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Case No: HC02CO2699

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

13/05/2004

B e f o r e :

THE HONOURABLE MR JUSTICE DAVID RICHARDS

Between:

(1) PT ROYAL BALI LEISURE
(2) PT JAZIRAH PEMASARAN INTERNASIONAL
trading as
PENINSULA MARKETING INTERNATIONAL **Claimants**

- and -

HUTCHINSON & CO TRUST COMPANY LIMITED **Defendant**

Sean Brannigan (instructed by Charles Russell) for the Claimants
Richard Southall (instructed by Herrington & Carmichael) for the Defendant
Hearing dates: 21, 22, 23, 26, 27, 28, 29 & 30 January 2004 and 2, 3 & 4 February 2004

HTML VERSION OF JUDGMENT

Mr Justice David Richards:

Introduction

1. The claims in this action arise out of two timeshare developments in Bali, Indonesia. The first Claimant, PT Royal Bali Leisure (RBL), is a company incorporated in Indonesia. It developed a timeshare resort called the Peninsula Beach Resort. The second Claimant, PT Jazirah Pemasaran Internasional, trading as Peninsula Marketing International, (PMI) is also incorporated in Indonesia and was established to market the Peninsula Beach Resort. Before that resort was ready to market, PMI was engaged by an unconnected developer to market a separate timeshare resort called Villa Lalu. Both Claimants are owned and operated by two brothers, Roger and Alan Thomas.

2. Timesharing is a relatively recent phenomenon. It operates on the basis that a developer of a resort, hotel or other property sells to purchasers the right to use the property or part of it for a particular week or other period each year for a fixed number of years. Frequently developers engage marketing companies in order to market the timeshares. Timeshare exchange companies exist to

enable timeshare owners to exchange use of their timeshare in one resort for use of another timeshare in a different resort. A resort's membership of a popular timeshare exchange is a strong selling point.

3. There are obvious risks associated with timesharing which have resulted in a good deal of adverse publicity. From the purchaser's point of view, the most obvious risks are that, having bought and paid for a timeshare, the developer fails to develop or maintain the resort; that the timeshare rights are defeated by a sale of the resort; that there may be over-selling of timeshare rights; or that the developer or resort owner may become insolvent. Other participants also face risks. A marketer may find that he sells timeshares which the developer is unable to provide. A developer may be defrauded by a marketer who collects payments for the sale of timeshares but does not account for them to the developer. A timeshare exchange may admit a resort, facilitate exchanges and then find that timeshares in a particular resort are unavailable for any of the reasons mentioned above. These problems are compounded by the fact that timesharing is an international business, with resorts in a large number of different countries, each with their own property laws, and timeshare owners also coming from a large number of different countries.

4. There is therefore pressure to find means whereby protection can be provided to all participants, so that each can feel a reasonable level of confidence in the performance by the others of their obligations. The provision of such protection is the business of the Defendant, Hutchinson & Co Trust Company Limited (HTC). It is owned by Peter Hutchinson who set it up in 1990. His previous experience was in the travel industry, more recently in providing collection agency services for resorts, including some operating as timeshares.

5. The particular form of protection developed by HTC is intended to combine English trust law with the local property law of the country of the resort. A separate trust is established in respect of each resort with HTC as the trustee. The principal asset of the trust are the shares in a non-trading company, usually incorporated in England, to which is transferred title to the resort. Title may be freehold or leasehold or the equivalent under local law. This ensures that the developer cannot dispose of or encumber title to the resort to the disadvantage of the timeshare owners. Similarly it provides protection to timeshare exchange companies. The beneficiaries of the trust are the timeshare owners and the developer, securing their respective interests. The trust is governed by English law, while title to the resort is transferred and held subject to the local property law. HTC does not itself market the resorts nor is it responsible for their management. Its function is limited to protection of the legal rights of occupation of the timeshare owners. Maintenance of the resort and other continuing obligations are a matter for the timeshare owners and development or management companies. HTC may also act as a stakeholder for money paid for the purchase of timeshare interests, but that function does not feature in this case.

6. HTC is currently trustee of some 60 resorts in Europe, 6 in India, 25 in the Far East and 8 elsewhere. It first became involved in Indonesia towards the end of 1995 in relation to a resort called the Royal Bali Beach Club. From the point of view of resort developers and marketers, the appointment of a trustee such as HTC is seen as a strong selling point. This is all the greater where resorts are located in countries which are regarded by prospective purchasers as politically unstable.

7. HTC was appointed as the trustee of both the resorts relevant to these proceedings. In the case of the Peninsula Beach Resort, it was appointed by RBL under a written contract made on 16 July 1998. An interest in the Resort was later transferred to an owning company incorporated in England and held by HTC as trustee, and timeshare rights in the Resort were marketed on that basis. Subsequently, doubts were raised as to whether under Indonesian law a foreign-incorporated company could hold an interest in land. It is RBL's case that it cannot do so, and that therefore no good title was vested in the owning company and HTC was in breach of contract in not establishing a trust structure which could achieve its object. It claims damages for breach of contract. In relation to Villa Lalu, PMI's case is not only that the trust structure would have failed for the same reason as the trust for Peninsula Beach Resort but also and more importantly that the developer did not have title to the property for the full period of the 25-year timeshares marketed by PMI as agent for the developer. PMI had no contract with HTC but its case is that it relied on HTC to ensure the developer had a sufficient marketable title and that it is entitled to damages in negligence for the loss which it suffered.

HTC's Promotional Material

8. HTC produced promotional material comprising documents and videos. This material was supplied to prospective developer clients by way of explanation and promotion of its role and services. For the purposes of this case, it is the material supplied to Roger Thomas in July 1998 which is significant. It is his evidence that he placed reliance on that material in relation to both RBL as developer of the Peninsula Beach Resort and PMI as marketing company for Villa Lalu.

9. The documents supplied to Roger Thomas were a three-fold leaflet entitled "Hutchinson – Service and Security – A Progressive Force in the Timeshare Industry" and eight other documents. The three-fold leaflet contains this description of HTC's role, under a heading "What does a Trustee do":

   "The Trustee's prime responsibility is to protect the interests of the timeshare purchaser, by ensuring that good title to the use of the timeshare weeks is held by the Developer and transferred, on sale, to the Purchaser. By extension, this principle can also be applied to the protection of the Marketer of a project.

   A Deed of Trust is signed, which provides the Trustee with the rules and guidelines for the operation of its day to day activities, and outlines the control over the rights to use the timeshare apartments which is vested in the Trustee.

   This control can take many forms, the choice of which is normally left to the Developer. The one over-riding factor is that the control must enable the Trustee to confirm to the individual Purchaser that their legal rights to use will be respected, no matter what happens to the various parties in the future.

   In some countries the concept of trust is not well developed, but the combination of UK Trust Law with the property laws of the country in which the resort is situated, provide a system with huge benefits to Developer, Purchaser and Marketer.

   The Trust Property is protected from the demise of the Trustee by English Law, whilst any Purchaser's funds held by the Trustee are protected both by the Professional Indemnity Insurance and by the "Acknowledgement of Trust" provided by the Trustee's banker confirming that the client bank accounts are protected against the financial failure of the Trust Company itself."

10. Elsewhere in the leaflet it is said that the trust structure "remains flexible and adaptable enough to function in any country or legal jurisdiction" and "provides protection of the interests of Purchasers, Developers and Marketers alike". The provision of protection by means of the trust system to all three categories of party (purchaser, developer and marketer) is repeated in other parts of the leaflet and in some of the other promotional material. For example a document headed "The Trustee System – Its Strengths and Advantages" states at paragraph 9:

    "Independent Marketers Developers selling through independent marketers can offer the Marketer and his client security, whilst protecting the developers own position. The Trust System can be adapted to prevent the situation that has arisen in the past whereby a Developer has lost many hundreds of thousands of dollars to an unscrupulous Marketer."

11. A document headed "Guidelines for Developers – Chronological Schedule of Events" is important. In paragraph 4 it explains that, following agreement to appoint HTC as trustee, the proposed project documentation is discussed and any specific requirements are incorporated into the standard form documents prepared by HTC. The project documentation includes a deed of trust, rules of occupation of the resort, a draft purchase agreement for a timeshare unit, and a draft timeshare ownership agreement. Paragraphs 5 and 6 continue as follows:

    "5. The acceptance of the Project Documentation in its final form (including the Purchase Agreements) should be one of the developer's first priorities, in order that the Trustee can proceed with the arrangements for printing of same.

Under no circumstances can sales be permitted to commence until such documentation has been agreed between the trustee and the developer and signed accordingly.

6. The developer will be required to provide various documents as outlined in the Trustee Questionnaire. On receipt of these, a lawyer will be appointed by the Trustee to undertake the legal procedures necessary in transferring the apartments into trust, and the estimated charges of the lawyer so appointed by the Trustee, will be notified to the developer. It is usual for the lawyer acting for the Trustee to liaise directly with the developer's lawyer in all matters relating to the transfer of title, however, it is not permissible for the Trustee and the developer to appoint the same lawyer."

12. Mr Thomas was also supplied with a 10-minute promotional video. It too emphasises the protection given by the trust system to purchasers, developers, and marketers, saying for example:

"Service and security for the marketer, by providing them with a very effective "

and:

[HTC has] "a proven track record in protecting the interests of the developer, the marketer and the purchaser".

13. Mr Hutchinson agreed in cross-examination that these documents had been prepared with care. He regarded them as accurately explaining the key features of HTC's trust system although not of course containing all the details. The entire portfolio of documents was prepared for developers, in order to explain and indeed market the system to them. Some of the documents were intended to have a wider circulation. The three-fold leaflet was intended to be read by developers, marketers and purchasers. Copies would be given to marketers to provide to actual or prospective purchasers.

14. A number of issues arose in evidence on the system as explained in these documents, which it is convenient to deal with here. First, Mr Hutchinson maintained that the purpose of the trust system is to protect the property rights against the insolvency of the developer, not against other problems associated with those rights such as inadequate tenure. In my judgment, a reader of the promotional materials would not consider its protection to be limited in this way. The clear statement in the three-fold leaflet that

"The Trustee's prime responsibility is to protect the interests of the timeshare purchaser, by ensuring that good title to the use of the timeshare weeks is held by the Developer and transferred, on sale, to the Purchaser"

goes wider than just the developer's insolvency and includes a fundamental problem such as inadequate tenure.

15. Secondly, Mr Hutchinson contended that the system was intended to provide protection to a marketer only if HTC was acting as an escrow trustee, holding payments made by purchasers pending completion of the sale. Again I do not consider that a person reading the material and watching the video would reach that conclusion. Returning to the three-fold leaflet, the next statement after the one quoted in the last paragraph is:

"By extension, this principle can also be applied to the protection of the Marketer of a project."

Further down the same page, there appears:

"In some countries the concept of trust is not well developed, but the combination of UK Trust Law with the property laws of the country in which the resort is situated, provide a system with huge benefits to Developer, Purchaser and Marketer."

These and other references carry a clear message that marketers, as well as purchasers, will benefit from the trust system in a way which is not limited to the holding of funds in escrow. As regards the developer's title, the interests of marketer and purchaser coincide, because if the title is inadequate the purchaser may well claim against the marketer.

16. Thirdly, Mr Hutchinson argued that the effect of the documentation was to indicate to the reader that HTC would ensure that good title was held by the developer only once the whole trust structure was in place. This evidence was inconsistent with his evidence given on the first issue addressed above, and was, I think, prompted by a realisation that his evidence on that issue could not stand with the terms of the documents themselves. This alternative position would, if correct, provide an answer to PMI's claim. As will be seen, title to Villa Lalu had not been transferred into trust when marketing began and during the five weeks or so of marketing which followed.

17. It became something of a mantra for Mr Hutchinson to repeat that purchasers were protected, but only in a completed scheme. However, it also became clear that HTC frequently permitted marketing to start, on the basis that protection was provided by the HTC scheme and using its promotional materials, before the developer's title had been transferred into trust and therefore before the structure was complete. Indeed this is contemplated by the document setting out the chronological schedule of events. Nothing in the documentation would alert a purchaser to a total absence of protection until the trust structure was complete. A purchaser would assume that he had the protection offered by the HTC material. As all agreed that it was intended to be a valuable selling point, there would be no purpose in it unless purchasers could assume that they had the protection of the scheme. Mr Hutchinson candidly admitted that unless he agreed to marketing before the trust structure was complete, most developers would not be prepared to use the scheme. In some cases he would not agree to the start of marketing using HTC materials, but this would depend on his assessment of the risk that the structure would not be completed. A relevant factor would be the standing of the developer. This led in the oral evidence to a distinction between a highly reliable developer, codenamed Disney, and a developer at the other end of the spectrum, codenamed Fred. Mr Hutchinson assessed the developer of Villa Lalu as being closer on the spectrum to Fred than to Disney. In practice, HTC operated with a system providing two stages of protection. The first stage arose when, in the circumstances of a particular resort and developer, HTC was sufficiently satisfied with the arrangements to allow marketing and sales on the basis of the HTC trust system to start. The second stage was when the structure was completed by the transfer into trust of the developer's title to the resort.

18. As will appear later, the promotional material was supplied to Roger Thomas shortly before his first meeting with Mr Hutchinson on 15 July 1998. I accept Mr Thomas' evidence that on reading this material and watching the video his impression was that the system would provide protection to purchasers, developers and marketers. He was favourably impressed with the safeguards which it offered. Mr Hutchinson accepted in his evidence that he explained to Mr Thomas at their meeting that, depending on the circumstances, he was content for marketing on the basis of the trust system to start before title to the resort had been transferred into trust. After signature of the trustee appointment form, the next step was for title documents to be supplied for examination by HTC or its local lawyers. That was, of course, an essential step if HTC were to be able to make good their assurance in the three-fold leaflet that it was its prime responsibility to ensure that "good title to the use of the timeshare weeks is held by the Developer…."

Facts: November 1997 – October 1998

19. The facts relating to the two claims are closely related for the period up to October 1998 which makes it convenient to set them out together. I will then address the issues on PMI's claim relating to the marketing of Villa Lalu, which occurred in September and October 1998. I will then deal with RBL's claim, including the facts after October 1998 which relate solely to its claim.

20. HTC's first contact with either of the resorts occurred in November 1997, in relation to Villa Lalu. The developer of Villa Lalu was nominally a Mr L.A. Ananda (sometimes called Mr Land), an Indonesian citizen. He was in fact a nominee for Mr Lynn Pratt, who was assisted by Mr Tom Waddell. They applied in November 1997 to Interval International, a leading timeshare exchange company based in Miami, for resort membership for Villa Lalu. It was stated in the application form that timeshare rights would be sold for a period of 25 years from 1 June 1998. Interval International's managing director for Asia and the Pacific region, Mr Rick Choate, wrote to Mr Pratt on 17 November 1997 accepting Villa Lalu for membership subject to satisfaction of certain conditions, including the establishment of a trust structure for the protection of purchasers' rights. HTC was recommended.

21. On the same day Mr Choate wrote to Mr Hutchinson, telling him that he had recommended HTC to the Villa Lalu developers and continuing as follows:

    "The only substantive issues we have outstanding are all associated with the legal protection of purchaser interests. Specifically we need to have addressed by the developer how to guarantee the rights of purchasers to use the property in accordance with their purchase agreements, regardless of events which might otherwise inhibit or prohibit the enjoyment of those rights."

    Mr Hutchinson responded quickly by sending Mr Pratt and Mr Waddell a portfolio of documents explaining in general terms the trust structure and the role of HTC and also two videos. The same or substantially the same documents and one of the videos were supplied the next year to Roger Thomas. In his covering fax dated 17 November 1997, Mr Hutchinson wrote:

    "In principle, our main function in life is to assist developers in putting together a legal structure which takes account of all eventualities in both the long and short term, allowing the developer/management company to sell and run the resort with the minimum intrusion, whilst providing the legal protection of the purchasers' right to use".

22. On or about 21 November 1997, HTC was appointed to establish a trust structure and to act as trustee for Villa Lalu. It is clear from the correspondence at this time that Mr Hutchinson knew that it was intended to sell 25-year timeshares.

23. In mid-January 1998 Mr Hutchinson visited Villa Lalu, met Mr Pratt and agreed with him all the details required for the preparation of the trust scheme documentation. Draft documentation was supplied by HTC in February 1998 but nothing of significance appears to have happened until May 1998, when Mr Lee Higgins wrote as the proposed marketer to HTC to enquire what needed to be done to finalise the trust arrangements. In a fax dated 27 May 1998 Mr Hutchinson replied that he was awaiting feedback on the draft documents already supplied and continued:

    "We will also need a lease over the properties concerned or an assignment of the existing leases, for the period being timeshared.

    The details of the lease or lease assignment have not been finalised, though I do not envisage any major problem in this area.

    Finally, the lease or its assignment will have to be notarised locally."

    Importantly, in a fax dated 27 May 1998 to Mr Pratt, Mr Hutchinson wrote:

    "If you remember, you kindly provided me with copies of your leases and their extension. The first step in the process is to identify which units are involved and under which lease they are held. I also note that there is a further payment due on 2010 (in gold) in respect of one lease extension. By my calculations this is not a huge sum of money, but we do need to take account of it in our discussions."

    The fax makes clear not only that Mr Hutchinson had copies of the leases by the date of this letter but also that he had read them.

24. Villa Lalu was held under two leases, in the name of Mr Ananda as assignee. One lease covered an area of 4400 square metres and was described in a note on the lease as "Villa Lalu proper". It was dated 12 January 1989 and had a term of 25 years expiring on 1 February 2014, with a right for the lessee to extend for a further 5 years conditional on a payment to the lessor. The other lease, dated 6 August 1990, covered an area of 1900 square metres described as "Villa Lalu Annex". Its original term of 10 years was extended in 1992 for 20 years from 8 August 2000 to 8 August 2020. The payment securing the first 10 years of that extension was made in 1992-93, but a further payment of "the rupiah value of 793.4 grams of pure gold of 24 carats" was due by 8 August 2010. Mr Hutchinson was obviously referring to this provision in his fax of 27 May 1998.

25. It is an important factual issue as to whether Mr Hutchinson understood that there was a mismatch between the terms of the leases and the sale of 25-year timeshares, whether he discussed this with Mr Pratt and whether it was his understanding that the timeshares to be sold would be for a shorter period expiring no later than 2019. I will return to this issue later in the judgment.

26. Once again the Villa Lalu project went into abeyance as regards HTC in June, July and August. In the meantime there was the first contact between HTC and Roger and Alan Thomas. Their company, RBL (the first Claimant) had acquired in 1990 a lease of land at Jalan Pratama, Tanjung Benoa, Bali. The term of the lease was 20 years, expiring in 2010, but it carried a right of extension to 30 April 2020. In 1998, the Thomas brothers decided to develop a timeshare resort on the site, to be called Peninsula Beach Club. Later in 1998, a problem arose in respect of this lease, as a result of which in December 1998 RBL entered into a joint venture agreement with a company called PT Wisata Ambara Citra (WAC), which held a lease of adjoining land. The initial term of that lease expired on 1 December 2008 but it contained a right of extension for 20 years to 1 December 2028. RBL and WAC agreed to construct and develop a timeshare resort on the site, to be called Peninsula Beach Resort.

27. In about June 1998 Roger and Alan Thomas investigated affiliation of the resort to an international timeshare exchange organisation and met representatives of an organisation called Resorts Condominium International Inc ("RCI"). They were advised that it would be necessary to put safeguards in place to protect the position of both purchasers and RCI, and one means acceptable to RCI was the use of a trust company such as HTC. Alan Thomas had been involved with Royal Bali Beach Club, for which HTC acted as trustee. While back in England, Roger Thomas contacted HTC on 13 July 1998. He spoke to Mr Hutchinson who told him that HTC was the trustee for two resorts in Indonesia. Mr Thomas mentioned his brother's involvement with Royal Bali Beach Club and said that although this was their first venture as a developer, they had some understanding of timeshares and the role of a trustee. On the same day Mr Hutchinson sent him the documents and video to which I referred earlier in this judgment.

28. On 15 July 1998 Roger Thomas met Mr Hutchinson at HTC's offices in Camberley. The meeting lasted an hour or two and a note was taken by Angela Lenman, Mr Hutchinson's assistant, who was also present. It was not intended to be a comprehensive note of the meeting, but more a record of information which Mr Hutchinson needed in order to proceed further. It mentions that PMI would be the marketing company for the Peninsula resort. It records that RBL has a 30-year lease expiring in 2020 and that Mr Hutchinson said that the lease would need to be assigned to HTC as trustee or to a non-trading subsidiary owned by the trust. Among the list of tasks or responsibilities at the end of the note is "P.H. arrangements for assignment of lease". Mr Hutchinson had only a sketchy recollection of the meeting, but he believed that he would have explained how the trust structure worked, including the transfer of property rights into trust. Roger Thomas remembers Mr Hutchinson saying that HTC would "carry out a thorough due diligence on all aspects of a resort's legality". I doubt whether those words, or anything quite so all-embracing, was said but Mr Hutchinson accepted that it is likely that he said something to the effect that they would carry out due diligence as regards transferring the property rights into trust and would appoint lawyers for that purpose. Mr Hutchinson's evidence was that he agreed to look at the arrangements for the assignment of the lease. The intention to appoint lawyers to act on behalf of HTC in the assignment of the lease was confirmed in a fax dated 17 July 1998 from Mr Hutchinson to RCI. After a discussion with his brother Alan who was in Bali, Roger Thomas on behalf of RBL signed the agreement for the appointment of HTC as custodian trustee on 16 July 1998. He had already told Mr Hutchinson at the meeting that they would not wish to appoint HTC as an escrow agent to hold purchase money paid by timeshare purchasers. RBL paid £1200 as the first instalment of the acceptance fee and placed an order worth £475 for marketing materials described, without any apparent irony, as "credibility materials".

29. The Trust Deed in the form prepared by HTC was executed by Roger Thomas on behalf of RBL and by HTC and was dated 23 July 1998. Recitals A and B state as follows:

    "A. The Vendor owns the Exclusive Rights of Occupation at a Resort known as Peninsula Beach Club ("the Resort") where it is intended to secure for the Holiday Owners Exclusive Rights of Occupation of certain fully constructed and furnished apartments at Jalan Pertama, Tanjung Benoa, Bali, Republic of Indonesia, for specified periods each year, with other ancillary rights of use, while Exclusive Rights of Occupation are or will be owned by charged or leased to registered or vested in the name of Peninsula Beach Club Title Ltd, a limited company incorporated in England, ("the

Owning Company"), the sole members of which are the Trustee and/or nominees of the Trustee or Custodians.

B. The Rules of Occupation of the Resort provide that the Trustee shall use its best endeavours to keep the respective Apartments free from any mortgage, lien or encumbrance and to ensure that nothing is done which might prejudice the Exclusive Rights of Occupation of the Apartments by the Holiday Owners until the Termination Date."

Following discussion of their terms HTC provided Rules of Occupation on 21 July 1998. In a fax dated 24 July 1998 to RCI, Mr Hutchinson confirmed that they would be "addressing the assignment of the lease to ourselves" the following week.

30. Development of the Peninsula Beach Club did not then proceed as anticipated, as a result of various problems including a dispute with the lessor of the property. As already mentioned, the project proceeded later with the development of the Peninsula Beach Resort on the land leased to WAC and with HTC continuing as the Trustee. In the meantime, the understanding of Roger and Alan Thomas as to the role and protection provided by HTC, derived from the promotional materials and discussions with Mr Hutchinson, provide the background to PMI's case in relation to Villa Lalu.

31. In mid-July 1998 it appears that Mr Choate of Interval International spoke to Mr Hutchinson to enquire about progress on Villa Lalu. He was told that everything necessary to finalise the trust had been sent out to Mr Pratt and was awaiting signature.

32. The Villa Lalu project revived in about August 1998. Mr Pratt needed a marketer for it and on 1 September 1998 there were discussions between Mr Waddell, representing Mr Pratt, and Roger and Alan Thomas for the appointment of PMI to that role. There was no connection between these discussions and the appointment of HTC as the Trustee of RBL's Peninsula Resort development. The Thomas' were told early in September that HTC was the trustee for Villa Lalu and that the resort would be affiliated to Interval International.

33. Events developed quickly in September 1998. On 1 September 1998 Mr Pratt faxed Mr Hutchinson to say that he was thinking of appointing PMI as marketer and asked for his views of Roger and Alan Thomas who had mentioned HTC's position as trustee of the Peninsula resort. On the same day Mr Hutchinson faxed Mr Waddell to say:

"I know that by now you will be virtually ready to commence sales and marketing, but I felt I should emphasise to you that without at least a couple of units in trust we will not be in a position to issue certificates etc.

Also you may well be aware, that Interval International are awaiting confirmation from ourselves that apartments are in trust before they can finalise all their documentation."

Mr Waddell replied by e-mail on 3 September 1998, to say that he had notified Mr Pratt of the need to place two units in trust and that PMI would be appointed as marketer subject to the approval of Interval International and agreement on financial terms. Mr Hutchinson's e-mail reply on 7 September 1998 stated that they had not heard from Mr Pratt with regard to placing units in trust. On 9 September 1998 Mr Choate informed Roger Thomas by fax that Interval International would approve PMI's appointment as marketer. Meanwhile it appears from an email dated 12 September 1998 from Mr Choate to an Interval International executive in Miami that he had advised both Mr Waddell or Mr Pratt as developer and PMI as marketer that he would not permit marketing of Villa Lalu as part of the Interval International exchange programme "until the trust is in place".

34. Mr Choate picked up on this in a fax on 12 September 1998 to Nick Deighton, another Interval International executive who was in Bali at that time:

"Since I wasn't able to reach you, this subject is the purpose of my call. I know Lynn is still away, but we still have one very major issue which must be resolved before we can allow Villa Lalu to be marketed and sold. To date, despite several inquiries from me to Lynn and to Peter Hutchinson, it appears none of the Villa Lalu units have been put into trust. Until this happens, I can't release

marketing materials to Peninsula and can't authorize them to begin offering the Interval International exchange program.

I have spoken to Peter Hutchinson about this matter on several occasions and he assures me all necessary documentation to implement the trust has been sent and explained. The ball now is in Villa Lalu's court to get the trust put in place (at least for some of the units) so sales may commence."

Mr Deighton replied the following day to say that he had discussed it with Mr Waddell and with Roger and Alan Thomas and that the trust would be attended to the next day. Roger Thomas said in evidence that Mr Deighton did not discuss this with him, but I think that Mr Deighton's contemporaneous statement is more likely to be correct. Mr Waddell confirmed in a fax to Mr Choate on 14 September 1998 that Mr Deighton had "conveyed to him the contents of your recent fax regarding the outstanding requirements for the assignation of the leases and the necessity for individual units to be placed in trust prior to the commencement of sales."

35. In response to this pressure from Mr Choate, Mr Waddell faxed Mr Hutchinson on 14 September 1998 with various questions with respect to the trust arrangements, as follows:

"1. Although I notice the appointment of trustee document has been signed, I am unable to ascertain if the Deed of Trust document has been signed/returned/if necessary. Please advise.

2. The locally notarised assignation of the leases into trust? There is a sample document pertaining to the Batam View Hotel, Batam. As this has been faxed through by your office I assume it is a suggested wording. I expect I shall have to reword the particulars, make an Indonesian translation and have both copies notarised. Is this correct?

3. We will need to put into trust at least one unit of each description prior to commencing marketing. What are the machinations of this? There does not seem to be any relevant documentation.

4. The scheme documentation? There are copies, several in some cases, of various documents, namely; rules of occupation, attached schedule, the holiday certificate, schedule of apartments, calendar of weekly periods, the purchase agreement and purchase agreement conditions. Once again I am unable to ascertain the status of the above. Roger and Alan Thomas have offered their assistance in the completion of this matter and I expect they will be in touch in the near future.

5. The lease extensions. Is it compulsory that these extensions be fully paid up before the leases be assigned or can some mechanism, whereby sufficient funds be set aside from Villa Lalu sales income or maintenance fees by yourselves, as trustees, to cover this outlay, be instituted. Once again we are liaising closely with Roger and Alan of PMI to resolve this matter. I believe Roger will be telephoning your office later in the day to discuss this point."

Mr Hutchinson was out of the office that day but his assistant Angela Lenman replied by fax, saying as regards the lease that "this will need to be transferred into our name, and we will appoint a lawyer locally to do this, and arrange for the units to be placed in trust." On the same day Roger Thomas had spoken to her, pressing for the Project Documentation to be approved and signed. She told him that HTC was waiting for comments, presumably from the developers. Roger Thomas and Mr Hutchinson spoke on 15 September 1998 and, in response to a request by Mr Hutchinson, Mr Thomas faxed back the name and address of a law firm in Bali. He added:

"As you know, we are trying to keep together probably the best sales and marketing team in the Far East so time is pressing on us. I should be grateful if you would advise I.I.'s Rick Choate as soon as you are satisfied that your requirements are being fulfilled."

36. On 16 September 1998 Mr Hutchinson replied to Mr Waddell's questions of 14 September, as follow:

"Thank you for your fax of 14 September to which Angela has given an initial reply. As mentioned to Roger on the telephone, we have sent a fax to lawyers locally to get things moving with regard to the assignment of the lease, and we will look to them to confirm that the wording of the Assignment

Documentation is adequate. Certainly, there will need to be an authorised Indonesian translation, and the copies will have to be notarised as you suggest.

As I understand the situation, Villa Lalu is held under more than one lease, and therefore it makes sense to assign either the whole resort or at least the whole of a lease at one time. If the latter option is adopted, we must take account of the access question if the lease being assigned is not at the front of the resort, and does not include the key common areas. If for no other reason the transfer of all the leases is therefore preferable, though I realise there may be other criteria to take into account.

With regard to the Project Documentation, we will need originals duly signed together with the company stamp, but I think it also worthwhile our sending a couple of bound copies incorporating the hand written alterations.

With regard to the cost of the lease extension, I think the most ideal modus operandi for all concerned, is for us to collect the maintenance charges and deduct an agreed sum on an annual basis to go towards the renewal. I will also be studying the wording of the extension criteria and be reverting to the lawyer on the subject. Our charges for the collection of the management fees are 5%. We would need confirmation of the acceptance of this proposal urgently as the alternatives are very long winded and will delay matters.

I trust this answers all your various outstanding queries."

37. The Deed of Trust for Villa Lalu was executed by the developer on 15 September 1998, and on 16 September Mr Hutchinson faxed Mr Choate:

"We now have faxed copies of the Project Documentation, duly signed with the originals on their way to us, and hence from that point of view, all the relevant documentation is in place. There remains the transfer of the lease into trust. We have approached local lawyers to implement this with all haste and will keep you informed."

38. Mr Waddell faxed the signature pages of the Deed of Trust and Rules of Occupation to Mr Hutchinson on 17 September 1998 and stated as follows in a covering faxed letter:

"Mr Choate is requesting that we forward a copy of the deed of trust to him in Singapore accompanied with a list of specific units that have been placed in trust. In my previous fax of the 14th Sept. I stated that I don't have documentation relevant to this procedure. Have you forwarded it directly to the lawyer along with the lease assignation papers? Or does the assigning of the leases suffice?

We would initially place a minimum of one unit of each description into trust.

As regards the lease extensions, we will pay these out upon Lynn's return from Europe, now scheduled for Mon. 21st. The question of instituting an arrangement for this from the maintenance fees was only meant as a temporary facilitation so we could proceed in his absence."

HTC faxed a copy of the signed Deed of Trust to Mr Choate on 17 September 1998. On the next day Mr Hutchinson spoke to the local lawyers in Bali and sent a fax to them, with respect to the transfer of the leases to the English company owned or to be owned by HTC as trustee.

39. On 18 September 1998 Mr Waddell sent a fax to Mr Choate, saying that PMI were eager to begin marketing as soon as possible and asking if there were any further requirements to be fulfilled. Mr Choate responded on 19 September 1998:

"Thank you very much for the insurance information concerning public liability insurance for Villa Lalu and for allowing Peter Hutchinson to forward copies of the completed trust documents to me. Based upon both, I am very pleased to give you and PMI the "

40. With the green light given by Interval International, PMI started to market units at Villa Lalu.

41. On 22 September 1998 Mr Pratt told Mr Hutchinson by fax that, having arrived back in Bali, he was going to meet Roger and Alan Thomas and formally agree with them that PMI would market Villa Lalu. As regards the two leases for Villa Lalu, he wrote:

    "As per the leases both landlords have agreed that we can buy back the years used and a deposit has been placed with the balance due by 31st January 1999.

    I hope that arrangement satisfies you as I need all the available money we have to develop the land (4700 M2) adjacent to the southern side of Villa Lalu."

    He mentioned his understanding that Roger Thomas would be meeting Mr Hutchinson in the next few days, so that they could discuss any matters arising in relation to Villa Lalu.

42. Mr Hutchinson responded by fax on the same day as follows:

    "I am afraid I do not quite understand your new arrangement with regard to the two leases on Villa Lalu. Does this mean that effectively by 31 January you will have a new lease of 25 years from that date, without any interim payments?

    If so, it is certainly acceptable from our point of view, though we could not issue any full certificates until the new/revised lease were assigned to us, (presumably in January). This notwithstanding, I am not sure how Interval will look upon this with regard to finalising the enrolment. Normally, they expect confirmation from us, first, that all the legals have been completed. Perhaps you could clarify the position for me."

43. Mr Pratt replied by fax the following day:

    "Villa Lalu now has a deposit on both the land leases.

    Both landlords have agreed that Villa Lalu can pay the balance by 31 January 1999. Villa Lalu will do so by instalments

    This means both land leases will be brought back to 25 years plus a five year option.

    In my presence Mr Tom Waddell has just spoken by phone to Mr Rick Choate re the above subject and he has given his approval of it.

    I hope that this now sorts out the land leases problem and Villa Lalu will make every endeavour to buy back our used years long before the 31 January 1999 due date (like as soon as PMI gives us some money!!!!)

    I do not foresee such a situation, but if Villa Lalu doesn't generate the land lease money by the due date you have my personal assurance that I will break one of my term deposits to complete the deal."

44. Mr Hutchinson's evidence was that he knew by 22 September 1998, or possibly by 21 September 1998, that PMI had started to market timeshares at Villa Lalu. He received written confirmation of it in an e-mail from Mr Deighton on 24 September 1998. He was pressed in cross-examination as to whether he knew that PMI was using HTC promotional materials. His evidence was that while he did not know it, he assumed that those materials were being used.

45. Mr Hutchinson and Roger Thomas met at HTC's offices in Camberley on 29 September 1998. Angela Lenman was present and took a short note. Part of the discussion related to the Peninsula development to which I will return. As regards Villa Lalu, it records only that it was necessary to set up an owning company, Villa Lalu Title Limited, and that Roger Thomas was given a price list to pass on to Mr Pratt. Mr Thomas accepted that he was told that a title company had not been set up, from which he must have realised that title to Villa Lalu had not yet been transferred into trust. His evidence was that he regarded this as no more than dotting i's and crossing t's and there was no

need to question it, as Mr Hutchinson was the professional. Angela Lenman's note does not record or refer to any discussion regarding the length of the leases or any need to extend them or the arrangements for extensions to which Mr Pratt had referred in his faxes to Mr Hutchinson a week earlier. Roger Thomas's evidence is that there was no discussion of lease extensions. Mr Hutchinson's oral evidence was that his belief is that it would have been discussed but he cannot specifically recall any discussion and cannot be sure that it was discussed. I am satisfied that there was no discussion. It was an important issue and, if there had been any discussion, it would almost certainly have been referred to in Angela Lenman's note, and in Mr Hutchinson's fax of 5 October 1998 to Roger Thomas.

46. Marketing of units at Villa Lalu continued for about another month, until 27 October 1998. Promotional material, such as the three-fold leaflet, which Roger Thomas had bought from HTC in July 1998 for RBL was used by PMI. Mr Thomas' evidence is that every customer was advised that the timeshare rights were safeguarded by HTC and that attention was drawn to HTC's material, particularly the three-fold leaflet. Any purchaser reading the leaflet would, in my judgment, have been reassured that the developer owned the legal rights necessary to honour the timeshare contract. That, after all, was the point of the materials.

47. Although marketing had started by 22 September 1998, no rights to Villa Lalu had been transferred into trust. As appears from his fax to Mr Choate on 24 September 1998, Mr Hutchinson was proceeding on the basis that the trust structure might not be finalised until January 1999. There was correspondence between HTC and the developers in late September and in October on establishing an owning company and transferring rights to Villa Lalu into trust but little, if anything, was done to achieve it.

48. The underlying problem of the mismatch between the 25-year timeshares and the remaining terms of the leases of Villa Lalu came into sharp focus on 22 October 1998. That evening Roger and Alan Thomas met Mr Pratt to discuss a possible new contract for marketing the timeshares. At about 10.30pm Mr Pratt received a telephone call and told the Thomas's that it was Mr Ananda reporting that the Balinese landlord was being difficult about extending the lease and that there could be problems. Roger Thomas said in his oral evidence that he and his brother were concerned about this development, but they both thought it was a negotiating ploy by Mr Pratt to put pressure on them. The next day Mr Pratt told them that sales should continue and he would sort the problem out.

49. On Saturday 24 October 1998 PMI received a fax from the developers, telling them to cease sales because the landlord had refused an extension. At a meeting later the same day Mr Pratt told Roger and Alan Thomas that a very difficult problem had developed. Nonetheless, the outcome of the meeting was that sales should continue. Roger Thomas agreed in cross-examination that the discussion on the lease extension problem was along the lines of a fax sent by Mr Ananda to Mr Choate on 23 October 1998. The terms of that fax made clear that there was a serious problem. A copy of the fax was faxed to Mr Hutchinson on 24 October 1998, with a request for any ideas as to how to fix the problem. Some suggestions were forthcoming but on 27 October 1998 PMI were told to stop marketing. By this time PMI had made sales to 47 purchasers of which 44 were made before 22 October 1998. Roger and Alan Thomas considered that they had been duped by Mr Pratt and terminated their contract with the developers. PMI was obviously exposed to the possibility of claims by the purchasers. By way of dealing with that problem they offered alternative timeshare rights at the Peninsula Beach Resort at the same price. 17 purchasers took up this offer which involved a loss of over $1,000 on each transfer, as well as the costs of dealing with all the purchasers.

PMI's claim: issues of fact

50. There are a number of issues of fact which need to be resolved before deciding whether in any respect HTC owed a duty of care to PMI as marketer of Villa Lalu timeshares and whether it was in breach of that duty. The issues of fact are:

    i. HTC's knowledge of the terms of the leases, the length of timeshares to be marketed and the steps taken by the developers to avoid a mismatch between the two.

    ii. The extent of PMI's knowledge of the terms of the leases.

iii. The extent of PMI's reliance on HTC to have ensured that there were no legal problems with the leases before marketing began.

51. At the heart of PMI's cases is the simple point that it marketed 25-year timeshares on behalf of the developer but the developer's tenure was materially shorter, even if the developer had exercised its rights to extend the leases. Mr Hutchinson knew from his early contacts with Mr Pratt that the intention was to sell 25-year timeshares. He accepted this in evidence and he stated it in a fax dated 9 December 1997 to Mr Pratt. He of course knew that this would require 25-year leases to be in trust, as he stated in a fax to Mr Pratt on 19 November 1997. There is no evidence to suggest that Mr Pratt ever changed his mind on the timeshare period to be offered or contemplated offering a shorter period. Mr Hutchinson accepted in cross-examination that he knew by May 1998 that Mr Pratt wished to market for 25 years.

52. By May 1998 Mr Hutchinson had copies of the leases and had read them, as is apparent from his fax dated 27 May 1998 to Mr Pratt. He does not, however, mention in that letter the fundamental point that the leases cannot support 25-year timeshares. This was of much greater significance than the point which he did mention concerning the calculation of the price for one of the lease extensions payable in 2010. There is no documentary evidence to suggest that he raised the issue at any time, before or after May 1997, with Mr Pratt, Mr Waddell or anyone else. For example, he did not raise it with Interval International, either when he wrote on 1 July 1998 or during September 1998.

53. An obvious explanation for not mentioning it in his fax of 27 May 1998 would be that although he had looked at the leases he had not realised that they would not cover a 25-year timeshare. The lack of any mention of the point in July and September 1998 could well, alternatively, be the result of Mr Hutchinson having forgotten it. He had made no written note of it and he was no doubt dealing with a significant number of other actual and prospective clients in the meantime.

54. However, Mr Hutchinson's evidence was that by May 1998 he knew that Mr Pratt wanted to market 25-year timeshares and he knew, having read the leases, that it would be necessary to agree further extensions to them. In the light of this evidence, Mr Hutchinson was pressed strongly in cross-examination to explain why he had not at any stage raised the issue in writing with Mr Pratt or anyone else. A number of explanations were put forward by Mr Hutchinson. Taking them in the order in which they were given, he first said that he did raise it with Mr Pratt in the discussions leading up to the execution of the Deed of Trust in September 1998. Secondly he said that he phrased his letter dated 27 May 1998 addressed to Lee Higgins, but sent to Mr Pratt, in order to deal with the issue. The letter stated that a lease over the properties concerned or an assignment of the existing leases would be needed "for the period being timeshared". This, said Mr Hutchison, informed or reminded Mr Higgins and Mr Pratt that under the current leases the developer had a certain period and, if he wanted to sell timeshares for a longer period, he would need other arrangements. He was asked why he had not spelt out the problem in the letter, to which he replied that the meaning was implicit to any businessman who read it. He said that in this letter he was emphasising that the leases must cover the period being sold and that they could sell for a shorter period than 25 years. Everyone, he said, was aware that the leases would terminate in 2019 and 2020 and it was unnecessary to state the obvious. Thirdly, he gave evidence that he had discussed the issue with Mr Pratt some time before May 1998 and Mr Pratt had promised that he would obtain extensions to the leases. Fourthly, he said that he had made it clear in discussions with Mr Pratt that the choice was between either not agreeing extensions to the leases but selling shorter timeshare periods, or selling 25-year timeshares and agreeing the necessary extensions. In May 1998 he did not know what timeshare period would be sold and so did not directly raise the issue of lease extensions, although he later accepted that to the best of his knowledge in May 1998 Mr Pratt intended to extend the leases and sell 25-year timeshares.

55. I have no hesitation in rejecting all these explanations given by Mr Hutchinson. I find it implausible that he would refer to the price payable in 2010 for one of the lease extensions, as he did in his letter dated 27 May 1998 to Mr Pratt, without also mentioning the far more important issue of agreeing new lease extensions to cover 25-year timeshares, if he had it in mind. His explanation of the letter on the same day to Mr Higgins is likewise implausible, particularly in view of his statement in the same letter that he did not envisage any major problems in relation to the details of the lease or lease assignment. Similarly, he would have drawn very clear attention to it in the discussions and faxes in September 1998 when it was a critical issue, if he was then aware of it. Not only would he have raised it with Mr Pratt or Mr Waddell, he would also have raised it with Mr Choate. There is no

hint in any of the communications from Mr Choate or others at Interval International that they were aware of this problem. If they had been, I have no doubt that it would have featured prominently in their faxes and e-mails. Mr Hutchinson accepted that he had no recollection of mentioning it to Mr Choate.

56. An issue of lease extensions was raised by Mr Waddell in his fax of 14 September 1998 to Mr Hutchinson. Mr Waddell refers only to the means and timing of payments for the extensions, not to any need to negotiate new and further extensions. It is clear from his reply on 16 September 1998 that Mr Hutchinson had read Mr Waddell's fax as being concerned only with "the cost of the lease extension". He states that he will be studying "the wording of the extension criteria" which to my mind indicates that he was considering only the exercise of existing rights of extension. I reject Mr Hutchinson's evidence that he thought Mr Waddell's letter was referring to both the acquisition of new leases and the exercise of existing rights of extension. This evidence was immediately qualified by Mr Hutchinson saying that he understood it to refer to such extensions, if any, as may be necessary for the timeshare period which they intended to market. He said that he did not know whether they had decided to market 25-year timeshares, in which case the new extensions were needed, or timeshares limited by the term of the existing leases, in which case it would be necessary to exercise only the existing extension rights. I reject this evidence also. Looking at the wording of his fax of 16 September 1998, Mr Hutchinson agreed that it looked as if he was referring only to the exercise of existing extension rights. I find that Mr Hutchinson did not have the need to negotiate new extensions in mind when he considered and replied to Mr Waddell's fax of 14 September 1998, but was dealing only with the existing extension rights.

57. These faxes were followed by the fax on 22 September 1998 from Mr Pratt who had just returned to Bali from Denmark. This is the first written indication of an agreement for new or extended leases of Villa Lalu. Mr Pratt stated that:

    "As per the leases both landlords have agreed that we can buy back the years used and a deposit has been placed with the balance due by 31 January 1999."

    Mr Hutchinson said in evidence that he found this reassuring because it meant that there was now a contract in place for 25-year leases. I reject this evidence. His true reaction appears clearly from his reply by fax on the same day. He stated:

    "I am afraid I do not quite understand your new arrangement with regard to the two leases on Villa Lalu. Does this mean that effectively by 31 January you will have a new lease of 25 years from that date, without any interim payments?

    If so, it is certainly acceptable from our point of view, though we could not issue any full certificates until the new/revised leases were assigned to us, (presumably in January)".

    That fax does not, in my view, suggest that Mr Hutchinson appreciated the need to negotiate an extended term of 25 years. It suggests instead some confusion on his part, which is consistent with him not previously realising that this would be needed. The reply the following day from Mr Pratt made the position clearer and from that time I find that Mr Hutchinson did understand the need for a new agreement for a longer term and believed that it had been negotiated. However, Mr Hutchinson accepted in evidence that he took no steps to verify the existence or terms of this new agreement, the amount payable under it or the ability of Mr Pratt to pay it. This was, he agreed, a mistake.

58. In my judgment the true explanation as to why Mr Hutchinson did not raise in any fax or e-mail to anyone the issue of the term of the leases is the obvious one. Although he looked at the leases in or before May 1998, he did not appreciate that even if the extension rights were exercised the leases would last for less than 25 years. It was an oversight on his part, and mistakes are easily made. However, it was of fundamental importance to the protection of the legal rights of purchasers of 25-year timeshares, and it was a careless mistake to make. I believe that Mr Hutchinson realised this and his evidence was driven by a refusal to admit to it.

59. I turn to Roger and Alan Thomas' knowledge of the Villa Lalu leases in September 1998. The appointment of PMI as marketer was discussed between Mr Waddell and the Thomas brothers at the beginning of September. There was no evidence that they were alerted during those discussions

to any difficulty in marketing 25 year timeshares and indeed Roger Thomas' evidence, which I accept, is that at the initial meeting Mr Waddell told him and Alan Thomas that rights existed to extend the leases to cover the full period of 25 years. Not unreasonably they thought that this was confirmed by the draft Rules of Occupation which specified the timeshare period as 25 years. By 12 September 1998 Mr Choate had told Roger or Alan Thomas that Interval International would not permit marketing until the trust was in place. On about 12 or 13 September 1998 Nick Deighton of Interval International also discussed this with Roger and Alan Thomas and may have told them that Interval International required some units to be put into trust. It is clear from Mr Waddell's fax to Mr Choate on 14 September 1998 that Mr Deighton made this clear to Mr Waddell and the likelihood is that he also told one or both of the Thomas brothers. Roger Thomas confirmed in evidence that he knew that no units had by then been put into trust.

60. Mr Waddell's fax to Mr Hutchinson on 14 September 1998 raised, for the first time in any document in evidence, an issue as to extensions to the lease. The question raised by Mr Waddell is whether the extensions need to be fully paid up before assignment of the leases or whether some other mechanism can be put in place. Mr Waddell's unchallenged evidence was that when he wrote this fax he understood, from what he had been told by Mr Pratt some considerable time earlier, that the extensions were in place and deposits had been paid. In the fax he states that he is liaising closely with Roger and Alan Thomas on this, as well as a completion of the project documentation. Roger and Alan Thomas said in evidence that they understood the issue to be the method of payment for lease extensions, not the more basic question as to whether it would be possible to obtain agreement for lease extensions. Roger Thomas said that as far as he and his brother were concerned, the lease extensions were in place.

61. There was nothing in any of the subsequent communications and discussions involving the Thomas' to indicate to them that any problem existed as regards the length of the leases. I accept Roger Thomas' evidence that he thought that the developer had a right of extension and that the issue was only when and how payment would be made for it. Not only is that consistent with the terms of paragraph 5 of Mr Waddell's fax to Mr Hutchinson on 14 September 1998, but I find it highly unlikely that Roger and Alan Thomas would have run the great risks involved in marketing 25-year timeshares if they thought that the developer did not have tenure for that period.

62. The third issue of fact is whether PMI placed any reliance on HTC to raise objections to the marketing of timeshares at Villa Lalu, if there was a problem with the developer's title. Roger Thomas' understanding of HTC's role derived from the promotional materials supplied to him in July 1998 and discussions at his meeting with Mr Hutchinson on 15 July 1998. Alan Thomas already had some understanding of their role from involvement in another resort and he saw the material which had been provided to Roger Thomas. When dealing with the marketing of Villa Lalu in September 1998, it would be natural for them to have regard to this material and information in understanding the role of HTC and I find that they did so.

63. I find that their understanding was that HTC provided protection to purchasers and marketers by ensuring that the developer had good title for the timeshares being sold and that the title would be transferred into trust. They knew that HTC would permit marketing and sales before the transfer of title into trust, provided that they considered it safe to do so. They knew that HTC and/or its local lawyers would have examined the developer's title to the resort. I find also that they were reassured by HTC's agreement to the Rules of Occupation annexed to the Trust Deed which provided expressly for a 25-year timeshare period.

64. The primary responsibility for informing PMI that the developer had sufficient tenure to sell 25-year timeshares lay with the developer and I am satisfied that PMI in fact placed substantial reliance on what Mr Waddell, speaking for the developers, told Roger and Alan Thomas. The degree of reliance is evidenced by the terms of a fax dated 7 November 1998 from Roger Thomas to HTC and by the fact that PMI bought proceedings against the developers in Indonesia.

65. Roger Thomas was inclined in his witness statement and oral evidence to understate their reliance on the developers as against HTC. His description of HTC as "the key player to us as regards the facts of the situation" was an exaggeration. Nonetheless, I am also satisfied that PMI placed real reliance on HTC. I find that Roger and Alan Thomas believed that marketing of the timeshares, using the HTC trust structure and materials, would not commence or continue unless HTC were satisfied

that the developers held good title to back the purchasers' rights. They were in fact wrong to think that marketing started with HTC's consent, but as from 21 or 22 September 1998 they were right to think that it was continuing with HTC's knowledge. I find that they did place reliance on the apparent attitude of HTC that it was appropriate for Villa Lalu to be marketed on the basis of the trust.

66. It is striking that even after the Villa Lalu debacle, Roger and Alan Thomas were willing to proceed with HTC as trustee of the Peninsula Beach Resort. Roger Thomas' explanation, which I accept, is that at that time they thought that HTC had also been duped by Mr Pratt and it was only later when they discovered the difficulties with the trust structure for the Peninsula Beach Resort and also concluded that HTC had been aware of the problem as to tenure, that they focussed on HTC's role. I do not consider that the fact that the Thomas's continued to engage HTC as trustee of Peninsula Beach Resort means that they had not placed reliance on HTC in relation to the sale of timeshares at Villa Lalu.

67. It was submitted for HTC that other evidence shows that even if PMI had known that the developer had insufficient title to support 25-year timeshares, it would still have marketed and sold units and that therefore PMI did not place reliance on HTC. The first matter relied on related to Interval International's approval of PMI as marketer of Villa Lalu. Interval International required a legal opinion letter dealing with the legal standing and corporate capacity of PMI to enter into a marketing agreement for Villa Lalu. An opinion letter dated 11 September 1999 was supplied by PMI to Interval International. It stated that the local lawyers providing the opinion had reviewed the licensing agreement between PMI and the developer. It was submitted that no agreement then existed and therefore PMI put forward an opinion letter which Roger Thomas must have known was wrong in order to obtain Interval International's approval. In fact, short heads of agreement dated 8 September 1998 had been prepared: although Roger Thomas believed it was a forgery, I accept Mr Waddell's evidence that he prepared it at this time. It seems very likely, and I find, that this is the licensing agreement referred to in the opinion letter. In view of the narrow scope of the opinion letter, which is restricted to issues of legality and capacity to enter into and perform the agreement, the short heads of agreement were sufficient to enable the opinion to be given and to be supplied to Interval International. I find that PMI did not put forward an opinion letter which was wrong, still less which it knew to be wrong.

68. The second matter relied on by HTC was an allegation that RBL started to market and sell, through PMI, timeshare units at Peninsula Beach Club when it had no guaranteed tenure because of its dispute with the lessor. However, the unchallenged evidence was that at the time of the dispute the only timeshares sold were in respect of apartments on the undisputed land forming part of the resort. This marketing was not general but was restricted to the offer of units to aggrieved purchasers of units at Villa Lalu. Likewise, the third matter relied on, that RBL started to market units on the basis of affiliation with Interval International when it had not been affiliated, was not supported by the evidence which was that there was a provisional affiliation to enable this limited marketing to take place.

69. I do not therefore find any of these matters established as grounds for concluding that PMI would have continued to market and sell units at Villa Lalu even if it had known the true position as regards the length of leases.

PMI's claim: duty and breach

70. PMI's claim against HTC is in negligence, based on the line of authorities beginning with *Hedley Byrne & Co Ltd v. Heller* [1964] AC 465. Its case is that it relied on HTC's involvement as trustee of Villa Lalu for assurance or confirmation that as marketer it would be selling 25-year timeshares which the developer was able to honour. It is submitted by PMI that HTC was in breach of a duty of care to PMI in two respects. The first is a representation by HTC to Interval International on 16 September 1998 that all the relevant documentation was in place, other than the transfer of the leases into trust. The second is a continuing representation by conduct that it was safe to market Villa Lalu on the basis of the HTC trust structure.

71. HTC denies that it owed any duty of care to PMI either when making any statements to PMI or others which led to the commencement of marketing and sales, or which required it to warn PMI of the mismatch once it knew that marketing and sales had started. There is a distinction between

these two duties, in that one concerns a statement made by HTC, while the other involves a representation by conduct and a failure to warn PMI.

72. There are issues of law which are common to the claims based on both of these alleged duties. However, in my judgment, the claim based on statements made in HTC's fax dated 16 September 1998 cannot succeed on the facts, even if HTC owed a duty of care to PMI in making those statements. I shall therefore deal with those factual issues, before considering whether, in relation to the failure to warn PMI once marketing began, HTC owed a duty of care to PMI and, if so, was in breach of it.

73. Although the fax dated 16 September 1998 was not sent to PMI, but to Interval International, it is submitted that HTC knew that Interval International would rely on the fax in its decision to give the green light for marketing to commence and that PMI would rely on Interval International's green light, to start marketing in the belief that there was no legal obstacle to doing so. PMI relies on Roger Thomas's fax dated 15 September 1998 to Mr Hutchinson, in which he wrote "I should be grateful if you would advise I.I.'s Rick Choate as soon as you are satisfied that your requirements are being fulfilled", to show that HTC knew that, if Interval International gave its green light, PMI would assume that HTC was satisfied that sufficient legal protection existed for purchased timeshares.

74. In my judgment there are on the facts two obstacles to this part of PMI's case. The first is that it makes too much of the fax dated 16 September 1998 to Interval International. The reference to "all the relevant documentation" being in place is in this sentence:

    "We now have faxed copies of the Project Documentation, duly signed with the originals on their way to us, and hence from that point of view, all the relevant documentation is in place."

    The relevant documentation is the Project Documentation; it is not a reference to the lease or leases of Villa Lalu. It is the next paragraph which deals with leases:

    "There remains the transfer of the lease into trust. We have approached local lawyers to implement this with all haste and will keep you informed."

    It is clear from the fax that in relation to the lease, there is more still to do, although it does not refer to or contemplate the problem of the length of leases, of which as I have found Mr Hutchinson was then unaware.

75. The second obstacle is that Mr Hutchinson could not have anticipated that Interval International would give the green light to marketing as a result of this letter. It is clear from all the faxes and other communications referred to above that, until Mr Choate's fax of 19 September 1998, all parties were proceeding on the basis that marketing could not start until the developer's interest in at least part of Villa Lalu had been transferred into trust. This was understood to be a requirement of Interval International and in all its communications HTC was making clear that it still remained to be done. There was no evidence from Mr Choate, so there can only be speculation as to why Interval International apparently changed its mind when it did and gave the green light for marketing to start. It may be that Mr Choate misunderstood the effect of execution of the Deed of Trust, but that would not fit with Mr Hutchinson's fax to Mr Choate on 16 September 1998. So far as this case is concerned, it does not matter, because in my judgment it is clear from all the evidence, and I find, that HTC continued to understand that putting at least part of Villa Lalu into trust was an essential pre-condition to any marketing of units, and HTC made clear to Interval International and others that it had not yet been done. I am satisfied on the evidence that Mr Hutchinson did not believe, and had no reason to believe, that Interval International would permit marketing to begin before the transfer into trust had taken place. Accordingly, the claim based on making the statements in the fax of 16 September 1998 must fail. It is not established that the fax caused Interval International to give the green light and I am satisfied that HTC could not have reasonably have foreseen that it would have that result.

76. Secondly, PMI relies on a continuing representation by conduct from 16 September 1998 that HTC was content for Villa Lalu timeshares to be marketed under the auspices of the HTC Trust Scheme, which necessarily implied that it had carried out sufficient checks to ensure that the development was safe to market. This was not the true position because the developers did not have tenure for at

least 25 years and HTC had failed to check that they did. The relevant representations and conduct are summarised in PMI's closing submissions as follows:

"The Defendant continually represented from the 16 September 1998 that:

(a) It was happy or content for the Villa Lalu development to be marketed under the auspices of the Hutchinson Trust Scheme;

(b) It had therefore carried out sufficient checks to ensure that the development was safe to market – i.e. that it was a "Disney" type of development rather than a "Fred"; and

(c) As a result, the Development was safe to market.

That conduct consisted of, inter alia:

(a) failing to stop sales (when it knew it could stop them with one letter to either PMI or Interval International),

(b) issuing (and charging for!) a certificate demonstrating that PMI was authorised to market the development under the auspices of the Hutchinson Trust Scheme; and

(c) even holding a meeting with PMI on the 29 September 1998 when the Defendant raised no objections at all but rather encouraged such sales."

77. Leaving aside the certificate in paragraph (b), which was not issued until 16 October 1998, the "conduct" relied on are omissions. They are a failure to inform PMI of the position as regards the leases at any time while marketing was taking place, including specifically at the meeting when Roger Thomas visited Mr Hutchinson on 29 September 1998. It is certainly the case that HTC raised no objections at any stage with PMI or anyone else, although the evidence of the meeting on 29 September does not sustain the submission that Mr Hutchinson encouraged sales.

78. In the usual case based on a negligent misstatement, it is the making of the statement, combined with the other factors such as proximity and foreseeability necessary to the imposition of a duty of care, which gives rise to the duty. It is a duty to take reasonable care in the making of the statement and, in the absence of a statement, there will commonly be no duty: see, for example, *Hedley Byrne & Co Ltd v. Heller & Partners*. A failure to warn, or other omission, will be actionable only if there already exists a duty requiring the defendant to speak or take other action. Most obviously the duty will exist where the defendant is already engaged or acting as an advisor to the claimant or where the defendant has made a statement giving rise to a duty of care and he subsequently discovers the statement to be untrue. Neither of those situations exists in this case. HTC was not an existing advisor to PMI or had any direct relationship with it, nor had it made any representation which required correction. If a duty arises at all, it must in my judgment be because from 21 or 22 September 1998 Mr Hutchinson knew that marketing had started, knew or should have known that 25-year timeshares were being marketed, assumed that HTC promotional materials were being used and therefore knew or should have known that purchasers and PMI would rely on HTC having ensured that the developer had good title for the 25-year timeshares.

79. I have no doubt that these facts would impose on HTC a duty of care to purchasers. The three-fold leaflet, and any other promotional material prepared by HTC and given to purchasers, constituted or contained representations by HTC which were addressed to purchasers and were intended to be relied on by them. In particular, in the three-fold leaflet, HTC represented that its prime responsibility was to protect purchasers' interests by ensuring that good title to the timeshare weeks was held by the developer. If HTC knew or ought to have known those representations to be untrue, HTC owed a duty of care to take all reasonable steps to correct that misrepresentation, or to prevent sales continuing under the auspices of the HTC trust structure and using its promotional material.

80. The issue is whether on these facts HTC also owed a duty of care to PMI to warn it of the mismatch or take other steps to put a stop to marketing. It was foreseeable that PMI might well suffer loss if HTC did not warn it of the problem with the leases of Villa Lalu, because purchasers were likely to

have claims against PMI. Foreseeability of loss, though necessary, is not of course sufficient to give rise to a duty of care.

81. If HTC had confirmed to PMI that it was safe to market and sell Villa Lalu units, I would have little doubt that it would owe a duty of care in giving that confirmation. The factors which lead to that result are relevant also to whether a duty to warn PMI arose on the facts of this case. It is necessary to consider first proximity and the assumption of responsibility. I have already found that PMI in fact placed reliance on HTC as to whether it was safe to market and sell 25-year timeshares and did so on the basis of the Thomas' understanding of HTC's role derived principally from information supplied by HTC in July 1998. I have also held that the promotional material issued by HTC gave a clear picture to the reasonable reader that its trust scheme was designed to give protection to marketers as well as purchasers with respect to the developer's title. The promotional material, and additional information given by Mr Hutchinson at the meeting on 15 July 1998, demonstrated that in order to provide that protection HTC would investigate the developer's title. The information given at the meeting also showed that in appropriate cases HTC would permit marketing and sales to start under the HTC trust system before title had been transferred into trust. HTC would do this only if it considered it safe to do so, having amongst other things considered the developer's title. All those facts, together with the contact between HTC and PMI as regards Villa Lalu in September 1998, would in my judgment be sufficient to provide the proximity, and to demonstrate an assumption of responsibility, necessary to give rise to a duty of care as regards a statement by HTC to PMI that it was safe to market 25-year timeshares at Villa Lalu. As the only marketer, PMI would be a defined class of one to whom the duty was owed.

82. It was submitted for HTC that PMI could not place reliance on the material and information provided to Roger Thomas in July 1998, because it was given to him as a director of RBL in the context of the Peninsula Beach development. I do not accept this submission. First, Mr Hutchinson was told of the proposed role for PMI as marketer of the Peninsula Beach Club. Secondly, it would be obvious to HTC that PMI through Roger Thomas would rely on this material and information in understanding HTC's role as trustee of the Villa Lalu resort. In fact, in paragraph 28 of his witness statement, Mr Hutchinson himself relies on information given to Roger Thomas in July 1998 for the purposes of HTC's defence against PMI's claim.

83. On the issue of the proximity, the facts of this case would fit the approach of Richmond P. in *Scott Group Ltd v. McFarlane* [1978] NZLR 553, cited with approval by Lord Bridge and Lord Oliver in *Caparo plc v. Dickman* [1990] 2AC 605:

"The question in any given case is whether the nature of the relationship is such that one party can fairly be held to have assumed a responsibility to the other as regards the reliability of the advice or information. I do not think that such a relationship should be found to exist unless, at least, the maker of the statement was, or ought to have been, aware that his advice or information would in fact be made available to and be relied on by a particular person or class of persons for the purposes of a particular transaction or type of transaction. I would especially emphasise that to my mind it does not seem reasonable to attribute an assumption of responsibility unless the maker of the statement ought in all the circumstances, both in preparing himself for what he said and in saying it, to have directed his mind, and to have been able to direct his mind, to some particular and specific purpose for which he was aware that his advice or information would be relied on. In many situations that purpose will be obvious…. I would think that it must almost inevitably follow, once the maker of the statement is aware of a specific purpose for which his information will be used, that he will also have in direct contemplation a specific person or class of persons, even though unidentified by name."

84. As to whether it would be unfair or unreasonable to impose the duty, it is worth noting, in addition to the factors considered above, that it would not expand on the work or standard of care in any event imposed on HTC by virtue of its duty to purchasers. If not satisfied with the position of the leases of Villa Lalu, HTC would need to do no more than alert PMI and Interval International. It is, however, relevant that PMI was appointed by the Villa Lalu developer, not by HTC, as marketer. Roger Thomas was told by Mr Waddell that the developer owned a lease with at least 25 years to run and the appointment of PMI was on the basis that it would market 25-year timeshares. The written agreement between the developer and HTC contains an express warranty by the developer that it was the legal and beneficial owner of the leases for the land and completed units, and although not stated, the existence of leases with a right to at least 25 years was in my view necessarily implied in the warranty. The facts that (a) the developer appointed PMI, (b) the developer warranted the

existence of the necessary leases, (c) PMI must have relied on the fact of its appointment and Mr Waddell's assurance for the existence of the necessary leases, (d) PMI could have taken its own steps with the developer to satisfy itself on this question, are considerations against the imposition of a duty of care in tort on HTC. However, reliance on the developer does not preclude reliance on HTC as well. In my judgment such reliance is reasonable in circumstances where HTC has by the express terms of its promotional material represented that its system is intended to provide protection for marketers as well as purchaser. The protection envisaged is precisely against the risk that the developer does not own a sufficient title. The imposition of a duty of care is not in my view unreasonable when it goes no further than the assurance which HTC has itself given to marketers.

85. In addition, Mr Southall relied on a number of provisions in the agreement appointing HTC as trustee and in the Deed of Trust. HTC's appointment as trustee of Peninsula Beach Club contained in clause 7 of the terms and conditions a provision that "The Trustee has no obligations to any third party with whom the Vendor may conduct business, other than to the Holiday Owners". The copy of HTC's appointment as trustee of Villa Lalu, signed in November 1997, does not have attached any terms and conditions but I assume that terms in much the same form were in fact part of that appointment. However, it is contained in an agreement with the developer of Villa Lalu and is not a notice to marketers or other third parties. It is not framed as an exclusion of liability for negligence, but, in its context as a term of an agreement to appoint a trustee, means that HTC is not to owe any fiduciary obligations other than to the developer and the purchasers who, as stated in clause 1, are to be the beneficiaries of the trust.

86. Mr Southall relied also on clauses 5.1 and 8.3 of the Trust Deed. Clause 5.1 of the Deed of Trust provides that the Trustee gives no warranty or guarantee in regard to the validity or otherwise of the title to the resort. I do not consider this provision to be in point because it is concerned only with the validity of the developer's title, not with whether it has apparently sufficient title to support the timeshares. The oddly-framed terms of clause 8.3, by which the developer warrants that HTC shall not by entering into and acting in pursuance of the Trust Deed owe any duty, obligation or liability to any persons other than the developer and the holding owners, are, like clause 7 of the Terms and Conditions, confined to the performance by HTC of its duties as trustee and make clear that the developer and the holiday owners are the only beneficiaries of the trust.

87. I would therefore hold that HTC owed a duty to take reasonable care in respect of any confirmation to PMI that it could commence marketing under the auspices of the HTC trust structure and distribute the three-fold leaflet. In these circumstances, the issue is whether in the absence of an express statement by HTC to that effect, HTC owed a duty of care to PMI to warn it, if HTC knew or ought to have known that the developer did not have a sufficient title to support 25-year timeshares. As I have held, PMI reasonably understood from promotional materials and information provided by HTC that HTC would not allow sales under the auspices of the HTC trust structure, unless it examined the necessary leases and considered it safe for marketing and sales to commence. HTC knew or should have known that if marketing and sales started or continued with its knowledge, this would be PMI's understanding. PMI believed that it started marketing on the basis of the HTC trust structure with the knowledge and approval of HTC. From 21 or 22 September 1998 HTC knew that marketing and sales had started and assumed correctly that it was under the auspices of the HTC trust structure and that the three-fold leaflet was given to prospective purchasers. HTC knew that its promotional material clearly indicated that its trust system was designed for the protection of marketers as well as purchasers.

88. Overall, therefore, HTC knew or ought to have known that unless it took steps to stop the marketing and sales, PMI would think that HTC agreed with it taking place. Crucially, HTC correctly assumed that PMI was marketing under the auspices of the HTC trust structure and was distributing the three-fold leaflet. HTC was therefore allowing, in the sense that it could have stopped, the distribution of its own representations to purchasers. This was in circumstances where, if the representations were untrue, PMI as well as HTC could be liable to claims by purchasers. Although there was no statement or other positive action by HTC, it was in effect representing to PMI that it was safe to market the Villa Lalu timeshares and safe to use the HTC promotional materials. Not only did HTC not take any steps to warn PMI but Mr Hutchinson met Roger Thomas on 29 September 1998 without raising the issue.

89. In my judgment all these circumstances established a representation to PMI, as well as to purchasers, that the developer held a good title to the resort which was sufficient to support 25-year

timeshares. There is no significant difference between, on the one hand, HTC telling PMI that it may distribute HTC's three-fold leaflet and, on the other hand, HTC assuming the PMI is distributing its three-fold leaflet but taking no steps to prevent it. As Mr Brannigan put it, HTC's silence with knowledge would reasonably be understood by PMI as assent. In reaching this view I have considered carefully the analysis of Lord Nicholls of Birkenhead on liability for omission in *Stovin v. Wise* [1996] AC 923 at 929-933 and borne in mind his observation that the general reluctance to impose a duty to act, as opposed to a duty to take care when acting, is even greater when the loss threatened in financial, rather than physical injury or damage. In this case, HTC's failure to take steps to prevent the marketing and sale of timeshare units at Villa Lalu on the basis of its trust structure and with the use of its three-fold leaflet was not a pure omission to be viewed in isolation, but arose in the context of its role as appointed trustee of the Villa Lalu resort.

90. The next issue is whether HTC was in breach of its duty of care to PMI in not taking steps to warn it that the developer of Villa Lalu did not have sufficient tenure for 25-year timeshares. I have already found that HTC had carelessly overlooked the maximum length of the existing leases of Villa Lalu. It should have known that the existing leases did not provide title for 25-year timeshares. It would follow that HTC was in breach of its duty of care, unless it can point to other steps taken by it reasonably to satisfy itself that the developer had secured the necessary additional leases or extensions to the existing leases to cover the full 25 years. HTC relies on its exchange of faxes with Mr Pratt on 22-23 September 1998. I have already commented on these faxes. Mr Hutchinson queried Mr Pratt's fax of 22 September and it is principally on Mr Pratt's further fax of 23 September that HTC relies. In that fax, Mr Pratt stated that both "leases will be brought back to 25 years plus a five year option", that a deposit had been paid on both leases and that the landlords had agreed to payment of the balance by 31 January 1999. HTC took no steps to see or examine the agreement for the extensions and, if it had, it would have found that none existed. It was clear from HTC's promotional material and from what Mr Hutchinson told Roger Thomas on 15 July 1998 that it was HTC's practice to examine leases or other documents of title and PMI could reasonably expect HTC to have done so in relation to the alleged extensions. The need to do so was the greater in this case because Mr Hutchinson's assessment of Mr Pratt as the effective developer of Villa Lalu was that he was more of a Fred than a Disney, i.e. that he was not particularly reliable. Mr Hutchinson accepted in cross-examination that it was a mistake not to make further enquiries and that normally he would not have simply accepted the developer's assurance. He said that he did not do so because sales had already started, but I can see no grounds for suggesting that as a good reason for not adopting his usual and sensible practice.

91. Mr Hutchinson also defended HTC's failure to follow its usual practice by saying that it could either kick up a fuss or move things forward as quickly as possible. He chose the latter course because he believed everybody involved was fully informed as to the position regarding the leases. In my judgment, this is not an adequate justification. He knew that purchasers would not be fully informed and he did not enquire of PMI as to its state of knowledge. It is also fair to say that HTC did not then press to put the trust structure in place quickly. Other justifications suggested by Mr Hutchinson are also inadequate. When asked whether he agreed that he should have contacted PMI, Mr Hutchinson said that, as HTC was engaged by the developer, it was inappropriate to communicate directly with PMI. However, when pressed as to whether this was the reason for not contacting PMI, he replied that he did not know that 25-year timeshares were being marketed. It is, however, clear from his evidence that he had no reason to think that anything other than 25-year timeshares were being marketed and indeed assumed that they were 25-year timeshares.

92. In my judgment, HTC was in breach of its duty of care to PMI in not warning PMI that it could not safely market and sell 25-year timeshares under the auspices of the HTC trust structure and using the three-fold leaflet. I do not consider that HTC discharged its duty by relying on what it was told by Mr Pratt in his faxes of 22-23 September 1998.

93. As a separate matter and as a complete answer to PMI's claim, Mr Southall submitted that on the principles laid in *Henderson v. Henderson* (1843) 3 Hare 100 PMI's claim should have been advanced in the action brought by PMI against Mr Ananda in Indonesia for breach of contract. HTC was thus arguing that it should have been made a defendant, and the claim made against it, in those proceedings. There is nothing in *Henderson v. Henderson* to justify this conclusion, and no further authority was cited to me in support of this submission. I should add that there was nothing in the agreements compromising the Indonesian proceedings against Mr Ananda which could be said to preclude the present claim against HTC.

RBL's Claim

94. Turning to RBL's claim, I shall first complete the narrative of relevant events. None of them is controversial. As mentioned earlier, a problem arose in relation to the lease of the land on which Roger and Alan Thomas had intended that RBL would develop a resort to be called Peninsula Beach Club. Negotiations led to a joint venture agreement with Mr Yutaka Minowa representing the corporate owner of 80 per cent of the shares of WAC which in turn held the lease of an adjourning piece of land. There were already 12 rooms and other resort facilities on this land and the parties agreed that RBL would construct, develop and market a resort to be called Peninsula Beach Resort on a timeshare basis. Mr Minowa was to make the land and existing buildings available to the joint venture, and ownership of the joint venture was ultimately to be divided on a 51/49 basis, with Mr Minowa as the majority owner. The resort was to be affiliated to Interval International.

95. The appointment of HTC as trustee continued, notwithstanding the changes in property and owner. The changes were explained in correspondence and discussions beginning in late November 1998, and in December 1998 RBL paid the second instalment of the trustee appointment fee. Mr Hutchinson confirmed in a fax dated 23 December 1998 to Interval International that all the project documentation had been agreed and signed and that the only outstanding matter was to complete the assignment of the lease into the name of the title company to be owned by the trust. HTC received a copy of the lease in mid-January 1999, and in a fax dated 21 January 1999 to Roger Thomas, set out the steps to be taken. These steps included confirmation by an independent local lawyer that the lease was valid and covered the resort and preparation by the lawyer of a deed of assignment from the lessee to a Title company. In another fax on the same day to Roger Thomas, HTC suggested that an owning company with the name "Peninsula Beach Resort (Title) Limited" should be set up at a cost of US $600.

96. On 30 January 1999 RBL appointed Erwin Siregar Associates, a local firm of lawyers, to act for it in the assignment of the PBR lease to the Title company. On the same day Roger Thomas suggested the requirements for local legal advice on "the validity of the lease etc" could be met by the Siregar opinion letter already provided to Interval International. The opinion letter dated 11 December 1998 stated, among other things, that Mr Siregar had examined the proposed trust scheme documentation and continued:

    "This scheme protects the rights of occupation of the individual owner…."

    Mr Hutchinson was concerned that HTC should engage its own local lawyer, not rely on Mr Siregar. In due course a draft assignment of lease was drafted by Mr Siregar and provided by RBL to HTC, on which HTC made detailed comments, including correcting the name of the assignee to Peninsula Beach Resorts (Title) Limited. HTC had instructed a local law firm, Bernard & Associates, by August 1999 and an opinion on the lease assignment was provided in September 1999. The lease assignment was signed on 19 October 1999, with an employee of HTC present to represent the Title company as assignee. A problem immediately emerged because the assigned lease expired in 2008, although it contained a right of extension to 2028. In the light of the experience with Villa Lalu, HTC understandably adopted a cautious approach, making clear that it would not issue certificates to purchasers until satisfied by Indonesian legal advice that the right of extension was specifically enforceable against the lessor and any mortgages or successors in title.

97. This problem had been substantially, though not completely, overcome by January 2001 when a prospective Indonesian purchaser of a timeshare unit at the Peninsula Beach Resort raised the issue as to the legality of the lease being owned by a foreign company. This was clearly not a point which had ever occurred to HTC or been drawn to its attention. It had not been raised by local lawyers when dealing with the lease transfer for Peninsula or other resorts. RBL pressed HTC to provide an opinion from an Indonesian lawyer that the Title company could own the lease, but RBL was not satisfied by the terms of an opinion given by Mr Siregar in May 2001. By June 2001 RBL had decided to terminate the arrangements with HTC, as Roger Thomas informed Interval International in a fax on 1 June 2001. There was a difficult meeting on 28 August 2001 between Paul Smythe and Daniel Chou of HTC and Roger and Alan Thomas. The Thomas' stated they were taking English legal advice with a view to recovering fees and charges paid to HTC, but would not either terminate or continue with the trust arrangements until receipt of English advice. There was a dispute on the evidence as to whether Paul Smythe said at this meeting that it might be better if both parties agreed

to just walk away, as Roger and Alan Thomas maintained. However, Alan Thomas accepted in cross-examination that Mr Smythe's contemporaneous note of the meeting correctly recorded the gist of what he said: "I said that between us we have two choices, to go ahead with the trust arrangements or to wind up the trust." I accept the accuracy of that account, although I do not see the difference as affecting any of the issues in the case.

98. RBL's case against HTC is pleaded on the basis of misrepresentation and breach of contract. The case of misrepresentation is based on statements contained in the promotional material and made at the meeting with Roger Thomas on 15 July 1998. It is alleged that the effect of the statements was to represent, among other things, that HTC or an English subsidiary was capable of owning or having vested in it title to RBL's resort and that in reliance on these representations RBL appointed HTC as trustee and executed the Deed of Trust. The claim for breach of contract is based on the express terms of the Deed of Trust, including in particular recital (A) which refers to RBL owning Exclusive Rights of Occupation of the resort, "which Exclusive Rights of Occupation are or will be owned by charged or leased to registered or vested in the name of Peninsula Beach Club Title Ltd". It is also pleaded that it was an implied term of the Trustee Appointment that HTC or the Title company would be capable of owning or having vested in it the title to the land or buildings comprising the Peninsula Beach Club. Contrary to the representation and/or in breach of contract, it is pleaded that under Indonesian law neither HTC nor the Title company, both being incorporated in England, were permitted to own and have vested in it the land and buildings comprising the resort, so that HTC's trustee scheme was "fundamentally flawed and incapable of being properly implemented so as to achieve its main purpose, viz. the safeguarding of the title to the apartments at the Peninsula Beach Club." As I have mentioned earlier, the switch in December 1998 to the Peninsula Beach Resort on adjoining land was agreed by the parties not to alter the arrangements between them other than the substitution of the one resort for the other.

99. In its Defence, HTC takes issue with RBL's case as to the true effect of statements made in the promotional literature. HTC did not admit (having previously denied) the implied term alleged by RBL that HTC or the Title company would be capable of owning or having vested in it the title to the land and buildings comprising the resort, and pleaded specifically as follows:

"It was the Defendant's practice, as explained to the First Claimant, that the said Trustee Appointment agreement and Deed of Trust were in standard form (subject to amendment to meet the individual requirements of the resort owner/developer) and signed and executed as a preliminary to the appointment of lawyers by each party to advise on the establishment of the Trust arrangement which would normally include the vesting of a lease over or title to timeshare property whether land, buildings or both, in an Owning Company, in whatever form was required by local jurisdictions. Alternatively, if there was such an implied term, it accurately represented Indonesian law at the time, namely that the said companies, being incorporated in England, were capable of owning or having vested in them title under lease to the land or buildings comprising the Peninsula Beach Club."

HTC denied that in breach of contract neither HTC nor the Title company was permitted to own, or to have vested in it, the land or buildings comprising the Peninsula Beach Club, or that its trust system was therefore fundamentally flawed. It also pleaded that it had received Indonesian advice that a foreign company could be a lessee or assignee under a lease. HTC made a request for further information of the allegation of breach of contract, requiring RBL to state with particularity (so HTC knew the case it had to meet) how it was alleged that the laws of Indonesia prevented a foreign company holding land in Bali.

100. On the basis of the pleadings, it would seem clear that the issue of Indonesian law which arose for decision was whether the Title company, as a foreign company, was legally capable of owning or having vested in it title under the lease to the resort. This was the issue on which HTC sought to satisfy RBL in 2001. However, in light of the reports of the experts on Indonesian law and their joint statement as to the matters on which they agreed and differed, there was some broadening of the issue at trial. It was submitted in the skeleton for HTC that by reason of the Transfer and Assignment of Legal Rights signed on 18 October 1998, the Title company owned the *contractual* rights and benefits of the lessee of the resort land and therefore had the ability to safeguard and protect the timeshare purchasers' rights to use and occupy the resort.

101. As to the basis of its claim, RBL's case at trial proceeded principally as a claim for breach of contract, although it maintained also its case of misrepresentation. It was submitted that HTC owed a contractual duty to provide a trustee system which was appropriate in the sense of being clearly binding and legal under Indonesian law, and that the trust scheme provided by HTC did not work as a matter of Indonesian law.

102. HTC's position was that by reason of its appointment as trustee, it was its responsibility to protect and keep protected the timeshare owners' legal rights to use the resort as detailed in the Deed of Trust, which required that RBL's Exclusive Rights of Occupation of the resort should be registered or vested in the name of the Title company. By reason of the Title company holding the contractual rights and benefits of the lessee of the resort pursuant to the Transfer dated 18 October 1998, the trustee system had been effectively implemented.

103. At root therefore there is little difference between the parties' positions as to HTC's contractual duty. They are agreed that it was HTC's responsibility to ensure that the Title company held such rights as were necessary to protect the timeshare purchasers' rights of occupation through the period of their timeshare. Mr Hutchinson accepted in cross-examination that HTC marketed itself as being able to put the trust structure in place. If, as HTC contends, this could be achieved through a transfer to the Title company of all the rights of the lessee under its lease, the trust scheme achieved its purpose and there was no need for an assignment of the lease itself. The important point was that the rights or interests transferred to and vested in the Title company should be such that the rights of the timeshare owners could not be defeated by a later mortgage, disposal or other dealing with the lease by the lessee. The issue is therefore whether the Transfer and Assignment of Lease Right dated 18 October 1999 was effective to achieve that result. This is an issue of Indonesian law which turns on the evidence of the experts called by each side.

104. Before turning to the expert evidence, I will deal with other points arising from the way the parties put their case. First, it follows from what I have said above that it was not in my judgment a term of HTC's appointment that the lease should be vested in the Title company if the necessary protection could be achieved by the transfer of other rights. Recital (A) to the Deed of Trust, which both sides rightly regard as a critical part of defining the result to be achieved by the trust structure, refers to the vendor owning "the Exclusive Rights of Occupation" of the resort which are or will be owned or vested in the Title company. The expression "the Exclusive Rights of Occupation" is general enough to cover either rights under lease or the lease itself, assuming of course a distinction can be made between them. Recital (B) makes clear that the purpose of vesting such Rights in the Title company is to ensure that nothing is done which might prejudice the timeshare owners' rights during their timeshare period. It is that purpose which defines what must be vested in the Title company.

105. Secondly, the promotional materials supplied to Roger Thomas before he met Mr Hutchinson on 15 July 1998 were not, as pleaded in the Defence, mere puffs. Subject to the obvious qualification that they did not spell out all the detail, they were reasonably to be regarded by a recipient such as Mr Thomas, and as Mr Hutchinson's evidence made clear were intended to be, an accurate description of the trustee scheme and its purposes. Statements made in the promotional materials and at the meeting did not themselves have contractual effect, but they are relevant to the proper construction of the Trustee Appointment and Deed of Trust, including the responsibilities of HTC. If any of the statements were untrue, they are capable of giving rise to a claim for rescission or damages on grounds of misrepresentation.

106. Thirdly, it should be noted that HTC has not contended that it was not responsible for ensuring that the transfer of rights to the Title company was effective under Indonesian law and achieved the agreed purpose of the trust arrangements. Clause 5.1 of the Deed of Trust indirectly underscores this point by providing that the Trustee relies on the vendor or its lawyers "in regard to the validity or otherwise of the title to the Apartments" which refers to the validity of the Vendor's title rather than the efficiency of the transfer to the Title company. Likewise, paragraph 6 of the document produced by HTC and headed "Guideline for Developers – Chronological Schedule of Events" states that a lawyer will be appointed by HTC to undertake the legal procedures necessary to transfer the apartments into trust.

107. I turn now to the expert evidence on Indonesian law. The claimants' expert, Dr Adriaan Bedner, is a senior researcher at the Van Vollenhoven Institute for Law and Administration in Developing Countries at the University of Leiden in the Netherlands. His primary area of expertise is Indonesian law, including land law which was one of the subjects of research for his doctoral thesis. The expert called by HTC, Mr Christian Teo, is an advocate by appointment of the High Court of Jakarta and a partner in the Indonesian law firm of Hadiputranto, Hadinoto & Partners, part of the Baker & McKenzie association of firms. He is head of the information technology and telecommunications practice, but he also advises on a wide range of commercial transactions, including hotel and property projects. I consider that both were qualified to give expert evidence on the issues of Indonesian law relevant to this case. It was suggested to Dr Bedner that as an academic lawyer he lacked the experience as to how transactions were in practice effected in Indonesia. However he has undertaken extensive research work in Indonesia, which has included wide contact with Indonesian lawyers and Indonesian practice. Mr Teo's own practice and experience is not primarily in the area of land law and overall I concluded that Mr Bedner had the greater understanding of Indonesian land law. His evidence was given clearly and logically, whereas Mr Teo's evidence was frequently confusing.

108. There was a good deal of common ground between the experts, summarised in their joint statement of 8 January 2004. Before Indonesia gained independence, its land law was a mixture of Dutch colonial law and local customary, or adat, law. There were considerable variations in adat law in different parts of Indonesia. Following independence, the Basic Agrarian Act (no.5 of 1966) (BAA) was enacted and has since provided the legal foundation for the land law system. All colonial and adat rights were converted into a single system of new rights, using adat law as its basis. One of its aims was to achieve a uniform system and this is expressed in article 16, which makes clear that it is exhaustive, with no rights recognised other than those mentioned in the BAA or subsequent statutes.

109. Another purpose of the BAA was to restrict foreign ownership of land. On implementation of the BAA, all land titles and rights held by Indonesian citizens were automatically converted into the equivalent title under the BAA. Those held by foreigners were converted only in those cases where foreign ownership was permitted under the BAA, and since then foreign ownership has been lawful only in those cases and subject to the conditions specified in the BAA.

110. The BAA creates a hierarchy of land titles which are listed in article 16. The most comprehensive is hak milik, which may only be held by Indonesian citizens and stipulated government agencies. It may be granted only by the state and must be registered at the National Land Agency, as must certain other land titles. The land title relevant to these proceedings is a hak sewa untuk bangunan (hak sewa), defined in article 44. It is a lease which may be granted by the holder of a higher land title and entitles the grantee to occupy and construct buildings on the land in return for the payment of rent. The grantee may transfer a hak sewa. There is not a complete prohibition on foreign ownership of a hak sewa, but it is restricted to a foreign individual domiciled in Indonesia or a foreign company with a representative office in Indonesia.

111. It is common ground that neither HTC nor the Title company had a representative office in Indonesia. It was therefore common ground between the experts that if the effect of the Transfer and Assignment of Lease Right dated 18 October 1999 (the Transfer) was to purport to transfer the hak sewa held by WAC, as a land title under the BAA, it was wholly ineffective. Dr Bedner's evidence was that this was its effect and therefore no right or title was vested in the Title company.

112. Mr Teo's evidence was that on two separate grounds the Transfer vested in the Title company sufficient rights to enable HTC's trust system to provide the intended protection. The first ground was that a right to use and build on land could be embodied in a private lease agreement which did not create a land title under the BAA but was effective, under the Civil Code, to confer rights as a matter of contract. Such an agreement fell outside the scope of the BAA and was not therefore subject to the restrictions on foreign ownership. The term hak sewa could properly be understood as applicable to such contractual rights, as well as to the defined land title under the BAA. His evidence was that these contractual rights were binding on, and would be enforced against, third parties such as purchasers of the grantor's title.

113. I was not entirely clear from Mr Teo's report whether his evidence was that these two different types of hak sewa, one a land title under the BAA and the other a purely contractual right,

co-existed in Indonesian law or whether it was because, on his evidence, the provisions of the BAA with regard to hak sewa had not yet been implemented that only contractual hak sewa could presently exist. Dr Bedner's objection to a theory of co-existence was that it would entirely undermine the policies behind the BAA of a uniform system of land ownership with prescribed restrictions on foreign ownership. If parties could achieve much the same rights over land as against each other and third parties by a contract as by the grant of a hak sewa under the BAA, there would be little point in using the latter and the restrictions on foreign ownership would be neatly sidestepped. I regard Dr Bedner's objection as compelling and find that under Indonesian law it is not possible to create hak sewa rights, certainly not binding on third parties, simply by contract.

114. This assumes that the BAA is in force as regards hak sewa. If it is not in force, the grant of a hak sewa must be under some other system. In his report, Mr Teo said that as the BAA provided for further regulations as regards hak sewa and as such regulations had not been issued, the BAA was not in force as regards hak sewa. He continued that it has been:

"a generally accepted approach that in the absence of such implementing regulation and the diminishing significance of the adat law in certain modern societies (which in the metropolitan area could be a rise of various adat laws), we could refer to the provisions of the Civil Code to fill in the void or the gap between the different adat laws, with the condition that such provisions must be expressly agreed by the parties and incorporated in the lease agreement"

In his oral evidence, Mr Teo accepted that this was his opinion, rather than a generally accepted approach. He also accepted that there was no support in any cases for his approach, although he indicated that there was some support in scholarly works not specifically referred to in his report. He was clear in his oral examination-in-chief that because there were no regulations implementing article 44 of the BAA, which deals with hak sewa, the provisions of the BAA as regards hak sewa were not yet in force and it was not yet possible to create or hold the land title of hak sewa provided for by the BAA. He referred to article 50 (2) of the BAA which provides:

"Further provisions concerning the right to exploit, right to build, right of exploration and right of lease for buildings shall be stipulated by a statutory regulation."

115. Specifically it was Mr Teo's oral evidence, although this is not spelt out in his report, that a hak sewa under the BAA must be registered to be effective and no regulations as to registration have been issued. Accordingly, it was not as yet possible to hold a hak sewa under the BAA. For the proposition that registration was required, Mr Teo relied on article 19 of the BAA. Article 19 (1) provides:

"In order to guarantee legal security the Government shall conduct land registration throughout the territory of the Republic of Indonesia according to provisions laid down by Government Regulation."

Article 19 (2) provides for such registration to cover the registration of the rights on land and transfer of these rights and the issue of certificates of rights on land which are to be valid as strong evidence. Article 19 does not specify which land rights or title are to be subject to registration, but articles 23, 32 and 38 make the registration of certain land titles mandatory. There is no equivalent provision in relation to hak sewa and indeed no provision of any sort in the BAA as to the registration of hak sewa, which strongly suggests that registration is not required for the creation of hak sewa. Later in his evidence, Mr Teo suggested that articles 23, 32 and 38 were drafted to apply only to rights existing at the time that the BAA came into force. Apart from a footnote in an academic work, he provided no support for this view. I can see none in the BAA and the footnote does not in my view support the proposition.

116. In his oral evidence, Mr Teo also relied on Government Regulation no. 24 of 1997 which implemented article 19. This was not referred to in his report, had not been put to Dr Bedner and, when it was first mentioned, the text was not available in translation for the court. His evidence was that the Regulation emphasised that to exist as a land title it must be able to be registered, but he said that it provided for registration of certain land titles and did not mention hak sewa. On the second day of his evidence, a translation of regulation 24 of 1997 had been prepared and agreed by the experts. Article 1.5 defines land titles as those listed in article 16 of the BAA which therefore

include hak sewa. Article 9 (1) lists "the objects of land registration" as including various titles, but hak sewa is not one of them. Article 44 (1) provides that:

"The placement of…hak sewa for building on hak milik…can be registered if it could be evidenced with a deed prepared by the Land Deed Official authorised in accordance with the prevailing laws and regulation."

This is the only provision dealing with the registration of hak sewa and, combined with the provisions of the BAA, it supports Dr Bedner's evidence that a hak sewa can, but need not, be registered.

117. I am satisfied on the evidence that the provisions of the BAA dealing with hak sewa are in force and that a hak sewa under the BAA could be granted and transferred in 1998 and 1999. I am also satisfied that it is not necessary to register a hak sewa under the BAA, although it is permissible to do so as contemplated by article 44 of regulation no. 24 of 1997. For reasons given by Dr Bedner, I reject Mr Teo's evidence that there is a parallel system of hak sewa created purely by contract and not subject to the provisions of the BAA. On this point, Mr Teo placed some reliance in his oral evidence on article 12 of the Housing and Domicile Act (no.4 of 1992), which Dr Bedner had referred to for completeness in his report but did not feature in Mr Teo's report. Article 12 concerns rights of residence in another's house, which may be created on the basis of a written lease or an agreement which may be written or oral. It creates a specific regime for such rights but has no application to the facts of this case. It provides no support for the existence of a more general regime for the creation of contractual hak sewa outside the scope of the BAA.

118. Mr Teo accepted in cross-examination that in practice foreigners do not hold hak sewa in their own names, but hold them through Indonesian companies. Practice therefore provides no support for Mr Teo's evidence on contractual hak sewa.

119. Mr Teo's alternative analysis related specifically to the terms and effect of the Transfer. Whether WAC held a hak sewa as a land title under the BAA or as a contractual right, the effect of the Transfer was not to assign the hak sewa to the Title company, but only the right of the lessee to enjoy the benefit of the lease without assuming responsibility for any obligations under it. The lease or hak sewa, and its obligations, remained with WAC while the rights and benefits vested in the Title company. In this way the Title company obtained the full rights as if it were the lessee and could assert those rights against third parties so as to safeguard and protect the legal rights of the timeshare owners. Dr Bedner's opinion is that this amounts to a transfer of title to the hak sewa. In his view, Mr Teo's analysis, like his theory of the contractual hak sewa, would permit a complete avoidance of the restrictions on foreign ownership in the BAA.

120. An agreed English version of the Transfer was executed by the parties on the same day as the original Indonesian version. On its face it would appear to be more than a transfer of benefits, although it is clear that the obligations remain with WAC. The recitals state that WAC is "entitled to re-rent or transfer the Lease Right" dated 1 December 1998, that WAC intends "to transfer his lease rights but without the obligations" to the Title company and that WAC:

"states that hereby he has transferred and assigned the lease to the second party and the second party states that hereby he has received the transfer right but not the obligations."

Article 2 provides that "all rights contained in the lease above-mentioned are hereby transferred and assigned" to the Title company, with the obligations remaining with WAC. Article 3 provides that:

"Commencing the validity of the Deed all land described above together with the buildings and facilities which have already been constructed…has been transferred and assigned to the second party as the trustee pursuant to the Deed of Trust dated 23-07-1998."

Article 5 includes a warranty by WAC that it has informed the lessor of the transfer and assignment to the Title company as required under the lease. That is a reference to clause 9 of the Agreement for lease dated 1 December 1998 under which the lessee was entitled to "transfer the lease title according to this Lease Agreement or re-lease the land to another party" provided that prior written notice was given to the lessor. By Article 6 the Title company agreed that WAC could enjoy free use

of the land and buildings throughout the period of the lease and any extension subject to the rights of timeshare owners. This reflected provisions in the Deed of Trust, to which the Transfer expressly referred. Mr Teo agreed in cross-examination that a transfer of full control of the land would infringe the purposes of the BAA and, when taken through the provisions of the Transfer and the Lease Agreement, agreed that a very wide measure of control was transferred to the Title company. Nonetheless he said that it did not offend the BAA.

121. I am satisfied on the evidence that Dr Bedner is right that the Transfer falls within the ambit of the restrictions on foreign ownership in the BAA and that the reservation to WAC of the obligations under the lease does not prevent it from doing so. I accept Dr Bedner's evidence that a transfer of this sort to a foreigner would undermine the basic policy to which those restrictions give effect and that the transfer amounts under Indonesian law to a transfer of the hak sewa.

122. It follows that in my judgment HTC was in breach of contract in failing to put in place a trust system which was effective under Indonesian law for its stated purpose. It was submitted for HTC that it was a remediable breach. There is however no evidence that HTC sought to provide a remedy, which presumably would have involved either the establishment of a representative office in Indonesia or, more obviously, the incorporation of an Indonesian company to be the Title company. Even if capable of remedy, it was a breach which went to the central purpose of the contract appointing HTC as trustee and one which entitled RBL to terminate the contract, as it did, and to claim damages for its loss.

123. In my judgment, RBL also makes out its case for misrepresentation. The effect of the promotional materials and information provided at the meeting on 15 July 1998 was that an English title company owned by HTC as trustee could own title to the Peninsula Beach Club. As a statement of foreign law, this was a representation of fact: *André & Cie SA v. Ets Michel Blanc et Fils* [1977] 2 Lloyds Rep. 166. It was therefore a representation for the purposes of the Misrepresentation Act 1967, RBL relied on it in agreeing to appoint HTC, and it was untrue. RBL would therefore be entitled to rescind its contract with HTC and I would not regard it as an appropriate case in which to substitute an award of damages under section 2(2). However, as I understand it, an award of damages for breach of contract gives RBL complete relief and I do not therefore propose to grant relief in respect of its claim based on misrepresentation.

Damages Claimed by RBL

124. Paragraph 28 (A) of the amended particulars of claim sets out nine heads of specific loss. There was no challenge to the first four heads, which total £3,340. They are all amounts paid to HTC arising directly out of RBL's agreement to use the trust structure marketed by HTC and to appoint HTC as trustee. The fifth head, a sum of £475 paid for credibility materials, was challenged on the grounds that, although RBL bought them, it passed them to PMI, which used them in the marketing of Villa Lalu. In view of the problems with Villa Lalu, of which HTC was or should have been aware, the credibility materials proved to be of no use to either RBL or PMI and it cannot be said that RBL obtained or gave away anything of value for its payment of £475. That sum is therefore recoverable from HTC. The sixth head is a fee of IR 15,000,000 paid to an Indonesian firm of lawyers for an opinion to be provided to HTC. This loss also flowed directly from RBL's appointment of HTC as trustee. No invoice for this fee has been produced but that is not fatal where evidence is given that it was paid and there is no evidence to contradict it.

125. The seventh head are payments made to HTC under various invoices relating to the provision by HTC of its services as trustees. These are also therefore recoverable. It was suggested to Roger Thomas in cross-examination that some of these costs were recouped from purchasers but I accept his evidence that there was no procedure for a specific or global recoupment from purchasers. It was also suggested that a total of £8,860.60 for contract administration fees at US $100 per week purchased was collected from purchasers and paid on to HTC. The purchase contracts showed a separate "Trust & Administration Fee" which presumably included this amount. It was therefore suggested that this was not recoverable by RBL from HTC because RBL had suffered no loss. However, if a different system of protection for purchasers had been adopted, it is not likely that the Trust & Administration Fee would have been any smaller. Accordingly, and as the fees paid to HTC came from RBL's own funds, not from moneys held on trust, they represent a loss to RBL. The remaining two heads are also recoverable. Bank transfer charges (item 8) were incurred to

make payments to HTC and item 9 represents retentions made by HTC from funds which were received from purchasers and later released to RBL net of the retentions.

Damages claimed by PMI

126. The specific amounts claimed by PMI changed significantly both before and after these proceedings were commenced, although the heads of loss have not changed. Amounts were claimed in a letter dated 3 November 1998 from PMI to Mr Ananda, which Roger Thomas described in his evidence as off the top of the head figures made without any real enquiries as to the loss suffered, and in fairness it may be added that it was sent at a time before all the losses now claimed had been incurred. Figures supplied by Mr Thomas in a letter to local lawyers in Indonesia for an action against Mr Ananda were, according to Mr Thomas' evidence, produced by administrative staff who were not sophisticated in maintaining files and would in any event have been revised as they came across new information. Two actions were brought against Mr Ananda in Indonesia claiming damages for breach of contract, but apart from the claim document dated 25 March 2000 none of the documents relating to that action was available for disclosure in these proceedings. The amounts claimed in the letter before action in this case, in the original particulars of claim and in the particulars of claim as amended in March 2003 were themselves altered and in many instances increased in Roger Thomas' witness statement. For many of the items there appeared to be no documents to support the amounts claimed, until the revised figures appeared in Mr Thomas' witness statements. Those figures are based, according to the claimants' evidence, on computerised accounting records which were not discovered until September 2003.

127. In its defence HTC did not admit the amounts claimed and put PMI to proof. This is hardly surprising, given that it had no basis or even access to documents on which to mount a positive case. In the light of the way in which the figures claimed have developed, for the most part without any firm basis, Mr Southall quite fairly maintained the submission that PMI had failed to prove its case. However, the amounts now claimed are supported by the entries in the computer printouts. It was not suggested that they were not genuine records made at the time they appeared to have been made. Mr Southall submitted that without evidence from the compiler they were not admissible, but they are hearsay evidence and as such admissible without more under the Civil Evidence Act 1999. Roger Thomas explained that he had gone through every item in the computer records and, where it fell within one of the heads of loss claimed, included it in the sum claimed in his witness statement. I am satisfied on the evidence that PMI has established the amounts which it claims, as set out in Mr Thomas' witness statement. This leaves for consideration any points of principle arsing under any of the heads of loss.

128. The relevant heads, and the amounts claimed under each, are set out in paragraph 46(2) of Roger Thomas' witness statement. A sum of US $5,000 included for legal costs in the particulars of claim was not included in the witness statement and was formally abandoned. No issues of principle arise on the amounts claimed or the heads of loss in sub-paragraphs (d) to (l) of paragraphs 46(2). They are all expenses incurred in the ordinary course of running PMI's operation as marketer for Villa Lalu, including some costs incurred in the period after sales ceased and PMI was dealing with the problems which then existed.

129. Paragraph 46(2)(c) claims the costs of employing a specialist timeshare salesman, David Marshall, for 3½ months from November 1998. He was engaged specifically to deal with the clients who had purchased timeshares at Villa Lalu. I accept that PMI acted reasonably in engaging Mr Marshall to deal with the difficult and sensitive problems which had arisen from discovery of the problem with the Villa Lalu leases. It was suggested that he cannot have spent more than part of his time on dealing with those clients but I am satisfied on the evidence that the amount claimed is recoverable under this head.

130. Paragraph 46(2)(b) claims the cost to PMI of upgrading 17 timeshare purchases to Peninsula Beach Resort. The background is that as a means of satisfying timeshare purchasers at Villa Lalu, PMI arranged for an offer of an equivalent unit at Peninsula Beach Resort at no additional cost. The proposed selling cost of such units at Peninsula was greater than at Villa Lalu and the amount claimed represents the difference. Four points arise. First, in my judgment, this was a reasonable step for PMI to take to mitigate its loss, because it could well have faced claims from Villa Lalu purchasers who had not received what they bargained for. Such loss would be a

foreseeable consequence of permitting the marketing of Villa Lalu to continue. Secondly, while it is RBL which has provided the timeshare units, it is entitled to claim the cost from PMI which is subject to a corresponding liability, causing PMI a loss of the same amount. Thirdly, I reject the suggestion made in cross-examination of Roger Thomas that these transfers created any significant benefit or value for the business of PMI or RBL. Fourthly, out of the total of 47 purchases, three were made after 22 October 1998 when Roger and Alan Thomas first heard of the lease problems. At the time they took the view that this was not a real issue but a bargaining ploy on Mr Pratt's part. They therefore continued to sell for a few days. They were wrong in their assessment and in my judgment they acted unreasonably in taking the risk of further sales. Accordingly, if any of the three purchases made after 22 October 1998 were transferred to Peninsula, PMI cannot include the resulting cost in its damages.

131. Paragraph 46(2)(a) claims loss of revenue on 30 cancelled purchase agreements, where the purchasers did not take units at Peninsula. As I understand the claim, loss of revenue here means loss of profit, since it is calculated as the difference between the percentage of the sales figure received by PMI and its cost of sales. This claim would in principle be recoverable from the Villa Lalu developers for breach of contract. However, the claim against PMI is in negligence, where damages are claimed against HTC for the losses which result from HTC's breach of duty in permitting the marketing of Villa Lalu to continue. If HTC had acted in accordance with its duty and taken steps to halt the marketing, PMI would have made no sales and would therefore not have lost any profits on sales. This head of loss is not therefore recoverable by PMI from HTC.

132. HTC submits that there should be deducted from the damages payable to PMI the value of a benefit received by PMI in the settlement of its claim in Indonesia against the developers of Villa Lalu. An agreement dated 8 May 2000 and made as part of the settlement provides that PMI is to have "the use, subject to availability, of either a one or two bedroom villa at Villa Lalu…for a period of two (2) years at no cost to PMI". Use of the villa was to be at the sole discretion of the developer for the high season periods 1 July to 15 September and 15 December to 15 January. It was submitted for HTC that the value of the benefit conferred by the settlement agreement was US $24,000 or US $33,600. This was on the basis that PMI's letter of instruction dated 21 January 1999 to its Indonesian lawyers gave the cash values of exclusive use of one and two bedroom villas at Villa Lalu as US $1,000 and US $1,400 per month respectively, which Roger Thomas said in evidence were the published weekly rates. In view of the restrictive terms on which this benefit was conferred, it is not clear that it had any significant value. The figures put forward by HTC are not applicable in the light of those terms, and no alternative figure was put forward. I am not satisfied that any monetary value can be attributed to this benefit, nor is there any evidence that PMI made use of it. I shall not therefore deduct any amount from the damages on account of this "benefit". Further, PMI was able to claim from Mr Ananda heads of loss for breach of contract which cannot be claimed against HTC. Unless the value of the benefit exceeded the sums which can be claimed only against the developers, I would be inclined to think that it would not fall to be deducted from the damages otherwise payable by HTC.

133. Finally, PMI makes a claim for damages under a head of loss which it describes as loss of reputation. The only reference to this loss in its pleaded case appears in paragraph 28 of the amended particulars of claim, which refers to the claimants' loss and damage "including damage to their goodwill and reputation". No particulars are given and there is no further identification, or any quantification, of the alleged loss. Likewise, the witness statements of Roger and Alan Thomas contain no quantification of any loss. Roger Thomas refers to a "considerable" loss of business resulting from adverse publicity and Alan Thomas refers only to the "damage to our business". Dawn Howarth, an administration manager employed by PMI since July 1998, states in her witness statement that she has no doubt that the damage to PMI's reputation had a serious effect on the sales of PBR through PMI.

134. The facts as they appear from these statements and the evidence given in cross-examination are as follows. There is no suggestion in the evidence of any adverse publicity or impact on PMI's business for nearly a year following the end of the marketing of Villa Lalu in October 1998. According to Roger Thomas, the most damaging publicity came in an article in September 1999 in an English-language newspaper, the Bali Sun. It is Australian-owned and issued free in hotels and other venues throughout Bali, which are the major sources of PMI's customers. I shall refer in a little more detail to this article but it deals with Villa Lalu and, amongst a number of issues, draws attention to the mismatch between the lease and timeshare periods. Similar articles appeared in

Indonesian-language papers and a publicity and political campaign developed against timeshare operators, including PMI and the Thomas brothers. This appears to have been largely at the instigation of hotel operators and their trade association who were in competition with the timeshare business. An article on 23 October 1999 in an Indonesian-language paper reported that Roger and Alan Thomas had been threatened with deportation unless they had the right documents for their involvement in the timeshare business. A further article in another Indonesian-language paper on 9 November 1999 reported that PMI's business was to be closed down as illegal. In June 2000, steps were taken by the authorities with a view to closing PMI on grounds which included a lack of due authorisation. The Thomas' were able to make successful representations at the highest level in the Ministry of Tourism to prevent PMI's closure. At about the same time, Alan Thomas was accused of organising a political demonstration and deported from Bali, but after intensive lobbying his deportation order was reversed some six weeks later.

135. In re-examination, Roger Thomas gave evidence as to the financial consequences of this adverse publicity. Taking the industry average of a sale of 90 per cent of timeshare units in a resort in a period of 50 months, they expected that level of sales at the Peninsula resort by September 2002. Because of the shortfall in sales, which Mr Thomas considers may take another 3-4 years to make up, he calculated a delay in the receipt of net income of some $9 million. Applying interest at 8 per cent he claimed in his evidence a loss of $2 million for RBL and PMI with respect to the Peninsula resort. In his closing submissions, Mr Brannigan put forward a figure of some $800,000 but said that PMI did not expect to receive as much as that, given the need to make appropriate deductions for other factors which may have delayed sales. It was submitted that an award of at least $100,000 - $150,000 would be appropriate.

136. The first issue which arises is whether what has been called by the claimants loss of reputation is capable of being a recoverable head of loss from HTC in respect of its breach of duty to PMI. Mr Brannigan for PMI relied principally on the decision of the House of Lords in *Spring v. Guardian Assurance plc* [1995] 2 AC 296. It was there held that a former employer who carelessly gave an inaccurate and damaging reference in respect of an ex-employee could be liable in negligence to the ex-employee. The principal area of argument was whether his only remedy should lie in defamation where liability would be subject to the particular defences available in such claims. One of the distinctions drawn between claims in negligence of this sort and claims in defamation is that the latter are concerned with damage to reputation generally. The damages claimed in *Spring* were not in respect of damage to reputation in the sense which founds a claim for defamation ("mere reputation", as it was described by Hallett J. in *Foaminal Laboratories Ltd v. British Artid Plastics ltd* [194] 2 All ER 393) but were for economic loss, i.e. the loss of alternative employment. As Lord Slynn of Hedley put it at p.334:

"The essence of a claim in defamation is that a person's reputation has been damaged; it may or may not involve the loss of a job or economic loss. A claim that a reference has been given negligently is essentially based on the fact, not so much that reputation has been damaged, as that a job, or an opportunity, has been lost."

Although, as I shall mention later, a claim is made by PMI for general damages for loss of reputation, its primary case is for the pecuniary loss said to have been suffered by its business in the form of disruption and delay to the selling process of units at Peninsula Beach Resort.

137. In principle, provided that it is foreseeable and falls within the scope of the duty of care, damage to the claimants' business could be a recoverable head of loss in a claim in negligence of the type made in this case. Although PMI was a new company whose first business was marketing Villa Lalu, HTC knew that it had been set up to market Peninsula Beach Club. If the facts are changed and PMI had been marketing the Peninsula resort at the same time as Villa Lalu or shortly afterwards, it would in my view be reasonably foreseeable to HTC that if PMI sold units in Villa Lalu on a false basis, this could well lead not only to claims from Villa Lalu purchasers but also to disruption or damage to its marketing of the Peninsula resort.

138. This is not, however, what happened. The marketing of Peninsula Beach Resort commenced at some point in late 1998 or early 1999 and was unaffected by the Villa Lalu debacle. It was only with the appearance of newspaper articles nearly a year later and a campaign against timeshare operators that there was any disruption to PMI's business. It is clear from the article in the Bali Sun

on 15 September 1999 that it was closely connected with the claim brought by PMI against Mr Ananda which, according to the article, was for the "staggering" sum of IR 32 billion. Mr Ananda had given an interview to the paper and is extensively quoted in the article. A large number of different issues are raised, of which the mismatch between the lease and the timeshare period is one. It suggests that the marketing agreement with PMI had several irregularities and might have been illegal. It states that the agreement was not witnessed, had no Indonesian tax stamps and no company stamps. Some of the contracts with purchasers did not have Indonesian tax stamps. The problems with those contracts are not only the mismatch but also the facts (so it is said) that neither the affiliation documentation with Interval International nor the trust documentation with HTC were finalised. It is also said that a marketing licence for Villa Lalu required under Indonesian law had not been applied for or granted. It quotes Mr Ananda as saying that PMI refused to stop marketing Villa Lalu for almost two weeks after he asked them to stop and had declined all his requests for a reconciliation. It also quotes Nr Ananda as confirming that he had instigated criminal fraud charges against PMI which were being investigated by the police. The subsequent articles did not mention the mismatch but focussed on the alleged illegality of PMI's business and the threats to close it down and deport the Thomas brothers.

139. Not only therefore was the question of the mismatch not raised publicly for nearly a year but it was just one of a large number of allegations being publicly made about PMI and the Thomas brothers, in the context of PMI's claim against Mr Ananda. Hotel operators were then able to build on these allegations to run a commercial and political campaign against timeshare operators. It is certainly credible that the threats to close PMI's business and to deport the Thomas brothers, and the actual deportation of Alan Thomas, disrupted the marketing of Peninsula Beach Resort. That all resulted from the campaign against timeshare operators in general and PMI in particular. It is, in my judgment, too remote from any negligence by HTC in September 1998 to be recoverable as damages from HTC.

140. There would also be considerable difficulty in identifying any loss which could be attributable to HTC's negligence. The evidence of loss was sketchy, the only figures being given by Roger Thomas in re-examination. There was no analysis of the extent to which different factors contributed to any delay in sales of units and no support, other than Roger Thomas' own evidence, for the industry rates on which he relied for comparison.

141. It was submitted for PMI that if the court is satisfied that PMI's reputation has been damaged but not satisfied that any pecuniary loss has been suffered, an award of general damages can be made and that the appropriate method is that adopted in defamation cases. I cannot accept this submission. For the reasons already given, the claim is not for loss of reputation in the sense relevant to defamation, but loss of business. If a pecuniary loss cannot be established, there is no other loss for which a claim in negligence would lie. Even if that were not generally so, in my view it would be in this case, where PMI had no business except marketing Villa Lalu and Peninsula Beach Resort. There was no suggestion in the evidence, and certainly none was made to HTC, that it would carry on business more generally as a marketing company. In any event, the approach to the assessment of damages in defamation would not be appropriate. It has been developed to compensate against a quite different type of damage, which by its very nature is largely incapable of being calculated in purely monetary terms. An award of such damages is also subject to the particular requirements of, and defences to, a defamation claim. The distinction was drawn by Lord Woolf in *Spring v. Guardian Assurance plc* (supra) at p. 350-351, where he said of claims for negligence and for defamation:

"In the present context the two causes of action are not primarily directed at the same mischief although they, admittedly, overlap. I have already indicated that an action for negligence is concerned with the care exercised in ascertaining the facts and defamation with the truth of the contents of what is published.

This is also demonstrated by what would be the respective approaches to damages in actions based on defamation and negligence. In the case of defamation the primary head, but not the only head, of damages is as to the loss of reputation. In an action for negligence, on the other hand, the subject of the reference will be primarily interested in and largely limited to his economic loss."

The point is summarised in *Clerk & Lindsell on Torts* (18th ed.) at para. 7-01:

"Negligent harm to reputation may give rise to both liability for negligence where it occurs within a special relationship causing economic loss, and for defamation which provides wide protection irrespective of fault but subject to a web of defences designed to protect freedom of speech."

142. Accordingly I reject PMI's claim for damages for loss of reputation or damage to its business, but allow its claim in respect of those other losses identified above.
