

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

In the matter of an Application for a mandate in
the nature of a Writs of Certiorari under and in
terms of article 140 of the constitution.

C.A. (Writ) Application No. 577/07

Lincoln Property Holdings (Private) Limited,
67, Ward Place,
Colombo 07.

Petitioner

Vs.

1. Condominium Management Authority
1st Floor National Housing Department Building,
Sir Chittampalam A Gardiner Mawatha, Colombo
02.
2. G.U. Upawansa
Acting General Manager Condominium
Management Authority 1st Floor National
Housing Department Building, Sir Chittampalam
A Gardiner Mawatha,
Colombo 02.
3. Mr. G.S.T. Perera
Inquiring Officer, Condominium Management
Authority 1st Floor National Housing
Department Building, Sir Chittampalam
A.Gardiner Mawatha,
Colombo 02.
4. The Management Corporation
Cinnamon Garden Residencies 67 Ward Place
Colombo 07.
5. R. Sivaratnam
No. 410/6 Baudhaloka Mawatha,
Colombo 07.

6. Marry Abbey
Cinnamon Garden Residencies
Apartment 5/4 67 Ward Place,
Colombo 07.
7. G. Ratnayake,
No. 7/9, 2nd Lane, Nawala,
Rajagiriya.
8. F.S. Selvarajah
Cinnamon Garden Residencies,
Apartment 2/7 67 Ward Place
Colombo 07.
9. J.M.S. Britto
Cinnamon Garden Residencies,
Apartment 7/5, 67 Ward Place,
Colombo 07.
10. Sri Lal Ariyadasa
British Lifestyle (Private) Limited
434 R.A. De Mel Mawatha
Colombo 03.
11. P. Nanayakkara
Cinnamon Garden Residencies
Apartment 6/7 67. Ward Place,
Colombo 07.
12. W.A.K. Silva
No. 20 Vajira Road,
Colombo 04.
13. Indrani Wijesundara
Cinnamon Garden Residencies,
Apartment 6/1 67 Ward Place,
Colombo 07.
14. Samantha Thanabe
Cinnamon Garden Residencies
Apartment 4/4 67 Ward Place,
Colombo 07.

15. Thweetha Ganeshen
Cinnamon Garden Residencies.
Apartment 5/8 67 Ward Place
Colombo 07.
16. Shashi Ganeshen
Cinnamon Garden Residencies,
Apartment 5/8 67 Ward Place.
Colombo 07.
17. Ranjani De Alwis
Cinnamon Garden Residencies
Apartment 9/3 67, Ward Place.
Colombo 07.
18. Daya Mahinda
Cinnamon Garden Residencies,
Apartment 4/1 67, Ward Place,
Colombo 07.
19. S. Thalwatha
Cinnamon Garden Residencies Apartment
3/8 67 Ward Place,
Colombo 07.
20. S. Sundaralingam
14/B Botheju Mawatha
Dehiwala.
21. N.D. Silva
Office Lincoln Property Holdings (Private)
Limited 67 Ward Place,
Colombo 07.
22. Devika De Silva
Office Lincoln Property Holdings (Private)
Limited 67 Ward Place.
Colombo 07.
23. Swarna Shellayia
Office Lincoln Property Holdings (Private)
Limited 67 Ward Place,
Colombo 07.

24. Sujeewa De Silva
Office Lincoln Property Holdings (Private)
Limited 67 Ward Place,
Colombo 07.

25. Kamani Jayasinghe
Office Lincoln Property Holdings (Private)
Limited 67 Ward Place,
Colombo 07.

Respondents

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Kuvera de Zoyza PC with Senaka De Saram, D.V. Lakshmi and Sanjaya Fonseka for the Petitioner

Suranga Wimalasena SSC for the 01st, 02nd and 03rd Respondents

Harsha Soza PC with N.R. Sivendran instructed by Neelakandan and Neelakandan for the 4th, 07th, 08th, 09th, 13th, 14th, 15th, 16th, 17th and 20th Respondents

Written Submissions: By the Petitioner filed on 06.09.2017 and 06.09.2019

By the 01st, 02nd and 03rd Respondents filed on 20.03.2018 and 12.09.2019

By the 4th, 07th, 08th, 09th, 13th, 14th, 15th, 16th, 17th and 20th Respondents filed on 12.12.2017, 10.01.2019 and 05.09.2019

Argued on: 30.07.2019, 01.08.2019 and 27.04.2021

Judgment on: 14.10.2021.

N. Bandula Karunarathna J.

This is an application for a Writ of Certiorari to quash the Order made by the 2nd Respondent, namely G.U. Upawansa the Acting General Manager of the Condominium Management Authority dated 14.05.2007 marked as "P49" and annexed to the Petition.

The Petitioner is a Company registered with the Board of Investment in terms of section 17 of the Board of Investment of Sri Lanka Law, No. 4 of 1978 as amended. The 1st Respondent

is a Public Authority established in terms of the Common Amenities Board Law as amended by Apartment Ownership Law and by the name assigned to it is a body corporate having perpetual succession and a common seal. The 2nd Respondent was the Acting General Manager of the 1st Respondent Authority whose impugned order is being challenged by this application.

The 3rd Respondent is an inquiring officer of the 1st Respondent, who carried out the purported inquiry of the 1st and 2nd Respondents. The 4th Respondent is the Management Corporation of Cinnamon Garden Residencies (CGR) created in terms of section 20 of the Apartment Ownership Law No 11 of 1973.

The 5th to the 11th Respondents were members of the 4th Respondent, during the period the 2nd Respondent conducted the purported inquiry, complainants against the Petitioner for which such findings are challenged by this application. The 12th to the 21st Respondents are persons who participated in the purported inquiry held by the 2nd Respondent and 3rd Respondent on behalf of the 1st Respondent. The 22nd to the 26th Respondents are persons who participated in the purported inquiry held by the 2nd and 3rd Respondents on behalf of the 1st Respondent. They were members of the Management Corporation of Cinnamon Garden Residencies during the period the 2nd and 3rd Respondents conducted the purported inquiry.

The Petitioner constructed and developed a condominium property at No 67, Ward Place, Colombo 07. The said project was approved by the Board of Investment in Sri Lanka, in terms of section 17 of the Board of Investment of Sri Lanka Law No 4 of 1978 as amended.

The said building was called as Cinnamon Garden Residencies and completed by the Petitioner. Upon completion, persons interested in the said apartments purchased 17 apartments at Cinnamon Garden Residencies after November 2001. There was no condominium property plan registered in relation to the said premises setting out each apartment as a condominium parcel. The purchasers occupied their respective apartments or condominium parcel purchased upon the signing of an agreement to sell.

There were 17 purchasers occupying apartments during the period November 2001 to March 2002 at Cinnamon Garden Residencies. Certain essential services with regard to the common elements of Cinnamon Garden Residencies such as security, insurance, maintenance staff, janitorial services pool maintenance, support staff, and managing and maintaining the said common elements were required by the said occupants. The petitioner says that providing of the aforesaid services were not the responsibility of the Petitioner as he was the initial owner and developer of Cinnamon Garden Residencies.

Providing of the facilities to occupants of any condominium residencies always vests with the entity known as a The Management Corporation of the particular condominium property created in terms of section 20 of the Apartment Ownership Law No 11 of 1973 which comprises of members who are owners of the said condominium property. Due to the reason

that Cinnamon Garden Residencies condominium plan was not approved by the Urban Development Authority and the condominium deed of declaration was not registered within the Colombo Land Registry during the period of November 2001 to March 2002 no management corporation was existed at Cinnamon Garden Residencies.

The petitioner says that during this period the Petitioner as an agent of the occupiers of Cinnamon Garden Residencies provided the aforesaid services to the occupants at the request of the occupiers, until such time the Management Corporation was officially created. In providing the said services the Petitioner incurred certain expenditure in relation to the same and further collected condominium property fees from the occupants during the said period to be utilized with regards to payments to be made to the said facilities.

The petitioner further says that the period 01.11.2001 to 31.03.2002 the Petitioner incurred a loss of rupees 677,526.56 in providing the aforesaid facilities to the occupants of Cinnamon Garden Residencies. The said sum was calculated after deducting all the expenses incurred by the Petitioner from the income received on an accrual basis. The condominium plan for Cinnamon Garden Residencies was approved and registered by the Urban Development Authority on the 07.03.2002. The condominium deed of declaration of Cinnamon Garden Residencies prepared was registered in the Colombo Land Registry on the 26.03.2002. With the approval and the registration of the condominium plan in terms of section 20 of the Apartment Ownership Law, the 4th Respondent was created by law with the owners of the condominium parcels or apartments being the members of the said body corporate. The inaugural meeting of the 4th Respondent was duly held on the 21.05.2002

The 4th Respondent was created by the operation of law, a separate bank account for the same was not opened resulting in the expenses incurred by the 4th Respondent been borne out by the Petitioner through the aforesaid bank account maintained by the Petitioner.

It was argued for the petitioner that the 4th Respondent was benefited by the expenditure incurred and service put in place by the Petitioner during the period 01.11.2001 to 31.03.2002 in providing security, insurance, maintenance staff, janitorial services pool maintenance, support staff and managing and maintaining the common elements of Cinnamon Garden Residencies. Due to the Petitioner incurring the said expenditure and providing the said services as a going concern the 4th Respondent was not required to incur any cost nor expenses in obtaining the said facilities for the benefit of the occupants and the owners of the condominium parcels.

The members of 4th Respondent met for the second time on the 6th of August 2002 and resolved *inter alia* the following;

- (a) That the excess of expenditure incurred by the Petitioner during the period 01.11.2001 to 31.03.2002 be borne by the management corporation of Cinnamon Garden Residencies.

- (b) The said costs were not to be passed on to the initial occupants but absorbed to the management corporation.
- (c) To hand over the functions of the management corporation to the owners when substantial numbers of properties were registered within the land registry.

The petitioner says that the period 31.03.2002 to 31.03.2003, the 4th Respondent incurred a loss of Rs. 1,344,805.43. The said figure was arrived at after deducting all the expenses incurred by the 4th Respondent from the income received by the 4th Respondent on an accrual basis.

On 26.02.2003 the Petitioner through their Attorney had duly informed the owners of Cinnamon Garden Residencies with regards to a meeting of the management corporation in order to elect members to the 4th Respondent management committee and transfer the functions carried out by the Petitioner to the said committee of the 4th Respondent. The period commencing from April 2003 the 4th Respondent functioned under a new management committee headed by the 9th Respondent and also comprising of 5th, 6th, 7th, 8th, 9th, 10th, 11th, 18th and 23rd Respondents. The Petitioner states further that all decisions of the 4th Respondent were carried out by the said committee. The said committee of the 4th Respondent met on the 06.05.2003 and 17.07. 2003 and resolved inter alia the following;

- (a) The Petitioner functions until the 1st of July 2003 in order to enable the new committee to take over the management.
- (b) The Petitioner to manage the accounting system, secretarial work of the management committee.
- (c) For the services rendered by the Petitioner the Petitioner ought to be paid a fee of Rs 50,000 per month.
- (d) The new committee shall be responsible for the management of Cinnamon Garden Residencies with effect from 01.04.2003
- (e) The Petitioner has paid its contribution towards the sinking fund and annual maintenance fee of Rs 90,000 an annum for the apartments held by it other than 6 or 7 apartments which were incomplete and unoccupied.
- (f) The Petitioner agreed to pay towards the sinking fund of Cinnamon Garden Residencies and a sum of Rs 1,000/- as maintenance charge per annum for the said 6 or 7 apartments which were incomplete and unoccupied.

It is evident that by letter dated 21.07.2003 marked P17 the management committee of the 4th Respondent, requested the Petitioner to continue as agent for accounting matters and request that the overdraft limit of the bank account of the corporation which was still running through the Petitioner's bank account be increased to Rupees two million. The said facility was obtained by the Petitioner on behalf of the 4th Respondent. The management committee opened a separate account but they failed to take any attempts to repay the Petitioner with regard to the expenditure incurred by the Petitioner in providing the utility services of Cinnamon Garden Residencies (C.G.R.)

The Petitioner by letter dated 07.10.2003 (P19) had formed the management committee of the 4th Respondent that the Petitioner will be withdrawing its services rendered to the corporation and shall not be paying any of the salaries submitted to the Petitioner by the corporation. The Petitioner's letter dated 07.10.2003 was tabled at an emergency meeting of management corporation of Cinnamon Garden Residencies.

They decided to resolved *inter alia* the following;

- (a) To take over the management of Cinnamon Garden Residencies completely from the Petitioner.
- (b) To open a separate bank account for Cinnamon Garden Residencies where all funds will be banked with effect from 13.10.2003.

The Petitioner further states that as no action was taken by the corporation to settle the overdraft facility, a sum of Rs 1,666,642.76 incurred by the Petitioner on behalf of the 4th Respondent, the Petitioner decided to set off the liabilities against the monthly maintenance charges to be paid to the 4th Respondent for the apartments owned by the Petitioner.

Due to the actions taken by the Petitioner the management committee of the 4th Respondent demanded a sum of Rs 4,369,010.00 from the Petitioner and decided to complain to the 1st Respondent with regard to the legitimate actions taken by the Petitioner to recover all monies due to the Petitioner from the 4th Respondent. On 28.03.2005 the 5th to the 11th Respondents made a complaint to the 1st Respondent setting out eleven points of complaint against the Petitioner. The 2nd Respondent carried out an inquiry with regard to the 11 points of complaint addressed to the 1st Respondent through a letter marked P30. The Petitioner states further that inquiry was carried out by the 2nd and 3rd Respondent on behalf of the 1st Respondent.

The 3rd Respondent requested the Petitioner to file written submissions in relation to all the issues set out in the complaint against the Petitioner. The Petitioner objected to the said summery manner in disposing of the inquiry due to the main reason that the 5th to the 11th had under no circumstances proved the points of complaint submitted to the 1st Respondent. The Petitioner states further that in spite of the fact that the 5th to the 11th Respondent had failed to establish and prove their points of complaint the Petitioner thereafter filed its written submissions (P43) in terms of the direction made by the 3rd Respondent.

After the said inquiry on the 21.01.2006 the 3rd Respondent continued to carry out discussions with the complainants but without the Petitioner's representatives been present and even ordering one of the Petitioner's representatives to leave the board room. Due to the said irregular manner in which the inquiry was held on the 21.01.2006 the Petitioner wrote to the 2nd Respondent informing the same. It was alleged that no action was taken by the 2nd Respondent with regard to the said complaint. The inquiry was conducted by the 3rd Respondent on the 25.03.2006 and the next date of inquiry was fixed for the 08.04.2006. However, the Petitioner became aware that the 3rd Respondent has on a request made by the 5th to the 11th Respondents changed the said inquiry date without informing the Petitioner.

Thereafter by order dated 14.05.2007 (P49) the 2nd Respondent made an order in relation to the aforesaid 11 points of complaint against the Petitioner. It is against this order that the Petitioner has come before us.

The Petitioner states that the findings and the order of the 1st to 3rd Respondents are illegal, unlawful, void and of no force or avail in law. Therefore, the petitioner argues that;

- (a) the said order is erroneous in fact and in law,
- (b) is contrary to the audited accounts of the management corporation of Cinnamon Garden Residencies,
- (c) the said order has been made in breach of the principles of natural justice in as much as the Petitioners have not been granted an opportunity of being heard by the 2nd Respondent prior to the making of the said order by concluding the inquiry on written submissions,
- (d) the said order has been made against the rules of bias,
- (e) the 2nd Respondent has taken into consideration irrelevant factors in considering the complain of the 4th to the 10th Respondent,
- (f) the 2nd Respondent has not taken into consideration relevant factors in considering the complain of the 4th to the 10th Respondent,

Thus, the petitioner prays that *inter alia*;

- (i) grant and issue a mandate in the nature of a Writ of Certiorari quashing the purported order made by the 2nd Respondent dated 14.05. 2007 on behalf of the 1st Respondent marked P49
- (ii) grant interim relief restraining the 01st Respondent, its servants or agents from taking any action in terms of the purported order dated 14.05.2007 marked P49 made by the 02nd Respondent on behalf of the 01st Respondent until the final hearing and determination of this application,

- (iii) grant interim relief suspending and staying the purported order dated 14.05.2007 made by the 2nd Respondent on behalf of the 01st Respondent until the final hearing and determination of this application,
- (iv) direct the 1st and 2nd Respondents to produce the entire record of the inquiry held by the 1st Respondent in relation to the subject matter of this application,
- (v) allow the Petitioner to file all the proceedings before the 01st, 02nd and 03rd Respondents as and when the same is obtained from the 01st Respondent or 02nd Respondent,
- (vi) grant the Petitioner costs; and
- (vii) such other and further reliefs.

While denying the averments in the petition, 01st to 03rd Respondents filed their objections *inter alia*;

- 1) Upon the complainant made to the 2nd Respondent on 28.03.2005 by the 4th Respondent, the 1st Respondent authority who is statutory empowered to look in to the said Complainant and make order accordingly, conducted an inquiry at which all parties were present.
- 2) The inquiry Officer of the 1st Respondent Authority conducted a site inspection, called for submissions of all parties, looked in to the aspect of reasonable settlement and failing all that, made a recommendation (R1) to the 02nd Respondent with regard to the complaint.
- 3) Thereafter the said recommendation of the 03rd Respondent was considered by the 02nd Respondent and after careful analysing of same made order P49 dated 14.05.2007.
- 4) 01st to 03rd Respondents deny the averments contained in the petition and reiterate that the order made is lawful and valid and is in accordance with the law.
- 5) Further these Respondents state that at all time they acted in accordance with the statutory provisions and the order made is just and reasonable and therefore implementation of the said order is lawful and valid.

In the circumstances, 01st to 03rd Respondents state that the application of the Petitioner is misconceived in law and should be dismissed with costs.

By way of Preliminary Objections, 4th, 07th, 08th, 09th, 13th, 14th, 15th, 16th, 17th and 20th Respondents state that the Petitioner's application is misconceived in law and should be rejected and dismissed inter alia,

- (a) the Petitioner has an alternate remedy and therefore, the Petitioner cannot have and maintain this application;
- (b) the Petitioner having already instituted action in the District Court of Colombo bearing Case No.21506/L, against some of the Respondents, this application cannot be maintained.
- (c) the Petitioner has purported to obtain interim relief in the said action and therefore, in any event cannot have and made this application;
- (d) the substantive relief prayed for by the Petitioner is relief which cannot ex facie be granted by this Court even if the averments in the Petition are accepted as true;

These Respondents further state that the application of the Petitioner is misconceived in law and should be rejected in limine for, inter alia, the following reasons;

- (a) The Petitioner has filed this application on the wrong footing without disclosing all the material facts relevant to the subject matter.
- (b) The Petitioner has not filed all the relevant documents before this Court and has not observed the imperative provisions of the Rules of this Court and therefore, on this ground too this Court should dismiss this application.

By way of further Preliminary Objections, 4th, 07th, 08th, 09th, 13th, 14th, 15th, 16th, 17th and 20th Respondents state that the Petitioner has deliberately and fraudulently and improperly suppressed the Constitution of the Management Corporation of the Cinnamon Garden Residencies, the proceedings before the 1st Respondent and the factual matters behind the dispute between the Petitioner and the other owners including these Respondents.

It is evident that the Petitioner having participated at the inquiry conducted by the 1st Respondent had acquiesced in the 01st Respondent's power and entitlement to carry out the inquiry and make a decision and thus, is estopped from challenging the authority of the 1st Respondent at this late stage because the order was not in favour of the Petitioner. The application made by these Respondents was made known to the Petitioner by the 01st Respondent and the Petitioner was fully aware of the scope and the purpose of the inquiry conducted by the 1st Respondent and is now not entitled to raise objection to the 01st Respondent's authority.

At the inquiry following facts have been disclosed;

the building consists of eleven storeys (G+10) for Seventy Six (76) residential Apartments with mezzanine floor, basement and swimming pool at premises No. 67, 67A, Ward Place, Colombo 07.

The Developer Lincoln Property Holdings (Pvt) Ltd (herein after referred to as L.P.H.) was the owners of the above condominium building accordance with the condominium Law.

It is now necessary to consider the recommendation of the 03rd respondent, produced by the 1st to 3rd Respondents along with their objection, with the marking of "R1". It was about in respect of 11 complaints against the petitioner.

The Complaints are as follows-:

Complaint No. 01;

- i. A roof top garden with barbecue and entertainment facilities were not provided.

Regarding this complaint, Management Corporation states as follows;

1. Premises were not completed as promised prior to purchase eg. according to the Plans and brochure given at the time of purchasing the apartments, a rooftop garden with barbecue and entertainment facilities was promised. This has never materialized. They further state today the roof is a jungle of pipes and decaying rubble merely walking on the roof terrace is hazardous.
2. L. P. H. took up the position that the said allegation was totally false and incorrect as the brochure issued to the prospective buyers refers only to providing provision for a rooftop terrace with barbecue facility for entertainment and it does not in any way under take to provide a rooftop garden and other entertainment facilities.
3. The problem here had been that the interested individuals want the location of this equipment on the rooftop to be changed, which cannot be done unless with the approval of the Fire Department UDA/CMC and it also warrants the consent of all the other residents (which had not been forthcoming) as it is a potential high risk and the insurance at an additional cost to be borne by the Management Corporation. (herein after referred to as M.C)
4. L. P. H. further states that developer pledged to give a roof top terrace with barbecue facility. There is an area of 1500 Sq. Ft. available for B. B. Q. facilities and would accommodate a family gathering. The Developer at his cost has also requested the MC to purchase a B. B. Q. of their choice for the last three years which has not been done by the complaints.
5. According to the brochures submitted by both parties it is evident that Property Holding (Pvt) Ltd agreed to give roof terrace with B. B. Q. facility for entertainment.

The Inquiry Officer States, I am of the view that in the brochures it is mentioned that a roof terrace with B. B. Q. facility for entertainment would be provided. But nothing is mentioned about roof top garden. When we visited the roof top terrace it is not suitable for B. B. Q. Because there are plenty of pipe lines laid on the roof. This laps on the part of the owner L.P.H.

Complaint No. 02

- i. full running expenses have been claimed by the Lincoln Property Holdings (Pvt) Ltd for November 2001 where there were no occupants at all.
- ii. As at December 2001 there was a substantial amount of building work to be completed.
- iii. The expenses should have been proportional to the number of occupants.

Regarding this complaint, Management Corporation states as follows;

1. The first few owners (or their tenants) occupied their apartments towards the end of December 2001 even though the Certificate of Conformity was obtained only on 31.01.2002. At this stage several apartments had been sold. Owners or their tenants had come into occupation and L. P. H. was collecting management fees and sinking fund contributions from them and ostensibly managing some services for them. Prior to taking occupation the following payment had to be made by the purchaser management fee of Rs.5000/- per month for 12 months Rs.60,000/- and sinking fund per year Rs.30,000/-
2. The Cinnamon Garden Residencies Management Corporation was established in March 2002. Therefore, any expenditure incurred before that date in respect of the property is not chargeable to the corporation, but must be met by the developer. On the other hand, L. P. H. has been claiming purported expenses (including monthly administrative expenses and accounting charges) from the management fund and sinking fund, not only for the immediate period before March 2002, but even from November 2001 three months before the C. of C. was obtained.

The purported expenses for the period November 2001 to March 2002 amounting to Rs.913,804/- cannot be charged to the Corporation as it was not in existence at that time and Cinnamon Garden Residencies was not a condominium property.

Appendix 3 elaborate on their points very clearly. Even if we work on the basis of figures extracted from L. P. H. the sum due are;

November 01 to March 02	=	Rs.1,046,454/-
April 02 to March 03	=	Rs.2,621,154/-
April 03 to October 03	=	<u>Rs. 338,027/-</u>

Total due = Rs.4,005,635/-

L. P. H. Reply as follows:-

By November 2001 all common amenities areas of the Cinnamon Garden Residencies were completed and 'Cinnamon Garden Residencies were in the totally habitable. It absolutely essential to do so in order to accommodate those who were due to move in December 2001.

The first occupant of Cinnamon Garden Residencies moved in December 2001 and by that time all common amenities had to be made serviceable and hence the necessity for expenditure to be incurred in advance in November 2001. Thus, it is to be noted that December 2001, 17 occupants moved into Cinnamon Garden Residencies. None of the Occupants were from Lincoln Property Holdings (Pvt) Ltd.

The very kind of charges referred to in the letter being accountancy charges and administrative charges are of a fixed kind. The Accountant has to be paid a fixed salary and a static number of books have to be maintained by the accounts department even if there was only one occupant. You will appreciate that L. P. H. cannot inform an Accountant that he is to be paid less because there were only a few occupants on a given monthly and no Accountant will remain in service with L. P. H. if that was the case.

Administration & Maintenance too in a similar matter and all common amenities have to be maintained and administered be it one occupant or more in occupation at a given time. Ex. The swimming pool requires the same attention at any given time if it were to be hygienically maintained whether used by only one person or many. It is inevitable that full running costs should be charged and cannot vary according to the number of occupants at a given time.

It is necessary to understand that there is a difference between incomplete apartments and unoccupied ones. The incomplete apartments were never charged to the system. But the complete apartments were as at December 2001, with 17 persons taking occupation of the completed apartments the occupancy rate was 100% at that month. There by too, it was necessary warranted to incur full running, expenses during, the period November 2001 to March 2002.

The Inquiry Officer States, I have studied the facts submitted by both parties by operation of Law. The Cinnamon Garden Management Corporation was established on 26.03.2002. I am of the view, that any expenditure in respect of maintenance fees is chargeable to the corporation only from 26.03.2002. The expenses charged to the management corporation for the period November 2001 to March 2002 amounts to Rs.1,046,454/- which cannot be charged because Management Corporation was not in existence at that time.

This is a transaction between the purchaser and the seller and it is completely outside the ambit of the Management Corporation. If this money had to be charged, he could make some other arrangements. Hence the amount of Rs. 1,046,454/- has to be settled to the Management Corporation by the owners.

In addition, I am not satisfied with the way that owner has charged maintenance fees for the period of April 2002 to March 2003 onwards the owner should have charged maintenance fee only according to the occupation of the houses, But the owner has charged maintenance fees even from the unoccupied houses. Therefore, extra money charged amounting into Rs.2,621,154/- has to be settled by the owner to Management Corporation.

Also, maintenance fees from April 2003 to October 2003 amounting to Rs.338,027/- has to be settled by the owner to Management Corporation.

Complaint No. 03

Unsold apartment which are owned by Lincoln Property Holding (Pvt) Ltd. does not pay Management fees or to the sinking Fund.

Regarding this complaint, Management Corporation states as follows;

In April 2002 Mr. Ayaru the Developer became Chairman of the first Management Committee. At the first meeting held on 02/ 05/ 2002 with no proper quorum and solely with his Lawyers and Company Secretary they decided that he does not have to pay management fees and sinking fund contributions for unsold unfinished apartments, even though this is contrary to the Condominium Law. The unsold apartments included nearly thirty apartments owned by him and shareholders of L. P. H. management fees were paid only for some of those apartments and that too, only sporadically as and when tenants were occupying them.

L. P. H. Reply as Follows;

The non-payment of management fees and sinking fund dues for unsold apartments, was done itself, in keeping with an existing resolution passed by the then management corporation, which if the complaining management corporation thought to be unfair had ample opportunity to change these provisions.

In the absence of any such changes or amendment to date the matter remains perfectly constitutional and legal and the complaint on this issue is baseless.

The resolution and constitution were not that of Lincoln Property Holdings (Pvt) Ltd; but was the constitution and the resolution resolved and adopted by the one-time management corporation of the Cinnamon Garden Residencies.

The management corporation was established and run for the well-being and smooth functioning of the Cinnamon Garden Residencies at a time when no one was willing to shoulder the burden of the management corporation.

The management corporation has been accepted and duly recognized by the Condominium Management Authority by letter dated under reference CAI3/08/01/028/74.

The Inquiry Officer States, I examined the annexure marked X16, but I cannot accept the reasons given by the owner in connection with the unsold and unfinished apartments according to the decision taken on 02.05.2002 at the said inaugural meeting of the Management Corporation.

The L. P. H. relied;

On the document marked annexure 16 and they took up the position that inaugural meeting of the Management Corporation (Condominium Plan No. 1966) resolution was passed in respect of 6 items which are relevant to the inquiry. The present Management Corporation does not agree with the resolution passed at the inaugural meeting.

When the Condominium Plan is registered with the Land Registry in terms of section 20 B (1) of the Apartment Ownership Law, the unit owners become members of the Management Corporation. This Management Corporation was formed on 02.05.2002. By this date L. P. H. has not issued Deeds to the unit owners. If so, unit owners have no authority to participate in the inaugural meeting. As such only the representative of the A. H. P. L. participated at the meeting and passed the resolution. This can be treated as ex-parte decision and it affects the future prospective purchasers.

Therefore, in my opinion I am in doubt whether prospective purchasers could be subjected to the decision made by only the representative of the Company.

Therefore, I am of the view that owner has to pay maintenance fees for the above unsold apartments and unfinished apartments also to the Management Corporation.

Complaint No. 04

There is building maintenance fees of Rs.180,000/= at a time when the building was not even one Year old.

Regarding this complaint, Management Corporation states as follows;

The bills included all the electricity, water and telephone bills (the telephone bills alone amounting to Rs.90,000/=, security salaries of his staff, maintenance staff, his residents Engineer, his Accountant and their travelling (Rs.104,000/=) He also claimed to have spent Rs.180,000/= on maintenance while the building was not even one year old. On top of all these the monthly administrative and accounting charges were paid.

L. P. H. Reply as Follows;

The building maintenance cost of Rs.180,000/= the time period of this alleged expenditure is unspecified unknown and thus it is not possible to reply this allegation will certainty.

However, all expenses have been audited by reputed independent auditors and the audited statement of accounts have been made available to the management corporation which had not raised any queries with the auditors who would have been in a better position to reply

The Inquiry Officer States, I am of the view that this complaint has not been established properly and the period of the expenses has not been specified.

Complaint No. 05

- (i) Mr. Ayaru personally canvassed members to be appointed to the Management Corporation in April 2003.
- (ii) Request of overdraft facilities from Commercial Bank for Cinnamon Garden Residencies. (CGR)
- (iii) Mr. Ayaru requesting the settlement of overdraft of 1.6 Million obtained as against Lincoln Property Holding (Pvt) Ltd. as Security.

Regarding this complaint, Management Corporation states as follows;

Handover of Empty Accounts (April 2003 — October 2003) Management Corporation states a new committee was elected in April 2003, for Mr. Ayaru personally canvassed for new committee members. He then handed over to the new committee an empty management account an empty sinking fund account and a massive overdraft of Rs.1.6 million taken from the Cinnamon Garden Residencies Commercial Bank Account. His explanation was that the owners were not paying the management fees on time. Since their overdraft was against L. P. H. Security Mr. Ayaru insisted that this had to be paid off before he handed over the Bank Account to the new committee. As this was not possible at the time, there was no alternative but to ask Mr. Ayaru to continue to manage the Cinnamon Garden Residencies till the overdraft was cleared.

Further Management Corporation states during the period March 2002 to 2003 Mr. Ayaru was the President of the Management Corporation and Lincoln Property Holdings (Pvt) Ltd was the Managing Agent of the Corporation. Mr. Ayaru is also the Chairman and Managing Director of the Lincoln Property (Pvt) Ltd. In March 2003 a new Committee was appointed wherein Mr. Ranjan Britto was elected as the President. However due to the non-availability of proper Accounts, bank Statements and other documentation and an existing liability to Commercial Bank of Ceylon Ltd is sum of. Rs.1,654,315.82 created by Mr. Ayani as President of the Corporation. Mr.

Ranjan Britto resigned from the Post of President of the Corporation. Mr. Ranjan Britto was re- elected as the President of the Corporation on 07th October 2003.

The new Management Committee appointed was not provided with Audited Accounts of the Corporation for the period March 2002 to March 2003. Neither was it provided with the Bank Statements of the Corporation for this period as managing Agents Lincoln Property Holdings (Pvt) Ltd is responsible for the provision of the documents.

L. P. H. answering as Follows;

- (a) There is no irregularity or illegality in the matter relating to the first of these allegations and at any event Mr. Ayaru canvassed persons to come forward as Committee members as no one was willing to come forward even at this stage in April 2003.
- (b) As at April 2003 admittedly there was an arrears in management fee to the tune of Rs.1.6 Million which had been advanced by the Lincoln Property Holdings (Pvt) Ltd on behalf of the Management Corporation. These expenses were incurred by the management corporation of that time and not by Mr. Ayrau or Lincoln Holdings (Pvt) Ltd. It is therefore nothing but right for the Management Corporation to settle the monies which had become due to Lincoln Property Holdings (Pvt) Ltd, which had occurred admittedly because the residents had failed to pay their monthly management fee in advance. More so because the overdraft had been allowed as against the security provided by Lincoln Property Holdings (Pvt) Ltd.
- (c) However, the seven signatories of the management corporation that has complained to you on this subject requested Lincoln Property Holdings (Pvt) Ltd, to use its good offices to enhance the overdraft limit from the current Rs.1.7 million to Rs.2 Million.

Your attention is drawn to the letter written by former Secretary Mr. Reginald Seneviratne dated 21/ 07/ 2003.

Neither Mr. Ayaru nor Lincoln Property Holdings (Pvt) Ltd, is responsible for any expenses incurred during, this period as a Management Corporation was in force and all such expenses have been incurred by the Management Corporation only.

The Inquiry Officer States,

- 01. However, I am of the opinion that although Management Corporation states that Mr. Ayaru had personally canvassed members of the new committee there is no proof to this effect.

02. If the unit holders did not pay the maintenance fees there is a procedure to be followed according to the terms of Apartment Ownership Law. But he did not do so. There for Mr. Ayaru has no business to obtain the massive overdraft amount to Rs.1.6 Million with out of the consent of the members of the Management Corporation.

I examined the documents marked X 19 dated 21st July 2003 written by Reginald Seneviratne to Ayaru. These documents have been signed by the said Seneviratne on behalf of the management committee. As Mr. Ayaru is a member of the Management Committee, it is wrong for him to take cover under the above-mentioned letter of Mr. Seneviratne and obtained the massive amount of Rs.1.6 Million as an overdraft and increase into Rs.2 Million.

When a financial crisis like this has taken place, it is the duty of Mr. Ayaru who is the representative of the owner company to have got a resolution passed at a special general meeting of the Management Corporation. Therefore, Mr. Ayaru has no Authority to obtain a massive overdraft from the Commercial Bank. Therefore, he is liable to pay the said overdraft to the Management Corporation.

Complaint No. 06

- (i) Mr. Ayaru does not regularly pay management fees for the apartment he owns.
- (ii) Insurance for the building had been paid without approval of the Management Corporation.

Regarding this complaint, Management Corporation states as follows;

Mr. Ayaru still continues to pay his fees and when he chooses for the 30 Apartments he owns and rents out. He withholds management fees and spends the money as he wishes. eg. recently he paid for the insurance for the building without the knowledge or consent of the committee and without paying his fees into the management fund.

Answering the said Complaint L. P. H. states as Follows;

it is totally false and inaccurate to state that Mr. Ayaru has not paid the dues for his Apartments as the apartments are owned by Lincoln Property Holdings (Pvt) Ltd. In fact, Mr. Ayaru need not pay management fees, as he is not the owner of the Apartments. That statement becomes further untrue as Lincoln Property Holdings (Pvt) Ltd. has made payments of management fees on the due dates.

Regarding the payment of insurance premiums it is Lincoln Property Holdings (Pvt) Ltd. who has paid the premium concerned out of moneys belonging to Lincoln Property Holdings (Pvt) Ltd. although Mr. Ayaru or Lincoln Property Holdings (Pvt) Ltd.

was not obliged to do so, solely because the insurance was to lapse on the day following the payments. This would have stripped all Cinnamon Garden Residencies, residents of their insurance cover. It is pertinent to note that this is a failure on the part of the complainants who were members of the Management Corporation at that time to have not made this payment on time.

The inquiry Officer States, I am of the opinion that Lincoln Property Holdings (Pvt) Ltd. has to pay the management fees for unsold apartments owned by the said Company to Management Corporation. Mr. Ayaru is a shareholder of the said Company and represents the interest of the Company. The payment of insurance fees as a responsibility of the management corporation and as it is highly irregularly for Ayaru to pay the insurance fees from the money that should be paid by him as management fees.

Complaint No. 07

- (i) The rooftop is leaking.
- (ii) Mr. Ayaru wants it done at the expenses of the Management Corporation.
- (iii) But the building is under a builder's warranty yet.
- (iv) Mr. Ayaru has failed to provide the warranty certificate.

Regarding this complaint, Management Corporation states as follows;

L. P. H. states as Follows;

01. The Builder of Cinnamon Garden Residencies, being Sanken Lanka Ltd., has issued a warranty of defects liability to be in force for a one-year period which ended in November 2002. The leak concerned was detected only 2003, and this is therefore not within the warranty period.
02. The Management Corporation of the Cinnamon Garden Residencies (CGR) on 24th June 2005 unanimously decided that waterproofing of the rooftop should be carried out at the expenses of the Management Fund. It also resolved that Mr. Ayaru, Chairman Lincoln Property Holdings (Pvt) Ltd. should personally supervise this task (Resolution marked annexure X2). Prior to that when the leak was first detected by his letter dated 9th October 2003, the Secretary of the Management Corporation informed Lincoln Property Holdings (Pvt) Ltd. that the rooftop will be water proofed and the expenses to be born out of the Management Fund.

03. Sadly, in violation of all these resolutions and decisions of the Management Corporation, Mr. Britto the then Chairman of the Management Corporation got the rooftop over 10/ 2 water proofed discriminating the other individual owners of the 10th floor and the entire apartment complete who were not favourites of Mr. Britto.

This allegation of a leaking roof is levelled against Lincoln Property Holdings (Pvt) Ltd. Mr. Ayaru is this backdrop of very uneven playing field.

04. Therefore, it is to be noted neither Lincoln Property Holdings (Pvt) Ltd. nor Mr. Ayaru is obliged to repair the leak an alleged falsely assuming that building is still under builder's warranty.

Management Corporation states there is a major leak in the rooftop area of Cinnamon Garden Residencies Mr. Ayaru is demanding that Management Corporation repairs this although the rooftop is still under the builder's warranty. However, despite being asked for it on numerous occasions Mr. Ayaru who is also the developer has failed to provide the warranty certificates. You might ask him to produce this certificate for the records of the Condominium Management Authority.

In reply to Lincoln Property Holdings (Pvt) Ltd., Management Corporation further states;

In our previous correspondence to the CMA, we have informed you that the repair to the rooftop was not carried out under warranty due to the non-payment of dues to the relevant contractor by the Developer. The contractor therefore, withheld the warranty proof attached see appendix 1.

Lincoln Property Holdings (Pvt) Ltd., has illegally withheld money from the management committee to repair the rooftop on their behalf the management committee are not responsible for repairs which should have been carried out under warranty.

A rooftop garden and entertainment areas were promised by Lincoln Property Holdings (Pvt) Ltd., to buyers in their sales broacher as already shown to the CMA. During visits prior to purchase of a property, it was assured by Lincoln Property Holdings (Pvt) Ltd., that pipe work would be covered to facilitate a roof top garden area. Furthermore, we believe the pipe work is exposed due to the Developer constructing another story on the building which was not accounted for in the original design.

The Inquiry Officer States, according to the submissions made by both parties, there seems to be a dispute between the parties regarding the water proofing of rooftop. Rooftop is still not water proofed and there are several other defects. It is clear as per appendix submitted by Management Corporation,

that there is a financial dispute regarding the issue of warranty certificate between Lincoln Property Holdings (Pvt) Ltd., and L. Chandrarathna Ltd. stated in their letter dated 09/ 07/ 2004 (Appendix 1) that the warranty certificates were not issued due to the non-payments of the final payments. The Management Corporation is not responsible for the dispute between the parties mentioned above regarding the non-payment of the final claim and non-issued of the warranty certificate.

However, of these were defects when the purchases of the unit moved into the Apartments it is a duty of a developer to point out such defects and get them attended to within a reason period.

Although Lincoln Property Holdings (Pvt) Ltd. states, in their submissions that the Management Corporation decided to do the water proofing of the rooftop at the expenses of the Management fund. It is not clear from answer annexure marked X2 to Para as – "Water Proofing" that management committee Funds should be made use of in this circumstance. I am of the opinion that waterproofing and other defects of the rooftop should be done by the Lincoln Property Holdings (Pvt) Ltd.

Complaint No. 08

That there are visitor's Car park bays which Mr. Ayaru will not allow residents to use.

Complaint No. 09

He is using two floors of Office for his personal use. Water is being utilized by these offices from common area and paid for from management fund.

The above 8 and 9 complaints are connected to each other.

Regarding those two complaints, Management Corporation states as follows;

Management Corporation states, Lincoln Property Holdings (Pvt) Ltd. informed the prospective purchases that only 76 units were available as residential units and others are units were reserved for office use. Lincoln Property Holdings (Pvt) Ltd. made the prospective purchases to understand their offices could be used for common purposes. But at present the situation has been completely changed. Now these offices are being used exclusively for the business purpose of Lincoln Property Holdings (Pvt) Ltd. and Management Corporation has no place to use as an office.

Further more employees of Lincoln Property Holdings (Pvt) Ltd. use water from the common water from Cinnamon water taps and other expenditure is bowed by the management corporation fund.

Also, two units of mezzanine floor used by the Lincoln Property Holdings (Pvt) Ltd. for their private use and the Car park area exclusively use by Lincoln Property Holdings (Pvt) Ltd. for their visitors should belong to Management Corporation.

In this regard Lincoln Property Holdings (Pvt) Ltd. states as follows;

I draw your attention to the Condominium Plan Ref No. 1969 approved by the U. D. A. very clearly it is depicted in this Plan, that the owner of the Car park is Lincoln Property Holdings (Pvt) Ltd and it is not a common element which Mr. Ayaru is forcibly retaining as alleged.

It is correct that Lincoln Property Holdings (Pvt) Ltd. occupying two floors in the premises as depicted in the Condominium Plan ref. No. 1969 (annexure 22) is owned by said Company and the said building and premises do not belong to the Cinnamon Garden Residencies.

It is also to be noted that no bills have been submitted to Lincoln Property Holdings (Pvt) Ltd by the Condominium Manager requesting payment. You will appreciate that Lincoln Property Holdings (Pvt) Ltd. cannot pay bills that had not reached them. However, payment has been made for the water consumed up-to date in accordance with the management corporation agreement.

Management Corporation further states that;

Mr. Ayaru and Lincoln Property Holdings (Pvt) Ltd. has annexed and are occupying and using a number of common elements for their private purposes.

There include, unit 80 (including Lot 80, Lot 80 A and Lot 80 B) which comprises the gymnasium female changing room, Security room and office for the administration of the Condominium Management Corporation. Mr. Ayaru is occupying these offices and using them to run a private business. The result in that the management committee has no place to meet or run its office within the premises and has no resort to meeting in outside locations. A look at minutes of the committee meetings will confirms this fact furthermore, carrying on a business within a residential complete constitutes a nuisance to residents and compromises the security of the premises. The blocking of visitor parking for genuine visitors to residencies another great inconvenience. It appears to be a common practice among many developers in Sri Lanka who try to retain a sector of the premises for their private business uses.

Fortunately, the Condominium Management Authority is well aware of this ruse and is putting a stop to it. We request you take up as a matter of urgency. The parking bays PL 78 to 85 which were shown to us a visitor parking, when we brought the apartments are shown in the Condominium Plan and Condominium Declarations belonging to Lincoln Property Holdings (Pvt) Ltd.

However, since they are said to be apartments to unit 80, which is a common element also. The visitor parking lots are claimed off by Mr. Ayaru and being used only by Lincoln Property Holdings (Pvt) Ltd. You could verify this when you visit the property in the course of your inquiry. This is another example of how running a business in a residential apartment complier can lead to abuses that inconvenience residents, and need to be dealt with urgently by the CMA.

Lincoln Property Holdings (Pvt) Ltd. and Mr. Ayaru are not only using common elements for their private purposes but the water they are using has also to be paid for from committee management funds.

The Inquiry Officer States, When I examined the above-mentioned Condominium Plan Unit 80 marked Lot 80 basement floor building bearing No. 67/ 1 (part) (floor area 269 Sq.), Unit marked 80 —Lot 80 A bearing assessment No. 67/ 1 (part) (floor area 1394 Sq.), Unit marked 80 —Lot 80B (First floor bearing Ass. No. 67 /1) (part) (floor area 1959 Sq.) is indicated as office building as per certificate of conformity (C. O. C.) dated 31/ 01/ 2002 (Appendix 2A) was issued by Urban Development Authority for the erection eleven storey (G+10) building for seventy-six (76) residential apartments with mezzanine floor, basement and swimming pool at premises No. 67, 67 A Ward Place Colombo 07. But there is nothing mentioned about business premises the Condominium Plan does not specifically describe the said mezzanine floor as common elements since it is described inter - alia to be used a Managing Directors Office.

The complaint C.G.R.M.C. also stated that Lincoln Property Holdings (Pvt) Ltd. has failed to provide the office spaces for their Management Corporation's office as whereas said office areas are being use for commercial purpose.

As per 26 of the Apartment Ownership Act No. 11 of 1973 as amended common elements include as follows;

"Premises for use by security guards, caretakers and watchman."

With regard to car park Lincoln Property Holdings (Pvt) Ltd. states P. L. 78, 79, 80, 81, 82, 83, 84 & 85 are allotted to the exclusive use of Lincoln Property Holdings (Pvt) Ltd.

According to the said Apartment Ownership Law the said car parking as common elements which all the residents of visitors can be parked.

Therefore, I recommend that the car park should be common to all residents of the said apartments and also unit marked 80 (Lot 80) basement floor office building bearing No. 67/1 (part) (floor arrear 269 Sq.), unit. 80, 80A Ground Floor office building bearing Ass. No. 67/1 (part) (floor areas- 1,394 Sq.) and unit 80 lot 80B first floor office building bearing Ass. No. 67/1 (part) (floor area 1,959 Sq.) should be handed over to Management Corporation of Cinnamon Garden Residencies.

Complaint No. 10

Four of the committee members are employees of Mr. Ayaru. They represent only Mr. Ayaru and Lincoln Property Holdings (Pvt) Ltd. interest and do not functions as genuine committee members.

Regarding this complaint, Management Corporation states as follows;

We are also unable to distinguish between genuine and non-genuine committee members. It appears to us that as per the letters those members who represent the interest of the signatories are genuine by virtue of the fact that they are in league with the complainants. Those who do not support the complainants are deemed to be non-genuine members.

All members are appointed in terms of clause 04 of the constitution of the Cinnamon Garden Residencies. On what basis is this allegation fortified.

In reply to said submission, Management Corporation states as follows;

"As you can see by the above information and as you have seen in the hearing it is impossible for Management Corporation to deal with L. P. H. and its representatives as they do not follow the laws, rules and regulations of CMA. As very succinctly put by Lincoln Property Holdings (Pvt) Ltd. in their letter to the CMA dated 12th June 2006 quote "please note 7 members out of 13 members constitute a majority voice in the management corporation unquote.

This majority voice consists of 5 employees of Lincoln Property Holdings (Pvt) Ltd. two of whom have never been elected to the committee. One is the developer and other his relative. This shows how the Developer continues to obstruct and manipulate the day to day running and functioning of the management Corporation.

The Inquiry Officer States, I examined the submission made by both parties relating to the said complaint, and in addition to that I studied other facts which are relevant to the said complaint.

It was revealed that management corporation has been divided into two divisions as representative of Lincoln Property Holdings (Pvt) Ltd. and representative of residents.

Respondent represent the Lincoln Property Holdings (Pvt) Ltd. I have noticed for several occasions both parties are not in good terms when they submitted their facts before the inquiry. I examined as to why these disputes were created, that is because of Lincoln Property Holdings (Pvt) Ltd. retained unsold Apartments in their hand which can involve them in the Management Corporation functions of the Apartments. For an example if the Lincoln Property Holdings (Pvt) Ltd. sold the 76 units of the apartments, they have to leave the apartments and they have no opportunity to involve in functions of the Management Corporation. But it was not done, therefore

Lincoln Property Holdings (Pvt) Ltd. happened to safeguard their right by appointing their representative as office bearers.

It was further revealed that the said unsold Apartments being let to the tenants only fact also been noticed by me, that is at the outset when the prospective purchases were moving into occupation of the Apartments, the disputes had been arisen with regard to the mode of payments of maintenance fees by Mr. Ayaru Chairman of Lincoln Property Holdings (Pvt) Ltd., especially with regard to financial disputes, between both parties, their disputes became worse. At present this dispute has influenced the administrative functions of the Management Corporation.

The complaint was against the property developer Lincoln Property Holdings (Pvt) Ltd. but Lincoln Property Holdings (Pvt) Ltd. appeared before the inquiry with 7 other committee members of Management Corporation.

They are as Follows:-

- | | | |
|--------------------------|---|-----------------|
| 01. Mr. R. Ayaru | - | Member |
| 02. Mr. D. Mahindadase | - | Vice Chairman |
| 03. Mr. W. A. K. Silva | - | Members |
| 04. Mrs. K. Jayasinghe | - | Asst. Treasurer |
| 05. Mrs. S. Chelliah | - | Member |
| 06. Mr. R. A. Paranathan | - | Member |
| 07. Mr. B. Kulabalam | - | Member |

The Management Committee consisted of 13 members which 7 members are in the side of Development Company out of 7, 5 employees are from Lincoln Property Holdings (Pvt) Ltd., and other two are residents of the Apartment. Management Corporation states, that those two members are relatives of the Developer. Because of these reasons the management committee cannot be worked together. They are unable to hold a committee meeting due to non-availability of quorum.

The Company can pass resolution by selecting representative of the committee in a proper manner and it has to be mentioned the names of representatives to the management Corporation. Then the Lincoln Property Holdings (Pvt) Ltd. representatives can participate as the committee members.

If the representatives vary Lincoln Property Holdings (Pvt) Ltd. has a responsibility to inform the new names of the representative if that employees of the Company have no powers to participate in the committee members. Unless they have not authorized by Board of Directors. According to facts revelled before the inquiry Lincoln Property Holdings (Pvt) Ltd. has not given those details to this inquiry to come to correct conclusion.

So, I am of the view Lincoln Property Holdings (Pvt) Ltd. has only interest to protect their right.

Complaint No. 11

An attempt was made by management committee to hand over the management of the Cinnamon Garden Residencies to a company for the betterment of the residencies. Mr. Ayaru is opposing this appointment, supposed due to cost.

The Inquiry Officer States, in this regards Condominium Management Authority (CMA) cannot intervene this dispute. Because this dispute can be resolved by the majority vote of the Management Corporation.

However, before coming to said finding, the Inquiry Officer says that, I examined as per terms of section 6 (m) and 16 (1) of the Common Amenities Board (Amendment) Act No. 24 of 2003. Under said 16 (1) Condominium Management Authority has the power to inquire into the case and give an equitable order.

Further in terms of section 9 (1) of Apartment Ownership (Amendment) Act No. 39 of 2003 the absolute owner of the common elements is management corporation and the unit owners could be treated as tenants in common proportionally of this respective share parcel. After formation of Management Corporation, it has the right to protect the common elements.

I examined the Condominium Plan bearing No. 1969 made by M. S. T. P. Senadhira dated 06/12/2000 and the certificate of conformity dated 31/ 02/ 2002 issued by UDA under approved Plan No. ME/PBJ/82/2000 with amendments dated 10th April 2001 bearing No. ME/PBJ/11/ 2001.

According to the said Condominium Plan unit 80 marked lot 80 basement floor, unit marked 80 lot 80A ground floor and unit marked 80 lot 80B first floor are depicted as office building and has one assessment No. 67 (1) part, 67 (1) part, 67 (1) part, whereby the UDA recognized each of there as separate units by giving one assessment number each to the basement the ground floor and first floor.

According to the said situation respondent Company claimed the said office buildings together with the parking areas depicted lot 78 to 85.

The Inquiry Officer further says that, "I am of the view that claim to ownership by respondent company has the following implications."

The respondent claims as portion of Condominium Apartment as its office although the UDA permit is only for residential apartments and thus prima facie the claim is contrary to the UDA permit.

As many as 7 parking areas are non-claimed by the respondent as belonging to itself where the need for 7 parking areas would not have arisen if the respondent, is not maintaining its

office within the premises. The absence of parking areas causes inconvenience to visitors who park their vehicles on the drive.

The Management Corporation of the Cinnamon Garden Residencies (The 4th Respondent of this case) made a complaint dated 28-03-2005 against the owners of the said property development, M/s Lincoln Property Holding (Pvt) Ltd, (The Petitioner) in respect of 11 issues with regard to common elements and maintenance fees.

At the time of argument, the Learned Counsel appeared for the Petitioner restricted the arguments for the complaints No. 2, 5, 8 and 9.

The said complaints No. 2, 5, 8 and 9 are as follows.

(a) Complaint No. 02 of the said letter

- i. Full running expenses have been claimed by the Lincoln Property Holdings (Pvt) Ltd for November 2001 where there were no occupants at all.
- ii. As at December 2001 there was a substantial amount of building work to be completed.
- iii. The expenses should have proportional to the number of occupants.

(b) Complaint No. 05 of the said letter

- i. Mr. Ayaru personally canvassed members to be appointed to the Management Corporation in April 2003.
- ii. Request of overdraft facilities from Commercial Bank of Cinnamon Garden Residencies. (CGR)
- iii. Mr. Ayaru requesting the settlement of overdraft of 1.6 Million obtained as against Lincoln Property Holding (Pvt) Ltd. as Security.

(c) Complaint No. 08 of the said letter

- i. That there are visitor's car park bays which Mr. Ayaru will not allow residents to use.

(d) Complaint No. 09 of the said letter

- i. He is using two floors of Office for his personal use. Water is being utilized by these offices from common area and paid for from management fund.

Accordingly, the decision of the 01st to 03rd Respondents in respect of the other issues are now, not in dispute.

Complaint No. 02

The dispute in respect of Complaint No. 02 is that, the Petitioner has deducted expenses that he had incurred for the period, prior to the establishment of the Management Corporation. The Petitioner has charged Maintenance fees during the period of April 2002 to March 2003 from the Management Corporation in respect of the units that has not been sold.

The period can be divided in to three categories in respect of the disputes between parties.

01. From November 2001 to March 2002.

02. March 2002 to April 2003.

03. Period after April 2003.

In respect of the dispute No. 02, the Management Corporation has stated that, the first few owners (or their tenants) occupied their apartments towards the end of December 2001 even though the Certificate of Conformity was obtained only on 31st January 2002. Accordingly, the Management Corporation can come in existence after 2002 and admittedly, it is after March 2002. Prior to the establishment of the said Management Corporation, the Petitioner has collected management fees from the individuals as Rs. 5,000/= per month and for sinking fund Rs. 30,000/=. The dispute was that, the Petitioner has been claiming purported expenses (including monthly administrative expenses and accounting charges) from the management fund and sinking fund, not only for the immediate period before March 2002, but even from November 2001 three months before the C. of. C. was obtained.

The Cinnamon Garden Management Corporation was established on 26th March 2002, any expenditure in respect of maintenance fees is chargeable to the corporation only from 26th March 2002. The expenses charged to the management corporation for the period November 2001 to March 2002 amounts to Rs. 1,046,454.00/= which cannot be charged because Management Corporation was not in existence at that time.

The Petitioner has charged maintenance fees for the period of April 2002 to March 2003 onwards. The Owner should have charged maintenance fee only according to the occupation of the houses, but the owner has charged maintenance fees even from the unoccupied houses. Therefore, extra money charged amounting into Rs. 2,621,154/= has to be settled by the owner to Management Corporation. Also, maintenance fees from April 2003 to October 2003 amounting to Rs. 338,027.00/= has to be settled by the owner to Management Corporation.

The above decisions are based on the fact that, the Petitioner (owner) has deducted the abovementioned amounts, which he ought to have incurred as the property developer, from the account of the Management Corporation. Therefore, he was ordered to settle the said deducted amounts back to the Management Corporation.

Complaint No. 05

Handover of Empty Accounts (April 2003 — October 2003)

During the period March 2002 to 2003 Mr. Ayaru (The Petitioner) was the President of the Management Corporation and Lincoln Property holding (Pvt) Ltd. He was the Managing Agent of the Corporation. Mr. Ayaru is also the Chairman and Managing Director of the Lincoln Property (Pvt) Ltd. In March 2003 a new Committee was appointed wherein Mr. Ranjan Britto was elected as the President. However due to the non-availability of proper Accounts, bank Statements and other documentation and an existing liability to Commercial Bank of Ceylon Ltd was a sum of Rs. 1,654,315.82. This was created by Mr. Ayaru as President of the Corporation. Mr. Ranjan Britto resigned from the Post of President of the Corporation but he was re-elected as the President of the Corporation on 07th October 2003.

The new Management Committee appointed was not provided with Audited Accounts of the Corporation for the period March 2002 to March 2003. The Bank Statements of the Corporation were not provided for this period, as managing Agents of Lincoln Property Holding (Pvt) Ltd. They are responsible for the provision of the documents.

The Management Corporation states that a new committee was elected in April 2003, for Mr. Ayaru personally canvassed for new committee members. He then handed over to the new committee an empty management account and empty sinking fund account and an overdraft of Rs. 1.6 Million. It was taken from the Commercial Bank for the Cinnamon Garden Residencies Account. His Explanation was that the owners were not paying the management fees on time. Since their overdraft was against L.P.H. Security Mr. Ayaru has insisted that this had to be paid off before he handed over the Bank Account to the new committee. As it was not possible at the time, there was no alternative but to ask Mr. Ayaru to continue to manage the C.G.R. till the overdraft was cleared.

The Respondents have decided that, if the unit holders did not pay the maintenance fees there is a procedure to be followed according to the terms of apartment Ownership Law. But Mr. Ayaru did not do so. Therefore, he (the Petitioner) has no authority to obtain the overdraft amount to Rs. 1.6 Million without the consent of the members of the Management Corporation.

When a financial crisis has taken place, it is the duty of Mr. Ayaru who is the representative of the owner company to have got a resolution passed at a special general meeting of the Management Corporation. Therefore, Mr. Ayaru has no Authority to obtain an overdraft from the Commercial Bank. Therefore, he is liable to pay the said overdraft to the Management Corporation. The Petitioner has been the Chairman of the Management Corporation, during the period of which the overdraft has been obtained. He has obtained the said overdraft for the Management Corporation without proper approval of the members and therefore, he was ordered to settle the same to the Management Corporation.

Complaint No. 08 and Complaint No. 09 are interconnected.

Management Corporation has stated that, Lincoln Property Holding (Pvt) Ltd. informed the prospective purchases that only 76 units were available as residential units and other units

were reserved for office use. But at present the situation has been completely changed. Now these offices are being used exclusively for the business purpose of Lincoln Property Holding (Pvt) Ltd. and therefore, Management Corporation has no place to use as an office. Employees of Lincoln Property Holding (Pvt) Ltd. use water from the common water from cinnamon water taps and other expenditure is bowed by the Management Corporation Fund.

Also, two units of the mezzanine floor used by the Lincoln Property Holding (Pvt) Ltd. for their private use. The car park area exclusively uses by Lincoln Property Holding (Pvt) Ltd. for their visitors but it should belong to Management Corporation.

The Petitioner has stated that, according to the Condominium Plan Ref. No. 1969 approved by the U.D.A, it is very clearly depicted that, the owner of the Car park is Lincoln Property Holding (Pvt) Ltd and it is not a common element which Mr. Ayaru is forcibly retaining as alleged.

It is correct that Lincoln Property Holding (Pvt) Ltd. as occupying two floors in the premises as depicted in the Condominium Plan ref. no. 1969 (annexure 22) is owned by said Company and the said building and premises do not belong to the Cinnamon Garden Residencies. It is also to be noted that no bills have been submitted to Lincoln Property Holding (Pvt) Ltd. by the Condominium Manager requesting payment. The Lincoln Property Holding (Pvt) Ltd. cannot pay bills that had not reached them. However, payment has been made for the water consumed up to date in accordance with the management corporation agreement.

Management Corporation has further stated that,

Mr. Ayaru and Lincoln Property Holding (Pvt) Ltd. are occupying and using a number of common elements for their private purposes. There include, Unit 80 (including Lot 80, Lot 80 A and Lot 80 B) which comprises the gymnasium, female changing room, Security room and office for the administration of the Condominium Management Corporation. The allegation was that Mr. Ayaru is occupying these offices and using them to run a private business. The result in that was the management committee has no place to meet or run its office within the premises. There is no resort to meeting in outside locations. The minutes of the committee meetings will confirm this fact and furthermore, carrying on a business within a residential complex constitutes a nuisance to residents and compromises the security of the premises.

The blocking of visitor parking for genuine visitors to residencies another great inconvenience. It appears to be a common practice among many developers in Sri Lankan who try to retain a sector of the premises for their private business uses. The parking bays PL 78 to 85 which were shown to us as a visitor parking when we bought the apartments are shown in the Condominium Plan and Condominium Declarations belonging to LPH. However, since they are said to be apartments to unit 80, which is a common element also. The visitor parking lots are claimed off by Mr. Ayaru and being used by Lincoln Property Holding (Pvt) Ltd. This is another

example of how running a business in a residential apartment complier can lead to abuses that inconvenience the residents, and need to be dealt with urgently by the CMA.

Lincoln Property Holding (Pvt) Ltd. and Mr. Ayaru are not only using common elements for their private purposes but the water they are using has also to be paid for from committee management funds.

The Inquiry Officer Stated that, when I examined the above-mentioned Condominium Plan Unit 80 was indicated as office building as per certificate of conformity (C o. C.) dated 31/01/2002. It was issued by Urban Development Authority for the erection of eleven storey (G+10) building for Seventy-Six (76) residential apartments with mezzanine floor, basement and swimming pool at premises No. 67, 67 A Ward Place, Colombo 07. But there is nothing mentioned about business premises. The Condominium Plan does not specifically describe the said mezzanine floor as common elements since it is described inter-alia to be used as a Managing Directors Office.

The complaint Cinnamon Garden Residencies management corporation (C.G.R.M.C.) also stated that Lincoln Property Holding (Pvt) Ltd. has failed to provide the office spaces for their Management Corporation's office as whereas said office areas are being used for commercial purpose. As per 26 of the Apartment Ownership Act No. 11 of 1973 as amended, common elements include "premises for use by security guards, caretakers and watchman."

With regard to car park, Lincoln Property Holdings (Pvt) Ltd. states that parking Lot. 78, 79, 80, 81, 82, 83, 84 & 85 are allotted to the exclusive use of Lincoln Property Holdings (Pvt) Ltd.

According to Apartment Ownership Law the said car parking as common elements which all the residents of visitors can be parked. Therefore, the court recommend that the car park should be common to all residents of the said apartments and also unit marked 80 (Lot 80) basement floor office building bearing No. 67/1 (part) (floor area 269 Sq.), unit. 80, 80A Ground Floor office building bearing Ass. No. 67/1 (part) (floor area -1,394 Sq.) and unit 80 lot 80B first floor office building bearing Ass. No. 67/1 (part floor area 1,959 Sq.) should be handed over to the management corporation of Cinnamon Garden Residencies.

The said plan described that, parking lots are attached to the exclusive use of respective units, which have been specifically set out each unit and allotted car park unit. In terms of the section 26 of the Apartment Ownership Law as amended by Act No. 45 of 1982, under the definition of "common elements", section 12 (c) (b) of the amended Act states that;

“unless, otherwise described specifically as comprised in any unit in a Condominium Plan and shown as capable of being comprised in such unit includes, car parks are common elements.”

In the light of the abovementioned section, for car parks to be excluded from the common elements, one of the below mentioned criteria must be satisfied.

- (a) Otherwise describe specifically

(b) Comprised in any unit.

Here, the Plan does not describe that car parks comprise in any unit. The plan just allotted each car park with special reference to each unit. Accordingly, it appears that the said allotment capture within the meaning of the abovementioned section and therefore, the common element nature of the car parks has been removed and the right of use of each car park goes with the title of each unit.

It is the contention of the petitioner that, as seen from at page 20 of 25 of the condominium plans marked P7 and page 98 to 100 of condominium deed marked P8 the said units are separate legally recognized units excluded from the common elements. The said office units were not transferred by the Petitioner to any 3rd person and as such owned by the Petitioner.

I do not agree with the said argument considering section 26 of the Apartment Ownership Law as amended by Act No. 45 of 1982, under the definition of "common elements", section 12 (c) (b) of the amended Act states that, "unless otherwise described specifically as comprised in any unit in a Condominium Plan and shown as capable of being comprised in such unit includes;"

In the light of the abovementioned section, for car parks to be exclude from the common elements, one of the below mentioned criteria must be satisfied.

1. Otherwise describe specifically
2. Comprised in any unit.

The said plan described that, parking lots are attached to the exclusive use of respective units, which have been specifically set out each unit and allotted car park unit. Here, the Plan does not describe that car parks comprise in any unit. The plan just allotted each car parks with special reference to each unit. Accordingly, it appears that the said allotment capture within the meaning of the abovementioned section and therefore, the common element nature of the car parks has been removed and the right of use of each car park goes with the title of each unit.

Accordingly, the right to use of the disputed car parks will be depend on the title and ownership of the related unit. It was the argument of the Management Corporation that they do not have any unit or premises to use as the office. Therefore, the reference as office that has been used in the plan, without mentioning whose office, needs to be construed that it is the office of the Management Corporation's office, which can be the only office that can exist in a Condominium Property, which has been built for residential purpose.

In the light of that, the respective car park slots also need to be considered as allotted to the said units, which is reserved for the use of the Management Corporation, the right of the use of which, can be as intends by the Management Corporation.

One of the grounds urged to seek this court's indulgence to issue the Writ of Certiorari is that the Inquiring Officer has been biased. But no material has been produced regarding bias. The Petitioner has failed to demonstrate as to how the Inquiring Officer has been biased. In order to succeed on the question of bias, the Petitioner who alleges bias should demonstrate to this Court as to how the Inquiring Officer was biased.

The mere allegation of bias is insufficient and the Petitioner should be able to substantiate and demonstrate to this Court that there was in fact, bias. The proceedings of the inquiry before the Inquiring Officer of the Condominium Management Authority (3rd Respondent) of 21st January, 2006 (P42) demonstrate that the inquiry terminated at 12.10 p.m. on that day. The document marked as P47 demonstrates the reason for giving another date and that the same was informed (copied) to the Petitioner.

In the case of Metropolitan Properties Co (F C C) Ltd vs Lannon and Others 1968(3) Aer 304 at 310 Lord Denning observed as follows;

"Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough.... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other."

The Supreme Court of India has held an allegation of malice by statutory officers have to be proved in Writ applications. In Mukesh Kumar Agrawal vs. State of U.P. & ORS. 2009(10) scale 534 the Appellant raised inter alia, allegations of malice. Dismissing the Appeal, S.B. Sinha J. held as follows;

"The High court, however, upon considering the averments made in the writ petition, as noticed hereinbefore, found that the allegations of malice made therein are vague in character. The appellant, thus, was entitled to raise all his contentions including the aforementioned contention before the authorities under the 1981 Order.

We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved. [See Swaran Singh Chand v. Punjab State Electricity Board 2009 (7) SCALE 622] (Emphasis added)".

In this present case there is no material whatsoever regarding bias. It is my view that there is no merit in the allegation of bias.

Another ground urged by the Petitioner was that the 02nd Respondent's decision is tainted with malice. In order to demonstrate malice, the Petitioner has not furnished any material upon which the Petitioner claims that the 02nd Respondent acted maliciously.

The 02nd Respondent is the Acting General Manager of the Condominium Management Authority, who is an officer who holds an office established under the statute and there is no reason for the 03rd Respondent to have malice or to be malicious. The record furnished by the 01st Respondent does not set out or does not establish any malice. There have been no previous dealings between the Petitioner and the 02nd Respondent in order to have a malicious effect or in order for the 02nd Respondent to act maliciously.

Another ground urged by the petitioner was that the Order is unreasonable and contrary to the principle of proportionality. Once the Condominium Plan and Deed of Declaration came into being in 2002, it is all the owners of the various condominium units which form the Condominium Management Corporation, which is the 04th Respondent in which the Petitioner is also a member in view of the fact that it is the owner of some condominium parcels or units and the 04th Respondent has the right and entitlement to manage the condominium property and its common elements.

In law, it is the Management Corporation, the 04th Respondent which is entitled to administer and manage the common elements. The Petitioner who is now considered as one of the occupiers and owners of condominium units, has no right to manage or administer any of the common elements. The Petitioner has admitted that the Management Corporation has the power and right to manage the common elements of the Condominium building.

The definition section of the Apartment Ownership Law No. 11 of 1973 (as amended), namely Section 26 which was amended, defines management corporation as follows; "26. (10) "management corporation" in relation to any one or more completed subdivided buildings shown in a condominium plan or any one or more partly completed buildings shown in a semi condominium plan, means the management corporation established for those buildings' "

The 04th Respondent is the management corporation. By-Law 3 of the Second Schedule to the Apartment Ownership Law No. 11 of 1973 (as amended), as referred to above, which reads as follows;

"The corporation shall control, manage and administer the common elements for the benefit of the owners:

Provided that the corporation may by agreement with a particular owner grant him the exclusive use and enjoyment of part of the common elements or special privileges in respect of the common elements or part of it."

The 04th Respondent has the right to control, manage and administer the common elements. As the car park is also a common element the 04th Respondent has the exclusive right to manages control and administer the car park and the parking slots therein. The 04th Respondent has had no agreement or understanding with the Petitioner with regard to the disputed car park. In the circumstances, The Petitioner is not entitled to use the car park exclusively for itself. In the circumstances, the Order made marked as "P49" is a valid and reasonable Order.

It is incorrect to say that the Petitioner has not been given an opportunity to be heard and produce evidence and that the principles of natural justice had been violated. The Petitioner was fully given the opportunity to be represented before the Inquiring Officer of the Condominium Management Authority (03rd Respondent). All parties were free to place evidence before the Inquiring Officer of the Condominium Management Authority, as is demonstrated by the proceedings before the Inquiring Officer. The Petitioner placed both oral evidence as well as written evidence and filed comprehensive Written Submissions with annexures before the Inquiring Officer of the Condominium Management Authority. No party was allowed to cross-examine at the said inquiry and this was not the procedure adopted at the inquiry before the Inquiring Officer of the Condominium Management Authority.

On a perusal of the documents authenticated and furnished by the 01st to the 03rd Respondents, no stretch of imagination could it be said that the principles of natural justice have been violated. It is true that it is the Petitioner who developed the condominium property. Once the condominium property is prepared and the Deed of Declaration is effected and the Condominium Plan is effected, the Petitioner ceases to be a developer and becomes the owner of the various unsold apartments.

The Petitioner as a developer was only entitled to any benefit or any right or entitlement as a developer until such time, the Deed of Declaration and Condominium Plan was effected. Once the Condominium Plan is affected and the Deed of Declaration is effected, the Petitioner who the developer ceases to exist in law as a developer and therefore, has no legitimate expectation as a developer. The character of the Petitioner as a developer ceases to exist and the character of the Petitioner as owner of the unsold apartment units, comes in to being. Therefore, the Petitioner becomes an owner of the unsold apartment units.

Thus, the Petitioner has only a legitimate expectation or rights as an owner of condominium apartment units after the creation of the Condominium Plan and the Condominium Deed of Declaration. The Petitioner as an owner of the apartment units once the Deed of Declaration and Condominium Plan are prepared has the same legitimate expectation as that of the owners of the various other condominium apartment units. The Petitioner cannot have any other entitlement or benefit as an owner of condominium apartment units which is not conferred on the other apartment owners.

In the circumstance, the Petitioner has no legitimate expectation as a developer and the Petitioner has only a legitimate expectation as an owner of condominium apartment units and this legitimate expectation is equal and in par with the legitimate expectation of the other owners of the apartment units. Therefore, the Petitioner's claim on the basis of legitimate expectation is also baseless.

It was decided in the case of K. A. Gunasekera vs T. B. Weerakoon 73 NLR 262 that if the petitioner has an alternative remedy which he has sought, a Writ of Certiorari should not be issued.

All the questions raised in this petition could be resolved in my view by considering the availability of the writ of Certiorari and Mandamus to the Petitioner. The learned counsel for the Respondent submitted that a writ of Certiorari and Mandamus being a public law remedy is not available to the Petitioner. The reason to this is found in the following passage in Halsbury's Laws of England, Vol (1), 4th Edition (Administrative Law) paragraph 132;

"An order of Certiorari and Mandamus will be granted ordering to stop or an act to be done which a statute requires to be done and for this rule to apply it is not necessary that the party or corporation on whom the statutory duty is imposed should be a public official or an official body."

The judicial control over the fast-expanding maze of bodies affecting rights of the people should not be put into water tight compartments. It should remain flexible to meet the requirements of variable circumstances.

There is rich and profuse case law on Certiorari and Mandamus on the conditions to be satisfied by the Petitioner. Some of the condition's precedent to the issue of Certiorari and Mandamus appear to be:

- (a) The Applicant must have a legal right to the performance of a legal duty by the parties against whom the Mandamus is sought. (R. V. Barnstaple Justices (1937) 54 TLR 36)
- (b) The foundation of Mandamus is the existence of a legal right (Napier ex parte 1852 18 QB, 692 at 695)
- (c) The right to be enforced must be a "Public Right" and the duty sought to be enforced must be of a public nature. (Credit Information Bureau of Sri Lanka vs Messrs Jafferjee & Jafferjee (Pvt) Ltd. 2005 (1) SLR 89)
- (d) The legal right to compel must reside in the Applicant himself (R. V. Lewishan Union (1897) 1 QBD 498)
- (e) The application must be made in good faith and not for an indirect purpose
- (f) The application must be preceded by a distinct demand for the performance of the duty
- (g) The Court will as a general rule and in the exercise of its discretion refuse writ of Certiorari and Mandamus when there is another special remedy available which is not less convenient, beneficial and effective.

The above principles governing the issue of a writ of Certiorari and Mandamus were also discussed at length in P. K. Benarji V H. J. Simonds AIR (1947) Cal 347. Whether the facts show the existence of any or all pre-requisites to the granting of the writ is a question of law in each case to be decided not in any rigid or technical view of the question, but according to a sound and reasonable interpretation. The court will not grant a Certiorari and Mandamus to enforce

a right not of a legal but of a purely equitable nature however extreme the inconvenience to which the applicant might be put.

The objection raised by learned Counsel and learned Senior State Counsel for the Respondent relate to a fundamental question as to the areas in which Writs of Certiorari and Mandamus, being Public Law remedies, would lie. It is clear these Writs come within the purview of administrative law which is a branch of law that has been developed by courts for the control of the exercise of governmental or statutory powers by mainly public authorities. The distinction between the Public Law and Private Law, which is a concept of recent origin in English law but, which has been a basic concept of Roman Law should be borne in mind in considering this matter.

The distinction between Public Law and Private Law in Roman Law (being the genus of our Common Law) Jus Publicum and Jus Privatum - is clearly stated in his Institutes (1.1.4) by Justinian - R. W. Lee in his work on the Elements of Roman Law (4th Edition page 35) states as follows with regard to the division of Roman Law to branches as Public Law and Private Law;

"This is the division which the Roman Lawyers take as the primary line of cleavage in the legal system. Public Law has regard to the Constitution of the Roman State. Private Law is concerned with the interest of individuals. The classification is intelligible and convenient, though there are points at which the two overlap. The first included constitutional law, administrative law, criminal law and procedure and the jus sacrum. The second comprises those branches of law which regulate the relations of citizens to one another, family law, property, obligations and succession. The institute is mainly concerned with private law. It ends with one Title on criminal law. which belongs to the jus publicum."

Writs of Certiorari and Prohibition are instruments of Public Law to quash and restrain illegal governmental and administrative action. Similarly, the Writ of Mandamus lies to enforce the performance of a statutory duty by a public authority. They are instruments of judicial review of administrative action.

In Administrative Law by H. W. R. Wade and Forsyth (1994) 7th Edition at page 627 it is stated as follows;

"But both certiorari and prohibition in their modern applications for the control of administrative decisions, lie primarily only to statutory authorities. The reason for this is that nearly all public administrative power is statutory. Powers derived from contract are matters of private law and outside the scope of prerogative remedies."

The authors cite the dictum of Lord Goddard CJ in the case of R v. National Joint Council for Dental Technicians (1953) 1 QB Pg. 704 at 707 The citation is thus;

"But the bodies to which in modern times the remedies of these prerogative Writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction."

It was decided in Wickramasinghe vs. Ceylon Electricity Board and Another 1997 (2), SLR 377; the general rules of mandamus is that its function is to compel a Public Authority to do its duty. It is a command issued by a Superior Court for the performance of a public legal duty. It is only granted to compel the performance of duties of a public nature and not merely of a private character that is to say for the enforcement of a mere private right stemming from a contract of the parties.

The petitioner has failed to satisfy this court that he has a statutory right against the 01st to 03rd Respondents.

Accordingly, we see no merit in the Application of the Petitioner. For all the above reasons, this court is not disposed to grant the discretionary remedy asked for.

The Application is dismissed with cost.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal