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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

CAUSE NO: 278 OF 2005

BETWEEN:

EMBASSY INVESTMENTS LIMITED

Plaintiff

AND

- (1) ASCOT CORPORATE NAME LIMITED
(for and on behalf of itself and all other members of
Syndicate 1414 at Lloyd's)**
- (2) FARADAY CAPITAL LIMITED
(for and on behalf of itself and all other members of
Syndicate 435 at Lloyd's)**
- (3) SIMON KING
(for and on behalf of itself and all other members of
Syndicate 2010 at Lloyd's)**
- (4) WURTTEMBERGISCHE VERSICHERUNG AS**
- (5) ECCLESIASTICAL INSURANCE COMPANY**
- (6) HOUSTON CASUALTY COMPANY**

Defendants

Appearances:

**Mr. Colin Edelman, Q.C. instructed by Mr. Timothy
Cooke also with Ms. Krishan Welcome of
Walkers all for the Plaintiff**

**Mr. Christopher Butcher, Q.C. instructed by
Mr. Jeremy Walton and Mr. Chris Easdon of
Appleby Spurling Hunter all for the Defendants**

Before:

Hon. Justice Henderson

Heard:

September 29 & 30, 2005



JUDGMENT

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The Plaintiff Embassy Investments Limited is the owner of the Hyatt Regency Grand Cayman Resort (“the Hyatt”). The Defendants are insurers in respect of the Hyatt on the first excess layer (of US \$15 million dollars excess of US \$10 million dollars) of insurance for the period during which the Hyatt suffered extensive damage from Hurricane Ivan. One of the covered risks is loss due to business interruption. The Plaintiff sues for the full amount of the excess coverage in that layer on the basis that its loss (particularly, due to business interruption) at least equals the entirety of that coverage. On this application, the Plaintiff asks for summary judgment.

A number of issues arise from the pleadings and were canvassed in argument, but I need deal with one only. Just prior to the application, the Defendants (except for the 5th Defendant) advised the Plaintiff that they were avoiding the policy due to material non-disclosure. A draft re-amended defence has been served and leave to amend has been requested.

During the two fiscal years immediately before the insurance coverage was placed, the Hyatt earned gross profits in the range of US\$25 million per year. There is no suggestion that, at the time of placing the insurance, the Plaintiff believed or had good reason to believe that the gross profits would vary significantly from that level. The annualized business interruption loss due to Hurricane Ivan is now estimated to be in the range of US \$28 million dollars.

1 When the coverage was placed, the Hyatt Regency's agent sent an email to the insurers
2 which referred to an attached "Schedule of Values". That schedule is in the form of a
3 spreadsheet and is headed "Summary of Property Damage/Business Interruption
4 Declared Values". The column which addresses business interruption is headed "Total
5 BI." The line entry in this column for the hotel specifies the amount of US \$14, 665,146.
6 To the immediate left of that column is one headed "IP months." In that column, the
7 figure shown is 24. Given that the figure was meant to represent a twenty-four month
8 period, the declared value for business interruption was around US 7.3 million dollars,
9 roughly 25% of the loss now claimed and about 28% of the gross profits level actually
10 experienced before the hurricane.

11

12 The Defendants say that the "total BI" figure was understood by them, as would be
13 expected in their industry, both as a representation of the expected level of gross profit
14 and an assertion that the Plaintiff wished to insure for that amount. The Plaintiff says the
15 representation was nothing more than an assertion that it wanted business interruption
16 coverage for that amount and that this is the customary way in which the representation
17 would be understood in the insurance industry.

18

19 The representation was carried forward into a profits worksheet which was attached to
20 and formed part of the underlying policy. Evidence from the Defendants indicates that,
21 whether or not an insured wishes to have coverage for the full amount of the estimated
22 annual gross profits, a representation of what those profits were expected to be would be

1 material to their decision. The Plaintiff replies that the Defendants were placed on notice;
2 if they wished to know the estimated annual gross profit, they should have inquired.

3
4 This claim of avoidance for material nondisclosure raises issues of fact which cannot be
5 determined on a Summary Judgment application. In particular, the question of what the
6 representation meant, and was intended to mean, must turn at least partly upon evidence,
7 which I do not have and which in any case will be disputed, about customs and practices
8 of the insurance industry.

9
10 To the claim for avoidance, the Plaintiff will plead an affirmation of the contract by the
11 defendants. That, also, raises questions of fact which must be resolved at trial. Proof of
12 affirmation requires proof of an informed choice to treat the contract as continuing, made
13 with knowledge of the facts giving rise to the right to avoid it. The affirmation must be
14 communicated unequivocally to the other party. What is required for affirmation is
15 knowledge, not a form of constructive knowledge. For authority for these propositions,
16 see the judgment of Mance, J. in *Insurance Corporation of the Channel Islands and*
17 *another v. the Royal Hotel Ltd. and others* [1998] QBD Com. Ct. 151. The state of the
18 defendants' knowledge at the time they are alleged to have affirmed the contract is pre-
19 eminently a question of fact and unsuited for a Summary Judgment application.

20
21 For these brief reasons, the application for Summary Judgment is dismissed. Leave to
22 amend the Defence is granted. The Defendants are at liberty to serve a rejoinder in

1 response to the Plaintiff's reply in the terms of the draft rejoinder attached to the
2 Defendants' summons. The parties are at liberty to speak to costs if they are unable to
3 agree.

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5 Dated this 4th day of November, 2005

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Henderson, J.

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Henderson, J.

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Judge of the Grand Court

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