Appeal No. CA-2026-000125

IN THE COURT OF APPEAL (CIVIL DIVISION)

On appeal from:
THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)
CLAIM NO. LM-2024-000252
Neutral Citation: [2025] EWHC 2704 (Comm)
Before His Honour Judge Keyser KC (sitting as a Judge of the High Court)

BETWEEN:

(1) INTACT INSURANCE UK LIMITED (FORMERLY ROYAL & SUN ALLIANCE INSURANCE LIMITED)
(on its own behalf and on behalf of all members of the Royal Insurance Group (now RSA Insurance Group) reinsured under reinsurance policies 0512428/R13/81 (M43/81), M43/82, XPM0431/301 (M43/83), 871/XPM043/401 (M43/84) and M56/84, their successors and assigns)
(2) ROYAL INSURANCE (UK) LIMITED (In Liquidation)
(3) ROYAL & SUN ALLIANCE REINSURANCE LIMITED (FORMERLY ROYAL REINSURANCE COMPANY LIMITED)

Claimants / Appellants

- and -

EQUITAS INSURANCE LIMITED

Defendant / Respondent

APPELLANTS' REPLACEMENT SUPPLEMENTARY SKELETON ARGUMENT
25 August 2026

References to the Core and Supplementary Bundles are in the format ***[Bundle/Tab/page no.]***

1. This supplementary skeleton argument is filed, with the Court's permission, pursuant to PD52C, para. 32 and para. 4.58 of the Court of Appeal Guide. It is filed in order for the Claimants to:

1.1 Address the true meaning and effect of reinsurance written on "excess of loss" terms. This responds to Equitas's confused reliance on the fact that the Reinsurances incorporated the terms of the underlying insurances (the RMPs); and

1.2 Develop the alternative case that if the £4m excess and £16m limit are concerned with indemnity payments only, it follows that Equitas agreed to reinsure all of the Claimants' exposure to defence costs, without any excess or financial limit.

2. In summary, reinsurance cover excess of £4m and limited to £16m *"any one loss or series of losses arising out of one occurrence"* means what it says: the Claimants are reinsured by Equitas if the Claimants' losses exceed £4m but up to a limit of £16m. The very essence of excess of loss reinsurance is to provide indemnity against losses suffered by the reinsured, a point which the Judge failed to recognise.

3. Alternatively, if (contrary to the Claimants' primary case) the correlation between the £20m indemnity limit under the underlying RMPs and the limit in the Reinsurances compels the conclusion that the limit provisions in the Reinsurances are concerned with indemnity losses only, it necessarily follows from the "back-to-back" nature of the Reinsurances that there was no excess and no financial limit in respect of defence costs.

4. The skeleton is restricted to addressing these points and does not attempt to respond more broadly to Equitas's appeal skeleton. It uses the same abbreviations as the Appellants' first appeal skeleton.

A. EXCESS OF LOSS REINSURANCE: TRUE MEANING AND EFFECT

5. In Hill v Mercantile [1996] 1 WLR 1239 at 1251, Lord Mustill identified as the first "obvious" rule of reinsurance that *"the reinsurer cannot be held liable unless the loss falls within the cover of the policy reinsured and within the cover created by the reinsurance"*. He drew the same distinction between the terms of the contract of insurance and the terms of the contract of reinsurance in Axa v Field [1996] 1 WLR 1026 at 1035.

6. The first rule in Hill v Mercantile encapsulates and underlines the fact that a contract of reinsurance is a separate contract from the underlying contract of insurance. The contract of reinsurance contains the terms that define and delineate the extent of the transfer of risk to the reinsurers.

7. The limit provisions in issue on this appeal are terms of the Reinsurances only. They defined the extent of the transfer of risks insured under the RMPs to Equitas. They were not terms of the underlying RMPs.

8. The judgment below and Equitas's submissions on this appeal lose sight of this distinction. The back-to-back scope of cover under the RMPs and Reinsurances does not, and cannot, of itself provide the meaning of the excess terms in the Reinsurances. Properly understood, the bargain under the Reinsurances was that all of the risks insured by the Claimants under the RMPs would be reinsured by Equitas (this is the back-to-back scope of cover point), but subject always to the terms of the Reinsurances, including the financial limits.

9. Accordingly, the core question on this appeal is: what do the words *"any one loss or series of losses arising out of one occurrence"*, by which the excess and limits in the Reinsurances are expressly defined, mean in these contracts of excess of loss reinsurance?

10. These are very commonly used words in reinsurance. They are the language that creates an excess of loss contract of reinsurance. The Claimants' central submission is that the words mean what they say: the reinsurer agrees to indemnify the reinsured against losses suffered by the reinsured under the underlying insurance but only once those losses exceed a specified sum, only up to a specified limit, and subject to the aggregating language *"arising out of one occurrence"*.

11. The analysis in the preceding paragraph gives effect to the long-standing view of the authors of all leading textbooks concerning the nature of an excess of loss contract of reinsurance and is the subject of authority (emphasis added throughout):

    11.1 Excess of loss reinsurance *"is a form of agreement under which the reinsurer agrees to pay the reinsured all losses which exceed a certain specified limit in respect of any one risk, or any one event, up to a specified maximum"*.[1] The same authors also describe excess of loss reinsurance as transferring to the reinsurer *"a slice or layer of the risk"* written by the reinsured.[2]

    11.2 Excess of loss reinsurance is *"perhaps the most significant form of non-proportional reinsurance"* and *"provides the reinsured with an indemnity – subject to express financial limits – for losses above its net retention. The essence of excess of loss reinsurance is that it is normally related*

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1 O'Neill and Arnold-Dwyer, Law of Reinsurance (6th edn, 2024), paras. 1-021.

2 Ibid, Para 1-016.

specifically to the reinsured's actual and net liability – its ultimate net loss – for losses under its original policies".[3]

11.3 Under excess of loss reinsurance contracts "*the reinsurer agrees to indemnify the reinsured for losses within a particular class which exceed an agreed minimum figure, and only for the amount of such loss above that minimum figure*".[4]

11.4 "*Except in rare instances, the reinsurer does not accept liability for the whole cost of a claim in excess of the underlying retention without any limit. A definite figure is thus set down as the maximum amount for which the reinsurer will become liable.*"[5] Similarly, the notion that because the Insurers' liability to pay defence costs under the RMPs was "*unlimited unless and until the indemnity payments alone exceeded the £20 million limit*",[6] the same should be true under the Reinsurances is contrary to the most fundamental premise of excess of loss reinsurance that such reinsurance fixes the underlying retention "*at a figure corresponding to the maximum amount which the reinsured considers its account can stand*".[7]

12. More fundamentally still, this analysis reflects the fact that a contract of reinsurance is one by which the reinsurer agrees to indemnify the reinsured. As stated by the editors of *MacGillivray on Insurance Law* (16th ed.) at 33-002: *"The object of the reinsurance is to indemnify the reinsured against liability which may arise on the primary insurance"*.

13. Against this background, and in light of the terms of the Reinsurances, it is hard to fathom Equitas's contention that the Claimants' submission that the "Limit" clause in the Reinsurances sets the floor and ceiling for Reinsurers' exposure is "*mere assertion*".[8] It is not: that is exactly what the "Limit" clause does, consistent with the description and structure of the Reinsurances as excess of loss reinsurance.

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3 Butler & Merkin's Reinsurance Law and Practice, para C-0199. The Claimants acknowledge that there is no ultimate net loss clause in the Reinsurances, perhaps because they are such old contracts. The essence of the deal is unaffected: the top and bottom limits of excess of loss cover are concerned with the reinsured's losses.

4 Balfour v Beaumont [1982] 2 Lloyds Rep 493, 496 (Webster J).

5 The Law and Practice of Reinsurance (5th edn, 1987), p. 123. *See also* pp.118, 133.

6 Equitas' appeal skeleton, para. 4(d) **[Core/5/45]**.

7 The Law and Practice of Reinsurance (5th edn, 1987) at pp.115-116.

8 Equitas' appeal skeleton, para. 28 **[Core/5/52]**.

14. More importantly, the fact that the excess of loss provisions appear in the Reinsurances only means that Equitas's central submission on "back-to-back" cover is confused. The RMPs do not of themselves tell the Court / reasonable reader anything about how the £4 million excess under the Reinsurances is to be eroded because (self-evidently) the RMPs do not contain the excess provisions which are the central workings of the Reinsurances. The phrase "back-to-back" is convenient shorthand for expressing the fact that the scope of cover under the Reinsurances matches that under the RMPs but it tells one nothing about the extent of the reinsurance. That is defined by the Reinsurances alone.[9] Accordingly, it is incorrect to invoke the presumption of back-to-back cover as a mantra supplying the answer to the proper interpretation of the Limit clause, as Equitas does.[10]

15. Properly analysed, therefore, the only question on this appeal is the meaning of the words *"any one loss or series of losses arising out of one occurrence"* in the Reinsurances, applying ordinary principles of construction. As to this:

    15.1 *"Loss"* must refer to financial loss incurred by the Claimants because the Reinsurances are contracts of indemnity for the Claimants.

    15.2 The Reinsurances use conventional excess of loss terminology. This form of reinsurance provides cover subject to an excess and an overall financial limit on the reinsured's losses: see the authorities listed above. There are no words indicating that some lesser or different form of excess of loss cover is intended.

    15.3 The ordinary and natural meaning of the word *"loss"* in the limits provisions in the Reinsurances is that it refers to the reinsured's (the Claimants') total losses under the RMPs – i.e. the total amount which the Claimants have paid or are liable to pay: *see* the Appellants' first appeal skeleton, para. 31 **[Core/4/31-32]**.

    15.4 This interpretation of *"loss"* as referring to the reinsured's total loss also makes commercial sense. The Claimants make the following submissions in addition to the points in its first skeleton and in response to Equitas' appeal skeleton:

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[9] In this regard, see Longmore LJ's comments in Wasa International Insurance Co Ltd v Lexington Insurance Co [2008] Lloyd's Rep IR 510 at [18]-[19]; and Butler & Merkin's Reinsurance Law (looseleaf), para. B-0180 (last paragraph).

[10] It appears 30 times in Equitas' 21-page appeal skeleton.

(a) Equitas has offered no response to the point that its approach undermines the structuring of excess of loss reinsurance. Excess of loss reinsurance functions on the basis that it will be possible to purchase further layers on top of the layer underwritten by the reinsurer(s) in question so that risk can be split between reinsurers.[11] The risk that the reinsureds' total exposure (i.e., from defence and indemnity costs) exceeded £20 million could easily have been managed in this way. The layering of cover would not be possible, or would be very difficult to achieve, on Equitas' interpretation, however, because there would be no fixed limit to reinsurers' liability.

(b) Equitas' approach disincentivises the reinsureds to ensure effective defence of large claims brought against the insured and generates moral hazard. The insurers' / reinsureds' consent was required for the incurring of costs by the insured under the RMPs (*see* Schedule D(3) **[Supp/1/16]**), but it would have been in the reinsureds' interests not to incur costs in respect of large claims and instead to settle them because the reinsureds would be in a better position vis-à-vis reinsurers if large claims succeeded than if they were fought and lost.

(c) Equitas has no answer to the fact that the claims cooperation clause **[Core/19/237]** is inconsistent with its interpretation of the limits clauses, instead asserting at paragraphs 32 and 34 **[Core/5/54, 55]** that "*there is no need to refer to the Claims Cooperation Clause*." This clause cannot simply be ignored: the contracts of reinsurance must be construed as a whole. The purpose of the clause is to ensure that the reinsurers have a say in the handling of claims "*where the potential cost may exceed £4m*" (emphasis added). This is consistent with the Claimants' case and inconsistent with Equitas's case and the judgment because:

    (i) Reinsurers have an interest in controlling decisions to litigate in respect of such claims because if the cost (a term that does not differentiate between indemnity payments and defence costs and is manifestly apt to include the latter) may exceed £4 million, then reinsurers will be on risk.

[11] O'Neill and Arnold-Dwyer, Law of Reinsurance (6th edn, 2024), para. 1-022.

(ii) Equitas' approach would give Reinsurers control without liability. Take a £20 million claim against the underlying insured. Reinsurers would be concerned by such a claim because they are at risk of having to pay part of the same on any view. Exercising their rights under the claims cooperation clause, Reinsurers participate in the decision as to whether to defend the claim, and encourage and consent to the underlying insured doing so. The underlying insured is successful, but it incurs £10 million of irrecoverable costs in the process. On Equitas' interpretation, Reinsurers could walk away with no liability. On the Claimants' approach, Reinsurers would bear £6 million of the costs that they had encouraged to be incurred and the incurrence of which had avoided them suffering a much greater liability.

B. THE CLAIMANTS' ALTERNATIVE CASE: NO LIMIT FOR DEFENCE COSTS

16. The central thesis of Equitas's arguments before the Judge and on appeal is that the excess and limit provisions in the Reinsurances must refer to indemnity payments only because the £16 million excess £4 million structure in the Reinsurances tracks the £20 million limit under the RMPs, which limit was concerned with indemnity payments only: *see, e.g.,* paras. 4(f), 53, 56 of Equitas' appeal skeleton **[Core/5/46, 59, 60-61]**.

17. If this is right, contrary to the Claimants' primary submissions, it follows that there is no excess or financial limit applicable in respect of defence costs because Reinsurers' defence costs liability would sit entirely outside the "Limit" clause in the Reinsurances: *see* Re-Re-Amended Reply, para. 16H **[Supp/7/300]** and para. 41.2 of the Appellants' appeal skeleton **[Core/4/39]**; *see* also Judgment, [29] **[Core/8/100-101]**. On such an interpretation, there would be unlimited defence costs cover *from the ground up* under the Reinsurances. This supplemental skeleton is lodged in order to make it clear that the Claimants will advance this argument as their alternative, fallback case, as they did before the Judge.

18. This alternative case follows inexorably from the combination of the back-to-back nature of the Reinsurances and the interpretation of the limits provisions as applicable to indemnity payments only which, *a fortiori*, the Court will have accepted if the alternative case arises. It is common ground that the back-to-back scope of cover under the Reinsurances means that defence costs were reinsured. On the logic of Equitas's own case, there was no applicable excess or limit to the reinsurance of defence costs.

19. It is no answer to this to say (as the Judge did and Equitas frequently does in its appeal skeleton)[12] that defence costs liability is "*parasitic*" on indemnity costs liability (the implication being that the Insurers, and therefore the Reinsurers, are only liable for defence costs when they have an exposure to indemnity payments).

20. First, and once again, Equitas's submission confuses the losses insured under the RMPs with the transfer of risk under the Reinsurances:

    20.1 There are no terms of the Reinsurances which say that defence costs are reinsured if, but only if, the level of indemnity for liability falls between £4m and £16m. Self-evidently, no express terms say this. An implied term has never been alleged.

    20.2 If and in so far as this is said to be the true construction of the words excess of £4m and limited to £16m *"any one loss or series of losses arising out of one occurrence"*:

        (a) That is not the natural meaning of the words used. It reads in a great deal, impermissibly.

        (b) It is contrary to commercial sense. The scheme would be hard to operate in practice because it would call for a micro-analysis of defence costs bills to work out when defence costs were incurred as against when the £4m and £16m marks were passed.

21. Second, it is not even correct that defence costs are payable "*in tandem*" with the obligation to make indemnity payments under the RMPs.[13] As to this:

    21.1 The RMPs provide, in Schedule D(3) **[Supp/1/16]**, that the Insurers will "*in addition*" indemnify the Insured against defence costs; they do <u>not</u> provide that defence costs liability will only arise once the Insurers become liable for indemnity payments. The distinction is important: defence costs liability under the RMPs could arise before, and independently of, any exposure to make indemnity payments. On Equitas' reasoning, the same must be true under the Reinsurances if these provisions are somehow to be transported across as part of the limits of the Reinsurances.

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12 *See* [29] of the Judgment and, e.g., para. 18 of Equitas' appeal skeleton **[Core/8/100-101], [Core/5/50]**.

13 Equitas' appeal skeleton, para. 26 **[Core/5/52]**.

21.2 That this is the case is put beyond doubt by considering Schedule D(3) in the RMPs alongside Schedule D(2) **[Supp/1/16]**.[14] It is common ground that Schedule D(3) requires the payment of defence costs from the ground up and without the application of any excess: *see* Equitas's appeal skeleton, para. 26 **[Core/5/52]**. The same is not true, however, for indemnity payments. Schedule D(2), which relates solely to the Indemnity under the RMPs for liability payments to third parties and not the separate indemnity for defence costs,[15] provides that such Indemnity is subject to a retention of a specified amount for each and every Occurrence (Schedule D(2)(a)) *or* is to be reduced by the amount of monies receivable and/or deductible under underlying primary insurances (referred to "*Separate Insurances*") to be placed by BOC (Schedule D(2)(b)).[16]

21.3 Consequently, where, for example, there is no primary underlying insurance or, by reason of some limitation of cover, the primary policy placed by BOC does not apply, the RMPs would provide cover for indemnity payments in excess of a retention (*see* Schedule D(2)(a) **[Supp/1/16]** and Schedule I(3) **[Supp/1/24]**), but would, by contrast, provide cover for defence costs *from the ground up*. Properly construed, the question of *when* liability for defence costs *arises* is not "*parasitic*" on the liability to make indemnity payments – the former can arise before, and independently of, the latter.

21.4 This analysis is not altered by Schedule D(5) of the RMPs **[Supp/1/17]** which provides (*inter alia*) that Insurers' liability for costs and expenses under Schedule D(3) *ceases* when the Indemnity Limit of £20 million under the RMPs is exhausted.[17] While that Schedule provides a temporal *upper limit* on the obligation to indemnify for defence costs which is coterminous with the obligation to make indemnity payments, this does not assist the Court in relation to the question of when the obligation to indemnify for defence costs *begins*. The structure and wording of Schedule D make plain that that obligation is separate and additional to Insurers' obligation to

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14 *See* Appellants' first appeal skeleton, para. 44.2 **[Core/4/40]**.

15 As the Judge found, *see* Judgment, [22] **[Core/8/97]**.

16 *See* also Schedule I(3) of the RMPs **[Supp/1/24]**.

17 *See* Equitas' appeal skeleton, footnote 11, and paras. 26, 29(b)(ii), 56(b) **[Core/5/50, 52, 53, 60]**.

indemnify BOC for liability payments to third-party claimants: the former applies without the application of any excess or retention, whereas the latter does not.

21.5 Equitas' fallback when confronted with this argument is that the RMPs, including the obligation to indemnify for defence costs, would only have been triggered once the underlying primary policies (beneath the RMPs, and referred to in the RMPs as "*Separate Insurances*": *see* Schedule D(2) **[Supp/1/16]**), such as the Liberty Mutual Policies,[18] had been exhausted by indemnity payments.[19] The argument appears to be that where such underlying primary insurance applied to a claim, Insurers' liability to pay defence costs was dependent on their liability for indemnity payments because until the underlying cover was exhausted, responsibility for defence costs would be with the underlying insurer; at the point of exhaustion of the underlying, Insurers' liability under the RMPs for defence costs and indemnity payments arose simultaneously. The premise for this argument, however, arises from the words of the Liberty Mutual Policies, and not the RMPs. The words of the underlying policies are not a permissible aid to the construction of the Reinsurances because there is no evidence to suggest Reinsurers saw them at the time of contracting.[20] As the Judge held, and Equitas accepts, the policy seen by Reinsurers at the time of contracting was the RMPs.[21] Equitas has not sought, by way of a Respondents' Notice, to widen the factual matrix available relevant to contractual construction.

21.6 Perhaps more significantly still, the relationship between Insurers' liability under the RMPs for indemnity payments and defence costs cannot be viewed exclusively through the lens of the present dispute. The Judge did not have before him, and this Court does not have before it, the terms of any underlying primary policies other

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18 The Liberty Mutual Policy for the 1981/1982 policy year is at **[Supp/3/37-113]** and a description of the Liberty Mutual Policies is included at para. 11.5 of the Appellants' first appeal skeleton **[Core/4/24]**.

19 *See* also Judgment, [29] **[Core/8/100-101]**.

20 Likewise, there is nothing to suggest that the Reinsurers knew the terms of the policies mentioned in the "INFORMATION" section of the Reinsurances **[Core/19/234]**, or whether those policies included defence costs liability at all, and if so, whether such liability was within or outside their limits.

21 Judgment, [20]; Equitas' appeal skeleton, para. 56(d) **[Core/8/97], [Core/5/61]**.

than the Liberty Mutual Policies. It cannot be assumed that they were on terms similar to the Liberty Mutual Policies or that they even provided defence costs cover. Moreover, Schedules D(2) and D(3) of the RMPs expressly envisage that there may be claims where there is no underlying primary insurance, where Insurers' liability for indemnity payments would be subject to the application of a retention, but where the RMPs would provide defence costs cover *from the ground up*.

22. **The Appellants will accordingly rely, as they did below, on an alternative argument on construction that the Reinsurances provide defence costs cover from the ground up, without the application of any excess**. If the operation of the "Limit" provision in the Reinsurances is to be dictated by Schedule D in the RMPs, as Equitas contends, then defence costs are to be covered on the same terms as in the RMPs.

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