

# Kluwer Patent Blog

## Geofabrics lays the tracks for large-scale damages inquiries in the UK

Eden Winlow (Bristows) · Wednesday, October 19th, 2022

### Geofabrics Limited v Fiberweb Geosynthetics Limited [2022] EWHC 2363 (Pat)

Geofabrics Limited (“Geofabrics”) has been awarded £13.4 million in damages for patent infringement, concluding a 5 year long dispute with Fiberweb Geosynthetics Limited (“Fiberweb”). Damages inquiries are rare in the UK so this judgment from Charlotte May KC (sitting as a Deputy High Court Judge), which provides an excellent summary of the Court’s approach to the assessment of damages in patent cases, is a must read.

The inquiry followed a successful infringement case brought by Geofabrics in relation to its patent for a geosynthetic railway trackbed liner (“the Patent”). The liner addressed a common problem with railways known as “pumping erosion”. Both at first instance and on appeal, the Court held that Fiberweb’s rival product Hydrotex 2 infringed the Patent. Hydrotex 2 was marketed from 2012-2021 in direct competition to Geofabrics’ Tracktex product. Prior to the damages inquiry, Geofabrics elected for damages on the basis of:

- lost profits on lost sales of Tracktex;
- lost profits on historic sales of Tracktex as a result of price competition from Hydrotex 2;
- lost profits on future sales of Tracktex as a result of ongoing price depression caused by Hydrotex 2’s lower price; and
- interest.

The assessment of damages proceeded on the basis of a counterfactual scenario in which, for the relevant period, the only trackbed liner on the market was Geofabrics’ Tracktex. However, the judge made it clear that this assessment is not capable of precise estimation but that the Court should nevertheless do the best it can with the materials available to it. The judge also stressed that the burden lies on the claimant to prove its loss despite these uncertainties.

Some of the key issues considered in the counterfactual included:

1. Causation and remoteness of damage – it is not enough for the claimant to show that “but for” the infringement, the damage would not have occurred, and instead, the claimant must demonstrate that the defendant’s infringing acts were a *cause* of the loss;
2. Loss of a chance – when assessing damages resting on hypothetical events, damages should be awarded that are *proportionate to the chances of the event occurring*; and

3. The appropriate amount of interest – the purpose of interest is to *compensate the claimant* for being kept out of the monies due to them by way of damages, *rather than to punish the defendant*.

This judgment serves as a reminder, and perhaps a warning, of the complexity that can be found in damages inquiries, with all manner of factors and evidence being taken into account – from the theoretical production capacity of Geofabrics, to savings that Geofabrics made from actual staff redundancies that would not have occurred in the counterfactual.

Having set out the law, the judge turned to the seven outstanding issues between the parties and considered each in the context of the counterfactual. In doing so, the judge found that:

- Geofabrics would not have entered into a less profitable exclusive distribution agreement;
- all sales of Hydrotex 2 would otherwise have been sales of Tracktex;
- the price and price increases of Tracktex should be determined by reference to each specific customer and the market size;
- the amount of damages should be reduced as a result of redundancies made by Geofabrics which resulted in costs savings;
- Geofabrics did lose profits on sales of Tracktex after the withdrawal of Hydrotex 2 from the market due to continued price depression;
- the loss of profits attributable to one particular commercial deal was too remote for damages to be given; and
- interest 2% above the Bank of England base rate should be awarded

Having made these findings, the parties agreed that it was not necessary for the Court to learn how to operate the financial models which had been developed by the parties' experts nor to reach a determination of the final damages award as part of the judgment. Instead, parties' experts used the judge's findings and did their own calculations to arrive at a final damages award of £13.4 million.

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