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

In the matter of an Application for Writs in the nature of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

KIA Motors (Lanka) Limited,
297, Union Place,
Colombo 2.

Petitioner

CA (Writ) Application No: 72/2013

Vs.

1. Consumer Affairs Authority.

2. Rumy Marzook,

2A. Dr. R. M. K. Ratnayake,

2B. Hasitha Thilakerathne,

2C. Anura Maddegoda,

2D. Dr. Lalith N. Senaweera,

Chairman,
Consumer Affairs Authority,
C. W. E. Secretariat Building,
27, Vauxhall Street, Colombo 2.

3. S.D.K. Tissera,
26/2, Kirimandala Mawatha,
Nawala.

Respondents

Before:	**Arjuna Obeyesekere, J**
Counsel:	Sanjeeva Jayawardena, P.C., with Ms. Prashanthi Mahindarathne and Charitha Rupesinghe for the Petitioner
	Sanath Singhage with Ms. Shanthini Karmegam for the 1st and 2nd Respondents
	Kaminda De Alwis for the 3rd Respondent
Oral submissions:	19th September 2019 and 6th March 2020
Written Submissions:	Tendered on behalf of the Petitioner on 26th March 2019 and 10th March 2020
	Tendered on behalf of the 1st and 2nd Respondents on 29th October 2018 and 6th March 2020.
	Tendered on behalf of the 3rd Respondent on 29th October 2018
Decided on:	26th May 2020

Arjuna Obeyesekere, J

When this application was taken up for argument, together with CA (Writ) Application No. 66/2013, the learned Counsel for the parties moved that this Court pronounce its judgment on the written submissions that have been tendered by all parties. On 28th February 2020, this Court, having examined the record maintained by the 1st Respondent, the Consumer Affairs Authority (the CAA/ 1st Respondent), directed the 1st Respondent to tender copies of documents which have been referred to in the Journal Entry of that date. The learned Counsel for the 1st and 2nd Respondents thereafter moved that he be permitted to make further oral submissions, which application was allowed by

this Court. Oral submissions were made by all learned Counsel on 6th March 2020.This Court has also had the benefit of receiving further written submissions of the Petitioner and the 1st and 2nd Respondents.

The issue that arises for the determination of this Court is whether the directive conveyed to the Petitioner by the 2nd Respondent, Chairman, Consumer Affairs Authority, to pay the 3rd Respondent a sum of Rs. 158,769.13 as compensation, is illegal, and/or unreasonable, and/or is tainted with bias.

Introduction

The facts of this matter very briefly are as follows.

The Petitioner is the registered sole authorised distributor in Sri Lanka for KIA motor vehicles manufactured in South Korea. At the relevant time, the 3rd Respondent was attached to the 1stRespondentand was holding the office of Director (Compliance and Enforcement), and functioning as the Head of the Legal Division of the 1st Respondent.

The *proforma* invoice

The 3rd Respondent was entitled to a permit issued by the Government of Sri Lanka to import a motor vehicle under the preferential tariff scheme introduced by the Government of Sri Lanka. While a vehicle sold by the Petitioner to a walk-in-customer would normally have been imported directly by the Petitioner, under and in terms of a letter of credit opened by it, the system under the above Scheme was different, with the obligation to open the letter of credit being with the permit holder, i.e. the 3rd Respondent. The 3rd

Respondent was therefore the applicant under the letter of credit annexed to the petition marked '**P5**', and the vehicle was consigned to the 3rd Respondent, as borne out by the Bill of Lading annexed to the petition marked '**P8**', and the Customs Declaration annexed to the petition marked '**P10a**'.

The first step in importing a vehicle therefore was to obtain a *proforma* invoice from the supplier of one's choice, and thereafter open the letter of credit, either in favour of the manufacturer or the local agent. The 3rd Respondent had accordingly obtained a *proforma* invoice from the Petitioner on 23rd July 2011, a copy of which has been annexed to the petition marked '**P4**'.

The letter of credit

The letter of credit to import the motor vehicle'**P5**', had been opened thereafter directly by the 3rd Respondent on 26th July 2011, for a sum of USD 16556.'**P5**' contains a seal of the Bank dated *28th July 2011* which indicates that the letter was credit, although dated 26th July 2011 had been issued by the Bank only on 28th July 2011.

Although '**P4**' required the letter of credit to be valid for a period of six months, the expiry date specified in '**P5**' was 22nd January 2012. In terms of '**P5**', payment was to be effected by the Bank, after shipment, and on receipt of documents in good order in Sri Lanka, with the exchange conversion rate being calculated at the rate prevailing on the date payment was effected. As is the case with all letters of credit, there is always the risk that the currency conversion rate may fluctuate, either upward or downward, and it is therefore the responsibility of the applicant, in this instance, the 3rd Respondent, to

safeguard her interests by fixing the conversion rate, or else, as what happened in this application, take the risk by agreeing to pay at the rate that prevails on the date of payment.

Extension of the letter of credit

By a letter dated 6th January 2012, annexed to the petition marked '**P6**', the Petitioner had informed the 3rd Respondent '*that our principals have informed us that there is an unexpected delay in production due to the high demand for KIA vehicles internationally, and as such the vehicle ordered will not be delivered to you as expected in January 2012*' and requested that the letter of credit be extended by a further period of three months. The 3rd Respondent had complied with the said request reluctantly, as borne out by her letter dated 10th January 2012, marked '**R2**'.

Shipment and delivery of the vehicle to the 3rd Respondent

According to the Petitioner, and as evidenced by the Bill of Lading '**P8**', the vehicle had been shipped on 31st January 2012, and had arrived at the Port of Colombo on 13th March 2012. After attending to the formalities at the Sri Lanka Customs, the vehicle had been delivered to the 3rd Respondent on 27th March 2012.

Complaint to the 1st Respondent

On 25th April 2012, the 3rd Respondent had lodged a complaint with the 1st Respondent, a copy of which has been annexed to the petition marked '**P12**'. In the said letter, the 3rd Respondent had stated that even though in terms of

the *proforma* invoice '**P4**', *the shipment of the vehicle was within 5-6 months after receipt of the letter of credit, …**and after confirmation of production** I was verbally promised the delivery of the vehicle by end December 2011.* The 3rd Respondent's complaint was that arising from the delay in delivery, she had suffered a monetary loss arising in the following manner:

a) The exchange rate that prevailed on 22nd January 2012 – i.e. the last date of the initial validity period of the letter of credit '**P5**'- was Rs. 113.76 per USD. However, by the time the letter of credit was settled in end March, the rate had gone up to Rs. 123.85, causing the 3rd Respondent a loss of Rs. 166,939 on the settlement of the letter of credit, and a further loss of Rs. 116,857 arising from the settlement of customs duty, calculated on the value of the vehicle, at the conversion rate prevailing as at the date of the customs declaration.

b) A sum of Rs. 95,000 being charges on vehicle rental for the period that the 3rd Respondent did not have a vehicle.

c) A sum of Rs. 2,379 being the expenses incurred as bank charges and interest charges.

The essence of the complaint of the 3rd Respondent was that the Petitioner had failed to provide her a service with due care and skill.

Section 32 of the CAA Act - Implied warranty

Section 32 (1) of the Act provides as follows:

> "*In every contract for the supply of goods or for the provision of services by any person in the course of a business of supply of such goods or provision of such services to a consumer, there is an implied warranty that—*
>
> (a) *the services will be provided with due care and skill;*
>
> (b) *that any materials supplied in connection with provision of such* ***services*** *will be reasonably fit for the purpose for which they are supplied*;
>
> (c) *the goods supplied or* ***services*** *provided will be in conformity with the standards and specifications determined under section 12 of this Act; and*
>
> (d) *the goods supplied will be reasonably fit for the purpose for which they are supplied*.

Section 32 – power of the CAA to conduct an inquiry into a complaint

In terms of Section 32(3), a consumer aggrieved by the breach of an implied warranty as provided for in subsection (1) or (2) of Section 32, may make a written complaint to the CAA. At an inquiry held into such complaint, the Authority shall give the trader or other person against whom the complaint is

made, an opportunity of being heard either in person or by an agent on his behalf.[1]

Section 32(5) of the Act provides as follows:

> "*Where after the inquiry* ***the Authority is of opinion*** *that a breach of an implied warranty has taken place, it shall order the trader or other person to pay compensation to the aggrieved party or refund the amount paid for the supply of such goods or provision of such services as the case may be, and for the supply of any materials in connection with the provision of those services, within such period as shall be specified in the order*."

It is not in dispute that the CAA has not determined standards and specifications in terms of Section 12, and that the provisions of Section 32(2) do not apply to the present application. Bearing that in mind, Section 32 can be summarised as follows with regard to the complaint of the 3rd Respondent:

a) The CAA has the power in terms of Section 32(4) to inquire into any complaint made to it with regard to a breach of an implied warranty with regard to services, provided such complaint comes within the provisions of paragraph (a) of Section 32(1);

b) The person against whom such complaint has been made has a right to be heard;

c) The CAA has the power to provide the relief set out in Section 32(5) if the CAA is of the opinion that there has been a breach of the implied warranty that the services will be provided with due care and skill.

[1] Vide Section 32(4) of the CAA Act.

Inquiry into the complaint of the 3rd Respondent by the CAA

Upon receipt of the complaint of the 3rd Respondent, the CAA had called for observations of the Petitioner. A preliminary discussion had thereafter been held on 30th July 2012. An inquiry had subsequently been conducted on 16th October 2012 and 4th December 2012 by an Inquiry Panel said to have consisted of *four members* of the CAA, with the participation of the Petitioner and the 3rd Respondent. After the inquiry, the said Panel is said to have made the following 'order' dated 14th December 2012, annexed to the petition marked '**P15**':

> "ඒ අනුව පැමිණිලිකාරිය හට දැරීමට සිදුවූ ඇමරිකානු ඩොලරයේ වටිනාකමට සාපේක්ෂව සිදු වූ රුපියලේ වටිනාකම වෙනස් වීම හේතුවෙන් වූ CIF හි රුපියලේ වටිනාකමේ වෙනස වන රු: 166,939.05 ක මුදලින් 50% ක්, එනම්, රු. 83,469.53, ක්ද එම CIF වෙනස මත වූ අනුරූප අමතර බදු, වැඩි වීම් සඳහා පැමිණිලිකාරියට දැරීමට සිදුවූ රු: 116,857.33 මුදලින් 50% ක් එනම් රු: 58,428.67 ක් ද, ණයවර ලිපිය දිරිඝ කිරීම වෙනුවෙන් පැමිණිලිකාරියට වැය කිරීමට සිදු වූ රු: 2379.93 ද ගුදම් ගාස්තු ලෙස පැමිණිලිකාරියගේ වරදින් තොර ව ගෙවීමට සිදු වූ රු: 14,491/- ක මුදලක් ද වශයෙන් මුලු මුදල ලෙස රු: 158,769.13 (රුපියල් එක් ලක්ෂ පනස් අට දහස් හත්සිය හැට නවයයි ශත දහ තුනක) මුදල මෙම නියමය නිකුත් කළ දින සිට දින 30 ක් ඇතුලත පැමිණිලකාරිය වන එස්.ඩී.කේ තිසේරා මහත්මිය වෙත ආපසු ලබා දෙන ලෙස වගඋත්තරකාර ආයතනයට මෙයින් නියම කරනු ලැබේ."

Conveyance of the *decision* of the Inquiry Panel to the Petitioner

By letter dated 22nd January 2013, annexed to the petition marked '**P14**' the 2nd Respondent had informed the Petitioner as follows:

> " ඉහත පැමිණිලිකාරිය විසින් පාරිභෝගික කටයුතු පිළිබඳ අධිකාරිය වෙත කරන ලද පැමිණිල්ලට අනුව පවත්වන ලද පරීක්ෂණයෙන් අනතුරු ව 2003 අංක 09 දරන

පාරිභෝගික කටයුතු පිළිබඳ අධිකාරිය පනතේ 13(4) වගන්තිය යටතේ මෙම නියමය නිකුත් කරනු ලැබේ

ඒ අනුව අදාල වාහනය ආනයනය කිරීමේ දී ඔබ විසින් අයකළ සේවා ගාස්තුවට සරිලන පරිදි තම සේවය සැපයීම නිසි සැලකිල්ලෙන් හා නිපුණතාවයක් නොමැතිව සිදු, කිරීම හේතුවෙන් සිදු, වූ ප්‍රමාදයන් වෙනුවෙන් පැමිණිලිකාරිය හට දැරීමට සුදුවූ ඇමරිකානු ඩොලරයේ වටිනාකමට සාපේක්ෂව සිදු, වූ රුපියලේ වටිනාකම වෙනස් වීම හේතුවෙන් වූ CIF හි රුපියලේ වටිනාකමේ වෙනස වන රු: 166,939.05 ක මුදලින් 50% ක්, එනම්, රු. 83,469.53, ක්ද, එම CIF වෙනස මත වූ අනුරූප අමතර බදු, වැඩි වීම් සඳහා පැමිණිලිකාරියට දැරීමට සිදුවූ රු: 116,857.33 ක මුදලින් 50% ක් එනම් රු: 58,428.67 ක් ද, ණයවර ලිපිය දිරිඝ කිරීම වෙනුවෙන් පැමිණිලිකාරියට වැය කිරීමට සිදු, වූ රු: 2379.93 ද, ගුදම් ගාස්තු ලෙස ගෙවීමට සිදු, වූ රු: 14,491/- ක මුදලක් ද, වශයෙන් මුල මුදල ලෙස රු: 158,769.13 (රුපියල් එක් ලක්ෂ පනස් අට දහස් හත්සිය හැට නවයයි ශත දහ තුනක) මුල මුදලක් මෙම ලිපියේ දින සිට 30 ක් ඇතුලත පැමිණිලිකාරිය වෙත ලබා දිය යුතු බව වගඋත්තරකාර ආයතනය වන ඔබ ආයතනය වෙත අධිකාරිය විසින් මෙයින් නියම කරනු ලබන අතර අදාළ නියමයේ පිටපතක් මේ සමග අමුණා ඇත."

Dissatisfied by the above decision, the Petitioner filed this application, seeking *inter alia* the following relief:

(a) A Writ of Certiorari to quash the order contained in '**P14**';

(b) A Writ of Certiorari to quash the purported findings of the Inquiry Panel contained in '**P15**'.

The grounds of challenge of the Petitioner

The learned President's Counsel for the Petitioner is seeking a Writ of Certiorari to quash the decision conveyed by '**P14**' and the findings of the Inquiry Panel contained in '**P15**', on the following three principle grounds:

1. The decision conveyed by '**P14**' has not been taken by the CAA in terms of the law, and is therefore illegal.

2. The members of the Inquiry Panel were biased in favour of the 3rd Respondent;

3. The findings contained in '**P15**' are unreasonable and irrational.

The first argument – is the decision conveyed by 'P14', illegal?

The first argument of the learned President's Counsel for the Petitioner was that the decision conveyed by '**P14**' has not been taken by the CAA in terms of the law, and is therefore illegal.

The position of the 1st Respondent

In response, the 1st and 2nd Respondents, in their Statement of Objections have explained the procedure that is generally followed by the CAA, as well as the procedure that was followed with regard to the complaint of the 3rd Respondent, in the following manner:

(a) Inquiries into complaints made in terms of Section 32 are conducted by a duly constituted Panel of Inquiry consisting of four members of the CAA;[2]

(b) The inquiry into the complaint of the 3rd Respondent was conducted by such a Panel;[3]

[2] Vide paragraph 7(a).
[3] Vide paragraph 21(a).

(c) '**P15**' has been issued by an Inquiry Panel which consisted of four members of the CAA;

(d) Orders of the Inquiry Panel are formally ratified by the Board of Directors of the 1st Respondent prior to being communicated to the parties concerned;[4]

(e) '**P15**' has been ratified by the Board of Directors of the CAA at a meeting held on 21st December 2012;[5]

(f) '**P15**' is an Order of the 1st Respondent CAA.[6]

There is one matter that this Court wishes to note at this stage. Although the quorum for any meeting of the CAA is four members,[7] it was not the position of the 1st and 2nd Respondents that the Inquiry Panel in fact acted as the CAA and by virtue thereof, '**P15**' would be a decision of the CAA. Such a position, if taken, would not have been tenable for the reason that the inquiry on 16th October 2012 consisted only of three members, and not four, as claimed by the 1st Respondent.[8]

Thus, in summary, the position of the 1st and 2nd Respondents is that the Inquiry Panel that inquired into the complaint of the 3rd Respondent consisted of four members of the CAA, that '**P15**' has been ratified by the CAA at its

[4] Ibid.
[5] Vide paragraph 21(c).
[6] Vide paragraphs 9, 12, 13, 15.
[7] Vide paragraph 8(2) of the Schedule to the Act.
[8] Vide proceedings of the Inquiry Panel held on 16th October 2012, annexed to the motion filed by the 1st Respondent on 4th March 2020. See Diesel and Motor Engineering PLC vs. Consumer Affairs Authority and others [CA (Writ) Application No. 43/2016; CA Minutes of 22nd November 2019.]; Shell Gas Lanka Limited vs. Consumer Affairs Authority and Others [[2007] 2 Sri LR 212; judgment of Sripavan, J (as he then was) with Sisira De Abrew, J agreeing.]

meeting held on 21st December 2012, and therefore '**P15**' is an Order of the CAA.

In the written submissions of the 1st and 2nd Respondents, it has been submitted that the Order made by the Inquiry Panel derives its legal validity from the approval granted at the Board meeting of the 1st Respondent. In paragraph 6 of the Written submissions of the 1st Respondent, it has been stated emphatically that, "*Any order and/or decision primarily obtained by any appointed committee or inquiry panel derives its validity and legal effect after the final approval made by the full Board of the Authority at a meeting held by summoning all the members of the Authority, in which the quorum of 4 members.*" Thus, there cannot be any ambiguity in the position of the CAA before this Court that '**P15**' must be *approved* by the CAA to have legal effect.[9]

Should the inquiry be conducted by the CAA itself?

Section 32(4) of the Act appears to suggest, on the face of it, that every complaint must be inquired into by the CAA. This Court however observes that Section 6 of the CAA Act provides that the Authority may, **for the purpose of discharging its functions,** delegate to a public officer, such functions vested in or imposed upon or assigned to the CAA. Furthermore, in terms of Section 8(n), the CAA may appoint any such committee or committees as may be necessary to **facilitate the discharge of the functions of the CAA**.

It is therefore the view of this Court that an ***inquiry*** into a complaint made to the CAA can be conducted:

[9] Vide paragraph 11 of the written submissions dated 6th March 2020.

(a) by the CAA itself; or

(b) by a public officer to whom the function has been delegated in terms of Section 6; or

(c) by a Committee appointed in terms of Section 8(n).

What is important however – and this is the thrust of the first argument advanced on behalf of the Petitioner - is that the decision, or in other words, the opinion that must be formed in order to provide the relief set out in Section 32(5), must be that of the CAA. Therefore, even if an inquiry into a complaint is conducted by a committee appointed for that purpose, the responsibility for taking the final decision or in other words, of forming an opinion in terms of Section 32(5), will always rest with the CAA. This could be achieved by (a) placing the report of the Inquiry Panel before the CAA, (b) by the CAA deliberating on the findings of the said report, and (c) the CAA arriving at a suitable decision, or in other words, forming an opinion, with reasons for such decision or opinion being provided.

Thus, it is clear that the law does not provide for ratification of a decision or findings of the inquiry panel by the CAA, nor does the law provide for the approval of such decision or findings by the CAA. Mere ratification or approval of such decision by the CAA, would be in derogation of the statutory function that requires the CAA to form an opinion that a breach of an implied warranty has taken place.

In **Administrative Law** by Wade and Forsyth,[10] under the sub-heading of 'Power in the wrong hands', it has been stated as follows:

> "*The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them. In this class might be included the case of the cinema licensing authority which, by requiring films to be approved by the British Board of Film Censors, was held to have surrendered its power of control[11] and also the case of the Police Complaints Board, which acted as if it were bound by a decision of the Director of Public Prosecutions when only required to 'have regard' to it*."[12]

The legal position in this regard has been clearly laid down in **R (National Association of Health Stores) v. Department of Health**[13] where it was held as follows:

> *"It would be an embarrassment both for government and for the Courts if we were to hold that a minister or a civil servant could lawfully take a decision on a matter he or she knew nothing about because one or more officials in the department knew all about it. The proposition becomes*

[10] H.W.R. Wade, C.F, Forsyth, *Administrative Law* [11th Edition, 2014] Oxford University Press; page 269.
[11] Ellis v. Dubowski; [1921] 3 KB 621.
[12] R v. Police Complaints Board ex p Madden; [1983] 1 WLR 447.
[13] [2005] EWCA Civ. 154; per Sedley J.

worse, not better, when it is qualified, as Crane J qualified it and as Mr Cavanagh now seeks to qualify it, by requiring that the civil servants with the relevant knowledge must have taken part in briefing or advising the minister. To do this is to substitute for the Carltona doctrine[14] *of ordered devolution to appropriate civil servants of decision-making authority (to adopt the lexicon used by Lord Griffiths in Oladehinde [1991] 1 AC 254) either a de facto abdication by the lawful decision-maker in favour of his or her adviser, or a division of labour in which the person with knowledge decides nothing and the decision is taken by a person without knowledge*."

In **Shell Gas Lanka Limited vs. Consumer Affairs Authority and Others**[15] it was held by this Court that, "*It is essential that for the lawful exercise of power, it should be exercised by the 1st Respondent Authority upon whom such power is conferred and by no one else. .... I am unable to agree with the learned Senior State Counsel that the powers of the Authority can be delegated to the Pricing Committee. The Pricing Committee may facilitate the discharge of the functions of the Authority. But, the Pricing Committee has no jurisdiction to exercise the powers of the Authority*."

Did the Consumer Affairs Authority take the decision that was conveyed by '**P14**'?

This Court shall now consider whether the decision conveyed by '**P14**' has been taken by the CAA in accordance with the obligation imposed on it by Section

[14]Carltona Ltd v Commissioners of Works [1943] 2 All ER 560. Sedley J in R (National Association of Health Stores) v. Department of Health *stated that "Carltona*, however, establishes only that the act of a duly authorised civil servant is in law the act of his or her minister. It does not decide or even suggest that what the civil servant knows is in law the minister's knowledge, regardless of whether the latter actually knows it."

[15] Supra.

32(5) of the Act, or whether there has at least been a consideration of '**P15**' at the meeting held on 21st December 2012.

In doing so, this Court shall bear in mind the statement of Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service**[16] [the GCHQ case], where, having classified the three grounds upon which administrative action is subject to judicial review, namely 'illegality', 'irrationality' and 'procedural impropriety', he proceeded to state that "*by 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it*."

According to the 1st Respondent, after the conclusion of the inquiry on 4th December 2012, the next step that was taken was the preparation of a Board Paper which the 1st Respondent has produced with its Statement of Objections, marked '**R5**' titled '*Summary of Orders issued by the Consumer Affairs Authority*'.

The learned President's Counsel for the Petitioner has pointed out two important matters, which casts a serious doubt on the authenticity of '**R5**', and more importantly, the integrity of the procedure followed by the CAA. Having drawn the attention of this Court to the same Board Paper that had been filed by the 1st Respondent in CA (Writ) Application No. 66/2013 where the Petitioner had challenged another decision contained in '**R5**', he submitted that even though both board papers contain the identical signatures on the final page, the rest of the pages in '**R5**' are different to the board paper filed in CA (Writ) Application No. 66/2013. The second matter is that the Board paper

[16] [1985] 1 AC 374.

'**R5**' does not contain the board paper number, whereas the copy filed in CA (Writ) Application No. 66/2013 contains a number. Regretfully, no explanation was offered by the 1st Respondent as to how there can be two different versions of the same Board Paper having the identical signatures. In the absence of an explanation, the only conclusion that this Court can arrive at is that there has been a serious irregularity in the preparation of the Board Paper, '**R5**'.

This Court has examined '**R5**', which is dated 14th December 2012 and observes the following:

(a) The right corner column of '**R5**' contains a 'summary of the order' made in 11 inquiries conducted by the '*CAA*';

(b) '**R5**' has been prepared and submitted by the 3rd Respondent, Director (Compliance and Enforcement);

(c) The decision pertaining to the 3rd Respondent's complaint is contained in '**R5**' and is recorded as follows: "*The inquiry panel made an order against the Respondent company to reimburse Rs. 158,769.13, 50% of the amount incurred as additional charges by the complainant.*";

(d) '**R5**' has been recommended by the Director General; and

(e) The submission of '**R5**' has been approved by the 2nd Respondent, the Chairman of the CAA.

If, as the 1st Respondent claims, decisions of inquiry panels are placed before the CAA for their *ratification and approval*, it would only be natural that such

decisions, or '**P15**' in this case, be placed before the CAA. What is significant however is that '**P15**' has not been annexed to '**R5**', nor does '**R5**' contain the factual matters relating to the complaint of the 3rd Respondent or the findings of the Inquiry Panel on the said complaint. The 1st Respondent has not produced any proof to demonstrate that the report of the Inquiry Panel '**P15**' was in fact placed before the CAA, at its meeting held on 21st December 2012, or that the CAA was apprised of the facts relating to the complaint of the 3rd Respondent at the meeting. The only material placed before the CAA was that *the inquiry panel made an order against the Respondent company to reimburse Rs. 158,769.*13. The CAA has not been apprised as to how and why such an Order has been made, and therefore the CAA could not have deliberated on the facts and circumstances of the complaint and the relief that should be allowed.

This Court is at a loss to understand how the decision in '**P14**' could have been taken by the CAA without having any idea as to what even the complaint is. The position of the 1st Respondent that '**P15**' was placed before the CAA at its meeting held on 21st December 2012 therefore cannot be correct.

Given the fact that the Board paper '**R5**' did not contain reasons as to why relief should be afforded to the 3rd Respondent, and in the absence of any evidence that '**P15**' had been placed before the CAA, this Court can only come to the conclusion that even if the CAA approved the Board Paper '**R5**', it did so in complete ignorance of the reasons that led the panel to conclude that the 3rd Respondent must be compensated by the Petitioner. In other words, the CAA has not formed the opinion as required by Section 32(5).

The only material considered by the CAA in making the decision contained in '**P14**', that the 3rd Respondent should be compensated, was '**R5**', which was submitted by the 3rd Respondent. This fact is crucial in light of the second argument of the Petitioner.

The above conclusions were in fact confirmed by the learned Counsel for the 1st Respondent, who, in the course of his oral submissions on 6th March 2020, submitted as follows:

a) The summary of the findings of the Inquiry Panel are submitted to the Legal Division, for the preparation of the report;

b) The Board paper relating to an inquiry is prepared by the Legal Division, and it is the Board paper that is submitted to the CAA;

c) The report of the Inquiry Panel was not submitted to the CAA;

d) The CAA does not go into each and every detail of an inquiry, but takes legal responsibility for its decision;

e) The report of the Inquiry Panel, once prepared by the Legal Division, is sent to each member for their signature. However, he is not in a position to tender a signed copy of '**P15**'.

This Court therefore has no hesitation in concluding that the decision contained in '**P14**' has not been taken by the CAA, and is therefore illegal.

Has '**P15**' been signed by the members of the Inquiry Panel?

All three Respondents have categorically stated that '**P15**' has been signed by all four members of the Inquiry Panel.[17] However, the report of the Inquiry Panel submitted with the petition marked '**P15**', which is the copy that had been sent to the Petitioner annexed to '**P14**', did not contain the signatures of the members of the Inquiry Panel. But as the date of the report had been inserted by hand, on '**P15**', this Court called for the Inquiry File of the 1st Respondent, which was made available to this Court by the learned Counsel for the 1st and 2nd Respondents the same day. This Court, having examined same, made several observations which contradict the position taken up by the 1st Respondent in its Statement of Objections.

The first such observation is that the report of the Inquiry Panel that is available in the official file of the 1st Respondent does not contain the signatures of the members of the Inquiry Panel, although all Respondents had emphatically stated that the members of the Inquiry Panel had signed '**P15**', nor does the said copy contain a date. This, together with the fact that '**P15**' does not have the signatures of the four members of the Inquiry Panel confirms that a signed copy thereof is not available, for the simple reason that '**P15**' was never signed. Thus, the averment in the Statement of Objections of the Respondents, supported by affidavits, that '**P15**' has been signed, is incorrect.

[17] Vide paragraphs 21(a) and 23 of the Statement of Objections of the 1st and 2nd Respondents; paragraph 21(b) of the Statement of Objections of the 3rd Respondent.

The 1st Respondent has suppressed the truth from this Court

The second observation that this Court made by examining the official file maintained by the 1st Respondent is that only three members had participated at the inquiry held on 16th October 2012, namely Mr. Milton Amerasinghe, Major General N. Jayasuriya, and Mr. Varuna Alawwa, contrary to the averment in the Statement of Objections that four members of the CAA sat at the inquiry held on 16th October 2012. During the hearing held on 6th March 2020, the learned Counsel for the 1st and 2nd Respondents submitted that even though the 1st Respondent had appointed several panels consisting of four members of the CAA to conduct inquiries, all four members of the inquiry panel are not present at each and every session of an inquiry. To this Court, such a course of action is unsatisfactory.

The third observation that this Court made was that on the file copy of '**P15**', an endorsement has been made on 2nd January 2013, to "*please resubmit with the corrections"*. This endorsement confirms once and for all that '**P15**' was not placed before the CAA on 21st December 2012, and that the CAA rubber stamped the Board Paper submitted by none other than the recipient of the relief.

Conclusion

In the above circumstances, this Court is of the view that the report of the inquiry panel '**P15**' was not placed before the CAA, and that the CAA did not deliberate whether the Petitioner has breached the provisions of Section 32(1)(a). This Court is also of the view that the CAA has not formed an opinion as required by Section 32(5) of the CAA Act that the relief afforded by '**P14**'

should be given, and that the CAA has merely rubber stamped the findings of an inquiry panel and the recommendations contained in a Board Paper, which is an abdication of the statutory power conferred on the CAA.

This Court is therefore in agreement with the first argument of the learned President's Counsel for the Petitioner that '**P14**' is not a decision taken by the CAA in terms of the law, and that the said decision is illegal.'**P14**' is therefore liable to be quashed by a Writ of Certiorari.

The second argument – was the CAA biased in favour of the 3rd Respondent?

The second argument of the learned President's Counsel for the Petitioner was that:

(a) The 1st Respondent inquiring into the complaint of one of its Senior employees gives rise to a conflict of interest;

(b) The Inquiry Panel and the CAA were biased towards the 3rd Respondent.

Bias has been defined as "*an operative prejudice, whether conscious or unconscious*"[18] and a "*predisposition or prejudice against one party's case or evidence on an issue, for reasons unconcerned with the merits of the issue*."[19]

Rationale for the Rule against Bias

The rule against bias, that no one should be a judge in his own cause (*nemo judex in sua causa)*, '*should be held sacred…it is* ***not confined to a cause in***

[18] R v. Queen's County Justices [1908] 1 I.R. 285 at 294; as referred to in De Smith's Judicial Review, ibid.
[19] Flaherty v. National Greyhound Racing Club Limited [2005] EWCA Civ1117;as referred to in De Smith's Judicial Review, ibid.

***which he is a party, but applies to a cause in which he has an interest*.**'[20] This maxim lies at the heart of natural justice and fair procedure, along with its counterpart '*audi alteram partem*' (hear the other side).

It is the view of this Court that what lies at the core of the rule against bias is that the integrity, independence and fairness of the decision making process must be protected and maintained at all times, thus ensuring public confidence in the judicial and administrative decision making process.

As stated in **De Smith's Judicial Review**[21],

> "*Procedural fairness demands... that the decision maker should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the arguments advanced by the parties. Although perfect objectivity may be an unrealizable objective, the rule against bias thus aims at preventing a hearing from being a sham or a ritual or a mere exercise in "symbolic reassurance", due to the fact that the decision maker was not in practice persuadable*."

It is observed further as follows in **De Smith's Judicial Review**[22],

> *"In defining the scope of the rule against bias and its content, at least two requirements of public law are in play.* ***The first seeks accuracy in public decision-making.*** *If a person is influenced in a decision by his private interests or personal predilections, he will not follow, or may be tempted not to follow, the required standards and considerations which ought to*

[20] Dimes v. Grand Junction Canal (1852) 3 HLC 759 at 793; Lord Campbell.
[21] Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith's Judicial Review* [8th Edition, 2018] Sweet and Maxwell; page 535.
[22] Supra; page 536.

guide the decision. An accurate decision is more likely to be achieved by a decision-maker who is in fact impartial or disinterested in the outcome of the decision and who puts aside any personal prejudices. ***The second requirement is for public confidence in the decision-making process****.*[23] *Even though the decision-maker may in fact be scrupulously impartial, the appearance of bias can itself call into question the legitimacy of the courts and other decision-making bodies."*[24]

A different dimension of the rationale has been set out in the following paragraph in **Administrative Law** by Timothy Endicott:[25]

"*A bias is a bad attitude. It is a disposition to make a decision against a party's interest, regardless of how it ought to be decided... If the decision maker has that sort of unfair attitude, no hearing can be fair. In fact, a hearing is not really a hearing at all if the decision maker is going to decide against you regardless of what he hears. The hearing becomes a sham.*"

Test to determine Bias

It is well established that a pecuniary or proprietary interest in a matter would automatically disqualify a decision-maker or judge from determining the outcome of such matter '*on the ground that public confidence would inevitably*

[23] Belilos v Switzerland (1998) 10 E.H.R.R. 466 at [67].

[24] In this respect, it is important to emphasise that if the fair-minded and informed observer would conclude that there is a real possibility that the tribunal will be biased, the judge is automatically disqualified from hearing the case. The decision to recuse in those circumstances is not a discretionary case management decision reached by weighing various relevant factors in the balance. Considerations of inconvenience, cost and delay are irrelevant: Resolution Chemicals [2013] EWCA Civ 1515; [2014] 1 WLR 1943 at [35].

[25] Second Edition; 2011 page 153

be shaken if the decision were allowed to stand[26]*… such cases clearly breach the maxim that nobody may be a judge in his own cause*[27] *and attract the full force [of the requirement that] justice must not only be done but manifestly be seen to be done.*"[28]

Where matters fall outside the scope of actual bias and the automatic disqualification doctrine, Courts must determine "*whether the judge's or decision-maker's interest in the matter is sufficient to justify disqualification*."[29] In doing so, Courts have applied several tests, ranging from the *real likelihood test*, *reasonable suspicion test*, *real danger test,* and appears to have settled with the *reasonable apprehension test* which is also known as the '*fair-minded and well-informed observer test*'.

The distinction between the *real likelihood test* and the *reasonable suspicion test* has been discussed in **Administrative Law** by Wade and Forsyth[30] as follows:

> "*In cases where there is no automatic disqualification it then has to be determined whether the judge's or decision-maker's interest in the matter is sufficient to justify disqualification. What is the test of apparent bias? This question has a tangled history although the modern test… is now relatively clear. Much confusion has been caused in the past by the concurrent use of differently formulated tests for disqualifying bias. In the past many judges have laid down and applied a 'real likelihood' formula,*

[26]De Smith's Judicial Review (supra); page 546.
[27]Rand (1866) L.R. 1 Q.B. 230 at 232.
[28]R v Gough [1993] AC 646 at 661.
[29]Administrative Law by Wade and Forsyth (supra); page 386.
[30]Ibid.

***holding that the test for disqualification is whether the facts, as assessed by the court**, give rise to a real likelihood of bias;[31] and this test has naturally been emphasised in cases where the **allegation of bias was far-fetched**.[32] Other judges have employed a 'reasonable suspicion' test, emphasising that **justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some personal interest**.'*[33]

In **Metropolitan Properties Co (F.G.C) Limited v. Lannon and others**,[34] which has been widely cited by our Courts,[35] Lord Denning M.R., whilst stating that the real likelihood test is *a matter on which the law is not altogether clear*, decided to *stand by* the rationale behind the 'reasonable suspicion' test, contained in "*the oft-repeated saying of Lord Hewart, C.J., in **R. v. Sussex Justices, Ex p. McCarthy***[36]*:*

"It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

*In **R. v. Barnsley County Borough Licensing Justices, Ex p. Barnsley & District Licensed Victuallers' Association**[37] Devlin L.J., appears to have limited that principle considerably, but I would stand by it. It brings home*

[31] R v. Rand (1866) LR 1 QB 230; R v. Sunderland Justices (1901) 2 KB 357; Frome United Breweries Co v. Bath Justices [1926] AC 586.
[32] R v. Camborne Justices ex p. Pearce [1955] 1 QB 41.
[33] R v. Gaisford [1892] 1 QB 381; R v. Sussex Justices ex p McCarthy [1924] 1 KB 256; Cooper v. Wilson [1937] 2 KB 309.
[34] [1968] 3 All E.R 304.
[35] See Mohammed Mohideen Hassan vs. Peiris [1982] 1 Sri LR 195;Kumarasena v. Data Management Systems Ltd. [1987] 2 Sri LR 190; Captain Navarathne vs. Major General Sarath Fonseka [2009]1 Sri LR 190.
[36] [1924] 1 KB 256 at 259.
[37] [1960] 2 Q.B. 167 at 187.

this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. ***The court looks at the impression which would be given to other people.*** *Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand*."[38]

However, Lord Denning, causing some confusion, appears to have interwoven the *real likelihood test* with the *reasonable suspicion test*, whilst reasserting the rationale cited above:

"Nevertheless, ***there must appear to be a real likelihood of bias****.* ***Surmise or conjecture, is not enough***[39]*. 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 court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did.* ***The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased***".

[38]See The Queen v. Huggins (1895 1 Q.B. 563); Rex v. Sunderland Justices (1901 2 K.B. 373) by Lord Justice Vaughan Williams.
[39]See Regina v. Camborne Justices (1955 1 Q.3. 41) at pages 48 to 51; Regina v. Nailsworth (1953) 2 All ER 652.

Similar sentiments were expressed by this Court in **Abdul Hasheeb v. Mendis Perera and others**[40] where Justice G.P.S.De Silva (as he then was), having discussed several English cases, held as follows:

> "*even on the application of the test of reasonable suspicion, it must be shown that the* ***suspicion is based on reasonable grounds*** *–* ***grounds which would appeal to the reasonable, right thinking man****. It can never be based on conjecture or on flimsy, insubstantial grounds. Adopting the words of Lord Denning in Lannon's case, Mr. Pullenayagam submitted that "bias" in this context would mean, "a tendency to favour one side unfairly at the expense of the other" -- a submission with which I agree*."

In 1993, in **R v. Gough**,[41] the House of Lords considered the various tests of bias discussed above, in the context of an allegation of bias on the part of a juror in a criminal trial, and ruled in favour of a 'real danger of bias' test in order to '*ensure that the court is thinking in terms of possibility rather than probability of bias',* and stated as follows*:*

> *"Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias*."

The Court in **Gough** thus rejected the notion that a matter must be viewed through the eyes of a reasonable man '*because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of*

[40] [1991] 1 SLR 243 at 257.
[41] Supra; at page 670.

which would not necessarily be available to an observer in court at the relevant time.'[42]

The above 'real danger of bias' test was however subsequently revisited as it '*introduced a discrepancy between the Convention (European Convention on Human Rights) and the common law in ensuring impartial decision making*.'[43] Further development came about in **Porter v Magill**,[44] where the test was held to be whether "*the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias*."[45] The *Porter* formulation, which was considered a *modest adjustment* to **Gough**, was endorsed by the House of Lords in the subsequent case of **Lawal v. Northern Spirit Limited**.[46]

The shift in perspective in **Porter** and **Lawal** were firmly based on the necessity to ensure public confidence in the system of administration of justice. As the House of Lords stated in **Lawal**:

> "*Public perception of the possibility of unconscious bias is the key*."

On the issue of what characteristics could be attributed to the *fair-minded and informed observer*, the House of Lords in **Lawal**, held as follows:

> "*It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer* ***will adopt a balanced***

[42] Ibid.
[43] Administrative Law by Wade and Forsyth (Supra) page 387.
[44] [2001] UKHL 67.
[45] Ibid. at 103.
[46] [2003] UK HL 35.

***approach**. This idea was succinctly expressed in Johnson v Johnson (2000) 200 CLR 488, 509, at para 53, by Kirby J when he stated that "**a reasonable member of the public is neither complacent nor unduly sensitive or suspicious**".*

In **Helow v Home Secretary**[47], Lord Hope said this of the *fair-minded and informed observer*:

> *"She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment*."

This Court is mindful of the fact that it is extremely difficult for a petitioner to establish bias, and it is for this reason that the test of a real possibility that bias might have affected the decision, viewed from the lens of a fair minded and informed observer, has been advanced.

Therefore, the Petitioner does not need to submit proof that the relationship between the 1st and 3rd Respondents affected the findings of the Inquiry Panel or the CAA, or that the Inquiry Panel or the CAA were favourably disposed towards the 3rd Respondent, or that the 3rd Respondent interfered with the decision pertaining to her own complaint. In the absence of any material that the 1st Respondent maintained a *Chinese Wall* between the 3rd Respondent on the one hand and the Inquiry Panel and the CAA on the other with regard to

[47] [2008] UKHL 62.

the complaint of the 3rd Respondent, even if the 1st Respondent and the Inquiry Panel or the CAA were in fact scrupulously impartial, all that the Petitioner had to establish was that the circumstances of this case are such that it can lead the fair minded and well informed observer to conclude that there was a real possibility of bias.

This Court must state that it does not wish to deny the 3rd Respondent the right to make a complaint to the 1st Respondent, in her capacity as a consumer, nor does it wish to deny the right of the 1st Respondent to inquire into such complaint and make an order in terms of the law. However, it is an admitted fact that the 3rd Respondent "*functions as the Head of the Legal Division of the 1st Respondent, who coordinates the matters with the Board of the 1st Respondent in assisting them in her official capacity in the conduct of inquiries in respect of the complaints made to the 1st Respondent by aggrieved consumers*."[48] Hence, given the potential for the conflict of interest, either real or apparent, and the allegations of bias that could be made, when an employer entrusted with regulatory power inquires into a complaint made by an employee against a third party, it was important that the 1st Respondent did not involve the 3rd Respondent at all in its decision making process involving the complaint of the 3rd Respondent.

As observed in **De Smith's Judicial Review**:[49]

> "*Possibility of bias may arise from the fact that an adjudicator is the employer or employee of one of the parties, if their relationship is a close*

[48] Vide paragraph 7(b) of the Statement of Objections of the 1st and 2nd Respondents, as well as that of the 3rd Respondent.
[49] Supra; page 564.

one or ***if their respective interests are directly involved in the subject matter of the proceedings***."

It was equally important that the 3rd Respondent, being a senior employee of the 1st Respondent, recused herself from the said decision making process, and stayed out of the loop, thereby allowing the 1st Respondent to have made an order in terms of the law.

By January 2012, the 3rd Respondent was unhappy with the delay in the delivery of her vehicle, as clearly expressed in her letter marked '**R2**'.[50] It is the view of this Court that the 3rd Respondent should have recused herself from handling complaints against the Petitioner at that point, whereas it is now admitted that the 3rd Respondent continued to handle ten other complaints against the Petitioner.[51] As the Director (Compliance and Enforcement), the 3rd Respondent ought to have recused herself from any involvement in the decision making process in all such inquiries, as well.

However, the evidence that was presented to this Court by the CAA itself is entirely different.

This Court has already noted the submission of the learned Counsel for the 1st Respondent that the Inquiry Panel did not prepare the report '**P15**', but that the findings of the Inquiry Panel were conveyed to the Legal Division of the CAA, of which the 3rd Respondent was the Head, for the preparation of the

[50] 'R2' annexed to the Statement of Objections of the 3rd Respondent.

[51] Vide paragraph 8 of the Statement of Objections of the 1st and 2nd Respondents, that the complaint in CA(Writ) Application No. 66/2013 is one "out of 10 numbers of similar types of complaints of consumers received by the 1st Respondent against the services provided by the Petitioner during the period of 2011/2012 for which the 3rd Respondent has carried out her official duties on behalf of the 1st Respondent."

report. It is the view of this Court that the independence that the Inquiry Panel was required to maintain was shattered the moment the Legal Division was entrusted with the task of preparing the report, and destroyed the integrity of the inquiry process.

Preparation of the report by the Legal Division can give rise to two possible scenarios. The first is that the report '**P15**' containing the purported findings of the Inquiry Panel and the recommendations of the relief that should be provided to the 3rd Respondent has been prepared by the 3rd Respondent herself. Giving the benefit of the doubt to the 3rd Respondent in this regard, the next scenario is that the report '**P15**' was prepared by the subordinates of the 3rd Respondent, giving rise to an inference that the findings were prepared to favour the 3rd Respondent.

The next step was to place the said findings before the CAA. The 1st Respondent has produced, marked '**R5**' a copy of the Board paper setting out *inter alia* the summary of the Orders said to have been made by the CAA in 12 inquiries, **including the inquiry relating to the complaint of the 3rd Respondent**. As noted earlier, '**R5**' had been initiated by the Division of which the 3rd Respondent was its Head, and submitted to the Board of the CAA under the signature of the 3rd Respondent. The effect of '**R5**' is that the 3rd Respondent is *recommending* to the decision maker that relief be provided to her, and what that relief should be.

The mockery does not end there. The 1st Respondent has produced marked '**R6**', an internal memorandum addressed to the 3rd Respondent, which reads as follows:

"*Extract of the Board decision on the following Board paper as decided at the meeting No. 12 of 2012 held on 21st December 2012 is* ***sent along with for necessary action and compliance, please.***"[52]

The effect of '**R6**' is that the task of implementing the relief that the 3rd Respondent is now entitled to, has been entrusted to the 3rd Respondent herself.

Conclusion

This Court has already noted that the duty to arrive at an opinion in terms of Section 32(5) rests with the CAA. It is the view of this Court that the objectivity that the CAA is required to exercise when called upon to arrive at an opinion in terms of Section 32(5), and the need for the CAA to strike a fair balance between the rights of the parties in that process, cannot be objectively expected in the light of the above facts and circumstances. The seriousness of the allegation of bias is heightened when one takes into account the fact that, in the absence of '**P15**', the only material that was placed before the CAA in relation to the complaint of the 3rd Respondent was the said Board paper '**R5**', submitted by the 3rd Respondent.

If the test in *Porter* is to be applied, the question, "*would a fair-minded and informed observer, who considers the above facts, conclude that there was a real possibility that '**P14**' and '**P15**' are tainted with bias*", can be answered by an overwhelming ***yes***. This Court is of the view that public confidence in administrative decisions would be shattered if decisions taken in light of the

[52] The Board Paper referred to is 'R5'.

facts and circumstances of this case, are allowed to stand. This Court therefore has no hesitation in concluding that the findings contained in '**P15**' as well as '**P14**' must be quashed by a Writ of Certiorari.

The final argument of the Petitioner – is the decision that the Petitioner breached the implied warranty unreasonable and/or irrational?

The necessity for this Court to consider the final argument of the Petitioner in view of the findings of this Court in respect of the first two arguments does not arise, as the said findings are sufficient to issue the Writs of Certiorari that has been prayed for. However, for sake of completeness, and in order to demonstrate through the findings in '**P15**' the bias that was displayed in favour of the 3rd Respondent, this Court will now consider the third ground that was urged by the learned President's Counsel for the Petitioner, which is that the decision of the inquiry panel to hold the Petitioner responsible for the delay in shipment and delivery is unreasonable, and irrational.

Irrationality

The following passages from **De Smith's Judicial Review** capture the essence of the above argument:[53]

> "*A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in arbitrary fashion, perhaps "by spinning a coin or consulting an astrologer"*[54]*. In such cases claimant does*

[53] Supra; pages 604 and 613.
[54] R v. Deputy Industrial Injuries Commissioner, Ex P. Moore [1965] 1 Q.B. 456 at 488 (Diplock LJ).

not have to prove that the decision was "so bizarre that its author must have been temporarily unhinged", but merely that the decision simply fails to "add up – in which, in other words, there is an error of reasoning which robs the decision of logic"[55].

"Absurd" or "perverse" decisions may be presumed to have been decided in that fashion, as may decisions where the given reasons are simply unintelligible. Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decision, or where there is absence of evidence in support of the decision.

Our view is that a material mistake or disregard of a material fact in and of itself renders a decision irrational or unreasonable. .... it should be presumed that Parliament intended public authorities rationally to relate the evidence and their reasoning to the decision which they are charged with making. The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration; or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision upon any or adequate evidence."

<u>The test for deciding the reasonableness of a decision of a Public Authority</u>

In considering whether the decision of the Inquiry Panel is reasonable, this Court shall be mindful of the fact that it is not the duty of this Court acting in

[55] R v. Parliamentary Commissioner for Administration, Ex P. Balchin [1998] 1 P.L.R. 1.

the exercise of its Writ jurisdiction, to assess whether the implied warranty was breached. The duty of this Court is thus to determine whether the CAA paid due regard to relevant matters, in arriving at their purported decision, and whether the findings of the inquiry panel are reasonable.

In exercising judicial review, Courts play a limited role and must be mindful not to substitute its own decision for that of the public authority who has been conferred with the power of making that decision, unless the authority has disregarded material facts or where the decision is unsupported by substantial evidence. In the words of Lord Bingham, '*they (judges) are auditors of legality; no more, but no less*.'[56]

In deciding whether a decision is reasonable, the test to be applied is not what a court of law thinks or considers is reasonable nor what the proverbial *Man on the Clapham Omnibus* would consider reasonable. Instead, it is settled law that in considering the validity of the exercise of discretionary power, the Court will consider whether the power has been properly used, or whether the authority has abused its discretion.

The test routinely applied for this purpose is the test set out in **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation**,[57] where Lord Greene defined unreasonableness as '*something so absurd that no sensible person could ever dream that it lay within the powers of the authority.'* The famous example of the red-haired teacher who was dismissed due to the colour of her hair, illustrates the high threshold for "unreasonableness" that was expected to justify judicial intervention on this ground.

[56] Tom Bingham, *The Rule of Law* [2011] Penguin Books at page 61.
[57] [1948] 1 K.B. 223 at pages 229 - 230.

Subsequently, in **Council of Civil Service Unions v Minister for the Civil Service**[58], Lord Diplock, having classified the three grounds on which administrative action is subject to judicial control, crystallized *irrationality* as a standalone ground for judicial review.[59] The ground of irrationality however was intrinsically linked to *Wednesbury unreasonableness*, and only applied '*to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*', thus keeping the threshold for judicial intervention still very high.[60]

A similar threshold was adopted by Lord Scarman who referred to a need to demonstrate that the guidance of the Secretary of State in that case '*were so absurd that he must have taken leave of his senses*'[61], in order to justify judicial intervention.

A common feature in the abovementioned cases is that for Courts to intervene, the decision of the public authority in question must not just be unreasonable, but manifestly unreasonable. There is however growing precedence to show that English Courts have attempted to reduce the rigour of "*Wednesbury unreasonableness*" over the years, particularly in light of the Human Rights Act 1998 which incorporated the European Convention on Human Rights into English domestic law.[62]

[58] Supra; at pages 410-411.
[59] The test laid down by Diplock, J has been applied in Sri Lanka as far back as in 1987 – see Sudhakaran v. Bharathi and Others [1987] 2 Sri LR 243, at page 254.
[60] Although the terms, 'irrationality' and 'unreasonableness' are often used interchangeably, irrationality is only one facet of unreasonableness.
[61] Nottinghamshire County Council v. Secretary of State for the Environment [1986] AC 240 at 247.
[62] See R v Secretary of State for the Home Department, ex parte Daly [2001] 3 All ER 433 page 447.

The case of **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**,[63] decided prior to the GCHQ case provides for what can be considered a more balanced test:

> *"In public law, "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which* ***no sensible authority acting with due appreciation of its responsibilities would have decided to adopt****."*[64]

The role of this Court in exercising judicial review

Authorities acting on behalf of the public ought to be accountable for the overall quality of the decision making process. While Courts must be mindful not to substitute its own decision for that of the public authority, this must be balanced with Courts taking an active role in probing the quality of decisions of public authorities, and ensuring that actions of public authorities are properly substantiated, justified, and strike a fair balance between parties. The necessity for judicial intervention could not have been clearer than in this case, where this Court has already seen the manner in which the 1st Respondent has permitted its internal processes to be manipulated and distorted.

[63] Supra; page 1064.
[64] The test used in Tameside was cited with approval in the case of R v Chief Constable of Sussex (Ex parte International Trader's Ferry Ltd) [[1999] 1 All ER 129 at page 157].

Failure to take into consideration relevant material

The final argument of the learned President's Counsel for the Petitioner is based on the premise that the Inquiry Panel failed to take into consideration relevant factors, which resulted in its decision not being supported by the material that was placed before the Inquiry Panel.

Failure to take into consideration relevant material or taking into consideration irrelevant material can render a decision unreasonable. As stated in **De Smith's Judicial Review**:[65]

> "*If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised."*

This Court has examined the report marked '**P15**', and observes that the findings contained therein have ignored the following three fundamentally important facts:

(a) That the date of shipment was variable;

(b) That there is a difference between an undertaking **to effect shipment** by a particular date as opposed to an undertaking **to deliver** by a particular date;

[65] Supra; at page 305.

(c) That the Petitioner cannot be held responsible for any delay that occurred from the date of shipment, and until the arrival of the vehicle at the Port of Colombo.

The task that was expected of the Inquiry Panel was to inquire and determine whether the Petitioner has breached an implied warranty that it shall exercise due care and skill in providing a service to the 3rd Respondent. Therefore, it was important that the *service* was identified first. For this, the Inquiry Panel and the CAA would have to go by the *proforma* invoice in order to determine the terms and conditions subject to which the service was to be provided, and thereafter determine whether there has been a breach of that *service*. To this Court, the service that was to be provided by the Petitioner consisted of placing the order with the manufacturer, effecting shipment of the vehicle, clearing the vehicle on payment of charges, carrying out the pre-delivery inspection, and complying with the warranty.

The date of shipment

The *proforma* invoice '**P4**' contained the following conditions with regard to shipment:

(a) Shipment shall be within 5-6 months after receipt of the letter of credit in favour of the Petitioner;

(b) Shipment shall be after confirmation of production;

(c) The latest shipment date to be 5 months from the date of the letter of credit.

On the face of it, there is a contradiction between the above three conditions, as to when the shipment should be effected. Thus, according to '**P4**':

(a) Shipment should be effected within five months from the date of the opening of the Letter of Credit;

(b) Shipment should be effected prior to the expiry of six months from the date of the letter of credit being opened.

(c) The shipment date shall be decided once the manufacturer confirms the date of production.

It appears to this Court that the intention of the Petitioner was that shipment shall take place during the validity period of the letter of credit, subject to confirmation of the date of production from the manufacturer of the vehicle, given the fact that the goods were being manufactured by its principal and not by the Petitioner. It is significant that in her complaint marked '**P12**', the 3rd Respondent has admitted that, "*as per the proforma invoice, shipment of the vehicle was within 5-6 months after receipt of LC in favour of KIA Motors (Lanka) Limited,* ***and after confirmation of production***." While the shipment of the vehicle cannot be delayed unreasonably, the date of shipment was not of the essence of the contract.

As noted earlier, even though the letter of credit is dated 26th July 2011, it appears from the date stamp of the Bank on '**P5**' that it has been issued by the Bank only on 28th July 2011. Thus, it would be safe to assume that in terms of the *proforma* invoice '**P4**', the Petitioner had time until 28th January 2012 to effect shipment. This, taken with the condition in the *proforma* invoice that

shipment is subject to confirmation from the manufacturer of the date of production, and the admission by the 3rd Respondent of this condition in '**P12**', means that there was no agreement on the exact date of shipment. '**P15**', however, has been prepared on the notion that the date of shipment was agreed between the parties and that the Petitioner breached this condition, although the material does not support such a conclusion

Effecting shipment as opposed to delivery

As observed earlier, one aspect of the service to be provided by the Petitioner was to effect shipment, and not delivery, within the aforementioned time period. The aspect of delivery was not subject to any conditions contained in '**P4**'. The Petitioner had not specified to the 3rd Respondent a date of delivery of the said vehicle in Sri Lanka, and therefore the Petitioner **has not undertaken to deliver** the vehicle by a given date, although the 3rd Respondent claims that a verbal assurance was given to that effect. The authors of '**P15**' have ignored this distinction between the date of shipment and the date of delivery of the vehicle to the 3rd Respondent, and have held that the Petitioner is liable for the failure to *deliver as agreed*.

Can the Petitioner be held liable for delay that occurs after shipment?

The Petitioner has stated in paragraph 8 of the petition that shipment was delayed beyond the agreed date due to production delays in Korea. In the letter dated 6th January 2012 annexed to the petition marked '**P6**', the Petitioner has stated that the delay in production had arisen as a result of there being a high demand for KIA vehicles internationally. This Court must note that even if there was such a delay, this fact has not been supported by

any documentary proof. Furthermore, it appears to this Court that this issue may not have arisen had the Petitioner obtained confirmed dates for shipment from the manufacturer after the 3rd Respondent opened the letter of credit, and thereafter informed the 3rd Respondent of the appropriate date of shipment. Such a course of action would have been entirely within the *proforma* invoice issued by the Petitioner, and the 3rd Respondent could not have had any complaint, had the Petitioner done so.

According to the Petitioner, the vehicle had been shipped on 31st January 2012, as evidenced by the bill of lading annexed to the petition marked '**P8**', on board MV Asian Grace. The Petitioner states further that although the vessel arrived at the Port of Colombo, due to congestion at the Port of Colombo caused by lack of storage yard space, the said vessel could not berth in Colombo, and the vessel had been diverted to Oman, where the vehicles had been unloaded. The vehicle of the 3rd Respondent, together with other vehicles consigned to the Petitioner, was collected by another ship, MV Princess VII on 3rd March 2012. The latter vessel had arrived at the Port of Colombo on 13th March 2012, the Customs Declaration had been filed on 16th March 2012 in the name of the 3rd Respondent, the Customs duties had been paid on 26th March 2012, and the vehicle had been delivered to the 3rd Respondent on 27th March 2012.

Having shipped the vehicle, the next obligation of the Petitioner was to clear the vehicle through Customs after its arrival at the Port of Colombo, carry out the manufacturer recommended inspection at its workshop, and hand over the vehicle to the 3rd Respondent. The above timeline does not therefore cover the period between shipment and the arrival of the vehicle at the Port of Colombo,

with the question being whether the Petitioner can be held liable for any delay caused during that period.

The Inquiry Panel had however held the Petitioner liable for the delay in delivery arising from the inability of MV Asian Grace to call over at the Port of Colombo, as evidenced from the following paragraph of '**P15**':

> "මෙහිදී පරීක්ෂණ මණ්ඩලය වගඋත්තරකරුවන්ගේ අවධානයට යොමු කලේ අදාල මෝටර් රථය රැගෙන ආ නැව ආපසු යාම හේතුවෙන් සිදුවූ යම් මූලෘමය පාඩුවක් වේ නම් එහි වගකීම වගඋත්තරකාර සමාගම විසින් දැරිය යුතු බවත් ඒ සඳහා පැමිණිලිකාරියට අමතර වියදමක් දැරීමට සිදු වීම අසාධාරණ බවත්,"

In terms of the complaint made to the 1st Respondent, the task of the Inquiry Panel was to ascertain if the Petitioner had breached the implied warranty to provide their services with due skill and care. The scope of Section 32(1)(a) thus would be to consider whether the Petitioner had failed to discharge a responsibility that was within its control.

The Petitioner has annexed to the petition marked '**P9**', a letter dated 15th August 2012 issued by M/s Aitken Spence Shipping Limited. The said letter, which had been attached to the letter dated 15th August 2012 annexed to the petition marked '**P13(b)**' sent by the Petitioner to the Deputy Director (Legal and Enforcement) of the CAA, reads as follows:

> "*We wish to inform you that MV Asian Grace, scheduled to call at the Port of Colombo on 19th February 2012, laden with 360 units of KIA motor vehicles had omitted her Colombo call to avoid heavy berthing delays / waiting time.* ***From May 2011, the Colombo port's vehicle yard was***

severely congested due to the increase of motor vehicle imports and as a result all vehicle carriers had to wait at the anchorage until the imported vehicles were cleared and the yard space is created to berth and discharge the cargo. *The average waiting time/berthing delay for a car carrier was 7 days.*

After omitting Colombo the 360 units of KIA motor vehicles were discharged at the Port (of) Sultan Qaboos on 23rd February 2012 to be subsequently transshipped to Colombo.

MV Princess VII which was the relief transshipment vessel, loaded the 360 units of KIA motor vehicles ex. Port Sultan Qaboos on 3rd March 2012 and she arrived at the Port of Colombo on 13th March 2012. She was allocated an on-arrival berth on the same day."

While '**P9**' explains the delay for the delivery, no material has been filed by the 3rd Respondent to contradict the contents thereof. '**P9**' therefore demonstrates that the vehicle yard at the Port of Colombo did not have sufficient capacity since May 2011 resulting in roll-on roll-off vessels not calling at the Port of Colombo.

The uncontradicted evidence that was available to the Inquiry Panel, which the Inquiry Panel failed to consider at all, is that the vessel that left South Korea carrying the vehicle consigned to the 3rd Respondent, was scheduled to call in Colombo on 19th February 2012, and did in fact call, but could not find berthing due to the vehicle yard at the Colombo Port being congested. It was due to this reason that MV Asian Grace left Colombo, causing a delay of almost 30 days prior to the vehicle being brought to Colombo on board MV Princess II. The

fact that the Inquiry Panel did not consider '**P9**' at all, inspite of the said letter being made available to it by the Petitioner, is borne out by the following paragraph of '**P15**':

> "අදාල මෝටර් රථය ගෙන්වීමට ප්‍රමාද වීමට තවත් හේතුවක් ලෙස කොළඹ වරායේ තිබූ තදබදය හේතුවෙන් නැව නැංගුරම් ලැමට නොහැකි වීම බව වගඋත්තරකාර ආයතනය ප්‍රකාශකළ ද, එම කරුණු පිළිගත හැකි සාක්ෂි මගින් ඔප්පු කිරීමට / තහවුරු කිරීමට වගඋත්තරකාර ආයතනය අපොහොසත් වීම."

Even if the Petitioner had undertaken to *deliver* by 28th January 2012 as opposed to effecting shipment by that date, it is the view of this Court that it would be unreasonable to hold the Petitioner liable for delays that are totally beyond the control of the Petitioner. Whatever skill and care that the Petitioner could have exercised would not have cleared the congestion of vehicles at the Port of Colombo.

In the above circumstances, this Court is of the view that the findings in '**P15**' are irrational and unreasonable, and glides with ease the high threshold set out in *Wednesbury* as well as in the GCHQ case. This Court is therefore of the view that '**P14**' and '**P15**' are liable to be quashed by a Writ of Certiorari, on this ground too.

Bias revisited

The failure to take into account material that was placed before the Inquiry Panel, and to arrive at a conclusion which is not supported by any evidence placed before the said Panel, gives the appearance that the decision was driven by extraneous considerations.

This Court is of the view that notwithstanding the real possibility of bias that has been established by the circumstances discussed under the second argument of the Petitioner, the above findings of this Court on the third argument of the Petitioner that the decision is unreasonable and irrational, provide sufficient material for this Court too to apprehend that the decision of the 1st Respondent is tainted with a real possibility of bias.

Conclusion

In the above circumstances, this Court issues a Writ of Certiorari quashing the decision contained in '**P14**' and a Writ of Certiorari quashing the findings contained in '**P15**'. The 2nd Respondent had made certain amendments to '**P14**' by letter dated 28th February 2013, annexed to the petition marked **P16**'. In view of the findings of this Court, '**P16**' shall be of no force.

This Court makes no order with regard to costs.

Judge of the Court of Appeal