

**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION PLEASE SEE WWW.JUSTICE.GOV.NZ/FAMILY/LEGISLATION/RESTRICTIONS.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 25/2012  
[2012] NZSC 48**

BETWEEN	S M Applicant
AND	ASB BANK LIMITED Respondent

Court: Elias CJ, Tipping and William Young JJ

Counsel: P L Twist for Applicant  
M V Robinson and E C Gellert for Respondent

Judgment: 25 June 2012

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed with costs of \$2,500 to the respondent.**

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**REASONS**

[1] The applicant seeks leave to appeal to this Court from a judgment of the Court of Appeal<sup>1</sup> dismissing her appeal against a determination of the High Court<sup>2</sup> that ASB Bank was entitled to exercise its rights as mortgagee over a property in respect of which the appellant had a right of occupation granted by order of the Family Court under s 27 of the Property (Relationships) Act 1976. The right of occupation was secured by notice of claim under s 42 of the Property (Relationships) Act. In the

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<sup>1</sup> *SM v ASB Bank Ltd* [2012] NZCA 103 (Arnold, Randerson and Stevens JJ).

<sup>2</sup> *ASB Bank Ltd v SM* HC Auckland CIV 2011-404-5239, 30 September 2011 (Whata J).

High Court and Court of Appeal, it was held that the presumption under s 46 of the Property (Relationships) Act of priority for the mortgage (which had been registered three years before notice of claim of interest under s 42 of the Property (Relationships) Act) was not rebutted on the facts, in application of ss 43 and 44 of the Property (Relationships) Act. The judgment of the Court of Appeal also allowed a cross-appeal by the respondent bank against conditions imposed by the High Court Judge on the orders he made relating to removal of the notice of claim of interest and the applicant's vacation of the property.

[2] In the High Court and Court of Appeal, the findings of fact excluded any question of the bank being implicated in a disposition "in order to defeat the claim or rights of any person under the Property (Relationships) Act" as is required by ss 43 and 44. The relevant legal principles are well established and were carefully applied by the Court of Appeal in a thorough judgment on the appeal. No matter of general or public importance arises. Given the findings of facts in the lower courts, the appeal has no reasonable prospect of success. The contention that the notice of claim could have priority over an earlier registered mortgage is untenable. There is no appearance of miscarriage of justice.

[3] For these reasons, the application for leave to appeal is declined. The applicant must pay the respondent costs on the application for leave to appeal, fixed at \$2,500.

Solicitors:  
Edwards Clark Dickie, Auckland for Applicant  
Simpson Grierson, Auckland for Respondent