

IN THE SUPREME COURT OF NEW ZEALAND

SC 32/2012
[2012] NZSC 77

BETWEEN	LOKTRONIC INDUSTRIES LIMITED Applicant
AND	STEPHEN JOHN DIVER First Respondent
AND	SDR LIMITED Second Respondent
AND	ROY BOWYER Third Respondent
AND	TRIMEC TECHNOLOGY PTY LIMITED Fourth Respondent
AND	NEIL RICHARD HINGSTON Fifth Respondent
AND	ASSA ABLOY NEW ZEALAND LIMITED Sixth Respondent

Court: Elias CJ, McGrath and William Young JJ

Counsel: S A Grant and E Krishnan for Applicant
M H Morrison and K D Puddle for First Respondent
Z G Kennedy and P D M Johns for Third, Fourth and Sixth
Respondents

Judgment: 5 September 2012

JUDGMENT OF THE COURT (RECALL)

- A The application for recall is dismissed with costs of \$1,000 to be shared equally by each set of respondents making submissions on the application.**
- B Any issues concerning orders made by the Court of Appeal or other outstanding matters must be addressed to that Court.**
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REASONS

[1] The applicant applies for recall of a judgment refusing it leave to appeal.¹ The ground is that the Court, in refusing leave, did not address whether the appeal had a sufficient prospect of success to warrant leave being granted to address a question of general commercial significance.

[2] The applicant says that the Court has not made clear which of the versions of the facts is relied on in concluding the appeal is unlikely to succeed. In this respect, the applicant's submissions misinterpret the Court's leave judgment. Paragraph [5] addressed the different possible formulations of the legal standard of knowledge required to establish liability. This Court said that a formulation of a test for that standard, that was different in subtle respects from that adopted by the Court of Appeal,² would not be dispositive. The comment that the applicant would not succeed in a further appeal on the point merely repeats what was said in the previous sentence. It is not expressing a conclusion that the appeal against the factual determination could not succeed if leave were granted.

[3] The underlying premise of the application to recall appears to be that where a proposition of general commercial significance is associated with a proposed appeal, leave to appeal should be given even if the determination of that question will not affect the outcome of the case. Under s 13(2)(c), however, it is only necessary in the interests of justice for the Court to hear a proposed appeal concerning a matter of general commercial significance if the matter relied on is likely to be material to the outcome of the case.

[4] As well, the proposed appeal on the factual issues did not satisfy the interests of justice test under s 13(1)(b) as the circumstances did not indicate that a miscarriage of justice might have occurred, applying that principle as explained in *Junior Farms Ltd v Hampton Securities Ltd*.³

¹ *Loktronic Industries Ltd v Diver* [2012] NZSC 60.

² *Diver v Loktronic Industries Ltd* [2012] NZCA 131, [2012] 2 NZLR 388.

³ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, [2006] 3 NZLR 522.

[5] The application for recall is accordingly dismissed with costs of \$1,000 to be shared equally by each set of respondents making submissions on the application. Any remaining issues concerning the interim orders made by the Court of Appeal, or other outstanding matters, must be addressed in that Court or the High Court.

Solicitors:

Baldwins Law Limited, Auckland for Applicant

Lowndes Jordan, Auckland for First Respondent

Minter Ellison Rudd Watts, Auckland for Third, Fourth and Sixth Respondents