

## MISTAKEN RELEASE OF SECURITY

**The Insolvency Lawyers' Association's Technical Committee wishes to draw members' attention to the recent decision of H H Judge Purle QC (sitting as a High Court Judge) in *Fender v National Westminster Bank Plc* [2008] EWHC 2242 (Ch.), in which the applicant administrator was directed to treat the respondent bank as secured, notwithstanding the latter's mistaken release of security granted to it by the debtor company.**

The bank held mortgage security from C for its own obligations, which also secured C's guarantee for an associated company (UKM). When UKM's indebtedness was discharged, the bank not only released the guarantee, but also executed a deed of release of the security, even though C's own indebtedness had not been discharged. The bank claimed the release was mistaken and that it was entitled to relief from the consequences of its mistake, whether that mistake was one of fact or of law (relying on *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349).

The administrator of C sought directions as to whether he should treat the bank as secured or not, claiming that there was no mistake on the part of the bank. It fully intended to release the property from the mortgage security, and that is what it achieved.

H H Judge Purle QC held that the equitable jurisdiction to relieve the bank of the consequences of its mistake was available, not because it now repented of an unwise commercial decision, but because the release was given in the mistaken belief that all of the secured obligations had been discharged. Turning itself from a secured creditor into an unsecured creditor was an unintended effect, mistakenly believing that it was not a creditor at all.

The judge reviewed decisions on mistake drawn from several different strands (pensions law, wills and inheritance tax cases) and noted that relief is now available in equity and at common law whether the mistake is one of fact or of law. He further approved the approach set down by Lewison J in *Re Griffiths (deceased); Ogden and another v Trustees of the RHS Griffiths 2003 Settlement and others* [2008] 2 All ER 654 that, for relief to be available, what had to be shown was that the person affected by the mistake would not have acted as he had done if he had been aware of the true facts. The judge concluded that the bank was entitled to be relieved from its mistake, and that the administrator be directed to recognise the bank as secured (as if the release had not been executed by it).

The short judgment is sound in principle, and no doubt welcome news to the bank concerned. However, it highlights the need for a full understanding of the nature and scope of the security held when issues of release and discharge come to be dealt with.