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Case No: CL 2016 000335

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
Fetter Lane,
London, EC4A 1NL

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Before:
MR. JUSTICE ROBIN KNOWLES CBE

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Between:

(1) THE BRITISH AMATEUR GYMNASTICS ASSOCIATION **(2) SHOOTING STARZ GYMNASTICS LIMITED**	**Claimants**
- and -	
(1) ZURICH INSURANCE PLC **(2) BRIT SYNDICATES LIMITED** **(3) PERKINS SLADE LIMITED**	**Defendants**

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MR. JAMES DRAKE QC and **MR. JAMES GOUDKAMP** (instructed by **Veale Wasbrough Vizards LLP**) for the **Claimant**
MISS NATALIE CONNOR (instructed by **Weightmans**) for the **First Defendant**
MR. BEN QUINEY QC and **MR. JAMES SHARPE** (instructed by **Mills & Reeve LLP)** for the **Third Defendant**

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APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR. JUSTICE ROBIN KNOWLES:

1. This is the claimants' application to amend its particulars of claim. The trial in this matter commences on 6th November 2017. There are certain minor amendments that are not the subject of opposition. The claim itself arises out of a devastating accident which has seen claims made by an injured young person again the claimants in this litigation. In this litigation the claimants in turn sue primary layer insurers and a broker. The amendments that are challenged would extend the allegations against the broker to include acts or omissions as regards excess layer insurers as well.

2. These are new claims against the broker. The excess insurers in question are not a party to this litigation. The claimants do not propose that the excess insurers should be brought into the litigation, although the broker's position on that at least is not necessarily the same. I do not know for my part whether the claimants' decision not to make the excess insurers a party is brought about by reason of exigency given lateness.

3. It is clear to me that the amendments that are proposed would cost the current trial date. The claimants say, as I have mentioned, that they do not seek to join the excess insurers as a party, but that still leaves this litigation and the broker within it with more facts and documents to be ascertained and investigated in relation to dealings between the claimants and the excess insurers. I appreciate fully, as has been fairly emphasised by Mr. Drake QC for the claimants, the brokers in question placed and notified the excess layer as well as the primary layer, but that involvement is neither the whole picture nor does it extend to the whole period potentially of relevance.

4. It is proposed by the amendments to allege that the excess insurers followed the claim against the second defendant primary layer insurer and voided the excess policy. This was, I note, in 2014. The position of excess insurers in relation to the claims against the first defendant primary layer insurer is not clearly alleged. The amendments overall are not as clear and complete as they might, indeed should, be particularly when advanced at this late stage and especially in respect of the years where the first defendant was the primary layer insurer.

5. The amendments would impose, in my judgment, the following additions between this point and the trial. Further disclosure, at least electronic disclosure; changes to the statements of case on the part of the defendants; investigation of facts with any intermediary that may have been involved at the stage of placement or notification of the excess layer; additions to the factual and expert evidence. I appreciate that the claimants' position is that its factual and expert evidence has sought to anticipate these changes but there remains the inevitability of addition to the factual and expert evidence on the defendants' part at least, so all of that alongside existing trial preparation. And that is quite apart from any question of ensuring a fair opportunity to the

broker to consider whether it wishes to seek the joinder of the excess insurers regardless of the position that the claimants' take.

6. In principle, in my judgment, the overriding objective strongly favours the retention of the trial date. That is fair to the parties and is in the interests of other court users who have their claim to court resources. I have listened closely and read closely in this case but regret that I do not find the claimants to have adequately explained why the amendments now being sought were not sought before now so that the consequence of their timing would not be as severe as I see that it now is. The claimants have known the position of excess layer insurers throughout. It has been apparent from a very early stage that the injury that underlies all of this litigation was catastrophic. The claimants have known that the claims in question would be significant. They plead in their original statement of case that one of the defendants' primary layer insurers reserved at around the limit of the primary layer - the reservation was at 5.25 million which is equal the primary layer ceiling with a moderate amount for costs.

7. It must in my assessment have been apparent for a long time that the matter could reach into the excess layer. The level of knowledge on the part of the claimants in 2014 and 2015 is notable, see for example the witness statement of Jane Allen of 12th July 2017 and the pre-action protocol letter dealing with notification of the excess layer insurers amongst other subjects. Inspection in February of this year following disclosure by the claimants included a document that referred to a potential liability of 11.5 million.

8. The claimants say that one thing that held them back, at least in the course of this year, 2017, had been a failing on the part of the brokers and those representing the brokers to respond to requests for documentation. The claimants say, and it is borne out by the documentation, that they asked for excess layer policy wording in March of this year and did not receive it until June. That, say the claimants, inhibited their ability to formulate their amendments. Had they received the material they were looking for in March they could have formulated their amendments in March.

9. Doing the best I can, March itself was, in my assessment, inexplicably late to be asking for that sort of material. The claimants refer to delay in obtaining from the broker, not just the wording of the policies but also the placing file. As a whole I am not happy with the delay that has been shown by the chronology in this respect and here the delay I am unhappy with is delay on the part of the broker in producing this material. The correspondence shows in the earlier part of this year an indication that the documentation would be provided, perhaps on a voluntary basis but that matters not, and yet the broker and those representing them took far too much time on the face of things actually to provide what they said they would provide. This still - unsatisfactory though as I must observe it is - does not explain why the amendments are so late, even if it might explain something about the detail of what could have been pleaded at an earlier point in the year.

10. The claimants have also said that something out of their control that has made the difference and which explains the late request for the amendments is the possible change in discount rate. We are here concerned with the discount rate in Northern Ireland rather than within England and Wales. I take note of what I am told in this regard but have to conclude on the material before me that even without any impact of a possible change in discount rate, the case already engaged in sharp focus the excess layer possibility and not just the primary layer possibility. I do not accept that the advent of the possible change in discount rate can have made the difference. Forensically Mr. Quiney QC points out, it was not put forward initially as having made the difference.

11. I do not doubt that prejudice will be caused to the claimants by a refusal on my part of the amendments. I take that prejudice into account. It is not altogether easy to measure it; it could in some circumstances be modest but it could also be very significant indeed. It could, on one analysis, cost the claimants the indemnity by a broker in the amount of the excess. It is not to be taken for granted that the claimant could simply bring a later claim against the broker. Case management considerations will be amongst the considerations that the court would likely consider in that context, see for example, *Aldi* and the line of authorities that followed that decision.

12. Even severe prejudice to the claimants in the present case does not tip the fair balance in favour of my allowing this application. These proposed amendments are new claims. They propose to extend the trial from a trial about breach in relation to primary layers to a trial about breach in relation to the excess layer. Their full complexity is not yet known, whatever may be current appearances, and the reason for that is that they have only just been proposed. They are too late now whether I measure that from the date of application for the amendment in July or from the date of this hearing in August or even from an earlier point at which they were provided in draft. Overall and with gratitude for the submissions that I have had on each side I am duty bound to refuse the application.

13. I will turn with the assistance of everybody to the question of the amendments that are not opposed, and to timing of the consequential amendments and costs. I also propose to return to any other case management business that can be dealt with today rather than delayed until the pre-trial review. One that has caught my eye, as everybody knows, is the fact that currently the experts are in breach of the court's order.

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