."

Article 6.12 propriety Rights of the Employer in Reports & 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."

The Employer in this instance is the 4th Defendant.

- (vii) Accordingly, the 3rd Defendant has totally failed to fulfil its contractual obligations and duties under the said Design & Supervision Contract P14.
 - (vii) Final Inspection done on 24/25.03.88 but Final Certificates issued on 25.08.88 only after the 4th Defendant's Board Decision not to appoint Independent Engineer.
 - (viii) If all payments as claimed have been fully settled by 1987, then the Final Inspection in 1988 and Final Certificate issued in 1988 are meaningless.
 - (ix) Particularly since all interim payments to the 1st & 2nd Defendants have been made automatically, based on time related schedules attached to the Construction Agreement P11 and Supplies Contract P13, without any certification of work it is very material and relevant that the Completion and Final Certificates should have had all supportive document; action, including Specified Bills of Quantities & Final Measurements. However, admittedly, these are not available.
 - (x) The 3rd Defendant admits that the Completion and Final Certificates are not architectural proper certificates, at paragraph 14(c) of its Statement of Objections. What more do we need to establish the Plaintiff's case?
- (g) No Cause of Action/No Status/No Prima Facie Case
- (i) Both the 1st and 2nd Defendants and the 3rd Defendant urge the above point. It all means the same thing. That the Plaintiff 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.
 - (ii) It has already been submitted in oral submissions that such a contention can only be made on the basis that the Averments relied upon by the Plaintiff are true.
 - (iii) 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 Laws of England (4th Edition) Volume 36
paragraph 35.----- APPENDIX VII
 - Supramanim Aver Vs Changarapillai
- 2 NCR 17, per Bonser C.J., ----- APPENDIX VIII

- "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----- APPENDIX IX

C.A. (L.A) 59/81, DC Jaffna 732/2
C.A. Minutes of 30th July 1982

- Darlev Buttler & Co. Ltd. Vs Lion Soon Shipping
and Trading Co. (Pte) Ltd. -----APPENDIX X

C.A. (LA) 112/81, D.C. Colombo Case No.84530/M
C.A. Minutes of 15th March 1982 per Atukorale J, when he answered.

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

(h) What then are the Averments in the Plaintiff and What do they Disclose?

For this exercise of determining whether the Plaintiff discloses a Cause of Action, none of the Defendants can be permitted to canvass the truth of the facts.

(i) Sections 2 to 19 in these Submissions together with the Charts I, II & III annexed hereto, summarise the Plaintiff's case as made out from the Averments of Facts.

Charts I, II, & III, setting out the correlation of Events and Documents, are annexed to these submissions as a part and parcel thereof. Annexure "B" hereto.

(j) Derivative Action/Right of the Plaintiff

(i) These Averments show that the Plaintiff's Averments disclose the fact that this is what is called a Derivative Action in Company Law.

Lord Denning MR in Wallersteiner V Moir (No.2) (1975) 2 AER 857 at 858 –

"the principle is that, where the wrongdoers himself 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".

- (ii) The submissions of both the 1st and 2nd Defendants and the 3rd Defendants, concedes 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.
 - (iii) 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.
 - (iv) So also can he seek an Injunction in 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.
 - (v) This much has to be conceded as a matter of law and is conceded by the Defendants.
 - (vi) What the Defendants do say, is that this is not a Derivative Action apparently since not so described and that the facts do not disclose such a basis.
- (k) The Question then is what is a Derivative Action?
- (i) A Derivative Action is an Action which is brought by a Member of a Company where the wrong doers are in control and prevent the Company itself from suing.
 - (ii) This is an exception to the rule postulated in *Foss v Harbottle* (1843) 2 Hare 461, that the proper Plaintiff in an Action brought in respect of a wrong done to the Company is the Company. ----- APPENDIX XI
 - (iii) Where the Derivative Action is brought the entire benefit of the proceedings will go to the Company and not to the Shareholder who brings the Action.
 - (iv) 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 transaction involves and 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 a confidential one.

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, to the attention of Court, the wrong doing on that part of the Board, which had full control of the day to day administration of the 4th defendant - namely, principally the representatives of the 1st and 2nd Defendants on the Board.

- (v) Wrong doing Directors cannot make a present of corporate assets to themselves. This is fraud.

Cook v Deeks (1916) 1 AC 554 at 564 ----- APPENDIX XII

Daniels v Daniels (1978) 2 AER 89 -----APPENDIX XIII

Menier V Hoopers Telegraph Works 1874 9 Ch App.350

- (vi) 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) ----- APPENDIX XII

Daniels y Daniels (1978) 2 AER 89 @ 96 - APPENDIX XIII

- (vii) 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 bringing an Action in its own name.

Mason V Harris 1879 Vol XI Ch D 97 at 107, 108 APPENDIX XIV 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 independently 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."

- (viii) All parties are agreed on the Law on the subject, the question is, do the facts bring it within this Rule? If it does, the Action is well founded. It is submitted that it does. On to the facts then.

- (ix) Assuming in the instant case that the 4th Defendant, wanted to bring the Action, could it have done so?

- (x) For the 4th Defendant to bring an Action, the Board of Directors have to resolve to bring an Action. For a resolution to be passed, at least a majority of the Directors must vote.

Vide: Articles of Association POI = P10(a)

"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 for their Alternate at the meeting including at least one Director nominated by the Foreign Collaborator."

"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 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."

Can it for a moment be imagined possible that the 1st and 2nd Defendants would have passed a resolution to bring this Action against themselves? They were the wrong doers, they were the Executive Directors.

Would they have permitted an Action to be brought even against the 3rd defendant?

Here then is wrong doer's control - the very basis of this Derivative Action.

(xi) What is the fraud they have perpetrated on the 4th Defendant?

- As set out in several paragraphs hereinabove the 1st, 2nd and 3rd Defendants, jointly and severally, held out, promised, contractually agreed and undertook to promote, formulate, plan, develop and build, for the 4th Defendant, an International 5 Star Class Hotel, with a total of 456 Rooms in 2 Towers in the 1st Phase, going up to 22 Floors, with covered i.e. basement car parking for 400 vehicles, on a turnkey fixed price basis, with no provision for cost escalations, on a loan basis, holding out consistently that the profits from such Hotel, could service such loans, in order to obtain the Government Guarantees.
- Under and by virtue of the several agreements and contracts entered into with the 4th Defendant, the 1st, 2nd & 3rd Defendants were contractually obliged to implement and deliver such a Hotel to the 4th Defendant.
- However, without the knowledge and approval of the 4th Defendant and violating several provisions of the said Agreements/Contracts they have jointly and severally colluded and amended the originally approved Plans and thereby have not constructed, equipped and delivered the said Hotel in accordance and in conformity with what was held out and contractually agreed upon. All copies of the originally approved plans are reported destroyed/missing.
- The 3rd Defendant who was the Architect and whose responsibility it was to supervise the Construction is now unable to satisfactorily certify that the said Hotel is in conformity with the originally committed and agreed configurations and specifications. They now admit that their certifications were issued without supporting specified Bills of Quantities and Final Measurement, pleading in defence that they are not bound to give architecturally proper certificates. But however they have been overpaid for a job fraudulently done, acting against the very interests of its Employer, the 4th Defendant.
- The fraudulent amendment of the Plans was concealed from the 4th Defendant right throughout, as set out in several paragraphs hereinabove, including non-disclosure of this fact in the Completion and Final Certificates, thereby making the 4th Defendant, including the Government of Sri Lanka, the Guarantor of the said Loans and the Plaintiff to believe that the Hotel was constructed as originally agreed and contracted upon. 1st, 2nd & 3rd Defendants have admitted to the fact of amending the Plans only after this Action was filed, pleading in defence that they carried out "minor modifications and alterations" as they so call it.
- In these circumstances, not only have a number of floors including the basement been reduced, but the Supplies to equip the Hotel too have been comprised. Likewise other areas of quality and specifications of supplies, finishes etc. not adhered to. Exhibit "A" to the Supplies Contract P13 giving inventory and quality specifications of supplies is also reported missing.

(xii) What is the net result of this Fraud? How does this fraud affect the Public?

- The 1st & 2nd Defendants are claiming from the 4th Defendant fraudulently for a Hotel that is not in conformity with what was contractually agreed to and promised to be delivered.
- Having reduced several floors and the basement and compromised on the Supplies to equip the Hotel in quality, specifications and quantity, they are fraudulently claiming the original contract price, stating that the balance now due is Rs.6000 million.
- Since the number of rooms are much less, and cars are being parked at ground and upper ground levels, sacrificing commercially valuable space, the 4th Defendant is unable to earn revenue as was expected to pay for the loans.
- The fraud has in effect made the 4th Defendant practically bankrupt with the threat of inevitable liquidation.
- In the circumstances the 1st & 2nd Defendants are claiming payment from the Government of Sri Lanka under the said Government Guarantee for monies to be remitted to Japan. These being public funds. this would amount to admittedly a fraud on the public of Sri Lanka.
- The concern of the Government has been clearly expressed by the Government Director K. Shanmugalingam, Addl, Deputy Secretary Treasury. P41 Page 3 Item 5

"Mr. Shanmugalingam stated as far as the Government is concerned we gave the guarantee to support the Company to borrow. We never expected that we would be called upon to pay. Our guarantee was based on the forecast (dependant on the total guest rooms available) and if there is a decrease in the number of saleable rooms from 452 to 387 the Cash Flow would be reduced by 15% arithmetically.

We would like to know if there is a drop in the Rooms from the original specifications and also whether any material changes were made to the original plan.

He understood that the number of covered parking spaces has been reduced from 400 to 200.

Mr. Shanmugalingam expressed his dissatisfaction with regard to these shortcomings, and said that this is a serious matter from the shareholders point of view. He reiterated that apart from negotiations with Mitsui/ Taisei these points have to be clarified. If any amendments have been correctly reported unless further assistance from the Government could not be expected. He suggested that we engage the services of a local Engineer for this work.

Mr. shanmugalingam suggested that we obtain the B.O.Q. particulars."

- The Government of Sri Lanka had already afforded this Hotel Project the exemption of Import Duty on the full import cost of Construction and all supplies of Furnishings, Fixtures & Equipment to equip the Hotel; cost to the Government of this is estimated to be over 650 million. In this context and in the context of the amounts claimed by the 1st & 2nd Defendants, the average standard size room cost of this Hotel works out to nearly Rs.17.0 million per room.
- This is the extent of fraud that has been perpetrated and now the public of Sri Lanka are being called upon to pay through the claims on the said Government Guarantees.

(xiii) Plaintiff endeavoured to resolve this at Board level but failed:

- Plaintiff tried to stop this at Board level but could not. Instead some of the Directors by-passed the Board and got payment for the 1st & 2nd Defendants.
- Even after the Hotel opened for operations in July '87 the 1st Defendant prepared and forwarded Profitability Forecasts & Cash Flow Projections on the basis of 452 Guest Rooms. P25(b)
- Extracts from the 1st Defendant's Profitability Forecasts & Cash Flow Projections for 452 Guest Rooms given after the opening of the Hotel in July '87 P25(b)

Year		1 st	2 nd	3 rd
No. of Rooms (Room Days) Available (for Year)				
452 Rooms x 365 Days	(A)	164980	164980	164980
Room Occupancy - %	(B)	50%	55%	65%
Average Room Rate – US\$	(C)	50.00	54.00	73.65
Room Revenue – US \$ '000 (A) x (B) x (C)				
		4125	4900	7898

- Observing that the Hilton International's Monthly Reports P25(a) (a) did not compute Room Income on 452 Guest Rooms, the Plaintiff queried this, but the 1st & 2nd Defendants did not give any satisfactory explanations.
- Plaintiff continuously pointed out at the 4th Defendant's Board that the consequent short-fall in room revenue would jeopardise the ability of the 4th Defendant to repay the loans.
- Plaintiff prompted for the appointment of an Independent Engineer but the 7th Defendant opposed, supported by the 5th Defendant.
- Plaintiff called for Specified Bills of Quantities and Final Measurements and relevant clarifications from the Architects, but the 7th Defendant opposed.

- Plaintiff objected to any payments to the 1st & 2nd Defendants but the 5th & 7th Defendants by passed the Board and got payment of U.S.\$2.0 million sanctioned by the Ministry of Finance, to the 1st & 2nd Defendants, without disclosure of the correct facts.
- When the surreptitious amendment of plans was discovered in March '90, the Plaintiff urged that this matter be referred to Arbitration. The 4th Defendant's Board could not act.
- The Plaintiff's efforts to obtain a copy of the originally approved Plans, from the 1st, 2nd, 3rd & 4th Defendants and the UDA proved futile.
- The Plaintiff had no alternative but to institute this action.

IN THIS BACKGROUND IS IT OPEN TO THESE DEFENDANTS TO SUGGEST THAT THE PLAINT DISCLOSES NO CAUSE OF ACTION, OR THAT THE PLAINTIFF HAS NO STATUS OR THAT THERE IS MISJOINDER OR SUPPRESSION OF FACTS, LACK OF BONA FIDES ETC.? IT DOES NOT LIE IN THEIR MOUTH TO SAY SO.

23. WHAT DID THE GOVERNMENT DIRECTORS ON THE 4TH DEFENDANT'S BOARD DO?

- (a) All the submissions by the 1st, 2nd & 3rd Defendants are directed towards covering up a massive fraud on the 4th defendant, on the Government and the people of Sri Lanka.
- (b) Is the major Shareholder i.e. the Government of Sri Lanka willing to approve this and pay under the Government Guarantees? Their silence in Court is eloquent. They have not filed any objections
- (c) In relation to this fraud, pertinent and important opinions expressed by the Government Directors have been as follows:-
 - (i) On 25.05.88 at the Board Meeting of the 4th Defendant, Mr. M.T.L. Fernando, Chartered Accountant, Precedent Partner of Ernst Young: P29 page 3 Item 4(b) + P38(b) page 2, stated:

"Mr.M.T.L. Fernando suggested that it would be prudent to retain by the Company the services of an independent Engineer for this purpose.

In response to the above suggestions the Executive Director clarified to the Meeting that in terms of the Agreement for construction, this inspection has to be carried out by the Architects, and that Messrs Kanko Kikaku Sekkeisha Yozo Shibata & Associates have already been retained by the Company for this inspection.

'Mr. M.T.L. Fernando further commented that as these Architects are more or less connected with the Contractors, there may be queries to this effect raised by the major shareholders, viz. the Ministry of Finance & Planning, and other shareholders, for which the ultimate responsibility would lie on the Board of Directors."

- (ii) On 09.08.90 at a Meeting of the Local Directors of 4th Defendant, Mr. D. Peter S. Perera, Chairman, Insurance Corporation. P52(g) Page 4 Item 6, had stated:

"Mr. Peter Perera commenting on the discovery of a set of amended Architectural Plans that apparently had been submitted to the Urban Development Authority unauthorised, drew the attention of the Board of Directors, stating that that such an amendment is not valid since under the Investment Agreement this would have to be entered into, as a written agreement by all parties to the Investment Agreement."

- (iii) On 07.03.90 at the Board Meeting of 4th Defendant Mr. K. Shanmugalingam, Addl., Deputy Secretary Treasury: P41, page 3 Item 5, had stated:

"Mr. Shanmugalingam stated that as far as the Government is concerned we gave the guarantee to support the Company to borrow. We never expected that we would be called upon to pay. Our guarantee was based on the forecast (dependant on the total guest rooms available) and if there is a decrease in the number of saleable rooms from 452 to 387 the Cash Flow would be reduced by 15% arithmetically.

We would like to know if there is a drop in the Rooms from the original specification and also whether any material changes were made to the original plan.

He understood that the number of covered parking spaces has been reduced from 400 to 200.

Mr. Shanmugalingam expressed his dissatisfaction with regard to these shortcomings, and said that this is a serious matter from the shareholders point of view. He reiterated that apart from negotiations with Mitsui/Taisei these points have to be clarified. If any amendments have been made to the original plans, such information should have been correctly reported unless further assistance from the Government could not be expected. He suggested that we engage the services of a local Engineer for this work.

Mr. Shanmugalingam suggested that we obtain the B.O.Q. particulars."

- (d) What do these opinions of the Major Shareholders' i.e. Government's Nominee Directors mean?

Do they not amply corroborate the Plaintiff's case?

- (e) The 4th Defendant represented by the Hon. Attorney General has not opposed the Application for the issue of the Interim Injunction under Prayer (h). Accordingly the Interim Injunction prayed for against the 4th Defendant should be granted and issued.

- (d) The local Directors, including the Government Directors, namely the 5th, 6th, 7th, 8th and 10th Defendants also have not opposed the Application for the issue of the Interim Injunctions.

They have all been represented by Counsel in Court.

They have not controverted anything that the Plaintiff, also a fellow Director, has affirmed to in these proceedings .

24. GENERAL SUBMISSIONS

(1) The only persons who strenuously oppose are the Japanese - 1st and 2nd Defendants who have Board Control. Documents and actions disclose friendly relationship with them of the 5th and 7th Defendants. Even they have not opposed this Application. The majority Shareholders - the Government of Sri Lanka does not oppose.

(2) - But because of the Veto power in Article 127 & 129 the 4th Defendant, through its Board cannot resolve to bring this Action. Can the Japanese fraudsters be permitted to get away with this without a trial?

Can they be permitted to draw under the Guarantees and impoverish the state and the people of Sri Lanka, whilst the Action is being tried?

The Plaintiff's Action cannot be dismissed without a trial.

(3) - If the Injunction is not granted what is the purpose of this Action? It will be a travesty of justice.

Can this Injunction be refused by a Court of Law purely to arrange sectarian interest?

It is submitted not, for justice must not only be done, but must be seen to be done.

(4) - In the given circumstances of fraud in accordance with established law the Government Guarantees in question, are invalid and should be set aside.

- The 1st & 2nd Defendants would not have a right of claim under the said Government Guarantees having perpetrated a fraud and from being paid from public funds under such Government Guarantees.

- 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 Government Guarantees, in the given circumstances, wherein the very validity of such Guarantees are now in issue.

(5) It is submitted that the Plaintiff has ex-facie established a very strong prima facie case on the facts and in law. If one takes into account the Affidavits of the 1st, 2nd and 3rd Defendants the case is stronger, as its contents has over whelming corroborative material and admission in support of the Plaintiff's case as set out herein.

(6) The Plaintiff relies on documents, the majority of which are under the very hands of these Defendants themselves. The documents marked by these Defendants themselves proves the Plaintiff's contention of fraud.

(7) Ought it not then be the bounden duty of Court to examine these facts and ascertain the truth of the prima facie case? Can any Court confidently say that NO CASE whatsoever has been made out to warrant an in limine dismissal of this Action?

(8) It is submitted not. As a matter of Law the BALANCE OF CONVENIENCE favours very greatly, nay, demands, that the Injunctions prayed for be issued.

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THE OBJECTIONS OF THE FRAUDSTERS - 1ST, 2ND AND 3RD DEFENDANTS BE DISMISSED WITH COSTS AND THE INJUNCTION PRAYED IN PRAYER (g) OF THE PLAINT BE GRANTED AND ISSUED.

IT IS FURTHER SUBMITTED THAT THE 4TH DEFENDANT HAS NOT OPPOSED THE APPLICATION FOR THE ISSUE OF THE INTERIM INJUNCTION PRAYED FOR IN PRAYER (h) OF THE PLAINT AND ACCORDINGLY THE INTERIM INJUNCTION PRAYED FOR IN IN PRAYER (h) OF THE PLAINT AGAINST THE 4TH DEFENDANT BE GRANTED AND ISSUED.

Colombo, on Twenty Eighth day of January, '1991



ATTORNEYS-AT-LAW FOR PLAINTIFF

Settled by:-

A.A. M. Illyas, Attorney-at-Law,

S. Sriskantha, Attorney-at-Law,

K. Kanag-Isvaran, President's Counsel

P. Navaratnarajah, Queen's Counsel

composed by - SK



I do hereby certify that the foregoing is a true photo copy of written submission filed of record in D.C. Colombo, Case No. 3155/SK.

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CASE REFERENCES TO THE
WRITTEN SUBMISSIONS OF THE PLAINTIFF

APPENDICES

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