

IN THE DISTRICT COURT OF COLOMBO

HOTEL DEVELOPERS (LANKA) LIMITED  
Colombo Hilton Sports Complex,  
Echelon Square,  
Lotus Road,  
Colombo 1.

PLAINTIFF

Case No. 15322/MR.

Vs.

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

DEFENDANT

On this 16th day of November 1994.

The ANSWER of the Defendant abovenamed appearing by Mr. J.W.D. Perera, practising under the name and style of De Silva & Perera, and his Assistant Mr. Vernon Gooneratna, his Attorneys-at-Law, states as follows:

1. The Defendant denies all and singular the averments in the Plaint, save and except those averments, which are hereinafter specifically admitted and those, which are not inconsistent or at variance with the averments hereinafter contained.
2. The Defendant admits the averments in paragraphs 1 and 4 of the Plaint.
3. Answering the averments in paragraph 2 of the Plaint, the Defendant only admits the residence, but denies the rest of the averments therein contained.
4. Answering the averments in paragraph 3 of the Plaint, the Defendant admits that he was a Director of the Plaintiff Company from 15.03.83, but only upto 22.12.90, when he was removed.
5. Answering the averments in paragraph 5 of the Plaint, the Defendant states that,
  - a) the Hilton International Hotel in Colombo was to be constructed and fully equipped on a turn-key fixed price basis by Mitsui & Co. Ltd. and Taisei Corporation, both of Japan, as per the Investment Agreement entered into by and between the said two Companies and the Government of Sri Lanka and Cornel & Co. Ltd.,
  - b) Mitsui & Co. Ltd. and Taisei Corporation further offered Loans for such purpose, as a part and parcel of the aforesaid arrangement, which Loans were guaranteed by the Government of Sri Lanka, as the major Shareholder of the Plaintiff Company, now holding 64%.

A True Copy of the said Investment Agreement dated 31.01.84 is annexed hereto marked D1 and pleaded as part and parcel hereof.

6. Answering paragraph 6 of the Plaint, the Defendant states that the fulfilment of the condition referred to therein, amongst other, was the responsibility of Cornel & Co. Ltd., as stipulated in Articles 17.01 and 17.02 of the aforesaid Investment Agreement, marked D1, which has been suppressed and not pleaded with the Plaint.

The said Articles 17.01 and 17.02 of the aforesaid Investment Agreement are marked D1A and D1B respectively.

7. The Defendant specifically and categorically denies the averments in paragraphs 7, 8, 10, 11, 15 and 16 of the Plaint.



8. Further answering the Defendant states that,

- a) only as a Director of the Plaintiff Company, the Defendant signed Letters of the Plaintiff Company dated 27.02.84 and 28.02.84, to which was attached copy of the Telex dated 28.02.84, addressed by Mitsui & Ltd. and Taisei Corporation to the Plaintiff Company and that, it is these said Letters, that the Letter dated 01.03.84 was addressed in reply to the Plaintiff Company, by the Department of Inland Revenue on the basis of the specific representations made by Mitsui & Co.Ltd., Taisei Corporation, and not to the Plaintiff Company's Letter dated 28.02.84 addressed to the Secretary, Ministry of Finance, attached to the Plaintiff, marked "B".

True Copies of the said Letters dated 27.02.84, 28.02.84 and 01.03.'84 and the Telex dated 28.02.84 are annexed hereto marked D2A, D2B and D2C respectively and pleaded as part and parcel hereof.

- b) the said letters dated 27.02.84 (D2) and 28.02.84 (D2A) and the Telex dated 28.02.84 (D2C) have been suppressed and not pleaded with the Plaintiff.
- c) the Defendant attended to the aforesaid matter at that time as a Director of the Plaintiff Company, at the specific request of the Chairman & Managing Director of the Plaintiff Company, Cornel L. Perera who at all material times was the Chairman & Managing Director of the Plaintiff Company, and as such, it was the duty and responsibility of the said Cornel L. Perera to have followed up this matter.

9. Further answering, the Defendant states that,

- a) the aforesaid Letters and the said reply referred to, was at the request and with the approval of the then Directors of the Plaintiff Company, and was based on the specific representations made by Mitsui & Co. Ltd. and Taisei Corporation and set out in their aforesaid Telex dated 28.02.84 addressed to the Plaintiff Company, marked D2C.
- b) the ruling given by the Inland Revenue Department by its aforesaid Letter dated 01.03.'84 (D2B) has been on the basis of the specific representations made by Mitsui & Co.Ltd. and Taisei Corporation in their aforesaid Telex dated 28.02.'84 and it was the responsibility of the said Mitsui & Co.Ltd. and Taisei Corporation to have afforded the necessary evidence and informations that had been called for by the Letter dated 01.03.'84, they having been given a copy of the said Letter dated 01.03.'84 and also having been Directors of the Plaintiff Company and more particularly having held the office of Executive Director of the Plaintiff Company at all relevant times through their representative.

10. Further answering, the Defendant states that Defendant did not render professional services, whatsoever, but in pursuance of the aforesaid request merely communicated, as a Director of the Plaintiff Company, and on its behalf, forwarding the specific representations, that were made by Mitsui & Co. Ltd. and Taisei Corporation, as aforesaid and that the Plaintiff Company's averments are totally fabricated, baseless, false, misleading, deliberately suppressing the correct documents and facts as aforesaid.

11. Further answering, the Defendant states, that it was the Auditors of the Plaintiff Company, M/s Ford, Rhodes, Thornton & Co. Chartered Accountants who professionally handled the tax matters of the Plaintiff Company and to the Defendant's knowledge, they had never taken up this matter, while the Defendant was a Director of the Plaintiff Company, nor had they reported on the said matter, in the Audited Accounts of the Plaintiff Company, certified by them, for the Financial Years ended 31.03.85, 31.03.86, 31.03.87, 31.03.88, 31.03.89 and 31.03.90,

12. Answering paragraphs 12, 13 and 14 of the Plaintiff, the Defendant states that he is unaware of the averments contained therein, and states further that the matters referred to therein were the obligation and responsibility of the aforesaid Mitsui & Co. Ltd. as set out in paragraph 6 hereinabove and that the said Auditors of the Plaintiff Company as aforesaid, who are statutorily and professionally, respectively, responsible as aforesaid.



13. Answering paragraph 9 of the Plaintiff, the Defendant states, that he was the only Director of the Plaintiff Company, who acted in the interest of the Plaintiff Company, discharging the fiduciary duties and obligations as Director, whilst the other Directors deliberately failed and neglected to act, in that, the Defendant instituted in this Court, on 13.09.90, Action No.3155/Spl, against the aforesaid Mitsui & Co.Ltd., Taisei Corporation the Japanese Architects and the then Directors of the Plaintiff Company named in that Action, as a Derivative Action in law, in the right and on behalf of the Plaintiff Company, in its interest and for its benefit, on the premise of fraud and under circumstances of wrong-doer control, by the said Directors of the Plaintiff Company, which, inter-alia, included;
- the destruction and/or suppression of the Original Architectural Plans of the aforesaid Hilton Hotel, Colombo
  - the surreptitious and illegal substitution of new Architectural Plans, described as "Amended Plans", two years after construction commenced, in blatant violation of all contractual Agreements and the procedures laid down by the UDA,
  - the destruction and/or suppression of the contracted inventory of supplies for the aforesaid Hilton Hotel, Colombo
  - the said Directors of the Plaintiff Company endeavouring to obtain payments, opposing independent professional examination and verification,
  - that too, merely on the basis of simple "Medical Certificates" type Letters, given as Completion and Final Certificates by the Japanese Architects, without any Specified Bills of Quantities, Final Measurements and Inventories of Fixed Assets, whatsoever, to support such certifications,
  - thereby consequently resulting in major discrepancies in the aforesaid Hilton Hotel, Colombo, actually constructed, in comparison with the Original Project Plans and the Profitability and Cashflow Projections, submitted by the aforesaid Mitsui & Co.Ltd. and Taisei Corporation, themselves.
14. a) The Defendant further states, that in the aforesaid Action, D. C. Colombo No. 3155/Spl., this Court, having issued Enjoining Orders in September '90, issued Interim Injunctions, after Inquiry in October '91, which have been upheld by the Supreme Court in December '92.
- b) The Learned District Judge in his Order, issuing the said Interim Injunctions, inter-alia, made the following observations, that,;
- *there is no acceptable basis, at present, for making payments to the aforesaid Mitsui & Co.Ltd. and Taisei Corporation,*
  - *the other Defendants, the Directors, as persons having connections and showing interest concerning the Company, acting to obtain monies, had not readily acted to conduct a correct examination,*
  - *the said persons having prevented such correct examination were attempting to, howsoever, effect the payment of monies,*
  - *whether, these persons are exercising the influence, that they have gained in society, to prevent the raising of questions concerning the matters of work in connection with the Contracts and the Prospectus etc.,*
  - *the collaboration of the said persons, was adverse to the interests of the Shareholders of the Company, and that they were acting through such collaboration, in a manner amounting to defeat the interests of the Shareholders of the Company,*
  - *if the position, that explains this is correct, then, this actually is an instance of acting in fraudulent collusion,*
- A True Copy of the said District Court Order is annexed hereto marked D3 and pleaded as part and parcel hereof.



15. The Defendant further states, that after the institution of the aforesaid Derivative Action D.C. Colombo No.3155/Spl and the issuance of Injunction Orders, the Defendant was removed from the Board of Directors of the Plaintiff Company on 22.12.90.

16. The Defendant further states, that the Supreme Court, in upholding the said Interim Injunctions in D.C. Colombo Action No. 3155/Spl, in a landmark Judgment in December '92, inter-alia, made the following observation that;

- *the Defendant, as the Plaintiff in the said Action, has succeeded in establishing that he has a legally enforceable right and that there is a serious question and prima-facie case of fraud and wrong-doer control,*

(The reliefs claimed being that the Mitsui & Co Ltd., and Tais Corporation and the Japanese Architects are not entitled to a payments, whatsoever)

- *the Defendant, as the Plaintiff in the said Action has a reasonable and real prospect of success, even in the light of the defences raised in the pleadings, objections and submissions of the Defendants*
- *the Defendant's, as the Plaintiff in the said Action, prospect of success was real and not fanciful and that he had more than a merely arguable case*
- *because in the circumstances of the case, the Directors, including the Government's representatives on the Board will not assist or are helpless to intervene*
- *it might be pointed out, that having become a major Shareholder, this could not entirely be a matter of indifference to the Government, the Government by issuing Letters of Guarantee, made itself eventually responsible for the repayment of the monies borrowed by the Company*
- *Interim Injunctions were granted to prevent the "devious syphoning out of money" from the Company and the Country*
- *but for the Interim Injunctions, the Company, like Pyrrhus after the battle of Asculum in Apulia, might well be constrained to say, "One more such victory and we are lost".*

A True Copy of the said Supreme Court Judgment published in the 19 Law Reports of the Commonwealth is annexed hereto marked D4 and plead as part and parcel hereof.

17. The Defendant further states, that in the aforesaid D.C. Colombo Action N 3155/Spl the Plaintiff Company, nor any of its then Local Director including its Chairman & Managing Director, Cornel L. Perera, filed a Objections to the Notices of Interim Injunctions issued against it and nor did any of the then Local Directors, including its Chairman & Managing Director, Cornel L. Perera, file Answer, eventhough the Defendant exhorted them to do so, if they could.

18. The Defendant further states, that in the aforesaid D.C. Colombo Action N 3155/Spl the Plaintiff Company in its Answer filed, in lieu of a prayer inter-alia, stated as follows:

*"Moreover this defendant states that in the event that this Court find that the averments made by the plaintiff are legitimately entitled to succeed this defendant will as a matter of course take immediate action to protect its interest and those of its share holders as circumstances would deem fit."*

A True Copy of the said Answer dated 11.04.91 is annexed hereto marked D5 and pleaded as part and parcel hereof.



19. The Defendant further states, that notwithstanding the aforesaid Action No. 3155/Spl., filed in this Court and the issuance in September '91 of Enjoining Orders, the Plaintiff Company, acting through its Directors, together with its aforesaid Auditors, thereafter in November '91, certified a fraudulent set of Annual Accounts for the Financial Year ended 31.03.90, disregarding the Defendant's objections thereto and consequently, the Defendant has had the said Annual Accounts enjoined by this Court, by a further Action No. 3231/Spl instituted on 11.01.91.

20. The Defendant further states, that the Plaintiff Company, in the aforesaid D.C. Colombo Action No. 3155/Spl., acting together with the aforesaid Mitsui & Co.Ltd., and Taisei Corporation and the Japanese Architects, objected to the Defendant's Application dated 03.03.92, made by the Defendant as the Plaintiff in the said Action, for the issuance of a Commission of this Court for an independent physical inspection, examination and verification of the said Colombo Hilton Hotel Construction and the Inventory of its Fixed Assets, thereby preventing the legitimate right of the Plaintiff Company itself, as the owner, to verify the correctness of the construction and its fixed assets for itself.

21. The Defendant further states that,

a) the Plaintiff Company has deliberately failed and neglected and has been evasive in giving proper and complete answers to the Interrogatories dated 06.03.92, served on the Plaintiff Company by this Court in the aforesaid Action No. 3155/Spl.,

b) the said Interrogatories included, a query regarding the payment of Jap. Yen. 340.0 Mn. (SL Rs. 170.0 Mn) by the aforesaid Mitsui & Co.Ltd. to a specific Bank Account in Hong Kong, for obtaining special concessions and favours at the relevant time from the Government of Sri Lanka, which, inter-alia, had included:

- *Issuance of the State Guarantees*
- *Opinions of the Attorney-General*
- *Exemption of Import Duties*
- *Exemption of Income Taxes*
- *Any other approval or consent of the Government of Sri Lanka*

A True Copy of the said Interrogatories is annexed hereto marked D6 and pleaded as part and parcel hereof.

22. The Defendant further states, that the wrong doing conduct and actions of the following Directors of the Plaintiff Company have been clearly set out in the Written Submissions filed in SC Appeal Nos. 33/92 & 34/92, in relation to the aforesaid D.C. Colombo Action No. 3155/Spl:

- i. A. Naka, Executive Director
- ii. H. Ogami, Executive Director
- iii. Cornel L. Perera, Chairman & Managing Director
- iv. K.N.Choksy, Director

A True Copy of the said Written Submissions dated 06.07.92 is annexed hereto marked D7, with the relevant page Nos. 36 to 44 therein, setting out the wrong doing conduct and actions of the aforesaid Directors, marked D7A to D7I and pleaded as part and parcel hereof.

23. The Defendant further states that,

a) the Government of Sri Lanka, which had issued to Mitsui & Co. Ltd. and Taisei Corporation, the aforesaid State Guarantees, today valued at around US \$ 240 Million, i.e. SL Rs. 12,000 Million, acting through the Hon. Attorney General, at the instance of Mitsui & Co Ltd. and Taisei Corporation, intervened to reach Settlement in respect of the aforesaid Actions Nos. 3155/Spl and 3231/Spl., that had been instituted by the Defendant as aforesaid to protect the interest of the Plaintiff Company, its Shareholders, the Government of Sri Lanka and the public in the context of the State Guarantees in issue.

True Copies of the said State Guarantees are annexed hereto marked D8 and D8a respectively and pleaded as part and parcel hereof



- b) A True Copy of the Newspaper Report carried as the lead Article in the front page of the "Sunday Island" of 05.06.94, inter-alia, setting out the terms and conditions of such settlement, as per the directions given by His Excellency President D. B. Wijetunga as advised by the Attorney General, is annexed hereto marked D9 and pleaded as part and parcel hereof.
- c) The said terms of Settlement, inter-alia, included the removal of the Chairman & Managing Director of the Plaintiff Company, Cornel L. Perera who has signed the Plaintiff Company's Proxy in this Action instituted on 04.08.94.

24. The Defendant further states that,

- a) this baseless and fabricated Action has been deliberately instituted with malice and malicious intent by the present Chairman & Managing Director of the Plaintiff Company, Cornel L. Perera, in the background of the aforesaid D.C. Colombo Action Nos. 3155/Spl., and 3231/Spl. instituted by the Defendant in the right and on behalf of Plaintiff Company to protect its interests, as aforesaid.
- b) in the said Action No.3155/Spl., the present Chairman & Managing Director of the Plaintiff Company, Cornel L. Perera has been named wrong-doer Director/Defendant, whose wrong doing conduct and action have been set out in the said Written Submissions filed in the Supreme Court at pages numbered 39,40,41 marked D7D, D7E, and D7F,
- c) as the Chairman & Managing Director of the Plaintiff Company at the relevant times, the said Cornel L. Perera, should be held totally accountable and responsible for such conduct and actions and the state of affairs of the Plaintiff Company, as disclosed in the aforesaid D.C. Colombo Action Nos. 3155/Spl and 3231/Spl.

25. The Defendant further states that, apart from it being a malicious attempt to cause, inter-alia, damage to the name and reputation of the Defendant this Action is misconceived, untenable and unenforceable by action at law

FOR A FIRST CLAIM IN RECONVENTION

26. The Defendant reiterates the averments in Paragraphs 1 to 25 hereinabove.

27. The Defendant further states that,

- a) the said Cornel L. Perera, Chairman & Managing Director of the Plaintiff Company, having an interest himself, and without disclosure to an approval from the Board of Directors of the Plaintiff Company, has caused a Casino operation contract to be entered into by the Plaintiff Company, with one Johannes Bovens presently of the Netherlands,
- b) the said Johannes Bovens has adduced evidence of the payment of money to the Plaintiff Company, but appropriated by the said Cornel L. Perera resulting in a dispute with the said Johannes Bovens, with claims made by the said Johannes Bovens against the Plaintiff Company, amounting to SL Rs. 25 Million and US \$ 8 Million, in D. C. Colombo Action Nos 10949/MR and 12978/MR, respectively.

28. The Defendant further states that,

- a) the Plaintiff Company, under the dictates of the said wrong-doer Directors, had deliberately failed and neglected to take any action whatsoever, to protect the interests of the Plaintiff Company and its Shareholders, as stated in its Answer filed in D.C. Colombo Action No.3155/Spl., set out at paragraph 18 hereinabove,
- b) the Plaintiff Company, under the dictates of the said wrong-doer Directors, had further deliberately failed and neglected to cause proper inquiries and investigations to be made into the several malpractices disclosed in the aforesaid D.C. Colombo Action Nos. 3155/Spl and 3231/Spl and to take any action, whatsoever, against the wrong-doer Directors and other relevant persons.



29. In the above premises, a cause of action as accrued to the Defendant, sue the Plaintiff Company by way of a Claim in reconvention,
- a) for a declaration that the Plaintiff Company is liable in law to call immediate inquiries and investigations into the aforesaid malpractice disclosed in D.C. Colombo Action Nos. 3155/Spl and 3231/Spl, to protect the interests of the Plaintiff Company and those of its Shareholders
  - b) for an order directing the Plaintiff Company to take immediate action lawfully warranted, against the wrong-doer Directors of the Plaintiff Company and against any others, as a consequence of the inquiries and investigations to be carried out under (a) hereinabove,
  - c) for a declaration that the Chairman & Managing Director of the Plaintiff Company, Cornel L. Perera, as the Chief Executive of the Plaintiff Company is accountable and responsible for the state of affairs of the Plaintiff Company, as disclosed in the aforesaid D.C. Colombo Action Nos. 3155/Spl and 3231/Spl and accordingly, that he is not a fit and proper person to hold such office of Chairman & Managing Director, or a Director, of the Plaintiff Company, on account of such wrongful conduct and actions as aforesaid.

FOR A SECOND CLAIM IN RECONVENTION

30. The Defendant reiterates the averments in paragraphs 1 to 25 hereinabove and more particularly, paragraphs 6, 11 and 12 hereinabove, and states that the proper persons to be sued in respect of the matters complained of are the Plaintiff Company, Cornel & Co. Ltd., and M/s. Ford, Rhodes, Thornton & Co. Chartered Accountant, and not this Defendant as aforesaid.
31. In the above premises, a cause of action has accrued to the Defendant, sue the Plaintiff Company by way of a Claim in reconvention,
- a) for a declaration that the Plaintiff Company is liable in law to institute immediate Action against Cornel & Co. Ltd. for the Claim wrongfully made against the Defendant in this Action,
  - b) for a declaration that the Plaintiff Company is liable in law to take immediate action against the aforesaid Auditors of the Plaintiff Company, M/s Ford, Rhodes, Thornton & Co. Chartered Accountants for the Claim wrongfully made against the Defendant in this Action,

FOR A THIRD CLAIM IN RECONVENTION

32. The Defendant reiterates the averments in Paragraphs 1 to 25 hereinabove
33. The Defendant further states that,
- a) he is a Fellow Member of the Institute of Chartered Accountants of Sri Lanka and a Fellow Member of the Institute of Chartered Management Accountants of the United Kingdom,
  - b) he is practising as a professional Business and Management Consultant having an established name and reputation, servicing a wide circle of clientele, including working as a Senior Consultant on World Bank and USAID funded public sector restructuring and privatisation programmes
  - c) he has been recently appointed as Advisor to the Ministry of Finance and a Director of the Plaintiff Company by the Minister of Finance, Planning, Ethnic Affairs & National Integration
  - d) this Action has been filed maliciously to deliberately to cause embarrassment, pain of mind, injury, damage and defamation to the Defendant and his name and reputation, consequent to the aforesaid D.C. Colombo Action Nos. 3155/Spl and 3231/Spl by the Defendant in the interest of the Plaintiff Company and the Government of Sri Lanka and the public, in the context of the State Guarantees in issue, and particularly moreso in the context of terms of Settlement of the aforesaid Actions, as set out in paragraph 23 hereinabove,



4. In the above premises, a cause of action as accrued to the Defendant sue the Plaintiff Company by way of a Claim in reconvention,

- a) for damages in a sum of Rupees Fifty Million (Rs. 50,000,000/-) for fabricated and malicious Action instituted against the Defendant.
- b) for an Order directing the Plaintiff Company to recover the said damage awarded by Court, from the Chairman & Managing Director of Plaintiff Company, Cornel L. Perera, and any other Directors of Plaintiff Company, who were responsible for the institution of Action,

**WHEREFORE THE DEFENDANT PRAYS:**

- a) for the dismissal of the Plaintiff Company's Action,
- b) for a declaration that the Plaintiff Company is liable in law to call for immediate inquiries and investigation into the aforesaid malpractice disclosed in D.C. Colombo Action Nos. 3155/Spl and 3231/Spl, to protect the interests of the Plaintiff Company and those of its Shareholders,
- c) for an Order directing the Plaintiff Company to take immediate action lawfully warranted, against the wrong-doer Directors of the Plaintiff Company and against any others, as a consequence of the inquiries and investigations to be carried out under prayer (b) hereinabove,
- d) for a declaration that the Chairman & Managing Director of the Plaintiff Company, Cornel L. Perera, as the Chief Executive of the Plaintiff Company is accountable and responsible for the state of affairs of Plaintiff Company, as disclosed in the aforesaid D.C. Colombo Action Nos. 3155/Spl and 3231/Spl and accordingly, that he is not a fit and proper person to hold such office of Chairman & Managing Director, a Director, of the Plaintiff Company, on account of such wrong conduct and actions as aforesaid.
- e) for a declaration that the Plaintiff Company is liable in law to institute immediate Action against Cornel & Co. Ltd. for the Claim wrongfully made against the Defendant in this Action,
- f) for a declaration that the Plaintiff Company is liable in law to take immediate action against the aforesaid Auditors of the Plaintiff Company, M/s Ford, Rhodes, Thronton & Co. Chartered Accountants for the Claim wrongfully made against the Defendant in this Action,
- g) for Judgment against the Plaintiff Company in a sum of Rupees Fifty Million, (Rs. 50,000,000/-) together with legal interest thereon from date hereof, until date of decree and thereafter on the decree amount at the same interest until payment in full.
- h) for an Order directing the Plaintiff Company to recover the said damage together with the aforesaid interest as per prayer g) herein above, from the Chairman and Managing Director of the Plaintiff Company, Cornel L. Perera, and any other Directors of the Plaintiff Company, who were responsible for the institution of this Action,
- i) for costs, and
- j) for such other Orders and Directions as may be appropriate, and other further relief as to this Court shall seem meet.



ATTORNEYS-AT-LAW FOR THE DEFENDANT