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

In the matter of an application made under Article 140 of the Constitution for Mandates in the nature of Writs of Certiorari and Prohibition.

Italian Thoroughbred Motor Company (Pvt.) Ltd.,
33/1, Mayfield Road, Colombo 13.

PETITIONER

CA (Writ) Application No. 412/2017

Vs.

1. Consumer Affairs Authority

2. W. Hasitha Tillekeratne,
Chairman, Consumer Affairs Authority.

3. D. Jeevanadan,
Director General, Consumer Affairs Authority.

3A. M.Z. Razeen,
Member, Consumer Affairs Authority,

3B. A.R.B. Nihmathdeen,
Member, Consumer Affairs Authority,

3C. Dr. M. Maharoof Hilmy,
Member, Consumer Affairs Authority,
All of 1st & 2nd Floor, CWE Secretariat Building,
No. 27, Vauxhall Street, Colombo 2.

4. P.W.S.C. Perera,
Medical Officer-In-Charge

Central Dispensary,
Mahawanawela, Dehiattakandiya.

5. Anura B. Meddegoda P.C.,
Chairman, Consumer Affairs Authority.

6. M.A. Anzil,
Member, Consumer Affairs Authority,

7. M.S.M. Fouzer,
Director General, Consumer Affairs Authority,
All of 1st & 2nd Floor, CWE Secretariat Building,
No. 27, Vauxhall Street, Colombo 2.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: Shanaka Cooray for the Petitioner

Ms. Ganga Wakishta Arachchi. Senior State Counsel for the 1st, 3B, 3C, 5th – 7th Respondents

Shiral Lakthilake for the 4th Respondent

Written Submissions: Tendered on behalf of the Petitioner on 16th January 2019 and 15th March 2019.

Tendered on behalf of the 1st, 3B, 3C, 5th – 7th Respondents on 11th April 2019

Tendered on behalf of the 4th Respondent on 7th February 2019

Decided on: 28th June 2019

Arjuna Obeyesekere, J

When this matter was taken up on 16th May 2019, the learned Counsel for all parties moved that this Court pronounce judgment on the written submissions that have already been tendered by the parties.

The facts of this case very briefly are as follows.

The Petitioner is engaged in the business, *inter alia*, of the service and repair of automobiles. The 4th Respondent handed over vehicle bearing registration No. CPKJ- 3191 owned by him to the Petitioner on or about 18th September 2016 for the specific purpose of repairing a mechanical defect in the engine of the said vehicle. The Petitioner claims that the required repair was duly carried out.

It is admitted by the parties that on or about 6th October 2016, prior to handing over the vehicle to the 4th Respondent after the repair of the vehicle, and whilst the said vehicle was being driven by an employee of the Petitioner by the name D. Chaminda Indrajith, an accident had occurred and the said vehicle had been damaged. It is admitted by all parties that at the time of the incident, the car was under the care and control of the Petitioner.

It does not appear that the Petitioner took steps to report the said accident to the nearest Police Station. After the said accident, the Petitioner had initially taken steps to contact the insurer of the 4th Respondent directly, without the knowledge of the 4th Respondent. The Petitioner had informed the 4th Respondent of the accident only thereafter. The 4th Respondent states that as

instructed by the Petitioner, the damaged vehicle was handed over for repairs to M/s Car Mart Limited, the local agent for the said vehicle, on 9th October 2016.

The 4th Respondent states that after the handing over of the vehicle to M/s Car Mart Limited, his insurer informed him that the insurance claim filed in respect of the said damage arising from the said accident had been rejected. It is admitted by the Petitioner that the insurer had rejected the claim of the 4th Respondent. The 4th Respondent had annexed to his written submissions, document marked '**V1**' dated 27th December 2016, issued by Sri Lanka Insurance Corporation Limited, rejecting his claim. The 4th Respondent had thereafter requested the Petitioner to carry out the repairs to the said vehicle caused as a result of the said accident, at its own cost as the accident was caused during the period the vehicle was under the care and control of the Petitioner. The Petitioner however refused to comply with this request, after which the 4th Respondent, by a letter dated 19th December 2016, annexed to the petition marked '**P2**', lodged a complaint against the Petitioner with the 1st Respondent, the Consumer Affairs Authority.

The Petitioner states that by a letter dated 10th January 2017, annexed to the petition marked '**P3**', the 1st Respondent had forwarded a copy of the complaint '**P2**' to the Petitioner and had requested a representative of the Petitioner to attend a discussion in respect of the said complaint '**P2**', on 26th January 2017. The Petitioner states that its representative attended the said meeting held on 26th January 2017. The Petitioner states that it received from the 1st Respondent another letter dated 17th January 2017 annexed to the petition marked '**P4**' requesting a representative of the Petitioner to attend

another meeting on 22nd February 2017 in relation to the complaint '**P2**'. The Petitioner states it was represented on the said date as well. It is the position of the Petitioner that "the said discussions were merely preliminary discussions held with a view to settlement of the issue" and that "no inquiry was held" on the complaint '**P2**'. This Court must observe that the 1st Respondent has not explained in the Statement of Objections filed before this Court as to what took place at the said meetings.

The Petitioner states that it received from the 1st Respondent a letter dated 19th September 2017 annexed to the petition marked '**P5a**', requesting that it pay a sum of Rs. 1,216,218,40 to the 4th Respondent. The Petitioner states that annexed to '**P5a**' was an Order of the 1st Respondent dated 27th April 2017, a copy of which has been annexed to the petition marked '**P5(b)**', by which the 1st Respondent had decided that the Petitioner is liable to pay a total sum of Rs. 1,216,218.40 to the 4th Respondent, being the costs incurred by the 4th Respondent to import spare parts worth Rs. 859,768.40 and repair costs of Rs. 356,450.

Dissatisfied by this Order, the Petitioner has invoked the jurisdiction conferred on this Court by Article 140 of the Constitution, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the document marked '**P5(b)**' dated 27th April 2017;

b) A Writ of Prohibition preventing the 1st Respondent from acting in pursuance of the complaint marked '**P2**'.

This Court is mindful that it is exercising its Writ jurisdiction in this matter. The facts of this case would only be considered by this Court in so far as it is necessary for a determination of the issues that have been raised by the parties in this application. This Court shall refrain, as far as possible, from making any factual determinations with regard to the liability of the Petitioner in relation to the said accident.

This Court would now consider each of the arguments placed before this Court by the learned Counsel for the Petitioner in support of his position that this Court must issue a Writ of Certiorari to quash '**P5b**'.

The first objection raised by the learned Counsel for the Petitioner is that the 1st Respondent does not have the jurisdiction to entertain the complaint of the 4th Respondent.

The objection on jurisdiction raised by the learned Counsel for the Petitioner consists of two limbs. The first is that the 1st Respondent has no jurisdiction in terms of Section 32 of the Consumer Affairs Authority Act No. 9 of 2003 to entertain the complaint '**P2**', as the damage that is complained of falls outside the contract between the Petitioner and the 4th Respondent.

The right of a consumer to make a complaint against the provision of a service is set out in Section 32(3) of the Act, which reads as follows:

> "A consumer aggrieved by the breach of an implied warranty as provided for in subsection (1) or (2) may make a complaint to the Authority in

writing against such breach within one month of the supply of such goods or the provision of such services as the case may be, or the supply of materials supplied in connection with the provision of those services."

The implied warranty referred to in Section 32(3) is provided for in Section 32(1) of the Act, which 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) any materials supplied in connection with provision of such services will be reasonably fit for the purpose for which they are supplied;

(b) 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.

The complaint of the 4th Respondent marked '**P2**' has been made on the basis of a violation of Section 32(1)(a). That is, the Petitioner did not comply with the

implied warranty that it would exercise "due care and skill" in the provision of services, namely the repairing of his vehicle.

The Petitioner has sought to argue that the accident which was the subject matter of the said complaint '**P2**', was outside the scope of the contract, implied or otherwise, between the Petitioner and the 4th Respondent. It is the Petitioner's contention that Section 32(1) is only applicable to the "contract for the supply of goods or for the provision of services" and that any duty to carry out the services with due skill and care only extends to the scope of the said contract. The Petitioner states that the contract for the provision of services was to repair the engine of the vehicle belonging to the 4th Respondent, which was carried out with "due skill and care", thus satisfying the provisions of Section 32(1)(a). The Petitioner states that the 4th Respondent has admitted that the said repair had been conducted with due skill and care because he had no complaints with regard to the repair, which proves that the Petitioner duly carried out its obligations under the contract and thereby satisfied the provisions of Section 32(1) of the Act. It is thus the position of the Petitioner that the accident occurred after the engine repair had been effected and is therefore outside the scope of the services that the Petitioner was required to provide under the contract. On this basis, the Petitioner states that the 4th Respondent had no right to make a complaint to the 1st Respondent under Section 32(3) for breach of contract and accordingly the 1st Respondent does not have the jurisdiction to hear the complaint.

Before considering the said argument, this Court would like to refer to the judgment of this Court in **Micro Cars Ltd. vs. Consumer Affairs Authority**[1] where it was 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."

This Court also referred to the judgment in **Wickremaratne v. Samarawickrema and others**,[2] which held that:

(a) 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;

(b) The interpretation of a statute should not have the effect of defeating the objective of the legislature and of detracting from its purpose.

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[1] CA (Writ) Application No. 189/2014; CA Minutes of 1st July 2016; Judgment by Justice Vijith Malalgoda, P.C./PCA (as he then was).

[2] (1995) 2 Sri LR 212; Judgment by S.N. Silva, J (as he was then).

It is admitted by all parties that the 4th Respondent handed over his vehicle to the Petitioner to effect engine repairs. The repair may have been carried out but the vehicle continued to remain with the Petitioner until the date of the accident. The Petitioner does not claim that its employee had gone on a frolic of his own at the time the accident occurred or that the Petitioner had not authorised the said employee to drive the said vehicle. Thus, the only inference this Court can come to is that the employee of the Petitioner was driving the vehicle as part of the service that the Petitioner had undertaken to provide or, as the learned Senior State Counsel for the 1st Respondent has stated, to carry out a test drive, which is a necessary requirement of any service to repair an engine.

This Court takes the view that a service provider such as the Petitioner must take responsibility for a vehicle that is handed over to it. The duty to provide the service with due care and skill commenced from the time the vehicle was handed over to the Petitioner and ended only once the vehicle was repaired and handed back to the 4th Respondent in the same condition that it was in, at the time of the initial handing over, other than the engine repair, of course. The Petitioner cannot absolve itself of its liability by seeking an extremely narrow interpretation of Section 32(1). It would certainly be a violation of the obligation to provide a service with due care and skill if the service provider can damage, either wilfully or due to negligence, the car handed over to it, the repair cost of which is in excess of Rs. 1.2 million and thereafter claim that it has repaired the engine which is the purpose for which the vehicle had been handed over and that it is not responsible for any damage to the vehicle,

although such damage occurred during the time vehicle was in the custody of the Petitioner.

To accept the position of the Petitioner that the subject matter of the complaint '**P2**' is outside the scope of the contract would lead to an absurdity and would be completely contrary to the objective of the Act, which is *inter alia* to protect innocent consumers. If the argument of the Petitioner is accepted, it would leave room for providers of a service to be completely negligent in relation to anything other than the "scope of the service" they are required to provide, which is most certainly not what the legislature intended through Section 32(1) of the Act. This Court therefore rejects the submission of the learned Counsel for the Petitioner that the 1st Respondent does not have the jurisdiction to entertain the complaint of the 4th Respondent.

The second limb of the jurisdictional objection raised by the learned Counsel for the Petitioner is that '**P2**' has been lodged outside the time limit provided by Section 32(3) of the Act for the making of complaints and therefore, the 1st Respondent is estopped from considering the said complaint.

Section 32(3) of the Act reads as follows:

> "A consumer aggrieved by the breach of an implied warranty as provided for in subsection (1) or (2) may make a complaint to the Authority in writing against such breach within one month of the supply of such goods or the provision of such services as the case may be, or the supply of materials supplied in connection with the provision of those services."

Thus, according to Section 32(3) of the Act, the 4th Respondent is required to make to the 1st Respondent, a complaint in writing against such breach within one month of the supply of such goods or the provision of such services as the case may be. It is the position of the Petitioner that the complaint '**P2**' made on 19th December 2016, is out of time.

This Court must observe that even though the Petitioner has participated at two discussions held on 26th January 2017 and 22nd February 2017, the Petitioner does not appear to have raised the said objection at the said discussions. In this regard, this Court would like to refer to the following paragraph in **Aqua Technologies (Pvt) Ltd vs. Consumer Affairs Authority and Others**[3] which has stressed on the importance of raising objections based on time bar at the first available opportunity:

> "The Petitioner's first objection in this application is that the 1st Respondent has entertained the complaint of the 2nd Respondent even though the said complaint was prescribed in terms of Section 13(2) of the Consumer Affairs Authority Act. It is pertinent to note that the Petitioner had not taken up this objection before the 1st Respondent when the inquiry was held before the 1st Respondent. The petitioner had acquiesced in the proceedings before the 1st Respondent as it had not taken up this objection before the 1st Respondent. As such the Petitioner cannot raise the said objection in judicial review proceedings before the Court of Appeal."

[3](2012) 1 Sri LR 358; judgment by Sriskandarajah, J (P/CA).

In any event, this Court is of the view that the question of time should also be given a purposive interpretation in view of the objects and purpose of the Act.

In the case of **David Peiris Motor Company V. Consumer Affairs Authority and eight Others**[4] this Court held as follows, in relation to the time bar contained in relation to complaints made under Section 13(2) of the Act:

> "Section 13(2) must be given a purposive interpretation. If a warranty of goods covers for a period of two years and the purchaser can only complain within three months of the purchase of the goods in relation to the breach of a warranty or guaranty; it will lead to absurdity and the protection given by section 13(1)(b) would be rendered nugatory. Section 13(2) has imposed a three months limitation for complaints only in relation to the sale of any goods or to the provision of any service which does not conform to the standards and specifications determined under section 12."

The same course of interpretation was followed in **Future Automobiles (Private) Limited vs. Consumer Affairs Authority**[5], where this Court held as follows:

> "If I may add a few words to elaborate it further, under section 13(1)(b), a consumer can complain to the Authority for any violation of a warranty or guarantee given expressly or impliedly in relation to a good sold. If the warranty period for a particular good, for instance, is three years, the

[4]CA (Writ) Application No. 635/2007; CA minutes of 3rd August 2009; as referred to in Micro Cars Limited vs. Consumer Affairs Authority and Others CA (Writ) Application No. 189/2014; CA Minutes of 1st July 2016..
[5]CA (Writ) Application No. 26/2016; CA Minutes of 18th February 2019; judgment of Samayawardena, J.

consumer can, in terms of section 13(1)(b), complain to the Authority during the period of three years, but the Authority can entertain complaints made only during the first three months of the warranty period. Such an interpretation obviously leads to absurdity. It is a canon of interpretation that statutes shall be construed to avoid absurdity. Further, such an interpretation also, *ex facie*, defeats the intention of the legislature in introducing this special piece of legislation, which is primarily the protection of the consumer.

Thus, in adopting a purposive interpretation of the provisions of Section 32(3), this Court holds that in this application, the time bar begins to run from the date on which the Petitioner refused to pay for the repairs caused by the said accident to the said vehicle belonging to the 4th Respondent, which could only be after the insurer rejected the claim of the 4th Respondent. Though the accident took place on 6th October 2016, the Petitioner held out to the 4th Respondent that the accident has been reported to the insurer and that the cost of the repair would be borne by the insurer. Thus, the 4th Respondent cannot be faulted for being under the impression that his insurer would pay for the damages. The 4th Respondent appears to have made an application to the 1st Respondent Authority, no sooner the rejection of the claim was finally conveyed in writing by the insurer to him on 27th December 2016. Although the complaint '**P2**' is dated 19th December 2016, it appears that the 4th Respondent filed it on 27th December 2016, after the insurer informed him in writing that his claim has been rejected. Thus, this Court is of the view that even if the Petitioner had raised the said objection before the 1st Respondent, that argument cannot stand as '**P2**' has been lodged within the time limit

specified under the Act. For these reasons, this Court does not see any merit in the said argument of the Petitioner.

The next argument of the learned Counsel for the Petitioner is that the Order **'P5(b)'** was issued without following the rules of natural justice and is thus, bad in law and liable to be quashed by way of a Writ of Certiorari. The learned Counsel for the Petitioner has specifically raised the following three matters in this regard:

a. No proper inquiry was conducted by the 1st Respondent in terms of Section 32(4) of the Act;

b. The Petitioner was not given the right to be heard by the 1st Respondent, in that the Petitioner did not receive notice of the inquiry allegedly conducted on 27th April 2017 and thus was not afforded the opportunity of being heard as per Section 32(4) of the Act;

c. No reasons were provided for the decision of the 1st Respondent.

The provisions of the Consumer Affairs Authority Act pre-suppose that once a complaint is made to the 1st Respondent, an inquiry should be held where both parties are given the opportunity of being heard. This is set out in Section 32(4) of the Act which states as follows:

> "At any inquiry held into a complaint made under subsection (3), the Authority shall give the trader or other person against whom the

complaint is made, an opportunity of being heard either in person or by an agent on his behalf."

The requirement to conduct an inquiry is further manifested by the provisions of Section 32(5) of the Act, which reads as follows:

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

It is the position of the Petitioner that the discussions held by the 1st Respondent at which the Petitioner participated, were merely preliminary discussions and could not be considered "an inquiry" within the scope of the Act. According to the order of the 1st Respondent '**P5(b)**', it is clear that the 1st Respondent too did not consider '**P3**' and '**P4**' to be notices of an inquiry as the Order states that the conclusions stated in '**P5(b)**' were arrived at following an inquiry held on 27th April 2017, which was incidentally the same date on which the Order '**P5(b)**' was issued. It is also to be noted that the documents marked '**P3**' and '**P4**' appear to be discussions conducted for the purpose of reaching a settlement, which appears to have been a preliminary step to conducting an inquiry.

The Petitioner states that it was not aware of any inquiry that was to be held on 27th April 2017 and that it was not given notice in order to be present and

make representations. The 4th Respondent's position is that both parties agreed that the inquiry was to be held on 27th April 2017 at the discussion held on 22nd February 2017 and that as the Petitioner was not represented, an inquiry was conducted *ex parte* and the order was issued on the same date. The 1st Respondent has not explained in its Statement of Objections as to what transpired on 22nd February 2017 and the manner in which the Petitioner was informed of the date of inquiry nor has the 1st Respondent produced any minutes of the discussions held on 26th January 2017 or 22nd February 2017 to contradict the position of the Petitioner that it was not informed of the inquiry.

In the case of **Future Automobiles (Private) Limited vs. Consumer Affairs Authority**[6], this Court, referring to an inquiry held under a complaint made as per Section 13(2), held that:

> "These inquiries are not very formal inquiries. They are *sui generis* but conducted with due regard to the rules of natural justice."

The necessity to have an inquiry was considered by the Supreme Court in **Izadeen v. Director-General of Civil Aviation**[7] where it was held as follows:

> " .... for the Respondent strenuously contended before us that there was no need whatsoever for a formal inquiry. The "inquiry team" had probed all aspects that need to be considered and had questioned the

[6]Supra.

[7] (1996) 2 Sri LR 348 (at page 354); judgment by Chief Justice G.P.S. De Silva. Cited in Lankem Ceylon PLC vs Consumer Affairs Authority and Others; CA (Writ) Application No. 245/2011; CA Minutes of 30th October 2014. Judgment by Anil GUneratne,J.

Respondent and the student pilot on all relevant matters. With these submissions, I find myself unable to agree. The inquiry conducted by the "inquiry team" was at best an inquiry of a preliminary nature. In my view, the Respondent cannot possibly rely on the statement of the Petitioner and his student pilot recorded on 1st May 1993 as constituting compliance with the rules of natural justice. There is no material on record to show that the Petitioner was informed at that stage of the precise nature of the allegations against him. He had no opportunity whatever of calling evidence in support of his position. As far as the Petitioner was concerned, the inquiry concluded in a matter of a few hours on the 1st of May itself. It was not even the finding of the Court of Appeal that a formal inquiry was unnecessary in the facts and circumstances of this case".

Justice Kulatunga, agreeing with the judgment of Chief Justice G.P.S. De Silva, held as follows in the same case:

"I do not agree with the submission of learned counsel for the Respondent that there was no need whatever for a formal inquiry. None of the decisions cited in support of that submission has application to this case. In Ridge v. Baldwin,[8] Lord Hodson summed up thus:

"No one, I think disputes that three features of natural justice stand out - (1) the right to be heard by an unbiased tribunal, (2) the right to have notice of the charges of misconduct, (3) the right to be heard in answer to those charges."

[8] (1964) AC 40 at 132.

In **Fountaine v. Chesterton** cited in **John v Rees**[9], Megarry J, referring to the above dicta of Lord Hodson said:

> "I do not think I shall go far wrong if I regard these three features as constituting in all ordinary circumstances an irreducible minimum of the requirements of natural justice."

Coming back to the facts of this case, it is clear to this Court that the Petitioner has been made aware of the nature of the complaint made against it by the 4th Respondent, for the reason that a copy of the complaint '**P2**' was sent to the Petitioner together with '**P3**'. It is also clear that the 1st Respondent held an inquiry into the complaint of the 4th Respondent. However, no material has been placed before this Court that adequate notice of the inquiry that was held on 27th April 2017 was given to the Petitioner thus depriving it of the opportunity to participate at the inquiry. Even though the background facts are admitted, this Court is in agreement with the submission of the learned Counsel for the Petitioner that it was not informed of the hearing that was held on 27th April 2017 and thus, was not afforded a hearing at which it could have placed its side of the story. If the Petitioner was absent on 27th April 2017, the 1st Respondent could very well have re-fixed the inquiry for an early date and informed the Petitioner to be present on the next date, especially since the Petitioner had honoured the notices '**P3**' and '**P4**' and participated at the discussions. The fact that the 1st Respondent need not have rushed is evident when one considers the fact that '**P5b**' was dispatched almost five months after 27th April 2017.

[9] (1969) 2 WLR 1294 at 1332.

Before concluding, there is one matter that this Court wishes to advert to. The Petitioner has brought to the attention of this Court that the 4th Respondent has filed action in the District Court with regard to the same accident. While this Court is of the view that the causes of action before the District Court and the 1st Respondent are mutually exclusive, this Court wishes to reiterate that the facts of this application were only considered in so far as it was necessary for a determination of the issues that have been raised by the parties in this application and that this Court has not reached any determination with regard to the liability of the Petitioner, to compensate the 4th Respondent.

In the above circumstances, this Court issues a Writ of Certiorari in terms of paragraph (b) of the prayer to the petition quashing the decision contained in '**P5b**'. This Court directs the 1st Respondent to afford the Petitioner and the 4th Respondent a hearing, where they would have the opportunity of placing oral and documentary material in support of their respective positions, and thereafter make an order, with reasons for such order, within two months from the date of this judgment. The Writ of Prohibition sought in paragraph (c) of the prayer to the petition is therefore rejected. This Court makes no order with regard to costs.

Judge of the Court of Appeal