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BY LOCAL COURIER

17th December 2001

Her Excellency Chandrika Bandaranaike Kumaratunga,
President of Sri Lanka,
President's House,
Janadhipathi Mawatha
Colombo 1.

Your Excellency,

**APPOINTMENT OF MR. K. N. CHOKSY P.C., M.P.
AS THE MINISTER OF FINANCE.**

**SPECIAL PRESIDENTIAL COMMISSION OF INQUIRY - 1995
RE - MATTER OF HOTEL DEVELOPERS (LANKA) LTD.**

We write as instructed on behalf of our Client, Mr. Nihal Sri Ameresekere, F.C.A., F.C.M.A. of No. 167/4, Sri Vipulasena Mawatha, Colombo 10.

The then Minister of Justice & Constitutional Affairs, Mr. G.L. Peiris, in consultation with the then Hon. Attorney General, Mr. Shibly Aziz P.C., the then Chief Legal Draftsman, Mr. Nalin Abeysekere P.C. and the then Secretary, Ministry of Justice, Ms. Dhara Wijayatilake, caused the formulation of the Presidential Warrant to appoint a Special Presidential Commission [SPC] under and in terms of SPC Law No. 7 of 1978, as amended, comprising Supreme Court Judge, Hon. P.R.P. Perera, as Chairman, and then Appeal Court Judge, Hon. H.S. Yapa, and then High Court Judge, Hon. F.N.D. Jayasuriya, as Members of the said Commission, in terms of the Warrant given under the hand of Your Excellency, published in Gazette Extra-ordinary No. 858/4 of 14.2.1995.

Item 2 of the Schedule to the said Presidential Warrant was:

"2. Hotel Developers (Lanka) Ltd.- Matters relating to the Hilton Hotel Project and acts of commission and omission by the Government and Public Bodies in connection therewith"

"Public Bodies" referred to above would have included, amongst others, the Urban Development Authority [UDA] and the Securities & Exchange Commission, of Sri Lanka, of which Commission, Mr. G.L. Peiris had been previously a Member, appointed by the then Government.

The SPC appointed as aforesaid was assisted in the prosecution, on behalf the Hon. Attorney General, by the then Solicitor General, Mr. Douglas Premaratne P.C., and the SPC was also assisted in its inquiries and investigations by Officers of the Criminal Investigation Department seconded to the SPC.

The SPC appointed as aforesaid commenced its inquiries and investigations into the aforesaid matter of Hotel Developers (Lanka) Ltd. [HDL], as its very first Inquiry, thus bearing Inquiry No. 1/95.

The 4th Interim Report dated 2.3.1997 submitted to Your Excellency by the SPC, published as Sessional Paper No. 1-1997, at page 229 thereof had listed 24 Witnesses, who had testified before the SPC at the said Inquiry into the matter of HDL. In addition to our Client, the said Witnesses, included, amongst others, Officials of the Ministry of Finance & Planning, UDA, Ceylon Tourist Board, Colombo Municipal Council, Ceylon Electricity Board, Fire Brigade and the Fort Police.

Consequently, the SPC on 17.7.1995 issued Notices on several persons under and in terms of Section 16 of the SPC Law No. 7 of 1978.

Thereafter, the SPC on 20.9.1995 appointed on the recommendation of the Institute of Chartered Architects of Sri Lanka, a panel of 3 Chartered Architects, chaired by Prof. Nimal de Silva, Professor of the Faculty of Architecture, University of Kadubedda, and comprising Mr. Upali Iddawala and Mr. Dudley Waas, to investigate and report on the said Hilton Hotel construction.

The aforesaid parties, who had been noticed on 17.7.1995 under Section 16 of the SPC Law No. 7 of 1978, had been permitted, upon their request, to make representations to the said panel of Chartered Architects, through the SPC. Similarly, our Client too was permitted to make representations via the Solicitor General through the SPC.

The said panel of Chartered Architects thereafter issued their Investigation Report dated 14.11.1995.

Thereupon, the SPC on 8.12.1995 served Show Cause Notices under and in terms of Section 9 of the SPC Law No. 7 of 1978, on former HDL Chairman & Managing Director, Mr. C.L. Perera, former HDL Directors, Mr. K.N. Choksy, P.C., M.P. and Mr. F.G.N. Mendis and former Secretary, Ministry of Finance & Planning, Mr. R. Paskaralingam - vide Page 227 of the aforesaid 4th Interim Report of the SPC.

The said Show Cause Notices served as aforesaid by the SPC, setting out several charges, therein *inter-alia*, stated thus: [Copies of the said Show cause Notices issued by the SPC, filed in a Case now before the Supreme Court, are annexed]

"The aforesaid acts of commission and/or omission on your part were fraudulent and were detrimental to the interests of the said Company and/or the Government of Sri Lanka, in its capacity as the major Shareholder, causing financial loss and damage to the said Company and/or the Government of Sri Lanka"

"Having regard to the matters set out hereinabove, you are hereby required to show cause as to why you should not be found guilty of misuse or abuse of power and/or corruption and/or commission of fraudulent acts in terms of Section 9 of the Special Presidential Commission of Inquiry Law No. 7 of 1978, as amended "

The aforesaid persons so noticed, including the said Mr. C.L. Perera, on or about 30.1.1996, tendered as required, Written Submissions to the SPC, on the aforesaid Charges, refuting and/or denying the same.

Whereas, on the contrary, previously in D.C. Colombo Case No. 4414/Spl instituted against the Secretary to the Treasury, Mr. A.S. Jayawardena, former HDL Chairman & Managing Director, Mr. C.L. Perera by his Affidavit dated 21.7.1995, had affirmed and/or concurred, that a fraud in fact had been perpetrated on HDL, as had been averred in our Client's D.C. Colombo Case No. 3155/Spl., our Client's said Case having been upheld by the Supreme Court in 1992, as a *prima-facie* case of fraud, with real prospect of success even in the light of the defences, and that the Interim Injunctions had been issued to prevent the syphoning out of monies from the country

Quoted below are paragraphs Nos. 56 and 59 of Mr. C.L. Perera's aforesaid Affidavit dated 21.7.1995;

"56. I further plead that as the Supreme Court has already observed that *prima-facie* fraud has been established and in any event, in all probabilities the alleged fraud to have been committed by the Mitsui and Taisei will be established in the Action....[reference being to D.C. Colombo Case No. 3155/Spl.]..."

"59. I further state that the Supreme Court of this Country had already observed that *prima-facie* fraud had been established on the part of Mitsui and Taisei and that in all probabilities that the fraud committed by the said Mitsui and Taisei will be established and in the said Case No. 3155/Spl., instituted by Mr. N.S. Ameresekre as representing the HDL"

However, when the aforesaid Charges were subsequently made on 8.12.1995 by the SPC, amongst others, against Mr. C.L. Perera on the very same fraud, he in a complete turnabout took a diametrically opposite stance; as the then Chairman & Managing Director he failed and neglected to file Objections and/or Answer in the interest of HDL in our Client's aforesaid Case D.C. Colombo 3155/Spl., though a Defendant therein

On Mr. K.N. Choksy P.C., M.P. 's Written Submissions that had been tendered to the SPC, in a postscript made in March 1996, published in the Daily News of 30.3.1996, the SPC had made strictures thereon, *inter-alia*, stating;

"In the course of the proceedings of February 29, 1996 the Commission has adverted to the provisions of Rules 15, 50 and 51 of the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) and to two Dicta pronounced by two eminent Judges presiding over the Superior Courts of the Great Britain."

"A Court of Law, a Tribunal, or a Statutory Commission ought to, in the course of its Proceedings, apply and enforce such rules of Conduct and Etiquette. A Court must not only be concerned with punishing Counsel for breach of such rules, but must ensure that such rules are observed in proceedings conducted before it."

"In addition to the dicta of Lord Reid and Lord Esher to which the Commission has already referred to in the Proceedings, this Commission wishes to place on record certain decisions which lay down valuable pronouncements in regard to the paramount duty of Counsel to Court. Lord MacMillan on Ethics of Advocates, states thus: - ' *In the discharge of his office, the Advocate has a duty to his Client, a duty to the State, and a duty to himself* '. This passage was cited with approval by Lord Justice Willmer in *Meek vs. Flemming*."

"We are of the unanimous view that in this respect he [reference being to Mr. K.N. Choksy P.C., M.P.] has stated untrue, erroneous and false facts, which necessarily has the tendency to mislead and deceive the public in general, and the members of this Commission"

The SPC in another postscript made in 1996, on the said Written Submissions of Mr. K.N. Choksy P.C., M.P., *inter-alia*, had also stated thus:

"Thus, the Supreme Court has in effect upheld the law as laid down the aforesaid English decisions and the law as set out in the Provisions of Article 106. This Commission is surprised to ascertain and note that Mr. K.N. Choksy P.C. was one of the Junior Counsel who appeared for the 2nd, 3rd and 7th respondents at the argument of this appeal before the Supreme Court. In these circumstances, it surprises and startles this Commission how Mr. Choksy with a conscience and consistent with his duties as Counsel to the Commission, making submissions to the effect that the Supreme Court refused to adopt the English law as laid down in these two English Cases and held that the English law did not coincide with the law of Sri Lanka."

Mr. K.N. Choksy P.C., M.P. did not seek to challenge in the Supreme Court the aforesaid determinations that had been made by the SPC. Upon such strictures being made by the SPC on his Written Submissions, Mr. K.N. Choksy P.C., M.P., refrained from defending himself before the SPC.

Mr. K.N. Choksy P.C., M.P., Member of the then Government and [disregarding the provisions of Article 91(1) (e) of the Constitution, in that HDL had a Contract with the Government as its Guarantor], and also a then Director of HDL, notwithstanding having been made a Defendant as a *wrong-doer* in the said D.C. Colombo Case No. 3155/Spl, did not file Objections or Answer, though he previously by his Letter dated 28.2.1990, disregarding our Client's objections as a professional accountant, had endorsed the full payment of the total Claims made by the Japanese Collaborators from HDL and the Government, as the Guarantor, Mr. K.N. Choksy, P.C., M.P. *inter-alia*, stating in his said Letter that - "*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*".

Mr. K.N. Choksy, P.C., M.P. had also previously by his Letter dated 8.8.1988 objected to an independent examination of the Hilton Hotel construction, *in the face of urgings made therefor*, by the then HDL Government Nominee Director, Mr. M.T.L. Fernando, *Precedent Partner of Ernst & Young, Chartered Accountants*.

Mr. K.N. Choksy, P.C., M.P. was fully aware that the said payments demanded by the Japanese Collaborators of HDL had to be made from public funds by the Treasury. *Consequent to Mr. K.N. Choksy P.C., M.P.'s aforesaid Letter dated 28.2.1990, the very next day, i.e 1.3.1990, the Japanese Collaborators of HDL gave notice of their Claims to the Secretary, Ministry of Finance / Secretary to the Treasury by their Letter dated 1.3.1990*

Mr. K.N. Choksy P.C., M.P., *having not filed Objections in the District Court*, wrongfully appeared in the Court of Appeal through Counsel to support the Leave to Appeal Applications of the Japanese Collaborators of HDL and endeavoured unsuccessfully to have our Client's said legal action dismissed, on the premise that, *there was no legal basis in this country and a legal right for our Client to have instituted such a derivative action in the public interest*, notwithstanding the duty and obligation on his part as a Member of Parliament, *moreso particularly of the Government*, to have protected and upheld the public interest and that of the Government and the country.

The Government intervening and requiring to bring about a settlement, Settlement Agreements had been formulated in 1993 by the former Hon. Attorney General, Mr. Tilak Marapana P.C., assisted by Mr. Srinath Perera, P.C. Drafts of the said Settlement Agreements including all the relevant documents and correspondence that pertained to the negotiations that were had to reach such settlement, were *transparently* placed before the SPC by our Client, through the Solicitor General, Mr. Douglas Premaratne, P.C., who, on behalf of the then Hon. Attorney General, Mr. Shibly Aziz P.C., finalised the Settlement Agreements, which had been formulated as aforesaid. The SPC having had no objection thereto, the signing of the same was approved by the Solicitor General, who was then assisting the SPC, by his Letter dated 15.6.1995 addressed to the then Secretary, Ministry of Finance / Secretary to the Treasury, Mr. A.S. Jayawardene.

As a consequence of our Client's sole sustained efforts, *amidst undue pressures and obstructions*, the Japanese Collaborators by the said Settlement Agreements signed on 28.6.1995, agreed to write-off all accrued interest for 10-years from commencement in 1984 and also to write-off 30 % of the Capital and re-schedule the balance at a reduce rate of 5.25 % p.a. interest (previously 6.0 % p.a.) to be repaid over a further period of 15-years upto the year 2010 [previously fully payable by the year 1999], after a grace period of 1-Year [i.e. from July 1995 to June 1996], which was specifically provided for, to further restructure HDL, to enhance HDL's debt repayment ability and to prevent any payments being made under the State Guarantees, *as per the specific direction that had been given in that regard by the said Secretary, Ministry of Finance / Secretary to the Treasury.*

The aforesaid write-off of a foreign debt guaranteed by the Government achieved due to the sole sustained efforts of our Client amounted to Jap.Yen. 17,586 Mn. i.e. US \$ 207 Mn. as at 28.6.1995 [SL Rs. 13,091 Mn. today]. This amounted to a write-off of 63.34% of the total claims made by the Japanese Collaborators including penal interest, and excluding penal interest, the write-off amounted to 54.4%. The funds accumulated in HDL, as a consequence of the interim injunctions that had been obtained by our Client, were essentially set-off against the balance unwritten-off Capital, all accrued interest for 10-Years having been written-off.

Notwithstanding the aforesaid conduct and actions of Mr. K.N. Choksy, P.C., M.P., our Client's sole sustained efforts prevented a colossal loss being caused to the Government and the public of this country.

Our Client's evidence-in-chief having been led before the SPC, he was under cross-examination in October 1996, when one of the Commissioners fell ill seriously and the said SPC Inquiry into the matter of HDL was indefinitely postponed.

Previously, Mr. R. K. W. Gunsekera, Counsel for Mr. F.G.N. Mendis, a former HDL Director, who had been issued a Show Cause Notice as aforesaid, and Mr. L.C. Seneviratne P.C., Counsel for the Japanese Architects, both *repeatedly* informed the SPC, *that they did not wish to cross-examine our Client on his evidence*, which fact the SPC recorded. Accordingly, they did not dispute and/or refute the evidence that had been placed before the SPC by our Client.

During the cross-examination of our Client by the SPC, it was revealed that the *floor elevations* depicted on the floor sheets of the substituted Architectural Plans of the Hilton Hotel, described as "*Amended Plans*" and approved by the UDA on 29.4.1986, were not the same *floor elevations* given in respect of the corresponding floors on the cross-sectional sheets forming a part and parcel of the very same UDA approved *Amended Architectural Plans*. The 3rd and 4th floors were shown to be at the same *elevation* of 24.5 meters, whilst the 19th floor and the Roof of the 19th floor were shown to be at *elevations* of 72.7 meters and 72.5 meters, respectively.

The SPC observed the above to be an *inherent, intrinsic impossibility*, and raised the question, *as to how the UDA could have ever approved such Amended Architectural Plans ?*

Mr. S. C. Crossette-Thambiah, Attorney-at-Law, Counsel appearing for Mr. C.L. Perera, former HDL Chairman & Managing Director, when questioned by the SPC on the aforesaid serious and grave discrepancies, *stated that his Client had no explanations therefor.*

Our Client subsequently submitted to the SPC, a statement identifying and reconciling the *floor elevations* depicted on the floor sheets, with the *floor elevations* given on the cross-sectional sheets of the Project Plan, *inter-alia*, upon which, our Client's said D.C. Colombo Case No. 3155/Spl., had been instituted and upheld by the Supreme Court as aforesaid

The Japanese Architects represented by Counsel at the SPC failed to produce a copy of the UDA approved original Architectural Plans of March 1984, *all copies of which had gone missing*, including the original Inventory Schedule to the Supplies Contract with the Japanese Collaborators.

After our Client had instituted in the right and interest of HDL on 13.9.1990 the said D.C. Colombo Case No. 3155/Spl, upon which Enjoining Orders had already been issued by Court on 17.9.1990 on the premise of fraud under circumstance of *wrong-doer control*, subsequently, HDL Auditors at that time, *acting in collusion with the then HDL Directors*, including Mr. K.N. Choksy, P.C., M.P., certified on 28.11.1990 the Annual Accounts of HDL for the Year Ended 31.3.1990, *regardless of our Client's written rejection thereof and objections thereto, and without having conducted an investigative examination, as had been specifically required in such regard by our Client, himself, a professional accountant.*

Such conduct and actions compelled our Client to institute in the right and on behalf of HDL a further *derivative action in law*, D.C. Colombo Case No. 3231/Spl on 11.1.1991 and have the said HDL Audited Annual Accounts enjoined by an Order of Court.

The abovementioned Show Cause Notices issued by the SPC on 8.12.1995, amongst others, against Mr. K.N. Choksy, P.C., M.P., contained a Charge, that the said HDL Annual Accounts for the Year Ended 31.3.1990 had been certified *with the object of suppressing fraudulent acts*. The said Charge made by the SPC read thus:

"disregard the discrepancies, shortcomings and irregularities which were brought to the notice of the Board of Directors, and wrongfully attempt to approve as authentic the Annual Accounts of HDL for the year ended 31st March 1990 and endeavour to take action to adopt the Accounts with the object of suppressing the aforesaid fraudulent acts and omissions".

The aforesaid facts pertaining to the conduct and actions of Mr. K.N. Choksy P.C., M.P. are in issue in several Cases, settlement of which Cases are being considered by the Supreme Court with the assistance of the Hon. Attorney General, and where the Government represented by the Secretary to the Treasury is a party, in addition to HDL, control over which Company, as Your Excellency is aware, is exercised by the Minister of Finance.

As disclosed as aforesaid, Mr. K.N. Choksy P.C., M.P., is an affected and interested party, and hence, there would be a serious *conflict of interest*, if he were to intervene in and/or interfere with and/or handle this subject matter, *inasmuch as he had regardlessly endeavoured to interfere previously*.

Furthermore, there is also a Case, SC (Spl.) LA 32/2001 [D.C. Colombo Case No. 21819/MR] before the Supreme Court, where our Client has instituted against Mr. G.L. Peiris, another Cabinet colleague of Mr. K.N. Choksy, P.C., M.P., a derivative action in law, in the right and on behalf of HDL, in its interest and for its benefit, claiming damages from Mr. G.L. Peiris to be paid to HDL for loss and damage caused by him to HDL, who is a party in the said Case. Your Excellency is aware, that due to the facts and circumstances disclosed in the said Case, the Treasury has been compelled to advance substantial sums of monies to the Japanese Collaborators of HDL under the State Guarantees that had been given, which advances consequently due by HDL to the Government stood at Rs. 2,059 Mn. as at 15.12.2001.


Given the foregoing facts and circumstances, it is incomprehensible, as to how Mr. K.N. Choksy, P.C., M.P., could have been appointed as the Minister of Finance in charge of the Treasury of this country.

Your Excellency exercising Constitutional powers, rights and duties, refused to appoint Mr. S.B. Dissanayake, as Minister of Samurdhi, in the circumstances of an inquiry.

Our Client asks, whether the foregoing facts and circumstances in comparison are not of a far more greater and graver degree and nature to have disqualified Mr. K.N. Choksy, P.C., M.P., from being appointed as the Minister of Finance in charge of the Treasury of this country ?

Our Client urges Your Excellency in the public interest and that of the country, to re-consider the aforesaid appointment in the light of the foregoing facts and circumstances, and duly act exercising the powers, rights and duties vested in Your Excellency under the Constitution, more particularly in terms of Article 44 (3) and Article 47 thereof.

Yours respectfully,



Attorneys-at-Law

cc: Hon. P.R.P. Perera, Former Supreme Court Judge
Hon. H.S. Yapa, Supreme Court Judge
Hon. F.N.D. Jayasuriya, Former Appeal Court Judge

} Former Members of the Special Presidential Commission appointed in terms of Presidential Warrant published in Gazette Extra-ordinary No. 858/4 of 14.2.1995

Hon. K.C. Kamalabayson Esqr. P.C., Attorney General