

Court of Appeal decision on damages in breach of confidence case

- ▶ The latest appeal judgment in a long-running and significant breach of confidence case involving mosquito net design
- ▶ Guidance on the calculation of damages where a product is derived from, rather than a direct result of, misuse of confidential information

What's it about?

In 2009, the High Court found a breach of confidence involving the misuse of confidential information relating to the design of mosquito nets belonging to the claimant (**Vestergaard**) by the defendant (**Bestnet**).

The confidential information was developed by a consultant whilst working for Vestergaard and used in his subsequent work for Bestnet. As a result, Bestnet had produced: (i) "first formula" nets, which were directly derived from Vestergaard's confidential information, and (ii) "second formula" nets, whose design was derived from the confidential information, but also involved significant additional development.

The main issue on appeal had been whether the High Court had taken the correct approach to damages in respect of the second formula nets. The Court of Appeal has upheld the High Court's decision, which had awarded damages (i) in respect of first formula nets, for lost profit and royalties on nets sold, and (ii) a "quasi-consultancy fee" for the use of the confidential information in the second formula nets. The Court of Appeal also considered awarding compensation for acceleration of the second formula nets into the market, but found no such acceleration on the facts.

Why does it matter?

This is a rare case which considered the assessment of damages arising from products derived from, rather than a direct result of, misuse of confidential information.

The High Court had correctly followed the established principles set out in *General Tire & Rubber Co Ltd v Firestone Tyre & Rubber Co Ltd (No.2)* [1975] 1 W.L.R. 819 in assessing damages for the first formula nets. Broadly, these principles involve calculating the profits which have been diverted from the claimant to the defendant due to the misuse of the information, or the typical cost of a licence by the claimant to its licensees (where it licenses the information). Where a profit approach is not appropriate, the *General Tire* principles measure damages by considering what a notional licensee would pay for a licence to a notional licensor in the open market, without knowledge of the dispute.

In the case of the second formula nets, however, it was permissible to deviate from these principles and apply a different calculation, specifically, by way of a payment to reflect the extent to which the sales of the second formula nets were brought about by the use of the confidential information (the "quasi-consultancy fee").

Now what?

Businesses should be aware of the liability that may arise from using confidential information as a starting point for new products, even where significant additional development work takes place. This case also serves as a reminder of the importance of protecting trade secrets and of the consequences of misuse.

[MVF 3 APS \(formerly Vestergaard Frandsen A/S\) and others v Bestnet Europe Ltd and others \[2016\] EWCA Civ 541](#)

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