Appeal No. CA-2026-000125
Claim No: LM-2024-000252

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 COMMERICAL COURT (KBD)

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 only 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/Applicants

-and-

EQUITAS INSURANCE LIMITED

Defendant/Respondent

RESPONDENT'S SUPPLEMENTARY SKELETON ARGUMENT

A. Introduction

1. This supplementary skeleton argument is filed on behalf of the Respondent ("**Equitas**"), with the Court's permission, pursuant to PD52C, para. 32 and para. 4.58 of the Court of Appeal Guide. It is filed to respond to the arguments raised by the Appellants in their supplementary argument dated 22 July 2026, namely:

    a. The Appellants' case as to the true meaning and effect of excess of loss reinsurance and the allegedly confused reliance by Equitas on the fact that the Reinsurances expressly incorporated the terms of the Royal Master Policies ("**RMPs**").

    b. The Appellants' alternative case that, if the excess and limit under the Reinsurances are concerned with indemnity payments only, Equitas allegedly agreed to reinsure

all of the Appellants' exposure to defence costs without any excess or financial limit i.e. from the ground up

2. In summary, Equitas' response to these arguments is as follows:

   a. The Appellants' additional arguments focus myopically upon the excess of loss nature of the Reinsurances. However, the Reinsurances cannot be construed as excess of loss reinsurance in isolation: they are excess of loss *and* facultative *and* back-to-back reinsurances and must be construed accordingly. Equitas' reliance on the incorporation of the terms of the RMPs in the Reinsurances is appropriate, necessary and not at all confused.

      i. The Reinsurances were facultative and back-to-back, and therefore were intimately tied to the same liability incurred by the Appellants on the inwards policies, the RMPs. In respect of that liability, the Reinsurances then provided excess of loss reinsurance.

      ii. The Reinsurances provided cover for "*General Third Party Liability… as per original policy indemnifying B.O.C. International plc*" and were to "*follow original terms*", which the Reinsurers had seen at placement (agreed by the parties to be the RMPs).[1]

      iii. Under the RMPs, the Appellants were separately obliged to pay defence costs in addition to the indemnity limit of £20 million: see Schedule D(3) {SB/1/16}.

      iv. In the same way, due to the facultative and back-to-back nature of the Reinsurances, Equitas was likewise liable to cover defence costs "outside" (i.e., in addition to) the limit of £16 million excess £4 million in the Reinsurances.

      v. Accordingly, the limit and excess under the Reinsurances were concerned with indemnity payments only, and not defence costs.

   b. The Appellants' alternative case that Equitas is liable for defence costs from the ground up is a *non sequitur* and is simply wrong.

[1] See the "CLASS" provision at {CB/19/233} and the "GEN.CONDS" provision and the "INFORMATION" provision at {CB/19/234}.

i. This alternative case is one of construction only. No pecuniary claim for defence costs from the ground up under the Reinsurances is advanced by the Appellants. Instead, this alternative case is said to be advanced "*to highlight the Respondent's failure to address the logical consequence of the Reinsurances being "back-to-back" with the underlying policies.*".[2] There was no such failure: see paragraphs 65 and 66 of the Respondent's Appeal Skeleton Argument.

ii. In any event, liability for defence costs outside the limit of £16 million under the Reinsurances does not mean that such liability is from the ground up under the Reinsurances. As addressed by Equitas at first instance and in its Appeal Skeleton and as the Judge held, Equitas' liability to pay defence costs is parasitic upon its exposure to indemnity liability: [29] {CB/8/100-101}. Equitas' liability to pay defence costs begins and ends with its liability to make indemnity payments in excess of £4 million and up to the limit of £16 million.

iii. Without prejudice to the foregoing, even if the Appellants' alternative case is correct, it is premised on the £4 million excess and £16 million limit being concerned with indemnity payments only (as contended for by Equitas and held by the Judge). No separate claim is advanced by the Appellants for such defence costs "ground up." Accordingly, the Appellants' appeal must be dismissed.

3. This supplementary skeleton uses the same abbreviations and defined terms as employed in Equitas' first appeal skeleton.

B. The True Meaning and Effect of the Reinsurances

4. In their supplementary skeleton, the Appellants place disproportionate weight on the fact that the Reinsurances are written on excess of loss terms. This is not an answer to the question of construction raised on this appeal as to whether the attachment point is eroded only by payments of indemnity or also by payments in respect of defence costs.

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[2] See the Appellants' application for permission to file and serve their supplementary skeleton argument dated 17 July 2026 in which the Appellants state in paragraph 12.ii.: "*The Appellants do not, for the avoidance of doubt, advance a pecuniary claim for defence costs from the ground up.*" {SB/9/308}.

a. The question of construction in this appeal cannot be addressed in the abstract or by general statements concerning excess of loss reinsurance. Nor can it be answered by isolating a single provision in the Reinsurances from the other provisions of the Reinsurances or from the RMPs. The Reinsurances are on excess of loss terms because of the Limit provision, but that does not elevate the excess of loss terms or the Limit provision above all else, as the Appellants attempt to do in their supplementary skeleton.

b. As the Judge recognised in [10] {CB/8/92-93}, the Reinsurances are facultative, excess of loss policies, back-to-back with the respective RMPs.[3] The Appellants cannot cherry-pick the excess of loss characteristic of the Reinsurances that allegedly supports their construction of the erosion of the £4 million excess whilst ignoring the Reinsurances' other equally significant characteristics.

c. In any event, the general statements of principle regarding excess of loss reinsurance relied upon by the Appellants in paragraphs 11 and 12 of their supplementary skeleton do not lead to the conclusion that the Appellants' construction of the Limit provision is correct. They simply beg the question as to what risk has been transferred to reinsurers or what is the liability arising on the primary insurance which Reinsurers are to indemnify. That question can only be answered by considering the terms of the Reinsurances and the RMPs in the round.

5. Further, the question of construction on this appeal cannot be narrowed down to the meaning of the words "*any one loss or series of losses arising out of one occurrence*" in the Limit clause in isolation.[4] Rather, the Limit clause is to be construed with regard to the facultative and back-to-back nature of the Reinsurances which themselves are to be construed as a whole (as the Appellants themselves assert in paragraph 15.4(c) of their supplementary skeleton).

6. Pertinently, as regards the facultative nature of the Reinsurances:

a. The Reinsurances are specific to the original policy indemnifying BOC International, as set out in the "CLASS" provision {CB/19/233}. See paragraph 9

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[3] The Appellants' criticism in paragraph 2 of their supplementary skeleton that the Judge failed to recognise that the essence of excess of loss reinsurance is to provide indemnity against losses suffered by the reinsured is not understood in circumstances where the Judge carefully analysed the losses suffered by the Appellants in [10] to [12] and [22]: {CB/8/92-95};{CB/8/97}.

[4] As asserted in paragraph 15 of the Appellants' supplementary skeleton.

of Equitas' Appeal Skeleton.

b. The Reinsurances were brokered, placed and written specifically in respect of the RMPs, i.e. the "*original policy*" which was seen by Reinsurers, as recorded in the "INFORMATION" provision of the Reinsurances {CB/19/234}.

c. Notwithstanding the Appellants' acceptance in paragraph 25 of their Appeal Skeleton that the "Class" provision defines what is covered under the Reinsurances {CB/4/29}, their supplementary skeleton myopically focuses (i) on the nature of excess of loss reinsurance in the abstract, and then (ii) on a few words in the Limit provision of the Reinsurances. But, in so doing, the Appellants thereby ignore the facultative and back-to-back nature of the Reinsurances.

d. Thus, the Appellants' arguments disregard the express provisions in the Reinsurances that what is covered is "*as per original policy*" i.e. the RMPs, and that the Reinsurances are to "*follow original terms, conditions*". In other words, the Reinsurances cover the Appellants' obligation under the RMPs to indemnify BOC up to £20 million *and* the separate obligation to pay defence costs in addition. Reinsurers were well aware of these separate obligations from the copy of the original policy seen by Reinsurers at placement.[5]

e. Indeed, in the absence of defence costs being covered in addition to the £20 million limit under the RMPs and the facultative nature of the Reinsurances, there would be no cover for defence costs at all under either the RMPs or the Reinsurances.

f. The cover under the Reinsurances is, of course, subject to the Limit provision and other provisions of the Reinsurances. Therefore, Reinsurers are not liable under the Reinsurances unless and until the £4 million excess provided by the Limit provision has been eroded. However, the Limit provision is not a trump card which enables the "CLASS" provision or any of the other provisions in the Reinsurances to be ignored or sidelined when determining what erodes the £4 million excess.

g. "*Any one loss or series of losses"* referred to in the Limit provision cannot be construed without regard to the specific risk reinsured under the Reinsurances, i.e., the Appellants' liability for indemnity payments to BOC up to a limit of £20 million with liability for defence costs in addition.

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[5] Again, see the "INFORMATION" provision at {CB/19/234}.

h. The Limit provision in the Reinsurances of £16 million "*any one loss or series of losses arising out of one occurrence*" excess of £4 million "*any one loss or series of losses arising out of one occurrence*" (which reflects the £20 million limit under the RMPs) must be construed accordingly.

i. In the premises, the limit of £16 million in the Limit provision is £16 million of indemnity payments with any accompanying defence costs in addition and the excess of £4 million is similarly £4 million of indemnity payments with any accompanying defence costs in addition.

j. The Appellants' attempt to construe "*loss*" in the Limit provision in the abstract and in isolation must be rejected. Equitas refers to and relies upon paragraph 29 of its Appeal Skeleton.

7. As to the back-to-back nature of the Reinsurances:

a. The Appellants accept that the Reinsurances are back-to-back with the RMPs, but seek to draw a distinction between the scope of cover and the extent of cover under the Reinsurances. This is a false dichotomy in light of the terms of the Reinsurances.

b. In the Appellants' supplementary skeleton, the Appellants again fail to recognise the nuances of the transfer of risk to the Reinsurers under the Reinsurances. As addressed in paragraph 7 of Equitas' Appeal Skeleton, it is not uncommon for third party legal liability policies to extend cover to defence costs. However, whether such cover is "inside" or "outside" the limit of indemnity depends upon the policy in question. Reinsurance on a back-to-back basis will reflect at the reinsurance level the position of the underlying policy.

c. As held by the Judge and addressed in Equitas' Appeal Skeleton, given the back-to-back nature of the Reinsurances with the RMPs, cover for defence costs is "outside" or in addition to the £16 million limit. Thus, the Limit provision in the Reinsurances is concerned with indemnity payments only, and not defence costs. Accordingly, the attachment point of the Reinsurances is eroded by payments of indemnity for claims under the original insurance only.

8. As to paragraph 15 of the Appellants' supplementary skeleton:

a. The terms "*loss*" or "*losses*" in the Limit provision cannot be construed in a blinkered fashion; instead, they need to be given meaning in the context of a facultative and back-to-back transfer of risk pursuant to the Reinsurances. In those circumstances, "*loss"* and *"losses"* can sensibly mean indemnity payments only, not defence costs. Equitas repeats and refers to paragraph 29 of its Appeal Skeleton.

b. The Appellants' "commercial sense" argument against such a construction is flawed for the reasons set out in paragraphs 60 to 66 of Equitas' Appeal Skeleton and set out below:

    i. As to the structuring of excess of loss reinsurance, the question in this appeal is one of construction of the Reinsurances. Any alleged commercial difficulty in layering cover resulting from the proper construction of the Reinsurances is not a reason to depart from that proper construction. In any event, there is a fixed limit to Reinsurers' liability for indemnity payments, namely £16 million. The parasitic liability for defence costs in respect of such indemnity payments without financial limit simply reflects the Appellants' liability under the RMPs to pay unlimited defence costs in addition to the indemnity limit of £20 million unless and until the £20 million indemnity limit is eroded.

    ii. As to the supposed disincentive to ensure the effective defence of large claims, the insurers'/reinsureds' consent could not be unreasonably withheld, thereby mitigating any alleged moral hazard. In any event, the Appellants ignore the flipside of this point: that it is in the insurers'/reinsureds' interests to consent to BOC defending claims successfully since that would reduce the Appellants' indemnity exposure under the RMPs. Whilst the cover under the Reinsurances may be a factor in the insurers'/reinsureds' decision whether or not to consent to defence costs, it is not the only factor and to suggest otherwise is overly simplistic and not grounded in commercial reality.

    iii. As to the Claims Cooperation Clause, Equitas does not accept that its construction of the Limit provision is inconsistent with that clause. As the Judge held in [25] {CB/8/98}, "*loss*" in the Claims Cooperation Clause refers to the loss in respect of which the duty to indemnify arises,

not a loss consisting of the costs of defending a claim in respect of such loss. Once again, the example given by the Appellants is the result of the facultative and back-to-back nature of the Reinsurances. If the Appellants wanted a different outcome, they ought to have provided for such in the express terms of the Reinsurances. It should also be noted that if the example given in paragraph 15.4(c)(ii) of the Appellants' supplementary skeleton is tweaked so that the £20 million claim against the underlying insured succeeds, on Equitas' approach Reinsurers would be liable for a very substantial sum: £16 million of that claim and the accompanying defence costs in addition to the £16 million limit. As the Judge observed at [30], "*[t]hings could turn out disadvantageously for either party.*"

iv. Further, the Appellants' construction of the Claims Cooperation Clause as giving Reinsurers an interest in controlling decisions to litigate in respect of claims if the indemnity payments and defence costs may exceed £4 million introduces uncertainty as to when the primary insurers/reinsureds must give notice to Reinsurers in respect of a claim for indemnity below £4 million. This is because the likely amount of defence costs would have to be estimated to decide whether that "*potential cost*" may exceed £4 million. It would also likely result in Reinsurers being involved in the majority of claims at the outset if the estimated amount of potential defence costs results in the "*potential cost*" possibly exceeding £4 million. This does not make commercial sense.

v. In contrast, as the order granting permission to appeal recognised, the Judgment offers "*a sensible and coherent interpretation of the Reinsurances as facultative excess of loss contracts*" {CB/11/147}. There is no lack of commercial sense in Equitas' construction.

C. The Appellants' Alternative Case: ground up defence costs cover under the Reinsurances

9. The Appellants' alternative case is that if, as Equitas submits and the Judge held, the excess and limit provisions in the Reinsurances refer to indemnity payments only, it

follows that there is no excess or financial limit applicable in respect of defence costs and therefore there is unlimited defence costs cover from the ground up under the Reinsurances. This is a *non sequitur* and is simply wrong. In any event, this alternative case is premised on the excess and limit provisions in the Reinsurances referring to indemnity payments only; if that is correct (as Equitas contends), this alternative case, even if right, provides no comfort to the Appellants as they have not advanced a claim for such defence costs. As such, the appeal still fails.

10. The thrust of the Appellants' alternative case is that defence costs liability is not parasitic on indemnity costs liability under the RMPs or under the Reinsurances. This ignores the wording of the RMPs and, once again, ignores the facultative and back-to-back nature of the Reinsurances. Specifically, the Appellants ignore the fact that cover under the RMPs for defence costs is "*in addition*" and the Reinsurances provide back-to-back cover on the same basis.

11. As to paragraph 20 of the Appellants' supplementary skeleton and the transfer of risk under the Reinsurances:

    a. The transfer of risk is addressed in Equitas' Appeal Skeleton, in particular in paragraphs 17 to 22 and 53 to 56. In summary:

        i. By the express terms of the Reinsurances, namely the "CLASS" provision providing that the class of cover is "*as per original policy*" and the "GEN. CONDS." provision providing that they "*follow original terms, conditions*", the Reinsurances reinsure the Appellants' liability under the RMPs on back-to-back terms.

        ii. The Appellants' liability consists of (i) liability for indemnity payments up to a certain limit with (ii) liability for defence costs in addition to that liability. As addressed further below in response to paragraph 21 of the Appellants' supplementary skeleton, the liability for defence costs under the RMPs is "*in addition*" to the liability for indemnity payments, thus necessarily making that liability for defence costs parasitic upon the liability for indemnity payments.

        iii. By the express terms of the Limit provision, the Appellants retain £4 million of their liability for indemnity payments, but also their liability for defence costs which accompanies that liability. Once the attachment

point of £4 million is exhausted by indemnity payments, Reinsurers are liable for up to £16 million of indemnity payments with liability for defence costs in addition to that liability.

b. This construction of the Reinsurances is not contrary to commercial sense, as has already been addressed in Equitas' Appeal Skeleton and above.

c. As to the specific point raised in paragraph 20.2(b) of the Appellants' supplementary skeleton that Equitas' submission would require a micro-analysis of defence costs bills, this point is overstated and inaccurate. Schedules B and C to the Appellants' Response to the Request for Further Information and Response 48 identify that the £4 million excess was exhausted by indemnity payments on 30 November 1987 in respect of the policy year 1983/84, being the only policy year in which this occurred {SB/5/229}. Accordingly, any defence costs payments made after 30 November 1987 would be for Reinsurers' account (unless and until the £16 million indemnity limit is exhausted). No micro-analysis of defence costs bills would be required. Instead, all that would be required is the identification of the amount of defence costs paid after 30 November 1987. Those defence costs incurred after that date would be for Reinsurers' account.[6] Indeed, the same analysis of defence costs bill is required where they are indemnified "inside" of the limits: one would still need to identify which indemnity payments and defence costs bills (or part thereof) fall within that which is retained and that which accrues to the next layer.

12. As to paragraph 21 of the Appellants' supplementary skeleton and the liability for defence costs under the RMPs:

a. The reference in Equitas' Appeal Skeleton to defence costs being payable "*in tandem*" with the obligation to make indemnity payments under the RMPs reflects the fact that the liability to pay defence costs (i.e., the duty to defend) subsists only until the liability to make indemnity payments ceases and/or is exhausted. Although the liability for defence costs is separate from the liability for indemnity payments which are provided by different provisions in Schedule D, that duty to defend is not independent from the liability for indemnity payments under the RMPs. Put

[6] It is also possible for defence costs to be covered on a *pro rata* basis to the amount of the indemnity payment covered by the limit as a matter of market practice or as a result of an agreement between the parties. Such a *pro rata* approach would also not require a micro-analysis of defence costs bills.

another way, when the primary liability to provide an indemnity ceases and/or is exhausted, the concomitant cover for defence costs also ends. To that extent, these liabilities therefore go hand in hand or, as the Judge held, the liability for defence costs is "*parasitic*" on the liability for indemnity payments. If there is no exposure to make indemnity payments, no defence costs liability can arise "*in addition*".

b. The Appellants are therefore correct that the duty to defend could be triggered and give rise to a liability to cover defence costs even if there is ultimately no liability, and thus no indemnity is payable, i.e., because the claims were successfully defended. The point remains, however, that the obligation under the RMPs to pay such defence costs subsists only as long as the obligation to indemnify has not been exhausted and/or otherwise ceased.

c. As stated in paragraph 21.1 of the Appellants' supplementary skeleton, this is indeed reflected in the Reinsurances: properly transposed, this means that there is an obligation to reimburse defence costs even if no indemnity payment has (yet) been made. That does not mean, however, that the Reinsurances cover defence costs ground up. Just like excess insurers providing coverage in a tower of direct insurance, each layer may provide defence costs outside the limits which is triggered only when that layer's obligation to indemnify is engaged. Until such time, the liability for defence costs rests with the layer below. Similarly, until the Appellants *qua* reinsured have exhausted their obligation to indemnify which they have retained under the Reinsurances (i.e., £4 million), they retain the liability to pay defence costs. As an excess of loss reinsurance, it is only when that obligation ends or is exhausted that the Reinsurance responds to pay £16 million xs £4 million *and* any defence costs incurred *after* the Appellants' retained losses of £4 million in indemnity payments have been exhausted.

d. Further, the Appellants appear to have misunderstood paragraph 26 of Equitas's Appeal Skeleton. The reference to the indemnity provided under the RMPs being applied "ground up" refers to both indemnity payments and defence costs. The reductions to the amount of indemnity provided under the RMPs in respect of indemnity payments pursuant to Schedule D(2) does not alter this "ground up" analysis; it simply makes the ground up liability for indemnity payments potentially subject to certain reductions. Nor does Schedule D(2) undermine the

analysis of liability for defence costs being parasitic on the liability for indemnity payments. The relationship between the two liabilities remains.

e. As to the Appellants' analysis of Schedule D(5) of the RMPs, this continues to ignore the obvious point referred to above that the relationship between the liability for defence costs and the liability for indemnity payments is parasitic or inter-dependent. If there is no potential liability for indemnity payments under the RMPs, there is nothing to which the liability for defence costs can be "*in addition*".

f. Finally, the relevance of paragraphs 21.5 and 21.6 of the Appellants' supplementary skeleton is not understood in circumstances where the parasitic nature of the liability for defence costs on the liability for indemnity payments under the RMPs is clear for the reasons set out above. The transfer of risk under the Reinsurances is specific to the RMPs as the "*original policy*" seen at placement and followed by the terms and conditions of the Reinsurances. The terms of any underlying primary policies do not affect that analysis of the RMPs or the Reinsurances. Notwithstanding, the parasitic nature of the obligation to cover defence costs is also entirely consistent with the underlying primary policies which are available as a sense check to this analysis, namely the Liberty Mutual Policies.

13. In the premises, the Appellants' alternative case on construction should be rejected and, in any event, the appeal should be dismissed.

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