Neutral Citation Number: [2024] EWCA Civ 363

Case No: CA-2023-002576

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
Stephen Houseman KC (sitting as a Judge of the High Court)
[2023] EWHC 3243 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2024

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE MALES
and
LORD JUSTICE LEWIS

- -

Between:

TYSON INTERNATIONAL COMPANY LIMITED	**Appellant/ Claimant**
- and -	
PARTNER REINSURANCE EUROPE SE	**Respondent /Defendant**

- -
- -

Timothy Killen & James Partridge (instructed by **Reed Smith LLP**) for the **Appellant**
James Brocklebank KC & Douglas Grant (instructed by **Norton Rose Fulbright LLP**) for the **Respondent**

Hearing date: 27th March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. On 1st July 2021 the parties entered into a contract of reinsurance containing an English law and exclusive jurisdiction clause. Eight days later, on 8th July 2021, at the request of the appellant reinsured ('Tyson'), the respondent reinsurer ('Partner Re') issued what looks like another contract of reinsurance covering the same risks, but containing clauses providing for New York law and arbitration. The principal issue on this appeal is whether this Partner Re document was intended to replace the previous contract or whether, as Tyson contends, it was merely an administrative document of no contractual effect.

2. The judge, Mr Stephen Houseman KC, sitting as a Deputy High Court Judge, held that the Partner Re document was intended to replace the previous contract and that the arbitration clause which it contained was valid and binding. Accordingly he granted a stay of the action begun by Tyson in the Commercial Court pursuant to section 9 of the Arbitration Act 1996. In addition he indicated that, even if he had held that the original English law contract was the operative contractual document, he would have refused on the ground of delay Tyson's application for an injunction to restrain the pursuit of the New York arbitration commenced by Partner Re.

3. On this appeal, brought with the permission of the judge, Tyson contends that the judge was wrong to stay the English action (ground 1) and that he ought to have granted the anti-arbitration injunction which it sought (ground 2).

Background

The Market Reform Contract

4. The standard form of insurance and reinsurance contract in the London market is what is known as the Market Reform Contract ('MRC'). Its origins are described in the judgment of Mr Justice Jacobs in *AIG Europe SA v John Wood Group Plc* [2021] EWHC 2567 (Comm):

> '49. Each of the 4 policies began with a number of pages which started with the heading "Risk Details". The background to the form of these policies is described in *Merkin: Colinvaux's Law of Insurance* 12th Edition paragraphs 1-082 – 1-094. In summary, the position is that prior to reforms resulting from steps taken between 2004-2007, the typical procedure in Lloyd's and the London market was for the broker to prepare a "slip" which contained brief details of the risk and its terms. Formal policy wording would be prepared at a later stage. On occasion, and particularly at the reinsurance level, the parties might agree that no formal policy was to be issued, in which case the slip was referred to as a "slip policy". However, in many cases there was no policy wording in existence at the time when the contract came into effect (ie when the slip was signed), which *Merkin* describes as one of the "weaknesses in the system".

> 50. Following intermediate reforms, the insurance regulator (the FSA) challenged the London market to find a solution to the problem of inadequate documentation. This resulted in the formation of two working groups in the London market. This included the Subscription Market Reform Group, whose work is relevant to policies such as those in the present case. Codes of Practice were later issued. This work resulted in the "Market Reform Contract", which is now the standardised form of agreement used in the London market. There is no longer any reference to the "slip". Instead, as Merkin describes:
>
> > "… when a risk is presented by the broker to the market, the presentation consists of an introductory section setting out the most important details of the risk (which more or less corresponds to the old slip) but attached to this document is a "schedule" which sets out the terms of the policy. The effect therefore is that all of the documents are prepared up-front, and when the underwriters scratch the documents the contract is in its entire form".'

5. This contract form contains initial pages (the 'Risk Details') with headings on the left hand side, covering such matters as the unique market reference, the type of risk, the period of cover, the sum insured, the premium and payment terms, and the parties' choice of law and jurisdiction. These are then completed on the right hand side of the document. The applicable conditions and policy wordings (usually but not exclusively standard market clauses) are also identified, and the applicable conditions will then be attached to these initial pages.

The Market Uniform Reinsurance Agreement

6. The Market Uniform Reinsurance Agreement ('MURA') is a standard form of reinsurance policy commonly used in the property reinsurance market in the United States. It is headed:

'AGREEMENT OF FACULTATIVE REINSURANCE

(THE "AGREEMENT")'

7. Like the MRC, the MURA contains standard headings, in its case for (among other things) the coverage, the reinsurance period, the reinsurer's participation, the applicable terms and conditions (some of which are described as 'required', while others are optional), the premium and service of suit. Succeeding pages then set out the standard terms and conditions, which include (as required terms) an insuring clause, an arbitration clause, a choice of New York state law as the governing law and an entire agreement clause.

The reinsurance programme

8. Tyson, a Bermuda company, is a subsidiary of Tyson Foods Inc, a US-based company which owns a large property portfolio ('Tyson Foods'). Before 2020 Tyson Foods insured its property risks through a direct insurance programme in which Partner Re

participated, but from 2020 onwards it used Tyson as a captive insurer, with Tyson reinsuring these risks across the reinsurance market. The reinsurance was a large programme providing cover of up to US $1.1 billion across 35 reinsurers, one of which was Partner Re. Tyson's broker for placing this business was Lockton Companies LLP ('Lockton'), a global insurance and reinsurance brokerage company.

9. The insurance policy by which Tyson insured Tyson Foods' property risks ('the direct policy') was governed by the law of Arkansas.

10. We are concerned with the reinsurance for the period from 1st July 2021 to 1st July 2022 ('the 2021 policy'), the second year of this reinsurance cover. However, it is necessary to begin by describing the policy for the period from 1st July 2020 to 1st July 2021, the first year of cover ('the 2020 policy'). Although there are some similarities, there are material differences between the two years.

The 2020 policy

11. Negotiations for the 2020 policy were with the Dublin branch of Partner Re. Lockton explained that a 'reinsurance certificate' would be forthcoming, 'based upon the Market Uniform Reinsurance Agreement'. It explained also that it would send 'a slip for signing and binding instructions soonest'. As both parties understood, the reference to a 'slip' was to an MRC form of contract. Negotiations concluded on 30th June 2020 when Lockton confirmed acceptance of Partner Re's offer to take a 10% share of the US $100 million excess of US $100 million layer of the reinsurance. Lockton sent an MRC contract for signature, which Partner Re signed, stamped and returned.

12. It is common ground that, at this stage, a binding contract for the 2020 policy year was concluded on the MRC form with Partner Re's Zurich branch. The contract provided for English law and the exclusive jurisdiction of the English courts. Its unique market reference was B0713PRPNA2003490.

13. On 30th July 2020 Lockton emailed Partner Re attaching what was described as the 'fac cert' or 'facultative certificate', a document which, in appearance, was a contract of reinsurance for the same risks on the MURA form. However, the email also attached an endorsement to the MRC form which stated that, with effect from inception:

> 'The Agreement of Facultative Reinsurance (The "Agreement") between Reinsured Tyson International Company Limited and Reinsurer Partner Reinsurance Europe SE-Zurich Branch is agreed subject to the terms and conditions of contract PRPNA 2003490. All other terms and conditions remain unchanged.'

14. The covering email explained that:

> 'The purpose of the endorsement is just to provide you protection that the fac cert is overall subject to the terms of the MRC.'

15. Despite the submission to the contrary by Mr James Brocklebank KC on behalf of Partner Re, in my judgment it is clear that the effect of this endorsement was to ensure that the MRC and not the MURA remained the governing contractual document for the 2020 policy year. Whatever its function may have been, the MURA or 'fac cert' was subject to the MRC, so that the terms of the MRC prevailed, including the choice of English law and jurisdiction. Indeed, the endorsement recognises that, if it had not been made clear that the MURA was subject to the MRC, there would at least be scope for dispute about which terms were to prevail.

16. Partner Re signed and stamped the MURA and the endorsement on 30th July 2020.

The 2021 policy

17. The 2021 policy was not simply a renewal of the 2020 policy. Negotiations began on 3rd June 2021 when Lockton emailed a statement of property values and other documents to Partner Re, pointing out various changes to the programme for the coming year, including an increase of the deductible to US $55 million per occurrence. The email stated:

> 'The programme will remain as reinsurance of the Tyson International Company Limited captive and we will provide reinsurance certificates and the updated policy form in due course.'

18. Partner Re responded by providing quotations on several alternative bases and listed a number of conditions which it would wish to include. Most of these were standard market wordings, but the list also included the 'Partner Re Communicable Disease' exclusion clause (which had also been included in the 2020 policy).

19. Terms were agreed and on 30th June 2021 Partner Re issued a policy on the MRC form. Lockton thanked Partner Re for 'the signed slip', adding that:

> 'Fac certs will come through at some stage.'

20. The MRC, stamped and signed by Partner Re on every page, contained the unique market reference B0713PRPNA2103490 and covered the period from 1st July 2021 to 1st July 2022. The risks reinsured were 'ALL RISKS OF DIRECT PHYSICAL LOSS OR DAMAGE, … as more fully defined in the Original Policy Wording'. (The 'Original Policy Wording' was the wording of the primary layer of reinsurance, referred to in argument as 'the Beazley policy', led by underwriters at Lloyd's). Partner Re's reinsurance was 10% of US $225 million in excess of US $75 million. The policy contained an English law and exclusive jurisdiction clause as follows:

> '**Choice of Law and Jurisdiction:**
>
> 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.'

21. As with the equivalent MRC contract in 2020, it is common ground that this was a binding contract of reinsurance for the 2021 policy year.

22. On 7th July 2021 Lockton sent an email in these terms to Partner Re:

> 'Please find attached the fac cert for agreement. If you can consider and agree as soon as possible then the processing of funds etc can begin.'

23. The attached 'fac cert' was a MURA document, which also bore the reference 'AGREEMENT No: PRPNA2103490'. It described the coverage as 'All Risk of Direct Physical Loss or Damage as per the Policy Reinsured' and the reinsurance as being from 1st July 2021 to 1st July 2022. The second page of the document listed the terms and conditions, which then followed on the succeeding pages.

24. Clause 3 of these standard terms provided that the reinsurer's liability would (with limited exceptions) be 'subject in all respects to the same risks, terms, conditions, rates, interpretations and waivers' as the policy reinsured, i.e. the direct insurance by which Tyson insured Tyson Foods.

25. Clause 13 was an arbitration clause providing for the appointment of arbitrators with 'at least ten (10) years of insurance or reinsurance experience' who were 'active or former officers of insurance or reinsurance companies with knowledge about the lines of business at issue'. Unless the panel agreed otherwise, the arbitration was to take place in New York. Clause 17 provided for the arbitral panel to apply the 'substantive law of the State of New York'.

26. Clause 26 was an entire agreement clause:

> '**Entire Agreement**
>
> This Agreement, including any duly executed written amendments and endorsements thereto … 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 …'

27. Partner Re signed and stamped each page of the MURA and returned it to Lockton, stating:

> 'Here is the TIC ri cert [i.e. Tyson reinsurance certificate] as requested. Trust to be in order.'

28. In contrast with the 2020 policy, there was no endorsement providing for the MURA to be subject to the MRC.

29. It is common ground that, if it had stood alone, the MURA would have been a valid and binding contract of reinsurance providing for arbitration in New York under New York law.

The dispute

30. The dispute between the parties arises as a result of a claim by Tyson in respect of a fire on 30th July 2021 at a poultry rendering facility in Alabama belonging to Tyson

Foods. Tyson has accepted liability under the direct policy. We were told that the loss, comprising damage to property and resulting business interruption, is likely to exhaust the reinsurance tower which provides cover up to US $500 million. It is Partner Re's case that, during the investigation of this claim, it was discovered that the statements of value affecting multiple facilities of Tyson Foods had been significantly understated to reinsurers. As a result, on 25th July 2022 Partner Re avoided (or as Tyson would say, purported to avoid) the contract of reinsurance.

31. This led to Tyson issuing a claim form in the Commercial Court on 3rd May 2023, while Partner Re commenced arbitration in New York the next day. Partner Re issued its application for a stay pursuant to section 9 of the Arbitration Act 1996 on 24th May 2023, and it was this application that came before the judge on 13th December 2023, together with an application by Tyson for an anti-arbitration injunction issued on 3rd November 2023.

32. Meanwhile arbitrators were appointed in New York, in Tyson's case without prejudice to its position that the arbitral tribunal was without jurisdiction, and the tribunal was fully constituted on 28th August 2023. On 29th August the tribunal notified the parties that it proposed to hold an organisational meeting, but Tyson requested that it should pause the arbitration proceedings until the English court had ruled on Partner Re's application for a stay of the English action.

33. The tribunal rejected that request in its Case Management Order No. 1 issued on 12th September 2023:

> '1. … It is unassailable that in the face of the broad arbitration clause contained in the Fac Cert, questions as to the scope or validity of jurisdiction of the arbitration panel are left to the panel to decide; … Given this broad arbitration clause language, as well as the terms of the Entire Agreement clause in the Fac Cert (which agreement replaces the "slip policy", not just amplifies its terms), the Panel requires no further jurisdictional briefing to make this ruling. Accordingly, Partner Re's request that the Panel order further briefing is also DENIED as moot.
>
> 2. In making this determination and issuing this ruling, the Panel relies solely and exclusively on the terms and conditions of the Fac Cert and the Panel members' collective, significant experience. We have not considered, and need not consider, any of the submissions to or arguments made by either Party in the High Court. Nor do we make any pronouncement as to the terms of the purported "slip policy" that is at issue in the High Court. Indeed, this Panel will remain blind as to what transpires before the High Court and we will proceed with this arbitration unless and until we are properly enjoined from doing so. …'

34. The organisational meeting was held on 17th October 2023. The tribunal gave directions leading to a hearing on the merits in October 2024.

35. Since then the arbitration has continued. Tyson has participated subject to a reservation of its position that the tribunal does not have jurisdiction.

36. It might be thought that a dispute whether the values of the insured properties had been significantly understated and whether, if so, that entitled Partner Re to avoid the reinsurance could be equally well decided by the Commercial Court in London or by arbitrators in New York experienced in the insurance and reinsurance business. It may be, however, that there are material differences between the approach of English and New York law to such questions which will affect the likely outcome, depending on where the dispute is resolved. Certainly the parties have devoted considerable resources to this jurisdictional question, which at least suggests a perception on their part that it may make a difference where the dispute is decided. Where the dispute should be decided, whether by the English court or by New York arbitrators, has nothing to do with the respective merits of English litigation and New York arbitration or with the underlying dispute, but depends upon which of the two candidate contracts, the MRC and the MURA, the parties intended to govern their relationship.

The judgment

37. The judge recognised that the MRC and the MURA cover precisely the same risk, period and parties, and that each of them could or would be a self-standing and self-sufficient contract if viewed in isolation from the other. The question was whether the later contract varied or superseded the earlier contract. The judge held that it did. The essence of his reasoning was as follows:

> '32. Having received full argument on this substantive issue, I am satisfied as a matter of English law that the English jurisdiction clause and the English choice of law in the MRC was or were replaced by the New York arbitration agreement (clause 13) and New York choice of law (clause 17) in the MURA. The latter contract was expressly contemplated by the parties through their brokers at the time of execution of the former contract. The MURA was proffered for consideration and agreement, and separately signed and agreed on both sides. It describes itself and defines itself as an "Agreement". It contains all the operative terms to be a contract of reinsurance, albeit one governed by New York law.'

38. The judge addressed and rejected a number of arguments advanced by Tyson, which were repeated on appeal, and which I will consider in due course.

39. As a result Partner Re's application for a stay succeeded and Tyson's application for an injunction did not arise. However, the judge went on to consider whether, if the MRC had remained the governing contract, he would have granted an injunction to restrain the continued pursuit of the arbitration. He held as a matter of discretion that he would not have done so because of Tyson's delay in issuing its application for such an injunction:

> '74. … There was no good reason to hold off seeking anti-suit relief whilst the tribunal was being put together in June to

> August. Nor was there any reason to eschew this coercive option whilst the tribunal was considering C's stay request. This could all have been done in parallel. There is no evidence to infer that seeking ASI relief at that early stage would have 'rocked the boat' or thrown the tribunal offside at the time of its formation.
>
> 75. The delay between the commencement of the arbitration on 4th May and at latest D's stay application in this court on 24th May, and issuing the ASI application on 3rd November, has not been adequately justified on an objective basis in my judgment. An anti-suit applicant is required to move much sooner. Whilst the rationale for this may not be as grounded in comity considerations where private arbitration is involved, as discussed above, waiting six months or so to seek coercive relief when it could have been sought at the outset, or in parallel with other solutions or steps within the arbitral process, is inexcusably long.'

The parties' submissions on ground 1

40. For Tyson, Mr Timothy Killen submitted that the judge's fundamental mistake was that he started from the assumption that this was a two-contract case, when the question was whether the MURA was a contract at all. The judge should instead have asked whether, reading the two documents together, the MURA was intended to vary or supersede the MRC, which was undoubtedly and admittedly a binding contract when concluded. He submitted that the judge should have held that it was not so intended: there was nothing in the language of the MURA to suggest that it was intended to vary the MRC; the MRC contained bespoke clauses which were not included in the MURA, which the parties cannot have intended to sweep away; the MURA was no more than a certificate for the parties' information; the parties had failed to follow the procedure set out in the London market General Underwriters Agreement ('the GUA', which was incorporated into the MRC) for making changes to an MRC contract; and the idea that they would have intended to make such a change only a few days after concluding the MRC was contrary to business common sense.

41. For Partner Re, Mr James Brocklebank KC submitted that the parties had always intended that their final contract would be the MURA which, on its face, was a contractual document. The entire agreement clause states in terms that the MURA supersedes all previous agreements. Tyson's broker, Lockton, had invited Partner Re to agree its terms, which Partner Re had done by signing and stamping every page of the MURA. The 2021 MURA was materially different from the 2020 MURA in ways which demonstrated that it was intended to have contractual effect, and it was agreement to the terms of the MURA which triggered the payment of premium. The MRC was not in any real sense a bespoke agreement, but rather a collection of standard clauses and there was very little difference of substance between the standard terms of the two contracts. The GUA did not prevent changes to the MRC from being agreed, but was concerned with the procedure to be followed if a change by the lead underwriter was to bind the following market – but that was irrelevant here, where there was no following market.

Ground 1 – Discussion

42. As already noted, there is no doubt that the MRC dated 30th June 2021 was a valid and binding contract of reinsurance, governed by English law and subject to the exclusive jurisdiction of the English court. The issue is whether the parties intended that contract to be superseded by the MURA. This requires an objective assessment of what the parties said and did. Their subjective intentions are irrelevant, though it appears fairly clear from the evidence before the judge that Tyson intended and understood subjectively that the MRC would continue to govern the parties' relationship, while Partner Re intended and understood that the MRC would be superseded by the MURA.

43. I would accept that there are some passages in the judge's judgment which do appear to assume that there were two binding contracts, when that is the question to be decided. For example, in introducing the case, the judge said that:

> '2. … The unusual feature of this situation is that there are two distinct contracts covering the same legal relationship, each providing for different applicable law and dispute resolution forum. This means that the choice between converse remedies is a direct product of which contract prevails. …'

44. However, when the judgment is read fairly as a whole, it is clear that the judge asked himself the right question, whether the MRC was varied or superseded by the MURA: see, for example, para 32 of the judgment which I have set out above.

45. Viewing the matter objectively, several points are clear. First, from the outset of their negotiations for the 2021 policy, the parties contemplated that what were described as 'reinsurance certificates and the updated policy form' would be provided by Lockton, acting as Tyson's brokers. This was a reference to the MURA.

46. Second, the parties were, or must be taken to have been, familiar with the nature and terms of the MURA, a widely used form of reinsurance contract in the US market which, on its face, makes it abundantly clear what the document is for. They would therefore have known that the MURA was an appropriate document to be used in order to record the terms of a contract, governed by New York law and subject to New York arbitration. Conversely, they must have understood that 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.

47. Third, there is no indication that the issue of the MURA was merely part of some administrative process. Lockton expressly sent the MURA to a Partner Re 'for agreement' and requested Partner Re to consider it 'and agree as soon as possible'. That is the language of contract formation.

48. Fourth, Partner Re duly signed and stamped the MURA on every page, and returned it to Lockton. The obvious inference, therefore, was that Partner Re did agree the terms of the document and accepted it for what it purported to be, namely the contract of reinsurance for the 2021 policy year.

49. Fifth, the entire agreement clause in the MURA, with which the parties must be taken to have been familiar, stated expressly that the MURA 'shall supersede all contemporaneous or prior agreements and understandings, both written and oral, between the Parties with respect to the subject matter hereof'. Mr Killen submitted that this clause is irrelevant to the question whether the parties intended the MURA to have contractual status: if they did, the clause adds nothing, but if they did not, the entire agreement clause is of no effect. However, I do not accept that argument. The issue is whether the parties intended the MURA to supersede the MRC: the fact that Tyson's broker sought and obtained Partner Re's agreement to a document containing a clause proclaiming that the document constituted 'the entire agreement between the Parties' and superseded all prior agreements between them is highly relevant. Indeed, it means that Mr Killen's submission that there is nothing in the language of the MURA to show that it was intended to supersede the MRC is mistaken. Although the MRC is not specifically identified, the entire agreement clause states in terms that all prior agreements are superseded. That includes the MRC.

50. Sixth, in contrast to the previous year, there was no endorsement making clear that the MURA was subject to the MRC. In the equivalent document for the 2020 policy year the Service of Suit clause had been left blank. That was consistent with the fact that, as indicated in the endorsement, the 2020 MURA was not intended to have contractual force. In 2021, however, the 'Service of Suit' clause was completed to provide for service on a New York law firm, Mendes & Mount. That must have been a deliberate change, reflecting the contractual status of the 2021 MURA and the recognition that any dispute would be determined in New York. It suggests that the absence of an endorsement in similar terms to the endorsement for the 2020 policy year was no oversight. Another apparently deliberate change, clearly intended to have contractual effect, was that whereas the MRC provided that premium was payable on or before 28th September 2021, the MURA brought this date forward to 1st September.

51. All this suggests that the 2021 MURA was intended to be the final contract of reinsurance for the 2021 policy year. Certainly it looks like a contract and contains everything needed to be a valid and binding contract of reinsurance. It resembles the proverbial duck.

52. Mr Killen advanced a number of arguments why this conclusion did not follow. First, he submitted that it would have been contrary to business common sense for the parties to have agreed a contract providing for English law and exclusive jurisdiction on 30th June 2021, only to replace it eight days later by a different contract providing for New York law and arbitration. There is some force in that submission. However, it is at least equally contrary to business common sense, if the parties intended their relationship to continue to be governed by English law and subject to English exclusive jurisdiction, for Tyson's broker to have requested Partner Re to agree to the terms of a MURA document providing for New York law and arbitration.

53. I doubt, therefore, whether business common sense has any significant role to play in the determination of this appeal. It is interesting, however, that Lockton described the MRC as 'the signed slip'. That terminology calls to mind the practice, before the introduction of the MRC form of contract in 2007, whereby a binding contract would be concluded by the underwriter scratching a slip, which both parties intended would be superseded at a later stage by a formal policy: see the discussion by Mr Justice Jacobs in *AIG Europe SA v John Wood Group Plc* cited above and by Lord Justice

Rix in *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735 at paras 69 to 97. It is not unknown in the insurance market, therefore, for an initially binding contract to be superseded by a later contract potentially containing different terms.

54. The question arises, if the MURA was not intended to have contractual force, superseding the MRC, what was it for? Mr Killen submitted that it was no more than a certificate, issued for administrative purposes. He relied on its description by the parties as a 'facultative certificate', although that is not a description which appears in the document itself, which is clearly headed 'Agreement'. He said that it was a 'summary of the cover'. In my judgment, however, this explanation of the MURA makes no sense. The only purpose of a certificate is to certify the existence and terms of the cover provided. A certificate purporting to show that reinsurance is in place on the terms of a MURA subject to New York law and arbitration would be worse than useless if in fact the reinsurance was intended to be on the terms of an MRC subject to English law and jurisdiction and containing different terms. The MURA was in no sense a 'summary of the cover' contained in the MRC.

55. Mr Killen sought to explain this by saying that the use of a MURA was an error. But that will not do. Plainly it was always both parties' intention that a MURA should be issued in terms to be agreed by Partner Re. The fact that the parties described the MURA as a certificate does not alter what is plainly its true nature, any more than the fact that they described the MRC as a 'slip', when it was not. As Tyson's own witness, Mr Brett Gillmon, a Senior Vice President at Lockton, explained, a MURA will be described in the US market as a 'facultative certificate', but is acknowledged to be the contract by which a reinsurer agrees to follow the fortunes of a captive reinsured.

56. Mr Killen developed the argument that the MURA was no more than a certificate by reference to clause 33 of the direct insurance between Tyson Foods and Tyson. This clause provided:

> '**33. CERTIFICATES OF INSURANCE**
>
> Any certificate of insurance issued in connection with this policy shall be issued solely as a matter of convenience or information for the address(s) [*sic*.] or holder(s) of said certificate of insurance, except where any Additional Insured(s) or Loss Payee(s) are named pursuant to the Special Provisions of said certificate of insurance. In the event any Additional Insured(s) or Loss Payee(s) are so named, this policy shall be deemed to have been endorsed accordingly, subject to all other terms, conditions and exclusions stated herein.'

57. This was not a submission made in the court below, or even in Tyson's skeleton argument in support of the appeal. The argument ran that this clause was incorporated into the primary layer of reinsurance ('the Beazley policy') and, as a result, formed part of the 'Original Policy Wording' which was incorporated into the MRC; and that it shows that a certificate is for information only and does not affect the terms of the policy. I do not accept this submission. I can see no justification for thinking that the parties intended to incorporate clause 33 of the direct insurance into the MRC (cf. the

discussion in *Edelman & Burns, The Law of Reinsurance*, 3rd Edition (2021) at paras 3.45 to 3.51), but in any event clause 33 of the direct policy cannot negate the true nature of the MURA which states on its face that it is a contract of reinsurance.

58. Next, Mr Killen submitted that the MRC contained various 'bespoke' clauses which the parties had negotiated, while the MURA was a document in standard form; that the parties would not have wished to sweep away these terms which were not included in the MURA; and that this demonstrated their intention that the terms of the MRC should prevail. However, most of the terms which were attached to the MRC were standard market wordings which were not the subject of any individual negotiation, while the MURA achieved essentially the same result by the mechanism of incorporating the terms of the direct insurance. Ultimately, it appeared that there was only one potentially significant term contained in the MRC which was not carried over by one means or another into the MURA. This was Partner Re's Communicable Diseases clause. On the other hand, the MURA contained a potentially valuable clause giving each party the right to inspect the books and records of the other, which was not included in the MRC. In my judgment the Communicable Diseases clause is a flimsy basis on which to deny that the MURA was indeed what it purported to be.

59. Finally, Mr Killen submitted that the only permissible mechanism for amending the MRC was by means of the procedure set out in the GUA. The MRC included a page, headed 'Subscription Agreement', which provided as follows:

> 'All changes to be managed and agreed in accordance with the General Underwriters Agreement (version 2.0) February 2014 and the GUA Non-Marine Schedule (October 2001). Non bureau markets to follow the agreement of the slip leader unless otherwise stated.
>
> As regards Contract Change Endorsements where full market approval is deemed not necessary within the provisions of the GUA then, when required Lockton Companies LLP may be permitted to utilise email facilities to supply the 'follow' Underwriters with scanned copies of such Contract Change Endorsements for their records.
>
> It is agreed that any increase/decrease in the total insured values by up to 10% may be agreed by the Slip Leader only.
>
> One month automatic extension of period at pro rata premium to be agreed Slip Leader only.
>
> Wherever practicable, between the broker and each (re)insurer which have at any time the ability to send and record ACORD messages:
>
> 1. the broker agrees that any proposed contract change will be requested via an 'ACORD message' or using an ACORD enabled electronic transfer platform;

> 2. whilst the parties may negotiate and agree any contract change in any legally effective manner, each relevant (re)insurer agrees to respond via an appropriate 'ACORD message' or using an ACORD electronic trading platform;
>
> 3. where a (re)insurer has requested to receive notification of any contract change the broker agrees to respond via an 'ACORD message' or using an ACORD enabled electronic transfer platform.'

60. Mr Killen went so far as to submit that even an agreement to vary the MRC stating in terms that 'we hereby agree to vary the MRC' and signed by the parties in their own blood would be ineffective if it did not follow the procedure for contract changes set out in the GUA. He submitted that this was in accordance with the decision of the Supreme Court, concerned with 'No Oral Variation' clauses, in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119.

61. However, it is clear from the 'Subscription Agreement' term of the MRC set out above that it does not limit the ability of the parties to 'negotiate and agree any contract change in any legally effective manner'. Rather, it is concerned with the procedure by which a following market, where there is one, is to be notified and bound by such changes. That is apparent also from the terms of the GUA itself, which describes its purpose as follows:

> 'The General Underwriters Agreement provides a standardised arrangement in respect of contract change agreements. The purpose of the GUA is to:
>
> * create an agreement between the subscribing Underwriters on a particular contract for the management of changes
>
> * clarify the extent of the delegated authority to the Slip Leader and Agreement Parties
>
> * enable each class of business to define their specific requirements/needs within a common framework
>
> * allow a single Slip Leader and/or Agreement Parties to agree contract alterations were empowered to do so by the GUA
>
> …
>
> The GUA is an agreement between the subscribing underwriters on a particular contract relating to the level of delegated authority in respect of post-placement alterations.
>
> …
>
> This GUA determines the basis upon which the specified slip leader and agreement parties for insurance and reinsurance risks to which this GUA is applied may act as agents of the

> other Underwriters subscribing to those risks, each for its own proportion severally and not jointly, in dealing with certain alteration(s), amendment(s) and additions ("Alterations") to the contract of insurance or reinsurance evidenced by a slip, policy, certificate or otherwise.'

62. In the present case there was no following market and the 'Subscription Agreement' page of the MRC was therefore redundant. There was nothing in the MRC to prevent the parties from agreeing, either expressly or by necessary implication, that the MRC should be superseded by a later contract on different terms. That is what they did. I would prefer to say that they did so expressly, in view of the terms of the entire agreement clause in the MURA. But if they did not do so expressly, they did so by necessary implication as a result of concluding a further contract (the MURA), relating to the same subject matter as the MRC, which was so fundamentally inconsistent with the earlier contract that the only inference to be drawn is that the parties no longer intended the MRC to be performed (cf. *Frangou v Frangos* [2023] EWCA Civ 1320 at para 98).

63. It is therefore unnecessary to decide whether the decision of the Supreme Court in *MWB v Rock Advertising* goes as far as Mr Killen submitted, though it seems to me that it would be surprising if it did.

Conclusion on ground 1

64. Although the MRC contract dated 30th June 2021 was a valid contract of reinsurance providing for English law and the exclusive jurisdiction of the English courts, it was superseded by the MURA dated 8th July 2021 which provided for New York law and arbitration. I agree with the judge's essential reasoning at para 32 of his judgment set out above. Or as Lord Justice Lewis put it in argument, the parties began by playing cricket but then switched to baseball.

65. Accordingly the judge was right to stay the English action pursuant to section 9 of the Arbitration Act 1996.

Ground 2 – the application for an injunction

66. In view of this conclusion, Tyson's application for an injunction to restrain Partner Re from pursuing the New York arbitration does not arise and it is unnecessary to say much about it. However, I would not endorse the judge's *obiter* conclusion on this issue.

67. The judge's view was that an injunction should be refused because Tyson had delayed in issuing its application. It should have done so promptly after 4th May 2023 when Partner Re purported to commence arbitration in New York, and should not have waited until 3rd November 2023. Although Mr Killen sought to persuade us that there was no real delay, it seems to me that this was a matter for the judge, with which I would not be prepared to interfere. We can only interfere with a discretionary decision by the judge if it was wrong in principle or failed to take account of a relevant consideration.

68. In my judgment, however, the judge did fail to take account of the consequences of the refusal of an injunction. On the assumption, contrary to the view which I have reached above, that the MRC remained the governing contract between the parties and that the MURA was of no binding contractual force, Partner Re's application for a stay of the English action would have to be dismissed and the action would continue. But it is apparent from the ruling of the New York arbitrators that, unless restrained by injunction, the arbitration in New York will also proceed. The result would be duplication of trouble and expense, a race to judgment, and a real risk of conflicting decisions of dubious enforceability. That seems to me to be the worst of all worlds. There is no indication in the judgment that these consequences were taken into account by the judge.

69. The judge's failure to have regard to these consequences means that it would have been open to us, if ground 1 of the appeal had succeeded, to consider the matter afresh. On that basis, there was delay by Tyson in issuing its application. But the delay was only of a few months, during which time the arbitration remained at an early stage, and it was understood by both parties that the arbitrators' jurisdiction was in dispute and would be decided by the English court on Partner Re's application for a stay. In my judgment the delay is substantially outweighed by the unacceptable consequences of allowing both the English action and the New York arbitration to proceed. If the point had arisen, I would therefore have been prepared to grant the injunction sought.

Disposal

70. As it is, however, I would dismiss the appeal.

LORD JUSTICE LEWIS:

71. I agree.

LADY JUSTICE ASPLIN:

72. I also agree that the appeal should be dismissed for the reasons given by Lord Justice Males.