BY HAND / COURIER

5th January 2007

Hon. Wijeyadasa Rajapakshe, P.C., M.P.,
Chairman, Committee on Public Enterprises (COPE)
Parliament of Sri Lanka,
Sri Jayewardenepura,
Kotte.

Dear Sir,

Issues pertaining to the Sale of 90% Shares of Lanka Marine Services (Pvt) Ltd. (LMSL) to John Keells Holdings Ltd.

As per the telephone conversation, the 'key issues' pertaining to the above are set out below:

GOVERNMENT POLICY

1. Cabinet on 17.8.2000 approved Cabinet Memorandum of 1.8.2000 to liberalise the bunkering sector *(sale of fuel to ships)* in Sri Lanka.

   The Cabinet Memorandum of 1.8.2000, noting that the magnitude of bunkering sector in Singapore was as large as Singapore Dollars 17 billion, had recommended;

   - to **liberalise the bunkering sector** and to permit a limited number of parties to operate bunkering services
   - **that the monopoly given to LMSL to be restricted to one year, within which period privatisation of LMSL to be completed**
   - **new entrants to the bunkering sector to sell bunkers within the territorial waters of Sri Lanka, including the immediate vicinity of Port of Colombo**
   - Government to charge licence fees from the selected operators
   - Ministry of Shipping to regulate and monitor bunker operators in terms of Merchant Shipping Act No. 52 of 1971
   - PERC to seek offers through an open tender process from investors, with necessary technical and financial ability and experience in bunkering
   - PERC to initiate action and make further recommendations to Cabinet **on the process to be followed**

   To facilitate the granting of such Licences to liberalise the petroleum sector, Parliament enacted Petroleum Products (Special Provisions) Act No. 33 of 2002, empowering the Minister to grant Licences, on the recommendation of the Energy Supply Committee.

167/4, Sri Vipulasena Mawatha, P.O. Box : 1796 Colombo Sri Lanka
Tel : 696814, 686364, 074-715988 Fax : 697134 [Kandy Tel/Fax : 074-470442]
E-mail : nihalsri@slt.lk, comindtax@lanka.ccom.lk

EXPRESSIONS OF INTEREST

2. On 28.10.2001 PERC advertised for Expressions of Interest (EOIs) for the 'Liberalisation of Bunkering', calling for applications from interested parties for the issuance of licences, **stating that there will be no restriction of the number of licences to be issued**. Interested parties were requested to collect from PERC Request for Proposals (RFPs), setting out the selection process and the specimen application forms.

3. On 8.2.2002 and 11.2.2002 PERC advertised calling for EOIs for the 'Sale of 90% Shares of LMSL', disclosing that it has a storage facility capacity of 31,000 MT at Bloemendal Road, with 3 Pipelines to the South Jetty at the Colombo Port, and intimating that the Guidelines for EOIs are available at PERC, and that completed EOIs must be submitted by **28.2.2002**.

TECHNICAL EVALUATION COMMITTEE

4. On **28.2.2002**, then Chairman, PERC, P.B. Jayasundera addressed a Letter to Charitha Ratwatte, Secretary, Ministry of Finance, through B. Hewagama, Secretary, Ministry of Economic Reforms, recommending the appointment of the following persons, as Members of a Technical Evaluation Committee (TEC) **to evaluate both EOIs and final bids** for the Sale of 90% Shares of LMSL.

   - Daham Wimalasena, Chairman, CPC
   - Upali Dahanayake, Director, National Planning Department
   - A.W.C. Perera, Addl. Secretary, Ministry of Economic Reforms

5. **Since request to appoint a TEC had been on 28.2.2002, the PERC advertisements calling for EOIs for the 'Liberalisation of the Bunkering' on 28.10.2001, and the 'Sale of 90% Shares of LMSL' on 8/11.2.2002, and the respective RFP and EOI Guidelines had not been formulated and approved by the TEC.**

   In the context of normal procedure to have a Cabinet Appointed Tender Board (CATB) and a TEC to handle a divestiture, the question arises as to why there was only a TEC, and that to constructively appointed by Chairman, PERC, P.B. Jayasundera ? Ought not the TEC have been independently appointed, after obtaining Cabinet sanction, particularly for a major divestiture such as this, having complex implications ?

PRE-BID CONFERENCE

6. At the 'Pre-Bid Conference' held on 30.4.2002, Chairman, PERC, P.B. Jayasundera, among other issues, had clarified the following issues;

   - "LMS will not have a monopoly on the import and sale of bunkers subsequent to the sale of Lanka Marine Services Ltd." – *(As per Item 1 of the Minutes)*

   - "The Government cannot takeover Court Cases. The court proceedings and clarifications may be obtained from the Chief Legal Officer, CPC. The purchaser may quantify potential liability from the Court Cases and discount the bid price accordingly" – *(As per Item 15 of the Minutes)*

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

- "SLPA have indicated price of $ 10/MT for the use of pipe line ... There was a unanimous request that the present rate of $ 2.76/MT be maintained. PERC agreed to revert by Tuesday, May 7th on the proposed arrangement with regard to the pipelines and a revised fee from SLPA along with a draft throughput agreement relating to the pipelines" - *(As per Items 2 of the Minutes).*

The RFP at Section 4.5.2 it is stated;

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

Furthermore, at Section 4.5.1 of the RFP it is stated;

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

The RFP has cautioned and put the prospective Bidders on notice:

> **"Bidders shall conduct and are solely responsible for conducting their own independent research ....Bidders shall conduct and are solely responsible for conducting their own due diligence ....No written or oral information provided shall be considered legally binding by the Bidders"**

VALUATION

7. Chief Valuer had given a Valuation Report on 2.7.1993, *inter-alia*, valuing at Rs. 82,866,000/-, (in the 'total net assets' valuation of LMSL of Rs. 342,000, 000/-), the Government Land in extent 8A 2R 21.44P at Bloemendhal Road, on which the Oil Storage Facility used by LMSL was situate. CPC in 1990 had paid the Government Rs. 59,157,219/- for this Facility.

On 6.2.2002 Chairman PERC, P.B. Jayasundera, forwarding copy of the 1993 Valuation Report had required an updated valuation of LMSL from the Chief Valuer for the Sale of 90% Shares of LMSL.

By Letter dated 7.5.2002 Chief Valuer had confirmed that the 'Assets Valuation' of LMSL was almost completed and could be finalised within a week; however, that the 'business valuation' was not started yet, and that since the Valuation Officers are entitled to an incentive as approved by the Cabinet, the Chief Valuer requested confirmation that such incentive would be paid.

Director General, PERC, Deepal Gunaratne replying by Letter dated 16.5.2002, making certain clarifications, required early the updated Valuation Report from the Chief Valuer, intimating that the final proposal is due by 28.5.2002.

Curiously, on the very previous day, i.e. 15.5.2002, Director General, PERC, Deepal Gunaratne has written to DFCC Bank requiring a 'business valuation' of LMSL by 28.5.2002, requesting them to confirm their acceptance, along with the estimated cost and the information required to carry out the valuation. Selection of DFCC Bank does not appear to have been on the normal selection process of having to call for offers from at least 3 parties, for selection.

DFCC Bank replying by Letter dated 20.5.2002 confirmed their willingness to undertake the 'business valuation' of LMSL for a fee of Rs 750,000/- + Taxes.

By Letter date 21.5.2002 Director General, PERC, Deepal Gunaratne confirmed the acceptance of the DFCC Bank's Fee, intimating that the Valuation Report should be submitted by 28.5.2002.

By Letter dated 24.5.2002 DFCC Bank confirmed that their valuation - 'would be largely based on future cash flows and the earnings potential of LMSL'.

By Letter dated 5.6.2002, Director General, PERC, Deepal Gunaratne, required the DFCC Bank to indicate the 'benchmark / floor price' at which the Government could offer 90% Shares of LMSL for bidding on the Colombo Stock Exchange.

TEC in its Report on 6.6.2002 had noted that DFCC Bank had been contracted to carry out a valuation of LMSL and that their report would be submitted within a week in order to fix the base price at which the Shares could be offered on the Colombo Stock Exchange, and to obtain Cabinet Approval therefor.

Subsequently, DFCC Bank on 10.6.2002 submitted its Valuation Report of LMSL said to be on the basis of a 'business valuation'.

As to why the updated Valuation Report that was being prepared by the Chief Valuer, who had confirmed on 7.5.2002 the completion of the 'net assets valuation' of LMSL had not been pursued with is baffling ?.

DFCC Bank's 'business valuation' of LMSL appears to be erroneous and questionable, in that -

- The discounted 'net present value' of projected cash-flows of LMSL for 15 years, at 18% is given as Rs. 1,428 Mn. and at 22% is given as Rs.1,129 Mn. Since the Land, an asset of an appreciating value, had been questionably taken into reckoning in this discounted cash flow, the 'present value' of the Bloemendhal Land in extent 8A 2R 21.44P, as per DFCC Bank's 'discounted valuation computation' is Rs. 49.5 Mn. and 29.1 Mn. respectively. How could this be, when as far back as July 1993, the Chief Valuer had valued this Land at Rs. 82,866,000/-?

- The 'business valuation' in June 2002 by DFCC Bank for LMSL on an 'earnings basis' reckoned for the Financial Year 2002/03, at a multiple of 8 had been given as Rs. 1,405 Mn. and at a multiple of 10 had been given as Rs. 1,757 Mn.

- The foregoing needs to be reckoned in the context of LMSL's Net Profits after Tax for the following Financial Years:

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

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

No 'Net Assets Valuation', which would have included the Market Value of the Land in extent 8A 2R 21.44P at Bloemendhal Road, has been obtained, as normally ought to have been done, in addition to the 'Business Valuation'

TEC REPORT

8. The TEC having completed the process of evaluation of the EOIs submitted by 17 parties, for the purchase of 90% Shares of LMSL, on 6.6. 2002 short listed 5 parties, who were to be allowed to place financial bids on the Colombo Stock Exchange for the purchase of 90% Shares of LMSL.

   In the TEC evaluation process, one party, namely, Sri Lanka Shipping Co. Ltd., has got disqualified, since their 'consortium partner' had requested a monopoly for LMSL for a period of 8 years. The condition of a monopoly even for a period of 8 years was deemed unacceptable by the TEC since it was not a condition set out in the RFP.

   The TEC Report has not been signed by Chairman, Daham Wimalasena, but by his nominee, D. Chandrasekera, Refinery Advisor CPC / Actg. General Manager, LMSL.

CABINET MEMORANDUM

9. Consequently, the Ministry of Power & Energy submitted Cabinet Memorandum dated **21.6.2002**, as per the TEC recommendations for the Sale of 90% Shares of LMSL on the basis of a 'benchmark / floor price' of Rs. 1,200,000,000/-, (which has been based on a 'business valuation' of LMSL by the DFCC Bank), on a bidding process on the Colombo Stock Exchange on the basis that only pre-selected bidders submitting a Bid Bond of 10% of the 'benchmark / floor price' will be allowed to bid on the Colombo Stock Exchange.

   The Cabinet Memorandum of 21.6.2002 had also recommended that charges applicable for the use of Common User Facilities (CUF) be maintained at US $ 3/MT, **which could be revised every 3 years.**

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

   By the Cabinet Memorandum of 21.6.2002, approval was sought for the following:

   - authorise CPC to sell 90% Shares of LMSL to successful bidder on the process identified, and terms and conditions stipulated in the Share Sale & Purchase Agreement and the Common User Facility Agreement, and to gift the balance 10% Shares to the employees of LMSL.
   - authorise the sale of 90% Shares of LMSL at or about the 'benchmark / floor price' of Rs. 1,200,000,000/-, which would be introduced for bidding on the Colombo Stock Exchange
   - authorise the Secretary to the Treasury, CPC and SLPA to enter into the Share Sale & Purchase Agreement, Common User Facility Agreement and any other ancillary agreements
   - authorise SLPA, in association with the CPC, to acquire and manage the Common User Facilities, until the formation of the proposed terminal company.
   - authorise allocation of funds required for upgrading the Common User Facilities to be multi-user capable from the sale of 90% Shares of LMSL, and CPC or any other party to carry out such works

CABINET APPROVAL

10. Cabinet Approval for the above Cabinet Memorandum of **21.6.2002** had been given only on **14.8.2002,** and which Cabinet Decision have been confirmed and notified by the Secretary to the Cabinet only on **21.8.2002**.

Hence, between 21.6.2002 i.e. date of Cabinet Memorandum and 21.8.2002 i.e. date of confirmation and communication of Cabinet Approval, no action, whatsoever, could have and should have been taken in regard to this matter, i.e. until the receipt of confirmation of Cabinet decision and approval, which would have only been after 21.8.2002.

Furthermore, it would be noted that the Share Sale & Purchase Agreement and the Common User Facility Agreement had been finalised for approval by the Cabinet, as per the Cabinet Memorandum of 21.6.2002.

The President on 7.8.2002 had made the following observations, requiring that the matter be deferred at least for two weeks;

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

CONDUCT AND ACTIONS BEFORE CABINET APPROVAL

11. However, before the Cabinet Approval confirmed and notified on **21.8.2002**, Chairman, PERC, P.B. Jayasundera on **12.7.2002** has written to John Keells Holdings Ltd., stating;

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

On the very same day i.e. **12.7.2002**, John Keells Holdings Ltd., replied Chairman PERC, P.B. Jayasundera, stating;

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

Apparently, the '**award**' of the Sale to John Keells Holdings Ltd., on **12.7.2002** had been made on the basis that John Keells Holdings Ltd., had been the only party, who had submitted a 10% Bid Bond on the 'benchmark / floor price' of Rs. 1.2 billion undertaking to pay a sum of Rs. 120,000,000/-, as intimated to the potential Bidders by letter dated **25.6.2002** by Chairman, PERC, P.B. Jayasundera, requiring such Bid Bond to be submitted by **10.7.2002** i.e. within a period of two weeks. **Could such action have been taken before Cabinet Approval on 21.8.2002 ? In any case, ought not the result of a 'sole party' have been reported to Cabinet for decision for 'exclusive award' ?**

The foregoing questionable 'sudden requirement' for a Bid Bond in a very short time, and the exclusive 'award' to John Keells Holdings Ltd., is alleged by the other Bidders to have been 'foul play', as per the attached copies of Newspaper Reports in July 2002.

12. Also before such Cabinet Approval confirmed and notified on **21.8.2002**, John Keells Holdings Ltd., addressed Letter dated **31.7.2002** to Director General, PERC, Deepal Gunaratne listing 6 issues that need to be resolved urgently. A Minute on the said Letter notes – *"Chairman met with JKH on 2.8.02"*

    Consequently, by Letter dated **2.8.2002** addressed to Chairman, PERC, P.B. Jayasundera John Keells Holdings Ltd. confirms the Meeting had with him on the same day i.e **2.8.2002** and thanked for agreeing to address the issues outlined in the above Letter dated **31.7.2002** in finalising the Agreements.

    One of the issues set out in the Letter dated **31.7.2002** of John Keells Holdings Ltd., was;

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

    Consequently, the CUF Agreement signed on **20.8.2002** included the following new Clause 8.2, which was not there previously:

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

13. Cabinet Approval for the Cabinet Memorandum of **21.6.2002** had been confirmed and notified by Secretary to the Cabinet on **21.8.2002**, *inter-alia*, authorising the signing of the CUF Agreement submitted with the Cabinet Memorandum of **21.6.2002** **which did not have the above new Clause 8.2**, whereas in addition the CUF Agreement was signed on **20.8.2002**.

    The Shares Sale & Purchase Agreement for the Sale of 90% Shares of LMSL has also been signed on **20.8.2002** whereas Cabinet Approval for the Cabinet Memorandum of 21.6.2002 had been confirmed and notified by Secretary to the Cabinet on **21.8.2002**, *inter-alia*, authorising the signing of Share Sale & Purchase Agreement.

    A Letter dated **15.8.2002** on the subject **"LMSL – Draft Agreements"** has been addressed by Chairman, PERC, P.B. Jayasundera to Chairman SLPA, Parakrama Dissanayake, with copies to R. Paskaralingam, Advisor to the Prime Minister, Charitha Ratwatte, Secretary to the Treasury, Daham Wimalasena, Chairman, CPC, in response to SLPA Chairman's Letter dated **13.8.2002.**

    PERC came under the purview of the Minister of Economic Reforms, Milinda Moragoda and Secretary, Ministry of Economic Reforms, B. Hewagama, and hence, had they approved the foregoing ?

    Cabinet Approval had been confirmed and notified on 21.8.2002 for the Cabinet Memorandum of 21.6.2002, which had been submitted by the Minister of Power & Energy, Karu Jayasuriya. Had he approved the foregoing conduct and actions on his Cabinet Memorandum, prior to its approval by the Cabinet ?

ENERGY SUPPLY COMMITTEE NOT CONSULTED

14. By Letter dated **30.10.2003** Director, Energy Supply Committee, Rajah Amaratunga has required Director Legal PERC, Ms. Shamalie Gunawardene to forward a copy of the CUF Agreement, together with Hon. Attorney General's clearance thereof.

    By Letter of the same date i.e. **30.10.2003** Director Legal PERC, Ms. Shamalie Gunawardene has forwarded copy of the CUF Agreement, drawing attention to the 'constructive monopoly Clause 8.2', and the Hon. Attorney General's Opinion dated **20.8.2002**.

    In terms of the provisions in the Petroleum Products (Special Provisions) Act No. 33 of 2002, ought not such Agreement have received prior approval of the Energy Supply Committee ?

'MONOPOLY CLAUSE' DECLARED UNLAWFUL BY COURT

15. Would not the forgoing surreptitious inclusion of Clause 8.2 affording a 'constructive monopoly' to LMSL, after purchase by John Keels Holdings Ltd., be blatantly contrary to and violative of the Government Policy, as had been approved by the Cabinet on **17.8.2000** as per the Cabinet Memorandum of **1.8.2000**, with the subsequent enactment of Petroleum Products (Special Provisions) Act No. 33 of 2002 for the liberation of the petroleum sector, as morefully set out at Paragraph No. 1 hereinabove.

    In addition, this is a fundamental breach, in that, Sri Lanka Shipping Co. Ltd., was disqualified by the TEC, essentially because their Offer stipulated a monopoly requirement for a period of 8 years for LMSL, the TEC noting that it was not a condition set out in the RFP.

16. In the given circumstances of the SLPA resisting the grant of Licenses to new entrants to the bunkering sector, the Hon. Attorney General by Letter dated 3.3.2004 *inter-alia* opined:

    > **"It is therefore submitted that any refusal to permit other barge owners to transport bunker fuel by barge would be a violation of Article 12(1) and 14(1) of the Constitution. In the circumstances, Clause 8.2 (*i.e. of the CUF Agreement*) cannot be interpreted to mean that such Clause cast an obligation on the Government to refuse to allow barges to transport bunker fuel within the Port of Colombo if they do not use the CUF, as such a refusal would be contrary to law".**

17. Since the SLPA did not act in conformity with the Opinion of the Hon. Attorney General, it resulted in 2 Cases being instituted in the Court of Appeal;

    i) CA (Writ) Application No. 1534/04 – Lanka Bunkering Services Ltd., Sri Lanka Shipping Co. Ltd., Lanka Maritime Services Ltd., Vs. SLPA, Ministry of Power & Energy and Hon. Attorney General, **filed on 20.7.2004**.

    ii) CA (Writ) Application No. 2173/04 – Lanka Maritime Services Ltd., Vs. SLPA, Ministry of Power & Energy and Hon. Attorney General, **filed on 9.11.2004**.

18. Given such predicament, LMSL on **25.5.2005** filed in the Court of Appeal, Writ Application No. 829/2005 vs. SLPA, Secretary to the Treasury, CPC, Lanka Bunkering Services (Pvt) Ltd., Lanka Maritime Services Ltd., Minister of Power & Energy, BOI and the Hon. Attorney General.

The Court of Appeal <u>refusing to issue Notice</u> delivered Order on **<u>1.8.2005</u>**, *inter-alia*, stating:

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

DFCC BANK RENEGES ON VALUATION

19. Confronted with the issue of disclosure of a monopoly having been given to LMSL, DFCC Bank reneged on its earlier 'business valuation', which has been based on the premise of a liberalised competitive market environment, and have reported that, had they been asked to give a 'business valuation' on the basis of a continuous monopoly of LMSL, then there 'benchmark / floor price' would not have been Rs. 1,200,000,000/- **<u>but Rs. 2,400,000,000/-,</u>**

    Furthermore, DFCC Bank intimated that had they been required to give a 'Net Assets Valuation' of LMSL, that they would have engaged the services of a professional Valuer for such purpose.

CONSEQUENCES OF MONOPOLY CLAUSE

Central Bank's Annual Report 2004 at page 64 stated;

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

Feeder Operators published a press Notices in May 2005 to the trade, captioned **'Bunker Price Crisis'** stating;

> **"Feeder Operators remain extremely concerned with the current high level of Bunker Prices being charged in Colombo as the competitive position of Sri Lanka as a container transshipment facility is being questioned.**
>
> **"As of date rates for IFO 180 remain in the region of US $ 350/ ton (which is approximately US $ 80 / ton more than Singapore / Dubai prices) and represents an increase of US $ 110/ ton more than last year's monthly average."**

'CASE' TAKEN OVER BY GOVERNMENT

20. At the 'Pre-Bid Conference' held on 30.4.2002, Chairman, PERC, P.B. Jayasundera, among other issues, had clarified the following issue;

    a. "<u>The Government cannot takeover Court Cases</u>. The court proceedings and clarifications may be obtained from the Chief Legal Officer, CPC. The purchaser may quantify potential liability from the Court Cases and discount the bid price accordingly" – *(As per Item 15 of the Minutes)*

However, in the Share Sale & Purchase Agreement signed with John Keells Holdings Ltd., a Claim against LMSL had been taken over by the Government as per Clause 3.5 (d) of the Share Sale & Purchase Agreement;

> **'The following payments which may arise shall be the responsibility of GOSL;**
>
> **Any liabilities which may arise pursuant to any claim made by Oxford Jay International (Pte) Ltd. Blk 2, Kitchener Road # 01-81, Singapore 200002, arising out of the subject matter of FR Application No. 954/97 or any amount which may become payable consequent to any judgment / order in a Court case which may be filed arising out of a breach of contractual obligations connected to the subject matter of the aforementioned FR Application No. 954/97, including any cost of litigation."**

The RFP at Section 4.8 Litigation, among other Cases, has specifically disclosed this Case;

> **"4.8.1 Juno Case – This case is with regard to the suspension of a barge operator, Oxford Jay International (Pvt) (OJI) Ltd. for carrying out unauthorized bunker deliveries outside Colombo Port limits. The case has been filed by OJI claiming damages for suspension."**

Claim by Oxford Jay International (Pte) Ltd. Singapore now known as Rehoboth International (Pte.) Ltd., in ICC Arbitration Proceedings was US $ 9.2 Mn. Also the Government has paid advance costs of US $ 170,000/- .

The undersigned, as Chairman PERC, in consultation with Hon. Attorney General, caused Prof. Lakshman Marasinghe, Chairman, Law Commission, to be appointed as an Arbitrator, and it is understood that the Government has won the Case, **however, costs have been incurred**.

PURPORTED 'TRANSFER' OF LAND

21. As per the draft Share Sale & Purchase Agreement issued with the RFP by PERC in April 2002 for the Sale of 90% Shares of LMSL, Clause 3.2(a) of the draft Share Sale & Purchase Agreement stated;

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

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

At the 'Pre-Bid Conference' held on 30.4.2002, Chairman, PERC, P.B. Jayasundera, among other issues, has clarified the following issue;

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

22. The RFP at Section 4.4.1 has stated;

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

However, by Letter dated **12.7.2002** to Chairman PERC, P.B. Jayasundera, Chairman, CPC, Daham Wimalasena, has stated:

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

23. **The Cabinet Memorandum of 21.6.2002 has not expressly disclosed the extent of this Government Land of 8A 2R 21.44P at Bloemendhal Road and its Market Value in 2002.**

By Letter dated 7.5.2002 Chief Valuer, who has previously valued this Land in July 1993 at Rs. 82,866,000/- has confirmed that the updated 'Assets Valuation' of LMSL, (which would have included the Market Value of this Land) was almost completed and could be finalised within a week. **However, this updated 'Assets Valuation' is not available, nor has been taken into reckoning.**

Short circuiting the Chief Valuer, DFCC Bank has been questionably exclusively selected to place a 'business valuation' on LMSL, and they have confirmed that they have not carried out an 'Assets Valuation', which would have included a professional valuation of this Government Land in extent 8A 2R 21.44P.

24. In June 2004, the Secretary to the Treasury P.B. Jayasundera *(who is also ex-officio Member of PERC)* required PERC to expeditiously effect the transfer of this Land.

This being a divestiture carried out in 2002, PERC having examined the matter, raised questions on the absence of a valuation of this Government Land, and to save the Stamp Duty on the contemplated transfer, the undersigned, as Chairman PERC, by Letter dated **15.7.2004,** citing Clause 3.2 of the Share Sale & Purchase Agreement, raised the question, as to whether this Land could not be directly given to LMSL, subject to the Hon. Attorney General's concurrence, since the Agreement had been to transfer this Government Land to CPC **in the first instance**, and **re-transfer** the same to LMSL, subject however to proper consideration ?

As per Letter dated **31.7.2002** of John Keells Holdings Ltd., addressed to Director General, PERC, Deepal Gunaratne, Stamp Duty payable on the transfer of this Land was required to be borne by the Government / CPC which PERC has agreed to as per Letter dated 2.8.2002 of John Keells Holdings Ltd., addressed to Chairman, PERC, P.B. Jayasundera, and the Agreement No. 538 entered into on 20.8.2002 between the Government, CPC and LMSL.

25. PERC **without taking any steps to have the said Land transferred,** began 'probing' into the Valuation of this Government Land in extent 8A 2R 21.44P, with Chairman CPC, Jaliya Medagama by his Letter dated **24.5.2004** addressed to Secretary, Ministry of Power & Energy having, *inter-alia*, stated;

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

PERC by Letter dated **5.10.2004** queried the Valuation of this Land from the DFCC Bank, whose response by Letter dated **12.10.2004,** in effect resulted in a Valuation of **Rs. 29.1 Mn.** to **Rs. 49.5 Mn.** for this Land in August 2002, whereas the Chief Valuer had valued this Land at **Rs. 82.9 Mn.** in July 1993, as set out in paragraph No. 7 hereinabove.

Hence, without disclosure to PERC, and short circuiting PERC, John Keells Holdings Ltd., following up *on a telephone conversation of the same day*, has forwarded Letter dated 3.11.2004 to the Ministry of Power & Energy, requiring the transfer of this Land.

On the very same day i.e. **3.11.2004** Secretary, Ministry of Power & Energy, P. Weerahendi, *after a telephone conversation had* with Addl. Secretary to the President, Ms. C. Athurugiriya has addressed Letter dated **3.11.2004** forwarding John Keells Holdings Ltd.'s Letter of **3.11.2004**.

Responding to Letter dated **5.11.2004** from Addl. Secretary to the President, Ms. C. Athurugiriya, the Commissioner of Lands by Letter of same date i.e. **5.11.2004** has recommended the transfer of this Land to LMSL, instead of John Keells Holdings Ltd., to whom it has been previously recommended to be transferred as per Letter dated 6.9.2004.

26. Consequently by Letter dated **11.1.2005** addressed to the Secretary to the President, Addl. Secretary, Ministry of Lands, W.M. Jayathilake has stipulated that the Secretary to the President has informed the Lands Commissioner that the President has approved the vesting of this Land to LMSL, **after recovering the purchase consideration of Rs. 1,199,362,500/-.**

    Accordingly, on **19.1.2005**, the President has placed signature on the Instrument of Grant, **which has recorded the acknowledgement of the receipt by the Government of Rs. 1,199,362,500/- as paid by LMSL to the Government on 19.1.2005,** and which Instrument of Grant had been registered on **1.2.2005**.

27. Though the Instrument of Grant has stated that the Government **has received Rs. 1,199,362,500/- from LMSL**, Director General, Department of Treasury Operations, by Letter dated **18.8.2006** **has confirmed that the Government has not received any money for the transfer of this Land**, in response to Letter dated **21.3.2006** addressed to the Secretary Treasury, P.B. Jayasundera by Chairman, PERC, W.M. Bandusena, **seeking confirmation as to whether the Government has received the purchase consideration as stated in the Instrument of Grant ?**

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

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

28. **Therefore, has not this Government Land been purported to be 'transferred' to LMSL 'without receipt of any consideration', in January 2005, for a 'purported payment' of Rs. 1,199,362,500/- ?**

    Hence, would not the Instrument of Grant be a 'fraudulent document' and a 'fiction', in that, no payment had been made by LMSL and has been received by the Government, as acknowledged in the said Instrument of Grant for the transfer of the Government Land at Bloemendal in extent 8A 2R 21.44P to LMSL ?.

    If so, how could there be a legal transfer of this Land, inasmuch as this Instrument of Grant is *ex-facie* fraudulent and a 'fiction' ?

29. Being totally unaware of the foregoing, the undersigned as Chairman, PERC, by Letter dated 1.7.2005 addressed to Chairman, John Keells Holdings Ltd., with copy, among others, to Hon. Attorney General, *inter-alia*, stated;

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

30. A Valuation by the Chief Valuer and a professional private Valuer will disclose the Market Value of this Land in August 2002 i.e. when the Share Sale & Purchase Agreement was executed.

In the context of a Sub-Committee of COPE probing into this matter, copies hereof are being forwarded to the Members of the Sub-Committee, to facilitate such probe.

Since Newspapers have reported *(without any denial)*, that the Secretary to the Treasury, P.B. Jayasundera has made representations to H.E. the President on the 'probes' being conducted by COPE, and that H.E. the President has sought clarifications from you in that regard, copies hereof are being submitted also to H.E. the President and the Secretary to the President, so that they may be apprised of the facts contained herein, which pertain to the subject of only one matter being probed by COPE.

Yours truly,

Nihal Sri Ameresekere

PS: As per the telephone conversation, a similar chronology of facts would be submitted, *vis-avis*, SLIC.

Daily News - 10/7/02

X Five bidders asked to sign MoU with CPC unions

Bunkering deal runs into storm

Daily News - 10/7/02

By Ravi Ladduwahetty

The Government's decision to divest the 90 percent equity stake in Lanka Marine Services Ltd, the wholly owned Ceylon Petroleum Corporation (CPC) subsidiary dealing with a monopoly bunkering service in the Colombo Port, has run into stormy seas with the five bidders being asked to enter into a Memorandum of Understanding (MoU) with the Trade Unions.

The five prospective bidders have been told to enter into the MoU at a meeting with Chairman of the Public Enterprise Reforms Commission (PERC) Chairman, Dr. P.B. Jayasundera on Monday night.

The bidders earlier expressed their dissent about the floor price of Rs. 1.2 billion for the sale of the 90 per cent equity stake of the bunkering monopoly.

The bidders are: John Keells Holdings Ltd, Maritime Holdings Ltd in association with Fal Bunkering of the United Arab Emirates, Lanka Transformers in association with Fuji Petroleum of Japan and Van Ommeran of Bangladesh, Master Divers in association with [illegible] International of Saudi Arabia and Pioneer Bunkering Services of Sri Lanka headed by veteran business magnate Nahil Wijesuriya.

The bidders are perturbed that the PERC, in addition to demanding that they enter into an MoU with the CPC unions have also declared that the deal has a floor price of Rs. 1.2 billion which is far in excess of its worth, authoritative commercial sources told the *Daily News* yesterday.

These sources point out that the US$ 1.2 million floor price is far too much in the wake of:

(a)The Government's decision to give the Trincomalee tank farm to the Indian Oil Corporation and reducing the competitiveness of the Colombo Port.

(b)The bidders having to sign a bond with PERC which means that they have to put down 10 per cent of the floor price value and face the prospect of losing it.

(c)Colombo's bunkering market being far in excess of Singapore where Colombo's gasoline is more expensive by US$ 80- 100 per ton and fuel being more expensive by US$ 50-60 per ton.

(d) the net worth of the company not being more than US 8 million and that the floor price should have been not more than Rs. 800 million. This is in the light of the written down value of tanks which are 300,000 tonnes capacity and five years old and need of repair whose written down value is US$ 3 million (Rs. 300 million) and the two barges are worth only US$ 500,000 (Rs. 50 million) This is also on the basis that the eight-acre plot of land of the company is valued at Rs. 300,000 per perch and an acre is priced at Rs. 48 million according to market rates.

Lanka Marine Services Ltd had a Rs. 3 million turnover for the year ended 2001, gross profit of Rs. 398 million, operating profit of Rs. 215 million and a post-tax profit of Rs. 155 million. The total operating capacity is 31,007 tonnes comprising 1,082 tonnes of Marine Diesel Oil, 6,991 tonnes of Marine Gas Oil and 23,294 tonnes of Fuel Oil.

What this means is that the Ceylon Petroleum Corporation is not prepared to take further losses and liabilities following the Government's decision to reduce the prices of diesel and petrol, they lamented.

"However, what is the message that the Government intends sending to the private sector and the investors hot on the heels of the bids for the deal to be invited from the five shortlisted bidders on the floor of the Colombo Stock Exchange on Friday?", they queried.

When pointed out that the floor price of Rs. 1.2 billion was too high by the bidders at the meeting with PERC, Chairman, Dr. Jayasundera had said that it was the DFCC Bank which had valued the deal at Rs. 1.2 billion and claimed that the DFCC Bank had credibility on the valuation issues.

However, these sources point out that despite the DFCC's Bank's credibility as a financial institution, it did not have expertise in petroleum technology and that the assets of Lanka Marine Services should have been valued by an international team of valuers which also should have had petroleum experts.

Analysts also argue that a further bone of contention of the entire transaction is that the new owner of the LMS would not have afforded the ownership of the pipelines and would have to be at the mercy of the CPC.

Analysts also point out that the Government would be leaving the floodgates open for the Indian Oil Company to take over the bunkering operation as well in the backdrop of the peace process.

Daily News

Divestiture of bunkering monopoly

Keells wins leaving other bidders unhappy

13/7/

by Ravi Ladduwahetty

The country's biggest conglomerate, John Keells Holdings Ltd., yesterday emerged as the clear winner in the bid to get a 90% stake in the state-owned Lanka Marine Services Ltd, the monopoly bunkering service in the Colombo port.

The company was the only bidder of the five who paid the Rs. 120 million bid bond before the deadline therefore, they will be the new owners when the funds, the remainder from the Rs. 1.2 billion is paid, Director-General of the Public Enterprises Reforms Commission Deepal Gunaratne told the Daily News yesterday.

Meanwhile, the other four bidders expressed dissent at the manner in which the Public Enterprises Reforms Commission (PERC) handled the divestiture of this state enterprise.

They protested at the decision by PERC to ask the bidders to sign an Memorandum of Understanding with the CPC employees on July 8, which was over 40 days after the bids closed way back on May 28.

☞ Page 10

Keells wins ... Continued from page 1

When asked to comment on the allegations, PERC Director General Gunaratne said: " It is true that there was a Memorandum of Understanding (MoU) but it was to be signed between the management of Lanka Marine Services Ltd and the employees and it was logical that this agreement was binding with the new buyer of Lanka Marine Services Ltd."

Commenting on the allegation that the bidders were given only an hour to pay the Rs. 120 million bid bond, Gunaratne said that the deadline for the bid bond was outlined in the Request For Proposals (RPF) and that the bidders were expected to know this.

the dissenting bidders said they were summoned to a hurriedly arranged meeting where they were told at 12.15 pm to be present at the PERC office in Fort by 12.30 pm. The meeting finished by 1 pm and they were asked to pay the bid bond by 2 pm, they charged.

This was following the bidders being told that the MoU requirement was cancelled after the exposure in the Daily News Business and Finance pages in its Wednesday's edition.

Bidders claim that it was difficult to raise the funds at short notice as some of them had foreign collaborations.

The five bidders are: John Keells Holdings Ltd, Maritime Holdings Ltd in association with Fal Bunkering of the United Arab Emirates, Lanka Transformers in association with Fuji Petroleum of Japan and Van Ommeran of Bangladesh, Master Divers in association with Bakri International of Saudi Arabia and Pioneer Bunkering Services of Sri Lanka.

Daily News - 24th July 2002

CMI.

Lanka Marine Services sale: PERC vs bidders

DN 24 July 2002

Further to our story on the 90 percent divestiture of Lanka Marine Services Ltd in the *Daily News* edition of July 13, 2002 titled: "Keells wins leaving other bidders unhappy", the Director General of the Public Enterprises Reforms Commission, Deepal Gunaratne says:

"I wish to categorically refute the claim made in the article that the prospective bidders were required to submit a bid bond within one hour, which resulted in them being unable to bid. Short-listed bidders were issued a Requst For Proposal (RFP) document in April 2002 which specifically states that an "Undertaking to Pay" (the bid bond or the 10 percent of the price of Rs. 1.2 billion) must be made two days prior to the date of bidding on the Colombo Stock Exchange.

Since the date of the bidding was rescheduled, the bidders were informed in writing on June 25th 2002, that the new date for bidding was July 12th 2002 and that the Undertaking to Pay or the bid bond must be submitted by July 10 at 12.30 pm. PERC did call all five shortlisted bidders for a meeting on July 10 at 12.30 pm.

The meeting was called to inform the bidders that PERC would facilitate a meeting with the trade unions and the successful bidder and to discuss matters raised by the trade unions prior to the conclusion of the transaction, the PERC Director General said in his statement.

Meanwhile, the bidders say:

According to the prequalified parties, the introduction of an MOU or discussion with the LMS Union by PERC at 4 p.m. on July 8th, 2002 during a meeting at their office was badly timed. It is indeed tragic that the requirement of the MoU was introduced 40 days after the Request for Proposals. The requirement of the MoU was not there in the RFP and was introduced at the last minute. An issue of such importance being introduced just two days prior to the deadline for submission of the "Undertaking to Pay" (bid bond for 10 per cent of the floor price of Rs. 1.2 billion) caused parties with foreign collaborators put their offer on hold pending clarification from PERC.

Foreign collaborators cited Sri Lanka's business unfriendly labour laws coupled with poor productivity as the reason for placing their offer on hold.

The parties advise that PERC was in receipt of their Business Plans for over 40 days (preliminary bids closed on May 28) and as such was well aware of the bidders plans to handle the issue of the surplus staff and future plans.

Based on the Business Plans submitted, PERC could have advised/reassured CPC (owners of LMS) without raising the issue with the prospective buyers. The requirement to submit a business plan was set by PERC in the request for proposals document and 50 marks out of 100 was granted as part of the preliminary bid process. The business plan was to be a part of the Share Sale and Purchase Agreement.

Regarding the lifting of the MOU with the LMS Union, confirmation was sought from PERC throughout July 9th without success.

On July 10 PERC hurriedly summoned a meeting with 15 minutes notice at their office - 12.30 p.m. on July 10th where it was announced by Dr. Jayasundera amongst other points that the requirement to sign an MOU with the staff/union of LMS has been waived.

The meeting at PERC finished at 1 p.m., with 1 hour to go before the undertaking to pay had to be submitted and this time was inadequate to re-start the banking process bearing in mind that Foreign Collaborators had to be kept informed of the developments".