18.9.2003

CIRCULATE

CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 262/2003

BETWEEN:

(1)CAYMAN GENERAL INSURANCE COMPANY
(2)NEM (WEST INDIES) INSURANCE LTD.

Plaintiffs

AND:

(1)DIVI HOTELS INC.
(2)DIVI HOTELS MARKETING INC.
(3)DIVI HOLIDAYS INC.
(4)ENERGY CAPITAL INC.
(5)DIVI PHOENIX NV

Defendants

BEFORE: MADAME JUSTICE LEVERS

APPEARANCES:
Counsel for the Plaintiffs: Mr. Joseph of Truman Bodden & Co.
Counsel for the Defendant: Ms. Corbett of Walkers

HEARD: 21st August 2003

JUDGMENT

The Plaintiffs are insurance companies carrying on business in the Cayman Islands. The Defendants carried on a hotel business at the Divi Tiara Hotel Complex situated on Cayman Brac in the Cayman Islands.

In or about April 2002, Cayman General and the Defendants started negotiations with a view to concluding a policy of insurance pursuant to which Cayman General were to provide insurance coverage for the Hotel Complex. The risks to be covered included risk of loss or damage to the Hotel Complex which might be caused by various perils such as hurricane, fire, flood, earthquake or explosion. Clauses included in the policy of insurance have caused differences in the form of redress to be sought and the Plaintiffs by way of Summons seek the following orders:

1. The Courts of the Cayman Islands have jurisdiction pursuant to the Clause NMA 1483 Overseas Jurisdiction Clause contained in a WEH 1992 Material Damage and Open Perils policy of insurance having number 18AR06020599 ("the Policy") effected between the Plaintiffs and the Defendants between the 31st May and 24th June 2002, to hear and determine any dispute between the Plaintiffs and the Defendants arising out of the Policy;

2. The Courts of the Cayman Islands have jurisdiction to determine whether the Plaintiffs are entitled to a declaration that the Plaintiffs were entitled to and did, by a letter dated the 10th February, 2003 sent by Cayman General

Insurance Company Limited on behalf of both of the Plaintiffs to Marsh Management Services Limited ("Marsh") on behalf of all the Defendants, avoid the policy by reason of the material non-disclosure and/or misrepresentation and that as a result, neither of the Plaintiffs has any liability to any of the Defendants arising out of the Policy;

3. Clause 12 of the Policy does not entitle any arbitrator or arbitrators howsoever appointed or purportedly appointed to determine whether the Plaintiffs were entitled to avoid the Policy;

4. Clause 12 of the Policy as a matter of constructions does not extend to the dispute between the Plaintiffs and the Defendants as to whether or not the Plaintiffs were entitled to and did avoid the Policy by reason of material of non-disclosure and/or misrepresentation and accordingly the arbitration which the Defendants have purported to commence under clause 12 of the Policy is invalid and the Plaintiffs are not bound in any event by any award should any be made or purportedly be made in that Arbitration;

5. The Cost occasioned by the Plaintiffs' Summons be paid by the Defendants in any event.

The purpose of this application pursuant to GCR Order 14/14(a) is to resolve the tribunal that has jurisdiction to determine the issues. The policy has an Arbitration Clause and an Overseas Jurisdiction Clause (NMA 1483); the Court is to decide if the NMA 1483 Clause overrides the Arbitration Clause and if not, is the question

of avoidance so fundamental that the Court should exercise its inherent jurisdiction to determine the dispute between the parties arising out of the Policy and in particular the question of avoidance. There is in fact only one factual issue between the parties and it is as to the scope of the Arbitration Clause and the NMA 1483 Clause and whether the latter was in fact incorporated into the contract and which clause takes precedence.

The Facts

Cayman General and NEM(WI)IL entered into the Policy with the Defendants between the 31st May and 24th June 2002. The Policy is an Open Perils Policy of Insurance ("the Policy) pursuant to which the Plaintiffs agreed to insure the Hotel Complex situated on Cayman Brac and owned and operated by the Defendant ("the Hotel Complex") against the risk of damage caused by a variety of perils including fire and hurricanes.

The Defendants' agents at the time of the policy negotiations was "Marsh". The Plaintiff issued a temporary cover note on the 8th May

2002, a subsequent cover note and a final one on the 23rd June 2002. By a letter dated the 10th February 2003, the Plaintiffs purported to avoid the Policy on the grounds of material misrepresentation and/or non-disclosure.

"Marsh" often approached the Plaintiffs to be the insurers of their clients and the Plaintiffs and "Marsh" had conducted business over several matters. Prior to sending the letter avoiding the Policy, the Plaintiffs relied on a report made by Axis International, a firm of loss adjusters, appointed by the Plaintiffs and the report confirmed that none of the buildings at the Hotel Complex had installed in them sprinkler systems.

The Plaintiffs allege that "Marsh" on behalf of the Defendants represented that the sprinkler systems were installed in all the buildings and that those sprinkler systems were inspected once a month.

Can the Overseas Jurisdiction Clause NMA1483 dispel the Arbitration Clause? If it cannot, is the question so fundamental that the Court

should exercise its inherent jurisdiction in hearing the matter. To answer the question posed I must start with an examination of the two clauses.

The Arbitration Clause

Clause 12 of the Policy – Arbitration:

> " If the Assured and Underwriters fail to agree in whole or in part regarding any aspect of this Policy, each party shall, within (10) days after the demand in writing by either party, appoint a competent and disinterested arbitrator and the two chosen shall before commencing the arbitration select a competent and disinterested umpire. The arbitrators together shall determine such matters in which the Assured and Underwriters shall so fail to agree and shall make an award thereon, and if they fail to agree, they will submit their differences to the umpire and the award in writing of any two, duly verified, shall determine the same.
>
> The parties to such arbitration shall pay the arbitrators respectively appointed by them and bear equally the expenses of the arbitration and the charges of the umpire."

The Overseas Jurisdiction Clause

Clause 13 under the heading **Service of Suit.**

> "NMA 1483 Overseas Jurisdiction Clause. This insurance is governed by the Law of the Cayman Islands."

Those are the two clauses as specified in the policy.

The Arbitration Clause:

Viscount Simon in *Heyman v Darwins Ltd.* [1942] AC 356 stated what he conceived to be the correct view of an arbitration clause:

> "An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio*, (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such difference as should be regarded as differences which have arisen 'in respect of' or 'with regard to' or 'under' the contract, and an

arbitration clause which uses those or similar, expression should be construed accordingly.'

Commenting in the same matter, Lord Macmillian made the following observations at page 370-371:

> "If it appears that the dispute is whether there has been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside. Again, an admittedly binding contract containing a general arbitration clause may stipulate that in certain events the contract shall come to an end. If a question arises whether the contract has for any such reason come to an end I can see no reason why the arbitrator should not decide that question.

Lord Macmillian after discussing the question of repudiation and its effect on the existence of a contract, made the following pertinent observations regarding the true nature and

functions of an arbitration clause in a contract. He said and I quote:

> "I venture to think that not enough attention has been directed to the true nature and functions of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde*, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement. Moreover, there is the further significant differences that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess

> as regards the other clauses of contracts.

This outline of decided cases which are relevant to the matter would be incomplete without a reference to the judgment of Lord Wright in *Heyman v Dawins Ltd.* That master of the English Common Law answers the question whether the issues in dispute in that case were fit and proper matters to be referred to arbitration in these words at page 389:

> "I need not quote authorities for what has been said so often, that under a general submission the arbitrator is appointed to decide issues both of fact and of law. In the background, indeed, is the court's jurisdiction to set aside an award if it is bad in law on its face, and the opinion of the court on issues of law may be invoked by means of cases stated under the Acts of 1889 and 1934, but, if the submission is general, it will require some substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both fact and law or is limited to either fact or law. In the present case I can find no sufficient reason. The dispute is of the most ordinary character."

The parties agree that the arbitration clause is binding, to what extent it is binding is the question for this Court to decide. Prior to analysing

the words in the Arbitration Clause, it is perhaps convenient for me now to deal with the Overseas Jurisdiction Clause MNA 1483.

Overseas Jurisdiction Clause

I have stated previously, the service of suit is the subheading under which this MNA 1483 Overseas Jurisdiction clause is mentioned in the Policy. The Clause itself has not been detailed and it is common ground that after the policy was avoided, details of the Clause were sent as an endorsement.

Can the court by implication import the overseas Jurisdiction Clause into the contract even though it is not complete? A term may by implication be incorporated into a contract if the circumstances are such, that the inescapable inference to be drawn is that the parties intended to have included the term in question, or, it is obvious that they had so intended. Scrutton LJ in *Reigate v Union Manufacturing Co.* (Ramsbottom) [1918] 1KB 592 at p. 605:

> "A term may be implied if it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the

> contract was being negotiated someone had said to the parties: 'what will happen in such a case?' they would both have replied: 'of course so and so will happen; we did not trouble to say that; it is too clear.'"

In this particular case it is not clear exactly what was intended as both clauses are included. It is clear that if any court was to have jurisdiction over this matter, it should be the Cayman Court. The wording of the policy contains the NMA 1483 Clause by brief reference. It is common ground that the precise terms of Clause 13, was not given to the defendants prior to the 5th February 2003 when the Plaintiff issued a document entitled endorsement number 5. That endorsement read:

> *"It is hereby noted and agreed that this Insurance shall be governed by the laws of the Cayman Islands whose Courts shall have jurisdiction in any dispute arising hereunder and any summons, notice or process to be served upon the Underwriters for the purpose of instituting any legal proceedings against them in connection with this Insurance may be served upon Cayman General Insurance Co. Ltd. of P. O. Box 2171GT, Grand Cayman, who have authority to accept service on their behalf.*
>
> *All other terms and conditions remain unchanged."*

Those are the two competing clauses.

Submissions:

The Plaintiffs contend that Clause 12 does not confer jurisdiction on any arbitrators appointed and that the Plaintiffs were entitled to and did avoid the Policy. Further, they contend that Clause NMA 1483 was incorporated into the Policy and that it does confer jurisdiction on the Grand Court of the Cayman Islands to determine whether, the Plaintiffs were entitled to and did avoid the policy.

The Plaintiffs contend that NMA 1483 was incorporated into the Policy in its complete form at the outset, by the agreement of the parties, as is shown by the fact that the cover note contains the reference to NMA 1483 and that it was specifically mentioned in the Policy, The parties had used and agreed on the same insurance policy through the agent "Marsh" who knew of the NMA 1483 Clause. At the highest the Plaintiffs can ask this Court to hold that the NMA 1483 was incorporated into the policy in a blank form and that the Court should and can construe the clause under GCR, order 14 (a)

with the words Cayman Islands included in it. They also urge this Court to hold that the arbitration agreement contained in the Arbitration Clause is narrow and far narrower than the NMA 1483 Clause and that in fact the wording of NMA 1483 makes this particular dispute one that the Court should have jurisdiction over.

The Defendants on the other hand argue that the NMA1483 Clause was not properly incorporated into the contract as the incorporation of the said Clause was never discussed between the parties at the time the policy was issued. That they are not bound by agent "Marsh's" knowledge of it and that in fact they should have been informed in writing of the details. They further argue that the incorporation of the NMA 1483 Clause under the heading service of suit in the jurisdiction,(if it is accepted as incorporated at all) gives a court jurisdiction in circumstances where it obviously would not have had jurisdiction in the first instance. Counsel for the Defendants argues strenuously that even if the NMA Clause was incorporated in the policy and the Court so held, the terms of the NMA Clause are so uncertain as to be unworkable. She says that the dispute that has arisen between the parties over avoidance of the contract is one that

falls within the scope of Clause 12 and should be determined by arbitration.

Examining the Arbitration Clause, the words therein are and I quote:

> "If the Assured and Underwriters fail to agree in whole or in part
> regarding any aspect of this Policy, each party shall , within ten(10) days after the demand in writing by either party, appoint a competent and disinterested arbitrator and the two chosen shall before commencing the arbitration select a competent and disinterested umpire. The arbitrators together shall determine such matters in which the Assured and Underwriters shall so fail to agree and shall make an award thereon, and if they fail to agree, they will submit their differences to the umpire and the award in writing of any two, duly verified, shall determine the same.
>
> The parties to such arbitration shall pay the Arbitrators respectively appointed by them and bear equally the expenses of the arbitration and the charges of the umpire."

On the other hand, the MNA 1483 Overseas Jurisdiction Clause states:

> "that it is hereby noted and agreed that this Insurance shall be governed by the laws of

> the Cayman Islands whose Courts shall have jurisdiction in any dispute arising hereunder.."

Both Clauses are drafted using words that are equivalent to each other and to decide this question perhaps it is best decided by reference to the dispute that has arisen between the parties. The dispute in my view is a matter of law and fact and it is a common feature of most of these cases where the Courts would only lean towards taking away the arbitrator's responsibility, if, in fact, it was a question of law alone. In this case the parties have clearly decided to be bound by an arbitration and this is not a case where the Plaintiffs are arguing that it is a contact *void ab initio* or illegal. The Plaintiffs argue that it is avoidable and one is reminded of a famous passage from the judgment of Lord Selbourne in the case of *Willesford v Watson* [1873] 28 LT 428; 8 Ch App. 473 at page 497 which was cited with approval by Cozens-Hardy, M.R. in *Rowe Brothers and Co Ltd. v Crossley Brothers Ltd.* [1912] 108 LT 11 at page 13, as follows:

> "Then we are told that this is an arbitrary tribunal, final and without appeal and so forth, and that there are not fit questions to go before the arbitrator. But I think that the legislature and the Act of Parliament under which the Court is now asked to act, have given the answer to that argument. If parties

choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since the Act of Parliament was passed a *prima facie* duty to cast upon the courts to act upon such an agreement."

He then went on to discuss the principles which guide the court in the exercise of its discretion to interfere with the agreement of the parties to submit their differences or disputes arising under a contract to arbitration. He dealt with the matter thus:

> 'I therefore do not think that it can be enough to say as questions of law of a serious kind will arise here the court ought not in the exercise of its discretion to interfere. This is not a case in which questions of law cant be kept apart from the facts of the case. If, for instance, it had been merely a question of law arising upon the construction of certain words in a lease or a contract of sale, or what not, I can quite conceive that the court might say – as the court has done in one or two cases – that there is only one question of law here, and that it is idle to refer that to arbitration, because the first thing the arbitrator would undoubtedly do would be to refer that to the court for the decision of the court as a question of law'.

The dispute here is about law and fact. The contract is voidable, the parties were intending to and intend to by virtue of the Arbitration Clause being incorporated in the Policy to be bound by arbitration. Does this dispute therefore come within the words "any aspect" of this Policy? I agree with learned Counsel for the Defendants that it is wide enough to incorporate this dispute. I further agree with her that the intention of the parties to go to arbitration cannot be displaced by reference to an overseas jurisdiction clause under a subheading Service of Suit without any details of that clause being annexed to the Policy.

Non disclosure does not automatically avoid the contract. It only makes it voidable. It gives the Insurer a right to elect, they can either avoid the contract or perform it: If it is voidable, evidence will have to be led on the factual issues and it is my view that that will come within the purview of "any aspect" of this Policy and in those circumstances it must have clearly been the intention of the parties that they would be bound by the arbitration. I do not believe that NMA 1483 Overseas Jurisdiction Clause overrides the Arbitration Clause nor that it is wider in scope than the Arbitration Clause.

I hold that the dispute must go to Arbitration. There is no good reason to justify the Court overriding the agreement of the parties. The Plaintiffs' summons is dismissed. The Defendants would therefore be entitled to obtain a stay of these proceedings pending arbitration. It is my understanding that the Defendants have proceeded to appoint an Arbitrator although arbitration has not yet commenced. I therefore give leave to the Plaintiffs to appoint an arbitrator within the next 14 days with the view to this matter proceeding to arbitration. Costs of this application to the Defendants, to be taxed if not agreed.

Dated this 15th day of September 2003

GRAND COURT CAYMAN ISLANDS

Madame Justice Priya Levers
Judge of the Grand Court