

BETWEEN WILLIAM OLAF PETERSEN
 of unit 4, 6 Keys Terrace
 St Heliers, Engineer

Appellant

AND JORDAN SANDMAN SMYTHE
 LIMITED a duly incorporated
 company having its registered
 office at Centrecourt,
 131-141 Queen Street,
 Auckland and carrying on
 business as shareholders

Respondent

Coram: Richardson J (presiding)
 Somers J
 Hardie Boys J

Hearing: 4 July 1988

Counsel: R. Harrison with Mrs Patricia Courtenay
 for Appellant
 C.A. Podwin for Respondent

Date of
Minute: 5 July 1988

MINUTE OF THE COURT

1. This appeal against a summary judgment was settled in the circumstances and upon the terms which we now set out. The appellant's case was that an admittedly arguable counterclaim qualified as a defence by way of set-off. We found the argument unconvincing and asked Mr Podwin, of

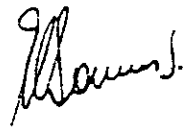
counsel for the respondent, whether the respondent could resist an application by the appellant in the High Court for a stay of execution if such were made. Mr Podwin realistically said it could not. We then suggested counsel might wish to confer. They did so and as a result the following orders are made by consent -

- i. The appeal is dismissed;
- ii. Execution of the judgment in favour of the respondent is stayed on terms as to the hearing of the counterclaim to be agreed by the parties with leave to apply thereon to the Master;
- iii. The appellant will pay the respondent's costs of the appeal which are fixed at \$1250 together with reasonable disbursements including travel and accommodation expenses (if any) of counsel as fixed by the Registrar of this Court.

2. This is not the first case heard by the Court in which a cross-claim has been rejected as a defence by a Master and in which the question of a stay could not be dealt with by him because it had not been asked for.

In cases where a defence of set-off is raised in respect of an arguable counterclaim it is desirable on the grounds of expedition and expense not merely to resist the entry of summary judgment but also to apply in the alternative for a

stay of execution if such is desired so that all issues are disposed of and the parties know where they stand after a single hearing before the Master.

A handwritten signature in cursive script, appearing to read "M. A. ...".