THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil)

SAINT LUCIA

Claim No. 77 of 1994

BETWEEN:

BARBARA KIDDELL

Claimant

vs

WINDJAMMER LANDING COMPANY LIMITED

Defendant

CONSOLIDATED WITH

Claim No. 778 of 1997

BETWEEN:

1. HUGH BRIAN MACNICOL
   ROBERT KNOWLES MACNICOL
   DAVID ALEXANDER MACNICOL
   WILLIAM SCOTT MACNICOL
   (EXECUTORS OF ESTATE BARBARA I. KIDDELL)
2. GEORGE B. KIDDELL
3. DAVID MACNICOL
4. JAMES E. DELANEY
5. PATSY DELANEY
6. KAINO HAMU

Claimant

vs

1. WINDJAMMER LANDING COMPANY LIMITED
2. WINDJAMMER LANDING COMPANY ST. LUCIA (1992) LIMITED.
3. ELGIN HOLDINGS LIMITED

Defendant

Appearances:

Mr. Michael Gordon Q.C. with
Ms. Leandra Verneuil for Claimants
Ms. Brenda Floissac Flemming with
Ms. Shan Greer for Defendants

2004: January 19, 20, 21, 22, 30
February 27,
March 5, 31
April 16
2005: July 15

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RE-ISSUED JUDGMENT

Background Facts

[1] EDWARDS J: Windjammer Landing Company Limited (*Windjammer*) has been registered in St. Lucia since 1987. In that same year it began the development of a Holiday Residential Resort Complex on its property at Labrelotte Bay, Gros Islet in St. Lucia. The Resort Complex was officially opened in November 1989.

[2] The property included land known as Block 1053 B Parcel 466/1 which was part of the 3.185 acres of land known as Queens Chain, which is owned by Windjammer under an Emphyteutic Lease for 99 years from the Crown, registered in September 1992.

[3] In developing the Resort Complex and its hotel operations, Windjammer built Condominiums and Villas varying in sizes from 1 bedroom to 4 bedroom units on its subdivided lots. Some of these lots with units are privately owned by non-nationals including the Claimants who all own multi-bedrooms units.

[4] The established structure of the Resort Complex contemplated that Windjammer and private owners would individually enter into a written agreement known as the Rental Pool Master Agreement. This Agreement, with some standard terms for private owners, provided that Windjammer would rent their privately owned units to the public for private residence, and subsequently pay over the net income earned from the rental pool to the private owners. There were 58 Villa Owners with Residential Units in the Rental Pool.

[5] Another contemplated feature of the Resort Complex was that private owners and Windjammer would enter into Maintenance Agreements in writing whereby Windjammer would provide certain maintenance services for their units for a fee. The terms were the same in all of the Claimants' Agreements except for that of Mr. Kaino Hamu and Mr. James Delaney.

[6] Mrs. Barbara Kiddell acquired Parcel No. 1053 B 531 on the 21st January 1989 while her husband Mr. George Kiddell acquired Parcel 1053 B 479 on the same date. On these parcels 3 bedroom units known as Villas 23 and 24 respectively were built. They executed Maintenance Agreements with Windjammer on the 21st January 1989 to commence 1st January 1989. Mr. Kiddell's testimony was that his Villa 24 joined the Rental Pool on the 30th June 1990 while Mrs. Kiddell's Villa 23 joined on the 15th June 1990.

[7] Mrs. Kiddell died on the 28th September 1997 at the age of 64 years. The executors of her estate Messrs Hugh, Robert, David and William MacNicol collectively are the 1st Claimants prosecuting her claim for the benefit of her estate.

[8] Mr. David MacNicol acquired from Windjammer Parcel 1054 B 187 with his brother Robert MacNicol on the 14th November 1988. On this Parcel, a 2 bedroom unit known as Villa 40 was built. Mr. D. MacNicol's Maintenance and Rental Pool Agreements are dated 1st November 1988, but the Maintenance Services were to be provided from the 1st January 1989.

[9] On the 1st June 1989 Mr. James Delaney and Mrs. Patsy Delaney both acquired Parcel 1053 B 480 from Windjammer. Upon their Parcel a 3 bedroom unit known as Villa 25 was built. It is unclear when the Delaneys' Maintenance and Rental Pool Agreements commenced, but a document, Schedule Statement (*Exhibit "J D 22*") states the Maintenance Agreement was dated the 1st June 1989. Another document also discloses that their Villa 25 was in the Rental Pool in 1993.

[10] Mr. Kaino Hamu's situation is peculiar. On the 9th March 1990 he was registered as the Emphyteutic Owner of the leasehold interest in Parcel 466/1 Block 1053 B with improvements. He also acquired the freehold interest in Parcel 544 Lot 11 A Block 1053 B which Deed of Sale was registered on the 22nd January 1991. However, his Maintenance Agreement is dated 27th June 1988 and it states in the Schedule that he was the "*Registered owner of Lot 11 Type C – 3 bedrooms Lands and Premises*". A proforma document dated November 1987 (*Exhibit "KH2"*) supports his testimony that from 1987 he had been negotiating to acquire property from Windjammer. His unit is known as Villa 11. He testified also that his Villa joined the Rental Pool from 1990.

[11] The 2nd Defendant Windjammer Landing Company St. Lucia (1992) Limited (*Windjammer St. Lucia*), having been incorporated in St. Lucia in 1992, procured ownership of certain unsold land and villas valuing EC$14,553,000.00 at

Labrelotte, by a Deed of Donation from Windjammer, dated 11th June 1993 and registered on the 18th June 1993.

[12] The 3rd Defendant Elgin Holdings Limited (*Elgin*) was incorporated in St. Lucia in 1996 for the sole purpose of acquiring the unsold land and villas owned by Windjammer St. Lucia, upon the purchase of the shares in the 2 Windjammer Companies in St. Lucia by Gallileo World of Bresica Italy on the 21st October 1996.

[13] Prior to this date, the 2 Windjammer Companies in St. Lucia were wholly owned subsidiaries of Ellis Don Inc., a Canadian Corporation with Corporate Office in Ontario. Elgin by Deed of Sale executed on the 21st October 1996 acquired the 8 Parcels for US$100, 000.00 or EC$270,000.00.

[14] The origin of the controversies in these claims stemmed from Mrs. Kiddell's queries in 1992 concerning the charges Windjammer was demanding for Maintenance fees, and how their Rental Pool income was being allocated and applied.

[15] Paragraph 2.3 of the Maintenance Agreement particularized the types of services that Windjammer is responsible for. I shall elaborate on this later.

[16] Paragraph 4 of the Claimants' Maintenance Agreements except Mr. Hamu's and Mr. Delaney's, specified that the monthly maintenance fees for the first operating year was US$500.00 which "*is an estimate for budgeting purposes only. The budget will be adjusted up or down depending on the actual figure. Windjammer provides the service on a open book basis for cost plus 10% . Each owner will be provided with quarterly statements*". Mr. Hamu's provided only for him to pay Windjammer US$500.00 monthly during the first operating year. Mr. Delaney's by paragraphs 3 and 4 provided for him to pay $400.00 monthly and this sum "*is based on the maintenance budget prepared, in advance, for the operating year. The budget will be adjusted up or down depending on the actual figures at the end of the operating year. Windjammer provides the service on an open book basis for cost plus 10%*". (*My emphasis*)

[17] The Agreements apart from Mr. Hamu's further stipulated that "*Windjammer shall provide to the owner not less than. . .3 months prior to the end of the Operating Year Notice in writing of any increase in maintenance fees for the next ensuing Operating Year and detailing the reason thereof*"". (*My emphasis*) The last 5 words were missing from Mr. Hamu's Agreement. For Mr. Delaney's, the word '*change*' was substituted for word, '*increase*'.

[18] Paragraph 7 of their Agreements (*paragraphs 11 and 12 in the case of Mr. Delaney*), provided that they could be terminated by either party where the other was in default of their obligations and failed to remedy such default within 30 days from receiving a notice of and request to remedy such default.

[19] Paragraph 4.1 of each Rental Pool Master Agreement stated that "*Windjammer shall use its best efforts and shall take all reasonable steps in accordance with recognized practice within the tourism industry to offer for rent and rent the residential units. Rates of occupancy Rent shall be set by Windjammer in accordance with resort rental rate structures for similar developments in the Caribbean. Rental rates may include service charges or similar charges which shall not form part of occupancy Rent under this Agreement. Rental commitments may be made orally or in writing in the discretion of Windjammer*".

[20] Paragraph 4.2 provided that "*For its services rendered in obtaining rentals and in undertaking all activities ancillary thereto, Windjammer shall be entitled to an Agent's Commission equal to twenty-five (25%) per cent of all occupancy Rentals or Rent collected in the operating year*".

[21] The list of services under the Rental Pool Agreement were to include Maid, Promotions, Advertising, Front Office Staff, Lobby and Reception Office, Stationary, and Property Management.

[22] According to Paragraph 5.3 of the said Agreement, Windjammer was obligated to "*Keep true and accurate books and records for the Rental Pool Operation and . . . furnish to owners unaudited statements and reports quarterly including all accounting data reflecting gross revenues, allowable deductions and owner distributions. All accounting shall be on the accrual basis in accordance with generally accepted accounting principles applied on a consistent basis from quarter to quarter and year to year*". (*My emphasis*)

[23] Based on paragraph 5.4 Windjammer was obligated also to "*meet with the owner upon not less than. . .15 days' notice, at the Residential Unit and. . .provide and make available to the owner all information, financial or otherwise requested regarding the Rental Pool Operation and the Owner's Unit. Windjammer shall prepare each Residential unit for occupancy by Guests or by the Owner in accordance with this Agreement recognizing that each Residential Unit shall be prepared to a standard set by the finest resorts in the industry*". (*My emphasis*) The other relevant provisions are set out at paragraphs 77 and 78, 248 to 252of this Judgment.

[24] Following exchanges of correspondence and meetings between Windjammer's representatives and the private owners including the Kiddells, a Windjammer Villa Owners Association was formed to deal with matters of concern and interest to Villa owners.

[25] The controversies broadened between 1992 and 1994 to include issues concerning Windjammer's failure to disclose its financial records, and alleged breaches of certain Servitudes.

[26] There were 20 standard Servitudes annexed to the Claimants' Deeds of Sale in the Second Schedule. Each Villa Owner's purchase Agreement had been subject to Restrictive Covenants which were imposed upon their parcel for the benefit of the remainder of Windjammer lands. Except for Mr. Hamu, the 20 Restrictive Covenants which were in Schedule C of the Purchase Agreements for the Claimants were to run with the land, and be annexed to the conveyance of the parcel each owner acquired. Though the 20 Restrictive Covenants consequently were incorporated into their Transfer Instruments, I note that Servitudes 2, 4,15, 16 and 18 in their Second Schedules are not identical to their corresponding Restrictive Covenants in Schedule C of the 5 Claimants' Purchase Agreements. Moreover, Mr. Hamu's Purchase Agreement (*Exhibit "LC 11"*) has only 13 Restrictive Covenants exhibited. Missing from Mr. Hamu's Schedule C are Covenants similar to Covenants 5, 11, 12, 13, 14, 15 and 17 displayed in the other Claimants' Schedule C. Mr. Hamu's Covenant 4 is also abridged. The exhibited copy of Mr. Hamu's Sub Emphyteutic Lease (*Exhibit "KH 1*") has only 18 Servitudes displayed in its Second Schedule. Servitudes 19 and 20 in the other Claimants' Second Schedule is missing from Mr. Hamu's.

The 20 Servitudes in Mr. Hamu's Deed of Sale for Lot 11 A Block 1053 B Parcel 544 are identical to the other Claimants' Servitudes in their Second Schedule. Of particular importance are Servitudes 14, 17, 2 and 12 in the Second Schedule to the Claimants' Deed of Sale.

[27] Servitude 14 provides that each private owner "*has the right of use and access to all facilities within the development plant, including sport facilities, water purification plant, sewage treatment and generator power*". (*My emphasis*)

[28] Servitude 17 stipulates that each private owner "*agrees not to lease, rent or accept remuneration for his villa unless he is in the Rental Pool Operation by. . .Windjammer*".

[29] Regarding the user of the land, Servitude 2 states –

> "*No building erected on the land shall be used for the purposes of any profession, trade, employment, manufacture or business of any description,. . .nor as an hotel, apartment house, rooming house, or place of public resort,. . .or for any other purposes other than that of a private residence for the use of a single family. . .*".

[30] Servitude 12 stipulates that the development will incorporate users including "*Residential – villa type accommodation, single homes, condos – stacked or otherwise*".

[31] The differences between Windjammer and certain Villa Owners resulted in these and other proceedings which commenced in early 1994.

The Pleadings

[32] By their Further Amended Statement of Claim filed on the 2nd October 2003, the Claimants seek among other things, special and/or general damages from Windjammer for deliberately or recklessly making false pre-contractual representations, for the alleged breaches of the Maintenance Agreements, Rental Pool Master Agreements Restrictive Covenants and Servitudes from May 1991 to date, damages for trespass to the property of Mr. Hamu, and Rescission of the Maintenance and Rental Pool Agreements with Mr. and Mrs. Delaney and Mr. Hamu.

[33] They also seek Declarations terminating their Rental Pool Agreements, pronouncing that certain Servitudes against their registered titles for their property are unenforceable, pronouncing void the Deed of Donation dated 11th June 1993 which transferred unsold lots and villas to Windjammer St. Lucia, and pronouncing void the transfer of 25 acres of land and 11 Villas by Windjammer St. Lucia to Elgin.

[34] They are seeking further (i) permanent injunctions restraining Windjammer from constructing its intended hotel type complex in violation of Servitude 12 or violating Servitude 12 at all and (ii) a permanent injunction requiring Windjammer to uphold Servitudes 11 and 14.

[35] Finally, they all seek to recover punitive and exemplary damages, and the Claimants who are the subject of the Counterclaim further request that this Counterclaim be dismissed.

[36] Windjammer by its Amended Counterclaim filed on the 17th October 2003, seeks to recover damages from the estate of Barbara Kiddell, Mr. Kiddell and Mr. Hamu for unpaid Maintenance fees and Maintenance costs.

[37] The Amended Defence generally denies the allegations that there were breaches of the Agreements and Servitudes by Windjammer. The Defence seeks to justify the maintenance charges levied, Windjammer's allocation of the Rental Pool income, and other conduct by Windjammer pursuant to the Maintenance and Rental Pool Agreements.

[38] The Defence has questioned the actionability of the alleged representations made by their former Managing Director Mr. David Cram to the Claimants in the course of negotiations for their purchase of their respective properties.

[39] The Defendants further deny that the transactions whereby Windjammer's unsold lots and villas were transferred to Windjammer St. Lucia by Deed of Donation, and subsequently transferred to Elgin by Deed of Sale were wrongfully done with intent to defeat, hinder and/or delay the Claimants in the enforcement of their rights and further judgments against Windjammer and Windjammer St. Lucia.

Issues

[40] The following issues have surfaced from the pleadings, pre-trial memoranda, evidence and submissions of counsel –

(1) (a) What was the extent of Windjammer's obligations to the Claimants concerning the keeping of accounts, furnishing and disclosure of financial statements, records, accounting, books, and other data for the Rental Pool and Maintenance Service operations under the respective Agreements?

(b) Did Windjammer perform those obligations? (*pages 10 to 42*)

(2) (a) Is the issue of Windjammer overcharging the Claimants for Maintenance costs or the excessiveness or otherwise of the Maintenance Charges *Res Judicata*? (*pages 42 to 45*)

(b) If no -
Do the furnished Windjammer accounting records disclose that Windjammer negligently overcharged, excessively charged and or wrongfully charged the Claimants for Maintenance costs? (*pages 45 to 59*)

(c) Did Windjammer fail to pay any of the Claimants the income they were entitled to pursuant to their Rental Pool Agreement – If yes, what sums Windjammer wrongfully deducted? (*pages 59 to 65*)

(3) Whether or not Windjammer wrongly refused or failed to maintain the Villa of Mr. and Mrs. Delaney pursuant to their Maintenance Contract. (*paragraphs 448 to 477*)

(4) (a) Whether or not Windjammer wrongfully terminated or caused to be terminated the Maintenance Agreements of Mr. and Mrs. Kiddell?

(b) Whether or not Windjammer wrongfully terminated the Maintenance and Rental Pool Agreements of Mr. Hamu?

(c) If the answer to (a) or (b) is No – Does the estate of Mrs. Kiddell, or Mr. Kiddell, or Mr. Hamu owe Windjammer for outstanding Maintenance Fees and Maintenance Costs? (*pages 65 to 76*)

(5) Whether or not Windjammer wrongfully trespassed upon Mr. Hamu's property after the termination of the Rental Pool Agreement? (*pages 76 to 87*)

(6) Whether or not Windjammer's termination of the essential

services and facilities, to Mr. and Mrs. Kiddell and their villas, and/or Windjammer's refusal or failure to maintain the Villas of Mr. Hamu and Mr. and Mrs. Kiddell constitute breaches of Servitudes 11 and 14 in the Second Schedule to their Deeds of Sale and the Maintenance Agreements. (*pages 76 to 87*)

(7) Whether or not Windjammer's sales of Units and Villas on a Time Share or Vacation Ownership Sale basis, or their conversions and partitioning of Villas, constitute breaches of Servitude 12? (*paragraphs 400 to 446*)

(8) (a) Whether or not the statements that were made by Mr. David Cram to the Claimants prior to the execution of their Purchase Agreements, constitute actionable misrepresentation? (*paragraphs 478 to 506*)

(b) If yes – are the Claimants estopped by Clause 26 of their Purchase Agreements from alleging reliance on such pre-contractual statements of Mr. David Cram?

(c) If No – is the action for misrepresentation prescribed by Article 212 of the Civil Code of St. Lucia?

(9) Whether or not Windjammer executed the Deed of Donation In favour of Windjammer St. Lucia with intention to defraud the Claimants, and/or fraudulently registered it? (*paragraphs 508 to 518*)

(10) Did Windjammer St. Lucia transfer the 25 acres of land and 11 Villas to Elgin with the intention and design to defeat the Claimants' claims, rights and any future enforcement of Judgment against Windjammer and Windjammer St. Lucia? (*paragraphs 508 to 518*)

(11) What remedy or Quantum of Damages should be available or awarded to the successful party for any breach found? (*paragraphs 519 to 530)*

Law of St. Lucia on Contracts

[41] Before dealing with the issues I wish to refer to certain provisions in the Civil Code of St. Lucia Chapter 242 dealing with the interpretation of contracts.

[42] *Article 945* of the Civil Code states that "***when the meaning of any part of a contract is doubtful, its interpretation is to be sought rather through the common intent of the parties than from a literal construction of the words***".

[43] *Article 946* provides that "***when a clause is susceptible of two meanings, it must be interpreted as of that which would have effect, and not as of that which would have none***".

[44] "***Expressions susceptible of two meanings must be taken in the sense which agrees best with the context***": (*Articles 947*)

[45] "*Whatever is doubtful must be determined according to the usage of the country where the contract is made*": (*Article 948*)

[46] "*The customary clauses must be supplied in contracts although they be not expressed*": (*Article 949*)

[47] *Article 950* states that "*The clauses of a contract are interpreted each with the meaning derived from the whole*"

[48] "*in cases of doubt, the contract is interpreted against him who has stipulated, and in favour of him who has contracted the obligation*": (*Article 951*)

[49] Finally, *Article 956* provides that "*The obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature*".

[50] The above mentioned Articles must be construed according to the law of England as far as practicable: (*Article 917 A*)

[51] I now move on to determine the first issue.

Book-keeping and Disclosure of Accounting Records Issue No. 1

[52] Paragraph 4 (5) of the Claimants pleadings allege that Windjammer wrongfully refused to disclose, render and or produce for the Claimants inspection despite numerous requests, all or any of its copied, original or any books of account, statements, financial records, invoices and cheques relating to Windjammer's alleged maintenance costs, the calculation of those costs, the maintenance pool allocations and allocation accounts, all or any of the maintenance accounts and the maintenance costs charged to the Claimants including any source documents forming the basis for the calculation of the costs.

[53] The Claimants contend that this was contrary to the First Defendant's express duty to produce such records and documents to the Claimants, pursuant to the express open book provision in each Claimant's Maintenance Agreement. The provision referred to is set out at paragraph 16 of this judgment.

[54] Windjammer has pleaded that pursuant to its financial reporting obligations under the Maintenance Agreements, it supplied to the Claimants accurate audited financial information for maintenance fees. That it supplied Maintenance budgets for the year 1993 to 1999, and quarterly Maintenance Reports from 1993 to 31st March 2002. Windjammer has challenged the Claimants' interpretation of the phrase "*open book basis for cost plus 10%*". Windjammer has pleaded that this phrase refers to the pricing model for the maintenance service and not an unlimited right to access information.

[55] The Vice President of Finance for Ellis Don Inc. since 1999, Mr. John Frank Bernhardt and a Director of Windjammer Mrs. Lynne Cram, testified in support of Windjammer's pleadings, that the phrase "*open-book basis*" is a generally accepted construction contract pricing term. Mr. Bernhardt who is not a Forensic Accountant, said he had been employed to Ellis Don Inc. since 1990, which was after the maintenance contracts in question came into existence.

Meaning of 'open book basis'

[56] He relied on a briefing authorized by Freshfields Bruckhaus Deringer an international law firm of over 2400 lawyers, to explain what "*open-book basis*" means. This briefing dated November 2001 is captioned "*The Contractual basis for partnering and alliancing*". Though the document does not expressly state that "*open-book basis*" is a generally accepted construction contract pricing term, it discusses payment terms in a partnering and alliancing contract which is treated in the briefing as another form of construction contract.

[57] Under the paragraph discussing payment terms the following is stated –

> "*A cost-reimbursable or open-book basis of payment is generally regarded as most appropriate to partnering and alliancing. But some contracts may be on a target cost or fixed price basis. Therefore the basis of pricing should be properly investigated at the outset so that both parties can be satisfied that it is realistic*".

[58] Mr. Bernhardt, relying on this statement in the briefing referred to the words "*open-book basis for costs plus 10%*" in paragraph 4 of the Maintenance Agreements of the relevant Claimants. He testified that "*the term 'open-book basis' was intended to be a reference to the sum of money to which ten percent could be added. Ten percent could not be added to access to book or to source documents therefore 'open book basis' was intended to mean the sum of money recorded in the books as the cost of maintenance*".

[59] Referring to the context in which "*open-book basis*" was used in paragraph 4 of the Maintenance Agreements, he concluded that it could not be referring to the disclosure of information. It was used, he said, as a pricing term indicating that the maintenance charge is based on actual costs plus an agreed mark-up of 10%.

[60] I do not regard this evidence of Mr. Bernhardt as falling within any of the exceptions to the parole evidence rule. In the absence of any submissions from Counsel as to its relevance and admissibility I shall disregard it. In my view, the interpretation of the phrase "*open-book basis*" is a matter exclusively for my determination according to what was written within the four corners of the Maintenance Agreements, and not on the views of the Claimants or the Defendant's Witnesses.

[61] I am guided by Articles 945 to 917A of The Civil Code (*set out at paragraph 42 to 50 of this Judgment*); and the recommended approach of Lord Hope of Craig head in Melanesian Mission Trust Board -vs- Australian Mutual Provident Society [1997] 2 EGLR 128, 129 F (P.C.). Counsel for the Claimants and Defendants relied on this authority in their submissions on the issue. Lord Hope said that "*The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is ambiguity. But it is not the function of the Court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there so the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail*".

[62] Both Counsel for the Claimants and Defendants regarded the term "***open book basis***" as unambiguous. By a process of examining the definition of the words "***open***" and "***book***", Counsel in their submissions each arrived at different conclusions concerning the meaning of the word "***book***".

[63] Learned Counsel for Defendants sought to restrict the meaning of "***book***" to a written or printed work consisting of pages glued or sewn together along one side and bound in covers. This was one of the many definitions given in the Concise Oxford Dictionary 8th edition 1990, page 126. Counsel Mrs. Floissac Flemming contended further that the word "***book***" did not permit the inclusion of invoices, receipts, cashed cheques and other documents which comprise the "***source documents***" since they are not glued or sewn together. Relying on the decision in Hearts of Oak Assurance Company Limited –vs- James Flowers and Sons [1986] 1 Ch.D 76, Counsel contended that since the documents identified as "***source documents***" can be undetectably removed, replaced, destroyed or tampered with they can not qualify as books.

[64] The Hearts of Oak Case decided that minutes of a Company's directors' meetings, consisting of a number of loose leaves fastened together in 2 covers, and which were tendered as evidence were inadmissible as "***minutes entered in books***" within the meaning of the relevant provision in The Companies Act 1920.

[65] Despite the Defendants' pleadings, Learned Counsel for Windjammer concluded her first rebuttal to the Claimants' contention, by arguing that since the phrase "*open book*" has not been proved to have a well recognized technical, vernacular, customary or other special meaning, the intended and understood ordinary meaning of the phrase is that Windjammer's books (*as distinct from "source documents"*) shall be accessible to the Claimants.

[66] The counter arguments for the Claimants depended on Learned Counsel's selection of another meaning in the Oxford Dictionary, which also defines "*books*" to include a set of records or accounts. Relying further on the definition of "*book*" in Black's Law Dictionary, it was submitted that the words "*Windjammer provides the service on a open book basis for cost plus 10%*" inescapably means it must provide unrestricted disclosure and access to its books of original entry, book accounts and book entries. Therefore, Counsel argued, by the clear, literal and unambiguous meaning of that provision, Windjammer had an unrestricted production, disclosure and access obligation relating to the maintenance service and fees.

[67] Reference to the Oxford Dictionary discloses that each of the words "*open book*" when individually used, commonly possess a variety of meanings. I have also observed from my study of various dictionaries including the Oxford Dictionary, that the word "*open*" when used as an adjective with other nouns (*open market, open prison, open contract, open verdict, open marriage, open order, open plan, open sentencing*) that the word "*open*" in each phrase emphasizes a different meaning of the definition of "*open*" as stated in the Oxford Dictionary. It is important to note further that Black's Law Dictionary 8th ed. defines the word '*open'* as an adjective to mean –

> "*1. Manifest; apparent; notorious.*
> *2. Visible; exposed to public view; not clandestine.*
> *3. Not closed, settled, fixed or terminated*".

[68] Despite Counsel's agreement that the phrase "*open book*" is unambiguous, I have concluded differently. In my view these words when isolated from the rest of the other words in the sentence are inherently ambiguous, because literally it is difficult for me to determine the precise meaning that ought to be attributed to them, having regard to the variety of meanings in the Oxford Dictionary definition of each word.

[69] When regard is had only to the possible literal and selective ordinary meanings of the words, without reference to the document as a whole and the context in which these words have been used, this probably provides an explanation for defence Counsel's apparent vacillation and or retreat from the defence pleaded.

[70] In my opinion a literal construction of the words as canvassed by Counsel for the parties will not suffice. Counsel for the Claimants have argued that where there is ambiguity in the interpretation of the phrase, it should be resolved against

Windjammer based on the Contra Proferentum Rule. But I am enjoined by Articles 947 of the Civil Code to interpret the phrase in question in the sense which agrees best with the context. According to Article 950, the sentence in question in Clause 4 of the relevant Maintenance Agreements must be interpreted "***with the meaning derived from the whole***" of the clauses of the contract. According to Article 945, the meaning of this phrase is to be ascertained through the common intent of the parties. According to Article 946, since the sentence in question is susceptible of 2 meanings, it must be interpreted with a meaning that would have effect.

[71] Learned Counsel Mrs. Floissac Flemming in her submissions, also referred to the observations of Lord Wensleydale in Trellusson –vs- Rendlesham [1858-89} 7 H.L.C. 429, 519 where he emphasized that, "*in construing all written instruments the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or to some repugnance, or to some inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified*". Though the written instrument in that case was a will, the Courts then "*were just as strict about the written words of a deed or contract as they were about a statute or a will. They went by the grammatical meaning*": (*Lord Denning in his book – The Discipline of Law (1979) page 32 discussing 'The Construction of Contracts'*).

[72] The grammatical meaning of the sentence "*Windjammer provides the service on a open book basis for cost plus 10%*" is paramount when considering the context within which the words "*open book basis*" was used. I have looked at Nesfield Modern English Grammar 1979 ed. Grammatically speaking, it seems to me that the words "*on an open book basis*" in the sentence, is an adverbial phrase introduced by the preposition "*on*", qualifying the verb "*provides*", telling us the basis on which the service is provided by Windjammer for cost purposes.

[73] It is significant that the sentence following the one in issue "*Each owner will be provided with quarterly statements*", and the subsequent paragraph "*Windjammer shall provide to the owner not less than . . . 3 months prior to the end of the Operating Year notice in writing of any increase in maintenance fees for the next ensuing Operating Year and detailing the reason thereof*", specifically address Windjammer's obligations to the Claimants to provide quarterly maintenance statements and Notice of Increase of Maintenance Fees with the reason for the Increase in a timely manner. These provisions in paragraph 4 of the Maintenance Agreements clearly define the disclosure obligations of Windjammer.

[74] In my view therefore, taking into accounting all of the submissions of Counsel for the parties, the grammatical structure of the sentence in question precludes the words "*open book basis*" being used there as an additional provision concerning Windjammer's disclosure obligations. To hold otherwise would be grammatically inappropriate in my opinion. I therefore find on applying Article 947 of the Civil Code that the meaning of "*open book basis*" which agrees best with the context

within which the phrase was used is that meaning ascribed to it in paragraph 5 (b) of the Amended Defence.

[75] I conclude that the parties to the relevant Maintenance Agreements had a common intention that the phrase "*open book basis for cost plus 10%*" would refer to how the actual costs would be calculated for the services provided by Windjammer. In my view, the provisions in paragraph 4 of the Maintenance Agreements permit the construction that the common intention of the parties was for Windjammer to: (a) furnish quarterly statements which would keep the 58 Villa Owners informed on an ongoing basis about the actual Maintenance expenses under their Agreements apparent on the Accounting Records, i.e. "*the open book basis for costs*" with 10% added to this, and (b) give details of the reason for any forecasted increase of maintenance charges for the next ensuing operating year in a timely manner. The parties contemplated that Windjammer's timely performance of these obligations would enable the 58 Villa Owners to assess the reasonableness of the estimated and actual Maintenance Costs on an ongoing basis, and mount any necessary challenges during the operating year, and before the beginning of the next ensuring operating year without individually or collectively reviewing Windjammer's Maintenance Accounting Records or source documents. There was therefore no common intention that that phrase would entitle the claimants to have unlimited disclosure of the Maintenance Accounting Records of Windjammer as alleged in Paragraph 4 (5) of the Claimants' further Amended Statement of Claim.

Financial Reporting

[76] The Claimants allege further in paragraphs 6 (5) to (7) of their pleadings that Windjammer has refused or failed to keep and submit proper and accurate Financial Statements and Accounts with respect to the Rental Pool Agreements. That Windjammer also failed to furnish Quarterly Accounting, Audited Statements, and Quarterly Reports to the Claimants, and had denied the Claimants access to the source financial documentation concerning such data for the Service Account referred to in the Rental Pool Agreements.

[77] Pursuant to paragraph 5.2 of the Rental Pool Master Agreement, Windjammer was obligated to "*provide managerial and clerical services for the operation of the Rental Pool Operation and . . . contract for and furnish owners with an annual audit thereof. An owner at his or its expense may request quarterly reviews with the auditor*". The other relevant provisions of paragraph 5 are set out at paragraph 22 and 23 of this judgment.

[78] Under paragraph 7 the Rental Pool Agreement Windjammer was obligated to "*Maintain on behalf of all owners a Service Account. All funds of the Service Account shall be invested only in savings accounts, or certificates of deposit and all interest earned on the Service Account shall accrue to the Owners. . .*" Pursuant to paragraph 7.2 of the said Agreement Windjammer was

obligated to "*furnish to the owners a quarterly accounting of the Service Account reflecting deposits, withdrawals and interest earned*".

[79] Windjammer pleaded that it has kept and submitted proper financial statements and accounts which have been audited and verified by Auditors Price Waterhouse St. Lucia. That pursuant to their obligations under paragraph 5 and 7 of The Rental Pool Master Agreement, they have provided the relevant Claimants with Quarterly Rental Pool Reports from 1993 to 30th June 2003 (*which include Maintenance Charges*), Quarterly Service Account Reports (*included in the Quarterly Maintenance, Furniture Replacement and Service Account Reports*) for 1993 to 2002 ending 31st March 2002, and Audited Annual Statements for 1993 to 2001 inclusive. Further, that they have furnished and continue to furnish to Mr. David MacNicol and Mr. James Delaney all required financial reporting for the Rental Pool even though there are presently only 3 owners within the Rental Pool. It is necessary therefore to carefully review the multitude of documentary exhibits tendered by the parties in order to arrive at my findings of fact.

[80] Exhibit "*GK 12*" is a letter written in March 1992 by Mrs. Barbara Kiddell to someone called "*Keith*" assumedly of Windjammer. It appears from this letter that Mrs. Kiddell was requesting financial information concerning the Rental Pool Operations which had not yet been circulated by Windjammer. The documentary exhibit "*GK 13*" discloses that under cover letter dated 1st June 1992, Windjammer dispatched to Mr. And Mrs. Kiddell the 1991 Maintenance Expense Summary, the 1992 Maintenance Budget for year ending December 31, 1992, and the 1991 and 1992 Villa Maintenance and Utilities Report. By that same correspondence, Windjammer also dispatched the Rental Pool Distribution Statement for the first quarter March 31, 1992 and the 1992 Marketing Costs Report. Exhibit "*GK 14*" is a letter dated 11th June 1992 from Mrs. Barbara Kiddell to Windjammer's employee Mr. Cumberbatch. I have inferred from this letter that some form of quarterly statements concerning maintenance fees were being sent by Windjammer to the Villa Owners prior to the date of the letter.

[81] The Claimants' and other members of the Windjammer Villa Owners Association's correspondence dated 6th July 1992 (*Exhibit "GK 16*") discloses that the Claimants expressed dissatisfaction with Windjammer's delinquency in providing adequate financial information concerning the actual figure for maintenance costs, which under the Agreement, should be disclosed to the Villa owners before any adjustment of budgeted maintenance costs.

[82] By the same correspondence the Villa Owners expressed disappointment in the lack of financial accountability regarding the operations of the Resort Project. They were also concerned about "*the depth of the financial Reporting and the accuracy of the accounting methods*". Consequently they communicated their request for "*greatly increased disclosure of the finances and record keeping*". Relying on paragraph 5.3 of the Rental Pool Master Agreement (*Set out at paragraphs 22 and 23 of this Judgment*), they reminded Windjammer that true and accurate books and records should be kept. Further, that they were

entitled to all information, financial or otherwise, and they reminded Windjammer what paragraph 7.2 of the Rental Pool Agreement stated (*See paragraph 78 of this Judgment*).

[83] By Letter dated 13th July 1992, the Claimants and other members of the Villa Owners Association communicated to Windjammer's Mr. Don Smith that they wished to meet with him at their office in Toronto Canada on the 5th August 1992. They requested Mr. Smith to bring to the meeting "*a complete list of the Windjammer Villa Owners and their respective Villa numbers, an audited statement of the Windjammer operation, detailed Statements of Maintenance Costs for 1990, 91 and 92, the Service Account for 1990 – 1992 the Rental Pool Operation*". Mr. Don Smith was then an Executive of Ellis Don Inc. the Canadian Parent Company of Windjammer.

[84] Subsequent correspondence exhibited (*Exhibit "GK 18" to "GK 23"*) discloses the following important facts:

(a) As at the 10th August 1992 (*Exhibit "GK 18"*) - there was no confirmation by Windjammer that Auditors had actually been appointed.

(b) The Audited Financial Statements for 1991 pursuant to para. 5.2 of the Rental Pool Agreement had not been provided to the Claimants; Windjammer had promised to provide this Audited Financial Statement by the 31st October 1992.

(c) Windjammer had not signed a draft consent authorization permitting Claimants to have access to their books, computer and financial records

(d) Villa Owners understood Windjammer to have admitted at the Meeting of the 5th August 1992 that there had been significant problems with the Record Keeping which it had agreed to in the Maintenance Agreement.

(e) Windjammer was understood to have also admitted at the meeting that there were not sufficient financial records to indicate the actual financial position of the project, meaning it was impossible to tell the proper allocation.

(f) By letter dated 13th August 1992 (*Exhibit "GK 19"*) Windjammer forwarded Mrs. Kiddell's Rental Pool Statement for the 2nd quarter of 1992.

(g) Copies of 1991 Financial Statements that were reviewed at the meeting held on 5th August 1992 were also forwarded to Mrs. Kiddell and presumably other Claimants.

(h) By letter dated 3rd September 1992 (*Exhibit "GK 20"*) Lawyer for Windjammer communicated Windjammer's confidence in the accuracy of the Maintenance figure calculations, the allocations, and the financial statements for 1991 which had been sent to the Villa Owners.

(i) By said correspondence it was confirmed that Windjammer had a separate general ledger for the Service Account for Rental Pool Operations, particulars of which could be available to the Villa Owners at the next scheduled meeting.

(j) Further, International Auditing Firm Price Waterhouse had been retained by Windjammer to complete a review of Windjammer's ongoing accounts.

(k) By this said letter it was communicated that as was discussed at the meeting on the 5th August 1992, a properly qualified individual on behalf of the Villa Owners Association would be given permission to review the financial records of Windjammer at a mutually convenient time.

(l) By letter dated 14th September 1992 (*Exhibit "GK 21"*) Windjammer Villa Owners requested Windjammer's Executive Mr. Don Smith to produce at the future meeting to be convened in Toronto, the figures and information for the complete accounting of the Service Account, the breakdown of policy coverage and allotted premium per villa, the number of security guards allotted to the upkeep of the Beach Villas from the cadre of 32, the monthly costs and source of electricity and water supplies per villa, land taxes per villa, and Windjammers relationship to the St. Lucia Telephone Company.

(m) By letter dated 8th October 1992 (*Exhibit "GK 22"*) Windjammer proposed to the Villa Owners Association that the terms and expectations of Windjammer and the Villa Owners for the financial review that the Villa Owners wished to conduct should be discussed in greater detail and established in London, and Windjammer stated that it would provide some funding to the Villa Owner's Association for such a financial review.

(n) Windjammer assured the Villa Owners Association in the following manner –

> "*Finally, we understand the frustration and concern which the owners are feeling at this time. We wish to assure you that we will work hard to improve the communications that flow to you from Windjammer both from a timely and informative point of view*".

[85] Two interesting communications between Windjammer and the Villa Owner's Association were Exhibited as part of "*GK 23*" in Mr. George Kiddell's Witness Statement. They are captioned: WINDJAMMER LANDING COMPANY LIMITED PROPOSAL TO VILLA OWNER'S ASSOCIATION OCTOBER 8, AND OCTOBER 27, 1992 respectively. I wish to incorporate 3 pages of each document in this Judgment as paragraph 86 for their full terms and effect.

[86] See Insertion following:

[87] The contents of these 2 proposals are relevant to the second issue in this case and I shall deal with them then.

[88] It appears from (*Exhibit "GK 24"*) a letter dated 16th November 1992 by Villa Owners Kiddell, Wunderwald and Mallo, that thy completely rejected the 2 proposals dated 8th and 27th October 1992. They informed Windjammer's Mr. Donald Smith thus –

> "*We the undersigned, intend to remain with our original agreement that we made with Windjammer Landing upon purchase of our respective villas.*
>
> *This registered letter is our notice to you of our request for full remuneration of monies owing, together with interest, from the 1992 Pool Income, with the sole deduction of $500.00 per month as per our agreements. We insist on this payment immediately.*
>
> *We are content to negotiate with you a change in Maintenance Fees for the 1993 fiscal year when you have presented to us the costs that have necessitated said change. The 2 and 3 bedroom rental pool must be kept separated as per our agreements*".

[89] Windjammer Landing responded to Mrs. Barbara Kiddell on the 24th November 1992 and sent a copy of this letter to The Villa Owners Association. I wish to include this letter and the response to it by The Villa Owner's Association dated 1st December 1992 (*Exhibits "GK 25" and "GK 26*") for their full terms and effect. I have incorporated them as paragraph 90 of this Judgment.

[90] See Insertion following:

[91] These 2 letters clearly establish in my view that the majority of the Villa Owners who were members of the Villa Owners Association, including the Claimants, had unequivocally rejected Windjammer's proposal for a change in the Rental Pool Agreements. They communicated their views that Windjammer by unilaterally adjusting the Rental Pool sharing formula was in breach of its contractual obligations. They further communicated to Windjammer their expectations that Windjammer would refund them the unauthorized Market and Maintenance charges it had imposed on them.

[92] Most importantly for this issue, the Claimants and other Villa Owners were loudly demanding to have an evaluation of Windjammer's financial records.

[93] As at the 1st December 1992, it appears to me that the Claimants were demanding the audited financial statements for the Rental Pool for 1991 which Windjammer had promised to let them have by the 31st October 1992 and which were still outstanding.

[94] As at the 1st December 1992 the Claimants and other Villa Owners were still expecting the figures and information for the complete accounting of the Service Account, as well as the other data they had requested at paragraph 84 (l) of this Judgment.

[95] The Claimants then were expecting Windjammer to finalize with them the terms and conditions for the financial review and keep its promise to provide funding to them for such a review.

[96] There was a meeting convened between the Villa Owners Association and Windjammer on the 11th February 1993 in which Mr. Kiddell and Windjammer's Ms. Lynne Cram participated. Despite the Minutes of the Meeting (*Exhibit "GK 28"*) disclosing that the 1993 Maintenance Budget was distributed by Windjammer in accordance with the Maintenance Agreement, Ms. Cram's testimony disputes this. Ms. Cram in general has challenged the accuracy of the Minutes, and she denied that Windjammer agreed to standardize the Maintenance and Rental Pool Agreements for all Villa owners.

[97] It appears that up to that point Windjammer had not been providing quarterly Statements of Maintenance Charges to the Villa Owners as the Claimant's Maintenance Agreement paragraph 4 required.

[98] Windjammer at the Meeting agreed to put in place a quarterly process. The Minutes of this Meeting also disclose that Windjammer promised to distribute the Maintenance Statements for the year ending 31st December 1992 by the 30th April 1993.

[99] It appears further that Windjammer up to then had not been issuing quarterly reports for the Rental Pool as was required by paragraph 5.3. of the Agreement. Windjammer therefore promised to issue such reports.

[100] Windjammer further promised to institute regular maintenance programmes for the Villa and commencing 1993 create individual logs for each Villa.

[101] It seems to me that the promises made by Windjammer at the meeting on the 11th February 1993 did not materialize because according to Ms. Cram's testimony, they were made in the spirit of compromise and in exchange for the Villa Owner's promise to fulfill their obligations.

[102] Ms. Cram testified that since the Villa Owners reneged on their commitments, Windjammer did not regard its promises as binding.

[103] It would seem further that as a result of Windjammer's indication (*Exhibit "GK 20"*) that they would permit a review of their financial records by a properly qualified individual on behalf of the Villa Owners Association, Chartered Accountant Mr. Marjan Medved who owned Villa 29 was chosen by the Villa owners to review the books of Windjammer.

[104] Mr. Medved's letter to Windjammer dated 14th July 1993 (*Exhibit "GK 29"*) was critical of Windjammer's "***recent 1992 and 1993 budget presentations***" which in his view "***showed substantial variances of actual result***", which "***reflect a failure to report properly***", further undermining the credibility of Windjammer's Management.

[105] Mr. Medved questioned Windjammer's unacceptable decision not to engage an audit since based or Windjammer's previous assurances, the Villa Owners were awaiting the audited results to substantiate the data and enable them to identify and address their concerns.

[106] Apparently Windjammer had already engaged Price Waterhouse to conduct a Review of the Financial Record. Mr. Medved wrote – "The current lack of management and financial reporting credibility makes the "***Review Engagement***" by Price Waterhouse totally meaningless. Mr. Medved's 3 pages of requests for further financial information are incorporated in this judgment as paragraph 107.

[107] See Insertion following:

[108] It is evident from Mr. Medved's letter that the Villa Owners Association Members harboured expectations of receiving Audited Reports for the maintenance services from Windjammer though the Claimants' Maintenance Agreements did not require this.

[109] On the 26th July 1993 Windjammer's Executive Vice Present Mrs. Cram communicated to Mr. Kiddell that Windjammer would provide only a full audit for 1993 (*Exhibit "GK 30"*).

[110] Mrs. Cram disclosed further, Windjammer's desire to change strategic direction by replacing the Rental Pool and Maintenance Agreements with a lease whereby Windjammer will be the tenant with full rights of the use of the villas among other things.

[111] The Executive Vice President of Windjammer Mr. Michael Dinnick by letter dated 30th July 1993 responded to Mr. Medved (Exhibit "LC 22") which is incorporated in this Judgment as paragraph 112. The Maintenance expenses for the Fiscal year March 1, 1993 to February 28, 1994 (part of Exhibit "LC22") is not included as paragraph 112.

[112] See Insertion following:

[113] By then it would seem, the Claimants had concluded that Windjammer's Managers were devious, callous, and lacking in good faith. By Notice dated 8th September 1993 Mr. Kiddell's Attorney-at-Law informed Windjammer of their several breaches of the 2 Agreements including their failure to be accountable financially, and make full disclosure of the financial status of the venture.

[114] By Notice dated 13th September 1993 Mrs. Barbara Kiddell, Secretary for the Villa Owners Association requested Windjammer to remedy 4 specified breaches of the 2 Agreements within 30 days failing which the Villa owners would withdraw their villas from the Rental Pool. The breaches specified included "*(i) The non-receipt of the Rental Pool Income Statement for the 2nd quarter that was due August 15th, 1993*". (4) "*The lack of proper financial statements giving full disclosure of the project's position*".

[114 –A] On the 29th September 1993, Windjammer's Mrs. Lynne Cram by letter (*Exhibit "LC 47"*) communicated the following information to Mr. and Mrs. Delaney –

(a) The Maintenance budget forwarded for the 12 months, ending December 3, 1994 suggest that the Maintenance Agreements do not work well for either Windjammer or the Villa Owners.

(b) Recognizing that one of the important tasks at hand is to devise a new arrangement which will satisfy both the Villa Owners and Windjammer, Windjammer had retained Luxury Resorts Enterprises Limited to prepare an advisory report on the present impasse and way forward.

(c) The report is expected to be prepared by late November, thereafter it will be necessary to arrange meetings for the presentation of their observations and recommendations. This will take time and in the interim Windjammer has a resort to run.

(d) "*There continue to be questions and concerns with respect to maintenance accounts and allocations. . . In the past, Windjammer has offered to make its accounting records available for independent inspection by an auditor as selected by the Villa Owners. . . . . to that end we are prepared to offer to reimburse to Villa Owners for 50% of the expenses of such an independent audit to a maximum of US$5,000.00 in order to complete such a review, provided such review is completed prior to December 15, 1993 and a copy of the report is available to us*".

[114-B] This correspondence confirms that Windjammer had not distributed to the Delaney's their Rental Pool Payment for the quarter ending 30th June, 1993. In the said communication to Mr. and Mrs. Delaney Windjammer enclosed their "*Net payment for the second quarter for all Rental Pool participants*"

[115] The lack of response by Windjammer to the abovementioned Notices culminated in Mr. Kiddell's termination of the Rental Pool Agreement on the 19th November 1993. By Suit No. 76 of 1994 filed on the 3rd February, 1994 against Windjammer, Mr. Kiddell among other things pleaded that Windjammer had failed to keep and submit proper and accurate Financial Statements and Accounts, had failed to furnish Quarterly Accounting of the Service Account, and had failed to furnish as required Unaudited Statements and Quarterly Report.

[116] It appears from the Judgment of Justice d'Auvergne delivered on the 15th April 1994 that other Villa Owners including the Claimants Mr. Delaney, Mr. Hamu and Mrs. Barbara Kiddell filed similar proceedings.

[117] Upon commencing action, they had made an application to the Court requesting among other things that the Court make an Order for "*The appointment of an accountant as an expert to examine and report on all revenues and expenditure pertaining to the Rental Pool, Maintenance, and Service Accounts, and to examine and determine the Gross revenue of all Revenue Rent received from the Rental of the Villas and all deductions allowed under the Maintenance Agreements and for all other appropriate Accounts, and that all necessary inquires and directions be then made*".

[118] The learned Judge, prior to refusing the application, considered the contents of Lynne Cram's 2 Affidavits opposing the Claimants' applications.

[119] Mrs. Cram deponed then that the following financial information had already been provided to the Villa Owners and this was prior to the date of hearing 14th March 1994 –

(1) Financial Statements for the year ended December 31, 1992 prepared by Price Waterhouse;
(2) the1993 and 1994 Maintenance Budgets;
(3) the first, second, third and fourth Quarterly Maintenance Reports ending 31st March 1993, 30th June 1993, 30th September 1993 and 31st December 1993;
(4) the first, second, third and fourth Quarterly Service Account Reports ending 31st March 1993, 30th June 1993, 30th September 1993 and 31st December 1993;
(5) the Rental Pool Quarterly Reports for 31st March 1993, 30th June 1993, 30th September 1993 and 31st December 1993.

[120] Mrs. Cram acknowledged then that the Audited Statements of the Service Account, and Furniture Replacement Account, and Audited Statements of the Rental Pool Profit Distributions and Maintenance Fees were currently being prepared. She promised that they would be subsequently provided to Windjammer's obligations under the Respective Agreements.

[121] Ms. Maryann Moons a Chartered Accountant in Canada, who since June 2000 has been the Director of Finance of Windjammer's Beach Resort, testified at the trial concerning Windjammer's fulfillment of its disclosure obligation. She also tendered documentary exhibits as proof of such fulfillment.

[122] Her documentary exhibits along with others tendered by Mrs. Lynne Cram and Mr. Kiddell, and also the documents at pages 137 to 150, 161, 171, 182, 192, 204 and 215 of the Trial Bundle No. 3, disclose the following as supplied to Villa Owners by Windjammer, taking into account Mrs. Cram's evidence at paragraph 119 above -

For Year 1991

(1) 1991 Financial Statements including the 1991 Maintenance Expense Summary and Villa Maintenance and Utilities Report supplied around the 1st June 1992. Probably quarterly maintenance statements were being supplied, but not in a timely manner.

For Year 1992

(2) *(a)* 1992 Maintenance Budget to 31st December 1992;

(b) Villa Maintenance and Utilities Report for 1992;

(c) Rental Pool Distribution Quarterly Statement for quarter ending 31st March 1992 (*supplied on 1st June 1992)* 30th June 1992 (*supplied 13th August 1992*), 30th September 1992, and 31st December 1992;

(d) Marketing Costs Report for 1992, supplied on 1st June 1992;

(e) The Audited Statement to 31st December 1992 for the Service Account and Furniture Replacement Account with Auditors' Certificate on 30th April 1993;

(f) The Unaudited Maintenance Fees statement for year ending 31st December 1992 which was reviewed by Price Waterhouse had the Auditors' note on it dated 30th April 1993 stating that "*A review does not constitute an audit and consequently we do not express an opinion on the Statement of Maintenance Fees*".

(g) Audited Rental Pool Profit Distribution Statement for 1992 with Auditors' Certificate dated 30th March 1993. Probably quarterly Maintenance Statements were supplied but not in a timely manner.

For Year 1993

(3) (a) Maintenance Budget to 31st December 1993 distributed to Villa Owners on the 11th February 1993 at Meeting, but sent to Mr. Hamu on the 29th December 1992, Maintenance Budget for 1993 with

Notice in writing of Increase in Maintenance fees supplied prior to 14th August 1992 to Mr. Hamu and prior to 31st September 1992 to other Claimants (Exhibit "*LC 16*");

(b) Audited Maintenance Fees Statement to 31st December 1993 with Auditors' certificate dated 29th April 1994;

(c) Unaudited Service Account and Furniture Replacement Account Statement to 31st December 1993;

(d) Audited Rental Pool Profit Distribution Statement to 31st December 1993 with Auditors' Certificate dated 29th April 1994;

(e) Quarterly Maintenance Reports ending 31st March 1993, 30th June 1993, 30th September 1993 and 31st December 1993 supplied before 14th March 1994, probably in a timely manner;

(f) Quarterly Service Account Reports ending 31st March 1993, 30th June 1993, 30th September 1993 and 31st December 1993 supplied to Claimants before 14th March 1994, probably in a timely manner;

(g) Quarterly Rental Pool Reports for 31st March 1993, 30th June 1993, 30th September 1993 and 31st December 1993 supplied to Claimants before 14th March 1994, probably in a timely manner.

For Year 1994

(4) (a) Audited Maintenance Fees Statement to 31st December 1994 with Auditors' Certificate dated 26th April 1995;

(b) Audited Service Account and Furniture Replacement Account Statements to 31st December 1994 with Auditors Certificate dated 28th April 1995;

(c) Audited Rental Pool Profit Distribution Statement to 31st December 1994 supplied on 29th September 1993 to Mr. and Mrs. Delaney.

(d) Maintenance Budget to 31st December 1994 supplied before 14th March 1994, probably in a timely manner.

For Year 1995

(5) (a) Audited Maintenance Fees Statement to 31st December 1995 with Auditors Certificate dated 8th May 1996;

(b) Maintenance Budget for 1995 supplied to Mr. Hamu on 10th August 1994 and 29th September 1994 to Mr. Kiddell and Mr. MacNicol and Mr. Delaney.

(c) Quarterly Maintenance Fees Statements for 31st March 1995, 30th June 1995, 30th September 1995, 31st December 1995, probably in a timely manner;

(d) Unaudited and Audited Quarterly Rental Pool Distribution Statements for 31st March 1995, 30th June 1995, 30th September 1995, 31st December 1995 and Auditors Certificate issued on 8th May 1996 for the Villas of Mr. D MacNicol and Mr. Delaney only;

(e) Unaudited Service Account and Furniture Replacement Account Quarterly Statements for 31st March 1995, 30th June 1995, 30th September 1995 and 31st December 1995. Audited Service Account and Furniture Replacement Account Statements to 31st December 1995 with Auditors' Certificate dated 8th May 1996.

(f) Unaudited Rental Pool and Profit Distribution Statement.

For Year 1996

(6) (a) Unaudited and Audited Maintenance Fees Statement to 31st December 1996 with Auditors' Certificate dated 30th April 1997;

(b) Audited Service Account and Furniture Replacement Account Statements to 31st December 1996 with Auditors' Certificate dated 30th April 1997;

(c) Maintenance Budget for 1996 to 31 December 1996 Supplied to Mr. Hamu 25th September 1995;

(d) Audited Rental Pool Profit Distribution Statements to 31st December 1996 with Auditors' Certificate dated 30th April 1997.

For Year 1997

(7) (a) Audited Maintenance Fees Statement to 31st December 1997 with Auditors' Certificate dated 29th May 1997;

(b) Audited Rental Pool Profit Distribution Statement to 31st December 1997 with Auditors' Certificate dated 29th May 1997;

(c) Audited Service Account and Furniture Replacement Account Statements to 31st December 1997 with Auditors' Certificate dated 29th May 1997.

For Year 1998

(8) (a) Audited Maintenance Fees Statements to 31st December 1998 with Auditors' Certificate dated 29th September 2000;

(b) Audited Service Account and Furniture Replacement Account Statements to 31st December 1998 with Auditors' Certificate dated 29th September 2000;

(c) Audited Rental Pool Profit Distribution Statement to 31st December 1998 with Auditors' Certificate dated 29th September 2000.

(d) Four Quarterly Maintenance Fees Statements for quarters 31st March 1998, 30th June 1998, 30th September 1998 and 31st December 1998.

For Year 1999

(9) (a) Audited Maintenance Fees Statement to 31st December 1999 Fees Statement to 31st December 1999 with Auditors' Certificate dated 29th September 2000;

(b) Audited Rental Pool Profit Distribution Statement to 31st December 1999 with Auditors' Certificate dated 29th September 2000;

(c) Audited Service Account and Furniture Replacement Account Statements to 31st December 1999 with Auditors' Certificate dated 29th September 2000.

(d) Quarterly Maintenance Fees Statements for quarters 31st March 1999, 30th June 1999, 30th September 1999 only.

For Year 2000

(10) (a) Audited Maintenance Fees Statement to 31st December 2000 with Auditors' Certificate dated 5th September 2001;

(b) Unaudited Service Account and Furniture Replacement Account Statements to 31st December 2000;

(c) Unaudited Rental Pool Profit Distribution Statement to 31st December 2000.

For Year 2001

(11) (a) Audited Maintenance Fees Statement to 31st December 2001 with Auditors' Certificate dated 15th August 2002;

(b) Audited Service Account and Furniture Replacement Account Statements to 31st December 2001 with Auditors' Certificate a dated 15th August 2002;

(c) Audited Rental Pool Profit Distribution Statement to 31st December 2001 with Auditors' Certificate dated 15th August 2002.

For Year 2002

(11) (a) Audited Maintenance Fees Statement to 31st December 2001 with Auditors' Certificate dated 6th October 2003;

(b) Audited Service Account and Furniture Replacement Account Statements to 31st December 2003;

(c) Audited Rental Pool Profit Distribution Statement to 31st December 2002 with Auditors' Certificate dated 6th October 2003.

[123] It is important to bear in mind that Mr. Kiddell by letter dated 19th November 1993 sought to terminate his Rental Pool Agreement with effect from the 18th November 1993, following the Notice dated 8th September 1993 which referred to alleged breaches of the Rental Pool and Maintenance Agreements which Windjammer was required to rectify (*Exhibits "GK 31 and 32"*). The Notice was sent by registered post to "*The Manager, P.O. Box T 504, Castries*".

[124] The letter dated 29th September 1994 (*Exhibit "LC 14"*) shows that Mr. Kiddell's Maintenance Agreement remained in existence until some time in 1995. Under cover of this letter the Maintenance Budget for 1995 was sent to Mr. Kiddell. According to Mr. Kiddell's testimony, Windjammer terminated all services and utilities for his Villa 24 on or about the 5th March 1995.

[125] Regarding Mrs. Kiddell's Villa 23, the Maintenance Agreement was terminated by Windjammer on the 25th June 1994 after notice of default for short payment of Maintenance Fees was given to her by Windjammer and she did not reply. However, Maintenance Services were reinstated for 4 days in October 1994, and from November 1994 to the 31st January 1995. According to Mrs. Cram, Windjammer had restored the Maintenance Services for 2 months while trying to settle differences with Mr. and Mrs. Kiddell. She apparently terminated her Rental Pool Agreement in October 1993 following Windjammer's lack of response to the Villa Owners Association Notice dated 13th September 1993.

[126] As for Mr. Hamu, the Statement of Account Exhibit "*LC 53*" shows that his Rental Pool Agreement was terminated from the 7th June 1994. However, Mr. Hamu testified that he rejoined the Rental Pool from February 1995 to 2000. The documentary evidence and Mrs. Cram's evidence refute this. She testified that between July 1994 to September 1995 Mr. Hamu's daughter occupied his Villa 11 for 258 days. Exhibit "*LC 54*" shows that Windjammer used Villa 11 from December 1995 to August 1996 when the hotel was overbooked. So I accept her evidence and find that Villa 11 rejoined the Rental Pool from December 1995 to August 1996.

[127] The Maintenance Agreement of Mr. Hamu was terminated by Windjammer with all Maintenance services discontinued on the 22nd October 1997. However, by a Court Order made on the 12th March 2001, Mr. Hamu undertook to pay and since July 2001, has been paying US$1,000.00 monthly to Windjammer for Maintenance

Fees pending determination of his claim. By a similar order made on the 19th July 2001, the Executors of Mrs. Kiddell's estate, and Mr. Kiddell undertook to pay, and since then has been paying US$1,000.00 monthly as Maintenance Fees for each Villa for the services stipulated in the Maintenance Agreements including metered electricity and water charges until the determination of their claim.

[128] Both the Maintenance and Rental Pool Master Agreements still exist in the cases of Mr. David MacNicol and Mr. And Mrs. Delaney. As for the increases in Maintenance Fees annually, the evidence of Ms. Cram disclosed that since 1997 there had been no increase.

[129] It is undisputed that in 1992 Windjammer attempted to raise the Maintenance Fees of the Claimants, but later reverted to the original maintenance fee in their Agreement, since adequate Notice had not been given to the Claimants. But this was only after Mrs. Kiddell's queries in 1992, and the subsequent vigorous challenges mounted by the Villa Owners Association. I also find that pursuant to the relevant provisions in the 2 contracts, the Claimants were entitled to the Financial information, Statements and Reports from Windjammer in a timely manner. I consider documents supplied more than 30 days after the end of a quarter as untimely issued by Windjammer.

[130] The claim refers to breaches of Contracts from May 1991. It seems clear to me from the contents of the Statements of Maintenance Fees up to the 31st December of each year, tendered by Windjammer, that they cannot be regarded as a fulfillment of the requirement for quarterly Maintenance Statements under the Maintenance Agreements. An examination of the Maintenance Budget for each year and the cover letters informing Claimants of an increase in maintenance fees, leads me to conclude further, that none of these documents fulfill the requirement for Windjammer to state details of the reason for the increase in Maintenance Fees.

[131] The operating year was defined as commencing 15th November each year in Mr. Hamu's Maintenance Agreement. This Agreement contained no provision that the US$500.00 maintenance fees was an estimate for budgeting purposes only. Neither was there a provision that the budget will be adjusted up or down depending on the actual figures. There was also no provision for Windjammer to provide Mr. Hamu with quarterly statements; and Windjammer was not obligated to state any details of the reason for the increase in Maintenance fees.

[132] So in the case of Mr. Hamu, the only question to be answered is - Whether or not Windjammer provided him not less then 3 months prior to the end of the operating year, with a notice in writing of any increase in maintenance fees for the ensuing operating years 1993 to 1997?

[133] It seems clear to me from the evidence reviewed that Windjammer on a balance of probability was in breach of the Maintenance Agreements in that Windjammer failed to do the following things –

(i) Provide quarterly statements in a timely manner to Mr. and Mrs. Kiddell, Mr. D. MacNicol and Mr. and Mrs. Delaney at the end of each quarter for the 31st March, 30th June, 30th September and 31st December for 1991 and 1992, pursuant to their Maintenance Agreements.

(ii) Provide to all of the Claimants except Mr. Hamu at least 3 months prior to the end of their respective operating years, a Notice in writing giving details of the reason for the increase in maintenance fees for the ensuing operating years ending 31st December 1993 and 1994.

(iii) Provide to Mr. Kiddell, Mr. MacNicol, and Mr. and Mrs. Delaney, 3 months prior to the end of the operating year a Notice in writing giving details of the reason for the increase in maintenance fees for the ensuing operating year 1995.

(iv) Provide to Mr. MacNicol, and Mr. and Mrs. Delaney and 3 months prior to the end of each operating year, a Notice in writing giving details of the reason for the increase in maintenance fees for the ensuing operating year 1996.

(v) Provide quarterly Maintenance Statements for the quarter ending 31st March 1994 to Mr. and Mrs. Kiddell, Mr. MacNicol and Mr. and Mrs. Delaney in a timely manner at the end of this quarter.

(vi) Provide quarterly Maintenance Statement for 1994, for the quarters ending 30th June, 30th September and 31st December 1994 to Mr. Kiddell, Mr. MacNicol and Mr. and Mrs. Delaney in a timely manner.

(vii) Provide quarterly Maintenance Statements for the quarters ending 31st December 1999 and 31st March, 30th June, 30th September, and 31st December for the years 2000 to 2002 to Mr. D. MacNicol and Mr. and Mrs. Delaney.

[134] Regarding the Rental Pool Master Agreement, Windjammer failed –

(i) To provide the Claimants with unaudited quarterly Rental Pool Statements in a timely manner for the quarters ending 30th June, 30th September, and 31st December 1991.

(ii) To provide the Claimants with unaudited Quarterly Rental Pool Statements in a timely manner for the quarters ending 30th June, 30th September and 31st December for the years 1994 to 2002.

(iii) To provide Mr. Hamu with unaudited Quarterly Rental Pool Statements in a timely manner for the quarters ending 31st March 1994, (upon termination of his agreement), the period 1st April to 7th June 1994, (after reinstatement of his agreement), the period 1st December to 31st December 1995 and subsequent quarters ending 31st March, 30th June, 30th September, 31st December 1995, the quarters ending 31st March, 30th September and 30th June 1996, (and upon termination of the reinstated agreement at the end of August) the period 1st July to 31st August 1996.

(iv) To provide quarterly Service Account Statement to each Claimant for the quarters ending 30th June 1991, 30th September 1991, 31st December 1991, 31st March, 30th June, 30th September and 31st December 1992.

(v) To provide to Mr. MacNicol and Mr. and Mrs. Delaney Quarterly Service Account Statements at the end of each quarter for the operating years 1994 and 1996 to 2002.

(vi) To provide to Mr. Hamu Quarterly Service Account Statements for the quarters ending 31st March 1994, (upon termination of the agreement) for the period 1st April to 7th June 1994, (upon reinstatement of the agreement) for the period 1st to 31st December 1994, the quarter ending 31st March, 30th June, 30th September, 31st December 1995, 31st March and 30th June 1996, (and upon termination of the agreement) the period 1st July to 31st August 1996.

[135] As for Audited Statements –

(a) Windjammer breached the Rental Pool Master Agreement by failing to furnish each Claimant with an Audited Statement of the Rental Pool Operations for 1991; further

(b) The Audited Statements for 1992 and 1998 were supplied after April 1994 and September 2000 respectively and to this extent there was unreasonable delay.

Specific Disclosure and Review

[136] Mr. Kiddell testified that in 1992 Windjammer had refused the request of the solicitor for the Villa Owners Association for Windjammer to consent and authorize their access to the books and records in relation to the Maintenance and Rental Pool Agreements. Further, that Windjammer had refused to let forensic accountant Mr. Robert Mc Donald review the said books and records or conduct an open book review of them. That Windjammer failed to produce the source records that were used to complete the Financial Statements supplied for the years 1991 and 1992, and failed to work with the Villa Owners on a totally open

book basis regarding their financial situation, after the Association's representative Mr. Medved, had questioned and requested financial information concerning the Maintenance and Rental Pool income.

[137] Mr. Kiddell testified further that until finally ordered by Mr. Justice Saunders in 2002 to produce financial records relating to the said Agreements, Windjammer never gave the owners access to any, let alone all of the source documents that they were entitled to, pursuant to the said Agreements.

[138] While the Maintenance Agreements do not as I have found expressly or impliedly impose any obligation on Windjammer to allow the review of source documents, or for specific disclosure of its books or accounting records to the Claimants, this is not the case under the Rental Pool Master Agreement. By paragraph 4.11 of the Rental Pool Agreement, Windjammer was obligated to keep a record of the usage of each of the Units in the Rental Pool for all owners to review.

[139] Pursuant to paragraphs 5 and 7 of the said Agreement, the Claimants and other Villa Owners were each entitled to all the information financial or otherwise which each owner requested for the Rental Pool Operations and their individual villas. I now have to decide whether this provision permits a construction that the Claimants were entitled to specific review of the financial records. Each owner could also request quarterly reviews with Windjammer's Auditors at their expense, presumably concerning the quarterly Service Account Statements and the quarterly Rental Pool Unaudited Statements and Reports that Windjammer was obligated to give each owner (*SEE paragraph 22, 23,77 and 78 above*).

[139 A] In the absence of a definition or qualification of the word " ***information***" in paragraph 5.4, learned Counsel Mrs. Floissac Fleming contended that Paragraph 5.4 of the Rental Pool Agreement does not expressly confer upon the Claimants any contractual right to production and inspection of or access to Windjammer's "***source documents***". Any such requirement is an implied term Counsel argued. She relied on the case Schuler AG –vs- Wickman Limited (1973) 2 ALL E.R. 39 (H.L) as the authority for saying that the Courts will not imply a term in a contract or interpret a contract in a certain way if the implication or interpretation will engender absurd, fantastic, unfair or unreasonable consequences which the parties (*as reasonable entities*) could not have intended.

[139 B] In another authority Counsel referred to, it is stated that "*Where there is, on the face of it a complete, bilateral contract, the Courts are sometimes willing to add terms to it, as implied terms; this is very common in mercantile contracts where there is an established usage; in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is an apparently complete bargain, the Courts are willing to add a term on the ground that without it the contract will not work . . . .*" (*Liverpool CC –vs- Irwin [1976] 2 ALL E. 39 at page 43 PER Lord Wilberforce*).

[139 C] In Schuler's Case, clause 7 (b) of the Sale of Goods Agreement stipulated that it was a '*condition*' of the Agreement that representatives of Wickman Limited would visit certain mentioned firms once weekly to solicit orders for panel presses and that the same representative would visit the same firm on such occasions unless unavoidable reasons prevented this. Wickman partially failed to comply with this obligation and Schuler consequently claimed to be entitled to repudiate the agreement for material breach. It was held that although where the word '*condition*' was used in a formal contract, there was a presumption that indicated a term of the contract, breach of which however small, gave rise to a right to repudiate, the word would not be given that meaning if such a construction produced a result so unreasonable that the parties could not have intended it, and if there was some other possible and reasonable construction. Lord Kilbrandon at page 63 reasoned *". . .I am not prepared to accept that if, instead of using the equivocal word 'condition' in cl. 7, Schuler's draftsman had spelled out the consequences he intended should follow on the slightest breach Wickman would have been prepared to sign the agreement presented to them*.".

[139 D] In the Liverpool Case the tenant's legal obligations were meticulously spelt out in Liverpool C.C.'s printed form, but which mentioned none of Liverpool C.C.'s obligations.. The Court implied that the obligations of the Corporation in respect of a block 15 storeys high, were to maintain the common parts i.e. the stairs, the lifts, and the lighting on the stairs in a state of reasonable repair and efficiency.

[139 E] The peculiar circumstances in the Schuler and Liverpool cases which resulted in those decisions are absent in the present case. Since the bone of contention here relates to whether or not the words "*all information financial or otherwise*" should be limited to exclude the production of "*source documents*", this in my view depends on the meaning which one chooses to give to the word "*information*" within the context of paragraph 5.4, which is a clear, unambiguous provision. It does not depend on any implied term. Hence the principle in Schuler and Liverpool is inapplicable. In my view therefore, the words "all information financial or otherwise in paragraph 5.4 of the Rental Pool Agreement are susceptible of a construction establishing that it was the intention of the parties that source documents including bills, cheques, invoices, receipts and other financial records if and whenever requested by the Villa Owners, for the Rental Pool operations would be produced by Windjammer for the Villa Owners' scrutiny.

[140] The parties here, clearly and unambiguously expressed what they intended. The parties obviously intended that the provisions which imposed such obligations on Windjammer, would enable the Claimants to assess for themselves whether Windjammer's accounting was in fact on an "*accrual basis and in accordance with generally accepted accounting principles on a consistent basis from quarter to quarter and year to year"*, apart from relying on the annual audited statements that Windjammer should furnish pursuant to paragraph 5.2 of the Agreement.

[141] The production process would also enable the Claimants to review and assess whether Windjammer's accounting obligations were being performed in accordance with its obligations concerning the Service Accounts, the Rental Pool Revenues Deductions and Distributions, Operating Inventory, and Furnishing Replacement Account, under the Agreement.

[142] I must therefore consider the specific requests for information and review, that the evidence discloses were made by the Claimants at different times, and the responses of Windjammer on such occasions.

[143] The request for the information set out at paragraph 83 of this Judgment was made by letter dated 13th July 1992. The Audited Statements of Windjammer 's operations for 1990 and 1991 were never supplied by Windjammer, and the 1992 Audited Statements were supplied in an untimely manner sometime after 30th March 1993. The quarterly Service Account Statements for 1990 to 1992 were never supplied by Windjammer. The Audited statement to the 31st December 1992 for the Service Account was supplied sometime after the 30th April 1993.

[144] Another specific request set out at paragraph 84 (l) of this Judgment was made by the Villa Owners Association on the 14th September 1992. Apparently at the meeting held on 23rd September 1992 Windjammer's Mr. Don Smith addressed the Villa Owners without giving the required information mentioned at paragraph 84 (l) of this Judgment. The focus of the subsequent meeting held on the 5th October 1992 seems to have been on the allocations of the Rental Pool Operations and the financial review the Villa Owners wished to conduct and not on the specific requests.

[145] Instead of dealing with the previous specific requests of the Villa Owners, Windjammer 'changed gear' and presented the Villa Owners with the proposals dated 8th October and 27th October 1992 (*SEE paragraph 86 above*).

[146] Although there is no evidence before me that Windjammer signed a draft consent authorization (*apparently in existence prior to the 10th August 1992*), permitting the Villa Owners to have access to their books, computer and financial records, Mrs. Cram testified that Windjammer did consent to the Review of its relevant records. This she said was obvious from the communication to the Villa Owners dated 3rd September 1992 by Windjammer's lawyers (*Mentioned at paragraph 84 (h) and (k) above*).

[147] There is no evidence which rebuts Mrs. Cram's testimony that Windjammer consented to their books being reviewed by Mr. Medved. In fact, the letter written by Mr. Medved dated 14th July 1993 confirms that Windjammer did consent to the review. This consent must have been between the 8th October 1992 and the 14th July 1993.

[148] It is clear that Mr. Medved was unsatisfied with the confidential financial statements disclosed, and the financial reporting policies of Windjammer. He demanded further information so as to evaluate the financial statements presented to the Villa Owners. (*See insert at paragraph 107 above*).

[149] It would seem from the response of Mr. Dinnick dated 30th July 1993 (*See paragraph 112 above*) that Windjammer was acknowledging that prior to their new computer system installed in November 1992 there was no daily backups which included all transactions since start up. Windjammer also seemed to have acknowledged that up to that point there was inconsistency in their financial reporting on a year to year basis and there was a problem with how Windjammer was presenting the numbers.

[150] It appears from Mr. Medved's letter to the Villa Owners dated 17th August 1993 (*Exhibit "L C 24*") that he met with Windjammer representatives and received several items of correspondence in the course of his review. It is important to incorporate his 3 pages report from this review which speaks for itself as paragraph 151.

[151] See Insertion following:

[152] I also accept the testimony of Mrs. Cram that another representative of the Villa Owners Association Mr. Stephen Probyn met with Mr. Don Carlson, Windjammer's Financial Comptroller on the 26th August 1993, posed the questions reflected in the memorandum dated 27th August 1993, and received the answers stated in the letter dated 29th September 1993 (*Exhibit "L C 29*"). Both of these documents are incorporated as paragraph 153 in this judgment for their full term and effect.

[153] See Insertions following:

[154] I will comment on Mr. Medved's Report and Mr. Don Carlson's answers when dealing with Issue No. 2.

[155] Following this occurrence it appears that the views and interests of the Villa Owners differed, leading some of them to negotiate with Windjammer to resolve their financial issues under the Maintenance and Rental Pool Agreements other than resort to litigation. Mr. Probyn and Mr. Medved chose to negotiate with Windjammer.

[156] Mr. Delaney's faxed message in response to Windjammer's lawyer's communication dated 11th April 1995 (*Exhibit "L C 25*") discloses that chartered Accountants Coopers and Lybrand were now retained by the Claimants to conduct the examination of Windjammer's books and records after litigation had commenced.

[157] The following documents Exhibit "*L C 25*", "*L C 26*" and "*L C 27*" are incorporated in the judgment as paragraph 158.

[158] See Insertions following:

[159] These documents substantiate Mr. Kiddell's testimony that the long awaited review of the specific records as particularized in Mr. Delaney's request, never took place until after Justice Saunders made a Specific Disclosure Order on the 6th February 2002. However, let me hasten to point out that Mr. Delaney's request and the subsequent requests for specific disclosure and review would be relevant only in the cases of Mr. and Mrs. Delaney and Mr. MacNicol up to 2002. In particular I note that by letter dated 27th January 1997 Mr. D. MacNicol made specific request to "*see the front desk rental books as well as any other books relating to the development, including the maintenance books*". Based on my previous findings, he was entitled to see only the front desk rental book under paragraph 5.4 Rental Pool Agreement. However Windjammer seems to have ignored this request. In the case of Mr. Hamu, such disclosure and review would be relevant only for the periods specified at paragraph 126 and 124 above when his Rental Pool Agreement was in existence. As for Mr. Kiddell the obligations of Windjammer would have continued up to the 5th March 1995 only for the Maintenance Agreement since his Rental Pool Agreement was terminated effective 14th November 1993.

[160] The evidence further discloses that following on this Court Order, the Chartered Accountants Kroll Lindquist Avey were retained by the Claimants to review Windjammer's Rental Pool Master Agreements and the Maintenance Agreements with the Claimants, along with the available accounting books and records related to the relevant operations of Windjammer.

[161] They were specifically requested to determine if revenues reported and maintenance fees and other expenses charged to the owners between 1991 to 2002 were in compliance with the Agreements and were appropriately supported by Windjammer's underlying books and records.

[162] During the production and review process, Mr. Robert Mac. Donald a Principal of Kroll, and a Chartered Accountant designated as a specialist in Investigative and Forensic Accounting, by his Affidavit sworn to on the 15th May 2002 deponed, that Windjammer's Accounting Records for 1990 to 1993 were missing, limited Accounting Records for 1994 were produced, the 1994 to 2000 Accounts Payable paid Invoices were incomplete, and the extent of incompleteness varied from year to year.

[163] Consequently, Mr. Mac Donald testified that between April and May 2002 he sought without success to obtain the audit working papers of Price Waterhouse Auditors for Windjammer, since according to him, the complete Accounts Payable Paid Invoices were necessary to verify expenses incurred by Windjammer.

[164] Though I accept that Price Waterhouse has a proprietary interest in their working papers created from missing or unavailable or inaccessible records and source documents of Windjammer, I do have some difficulty understanding why Windjammer made no attempt to persuade or influence their Auditors to make such working papers available to the Claimants' Chartered Accountants. Indeed

the evidence shows that Windjammer's Auditors were prepared to permit Windjammer's expert Forensic Accountant Mr. David Smith to review these working papers.

[165] Mr. Smith deponed in his Affidavit sworn to on the 19th June 2002 that he was "*confident that the combination of the existing accounting records and audited financial statements, together with information contained in the Price Waterhouse working papers, is sufficient for anyone to complete the tasks with respect to the supportability for the Rental Revenue Credits and expense charges to the Plaintiff Villa Owners for the periods 1992 to March 2001 inclusive*".

[166] Although the fact that Price Waterhouse had independently in the past, audited documents that were now not available to the Claimants' Expert, would not make the absent documents irrelevant, or excuse Windjammer's obligations to make them available, the reason for their unavailability must be considered.

[167] Mrs. Cram testified that the accounting records for 1990 and 1991 calendar years were destroyed by a fire occurring on the 6th December 1991. It seems to me therefore on the authority of Taylor –vs- Caldwell 8 L.T. 356 that Windjammer should be absolved from their obligations to produce the financial information requested after 6th December 1991 by Claimants for calendar years 1990 and 1991, since the possibility of performance depended on the existence of the records which had been destroyed before the Claimants' request was made.

[168] As for the unavailability of other accounting records and information, there is conflicting evidence on this since according to Ms. Moon and Mr. Smith's testimony the Claimants' expert was given access to all the available records that were in Schedule A under the Order of Justice Saunders, and failed to examine them. In my view the contents of the Court Order for specific disclosure did not modify or derogate from the terms of paragraph 5.4 of the Rental Pool Agreements. Consequently, although there may have been full compliance with that and any other subsequent Court Order, the existence or non existence of a breach of paragraph 5.4 must necessarily depend on a strict construction of the Agreement. The evidence discloses deliberate delay and or refusal by Windjammer in some instances to perform its obligations pursuant to paragraph 5. of the Rental Pool Agreements.

Conclusions for Issue No. 1

[169] On considering all of the relevant evidence and submissions of Counsel the following are my conclusions –

(i) Windjammer was in breach of its obligations under the Maintenance Agreements with the Claimants for the reasons stated at paragraph 133 above.

(ii) Windjammer was in breach of its obligations under the Rental Pool Agreements for the reasons specified at paragraphs 134 and 135 above.

(iii) Up to November 1992 the financial documentation and accounting system in place for the Rental Pool operation were deficient and not of the standard contemplated by the Rental Pool Agreement. Consequently proper and accurate account books and records were not being kept by Windjammer for the years 1991 and 1992, despite the Audited Statements for 1992. (See Exhibit "GK 15" letter dated 26th June 1992 written by Windjammer, Exhibit "GK 18" letter dated 10th August 1992 by Villa Owners Association's Lawyers, Exhibit "GK 19" letter dated 12th August 1992 by Windjammer, Exhibit "GK 20" letter dated 3rd September 1992 by Windjammer's Lawyers, Exhibit "LC 26" Windjammer's lawyer's letter dated 19th June 1995 to Mr. Delaney)

(iv) Accepting the testimony of Mr. Mac Donald, to the extent that the accounts payable paid Invoices were incomplete for the years 1994 to 2000, Windjammer failed to keep accurate accounting books and records for the Rental Pool operations for those years.

(v) Though there may have been substantial performance of its obligations to disclose specific documents that were available pursuant to Court Orders, Windjammer between the 13th July 1992 and 6th February 2002 on some occasions failed to provide and make available to the Claimants the financial information requested, concerning the Rental Pool Operations and their individual units, within a reasonable time or at all, as paragraph 5.4 of the Rental Pool Agreements called for.

[170] I now move on to consider the second set of issues stated at paragraph 40 (2) above.

Overcharging Maintenance Fees

[171] The pleadings alleged that Windjammer has been and is deliberately or alternatively, negligently overcharging, excessively charging and/or wrongfully charging each of the Claimants for alleged maintenance costs contrary to the express provisions for the assessment and calculation of those costs.

Res Judicata

[172] Windjammer pleaded that the issue of the excessiveness or otherwise of the maintenance charges was expressly determined on its merits by the Judgments of Justice Suzie d'Auvergne dated 14th March and 15th April 1994 in Suit Nos. 71, 73, 75, 76, 77, 158, 159 and 113 of 1994 and is now Res Judicata. In this Judgment,

the learned Judge merely granted the Applicants an injunction restraining Windjammer from dividing Windjammer's 3 bedroom villas into one bedroom units, and engaging in time sharing transactions. The learned Judge also dismissed the Applicants applications for the appointment of an accountant as an expert to examine and report on the revenues and expenditure pertaining to the Rental Pool Maintenance and Service Accounts. This Judgment therefore cannot ground the defence.

[173] In her submissions, Counsel for Windjammer identified a passage in another Judgment of Justice d'Auvergne delivered on the 25th October 1994 where the learned Judge said at pages 10 – 11:

> "*The Plaintiff was also informed by another correspondence viz September 29th 1993 that the monthly maintenance payments for the year 1994 would be $1,855.00. Despite these notices the Plaintiff continued to pay US$500.00.*
>
> *In my judgment the Plaintiff by her conduct has breached the contract and consequently the Defendant could either accept the breach and terminate the contract or wave the breach and keep the contract alive. The Defendant chose the former and terminated the contract*".

[174] It is obviously this Judgment that Windjammer is seeking to rely on in its pleaded contention that the Claimants are estopped per Res Judicata from relitigating that adjudicated issue.

[175] Before dealing with the submissions of Counsel for the parties, it is prudent to review the relevant law.

[176] Article 1171 of The Civil Code Chapter 242 states –

> "*The authority of a final Judgment (Res Judicata) supplies a presumption incapable of contradiction in respect of that which has been the object of the Judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon*".

[177] There are 2 distinct forms of estoppel to the plea of Res Judicata. They are cause of action estoppel and issue estoppel. The relevant estoppel for the purposes of this matter is issue estoppel. Learned Counsel for the Claimant on the authority of Carl – Zeiss – Stiftung –vs- Rayner and Keeler Limited And Others quite rightly submitted that for issue estoppel to be applicable. The following 3 conditions must be satisfied –

(a) the identify of the parties in the former litigation and in the current litigation must be the same;

(b) the earlier judgment relied upon to ground estoppel must have been a final judgment;
(c) There must be the identical subject matter in the former litigation and the current litigation.

[178] Among the authorities Counsel for Windjammr relied on is the case Arnold –vs- National Westminster Bank [1991] 3 ALL E.R. 41 (H.L.). There, Lord Keith in his Judgment at page 47 , paragraph c clearly explained that issue estoppel arises "*where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue*".

[179] *". . . There may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings whether or not that point was specifically raised and decided, being material which would not by reasonable diligence have been adduced in those proceedings*" (*Per Lord Keith in Arnold –vs- National Westminster (supra) at page 50 paragraph e to f*).

[180] The Claimants' argue that the issue of the alleged overcharge for maintenance costs is not Res Judicata because Justice d'Auvergne's Judgment was a judgment on an application by Barbara Kiddell for an interlocutory injunction to restrain Windjammer from interfering with the electricity and water supply or any other service connected to her Villa No. 23 until the determination of her Suit No. 77 of 1994.

[181] Counsel for Windjammer argued that although the issue of an interlocutory injunction was not Res Judicata, the issue of the alleged overcharging for maintenance costs was rendered Res Judicata by the learned Judge's Judgment which Barbara Kiddell is estopped from challenging.

[182] My understanding of the law on Res Judicata and issue estoppel compels me to agree with the written submissions of Counsel for Claimants in their entirety for the following reasons –

(i) The cause of action in which the application for the interlocutory Injunction was made by Barbara Kiddell – Suit No. 77 of 1994 – is the same cause of action which has been consolidated with Claim No. 778 of 1997. That application is not a cause of action by itself.
(ii) Mr. Kiddell, Mr. D. MacNicol, Mr. and Mrs. Delaney and Mr. Hamu were not parties to the application in Suit No. 77 of 1994.
(iii) The only issues for the Court in an Application for interlocutory Injunction is whether or not the applicant has

shown that there is a serious question to be tried; and whether or not the Court should exercise its discretion on the balance of convenience and grant the injunction or refuse to grant the injunction because damages would be a sufficient remedy. The settled law is that in determining such an application, the Court must not attempt to decide the substantive claim on its merits (American Cyanamid Co. –vs- Ethicon Limited [1975] 1 ALL E.R. 504 (H.L.)).

(iv) The issue of overcharging of Maintenance Costs was therefore never litigated in the Application for interlocutory Injunction, or decided on in the Judgment of Justice d'Auvergne delivered on the 25th October 1994 in Suit No. 77 of 1994. Hence there was no final judgment delivered then on that Application or in Suit No. 77 of 1994.

[183] Consequently, in my view this defence cannot avail Windjammer since the conditions necessary for invoking issue estoppel are non-existent.

Calculations of Maintenance Costs

[184] The nature of the services for which the Claimants were to be charged Maintenance Fees is spelt out in their respective Agreements in either paragraphs 2, 8.2 or Schedule A paragraph 4 (*Mr. Delaney's*).

[185] They include the following Services:

(1) Maintenance of the exterior of the Residential Unit including painting and maintaining outside areas of the Residential Unit originally painted, as needed due to normal wear and tear, and maintaining exterior of the Residential Unit and roof. The repairs to preserve the exterior were to be provided by Windjammer subject to obtaining the owner's consent.

(2) Landscaping of the grounds immediately adjacent to the Residential Unit in a first class manner consistent with the finest resorts in the Caribbean. Trimming shrubberies as needed, removing all leaves and cuttings, moving and edging grass, watering, fertilizing and maintaining the care of grass, shrubbery, trees and lawns adjacent to the Residential Unit.

(3) Maintaining and repairing wear and tear of all sidewalks, roadways, grounds and landscaping used in connection with the Residential Unit, caused by usage and the elements. Cleaning parking areas and walkways.

(4) Providing garbage service including maintaining and keeping clean the garbage and trash areas adjacent to the Residential Unit.

(5) Providing Sewer Services, Security Service, Swimming Pool.

(6) Providing Car shuttle, Recreational Facilities, Generating Facilities, Irrigation Systems, Sewerage Treatment Plant, Electricity Charges, Water Charges, Cable T.V., Telephone Answering Services, Telephone Local only long distance to user through Windjammer's Switchboard.

(7) Mr. Delaney's Agreement included fire, theft, hurricane and general liability insurance premium, and property taxes as responsibilities of Windjammer included in the Maintenance Fees. There must have been a common intention that this would be applicable to all Villa Owners since paragraph 8.2 of the Agreements required all Villa Owners to participate in such insurance for full replacement value of their building and contents, provided through a group policy by Windjammer.

[186] Mr. Hamu's Agreement did not expressly include the services mentioned in paragraph 185 (6) above. However based on Windjammer's obligations to the other Claimants, the terms of the Purchase and Emphyteutic Lease Agreement with Mr. Hamu, and the Maintenance Fees that Mr. Hamu was charged, it is obvious in my view that the parties intended those services to be included.

[187] Having found that "*open book basis for cost plus 10%*" in the Maintenance Agreement refers to the actual Maintenance expenses apparent on the Accounting Records with 10% of this amount added, I will now proceed to consider Windjammer's method of arriving at the Maintenance charges.

[188] The Notes to the Statement of Maintenance Fees for the year ending December 1995 by Windjammer's Auditors Price Waterhouse, confirm that Windjammer's method was to compute the Maintenance Costs by allocating selected expense accounts to the Statement of Maintenance Fees from their general ledger, which Windjammer determined to be a reasonable allocation of costs.

[189] One of the contentions of the Claimants is that the costs for Windjammer's other hotel operations have been and continue to be wrongfully allocated to the Claimants' Maintenance Account.

[190] Ms. Cram testified that Windjammer's Resort Complex has 52 one-bedroom units 32 two-bedroom units, 27 three bedroom units and 5 four-bedroom units – a total of 116 units.

[191] There are also other areas incorporated in the Resort Complex such as Restaurants, Sports facilities, Marine facilities, Bars, Entertainment facilities and Shops. Apart from the Swimming Pool and Recreational Facility under the contracted Maintenance Services, which could be classified as Sport facilities, these other areas are not included in the Maintenance Agreements.

[192] Ms. Moons' Exhibits "*MM 9*" are Windjammer's Hotel Inventories for the years 1995 to 2002. They show that Windjammer owned 74 to 76 Rentable Units. Also included in the Total Rentable Inventory of 128 to 130 Units, were 12 to 20 Time Share Units and 40 to 48 Outside Owned Units. There were also 6 to 7 Owner Occupied Villas.

[193] Though at first it was unclear to me whether the 74 to 76 Rentable Units owned by Windjammer were included in the 116 Units Ms. Cram testified about, I was compelled to draw the inference that they were not from Ms. Moons' evidence about the Spreadsheets.

[194] Ms. Moons and Ms. Cram tendered the Resort Site and Master Plans for Windjammer (*Exhibits "MM 8" and* "*LC 1*"). They confirm Ms. Moons' testimony that at least two-thirds of the developed villa lands are multi bedroom units which have significantly more grounds and exterior surfaces than the one-bedroom stacked units. This evidence is important since I am dealing here with the 59 multi-bedroom villas i.e. 32 two-bedroom and 27 three-bedroom units owned by some of the members of the former Windjammer Villa Owner's Association including the Claimants. It is also possible that Windjammer owned some of these villas.

[195] Ms. Moons who is a Chartered Accountant and Director of Finance of Windjammer since June 2000, testified about Windjammer's system of accounting and allocations. She said that the various expenses of all of Windjammer's operations including the Villas, were categorized according to the departments incurring the expenses. Each department keeps various identifiable accounts which individually represent expenses, including types of expenses for the services contemplated by the Maintenance Agreements, salaries and benefits.

[196] For the purpose of the Maintenance Fees Statements, there are approximately 170 accounts from 9 departments to consider which contain expenses which are either fixed, variable, or discretionary.

[197] The expenses accounts relating to Villa Owners are compiled in a spreadsheet in order to allocate the expenses incurred by Villa Owners to their Villas. Ms. Moons tendered spreadsheets in use since 1997, for the year ending December 2002 (*Exhibit "MM 9*"), while explaining the allocation percentages and the reason for such allocations.

[198] She explained that for expenses relating only to the Villas, the allocation rate is 100%. Where the expense is a shared expense between Villa Owners and Windjammer's hotel operations, Management determines the percentages to be allocated which are reviewed by Price Waterhouse during the Audit of the Maintenance Fees Statements.

[199] In order to satisfy the scrutiny of their Auditors, Ms. Moons testified self-servingly, that Windjammer makes every effort to err in favour of the Villa Owners by allocating a lower percentage of the expense to them so as to be fair.

[200] The percentages formula for allocations, in use since 1997 are applied consistently from year to year Ms. Moons said.

[201] An examination of the Maintenance Fees Statement for 1992 shows that they were only subject to the Auditors Review and were not audited. Consequently no opinion was expressed by Price Waterhouse. But the Maintenance Fees charged for 1992 is no longer an issue, since Windjammer reversed its budgeted Maintenance Fee forecast and the actual Maintenance Fee was US$500.00.

[202] The Audited 1993 Maintenance Fees Statements shows that Price Waterhouse approved the rates allocated for allowable expenses under the Maintenance Agreements which were as follows –

(a)	Front Office Salaries and Benefits	-	50%
(b)	Other Front Office Expenses	-	75%
(c)	All Guest Relations Expenses	-	80%
(d)	Watersports Salaries and Benefits	-	90%
(e)	Other Watersports Expenses	-	50%
(f)	Maintenance Salaries and Benefits	-	85%
(g)	Other Maintenance Expenses	-	60% - 95%
(h)	All Security Expenses	-	75%
(i)	Utilities	-	75%

[203] I note however that the 1992 and 1993 Maintenance Budgets did not contemplate that the "*Front Desk*" Category Expense would include Front Office Salaries and Benefits. It merely forecasted for Reception, Telephone Answering Guest Services and Capital Replacements; and such expenses were estimated to amount to $58,741.00 for 1992 and $72,178.05 for 1993. Reception, Telephone Answering and Guest Services were estimated as $32,794.00 for 1992 and $34, 433.70 for 1993. The Notes to the Audited 1993 Maintenance Fees Statements explains that the allocations were made in accordance with the definitions of allowable expenses per the relevant Maintenance Agreements.

[204] The allocations remained the same in the Audited Maintenance Fees Statement for 1994. Added to the Categories of Expenses were Cable Television with 100% allocation, Insurance on Villas and Condominiums with 100% allocation, and Property Tax on Villas and Condominiums with 80% allocation. A look at the Maintenance Expense Budget for year ending 31st December 1994 shows that 50% of Salaries and Wages and Employee benefits were now forming a part of Front Desk allocations along with a "*Miscellaneous*" component. Fifty percent of Salaries and Employee benefits were estimated to be $119,641.00. The 1994 Budget also disclose that Windjammer considered telephone and Communications to be a part of the 10% Administration Charge.

[204-A] The Maintenance Expense Budget for 1995 was compiled to state the Actual amount allocated for "***Front Desk (including Reservations, Operations, Shuttle Drivers)***" for 1993. This amount included a "***Miscellaneous***" component. The Total Front Desk Expenses for 1993 was actually $176,153.00. Of the $176,153.00 the Salaries and Wages allocation of 50% to Villa Owners was $73,130.00 and Employee Benefits was $29,909.00 which totaled $102,039.00.

[204-B] My conclusion from this is that though the 1993 Estimate for Front Desk stated that Reception, Telephone Answering and Guest Services were estimated to Cost $34,433.70, because Salaries and Wages and Employee benefits were subsequently included in the calculations for Actual Expenses for 1993, an amount of $102,039.00 representing this inclusion was added to the estimated $34,433.70.

[204-C] I note also that Exhibit "*LC 33*" which is Windjammer's worksheet for Special Maintenance for Mrs. Kiddell states that it is based on fiscal 1994 projected costs. I would therefore have expected the Front Desk and Shuttle Service full year amounts stated therein to dovetail with the 1994 Maintenance Expense Budget. Based on the allocated percentages for Front Desk in the Maintenance Expenses Budget, I have calculated that the estimated total amounts for Front Desk for the full year would be $323,032.00. However the total amounts for Front Desk and Shuttle Service appears as $337,000.00 in Exhibit "*LC 3*". This, and other observations above mentioned are obviously examples of Windjammer's arbitrariness in allocating expenses which they apparently regard as variable or discretionary in my view.

[205] I note also that for the 1995 Audited Maintenance Fees Statement, the percentage allocations were compiled differently with changes in percentages allocated as follows without any Guest Relations Service Expenses:

(a)	Repairs and Maintenance	-	60% - 95%
(b)	Security Expenses	-	75%
(c)	Watersports Facilities *(1994 50% - 90%)*	-	100%
(d)	Front Office	-	50% - 80%
(e)	Utilities	-	75%
(f)	Cable Television	-	100%
(g)	Insurance	-	100%
(h)	Property Tax	-	80%

[206] Using the 1993 Audited Statements Categories' descriptions, there appears to have been an increase of 5% allocation in the Front Office Salaries and Benefits and Other Front Office Expenses, and an increase of 10% for the Watersports Salaries and Benefits and Other Watersports Expenses.

[206-A] The Audited 1996 statement of Maintenance Fees was compiled to include the following allocations:

(a)	Repairs and Maintenance	=	$445,442.00
(b)	Security	=	$176,376.00
(c)	Watersports Facilities	=	$193,517.00
(d)	Front Office	=	$235,015.00
(e)	Utilities	=	$525,019.00
(f)	Cable Television	=	$ 17,425.00
(g)	Insurance	=	$263,670.00
(h)	Property Tax	=	$ 33,665.00
(i)	Administration	=	$189,013.00
	TOTAL	=	*$2,079,142.00*

[206-B] The Notes to this Audited Statement stated the percentage allocations of the selected expenses totaling $2,079,142.00 to be as follows –

(a)	Front Office Salaries and benefits	=	50%
(b)	Other Front Office Expenses	=	75%
(c)	Guest Relations Expenses	=	80%
(d)	Watersports Salaries and Benefits	=	100%
(e)	Other Watersports Expenses	=	100%
(f)	Maintenance Salaries and Benefits	=	85%
(g)	Other Maintenance Expenses	=	60-95%
(h)	Security Expenses	=	75%
(i)	Utilities	=	75%
(j)	Cable T.V.	=	100%
(k)	Insurance on Villas and Condominium	=	100%
(l)	Property Tax on Villas and Condominium	=	80%

[207] Ms. Moons testified that upon allocating a percentage of shared expenses between the Villas and Hotel services, there is a further allocation between one-bedroom and multi-bedroom Villas.

[208] In determining how to distribute the cost, Windjammer takes into account the level of cost of maintaining the exterior of the Villas, their grounds, and the common areas, much like the way in which a condominium fee is charged. She said that because the two, three and four bedroom villas (*collectively, referred to as the multi bedroom villas*) have the same basic outlay, they require the same amount of exterior maintenance unlike the one-bedroom villas which are stacked units.

[209] She relied on the weighted average square footage test as a possible method of determining whether Windjammer's further percentage allocations of costs to one bedroom-units being 37%, and Multi-bedroom Units being 63%, were reasonable. This test, reflected in her Exhibit "*MM 10*" showed the square footage for one bedroom units ranging from 983 to 1381 square feet, while the Multi-bedroom Range from 1, 260 to 4000 square feet. The average square footage for one-bedroom units is 1216 square feet, and for Multi-bedroom the average is 2895 square feet.

[210] She said the weighted average square footage for the 56 one-bedroom units was 598 and for the 58 Multi-bedrooms it was 1473. Percentage wise, the weighted average square footage was 29% for the one-bedroom and 71% for the multi-bedroom Units. She concluded therefore that in such circumstances Windjammer's percentage allocation of 37% to one-bedroom units, and 63% to multi-bedroom units was reasonable and in favour of the Villa Owners.

[211] Ms. Moon's explanations concerning allocations based on the spread sheets depended on the Windjammer Spreadsheets for the year ending 31st December 2002 (*Exhibit "MM 7*"). Under cross examination she said that the Front Office Salaries amount of $400,571.72 for that year represented the whole of the Front Office Salaries and Costs to Windjammer including Salaries for Shuttle Drivers.

[212] In support of their pleaded allegations concerning this issue, the Claimants adduced evidence from their expert Mr. Robert Mac. Donald who is a Chartered Accountant and Specialist in Investigation and Forensic Accounting from the Forensic Accountants firm Kroll Lindquist Avey Co. in Canada.

[213] The Kroll Report and his testimony, focused on determining from their review of Windjammer's Financial Records, whether or not the Revenues reported and Maintenance Fees and other expenses charged to the Villa Owners between 1991 and 2002, were in compliance with their Maintenance Agreements and were appropriately supported by Windjammer's underlying books and records.

[214] In the absence of any analysis or information from Windjammer concerning the composition of the initial Maintenance Fee charge of US$500.00, and handicapped by the absence of underlying records, they concluded from their review that in aggregate Windjammer had charged multi-bedroom Villa Owners approximately US$9.6 million more that the indicated US$500.00 per month, adjusted for inflation.

[215] They also concluded that Windjammer had allocated approximately 77% of total Maintenance Fees to Villa Owners.

[216] Their Schedule (1) prepared to demonstrate and support their conclusion, did not stand up very well to scrutiny or assist the Claimants' case. It was flawed for the following reasons –

(1) It failed to take into account the fact that the budgeted Maintenance charges for each year was an estimate subject to adjustment up or down, and that the actual Maintenance costs for each multi-bedroom owner was that reflected in the Annual Audited Statement of Maintenance Fees for the years 1993 to 2002.

(2) It failed to recognize that for the years 1991 and 1992 the Maintenance Fees charged was US$500.00 monthly.

(3) It failed to take into account the actual amounts paid by the Claimants for each year.

(4) It failed to take into account the relevant periods that Windjammer provided services to each Claimant, bearing in mind the termination dates for Mr. and Mrs. Kiddell and Mr. Hamu.

(5) It also did not take into account the fact that since July 2001, Mr. Hamu, Mr. Kiddell and the Executors of Mrs. Kiddell's estate have been paying US$1,000.00 for Maintenance Services. (*See paragraph 127 of this Judgment*)

[217] The Sensitivity Analysis that Kroll applied to demonstrate the impact in being precise led them to apply an allocation percentage of 67% which was 10% lower than the 77% they concluded Windjammer had allocated to the Villa Owners from the total Maintenance Fees. This in my view was a speculative analysis which did not assist the Claimants' Case.

[218] Of some significance was their Schedule 3 calculations in support of Kroll's assertions that Front Office Charges totaling approximately US$1.5 million were inappropriately charged as part of Maintenance Fees to Multi-bedroom Villa Owners between 1992 and 2002.

[219] Kroll contended the following: "*Between 1992 and 2002, Windjammer's Statement of Maintenance Fees included fees totaling US$2.1 million for "Front Desk" and/or "Front Office" of which Windjammer allocated US$1.3 million to Multi-bedroom Villas. Notes to the Statement of Maintenance Fees refer to "Front Office Salaries and benefits" and "other Front Office expenses. Front Office charges are not specified in the Maintenance Agreement nor are front Office Salaries and benefits consistent with the nature of expenses described in the Maintenance Agreement. We noted the Rental Pool Agreement stipulates Windjammer's "Agent's Commission" of 25% is to cover services including "Front Office Staff and Lobby and Reception". Kroll has determined that, had Front Office charges not been applied to the multi-bedroom villas, the total of Maintenance Fees allocated to the multi-bedroom villas would have been reduced by US$1.5 million inclusive of he 10% administration fee to Windjammer and inclusive of an estimate for the year 1991 for which records are not available*" (*See paragraphs 20 and 21 of this Judgment for the relevant Rental Pool Provision*).

[220] Both Ms. Moons and Windjammer's Expert Forensic Accountant Mr. David Smith countered. Mr. Smith testified that Front Office Salaries included Salaries for the Telephonists and Shuttle Drivers. That Telephone Expenses includes Switchboard costs and local telephone Services. That Vehicle Maintenance Miscellaneous supplies, Insurance and Vehicle depreciation cost appearing in the Spreadsheets relate to shuttle operations.

[221] Mr. Smith's evidence was that he had tested this allocation of 50% by Windjammer, by obtaining listings of all employees and their position and salaries and wages. He had determined that Front Office Salaries of Telephonists and Shuttle Drivers were approximately 45% and not 50%. He found Windjammer's 50% allocation to be somewhat aggressive he said.

[222] Ms. Moons denied the Claimants' accusation of double counting by Windjammer. She said that to prevent double counting expenses already accounted for in the 25% commission under the Rental Pool, Windjammer backs out the portion of salaries, wages and benefits that relate to lobby and reservations staff. This leaves only the portion of these expenses relating to the maintenance account. To do this, Windjammer applies a 50% factor to the total for these accounts.

[223] I was impressed with the schedule prepared by Mr. Smith which makes a meaningful comparison of the appropriate maintenance cost charges to each of the Villas of the Claimants in contrast to the actual fees they paid and in contrast to US$500.00 per month adjusted for inflation rates in St. Lucia.

[224] But as Mr. Smith testified my judgment as to the reasonableness of the allocations can only be made by examining them on an individual account basis, disregarding the approval of the allocations by Price Waterhouse which even Mr. Smith candidly admitted, he would not rely on as Accountant for Windjammer. Price Waterhouse for the years 1994 to 2002 approved Windjammer's cost allocations in the Audited maintenance Fees Statements on the basis that they were a reasonable allocation of costs.

[225] I have therefore carefully scrutinized the spreadsheets for the years 1997, 1998 and 1999 in the Documents Bundle NO. 3 and the 2002 Spreadsheets Exhibit "*MM 7*". They disclose very important information, bearing in mind the submissions of Counsel for Claimant, whose arguments included the following, based on his analysis of these spreadsheets and Maintenance Statements:

(1) Windjammer arbitrarily allocated various items of expenses to be charged to the Claimants' Maintenance Services Account and further allocated percentages of alleged costs. By so doing, Windjammer failed to charge the Claimants' "*Cost plus 10%*" pursuant to the Maintenance Agreements.

(2) Windjammer failed to charge appropriate items relating to Maintenance Services. In particular, Windjammer wrongfully charged amounts for Depreciation of buildings, Nursery, Docks, F & E, Electrical Equipment and Vehicles for the years 1997, 1998, 1999 and 2002, and presumably 2001 when depreciation involves writing down the value of the asset and is not an actual cost.

(3) Windjammer wrongfully charged for Guest Relations Services When it is not identified as a Maintenance Service or charge in the Maintenance Agreements.

(4) The Audited Statement of Maintenance Fees for 2002 has the Watersports Facilities allocated charge being 100% as US$29,843.00 when Windjammer earned a profit from Watersports or Recreational Facilities of US$54,796.25. To arrive at the charge to the Villa Owners, Windjammer offset the profit with the 80% Guest Services allocated charge which was US$93,481.65, thereby purporting to charge the deficit of $29,843.00 as a cost to the Villa Owners without including Guest Services as a charge in the Statement of Maintenance Fees. This is an example of Windjammer hiding Guest Services costs in their inflated but non existent costs for Recreational Facilities Counsel argued.

(5) Windjammer has purported to average and charge property taxes and insurance, on account of the Maintenance Services when these are items specific to each property and each owner is liable for his own property taxes and insurance which should not be averaged.

(6) Windjammer has made unauthorized Maintenance charges for "*front office expenses*" which is not provided for in the Maintenance Agreement. That it was unchallenged that the 25% Rental Pool Income was earned by Windjammer for specific services under the Rental Pool operations including those classified as Front Office Expenses. That since most of the use of the local telephone, answering service and shuttle was by those renting units, and not by owners of the Villas, Windjammer could only charge for such services where they had not received payments for such services under the Rental Pool Agreement. In the absence of any such evidence by Windjammer, Counsel urged the Court to find that Windjammer was not entitled to pass on any of its front office expenses to the Claimants as Maintenance Fees.

(7) Windjammer has allocated the purported Maintenance Fees charged to 114 units comprising 56 one-bedroom units and63% to the 58 multi-bedroom units. But according to the Hotel Inventories (*Exhibits "MM 9*") for 1995 , 1996 and 1997 there were 134 units in Windjammer's Total Inventory, for 1998 there were 135 to 140 such units, for 1999 there were 137 to 143 units, and for 2000 to 2002 there were 142 to 143 units, all of which should have been included to share the costs allocated to the 114 units.

(8) Windjammer admittedly collected Maintenance from the 12 to 21 Time Share Units without taking this into account in its allocation of cost to the 116 Villa Owners and has been wrongfully benefiting from

inflated and excessive Maintenance Charges to the 116 Villa Owners including Claimants.

(9) Windjammer has been wrongfully benefiting from inflated charges to Claimants because it controls and is responsible for all Maintenance Costs for the 74 to 76 Units in the Hotel Inventories for 1995 to 2002.

[226] Counsel Mrs. Floissac Flemming has sought to justify the charges for "*Front Desk*" or "*Front Office*", arguing that they relate to 50% of Salaries, wages and related benefits for Shuttle Service Staff and Telephone Receptionists, 75% of the cost of operating the switch board, and 75% of the cost for vehicle maintenance miscellaneous supplies, insurance and vehicle depreciation.

[227] She argued that these cost were authorized by paragraph 4.1 of Agreement, since Telephone Answering Service and Car Shuttle Service are stipulated as 2 of the Maintenance Services Windjammer should provide.

[228] Further, that to the extent to which the Maintenance Agreements are not sufficiently explicit as to the items of maintenance costs charged thereunder, a term should be implied in the Maintenance Agreements in order to give business efficacy to the express terms in order to make those terms workable.

[229] Learned Counsel invited the Court to imply that all reasonable costs incurred by Windjammer in supplying or providing services specified in paragraph 2.3 of the relevant Maintenance Agreements "for the benefit of" the Claimants are chargeable to Claimants.

[230] While I have no difficulty implying such a term, the question to be answered is whether the questioned allocations truly represent the reasonable costs for those services that Windjammer provided for the benefit of the Claimants. Pursuant to the Maintenance Agreement.

Findings of Facts

[231] The following are my findings of facts on the totality of the evidence and submissions of Counsel.

[232] It was contemplated by the Maintenance Agreement that Windjammer would always be a year behind in ascertaining what actual costs should be charged to the Claimants for Maintenance Fees.

[233] The monthly fee of US$500.00/$400.00 for the first operating year was a monthly estimate that could be varied upwards or downwards pending on the subsequent calculation of the actual cost for providing the services.

[234] Though Windjammer has failed to justify the basis for the estimate of US$500.00/$400.00 for the first operating year, in subsequent years 1990, 1991, 1992, it has communicated Maintenance Budgets to the Claimants, which allocated categories of expenses to the Villa Owners, and which showed an increase in Maintenance Fees, which increases it subsequently retracted. There was therefore no overcharging of Maintenance Fees for the years 1990, 1991 and 1992

[235] Windjammer's method of arriving at the actual Maintenance charges to the Claimants for 1993 to 2002 was arbitrary and flawed because it wrongly included various items of expenses in the Claimants' Maintenance Account which paragraph 2.3 of the Maintenance Agreements cannot accommodate.

[236] I agree with the submissions of Counsel for Claimants stated at paragraphs 225 (2), (3), (5) and (6) and (7) above for the following reasons –

(a) There is no provision in the Maintenance Agreements similar to paragraph 4.12 of the Rental Pool Agreement, providing for the pooling of expenses for services identified at paragraph 2.3 of the Maintenance Agreements among the Claimants, other Villa Owners, and other users of such Services in the Resort Complex, so as to provide for an equitable division of such expenses.

(b) Consequently, in my view, the parties contemplated that Windjammer would institute a system which would permit precise or accurate calculations for painting and repairs done to the exterior and roof of each Residential Unit, Electricity, Water, and Cable T.V provided to each Villa, Property Tax, and Insurance Premium for fire, theft, hurricane and general liability for each Villa.

(c) Regarding the Electricity and Water used in common areas, the Maintenance of the adjacent grounds, the landscaping and road repairs in the areas used in connection with the Residential Units, the Swimming Pool Recreational Facilities, Security Services, Telephone Answering Service, Local Telephone Facilities, Contributions to Switchboard expenses, Garbage Collection and Shuttle Services, I find on a balance of probability that the parties contemplated that these actual expenses would be shared in a reasonable manner among all users of such services in the Resort Complex taking into account the geography and layout of the Resort and the total number of Residential Units using and benefiting from these Facilities and Services.

(d) However, the Claimants failed to adduce evidence concerning the Rentable Units in the Hotel Inventory, the Restaurants, Bars, Shops and other Facilities, their usage of the services for which the Claimants were being charged Maintenance Fees, and identify their positions on the Resort Site and master Plans. Consequently, apart from the shared percentage allocations in the spreadsheets there was only the evidence of Mr. Smith concerning the Sensitivity test he carried out for the allocations relating to the Electricity Charges on the basis that Windjammer's 75% allocation was probably high by 5% as were other percentage allocations.

(e) He testified that there was only 1 bill for power usage for the whole Resort Complex. In the absence of any Power Consumption Audit and given the geography and layout of the Resort, Mr. Smith concluded from his test that Windjammer's allocations of 75% of the total costs to Villa Owners "*could be considered aggressive, high pick a term*".

(f) Mr. Smith admitted that he did not go into the kitchen to assess the electrical appliances being used. Neither was there any evidence before me concerning occupancy of the relevant Villas on a year round basis, and the other operations in the Resort which utilized electricity. All such evidence could have helped the Defendant or the Claimants' case.

(g) But since the spreadsheets disclose the total costs to supply the services to the Resort, I find on a balance of probability that the allocation of 75% for Electricity Expenses to the Villa Owners is excessive. In my view, the evidence before me permits a reduction of the allocation to 65%.

(h) In my view, Guest Relations expenses are more probably related to expenses for services under the Rental Pool Agreement, or relating to Lobby and Reception and Promotion which would be subsumed under the 25% Agent's commission chargeable on the Rent collected under Rental Pool operations. Guest Relations have been wrongly included as services provided under the Maintenance Agreement.

(i) Depreciation is not an item of costs contemplated for any of the Services under the Maintenance Agreement in my view. The Depreciation Costs should therefore be subtracted from the total costs for the services rendered by Windjammer pursuant to the Maintenance Agreements, wherever such

Depreciation costs appear in the Spreadsheets from 1997 to 2002. There were no spreadsheets exhibited for the years 1993 to 1996 disclosing the inclusion of Depreciation charges. Consequently the probabilities are equal so the Claimants have not proven that Depreciation charges were included in their Maintenance fees for the years 1993 to 1996.

(j) Since the Nature of the Telephone and Shuttle Services led Windjammer to classify them as Front office operations, it follows that the Employees of Windjammer performing such services would be Front Office Staff.

(k) But to the extent that Telephone and Shuttle Services which are a part of the Front Office Staff operations, are specific services to be paid for by Villa Owners under the Maintenance Agreements it is more probable that the parties intended a portion of the total costs for such services to be charged to Maintenance Fees.

(l) The fact that the 1994 Budget for Maintenance Expenses mentioned Telephone and Communication as included in the 10% administration charge is significant in my view.

(m) Applying Article 951 of The Civil Code, I interpret this inclusion to reflect the common intention of the parties for only a portion of the cost for telephone answering service and local service charge to be paid by the Villa Owners.

(n) The spreadsheets show that 75% of the Total Telephone Costs for Security, 95% of the Total Telephone Costs for Maintenance, 100% of the Total Telephone Costs for Watersports, and 75% of the Total Telephone Costs for Front Office were allocated to the 116 Villa Owners. Seventy-five percent of the Total Costs for Security were allocated to the 116 Villa Owners.

(o) While there is no testimony disputing that Windjammer's Watersports operations catered exclusively to the 116 Villa Owners, the 1993 Maintenance Fees Audited Statements proves these expenses were at one time not fixed expenses calling for the 100% allocations for all Watersport Costs to the Villa Owners including Claimants. It is more probable from the evidence that Telephone Services, Shuttle Services and Security Services extended throughout the Resort; covering the 74 to 76 Windjammer owned Rentable Units, Villas with plunge, condos, time share units, as well as the other business areas.

(p) In my view therefore the percentage allocations to the 116 Villa Owners for Security and front office costs including Salaries, Wages, Employee benefits, shuttle services and the prescribed Telephone Services under the Maintenance Agreement are unreasonable and too high. The allocations do not reflect that Windjammer has erred in favour of the 116 Villa Owners as Ms. Moons testified.

(q) Acting on Mr. Smith's testimony and findings that Windjammer was aggressive in the percentages it allocated as costs to Villa Owners, and in light of the geography and layout of the Resort, and inclusion of all Users of the Services, I conclude that a greater percentage of the Costs for the use of such services by the quests and occupants of the Units in the Hotel Inventories should have been backed out by Windjammer.

(r) Thereafter the percentages allocated to the 116 Villa Owners should have been reduced to reflect that the majority of the costs for Front Office is being absorbed by Windjammer under Rental Pool Operations' Commission of 25%. In all the circumstances therefore, the Front Office Costs to the Villa Owners contemplated by the Maintenance Agreement would be more probable in the region of 25% for the years 1993 to 2002.

(s) A reasonable percentage allocation for Security costs is more probably 60% to the 116 Villa Owners for the years 1993 to 2002.

(t) Based on Mr. Smith's testimony, all the other percentage allocations should be reduced by 5% for the years 1993 to 2002.

[237] I do not agree with the submission reflected at paragraph 225 (4) since despite the profit that the Watersports operations has generated, it is the expenses incurred by Windjammer in making the Recreational Facilities and Swimming Pool available to the Villa Owners, that the Maintenance Agreement addressed. The Agreement contemplated that such expenses should be allocated to the Villa Owners and other users regardless of profits.

[238] I find also that Windjammer's allocation of 37% to the one-bedroom Villas and 63% to the Multi-bedroom Villas is reasonable, having regard to the size, construction designs and area occupied by the 1 bedroom Villas.

Rental Pool Deductions and Distributions

[239] The Claimants alleged in their pleadings that Windjammer has wrongfully refused or alternatively failed to fully disclose and account to them for the revenue expenses and allocations relating to the Rental Pool and their respective entitlements to income therefrom. That Windjammer has wrongfully refused and or failed to pay them the income that each of them is entitled to pursuant to their respective Agreements. That Windjammer has wrongfully deducted and/or allocated and is continuing to wrongfully deduct and have allocated to Windjammer's benefit a 15% commission from travel agents, expenses relating to Windjammer's restaurants and other operations unrelated to the Rental Pool Programme, and has wrongfully retained and used these deducted unwarranted charges for its benefit.

[239-A] Windjammer pleaded at paragraph 7 (iii) of its Amended Defence that as agent for the Claimants, it engaged the services of travel agents and brokers from time to time in order to enhance occupancy of the units within the Rental Pool Operation, involving a payment of a commission which the Claimants, after the event refuse to pay and now seek to contest. That Windjammer, in seeking the services of the travel agents and brokers, acted with the express or implied authority of the Claimants consistent with obligations of Windjammer, and wide discretion under the terms of the agreement in the operation of the Rental Pool. Windjammer denied making any wrongful deductions from payments due to the Claimants.

[240] The evidence adduced by Claimants to prove these allegations came from the Kroll Report and Mr. Mac Donald. The Report disclosed that Windjammer's underlying books and records indicated that the reported Gross Rental Revenue in the Rental Pool Profit Distribution Statements was not the real Gross Revenue collected by Windjammer for the Rental Pool Operations. That in fact the real Gross Rental Revenue had been subjected to deductions not contemplated by the Rental Pool Agreement.

[241] It is not disputed that Windjammer had been deducting from the real Gross Rental Revenue amounts for nine items described as Out-bookings, Guest transfers, Kimonos, Taxi Shuttle-golf, Manager's Cocktail Party, Credit Card Commission, Bad Debts and Days Out Adjustments.

[242] Mr. MacDonald's report disclosed that from 1992 to 2001 amounts totaling approximately US$389,000.00 were deducted under these 9 items.

[243] According to the Kroll Report, Windjammer had also been wrongfully deducting amounts described as "***Commission***" ranging from a high of 15% in 1992 to a low of 5.22% in 2000. A total of approximately US$699.00.00 (*inclusive of an estimate for the year 1991*) was allegedly deducted wrongfully as "***Commission***" by Windjammer. Mr. MacDonald prepared a Schedule 4 which summarized such "***Commissions***" deducted from reported Rental Revenue prior to distribution to the Villa Owners for each year between 1991 and 2002.

[244] This Schedule 4 shows the number of Multi-bedroom Villas in the Rental Pool to be ranging from 49 in 1991 to 1993, to 3 Villas from 2000 to 2002.

[245] It does not disclose the amount of Travel Agents' Commissions which have been deducted from the 6 Claimants' Villas from 1991 to 2002.

[246] The Kroll Report relied on paragraphs 4.1, 4.2, 7.1 to 7.6, 8, 8.1 and 8.2 of the Rental Pool Master Agreement in its assertions that the deducted sums for the 9 items above mentioned, and the commissions dealt with in their Schedule 4, were inappropriately deducted from the Gross Rental Revenue.

[247] Paragraphs 4.1 and 4.2 of the said Agreement are already setout at paragraphs 19 to 21 of this Judgment.

[248] Paragraph 7.1 of the Rental Pool Agreement states that "*Windjammer shall maintain on behalf of all Owners a Service Account . . .*" Paragraph 7.1 to 7.6 provide further particulars of the Service Account including paragraph 7.4 which states that: "*At the end of each quarter of the operating year, Windjammer, at the time of making quarterly distributions, shall deposit into the Service Account a sum equal to 5% . . . of the total Occupancy Rental received by the Rental Pool Operation during the said quarter*".

[249] Paragraph 8.0 is captioned "*Rental Pool Operation – Revenue Deductions and Distribution*", while paragraph 8.1 states that "*Gross Revenue shall equal the sum of all Occupancy Rental received by the Rental Pool Operation from the rental of Residential Units*".

[250] Paragraph 8.2 states: "*Deductions from gross revenue shall equal the sum of the following items*":

1. 25% - Windjammer Commission
2. Contributions to the Service Account 5%
3. Property taxes, and Maintenance Fees under Paragraph 6.3 hereof, if so directed
4. All other deductions authorized by this Agreement"

[251] On the other hand Ms. Moons and Mr. Smith by their testimony sought to justify such deductions. Ms. Moons' testimony recognized that Mrs. Kiddell, Mr. Kiddell and Mr. Hamu did not participate in the Rental Pool for the entire period 1991 to 2002. She estimated that for this period approximately $27,000.00 each was paid by Mr. Delaney and Mr. MacNicol for Travel Agent Commissions for their unit.

[252] She relied on paragraph 6.3 of the Agreement which states that "*The owner shall pay when due all property taxes, maintenance fees and any other charges applicable to his Unit which are not the express responsibility of Windjammer hereunder . . . Windjammer shall have the right but not the obligation to pay any arrears for property taxes, maintenance fees and any*

other charges properly the responsibility of the Owner and may deduct the amount of such payment from amounts otherwise due to the Owner from the Owner's Distribution Account". (*My emphasis*)

[253] Though under cross examination of Mr. Mac Donald, it was put to him that it is a Hotel practice when dealing with Travel Agents that Travel Agents sell room for Hotels, remit revenue to Hotels, and then expects Commission to be paid by way of deduction from the Room Revenue, there was no credible evidence adduced concerning this alleged established practice.

[254] Consequently it is a matter of construing the relevant provisions of the Rental Pool Agreement, having regard to Articles 945 to 951, Article 956, 917 A, 16101 to 1627 of the Civil Code Chapter 242, and the submissions of Counsel. Article 1620 of the Civil Code provides that: "*The principal is bound to indemnify the agent for all obligations contracted by him towards third persons, within the limit of his powers; and for acts exceeding such powers, whenever they have been expressly or tacitly ratified*".

Article 1627 states –
"*The Principal is bound in favour of third persons for all the acts of his agent, done in execution and within the powers of the agency, except in the case provided for in Article 1638 of this Book, and the cases wherein by agreement or the usage of trade the latter alone is bound*. (*My emphasis*)

The principal is also answerable for acts which exceed such power, if he has ratified them either expressly or tacitly".

[255] "*Property Management*" which is one of the 6 services covered by Windjammer's 25% commission, is not defined under the Agreement. But "*Manager*" is defined by paragraph 1.8 to mean "*Windjammer in its management capacity carrying out its obligations under the terms of the Agreement*".

[256] Windjammer's management obligations under paragraph 4.1 of the Agreement, included using its best efforts and taking reasonable steps in accordance with recognized practice within the tourism industry to offer for rent and rent residential Units. This paragraph also provided that "*Rental Rates may include service charges or similar charges which shall not form part of occupancy rent under this Agreement*". The parties under their Agreements by paragraph 2, recognized "*the commercial necessity of a Residential Unit being available to Windjammer for commitment to travel agents, tour operators and travel brochures*". Since there is no other expressed provision dealing with travel agents and tour operators, in my view it is reasonable to conclude that the parties regarded this as activities ancillary to Windjammer's services in obtaining rentals.

[257] Though rental rates may include service charges and other similar charges which should not form part of the occupancy rent, in my view the parties did not intend Travel Agent's Commission to fall within the charges contemplated by paragraph 4.1 and 6.3 of the Agreement.

[258] The Agreement under paragraph 1.1 defines "*Agents Commission*" to mean "*commission paid for services rendered in obtaining rentals*".

[258 A] I do not agree with the opinion expressed by Mr. Medved in his correspondence incorporated as paragraph 151 of this Judgment. Speaking of the 15% commission to Travel Agencies as a cost of securing guests, he opined that this would be a legitimate deduction from gross receipts. He did not think it conceivable that the intention was to pay the agents or tour operators15% or more out of the 25% fee charged by Windjammer. He felt this was a matter of definition of gross or net rental revenue.

[259] I have considered the submissions of Counsel for the Parties. In my opinion, since Travel Agents' Commission is a commission paid to Travel Agents for services in obtaining rentals, it is clearly expressed by the Agreement to be a responsibility of Windjammer, which is covered by the 25% Agents Commission paid to Windjammer for its services rendered in obtaining rent and in undertaking all activities ancillary thereto.

[260] In my view therefore the sums deducted from the Gross Rental Revenue between 1991 and 2002 as Travel Agents Commissions have been wrongfully deducted.

[260-A] Ms. Moons and Mr. Smith explained about the 9 items referred to at paragraph 241 above. Outgoings is the expense of paying to book guests out to other hotels after collecting the revenue from the guests. Though the sum paid by guests is credited to the Rental Pool there is an offsetting expense to pay for their accommodations elsewhere whenever guests for some reason have to be accommodated at other hotels.

[261] It is obvious that if a guest was subsequently booked to another hotel the cost of accommodation for the period of stay at that hotel would have to be deducted from the Rental Revenue collected by Windjammer. In my view therefore the Outgoings deductions represent sums not earned as rental for the residential Units and the Claimants would therefore not be entitled to these sums as Rental Pool Revenue.

[262] Guest Transfers deductions were explained as allocations from package revenues when airport transportation is included in the packaged room rate paid by the guests. The list of services that are included in Windjammer's 25% Commission do not include services for airport transportation for guests in my view. Though airport transportation could be regarded as an activity undertaken by Windjammer which is ancillary to obtaining rentals, it is more probable that it falls under paragraph 4.1 of the Agreement in my view. I therefore find that such deductions

are for charges which though included in the Rental Rates, do not form part of occupancy rent.

[263] I am satisfied from the explanations given for Kimonos and Taxi Shuttle-Golf, that these are activities undertaken by Windjammer ancillary to obtaining rentals. These costs should therefore be subsumed in Windjammer's 25% commission pursuant to paragraph 4.2 of the said Agreement.

[264] Regarding the explanations for Credit Card Commissions, Bad Debts and Days Out Adjustments, in my view these directly impact on the Gross Rental Revenues realized under the Agreement as Ms. Moons testified. To the extent that such sums represent revenue not collected though charged as Rental Revenue, they are permissible deductions from the Goss Rental Revenue in my view.

[265] However, I find that Manager's Cocktail Party deductions are impermissible since in my view, they can reasonably be construed as expenses falling within Promotion and Reception Services covered by Windjammer's 25% Commission.

Conclusion For Issue 2

[266] The issue of Windjammer overcharging the Claimants for Maintenance Costs or the excessiveness or otherwise of the Maintenance Charges is not "*Res Judicata*" for reasons stated at paragraphs 172 to 183 of this Judgment.

[267] The Accounting Records, other documents exhibited as evidence, and testimony of Mr. David Smith and Mr. Robert MacDonald show that Windjammer excessively charged and or wrongfully charged the Claimants for Maintenance Costs for the reasons stated at paragraph 236 above. In particular –

(i) The allocations of 75% for Electricity Expenses to the Villa Owners for the year 1993 to 2002, were excessive and it is more probable that 65% would be a reasonable allocation having regard to the evidence (paragraph 236 (g).

(ii) The Expenses for Guest Relations have been wrongly included as services provided under the Maintenance Agreement for the year 1993 to 2002 (paragraph 236 (h).

(iii) Depreciation is not an item of costs contemplated for any of the Services under the Maintenance Agreement for the years 1997 to 2002 (paragraph 236 (i).

(iv) To the extent that Telephone and Shuttle Services, though a part of the Front Office Staff Operations, are specific services to be paid for by Villa Owners under the Maintenance Agreements, it is more probable that the parties intended a portion of the total Costs for such services to be charged to Maintenance Fees (paragraph 236 (k).

(v) The Front Office Cost to the Villa Owners contemplated by the Maintenance Agreement would be more probable in the region of 25% for the years 1993 to 2002. (paragraph 236 (r)).

(vi) A reasonable percentage allocation for Security Costs is more probable 60% to the 116 Villa Owners for the years 1993 to 2002 (paragraph 236 (s).

(vii) Based on the testimony of Windjammer's Expert Mr. David Smith, all the other percentage allocations for Maintenance Services should be reduced by 5% for the years 1993 to 2002 (paragraph 236 (t).

[268] Windjammer's allocation of 37% to one bedroom Villas and 63% to the Multi-bedroom Villas is reasonable, having regard to the size, construction, design and area occupied by the 1 bedroom villas (*paragraph 235 above*).

[269] Windjammer failed to pay the Claimants the income they were entitled to for the duration of their respective Rental Pool Agreements by wrongfully deducting Travel Agents Commission, Kimonos, Taxi Shuttle Golf and Managers Cocktail Party Expenses from the Gross Rental Revenue earned for Rental Pool Operations prior to reporting it in the Rental Pool Profit Distribution Statements for the Claimants for the years 1991 to 2002 (*paragraphs 260 (A) to 265 above*).

[270] I will now proceed to consider the issues identified as number 4 (*See paragraph 40 above*).

Termination of the Agreements

[271] The Claimants' pleadings allege that Windjammer wrongfully terminated the Maintenance Agreement of Mrs. Barbara Kiddell and Mr. Hamu. Further that Mr. Kiddell was forced to terminate his Maintenance Agreement due to Windjammer's material breaches of same.

[272] Windjammer pleaded in response that it served notices on Mrs. Kiddell and Mr. Kiddell notifying them of their default in not paying the maintenance fees. That despite service of these notices, they each failed to remedy or cure this default. That it acted lawfully in terminating the Maintenance Agreements of Mr. and Mrs. Kiddell.

[272-A] By their Written Notice of Default dated 15th April 1994 Windjammer contended that Mrs. Kiddell owed U.S.$22,479.18 for Maintenance Fees, being $16,559.18 for the year 1993, and $5,920.00 up to April 1994. On the 7th June 1994, the date of the Termination Notice, the Reconciliation Statement showed that Mrs. Kiddell owed a total of U.S.$23,414.72 to 31st May 1994.

[272-B] Windjammer's written Notice of Default to Mr. Kiddell dated 30th January 1995 stated that he owed a total of U.S.$15,606.41 being $13,012.00 as Maintenance fees from 1st July 1994 to January 1995 and U.S.$2,594.41 as net balance for 2nd

quarter (1994) Rental Pool Statement. Mr. Kiddell left the Rental Pool on the 14th April 1994 and his Maintenance Services were terminated on the 5th March 1995. Windjammer's Counterclaim states that Mr. Kiddell owes U.S.$16,802.89 (*E.C.$45,967.79*).

[273] Windjammer pleaded that Mr. Hamu contravened the provisions of his Maintenance Agreement and refused to pay the Maintenance fees charged to him despite the fact that Mr. Hamu's daughter occupied his villa for over a year. That as a result of this refusal, and in accordance with paragraph 7.2 of the Agreement, Windjammer gave written notice to Mr. Hamu of its intention to terminate the Agreement if this default was not remedied. That Mr. Hamu failed to remedy the default despite the Notice, so Windjammer lawfully terminated the Maintenance Agreement.

[273-A] There was a Notice of Default dated 10th August 1995 to Mr. Hamu which stated that he owed U.S.$25,448.00 for Maintenance fees from July 1994 to August 1995 and U.S.$1,736.92 as net balance for 2nd Quarter (1994) Rental Pool Statement. He was required to pay the total sum of $27, 184.92 within 30 days failing which the default provisions in Clause 7.2 of the Agreement would operate.

[273-B] A later relevant correspondence exhibited by Mrs. Cram is dated 13th January 1997. It is not in the form of the previous Notice of Default dated 10th August 1995. Although like the previous notice it points out Mr. Hamu's obligations under the Maintenance Agreement, his breach of such obligations, and his default in regards to his second quarter (1994) Rental Pool Statement, it does not invoke clause 7.2 of the Agreement. Instead it stated the following –

> ". . .We are aware of recent conversation between yourself and Mrs. Lynne Cram and correspondence from her which you have conveniently not responded to. I also had Mr. Anthony Bowen the General Manager of the resort, call you on December 04, 1996, to advise you of the fact that the new Owning Company was extremely unhappy about the whole situation. Inspite of the fact that we did not get response from you we have allowed your guests and later yourself to use the villa without any difficulty. Obviously, this gesture of goodwill was interpreted as a sign that you would be allowed to continue your "free ride" indefinitely.
>
> In view of the above, we are therefore informing you that unless the said sum of U.S.$29,125.29 (see the attached statement of account) is paid to us within 15 days of the date of this letter, we will have no alternative but to terminate the Maintenance Agreement, at which time All SERVICES to your unit will be discontinued. . . ".

[273-C] The Statement of Account for Mr. Hamu, as at 31st December 1996, shows that he owed Maintenance Fees being $11,130.00 from July to December 1994 less $738.00, $20,702.00 for 1995 (*11 months @ $1,882.00*) less $399.63, and $8,730.00 for 1996 (*4 ½ months @ $1,940.00 from August 15 to December 31*).

[273-D] The statement showed further that there was a credit of $12,036.00 for Windjammer's rental of Mr. Hamu's Unit from December 1995 to August 15 (*being $1,416.00 X 8.5 months*). When all of this was taken into account, Mr. Hamu was allegedly owing Windjammer the sum of $29,125.29 as at 31st December 1996.

[273 E] The letter terminating Mr. Hamu's Maintenance Services is exhibit "*LC 55*" dated 21st October 1997. Its contents included the following excerpt –

> "Dear Mr. Hamu:
>
> I am attaching a copy of the Notice letter sent to you on January 13. You did not have the courtesy to respond to it directly or through your lawyers. You recently came to the resort with six guests of yours, took possession of your villa using some kind of key and not passing through the reception. The next day you decided to announce your arrival. You probably remember that we met in the lobby and I indicated to you that we had to meet to discuss the issue of the notice letter sent to you. As you know we did not cut your service as we were hoping for peaceful solution. . .
>
> Yesterday, friends of yours came to the Resort, did not stop by the reception and using old keys entered Villa No. 11. The reception contacted them and they refused to stop by and even leave a credit card for any charges. It is obvious that you have the intention to go on forever, using the resort as if it was yours and as if you were paying for the services and facilitates offered to you and your numerous friends.
>
> Let me assure you that the "free ride" is over: Tomorrow, Wednesday October 22 at 11:30 a.m. we will discontinue all services to Villa No. 11. ." .

[274] Paragraph 7 of the Maintenance Agreement deals with DEFAULT. It states: -

> "7.1. In the event that Windjammer shall be in default of any of its covenants or obligations hereunder, the Owner, in addition to any other rights which he may have, may give to Windjammer Notice in Writing stating the said default and requiring that the default be remedied within thirty (30) days after receipt of such notice or such longer period as may be reasonable necessary in view of the nature of the default. If

Windjammer fails to remedy the default within the time appointed, or if Windjammer makes an assignment for the benefit of Creditors or becomes bankrupt or insolvent, the Owner may at its option terminate this Agreement.

7.2 In the event that the Owner shall default in payment or in any of the obligations of the owner hereunder, Windjammer in addition to whatever rights it may have at law, in equity or in any manner whatsoever to force the Owner to cure the said default or obtain other relief from the owner, may give to the owner notice in writing stating said default and requiring that the default be remedied within thirty (30) days after receipt of such notice. Failing remedy of the said default, Windjammer may at its option and in its absolute discretion terminate this Agreement. In addition to all of the rights granted to Windjammer hereunder, it may, after notice in writing to the Owner as aforesaid, take all necessary steps to cure the default of the owner, and the costs of Windjammer incurred in curing the said default shall be paid promptly by the Owner to Windjammer and shall be a charge against any and all sums which may be owing from time to time by Windjammer to the Owner under this Agreement or any other Agreement to which Windjammer and the Owner are a party".

[275] Paragraph 3 of the Agreement states that it shall be for a term of unlimited duration and it shall be terminated only in accordance with the Default provisions in the Agreement.

[276] Mr. Smith's Schedule (1) contains information about individual payments of Maintenance fees by the Claimants' for their Villas which I find to be accurate and acceptable.

[277] As long as the Rental Pool Agreement between the Claimants and Windjammer subsisted, Windjammer was able to collect the Maintenance Fees it was charging or that was actually due from the Claimants (*regardless of their protests*), from their share of the Rental Revenue Profits Distribution that each of the Claimants was entitled to under their Rental Pool Agreements.

[278] Paragraph 6.3 of the Rental Pool Agreement authorized Windjammer to deduct the Maintenance Fees outstanding from amounts otherwise due to the Owners from the Owner's Distribution Account where the Owner failed to make such payments.

[279] Paragraph 12.1 of the Rental Pool Agreement provided: "If the owner defaults in the performance of any of his or its duties responsibilities and obligations hereunder and does not cure said Default within thirty (30) days after receipt of written notification thereof from Windjammer, Windjammer shall have the right to cause the immediate termination of the Agreement and withdrawal of

the Residential Unit from the Rental Pool Operation, exercisable by given written notification to the Owner. At the time of withdrawal, Windjammer may charge against the owner's share of the owner's Distribution account any amount due to Windjammer for any financial obligations of the owner under this Agreement and any balance due to the owner shall be paid net of funds so deducted at the next regular quarterly distribution."

[280] Paragraph 12.3 stated – "In the event that Windjammer does not make quarterly distributions from the Owner's Distribution Account at the time and in the amounts required by this Agreement, or default on any other obligation or undertaking under this Agreement, and does not cure said Default within (30) days after written notice of said Default from the Owner or in the event that Windjammer has been adjudicated bankrupt, then, the Owner or his authorized representative shall have the right to terminate this Agreement and collect from Windjammer any monies due to the Owner under the terms of this Agreement."

[281] Based on my conclusions at paragraph 267 above, Windjammer has to adjust their percentage allocations downwards and recalculate the Maintenance fees for the years 1993 to 2002.

[282] Given my findings at paragraph 269 above, Windjammer must also adjust the Rental Pool Distribution Profits upwards and recalculate the income earned by all of the Claimants for the duration of their Rental Pool Agreements from 1991 to 2002.

[283] However, this does not prevent me from determining on a balance of probability whether Mr. and Mrs. Kiddell and Mr. Hamu owed Maintenance Fees to Windjammer at the date their Maintenance Agreements were terminated.

[284] In the absence of their individual Quarterly Rental Pool Distribution Statements from 1991 to the termination dates of their Rental Pool Agreement (which were not tendered), I do not know what their rental Pool Earnings were for that period or the Rental history for their Villas. Neither do I have the benefit of the Room Revenue Calculation Spreadsheets Windjammer used for the period 1991 to 2002.

[285] In the absence of such information the Kroll Report Schedule 4 and Ms. Moons' Table of Revenue Allocated to the Rental Pool Proportionate Analysis (*Exhibit* "*MM*") is of limited assistance.

[286] It is evident that the sums representing the Net Impact of Commissions Inappropriately deducted from the Rental Revenue earned by the Multi-bedroom Villas for the years 1991 to 2002 in Schedule 4 are speculative, since it is assumed that each of these 3 Claimants' Villas fully participated in earning the Gross Multi-bedroom Villas Rental Revenue for the years in question; and these sums also would not have taken into account my findings at paragraph 269 above.

[287] My assessment therefore must of necessity depend on the information in Mr. Smith's Schedule No.1, relating to the sums paid by each of these 3 Claimants for Maintenance Fees, compared with the sums that the other Claimants paid for the said periods, taking into account the necessary percentage allocation adjustments based on my findings, and the speculative sums representing the per unit amount of Commissions Inappropriately Deducted.

[288] My assessment also depends on my acceptance of Ms. Moons' statements concerning the number of Multi-bedroom Villas that were in the Rental Pool for the years 1993 to 1999. The Table (*Ex "MM 11")* shows that for 1993 there were 31, 1994 there were 28, in 1995 and 1996 there were 5, for 1997 there were 4.83 and from 1998 to 2002 there were 3 Multi-bedroom Group A Villas in the Rental Pool. Kroll's Schedule 4 shows that there were 49 in 1992 and speculates that there were 49 in 1991.

[289] Mr. Smith's Schedule No. 1 discloses that for 1993 Windjammer charged each Claimant US$21,987.00 and collected from the Claimants the following sums for Maintenance Fees – US$9,733.00 from Mrs. Kiddell, US$22,843.00 from Mr. Kiddell, US$22,398.00 each from Mr. Delaney, Mr. MacNicol and Mr. Hamu.

[290] For 1994 Windjammer charged Mrs. Kiddell $8,994.00 but collected only $3,000.00. It charged the other Claimants $20,778.00 each. However it collected only $7,006.00 from Mr. Kiddell, and from Mr. Delaney and Mr. MacNicol it collected $20,372.00 each. From Mr. Hamu it collected only $10,716.00.

[291] For the years 1995 to 2000 no maintenance fees were paid for Mr. and Mrs. Kiddell's Villas. Mr. Hamu made no maintenance fees payments from July 1994 to November 1995 or from August 16, 1996 to October 1997 when Maintenance services were terminated to his villa. From July 2001 Mr. Hamu, Mr. Kiddell, and the Executors of Mrs. Kiddell's estate have paid $1,000.00 monthly for maintenance fees.

[292] For 1995 Windjammer charged Mr. Kiddell $3,883.00 for maintenance services up to March 5, 1995 when his Agreement was terminated. However, Mr. Kiddell paid no maintenance fees to Windjammer from 1st July 1994 to 5th March 1995.

[293] For 1995 Windjammer charged Mr. Hamu $20,302.00 for maintenance services but collected nothing from him . It charged and collected from Mr. Delaney and Mr. MacNicol each US$22,148.00 for maintenance fees.

[294] The speculative sums that the Claimants would be entitled to be refunded as representing deducted inappropriate Commissions would be as follows according to Schedule 4 and Ex "*MM 11*" –

US$4,026.00 for 1991
US$4,026.00 for 1992
US$3,757.77 for 1993

US$3,700.00 for 1994
US$3,343.20 for 1995
US$3,318.60 for 1996

[295] It would seem from these sums (*though they appear somewhat excessive based on my findings*), that assuming Ms. Kiddell was entitled to the sum of approximately US$10,052.00 from Windjammer for wrongly deducted commissions due up to the 8th March 1993 (*the date of the termination of her Rental Pool Agreement*), it is more than probable that she would still be owing Maintenance Fees to Windjammer since the default notice required her to pay US$22,479.18 within 30 days from the 15th April 1994.

[296] It is my opinion that even after the necessary adjustments in the Maintenance Costs are made based on my findings, Mrs. Kiddell would be still owing Maintenance fees to Windjammer as at 15th April 1994.

[297] As for Mr. Kiddell, since he terminated his Rental Pool Agreement on the 14th April 1994, then assuming that he was entitled to the sum of approximately, US$13,809.77 or less for wrongly deducted commissions, it is more than probable that he would not be owing Maintenance fees to Windjammer since his default notice required him to pay US$13,012.00 for Maintenance costs which has to be adjusted downwards according to my findings.

[298] In the case of Mr. Hamu, when he left the Rental Pool on the 7th June 1994, assuming that he was entitled to the sum of approximately US$14,809.77 for wrongly deducted commissions, it is more than probable that he would still be owing Maintenance Fees to Windjammer even after the additional income earned from December 1995 to August 1996 is taken into account, and the Maintenance costs of $29,125.29 are adjusted downwards according to my findings.

[299] In these circumstances therefore, Windjammer would have been entitled to force Mrs. Kiddell and Mr. Hamu to '***cure their default***'.

[300] However, it is more probable that there would be no default for Mr. Kiddell to cure as at the 5th March 1995 when his maintenance services were terminated by Windjammer.

[301] Since Windjammer was also in default of its obligations (*given my findings at paragraphs 133, 134, 135, 169, 266, 269 above*) I now have to consider the relevant law on breach of Contract in dealing with this issue.

[302] The English Law of Contract recognizes that the obligations imposed on the parties in the contract may not all have equal importance. The law makes a distinction between major contractual obligations, the breach of which entitles the injured party to treat the contract as discharged, and minor contractual obligations, the breach of which entitles the innocent party only to damages. The minor obligations are classified as '***warranties***' while the major are called '***conditions'***.

[303] The observations of Lord Upjohn L.J. on the distinction between warranties and conditions is reflected in The Privy Council Case Hong Kong Fir Shipping Co. Ltd. –vs- Kawasaki Kisen Kaisha Limited [1962] 1 All E.R 474 at page 481 where he said: "*The formula for deciding whether a stipulation is a condition or a warranty is well recognized; the difficulty is in its application. It is put in a practical way by Bowen L.J., Bentson –vs- Taylor, Sons & Company (2) [1893] 2 Q B at p.281: "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself , will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.""*

[304] Learned Counsel Mrs. Floissac Flemming, while referring to the Hong Kong Case, argued that the contractual obligations under paragraph 4.1 of the Maintenance Agreements (*which I have found Windjammer to have breached*) are an integral part of a contractual procedure or administrative machinery for monitoring the amount from time to time payable under the contracts as maintenance fees.

[305] Such obligations she argued, have been held and should be held to be a mere warranty and not a condition which is of the essence of the contract (United Scientific Holidays –vs- Burnley B.C. (1977) 2 All E.R. 62 (H-L). Per Lord Diplock at p. 72-73, 74 and 88 (e) to (f); Per Lord Fraser at p. 95 (g), p96 (c) to (d); Per Lord Salmon at p.89 (c), p. 92 (f) to (g).

[306] She argued further that Paragraphs 4.1 and the other paragraphs of the Maintenance Agreements do not expressly state that the contractual obligations or promises of the Claimants to pay maintenance fees and costs are subject to or conditional upon the performance by Windjammer of it's contractual obligations. Neither do Paragraphs 4.1 or any other paragraphs provide that breaches by Windjammer of its contractual obligations or promises entitle the Claimants to withhold or suspend payment of maintenance fees and costs.

[307] She advanced her submissions by arguing thus – "*The resolutive condition created by Clause 7.1 of the Maintenance Agreement is the Notice of Default (which Windjammer never received from any of the Claimants) and not Windjammer's contractual obligations or promises per se. In other words, it is Windjammer's breach of a notice of default (and not Windjammer's breach of its obligations or covenants under the Maintenance Agreements) which entitles the Claimants to rescind the Maintenance Agreements or to refuse, withhold or suspend performance of their contractual obligations under Clause 4.1 of he Maintenance Agreement*".

[308] Finally, she argued – "*The elevation of Windjammer's contractual obligations, promises or predictions to the status of conditions would enable the*

Claimants to refuse or withhold payment of maintenance fees and costs on the ground of Windjammer's breach of a condition of the Maintenance Agreements. The Claimants could thereby set-off their claim for unliquidated damages for breach of contract against the liquidated debt owed by the Claimants to Windjammer for maintenance fees and costs. Such set-off would be unlawful or contrary to Article 1118 of the Civil Code".

[309] Article 1118 of The Civil Code states that "*Set-off takes place by the mere operation of law between debts which are due and liquidated and are each in respect of a sum of money or a certain quality of indeterminate things of the same kind and quality*".

[310] On the other hand, Learned Counsel for Claimants contended that the default provisions in paragraph 7.1 of the Maintenance Agreements have nothing to do with the Notice Condition in 4.1. That if the Notice Condition in 4.1 is not complied with, Windjammer is simply prohibited from imposing an increase in fees. That there is no default on the part of Windjammer triggering the default provisions in 7.1. There is simply no contractual right to increase fees. That only compliance with the Notice Condition in 4.1 gives Windjammer the right to increase maintenance fees.

[311] Learned Counsel's interpretation of the Contract caused him to argue that where Windjammer failed to comply with the Notice Conditions, Windjammer does not breach the Notice Conditions but only disentitles itself to increase maintenance fees for the next operating year. It could not be, Counsel argued, that Windjammer could completely ignore the Notice Conditions, impose increases in fees as it sees fit, and force the Claimants to pay same under penalty of the default provisions in the Maintenance Agreements.

[312] If I understand Counsel for Claimant's submissions clearly, I have been urged to find that the Claimants were not obligated to pay more than US$500.00 as long as Windjammer failed to comply with the Notice Conditions. Therefore Windjammer under those circumstances would not be lawfully entitled to terminate the Agreement.

[312-A] As for the termination of Mr. Hamu's Rental Pool Agreement, he pleaded that Windjammer terminated this Agreement in circumstances when it had no right to do so, causing him to suffer loss and damages.

[312-B] Windjammer countered in its Defence that Clause 6.3 of the Rental Pool Agreement to which Mr. Hamu was a party specifically provided that a failure to pay maintenance fees constituted a default under this Agreement. In accordance with clause 12.1 of that Agreement, Windjammer served written Notice upon him requiring him to remedy such default within 30 days. Despite receipt of this Notice, Mr. Hamu failed to remedy the default and Windjammer lawfully exercised its right to terminate this agreement in accordance with the provisions of clause 12.1 of this Agreement.

[312-C] Mr. Hamu has not disputed that such a Notice was served on him. In fact he tendered this Notice as Exhibit "*KH 4*". The Notice is dated 7th June 1994 and states –

> "WHEREAS you were given Notice in writing dated April 15, 1994, of default of payment under the Maintenance Agreement between you and Windjammer Landing Limited dated June 27, 1988;
>
> AND WHEREAS you remain in default as to the date hereof;
>
> TAKE NOTICE that pursuant to Section 12. of the said Rental Pool Master Agreement, Windjammer Landing Company Limited, with the authority of the partnership, hereby terminates the said Rental Pool Master Agreement and withdraws your residential unit from the rental pool operation effective on the dated hereof. . .".

[312-D] Since paragraph 6.3 of the Rental Pool Agreement stipulated that Mr. Hamu should pay when due all property taxes, maintenance fees and any other charges applicable to his unit, and that failure to make such payments is a default under the Agreement, the question to be answered is Whether the Default Notice under the Maintenance Agreement dated 15th April 1994, requiring Mr. Hamu to pay US$16,018.52 being the outstanding maintenance fees owing, within 30 days, and which informed him that otherwise, Windjammer would be forced to abide by the default provision in Clause 7.2, was also a Notice of Default under paragraph 12.1 of the Rental Pool Agreement?

Conclusions For Issue 4

[313] Having considered the provisions of the Maintenance Contracts, the existing circumstances, and the submissions of Counsel, I make the following findings –

A. Windjammer's performance of its obligations under paragraph 4.1 of the Maintenance Agreements was not a condition which had to be satisfied prior to the payment of increased maintenance fees by the Claimants.

B. The object of each Maintenance Contract as clearly shown by its terms was that Windjammer would perform certain services in return for the payment of Maintenance fees based on the actual costs of such services + 10%.

C. By failing to give the required written Notice with details of the reasons for the increase in maintenance fees, and also in its failure to give timely quarterly statements to the Claimants, Windjammer did not make it impossible for the essential object of the contract to be attained. Windjammer's breaches of the contract were therefore not fundamental breaches.

D. When Windjammer failed to give the written Notice with details for the increase of maintenance fees, and failed to provide quarterly statements in a timely manner, pursuant to paragraph 7.1 of the Agreement, the Claimants could have served a Default Notice on Windjammer. None of the Claimants did this.

E. The Claimants in the face of Windjammer's breaches, also had other rights in law. They had the option of either affirming their contract by treating it as still in force, or treating it as finally and conclusively discharged. None of the Claimants communicated to Windjammer that they were electing to treat the contract as discharged. Where a party has repudiated his obligations and the party who is not in default affirms the contract by treating it as still in force – "In that case he [the innocent party] keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party . . . to complete the contract, if so advised, notwithstanding his previous repudiation of it. . ." (PER Cockburn C.J in Frost –vs- Knight (1872) L.R.7 Exch 111 at page 112).

F. The 3 Claimants instead, embarked on protracted negotiations with Windjammer from 1992 up to September 1993. This in my view reveals that the parties had a disposition to relax the strict contractual terms of their Agreements.

G. By embarking on these negotiations with Windjammer, it is more than probable that the 3 Claimants were communicating their intention not to accept these breaches by Windjammer as a discharge of the contract. In these circumstances they were in my view preserving the status quo ante intact.

H. The contract therefore remained in existence for the future on both sides, with the Claimants having the right to sue for damages if the contract was broken.

I. Windjammer was entitled to terminate the Maintenance Agreements of Mrs. Kiddell and Mr. Hamu for outstanding maintenance fees owing. Having given Mrs. Kiddell the required Default Notice pursuant to paragraph 7.2 of the Agreement, her Agreement was lawfully terminated by Windjammer. Despite Windjammer's failure to serve another Notice of Default pursuant to paragraph 7.2, requiring

payment of outstanding fees within 30 days instead of 15 days, Mr. Hamu's Agreement was terminated lawfully, since paragraph 7.2 of the Agreement recognized the 30 days Notice of Default as an additional way and not the only way to cure default or obtain relief

J. The 3 Claimants can recover damages where proven for Windjammer's past breaches of the contract. In the case of Mr. Kiddell, he is entitled to recover damages also for the wrongful termination of his Maintenance Services.

K. The Default Notice dated 15th April 1994 was adequate Notice to Mr. Hamu under paragraph 12.1 of the Rental Pool Agreement. Windjammer therefore lawfully terminated Mr. Hamu's Rental Pool Agreement.

[314] Windjammer is entitled to recover the maintenance fees owing for the relevant period stated in their counterclaim against the Executors of Mrs. Kiddell's Estate and Mr. Hamu only.

[315] According to Windjammer's counterclaim, the maintenance fees owing for the villas of Mrs. Kiddell and Mr. Hamu are as a follows –

(a) EC$69,857.53 (approximately US$25,872.16) for the period 1993 to the 1st May 1995 for Mrs. Kiddell's Villa;
(b) EC$78,294.61 (approximately US$28,947.80) for the period July 1994 to 31st October 1996 for Mr. Hamu's Villa.

[316] However, these sums will have to be recalculated and adjusted downwards by Windjammer based on my findings at paragraphs 236, 267 and 269 of this Judgment.

[317] I will next consider Mr. Hamu's Claim that Windjammer wrongfully trespassed upon his property. This is issue number 5. It is convenient to determine issue number 6 also though it is unrelated to issue 5.

Trespass and Breaches of Servitudes

[318] Mr. Hamu pleaded that Windjammer wrongfully trespassed upon his villa after the Rental Pool Agreement was terminated. However, in his Witness Statement he testified-

> "I agreed to the return of Villa Number 11 to the Rental Pool and I know Windjammer used Villa Number 11 in their Rental Pool commencing February 1995 until the latter part of the year 2000".

[319] While Windjammer has admitted that from the 20th December 1995 to the 15th August 1996 it inadvertently trespassed upon Mr. Hamu's Villa by renting it to

guests at a time when occupancy was overcrowded at the Resort, Windjammer credited US$12,036.00 to Mr. Hamu for this use of his Villa and waived maintenance costs for that period. I accept Ms. Cram's testimony that this rental revenue credited to Mr. Hamu was on the same basis as the other Villa Owners for the 8 ½ months in question

[320] Mr. Hamu has provided no credible evidence to substantiate his allegations that Windjammer used his Villa between the period 16th August 1996 to January 2000.

[321] Mr. Hamu's witness Mr. Donaldson Barton testified that he went to the Villa about 6 or 7 times after late September 1996 following Mr. Hamu's request that he check on the Villa. On such occasions he either saw guests staying at the Villa, or noticed clothing and other belongings which he assumed belonged to guests, he testified. It turned out under cross examination that he made no notes of the dates he made such observations, and he did not recall the periods or time he observed this. Mr. Barton was employed as a Seamen on Mr. Hamu's sports boat from 1992 to 1999.

[322] In light of Mr. Hamu's evidence that he continued to use his Villa periodically from 1995 until 1999, and the contents of the correspondence dated 16h August 1996 (*Exhibit LC 54*) and 21st October 1997, it is obvious that Mr. Hamu and or his friends were using his Villa from September 1996 up to the 22nd October 1997 when the Maintenance Services were terminated, and probably thereafter.

[323] Mr. Barton's inability to relate his observations to specific dates, or months, or years, and Windjammer's record for visitors at and occupiers of Mr. Hamu's Villa after August 1996, makes it more probable that on the 6 or 7 occasions that Mr. Barton made the relevant observations, this was during the period 1995 to August 1996 when Windjammer admitted using Mr. Hamu's Villa in my view.

[324] Further, I find it highly improbable that after terminating the Maintenance Services at the Villa, Windjammer would have continued to rent Mr. Hamu's Villa for its own benefit in the face of this litigation which was then pending, and the hostile engagement and impasse between the parties. I also accept Ms. Cram's evidence that from the 15th August 1996 Mr. Hamu's Villa was returned to a strictly "***maintenance only***" arrangement and reservations and advised to never book Villa 11 until further notice.

[325] I therefore find that after August 1996 Windjammer committed no trespass upon Mr. Hamu's Villa.

[326] Though Mr. Hamu testified that Windjammer was charging Maintenance fees to Villa Number 11 up to the latter part of 1999 he has failed to provide any documentary proof to substantiate his assertions. I therefore reject this testimony.

[327] Mr. Hamu testified also that a barbeque grill which he had purchased and shipped to St. Lucia in 1993 at a cost of US$1,300.00, was removed or stolen from his villa in 1995 during his absence.

[328] It is not disputed that Mr. Hamu's daughter lived in his Villa from July 1994 to September 1995 for probable 258 days during this 14 months period. Ms. Cram testified that during this period Mr. Hamu's daughter had her own key, and her access and occupancy of the villa were without reference to Windjammer.

[329] Since Mr. Hamu has failed to prove exactly when in 1995 the barbecue grill was removed from the Villa, the probabilities are equal, since this could have happened while his daughter was living there and in control of the villa. Consequently , he has failed to prove that Windjammer is liable in my view.

[330] It appears from the evidence that Mr. Hamu's Villa was not maintained by him after Windjammer terminated the Agreement in October 1997 up until January 2000 when he visited his Villa. Consequently, it became uninhabitable, having fallen into disrepair for lack of maintenance; and it was also apparently vandalized.

[331] Mr. Hamu's Witness Statement disclosed that when he visited his Villa in January 2000, he found that there was substantial damage to a toilet, sewer line and the glass panels of the solar system on the roof. He found the furniture in each room piled up with resulting damage and mold accumulation. His coffee maker and toaster were missing, and his refrigerator which was opened had rusted and corroded.

[332] Ms. Cram testified that at no time after the termination of the Maintenance Agreement did Windjammer have access to Mr. Hamu's Villa. She testified that Mr. Hamu installed a heavy metal lock and a door to which only he and his daughter had a key and Mr. Hamu has not denied this.

[333] If Mr. Hamu continued to use his villa periodically from 1995 to 1999, I have difficulty understanding why he failed to discover the disrepair after the 22nd October 1997 and before January 2000. There is no evidence to suggest that prior to the termination of the Maintenance Agreement Windjammer had damaged his toilet, sewer line, solar system and removed his appliances from his Villa. In fact the evidence is that at the time the services were terminated, the day before Mr. Hamu's friends were staying at his Villa.

[334] I therefore reject the arguments of Mr. Hamu's Counsel that the damage to Mr. Hamu's Villa were deliberately caused by Windjammer to render the Villa uninhabitable. I find it more probable that in the absence of the security services afforded under the Maintenance Agreement, Mr. Hamu's Villa may have been vandalized. I find also that the state of the furniture and refrigerator was a direct consequence of the lack of maintenance of a Villa near the sea.

[335] Consequently Windjammer is not liable to Mr. Hamu for any costs he incurred to repair the damage to his Villas because of their termination of this Maintenance Agreement.

[336] Servitude 11 of the Second Schedule to the Relevant Deeds of Sale for Mr. and Mrs. Kiddell and Mr. Hamu's properties provides –

> "*No cars, trucks, motorbikes or unauthorized vehicles shall be allowed into area of Beach Villas Lots 1-58 but parking will be supplied with authorized cars providing shuttle for guests and owners alike*".

[337] Servitude 14 provides –

> "*The purchaser has the right of use and access to all facilities within development plant, including sport facilities, water purification plants, sewage treatment and generator power*".

[338] These 3 Claimants and Windjammer covenanted that these Servitudes would '*run with the land'*.

[339] These 3 Claimants alleged in their pleadings that Windjammer has breached and continues to breach its obligations to them by the following acts –

(1) Wrongfully cutting off and terminating all electrical, hydro, water, sewage disposal and electrical services to their proprieties;
(2) Wrongfully barring them from all facilities within its lands and development;
(3) Wrongfully refusing them access to the shuttle service to their respective Villas and elsewhere within the development for more than 2 years;
(4) Unlawfully removing and carrying away the vehicles which Mr. and Mrs. Kiddell hired for their alternative use and at great cost, thus depriving them of a motorable service to their Villas, and thereby causing them to use a back road in order to get to their Villas.
(5) Wrongfully refusing to supply them with the other services and amenities that they are entitled to for the use maintenance and upkeep of their property and Villas with the result that the condition of their respective Villas has deteriorated and the further result that they have diminished in value, and these Claimants have suffered loss and damage.

[340] By paragraph 11 of the Amended Defence and Counter Claim, Windjammer averred that these 2 Claimants were deprived of the services to their facilities, as a

result of the lawful termination of their Maintenance Agreements because of their breaches. Windjammer therefore denied that it wrongfully refused them the use of its services or facilities

[341] The evidence disclosed that Windjammer finally withdrew the maintenance services to Mrs. Kiddell's Villa on the 30th January 1995 by letter dated 25th January 1995 (*Exhibit "GK 36*"). Mr Kiddell's Villa continued to have the benefit of maintenance services from Windjammer up until the 5th March 1995. The Kiddell's sought to render Mrs. Kiddell's Villa usable by doing several things. They caused a 20 foot pole to be placed in the ground near Mrs. Kiddell's Villa 23 in order to obtain electricity from another source. A hole was also drilled through the common wall between Mrs. Kiddell's Villa 23 and Mr. Kiddell's Villa 24 to provide electricity service to Mrs. Kiddell's Villa.

[342] By letter dated 16th February 1995 (*Exhibit "GK 37*") Windjammer informed the Kiddells that the Servitudes and the building scheme did not permit them to erect a pole or provide private electrical service. Further, that by reconnecting the water service to Villa 23, they had committed "a trespass to property owned by Windjammer" and the water secured constituted a theft. That the unauthorized act of obtaining electrical service for Villa 23 by way of Mr. Kiddell's Villa was a serious breach which left Windjammer with "no alternative but to withdraw electrical service to Villa 24 as George Kiddell is obviously complicit in this arrangement". They were requested to immediately remove the pole at their expense and restore the property to its original state, failing which Windjammer would take action to see that this is accomplished. They were also given 3 days to repair the damage. Windjammer also suggested to the Kiddells that "the restoration of services to your unit can be easily solved and that is to pay for those services that have been authorized by the Court and which your fellow Villa Owners have been paying". The Kiddell's were also told in this letter that they had 3 days to pay up the arrears of maintenance costs. All of the Maintenance Services to Mr. Kiddell's Villa were withdrawn on the 5th March 1995.

[343] The evidence further disclosed that the Kiddells subsequently erected a water tank on their property, which led Windjammer to inform them (*by letter dated 14th March Exhibit GK 39*) of their breach of Servitude 7.

[344] Servitude 7 states –

> "No structure, other than a house and a garage as herein specified shall be erected on the PROPERTY and no fences, hedges, walls, excavations, or other erections shall be completed upon the PROPERTY without the location, design and materials having first been approved by the Vendor".

[345] The Kiddell's also acquired a generator for their own electricity supply which led Windjammer to inform them (*by letter dated 10th March 1995*) that they were in breach of Servitude 13.

[346] The Exhibited Second Schedule to the Deed of Sale for Mrs. Barbara Kiddell's Villa 23 (*Exhibit "GK 4"*) contains no Servitude 13. However Schedule C to the Purchase Agreement of Mrs. Kiddell (*Exhibit "Gk 8"*) does have a restriction/Covenant/Stipulation 13 which states –

> "No sound disturbances shall be allowed from midnight to 7:00 a.m".

[347] Windjammer informed the Kiddells in the letter dated 10th March 1995 that "we are receiving complaints from other guests. The operation of this generator is in contravention of the servitudes between the vendor and the purchaser, and is creating a nuisance to the other guests of the Resort. We request that the generator be removed from the premises within 24 hours, or appropriate measures will be taken".

[348] Mr. Kiddell testified that: "Given (1) the distance and steep incline of the roads from Windjammer's parking lot and public areas to Villas 23 and 24 (ii) my age and Barbaras's age and (iii) my impaired walking ability, it was essential that transportation be provided and guaranteed to and from Villas 23 and 24". He therefore considered that he had a guaranteed right and access to the shuttle service by virtue of Servitude 11.

[349] There is no evidence as to when it was that they were denied the use of Windjammer's shuttle services after Windjammer withdrew their maintenance services. It is possible that believing this would happen the Kiddells rented a car so that they could have vehicular transportation directly to their Villas.

[350] By letter dated 6th March 1995, Windjammer informed the Kiddells that this vehicle H 6153 was observed parked on the road in the vicinity of the Villas, which was a breach of Servitude 11. They were requested to "*desist from parking the vehicle in any other area than the car park provided, with immediate effect*".

[351] By letter dated 14th March 1995, the Kiddells were informed by Windjammer's General Manager that their said rented car "*had been towed away and impounded. Please be advised that we would be prepared to release this vehicle on payment of EC$300.00 which covers the cost of the towing incurred by Windjammer*".

[352] It appears that following these events, from March 1995 to September 1997 when Mrs. Kiddell died of terminal cancer, she never returned to her Villa in St. Lucia. since there was no basic facilities and services there. The attempts that were made by her son Mr. David MacNicol to negotiate with Windjammer for reinstatement of maintenance services prior to her death proved futile.

[353] Mr. Kiddell testified that both Mrs. Kiddell's Villa and his were unused and essentially vacant for more than 6 years with the pending litigation. His evidence that a total sum of EC$67,640.28 was paid to house keeper Mrs. Shirley Gustave

has not been substantiated by evidence from her, or by any documents or receipts.

[354] In early 2001, Mr. Kiddell came to St. Lucia. He testified that the 2 Villas were dilapidated, looking dreadful, and an eyesore. He therefore decided to have them repaired as soon as possible so as to avoid further dilapidation more expense and more cost of repair.

[355] An undated estimate of repair prepared by Mr. Wayne Brown (*Exhibit "GK 41*") confirms Mr. Kiddell's testimony concerning the state of his Villa. It states that the total cost of repair for Mr. Kiddell's Villa would be about EC$36,505.00. Mr. Brown's estimate (*Exhibit "GK 42*") for repairing Mrs. Kiddell's Villa was EC$39,205.00.

[356] Windjammer refused to accommodate any arrangements which would permit the supply of electricity, water and sewage to Mr. and Mrs. Kiddell's Villa so that Mr. Brown could repair them.

[357] Consequently, in July 2001 Mr. Kiddell and the Executor of Mrs. Kiddell's estate, obtained a Court Order that they pay US$1,000.00 monthly to Windjammer for maintenance costs under certain stipulated conditions.

[358] Following on this Order, repairs were carried out on both Villas.

[359] I have already found that Mr. Kiddell's Maintenance Agreement was wrongfully terminated. Consequently, Windjammer's termination of the essential services and facilities to Mr. Kiddell and his Villa, and its failure to maintain his Villa do constitute breaches of his Maintenance Agreement.

[360] Mr. Kiddell has not denied that between May to November 1998 Windjammer obtained an estimate of the costs to repair Mr. and Mrs. Kiddell's Villas, forwarded this estimate to Mr. Kiddell, offered to arrange for the repairs to be done, and undertook to handle all of the expenses incurred for the repairs to Mr. Kiddell's Villa up front according to the costs in the estimate.

[361] Ms. Cram's testimony and Exhibits "*LC 36*" and "*LC 37*" substantiate this. According to Ms. Cram, Mr. Kiddell refused Windjammer's offer to repair Villas 23 and 24 at a total cost of US$25,000.00.

[362] I will take this into consideration later, when determining the quantum of damages for Mr. Kiddell.

[363] For now, I move on to consider legal arguments concerning the Servitudes.

[364] Learned Counsel for the Claimants contended that the Guaranteed Essential Services required by Servitudes 11 and 14 arose and exist independently of any other contracts between the Claimants and Windjammer. That the right to the

Guaranteed Essential Services covered by these Servitudes is unconditional and not dependent on the Maintenance Agreements or the services particularized at paragraph 2.3 of the Maintenance Agreement.

[365] Counsel argued further that the Kiddells were entitled to arrange and were prevented from arranging with St. Lucia Electricity Services Limited and the Water and Sewage Company Limited, and Cable and Wireless (St. Lucia) Limited for their own separate and distinct essential services and supplies of electricity, water and telephone after Windjammer terminated the Maintenance Agreements.

[366] In light of the Claimants' contention it is necessary to determine the legal nature and effect of these Servitudes.

[367] Article 449 of The Civil Code defines a Servitude as –

> "a charge upon real property, which imposes upon the owner or occupant of the property an obligation towards another, either to prevent its condition from affecting such other, or to use or forbear from using it in a particular manner, or to permit it to be used in a manner definite and circumscribed which is short of occupation. When this obligation exists for the benefit of the owner or occupant of adjoining land, in his quality as such owner or occupant, the charge is called a real Servitude".

[368] Because of this definition, I am inclined to agree with Learned Counsel for Windjammer's submission. She mistakenly referred to Servitude 11 as 12. She argued that Servitudes 11 and 14 are not real Servitudes because the obligation implied therein purports to exist for the benefit of the Claimants who are owners of the servient property under the Deed of Sale. Further, that the only persons who can commit breaches of Servitudes 11 and 14 are the Claimants themselves.

[369] It is trite law that the property burdened with a servitude is designated as "*Servient*", while the property in whose favour or in whose owners favour a servitude is established is designated as "*Dominant*".

[370] In the First Schedule to their Deeds of Sale, the word "*PROPERTY*" is defined in substance as the parcel of land that each Claimant bought from Windjammer.

[371] The preamble to the Servitudes in the Second Schedule of the Deed of Sale states: "For the benefit of the remainder of the Vendor's lands, so as to impose a servitude or servitudes upon the PROPERTY into whomsoever hands the same may come the Purchaser hereby covenants with the Vendor that the Purchaser and the persons deriving title under the Purchaser will at all time hereafter observe and perform all and singular the covenants, restrictions and stipulations hereafter contained". (My emphasis) The property of the Claimants and the Claimants are clearly burdened with these

servitudes, and the observance and performance of the covenants. It is not Windjammer who in burdened.

[372] The contents of these servitudes vary. Servitudes 2, 3, 4, 8, 9, 10, 13, 17 and 19 seem to me to be real Servitudes which prohibit certain acts by the Claimants on their property, or require the Claimants as servient owners to tolerate certain activities by Windjammer on their servient properties. In some instances the Claimants are restricted in the use of their properties, so there is a restriction of certain rights belonging to the owner of the servient property for the benefit of Windjammer.

[373] Since one of the essential features of the real servitude is that there must be a benefit to the dominant property, I must confess I have some difficulty discerning the benefit that has accrued to Windjammer from Servitude 14, though it is remotely possible that a possible convenience or a future advantage could be called a benefit.

[374] I am of the view therefore that though Servitude 14 is more than likely not a real servitude, there is plenty room for argument that it is a covenant or a promise imposing a personal obligation on Windjammer in respect of each Claimant

[375] As for Servitude 11, it seems to me that this stipulation is not a charge upon the real property of the Claimants. The restriction relates to unauthorized vehicles not being allowed "*into area of Beach Villas Lots 1 – 58*", and not upon Beach Villas Lots 1 – 58 land or premises. It appears to me that the Claimants were required to use or forbear from using the common access roads in the vicinity of their villas in a particular manner, they were not required to use or forbear from using their properties in a particular manner.

[376] So though this stipulation may have been of some aesthetic benefit to the resort development and Windjammer, pursuant to Article 449 of The Civil Code it still would not be a real servitude in my view.

[377] That part of Servitude 11 which represented to the purchasers that authorized shuttle cars would be provided for guests and owners is obviously a covenant or a promise which like Servitude 14 also imposes a personal obligation on Windjammer in respect of each Claimant.

[378] In any event, Windjammer's personal obligations to provide shuttle car services and the services and facilities under Servitude 14 do not exist in a vacuum. They depend on certain circumstances known to the parties that were existing at the time the Purchase Agreement was executed.

[379] Learned Counsel Mr. Floissac Flemming quite rightly submitted in my view, that the general rules applicable to the interpretation of contracts, reflected in several cases she cited, were relevant in the Court's deliberations on this issue.

[380] The judicial pronouncements in these cases underscore the need for the Court, in interpreting contractual terms such as these Servitudes, to take into account the surrounding circumstances and the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. I am reminded that I ought not to take into account the previous negotiations of the parties and their declarations of subjective intent.

[381] I am urged by Counsel to bear in mind the learned Chief Justice Sir Vincent Floissac's following enunciation of the rules in Halstead –vs- Attorney General (1995) 50 WIR. 98 at p. 103 paras f to h. He stated –

> "The objective purpose of a contract may be ascertained by reference to facts to which the contract refers or relates or by reference to facts which were known to the parties at the time of the execution of the contract and which constituted the factual basis of the contract or the factual background against which the contract was executed. Those facts are presumed to have been in the contemplation of the parties at the time of the execution of the contract. Consequently, those facts are themselves part of the relevant contractual surrounding circumstances and are themselves ingredients of the contractual context by reference to which the objective common intention of the parties may be inferred and the contract may be properly interpreted".

[382] Mrs. Floissac Flemming has therefore invited me to interpret Servitudes 11 and 14 with reference to the Purchase/Sale Agreements which she argued, constituted the factual bases of the conveyances or the factual background against which the conveyances were executed.

[383] She alluded to Clause 12 of the Purchase/Sale Agreements which provides –

> "It shall be a condition of the closing of the transaction of purchase and sale between the Vendor and the Purchase that the Purchaser enter into a Maintenance Agreement with the Vendor under which the Vendor shall provide maintenance services to the residential unit being purchased by the Purchaser. The Purchaser hereby acknowledges receipt of a copy of the aforesaid Maintenance Agreement and hereby undertakes to execute on closing the said Maintenance Agreement and be bound by terms and conditions thereof".

[384] Arguing that Servitudes 11 and 14 must therefore be read subject to the right of rescission or termination pursuant to paragraph 7.2 of the Maintenance Agreements, she concluded that Windjammer's lawful recission to termination of the Maintenance Agreement had liberated Windjammer from the obligation to provide or supply maintenance services including electricity, water and disposal of

sewage to the Claimants. Consequently Windjammer was also discharged from the obligation under Servitude 14, she argued.

[385] As for Servitude 11, I am inclined to agree with Counsel Mrs. Floissac Flemming that the Claimants have provided no evidence to prove that Windjammer failed to provide authorized shuttle cars for the Claimants and their guests. The evidence adduced proves only that Windjammer impounded the Kiddell's rented car because it was parked in an area forbidden by Servitude 11. By doing this Windjammer was not in breach of Servitude 11, Windjammer was merely enforcing the restriction on parking that the Kiddells agreed to.

[386] Learned Counsel for Claimants countervailed that since the obligations and restrictions of and upon Windjammer are clear literal unambiguous, and beyond doubt they are not in need of interpretation but of enforcement, so the rules of interpretation mentioned at paragraphs 380 to 381 above, are inapplicable.

[387] He argued further that where the Maintenance Agreements are rightfully terminated, the Claimants are entitled to the Guaranteed Essential Services but not the 15 or more services listed in the Maintenance Agreements. That Windjammer would then appropriately charge the Claimants by metering for electricity, water etc. or permit Claimants to make their own arrangements for same.

[388] In my opinion, even if it was the case that Servitudes 11 and 14 did in fact guarantee essential services to the Claimants, the supply of such services was conditional and depended on the Claimants' performance of their obligations under the Maintenance Agreements to pay for the costs of such services.

[389] Article 1010 of The Civil Code Chapter 242 (St. Lucia) states that "An obligation is conditional when it is made to depend upon an event further and uncertain, so as to be either in suspense or dissolved by the occurrence or non-occurrence of the event". Article 1013 states that "If there be no time fixed for the fulfillment of a condition, it may always be fulfilled; and it is not deemed to have failed until it has become certain that it will not be fulfilled".

[390] Servitudes 11 and 14 would be therefore, what I regard as dependent covenants, imposing a duty on Windjammer that depends on the Claimants performance. Until the Claimants performed by paying for the costs of it, or showing their intention to do so, Windjammer would not have to supply such essential services.

[391] I therefore find the submissions of Counsel for Windjammer not only attractive, but compelling.

Conclusions for Issues 5 and 6

[392] Windjammer did not wrongfully trespass upon Mr. Hamu's property after the 15th August 1996 for the reasons mentioned at paragraphs 320 to 324 above.

[393] Although Windjammer may have trespassed upon Mr. Hamu's property between the 20th December 1995 and 15th August 1996, the sum of US$12,036.00 credited to his account with Windjammer as Rental Revenue for that period was adequate and reasonable compensation for that breach.

[394] Windjammer did not wrongfully refuse or fail to maintain the Villas of Mrs. Kiddell and Mr. Hamu for the reasons mentioned at paragraph 313 – I above.

[395] Windjammer wrongfully refused and failed to maintain the Villa of Mr. George Kiddell since according to my previous findings it wrongfully terminated his Maintenance Agreement.

[396] To the extent that some of the Servitudes described in the Second Schedules of each of the Claimants' Deeds of Sale, include restrictions, stipulations and covenants, which imposed a burden on the Claimants' properties for the benefit of Windjammer's adjoining lands, these are real Servitudes which only Windjammer was entitled to enforce whenever the Claimants contravened them.

[397] Servitudes 11 and 14 lacked the essential features of a real Servitude by virtue of Article 449 of The Civil Code.

[397-A] The portion of Servitude 11 which stated that unauthorized vehicles would not be allowed into area of Beach Villas Lots 1 – 58 was a restriction which imposed a personal obligation on each Claimant. Windjammer was lawfully enforcing this restriction when the Kiddells' rented car was impounded.

[398] Servitude 14 was not a real Servitude for the reasons mentioned at paragraph 366 to 374 of this Judgment.

[399] Servitude 11 was not a real Servitude since the prohibition which disallowed unauthorized vehicles into the area of Beach Villas Lots 1 to 58, did not create a charge upon the real property of the Claimants pursuant to Article 449. The prohibition related to the Claimants' use of the Common areas and roadway which were not a part of their property.

[399-A] The provisions in Servitude 11 and Servitude 14, which imposed personal obligations on Windjammer to provide each Claimant with shuttle car services and other essential services and facilities are conditional obligations. They imposed a duty on Windjammer that depended on each Claimants performance of their obligations under their Maintenance Agreements to pay for the costs of such services. When it became certain that these Claimant's had no intentions of fulfilling their obligations Windjammers obligations dissolved.

[399-B] Windjammer therefore did not breach Servitudes 11 and 14 when it withdrew such essential services and facilities from Mrs. Kiddell and Mr. Hamu.

Time Share and Partitioning – Issue 7

[400] All the Claimants pleaded that the "First Defendant has breached its obligation to them pursuant to the servitudes, covenants, restrictions and stipulations set out in paragraph 12 of their Deeds of Sale as per particulars 5 to 9 hereunder. . .

> PARTICULARS OF BREACH OF COVENANTS,
> RESTRICTION AND STIPULATIONS –
>
> *(1) to (4) . . .*
>
> *(5) In or about October 1992 the First Defendant Commenced to sell units and villas forming the subject matter of the development on a Time Share or Vacation Ownership Sale basis and has continued to do so to the date hereof (even though the First Defendant stated in writing that such sales would be discontinued approximately two years ago) contrary to the express or implied restriction against same;*
>
> *(6) Since October 1993, the First Defendant has changed and converted or partitioned a substantial number of one Bedroom Condos as well as both two and three bedroom villas into hotel type rooms or units, without the consent of eighty percent (80%) of the owners of the villas single home and condos forming the subject matter of the development, in breach of the express or implied restriction against same contained in the Plaintiffs' Deed of Sale;*
>
> *(7) The first Defendant is currently in the process of constructing a total of four. . . (2) storey buildings containing a total of 32 hotel type rooms or units or similar types of rooms or units ("the hotel complex") which are in any case contrary to the express or implied restrictions against same;*
>
> *(8) The First Defendant has by reason of the foregoing impaired and aggravated said impairment of the concept and integrity and value of the aforesaid respective properties. The value of the Plaintiffs' properties has already been diminished as a result of same and, if the First Defendant is allowed to proceed with the construction of the aforementioned hotel complex, the integrity and value of the Plaintiffs' respective properties and units shall be further aggravated and irreparably impaired and substantially diminished in value, status, concept and integrity and the Plaintiffs are and shall continue to suffer loss and damage -;*
>
> PARTICULARS OF LOSS AND DAMAGE RESULTING
> FROM ABOVE BREACHES

(1) to (5) . . .
(6) All the Plaintiffs' Villas have suffered, and shall continue to suffer from a diminution in status and integrity and value".

[401] Windjammer's pleaded defence was that it has complied with all of its obligations under the Servitudes and covenants under the Deeds of Sale. Windjammer has denied that any of its actions in respect of Time Share Sales or partitioning of the Villas constitutes in any degree a breach of any provision, covenant or agreement contained in the Claimants' Deeds of Sale or any other Agreement entered into between the Claimants and Windjammer.

[402] Windjammer contended in its defence, that "the essential nature of the development namely the Rental of Villas for commercial or residential use continues to be maintained consistent with the general intent of the servitudes and covenants. Even if (which is not admitted) this partitioning of the Villas constitute a change in the nature of the development, the Defendants maintain that they have obtained the consent of more than . . . (80%) of the villa owners by virtue of their acceptance of the Conversion Agreement dated back to 1994".

[403] The Claimants have claimed general damages for breach of Servitude 12 and an Interim and a Permanent Injunction, restraining Windjammer from constructing its intended hotel type complex in violation of the said Servitude 12 or violating Servitude 12 at all.

[404] On the 15th April 1994, the Claimants Mr. James E. Delaney, Mr. Kanino Hamu, Mr. and Mrs. Kiddell and others, obtained an interim injunction from the Court by the Order of Justice Suzie d'Auvergne. That Order was made in 8 consolidated Suits including Suits Nos. 71, 75, 76 and 77. Of 1994 brought by these Claimants against Windjammer only. This Order in effect restrained Windjammer from dividing the 3 – bedroom villas belonging to Windjammer, into three 1 – bedroom units and from selling or offering for sale the villas or other units on a Time Sharing basis until the trial of this action and the final determination thereof.

[405] A temporary stay of this injunction pending appeal lapsed, when on the 29th January 1996 the Court of Appeal, upon Windjammer's Notice of Withdrawal of Appeal dated 22nd January 1996, ordered that the Appeal was withdrawn and dismissed with No Order as to Costs.

[406] The Claimants case rests primarily on 2 Servitudes in the Second Schedule to each of the Claimants' Deed of Sale. They are Servitudes 2 and 12.

[407] Servitude 2 states as follows:

> "2. No building erected on the PROPERTY shall be used for the purposes of any profession, trade, employment, manufacture or business of any description, nor as a hospital or other

charitable institution nor as a school or anything in the nature thereof, or as a hotel, apartment house rooming house, or place of public resort, nor for any sport or game other than as may ordinarily be enjoyed in connection with the occupation of a private residence, nor for any other purpose other than that of a private residence, for the use of a single family and garage for use of the occupants thereof, nor shall anything be done which shall interfere in any way with the quiet enjoyment of all neighboring and adjacent lands". (My emphasis)

[408] Servitude 12 in the Second Schedules of the Claimants Deeds of Sale stipulates as follows –

> "12. The Development will incorporate the following types of uses:-
>
> (1) Residential – Villa type accommodation single homes, condos stacked or otherwise.
>
> (2) Restaurant – racquet sports, `playground, fitness center, watersports and marine facilities.
>
> (3) Commercial – bars, restaurants, entertainment facilities, shops convention center.
>
> Any change to this nature in the development must be approved by either percent (80%) of the owners".

[409] The Deed of Sale discloses no intention by Windjammer that the Claimants were to have the benefit of those 2 Servitudes. The Recital/Preamble to the Servitudes clearly indicates that each Claimant covenanted with Windjammer to observe and perform all of the covenants, restrictions and stipulations for the benefit of the remainder of Windjammers lands so as to impose a servitude or Servitudes upon each Claimant's property.

[410] Paragraph 23 of the Purchase/Sale Agreements acknowledged that these same restrictions in the Servitudes would be annexed to each Claimant's Deed of Sale "and shall run with and be binding upon the land from and after the date of closing".

[411] Servitude 20 also states that:

> "These restrictions shall run with the land from and after the date of closing".

[412] Counsel for the parties have not made any legal submissions on this point. Confining themselves mostly to the facts, they have apparently assumed that Windjammer would be bound by its development scheme and the building restrictions it imposed on each Claimant's property in its Resort Development.

[413] I do not feel constrained to accept this as a fact and not look at the law. The circumstances of the case and Article 449 of the Civil Code have induced me to carefully examine the law on Restrictive Covenants also before dealing with the facts.

[414] In my opinion, the only basis on which the Claimants can enforce Servitudes 2 and 12 against Windjammer is where these restrictions/stipulations are not real servitudes under Article 449 of the Civil Code.

[415] I refer to paragraphs 367 to 373 above where I have discussed the nature of Servitudes. Servitude 2 seems to have all the qualities of a real servitude in my view –

(a) It imposes upon the Claimants who are owners of real property, an obligation towards neighboring and adjacent lands of Windjammer for the benefit of Windjammer lands;

(b) The obligations are -

(i) to use the buildings erected on their property i.e. their Villas as a private residence for the use of a single family only;

(ii) to forbear from using it for commercial and other similar purposes, or as a hotel, apartment house, rooming house, or place of public resort; and

(iii) to do nothing on their property which will interfere with the quiet enjoyment of all neighboring and adjacent lands.

[416] Article 502 of The Civil Code states that "If the land in favour of which a servitude has been established come to be divided, the servitude remains due for each portion, without however the conditions of the servient land being rendered worse".

[417] Applying Article 502 to the facts in the case, in my view the benefit of the real servitudes on each Claimant's servient property, remains due to all of the lots in the Windjammer Resort Development which were sold to purchasers, subsequent to each Claimant's Conveyance. A subsequent purchaser claiming the benefit of Servitude 12 may be able to enforce the Servitude against any of the Claimants whose property is burdened with the Servitude.

[418] If that was to occur, in my opinion the date when the Sale/Purchase was closed, the wording of the Recital/Preamble in the Second Schedule to the Deed of Sale, the relevant provisions in the Sale/Purchase Agreement, and the contents of the Restrictions in the Deed of Sale for the Purchaser seeking to enforce the servitude would be very important in deciding whether the servitude is enforceable.

[419] In the absence of local legislation concerning Restrictive Covenants, Article 917 A of The Civil Code requires me to apply the law of England. Where a conflict exists between the English law and the express provisions of the Code, the provisions of the Code shall prevail (*Article 917 A (3)*).

[420] "Covenants restricting the use of land imposed by a vendor on sale may be divided into 3 classes: (1) covenants imposed for his own benefit, (2) covenants imposed as owner of other land, of which the land sold formed a part, and intended to protect or benefit the unsold land; or (3) covenants upon a sale of land to various purchaser who with their respective successors in title, are intended mutually to enjoy the benefit of and be bound by the covenants.

Covenants of the first class are personal to the vendor and enforceable by him alone unless expressly assigned by him. Covenants of the second class are said to run with the land and are enforceable without express assignment by the owner for the time being of the land for the benefit of which they were imposed. Covenants of the third class are most usually found in sales under building schemes, but are not confined to such sales. It is enough that the Court be satisfied that it was the parties, intention that the various purchaser from a common vendor of parts of a defined area of land should have rights among themselves. A buildings scheme is only a species of scheme of development, a more ample term. In a case within the third class one purchaser can sue another for equitable relief by injunction without making the remaining purchasers parties": (Halsburys Encyclopedia – Laws of England 4th ed. Vol. 16 para. 1344).

[421] At paragraph 1345 it is stated that "As between persons other than lessor and lessee the benefit of a covenant, whether positive or negative, may run with the land at law if it touches and concerns the land and if the person claiming the benefit can show that he is entitled to the same estate in the land as that to which the covenantee was entitled, and it may so run where covenantor has never even had any interest in the land and there is no servient tenement, but the burden will never run at law".

[422] Paragraph 1346 deals with Covenants running with the land in equity. It states that "The equitable doctrine relating to restrictive covenants is confined to covenants of a negative nature, for equity will not aid in enforcing positive covenants. It is sufficient if the covenant is negative in substance though not in form; and a covenant partly positive and partly negative if severable will be enforced so far as it is negative".

[423] The 2 Servitudes in question were imposed in circumstances consistent with a general scheme of development which could put them in the Class 3 category of restrictive covenants. However, the Recital/Preamble in the Second Schedule of the Deed of Sale indicates that these 2 Servitudes belong to the Class 2 Category.

[424] Based on the law relating to building schemes and schemes of development, for the Court to find that there was an intention for the Claimants to mutually enjoy the benefit of and be bound by the covenants, the Claimants must prove that "(1). . . there was a common vendor under who the various owners derive title; (2) that before land was sold there was a scheme relating to a defined area which the vendor intended to sell in lots, containing restrictions which were to be imposed on all lots and which, though varying in details as to particular lots, were consistent only with some general development; (3) that the restrictions were intended by the vendor to be and were for the benefit of all lots; (4) that the parties or their predecessors in title purchased their lots from the common vendor on the footing that the restrictions imposed on the land purchased by them were to enure for the benefit of the other lots included in the general scheme. For the Second requirement to be satisfied it is essential that both the area within which the scheme is to operate and the obligations imposed within the area should be definite so that each party may know with certainty what his rights and obligations are, and against and by whom those rights and obligations may be enforced . . .It is not necessary that all the lots should be defined when the scheme is established.

The intention required to satisfy the third requirement is to be gathered, generally speaking, from a consideration of all the circumstances included the nature of the restrictions. It is not negatived by the fact that the vendor reserves to himself power to dispense with the restrictions as regards lots which are not sold. Apart from the exercise of any such power the vendor himself is bound by the scheme": (Halsburys Vol. 16 (supra) para 1355). (My emphasis)

[425] The pronouncements of Stirling J. in the case In Re. Birmingham and District Land Company –vs- Allday [1893] 1 Ch. 342, are of some assistance in resolving the dilemma in classifying the Servitudes.

[426] He said at pages 349 to 350 that where a vendor puts up building land for sale in lots subject to restrictive covenants, "it is a question of fact to be deduced from all the circumstances of the case, whether the restrictions are merely matters of agreement between the vendor himself and his purchasers, imposed for his benefit and protection, or are meant by him and understood by the buyer to be for the common advantage of the several purchasers . . . Though the retainer by the vendor of some part of the property is a highly important element, it is . . . only an element to be taken into consideration along with other circumstances in ascertaining the intention . . . Although the vendor may not part with his whole estate, there may be circumstances which show that the intention was that each purchaser should be entitled to enforce building restrictions against the vendor and every other purchaser".

[427] On looking at the facts in the present case, there are circumstances which show that Servitude 2 was not intended to be enforced against Windjammer. In my

judgment, those circumstances exist in the Preamble/Recital to the Servitudes in the Second Schedule to the Claimants' Deeds of Sale, and the law of St. Lucia which establishes that in circumstances where the law of St. Lucia conflicts with the law of England, the domestic Laws must prevail. Servitude 2 is therefore a real Servitude which only Windjammer and probably subsequent purchasers can enforce against the servient properties.

[428] As for Servitude 12 which is not a real Servitude or a negative covenant, in my opinion, though according to the Preamble/Recital to the Servitudes in the Second Schedule it could be placed in the Class 2 category of Restrictive Covenants, there is at least one circumstance which shows that it should be placed in the class 3 category which allows the Claimants to enforce it against Windjammer.

[429] The provision in Servitude 12 itself requiring the participation of 80% owner approval for Windjammer to change the nature of the development provides that circumstance. That stipulation was obviously for the benefit of all the private owners in the resort complex; they all have a common interest in maintaining that restriction. It affords a real protection to each Claimant to see that Windjammer or other Villa owners conform with the Servitude 12 stipulation. Windjammer's Ms. Cram also acknowledged the binding effect of Servitude 12 on Windjammer. I shall move on now to consider the merits of the arguments of Counsel.

[430] The facts concerning Windjammer's involvement in selling Time Share Units for their Villas mostly, and their condos and their conversion of multi-bedroom villa into multi-key rooms are not in issue.

[431] The evidence shows that the conversions started from about 1st September 1992 and the Time Share Sales commenced sometime in 1993.

[432] Timesharing scheme is defined by Section 2 of the Time Sharing (*Licensing and Control*) Act No. 21 of 1996 to mean "any premises or complex of premises (whether contiguous to each other or not) and the grounds appurtenant thereto operated as a single business venture for the accommodation of purchasers and let for occupancy in exchange for a consideration given in advance by a purchaser who receives in return a right to occupy and use facilities of the scheme for a specified period of not more then one month during any given year".

[433] "Purchaser" is defined by Section 2 to mean "a person who has given valuable consideration in exchange for the right to occupy and use the facilities of a time sharing scheme".

[434] In order to be engaged in the business of Time Sharing, a person has to be a developing owner licensed under this Act to do "business of creating and selling his own Time Sharing intervals in a timesharing scheme. . ." (Section 2).

[435] It is evident from this law that Windjammer is operating a separate business which may or may not harmonize with Servitude 12. Learned Counsel for Windjammer contended it is compatible with Servitude 12 for the following reasons –

(a) Sales of Time Sharing are not expressly prohibited by the Servitudes.
(b) The Time Share Units are not constructed or being used in a manner contrary to Servitudes 2 and 12.
(c) Section 6 of the Time Sharing (Licensing and Control) Act states that "*a purchaser may take, acquire, hold, lease, assign and dispose of, his right to occupy and use the facilities of a timesharing scheme, in the same manner in all respects as personal property and the timesharing scheme may be derived through, from or in succession to, another purchaser in the same manner in all respects as personal property enforceable by action*".
(d) Counsel relied on Article 449 which states that Servitudes are charges on or restrictions upon the use and enjoyment of real property. I have found Servitude 12 not to be covered by Article 449. However, given the positive nature of Servitude 12, the benefit of it would run with the land at law. A covenant runs with the land when the benefit or burden of it, whether at law or in equity passes to the successor in title of the covenantee or covenantor as the case may be and also binds the covenantor's real estate as well as his personal estate – Law of Property Act (U.K) 1925 Sec. 80 (4). (See Halsburys Vol. 16 paras. 1345 and 1350).
(e) Given Article 449, Section 6 of the Time Sharing Act, and if I might add the law on positive Restrictive Covenants, Counsel argued that the right to use, occupy and enjoy property is also subject to the legal and contractual restrictions on the use, occupation and enjoyment of the property so premises used for timesharing, are not exempted from the Servitudes to those premises. Consequently a purchaser of the right to occupy and use the facilities of a timesharing scheme is bound by the Servitudes attaching to the premises which comprise the timesharing scheme.
(f) There is no inherent incompatibility between a Servitude and a timesharing scheme.

[436] On the other hand, Counsel for Claimants rebutted in substance that timesharing by its very nature is a different concept introduced into the Development of the Resort. Emphasis was placed on Ms. Cram's testimony that ownership of timesharing and leasehold are different profiles. For timesharing, he argued, the purchasers are interested in a holiday, but for leasehold of Villas, they are interested in an investment and a second home. Timesharing was therefore a

change in the nature of the development which required 80% approval of owners, which Windjammer did not obtain.

[437] As for the conversion of the Villas, the submissions of Counsel, seem to suggest that I determine only whether prior to obtaining the approval of over 80% of the owners, Windjammer's conversion activity constituted a change in the stipulated residential use of the villas and units as required by Severtude12.

[438] I have taken into account the testimony of the parties 2 expert witnesses Mr. Jonathan Everett and Ms. Donna Maria Jackson and all of the evidence of the Witness on this issue. My findings are as follows.

[439] Servitude 12 contemplated that there would be specific types of buildings used for residential purposes. Though there were internal changes to the structure of the existing villa type accommodations, this reflected only a change in the configuration and use of space in the private residences to promote efficient and profitable use of these residences, and not a change in the user of these residences.

[440] Converting the villas into 1 bedroom units would not affect the nature of the development since it would essentially be residential and the Villa Owners entitlement to the benefit of Servitudes 12 would not be affected.

[441] I think that a residential villa or 1 bedroom hotel type unit may be used as a private dwelling house even where the person who resides in it is a timeshare purchaser. I do not see that it ceases to be used as a private residence if the occupier, tenant, lessee, happens to be a tourist occupying that residence as his residence be it for a month, week, or even a day.

[442] The question in my mind ought to be not whether the villa or 1 bedroom unit is the residence of the occupier, but whether the user of the villa or other unit is as a residence.

[443] The fact that the owners do not reside permanently in their villas, or that their villas are rented or occupied on a timesharing basis does not affect the user of the residences as designated by Servitude 12.

Conclusion – Issue 7

[444] Windjammer's sales of Units and Villas on a timeshare or vacation sales basis does not constitute a breach of Servitude 12.

[445] Prior to obtaining the conversion approval from more then 80% of the Owners, Windjammer's conversion and partitioning of the Villas did not constitute a change in the nature of the development so as to be in breach of Servitude 12.

[446] The fact that Windjammer did obtain approval of over 80% of the owners subsequent to the commencement of these actions is no indication or proof that they were in breach of Servitude 12.

[447] I will now consider Mr. and Mrs. Delaney's claim as issue No. 3.

The Delaneys' Claim

[448] The Delaneys' claim paragraph 4 of the Further Amended Statement of Claim filed on the 2nd October 2003 alleged that "Contrary to the terms and conditions herein before stipulated in the Maintenance Agreement, the First Defendant has breached the said Agreement from and after inter alia May 1991 to date and is continuing to deliberately breach the said Agreements and the Plaintiff have suffered loss and damage".

[449] Sub-paragraph 2 of the particulars of Breach of Maintenance Agreement alleges that "The First Defendant has wrongly refused or failed to maintain the Villas of Plaintiff Nos. 1, 2 and 6 and Plaintiffs 4 and 5".

[450] Mr. and Mrs. Delaney were included in the particulars at Sub-paragraph 2 by way of a Court Order made on the 5th March 2004 after all of the evidence that the parties were relying on to prove their cases, had been completed on the 30th January 2004.

[451] By this said Order the Claim (*Prayer for Relief*) was amended to include paragraph 14 as follows: "An Order that Plaintiffs Number Four and Five be granted as Special Damages the sums placed in evidence before the Court in the Witness Statement of James E. Delaney, specifically at paragraphs 30 and 31 thereof".

[452] No particulars of Special Damages in support of Mr. And Mrs. Delaney's Claim have been pleaded. Neither was there a statement of all the facts on which Mr. And Mrs. Delaney were relying on pleaded as is mandated by PART 8.9 (1) of The Civil Procedure Rules 2000.

[453] Nevertheless, I shall consider the merits of the claim.

[454] Windjammer's contractual obligations to maintain and/or repair the Delaney's Villa No. 25 resides in paragraphs 2.3, 5.1, 5.2 of the Delaney's Maintenance Agreement the provisions of which I shall set out –

> "2.3 . . . Windjammer shall provide repairs to preserve the exterior of the Residential Unit subject to obtaining the Owner's consent. . . . In addition to (responsibilities of Windjammer for particular items listed as 1 – 23). Windjammer may perform any item of repair or maintenance not specifically mentioned herein, which it deems to be in the best interests of the Owner in the maintenance of the Residential Unit.

5. MAJOR REPAIRS

In the event that, at anytime during the term or any renewal thereof, repair or maintenance, is required to the Residential Unit other than minor repairs covered by this Agreement, at least two estimates will be provided to the Owner . . . where repairs are immediately necessary for the preservation and safety of the Residential unit or required to avoid suspension of any necessary service to the Residential Unit, Windjammer may engage any person, firm or corporation to perform any such repairs or maintenance.

5.2 In consideration of arranging for major repairs hereunder Windjammer shall be entitled to a service charge equal to 10% of the cost of the said major repairs".

[455] If I understand Mr. Delaney's testimony correctly, his claim partly relates to Maintenance Repairs costs and costs incurred to correct the original construction faults of the Villa. He is requesting to be refunded EC$11,424.00 which he paid to Mr. Wayne Brown as costs for maintenance repairs and corrections to the original construction faults of the Villa. He is also seeking a sum of EC$27,141.50 estimated as the costs for correcting the roof from the condition it has been in since construction.

[456] Mr. Delaney's exhibit "*JD 19*" is an estimate of cost prepared by Mr. Wayne Brown. It includes costs for repair work on the interior of the roof or ceiling, the interior railings, uprights, flooring, walls, toilets, enamels, tiles, bath tubs, bedrooms, bathrooms, terraces, doors, windows, pickling or repickling, all of which Windjammer is denying it is responsible for under the Maintenance Agreement.

[457] In both Ms. Cram's testimony and the submissions of Counsel for Windjammer, it is contended that –

(a) Windjammer's contractual obligations to repair and maintain (at Windjammer's expense) the exterior of the Delaney's villa (including the roof) is limited to minor repairs only.
(b) Major repairs to the exterior are the responsibility of the Delaneys who are contractually required to bear the cost.
(c) Windjammer has the contractual authority (but is under no contractual obligation) to arrange for major repairs to the exterior of the Villa in 2 sets of circumstances which are (i) where Windjammer has provided to the Delaney's 2 estimates to those major repairs and the Delaneys have chosen one of them,

and (ii) where those major repairs constitute an emergency.

(d) In the event major repairs to the exterior of the villa is carried out under any of the 2 circumstances just mentioned, Windjammer should be paid the costs of such repairs plus 10%.

[458] Learned Counsel for Windjammer referred to the well known rule for interpreting instruments which states that where an instrument authorizes a particular model of dealing with property, this excludes any other model of dealing with it for the same purpose – "*expressio unius est exclusio alterius*" (Halsburys 4th ed. Vol. 13 par. 182).

[459] Fortified by this rule and the observations of Slade LJ in Murray –vs- Birmingham City Council (1987) 2 EGLR 53 (C.A.), Counsel concluded that Windjammer's contractual obligations in paragraph 2.3 of the Maintenance Agreement to maintain the exterior of the roof was restricted only to the execution of minor repairs to a limited number of identified incidents of disrepair to the roof by reason of fair wear and tear. It is not an obligation to execute major repairs, Counsel argued.

[460] The opposing arguments of the Delaneys' Counsel are factual, indicating that a resolution of this matter can only depend on the Courts ruling as to the interpretation of the relevant provisions in the Maintenance Agreement.

[461] The Delaney's contractor Mr. Wayne Brown was not called as a Witness, but Mr. Delaney tendered several pictures of the portions of the villa that were the subject of Mr. Brown's report. The pictures speak for themselves quite adequately. They confirm Mr. Delaney's testimony.

[462] The fact that some or most of the problems identified in Mr. Brown's Report relate back to the defects in the construction that the Delaney's complained about in December 1989 to January 1990 shortly after the construction of the Villa was completed, is significant. This led me to examine the provisions of the Building Contract that the Delaney's entered into with Windjammer as contractor, dated 20th October 1988.

[463] Under this Construction Agreement the Delaney's Villa was to be completed and ready for occupancy by October 1989. There were warranties made by Windjammer relating to the construction of the Villa. It is evident to me that under these 4 Warranties there was a mechanism in place for the Delaney's to resolve the defects in the construction of their Villa where they were of the opinion that the villa was not constructed in a good and workmanlike manner.

[464] By Warranty 4, Windjammer warranted the building but excluded damage caused by wear and tear for a period of 12 months. This Warranty applied to all structural components. The Delaney's could have pursued some of their complaints through the mechanism provided for timely arbitration. They could also have proceeded

under the Warranty in the Building Contract in a timely manner. They chose not to.

[465] Returning now to the true construction of the Maintenance Agreement and only what is within the 4 corners of it, I am guided by Article 950 of The Civil Code which allows me to look at all of the terms of the Agreement.

[466] The Agreement makes a distinction between repairs for preserving the exterior of the Villa and Maintenance repairs. Whereas repairs which preserve the exterior require the owner's consent, repairs which are covered by the maintenance fees payments do not.

[467] The two relevant Maintenance Services covered by maintenance fees, relate to the exterior of the Villa only. Pursuant to paragraph 2.3 - Services 9 and 10, they are –

> (1) Painting and maintaining outside areas of the residential unit originally painted as needed due to wear and usage; and
> (2) Maintaining exterior of residential unit and roof.

[468] It is significant that the Owner's consent is required for repairs which preserve the exterior.

[469] It is clear from the relevant provisions in the Agreement that the consent of the Owner is obviously necessary because of the nature of such repairs, which may involve major external repairs, any emergency repair and any repair to preserve and secure the villa, where Windjammer deems it to be in the best interests of the owner of the Villa (*paragraphs 2.3 and 5.1 of the Maintenance Agreement*).

[470] It is also evident from these provisions that such major repairs may be external or internal. These sorts of repairs are not covered by the Maintenance fees, so it is manifest that the parties intended that the Delaneys bear the costs of such repairs.

[471] Based on a literal interpretation of paragraphs 5.1 and 5.2, the submissions of Learned Counsel for Windjammer finds favour with me. It is also very clear that Windjammer would not be entitled to a service charge of 10% of the costs of such major repairs, unless it arranged for such repairs, provided at least 2 estimates to the owner, obtained the owner's consent and engaged someone to carry out such repairs.

[472] Regarding the exterior roof, I agree with Counsel for Windjammer that Windjammer's contractual obligations would only be for minor repairs.

[473] The case cited by Windjammer's Counsel Murray –vs-Birmingham City Council (supra) concerned the nature and extent of a landlord's implied covenant to repair a roof. The tenants roof had a history over a period of 6 years of incidents of disrepair which the landlord had been attending to. The tenant alleged that the

roof was seriously defective and in need of replacement, but adduced insufficient evidence to establish this. Slade LJ at page 55 found it unacceptable that "merely because there had been some half a dozen . . . troublesome, incidents of disrepair occurring during those 6 years, it necessarily followed from that, that the roof was incapable of repair by any way other than replacement. . . If the Plaintiff was to submit that replacement was the only practicable method of repair, it was imperative that more evidence should have been adduced to support the submission than the mere evidence of incidents of disrepair which was adduced".

[474] In passing I wish to comment on the Rental Pool Agreement as it relates to internal repairs in the Villa.

[475] Paragraph 7.3 of the Rental Pool Agreement states that "The Service Account shall fund . . . 2. Repair and Replacement of Furnishings Damaged by Guests; 3 Internal maintenance (not day to day cleaning) (i.e. painting touch ups etc.), . . .5. The furniture Replacement Accounts".

[476] The funds in the Service Account represent 5% of the Rental Revenue Profits earned by the Delaneys from the Rental of their Villa. So in fact it is not Windjammer but the Delaneys who pay for the repair and replacement of furnishings damaged by guests, internal maintenance like painting touch ups and replacement of furniture through their agent Windjammer, who receives a commission. Windjammer's responsibility relates to Managing the Villa by seeing to it that these things are done. In return for Windjammer's property management, it receives a commission.

Conclusion

[477] The Delaney's have failed to prove that Windjammer is contractually liable under the Maintenance Agreement to reimburse them the sum of EC$38,566.50 for the repairs they did to their villa.

Misrepresentations – Issue 8

[478] Paragraph 13 of the Claimants' Further Amended Statement of Claim avers that Windjammer through its employee and or agent the Managing Director Mr. David Cram induced the Claimants to enter into the agreement to purchase their respective properties by deliberately and or negligently representing and warranting to each Claimant:

(i) that the maintenance costs that would be charged the Plaintiffs pursuant to their respective Maintenance Agreement would not but marginally exceed US$500.00;

(ii) that the potential rental pool income and earnings and investment potential as shown and published in

> a Pro Forma Invoice Sales Report prepared by Windjammer and given to the Claimants was accurate, true and proper but was in fact inflated and a deception to lure the Claimants to purchase their respective properties and Windjammer well knew that the representations were inaccurate, misleading and too low and were made negligently intending the Claimants to accept and rely upon them which they did and the Claimants have thereby suffered loss and damage.

[479] The Particulars allege that Windjammer has to date substantially raised without consultation the maintenance charges from US$500.00 per month to US$2,000.00 per month. Further that the Rental Pool earnings have been substantially less than represented or nothing at all.

[480] They allege as Particulars of Negligence that Windjammer through Mr. David Cram as Managing Director was negligent and failed to exercise special skill and knowledge and reasonable care to see that the information and advice he imparted to the Claimants was accurate or reasonably accurate and reliable.

[481] That Further or Alternatively Windjammer through Mr. David Cram its Managing Director knew or ought to have known that the Plaintiffs were relying upon the Mr. Cram to exercise due care, skill and judgment in giving information and advice relating to the said maintenance costs, rental income and investment potential. Accordingly, Windjammer owed the Claimants a duty to exercise reasonable care in tendering such information and advice to them and they failed to do so; thus causing the Claimants loss and damage.

[482] Windjammer's pleaded defence denied these allegations, put the Claimants to prove them, and explained the reason for the increases in maintenance charges.

[483] By paragraph 14 (iv) of their Amended Defence, Windjammer pleaded that the Claimants were fully aware that the proforma income projections were estimates and accepted that further maintenance fees would be based on actual costs and verified by independent audit. That the Claimants who had extensive investment and business backgrounds, should reasonably have assumed the risk that proforma income projections contain estimates that may not reflect actual results. That consequently, the Claimants accepted Clause 4.1 of the Maintenance Agreement without dispute when signing the Maintenance Agreement.

[484] The Defence pleaded further that the alleged misrepresentations were not misrepresentations of fact but were merely expressions of Mr. Cram's honest opinion belief, forecast or genuine expectation which could honestly have been held or made by a reasonable man with Managing Director's knowledge. That as such, they were not actionable misrepresentations.

[485] The Defence alleged also that given the attractive prices and other benefits derivable under the Sale Agreements the alleged misrepresentations were immaterial in that in the particular circumstances of their making, they were incapable of inducing the Claimants to act on the fact of them by participating in the Agreement, notwithstanding the said prices and other benefits. That the Claimants exercised all their rights under and enjoyed the full benefits conferred by the agreements and thereby elected to waive all rights or remedies which they may have had by virtue of the alleged misrepresentations and to affirm the sales agreements.

[486] Windjammer pleaded also that since the Sale Agreements were executed on the 27th June 1988, 1st November 1988, 21st January 1989, and 1st June1989 respectively, consequently, the alleged deliberate and/or negligent misrepresentations could only have been made before or during the period 27th June 1988 to 1st June 1989 (*that is to say more than three years before the institution of The 1994 Suits and Suit No. 778 of 1997*).

[487] By reason of these facts, the defence pleaded, the Claimants' action (*in so far as it is based on the alleged deliberate and/or negligent misrepresentations*) is prescribed under Article 2122 of the Civil Code of St. Lucia.

[488] Before proceeding to deal with the facts and submissions it is prudent to look at the law. The pleadings of Claimants are deficient in not disclosing whether the action is in contract or tort.

[489] The law of Misrepresentation allows Claimants to bring a claim under the Statutory Action created by Section 2 (1) of The Misrepresentation Act 1967 (*UK*) where a person has entered into a contract after the alleged misrepresentation.

[490] It also permits Claimants to bring the action in tort at common law and recover damages where they are able to prove that Windjammer was either fraudulent or negligent in making the statements alleged at paragraphs 13 (1) and (ii) of their pleadings.

[491] It is not a requirement of the action in tort at common law that the Claimants should have entered into a contract, but simply that the Claimants suffered loss in reliance on the statements made by Mr. David Cram.

[492] There are 2 types of actions in tort at common law –

(i) An action where the Claimants rely on the tort of deceit involving fraudulent misrepresentations. In the landmark case of Derry –vs- Peek, Lord Herschell defined fraud to mean a false statement "made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false". (1889) 14 App. Case. 337 at 374). The House of Lords decided in this case that the distinction between

negligence and fraud must never be blurred. Fraud is dishonest and it is not necessarily dishonest, though it may be negligent to express a belief upon grounds that would not convince a reasonable man.

(iii) An action in tort for negligent pre-contractual misrepresentations depends upon the existence of a special relationship between the Claimants and Windjammer. For this action to be successful, it must be proven by the Claimants that Windjammer's Mr. Cram knew in general terms the purpose for which the advice was sought by the Claimants The famous Judgment in Hedley Byrne and Company Limited –vs- Heller and Partners Limited [1964] AC 465 is the authority which recognized the existence and form of this action.

[493] In an action based on the Act, Windjammer bears the burden of disproving negligence.

[494] However the authorities show that Claimants usually formulate their action under the Act rather than sue at Common law for fraud or negligence. Because a Claimant who relies on the doctrine in Hedley Byrne need not establish that a misrepresentation in the strict sense has been made, and it maybe that because there are different rules as to remoteness and measure of damages for the 3 forms of action open to a Claimant, the prospect of recovering heavier damages might spur a Claimant to assume the greater burden of proving fraud or negligence: (*Cheshire and Fifoot 9th ed. Page 261*)

[494-A] Against this background of the law, I therefore expect that where the Claimants were formulating their claim for Misrepresentation as an action in contract they would plead –

(i) That the statements made by Mr. Cram were intended and designed as a term of their contracts though made prior to the contracts;

(ii) That they formed a part of the contract, or was a collateral contract;

(iii) That they would disclose whether the Claimants were relying on the statutory action existing under Section 2 (1) of the Misrepresentation Act 1967 (U.K.) which provides -

"Where a person has entered into a contract after a misrepresentation has been made to him and –

(a) the misrepresentation has become a term of the contract, or

(b) the contract has been performed;

> or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of the section".

[495] I also expect that the pleadings would disclose what special knowledge or skill Mr. Cram had as Windjammer's Managing Director.

[496] I again refer to PART 8.7 of the Civil Procedure Rules 2000 which requires the Claimants to state in their statement of claim in a precise and brief manner, a statement of all the facts on which the Claimants rely. (SEE also Blackstones Civil Practice 2002 paras. 24.14, 24.18 and 24.19).

[497] A searching examination of the pleadings in the Claimants' claim leads me to conclude that their action has not been formulated in contract, but in tort.

[498] I accept the submissions of Counsel for Windjammer who argued in substance that their claim is for fraudulent misrepresentation and negligent misrepresentation in tort or delict.

[499] This leads me now to consider the pleaded defence that the Claimants action has been prescribed under Article 2122 of The Civil Code which provides that actions "*For damages resulting from delicts or quasi-delicts*" are prescribed by three years "*wherever other provisions do not apply*".

[500] She argued that time begins to run under Article 2122 of the Civil Code when the cause of action in delict or tort accrues (i.*e. from the date when the Claimant first sustains damages as a result of the delict or tort*) (*Per Bingham LJ* in D.W. Moore and Company –vs- Ferrier (1988) 1 ALL E.R. 400, at p. 410 (c) to (d)).

[501] It was submitted further that in the case of the delict or tort of fraudulent or negligent misrepresentation, as a result of which the misrepresentee entered into the contract, the cause of action accrues and time begins to run against the action from the date when the misrepresentee entered into the contract and thereby suffered damage by incurring liability under the contract: (Foster –vs- Outred and Company [1982] 2 ALL E.R. 753 (CA) Per Stephenson LJ at p. 764 (b) to (d); Per Dunn LJ at p. 765 (c) to (d) and (f) to (g)).

[502] Learned Counsel developed her argument by submissions that the Claimants' causes of action against Windjammer for the alleged delicts or torts accrued between 1988 and 1989 when the Claimants allegedly suffered damage by executing their Sale Agreements. That time began to run against the Claimants' actions in delict or tort on the 21st January 1989 at the latest and expired no later than the 21st January 1992.

[503] Consequently she argued on the 4th February 1994 when the first of these consolidated actions were instituted, the alleged action had already been prescribed under Article 2129 of The Civil Code which states –

> "In all cases mentioned in Article . . . 2121 . . .the debt [the term "debt" denotes anything due under an obligation, whether money or otherwise- SEE Article 1.11] is absolutely extinguished and no action can be maintained after the delay for prescription has expired . . ."

[504] I did not have the benefit of any submissions from Counsel for Claimants.

[505] In my opinion the arguments of Counsel for Windjammer are unassailable. I agree with every aspect of such submissions. It follows therefore that I cannot consider the merits of the Claimants claim.

Conclusion

[506] The Claimants claim for Misrepresentation is prescribed by Article 2121 of The Civil Code and is dismissed.

[507] Issues 9 and 10 relates to the transfer of Windjammer's properties to Windjammer (St. Lucia) and Elgin so I will now consider them together.

The Transfers

[508] The Claimants' pleadings, paragraphs 15 to 29 deal with these 2 issues. I have incorporated the said paragraphs as paragraphs 509 of this Judgment which speak for themselves.

[509] See Insertions following.

[510] The pleadings of the 3 Defendants in defence of these allegations are set out at paragraphs 19 to 31 of their Amended Defence and Counterclaim. I have incorporated these paragraphs as paragraph 511 of this Judgment for their full terms and effect.

[511] See Insertions following:

The Deed of Donation

[512] A necessary prerequisite to the success of such a claim alleging an intention to defraud as stated in paragraphs 17 and 18 of the Claimants' pleadings is that there must be definitive particulars of fraud pleaded with specificity . Another searching examination of the Claimants pleadings disclose no such particulars.

[513] Relying on the pronouncements of Byron C.J. in Thomas –vs- Stoutt and others (1997) 95 WIR, Learned Counsel for Windjammer has quite rightly argued that the Claimants have not alleged or proved that the Registration of the Deed of Donation in question was obtained by fraud, or that Windjammer executed the Deed of Donation with intent to defraud.

[514] In this case, the learned Chief Justice (Ag.) at pages 117 had this to say –

> "The mere averment of fraud in general terms is not sufficient for any practical purpose in the prosecution of a case. It is necessary that particulars of the fraud are distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct. A definite character must be given to the charges by stating the facts on which they rest. The requirement for giving particulars of fraud in the pleadings is mandated in the Rules of the Supreme Court . . . This ancient principle was referred to in Wallingford –vs- Mutual Society and Official Legislator (1880) 5 App. Cas. 685 at page 697 by Lord Selbourne L.C "With regard to fraud, if there be any principle which is perfectly well settled it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable the Court to understand what it was that was alleged to be fraudulent. These allegations, I think must be entirely disregarded' ".

[515] Given the pleadings of Claimants at paragraphs 18 and 20, Articles 966, 967 and 968 of The Civil Code are applicable. Article 966 states that "a contract cannot be avoided unless it is made by the debtor with intent to defraud and will have the effect of injuring the creditor".

Article 967 sates that "a gratuitous contract is deemed to be made with intent to defraud, if the debtor be insolvent at the time of making it".

Article 968 provides that "An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud".

[516] Having reviewed the relevant law, read the submissions of both Counsel on those issues, and examined the evidence of the Parties' Witnesses, the following are my findings on these issues –

A. I adopt the approach, thinking and principle of Byron CJ in Thomas –vs- Stout as it relates to the deficiencies in the Claimants' pleadings. The Claimants failure to plead any or adequate particulars of fraud of necessity leads me to disregard their allegations that Windjammer executed the Deed of Donation with intent to defraud.

B. There is no credible evidence before me establishing that Windjammer was an insolvent debtor within the meaning of the law at the time the Deed of Donation was executed.

C. The Claimants claim that the Registration of the Deed of Donation was obtained by fraud has no merits. It has also failed because of their failure to bring themselves under Section 98 of The Land Registration Act No. 12 of 1984.

D. Section 98 states that "(1) Subject to the provisions of subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents and acquired the land, lease or hypothec for consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by its act, neglect or default".

E. Section 98 cannot apply to the claimants claim because Section 98 (1) applies "*to fraud practised upon the Land Registry in order to obtain the entry in question*": (Norwich and Peterborough BS –vs- Stead No. 2 [1993] 1 ALL E.R. 330 per Scott L.J. at p. 344 (b) to (f) speaking of Section 82 (1) of The Land Registration Act 1925 UK, a provision comparable to Section 98 (1) of our Act No. 12 of 1984). There is no evidence that Windjammer practiced such fraud.

F. The allegations of the Claimants at paragraph 26 of their pleadings do not amount to fraud or mistake that would cause Section 98 of the Land Registration Act NO. 12 of 1984 to operate.

G. The absence of any statutory basis or judicial authority to ground their claim for the relief sought, leads me to conclude that these allegations of the Claimants are without merit.

Conclusion

[517] Windjammer did not execute the Deed of Donation in favour of Windjammer St. Lucia with intention to defraud the Claimants, and/or fraudulently registered it.

[518] Windjammer St. Lucia did not transfer, 25 acres of land and 11 Villas to Elgin with intention and design to defeat the Claimants' claims, rights and any future enforcement of Judgment against Windjammer and Windjammer St. Lucia.

Damages

[519] I now consider the question of damages which is the last issue. But before I do so it is necessary to restate the results of the various claims.

[520] The Claimants have been successful in their claims against Windjammer for breaches of their Maintenance Agreement and Rental Pool Agreements as stated at pages 32, 33, 41 and 42 of this Judgment.

[521] The Claimants are all successful in their Claims against Windjammer for wrongfully overcharging them maintenance fees and making wrongful deductions from their Rental Pool Income as stated at pages 64 and 65 of this Judgment.

[522] Mr. George Kiddell has been successful in his claim against Windjammer for wrongful termination of his Maintenance Agreement as stated at para. 313 J, page 76 of this Judgment.

[523] Windjammer has been successful in its Counterclaim against Mrs. Barbara Kiddell's Estate and Mr. Kaino Hamu for the outstanding maintenance fees that they failed to pay – as stated at paragraphs 314, 315 and 316 of this Judgment.

[524] Windjammer and the other 2 Defendants have been successful in all of the other claims brought by the Claimants against them.

[525] Because of the Courts findings regarding Windjammer's breaches of the Maintenance Agreements concerning overcharging maintenance fees and the wrongful deductions from the Rental Pool Income of Claimants, there is now the need for Windjammer to assess and recalculate their Maintenance fees and Rental Pool Profits according to the Court's findings.

[526] Consequently an award for damages cannot be made until this is done.

[527] The directions at paragraphs 525 and 526 above also apply to Windjammer's Counterclaims.

[528] The assessment of damages for Mr. George Kiddell will be postponed also to await Windjammer's recalculations.

[529] I therefore direct that the necessary calculations be done by Windjammer and filed by the 31st October 2005.

[530] The assessment of damages is therefore postponed to a date in November 2005 to be fixed by the Court. Thereafter final Judgment will be given.

[531] I would like to express my gratitude to Counsel on both sides. Their industry has been such, that I had to pore over and consider volumes of legal submissions and authorities, apart from examining copious notes of evidence and a very large number of bundles of documents. It was an exercise that tested my mettle. I also wish to apologize for the length of time it took to do this. I know that the delay may have caused anxiety and frustration for some or all of the parties. I wish to express my gratitude for your patience.

Dated this 15th day of July 2005.

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OLA MAE EDWARDS
HIGH COURT JUDGE