

IN THE DISTRICT COURT OF COLOMBO

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

PLAINTIFF.

No. 3155/SPL.

Nature : Special

- VS -

Value : Rs.100,000/-

Procedure : Regular

1. MITSUI AND COMPANY LIMITED, a company organized and existing under the Laws of Japan and having the Principal Place of business at 2-1, Ohtemachi 1-Chome, Chiyoda-Ku, Tokyo, Japan and having a Liaison office and/or a Place of business in Sri Lanka at No.315, Vauxhall Street, Colombo 02.
2. TAISEI CORPORATION, a Company organized and existing under the Laws of Japan and having the Principal place of business at 25-1, Nishi-Shinjuku 1-chome, Shinjuku-ku, Tokyo, Japan and having a Liaison Office and/or Place of business in Sri Lanka at No.65, High Level Road, Maharagama.
3. KANKO KIKAKU SEKKEISHA YOZO SHIBATA & ASSOCIATES, Architects & Designers, a corporation duly organized under the Laws of Japan and having the Principal place of business at No.9, Mori Building,1-2-2, Atago, Minato-ku, Tokyo, Japan.

4. HOTEL DEVELOPERS (LANKA) LIMITED, formerly known as LANKA JAPAN HOTELS LIMITED, and of No.16, Alfred Place, Colombo 03.
5. CORNEL LIONEL PERERA, Chairman/Managing Director, Hotel Developers (Lanka) Limited, of 16, Alfred Place, Colombo 03.
6. FREDERICK GERMAIN NOEL MENDIS, Director, Hotel Developers (Lanka) Limited, and of No.51/3, Dharmapala Mawatha, Colombo 03
7. KAIRSHASP NARIMAN CHOKSY, Director, Hotel Developers (Lanka) Limited, of 23/2, Sir Ernest de Silva Mawatha, Colombo 07.
8. DON PETER SEVERINUS PERERA, Director, Hotel Developers (Lanka) Limited, of No.696/2, Havelock Road, Colombo 06.
9. KAZUTAKA KOBOI, Director of Hotel Developers (Lanka) Limited, and of 6-38, Fujimicho, Chigasaki, Kasagawa, Japan.
10. KANAPATHIPILLAI SHANMUGALINGAM, Director, Hotel Developers (Lanka) Limited, and of No.4, Ramakrishna Avenue, Colombo 06.
11. KOJI ITO, Director of Hotel Developers (Lanka) Limited, and presently of No.315, Vauxhall Street, Colombo 02.

DEFENDANTS.

On this 12th day of September, 1990.

The Plaintiff of the Plaintiff above named appearing by Mr. J.W.D. Perera, Practicing under the name style of De Silva & Perera, and his assistant Mr. Vernon Gooneratna, his Attorneys-at-Law, states as follows:

1. (a) The Plaintiff above named 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, and the Managing Director of Comindtax Management Service Ltd., a limited liability Company Registered under the Companies Act No.17 of 1982 and having its Registered Office at No.167/4, Sri Vipulasena Mawatha, Colombo 10.

- (b) The Plaintiff is practicing as a Business and Management Consultant and has a prestigious Clientele and is also the Lead Consultant to a large World Bank Funded Project in Sri Lanka.
- (c) The Plaintiff is a Subscriber to the Memorandum and Articles of Association of "LANKA JAPAN HOTELS LIMITED", holding 70,000 Ordinary Shares of Rs.10.00 each and a Director of the said Company, which company changed its name to "HOTEL DEVELOPERS (LANKA) LIMITED " the said 4th Defendant Company on 20.10.1983.

True copies of the Memorandum and Articles of Association of the said "Lanka Japan Hotels Limited", its Certificate of Incorporation dated 15.03.1983, the Form 48 notifying the first Directors of the said Company, the Form 43 notifying the change of Name to Hotel Developers (Lanka) Limited and the Certificate dated 20.10.1983 giving effect to the change of name to "Hotel Developers (Lanka) Limited" are annexed hereto marked P1, P2, P3, P4(a) and P4(b) respectively and are pleaded as a part and parcel of this plaint.

- 2. (a) The 1st Defendant above named is a Company organized and existing under the Laws of Japan and having its Principal Place of Business at the address mentioned above in Japan and having a liaison office and/or a place of business at the address above mentioned within the jurisdiction of this Court, sometimes herein after referred to as "Mitsui".
- (b) The 1st Defendant Company is a member of a multinational group in business, including trade, industry, finance, commerce and construction.
- (c) The said Mitsui (1st Defendant) is a Shareholder and is represented on the Board of Directors of the 4th Defendant Company and was one of the Contractors, the Supplier and one of the Lenders to the said Hotel Developers (Lanka) Limited (4th Defendant Company) for constructing and equipping the Hilton Hotel. The said Mitsui (1st Defendant) was also a Promoter named in the Prospectus dated 6.3.1984 issued by the said Hotel Developers (4th Defendant Company) for a Public Share Issue.

A true copy of the Prospectus is annexed hereto marked P5 and pleaded as a part and parcel of this Plaint.

3.
 - (a) The 2nd Defendant above named is a Company organized and existing under the Laws of Japan having its Principal Place of Business at the address mentioned above in Japan and having a liaison office and/or a place of business at the address above mentioned, in Sri Lanka, sometimes herein after referred to as "Taisei".
 - (b) The 2nd Defendant Company is a construction company executing large construction projects both within and outside Japan.
 - (c) The said Taisei (2nd Defendant) is also a shareholder and is represented on the Board of Directors of the said Hotel Developers (4th Defendant Company) and was also one of the Contractors and also one of the Lenders to the Hotel Developers (4th Defendant Company) for constructing and equipping the said Hilton Hotel. The 2nd Defendant Company was also named a Promoter in the Prospectus dated 6.3.1984 issued by the Hotel Developers (4th Defendant) for a Public Share Issue.

4.
 - (a) The said Mitsui and the said Taisei (1st and 2nd Defendants) abovenamed acted jointly and severally as Promoters, Shareholders with representation on the Board of Directors of the said Hotel Developers (4th Defendant Company) and as Contractors and Lenders to the said 4th Defendant Company and were known and referred to as the "Mitsui/Taisei Consortium", and sometimes herein referred to also as the Mitsui/Taisei Consortium.
 - (b) The said Mitsui/Taisei Consortium (1st and 2nd Defendants) had one of its representatives on the Board of Directors of the said Hotel Developers (4th Defendant Company) as a full time resident Director in Colombo with Executive powers to manage and control the administration and the day to day affairs of the Hotel Developers (4th Defendant Company).

5.
 - (a) The 3rd Defendant above named is a Corporation duly established in Japan under the Laws of Japan and having its Head Office at the above mentioned address in Japan, sometimes herein after referred to as the "Architects".
 - (b) The 3rd Defendant is carrying on, inter alia, the business of professional Architects and Designers.
 - (c) The 3rd Defendant was the Architect and a signatory to the Construction Agreement referred to hereinafter.

6.
 - (a) The 4th Defendant abovenamed is a limited liability Company duly incorporated under the Companies Act, No.17 of 1982 and having its Registered Office and an operational office at the above mentioned address, within the jurisdiction of this Court, sometimes herein referred to as "Hotel Developers".

- (b) The said Hotel Developers (4th Defendant Company) was formerly known as "Lanka Japan Hotels Limited" which name was changed to its present name of "HOTEL DEVELOPERS (LANKA) LIMITED" on 20.10.1983.
- (c) The said Hotel Developers (4th Defendant Company) is the owning company of the Colombo Hilton Hotel situated at Echelon Square, Colombo, Sri Lanka.
- (d) The Directors of the said Hotel Developers, 4th Defendant Company in addition to the Plaintiff are as follows:-

Cornel Lionel Perera (Chairman & Managing Director)
 Frederick Germain Noel Mendis
 Kairshasp Nariman Choksy
 Don Peter Severinus Perera
 Kazutaka Kobo
 Kanapathipillai Shanmugalingam
 Koji Ito

who are respectively the 5th, 6th, 7th, 8th, 9th, 10th and 11th Defendants abovenamed and are made parties to this action for purposes of notice.

A true copy of the Form 48 dated 03.05.1990 giving the names of the present Directors of the said Hotel Developers (4th Defendant Company) is annexed hereto marked P4(c) and pleaded as a part and parcel of this Plaint.

At all times material to this action, the Executive Directors of the said Hotel Developers (4th Defendant Company) were Mr. A. Naka (from 06.03.1984 to 24.11.1986) and Mr. H. Ogami (from 24.11.1986 to 30.4.1990) who were representatives of the Mitsui/Taisei Consortium (1st and 2nd Defendants).

- 7. The cause of action herein after set out arose at Colombo within the jurisdiction of this Court.
- 8. (a) The said Lanka Japan Hotels Ltd., was formed and incorporated for the purpose of promoting, and owning a first class Hotel to be built at the Echelon Square, Colombo, Sri Lanka to be managed by Hilton International, New York, an internationally known hotel management company.
- (b) The Plaintiff having been actively involved in the promotional work of the said Hotel Project since 1979, in addition to being a Subscriber to the Memorandum & Articles of Association,

was one of the first Directors of the said Company.

9. (a) On or about 30.3.1983, a Preliminary Agreement was entered into by and between the Mitsui/Taisei Consortium (1st and 2nd Defendants) and Cornel & Company Limited, a company incorporated under the said Companies Act, to construct and operate an International Five Star Class Hotel with 452 Bays i.e. Guest Room Bays having a total floor area of about 40,000 Square Meters and hereinafter sometimes referred to as the "Hilton Hotel".
- A true copy of the Preliminary Agreement is annexed hereto marked P6 and pleaded as a part and parcel of this Plaint.*
- (b) The proposed said Hilton Hotel was to be built on approximately 6.6 Acres of land which land was to be first leased by the Government of Sri Lanka to the said Cornel & Company Limited, and in consideration of the allotment of Shares in the said Hotel Developers (4th Defendant Company) the said Cornel & Company Limited underleased the said lease of the said land to the said Hotel Developers (4th Defendant Company).
- (c) The said Hilton Hotel to be built according to the Architectural Plans submitted by the said Architects (3rd Defendant) and annexed to the said Construction Agreement was to be managed by the said Hilton International of New York, U.S.A.
- (d) The Contract Price for Construction of Jap. Yen 11,952,000,000/- with the said Mitsui/Taisei Consortium (1st and 2nd Defendants) and the Contract Price for the Supplies of Furnishings, Fixtures and Equipment of Jap. Yen 1,680,000,000/- with Mitsui (1st Defendant) and the Contract Price for the Design and Supervision Services of Jap. Yen 400,000,000/- with the Architects (3rd Defendant) had been agreed upon at the time of execution of the said Preliminary Agreement on 30.03.1983.
- (e) A Letter of Award had been issued by the said Hotel Developers (4th Defendant Company) to the said Mitsui/ Taisei Consortium (1st and 2nd Defendants) for the construction of the proposed hotel, on 30th March 1983, with the signing of the said Preliminary Agreement, which fact had been confirmed in the Construction Agreement subsequently executed on 31st January 1984 referred to hereinafter.
10. (a) Hilton International's letter dated 31.03.1983 (a copy of this letter was sent to the 1st Defendant) confirmed that they were willing to change the average room rate of the Forecast of Income and Expenses that had been made by them in August 1981, changing the Average Room Rate for the first full year of operation from U.S.\$70 to U.S.\$73. The forecast of Hilton International made in August 1981, was in respect of 456 Rooms (452 Rooms for Guests and 4 Rooms to be used for the Manager) on which basis the said Forecast of Income and Expenses had been computed.

A true copy of letter dated 31.03.1983 and the said Forecast of Income and Expenses is annexed hereto marked P7 (a) and P7 (b) and pleaded as a part and parcel of this Plaintiff.

- (b) The said Forecast of Income and Expenses prepared by Hilton International, was in conformity with the set of Architectural Plans finalised for the said Hotel Project by the said Architects (3rd Defendant), which provided for 456 Rooms being 452 Guest Room Bays and 4 Room Bays as the Manager's Apartment.

A true copy of the said Architectural Plans is annexed hereto marked P8 and pleaded as a part and parcel of this Plaintiff.

11. After the execution of the said Preliminary Agreement the Government of Sri Lanka also became a party to the said Hotel Project by entering into a joint-venture with the said three parties to the said Preliminary Agreement, namely Cornel & Company Limited and the said Mitsui/Taisei Consortium, (1st and 2nd Defendants) which led to the formulation of an Investment Agreement, by and between the said three parties and the Government of Sri Lanka, for the construction of the said Hilton Hotel comprising 452 Guests Room Bays.

A true copy of the said Investment Agreement dated 31.01.1984 is annexed hereto marked P9 and pleaded as part and parcel of this Plaintiff.

12. In compliance with the said Investment Agreement the Articles of Association of the Hotel Developers (4th Defendant Company) was amended inter alia, to empower the parties to the said Investment Agreement to make appointments to the Board of Directors of the said Hotel Developers (4th Defendant Company). The Plaintiff continued to function as a Director of the said Hotel Developers (4th Defendant Company).

A true copy of the said Memorandum & Articles of Association, with the amendments and, the Form 43 notifying such Amendments to the Registrar of Companies are annexed hereto marked P10(a) and P10(b) respectively and are pleaded as a part and parcel of this Plaintiff.

13. (a) In order to achieve the objects of the said Preliminary Agreement, on or about 31.1.1984 the said Hotel Developers (4th Defendant Company) entered into an Construction Agreement with the 1st, 2nd and 3rd Defendants abovenamed for the construction of an International Five Star Class Hotel of 22 storeys containing 452 bays i.e. Guest Room Bays with a construction area of 39,042.3 square meters on the said land for the price or sum of Japanese Yen 11,952,000,000.00 equivalent to Sri Lanka Rupees 1,328,584,320, on a fixed

price turn-key basis.

- (b) The drawings and technical specifications which fully described the said Hotel Project were attached to the said Construction Agreement and formed a part and parcel of the said Construction Agreement.

A true copy of the said Construction Agreement dated 31.1.1984 is annexed hereto marked "P11" and is pleaded as a part and parcel of this plaint.

- (c) In pursuance of the said Construction Agreement the General Conditions of Contract for Construction, agreed upon by and between the said parties was also executed on 31.1.1984, forming a part and parcel of the said Construction Agreement marked P11.

A true copy of the said General Conditions of Contract for Construction is annexed hereto marked "P12" and pleaded as a part and parcel of this Plaint.

14. (a) On or about 31.1.1984, in pursuance of the said Preliminary Agreement, the said Hotel Developers (4th Defendant Company) entered into an Agreement with the said Mitsui (1st Defendant) for the Supply and Delivery of Furnishings, Fixtures and Equipment to the said Hilton Hotel for the price or sum of Japanese Yen 1,860,000,000.00 (equivalent to Sri Lanka Rupees 206,757,600), which Supplies Contract provided for the supply of Furnishings, Fixtures and Equipment for an International 5 Star Class Hotel with 452 Bays i.e. Guest Room Bays.

A true copy of the said Supplies Contract dated 31.1.1984 is annexed hereto marked "P13" and is pleaded as a part and parcel of this plaint.

- (b) The Scope of such supplies of Furnishings, Fixtures and Equipments was described in Exhibit "A" attached to the said Supplies Contract forming a part and parcel thereof.

15. (a) On or about 31.1.1984, the 4th Defendant Company entered into a contract with the Architects (3rd Defendant) abovenamed for the Design and Supervision for the said Hilton Hotel stipulated as an International 5 Star Class Hotel with 452 bays, i.e. guest room bays, for the price or sum of JY 400,000,000.00 (equivalent to Sri Lanka Rupees 44,464,000).

A true copy of the said Design and Supervision Contract dated 31.1.1984 is annexed hereto marked "P14" and is pleaded as a part and parcel of this Plaint.

- (b) Further the said Architects (3rd Defendant) agreed and undertook as stipulated in the said Supplies Contract to supervise the quality and specifications etc. of the supplies being made under the said Supplies Contract.

16. (a) On or about 31.1.1984 the said Hotel Developers (4th Defendant Company) entered into a Loan Agreement with the said Mitsui/Taisei Consortium (1st and 2nd Defendants) abovenamed for a loan of JY 12,300,000,000.00 (equivalent to Sri Lanka Rupees 1,367,268,000) to be disbursed by the said 1st and 2nd Defendants. The said Loan Agreement stipulated that the proceeds of the loan were to be utilised for the payment to the said Mitsui/Taisei Consortium (1st and 2nd Defendants) for the Construction of the said 5 Star Class Hotel consisting of 452 Guest Room Bays under the said Construction Agreement, and to the said Mitsui 1st Defendant for the Supply and delivery of the goods referred to in the said Supplies Contract, and to the said Architect (3rd Defendant) for Design and Supervision services under the said Design and Supervision Contract.

A true copy of the said Loan Agreement is annexed hereto marked "P15" and is pleaded as a part and parcel of this plaint.

- (b) The said Loan Agreement contained appendices A, B and C showing the Loan Advances to be made by the Mitsui/Taisei Consortium (1st and 2nd Defendants), and payments for Construction and Supplies to be made from such Loan Advances to the said Mitsui/Taisei Consortium (1st and 2nd Defendants) and Loan Re-payments with Interests to be repaid by the said Hotel Developers (4th Defendant Company), over a 12 year period in 24 semi-annual installments to the said Mitsui/Taisei Consortium (1st and 2nd Defendants) above named.
- (c) The said 24 semi-annual loan repayment installments with interest spread over 12 years, were in conformity with the Profitability Forecast and Cash Flow Projections formulated and submitted for the said Hilton Hotel Project by the said Mitsui (1st Defendant). These profitability projections had been computed on the basis of 452 Guest Rooms.

A true copy of the said Profitability Forecast and Cash Flow Projections is marked P16 and pleaded as a part and parcel of this Plaint.

17. (a) In terms of the Construction Agreement, Supplier's Contract and the Design and Supervision Contract payments were to be made to the said Mitsui/Taisei Consortium (1st and 2nd Defendants) and the said Architects, in terms of Annexures appended to the said Agreements/Contracts, but without the issue of any Architects proper certificates for work actually done.
- (b) The payments referred to in paragraph 17 (a) above were executed through a bank account

maintained in the name of the said Hotel Developers (4th Defendant Company), opened for this purpose at the Fuji Bank, Tokyo. The said Mitsui/Taisei Consortium (1st and 2nd Defendants) first advanced and deposited funds into the said Bank Account, as Lenders in accordance with the Loan draw down Schedule attached to the said Loan Agreement and at the same time, receiving the above mentioned payments primarily to themselves i.e. excluding the payments to the Architects (3rd Defendant), on the basis of standing instructions given by the said Hotel Developers (4th Defendant Company) to effect such payments in accordance with the said annexures to the said Construction Agreement, Supplies Contract and Design and Supervision Agreement. Such decision was taken by the Board of Directors of the said Hotel Developers (4th Defendant Company).

18. The said Loan Agreement stipulated that the said loan of JY 12,300,000,000.00 (equivalent to Sri Lanka Rupees 1,367,268,000) be guaranteed by the Government of Sri Lanka in a like amount, in accordance with the terms and conditions agreed upon in the said Investment Agreement. Accordingly, the Government of Sri Lanka guaranteed the repayment of the said Loans of JY 12,300,000,000.00 (equivalent to Sri Lanka Rupees 1,367,268,000) to the Mitsui/Taisei Consortium (1st and 2nd Defendants) abovenamed.

True copies of the said Letters of Guarantee annexed to the said Loan Agreement are annexed hereto marked P17(a) and P17(b) and pleaded as a part and parcel of this Plaint.

19. (a) The Plaintiff states that the Investment Agreement, Construction Agreement, Supplies Contract, Design & Supervision Contract and the Loan Agreement marked "P9", "P11", "P13", "P14" and "P15" respectively were tabled and approved by the Board of Directors of the said Hotel Developers (4th Defendant Company) which Agreements described the said Hilton Hotel to be 22 storeys high containing 452 bays, i.e. guest room bays.
- (b) At the said Board Meetings the Board had noted that the said Legal Agreements had been formulated and finalised by and between the Lawyers of the said Hotel Developers (4th Defendant Company) and the Lawyers of the Mitsui/ Taisei Consortium (1st and 2nd Defendants). The Board had also noted that the said Legal Agreements and documents had been subject to the scrutiny and approval of Hamada and Matsumoto, Attorneys-at-law, in Tokyo, Japan who had been retained by the Ministry of Finance and Planning for and on behalf of the Government of Sri Lanka for this purpose and that they had also been approved by the Hon. Attorney General of Sri Lanka.
- (c) At the said Board Meeting the said Profitability Forecast and Cash Flow Projections for a period of 12 years computed on the basis of 452 guest rooms forming the Financial Plans of the said Hotel Developers (4th Defendant Company) prepared and submitted by the said Mitsui (1st Defendant) were tabled.

- (d) Further the Board noted that the proposed Hotel was to comprise 452 guest rooms to be built up to 5 Star Class standards in keeping up to such standards required by Hilton International, New York.
- (e) A complete set of the Architectural Plans together with the Construction Drawings prepared by the said Architects (3rd Defendant) were also tabled at the said Board Meeting and the Board had noted that the Hotel Project had been developed in close co-operation and collaboration with the Mitsui/Taisei Consortium (1st and 2nd Defendants).

A true copy of the said Minutes of the Board Meetings held on 07.01.1984 and 31.01.1984 are annexed hereto marked P18 (a) and P18 (b) and are pleaded as a part and parcel of this plaint.

- 20. (a) On or around 26.3.1984 the said Hotel Developers (4th Defendant Company) issued a Prospectus for the Public Issue of 11,947,505 Ordinary shares of Rupees Ten each i.e. for Rupees 119,475,050.00.
- (b) The Promoters named in the said Prospectus were Cornel & Company Limited, Delmege Forsyth & Company Limited, Mitsui & Company Limited, Japan, (1st Defendant) and Taisei Corporation, Japan, (2nd Defendants).
- (c) The key feature of the said Hilton Hotel that was to be built as set out in the Prospectus appearing in page 8 there in, was to have a 452 roomed tower concept construction going up to 22 floors. Amongst other features described was covered car parking facilities for up to 400 vehicles.
- 21. (a) In the context of the final stages of project formulation and implementation a number of officials from the Mitsui/ Taisei Consortium from Japan were in Sri Lanka particularly from the latter half of the year 1983. The principal officer who handled all matters pertaining to the project formulation work, documentation, negotiation and the finalisation of Agreements was Mr. Akio Kato, of Mitsui, who had been visiting Sri Lanka from time to time in connection with the said project formulation, negotiation and development work.
- (b) Amongst other expatriates some of the Officers who were actively involved during this time in association with Mr.A. Kato were K. Fukushi and J. Kojima both of Mitsui; and Toru Kosugi and Seiichi Shinohara both of Taisei; and Kenzo Watanbe and Tomio Okabe both of KKS; and Fergus Paul Rooney, Lawyer of Mitsui, Masafumi Anami, Legal Dept of Taisei.

22. (a) In or about March 1984 the said Mitsui/Taisei Consortium (1st and 2nd Defendants) commenced construction of the said Hilton Hotel in terms of the Construction Agreement under the Supervision of the said Architects (3rd Defendant) abovenamed.
- (b) Prior to the commencement of construction of the said Hilton Hotel on or about 19.10.1983 the Architectural Plans of the said Hilton Hotel had been submitted for Statutory Approval to the Urban Development Authority.

A true copy of the Urban Development Authority Paying-in-Slip dated 19.10.1983 is annexed hereto marked P19 and pleaded as a part and parcel of this Plaintiff.

- (c) A copy of the said Architectural Plans had been tabled at the Board of Directors of the said Hotel Developers (4th Defendant Company) on 7.1.1984 and the Board had noted that the Hotel was to comprise 452 Guest Rooms and further that the Profitability Forecast and Cash Flow Projections prepared by the said Mitsui (1st Defendant) tabled at the said Board Meeting was also computed on the basis of 452 guest rooms.
- (d) As evidenced by the Urban Development Authority's letter dated 19.1.1984 addressed to the Fire Brigade the said Architectural Plans had comprised 27 sheets.
- (e) The Urban Development Authority had approved the said Architectural Plans as per their letter dated 23.3.1984.

True copies of the said letters dated 19.1.1984 and 23.3.1984 are annexed hereto marked P20(a) and P20(b) respectively and are pleaded as a part and parcel of this Plaintiff.

23. (a) The Plaintiff, by his letter dated 22.7.1985, submitted to the Board, had inter alia requested for Reports from the said Architects (3rd Defendant) and the said Mitsui/Taisei Consortium, (1st and 2nd Defendants) showing the progress of construction monitored against projected construction.

A true copy of the said letter dated 22.07.1985 and the said Board Minutes dated 25.07.1985 are marked P21(a) and P21(b) and are pleaded as a part and parcel of this Plaintiff.

- (b) The Plaintiff did not receive the Reports called for nor any reply to his request stated in paragraph 22(a) above.

24. Instead, the Executive Director, Mr. A. Naka, representative of the Mitsui/Taisei Consortium (1st and

2nd Defendants) submitted a Report from the Mitsui/Taisei Consortium on or about 30.10.1985 that a fire had occurred at the Mitsui/ Taisei Consortium Site Office located at the said Hilton Hotel, which was forwarded to the Board of Directors of Hotel Developers, (4th Defendant Company) as per letter dated 30.10.1985. The report expressly states that all Drawings and Documents had got burnt and that the principals of the Mitsui/Taisei Consortium, (1st and 2nd Defendants) in Tokyo had dispatched copies of all Drawings and Documents and that the construction work on the Hilton Hotel project had recommenced. However, the Plaintiff has discovered only in March 1990 that the said drawings and documents that had been replaced by the Principals of the Mitsui/Taisei Consortium (1st and 2nd Defendants) are not in conformity with the Original Approved Architectural Plans which had formed a part and parcel of the Construction Agreement.

A true copy of the said Letter dated 30.10.1985 together with the Report on the fire attached thereto are annexed hereto marked as P22(a) and P22(b) and are pleaded as a part and parcel of this Plaintiff.

25. On or about 08.06.1987 the 5th Defendant reported to the Board of the handing over of the keys of the said Hilton Hotel to Hilton International, New York on 30th April 1987.

A true copy of the said Minutes of the Board Meeting held on 08.06.1987 is annexed hereto marked P23 and pleaded as a part and parcel of this Plaintiff.

26. (a) After the opening of the said Hilton Hotel on 01.7.1987 for operations, the Mitsui (1st Defendant) sent its representative, Mr.M.Kubota, specially to Colombo to submit to the Board of Directors of the 4th Defendant Company, the revised Profitability Forecasts and Cash Flow Projections of the said Hilton Hotel.
- (b) The said Mr. M. Kubota, by invitation, attended Board Meetings of the 4th Defendant Company held on or about 15.07.1987, 12.11.1987 and 18.11.1987 in respect of the Profitability Forecasts and the Cash Flow Projections of the said Hilton Hotel.

True copies of the Minutes of the said Board Meetings held on 15.07.1987, 12.11.1987 and 18.11.1987 are annexed hereto marked P24(a), P24(b) and P24(c) respectively and are pleaded as a part and parcel of this Plaintiff.

- (c) The said revised Profitability Forecasts and Cash Flow Projections spread over 24 years, submitted by the 1st Defendant dated 26.06. 1987 had taken into account the lower rates of room occupancy and average room rates, in view of the prevalent conditions in the hotel industry at the time the said Hilton Hotel opened for operations, but however the said computations were based on 452 guest rooms.

- (d) Whilst studying and reviewing the said revised Profitability Forecasts and Cash Flow Projections, dated 26.06.1987 submitted by the 1st Defendant and when comparing these figures with the actual performance of the Hilton Hotel as indicated by the Hilton Management Statements for the first few months of operation, the Plaintiff noticed, that whilst the 1st Defendant had computed the Profitability Projections on the basis of 452 Guest Rooms, the Hilton Monthly Statement had reflected only 387 Guest Rooms.
- (e) The representative of Mitsui (1st Defendant), Mr.M.Kubota could not explain this discrepancy, but however immediately thereafter forwarded a further Revised Profitability Forecast and Cash Flow Projections re-computed on the basis of 387 guest rooms.

True copies of the Monthly Summary Reports from Hilton International, the revised Profitability and Cash Flow Projections submitted by Mitsui (1st Defendant) and the Re-computed Revised Profitability Forecast and Cash Flow Projections submitted by the 1st Defendant are annexed hereto marked P25(a), P25(b) and P25(c) respectively and are pleaded as a part and parcel of this Plaint.

27. (a) The Plaintiff brought this discrepancy to the notice of the Board and submitted a Board Paper at the Board Meeting held on or about 30.12.1987 setting out certain material and important facts and, in particular, the discrepancy in the number of guest room bays, which would make it impossible to repay the said total debt on the basis of 387 guest rooms even at 100 % room occupancy and even at an average room rate of US\$ 100.00 per guest room.
- (b) The Plaintiff states that since he insisted on seeking clarifications on this matter from the Mitsui/Taisei Consortium (1st and 2nd Defendants), at the said Board Meeting where also Mr. H. Ogami, the Executive Director, the representative of the said Mitsui/Taisei Consortium (1st and 2nd Defendants) was present and who was aware of the discussions at the said Board Meeting of Hotel Developers (4th Defendant Company) and the contents of the said Board Paper dated 30.12.1987, the Plaintiff was requested by the other Directors to draft a letter to be addressed to the Mitsui/Taisei Consortium (1st and 2nd Defendants).
- (c) At the next Board Meeting held on or about 13.01.1988 the Plaintiff tabled a draft of such a letter, which included the discrepancy in the number of guest room bays and the impossibility of servicing the said total debt.
- (d) The Board decided that the Chairman and Managing Director Mr. Cornel L Perera and the then Executive Director Mr.H. Ogami, the representative of the Mitsui/Taisei Consortium (1st and 2nd Defendants) should review the said draft letter and prepare a final draft letter and the copies of the final draft letter be sent to Messrs F.G.N. Mendis and K.N. Choksy, both Directors of Hotel Developers (4th Defendant Company) who were absent from the said Meeting, for their consent and that thereafter the letter be sent to the Mitsui/Taisei

Consortium.

- (e) At the next Board Meeting held on or about 28.01.1988 Mr. Cornel L. Perera, Chairman and Managing Director of Hotel Developers (4th Defendant Company) reported that the said letter dated 14th January 1988 had been dispatched with the approval of all the Directors. The said letter included the subject matter of the discrepancy of the number of guest room bays and the impossibility of servicing the said total debt.

True copies of the Minutes of Board Meetings dated 30.12.1987, 13.01.1988, 28.01.1988, and the Board Paper dated 30.12.1987, the draft letter tabled on 13.01.1988 and the Final Letter dated 14.01.1988 are annexed hereto marked P26(a), P26(b), P26(c), P26(d), P26(e) and P26(f) respectively and are pleaded as a part and parcel of this Plaintiff.

28. (a) The reply from the said Mitsui/Taisei Consortium (1st and 2nd Defendants) to the said letter dated 14.01.1988, was a telex dated 29.1.1988, in response to the queries raised. In the said telex an explanation had been attempted, which was confusing and did not clarify the matter. However, inter alia, the telex confirmed that there was no change in the number of room bays specified as 452 guest room bays in the Original Plan. The Plaintiff states that even at this stage, that the Mitsui/Taisei Consortium misled the Board of Directors of Hotel Developers (4th Defendant Company).

A true copy of the said telex dated 29.01.1988 is annexed hereto marked P27 and is pleaded as a part and parcel of this Plaintiff.

- (b) Subsequently, the Executive Director, Mr. H.Ogami, Representative of the Mitsui/Taisei Consortium (1st and 2nd Defendants) forwarded a revised Profitability Forecasts and Cash Flow Projections dated 01.02.1988 clearly indicating on a attached note that these Profitability Forecasts and Cash Flow Projections are based on 387 guest rooms.

True copy of the said revised Profitability Forecasts and Cash Flow Projections are annexed hereto marked P28 and pleaded as a part and parcel of this Plaintiff.

- (c) The Plaintiff states that even at this stage the Mitsui/Taisei Consortium was endeavoring to mis-lead the Board of Directors of the 4th Defendant Company.

29. (a) The Plaintiff not being satisfied with the said explanations and clarifications, expressed doubts in this regard in reviewing the Profitability Forecasts and Cash Flow Projections with two other Directors (in accordance with the request of the Board) namely; Mr. M.T.L. Fernando and Dr. A.C. Randeni, both of whom were the then nominee Directors of the

Government of Sri Lanka, on the Board of Directors of Hotel Developers (4th Defendant Company).

- (b) In the circumstances the said Mr. M.T.L. Fernando, (Fellow Chartered Accountant and Precedent Partner of Ernst & Young) suggested at the Board Meeting held on or about 25.5.1988 that it would be prudent to retain the services of an Independent Engineer for the purpose of final inspection, of the said Hilton Hotel building and the Plant and Machinery installed therein, and to Report thereon commenting further that the Architects, the 3rd Defendant above named, are more or less connected with the Contractors, the Mitsui/Taisei Consortium (1st and 2nd Defendants).

A true copy of the said Board Minutes dated 25.5.1988 is annexed hereto and marked P29 and pleaded as a part and parcel of this Pleint.

- (c) Since the then Executive Director, Mr. H. Ogami, Representative of the Mitsui/Taisei Consortium, (1st and 2nd defendants) had objected to this suggestion, it had been decided to obtain the advice of Mr. K.N. Choksy, Director of Hotel Developers (4th Defendant Company) who had been absent from this Board Meeting.
30. (a) The matter of an examination by an Independent Engineer was awaiting the advice of Mr. K.N. Choksy, Director of Hotel Developers (4th Defendant Company). The Final Certificate had yet to be issued by the Architects, (3rd Defendant) although the final inspection had been reported to have been carried out on the 24th and 25th March 1988.
- (b) At the Board Meeting held on or about 12.8.1988, Mr. Cornel L. Perera, Chairman and Managing Director of Hotel Developers (4th Defendant Company) , tabled a Note from Mr. K.N. Choksy, Director, Hotel Developers (4th Defendant Company) , dated 8.8.1988 on the question of an examination by an Independent Engineer in addition to the Architects, (3rd Defendant). The said Note from Mr. K.N. Choksy inter alia stated -

"In my view, this does not appear to be necessary. Clause 16 requires the Architect to carry out an "Inspection on Completion" and to issue the Completion Certificate if satisfied after such inspection that the construction work is acceptable. This the Architect has done. The Architect is the owner's agent and technical adviser for this purpose, and his inspection and certification is an adequate protection to both the Board and the shareholders that the construction is in order in every respect. The Board is entitled to rely on the Architect's Certificate.

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

the contractors are concerned, they will not be bound by such a Report".

A true copy of letter dated 08.08.1988 from the said Mr. K. N. Choksy and a true copy of the said Minutes of the said Board Meeting held on 12.08.1988 are annexed hereto and marked P30(a) and P30(b) respectively and are pleaded as a part and parcel of this Plaint.

- (c) In this background the Board of Directors of Hotel Developers (4th Defendant Company) decided not to retain an Independent Engineer. The Executive Director, Mr. H. Ogami, representative of the Mitsui/Taisei Consortium (1st and 2nd Defendants) objected to the appointment of an Independent Engineer. The Plaintiff however, thought that this decision was not proper but could not change the decision taken by the Board.
- (d) On subsequent representations made by the Plaintiff, when the Plaintiff came to know of the inadequacy of the Completion and Final Certificates issued by the Architects (3rd Defendant), and on a suggestion made by Mr. K. Shanmugalingam, a nominee Director of the Government of Sri Lanka on Hotel Developers (4th Defendant Company), the Plaintiff was authorized to obtain the assistance and services of a local Architect/Engineer.

True copies of the said Completion Certificate dated 30.4.1987 and the Final Certificate dated 25.08.1988 are annexed hereto marked P31(a) and P31(b) respectively and are pleaded as a part and parcel of this Plaint.

- 31. (a) Therefore in accordance with the suggestions made by Mr. K. Shanmugalingam the Nominee Director of the Government of Sri Lanka, on the Board of Directors of Hotel Developers (4th Defendant Company) and as authorised by the Board of Directors of the said Hotel Developers (4th Defendant Company), for the Plaintiff to obtain the services of a local Architect/Engineer by way of assistance to probe this matter further, the Plaintiff engaged the services of Mr. Shelton Wijayaratra, F.I.A.(Sri Lanka) A.R.I.B.A., A.A. Dip (Lond) A.I. Arb. of Messrs Shelton Wijayaratra, Williams and Associates. Mr. Shelton Wijayaratra is a Senior Chartered Architect who has also been a one time President of the Institute of Chartered Architects, Sri Lanka and has a very wide and varied experience in the Hotel Industry.
- (b) 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).
- (c) As already set out herein above Hilton International's Forecast of Income and Expenses submitted in August 1981 had been based on the said Architectural Plans which had

provided for 456 guest room bays on 19 guest room floors; the said Forecast had been referred to and confirmed by Hilton International's letter dated 31st March 1983, which letter had also been copied to Mitsui, the 1st Defendant. The Mitsui/Taisei Consortium, the 1st and 2nd Defendants, had been issued the Letter of Award for Construction on 30th March 1983.

- (d) The Plaintiff required the said Mr. Shelton Wijyaratna to examine the said Original Architectural Plans referred to in Sub-paragraph (b) herein above and compare the same with the set of the unauthorised amended Architectural Plans submitted in 1985 and approved in April 1986.

32. Mr. Shelton Wijyaratna has issued a Report dated 22nd August 1990 addressed to the Plaintiff in this regard. The main differences pointed out in the said Report are as follows:-

- i) the height of the building as per the said Original Architectural Plan, had been 274.6 feet whilst, as per the unauthorised Amended Architectural Plan the height of the building is 233.9 feet.
- ii) the number of floors in the said Original Architectural Plan including a mezzanine floor and the ground floor has been 23 floors whilst the unauthorised Approved Architectural Plan has only 20 floors including the ground floor and has no mezzanine floor in the main building.
- iii) the said Original Architectural Plan had provided for 19 floors of Guest Rooms whilst the said unauthorised Amended Architectural Plan had provided for only 17 floors of guest rooms.
- iv) the said Original Architectural Plan had provided for 456 guest room bays, whilst the said unauthorised Amended Architectural Plans had provided for 408 guest room bays plus a further 17 guest room bays depicted on earlier lobby areas.
- v) the said original Architectural Plans had provided basement levels going down to a 30.5 feet below the ground level taking Parsons Road, as a datum, whilst the unauthorised amended Architectural Plans does not have a basement and the ground floor is stated to be a partly sunken at certain sections upto 4.1 feet below the ground level taking Parsons Road as a datum.
The Plaintiff states that the covered car parking for 400 vehicles as reported in the Prospectus was to be in the basement area and not on ground floor and upper ground floor areas, which are very valuable in the said Fort area and could be utilised for high income generating and profitable commercial usage.
- vi) Mr. Shelton Wijyaratna's Report has also pointed out that in the absence of the

basement in the unauthorised Amended Architectural Plans, as opposed to the basement provided in the said Original Architectural Plans, the two foundations too could differ.

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

A true copy of the Report prepared by Mr. Shelton Wijayaratna, Chartered Architect, is annexed hereto marked P32(a) and a true copy of the said Schedules of the Architects (3rd Defendant) dated 15.07.1985 marked P32(b) are both annexed hereto and same are pleaded as a part and parcel of this Plaint.

Also a true copy of the unauthorised Amended Architectural Plans bearing the Approval Seal of the Urban Development Authority dated 29.04.1986 marked P54 is annexed hereto and same is pleaded as a part and parcel of this Plaint.

33. (a) The Plaintiff points out that the Completion Certificate had been issued by the Architects, (3rd Defendant) dated 30.4.1987, and that at the said Board Meeting held on or about 25.5.1988, it had been confirmed that the final inspection had been carried out by the Architects, (3rd Defendant), on the 24th and 25th March 1988.
- (b) However, the Final Certificate significantly dated 25.08.1988 from the Architects (3rd Defendant) had been tabled at the Plaintiff's request at the Board Meeting only on 4.10.1988.

A true copy of the Board Minutes of the said Board Meeting held on 4.10.1988 is annexed hereto marked P33 and is pleaded as a part and parcel of this Plaint.

- (c) The Plaintiff points out that even though the final inspection is stated to have been carried out on 24th and 25th March 1988, the Final Certificate had been issued only after the Board Meeting held on 12.08.1988 where the decision had been made not to retain the services of an Independent Engineer.
- (d) The Plaintiff states that the decision not to appoint an Independent Engineer at that point of

time in early 1988 prior to the issue of the Final Certificate dated 25.8.1988 is now shown to be wrong and detrimental to the interest of the Hotel Developers (4th Defendant Company) and its Shareholders. The Plaintiff further states that had an Independent Engineer been appointed as demanded for in early 1988, the Hotel Developers (4th Defendant Company) would not have been prevented from ascertaining and finding out the actual position as has now been discovered, with much effort and endeavour as set out hereinafter. Further the payment of U.S.\$ 2.0 million (Rupees 80 million) made in the circumstances hereinafter referred to would not have been made to Mitsui/Taisei Consortium (1st and 2nd defendants).

34. (a) The discussions and negotiations with the 1st and 2nd Defendants for the rescheduling of the Cash Flow only resulted in the 1st and 2nd Defendants postponing re-payments falling due to a given date 11th March 1990.
- (b) The Plaintiff emphatically pointed out that it was impossible and impracticable for the 4th Defendant Company to make such payments on the said given date and that a long term rescheduling of the said Loans would have to be agreed upon prior to the said date, pointing out repeatedly that the short-fall in the availability of the number of guest room bays, thereby affecting the Profitability Forecasts and the Cash Flow and consequently the debt service ability.
35. (a) In accordance with the interim arrangement to postpone the intervening payments to the said date 11.3.1990, the Mitsui/Taisei Consortium (1st and 2nd Defendants) submitted draft Debt Rescheduling Agreements with a stipulation requiring a commitment to mortgage the said Hilton Hotel property to the Mitsui/Taisei Consortium (1st and 2nd Defendants) which were tabled at a Board Meeting of the 4th Defendant Company held on or about 12.7.1989.
- (b) On objections raised by the Plaintiff and Dr. A.C. Randeni, the then Nominee Director of the Government of Sri Lanka, on the Board of Hotel Developers (4th Defendant Company), the Board agreed to execute the said Agreements, with the explicit deletion of the clause stipulating a mortgage requirement.
- (c) The Plaintiff and Dr. A.C. Randeni maintained that the said Mitsui/Taisei Consortium (1st and 2nd Defendants) could not have both a State Guarantee and a Mortgage.
- (d) However, the said Agreements had been subsequently executed surreptitiously on or about 17.7.89, 18.7.89 and 19.7.89 including the said mortgage clause and this was discovered only at the Board Meeting held on 6.11.1989 when the Plaintiff repeatedly insisted on having the said signed Agreements tabled at the Board of the said Hotel Developers (4th Defendant Company).
- (e) Further the Secretary, Ministry of Finance by his letter dated 20.11.1989 addressed to the said Hotel Developers (4th Defendant Company), required that immediate steps be taken to

delete the said Mortgage Clause from the said Debt Rescheduling Agreements.

True copies of the said Debt Rescheduling Agreements marked P34(a), the Minutes of the said Board Meeting held on 06.11.1989 marked P34(b) and the said Letter from the Secretary, Ministry of Finance marked P34 (c) are annexed hereto and pleaded as part and parcel of this Plaint.

- (f) The said mortgage clause however, had been deleted, on the repeated insistence of the Plaintiff, only on 17.5.1990.

A true copy of the said Amendment is annexed hereto marked P35 and is pleaded as a part and parcel of this Plaint.

36. (a) The said incident of the surreptitious inclusion of the mortgage clause referred to herein above caused grave doubt in the mind of the Plaintiff of the honesty, integrity and intentions of the officials of the Mitsui/Taisei Consortium (1st and 2nd Defendants).
- (b) Accordingly, from November 1989 the Plaintiff, though not an Executive Director and only a Board member, decided to probe into all relevant matters.

37. Immediately thereafter the Plaintiff by exchange of letters with the said Executive Director, Mr. H. Ogami, obtained confirmation that other than the said original Agreements entered into on 31.01.1984 referred to herein above there had been no other amendments or agreements except the Agreement for Interior Design Work and a Contract for the supply of transformers.

True copies of the said letters dated 27.11.1989, 29.11.1989, 08.12.1989, and 08.12.1989 are annexed hereto marked P36 (a), P36 (b), P36 (c) and P36(d) respectively and are pleaded as a part and parcel of this Plaint.

38. (a) When the Mitsui/Taisei Consortium, (1st and 2nd Defendants) abovenamed pressed for payment at a meeting of the Board of Directors of the said Hotel Developers (4th Defendant Company) held on or about 20.11.1989, since the suspicions of the Plaintiff had already been aroused, the Plaintiff called for the Completion Certificate, the Bills of Quantities including the Final Measurements and was shocked to be informed that other than the Completion Certificate there were no Bills of Quantities and Final Measurements.

A true copy of the said Board Minutes of 20.11.1989 is annexed hereto marked P37 and is pleaded as a part and parcel of this Plaint.

- (b) The Plaintiff received the Completion Certificate only in November 1989 and it is then in the

absence of other documentation that the Plaintiff realised that both these Certificates i.e. the Completion Certificate and the Final Certificate were mere letters which were unsatisfactory and unacceptable and in no way conformed to the form of a Completion Certificate recognised and accepted in the Construction Industry which would include certified Specified Bills of Quantities giving the Final Measurements and rectifications and defects to be attended to prior to the issue of the Final Certificate.

- (c) The Plaintiff observed that he could not accept that such leading International Construction Companies and Professional Architects had made no final quantities and measurements including relevant specifications, for a Project of this magnitude and whether the said inspection was purely on a visual and on an assumption basis in the absence of such bills of quantities and measurements as is the normal custom and practice in the construction industry.

39. By Memoranda dated 27.11.1989 and 13.12.1989 tabled at the Board Meetings and circulated to all Directors of the said Hotel Developers (4th Defendant Company) the Plaintiff stated that it would be imprudent to make any payment to the Mitsui/Taisei Consortium (1st and 2nd Defendants) and suggested that the Public Shareholders be refunded their Share Capital rather than apply any funds to make any part payment to the Mitsui/Taisei Consortium (1st and 2nd Defendant) stating further that until such time as the Plaintiff receives satisfactory clarification in categorical terms, he cannot agree to the said Hotel Developers (4th Defendant Company) making any payment to the Mitsui/Taisei Consortium (1st and 2nd Defendants) on account of retention and/or balance construction monies as claimed by them.

A true copy of the Plaintiff's Memoranda dated 27.11.1989 and 13.12.1989 and the said Minutes of the Board Meetings held on 27.11.1989 and 13.12.1989 are annexed hereto marked P38(a), P38(b), P38(c) and P38(d) and are pleaded as a part and parcel of this Plaint.

40. (a) On or about 26.1.1990 Mr. Cornel L. Perera, Chairman and Managing Director of the said Hotel Developers (4th Defendant Company) and Mr.K.N.Choksy, Director, Hotel Developers (4th Defendant Company) and the Executive Director, Mr.H. Ogami, representative of the Mitsui/ Taisei Consortium (1st and 2nd Defendants) together with Officials of the Mitsui/Taisei Consortium who had arrived from Japan, held discussions with officials of the Ministry of Finance pertaining to the claims being made by the said Mitsui/Taisei Consortium (1st and 2nd Defendants), The said Meeting had been held without the prior knowledge, approval and consent of the Board of Directors of the said Hotel Developers (4th Defendant Company).
- (b) As a consequence of the said meeting, the Secretary, Ministry of Finance, Mr. R. Paskaralingam confirming such discussions had intimated that it had been proposed at such

discussions that a token payment of U.S.\$ 2.0 million (equivalent to Sri Lanka Rupees 80.0 million) be made to the Mitsui/Taisei Consortium (1st and 2nd Defendants) as a basis for negotiations, before the due date, of the re-scheduled/postponed payments falling due on 11.3.1990.

- (c) The said payment of US \$ 2.0 million (equivalent to Sri Lanka Rupees 80.0 million) had been made on or about 8.03.1990 to the Mitsui/Taisei Consortium (1st and 2nd Defendants). Such payment would not have been made if the Independent Architect/Engineer had been appointed to examine the work done which would have revealed as done later that Mitsui/Taisei Consortium (1st and 2nd Defendants) had committed a very serious breach of contract and was not entitled for any payment whatsoever but was liable to recompense the Hotel Developers (4th Defendant) and make restitution of payments already drawn on account.
- (d) At a Board Meeting of Hotel Developers (4th Defendant Company) held on or about 28.2.1990, the Plaintiff had corrected the Minutes of the previous Board Meeting held on 16.02.1990, reiterating that the U.S.\$ 2.0 million payment should be made only in the context of fully agreed final rescheduling with the Mitsui/Taisei Consortium (1st and 2nd Defendants).
- (e) However, notwithstanding the protests made by the Plaintiff and the stipulations made by the Ministry of Finance, the said payment had been appropriated towards the balance construction dues and interests thereon which are not covered by the said Government Guarantees.

*True copies of the Board Minutes dated 08.02.1990, 16.02.1990, and 28.02.1990, and the said two letters dated 08.03.1990 and 08.03.1990 to the Mitsui/Taisei Consortium (1st and 2nd Defendants) and the Fuji Bank, Tokyo and the copy of telex dated 04.07.1990 sent by the Mitsui Taisei Consortium (1st and 2nd Defendants) to the Auditors of the 4th Defendant Company are annexed hereto marked P39(a), P39(b), P39(c), P39(d), P39(e) and P39(f) respectively and are pleaded as a part and parcel of this *Plaint.**

- (f) Further the proposal to make such payment had been made notwithstanding the Plaintiff's objections and submissions made at the immediately preceding Board Meetings and the Memoranda dated 27.11.1989 and 13.12.1989 made to the Board of Directors of Hotel Developers (4th Defendant Company).
- (g) The Plaintiff reasonably believes that the Secretary, Ministry of Finance had not been fully briefed of the objections and observations made by the Plaintiff at the preceding Board Meetings as referred to herein.

41. (a) At the Board Meeting held on 28.02.1990 the Executive Director Mr. H. Ogami submitted a letter of the same date 28.02.1990 addressed to him by Mr. K.N. Choksy, Director, Hotel Developers (4th Defendant Company) specifically in relation to the Plaintiff's Memorandum dated 13.12.1989, wherein the Plaintiff had objected to any payment being made to the Mitsui/Taisei Consortium (1st and 2nd Defendants) until such time as satisfactory clarifications, confirmations and properly documented certifications are received from the Architects i.e. the 3rd Defendant. This position not to pay was taken by the Plaintiff in view of the absence of a comprehensively documented Completion Certificate with all final Specified Bills of Quantities and Measurements in accordance with conventional practice. The Plaintiff also drew attention to the suggestion that had been made in early 1988, for an examination by an Independent Engineer and report by him.

A true copy of the said Letter from Mr. K.N. Choksy dated 28.02.1990 is annexed hereto marked P40 and same is pleaded as a part and parcel of this Pleint.

- (b) The Plaintiff's said Memorandum dated 13.12.1989 inter alia stated -

"From the attached copy of the Completion Certificate I am unable to satisfy myself whether the Hotel construction is in conformity with the stipulations I have cited above, particularly in relation to the numbers/quantities specified therein. Normally one would have expected a comprehensively documented Completion Certificate with all final quantities and measurements in accordance with conventional practice. I wish to have satisfactory clarifications and confirmation in this regard from the Architects. Until as such time I receive such satisfactory clarifications and confirmation in categorical terms, I regret I cannot agree to make any payment to the Construction Consortium on account of any balance Construction Dues and/or Retention. In this context I would also like to draw the attention of the Board to relevant Board Minutes i.e. 9/88, 11/88, 12/88 and 13/88 and the Letter dated 8th August 1988 from Mr. K.N. Choksy, and particularly to the suggestion and comments made at the Board Meeting on 25.5.1988 by Mr. M.T.L. Fernando a Government Nominee Director on the Board at that time".

- (c) The said Letter dated 28th February 1990 from Mr.K.N.Choksy, Director, Hotel Developers (4th Defendant Company) addressed to Mr. H. Ogami, representative of the Mitsui/Taisei Consortium (1st and 2nd Defendants) was in response to a letter that had been addressed to the said Mr. K.N. Choksy by the said Mr. H. Ogami, tabled at the said Board Meeting, inter alia stated -

"I have considered your letter to me dated 21st February 1990 giving cover to the Memorandum dated 13/12/89, submitted to the Board by Mr. Nihal Sri Ameresekere (Director).

I have considered the Certificate of Practical Completion dated 10/4/1987 and the Completion Certificate (Final Certificate) dated 25/8/88 issued by the Architects under Clause 16 of the General Conditions of Contract.

These Certificates are in accordance with the General Conditions of the Contract. The Completion Certificate expressly states that "all necessary defective works (save one item) have been executed during the defects liability period". The two Certificates are adequate coverage that the Hotel Construction work is in conformity with all the stipulations of the Contract, and the owner will be justified in making the balance payment to the contractor in pursuance of these Certificates.

In regard to the necessity/advisability of obtaining a Completion Certificate from a third-party Architect, I have already advised by letter dated 8th August 1988 that this is not necessary.

Please table this letter at today's Board Meeting".

- (d) When the Plaintiff voiced his objection to the contents of the aforesaid letter Mr. K.N. Choksy expressed the view that the said letter was written on matters placed before him by the Executive Director Mr. H. Ogami, Representative of the Mitsui/Taisei Consortium (1st and 2nd Defendant) and that he would consider revising his opinion, if necessary.
- (e) It would be recalled that the absence of proper certification and documentation, and inadequacy of the said Certificates without Specified Bills of Quantities and Final Measurements, and the discrepancy in the number of rooms, had been adverted to by the Plaintiff in Memoranda dated 27.11.1989 and 13.12.1989 tabled at and circulated to the Board of Directors of Hotel Developers (4th Defendant Company).
- (f) The Plaintiff continued to probe further and a few days thereafter as described in greater detail herein after, when a set of the Architectural Plans was called for from the Urban Development Authority, by the Ministry of Finance at the instance of the Plaintiff in the course of assisting the officials of the Ministry of Finance, the Plaintiff discovered that an unauthorised set of Amended Architectural Plans had been filed in contravention of the provisions of the said Investment Agreement and without approval from the Board of Directors of the said Hotel Developers (4th Defendant Company). This very serious matter was brought to the notice of the Board of Directors of Hotel Developers (4th Defendant Company) by the Plaintiff at the next Board Meeting held on 7th March 1990.

A true copy of the said Board Minutes of 07.03.1990 is annexed hereto marked P41 and pleaded as a part and parcel of this Plaint.

- 42. (a) In February 1990 at a Meeting held at the Ministry of Finance, the Plaintiff was requested by Mr. R. Paskaralingam, Secretary, Ministry of Finance to assist Mr. K. Shanmugalingam, Add. Deputy Secretary Ministry of Finance and Mrs. V.M.Y. Cassie Chitty, Director Economic Affairs, to have discussions and negotiations with Representatives of the said Mitsui/Taisei

Consortium (1st and 2nd Defendants).

- (b) Consequently the Plaintiff submitted various notes schedules and computations to assist the said officials in the said discussions and participated at a number of meetings with the representatives of the Mitsui/Taisei Consortium (1st and 2nd Defendants).
- (c) At these meetings the Plaintiff once again raised the question of the number of room bays and its impact on the Profitability Forecast and the Cash Flow Projections stating that the State Guarantees had been issued on the basis of such Profitability Forecasts and Cash Flow Projections computed on the basis of 452 guest rooms and not on the basis of 387 guest room bays.
43. (a) At the discussions at the Ministry of Finance and at the Board of Directors, the Plaintiff once again raised the query in relation to the number of Room Bays. The Executive Director, Mr. Ogami, representative of the Mitsui/Taisei Consortium (1st and 2nd Defendants) again attempted to mislead the Board by deliberately making false representations tabling an adjusted Schedule purported to have been prepared by the Architects, the 3rd Defendant.
- (b) Doubting the correctness of this representation in further pursuance of this matter even though the said Mr. Ogami avoided submitting the Original of this schedule though requested for, the Plaintiff has been subsequently able to discover, as per the letter dated 26.06.1990 from the General Manager of the said Hotel Developers (4th Defendant Company), that the Original Schedule had been in fact prepared by a Front Office Manager of Hilton Hotel for sales purposes, and that too the schedule tabled itself had been further doctored by the said Mr. Ogami.
- True copy of the said Schedule marked P42(a) and a copy of said letter dated 26.06.1990 marked P42(b) are annexed hereto and pleaded as a part and parcel of this Plaint.*
44. (a) Since the Plaintiff wished to probe the subject matter further he requested at the Ministry of Finance that a set of the Approved Architectural Plans be obtained from the Urban Development Authority. This the Ministry of Finance did and when the Plaintiff perused the said set of Architectural Plans brought from the Urban Development Authority he was shocked and surprised to find out that these were a set of Amended Architectural Plans prepared by the Architects dated 15th July 1985 and for which approval had been given by the Urban Development Authority on 29th April 1986. The Plaintiff observed that the said Architectural Plans had been forwarded to the Urban Development Authority as per a letter dated 8th August 1985 signed by one C. Weerakoone as Chief Engineer, as per the correspondence in the files of the Urban Development Authority, which were brought along to the Ministry of Finance together

with the said Architectural Plans.

- (b) The Plaintiff states that neither the said C. Weerakoone nor any other officers of the said Hotel Developers (4th Defendant Company) had any authority or right whatsoever to submit such Amended Architectural Plans without explicit approval for same from the Board of Directors of the said Hotel Developers Limited and further any such Amendment should have been entered into in writing as per Article 6.01 (iv)(f) and Article 12.02 of the Investment Agreement between all parties thereto, including the Government of Sri Lanka.
- (c) Since as evidenced by the said set of Amended Architectural Plans, the same had in fact been prepared by the said Architects (3rd Defendant) and since the, then Executive Director Mr. A. Naka, Representative of the Mitsui/Taisei Consortium (1st and 2nd Defendants), was in full time charge of the said Hotel Developers (4th Defendant Company), Office in Colombo, responsible for all communications with the Architects (3rd Defendant) in Japan, it is very clear that this set of Amended Architectural Plans had been arranged for, obtained and submitted to the Urban Development Authority with the full knowledge and direction of the said Executive Director, Mr. A. Naka, the representative of the Mitsui/ Taisei Consortium, (1st and 2nd Defendants).
- (d) On both these occasions the Officer from the Urban Development Authority who brought the amended Architectural Plans stated that there were no other plans at the Urban Development Authority and that he was unable to trace a copy of the original Architectural Plans at the Urban Development Authority.
- (e) However, thereafter by letter dated 3rd May 1990, the Urban Development submitted to the Ministry of Finance a set of Architectural Plans, purported to be a set of the Original Architectural Plans. When at the request of the Ministry of Finance, the Plaintiff examined this set of Architectural Plans, he observed that they did not bear the official seal of approval of the Urban Development Authority, identifying the said Sheets as Approved Plans and further the Plaintiff on a count made of the number of sheets observed that this set of the Architectural Plans had 21 Sheets only, whilst the original set of the Architectural Plans had comprised 27 sheets as per the Urban Development Authority's letter dated 19th January 1984. These discrepancies were pointed out by the Plaintiff to the Ministry of Finance.
- (f) However, thereafter in June 1990, the Urban Development Authority had informed the 4th Defendant Company, that they do not have a set of the Original Approved Architectural Plans as confirmed by the letter dated 5.07.1990 addressed to the Plaintiff by the General Manager, of the 4th Defendant Company. However the Urban Development Authority letter dated 23rd March 1984 had confirmed the approval of the said Original Architectural Plans.

A true copy of the letter dated 08.08.1985 signed by C. Weerakoone and referred to in sub-paragraph (c) herein above and the Urban Development Authority dated 03.05.1990, and the letter dated 5th July 1990 from the 4th

Defendant Company are respectively annexed hereto marked P43 (a), P43 (b) and P43(c) and are pleaded as a part and parcel of this Plaint.

45. (a) The Plaintiff addressed letter dated 24th April 1990 to the Executive Director, Mr. H. Ogami, representative of the Mitsui/Taisei Consortium (1st and 2nd Defendants) in relation to the letters exchanged by the Plaintiff and the said Mr. H. Ogami, dated 12th April 1990 and 18th April 1990. In the said letter the Plaintiff inter alia stated that the said Mr. Ogami notwithstanding the conflicting interest in representing an interested party, had made endeavours to influence the deliberations and decision making of the Board, pointing out the matter of the surreptitious inclusion of the Mortgage Clause.
- (b) In the said letter the Plaintiff further stated that the relevant Certificates issued by the Architects as well as the Certificate of Conformity issued by the Urban Development Authority had no meaning or validity since they relate to an Amended set of Architectural Plans that had been filed in August 1985 without the approval of the Company, after the construction had commenced in March 1984 based on a set of Architectural Plans that had been approved by the Urban Development Authority in March 1984; further noting that such drawings and specifications had formed a part and parcel of the Construction Agreement entered into by the said Hotel Developers (4th Defendant Company) on 31st January 1984.
- (c) The Plaintiff has received no reply to date, to the said letter referred to in the preceding paragraphs (a) & (b) herein, which only implies that the Mitsui/Taisei Consortium is at fault and that they are unable to explain and afford the necessary informations and clarifications demanded by the Plaintiff.
- (d) The Certificate of Conformity dated 27.04.1987 was only received by the Plaintiff in response to the request made for same by the Plaintiff's letter dated 12th April 1990. The Certificate of Conformity has only certified that the Hilton Hotel had been constructed as per the Amended Architectural Plans approved in 1986. The Plaintiff states that the said Amended Architectural Plans is an unauthorised set of Plans and not part and parcel of the Construction Agreement entered into between the said Hotel Developers (4th Defendant Company) and the Mitsui/Taisei Consortium,(1st and 2nd Defendants).

True copies of the said letter dated 12.04.1990; 18.04.1990 and 24.04.1990 are annexed hereto marked P44 (a), P44 (b) and P44(c) respectively and are pleaded as a part and parcel of this Plaint.

46. (a) The Plaintiff immediately brought this serious matter to the attention of the Board of Directors at the Board Meeting held on or about 7.03.1990 and on the Plaintiff's insistence that he would write directly to the Architects, i.e. the 3rd Defendant the Board Agreed that the Plaintiff could do so.

- (b) Mr. K. Shanmugalingam observed this to be a very serious matter and suggested that the Plaintiff be assisted by a local Architect or Engineer and that the said original Architectural Plans and the copy of the Bills of Quantities be obtained from the Architects, the 3rd Defendant, above named.
- (c) The engagement of the services of a local Architect or Engineer, completely vindicated the position taken by the Plaintiff.
47. (a) At the Board Meeting held on 24.04.1990 the Plaintiff submitted a Memorandum of even date on this serious subject matter, setting out the salient facts and inter alia made the following submission:-
- i) That the Certifications given by the Architects (3rd Defendant) and the Certificate of Conformity given by the Urban Development Authority refer to another set of Plans, Drawings and Specifications and not to those attached to the Construction Agreement executed by the said Hotel Developers (4th Defendant Company) on 31st January 1984, in conformity with which Plans, Drawings, Specifications, the Letter of Award for Construction had been awarded to the Mitsui/Taisei Consortium on 30th March 1983, and further that the said Drawings and Specifications had been part and parcel of the said Construction Agreement.
 - ii) Accordingly, the Plaintiff submitted that the Construction Agreement has remained uncertified, since the issued Certifications refer to another set of Plans, Drawings and Specifications which do not form a part and parcel of the Construction Agreement marked. Therefore, no payment, whatsoever would be due in the absence of the stipulated and required certifications.
 - iii) The Plaintiff concluded that this was a very serious matter and would need thorough examination and clarifications and that all payments to the Mitsui/ Taisei Consortium should be suspended till the above matters are thoroughly examined, satisfactorily clarified and resolved and if not, referred to arbitration. Mr. K. Shanmugalingam, the Deputy Secretary to the Treasury, concurred with the views expressed by the Plaintiff, at the said Board Meeting, reiterating the suggestion that the Plaintiff be assisted with the services of a Local Architects and/or Engineer to obtain a proper and comprehensive report.

True copies of the Minutes of the said Board Meeting dated 24th April 1990 and the Plaintiff's Memorandum dated the even date 24.04.1990 are annexed hereto marked P45(a) and P45(b) respectively and pleaded as part and parcel of this Plaint.

48. (a) By an Amendment executed by all Parties to the Investment Agreement, on 30th April 1990 Article 11.05 of the said Investment Agreement was annulled and voided, whereby the Mitsui/Taisei Consortium (1st and 2nd Defendants) gave up their right to have a full-time Executive Director in Colombo, Managing and in control of the affairs of the said Hotel Developers (4th Defendant Company). Accordingly, Mr. H. Ogami resigned with effect from 30th April 1990 and Mr. K. Ito was appointed in his place as a non Executive Board Member, representing the said Mitsui/Taisei Consortium (1st and 2nd Defendants).
- (b) The said Investment Agreement (P9) includes the following provisions in respect of any Amendments.
- i) Article 6 Special Covenants 6.01 (iv) (f)
 "The following matters shall require the unanimous approval by written voting agreement of the parties hereto and the parties shall act and/or they shall cause the Company to act accordingly.
 (f) the cancellation or amendment (in any substantial manner) or conclusion of any contract, the effect of which would have a material adverse effect on the financial condition, properties or operation of the Company".
- ii) Article 12.02
 "No amendment or modification of this Agreement shall be effective for any purpose whatsoever, if not confirmed in writing by the duly authorised representative of each of the parties hereto".
- (c) The said Amendments to the Architectural Plans should also have been signed by all the said parties to the said Investment Agreement, including the Government of Sri Lanka, as provided for in the said Investment Agreement as referred to in the paragraph herein above.

True copy of the said Amendment dated 30th April 1990 is annexed hereto marked P46 and is pleaded as a part and parcel of this Pleat.

49. (a) After the said Memorandum dated 24th April 1990 submitted by the Plaintiff, the said Mr. K. Ito suggested at the next Board Meeting that the Mitsui/Taisei Consortium (1st and 2nd Defendants) wish to have direct discussions and negotiations with the Ministry of Finance and requested Mr. K. Shanmugalingam to arrange for such Meetings and Mr. Shanmugalingam agreed to do so. As a consequence, the negotiations and discussions at the Ministry of Finance referred to herein above with the participation of the Plaintiff got abandoned and was not proceeded with.
- (b) Thereafter, a Committee of Officials have been appointed to have discussions and

negotiations with the said Mitsui/Taisei Consortium (1st and 2nd Defendants) in the context of the pressing claims being made by the said Mitsui/Taisei Consortium (1st and 2nd Defendants) who also are threatening to invoke the Letters of Guarantee, issued by the Government of Sri Lanka, and are avoiding to clarify and attempting to conceal, the serious discrepancies that have now surfaced as referred to herein above and further herein below.

50. Efforts made by the Plaintiff to obtain a copy of the Approved Original Architectural Plans to probe this matter further, have so far proved futile.

- i) The General Manager of the 4th Defendant Company has confirmed that the Office of the 4th Defendant does not have a copy of the said Original Approved Architectural Plans nor a Specified Bill of Quantities and Measurements.
- ii) The General Manager of the 4th Defendant Company drew attention to a Hand Written Note in a file titled "UDA PERMITS AND APPROVALS - LJH/HP/1/4", which hand written note had a purported entry that the Approved Original Architectural Plans, borrowed by the Mitsui/Taisei Consortium (1st and 2nd Defendants), had got burnt in the fire that had occurred in the Site Office in 1984.

A true copy of the said hand written Note annexed hereto marked P47 and is pleaded as a part and parcel of this Plaint.

- iii) The Plaintiff points out that the fire in fact, as referred to in paragraph 24 hereinabove, had occurred in October 1985, bearing the fraudulent nature of the said Note, quite apparently made to suppress the said Approved Original Architectural Plans. Further, the Plaintiff points out that it is quite strange that the Mitsui/ Taisei Consortium (1st and 2nd Defendants) should have required to have the only set of the Approved Original Architectural Plans of the said Hotel Developers (4th Defendant Company) when the said Mitsui/Taisei Consortium (1st and 2nd Defendants) themselves would have had more than adequate copies of Plans and Drawings for construction purposes as well as with the Architects, (3rd Defendant), who were present in Colombo at that time, directing and supervising the said Construction.
- iv) The Plaintiff's efforts to obtain a copy of the Approved Original Architectural Plans from the Urban Development Authority did not bear any results as set out hereinabove; the Urban Development Authority have finally confirmed that they have no copy of the said Approved Original Architectural Plans.
- v) The Plaintiff had not been able so far to obtain a copy of the said Approved Original Architectural Plans from the Architects, the 3rd Defendant even though the Plaintiff specifically requested for a copy of same as per letter dated 05.06.1990 addressed to the said Architects, (3rd Defendant). The Plaintiff received in reply the letter dated 20.06.1990 from the Architects, (3rd Defendant) virtually refusing to give a set of the said Approved

Original Architectural Plans, nor a copy of the Final Bills of Quantities and Measurements, that were requested for by the Plaintiff by the Plaintiff's said letter. The Plaintiff has responded by letter dated 30.08.1990.

A true copy of the said letter dated 05.06.1990 written to the Architects, (3rd Defendants), by the Plaintiff their letter dated 20.06.1990 to the Plaintiff and the letter dated 30.08.1990 addressed to the Architects, (3rd Defendant) by the Plaintiff are annexed hereto marked P48(a), P48(b) and P48(c) respectively and pleaded as a part and parcel of this Plaintiff.

- vi) The Plaintiff is also presently endeavouring to obtain a copy of the said Approved Original Architectural Plans from Hilton International, upon which they had based and computed the Forecast of Income and Expenses on the basis of 456 Rooms (i.e. 452 guest rooms plus 04 manager's rooms), as referred to by their letter dated 31.03.83, noting that the letter of Award to the Mitsui/Taisei Consortium (1st and 2nd Defendants) had been issued on 30.03.1983.
51. (a) In the course of further probing into the matters relating to the Hotel the Plaintiff has now also become aware that there is no properly accounted and reconciled inventory of the Furnishings, Fittings and Equipments supplied by Mitsui, (1st Defendant), under the aforesaid Supplies Contract.
- (b) The scope of supplies of Furnishings, Fittings and Equipments by Mitsui (1st Defendant), had been defined in the Exhibit "A" attached thereto as stipulated in Article I therein, and forming part and parcel of the said Supplies Contract.
- (c) In response to the Plaintiff's letter dated 24th August 1990 to the General Manager of the said Hotel Developers (4th Defendant Company), the Plaintiff received a reply dated 5th September 1990 from the said General Manager disclosing that the Exhibit "A" of the said Supplies Contract is now not available and what is available is only a list of Furnishing, Fittings and Equipments described as Exhibit "A", submitted by the Architects, (3rd Defendant) only in June 1986.
- True copies of the said Letters dated 24.08.1990 and 05.09.1990 are annexed hereto marked P49(a) and P49 (b) respectively and are pleaded as a part and parcel of this Plaintiff.*
- (d) The Plaintiff notes that this purported document is not a document initialled at the time of executing the said Supplies Contract on 31.01.1984 and would appear to be a Schedule prepared and submitted by the Architects (3rd Defendant) to suit the Amended Architectural Plans submitted in 1985.
- (e) Even so, the said Hotel Developers (4th Defendant) does not have a properly accounted and

reconciled Inventory of the said Assets supplied by the said Mitsui/Taisei Consortium (1st Defendant Company) whose representative has also been the Executive Director of the said Hotel Developers (4th Defendant Company).

52. (a) Particularly after the discovery of an unauthorised set of Amended Architectural Plans, since the Plaintiff was assisting the officials of the Ministry of Finance, with the discussions and negotiations with the Mitsui/Taisei Consortium (1st and 2nd Defendants) the Plaintiff brought this matter to the attention of Mr. R. Paskaralingam, Secretary, Ministry of Finance as per the Plaintiff's letters dated 27.04.1990 and 14.05.1990.
- (b) Further in pursuance to the above the Plaintiff submitted a number of letters to Mrs. V.Y.M. Cassie Chitty, Director Economic Affairs, Ministry of Finance, and by letter dated 29.06.1990 addressed to the said Mr.R. Paskaralingam the Plaintiff inter alia stated "I do not think that any negotiations with the foreign collaborators should be concluded till as such time relevant clarifications and the related certifications are resolved satisfactorily in the first instance.

A true copy of the said letter dated 29.06.1990 is annexed hereto marked P50 and is pleaded as a part and parcel of this plaint.

53. (a) Notwithstanding the financial condition of the said Hotel Developers (4th Defendant Company), which Company the Mitsui/Taisei Consortium (1st and 2nd Defendants) themselves were active parties in promoting and further playing a number of roles as Investors, Contractors, Suppliers, Lenders, Directors exercising right of the Executive Management and further notwithstanding the queries and clarifications raised as stated hereinabove, the Mitsui/Taisei Consortium (1st and 2nd Defendants) continuously and persistently have repeatedly primarily been only concerned with endeavours to recover monies, even when it had been pointed out by the Plaintiff that the said Construction Contract remained uncertified.
- (b) By deliberately and consciously postponing and bunching all the initial payments to 11th March 1990, notwithstanding the protests made, the Mitsui/Taisei Consortium (1st and 2nd Defendants) only endeavoured to pressurise the said Hotel Developers (4th Defendant Company) and the Government of Sri Lanka as a Guarantor to the said Loans.
- (c) Further, notwithstanding the protests and objections made by the Plaintiff the Mitsui/Taisei Consortium (1st and 2nd Defendants) pressurised and obtained a payment of U.S.\$2 Million (Rs.80 million) from the said Hotel Developers (4th Defendant Company) and have appropriated the same against the balance construction dues, notwithstanding the questions that had arisen regarding the construction.

A true copy of the Plaintiff's letter dated 27.08.1990 disputing this matter is annexed

hereto marked P51 and is pleaded as part and parcel of this Plaint.

- (d) The Plaintiff fears that efforts will be made with undue influence and/or pressure to obtain further payments, notwithstanding the serious discrepancies that have now surfaced, but appear to be disregarded and, which discrepancies prevent the Mitsui/Taisei Consortium (1st and 2nd Defendants) from recovering any payment having failed to perform the contract. In any event the said Hotel Developers (4th Defendant Company) and/or the said Guarantor of the said Loan are not entitled to make any payments, whatsoever, until the determination of this action. The Plaintiff states that a further date of payment falls due on 11.09.1990 with a default period ending 18.09.1990 together with further amounts claimed as due for balance construction and retention with a threat of claiming under the said Letters of Guarantee, vide Debt Rescheduling Agreements marked P34(a) and the Annexures to the said Loan Agreement marked P15.
54. (a) Notwithstanding the seriousness of the subject matter dealt with by the Plaintiff in his Memorandum dated 24th April 1990, except for Mr. K. Shanmugalingam, who endorsed the seriousness of this matter and requested the Plaintiff to pursue this matter further, no proper deliberation or decision forth came from the Board of Directors of the said Hotel Developers (4th Defendant Company).
- (b) Subsequently, by letter dated 31st May 1990 circulated to the Local Directors in view of the serious nature of the subject matter, the Plaintiff suggested that the matter be deliberated upon at a Board Meeting requesting the nominee Director of the Mitsui/Taisei Consortium (1st and 2nd Defendants) to withdraw from such Board Meeting in view of conflicting interest. The Plaintiff further pointed out that in the circumstances, he could not subscribe to a letter dated 27.04.1990 submitted by the said Hotel Developers (4th Defendant Company) to the Mitsui/Taisei Consortium, (1st and 2nd Defendants).
- (c) i) Further notwithstanding the above when the said Hotel Developers (4th Defendant Company) addressed another letter dated 22nd June 1990 to the Mitsui/Taisei Consortium, (1st and 2nd Defendants), the Plaintiff submitted a Memorandum dated 29th June 1990 and circulated to the Directors of the said Hotel Developers (4th Defendant Company), with copy to the Secretary Ministry of Finance, stating that in the context of the contents of the Plaintiff's Memorandum dated 24th April 1990, the Plaintiff cannot concur with the contents of the said Letter under reference.
- ii) The Plaintiff further stated that in his opinion the very validity of the Agreements and the Guarantees would be in question, pointing out the deficiency in the contractual certifications, since they related to an unauthorised set of Amended Architectural Plans in contravention of the provisions of the Investment Agreement and that the company should take serious cognisance and considered action in this regard without any further delay.

- (d) The Plaintiff followed this up further with a Memorandum dated 4th July 1990, circulated to the Directors with copy to the Secretary, Ministry of Finance.
- (e) In response to the sustained urging by the Plaintiff the Meeting of the Local Directors was had on 9th August 1990. The Plaintiff reiterated that all the facts set out herein above as recently disclosed and urged serious action be taken in this regard. The Plaintiff informed the Board of Directors of the said Hotel Developers (4th Defendant Company) that he would pursue further with the Architects and Hilton and that he would draft a Letter to be submitted by the said Hotel Developers (4th Defendant Company) to the Mitsui/Taisei Consortium (1st and 2nd Defendants) in the first instance, undertaking also to forward the Draft Minutes of the said Meeting of the Local Directors. This the Plaintiff did as per the Plaintiff's Memorandum dated 29th August 1990 circulated to the said Local Directors.

True copies of the Plaintiff's letter dated 31st May 1990 and the Hotel Developers (4th Defendant) letter dated 27.04.1990 and 22nd June 1990 and the Plaintiff Memorandum dated 29th June 1990, 4th July 1990 and 29th August 1990 together with the Draft Minutes of the said Meeting held on 9th August 1990 and the Draft Letter to be sent to the said Mitsui/Taisei Consortium (1st and 2nd Defendants) are hereto marked P52(a), P52(b), P52(c), P52(d), P52(e), P52(f), P52(g) and P52(h) respectively and are pleaded as a part and parcel of this Plaintiff.

- 55. (a) As a consequence of the Plaintiff's request for Reports from Architects (3rd Defendant) and Mitsui/Taisei Consortium, (1st and 2nd Defendants), after the said Fire referred to in paragraph 28 herein above, the Executive Director Mr. H. Ogami, representative of the Mitsui/ Taisei Consortium (1st and 2nd Defendants) submitted copies of Monthly Progress Reports, for certain months only to the Board of Directors.
- (b) In the course of the Plaintiff's recent probing into the matters of the Hotel Construction and examining some of these Reports more carefully, the Plaintiff discovered that the number of storeys of the said Hotel Building as stated in the said Monthly Reports is 20 which in itself is a self admitted contravention, violation and breach of the Construction Agreement, which has clearly stipulated that the said Building would comprise of 22 storeys, in the body of such Construction Agreement itself.
- (c) The said Monthly Report also indicates the highest floor as the 19th floor and the height of the said Building as 71.2 meters.

True copies of the said Monthly Reports bearing No.25 (November 1986) and Monthly Report bearing No.30 (April 1987) are annexed hereto marked P53(a) and P53(b) and are pleaded as a part and parcel of this Plaintiff.

56. The Plaintiff states that the clause 17(6) of the General Conditions of Contract for Construction entered into by and between the Mitsui/Taisei Consortium and the 4th Defendant Company provides as follows, under the Caption LIABILITY AFTER THE FINAL CERTIFICATE.

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

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

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

58. (a) The Plaintiff states that though he is only a member of the Board of Directors of the said Hotel Developers, the 4th Defendant Company without executive powers, he has spent considerable and valuable personal time and effort on behalf of Hotel Developers, the 4th Defendant Company, its share holders and of himself qua shareholder and in the public interest, in investigating and exposing this fraud perpetrated by the 1st, 2nd and 3rd Defendants above named on the said Hotel Developers, the 4th Defendant Company above named and its share holders.
- (b) The Plaintiff states that unless the reliefs prayed for hereinafter are granted, irreparable mischief and irreparable loss, damage and detriment will be caused to the said Hotel Developers, the 4th Defendant Company above named, its share holders including the Plaintiff and the general public.

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

- (a) for a declaration that the 1st and 2nd Defendants are not entitled to any payment, whatsoever, under and in terms of and according to the tenor of the said Construction Agreement referred to herein.
- (b) for a declaration that the said Mitsui, the 1st Defendant is not entitled to any payment, whatsoever, under and in terms of and according to the tenor of the said Supplies Contract referred to herein.
- (c) for a declaration that the 3rd Defendant was not entitled to receive any payments, whatsoever, under and in terms of and according to the tenor of the Design & Supervision Contract referred to herein.
- (d) for a declaration that the said Mitsui/Taisei Consortium, the 1st and 2nd Defendants above named are not entitled to make any claim and/or receive any payment, whatsoever, under the said Loan Agreement referred to herein and are precluded from claiming under and/or enforcing the said Guarantees referred to herein.
- (e) for a declaration that the said Hotel Developers, the 4th Defendant Company is not under any obligation to make any further payment, whatsoever to the 1st and/or 2nd and/or 3rd Defendants above named under the said Agreements and Contracts, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract and the said Loan Agreement referred to herein.
- (f) for a declaration that the said Hotel Developers, the 4th Defendant is entitled to the reimbursement and/or restitution of all monies paid and received by the 1st and/or 2nd and/or the 3rd Defendants above named, to date.
- (g) for an Interim Injunction restraining the said Mitsui/Taisei Consortium and the said Architects, the 1st, 2nd and 3rd Defendants respectively, by themselves their representatives, servants and agents or otherwise howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two Guarantees and referred to in the plaint, until the final determination of this action.
- (h) for an Interim Injunction restraining the 4th Defendant Company by itself, its Directors, Servants and Agents or otherwise, howsoever, from entertaining any demand and/or claim from the 1st and/or the 2nd and/or the 3rd Defendants above named in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract, and Loan Agreement referred to in the plaint until the final determination of this action.

- (i) for a Permanent Injunction restraining the said Mitsui/Taisei Consortium and the said Architects, the 1st, 2nd and 3rd Defendants respectively, by themselves, their representatives, servants and agents or otherwise, howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever, in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two guarantees referred to in the plaint.
- (j) for a Permanent Injunction restraining the said Hotel Developers, the 4th Defendant Company by itself, its Directors, servants and agents or otherwise, howsoever, from entertaining any demand and/or claims, whatsoever, from the 1st and/or 2nd and/or 3rd Defendants above named in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint.

60. The Plaintiff values this action at Rs.100,000.00 for the purpose of stamp duty only.

61. The Plaintiff's affidavit is annexed hereto in support of the several averments herein contained.

WHEREFORE the Plaintiff prays:

- (a) for a declaration that the 1st and 2nd Defendants are not entitled to any payments, whatsoever under and in terms of and according to the tenor of the said Construction Agreement referred to herein.
- (b) for a declaration that the said Mitsui, the 1st Defendant is not entitled to any payment, whatsoever under and in terms of and according to the tenor of the said Supplies Contract referred to herein.
- (c) for a declaration that the 3rd Defendant is not entitled to have received any payments, whatsoever under and in terms of and according to the tenor of the Design & Supervision Contract referred to herein.
- (d) for a declaration that the said Mitsui/Taisei Consortium, the 1st and 2nd Defendants above named are not entitled to make any claim, whatsoever under the said Loan Agreement referred to herein and therefore precluded from claiming under or enforcing the said Guarantees referred to herein.
- (e) for a declaration that the said Hotel Developers, the 4th Defendant Company is not under

any obligation to make any further payment, whatsoever to the 1st and/or 2nd and /or 3rd Defendants abovenamed under the said contracts and agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract and the said Loan Agreement.

- (f) for a declaration that the said Hotel Developers, the 4th Defendant is entitled to the reimbursement of all monies paid and received by the 1st and/or 2nd and/or the 3rd Defendants abovenamed, to date.
- (g) for an Interim Injunction restraining the said Mitsui/Taisei Consortium and the said Architects, the 1st, 2nd and 3rd Defendants respectively, by themselves their representatives, servants and agents or otherwise howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two Guarantees and referred to in the plaint, until the final determination of this action.
- (h) for an Interim Injunction restraining the 4th Defendant Company by itself, its Directors, Servants and Agents or otherwise, howsoever, from entertaining any demand and/or claim from the 1st and/or the 2nd and/or the 3rd Defendants abovenamed in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint until the final determination of this action.
- (i) for a Permanent Injunction restraining the said Mitsui/Taisei Consortium and the said Architects, the 1st, 2nd and 3rd Defendants respectively, by themselves, their representatives, servants and agents or otherwise, howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever, in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two guarantees referred to in the plaint.
- (j) for a Permanent Injunction restraining the said Hotel Developers, the 4th Defendant Company by itself, its Directors, servants and agents or otherwise howsoever, from entertaining any demand and/or claims, whatsoever, from the 1st and/or 2nd and/or 3rd Defendants above named in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint.
- (k) for costs; and

(l) for such further or other reliefs as to the Court shall seem meet.



ATTORNEY-AT-LAW
FOR THE PLAINTIFF

DOCUMENTS ANNEXED TO THE PLAINT

1. Proxy of the Plaintiff
2. Documents marked "P1" to "P54"
3. Affidavit of the Plaintiff



ATTORNEY-AT-LAW
FOR THE PLAINTIFF

Settled by:-

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

S.Sriskantha, Attorney-at-Law

K.Kanag-Isvaran, President's Counsel

P.Navaratnarajah, Queen's Counsel