Neutral Citation Number: [2026] EWCA Civ 40

Case No: CA-2025-000586

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Nigel Cooper KC (sitting as a Deputy High Court Judge)
[2025] EWHC 77 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 February 2026

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE NUGEE
and
LORD JUSTICE MILES

- -

Between :

TYSON INTERNATIONAL COMPANY LTD	**Claimant/ Respondent**
- and -	
GIC RE, INDIA, CORPORATE MEMBER LTD (sued as the sole corporate member for Syndicate 1947 at Lloyd's of London for the 2021 and 2022 years of account)	**Defendant/ Appellant**

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Peter MacDonald Eggers KC and Tim Jenns (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
Timothy Killen and James Partridge (instructed by **Reed Smith LLP**) for the **Respondent**

Hearing date: 30 October 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the Commercial Court concerns the construction and effect of a clause in agreements for reinsurance.

2. On 30 June 2021 the Appellant, GIC Re, India, Corporate Member Ltd (**"GIC"**), signed two reinsurance agreements on the Market Reform Contract (**"MRC"**) form reinsuring the Respondent, Tyson International Company Ltd (**"TICL"**). The agreements, variously referred to as "reinsurance slips" or "MRCs" and which I will refer to as **"the MRCs"**, contained a clause providing for English governing law and exclusive English jurisdiction.

3. On 9 July 2021 GIC agreed reinsurance agreements on the Market Uniform Reinsurance Agreement (**"MURA"**) form covering the same reinsurance. These agreements, referred to as "Facultative Certificates", and which I will refer to as **"the Certificates"**, contained a New York arbitration clause and a clause providing for New York governing law. They also contained what has been referred to as the "**Confusion Clause"** which read:

> "RI slip to take precedence over reinsurance certificate in case of confusion".

It is common ground that the reference to "RI slip" is to the relevant MRC, and that the reference to the "reinsurance certificate" is to the Certificate itself.

4. In the judgment under appeal, Mr Nigel Cooper KC, sitting as a Deputy High Court Judge (**"the Judge"**), held that the effect of the Confusion Clause was to give precedence to the terms of the MRCs in the event that there was confusion or inconsistency between the terms of the MRCs and the terms of the Certificates. He also held that there was such inconsistency, the two sets of provisions being irreconcilable, and hence that the jurisdiction clause in the MRCs prevailed over the arbitration agreement in the Certificates.

5. GIC appeals his decision with the permission of Popplewell LJ. We had the benefit of well-argued submissions from Mr Peter MacDonald Eggers KC, who appeared with Mr Tim Jenns, for GIC, and from Mr Timothy Killen, who appeared with Mr James Partridge, for TICL.

6. For the reasons that follow, I prefer those of Mr Killen and would dismiss the appeal.

Facts

7. TICL is a Bermudan captive insurance company. It provided insurance under a policy (**"the Captive Policy"**) issued to its affiliate, Tyson Foods, Inc (**"Tyson Foods"**), a company registered in Arkansas. Tyson Foods' activities include the processing, sale and marketing of chicken, beef and pork products and it owns a large property portfolio. The Captive Policy was agreed on 5 July 2021 and provided cover against all risks of direct physical loss of or damage to property situated in the United States and Puerto Rico for the period from 1 July 2021 to 1 July 2022. Clause 38 provided that it was governed by Arkansas law.

8. TICL entered into reinsurances with a number of reinsurers, including GIC and Partner Reinsurance Europe SE (**"Partner Re"**). GIC is the sole corporate member for Lloyd's of London Syndicate 1947. It wrote separate reinsurance of 10% of two layers, namely under Policy No PRPNA2104091 $25m in excess of $175m, and under Policy No PRPNA2104667 $75m in excess of $225m (all references to $ are to US $).

9. On 30 June 2021 GIC signed the MRCs, being two agreements with those policy numbers on the MRC form reinsuring TICL against all risks of direct physical loss and damage as defined in the Captive Policy. They were in similar form (apart from the relevant layers and premiums) and each contained a clause sidenoted "**Choice of law & jurisdiction**" as follows:

> "This Reinsurance shall be governed by and construed according to the Laws of England and Wales. The Courts of England and Wales shall have exclusive jurisdiction of the parties hereto on all matters relating to this Insurance."

10. On 9 July 2021 GIC agreed the Certificates, being two reinsurance agreements or Facultative Certificates on the MURA form covering the same subject matter as the MRCs and with the same policy numbers. Again they were in similar form to each other apart from the layer concerned and premium. The first page of each gives the policy number, and is then headed "Agreement of Facultative Reinsurance (the "Agreement")" which is followed by "Declarations". It then sets out details of the Reinsured and Reinsurer, and continues:

> "Reinsurers have made the following amendments to this Reinsurance Certificate:-
>
> 1) Excluding ex gratia, without prejudice payments and follow the fortunes/settlement (if applicable)
>
> 2) RI slip to take precedence over reinsurance certificate in case of confusion
>
> 3) Cancellation/Termination – Subject to no losses"

It is amendment 2 which is the Confusion Clause.

11. The remainder of page 1 and page 2 set out other details such as Coverage and Reinsurance period and the like; under the heading "Terms and Conditions" on page 2 there are listed 30 conditions, the first 26 being described as "Required Terms and Conditions" and the last 4 as "Additional Terms and Conditions (if Applicable)". Conditions 13, 17 and 26 are listed as "Arbitration", "Governing Law and Jurisdiction" and "Entire Agreement" respectively. The terms and conditions are set out from page 3 onwards. Conditions 13, 17 and 26 provide, so far as relevant, as follows:

> "**13. Arbitration**
>
> a. As a condition precedent to any right of action hereunder, any dispute arising out of the interpretation, performance or breach of this Agreement, including the formation or validity thereof, shall

be submitted for decision to a panel of three arbitrators…

f. … Unless the panel agrees otherwise, arbitration shall take place in New York, but the venue may be changed when deemed by the panel to be in the best interest of the arbitration proceeding. Insofar as the arbitration panel looks to substantive law, it shall follow the law of New York in accordance with the dictates of the Governing Law Clause…

17. Governing Law and Jurisdiction

Insofar as the panel looks to the law of a jurisdiction as governing law, it will apply the substantive law of the State of New York without reference to that state's choice or conflict of laws rules; provided, however, that the substantive law of the State of New York shall not be used to supplant or override underlying court or other judicial body decisions concerning the claim(s) at issue.

26. Entire Agreement

This Agreement, including any duly executed written amendments and endorsements thereto, and appendices, schedules or other attachments made part thereof or expressly incorporated by reference, and the Policy and any written endorsements, modifications, alterations and cancellations thereto, and waivers and interpretations thereto but only with respect to the claim in dispute, all as permitted under Reinsurance Agreement Clause 2 and Reinsurance Accepted Clause 3, shall constitute the entire agreement between the Parties and shall supersede all contemporaneous or prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter hereof provided, however, that this Clause 26 shall not override or take precedence over Clause 3 hereof."

12. On 30 July 2021 there was a fire at a poultry rendering plant owned by Tyson Foods in Hanceville, Alabama. TICL accepted coverage for that casualty under the Captive Policy, and provided notice of the loss to GIC. GIC however failed to confirm an indemnity to TICL and by letter dated 3 November 2022 rescinded (or purported to rescind) the reinsurances for alleged misrepresentation in that the values of the Hanceville facility were said to be significantly understated. The question is whether the substantive dispute is to be referred to New York arbitration in accordance with the arbitration clause in the Certificates, or to the English Court in accordance with the English jurisdiction clause in the MRCs.

13. There are certain other background facts that were relied on by one or other of the parties. First, cover was also provided by GIC to TICL for the previous policy year, 1 July 2020 to 1 July 2021; this was for 4% of $100m in excess of $100m. As with the policy year 2021/22, a policy in the MRC form (under Policy no PRPNA2004091) was agreed first (on 30 June 2020), followed by a Facultative Certificate (agreed on 31 July 2020). The latter was endorsed with an endorsement which provided:

"The Agreement of Facultative Reinsurance … between Reinsured

> Tyson International Company Ltd and Reinsurer Lloyd's syndicate 1947 GIC is agreed subject to the terms and conditions of contract PRPNA 2004091."

14. Second, for the 2021/22 policy year, the primary layer of reinsurance was placed with Beazley Syndicates AFB (under Policy No PRPNA2103094) (**"the Beazley Policy"**). The MRCs were expressly subject to the same terms and conditions of the Beazley Policy, including any additions to it prior to the happening of a loss. The effect of incorporating the Beazley Policy was in turn to incorporate the wording of the Captive Policy, as amended by the terms of a General Change Endorsement agreed to the Beazley Policy on 5 July 2021; the General Change Endorsement among other things contained a provision amending the cancellation provisions in the Captive Policy.

15. Third, the Judge had detailed evidence as to the process of placing the reinsurance for the 2021/22 year. Negotiations began on 12 May 2021 when TICL's broker, Lockton Companies LLP (**"Lockton"**), e-mailed GIC various documents. The e-mail stated that "we will provide reinsurance certificates and the updated policy form in due course" which the Judge accepted as showing that the parties anticipated that the MRCs would be followed by Facultative Certificates. Lockton subsequently forwarded the MRCs to GIC which GIC signed on 30 June 2021, thereby allowing Lockton to evidence to Tyson Foods that coverage was in place for 2021/22. Lockton then prepared and sent draft Facultative Certificates on 6 July 2021. Mr Sameer Gupta, an underwriter at GIC, confirmed on 7 July 2021 that he was happy to accept the draft subject to three amendments; Lockton incorporated these, which are the three amendments now listed on page 1 of each Certificate including the Confusion Clause (see paragraph 10 above), and recirculated the Facultative Certificates on 8 July 2021. They were then agreed on 9 July 2021.

Proceedings

16. TICL issued a claim in the Commercial Court on 20 October 2023. On 23 October 2023 it applied without notice for an interim anti-suit injunction. That application was heard and granted by Foxton J (as he then was). He gave a brief judgment in which he referred to the Confusion Clause as a "contractual hierarchy provision", and concluded that it was highly probable that it would not be possible to read the two clauses (the jurisdiction clause in the MRCs and the arbitration clause in the Certificates) together.

17. GIC applied to set aside the interim anti-suit injunction. It also filed an Acknowledgment of Service indicating an intention to contest jurisdiction. TICL applied to make the anti-suit injunction permanent or to continue it pending any jurisdiction challenge by GIC. Both applications came before Mr Christopher Hancock KC sitting as a Deputy High Court Judge on 6 December 2023. He handed down a reserved judgment on 7 February 2024 at [2024] EWHC 236 (Comm), concluding that the appropriate course was to continue the anti-suit injunction until the determination of any challenge by GIC to the jurisdiction of the English Court. In the course of his judgment he said that he was inclined to prefer the submissions of TICL to the effect that the jurisdiction provisions of the earlier agreement took precedence over the arbitration provisions of the later agreement; and that the suggestion that the two should be read together, such that the jurisdiction clause

changed to being a supervisory jurisdiction clause, was "really not sensibly arguable". But he made it clear that his conclusions were not to be regarded as final.

18. GIC then applied for an order that the Court did not have, or should not exercise, jurisdiction to try the claim, and a stay under s. 9 of the Arbitration Act 1996; TICL applied for permanent or continued anti-suit relief. Both applications came before the Judge on 18 July 2024. He handed down judgment on 21 January 2025 at [2025] EWHC 77 (Comm) (**"the Judgment"**). He too preferred the submissions of TICL. As to the meaning of the Confusion Clause the essence of his decision can be found in the Judgment at [100] as follows:

> "When one looks at that language 'RI slip to take precedence over reinsurance certificate in case of confusion', two conclusions follow in my judgment:
>
> i) The confusion being referred to is confusion arising as between the terms of the MRC (it being common ground that the reference to RI slip is a reference to the MRC) and the terms of the Facultative Certificate.
>
> ii) The intention of the clause is that where there is such confusion, it is the terms of the MRC which are to prevail."

As to whether the two clauses could be read together, the Judge concluded that the two sets of provisions were irreconcilable (Judgment at [114]).

19. He therefore concluded that GIC's application failed and granted TICL a permanent anti-suit injunction, there being no reason to hold over determination of this until trial. That was given effect to by his Order dated 21 February 2025 in which he also refused permission to appeal.

Grounds of Appeal

20. Permission to appeal was granted by Popplewell LJ. There are two grounds of appeal:

(1) The Judge erred in his construction of the Confusion Clause. He should have found that it only applied if the relevant provision in the Certificates was uncertain in its meaning, which the New York arbitration agreement was not.

(2) The Judge erred in failing to conclude that the two clauses could be reconciled by giving priority to the later arbitration agreement and reading the English jurisdiction clause as giving the English Court auxiliary or supervisory jurisdiction over the New York arbitration.

The Partner Re litigation

21. Before coming to the grounds of appeal, there is one other matter which it is convenient to refer to here. One of the other excess reinsurers of TICL for the same risk and policy year was Partner Re. There are many close parallels with the present case. As with GIC, Partner Re had provided cover for the previous year 2020/21 (for 10% of $100m in excess of $100m), signing both an MRC on 30 June 2020 and then a

Facultative Certificate in the MURA form on 30 July 2020, the latter being endorsed to the effect that it was agreed "subject to the terms and conditions of contract PRPNA 2003490". For 2021/22 Partner Re provided cover for 10% of $225m in excess of $75m, first signing an agreement in the MRC form on 30 June 2021 and then eight days later a Facultative Certificate in the MURA form on 8 July 2021. On this occasion however the latter did not contain any endorsement making it subject to the MRC (nor did it contain anything similar to the Confusion Clause). TICL made a claim on Partner Re in respect of the fire at the Hanceville facility. Partner Re did not accept the claim and avoided (or purported to avoid) the reinsurance on the grounds that statements of value had been understated. TICL issued a claim against Partner Re in the Commercial Court. Partner Re applied to stay the claim under s. 9 of the Arbitration Act 1996 and TICL applied for an injunction restraining TICL from pursuing arbitration in New York.

22. Both applications were heard by Mr Stephen Houseman KC sitting as a Deputy High Court Judge, and he handed down his judgment on 15 December 2023: *Tyson International Co Ltd v Partner Reinsurance Europe SE* [2023] EWHC 3243 (Comm), [2024] Lloyd's Rep IR 279. He concluded that although (as was common ground) the MRC was and would have been without more a legally binding and full contract of reinsurance (at [20]), it had been superseded by the later Certificate in MURA form which, viewed in isolation, would itself be a binding contract of reinsurance subject to New York law and arbitration (at [26]). However unusual it might be for contracting parties to swap out fundamental terms of a concluded contract by another contract within eight days, that is what they did here (at [55]). Hence the parties agreed to arbitration in New York and the Court was obliged to grant a stay under s. 9 of the Arbitration Act 1996 (at [57]). That made it unnecessary to consider an alternative submission by Partner Re which involved an attempted reconciliation of the English jurisdiction clause in the MRC and the New York agreement in the MURA so that they could operate or dovetail together; but Mr Houseman said that he found this an "extremely challenging" submission given the language of the forum selection clauses (at [58]).

23. TICL appealed to this Court. The appeal was dismissed for reasons given by Males LJ (with whom Asplin and Lewis LJJ agreed): *Tyson International Co Ltd v Partner Reinsurance Europe SE* [2024] EWCA Civ 363, [2024] Lloyd's Rep IR 633 (***"Partner Re (CA)"***). His judgment sheds some interesting light on the background, including the fact that the MRC is the standard form of insurance and reinsurance contract in the London Market; and (by reference to the judgment of Jacobs J in *AIG Europe SA v John Wood Group plc* [2021] EWHC 2567 (Comm), [2022] Lloyd's Rep IR 485) that it was introduced because of weaknesses in the former system where the typical procedure was for a slip, with only brief details, to be prepared first and there was often no policy wording in existence when the contract came into effect. The MRC by contrast contains a schedule setting out the terms of the policy such that when underwriters scratch the documents, the contract is in its entire form (see judgment of Males LJ at [4]). Males LJ also refers to the MURA form as a standard form of insurance policy commonly used in the property reinsurance market in the United States (at [6]).

24. So far as the policy year 2020/21 is concerned, Males LJ considered it clear that the effect of the endorsement on the Facultative Certificate was to ensure that the MRC

and not the MURA remained the governing contractual document; whatever its function may have been the MURA or Facultative Certificate was subject to the MRC so that the terms of the MRC prevailed, including the choice of English law and jurisdiction (at [15]). But for the policy year 2021/22 there was no such endorsement, and Males LJ rejected a submission advanced by Mr Killen for TICL that the Certificate was not contractually binding at all. He agreed with Mr Houseman that although the MRC was a valid contract of reinsurance providing for English law and jurisdiction, it was superseded by the Certificate in MURA form which provided for New York law and arbitration; Mr Houseman was therefore right to stay the English action pursuant to s. 9 of the Arbitration Act 1996 (see at [64]-[65]).

25. Both counsel referred us at various points to parts of Males LJ's judgment in support of their submissions. What he says is interesting and informative, but it can be seen that the actual decision turned on the crucial fact that there was no wording which even arguably provided for the earlier MRC to prevail over the latter Certificate.

Ground 1 – meaning of Confusion Clause

26. With that introduction I can now consider the grounds of appeal. Ground 1 concerns the true construction of the Confusion Clause. I have set it out above but repeat it here for convenience:

> "RI slip to take precedence over reinsurance certificate in case of confusion".

27. There was very little dispute between the parties as to the principles of contractual construction. They have been examined by the Supreme Court in a series of well-known cases and can be considered to have reached a state of well-settled maturity. Mr Killen summarised them as being that one must consider the language used and then ascertain what the reasonable person with all of the relevant background knowledge would have understood the language to mean; and that if there are two possible constructions the Court is entitled to prefer that which is more consistent with business sense. That seems to me a reasonable summary and adequate for present purposes, and it is not necessary to refer to the authorities.

28. There are only two footnote points to that. One was that Mr Killen submitted that the reasonable reader would not be a pedantic lawyer but the ordinary insurer (or reinsured) and reinsurer, who do not typically negotiate their contracts through their lawyers but do it themselves with the assistance of their brokers. I did not understand Mr MacDonald Eggers to dissent from that.

29. The other is that there was a suggestion in Mr Killen's skeleton argument that the Court should show a degree of deference to the decision of the Judge at first instance, and moreover that since the ordinary meaning of words is a question of fact, the Judge's decision on the ordinary and natural meaning of the word "confusion" could only be overturned if no reasonable judge could have reached it. This submission raised some potentially far-reaching and quite difficult issues, and at first blush seems contrary to my understanding of the usual practice which is that although it is true that the meaning of an ordinary English word is a question of fact, and that an appellate Court will always consider with respect what the lower Court has said, the meaning and effect of a contractual provision is (or rather is treated by English law as being) a

question of law on which an appellate Court is not only entitled but obliged to reach its own view. But I do not think anything in the event turns on it in the present case and it is not necessary to pursue the question.

30. Mr MacDonald Eggers' submission is that the Judge was wrong to regard the Confusion Clause as a hierarchy clause applicable in the case of inconsistency between the MRC and the Certificate; it is a clause which applies only if there is a confusion arising out of the terms of the Certificate itself in that they are unclear, uncertain or indistinct. In those very narrow circumstances the clause gives priority to the RI slip or MRC.

31. What this construction would mean in practice became clear in oral argument. Mr MacDonald Eggers said that it would apply, for example, if the Certificate provided in one place for the premium to become due on 1 September and in another on 20 September; having two clauses at odds with each other would be confusing for the reader, and in such a case one would go back to the MRC. So if the MRC provided for a date of 1 September then that would be the answer.

32. But he also accepted two other things. First, that there might be a scenario where the terms of the contract were superficially unclear but where this apparent uncertainty could be resolved by the normal processes of construction. In such a case he accepted that the Confusion Clause would not operate because in the end the apparent difficulty would be resolved without recourse to the MRC.

33. Second, he accepted that if you could not resolve the conflict by construction so that the Confusion Clause did apply, its effect would not be to enable you to use such help as the MRC might give you to choose between the two provisions, but more simply that the terms of the MRC would prevail. So to take the example where the Certificate variously provided for the premium to be due on 1 September and 20 September: if the MRC provided for it to be due on 15 September, then that would displace *both* provisions in the Certificate such that the premium would indeed be due on 15 September. Or, to adapt another example referred to in argument, if the Certificate provided in one place that it was to be governed by Arkansas law, and in another by New York law, such that it was not possible to choose between them in accordance with normal techniques of construction, then one would go back to the MRC to see what governing law that provided for; and if that was English law then that would be the governing law rather than either New York or Arkansas law.

34. I think a number of things follow from this, both as to the natural meaning of the language used in the clause and as to the commercial consequences. First, there is no difference between the parties as to the meaning of the word "precedence" or the effect of the provision that "RI slip to take precedence over reinsurance certificate". As Mr MacDonald Eggers accepted, where the clause applies, you find the answer within the slip; the slip or MRC becomes to that extent the dominant contractual document as opposed to the Certificate. The dispute is therefore not over the effect of the Confusion Clause where it applies, but as to the circumstances in which it does apply.

35. Second, that means that the only difference between the parties is how to identify when there is a case of "confusion". Mr MacDonald Eggers submitted that this was an odd word to use in a hierarchy clause; and if this had been what was intended one

would have expected to find more usual words such as "conflict" or "inconsistency" instead. I accept that "confusion" is an unusual word to find in this context, but I think that this submission does not amount to saying any more than that if the parties had really intended the clause to have the effect of a hierarchy clause they could have made it much clearer. Such arguments usually carry very little weight. As Asplin LJ said in *European Film Bonds A/S v Lotus Holdings LLC* [2021] EWCA Civ 807 at [52] the question for the Court is what the contract in fact entered into by the parties means, not whether it could have been better or differently expressed. If a contractual provision is sufficiently unclear to give rise to a difficulty which the Court has to resolve, it will almost always be possible to say that it could have been drafted better or more clearly. This is also usually an argument that cuts both ways: it could equally be said that if Mr MacDonald Eggers' construction had really been intended, the parties could have referred to conflict or inconsistency within the Certificate itself.

36. And as this shows, and as Mr MacDonald Eggers' examples illustrate, I do not think there is on analysis any real difference between the parties as to what "confusion" means in this context: it means, or at least includes, the confusing state of affairs brought about by having two different provisions dealing with the same subject-matter. Do I have until 20 September to pay the premium or only until 1 September? Can I litigate in England or must I arbitrate in New York? Unless the contractual provisions give a clear answer to these questions, having two different provisions *is* confusing. Confusion may indeed be an unusual word for a lawyer to use in this context, but it is not difficult to see how the reasonable insurer or broker would understand it. The only difference between the parties is whether the Confusion Clause refers to the case where there are two different provisions in the Certificates so that the Certificates are confusing on their own (as Mr MacDonald Eggers submits), or refers to the case where the provisions of the Certificates differ from those of the MRCs (as Mr Killen submits) so that it is the difference between the two documents which is confusing.

37. Once this point in the analysis has been reached, then I agree with Mr Killen that simply as a matter of language the latter seems by far the more natural interpretation. The entire purpose of the Confusion Clause is to give precedence where it applies to the provisions found in one document (the RI slip or MRC) over those found in another (the Certificate). By its terms it applies "in case of confusion". It seems much more likely that what this was intended to refer to was a case of confusion as between the provisions in those two documents (which is reconciled by giving precedence to the MRC provision) than a case of confusion as between two provisions within one of the documents, in which case reference is made to the other document. As Mr Killen put it, "take precedence over" itself imports a suggestion that there may (or indeed will) be a conflict between the MRC and the Certificate; and hence the structure of the clause suggests that the proper and sensible interpretation is that the confusion referred to is between the two documents. I agree.

38. Indeed I would go slightly further. If the clause had stopped after the word "certificate" so that it simply read "RI slip to take precedence over reinsurance certificate" then I think it plain that this would have had the same effect as the endorsements for the 2020/21 policy year which, in the case of both GIC and Partner Re, simply provided that the certificates were "subject to" the terms and conditions of the MRCs (see paragraphs 13 and 21 above), and would mean that the MRCs

prevailed over the Certificates. If one then asks if the addition of the words "in the case of confusion" was intended merely to confirm that the MRC was to prevail when there was a confusing difference between the two documents; or whether it was intended to cut down the operation of the clause so that it only applied where there were two irreconcilable provisions within the Certificates, then I think there is no contest. The former is no more than one would expect from the opening of the clause, whereas the latter requires reading a great deal into these words without really any indication that that is what the parties intended by them.

39. So even without considering the potential commercial consequences and simply looking at the natural and ordinary meaning of the language used in the clause, I prefer Mr Killen's construction. When one adds in the commercial consequences however I am left in no real doubt about it. Mr MacDonald Eggers' interpretation seems to me to have such strange potential consequences that it cannot be supposed that this is what the parties intended.

40. First, it seems a bit odd to make provision at all for the case where the Certificate is internally contradictory or confusing. As Miles LJ pointed out in argument, most contracting parties think that their contracts make sense and it would seem strange for them to go to the trouble of making provision for what must have seemed the quite improbable contingency that the Certificates, based on a widely used form, would nevertheless contain confusing or contradictory provisions. It was not suggested that the Certificates here in fact had any provisions that would trigger the Confusion Clause if Mr MacDonald Eggers' construction were right. By contrast the idea that two forms of standard contract, one developed for use in the London Market and one commonly used for property reinsurance in the United States, might differ in their detail seems a much more plausible possibility, and it is not difficult to see why the parties might have thought it sensible to guard against this risk by providing which was to prevail, not least because this is precisely what they had done for the previous policy year.

41. Second, Mr MacDonald Eggers accepted, as referred to above, that on his interpretation if the provisions of the Certificate were unclear one would first try to resolve the difficulties by the ordinary processes of construction, and that one would only resort to the Confusion Clause if this could not be done. But this, as he also accepted, inevitably leads to a grey area. There might be two competing provisions which could in the view of some be reconciled without undue difficulty, but which others might regard as difficult or impossible to resolve by any ordinary process. It would be very difficult to identify in such a case whether the Confusion Clause was triggered or not. In this way a clause which was presumably intended to provide for greater certainty by specifying which provision was to prevail in case of difficulty might well end up doing the very opposite and causing greater uncertainty.

42. Third, and to my mind most tellingly, Mr MacDonald Eggers accepted, as explained above, that if the Certificate contained two irreconcilable provisions providing for A and B (payment on 1 September or payment on 20 September; New York law or Arkansas law), the effect of his construction would be that the provisions in the MRC would prevail, despite the fact that it might provide for neither A nor B but C (payment on 15 September, English law). This to my mind seems a truly bizarre intention to ascribe to the parties. They are to be taken on this view to have intended the Certificate to have superseded the MRC, so that if the MRC says one thing (15

September) and the Certificate another (1 September), the MRC is to be ignored, but nevertheless to have intended to resort to it as a sort of tie-break if the Certificate says or might say two things (1 and 20 September), depending on how easy it is to resolve the conflict between them. This is so notwithstanding that it may be plain that the one thing the Certificate does not say is what the MRC says (15 September). Contracting parties are of course generally free to decide whatever they like; but for the parties to have here decided (i) that in all normal circumstances their contractual relations were to be governed by the Certificate alone, the MRC being treated as superseded and its provisions effectively dead, but (ii) in certain (necessarily ill-defined) circumstances the MRC was to spring back into life to govern one particular aspect of their contract seems such an unusual and irrational thing to have done that one would expect it to be much more clearly spelt out if it had really been intended.

43. For all these reasons I think that Mr MacDonald Eggers' interpretation of the Confusion Clause makes little commercial sense. By contrast Mr Killen's interpretation simply requires the clause to be given the same effect as any other hierarchy clause where parties have entered into two documents and wish to specify which is to prevail in case they differ. That seems a sensible enough thing to do.

44. I therefore consider that Mr Killen's construction is not only the more natural reading of the language of the Confusion Clause but also makes more commercial sense.

45. Mr MacDonald Eggers nevertheless advanced a number of arguments in support of his construction which I should deal with briefly.

46. First, he said that it would be an odd thing to do for the parties to (i) agree the English law and jurisdiction clause in the MRC; (ii) agree New York law and arbitration clauses in the Certificate; and then (iii) revert back to the English law and jurisdiction agreement in the MRC by means of the Confusion Clause. This would be a very circuitous (or serpentine) way of going about it. If the parties had intended to stick with English jurisdiction it would have been much simpler for them not to have agreed to New York arbitration in the first place.

47. I accept that there is something in this point. In *Partner Re (CA)* Males LJ said at [46] that the parties in that case were, or must be taken to have been, familiar with the nature and terms of the MURA and would have known that the MURA was an appropriate document to record the terms of a contract governed by New York law and subject to New York arbitration, whereas it was an inappropriate, indeed misleading, document to use if the parties intended their relationship to be governed by an MRC subject to English law and jurisdiction.

48. But I do not think this point can bear much weight or is in the end of much assistance. We know that in both the previous policy year of 2020/21 and in 2021/22 both GIC and Partner Re first signed MRCs and then after a few days agreed Certificates in the MURA form. Each was a complete contract in itself and the parties must have known that they differed in their details. We do not know why they wanted to enter into both contracts – and I do not think we should be tempted to speculate – but what we do know is that both Partner Re and GIC did agree in 2020/21 that the potential conflict between the two contracts was to be resolved by agreeing that the Certificates should be subject to the MRCs. The result was that they did in fact choose English law and jurisdiction for 2020/21, whether that could have been done more simply or not. The

only question is whether GIC, unlike Partner Re, in effect adopted a similar route in 2021/22. Whether it did so or not depends on the true effect of the Confusion Clause but since GIC had undoubtedly done this the year before, I do not think that the fact that it might seem a roundabout way of doing it really helps to answer that question.

49. Second, Mr MacDonald Eggers pointed to the fact that the arbitration and governing law clauses in the Certificates were not just included as boilerplate but listed as "Required Terms and Conditions". That is true but I think Mr Killen is right that in context the contrast is between those terms and conditions that apply in all cases and those that only apply in certain cases. On that interpretation the listing of the "Required Terms and Conditions" on page 2 is just a list of the standard terms in the MURA, and I do not think this adds anything of substance to Mr MacDonald Eggers' first point. The parties did agree to these standard terms in the Certificates but they also agreed that the MRC should take precedence in certain circumstances which on either party's case could lead to one of the "required" terms being displaced in favour of a provision of the MRC.

50. Mr MacDonald Eggers' next point concerned the date for the payment of premium. The MRCs provided that the premium had to be paid within 90 days of 30 June 2021, namely by midnight on 28 September 2021. The Certificates provided that the premium due date was 1 September 2021. He said that the parties had gone to the trouble of agreeing this new date, but if Mr Killen were right, this would be overridden by the Confusion Clause and the date in the MRCs would take precedence.

51. A similar issue arises in relation to the provisions for cancellation. In the MRCs the standard cancellation clause was in fact struck through, but the effect of the incorporation of the Beazley Policy was to provide both insured and insurer with a right to cancel at any time on 90 days' notice. But the third of the amendments made to the Certificates was "Cancellation/Termination – Subject to no losses". Mr MacDonald Eggers submitted that if Mr Killen were right however the provision in the MRCs which did not make cancellation subject to there being no losses would take precedence.

52. These points were considered by the Judge. He said (Judgment at [105]) that he was not persuaded this argument was correct in circumstances where both the premium payable date and the cancellation clause were specific amendments individually negotiated by the parties, it being TICL who wished to bring forward the premium payment date and GIC who wanted the three amendments.

53. Mr Killen had a number of answers to the point. He said that the two payment dates were not necessarily inconsistent: non-payment by 1 September 2021 as per the Certificates would entitle GIC to terminate the agreement on 20 days' notice, whereas non-payment by 28 September 2021 as per the MRCs would automatically terminate the agreements. But I do not think this is an answer as the premium must be due on one date or another – as Mr MacDonald Eggers said if it is not paid on the due date you can sue for it, and a single payment cannot sensibly fall due on two different dates.

54. Mr Killen next submitted that the Judge was right that where there was a specifically agreed amendment, the Confusion Clause did not apply; thirdly he submitted that even if his construction meant that the payment date in fact reverted to that being in

the MRCs, it did not mean that his construction was wrong. He gave similar answers in relation to the cancellation provisions.

55. So far as the cancellation provisions are concerned, I do not think there is any difficulty. The third amendment in the Certificates, providing for cancellation to be "Subject to no losses", can I think be regarded as qualifying or modifying the effect of the cancellation provision in the MRCs rather than being inconsistent with it or giving rise to confusion. To be inconsistent a term must contradict another term or be in conflict with it such that effect cannot fairly be given to both: see *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565 (***"Pagnan"***) at 575a per Bingham LJ (as he then was).

56. But so far as the date for payment of premium is concerned, I accept that this point does cause at least a theoretical difficulty for Mr Killen's construction. But I think it is almost entirely theoretical. It was, as the Judge found, Lockton (on behalf of TICL) which wished to bring forward the premium payment date because it wanted to pay the premium to all reinsurers at the same time. It therefore seems unlikely that TICL would ever have failed to meet the earlier date, in which case the conflict between the two dates would be unlikely ever to arise in practice.

57. In those circumstances I accept Mr Killen's submission that even if the strict effect of the Confusion Clause was in principle to reinstate the premium payment date in the MRCs of 28 September, this had no practical effect and is not a sufficient reason to reject his construction.

58. Mr MacDonald Eggers' next point was based on the entire agreement clause in condition 26 of the Certificate. He said that that too was a "Required Term", and when one put it with the arbitration and governing law clauses, it suggested that the Certificate was the predominant document unless there were something within the four corners of the Certificate which created a confusion. But this is another point which I do not think will bear the weight sought to be put on it. The entire agreement clause means that the Certificate *prima facie* supersedes all prior agreements (cf *Partner Re (CA)* at [49]). But this must be subject to the terms of the Certificate itself, including the Confusion Clause. On either party's case this has the effect of bringing in the terms of the MRC in certain circumstances. So to that extent the MRC is not superseded. The dispute between the parties, as I have already said, is not whether the provisions of the MRC ever take precedence, but over the circumstances in which they do so.

59. Mr MacDonald Eggers' final point under Ground 1 was that the normal position where one contract is followed by another is that the latter supersedes the former, and if you want to provide for anything else you need to do so expressly. I do not think this takes matters any further. Whether a later contract is intended to supersede an earlier one in its entirety, or to be read alongside the earlier one, and, if the latter, which is to prevail in the case of conflict between them, must depend on the parties' intentions. Here the parties' intentions are to be found in the Confusion Clause, and it is only by construing that clause that one can determine the extent to which the Certificates were subject to the provisions of the MRC.

60. I have now considered the various points advanced by Mr MacDonald Eggers under Ground 1. None of them is sufficient to persuade me to change my view that

Mr Killen's construction of the Confusion Clause is to be preferred, and that the Judge was right on this point. I would therefore dismiss Ground 1.

Ground 2 – can the clauses be reconciled?

61. Ground 2 is that even if the Judge was right as a matter of construction of the Confusion Clause, he was wrong to hold that the English law and jurisdiction clause in the MRCs displaced the arbitration agreement in the Certificates. He should have held that they could both take effect by reading down the English jurisdiction clause as providing for an auxiliary or supervisory jurisdiction over the New York arbitration.

62. This contention has, as Mr Killen pointed out, now failed to find favour with four judges sitting in the Commercial Court. In October 2023 Foxton J said that he was satisfied that it was highly probable that no reading of the two clauses together could be adopted in this case, and made the point that the Court must be wary, when reading a term in a primary contractual document with a term in a contractually subordinate document, that you do not end up with something that would fundamentally change the meaning and effect of the term in the primary document (see paragraph 16 above). In December 2023 Mr Houseman said of the same contention advanced in *Partner Re* that he found it an extremely challenging submission given the language of each of the forum selection clauses (see paragraph 58 above). In February 2024 Mr Hancock concluded that it was really not sensibly arguable and not even plausible (see paragraph 17 above). Finally the Judge said in the Judgment that the two sets of provisions were irreconcilable (at [114]), adding at [115]:

> "…one can anticipate experienced insurance professionals such as the individuals working for GIC and TICL entering reinsurance contracts which provide either for dispute resolution under English law before the courts of England & Wales or dispute resolution under the law of New York before a New York arbitration tribunal with the New York courts having supervisory jurisdiction. What seems to me extremely unlikely is that such insurance professionals would agree that their disputes should be resolved by arbitration in New York with the courts of England & Wales exercising a supervisory jurisdiction and the courts of the United States also having a residual jurisdiction."

Taken together these judicial observations form an unpromising, if not downright discouraging, backdrop for Mr MacDonald Eggers' submissions on Ground 2. But these should of course nevertheless be considered on their merits.

63. Mr MacDonald Eggers referred us to three authorities: *ACE Capital Ltd v CMS Energy Corporation* [2008] EWHC 1843 (Comm), [2009] Lloyd's Rep IR 414 (***"ACE Capital"***); *Sul América Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm), [2012] 1 Lloyd's Rep 275 (***"Sul América"***); and *Surrey County Council v Suez Recycling and Recovery Surrey Ltd* [2021] EWHC 2015 (TCC), [2021] BLR 625 (***"Surrey"***).

64. In *ACE Capital* Christopher Clarke J, as he then was, was concerned with an insurance policy which contained both a clause providing for English governing law and LCIA arbitration in London and a standard form service of suit clause under

which underwriters agreed to submit to the jurisdiction of a court of competent jurisdiction within the United States. At [68]-[70] he referred to certain previous authorities (including *Paul Smith v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 (Steyn J) and *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72 (Moore-Bick J)), and said:

> "These cases all illustrate the principle that the contract must be read as a whole and every effort should be made to give effect to all of its clauses."

65. In *ACE Capital* itself he applied this principle to reconcile the clauses by holding that the service of suit clause did not entitle the assured to have determined in any court of the United States the merits of disputes which the parties agreed to have determined by LCIA arbitration (at [81]); this still left the service of suit clause with meaningful scope as it enabled the assured to found jurisdiction in any US court, including its home court, to declare the arbitrable nature of the dispute, to compel arbitration, to declare the validity of an award, to enforce an award, or to confirm the jurisdiction of the US courts on the merits in the event that the parties agreed to dispense with arbitration (at [82]).

66. The principle is well established. But it may be noted that the cases referred to were all cases where the two relevant clauses appeared in the same contractual document. Such a document has to be read as a whole and effect given to every part of it if at all possible.

67. *Sul América* was a similar case in which two insurance policies each contained both a clause providing for disputes to be referred to arbitration under the ARIAS rules in London and a clause providing for Brazilian governing law and exclusive jurisdiction. Cooke J followed the decision of Christopher Clarke J in *ACE Capital* and held that the arbitration clause took effect, even though this meant that very little was left in practice of the Brazilian jurisdiction clause, being much the same as found by Christopher Clarke J in *ACE Capital* (at [49]). He continued at [50]:

> "The effect is, of course, to give priority to the arbitration clause over the exclusive jurisdiction clause but there is no other way of reconciling the two. To give full width to the exclusive jurisdiction clause would be to exclude the right to arbitrate altogether. The only other option would be to allow both the right to litigate in Brazil and the right to arbitrate to run in tandem, with the potential for a race to judgment between the two. That, for the reasons already given, is a most unlikely construction of the parties' intentions, as all the authorities indicate."

His decision was appealed, and the appeal dismissed, without affecting this aspect of his decision: see at [2012] EWCA Civ 638, [2012] 1 Lloyd's Rep 671.

68. In *Surrey* an agreement, referred to as the WDPA, was entered into for waste disposal. This contained a number of dispute resolution clauses, providing in clause 51 for expert determination of some issues, in clause 52 for arbitration of others and in clause 63 for the parties to submit to the exclusive jurisdiction of the English Courts. Three deeds of variation were subsequently entered into. The latest, referred to as

DOV2, was concerned with an Ecopark project. It provided that the WDPA should, save as expressly modified, remain in full force and effect; it also provided that in the event of any inconsistency and/or conflict between DOV2 and the WDPA, the provisions of DOV2 should prevail; it made certain minor changes to clauses 51 and 52 and left clause 63 unchanged; and it contained its own clause that the English Courts should have exclusive jurisdiction in relation to DOV2 and any contractual or non-contractual obligations arising from or connected with it. The question for Mr Alexander Nissen QC, sitting as a Deputy High Court Judge, was whether disputes in relation to the Ecopark were subject to arbitration under clause 52 of the WDPA. He held that they were.

69. That seems an unsurprising conclusion where DOV2 took effect by its own terms as an amendment to the WDPA rather than a replacement of it; and where it not only provided that the WDPA, save as amended, should remain in full force and effect but amended clauses 51 and 52 themselves, thereby recognising (as was common ground) that they continued in force. Given that background it was not difficult to conclude that the arbitration clause governed all disputes between the parties, not least because of the strong imperative, following the well-known decision in *Fiona Trust and Holding Corporation v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, to find that contracting parties intend a single forum for resolution of their disputes.

70. On the basis of these decisions Mr MacDonald Eggers submitted that they established three principles: (1) that an arbitration agreement and an exclusive jurisdiction clause in the same agreement can be reconciled; (2) that this is so even if they are in different constituent documents; and (3) that this is so even if the seat of arbitration is in a different jurisdiction from the chosen jurisdiction. And he pointed to the fact that in *Surrey* there was an inconsistency provision (in DOV2) but this did not prevent Mr Nissen from giving effect to the arbitration clause in the WDPA.

71. I do not particularly take issue with the propositions Mr MacDonald Eggers derived from these authorities. But ultimately all such questions are questions of construction which have to be answered in the light of the particular circumstances of each case. I think there is a real and substantial difference between the type of case exemplified by *ACE Capital* (and the cases referred to in it) and *Sul América* where an arbitration clause and an exclusive jurisdiction clause are found in a single document containing no inconsistency or hierarchy clause, and a case such as the present where the clauses are found in different documents agreed at different times and the parties have agreed a hierarchy clause. In the *ACE Capital* type of case the principle is that expressed by Christopher Clarke J, namely that the Court will make every effort to give effect to all the clauses of the contract. In the absence of an inconsistency clause, that may indeed involve reading down the exclusive jurisdiction clause so that little is left of it, as was done in both *ACE Capital* and *Sul América*.

72. But where there are two separate documents which contain different provisions, it is immediately apparent that a very significant question is whether the parties have agreed anything in the nature of an inconsistency or hierarchy clause. If they have, the case is not like that of a single document. Instead the correct approach, as Mr Killen submitted, is that explained by Bingham LJ in *Pagnan*. This was not in fact a case of two documents but of a contract containing an inconsistency clause under which the special conditions were to prevail over the printed standard conditions in so far as they might be inconsistent. Bingham LJ said at 573j that it would be wrong for

the Court to approach a question of construction with a predisposition to find inconsistency, and continued at 574b:

> "On the other hand, it is wrong to approach the contract on the assumption that there is no inconsistency. By including the inconsistency clause, the parties have acknowledged that there may be. One should, therefore, approach the documents in a cool and objective spirit to see whether there is inconsistency or not."

73. Thus, even if there is an inconsistency or hierarchy clause, the Court may be able to resolve an apparent difficulty without recourse to it, as exemplified by the decision in *Surrey*. But if the Court concludes, applying a cool and objective approach, that the two provisions are in truth inconsistent, it should say so and apply the clause, as this is what the parties have agreed.

74. Applying these principles in the present case, I have no doubt that the Judge, and the other judges of the Commercial Court who have considered this question, were entirely right. The MRCs were signed on 30 June 2021. They contained no arbitration clause of any form, and provided for English governing law and for the English Courts to have exclusive jurisdiction on "all matters relating to this Insurance". There is no ambiguity about what that meant: it meant that any dispute as to the policies, including the dispute that has in fact arisen as to whether GIC were entitled to avoid them for misrepresentation, would fall to be litigated in England under English law rather than resolved elsewhere. The Certificates were not agreed until nine days later on 9 July 2021. They provided for disputes to be referred to arbitration in New York, applying New York law. On its face that is flatly inconsistent with what was agreed in the MRCs, and it would be equally inconsistent with it if the English law and jurisdiction clause were cut down to survive only in the severely attenuated form that Mr MacDonald Eggers suggests. If his submission were to be accepted, precedence would therefore in fact be given to the provision in the Certificates over that in the MRCs, despite the fact that, as I have held under Ground 1, the parties agreed the very opposite.

75. This cannot be right. As Mr Killen put it, one simply cannot read the two provisions together in the way suggested without essentially inverting the bargain the parties have struck. I think it was well put by Foxton J when he said right at the outset of this litigation:

> "… it seems to me that to try and read the arbitration agreement in the subordinate document, together with the English jurisdiction clause in the primary document here, would fundamentally change the meaning of the former."

76. I agree and would dismiss Ground 2, and with it the appeal.

Lord Justice Miles:

77. I agree.

Lady Justice Asplin:

78. I also agree.