EIP

Damages pull into the station for Geofabrics

Charlotte May KC recently handed down a comparatively rare judgment, for the Patents Court, in respect of a damages enquiry for infringement of Geofabrics' railway related patent by Fiberweb in Geofabrics Ltd v Fiberweb Geosynthetics Ltd [2022] EWHC 2363 (Pat). Whilst a damages enquiry is very fact dependent some useful general guidance on certain points comes out of the judgment.

Factual background

Geofabrics' product had been launched in 2010 with the infringing competing product from Fiberweb on the market between 2012 and 2021, when it was forced off the market by a court ordered injunction and at that time Fiberweb launched a new licensed product. The price of Geofabrics' product was forced downwards when Fiberweb's product was launched in 2012 and Geofabrics lost market share. This reduction in share and price unfortunately caused Geofabrics to make some redundancies during this period. An important point about the structure of this market was that the primary customer for both products was Network Rail, with sales both directly to Network Rail and through a distributor.

Approach of the court

There were a number of disputes for the court to decide to feed into what the appropriate final damages sum would be. The majority of these disputes between Geofabrics and Fiberweb related to the counterfactual of what would have happened had Fiberweb not infringed Geofabrics' patent, which is a problem given the inherent uncertainty of assessing what might have happened over a 10-year period. Both Geofabrics and Fiberweb called an internal witness and a forensic accounting expert to provide evidence on this point.

The judgment, referring to previous case law, makes it clear that the assessment of what would have happened if there had been no infringement is not capable of precise estimation, given the uncertainty, but that the court should do the best it can on the materials available to it, and that the burden lies on the claimant to prove the loss despite these uncertainties. The judge expressly states that determining what would have happened is harder than it looks.

Decision on the facts

The judge found that:

- Geofabrics would not have been forced to enter into a less profitable exclusive distribution agreement with its distributor if there had been no infringement,
- The market would have grown to same size even with Geofabrics being the monopoly supplier,
- Geofabrics would have had the capacity to supply the entire market,
- The correct starting point for the prices were those agreed with Network Rail and the distributor prior to the infringement,
- Different rates of price increases were to apply to the sales to Network Rail and the distributor,
- Some of Geofabrics redundancies would not have been made if Fiberweb had not infringed and so the savings from those redundancies should be deducted from the final sum,
- The price of Geofabrics' product would decline over a period of two years following the launch of Fiberweb's licensed product in 2021,
- The reduced price offered by Geofabrics for the Crossrail project was not caused by Fiberweb's infringement, and
- The appropriate rate of simple interest in this case was 2% above base rate.

Commentary

A counter-factual enquiry as to what would have happened absent infringement of a patent is an inherently speculative enquiry, which the claimant has to prove. Any such enquiry will necessarily be a fact dependent one including factors such as the particular products sold, the structure of the market and the business practices of the companies involved. It would therefore be unwise to draw too many conclusions from the particular facts in this case. Nonetheless it should be noted that many of the findings of the judge as to the correct counterfactual depended on the market continuing in the same way as it did before the infringing product was launched. One tentative conclusion that might be drawn is that the simplest counterfactual of the market continuing in the same way as it

was before the infringement began is likely to prove attractive.

p3 The task for the court when calculating the appropriate interest rate is to compensate Geofabrics for being kept out of the money due to them with the amount paid benchmarked against what a borrower similar to Geofabrics would have paid. However, in this case there was only limited evidence available to the court and in particular no evidence as to what the average borrowing rate was. Based on the limited evidence before it the court then awarded a rate of 2% above base rate, which for the period 2012 to 2021 would be less than 3%, despite acknowledging that SMEs, like Geofabrics, in general have higher borrowing rates. In future cases it might be that providing evidence as to the higher cost of borrowing for a particular company and similarly placed companies could provide the basis for the court to award an interest rate more than 2% above base rate to compensate that company.

A further point to note is that the judgment does not include a final lump sum figure as both parties' experts produced complicated financial models which took various inputs to output a single final sum and the judge did not use either expert's model or construct her own. Instead, the judge instructed the parties to work with their experts using their models to produce a final figure that the experts agree on. The court has made a final order base on the judge's expectation that this could be agreed cooperatively (although she did indicate that she would hear further argument if necessary). It therefore may well be that judges in similar circumstances in the future will make decisions as to what the correct inputs should be and leave the calculations of a final lump sum to be agreed by the parties and their experts.