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: 66/2013

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. Dr. W. W. Gunaratne,
No. 2, Mosque Road,
Beruwela.

Respondents

Before: **Arjuna Obeyesekere, J**

Counsel: Sanjeeva Jayawardena, P.C., with Ms. Prashanthi Mahindarathne and Charitha Rupesinghe for the Petitioner

Vikum De Abrew, Senior Deputy Solicitor General for the 1st and 2nd Respondents

Sanath Singhage for the 3rd Respondent

Oral submissions: 19th September 2019

Written Submissions: Tendered on behalf of the Petitioner on 5th March 2019

Tendered on behalf of the 1st and 2nd Respondents on 19th November 2018

Tendered on behalf of the 3rd Respondent on 29th October 2018

Decided on: 26th May 2020

Arjuna Obeyesekere, J

The Petitioner has invoked the jurisdiction of this Court to quash the decision to replace the vehicle that it sold to the 3rd Respondent. The issue that this Court is therefore called upon to consider in this application is whether the said decision is illegal, unreasonable and contrary to the principles of proportionality.

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. The 3rd Respondent, who at the relevant time was a Doctor in Government Service, placed an order with the Petitioner in May 2011, for the importation and supply of a KIA Sorento motor vehicle under the preferential tariff scheme granted to Government Sector employees.[1] The Petitioner imported[2] and delivered the said vehicle, bearing Registration No. WP KS-3850, to the 3rd Respondent on 15th February 2012. The said vehicle was accompanied by a manufacturer's warranty, marked '**P7**', valid for a period of 03 years from the date of delivery, or for the first 100,000km, whichever came first.

It is admitted between the parties that the issue that culminated in this application, began on the date of delivery of the said vehicle. The 3rd Respondent, having taken delivery of the vehicle had informed the Petitioner that the air-conditioning in the vehicle had ceased to function, and that upon inspection, he had found that the radiator did not contain any coolant. The vehicle had been returned to the Petitioner on the same day, at its request. Upon inspection, the Petitioner had found that the loss of the coolant was due to the "Radiator Upper Hose" becoming loose. The Petitioner states that it returned the vehicle to the 3rd Respondent the same day, having rectified the

[1] Approval granted to the 3rd Respondent by the Department of Trade, Tariff and Investment Policy, Ministry of Finance and Planning, to import a motor vehicle on concessionary terms, has been annexed to the petition marked 'P2'.

[2] The Bill of Lading, Commercial invoice and the Packing List in respect of the importation of the said vehicle have been annexed with the petition marked 'P4', 'P5' and 'P6' respectively.

said error by tightening the said hose and restoring the level of coolant, free of charge.

This Court observes that even though the 3rd Respondent had collected the vehicle, he had expressed concern about the said issue a few days thereafter, prompting the Petitioner to inform the 3rd Respondent as follows:[3]

> "*Your letter dated 2012.02.20 on the subject vehicle refers. Our investigation revealed that there had been a coolant leak through inlet pipe/inlet hose connection. The connection clamp has been properly re-fixed, the cooling system has been thoroughly checked. Further, the* ***coolant leak has not affected the engine and we guarantee that there would be no consequential effect originating from this cause***." (emphasis added)

On 17th May 2012, which is three months after the above incident, the 3rd Respondent notified the Petitioner that the temperature gauge of the vehicle was indicating an increase in temperature. At the request of the Petitioner, the 3rd Respondent handed over the vehicle to the service centre of the Petitioner on the same day. This Court observes that the odometer reading of the said vehicle at that time was 1300km,[4] which is evidence that the vehicle had been used since delivery. As the inspection had not revealed any particular issue, the Petitioner had concluded that there was a problem with the heat sensor known as the "Sensor Assembly Coolant". The Petitioner had therefore replaced the defective part with a brand-new sensor, free of charge and returned the vehicle to the 3rd Respondent on 21st May 2012.

[3] Vide letter dated 24th February 2012, marked '1R1'.
[4] Vide Invoice dated 17th May 2012, marked '1R2'.

Even after the replacement of the sensor, the issue had persisted, with the vehicle indicating rising temperatures, resulting in the 3rd Respondent returning the vehicle to the Petitioner on 30th May 2012. The Petitioner states that upon inspection, it was discovered that the rising temperature was due to a malfunctioning of the gasket caused by the vehicle running without coolant due to the initial leakage. The damaged gasket was replaced by the Petitioner, free of charge, and the vehicle was returned to the 3rd Respondent on 11th June 2012.

At the time the vehicle was handed over, the Petitioner informed the 3rd Respondent as follows:

> "*We are pleased to inform that your vehicle is ready for collection after replacement of Head Gasket. We regret any inconvenience caused due to overheating problem experienced in your vehicle. Further,* ***we assure you that we will look after your vehicle as per the warranty conditions pertaining to KIA Sorento"***.[5] (emphasis added)

The Petitioner states that it carried out a scan of the vehicle on 9th July 2012, and that the scan did not reveal any other problem with the vehicle. The odometer reading at this point was 2009km.[6]

There is no dispute between the parties that there was an issue in the brand new vehicle which was sold to the 3rd Respondent and that the said vehicle developed problems immediately after it was delivered to the 3rd Respondent,

[5] Vide letter dated 11th June 2012 marked '1R3'.
[6] Vide Invoice dated 9th July 2012, marked '1R2'.

causing the 3rd Respondent to return the vehicle to the Petitioner for repairs, on three separate occasions. There is also no dispute between the parties that the Petitioner did in fact repair the said issue under and in terms of the warranty '**P7**' by replacing the sensor and the gasket, at no cost to the 3rd Respondent.

The Petitioner states that after the replacement of the gasket, the 3rd Respondent had no further complaints about the vehicle, and that the vehicle had been brought in for its regular service on 25th July 2012 and 14th September 2012[7]. The Petitioner's position therefore is that the 3rd Respondent continued to use the said vehicle without any issue. It is noted that apart from an averment in the Statement of Objections of the 3rd Respondent that the vehicle had several issues after it was handed over, the 3rd Respondent has not produced before 1st Respondent, the Consumer Affairs Authority (the CAA / Authority / 1st Respondent), any material to show that the vehicle continued to be defective or that he cannot use the vehicle.

Complaint by the 3rd Respondent to the Consumer Affairs Authority

On or about 8th June 2012, which is prior to taking delivery of the vehicle after the replacement of the gasket, the 3rd Respondent had filed a complaint with the CAA. A copy of the said complaint has not been produced before this Court. By letter dated 20th June 2012, annexed to the petition marked '**P11**', the Director (Compliance and Enforcement) of the CAA had informed the Petitioner as follows:

[7] The odometer reading stood at 4723 km vide 'P8'.

"**<u>දෝෂ සහිත වාහනයක් සම්බන්ධ පැමිණිල්ල</u>**

උක්ත කාරණය සම්බන්ධයෙන් බේරුවල, පල්ලිය පාර, නො 02, හි පදිංචි වෛද්‍ය ඩබ් ඩබ් ගුණරත්න මහතා විසින් 2012/06/08 **දිනැතිව අප අධිකාරිය වෙත යොමු කරන ලද පැමිණිල්ල හා බැඳේ.**

එකී පැමිණිල්ලට අනුව පැමිණිලිකරු විසින් ඔබ ආයතනයෙන් SORENTO (WP KS 3850) **වර්ගයේ මෝටර් රථයක් මිල දි ගෙන ඇත. එහි අවස්ථා කිපයකදි ඇතිවූ දෝෂ සහගත තත්වයක් හේතුවෙන් <u>එය ඔබ ආයතනය විසින් අලුත්වැඩියාකර දි ඇති බව පැමිණිල්ලේ සඳහන් වේ.</u> එහෙත් එම මෝටර් රථය නවතම මෝටර් රථයක් ලෙස ආනයනය කළද, එම රථය දෝෂ සහගත බැවින් ඒ සඳහා සාධාරණයක් ඉටු කර දෙන ලෙස මෙම අධිකාරියෙන් ඉල්ලා සිට.**"

By '**<u>P11</u>**', the Petitioner had been requested to call over at the CAA on 6th July 2012. A preliminary discussion had accordingly taken place at the CAA on that day between the Petitioner and the 3rd Respondent, where the CAA had attempted to resolve the said dispute. The discussion that took place had centred around the Petitioner providing an extended warranty on the said vehicle, which request, however had been rejected by the Petitioner, on the basis that the vehicle is being used by the 3rd Respondent without any issue.[8]

<u>Inquiry by the Consumer Affairs Authority</u>

The power of the CAA to conduct an inquiry into a complaint made to it relating to goods, the procedure that should be followed, the manner in which the decision should be taken, and the relief that could be granted by the CAA to a complainant is set out in Section 13 of the Consumer Affairs Authority Act No. 9 of 2003 (the Act / CAA Act).

[8] Vide Minutes of the meeting held on 6th July 2012, marked 'P12' and the letter dated 13th July 2012 sent by the Petitioner to the CAA, marked 'P13'.

In terms of Section 13(1) of the Act:

> "***The Authority may inquire into complaints*** *regarding—*
>
> *(a) the production, manufacture, supply, storage, transportation or sale of any goods and to the supply of any services which does not conform to the standards and specifications determined under section 12; and*
>
> *(b) the manufacture or sale of any goods which does not conform to the warranty or guarantee given by implication or otherwise, by the manufacturer or trader*."

Section 13(3) specifies that, "*At any inquiry held into a complaint under subsection (1), the Authority shall give the manufacturer or trader against whom such complaint is made* ***an opportunity of being heard*** *either in person or by an agent nominated in that behalf.*"

Section 13(4) of the Act reads as follows:

> "*Where after an inquiry into a complaint,* ***the Authority is of opinion*** *that a manufacture or sale of any goods or the provision of any services has been made which does not conform to the standards or specifications determined or deemed to be determined by the Authority, or that a manufacture or sale has been made of any goods not conforming to any warranty or guarantee given by implication or otherwise by the manufacturer or trader,* ***it*** *shall order the manufacturer or trader to pay compensation to the aggrieved party or to replace such goods or to refund*

the amount paid for such goods or the provision of such service, as the case may be."

Section 13 can thus be summarised as follows:

a) The CAA has the power to inquire into any complaint made to it, provided such complaint comes within the provisions of paragraphs (a) or (b) of Section 13(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 13(4) if the CAA is of the opinion that the manufacture or sale has been made of any goods not conforming to any warranty or guarantee given by implication or otherwise.

A panel consisting of *three members* of the CAA had thereafter conducted an inquiry into the said complaint of the 3rd Respondent on 9th October 2012, with the participation of the Petitioner and the 3rd Respondent. According to the proceedings of that date, marked '**1R4**', the representative of the Petitioner, while admitting that the radiator hose had not been tightened properly, had explained that it resulted in the discharge of coolant, which in turn resulted in the overheating of the engine and that the damage to the gasket was a consequence of the initial overheating. This Court has examined '**1R4**' and observes that the relief sought by the 3rd Respondent was the replacement of the vehicle with a new vehicle or that he be paid the market value of the vehicle.

The Inquiry had continued before the same panel of members of the CAA on 4th December 2012. According to the proceedings of that date, marked '**1R5**', the Petitioner and the 3rd Respondent had informed the Inquiry Panel that an amicable resolution of the dispute is not possible. '**1R5**' bears out the following observation made by the inquiry panel:

> "පරීක්ෂන මණ්ඩලය පවසන්නේ තමන් කිසිම ආකාරයකින් ව්‍යාපාරිකයන් ට අගතියක් නොකරන නමුදු, පාරිභෝගිකයන්ගේ අයිතිවාසිකම් රැකිමටද කැපවන බැවින් කරුනු සලකා බලා මේ පිලිබඳව අවසාන නියෝගයක් ලබා දෙන බවත්, එය ඉටු කිරීමට චිත්තිකරු බැඳි සිටින බවත්ය."

The above observation is an indication that as at the end of the inquiry on 4th December 2012, the inquiry panel had not arrived at a final decision.

Conveyance of the *decision* of the Consumer Affairs Authority to the Petitioner

The 2nd Respondent had thereafter sent under his signature the following letter dated 28th January 2013 annexed to the petition marked '**P17**' to the Petitioner and the 3rd Respondent:

> "**පාරිභෝගික කටයුතු පිළිබඳ අධිකාරිය පනතේ 13(1) වගන්තිය යටතේ කරනු ලබන පරීක්ෂණය - KIA මෝටර්ස් ආයතනයට එරෙහි පැමිණිල්ල**
> **පැමිණිලිකරු: වෛද්‍ය ඩබ්. ඩබ්. ගුණරත්න මහතා**
>
> ඉහත පැමිණිලිකරු 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.

එනම් ඔබ ආයතනය වෙතින් පැමිණිලිකරු මිල දී ගත් මෝටර් රථයට ඇතුළත් උපාංග සියල්ල අඩංගු එම වර්ගයේ ම (Brand) නවතම මෝටර් රථයක් පැමිණිලිකරු වෙත ලබා දිය යුතු බවට මෙයින් නියම කර සිටින අතර එකී නියමය නිකුත් කල දින සිට දින 30 ක් ඇතුළත අදාළ නවත ම මෝටර් රථය පැමිණිලිකරු වෙත ලබා දීමට කටයුතු කළ යුතු බවට මෙයින් වැඩි දුරටත් නියම කරනු ලැබේ."

The Petitioner states that although not referred to in '**P17**', attached to '**P17**' was the report of the inquiry panel dated 21st December 2012, which has been annexed to the petition marked '**P18**'.

Application to this Court and the relief sought

Dissatisfied by the decision in '**P17**' to replace the motor vehicle sold to the 3rd Respondent with a brand-new vehicle of the same model and containing all the features of the said vehicle, the Petitioner filed this application, seeking the following relief.

(a) A mandate in the nature of a Writ of Certiorari, to quash the order/decision/communication dated 28th January 2013, issued by the 2nd Respondent, the Chairman of the Consumer Affairs Authority, annexed to the petition marked '**P17**'.

(b) A mandate in the nature of a Writ of Certiorari, to quash the findings of the Panel of Inquiry, dated 21st December 2012, annexed to the petition marked '**P18**'.

The grounds of challenge of the Petitioner

The learned President's Counsel for the Petitioner is seeking a Writ of Certiorari to quash the said decision '**P17**' and the findings of the inquiry panel contained in '**P18**', on the following four principle grounds:

1. The decision conveyed by '**P17**' has not been taken by the CAA, and is therefore illegal.

2. An express warranty excludes the implied warranty provided by the CAA Act.

3. The decision that the vehicle is not reasonably fit is unreasonable.

4. The decision to replace the vehicle is unreasonable and/or disproportionate.

The first argument – is the decision conveyed by 'P17', illegal?

It is the contention of the learned President's Counsel for the Petitioner that the decision contained in '**P17**' has not been taken by the CAA and is therefore illegal.

The power to conduct an inquiry

Section 13(1) 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:

(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).

This Court wishes to make two observations at this stage. The first is that the Respondents have admitted in paragraph 21 of its Statement of Objections that no delegation of authority had taken place.[9] The second is that the option at (c) can be pursued only to **facilitate** the discharge of the functions of the CAA and not to discharge the functions of the CAA.

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 13(4), 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 13(4), will always rest with the CAA.

[9] In any event, none of the members of the inquiry panel were Public Officers, which is a pre-condition for the delegation of any function.

Quorum for any meeting of the CAA

This would perhaps be an appropriate stage to consider what or who is meant by the CAA. In terms of Section 2(1), the CAA shall consist of the persons who are for the time being members of the Authority under Section 3. Section 3(1) provides that the Authority shall consist of *a Chairman and not less than ten other members who shall be appointed by the Minister from among persons who possess recognized qualifications, have had wide experience and have distinguished themselves in the field of industry, law, economics, commerce, administration, accountancy, science or health*. Section 3(2) proceeds to state that *the Chairman and three of the members, selected by the Minister from among the members appointed under subsection (1), shall be full time members* of the CAA. Paragraph 8(2) of the Schedule to the Act provides that the **quorum for any meeting of the Authority shall be four members**.

The procedure followed by the Consumer Affairs Authority

This Court will now consider the procedure that was followed by the CAA with regard to the complaint made by the 3rd Respondent in order to ascertain which of the above avenues was pursued by the CAA in inquiring into the complaint of the 3rd Respondent. The objective of doing so is twofold. If the inquiry panel was in fact acting as the CAA, as the learned Senior Deputy Solicitor General sought to argue, then, its report '**P18**' dated 21st December 2012 would be the decision of the CAA, and '**P17**' would not be illegal, as '**P17**' serves merely as a conveyance of the decision of the CAA in '**P18**'. If however, the inquiry panel was not acting as the CAA, then this Court must consider if '**P18**' has been considered by the CAA, and if so, whether the decision

conveyed by the 2nd Respondent by '**P17**' is a decision taken by the CAA, in terms of the Act. In the event of this Court holding that '**P17**' is a decision taken by the CAA, the necessity would then arise for the CAA to give reasons as to why they are following the findings of the Inquiry Panel.

Is the decision of the Inquiry Panel, 'P18', a decision of the Consumer Affairs Authority?

As observed earlier, the preliminary discussion held on 6th July 2012 had been with officers attached to the Compliance and Enforcement Division of the CAA. Once the Petitioner informed its position by letter dated 13th July 2012 that an extended warranty cannot be provided, the CAA had proceeded to conduct a formal inquiry into the said complaint.

It was the submission of the learned Senior Deputy Solicitor General that the inquiry panel comprised of four members of the CAA, namely Mr. Milton Amerasinghe, Major General N. Jayasuriya, Mr. Sunil Jayaweera, and Mr. Varuna Alawwa, and that **the inquiry panel functioned as the CAA when it conducted the inquiry.** This position is supported by the first paragraph of '**P18**' where it is stated that the inquiry is being held in terms of Section 13(1), and the final paragraph of '**P18**' which states that a decision is being taken in terms of Section 13(4). The learned Senior Deputy Solicitor General submitted further that the decision of the Inquiry Panel marked '**P18**' has been *ratified* by the entire Authority, at a meeting held on 21st December 2012.[10]

[10] Vide document marked '1R12'.

However, according to the inquiry notes / proceedings marked '**1R4**' and '**1R5**', the inquiry had been conducted on both days by a panel comprising of three members, namely Mr. Milton Amerasinghe, Major General N. Jayasuriya, and Mr. Varuna Alawwa. '**1R4**' and '**1R5**' does not bear the name of Mr. Sunil Jayaweera. This Court observes that the proceedings '**1R4**' have been recorded by a Legal Officer of the CAA while the proceedings '**1R5**' have been recorded by a Deputy Director of the CAA. Therefore, if Mr. Sunil Jayaweera was present, his name would have been recorded in '**1R4**' and '**1R5**'. No explanation has been offered by the Respondents as to why the officer who recorded the minutes did not record the name of Mr. Jayaweera, if he was present during the inquiry.

As observed earlier, the quorum of the CAA is four members. By its own documents marked '**1R4**' and '**1R5**', the 1st Respondent has established that the quorum was not available, either on the first date of inquiry or on the second date of inquiry. Thus, when Mr. Milton Amerasinghe, Major General N. Jayasuriya, and Mr. Varuna Alawwa conducted the inquiry on 9th October 2012 and 4th December 2012, they could not have acted as the CAA. Any argument that they did so as the CAA is not supported by the material that has been placed before this Court.

This Court must note that no explanation has been offered to this Court by the 1st Respondent as to what authority Mr. Jayaweera had to sign '**P18**', as he was not a member of the inquiry panel that sat on 9th October 2012 and 4th December 2012.

It would, perhaps, be appropriate for this Court to refer at this stage to the judgment of this Court in **Diesel and Motor Engineering PLC vs. Consumer Affairs Authority and others**[11] where a similar situation had occurred. In that case too, the panel of inquiry had consisted of only three members. However when the settlement reached at the inquiry was later converted into an order in terms of Section 13(4) of the Act, four members had signed it. The explanation provided was that one of the members of the panel of inquiry had stepped out and was not present when the settlement was entered into.

This Court, in answering the question if the said order was valid, due to a lack of a quorum, held as follows:

> *"As I stated earlier "The quorum for any meeting of the Authority shall be four members", and signing the formal order after several months of the inquiry by four members will not validate an otherwise invalid meeting due to lack of quorum. In this case the inquiry was held on 09.07.2013 and the order was made on 29.05.2014. According to the inquiry notes, the inquiry has been held before three members, and the order has been signed by those three members of the inquiry panel and another member of the Authority. It is clear that there was no quorum to hold a proper inquiry in order to make a legally enforceable order based on the settlement arrived at in that inquiry."*

It is perhaps too much of a coincidence that the identical situation has arisen in two inquiries held within a space of one year. This Court is of the view that the CAA must take its statutory responsibilities seriously, and must act according

[11] CA (Writ) Application No. 43/2016; CA Minutes of 22nd November 2019.

to the applicable legal provisions, instead of resorting to practices that have a facade of compliance and legality but in fact is not so. The CAA must bear in mind that in terms of Section 13(6), failure to comply with an order made under Section 13(4) attracts criminal prosecution, and that therefore the CAA must ensure that the procedure laid down in the Act is followed scrupulously.

The above judgment is certainly not the first time that this Court has struck down decisions of the CAA taken without a proper quorum. **Shell Gas Lanka Limited vs. Consumer Affairs Authority and Others**[12] was a case where the petitioner made an application to the CAA in terms of section 18 of the CAA Act seeking an upward revision in the price of an LP Gas Cylinder, which application was refused by the CAA. The impugned decision had been taken by the Pricing Committee of the CAA, consisting of three members who were also members of the CAA. This Court expressed its reservation to the Pricing Committee taking the impugned decision and held 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*."

This Court went on to hold that in the absence of a quorum, the decision of the CAA was devoid of any legal effect, and therefore the said decision was quashed.

[12] [2007] 2 Sri LR 212; judgment of Sripavan, J (as he then was) with Sisira De Abrew, J agreeing.

In the above circumstances, and on the material presented to this Court, the only conclusion that this Court can arrive at is that the Inquiry Panel did not function as the CAA and that '**P18**' is not a decision of the CAA.

Did the Consumer Affairs Authority take the decision that was conveyed by 'P17'?

This Court shall now consider whether the decision conveyed by '**P17**' has been taken by the CAA in accordance with the obligation imposed on it by Section 13(4) of the Act.

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**[13], 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*."

As noted earlier, in terms of Section 8(n) of the Act, the CAA can appoint a committee to facilitate the discharge of its functions. The Respondents have not placed any material before this Court to establish:

(a) that the said inquiry panel was a committee appointed in terms of Section 8(n); or

[13] [1985] 1 AC 374.

(b) the nature of the mandate provided to the said Inquiry Panel by the CAA,

in view of its position that '**P18**' was in fact a decision of the CAA.

This Court, being conscious of the fact that a decision maker can act on a report submitted by a subordinate officer or a group of officers acting as a committee, and in order to give meaning to the procedure adopted by the CAA, would proceed on the basis that '**P18**' is a report prepared by a Committee that was appointed by the CAA in terms of Section 8(n) to facilitate the discharge of the functions of the CAA, and consider if the decision that was conveyed to the Petitioner by '**P17**' has been arrived at by the CAA after a consideration of '**P18**'.

As already noted, the Inquiry was concluded on 4th December 2012, with the inquiry panel announcing that they would consider the facts and make a final order (**කරුණු සලකා බලා මේ පිලිබඳව අවසාන නියෝගයන් ලබා දෙන බව**). The next step that was taken, according to the 1st Respondent, was the preparation of a Board Paper which the 1st Respondent has produced with its Statement of Objections, marked '**1R11**' titled '*Summary of Orders issued by the Consumer Affairs Authority*'.

This Court has examined '**1R11**', which is dated **14th December 2012** and observes the following:

(a) The right corner column of '**1R11**' contains a 'summary of the order' made in 11 inquiries conducted by the '*CAA*';

(b) The decision pertaining to the 3rd Respondent's complaint is recorded as follows: "*The inquiry panel made an order against the respondent company to replace the defective car with a brand new motor car of same make and model with similar options*";

(c) As at 14th December 2012, the report of the Inquiry Panel dated 21st December 2012 was not available, and hence '**P18**' did not form part of the Board paper;

(d) '**1R11**' has been prepared and submitted by the Director (Compliance and Enforcement);

(e) '**1R11**' has been recommended by the Director General; and

(f) The submission of '**1R11**' has been approved by the 2nd Respondent, the Chairman of the CAA.

There are two other salient features in '**1R11**' which this Court wishes to advert to.

The first is that the purpose of '**1R11**' is to seek approval of the CAA for the Orders referred to therein. Therefore, although it is titled '*Summary of Orders issued by the Consumer Affairs Authority*', the orders referred to in '**1R11**' cannot be orders made by the CAA, if further approval of the CAA is required. The question of submitting an order of the CAA, to the CAA, does not make legal sense.

The second and most important feature of '**1R11**' is that it is dated **14th December 2012**, which is one week prior to the reasons of the inquiry panel

'**P18**' being issued.[14] The learned President's Counsel for the Petitioner quite correctly pointed out this contradiction, thus raising a very serious doubt as to how the Board paper '**1R11**' was prepared without the Director (Compliance and Enforcement) knowing the outcome of the inquiry, and in the absence of '**P18**'.

In order to clarify this position, the learned Senior Deputy Solicitor General appearing for the 1st Respondent, by way of a motion dated 27th September 2018 filed a document dated 4th December 2012, titled '**පරීක්ෂණ මණ්ඩලයේ තීරණය**', which reads as follows:

> "**පැමිණිලිකරු ඉල්ලා සිටින්නේ ඔහු මිලදි ගත් වාහනය හා සමාන වර්ගයේ නවතම වාහනයක් වන බැවින් නව වාහනයක් ලබා දීම සඳහා නියමයක් ලබාදීමට තීරණය කරන ලදි.**"

This Court has several concerns with this document. The first is that no explanation has been given in the motion as to how this document came to be prepared or the purposes for which this document was utilised. The second is that this document was not tendered to this Court with an affidavit, and does not form part of the pleadings. The third is that no material has been placed to demonstrate that this document was utilised in the preparation of '**1R11**'. The fourth is that this document has been signed by the four persons who have signed '**P18**', although the proceedings of that date, '**1R5**' do not contain all four names. No explanation has been given for this ghost appearance by Mr. Sunil Jayaweera for the sole purpose of signing this document, in respect of an inquiry in which he did not participate.

[14] 'P18' is dated 21st December 2012.

Be that as it may, in paragraph 16 of its Statement of Objections, the 1st Respondent, having referred to '**P18**' as an 'Order' of the inquiry panel, states that '**P18**' was *ratified by the Full Board at a meeting held on 22nd December 2012*. Even though in paragraph 18 of the Statement of Objections, it has been stated that '**P18**' *was ratified at a meeting held on 21st December 2012*, this Court shall disregard the said discrepancy, in view of '**1R12**'[15] which gives the date of the meeting as *21st December 2012*.

It is in the above background that this Court must consider whether '**P18**' was placed before the CAA at its meeting held on 21st December 2012. When this Court considers that:

(a) '**P18**' had been issued on the same date as that of the meeting of the CAA;

(b) the 1st Respondent has not produced any proof to demonstrate that '**P18**' was placed before the CAA, at the said meeting;

(c) the fact that '**1R12**' does not have any reference to '**P18**'; and

(d) the 1st Respondent has not produced any material to demonstrate that the members of the CAA deliberated on the factual matters relating to the complaint of the 3rd Respondent in the context of the provisions of the CAA Act,

the only conclusion that this Court can arrive at is as follows:

(a) The report of the inquiry panel '**P18**' was not placed before the CAA.

[15] '1R12' is an internal memorandum stating that '1R11' was considered on 21st December 2012, and that the 'Board approved the Paper'

(b) The CAA did not deliberate whether there has been a breach of a warranty by the Petitioner, implied or otherwise.

(c) The CAA did not deliberate as to what relief should be afforded to the 3rd Respondent.

(d) The CAA has been completely oblivious to the fact that the law requires the CAA, and no other, to decide on the matters set out in Section 13(4).

(e) The CAA has failed to decide whether there has been a breach of warranty, implied or otherwise.

(f) Even if it was within the power of the CAA to ratify the decision of the panel, it did so in complete ignorance of the reasons that led the inquiry panel to conclude that the vehicle must be replaced by the Petitioner.

It was open to the 1st Respondent to take up the position that the three members of the CAA who sat on the Inquiry Panel apprised the other members of the CAA that sat at the meeting held on 21st December 2012, of the facts and the reasons for their decision, and that the CAA therefore took an informed decision. While such a fact is not reflected in the Board decision '**1R12**', the fact that such an explanation has not been offered gives credence to the view taken by this Court that the members of the CAA that met on 21st December 2012 were completely ignorant of the facts and circumstances relating to the issue.

In **Administrative Law** by Wade and Forsyth,[16] 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*[17] *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*."[18]

The legal position in this regard has been clearly laid down in **R (National Association of Health Stores) v. Department of Health**[19] 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 worse, not*

[16] H.W.R. Wade, C.F, Forsyth, *Administrative Law* [11th Edition, 2014] Oxford University Press; page 269.
[17] Ellis v. Dubowski; [1921] 3 KB 621.
[18] R v. Police Complaints Board ex p Madden; [1983] 1 WLR 447.
[19] [2005] EWCA Civ. 154; per Sedley J.

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[20] *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*."

Conclusion

In the above circumstances:

(a) This Court is of the view that the CAA has not formed an opinion as required by Section 13(4) of the CAA Act that the relief afforded by '**P17**' should be given.

(b) This Court is of the view that the CAA has merely rubber stamped the decision of an inquiry panel or a committee, without even having seen the colour of that report, which is an abdication of the statutory power conferred on the CAA.

(c) This Court is in agreement with the first ground of challenge placed before this Court by the learned President's Counsel for the Petitioner that '**P17**' is not a decision taken by the CAA, and that the said decision is illegal.

[20] 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."

(d) This Court is therefore of the view that '**P17**' is liable to be quashed by a Writ of Certiorari.

The next course of action

In view of the above finding, this Court has two options. The first option available to this Court is to consider the other grounds of challenge placed before this Court by the learned President's Counsel for the Petitioner with regard to Sections 13 and 32, and to lay down, the opinion of this Court on the questions of law arising from the said grounds. The second option is to direct the CAA to consider the report of the inquiry panel '**P18**', and arrive at a decision in terms of Section 13(4) of the CAA Act, as the Petitioner has no complaints with regard to the procedure followed by the inquiry panel or the hearing afforded to it.

However, if this Court follows the second option, and the CAA arrives at the same decision but in terms of the law, this Court may be faced with a similar application, urging the same questions of law that have been raised in this application relating to the said sections. Such a course of action would be to the disadvantage of the Petitioner as well as the 3rd Respondent, as a fresh application would necessarily entail substantial legal costs, and delay.

Hence, this Court is of the view that it should adopt the first option and proceed to consider the other three arguments of the learned President's Counsel for the Petitioner.

The second argument - does an express warranty exclude the implied warranty given by the Act?

This Court shall now consider the second argument of the learned President's Counsel for the Petitioner which is that when a manufacturer or trader has extended a written or express warranty, as in this case, a consumer cannot have the benefit of the implied warranty provided by the CAA Act in respect of those goods. What this Court must consider is whether the implied warranty provided in Section 32 is independent of the written warranty that a consumer would be offered by a manufacturer or trader, so that, where there is a written warranty, the consumer would not be entitled to the implied warranty. In other words, the question is whether the consumer would be disentitled to the protection afforded by way of an implied warranty under Section 32(1)(d) where there is an express warranty given by the trader.

The protection of consumers is paramount

In considering this argument, this Court shall be mindful of the fact that the CAA Act was introduced *inter alia* for the protection of consumers. There is specific recognition of this fact in the preamble, which provides that "*it is the policy of the Government of Sri Lanka to provide for the better protection of consumers through the regulation of trade*". The fact that the protection of consumers is one of the primary objectives of the CAA is confirmed when one considers the provisions of Section 7, which reads as follows:

"*The objects of the Authority shall be—*

(a) to protect consumers against the marketing of goods or the provision of services which are hazardous to life and property of consumers;

(b) to protect consumers against unfair trade practices and guarantee that consumers interest shall be given due consideration;

(c) to ensure that wherever possible consumers have adequate access to goods and services at competitive prices; and

(d) to seek redress against unfair trade practices, restrictive trade practices or any other forms of exploitation of consumers by traders."

It is pertinent to cite at this stage, the judgment of Justice Vijith Malalgoda,P.C., P/CA (as he then was) in **Micro Cars Ltd vs. Consumer Affairs Authority and Others**[21], where this Court held as follows:

"*When considering the provisions of the Consumer Affairs Authority Act along with its long title this Court is of the view that the said Act has been primarily promulgated for the purpose of the effective competition and* ***protection of the consumers****. Therefore,* ***it is of paramount importance to view the provisions of the Consumer Affairs Authority Act in the perspective of not only of the effective competition but necessarily focusing on the interest of the protection of the innocent consumers****. Under these circumstances it is the duty of this court when interpreting the provisions of the Consumer Affairs Authority Act, to be mindful of the object of the above Act*."

[21] CA (Writ) Application No. 189/2014; CA Minutes of 1st July 2016.

This Court also referred to the judgment in **Wickremaratne v. Samarawickrema and others**,[22] which held that:

> "*The basic rule of interpretation is that the legislative objective should be advanced and that the provisions be interpreted in keeping with the purpose of the legislature. The interpretation submitted by learned counsel for the Appellant has the effect of defeating the objective of the legislature and of detracting from its purpose*."

In **Shell Gas Lanka Limited vs Consumer Affairs Authority**[23] this Court observed as follows:

> "*The objectives of the Consumer Affairs Authority Act No. 9 of 2003 as shown in its long title is the promotion of effective competition and the protection of the consumers. Thus, the Court is bound to consider the general legislative policy underlying the provisions contained (in) the Act. While the Act protects traders and manufacturers against unfair trade practices, the consumer interest shall also be given due consideration as provided in section 7 of the said Act*."

This Court however wishes to add a word of caution. That is, even though protection of consumers is one of the primary objectives of the CAA Act, the CAA must at all times strike a fair balance between the rights of the consumer and the trader.

[22] [1995] 2 Sri LR 212 at page 220; Judgment by S.N. Silva, J (as he then was).
[23] Supra.

The applicable provisions of the CAA Act

In order to place in perspective this argument of the Petitioner, it would be necessary for this Court to lay down at the outset the relevant provisions of the CAA Act.

This Court has already noted that in terms of Section 13(1)(b) of the CAA Act, *the Authority may inquire into complaints regarding the manufacture or sale of any goods which do not conform to the warranty or guarantee given by implication* ***or otherwise****, by the manufacturer or trader*.

Section 13(4) provides that where after an inquiry into a complaint, "*the Authority is of opinion that …. a manufacture or sale has been made of any goods not conforming to any warranty or guarantee given by implication* ***or otherwise*** *by the manufacturer or trader, it shall order the manufacturer or trader to pay compensation to the aggrieved party or to replace such goods or to refund the amount paid for such goods or the provision of such service, as the case may be*."

On a plain reading of Sections 13(1)(b) and 13(4), it is clear that the CAA Act recognises two types of warranties. The first is an implied warranty, which, when read together with the provisions of Section 32(1)(d) of the CAA Act, (which is the paragraph in Section 32(1) that is applicable to the facts of this application), means that goods supplied will be reasonably fit for the purpose for which they are supplied. The second type of warranty is the warranty which is '***otherwise***' given by the manufacturer or trader. There is no dispute between the parties that the reference to 'otherwise' is a reference to a

written or express warranty that is given by the manufacturer or trader at the point of sale and/or supply of the good.

The argument of the learned President's Counsel for the Petitioner is premised on the use of the word '**or**' between the words, "warranty given by implication" and "otherwise" in Sections 13(1)(b) and 13(4). When this Court considers these two Sections, it is clear that the Legislature has recognised the fact that there can be goods or services in respect of which a warranty may be extended by the manufacturer or trader, and that there can also be goods where no such warranty has been extended. The drafters have given foremost recognition to the implied warranty that the Legislature is extending to all consumers in terms of Section 32(1)(d), irrespective of whether there is a written express warranty. The Legislature has been mindful that the implied warranty should not deprive a consumer of a written warranty that he or she may have got from the manufacturer or trader and has recognised such written warranty, by the use of the word, *otherwise*. It is the view of this Court that the use of the word '*or*' does not mean '*either*' and that every good shall carry with it an implied warranty, and where a written warranty has been offered, such written warranty as well. This position is confirmed by the fact that Section 32(1) applies in respect of "**every contract** for the supply of goods or for the provision of services", thus leaving no ambiguity in this regard.

The argument of the learned President's Counsel for the Petitioner that where there is an express warranty, there cannot be an implied warranty can lead to a situation where an unscrupulous manufacturer or trader extends a restrictive written warranty and where there is a defect in a good, claim that it is not liable to the consumer to rectify such defect beyond what has been extended

by the written warranty. Such an argument, if accepted, would be contrary to the stated objectives of the CAA Act.

In light of the above, it would be wrong to hold that manufacturers or traders can contract themselves out of liability arising from supplying defective products by offering a limited warranty or by the inclusion of clauses to limit liability. Such express warranties cannot give immunity to a manufacturer or trader, contrary to the legal protection provided by the Legislature to protect consumers. The CAA has a statutory duty to protect the consumer rights of the citizens of Sri Lanka by ensuring that every vendor provides to every purchaser a product of good quality. Thus, this Court is of the view that an implied warranty, that goods supplied will be reasonably fit for the purpose for which they are supplied, is the primary layer of protection provided by the legislature for the benefit of the consumer, in line with the preamble[24] of the Act and the objects of the Authority, and such an implied warranty shall always be available to a consumer, irrespective of a written warranty that may be given. Hence, this Court cannot agree with the submission of the Petitioner that where there is an express warranty, a consumer cannot have recourse to an implied warranty provided by Sections 13(1), 13(4) and 32(1)(d) of the CAA Act.

[24] Preamble of the Act reads as follows: WHEREAS it is the policy of the Government of Sri Lanka to provide for the better protection of consumers through the regulation of trade and the prices of goods and services and to protect traders and manufacturers against unfair trade practices and restrictive trade practices: AND WHEREAS the Government of Sri Lanka is also desirous of promoting competitive pricing wherever possible and ensure healthy competition among traders and manufacturers of goods and services.

Would the position be different where the Petitioner has complied with the written warranty?

There is one other matter that this Court would like to consider, prior to concluding its discussion on the second argument. That is the submission of the learned President's Counsel for the Petitioner that the Petitioner has complied with the express warranty offered by it.

The fact that the Petitioner extended a written warranty to the 3rd Respondent is undisputed. This Court has examined the said warranty annexed to the petition marked '**P7**' and observes the following:

a) KIA has warranted that the vehicle is new and that the vehicle is free from defects in material or workmanship, subject to the terms and conditions specified in '**P7**'.

b) The above warranty which extends to all components of the vehicle is valid for a period of 36 months or 100,000km, whichever occurs first, commencing from the date of first service.

c) The liability of KIA under the warranty is limited solely to the repair or replacement of original parts defective in materials or workmanship, by an authorised KIA dealer at its place of business.

d) The warranty does not include any expense for or related to transportation to such a dealer or payment for loss of use of the KIA Vehicle during warranty repairs.

Thus, KIA has warranted two important matters.

The first is that the vehicle supplied to the 3rd Respondent is a new vehicle. Brand new means that the vehicle has not been driven on the road except *en route* delivery and has not been registered by a licensing authority. There is no dispute in this case that the vehicle had a *zero* mileage, had not been used by a third party and has not been registered, except in Sri Lanka. Therefore, there is no breach of the first aspect of the warranty.

The second is that the vehicle shall be free from defects in materials or workmanship. The latter warranty however is limited to a KIA dealer making the necessary repairs or replacing the defective part, or both.

What is therefore significant is that the warranty in '**P7**' recognises that even though the vehicle is brand new, it can develop problems or defects, and therefore warrants that if problems or defects do occur, such problems or defects will be identified and that such problems or defects will be repaired or replaced. It is therefore clear that although the above warranty '**P7**' holds out that the vehicle shall be free from defects in material or workmanship, it is subject to an important limitation. That is, in the event any defect occurs in the vehicle during the warranty period, such defect would be repaired by the manufacturer's agent – in this case, by the Petitioner – free of charge, by replacing the defective part, or carrying out the necessary repair. This would be the remedy available under '**P7**' to a person who purchases a brand new vehicle, unless of course the defect in the vehicle is not capable of being diagnosed or is not capable of being repaired, or the issues are multiple and affects the safety, reliability and roadworthiness of the vehicle.

This Court has already outlined what occurred with the vehicle of the 3rd Respondent. The issue, as this Court sees it, was that the radiator hose had not been fitted properly or it had become loose. A consequence of this issue was the discharge of the coolant. Any person acquainted with motor vehicles, and certainly a vehicle agent such as the Petitioner would know that one of the possible consequences of an engine overheating as a result of the vehicle being used without coolant, is the possibility of damage to the gasket. At least when the vehicle was brought in for repairs for the second time, the Petitioner ought to have checked the root cause for the rise in temperature and whether such rise in temperature could have a nexus to the initial problem of the vehicle being used without coolant.

Be that as it may, what is important to consider is the fact that on each occasion, the Petitioner did repair the issue that had arisen and thereby honoured the written warranty '**P7**'. It is the position of the Petitioner that after the gasket was replaced, the overheating issue had been resolved, and the vehicle had been used by the 3rd Respondent. While it is possible that the 3rd Respondent may have been inconvenienced as a result of the said issue, and that a vehicle with rising temperatures is not what the 3rd Respondent expected when he took delivery of a new vehicle on 15th February 2012, this Court takes the view that the Petitioner has honoured the warranty that was extended by '**P7**', and that the Petitioner is not in breach of its obligations in terms of '**P7**', as it has duly rectified the issue that arose during the period of the warranty, free of charge. It is the view of this Court that this fact is crucial in the determination of the relief that the CAA is empowered to provide in terms of Section 13(4).

Conclusion

In the above circumstances, this Court is of the view that the 3rd Respondent is entitled to the implied warranty that has been conferred on a consumer by the CAA Act, in spite of being a beneficiary of the written warranty '**P7**' and in spite of the Petitioner having honoured the written warranty '**P7**' by successfully repairing the issue.

The third argument - is the decision that the vehicle is not reasonably fit, unreasonable?

The next question that must be considered by this Court is whether (a) the decision of the inquiry panel '**P18**' contains sufficient and relevant material to conclude that the vehicle sold to the 3rd Respondent was in violation of the implied warranty under Section 32(1)(d) and if so, (b) whether the decision of the inquiry panel that the Petitioner has breached that implied warranty is reasonable.

Implied warranty in terms of Section 32(1) of the CAA Act

The starting point in considering whether the Petitioner has breached the implied warranty in Section 32(1) is to set out what constitutes a warranty or guarantee given by implication in respect of goods. Section 32(1) of the Act, which deals with implied warranties in relation to the supply of goods and services, reads 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*

provisions 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*****."**

If the provisions of Section 32(1)(d) are interpolated into Section 13(4), it would read as follows - Where after an inquiry into a complaint, the Authority is of opinion that a sale has been made of any goods which are not reasonably fit for the purpose for which they are supplied, the CAA has the power to order the manufacturer or trader (a) to pay compensation to the aggrieved party, or (b) to replace such goods, or (c) to refund the amount paid for such goods or the provision of such service, as the case may be.

<u>The two-tiered approach</u>

It is the view of this Court that in order to provide the above relief, Section 13(4) of the CAA Act requires the 1st Respondent to adopt a **two-tiered approach**.

Firstly, the Authority has to form an opinion after an inquiry that '*a manufacture or sale has been made of any goods not conforming to any warranty or guarantee given by implication or otherwise by the manufacturer or trader'*. In this application, this provision, when read together with Section 32(1)(d), means that the CAA must form the opinion that the goods are not reasonably fit for the purpose for which they are supplied.

Secondly, if and when such an opinion is formed, the CAA has the power to order the manufacturer or trader to pay compensation, replace the goods or refund the amount paid.

While each of these two issues will be discussed later, this Court must state at this point that at each of the above two tiers, the CAA must act reasonably and rationally, with due appreciation of the duties and responsibilities conferred on it by the CAA Act. Thus, while the decision reached at each of the above stages must not be illegal or *ultra vires*, and should be arrived at after adhering to the applicable procedure, the decisions must not be unreasonable in a *Wednesbury* sense.

<u>What is meant by reasonably fit?</u>

The first tier of Section 13(4) requires the Authority to consider whether there has in fact been a breach of the implied warranty afforded to the 3rd Respondent as per Section 32(1)(d).

The wording of Section 32(1)(d) illustrates the fact that the Legislature was conscious of the need to provide for defects that might arise in any product that is sold to a consumer, new or otherwise. If the wording in the CAA Act was

for the goods that are sold to be 'free from any defects' or to be in 'perfect condition', an aggrieved consumer may even succeed in a claim where there is a very minute and even negligible cosmetic defect on a product sold to them. Instead, the standard expected is 'reasonable fitness for the purpose for which it is supplied'.

This Court shall now consider what is captured by "goods supplied will be **reasonably fit for the purpose for which they are supplied**". The learned President's Counsel for the Petitioner has quite correctly submitted that there is no definition of the term 'reasonably fit' in the Act, and that leaving it open can lead to different members of the CAA taking different views on what is 'reasonably fit'. This Court is in agreement with this submission. However, this Court takes the view that it is almost impossible to set out an exhaustive list of guidelines to be used by the CAA that can be taken into account across the board in deciphering what constitutes *reasonably fit for the purpose for which a good is supplied*. The phrase '*reasonably fit*' is not meant to be read in isolation but as the section itself makes it clear, must be decided according to '*the purpose for which it is supplied*'. As such, it is the view of this Court that each case must be considered on its unique facts and circumstances because the concept of 'reasonable fitness' will differ with varying circumstances.

Of course, as noted earlier, any conclusion that the CAA may reach in this regard must be rational and must reach the threshold of reasonableness that now stands alone as a ground for judicial review. Whether a decision is reasonable is a matter that this Court, in the exercise of its Writ jurisdiction can consider, apart from examining the *vires* of the decision and whether due process has been followed. This is the safeguard that is available to a

manufacturer or trader against an *unreasonable, arbitrary or irrational* decision of the CAA.

What is a reasonably fit motor vehicle?

In the context of motor vehicles, general roadworthiness at the point of sale would be the standard of reasonable fitness, unless the motor vehicle is intended for a particular purpose which is duly communicated to the seller, in which case the threshold may need to match the criteria duly communicated to the seller. Thus, this Court takes the view that any defect that may affect the basic and core function of the vehicle, and thereby affect the purpose for which the vehicle was supplied – i.e. as the Petitioner puts it, *to serve as a motorable mode of conveyance*[25] - could render the vehicle not 'reasonably fit' for the purpose for which it is supplied.

The standard of 'reasonable fitness' for a particular class of good, in this case motor vehicles, too can vary. For instance, the legislature could not possibly have intended the same standard of 'reasonable fitness' to be applied to brand new vehicles as well as to second hand vehicles. This distinction has been referred to by Lord Denning M.R. in **Bartlett v. Sidney Marcus Ltd**[26] where he held that:

> "*A buyer should realise that when he buys a secondhand car defects may appear sooner than later; and, in the absence of an express warranty, he has no redress.*[27] *Even when he buys from a dealer the most he can require*

[25] Paragraph 57(a) of the written submissions of the Petitioner.
[26] [1965] 1 WLR 1013 at page 1017.
[27] The situation in Sri Lanka would be different in view of the provisions of Sections 13(4) and 32(1)(d).

is that it should be reasonably fit for that purpose of being driven along the road."

The above passage recognises the fact that brand new vehicles too can develop defects, but later as opposed to sooner when compared with used vehicles, and explains why the warranty on a brand new vehicle is limited by time and mileage, whichever comes first.

Lord Denning M.R. thereafter went on to state that:

"*This car came up to that requirement. The plaintiff drove the car away himself. It seemed to be running smoothly. He drove it for four weeks before he put it into the garage to have the clutch repaired. Then more work was necessary than he anticipated. But that does not mean that,* ***at the time of sale****, it was not fit for use as a car. I do not think that, on the judge's findings, there was any evidence of a breach of the implied conditions*." (emphasis added)[28]

Reasonable fitness for a reasonable period

This Court recognises that in determining reasonable fitness for which a good is supplied, due weight must be given to the condition of the good **at the point of sale**. In the case of **Crowther v. Shannon Motor Co**,[29] Denning M.R. once again placed due emphasis on the '**time of sale'** when he stated as follows:

"*Some criticism was made of a phrase used by the judge. He said "what does 'fit for purpose' mean?" He answered: "To go as a car for a*

[28] Supra; page 1017.
[29] [1975] 1 WLR 30 at page 33.

reasonable time." I am not quite sure that that is entirely accurate. ***The relevant time is the time of sale****. But there is no doubt what the judge meant. If the car does not go for a reasonable time but the engine breaks up within a short time, that is evidence which goes to show it was not reasonably fit for the purpose at the time it was sold. On the evidence in this case, the engine was liable to go at any time. It was "nearing the point of failure," said the expert Mr. Wise. The time interval was merely "staving off the inevitable." That shows that at the time of the sale it was not reasonably fit for the purpose of being driven on the road.*"

The relevant time being the time of sale does not however mean that a seller can exclude itself from any liability arising out of a defect that the vehicle may face within a reasonable time period, and accordingly, *such time period* in which the issue arose has to be given due consideration in determining 'reasonable fitness'.

In **Lexmead (Basingstoke) Ltd. v Lewis and Others**[30] it was held that:

"*The implied warranty of fitness for a particular purpose relates to the goods at the time of delivery under the contract of sale in the state in which they were delivered. I do not doubt that* ***it is a continuing warranty that the goods will continue to be fit for that purpose for a reasonable time after delivery****, so long as they remain in the same apparent state as that in which they were delivered, apart from normal wear and tear*."

[30] [1982] AC 225 at page 276; Lord Diplock.

Rescission of a contract and damages

It is common knowledge that a vehicle consists of several components. A failure in the radio system of a vehicle does not render the vehicle not usable nor does the failure of the central locking system make the vehicle not usable. A failure in the engine or the transmission however would render the vehicle not roadworthy. Thus, a minor issue which could be remedied will not entitle the buyer to rescind the contract while a major issue which affects the roadworthiness of the vehicle and which cannot be repaired will allow the buyer to rescind. This reflects the principles of the law of Contract, as set out in **The Law of Contracts** by **Weeramantry** where he has stated as follows:[31]

> *"According to the trend of modern decisions the test to be applied in deciding the rights of parties where there is a failure to perform obligations undertaken by contract is whether the particular stipulation goes "to the root of the contract, to the foundation of the whole." If a failure to perform would render the performance of the rest of the contract by the party in default a thing differing in substance from what the other party has stipulated for, the other party would be discharged but not where it merely partially affects the contract and may be compensated for in damages.*[32]
>
> *Contracts for the sale of goods afford convenient illustrations of performance in part, and in this connection reference must be made to section 31(2) of the Sale of Goods Ordinance which provides that "it is a question in each case depending on the terms of the contract and the*

[31] Page 882.
[32] Kandiah v. Kandasamy [1958] 61 NLR 434 at 436.

circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach…"

The circumstances of each case must determine whether the breach is so fundamental as to go to the root of the contract. Two particular aspects that are of much assistance in deciding such matters are, "first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly, the degree of probability or improbability that such a breach will be repeated."

Thus, while a breach so fundamental that it goes to the root of the contract may entitle the innocent party to rescind the contract, such party would only be entitled for damages for any other breach. This Court takes the view that the equivalent of the right to a replacement or refund under the CAA Act is the right to rescind under the general law, while the equivalent of damages is compensation under the CAA Act.

It would perhaps be appropriate to consider at this juncture several judicial decisions where courts have rescinded the contract and ordered the vehicle to be returned on the basis that the said vehicle was not 'reasonably fit', as opposed to granting damages or compensation.

In the unreported case of **Spencer v. Claude Rye (Vehicles) Ltd** [33] the plaintiff who was a Barrister had purchased a new Triumph '*Vitesse*' from the Defendant company. The vehicle had problems from the start and the plaintiff brought an action for rescission and damages almost 18 months after

[33]The Guardian, 19th December 1972, as cited in, M Whincup, 'Reasonable Fitness of Cars', The Modern Law Review, Volume 38 (1975) page 660 at page 661.

purchase. The day after delivery the throttle cable broke and the car had to be towed back to the garage. It was returned to the defendant with assorted defects twelve times over a period of several months. The Trial Judge had observed that "*the serious matter was its tendency to overheat. All the other complaints may well have been very irritating, but all were eventually cured and did not amount to sufficient reason for him to reject the car*." The problem of the boiling radiator however was not repaired, so much so that one witness had said that the only way to solve the mystery of the boiling radiator was to saw the cylinder block in half. Croom-Johnson J, held that "*If the car was in that condition it was clearly not fit for its purpose. If it had been offered for sale with a label indicating it was liable to boil every hundred miles or so for a reason that nobody could discover I could not see anyone buying it- except perhaps in the interests of motor research or for scrap value*.""

However, in spite of the said observation, the trial Judge had only awarded damages. The threshold adopted for reasonable fitness in **Spencer** and its failure to consider that *very irritating* complaints might well cause a vehicle to not be reasonably fit, has been subject to some criticism.[34] This Court is of the view that while factors such as the inability to detect and hence, repair the problem may be useful in justifying the relief that is given to a complainant, in determining reasonable fitness, *irritants* which would disrupt the core function

[34] M Whincup, 'Reasonable Fitness of Cars' (Supra) at page 661: "*A car whose engine seizes up every 100 miles is obviously useless. In themselves, therefore, the judgment and the ratio are unexceptionable. What is put forward here as the most significant aspect of the case, however, is the principle stated in the italicised passage above on the general standard of fitness of new cars. On the face of it a car must be accepted as "reasonably fit" if it goes "satisfactorily," as distinct from "perfectly". Mechanical deficiencies of some sort are inevitable. But when a new vehicle immediately develops a number of "very irritating" defects such as a broken throttle cable, necessitating its return to the garage on 12 occasions with all the consequential loss and inconvenience, it might seem thereby to be so unsatisfactory as to be intolerable. Mr. Justice Croom-Johnson's dictum suggests clearly that he rejects this view and to that extent his judgment seems actually against the interests of consumers at large. If his remarks state the law correctly, then with respect it must be said that the law accepts depressingly and unnecessarily low standards of workmanship and performance*."

of the vehicle would be adequate to fail the test of reasonable fitness.

This Court will now consider the judgment in **Farnworth Finance Facilities Limited v. Attryde and another**[35] which involved the sale of a new Royal Enfield motor cycle. The motor cycle had to be returned twice to the suppliers and once to the manufacturers for a wide range of complaints to be remedied. After four months the purchaser rejected it. Lord Denning M.R. said that the condition of reasonable fitness meant that the machine should be "roadworthy" and added "*the machine in this case was expressly described as "new", which adds emphasis to the implied terms. A new motor cycle should at any rate be a workmanlike motor cycle which is safe to be used on the roads*.''[36]

Lord Denning M.R. went onto state as follows:

> "*There were clearly breaches of those implied terms. But were the breaches fundamental? Were they such as to preclude the finance company from relying on the printed conditions which purported to exclude their liability?*
>
> *Any defect is serious if it is likely to cause an accident or to render the vehicle unsafe on the road. It may be easily remediable, yet until it is remedied it is a serious defect. There were defects here which very nearly caused accidents... a pannier fell off and caused the machine to slide about the road. A headlight failed at night and at speed because the dip switch was corroded. After the return from the makers the machine was still unstable at high speeds. ..The headlights failed twice more at night*

[35] [1970] 1 WLR 1053.
[36] Ibid. at page 1058.

and at speed owing to the terminals coming off the wires. The lubricating system was still at fault. Finally the rear chain broke. It was only by good fortune that there was not a serious accident. All these add up to a "congeries of defects"…. In those circumstances, I think the breaches were fundamental..."[37]

Atkinson L.J. agreed, saying that this was "*undoubtedly a thoroughly unsatisfactory machine. . . [It] really was not a workable machine upon the road*."[38]

In the case of **Lightburn v. Belmont Sales Ltd**[39] the plaintiff bought a new Ford Cortina which, as Ruttan J. put it, he found he could not rely on "*from one hour to the next*." In the eight months following the sale of the car, it had to be towed back to the seller's garage twice and returned a total of 17 times, due to continuous trouble with the electrical system. It never started easily, and the battery frequently went flat. The battery had to be recharged three times in one week and on one occasion the engine "died" while the car was moving. There were other miscellaneous troubles such as a cracked oil pump and oil leaks, which were rectified. The judge ordered rescission of the contract after holding as follows "*I conclude that the defendant was in breach of a fundamental term of the contract to purchase a motor car of workable character capable of giving a sustained reliable performance throughout the year. . . It can hardly be said [the plaintiff] had reasonable use of the motor vehicle, for its continued operation was uncertain and a steady cause of worry.*"

[37] Ibid; at page 1059.
[38] Ibid; at page 1060.
[39] (1969) 6 D.L.R (3d) 692; decision of the Supreme Court of British Columbia – referred to in M Whincup, 'Reasonable Fitness of Cars'; Supra, at page 664.

It would therefore be seen that in **Lightburn**, the plaintiff's claim was upheld primarily because the vehicle was completely unreliable, as opposed to the vehicle being unsafe or dangerous to run, as in **Farnworth**.

In **Gibbons v. Trapp Motors**[40], the plaintiff purchased a new automobile, a Pontiac convertible, which developed problems soon after. Over 30 hours repair time was required in the first 10 months, followed by a period of 10 days during which the car was to be brought once and for all to reasonable running order. But even that lengthy treatment failed to deal with its many (unspecified) weaknesses in "*steering and roadability [and] reliability*". Although the issue was partly one of safety, it seems clear from the reasoning of Gould J that repeated loss of use and unreliability were the main factors, which prompted him to order that the purchase price be refunded.

This Court observes that in each of the above cases, the courts held that the contract was liable to be rescinded and therefore the consumer was able to reject the car because the vehicle did not reach the threshold of reasonable fitness. This Court is of the view that the threshold for 'reasonable fitness' adopted in these cases would justify a replacement of the vehicle if the two-tiered approach under Section 13(4) was adopted. This aspect would be discussed later on in this judgment.

In **Future Automobiles (Private) Limited Vs. Consumer Affairs Authority of Sri Lanka and Others**[41] the 2nd respondent complained about various defects of the vehicle when the vehicle had a mileage of about 30,000km. When the

[40][1970] 9 D.L.R (3d) 742 referring to Pollock v Mucrae [1913] 60 Scot LR - as cited in M Whincup, 'Reasonable Fitness of Cars'; Supra at page 665.
[41] CA (Writ) Application No. 26/2016; CA Minutes of 18th February 2019.

vehicle had a mileage of about 40,000km and still under warranty, the petitioner admitted the replacement of *inter alia* the Transmission Solenoid Control Body, Fuel Gauge etc. The Transmission Solenoid Control Body is said to be the nerve center of the transmission, the failure of which directly affects the operation of the vehicle. This Court held that the above rendered the vehicle not reasonably fit for the purpose for which it was supplied and went on to hold that the decision taken by the CAA to replace the vehicle was not unreasonable. However, in that case, the petitioner sought to exclude themselves from the warranty, and unlike the Petitioner in this application, did not repair the defect. This is a factor that would be relevant in considering the relief that could be granted.

The above cases demonstrate two very important matters.

The first is, it is not the number of issues that decide whether a brand new vehicle is not reasonably fit. What is required for a vehicle to be classified as not being reasonably fit is for the issue, multiple or otherwise, to affect the core function of the vehicle and render the vehicle unfit for use on the road.

The second is that the rescission of a contract or the replacement of the vehicle on the basis that it is not reasonably fit requires the vehicle to be completely unroadworthy and incapable of repair.

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

In considering whether the decision of the Inquiry Panel that the vehicle was not reasonably fit for the purpose for which it was intended is reasonable in the light of what was discussed above, this Court shall be mindful of the fact

that it is not the duty of this Court acting in the exercise of its Writ jurisdiction, to assess whether the implied warranty was breached. The duty of this Court is to determine whether the Inquiry Panel, in deciding that the implied warranty was breached, paid due regard to relevant matters and whether the decision of the Inquiry Panel is 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*.'[42]

This Court shall bear in mind the following two passages from **Administrative Law** by Wade and Forsyth:[43]

> "*The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority…..*.
>
> *Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the courts function to look further into its merits."*

As Lord Hailsham L.C. has observed, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without

[42] Tom Bingham, *The Rule of Law* [2011] Penguin Books at page 61.
[43] Supra; page 302.

forfeiting their title to be regarded as reasonable.[44] Similarly Lord Diplock has observed that, *'the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred'*. [45]

As such, 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**,[46] 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.

Subsequently, in **Council of Civil Service Unions v Minister for the Civil Service**[47] [the GCHQ Case], Lord Diplock, having classified the three grounds on which administrative action is subject to judicial control, crystallised

[44] Re W (an infant) [1971] AC 682 at 700.
[45] Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 at 1064.
[46] [1948] 1 K.B. 223 at pages 229 - 230.
[47] Supra; at pages 410-411.

irrationality as a standalone ground for judicial review.[48] 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.[49]

A similar threshold was adopted by Lord Scarman[50] 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*' 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 European Convention on Human Rights into English domestic law.[51]

The default position, however, as noted in **De Smith's Judicial Review**,[52] "*is still, at the time of writing, that of the Wednesbury formulation, although it has*

[48] 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.
[49] Although the terms, 'irrationality' and 'unreasonableness' are often used interchangeably, irrationality is only one facet of unreasonableness.
[50] Nottinghamshire County Council v. Secretary of State for the Environment [1986] AC 240 at 247.
[51] See R v Secretary of State for the Home Department, ex parte Daly [2001] 3 All ER 433 page 447.
[52] Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith's Judicial Review* [8th Edition, 2018] Sweet and Maxwell, page 648.

been reformulated to a standard that requires the decision maker to act within the range of reasonable responses."[53]

The varying application of the "*Wednesbury* principles" or "irrationality" demonstrates that the Courts are more concerned with ensuring that a correct decision is taken with due regard to the context. The *Wednesbury* standard is thus not 'monolithic'[54].

The case of **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**,[55] 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****."*[56]

Authorities acting on behalf of the public ought to be accountable for the overall quality of the decision making process. This Court is therefore of the view that Courts must take an active and more effective approach in fulfilling its function of probing the quality of decisions and ensuring that assertions made by public authorities are properly substantiated, justified, and strike a fair balance between parties. With that in mind, it is the view of this Court that

[53] In Boddington v. British Transport Police [[1998] UKHL 13]; [1999] 2 AC 143] it was held that it is sufficient for a decision to be '*within the range of reasonable decisions open to a decision-maker*.'
[54] Wade and Forsyth, supra; page 304.
[55] Supra; page 1064.
[56] 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].

the time has come for our Courts to apply the less tortuous test laid down in **Tameside**, in applications such as this, where the decision, if not complied with, can result in proceedings in the Magistrate's Court for enforcement.[57]

Is the decision of the Inquiry Panel reasonable?

This Court shall now consider whether the inquiry panel acted reasonably when it arrived at the conclusion that the vehicle was not reasonably fit for the purpose for which it was supplied.

There is no dispute between the parties that an issue arose on the very first day of use. Though the consequential damage caused by the loose radiator hose was successfully repaired, and the vehicle did not have any issue thereafter and was thus roadworthy, the fact remains that at the **point of sale**, the motor vehicle had a loose radiator hose, which eventually affected its core function. It is common ground that a vehicle that overheats cannot be used on a road, and to that extent, the vehicle was not roadworthy. Thus, it could be reasonably concluded in the above circumstances, that the brand new vehicle that was sold and delivered to the 3rd Respondent, even though it did not have any defect with its major components, was not roadworthy **at the point of sale** due to the radiator hose not having been tightened properly. Very significantly, the subsequent issues that arose, namely the discharge of the coolant, the overheating and the replacement of the gasket, were all as a result of a hose not being tightened properly, and not due to any structural or inherent defect in the vehicle.

[57] Vide Section 13(6) of the Act.

It is in the light of the above factual circumstances that the inquiry panel arrived at a finding that the vehicle was not reasonably fit for the purpose for which it was supplied. This Court must state that the findings of the Inquiry Panel are not clear as this Court would have liked it to be, nor does it appear to have considered the provisions of Section 32(1)(d) in the manner that it should have. Nonetheless, this Court is of the view that the said finding is a reasonable decision in view of the facts of this application, and there was no other conclusion that the Inquiry Panel could have reached in light of the facts and material placed before it. It is not a finding which can be called *irrational* in the *GCHQ* sense, nor is it a decision which is *Wednesbury* unreasonable. On the contrary, this Court takes the view that it is a decision which a sensible person acting with due appreciation of its responsibilities would have arrived at.

The fourth argument - Is the decision to replace the vehicle, unreasonable and/or disproportionate?

This Court shall now proceed to consider the final argument of the learned President's Counsel for the Petitioner that the Inquiry Panel acted unreasonably when it held that the vehicle must be replaced, and that in any event, the relief granted is completely disproportionate when compared with the issue that the vehicle faced.

Are brand new vehicles free of defects?

A statement that a brand new vehicle can have defects might in the first instance sound ludicrous. However, the reality is that it would be humanly impossible, and even beyond the capability of robots that are used in the manufacturing process, to manufacture vehicle after vehicle that shall have no

defects, either at the point of sale or during the period of its warranty. While in recent times, with the technological advances that have been made, the motor industry has seen manufacturers extending warranties for longer periods and over higher mileages, thereby demonstrating that the vehicles that are manufactured now are of a better quality than before, the fact remains that a vehicle can nonetheless develop issues. In fact, it is for this precise reason that manufacturers provide the warranty – i.e. if defects do occur during such period, such defects would be repaired.

The learned President's Counsel for the Petitioner has drawn the attention of this Court to *several mass scale recalls of motor vehicles across the world whenever a defect is discovered*, in support of his three fold argument, that:

(a) A brand new vehicle can develop defects;

(b) In such situations, repair of such defects as opposed to the replacement of that vehicle with a brand new vehicle, is the solution; and

(c) That *such defects are never considered to be a defect rendering the manufacturer liable to replace the entire motor vehicle*.[58]

It would perhaps be appropriate to consider some of the examples of vehicle recalls cited in the written submissions of the Petitioner, as it would shed light on the approach of vehicle manufacturers in dealing with defects. That is of course not to state that this Court accepts that a vehicle manufacturer should never replace a defective motor vehicle, whatever the extent of the defect may be.

[58] Vide paragraph 31 of the Written Submissions of the Petitioner.

The first example is where the brake pressure accumulator fixed on two hybrid models, the Toyota Prius and the Lexus HS 250H had developed fatigue cracks due to vibration. These vehicles had been recalled and replaced with an improved brake booster pump assembly.

The second instance is where Toyota, having received reports of crashes, injuries and deaths arising from a defective parking brake had recalled 340,000 units of its Prius 2016 model, and carried out the necessary repairs.

The third example is where Mercedes Benz had recalled 132167 vehicles to rectify a defective passenger side air bag which had the tendency to rupture upon being activated during a crash, causing metal fragments to come through the air bag and injure the occupants.

Thus, when an issue is discovered in a brand new vehicle, the answer is not to rush in and replace the said vehicle with a new vehicle, where the circumstances do not warrant it. This Court is of the view that when a brand new vehicle develops an issue, a more balanced and cautious approach needs to be adopted. In other words, what this Court is saying is that the CAA must act reasonably, and in proportion to the issue that had arisen. That is not to say that a new vehicle with multiple defects which is not roadworthy and which cannot be repaired must be tolerated by a consumer, as evidenced by the cases that were discussed earlier. If this Court is to reiterate, in deciding what relief is to be afforded, the Authority must act reasonably and proportionately.

Section 13(4) confers upon the CAA discretion with regard to the relief

A consideration of this final argument requires this Court to examine the second tier of Section 13(4), in terms of which, once the Authority has arrived at the opinion that a sale has been made of any goods not reasonably fit for the purpose for which it was supplied, it has to decide whether relief should be afforded to the consumer, and if so, what that relief is.

As already noted, in terms of Section 13(4), the CAA has three options. They are:

1. To order the manufacturer or trader to pay compensation to the aggrieved party;

2. To replace such goods; or

3. To refund the amount paid for such goods or the provision of such service,

as the case may be.

The words '*as the case may be'* essentially means '*according to the circumstances*' and the said words therefore demonstrates that the CAA has a discretion with regard to the relief that it can grant to the consumer. In the case of **Micro Cars Ltd vs. Consumer Affairs Authority and Others**[59], Justice Vijith Malalgoda, P.C., P/CA (as he then was) referring to the above portion of Section 13(4) held that, "*When considering the said provisions it is our view that the said provision has given discretion to the tribunal to consider as to how*

[59] Supra.

they are going to compensate the aggrieved party considering the facts of each case or as referred to in the act itself "as the case may be".

The exercise of the discretion by the CAA

This Court must of course state that there is nothing called absolute or unfettered discretion, and that every exercise of discretion is subject to review.[60]

The manner in which the discretion should be exercised was discussed by this Court in **Benedict and Others vs. Monetary Board of the Central Bank of Sri Lanka and Others**[61] where it was held as follows:

> "*This court does not dispute that the first respondent has a discretion in the matter. However, it is a discretion that has to be exercised reasonably, fairly and justly. As Lord Diplock said "the administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred." – Secretary of State for Education v. Tameside Metropolitan B.C. The* ***valid exercise of a discretion requires a genuine application of the mind*** *and a conscious choice by the first respondent. The effect of the Monetary Law Act is not to set up the court as an arbiter of the correctness of one view over the other. It is the first respondent alone who can take such a decision and, provided the first respondent acts fairly and reasonably within the four corners of its lawful jurisdiction, this court in my opinion cannot interfere. Accordingly, it*

[60] See Premachandra vs Major Montague Jayawikrama and another (Provincial Governor's case); [1994] 2 Sri L.R. 90, at page 101, per Chief Justice G.P.S. De Silva.
[61] [2003] 3 Sri L.R. 68 (Pramuka Bank case), at page 75.

follows, that the court can examine the exercise of the discretionary power in order to see whether it has been used properly, fairly and according to the rules of reason and justice." (emphasis added).

The CAA must at all times remember that there are two parties before it, and that the rights and interests of both parties must be considered equally. It would be appropriate to refer to at this stage, the approach our Courts have adopted with regard to the powers of an arbitrator appointed under the Industrial Disputes Act in order to demonstrate the approach that the CAA ought to have adopted. In doing so, this Court is mindful that the Industrial Disputes Act specifically requires an arbitrator to act in a just and equitable manner, whereas the CAA Act does not contain such a provision. Nonetheless, it is the view of this Court that the CAA must strike a fair balance between the rights of the consumer and the rights of the trader when arriving at its decision.

In **Municipal Council Colombo vs. Munasinghe**[62] it was held by Chief Justice H.N.G.Fernando as follows:

"*I hold that when the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable', the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse. An award must be 'just and equitable' as between the parties to a dispute; and the fact that one party might have encountered 'hard times' because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions. In addition, it is time that this Court*

[62] 71 NLR 223 at page 225. Referred to with approval in Standard Chartered Grindlays Bank Limited vs The Minister of Labour [SC Appeal No. 22/2003; SC Minutes of 4th April 2008].

should correct what seems to be a prevalent misconception. The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee. An Arbitrator holds no license from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin."

In **Ceylon Tea Plantations Company Limited vs. Ceylon Estate Staff Union**,[63] Rajaratnam, J opined that, "*A just and equitable order must be fair by all parties. It never means the safeguarding of the interest of the workman alone*."

The Supreme Court, in **Singer Industries (Ceylon) Limited vs. The Ceylon Mercantile Industrial and General Workers Union and others**[64] agreeing with the observations in Municipal Council Colombo vs. Munasinghe[65] held as follows:

"*It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties*."

Thus, it is the view of this Court that the CAA does not have the freedom of the wild horse when taking decisions and that it must always remain within the four corners of its lawful jurisdiction.

[63] SC Appeal 211/72; SC Minutes of 15th May 1974.
[64] [2010] 1 Sri L.R. 66.
[65] Supra.

Relevant and Irrelevant considerations

The submission of the learned President's Counsel for the Petitioner that the decision of the Inquiry Panel that the Petitioner must replace the vehicle of the 3rd Respondent with a brand new vehicle is unreasonable, irrational and arbitrary, is two-fold; the first is the failure by the Inquiry Panel to take into consideration relevant factors; the second is that its decision is not supported by the material that was placed before the inquiry panel.

The following passages from **De Smith's Judicial Review** capture the essence of the above argument:[66]

> "*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"*[67]*. In such cases claimant does 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"*[68]*.*
>
> *"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*

[66] Supra; pages 604 and 613.
[67] R v. Deputy Industrial Injuries Commissioner, Ex P. Moore [1965] 1 Q.B. 456 at 488 (Diplock LJ).
[68] R v. Parliamentary Commissioner for Administration, Ex P. Balchin [1998] 1 P.L.R. 1.

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."

The reasons for the decision of the Inquiry Panel

The conclusions reached by the inquiry panel in '**P18**', which prompted their decision to replace the vehicle, can be summarised as follows:

1. The motor vehicle purchased by the 3rd Respondent, was defective from the date of purchase and the defects have been accepted by the Petitioner;

2. The Applicant was denied the use of a defect-free vehicle from the date of purchase;

3. After informing the Petitioner of the defect from the date of purchase of the said vehicle, the said vehicle was repaired on four instances but the **issue was not rectified**;

4. The gasket in the said defective motor vehicle was replaced by the Defendant Company and the said replacement deteriorated the value of the vehicle as a whole;

5. The Applicant has lost confidence in the said vehicle as it has been defective on multiple occasions since the date of purchase within the Warranty period;

6. Having to take the motor vehicle for repairs affected the professional duties of the Applicant and he thus suffered a great loss as a result of this.

Failure to take into consideration relevant matters

Even though the above conclusions have been reached, the Inquiry Panel has failed to consider the two most important factors that were placed before the Inquiry Panel by the Petitioner – the first being that the vehicle was successfully repaired by the Petitioner and was thereafter roadworthy; and the second being that the 3rd Respondent had not produced any material to show that the vehicle was unusable after the gasket was replaced.

The inquiry panel has completely lost sight of the fact that on each occasion the vehicle was brought in, the Petitioner repaired the vehicle free of charge, thus honouring the written warranty '**P7**' extended by it at the point of sale. What is most important is the fact that according to the material produced before the CAA, the vehicle was **useable** and **roadworthy** after the gasket was replaced. With the issues arising from the faulty radiator hose having been rectified, the vehicle was reasonably fit for the purpose for which it was supplied. It is the position of the Petitioner that the fact that the 3rd

Respondent requested for an extension of the warranty is ample evidence to show that the vehicle was in fact roadworthy after the gasket was replaced, and that the 3rd Respondent intended to use it thereafter.

This Court is of the view that the nature of the defect itself needs to be given due consideration in determining what remedy the complainant is entitled to. In the present instance, although the 3rd Respondent has made three visits to the Petitioner, the fact remained that the issue originated from one source. Once that core issue was identified and repaired, the vehicle was reasonably fit for the purpose for which it was intended, a factor that has been ignored by the Inquiry Panel.

This Court must state that the 3rd Respondent has not provided any material to the CAA to show that the motor vehicle suffered further defects thereafter. It could therefore be concluded, in the absence of any evidence to the contrary, that the vehicle was roadworthy after the replacement of the gasket, a fact which the inquiry panel not only opted to turn a blind eye to, but went a step further by claiming that the vehicle had not been repaired.

The Petitioner has drawn the attention of this Court to the judgment of the Supreme Court in **Seylan Bank Ltd vs. Clement Charles Epasinghe and another**.[69] In that case, the appellant bank and the respondents entered into a Lease Agreement by which they agreed that the appellant shall lease to the respondents, a brand new 40 seater bus sold and supplied by *Sathosa Motors*. The respondents had agreed to pay to the appellant as rent for the lease of the vehicle, an aggregate sum of Rs. 2,865,540/- in 60 monthly rentals of

[69] SC (CHC) Appeal No. 39/06; SC Minutes of 1st August 2017 – per Prasanna Jayawardena, P.C., J.

Rs.47,759/- each. On non-payment of the lease rentals, the appellant bank had filed action in the Commercial High Court to recover the moneys due under the lease agreement. The respondents had taken the defence that the vehicle had developed serious problems and as the vehicle was not in a serviceable condition, the lease agreement had been frustrated. Having considered whether the bus had in fact been rendered unserviceable, the Supreme Court stated as follows:

> "*Next, to consider the defects in the vehicle, the letters written by the defendants refer to the vehicle breaking down on 11th January 1998 after which it was repaired and returned to the defendants. The letters also refer to defects in the lights, the front and rear windscreens not being properly fixed, repairs to the front hub, oil leaks, and defects in the front shock absorbers. These are all defects which can be repaired.*
>
> *As mentioned earlier, the evidence is that, these defects were repaired and the vehicle was handed back to the defendants on 27th July 1998. The evidence indicates that the defendants continued to use the vehicle after that. In these circumstances, it is not possible to reasonably conclude that, the defects in the vehicle rendered the vehicle unusable*."

This Court therefore takes view that the failure on the part of the Inquiry Panel to take into account the aforementioned two most relevant facts – i.e. that the vehicle was roadworthy after the repairs were effected successfully by the Petitioner – has robbed the decision of all logic, and has rendered the said decision unreasonable and irrational.

The conclusions of the Inquiry Panel are not supported by the evidence

The fact that the 3rd Respondent purchased a KIA Sorento motor vehicle from the Petitioner and that the said motor vehicle had an issue on the date of purchase is not in dispute. The fact that the Petitioner carried out repairs on several occasions but all arising from the loose radiator hose, is also undisputed.

The Petitioner states that the Inquiry Panel however had no evidence to support its finding that the replacement of the gasket reduced the value of the vehicle, and that for such a conclusion to be valid, it must be supported by expert evidence or testimony of a person knowledgeable in the field of motor vehicles. This Court is in agreement with this submission, especially since no material has been placed before this Court that the members of the Inquiry Panel had expertise in motor mechanism. The 3rd Respondent did not place the evidence of an expert to support the position that the replacement of the gasket reduced the value of the vehicle. Neither has the inquiry panel explained the basis for such conclusion. The Inquiry Panel has therefore arrived at a conclusion, which ultimately weighed heavily in their ultimate decision that the vehicle be replaced, without having any factual or legal basis for such conclusion.

The Inquiry Panel has also been influenced by the fact that the 3rd Respondent's ability to pursue his career as a dental surgeon was affected by having to take the motor vehicle for repairs on three occasions. It is the position of the Petitioner that this finding of the Inquiry Panel too is devoid of evidence. The 3rd Respondent was employed by the Government, and no

evidence has been placed that his career as a Government Medical Officer was affected by the issue relating to the vehicle, or that he suffered a loss professionally. This Court therefore observes again that such a conclusion, quite apart from being irrelevant to the core issue, has been reached in the absence of any evidentiary support.

The conclusion that the 3rd Respondent was denied the use of a defect free vehicle from the date of purchase is contrary to the facts of this application. This Court has already noted that after the Petitioner replaced the coolant on day one, it took three months for the 3rd Respondent to make the next complaint. The repair on the second occasion took four days while the final repair took twelve days.

It appears to this Court from the above reasoning of the Inquiry Panel that it was swayed by emotional considerations as opposed to acting in a professional manner with the result that it failed to arrive at a just decision based on the facts placed before them and the applicable law.

It also appears to this Court that the members of the Inquiry Panel had already made up their mind to replace the vehicle and that the reasons provided were merely an unsuccessful attempt to justify the decision, without there being a proper consideration of the evidence placed before them. The fact that the Inquiry Panel was determined to replace the vehicle of the 3rd Respondent with a new vehicle is clear when one considers the fact that the inquiry panel completely lost sight of the fact that the vehicle was in fact repaired. This is borne out by the fact that the reasons provided by the inquiry panel are based on the assumption that the issue has still not been remedied, when the

material placed before them was to the contrary. Such was their resolve to replace the vehicle that the Inquiry Panel did not for a moment consider the appropriateness of granting compensation, instead of replacement.

Conclusion

If the facts in the cases that this Court have referred to in considering what is meant by reasonably fit, as well as the decision of the Supreme Court in **Seylan Bank vs. Clement Charles Epasinghe and another**[70] are compared with the facts of the present case, one would observe that:

(a) The vehicle of the 3rd Respondent did not have multiple defects, even though having multiple defects is not the sole determining factor;

(b) The issue was identified by the Petitioner, although belatedly;

(c) The issue was repaired;

(d) The vehicle did not have any issue thereafter;

(e) The vehicle was roadworthy, after the last repair.

This Court is therefore of the view that neither on the facts nor on the law could the Inquiry Panel have arrived at the conclusion that the vehicle should be replaced. In the above circumstances, this Court is of the view that the decision in '**P18**', as conveyed by '**P17**' to replace the vehicle with a brand new vehicle is unreasonable and irrational. Not only would the said decision pass the lower threshold for unreasonableness laid down in Tameside, it would

[70] Supra.

even pass the high threshold for unreasonableness laid down in *Wednesbury*, and the GCHQ case, namely that it's 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.

Is the decision of the Inquiry Panel contrary to the principles of proportionality?

This Court shall now consider the second aspect of the final argument of the learned President's Counsel for the Petitioner that the decision of the Inquiry Panel to replace the vehicle is contrary to the principles of proportionality. Apart from determining whether the decision of the inquiry panel '**P18**' is irrational or unreasonable, it is the view of this Court that it can also view the said decision in the light of the developing principle of proportionality, which is considered as an additional safeguard to the existing grounds of judicial review whereby Courts can effectively exercise their role in ensuring a superior quality of decisions by Public authorities.

"Do not use a sledgehammer to crack a nut" is a common phrase which can be used to summarise the basic concept of proportionality. Lord Steyn in **R v Secretary of State for the Home Department (Ex parte Daly)**[71] cited with approval the three stage test for proportionality adopted by the Privy Council in the case of **de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing**[72]. A fourth ground, namely that the decision must always involve the striking of a fair balance between the rights of the

[71] Supra.
[72] [1999] 1 AC 69.

individual and the interests of the community was endorsed in **Huang v. Secretary of State for the Home Department**[73]

There is much discussion on the overlap between the principles of proportionality and unreasonableness. As stated in **Administrative Law** by Wade and Forsyth:[74]

> "*It is clear that the principles of reasonableness and proportionality cover a great deal of common ground. In the case, for example, where the revocation of a market trader's license was quashed as being an unreasonably severe penalty for a small offence, the decision could have been based on disproportionality as easily as on unreasonableness.*[75] *As Lord Hoffmann has said,* ***it is not possible to see daylight between them.***[76] *They will often be assimilated by the 'margin of appreciation' allowed by European law, which gives latitude for administrative decisions by national authorities in a manner similar to the British doctrine.*"

The primary distinction between unreasonableness or irrationality and proportionality has been described in **De Smith's Judicial Review**, in the following manner[77]:

> "*The focus of attention in these cases will be principally the impact of the decision upon the affected person. The outcome or end-product of the decision making process will thus be assessed, rather than the way the*

[73] [2007] 2 AC 167.
[74] Supra. page 315.
[75] R v Barnsley, ex p Hook [1976] 1 WLR 1052.
[76] In "A sense of proportion (John Morris Kelly Memorial Lecture, 1996) quoted in R v. Chief Constable of Sussex ex p International Trader's Ferry Limited; supra.
[77] Supra. at page 628.

decision was reached (although the factors taken into account in reaching the decision may also be – or may be assumed to be – incorrectly weighed.)

The ground of proportionality as a separate ground of judicial review was predicted by Lord Diplock in the GCHQ case.[78] In **R v Secretary of State for the Home Department, ex parte Brind**[79] the House of Lords, while refusing to accept that proportionality was a separate ground of review in English domestic law, still acknowledged that it might be incorporated into English law at some point.[80] In **Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)**,[81] the principle of proportionality received the endorsement of seven justices of the Supreme Court as a flexible approach to principles of judicial review, although this case was not decided on proportionality.[82]

Although the ground of proportionality is gaining increasing acceptance in English Courts in matters involving Convention rights[83] and EU Law, there is still some concern about the degree of interference with the merits of a decision of a public authority and therefore there is still some resistance to adopting the doctrine as a separate ground of judicial review in English domestic law or in general as a replacement of the test of *Wednesbury* unreasonableness and irrationality.

[78] Supra. Lord Diplock, having set out Illegality, Irrationality and Procedural Impropriety as being the grounds under which judicial review was available, went onto state as follows: "I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the Administrative Law of several of our fellow members of the European Economic Community".
[79] [1991] 1 AC 696.
[80] This case 'is still the leading case on the status of proportionality in common law'- Administrative Law by Wade and Forsyth (Supra) at page 315.
[81] [2015] UKSC 19.
[82] Lord Carnwath at page 60- as cited in De Smith's Judicial Review (Supra); page 640.
[83] European Convention on Human Rights.

The principle of proportionality is by no means a new concept to judicial review in Sri Lanka. In the case of **Premaratne vs. University Grants Commission and Others**[84], this Court concurred with the view of Lord Denning M.R. in **R v Brantley Metropolitan Borough Council, Ex parte Hook**[85], '*which illustrates that if any action or measure is considered to do more harm than good in reaching a given objective it is liable to be set aside for the court has to consider whether the ends justify the means.*' This Court went onto hold that, "*to punish a student as severely as has been done in this case entails a breach of the principle of proportionality*".[86]

In the subsequent case of **Neidra Fernando vs. Ceylon Tourist Board and Others**[87] this Court, while holding that the allegation of bias regarding the recommendation to dismiss the petitioner from service was well founded, went on to state that the recommended punishment was disproportionate, although this Court noted that "*there has been and remains some uncertainty as to the extent to which the notion of "proportionality" may or should be considered to be a ground of review*."

In the case of **Wickremasinghe vs. Chandrananda De Silva, Secretary, Ministry of Defence and Others**,[88] this Court was hesitant to accept the doctrine of proportionality as a separate ground for judicial review in Sri Lanka, particularly in light of the facts and circumstances of that case.

[84] [1998] 3 Sri LR 395 at 417.
[85] [1976] 1 WLR 1052.
[86] Supra. at page 418.
[87] [2002] 2 Sri LR 169.
[88] [2001] 2 Sri LR 333.

Gooneratne, J recently held that the case of **N.V. Gooneratne v. Sri Lanka Land Reclamation and Development Corporation and Others**[89] was '*a fit and proper case to apply the doctrine of proportionality*.'

In that case, it was held that the decision of the 3rd respondent to send the petitioner on compulsory leave was highly unwarranted and unreasonable and contrary to the doctrine of proportionality:

> "*The Petitioner's submission on proportionality is a recongised Principle in Administrative Law. I have no hesitation with the development of law in this direction, to apply the doctrine of proportionality to the facts of this case. I am in full agreement with the submission of learned President's Counsel for the Petitioner regarding applicability of the above principle.*"

This Court is of the view that the doctrine of proportionality has still not developed to a stage where it can stand alone as a separate ground for judicial review in the realm of Administrative Law in Sri Lanka. However, where the appropriate facts and circumstances warrant it, this Court does not see any reason why the doctrine of proportionality may not be developed further, particularly in light of the considerations that have motivated this Court to loosen the rigours of *Wednesbury* unreasonableness and review decisions with varying degrees of intensity, depending on the facts and circumstances of each case.

[89] CA (Writ) Application No. 412/07; CA Minutes of 24th February 2011.

As observed by Professor Craig, "*proportionality should neither be regarded as a panacea that will cure all ills, real and imaginary within our existing regime of review, nor should it be perceived as something dangerous or alien".*[90]

This Court wishes to reiterate the fact that the CAA must strike a fair balance between the interests of the consumer and that of the trader. Being vested with discretion with regard to the relief that can be given, the CAA must exercise great caution in exercising that discretion, and provide the relief that would address the grievance of the consumer which is commensurate with the grievance of the consumer. It is certainly a matter of regret that the Inquiry Panel has not considered at all, whether compensation was an adequate remedy. As held by this Court in **Benedict vs. The Monetary Board of the Central Bank of Sri Lanka and another**,[91] when a statute confers a public authority with several options, it is the duty of such public authority to consider all such options and arrive at a decision which is commensurate with the complaint.

The fact remains that even though the vehicle had an issue, and the 3rd Respondent may have been inconvenienced by it, the Petitioner effected the necessary repairs and the vehicle was thereafter roadworthy. The condition of the vehicle was not the same as the vehicles in the cases that this Court has already referred to. In these circumstances, it is the view of this Court that replacement of the vehicle was certainly not warranted, and therefore, the relief provided is entirely disproportionate to the issue that had arisen. On this basis, too, the decision of the Inquiry Panel is liable to be quashed by a Writ of Certiorari.

[90] P.P. Craig, *Administrative Law,* (5th Edition, Sweet & Maxwell, 2007) at page 630.
[91] Supra.

Is the 3rd Respondent entitled to compensation?

There is one final matter that this Court wishes to consider. That is whether this Court, in the exercise of the discretionary powers vested in it, should direct the CAA to consider whether the 3rd Respondent is entitled to compensation under and in terms of Section 13(4) of the CAA Act. Such a course of action would enable the CAA to duly assess the evidence placed before the Inquiry Panel and determine the nature of such compensation and the quantum thereof, upon due consideration of the material placed before it by the 3rd Respondent.

In **Coca-Cola Beverages Sri Lanka Ltd vs. Consumer Affairs Authority**,[92] this Court has held that compensation in terms of Section 13(4) is not punitive in nature, and that compensation can be awarded to meet the actual loss or to compensate for a proven injury or loss.

The burden of establishing loss is therefore with the consumer. Consumers who make applications to the CAA must bear in mind that they are not entitled to relief as of right and that they must play an active role by presenting before the CAA, the necessary material to prove the loss suffered, thereby enabling the CAA to arrive at a decision in terms of the law.

This Court, having considered whether it should adopt the said course of action, is of the view that such an exercise would be futile, for the reason that no material has been placed by the 3rd Respondent before the Inquiry Panel to

[92] CA (Writ) Application No. 326/2006; CA Minutes of 18th February 2011.

substantiate the loss that he suffered, if any, and in such a situation, the CAA will not be in a position to quantify the loss.

Conclusion

In the above circumstances, this Court issues a Writ of Certiorari quashing '**P17**', and a Writ of Certiorari quashing the findings in '**P18**' that the Petitioner should replace the vehicle sold to the 3rd Respondent.

This Court makes no order with regard to costs.

Judge of the Court of Appeal