
IN THE DISTRICT COURT OF COLOMBO

Nihal Sri Ameresekere, of
167/4, Sri Vipulasena Mawatha,
Colombo 10.

PLAINTIFF

No.3155/Sp1.

- Vs -

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

and 10 Others

DEFENDANTS

WHEREAS on 11.03.1991 the 4th Defendant in this case filed its Answer

AND WHEREAS the 4th Defendant in the said Answer has failed to plead to several serious and material averments referred to in the Plaintiff abovenamed, as required by Section 75(d) of the Civil Procedure Code, nor has it expressly traversed same; and in many instances has evasively pleaded unawareness, falsely asserting in certain instances that such averments are a mere speculation and conjecture, in an attempt to conceal the real issues between the parties in this case

AND WHEREAS the real issues between the parties cannot be conveniently raised without a FURTHER PLEADING by the Plaintiff

AND WHEREAS it has therefore become very necessary for the Plaintiff to file FURTHER PLEADINGS to the said Answer, in order to enable this Court, to effectually and completely adjudicate upon and settle all the questions involved in this Action

IN THE ABOVE circumstances WE MOVE for leave of Court to file Plaintiff's FURTHER PLEADINGS to the said Answer under Section 79 of the Civil Procedure Code, and tender herewith the Plaintiff's FURTHER PLEADINGS and further MOVE that the Court be pleased to accept the same.

COLOMBO, ^{Twenty first} ~~Thirteenth~~ day of May 1991


Attorneys-at-Law for Plaintiff

Copy of this MOTION together with the Copy of the FURTHER PLEADINGS was sent to Attorneys-at-Law for all the Defendants and the Postal Article Receipts are annexed hereto.

IN THE DISTRICT COURT OF COLOMBO

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167/4, Sri Vipulasena Mawatha,
Colombo 10.

PLAINTIFF

No.3155/Spl.

- Vs -

1. MITSUI AND COMPANY LIMITED, a Company organized and existing under the Laws of Japan and having the Principal Place of business at 2-1, Ohtemachi 1-Chome, Chiyoda-Ku, Tokyo, Japan and having a Liaison office and/or a Place of business in Sri Lanka at No.315, Vauxhall Street, Colombo 02.
2. TAISEI CORPORATION, a Company organized and existing under the Laws of Japan and having the Principal place of business at 25-1, Nishi-Shinjuku 1-chome, Shinjuku-ku, Tokyo, Japan and having a Liaison Office and/or Place of business in Sri Lanka at No.65, High Level Road, Maharagama and presently at Hilton Hotel Colombo.
3. KANKO KIKAKU SEKKEISHA YOZO SHIBATA & ASSOCIATES, Architects & Designers, a corporation duly organized under the Laws of Japan and having the Principal place of business at No.9, Mori Building 1-2-2, Atago, Minato-ku, Tokyo, Japan.
4. HOTEL DEVELOPERS (LANKA) LIMITED, formerly known as LANKA JAPAN HOTELS LIMITED, of No.16, Alfred Place, Colombo 03.
5. CORNEL LIONEL PERERA, Chairman/Managing Director, Hotel Developers (Lanka) Limited, of 16, Alfred Place, Colombo 03.
6. FREDERICK GERMAIN NOEL MENDIS, Director, Hotel Developers (Lanka) Limited, and of No.51/3, Dharmapala Mawatha, Colombo 03
7. KAIRSHASP NARIMAN CHOKSY, Director, Hotel Developers (Lanka) Limited, and of 23/2, Sir Ernest de Silva Mawatha, Colombo 07.

8. DON PETER SEVERINUS PERERA, Director, Hotel Developers (Lanka) Limited, and of No.696/2, Havelock Road, Colombo 06.
9. KAZUTAKA KOBOI, Director of Hotel Developers (Lanka) Limited, and of 6-38, Fujimicho, Chigasaki, Kasagawa, Japan.
10. KANAPATHIPILLAI SHANMUGALINGAM, Director, Hotel Developers (Lanka) Limited, and of No.4, Ramakrishna Avenue, Colombo 06.
11. KOJI ITO, Director of Hotel Developers (Lanka) Limited, and presently of No.315, Vauxhall Street, Colombo 02.

DEFENDANTS

On this ^{thirteenth} ~~thirteenth~~ day of May, 1991.

FURTHER PLEADINGS of the Plaintiff abovenamed, in reply to the Answer of the 4th Defendant abovenamed, appearing by J.W.D. Perera, practising under the name style of De Silva & Perera, and his assistant Vernon Gooneratna, his Attorneys-at-Law, states as follows:

1. (a) Plaintiff denies all and singular the several averments contained in the said Answer, save and except those that are specifically admitted hereinafter.
- (b) Plaintiff reiterates the several averments in the Plaint and relies on the Documents marked P1 to P61(a) filed in this Case.
2. (a) At the outset and for the purpose of record, Plaintiff states, that after the service of Summons and Enjoining Order in this Case, as a consequence of discussions had by the then Dep. Solicitor General, Mr. Shibly Aziz, P.C., with one of Plaintiff's Junior Counsel, that he, together with the said Counsel, had several discussions at the Attorney-General's Department, with Mr. Shibly Aziz, in relation to the matters referred to in several averments in the Plaint and the documents filed therewith.
- (b) These discussions were had on the understanding given to Plaintiff, of requiring explanations and clarifications of the facts pertaining to this Action, on the premise of exploring mutual co-operation, since this Action had been instituted in the interest of the 4th Defendant.

3. Answering Paragraph of 2 of the said Answer, Plaintiff states:

- (a) that, at the said discussions had at the Attorney General's Department, Plaintiff was informed of the proposed Amendments by the Government, to the Articles of Association of the 4th Defendant, for the Government to have majority representation on the Board of Directors of the 4th Defendant, and for which Plaintiff's co-operation was solicited.
- (b) that, in the context of the said discussions being on the premise of mutual co-operation, Plaintiff agreed to do so, in the interest of the 4th Defendant and its Shareholders, reiterating that he had instituted this action in the very interest of the 4th Defendant, and there should be no jeopardy caused to his position as a Director, until the determination of this Action.
- (c) that, however, with the introduction of the said Amendments on 18.12.90, and as a consequence thereof, Plaintiff was served with a letter dated 22.12.90 by Cornel & Co. Ltd., intimating that the Plaintiff has ceased to be a Director of the 4th Defendant; significantly, after Plaintiff's Memorandum dated 20.12.90 to the 4th Defendant's Board, setting out certain statements of fact, and inter-alia requiring the Directors, namely the 5th, 6th, 7th, 8th, 9th, 10th & 11th Defendants in this Action, as follows:

"If any member of the Board of Directors, wishes to contradict any of the above and/or affirms to 17 and/or 18 above, he is welcome to respond, to this letter in writing, so that the particular Director's position on these serious matters could be known and thereafter if such Director is so advised he may state his position in the DC Case No.3155/Special in Court; a Case instituted in the interest of the Company and its Shareholders".

It is a matter of record now, that none of the above mentioned Defendants have responded thereto in any manner whatsoever.

- (d) that, Plaintiff instituted another Action No.3231/Spl., in this Court, in relation to the tabling and adopting of the Accounts of the 4th Defendant, in contravention of the Orders issued by Court in this Action and Plaintiff at Paragraph 16 of the Plaint in the said Case, setting out the relevant matters, pleaded that the said purported removal from the Board of Directors of the 4th Defendant was malafide, with no force or avail in law and that it is not in the interest of the 4th Defendant and its Shareholders.

4. Replying to the said answer as a whole, the Plaintiff states:

- a) that, the 4th Defendant has pleaded its "unawareness" in several paragraphs in the said Answer, in relation to several material averments referred to in the Plaint, and thereby has evaded answering such averments, and in some instances even falsely asserting, that they are matters of speculation and conjecture.

Plaintiff states that this Action being an Action instituted in the very interest of the 4th Defendant, the reliefs claimed being for the benefit of the 4th Defendant and its Shareholders and the Public of Sri Lanka, in the context of the very material State Guarantees in question, the 4th Defendant should have been very specific and diligent in its averments, in answering the Plaint.

- b) that, in the light of the serious and material facts disclosed in the Plaint, in the very interest of the 4th Defendant, its Shareholders and the Public of Sri Lanka as aforesaid, the 4th Defendant should have conducted its own investigations and/or inquiries to probe the said matters, with any technical and/or professional assistance wherever necessary, to satisfy itself and endeavour to ascertain the truth of the several averments referred to hereinabove, prior to pleading its "unawareness". The unawareness plea would appear to have arisen from an anxiety to sweep matters under the carpet.
- c) that, 4th Defendant being owned in the majority by the Government of Sri Lanka, the said Shareholder being the Secretary to the Treasury, and the majority of the Directors being Nominees of the Government of Sri Lanka, appointed by the Secretary to the Treasury, and presently four of such Directors being Senior Officials of the Ministry of Finance itself, the 4th Defendant, thus having access to relevant materials and informations referred to in the Plaint and otherwise, in the context of the interest referred to hereinabove, could have easily ascertained the truth of the relevant averments in the Plaint, prior to pleading its "unawareness".

5. Answering paragraph 3 of the said Answer, Plaintiff states, that the 4th Defendant has not distinctly and expressly pleaded, traversing the jurisdiction of this Court, in respect of the cause of Action in this Case, in contravention of the provisions of the Civil Procedure Code, thereby conceding that the cause of Action in this case, instituted in the right of the 4th Defendant and its Shareholders and in their interest, has arisen to the Plaintiff. Further, Plaintiff states that the 4th Defendant has not pleaded specifically to the Paragraphs 59 & 60 of the Plaint, and thereby has conceded that Plaintiff has a right to sue and maintain this Action and that a cause of Action has arisen in favour of Plaintiff.

6. Further answering the said Answer, as a whole, Plaintiff states:

- a) that, in contrast with the vague and evasive answers in relation to Plaintiff's conduct and efforts, as referred to hereinabove, notwithstanding evidence to the contrary, the 4th Defendant, has in its answer, made specific endeavour to defend, deny and explain and answer certain averments in the Plaint, which refer to the conduct and behaviour of the 7th Defendant & 5th Defendant and also the Representatives of the 1st & 2nd Defendants, who functioned as the Executive Director of the 4th Defendant.

- b) that, in the given circumstances, the 4th Defendant, in fact and in law, has no legal right and entitlement, to proffer answers in defence of the aforesaid persons, when they have been represented by their own Counsel and Attorneys-at-Law, and further to explain their conduct and behaviour without personal knowledge thereof. The Counsel for the 7th & 5th Defendants, having obtained a date previously to file Answer, thereafter filed a motion informing Court, that they were not filing Answer, on the same said date the 4th Defendant filed the said Answer.
- c) that, even if it is conceded, that the 4th Defendant has a legal right and entitlement to proffer answers, on behalf of the aforesaid persons, in the light of the serious and material averments in relation to the conduct and behaviour of the aforesaid persons, as Officers of the 4th Defendant, the 4th Defendant should have in the first instance conducted inquiries into the said matters, to ascertain the truth or otherwise thereof, prior to proffering such Answers.
- d) that, from the very inception, the 5th Defendant has functioned as the Chairman and Managing Director and the said Representatives of the 1st & 2nd Defendants have functioned as the Executive Director, of the 4th Defendant; the 4th Defendant has failed and neglected in its duty to hold inquiries into the several serious matters referred to in the Plaint and admitted to by the 4th Defendant in the said Answer and hold the said persons responsible, accountable for any breaches thereof, which have been detrimental to the interests of the 4th Defendant.
- e) that, it is evident that the 4th Defendant is anxious to cover up the wrong doings of the above said persons, without proper inquiry into the said several matters, notwithstanding the detriment caused to the 4th Defendant, its Shareholders, including to the Govt. of Sri Lanka and the Public as aforesaid.
- f) that, on the contrary, notwithstanding the considerable efforts, professional time and costs, incurred by Plaintiff, acting in the very interests of the 4th Defendant, its Shareholders, and the Public of Sri Lanka, without any relief being claimed for himself, the said Answer of the 4th Defendant reflects clear bias, notwithstanding the fact that it is further detrimental to the 4th Defendant, its Shareholders and the Public of Sri Lanka as aforesaid.
- g) that, the Proxy given to the Hon. Attorney-General, as decided by the Board of the 4th Defendant on 16.10.90, was for the specific purpose of defending the 4th Defendant and not the aforesaid persons, who are not Nominees of the Government of Sri Lanka; and that in contrast, the Hon. Attorney-General, appearing also for the Government Nominee Directors, has curiously neither filed answer on their behalf, nor in the said Answer, has explained, clarified or proffered specific answers in relation to averments pertaining to the conduct and behaviour of such persons, referred to in the Plaint, which are very material and are in the very interest of the 4th Defendant.

7. Answering Paragraphs 4, 5, 6, & 8, of the said Answer, Plaintiff states:

- a) that, in its reference to "452 bays" and "452 guest room bays" the 4th Defendant has failed to take cognisance of its own Architect's, i.e. 3rd Defendant's definition of a "bay" in the Affidavit dated 20.11.90 of Kenzo Watanabe, Architect and Executive Director of the 3rd Defendant and the corresponding Statement of Objections of the 3rd Defendant at Paragraph 15 therein, filed in this case, defining that:

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

The independent Chartered Architect, Shelton Wijayaratna, has further corroborated and certified in his Report (P32(a)) page 4 Item (vi) that:

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

Therefore, it is lucidly clear that "452 bays" are in fact "452 standard size guest rooms".

- b) that, the 4th Defendant being the very owner of the said Hotel Property, should be lucidly clear in its own mind, as to the number of Guest Rooms the said Hotel was to consist of, having clearly admitted to this in its same said Answer, at other Paragraphs therein: i.e.
- i. at Paragraph 7 of the said Answer the 4th Defendant admits, that its own Prospectus, published for the Public Issue of Shares, stipulated that the said Hilton Hotel was to consist of 452 Rooms.
 - ii. at the 4th Defendant's Board on 07.01.84, in approving the Hotel Project and the relevant Agreements/Contracts, referred to in the said Paragraphs 4,5,6, & 8 of the said Answer, and the Architectural Plans of the 3rd Defendant, that the Board had noted that the Hotel was to have 452 Guest Rooms and further that the Profitability Forecast & Cash Flow Projections, of the 1st Defendant, was based on 452 Guest Rooms.
 - iii. at Paragraphs 4, 5 and 18 of the said Answer, the 4th Defendant, in admitting the averments at Paragraphs 9, 10 and 31 (c) of the Plaint, has admitted that Hilton International's Forecast of Income & Expenses confirmed by their letter dated 31.03.83 (P7(a) & P7(b)) was in conformity with the 3rd Defendant's July '80 Plans (P08) and was for 456 Rooms (i.e. 452 Guest Rooms + 4 Rooms as Manager's Apartment) and further that the Letter of Award for Construction was awarded to the 1st & 2nd Defendants on 30.03.83, with the signing on the same said date, of the Preliminary Agreement, defining the Construction Price and other relevant arrangements and other prices.

8. Further Answering Paragraph 8 of the said Answer, Plaintiff states that as admitted to by the 4th Defendant, the Construction Agreement stipulated 22 Storeys and as admitted to by the 4th Defendant at Paragraph 7 of the said Answer, the Prospectus stipulated going upto 22 Floors, and as such that the other Agreements/Contracts being, incidental thereto, could not have contemplated otherwise.
9. Answering Paragraph 10 of the said Answer, Plaintiff states, that the fact, that freshly drawn Amended Plans dated 15.07.85 had been surreptitiously submitted to the UDA on 08/08/85 without disclosure to the Board of the 4th Defendant, notwithstanding Plaintiff's written requirement as per his letter dated 22.07.85 (P21(a)) for Reports from the 1st, 2nd & 3rd Defendants to be made available to the Board on 25.07.85, (P21(b)), by itself vindicates Plaintiff's averment, that Reports called for were not submitted. 4th Defendant is aware of this and has been unable to prove otherwise.
10. Answering Paragraph 11 of the said Answer, Plaintiff states, that the fact that the said Plans referred to in the preceding paragraph had been subsequently approved by the UDA in April '86 as Amended Plans (P54), in the context of the 3rd Defendant's Schedule of Alterations/ Amendments (P32(b)) to the Original Plans, is in itself proof, that such Amended Plans discovered in March '90, have been admitted as amended/alterd from the Original Plans, and therefore obviously cannot be the very same Original Plans.
11. Answering Paragraph 13 of the said Answer, Plaintiff states, that from the very Profitability Forecast & Cash Flow Projections, forwarded by the 1st Defendant in July '87 (after the Hotel opened for operations) as admitted to by the 4th Defendant, it is evident and clear as to on what number of Guest Rooms, the Revenue Projections had been computed. The 4th Defendant's unawareness of averments 26(c), 26(d) and 26(e) of the Plaintiff is false, as further evidenced from its own admission of Averments in Paragraph 27 of the Plaintiff, wherein it is adduced that Plaintiff had specifically brought to the notice of the 4th Defendant's Board, on 30.12.87, the discrepancy in the number of Rooms as 387, as subsequently claimed by the 1st & 2nd Defendants, and not 452 as originally had been agreed upon; and further evidenced by the Revised Profitability & Cash Flow Projections (P25(c)) dated 21.12.87 and 09.12.87 faxed from Japan (P25(c) last sheet) submitted by M. Kubota of the 1st Defendant, for 387 Rooms, in response to the query raised by the Plaintiff previously.
12. Answering Paragraphs 18, 19 and 49 of the said Answer Plaintiff states:
 - a) that, the 4th Defendant's unawareness of averments in sub-Paragraphs 31(a), 31(b), 31(c) and 31(d) of the Plaintiff at Paragraph 18 of the said Answer is intriguing, since the 4th Defendant at Paragraph 19 of the said Answer contradicts this position and pleads its awareness of the said Report from the independent Chartered Architect, Shelton Wijayarathna.

- b) that, the 4th Defendant has admitted, at Paragraph 4 of the said Answer, that the Preliminary Agreement (P06) was entered into on 30.03.83, and has also admitted the issuance of the Letter of Award for Construction to the 1st & 2nd Defendants on 30.03.83 with the Construction Price defined and agreed upon; and further, that the 4th Defendant has also admitted in Paragraph 9 of the said Answer, that the Hilton's Forecast of Income & Expenses was for 456 Rooms, as confirmed by Hilton's Letter dated 31.03.83 (P7(a) & P7(b)) and that such was based on the Architectural Plans of July '80 (P08) submitted by the 3rd Defendant.
- c) that, the 4th Defendant, has admitted to the Amended Architectural Plans (P54) at Paragraph 37 in the said Answer.
- d) that, for the 4th Defendant having admitted all the Documents referred to in the preceding sub-paragraphs, to state that it is unable to comment on the Report from the independent Chartered Architect, or on the validity of the conclusions drawn therefrom, as stated at Paragraph 19 of the said Answer, is irresponsible and on the contrary, the 4th Defendant in its own interest and in the interest of its Shareholders and the Government of Sri Lanka as the Guarantor and the Public, should have examined and probed the said Documents, to satisfy itself of the several averments in the Plaint.

13. Answering Paragraph 22 of the said Answer, Plaintiff states:

- a) that from the letter dated 20.11.89 (P34(c)) from the Secretary, Ministry of Finance, it is evident that, such letter was as a consequence of the objections raised by Plaintiff and the Government Nominee Director, Dr. A.C. Randeni, at the Board Meeting on 06.11.89 (P34(b)). Clearly the Secretary, Ministry of Finance would not have been correctly advised, when he placed his signature to such Agreements in July '89.
- b) that, in the context of its own admission in Paragraph 22 of the said Answer, that the Board as a whole was against giving a Mortgage, the 4th Defendant, has failed to explain, as to how the 5th Defendant acting together with H. Ogami, Representative of the 1st & 2nd Defendants, had executed the said Agreements in July '89, including such Mortgage Clause, contravening such admitted consensus at the Board. Plaintiff reiterates that such commitment to Mortgage the Hotel was done surreptitiously, and accordingly, the Board was compelled to rectify same.

14. Answering Paragraphs 24, 46 and 47 of the said Answer, Plaintiff states:

- a) that, whilst reiterating the averments in Paragraph 37 of the Plaint, that the said correspondence in Nov./Dec. '89 (P36(a)), P36(b), P36(c) and P36(d)) was had with H. Ogami, Representative of the 1st & 2nd Defendants, who was functioning as the Executive Director of the 4th Defendant, and that copies of such correspondence would be in the Office of the 4th Defendant, and therefore states that, the 4th Defendant cannot plead unawareness of same.

- b) that, such correspondence was had, since grave doubt was created in Plaintiff's mind, as stated in Paragraph 36 of the Plaint, and was in the very interest of the 4th Defendant, and as such, the 4th Defendant's answer of unawareness, without efforts to verify same, is irresponsible.
 - c) that, the significance of such correspondence is, that the said H. Ogami, had not disclosed even at that time, when specific queries were raised, that the original Architectural Plans, had in fact been amended; nor did the Completion & Final Certificates of the 3rd Defendant disclose such material fact.
 - d) that, contrary to its unawareness of the said correspondence, that however, at Paragraphs 46 & 47 of the said Answer, the 4th Defendant admits to similar correspondence had by Plaintiff, with the said H. Ogami in April '90 (P44(a), P44(b) and P44(c)).
15. Answering Paragraph 25 of the said Answer, Plaintiff, whilst reiterating the averments of Paragraph 38(a) of the Plaint, state that the correspondence referred to in the preceding sub-paragraphs 14 (a), 14(b) and 14(c), hereinabove, vindicate the position that Plaintiff was calling for relevant documentations; and clearly in the absence of such documentations, by Memorandum to the Board dated 13.12.89, inter-alia, objected to making payments to the 1st & 2nd Defendants.
16. Answering Paragraphs 29 & 30 of the said Answer, Plaintiff reiterates the fact, that there was no prior knowledge, approval or consent of the Board of the 4th Defendant, before such Meeting at the Ministry of Finance on 26.01.90, and that accordingly, the 7th & 5th Defendants were not authorised to attend such Meeting. Plaintiff states that the 4th Defendant has admitted that the Board was informed only on 08.02.90 of the said Meeting had on 26.01.90 i.e. subsequently after such Meeting. Plaintiff puts the 4th Defendant to the strict proof of the fact that there was prior knowledge, consent and approval of the Board, more so particularly for the 7th & 5th Defendants to attend such Meeting.
17. Answering Paragraphs 31 & 32 of the said Answer, Plaintiff states:
- a) that, the 4th Defendant at Paragraph 28 of the said Answer has admitted Plaintiff's Memoranda dated 27.11.89 (P38(a)) and 13.12.89 (P38(b)) objecting to any payments to the 1st & 2nd Defendants, in the absence of relevant documentations and a total resolution of the relevant matters in question.
 - b) that the 4th Defendant does not deny, the material averments in the said sub-Paragraphs 40(d), 40(e) & 40(f) of the Plaint.
 - c) that, any monies advanced by the Government of Sri Lanka, as the Guarantor, could only have been applied against any sums claimed as due under the said Guarantees.

d) that, the 4th Defendant, in fact and in law, is not entitled to deny the averments at sub-Paragraphs 40 (g) of the Plaint, particularly more so, since the 7th & 5th Defendants, were not authorised to represent the 4th Defendant at such Meeting, and furthermore that they had made no report to such effect at the subsequent Meeting of the 4th Defendant's Board on 08.02.90. On the contrary, the 5th Defendant's report to the Board, as recorded in the said Board Minutes (P39(a)) at Item 3 therein, is significantly very revealing.

18. Answering Paragraphs 26, 27, 33, 34, 35, 36 & 37 of the said Answer, Plaintiff states:

a) that, in relation to sub-Paragraphs 38(b) and 38(c) of the Plaint, for the 4th Defendant, being the owner of the said Hotel Property, to plead at Paragraphs 26 and 27 of the said Answer, that it is unaware of the "construction industry practices", including, inter-alia, that the Final Certificate, should have supporting documentations such as Specified Bills of Quantities and Final Measurements, is irresponsible, dishonest, false and is not in the interest of the 4th Defendant and its Shareholders, and further the Public of Sri Lanka in the context of the State Guarantees, that had been negotiated and arranged for by the 4th Defendant, which presently as claimed, amounts to over US \$ 150.0 Mn. (Rs. 6000 Mn.)

b) that, this is the very reason, the 4th Defendant, should have engaged the services of an independent Engineer, when so suggested by, the then Government Nominee Director, M.T.L. Fernando (Fellow Chartered Accountant, and Precedent Partner of Ernst & Young), in the background of the discrepancy in the number of Rooms, raised at the 4th Defendant's Board, at that point of time by Plaintiff. This however was prevented by the 7th Defendant by his letter dated 08.08.88 and H. Ogami, Representative of the 1st & 2nd Defendants; whilst the 5th Defendant had thanked the 7th Defendant for the said letter.

c) that, it is further significant to note, that without any Board decision to do so, the said H. Ogami had referred, to the 7th Defendant, the Plaintiff's Memorandum dated 13.12.89, calling for clarifications, in categorical terms, from the 3rd Defendant, quite contrary to the 4th Defendant's averments in Paragraph 26 of the said Answer.

d) that, the 4th Defendant, is estopped from pleading ignorance and unawareness of, and denying, in its own interest, the several contractual obligations of the 3rd Defendant, stipulated in the Design & Supervision Contract (P14), entered into between the 4th Defendant and the 3rd Defendant, particularly, Articles 6.01, 6.04, 6.05, & 6.12 of the said Contract.

e) that, the averments of the 4th Defendant at Paragraphs 26 and 36 of the said Answer, adducing that the 7th Defendant would have considered all relevant documents in forwarding his letter dated 28.02.90, on the solicitation of the said H. Ogami, would only imply; that the 7th Defendant, had so stated, that, "the two Certificates are adequate coverage that the Hotel Construction work is in conformity with all the stipulations of the Contract" in his said letter dated 28.02.90, notwithstanding, the stipulations in the

said Design & Supervision Contract referred to above, and further notwithstanding the absence of the Original Plan, which formed a part & parcel of the Construction Agreement, as admitted to by the 4th Defendant at Paragraph 51 in the said Answer, and further notwithstanding the absence of Specified Bills of Quantities and Final Measurements, and the absence of Exhibit "A" to the Supplies Contract and also the absence of an account or a reconciled inventory of the Furnishings, Fittings and Equipment, as admitted to by the 4th Defendant at Paragraphs 54 & 55 of the said Answer.

- f) that, Plaintiff questions the professional competence, in the field of engineering and hotel construction industry, of the 7th Defendant and the adequacy of the documentations examined by him, including the said two Certificates (P31(a) and P31(b)), in giving his said letter dated 28.02.90; and that the said Letter was given on Plaintiff's Memorandum dated 13.12.89, without any reference to or inquiry, whatsoever, from Plaintiff, a Professional co-Director.
- g) that, in the absence of the Original Plans which formed a part & parcel of the Construction Agreement, and the absence of the Specified Bills of Quantities and Final Measurements and the absence of the Exhibit "A" to the Supplies Contract and a reconciled inventory of the Furnishings, Fittings and Equipment, let alone the 7th Defendant, it is not possible, even for a professionally competent person, to state that "the Hotel Construction work is in conformity with all stipulations in the contract and that the owner will be justified in making the balance payments to the Contractor".
- h) that, when Plaintiff promptly objected, to the contents of such letter, at the said Board Meeting on 28.02.90, the 7th Defendant, thereupon volunteered to reconsider same.
- i) that, by the Memorandum dated 13.12.89, Plaintiff, himself a Fellow Chartered Accountant, and a Fellow Chartered Management Accountant, with considerable experience in and exposure to the Hotel Industry, had called for specific and categorical clarifications from the 3rd Defendant, the Architects, and not from the 7th Defendant.
- j) that, further answering Paragraph 33 of the said Answer, the Plaintiff states that he had objected to any payments, being made to the 1st & 2nd Defendants, because the Hotel built was not in accordance with the agreed configurations, which also had been stipulated in the Prospectus i.e. of 452 Rooms, going upto 22 Floors with covered car parking for 400 vehicles (i.e. basement), and further because no Bills of Quantities & Final Measurements were available to support the simple Completion & Final Certificates of the 3rd Defendant; and that the Hotel built was not in conformity with the agreements and arrangements as per the several Agreements/Contracts entered into which were also disclosed in the Prospectus; Plaintiff's reasons for such objections were clearly stated in the said Memorandum dated 13.12.89.

- k) that, the 7th Defendant's action in this regard on 28.02.90, contradicting the contents of Plaintiff's Memorandum dated 13.12.89, i.e. 2-1/2 months thereafter, is significantly after the said Meeting, at the Ministry of Finance, on 26.01.90, attended by the said H. Ogami, the 7th Defendant and the 5th Defendant, at which Meeting a proposal had been made to make a payment to the 1st & 2nd Defendants, notwithstanding Plaintiff's objections to do so, as stated in the said Memorandum to the Board, dated 13.12.89, which was unopposed at the said Board Meeting.
- l) that, specifically answering the last sentence of paragraph 35 of the said Answer, Plaintiff denies the same, and states that such averment is deliberately false and misleading, in that, Plaintiff -
- i. had, objected promptly to the 7th Defendant's letter dated 28.02.90 at the said Board Meeting, and the 7th Defendant immediately agreed to reconsider same.
 - ii. had, brought to the notice of the Board of the 4th Defendant, on 07.03.90, the discovery of the unauthorisedly amended Architectural Plans, as is evidenced by the said Board Minutes.
 - iii. had, submitted Memorandum dated 24.04.90 (P45(b)) to the 4th Defendant's Board, setting out the several breaches and serious implications thereof, copies of which were circulated to all Directors; further Plaintiff had suggested that the relevant matters therein be referred to Arbitration by the same said Memorandum.
 - iv. had, submitted Memoranda/Letters persistently thereafter, to the 4th Defendant, on 31.05.90, 29.06.90, 04.07.90, and 29.08.90; copies of which were circulated to the Directors.
- m) that, the above clearly gives the lie, to the said Averment, in Paragraph 35 of the said Answer of the 4th Defendant, which has admitted to the matters referred to at Items 1(ii), (iii) and (iv) above, at Paragraphs 37, 50, 59 and 60 of the said Answer, and further, that, contrary to the averments in Paragraph 35 of the said Answer, the 7th Defendant, notwithstanding the said several submissions, referred to in the preceding sub-paragraph hereinabove, not only failed to revise the contents of his said letter dated 28.02.90, but also, failed to even respond to Plaintiff's Memorandum dated 20.12.90, referred to in Paragraph 3(c) hereinabove.

19. Answering Paragraphs 38, 39, 40 and 52 of the said Answer, Plaintiff states:

- a) that, by letter dated 02.02.90 addressed to the Company by the Secretary, Ministry of Finance, all Directors of the 4th Defendant, were requested to attend a Meeting at the Ministry of Finance on 16.02.90 at 3.30 p.m. The said letter was tabled at the Board of the 4th Defendant on 08.02.90; and decision was made to have another Board Meeting on 16.02.90 at 2.00 p.m. prior to the said Meeting at the Ministry of Finance. (P39(a) Item 3 penultimate and final paras). These Meetings were had with the attendance of all Directors (P39(b) Item 3 para 4).

- b) that, the progress of the consequent discussions had subsequently, at the Ministry of Finance on 20.02.90, 27.02.90, 06.03.90 and 08.03.90, respectively, were reported to the 4th Defendant's Board, on 28.02.90, 07.03.90 and 22.03.90, respectively.
- c) that, upon the discovery of the unauthorisedly Amended Architectural Plans and disclosure of same to the 4th Defendant's Board on 07.03.90; the said negotiations and discussions at the Ministry of Finance came to an abrupt end, with the last Meeting on 08.03.90, proving Plaintiff's averment in Paragraph 49 of the Plaint. Further in the context of the averment in sub-paragraph 49(b) of the Plaint, Plaintiff states that he had submitted two Letters dated 22.08.90 and a Letter dated 26.09.90 to the said Committee of Officials.
- d) that, as evidenced by the Board Minutes of 22.03.90, based on the draft of same forwarded by the Ministry of Finance by their letters dated 12.03.90 and 13.03.90, a letter dated 23.03.90 was forwarded by the 4th Defendant to the 1st & 2nd Defendants, including a copy of the Minutes of the said Meetings had at the Ministry of Finance, referred to in the preceding sub-Paragraph 19 (b), as evidenced by the said Letter of the 4th Defendant.
- e) that, significantly, the Profitability Forecast & Cash Flow Projections, formulated and submitted to the 4th Defendant, by the Ministry of Finance, that was attached to such letter, was for 452 Rooms i.e. Guest Rooms
- f) that, in the light of the foregoing facts, known to the 4th Defendant, and as evidenced by the said Board Minutes and correspondence, the 4th Defendant's plea of unawareness of the averments in Paragraphs 42 and 43 (a) of the Plaint is deliberately false, misleading and is not in the interest of the 4th Defendant and its Shareholders and the Public of Sri Lanka in the context of the State Guarantees in question. The 4th Defendant was well aware of the averments in Paragraph 49 of the Plaint; Government Nominee Director K. Shanmugalingam informed of this at the local Directors Meeting on 09.08.90 (P52(g) Item 15).
- g) further, that the 4th Defendant in fact and in law is not entitled to answer for and explain the conduct of the said H. Ogami, Representative of the 1st & 2nd Defendants, that too without personal knowledge thereof and without proper inquiry into the said matters; the said matter was reported at the local Directors Meeting on 09.08.90 (P52 (g) Item 5).

20. Answering Paragraph 50 of the said Answer, Plaintiff states:

- a) that, since the 4th Defendant was not effectively reacting and taking action on the serious breaches brought to its attention at the Board on 07.03.90, Plaintiff addressed the Memorandum dated 24.04.90 (i.e. 7 weeks thereafter) to the Board, setting out clearly the several breaches and the serious implications thereof, urging that the said matters be referred to Arbitration.
- b) that, as evidenced by the said Board Minutes of 24.04.90 (P45(a), K. Shanmugalingam, Govt. Nominee Director, concurred with the views of Plaintiff; whilst none of the other Directors had controverted the contents of the Plaintiff's said Memorandum dated 24.04.90.

- c) that, the 4th Defendant is estopped from pleading, that it was unaware of the several breaches and their serious implications.
- d) that the 4th Defendant does not deny the very material averments of Paragraph 47 of the Plaint, which constitute the main issues and has deliberately avoided answering same.
- e) that, the 4th Defendant, unable to explain as to what cognisance and action it took of these several breaches, and unable to answer for its conspicuous inaction, is now deliberately avoiding answering the said Paragraph 47; being further unable to explain why the said serious matters and several breaches, were not referred to Arbitration, as suggested by Plaintiff, in the said Memorandum to the Board dated 24.04.90 (P45(b)).
- f) that, the 4th Defendant, in not taking any action has neglected and failed in its duty, responsibility and obligation, by itself and its Shareholders and further by the Government of Sri Lanka and the Public, in the context of the said State Guarantees in question.

21. Answering Paragraphs 57 & 58 of the said Answer, Plaintiff reiterating the averments at Paragraph 53 of the Plaint, states:

- a) that, the said averments contain material facts, which the 4th Defendant has deliberately avoided answering, and that the 4th Defendant has failed to state, as to what action it took to safeguard the interest of the 4th Defendant, its Shareholders and the Government of Sri Lanka as the Guarantor, in the light of the several discrepancies and breaches disclosed, which are now admitted to by the 4th Defendant.
- b) that, the 4th Defendant has failed and neglected in its duty and responsibility, to hold even an inquiry into the said serious matters, notwithstanding also the interest of the Public of Sri Lanka, in the context of the State Guarantees in question.
- c) that, the averments in sub-paragraph 54 (a) of the Plaint is self-evident, from the record of the relevant Board Minutes itself; the 4th Defendant has not been able to state, as to what action the 4th Defendant took, and why the 4th Defendant failed even to hold an inquiry into the said several matters and hold the 1st, 2nd & 3rd Defendants accountable and responsible.

22. Answering Paragraph 61 of the said Answer, Plaintiff states:

- a) that, the 4th Defendant's answer in this regard is deliberately false.
- b) that, the 4th Defendant has admitted at Paragraph 10 of the said Answer, that Plaintiff by his Letter dated 22.07.85 recorded at the Board Meeting on 25.07.85; required the Reports from the 1st, 2nd & 3rd Defendants on the progress of construction be made available to the Board.

- c) that, the 4th Defendant has admitted at Paragraph 12 of the said Answer, that the 5th Defendant reported to the Board on 08.06.87 that the Hotel was handed over to Hilton on 30.04.87, as evidenced by the said Board Minutes of 08.06.87, admitted to by the 4th Defendant.
- d) that, at the very same said Board Meeting on 08.06.87, the said certified Monthly Report for April '87 (P53(b)) of the 1st, 2nd & 3rd Defendants was tabled, as recorded in the said Board Minutes (P23) at Item 10 therein.
- e) that Clause 11 (1) of the General Conditions of Contract (P12) and Clause B.4.04 of Appendix "A" to the Design & Supervision Contract (P14) stipulate the submission of such Monthly Reports, by the 1st, 2nd & 3rd Defendants, to the 4th Defendant.
- f) that, the 4th Defendant is therefore now estopped from denying these certified Monthly Reports, forwarded by the 1st, 2nd & 3rd Defendants.
- g) that, as evidenced from these Monthly Reports, certified and forwarded by the 1st, 2nd & 3rd Defendants, it is confirmed that the Hotel has only 20 Storeys, in contrast to the stipulation of 22 Storeys in the Construction Agreement (P11) between the 1st, 2nd and 4th Defendants and counter-signed by the 3rd Defendant, which alone proves the Plaintiff's Case.
- h) that, the 1st, 2nd, 3rd & 4th Defendants are now estopped from denying the same.
- i) that, in falsely pleading unawareness, to these very serious and material facts, the 4th Defendant is acting contrary to its own interest and the interest of its Shareholders; and also the Government of Sri Lanka and the Public, in the context of said State Guarantees in question.

23. Answering Paragraph 63 of the said Answer, Plaintiff states:

- a) that, the 4th Defendant has admitted to several material averments of facts and serious breaches, as clearly set out in the Schedule pleaded to in Paragraph 27 of these Pleadings.
- b) that, the 4th Defendant has also admitted to, at Paragraph 14 of the said Answer, the impossibility of repaying the debts claimed by the 1st & 2nd Defendants, in the given circumstances.
- c) that, notwithstanding the above, the significant inaction by the 4th Defendant, in not holding any inquiries and/or calling for any explanations, is unexplained and further not in its own interest, and its Shareholders and the Public of Sri Lanka, in the context of the State Guarantees in question.
- d) that, the facts and documents placed before Court, speaks for itself and vindicates Plaintiff's position as stated in Paragraph 58 of the Plaintiff and that Plaintiff's actions and conduct have been consistently in the interest of the 4th Defendant Company, its Shareholders and the Public.

4. Answering Paragraphs 64 and 65 of the said Answer, Plaintiff states, that the averments in the said Paragraph 64, are deliberately false and dishonest, without any documentary evidence to support, and further have been adduced totally in disregard of the several material averments of facts and discrepancies, admitted to by the 4th Defendant, in the very same said Answer, and has been made to prima-facie cover up the 4th Defendant's significant inaction, in the light of the several averments admitted to, by the 4th Defendant, in the same said Answer.
5. Further answering Paragraphs 64 and 65, Plaintiff states:
- a) that, as evidenced hereinabove, that the Board of Directors of the 4th Defendant, never arrived at a decision that the said Hotel comprised of 452 Rooms, as had been originally planned and committed, and that the very same matter was subject to query and undecided upon, upto the very time this Action was instituted.
 - b) that, in the context of the 4th Defendant's own admission of the non-availability of the said Original Plans at Paragraph 51 of the said Answer, and the admitted non-availability of Specified Bills of Quantities and Final Measurements, and the admitted non-availability of an account and reconciled inventory of the Furnishings, Fittings & Equipment and the admitted absence of the Exhibit "A" to the Supplies Contract, at Paragraphs 54 & 55 of the said Answer, there could never have been any discussions, whatsoever, at the Board, as to whether the Hotel conformed to the Original Plans and requirements.
 - c) that, on the contrary, let alone thorough discussions, the only discussions that took place at the 4th Defendant's Board, before the Final Certificate was issued by the 3rd Defendant, was the matter of the very discrepancy in the number of Guest Rooms, which discrepancy was queried by Plaintiff, no sooner the said Hotel opened for operations, and also at the 4th Defendant's Board in December '87 and January '88, resulting in the subsequent suggestion made in May '88, by the then Government Nominee Director, M.T.L.Fernando, (Fellow Chartered Accountant & Precedent Partner, Ernst & Young), to appoint an Independent Engineer, to examine and inspect the Hotel Building, prior to the issue of the Final Certificate of the 3rd Defendant in August '88. Ofcourse, this however, was prevented by H. Ogami, Representative of the 1st & 2nd Defendants objecting and by the 7th Defendant, by his letter dated 08.08.88 (P30(a)), for which he had been thanked by the 5th Defendant, the Chairman and Managing Director of the 4th Defendant, vide Item 3(b) of the Board Minutes of 12.08.88 (P30(b)): the Final Certificate by the 3rd Defendant was issued only thereafter, on 25.08.88, without any disclosure whatsoever, that the Original Plans in fact had been amended in July '85, which fact, however was discovered only in March '90 by the Plaintiff at the Ministry of Finance.

