

# Account of Profits for patent infringement

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- ▶ Rare guidance from the Court of Appeal on how to assess an account of profits
- ▶ Is the infringer liable for the whole of the profits made where the infringing items are sold as part of a larger product?
- ▶ Is the infringer allowed to deduct any part of their general overheads?

## What's it about?

The Court of Appeal in *Design & Display v Ooo Abbott and another* has provided guidance on how to assess an account of the Defendant's profits for patent infringement. Here, the patent relates to Abbott's Snap-in inserts used for displays fitted on shop walls. Design & Display manufactured and sold slatted panels which included the infringing inserts. After a successful claim for infringement, Abbott sought an account of Design & Display's profits.

The infringing item was sold as part of a larger product. Design & Display argued that it was not liable for the whole of the profits on sales of the larger product, but only for the proportion derived from the infringing article. It also argued that it should be entitled to deduct part of its general overheads, which relates to the non-infringing activity, against the relevant gross profits.

## Why does it matter?

After infringement of a patent is established, a patentee can either claim damages for loss of profits, or an account of the profits made by the infringer derived from the infringement. If the infringer has made significant profits from the infringing activity, the latter option will often be more attractive.

The Court of Appeal held that:

- ▶ If the presence of the infringing item was not an essential ingredient and did not drive the sales of the larger product, then the profit for each sale should be apportioned. Accordingly, Design & Display was liable only for the profits "derived from the infringement" and not for the whole of the profits on the larger product; and
- ▶ Since Design & Display would have, but for the infringement, manufactured and sold other non-infringing products, then to the extent that its actual overheads would have been used in sustaining that alternative sale, the overheads could be deducted in calculating the profits

## Now what?

When considering whether to seek damages or an account of profits against an infringer, this case is a good reminder that the Claimant should consider whether the infringing article forms part of a larger product and, if so, whether the infringing article is key to the commercial success of the overall product. It could be that claiming for the Claimant's own loss of profits by way of damages results in a higher financial compensation.

[\*Design & Display Ltd v Ooo Abbott & Anr \[2016\] ECWA Civ 95\*](#)

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