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

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Case No: CA/WRIT/182/2024

1. Laugfs Gas PLC.
   No.101, Maya Avenue,
   Colombo 06.

2. W.K.H. Wegapitiya
   Chairman
   Laugfs Gas PLC
   No. 101, Maya Avenue,
   Colombo 06.

PETITIONERS

Vs.

1. Hon. Attorney General
   Attorney General's Department
   Colombo 12.

2. Hon. Shehan Semasinghe
   State Minister of Finance
   The Secretariat,
   Colombo 01.

3. Hon. R. Siyambalapitiya
   State Minister of Finance
   The Secretariat,
   Colombo 01.

4. K.M. Mahinda Siriwardana
   Secretary to Treasury and
   Ministry of Finance, Economic
   Stabilization and National
   Policies,
   The Secretariat,
   Colombo 01.

5. Suresh Shah
6. Dilani Alagaratnam
7. Ajith Gunawardene
8. Murtaza Jafferjee
9. Nisanka Weerasekara
   5th to 9th Respondents being
   Members of the Special Cabinet
   Appointed Negotiating Committee
   of the "State Owned Enterprise
   Restructuring Unit",
   03rd Floor, Lotus Building,
   Temple Trees,
   Colombo 03.

10. Sunil Hettiarachchi
    Deputy Director General
    (Administration and Reforms)
    State Owned Enterprise
    Restructuring Unit,
    3rd Floor, Lotus Building,
    Temple Trees,
    Colombo 03.

11. A.M.P.M.B. Athapattu
12. Chamath Gunaratne
13. G.M.A. Bandara
14. Dhammika Mallikarachchi
15. Mahesha Ranasoma
16. Rimoe Saldin

17. Aruna Perera

All of 03rd Floor, Lotus Building,
Temple Trees, Colombo 03.

11th-17 Respondentsbeing
Members of the Cabinet
Appointed Special Project
Committee for Litro Gas Lanka
Limited and Litro Gas Terminals
Private Limited.

RESPONDENTS

Before: Hon. D.N. Samarakoon, J.

Counsel: Dr. Romesh De Silva P.C., with Mr. Suren De Silva instructed by Mr. Sanath Wijewardane for the Petitioners.

Mr. Milinda Gunathilake A.S.G., P.C., with Ms. Navodi De Soyza, S. C. for the 1st Respondent.

Supported on: 28.03.2024

Written Submissions: 04.04.2024 by the Petitioners.

04.04.2024 by 1st to 4th and 10th Respondents.

Decided on: 29.04.2024

D.N. Samarakoon, J

The petitioners are LAUGFS GAS PLC and W. K. H. Wegapitiya, who is its Chairman.

The written submissions of the petitioner dated 04.04.2024 says, that, following questions need not be, not necessary to be and or cannot be considered at this stage,

(i) Facts – because the court satisfied on a prima facie basis issued notice on the respondents

(ii) Whether clause 4.5(a) of P.16 is reasonable

(iii) Whether paragraphs 4 and 5 in section B of Annexure 4 [P.16] is reasonable

(iv) Whether the principle of anti monopoly is a part of the Law of Sri Lanka and / or is reasonable

Items (ii) to (iv) are mentioned at paragraph 26 of the above written submissions.

Nevertheless, the petitioners say, at paragraph 31, that, in any event and without prejudice, what is sought to be attacked in this case is Clause 4.5(a) and paragraphs 4 and 5 in section B of Annexure 4 of the P.16.

Clause 4.5(a) of the Bid Document, as reproduced by the petitioners at paragraph 49 of their written submissions reads thus,

> "Clause 4.5(a) of the Bid Document dated 16th January 2024 -
>
> "A Prospective Bidder may be disqualified from the Bidding Process and excluded from further consideration for the following reasons in GoSL 's opinion:
>
> The Prospective Bidder (in case of a Consortium, and Consortium Member) or its Connected Party is operating in the same sector as the Company in Sri Lanka and in the event such Prospective Bidder is the Successful

Bidder, the Post Divestiture Market Share would be 50% (fifty percent) or more. It is hereby clarified that the above threshold of Post Divestiture Market Share shall be calculated only for such Prospective Bidders (in case of a Consortium, and Consortium Member) or its Connected Party that operates in the LPG sector in Sri Lanka. It is the policy of the GoSL to promote contestable markets and in a similar way it will apply to the LPG market in Sri Lanka."

Paragraphs 4 and 5 in section B of Annexture 4 of the Bid Document reads thus,

"4. A Prospective Bidder must: have a minimum Net Worth of at least USD 100,000,000 (United States Dollars one hundred million) or its equivalent. Such Net Worth should be calculated based on its latest audited financial statements which must be dated not earlier than 31 December 2022 or the last day of the entity's fiscal year, whichever is later.

5. If the Prospective Bidder, is a Consortium, the combined Net Worth of the Consortium Members must be USD 100,000,000 (United States Dollars one hundred million), measured by each Consortium Member's Net Worth in proportion to their proposed shareholding in the Consortium. For avoidance of doubt, this means that if a Consortium Member has 25% (twenty five percent) shareholdings in the Consortium, such Consortium Member must have a minimum Net Worth of USD 25,000,000 (United States Dollars twenty five million).

Where the Net Worth is expressed in a currency other than USD, the Prospective Bidders are required to demonstrate its Net Worth by taking the equivalent USD amount at the exchange rate published by the Federal Reserve Board as on the date considered for Net Worth.

A Prospective Bidder must provide evidence that it has the Net Worth of at least USD 100,000,000 (United States Dolars one hundred million) or its equivalent for the Proposed Transaction. Such evidence shall be in the

form of a certificate dated on or after the date of issuance of this REOI, issued by a practicing chartered accountant or by any other professional having equivalent qualification and permission/license to practice from a governmental or regulated authority of any jurisdiction".

The state represents 01st to 04th and the 10th respondents.

They are,

01. The Attorney General
02. Shehan Semasinghe State Minister of Finance
03. R. Siyambalapitiya State Minister of Finance
04. K. M. Mahinda Siriwardane Secretary to the Treasury and Ministry of Finance, Economic Stabilization and National Policies

10. Sunil Hettiarachchi Deputy Director General (Administration and Reforms) State Owned Enterprises Restructuring Unit

They state in written submissions filed on their behalf dated 04.04.2024, among other things, that,

> "(a) **The Petitioner after having submitted their bid, cannot now challenge a particular clause of the tender document as they are now bound by the clauses of the tender documents**.
>
> .....
>
> 8. If the Petitioners were of the position that clause 4.5(a) was ultra vires/unreasonable, the Petitioner ought to have then challenged the said clause at their earliest opportunity when they first got to know about the said clause. This was on 16.01.2024 as evident on the face of P 16. However, without doing so, the Petitioners tendered their bid.
>
> 9. **The mere submission of the bid alone estops the Petitioner by their own conduct from challenging the terms of the Bid. By submitting an**

expression of Interest the Petitioners have implicitly accepted that all terms and conditions of the document marked P.16 would form the basis of selection . ."[1]

What does Sir William Wade say about this kind of estopple in his "Administrative Law," 12th Edition?

"A. ESTOPPEL: BASIC PRINCIPLES

The basic principle of estoppel is that a person who by some statement or representation of fact causes another to act to their detriment (*Norfolk CC vs. Secretary of state for the Environment [1973] 1 W. L. R. 1400*) in reliance on the truth of it is not allowed to deny it later, even though it is wrong. Justice here prevails over truth. Estoppel is often described as a rule of evidence, but more correctly it is a principle of law. (*Canada & Dominion Sugar Co Ltd vs. Canadian National (West Indies) Steamships Ltd [1947] A. C. 46 at 56).* As a principle of common law it applies only to representations about past or present facts. But there is also an equitable principle of 'promissory estoppel' which can apply to public authorities. (*Robertson vs. Minister of Pensions [1949] 1 K. B. 227*). In a class by itself is estoppel by judgment, res judicata, discussed below. (below page 201). This last is also known as issue estoppel, since it is a rule against the relitigation of the same issue between the same parties." [page 277]

In the present case, the petitioner says, that, clause 4.5(a) is unreasonable. So that clause is then for the detriment of the petitioner. But the petitioner without challenging the same tendered its bid. It is a little different to what was discussed in the above passage in mechanism. But the principle is similar. By tendering a bid, knowing about the existence of clause 4.5(a), the petitioners represent to the

[1] [The dots appear in the above written submissions. As paragraph 9 is not a passage quoted from elsewhere it appears that the dots serve no purpose. But they are reproduced here in quoting paragraph 9 verbatim].

maker of that clause that the petitioners have no grouse about the same. Hence it appears that they cannot do so later.

Wade continues,

> "Legal rules about estoppel and waiver sometimes seem to be applicable to public authorities in the same way that they apply to persons." [page 277]

So the emphasis of Wade here is to instances where a public authority, a country council or a city corporation, etc., is estopped. But his above words, that, "….seem to be applicable to public authorities **in the same way that they apply to persons**", makes it clear, that, the same principle applies in reverse to a person, such as the 01st and or the 02nd petitioner too.

The learned author continues,

> "A city corporation may be estopped from denying that payments made to it in satisfaction of a liability for rates are 'rates actually levied', (*North Western Gas Board vs. Manchester Corporation [1964] 1 WLR 64*) and a county council may, by giving an employee a certain status for superannuation, estop itself from denying that status later. (*Algar vs. Middlesex County Council [1945] 2 All E R 243*). Similarly a public authority which lets land on lease is bound by the usual rule that acceptance of rent with knowledge of a breach of covenant by the tenant amounts to waiver of the lessor's right of forfeiture for the breach. (*Davenport vs. Rex (1887) 3 App Cas 115*). A local authority which agrees that a landowner may have access to a road from a particular plot may not, after the owner has fenced the plot and agreed to sell it, revoke the permission given. (*Crabb vs. Arun DC [1976] Ch. 179*). If they negotiate the purchase of land for road widening and encourage the owner to incur expenditure on an alternative site, they may not then discontinue the purchase. (*Salvation Army Trustee Co vs. West Yorkshire CC (1980) 41 P & CR 179*)". [page 277]

> "But, just as with contracts, the ordinary rules must give way where their application becomes incompatible with the free and proper exercise of an authority's powers or the due performance of its duties in the public interest. Where the normal principles of justice are forced to give way, hard cases naturally result. As discussed below, it is possible for a citizen to be seriously misled by a public authority in a manner which ought, under the normal rules, to give rise to an estoppel which would compel the authority to stand by its representations; but there may be no legal remedy." [page 277]

It is not the position of the petitioners that they tendered the bid having been misled about the scope of clause 4.5(a) but later realized its import. It is plain and straightforward as to what it says.

The position of the petitioners is that the clause 4.5(a) is unreasonable. Hence it is pertinent to consider what Wade says next about estoppel and ultra vires, because whether alleged or not ultra vires could be a cause for unreasonability.

B. ESTOPPEL AND ULTRA VIRES

> "In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. **In other words, no estoppel can legitimate action which is ultra vires.** Thus, where an electricity authority, by misreading a meter, undercharged its customer for two years, it was held that the accounts it delivered did not estop it from demanding payment in full, (*Maritime Electric Company vs. General Diaries Ltd [1937] A. C. 610*) for the authority had a statutory duty to collect the full amount, and had no power to release the customer, expressly or otherwise. Where a minister took possession of land under statutory powers of occupation which did not extend to the grant of leases, he was not estopped from denying that he had granted a lease, even though he had expressly purported to 'let' the

land to a 'tenant.' (*Minister of Agriculture and Fisheries vs. Matthews [1950] 1 K. B. 148*). The result was the same where the supposed landlord was a local authority which had failed to obtain the requisite consent from the minister, so that the lease was void. Accordingly, the local authority was at liberty to deny the validity of their own 'lease', contrary to the rules which govern private lettings. (*Rhyl UDC vs. Rhyl Amusements Ltd [1959] 1 W. L. R. 465*). No arrangement between the parties could prevent either of them from asserting the fact that the lease was ultra vires and void. **Nor can any kind of estoppel give a tribunal wider jurisdiction than it possesses**. (*Secretary of state for employment vs. Globe Electric Thread Co Ltd [1980] A. C. 506*)". [Emphasis added in this order]. [page 278]

The rules embodied in the above passage are,

(i) Estoppel does not permit a public body to bind a person on what is ultra vires and if that is ultra vires the person who acts on it will not be prevented from resiling from what he represented based on that clause, etc.,

(ii) If the "promise" extended by the public authority to a person is ultra vires, then, the public authority also is not bound from the same

In both (i) and (ii) it appears that the promise, clause, condition etc., becomes a nullity.

Wade continues,

"Similarly, the principle of estoppel cannot prevent a change of government policy. A government department which encourages an airline to invest in aircraft on the understanding that its licence will be continued is not estopped, if there is a change of government and a reversal of policy, from withdrawing the licence. (*Laker Airways Limited vs. Department of Trade*

[1977] Q. B. 643[2]). Many people may be victims of political vicissitudes, and 'estoppel cannot be allowed to hinder the formation of government policy'.

Estoppels have, however, been allowed to operate against public authorities in minor matters of formality, where no question of ultra vires arises. In one case Lord Denning MR said: (Wells vs. Minister of Housing and Local Government [1967] 1 W. L. R. 465).

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[2] However Laker Airways decision of the House has been criticized by some text writers. It appears that the Court of Appeal judgment of Denning M. R. is the sounder one. Further Harry Woolf was the junior treasury counsel in the original case Laker Airways Ltd., vs. Department of Trade [1977] Q. B. 643. The other airlines who objected to the new idea of Sir Freddie Laker, who started Laker Airways in 1966, to have what was called a "sky train" between England and the United States, which enabled passengers to go to an Air Port and buy a ticket and board a plane, without the hazel of bookings through Travel Agents etc., or even directly from the airline, having waited for a considerable time; and if not paying an exorbitant sum to reserve a seat, which could have started in 1973 or a half a century ago, instituted cases against Laker Airways. Some of them were BRITISH AIRWAYS BOARD v. LAKER AIRWAYS LTD. AND OTHERS [1983 B. No. 342] and BRITISH CALEDONIAN AIRWAYS LTD. v. LAKER AIRWAYS LTD. AND OTHERS [1983 B. No. 377]. It is said, that, "At the hearing of their appeals British Airways and British Caledonia relied upon the Order and directions by the Secretary of State under the Act of 1980. Lakers stated that they wished to challenge the validity of the Order and directions and applied to Woolf J. for leave to apply for judicial review. The refusal of such leave was followed by a renewal of the application to the Court of Appeal which was heard concurrently with B.A.'s and B.C.'s appeals. [This quotation is from the above two cases reported at [1984] Q. B. 142 at page 143. Sir Stephen Sedley, in his lecture, "The Lion Beneath the Throne: Law as History," said,

"Lord Woolf in his 1989 Hamlyn Lectures noted without rancour that the string of celebrated public law cases which he lost as Treasury counsel over little more than a year – Tameside, Congreve, The Crossman Diaries and Laker Airways - had (in his words) all contributed to the development of administrative law".

Harry Woolf is presently the chief editor of De Smith's Judicial Review 7th edition.

[See., The Caucasian Chalk Circle (1944) by Bertolt Brecht Digitalized by RevSocialist for SocialistStories, Chapter 5 "The Story of the Judge"].

In the three cases, Congreve, Laker Airways and Tameside the courts granted relief, although in Laker Airways the subsequent litigation stultified the effect of Lord Denning's decision in the Court of Appeal, as a result of which if one makes a search in the internet today (in 2023) on the keyword "Sky Train", it shows a "medium-capacity rapid transit system serving the Metro Vancouver region in British Columbia, Canada" and such other rails fixed on bridges and a reference to "Laker Airways" the institution founded by Sir Freddie Laker in 1966 and its demise due to transatlantic monopoly of United States foreign trade (as alleged by Laker) reported as out of court settlements.

Hence the institution founded by Sir Freddie Laker in 1966 and its demise due to transatlantic monopoly of United States foreign trade (as alleged by Laker) prevented the traveler by air of the convenience of the "sky train" system; and there was no other Freddie Laker born in this world for the next fifty years. This is an example of monopoly affecting the consumer.

> Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on technicalities.

He then held that the court could ignore the fact that the proper statutory application had not been made before a planning authority's determination, since the authority itself had led the landowner to suppose that it was not required; and the authority was therefore estopped from taking the objection. The same doctrine was applied in a case where a mother was out of time in lodging a statutory notice of objection to a local authority's order assuming parental rights over her child; the authority was estopped from insisting on the time limit because its officers had misled the mother into supposing that a previous notice of objection was still effective. (*Re L (AC) (an infant) [1971] 3 All E R 743*). Where a public authority abuses its powers, a strong obiter dictum in the House of Lords holds that it may be estopped. (*Regina (Anufrijeva) vs. Home Secretary [2003] UKHL 36*)". [page 278,279]

If the position of the petitioners that clause 4.5(a) is unreasonable is correct, then, most probably it resulted from an abuse of power by its maker. But here the situation becomes different, because, the petitioners acquiesced with it.

Hence it is pertinent to consider what Wade says on "Waiver and Consent."

> "7. WAIVER AND CONSENT
>
> A PRIMARY RULES
>
> Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from it. But no rigid distinction need be made, since for present purposes the law is similar (*But note the distinction drawn in R (Hill) vs. Institute of Chartered Accountants in England and Wales [2013] EWCA Civ 555, a natural justice case discussed morefully*

above page 223, between a particular procedure which is not a breach of natural justice because all parties have consented in advance and a breach of natural justice which is waived). The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again, the principle of ultra vires must prevail when it comes into conflict with the ordinary rules of law (Previous two sentences approved in Cropp vs. A Judicial Committee [2008] NZSC 46). A contrasting rule is that a public authority which has made some order regulation is not normally at liberty to waive the observance of it by exercising a dispensing power. The principle here is that law which exists for the general public benefit may not be waived with the same freedom as the rights of a private person. In other cases, where neither of these rules is infringed, waiver and consent may operate in a normal way so as to modify rights and duties.

ln one case a tenant had applied to a rent tribunal and obtained an order substantially reducing his rent, but later discovered that the house had been let at a date which put it outside the tribunal's jurisdiction. He then applied to the county court, which in that case would have jurisdiction. The High Court granted mandamus to compel the county court to decide the case, despite the fact that both parties had previously acquiesced in the rent tribunal's order. (*Regina vs. Judge Pugh ex p Graham [1951] 2 K B 623*). The issue was one of jurisdictional fact and the court before which it was raised was obliged to determine it. In a planning case concerning a caravan site, the Court of Appeal held that the site-owner could apply for a declaration that the planning authority's enforcement notice was bad in law, even though he had pleaded guilty to contravention of the notice in previous criminal proceedings (*Munnich vs. Goldstone Rural District Council [1966] 1 WLR 427*). If the notice was in reality bad, no previous acquiescence could preclude him from contesting it. Exactly the same

point determined an earlier enforcement notice case in which the landowners on whom the notice had been served applied for planning permission on the footing that the notice was valid. They were held entitled, nevertheless, to dispute its validity subsequently. (*Swallow & Pearson vs. Middlesex County Council [1953] 1 WLR 422*). The House of Lords confirmed this principle in a case where a party had acquiesced in proceedings before the Lands Tribunal which were later held to be outside that tribunal's jurisdiction. Lord Reid said: 'in my judgment, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction (*Essex Incorporated Congregational Church Union vs. Essex County Council [1963] A. C. 808; London Cpn vs. Cox (1867) L R 2 H L 239 at 283; Bradford City M C vs. Secretary of State for the Environment (1986) 53 P & C R 55*).

It follows that resort to a statutory remedy cannot be a waiver of the right to seek judicial review later. (*See below, page 601*)".

Therefore **if** clause 4.5(a) is unreasonable and **if** that resulted from the powers of the authority that made it, then acquiescence to it does not bind the petitioner.

But can clause 4.5(a) be ultra vires or otherwise unreasonable or disproportionate?

It is pertinent to consider the report titled "**TOWARDS A NEW COMPETITION LAW IN SRI LANKA**" 2002 with a foreword by Dr. Saman Kelegama, Institute of Policy Studies and preface by Ms. Damaris Wickremesekera, Law & Society Trust.

The report says,

> "There is also a growing realisation that mutually supportive trade and competition policies can contribute to sound economic development and that effective competition policies help to ensure that the benefits of liberalisation and market-based reforms flow through to all citizens.
>
> The benefits of competition policy, including greater social welfare, as well as enhanced producer efficiency, were essential elements in selling this concept to the developing nations. However, the impact of the introduction of such policies, or, elements of such policies, among the developing nations has not been significant[3]."
>
> (from the foreword)

It also says,

> "This is the Sri Lanka country report, which will feed into the first phase of the Comparative Study of Competition Law Regimes of Select Developing Countries of the Commonwealth, also known as the 7-Up Project, undertaken by the Consumer Unity & Trust Society (CUTS) with the support of the Department for International Development, UK. The Sri Lanka component of study is being jointly conducted by the Institute of Policy Studies (IPS) and the Law & Society Trust (LST).
>
> **The motivation behind the project was increasing international concern with regard to anti- competitive practices, and the need to put in place an appropriate legal framework to deal with such practices**. The research project is a comparative study of the competition regimes of seven developing countries in the Commonwealth. It aims to identify measures that would assist developing countries in strengthening their competition laws and introducing such laws where they are absent.

[3] https://www.ips.lk/wp-content/uploads/2017/01/02_Towards-a-New-IPS.pdf

Beside Sri Lanka the other countries in which the study has been undertaken are India, Kenya, Pakistan, South Africa, Tanzania and Zambia.

The proposal for a new Consumer Protection Authority in Sri Lanka, which is still awaiting parliamentary approval, would replace the Fair Trading Commission Act of 1987 and the Consumer Protection Act of 1979. This represents the first attempt to combine consumer protection with market regulation of international trade, and will replace the existing Fair Trading Commission and the Department for International Trade with a single body. However, given the absence of a co-ordinated approach to the promotion of competition in Sri Lanka, and the gaps in the proposed bill, the need for analysis of competition policy is still great.

It is most timely in the light of current developments in competition policy in Sri Lanka, and the need to encourage consumer organisations to engage in their activities with renewed strength. The Institute of Policy Studies and the Law & Society Trust are happy to be involved in this project and would like to thank Thushari de Zoysa and Pubudini Wickramaratne Rupesinghe for their hard work in preparing this country Report."

(from the preface) [Emphasis added in this order].

Therefore, at least, from as far back as 2002 [and undoubtedly prior to that too] the policy of the government was to encourage competition and to prevent anti competitive practices.

The above report refers to

(i) A Competition Protection Authority
(ii) A Competition Protection Council and
(iii) Consumer Protection Act and 1979 Consumer Protection Act (1979)

As the preface said, at the time of this report the 2003 (present) Consumer Affairs Authority Act No. 9 of 2003 was in the process of being enacted.

The said Act of 2003 says in its sections 34 and 35 as follows,

"PART III

PROMOTION OF COMPETITION AND CONSUMER INTEREST

Authority to carry out investigation into anti-competitive practices.

34. (1) The Authority may either of its own motion or on a complaint or request made to it by any person, any organization of consumers or an association of traders, carry out an investigation with respect to the prevalence of any anticompetitive practice.

(2) It shall be the duty of the Authority to complete an investigation under subsection (1), within one hundred days of its initiation.

Anti-competitive practice.

35. For the purpose of section 34, an anti-competitive practice shall be deemed to prevail, where a person in the course of business, pursues a course of conduct which of itself or when taken together with a course of conduct pursued by persons associated with him, has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition in connection with the production, supply or acquisition of goods in Sri Lanka or the supply or securing of services in Sri Lanka".

Hence it is clear, that, clause 4.5(a) has come to the relevant document on the basis of the government policy of preventing anti competitive practices and promoting competition.

The next question is whether, the court, in judicial review can question the Ministerial policy or planning policy.

A case to be considered is **Save Britain's Heritage vs. Number 1 Poultry Ltd. [1991] 1 WLR 153** decided in the House of Lords.

Lord Bridge of Harwich said,

> "Perhaps the central issue in the appeal is the issue relating to planning policy." (page 168)

In this case, the application of the owners to demolish certain property in the city of London and to rebuild a new structure was rejected by the Secretary of State in 1985, who had to consider, among other things, whether the building should be one that should be preserved. They were called "listed" buildings and the building in question was listed as Grade II G. V. or Group Value, the value of the building derived by its position in a group of buildings.

Here the local planning authority refused the application of the owners and when they appealed to the Secretary of State [*on a subsequent occasion*] the Secretary of State accepting his inspector's recommendations held that the architectural merits of the proposed replacement building were such as to override his stated policy, set out in paragraph 89 of D. O. E. Circular 8/87, that listed buildings capable of economic use should not be demolished. An objector to the proposed redevelopment sought under section 245 of the Town and Country Planning Act of 1971 to quash the Secretary of State's decision on the ground that he had failed to give sufficient reasons for his decision as required by rule 17(1) of the Town and Country Planning (Inquiries Procedure) Rules 1988 and failed to had regard to, or misdirected himself as to the effect of, his policy relating to consent for demolition of listed buildings. The Divisional Court dismissed that application, but the Court of Appeal, including Woolf J., quashed the Secretary of State's decision. On appeal to the House the appeal was allowed.

In this case, on analogy, the clause 4.5(a) represents the policy of the state.

Lord Bridge of Harwich said,

> "The true gravamen of Save's complaint in relation to the policy issue is that by his decision in this case the Secretary of State has sanctioned a departure from the declared policy in Circular 8/87 without specifying in terms the limits of the exception to the general rule that a listed building may never be demolished to make way for other development if it is still capable of economic use and has thereby set a dangerous precedent for the future. Even if Circular 8/87 laid down such a general rule as admitting of no exceptions, which, as already indicated, I do not accept, it was clearly open to the Secretary of State to make an exception, the decision letter of May 1985 foreshadowed such an exception and the present decision treated the circumstances as justifying such an exception". (page 170)

Another case decided in the House of Lords which was on planning policy was **London Residuary Body vs. Lambeth London Borough Council [1990] 1 WLR 744**.

When the Greater London Council was abolished in 1986, County Hall on the South bank of the Thames became vested in the London Residuary Body which applied for planning permission to use the main block for mixed hotel, residential and general office purposes unconnected with any local government functions, After the inquiry, the Secretary of State disagreed with his inspector and decided that these general office purposes should be permitted. **The Court of Appeal held that this decision should be quashed because the minister had not applied the correct test of competing needs, in this case between those of local government and those of other office users. But the Law Lords unanimously decided that he was obliged to have regard only to "material considerations" and that the amount of weight to be given to these was a matter for his judgment**.

Lord Templeman said,

> "In the present case, the inspector who recommends, took one view and the Secretary of State who decides, took the opposite view. Subsequently, I. L. E. A. which was the only organization worth considering, disappeared from County Hall and from existence. By the Act of 1985, Parliament decided to change the organization of the local government of Greater London in a way which, in the opinion of the Secretary of State, made County Hall redundant for local government purposes. It is not for the court to question the wisdom of Parliament. It is not for the court to order that the main building shall have a splendid future as the home of local government and that the owners from time to time of the main building shall be compelled to let the premises to local government authorities and no one else and to suffer offices to be occupied by public typists to the exclusion of private typists. Consistently with the Act of 1985, the abolition of G. L. C. and the abolition of I. L. E. A. and the dispersion of their functions, the L. R. B. has secured and the Secretary of State has approved, that the main building shall have no future as the home of local government. That is a political decision **and the planning decision follows inexorably...**" (page 755)

In regard to the statement in the above passage, "It is not for the court to question the wisdom of Parliament", it is true that because of the presence of Article 80(3) of the Constitution, the courts in this country cannot do so. But it is the court and no other, that interpret the law. As Chief Justice John Marshall said in William Marbury vs. James Madison, "It is the duty of the judiciary department to say what the law is".

However, in this case it does not appear, at least at this stage, to this Court that clause 4.5(a) is ultra vires, or come under any other disqualification such as unreasonableness, irrationality or disproportionality, etc., which come within

the scope of administrative law. Furthermore, this is not to say, that, the court in judicial review can never question state policy. In the case of **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374**, commonly known as the GCHQ case, the House of Lords ruled that the government acted unlawfully when it used the royal prerogative to ban trade union membership at the Government Communications Headquarters (GCHQ). The court held that the decision was subject to judicial review and that the government could not use prerogative powers to bypass Parliament in matters affecting individual rights. This case marked a significant development in administrative law by establishing the principle that prerogative powers are reviewable by the courts. If the prerogative is subject to judicial review it must naturally follow, that, state policy too is so. But what this Court sees, in respect of clause 4.5(a) is that, if at all, it is for the benefit of the public, whose natural liberty is the basis and source of, not only the public law, but all law.

Hence this Court is not inclined to grant interim orders prayed for.

There is no order on costs.

Judge of the Court of Appeal.