

Cayman Conference 2020
Virtual Workshop 3: Abuse of process in cross-border cases
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Sports Tech Limited ("**SportsTech**") is a company that acts as a reseller of sports technology.

In **2014**, it places an order for 1,000 machines, known as the "Pec Man", which can be used by personal trainers to assist clients in improving their pectoral strength. The purchase is made from On The Bench Limited ("**On The Bench**").

The Pec Man machines soon prove to be problematic. They make no difference to muscle development and in fact cause muscle damage to those who use them.

In 2013, Gym&Tonic Limited ("**G&T**"), another sports technology reseller, had purchased 2,000 Pec Man machines from On The Bench. G&T discovers similar issues with the Pec Man.

SportsTech issues proceedings against On The Bench in **January 2017** claiming £5m. On The Bench admits liability to SportTech, but disputes quantum. On The Bench joins Gym Bunnies Limited ("**Gym Bunnies**") as an additional defendant, saying that it is Gym Bunnies' faulty provision of parts and services to On The Bench that has caused the issues.

Gym Bunnies denies any liability and also asserts that, due to an exclusion clause, any damages would be assessed on a different basis to any damages that SportsTech can claim again On The Bench.

In **March 2017** G&T issued proceedings against On The Bench, which again joins Gym Bunnies. This time, On The Bench denies liability as it says this batch was functional, but in the alternative blames Gym Bunnies.

The G&T and SportsTech claims are thereafter case managed together.

In **June 2017**, On The Bench goes into administration. However, it holds an insurance policy for £10m. SportsTech and G&T continues their claims against On The Bench.

2 trials are listed:

- Quantum as between SportsTech and On The Bench. Gym Bunnies agrees not to be bound and takes no part in it (due to its arguments that its liability is to be assessed on a different basis)
- All issues between G&T, On The Bench and Gym Bunnies. This will take place in June 2018 (the "**Other Trial**").

In **January 2018**, On The Bench settles with SportsTech for £2m. SportsTech writes to the insurers and asks for payment, threatening proceedings. The insurers refuse to pay.

In **May 2018**, SportsTech commences a claim against the insurers. The insurers say the policy has been voided.

In **June 2018**, the Other Trial commences. It is due to last 6 weeks and legal fees are in excess of £10m. Due to an error on the part of SportsTech's lawyers, it fails to apply to the Court seeking permission to appear at the Other Trial and to seek remedies against Gym Bunnies. The Other Trial settles in the second week. SportsTech is not a party to the settlement.

In **July 2018**, SportsTech receives advice from Counsel that its claim will fail against the insurers. It settles the claim for a nominal sum. It then issues a claim against Gym Bunnies.

Questions

- 1. Will SportsTech's claim against Gym Bunnies be struck out as an abuse of process?**
- 2. Would it make a difference if, in March 2018, SportsTech had written to Gym Bunnies and to the Court stating that if satisfaction could not be obtained against the insurers, it would pursue Gym Bunnies?**
- 3. What about if, instead of lawyer error, SportsTech had not taken part in the Other Trial because it had no money to take part?**

Now consider the position based on a claim purely by SportsTech against On The Bench. At trial, the Judge found that the Pec Man machines were not fit for purpose due to a fundamental flaw in design. SportsTech wishes to litigate against others who sold it Pec Man machines, in particular:

- Above The Bench Limited, the parent of On The Bench, which sold 1,000 machines to SportsTech; and
- Below The Bench Limited, the 100% subsidiary of On The Bench, which also sold 1,000 machines to SportsTech.

Questions

- 4. Both contend the Pec Man machines are fit for purpose. Is this an abuse of process?**

It transpires that SportsTech had entered into a second contract with On The Bench, relating to 1,000 Abs Synth machines. The contract was signed on the same day as the Pec Man contract and the machines had the same faults. The Pec Man agreement had an English law and non-exclusive English jurisdiction clause. The Abs Synth contract had a Cayman law and non-exclusive Cayman jurisdiction clause. The English court in the Pec Man proceedings determined as a matter of fact that the Abs Synth machines were also not fit for purpose. After SportsTech succeeds in England in the Pec Man claim, it brings a claim in Cayman relating to Abs Synth.

Questions

- 5. Assuming the Cayman proceedings were properly brought, is it an abuse of process for On The Bench to assert that Abs Synth was fit for purpose?**
- 6. Is it an abuse of process for SportsTech to bring the Cayman proceedings?**