

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2008-404-004657**

BETWEEN	LOKTRONIC INDUSTRIES LIMITED Plaintiff
AND	STEPHEN JOHN DIVER First Defendant
AND	SDR LIMITED Second Defendant
AND	ROY BOWYER Third Defendant
AND	TRIMEC TECHNOLOGY LIMITED Fourth Defendant
AND	NEIL RICHARD HINGSTON Fifth Defendant
AND	NEIL HINGSTON ENGINEERING LIMITED Sixth Defendant
AND	ASSA ABLOY NZ LIMITED Seventh Defendant

Hearing: 2-6 November 2009

Appearances: S A Grant for Plaintiffs  
M H L Morrison and S J Nicolson for First and Second Defendants  
Z G Kennedy and S K Hindle for Third, Fourth and Seventh Defendants  
P L Rice and B P Molloy for Fifth and Sixth Defendants

Judgment: 27 November 2009 at 4:30 pm

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**RESERVED JUDGMENT OF COURTNEY J  
[Application for further security for costs]**

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This judgment was delivered by Justice Courtney  
on 27 November 2009 at 4:30 pm  
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar  
Date.....

## **Introduction**

[1] This proceeding was adjourned part-heard on 6 November 2009 after five days hearing. It will resume next year and counsel expect a further week will be required.

[2] Less than a month before the trial Sargisson AJ had ordered the plaintiff to provide security for costs in the sum of \$85,000 either by payment into the Registry or a personal guarantee by Mr Calvert (a director of the plaintiff) and a guarantee from the plaintiff. The defendants now seek a total of \$140,000 further security. The application is opposed.

[3] In considering the issue of security for costs Sargisson AJ canvassed the relevant factors in some detail, concluding that the plaintiff's claim appeared to have merit but that the defendants should not be left totally exposed in the event that it was unsuccessful. Her rationale for fixing security in the sum of \$85,000 was:

Security in this amount would in my view best do justice between the parties. It does not purport to make full allowance for past costs or the likely costs of trial but it does take some account of the costs associated with the preparation and attendance at a five-day trial. In short, it would provide the defendants with a measure of protection in the event that their contentions are correct while not preventing Loktronic continuing with its proceeding.

[4] In support of their application the defendants point to the fact that the previous order for security for costs was calculated on the premise of a five-day trial but that the claim is "considerably more complex and of larger scale than previously envisaged". Their calculation of scale costs for a further five days on a 2B basis is \$28,000 for any one defendant (though there are some "pairs" of defendants sued both personally and through their corporate entities). In addition, the defendants submit that there ought to be recognition of the need for second counsel and of the fact that some of the causes of action require proof of intention or wrongdoing on the parts of the defendants and are akin to allegations of civil fraud. The defendants also submit that the plaintiff's claim is grossly exaggerated and, even if successful, would not approach the figure currently claimed of \$10m.

[5] Against these points is the fact that the issue of security for costs was carefully considered following a defended hearing. Had Sargisson AJ been asked to determine the issue of security for costs on the basis of a ten day trial rather than a five day trial it is possible she would have taken a different view of the amount of security that was

appropriate. However, it is very clear from her decision that the trial time was only one factor among many that she took into account. In particular, the Associate Judge concluded that the plaintiff's claim appeared to have merit. I cannot make any assessment of the probable outcome of the case at this stage but the evidence I have heard to date does not detract from Sargisson AJ's assessment.

[6] Nor is it the case that the claim now appears more complex than previously anticipated. There has been no change to the pleadings or the evidence. All parties were fully informed of the allegations they were facing and the evidence that was to be called. At the start of the hearing most of the preparation needed for the trial would have been done, with only cross-examination and submissions to prepare. The only real change is that counsel have now realised that, as a group, they woefully underestimated the trial time needed for this case.

[7] I am prepared to allow a modest amount of additional security for costs to reflect the additional hearing time that is now required. Mr Calvert has indicated that he would accept an order that resulted in him increasing the amount of his guarantee. The plaintiff, however, resists any increase to its guarantee because the term of its current guarantee that it not further encumber its assets is already a constraint on its trading activities. Taking everything into account I order that Mr Calvert provide further security for costs of \$35,000 (or \$5,000 per applicant) by way of an increase in his guarantee.

[8] Costs on this application will be reserved.

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P Courtney J

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