Royal & Sun Alliance Insurance Limited & Ors v Equitas Insurance Limited [2025] EWHC 2704 (Comm)

Helpful High Court guidance in relation to reinsurance contract issues

In *Royal & Sun Alliance Insurance Limited & Ors v Equitas Insurance Limited* [2025] EWHC 2704 (Comm) (see the judgment here) the High Court provided useful guidance on a number of issues which arose under excess of loss reinsurance of APH risks, but are also relevant more generally. Of particular interest is the Court's consideration of whether defence costs eroded the applicable excess under the reinsurance, the interaction between the Claims Cooperation Clause and the Follow the Settlements Clause, the evidential standards required to dislodge a settlement under a follow provision and the principles governing the award of compound interest.

Background

The dispute arose out of long-tail US bodily injury litigation concerning asbestos and welding-fume exposures linked to products distributed by BOC Group during the 1970s and 1980s. RSA had insured BOC under a substantial programme that included layers requiring RSA to indemnify BOC for bodily injury liabilities and, separately, to fund defence costs associated with those claims. In the early 2000s, these liabilities were finalised through a significant settlement arrangement known as the Toxic Torts Settlement Agreement ("TTSA"), which resolved thousands of long-running claims in US State Courts.

RSA's aggregate exposure under the TTSA exceeded £20 million. Sitting above RSA's participation were five excess of loss reinsurances written between 1981 and 1985 by a number of Lloyd's Syndicates, whose liabilities were later assumed by Equitas. RSA sought approximately £3.76 million from Equitas under these reinsurances. Equitas denied liability.

The dispute centred on the following four key issues:

(1) Whether defence costs count towards the reinsurance excess before cover is triggered.

(2) Whether Equitas was bound to follow RSA's settlements under the TTSA.

(3) Whether RSA had taken all proper and businesslike steps in reaching the settlement.

(4) RSA's entitlement to interest.

1. Whether Defence Costs reduce the Excess

RSA argued that both indemnity payments and defence costs should count toward exhausting the £4 million excess in the reinsurance. RSA argued that this reflected commercial common sense - the costs were compelled under the underlying policies, were directly connected to the insured event, and were effectively unavoidable.

Equitas argued the opposite - only indemnity payments erode an excess in an Excess of Loss Treaty unless the wording clearly provides otherwise. The reinsurance wording used "loss" in a manner consistent with indemnity only, and the structure of both the underlying insurance and the reinsurance treated defence costs as distinct and additional. Equitas also pointed out that in the BOC programme, the £20 million indemnity limit was separate from unlimited defence costs and that separation carried through to the reinsurance.

On this issue, the Court agreed with Equitas, holding that defence costs do *not* erode the excess. The underlying insurance policies expressly treated indemnity limits and defence costs separately; defence costs were "in addition". The reinsurance replicated that structure: both the £4 million excess and the £16 million cover related only to indemnity payments. Excess-of-loss reinsurance is traditionally structured on indemnity exhaustion, unless stated otherwise. The wording did not provide any basis for treating defence costs as part of the erosion calculation.

2. Whether Equitas was bound to follow RSA's Settlements

At the heart of the second issue was whether Equitas was contractually bound to follow RSA's settlement, including the 47% allocation to the 1981–1985 years. The reinsurance policies contained a Follow the Settlements Clause, obliging reinsurers to indemnify the reinsured in respect of settlements made "*in the ordinary course of business"* and "*in a businesslike and proper manner".*

Equitas did not contest the existence of the Follow the Settlements Clause. Instead, it sought to limit its effect by asserting that the Claims Cooperation Clause imposed pre-conditions before reinsurers became bound by any settlement. Equitas' case was that the Claims Cooperation Clause gave reinsurers the contractual right to influence RSA's conduct of the US litigation and, crucially, the settlement of that litigation. While the Clause did not contain express *"no settlement without consent"* wording, Equitas argued that its commercial purpose was to ensure reinsurer oversight of major developments. The reinsurer stressed that the TTSA was a large, complex and multi-year mass-tort settlement; in such a context, cooperation implied active dialogue, early notice and reinsurer approval before RSA made binding concessions.

Equitas relied on the logic underpinning earlier authorities such as *ICA v Scor*, where a broad Cooperation Clause curtailed the effect of a Follow Clause. Though the wording here was different, Equitas contended that the same commercial expectation applied: the cedant should not be able to bind the reinsurer through a major settlement without giving reinsurers meaningful participation rights.

RSA, however, argued that on a precise and natural reading, the Clause addressed only the commencement of litigation or procedural steps in claims handling, not RSA's settlement of the claims in good faith. RSA pointed to the absence of language requiring consent or approval before settlement, a sharp contrast to the detailed and strict Cooperation Clause considered in *ICA v Scor*. RSA further argued that the Follow Clause would be neutered if reinsurers could invoke a broadly-phrased Cooperation Clause as a veto right. Excess of loss reinsurers price their business on the assumption that cedants settle large volumes of underlying claims autonomously.

The Court found unequivocally that Equitas was bound to follow the TTSA settlement. Critically, the Judge held that the Claims Cooperation Clause did not restrict RSA's ability to settle, because it applied only to the conduct of litigation and did not impose a requirement for reinsurer consent

prior to settlement. This was a question of contractual construction: nothing in the Clause displaced RSA's primary settlement authority or the follow settlements obligation.

3. Whether RSA took all proper and businesslike steps in reaching the Settlement

Equitas argued that RSA had acted outside the bounds of proper and businesslike behaviour by adopting an unreasonable interpretation of the applicable New Jersey law and failing to obtain information relevant to decisions regarding settlement and consequently agreeing to bear an unreasonably high proportion of BOC's losses. Equitas' case was that a prudent insurer would have pressed the causation and allocation points more firmly and would have approached the exposure analysis with greater scepticism. Had RSA done so, Equitas contended, a materially lower figure could have been achieved. Equitas therefore maintained that it was not obliged to follow the settlement reached.

RSA rejected that characterisation. Its evidence demonstrated that it had sought and relied on specialist legal advice. RSA argued that the advice it received reflected reasonable, competent legal opinion based on the authorities then available. The purpose of the TTSA was to crystallise liabilities and avoid the enormous cost and uncertainty of litigating allocation issues in the US Courts — a legitimate and businesslike objective.

The Judge noted that an allegation of failure to take proper and businesslike steps is tantamount to an allegation of professional negligence. It held that the reinsurer bears the burden of showing that the cedant's conduct fell outside the permissible range. Having heard expert evidence on New Jersey law, the Judge held that Equitas had not discharged that burden. The Judge noted that RSA had followed a methodical process: it took appropriate advice, assessed the factual and legal position with care, and reached a settlement that a reasonable insurer could have regarded as prudent. The Judge also placed weight on the fact that reinsurers had, during the relevant period, been kept apprised of negotiations and had expressed no objection.

4. Entitlement to Interest

RSA sought interest running from the dates on which losses were incurred, applying the statutory right under section 35A of the Senior Courts Act. Given the commercial nature of the dispute and the decade's long delay in payment, RSA argued that compound interest was appropriate to reflect the loss.

Equitas resisted the award of interest for long periods, pointing to delays in RSA fully particularising its losses during and after the Standstill Agreement. Equitas argued that it should not be penalised for delays attributable to RSA and that simple interest, if any, should be preferred.

As to the timing, the Judge awarded interest from the date of each respective loss. The basic rule that interest runs from the date of the loss is neither arbitrary nor a mere matter of technical and legal analysis. It reflects the fact that the insurer (or reinsurer) has undertaken an obligation to hold the insured harmless against the loss insured against and is in breach in failing to pay at the date of the loss. That is important, because interest is not penal, but compensatory.

As to the rate of interest, the Judge found that there is no default rule that, in a commercial case, compensation for being kept out of one's money will be awarded on the basis of the cost of

commercial borrowing, i.e by way of compound interest. The legal position is simply that compensation on that basis will be awarded if the facts pleaded and proved are sufficient to justify the inference that such an award does indeed reflect the claimant's actual loss. In the present case, RSA simply claimed compound interest at common law or, alternatively, simple interest under section 35A of the Senior Courts Act 1981. No particular facts were pleaded in support of the claim for compound interest. The Judge accepted that insurance markets are an area in which actual losses may more commonly be reflected by compound interest than is the case in other areas of activity. However, he found that it was not sufficient for a claimant simply to assert that it operates in the insurance market. In the circumstances, the Judge awarded simple interest at the rate of 2% above the Bank of England base rate from the date of each respective loss.

CPB Comment

Overall, the decision reflects a careful balancing of contractual rights, professional judgement and commercial pragmatism. It provides clear guidance for insurers, reinsurers, and their legal advisors on a number of important issues.

Precise drafting governs outcomes. Excess erosion must be grounded in the policy wording. Defence costs do not erode an excess unless that is the meaning of the words used in the reinsurance contract (read with the original insurance) in question. The traditional distinction between indemnity and defence costs remains robust. Cooperation Clauses will not be judicially expanded to provide reinsurers with latent approval rights. If reinsurers want a right to approve settlements, the contract must say so clearly.

Evidence is key. The Court confirmed the high bar reinsurers must clear before they can escape a follow the settlements obligation. Allegations resembling negligence claims will fail unless clearly evidenced. Claims for compound interest also require proof - unless supported by evidence of actual financial loss, the Courts will default to simple interest, even in capital-intensive sectors.

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Any questions

If you have any questions regarding the issues raised in this article, please get in touch with Stephen or Dean.

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