HIGH COURT OF AUSTRALIA

BRENNAN CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

IVAN JOHN KENDLE & ANOR APPELLANTS

AND

PETER MICHAEL MELSOM & ANOR RESPONDENTS

Kendle & Anor v Melsom & Anor (P5-1997) [1998] HCA 13
25 February 1998

ORDER

1. *Appeal allowed in part.*

2. *Set aside order 3 of the orders of the Full Court of the Supreme Court of Western Australia and in lieu thereof order that pars 1 to 5 of the orders made by Parker J dated 1 May 1995 be set aside and in lieu thereof it be declared that the appointment of the respondents as receivers and managers on 12 June 1986 is valid.*

3. *Otherwise appeal dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation:

R H B Pringle QC for the appellants (instructed by Leonard Cohen & Company)

R A Conti QC with K L Christensen for the respondents (instructed by Tottle Christensen)

CATCHWORDS

Ivan John Kendle & Anor v Peter Michael Melsom & Anor

Mortgages - Receivers and managers – Joint and several appointment – Validity of appointment – Nature of duties of appointees – Effect of appointment on liability in tort.

1 BRENNAN CJ and McHUGH J. The respondents Messrs Melsom and Robson ("the Receivers"), were appointed by the Commonwealth Development Bank of Australia ("the Bank"), to be the receivers and managers of the undertaking and assets of Velcrete Pty Ltd ("Velcrete"). The appointment was made pursuant to the authority conferred on the Bank by an equitable mortgage ("the Charge") given by Velcrete, whereby Velcrete charged its assets to secure advances by the Bank. The assets charged included those it held as trustee under a Deed of Trust. Gummow and Kirby JJ have stated the relevant terms of the Charge, the Appointment and the Indemnity relating to the appointment and powers of the Receivers. Velcrete and its successor as trustee, Mr Kendle, are the appellants.

2 The appellants are plaintiffs in an action in the Supreme Court of Western Australia in which the Receivers are sued as defendants in tort. By the appellants' Further Re-Amended Statement of Claim, they allege:

> "13. From 12th June 1986 until 27th July 1988 the Defendants, and from 27th July 1988 to date, the First Defendant [Mr Melsom] -
>
> (a) took and retained possession of the land and carried on the business thereon;
>
> (b) in carrying on the business used plant and equipment of the successive trustees of the trusts in the said deed ('the trustees');
>
> (c) disposed of the trustees' chattels, stock and lease of a sand pit;
>
> (d) collected or purported to collect debts due to the trustees from their trade debtors.
>
> 14. From 12th June 1986 to 27th July 1988 the Defendants by themselves, their servants and agents trespassed upon the land.
>
> 16. From 27 June 1988 to date, the First Defendant, by himself, his servants and agents, have trespassed upon the land."

3 The Receivers' defence is, inter alia, that they or one of them did the acts complained of in exercise of the powers conferred upon them by the Appointment. The appellants contend that the Appointment of the Receivers was invalid. Clause 2 of the Appointment stated that their appointment was "joint and several" and the contention was that the Charge did not authorise the making of such an appointment. Parker J upheld that contention in proceedings to determine particular issues before the trial of the action. The Full Court set aside the orders of Parker J and declared that the appointment of the Receivers as joint and several receivers and managers was valid. The same question is now before this Court for determination, but the question needs to be more closely defined.

The nature of the Receivers' alleged liability

4 If the acts complained of by the appellants were done or authorised by both of the Receivers or were done or authorised by one of them in intended performance of the duties which the Bank had appointed both of them to perform, and if the Receivers had no authority to do or to authorise the doing of those acts, they would be joint tortfeasors[1]. As joint tortfeasors they would be liable in damages jointly[2] and, consequent upon the enactment of s 7 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA), they would each be liable for any damages unrecovered[3]. We do not understand the Further Re-Amended Statement of Claim to allege that either Receiver did any of the acts complained of otherwise than in intended performance of the duties which the Bank had appointed both of them to perform. Therefore the relevant question is whether the Receivers were, or the Receiver who did a particular act was, validly empowered to do the act or acts complained of for the purpose of performing their duties as receivers and managers.

The nature of the authority conferred on the Receivers

5 The question is not whether two or more persons could be appointed as receivers and managers. That question is answered by cl F31 of the Charge[4]. A plurality of persons may be appointed. The question is whether, if a plurality be appointed, the powers which the Bank is authorised to confer on them are powers that must be exercised by them jointly - that is to say, powers in which each must join in the exercise - or powers that can be exercised by them severally - that is to say, powers which each may exercise independently of the other. In either case, of course, the powers must be conferred by the Bank and must be exercised by the Receivers for the purpose of the Receivers' performance of their duties as receivers and managers[5]. In the absence of any express provision in the Charge, the question whether the powers which the Bank is authorised to confer on a plurality must be

---

1 *The "Koursk"* [1924] P 140 at 155, 159-160; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581, 600.

2 *Cocke v Jennor* (1614) Hobart 66 [80 ER 214].

3 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 584.

4 " Except to the extent that such interpretation shall be excluded by or be repugnant to the context ... words importing the singular number or plural number shall include the plural number and singular number respectively ..."

5 See *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820 at 829; *McKendrick Glass Co v Wilkinson* [1965] NZLR 717 at 722.

exercised jointly or can be exercised severally must depend on the nature of the duties which the Charge authorises the Bank to appoint receivers and managers to perform.

6 In *R v Wake*[6], where an appointment had been made under statute of two persons "to execute jointly the office of clerk" of the County Court of Derbyshire, holden at Chesterfield, Coleridge J noted that the statute contemplated the case of a populous district in which two persons would be needed to discharge the duties of clerk. The appointees were to discharge their duties under regulations made by order of the Court. This satisfied his Lordship[7] that the statute contemplated "that each should discharge certain duties at all events separately". Lord Campbell CJ and Erle J were of the same opinion, the latter observing "that it was the intention of the legislature that each should act separately, though perhaps in the name of both"[8]. The Court held that the duties (and therefore the powers) of the court clerk could be exercised separately and, having regard to the statute, were intended to be exercised separately by any person appointed to the office. In *Guthrie v Armstrong*[9], where an underwriter gave a power of attorney to a plurality "jointly and separately", Abbott CJ said:

> "Here, a power is given to fifteen persons jointly and severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is ... that the power is given to all or any of them to sign such policies, as all or any of them should think proper."

In that case, the grantor intended to be bound whenever one or more of his attorneys might think it proper to exercise the power reposed in him. These cases are very different from a case where the owner of property charges his property and authorises the chargee to appoint a receiver and manager to deal with the property.

7 In the present case Velcrete authorised the Bank to appoint one or more persons as a receiver and manager to exercise powers which included the following[10]:

---

6 (1857) 27 LJQB 11.

7 (1857) 27 LJQB 11 at 14.

8 (1857) 27 LJQB 11 at 15.

9 (1822) 5 B & Ald 628 at 629 [106 ER 1320 at 1320].

10 Clause F3 of the Charge.

"(a) to take possession of collect and get in the whole or any part of the mortgaged premises;

(c) to carry on or concur in carrying on the business of the Mortgagor ...

(e) to sell or concur in selling (whether such receiver shall or shall not have so taken possession as aforesaid) all or any of the mortgaged premises ...

(g) to employ managers solicitors officers agents auctioneers workmen and servants for all or any of the purposes aforesaid ...

(i) to give effectual receipts for all moneys and other assets which may come to the hands of the receiver in exercise of any power hereby conferred ...

(n) to do all such other acts and things without limitation as the receiver shall think expedient in the interests of the Bank;

(o) with the consent in writing of any authorised officer of the Bank to delegate to any person for such time or times as the authorised officer shall approve any of the powers hereinbefore conferred upon him".

These are powers which, by their nature, must be exercised in an orderly manner for the purposes of the receivership. It is absurd to think that the receivership could proceed without the Receivers agreeing on the course to be pursued in respect of the property which they are appointed to receive[11]. The powers which the Bank is authorised to confer on a plurality could not be exercised by two or more persons acting independently one of the other. If a plurality of repositories of these powers exercised them independently one of the others, chaos could result. One may desire to take possession today, another tomorrow; one may carry on business in a particular way or sell particular property, another may carry on business in a different way or retain property from sale. And so on. That could not have been the intention of either Velcrete in giving or the Bank in taking the Charge. Moreover, a receiver and manager who gets in money in exercise of powers conferred pursuant to the Charge is bound to apply them in accordance with the Charge[12]. In the absence of any contrary provision in the Charge under which an appointment is made, a plurality of receivers are under a joint obligation to account

---

11 The Charge provides for the appointment of a receiver "of the mortgaged premises or any part thereof": cl F3. Hence different receivers may be appointed in respect of different parts of the mortgaged premises.

12 *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820 at 828-832; see cl F7.

for the money got in[13]; they are jointly responsible for the discharge of their duties[14]. They could not fairly be held to be jointly responsible for a breach of duty by one of them in the exercise of the powers of receiver and manager if each was severally authorised to exercise those powers.

8 When a charge is authorised to confer on a plurality of persons powers over the assets and undertaking of the person creating the charge and the purpose for which those powers are conferred is such that they must be exercised in an orderly or consistent manner, the powers must be conferred jointly unless the terms of the charge otherwise provide, expressly or impliedly. This was the view of the courts in *R J Wood Pty Ltd v Sherlock*[15], *Wrights Hardware Pty Ltd v Evans*[16] and *Kerry Lowe Management Pty Ltd v Isherwood & Sherlock*[17]. But in *DFC Financial Services Ltd v Samuel*[18] the New Zealand Court of Appeal upheld the validity of an appointment made jointly and severally. Somers J said[19]:

> " The proposition that an appointment of two or more agents requires them to act jointly unless there are words of severance has cast its shadow over this issue. A joint and several appointment has commercial advantages and does not seem to involve any prejudice to the borrower. Accordingly, I prefer to approach the matter on the footing that unless there is good reason for doing so the Court ought not to view such an appointment as requiring express power or necessary implication. I am of opinion that a power to appoint one or more receivers or managers empowers a joint and several appointment unless upon the true construction of the empowering document it can be seen that such an appointment is not authorised."

DFC Financial Services was followed by the Court of Appeal of New South Wales in *NEC Information Systems Australia Pty Ltd v Lockhart*[20]. Meagher JA,

---

13 *White v Tyndall* (1888) 13 App Cas 263 at 269.

14 See *In re The Liverpool Household Stores Association (Limited)* (1890) 59 LJ Ch 616 at 624-625.

15 Unreported, 18 March 1988, Federal Court.

16 (1988) 13 ACLR 631.

17 (1989) 15 ACLR 615.

18 [1990] 3 NZLR 156.

19 [1990] 3 NZLR 156 at 161.

20 (1991) 22 NSWLR 518.

referring to the commercial practice of appointing joint and several receivers, said[21]:

> "The commercial purpose behind this practice must be that it is more convenient to conduct an expeditious receivership or liquidation if decisions can be made by one only of the appointees. That end would not be served if every decision, and every act, however trivial, required the concurrence, after due consideration, of all appointees. Indeed, joint receivers would be more cumbersome than a single appointee. This was recognised - rightly in my view - in the *DFC Financial Services* case. Again, as was stressed in that case, to construe a power as extending to the making of a joint and several appointment and not merely a joint one does not inflict any appreciable - or, indeed, any - harm on the mortgagor."

9 In these cases, the practical desirability of individual receivers being able to act in the day-to-day exercise of receivership powers led the courts to the conclusion that the powers themselves could be conferred, and should be held to have been conferred, severally as well as jointly. In our respectful opinion, that practical consideration does not indicate, much less warrant, the conclusion that powers which must be exercised in an orderly or consistent manner should be treated as powers which a chargee can authorise a plurality of receivers to exercise severally.

10 Equally, we are unable to appreciate why it may be thought that a power conferred on a plurality of receivers jointly should require every decision and every act, however trivial, to have the concurrence of all appointees. No doubt a requirement of conscious concurrence in each exercise of power would often frustrate the purpose of appointing a plurality of receivers and managers but the powers usually reposed in receivers would permit of their exercise in detailed, day-to-day functions by one or more of the plurality or by an agent appointed in that behalf. The powers are reposed in the plurality jointly because they must together resolve on the general course of the receivership and because they are to be jointly liable for the discharge of the duties of receiver and manager. But the implementation of their resolution of the course of the receivership can be left to one of their number or, if they so determine, to some agent appointed for the purpose. In the Charge in the present case, there is an express power to employ agents and servants: cl F3(g). The proposition that a plurality appointed as receiver and manager must be able to exercise their powers severally lest the purpose of the appointment be frustrated is a misconception. Rather, the conferring of those powers severally on a plurality would tend to frustrate the purposes of a receivership.

---

21 (1991) 22 NSWLR 518 at 529.

11 The proposition which was embraced in *DFC Financial Services* and *NEC Information Systems* has understandably influenced the textbook writers[22] but, rejecting that proposition, we would hold that the Charge did not authorise the Bank to confer the powers stipulated in cl F3 severally on a plurality of Receivers.

12 Construing the Charge in this way, the purported appointment of Messrs Melsom and Robson as "joint and several" receivers and managers by cl 2 of the Appointment is ineffective to confer on either of them any authority to exercise the powers set out in cl F3 independently of the other Receiver. But it does not follow that the Appointment is invalid. It is cl 1 of the Appointment which confers the relevant powers and authorises the Receivers to do the acts of which the appellants complain in the Further Re-Amended Statement of Claim. Clause 2 must be construed, if possible, consistently with the authority to appoint conferred on the Bank by the Charge. Clause 2 of the Appointment is apposite to impose on the Receivers who accept appointment a joint and several liability for any breach of the duties owed by them to the Bank. As between the Bank and the Receivers it appointed, a stipulation for the joint and several liability of the Receivers is valid[23]. In other words, the Receivers are the joint repositories of the powers conferred under the Charge but they have accepted a joint and several liability to the Bank for any breach of the duties they have undertaken.

13 If any of the acts complained of by the appellants in the Further Re-Amended Statement of Claim was done by one only of the Receivers independently of and without the concurrence or authority of the other to do that act - a concurrence or authority that might be express or implied - the Receiver who did the act could not rely by way of defence on the Charge and the Appointment. He would be severally liable as for any tort constituted by the doing of that act. But if an act was done by one Receiver with the concurrence or authority of the other, both Receivers would be entitled to rely on the Charge and the Appointment as conferring upon them the power to do the act which, in the absence of the power to do it, would or might have made them joint tortfeasors.

Orders

14 Paragraph 3 of the orders of the Full Court set aside the declaratory relief made by the primary judge and in place thereof "declared that the appointment of

---

22 Lightman & Moss, *The Law of Receivers of Companies*, 2nd ed (1994), par 4-08 at 86 where the authors cite as authorities *NEC Information System Australia Pty Ltd v Lockhart* (1991) 9 ACLC 658; *DFC Financial Services Ltd v Samuel* [1990] 2 NZLR 156 and cf *Re Liverpool Household Stores* (1890) 59 LJ Ch 616.

23 *R v Hoare* (1844) 13 M & W 494 at 505 [153 ER 206 at 210]; *Ex parte Honey. In re Jeffery* (1871) 7 Ch App 178 at 183.

the Appellants (Defendants) as the joint and several receivers and managers of the assets of [Velcrete] on 12 June 1986 is valid". A declaration in those terms does not distinguish between the validity of an appointment of two persons to exercise the powers of a receiver and manager and the joint nature of the powers that can be conferred upon them. A preferable course would be to make a declaration stating simply that the Appointment of the respondents as receiver and manager was valid. Further understanding of the principles relevant to the issues at trial would then be drawn from the reasons for judgment of this Court.

15 Order 3 of the orders made by the Full Court should be varied as indicated. Otherwise, the appeal to this Court should be dismissed with costs.

GUMMOW AND KIRBY JJ.

The appointment of the Receivers

16 By deed dated 25 July 1984 and headed "EQUITABLE MORTGAGE" ("the Charge"), Velcrete Pty Ltd ("Velcrete"), the second appellant, charged to Commonwealth Development Bank of Australia ("the Bank") its "undertaking property and assets" in consideration of and to secure advances and accommodation by the Bank to Velcrete. Velcrete was incorporated under the *Companies (Western Australia) Code* ("the Code"). The Charge was in what appears to have been a standard form prepared by the Bank. Greater attention in drafting the provisions therein for the appointment of receivers would have foreclosed the issues on this appeal.

17 By instrument headed "APPOINTMENT OF RECEIVER AND MANAGER" and dated 12 June 1986 ("the Appointment"), the Bank appointed the first and second respondents, Mr Peter Michael Melsom and Mr Stanley Frederic Robson of Perth, chartered accountants ("the Receivers"), the receivers and managers of the undertaking and assets of Velcrete. The Appointment recited continuing default by Velcrete under the Charge and stated that, in making the appointment, the Bank was acting in exercise of powers and authorities conferred upon it by the Charge. The Appointment stipulated that the assets in question included assets held by Velcrete as trustee of the trusts of a deed of trust dated 14 October 1980 ("the Trust"). Mr Kendle, the first appellant, later became and has remained trustee of the Trust. By an order made at the commencement of the hearing of the appeal in this Court, Velcrete was added as second appellant. Velcrete had been a party in the proceedings in the Supreme Court of Western Australia but had not been an applicant for special leave.

18 By an instrument headed "Deed of Indemnity" between the Bank and the Receivers, also dated 12 June 1986 ("the Indemnity"), the Bank covenanted to indemnify the Receivers against liabilities incurred by them which arose out of or in connection with the receivership of Velcrete or any invalidity or defect in the Appointment or in the exercise of the powers of the Bank under the Charge. The Indemnity was so drawn that references therein to the Receivers were to those persons "jointly and each of them severally".

19 The first question is whether a plurality of receivers might be appointed. If so, the next question is whether joint receivers so appointed had the leave and licence of Velcrete to act severally as well as jointly in dealing with the assets of Velcrete which were secured to the Bank by the Charge. These questions involve the construction of the power of appointment in the Charge and of the terms of the Appointment itself. In particular, cl 2 of the Appointment reads:

"Where this Appointment is directed to more than one person their appointment hereunder is joint and several."

"Joint and several"

20 The legal content and operation of the term "joint and several" is seen in the construction of covenants or other contractual promises[24]. The term also finds application in partnership law[25] and in the law dealing with liability to account and with joint and several tortious liability[26]. With respect to property interests, it is contradictory to describe a joint interest as "joint and several". If the property is owned in severalty, that is to say, by persons singly, so that the share of each is ascertained, it cannot be owned jointly. A joint owner does not have "a distinct or separate title, interest or possession" in the subject-matter[27]. It will be seen later in these reasons that the office of receiver is an item of property, with the consequence that it cannot be held severally as well as jointly.

The course of the litigation

21 The identification in the Appointment of the assets to which the Receivers were appointed included "the business known as Boulder Brick & Tile" ("the Business"). By action instituted in the Supreme Court of Western Australia in 1990 by Velcrete and Mr Kendle against the Receivers, damages were claimed for alleged acts of trespass, conversion and other tortious conduct alleged to have been committed by the Receivers between 12 June 1986, the date of the Appointment, and 27 July 1988[28]. The alleged wrongful acts included the taking and retention of possession of land upon which the Business was conducted, the use of plant and equipment to carry on the Business, the disposition of chattels and stock, and the collection of debts due from trade debtors. The Bank was not joined as a party.

---

24 *Norton on Deeds*, 2nd ed (1928) at 566-575.

25 Glanville Williams, *Joint Obligations*, (1949) at §§12, 22, 23, 40.

26 See *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580-581, 599-600; Glanville Williams, *Joint Torts and Contributory Negligence*, (1951) at §§10, 13.

27 *Wright v Gibbons* (1949) 78 CLR 313 at 329.

28 On 27 July 1988, the second respondent retired from the receivership and the Bank made a fresh appointment of the first respondent with a further indemnity from the Bank. The appellants pleaded that the first respondent "remained in possession of the trust assets" to their exclusion.

22 The effect of the pleadings, in substance if not in form, was to raise the issue whether the Receivers had a good defence to those claims in tort by reason of their having acted under the Appointment. That in turn raised the issue whether the Appointment had been authorised by cl F3 of the Charge granted by Velcrete to the Bank. Velcrete and Mr Kendle submitted that the Appointment executed by the Bank and the Charge granted by Velcrete provided no such answer to their claims in tort. This was said to be because no power had been conferred by the Charge upon the Bank to appoint a plurality of persons. The appellants further contended that, if such an appointment was authorised, it was limited to a joint appointment, not one which, as in the terms of cl 2 of the Appointment, was "joint and several". In addition, the case against the Receivers was that, even if a joint appointment could have been made validly, no severance of cl 2 of the Appointment properly could be made so as to leave the appointment valid as a joint appointment by disregarding or excising the words "and several".

23 On 23 April 1992, an order was made for the trial "before the main action" of certain issues. After a hearing upon the separate issues, Parker J declared that the appointment of the Receivers as joint and several receivers "was invalid" and that the appointment "was not valid and effective as a joint appointment". The Full Court[29] set aside those declarations and substituted a declaration that the appointment of the Receivers as joint and several receivers and managers of the assets of Velcrete "is valid". It followed that it was not necessary for the Full Court to determine whether, if only valid as a joint appointment, the several element in the appointment might properly be severed from cl 2 of the Appointment.

24 Special leave was granted with respect to the question whether the Charge authorised the appointment of "joint and several receivers and managers". In the course of argument on the appeal, the grant of leave was expanded to include issues of severance of the appointment of the Receivers. By their subsequently filed notice of contention, the Receivers submit that their appointment may be upheld by severance of cl 2 of the Appointment or the excision from it of the phrase "and several". This deals with the possibility that this Court might disagree with the Full Court and hold that the appointment of the respondents was not valid as a joint and several appointment in the terms of cl 2.

25 The appellants seek the restoration of the relief granted by Parker J. The fundamental issue is whether the terms of the Charge and the nature and terms of their appointment are such that the Receivers are provided with an effective answer to the tortious liability alleged against them, namely the leave and licence of Velcrete. No act is actionable as a tort at the suit of any person who has expressly

---

29 *Melsom v Velcrete Pty Ltd* (1995) 20 ACSR 291.

or impliedly assented to it[30]. Paragraphs 13 and 14 of the Further Re-Amended Statement of Claim alleged the commission of the tortious acts in question by "the Defendants". However, in the course of argument in this Court, it appeared that the appellants at a trial of all of the remaining issues might seek leave to amend to allege that one or more of the acts complained of were committed by one (particularly Mr Melsom), rather than the other or both, of the Receivers.

Clause F3 of the Charge

26 The source of the authority of the Bank to make the Appointment is found in cl F3 of the Charge. It provides for an appointment in respect of "the mortgaged premises or any part thereof". The term "the mortgaged premises" is so defined earlier in the Charge as to encompass the assets of Velcrete in respect of which the Appointment was made. Accordingly, this was an exercise of the power to make an appointment in respect of "the mortgaged premises" rather than "any part thereof".

27 Clause F3 of the Charge opens as follows:

> "At any time after the moneys hereby secured become payable or after this mortgage shall have become enforceable the Bank or an authorised officer of the Bank may appoint in writing any person to be receiver of the mortgaged premises or any part thereof and may remove *any such receiver* and in case of the removal retirement or death of *any such receiver* may appoint another in his place and may fix the remuneration of *any such receiver* at such amount or at such rate as the Bank shall think fit **Provided always** that *every such receiver* shall be the agent of the Mortgagor and the Mortgagor alone shall be responsible for his acts and defaults and *such receiver* so appointed shall without any consent on the part of the Mortgagor have power ...". (emphasis added)

There follow pars (a)-(o). These deal with a wide range of activities. The first (par (a)) is a power "to take possession of collect and get in the whole or any part of the mortgaged premises". There follow (par (c)) a power to carry on the business of Velcrete and (par (g)) a power to employ "managers solicitors officers agents auctioneers workmen and servants for all or any of the purposes" stated in the other paragraphs, at such salaries or remuneration as is thought fit. There is also (par (o)) a power with the consent in writing of any authorised officer of the Bank "to delegate to any person for such time or times as the authorised officer shall approve" any of the powers conferred by the other paragraphs. It may also be noted that cl F5 provides:

---

30 *Chapman v Ellesmere (Lord)* [1932] 2 KB 431 at 463.

> "Whether or not a receiver has been appointed as aforesaid it shall be lawful for the Bank at any time after the moneys hereby secured become payable or after this mortgage shall have become enforceable and without giving any notice to exercise all or any of the powers authorities discretions rights and remedies which the Bank may confer on a receiver as aforesaid."

28 It will be apparent that cl F3 of the Charge deals with three matters. First, the circumstances in which an appointment may be made and the making and revocation of that appointment. Secondly, the position of every receiver as agent not of the Bank but of Velcrete, and that of Velcrete as the party responsible for the acts and defaults of the receivers. Thirdly, the powers which may be exercised by every receiver appointed under cl F3. This case is concerned with the first and third but not the second of these matters.

29 As to the first, various paragraphs in cl F3 of the Charge are, on their face, apt to authorise the taking and retention of possession of land, the carrying on of business, the disposition of chattels and stock, and the collection of debts, of which complaint is made in pars 13 and 14 of the Further Re-Amended Statement of Claim. Clause F3 states that "every ... such receiver so appointed shall without any consent on the part of [Velcrete] have power" as is then detailed in pars (a)-(o).

30 So far as relevant, cl F31 provides:

> "Except to the extent that such interpretation shall be excluded by or be repugnant to the context ... words importing the singular number or plural number shall include the plural number and singular number respectively ...".

31 Clause F31 also provides that the word "receiver" shall include a receiver and manager according to the nature of the appointment made by the Bank. The Appointment of the respondents identified them in terms as "Receivers and Managers". When cl F31 is read with cl F3, it follows that the Bank may appoint to be receiver and manager of the mortgaged premises not only "any person" but "any persons".

The office of receiver

32 This plurality of persons, being the Receivers in the present case, was appointed to an office, rather than to several offices. The latter would have been the case if, for example, with respect to each of distinct portions of the mortgaged premises, an appointment had been made. Each such appointment might have been of one individual or of a plurality of individuals jointly. Here, the Receivers were appointed to "the mortgaged premises", not to any part thereof. They took their office jointly, notwithstanding the addition in cl 2 of the Appointment of the words "and several" to the term "joint". This follows from the nature of an office at common law.

33 The term "office" when used in a statutory or constitutional provision will take its meaning from that provision[31]. As to the common law, it has been said that[32]:

> "OFFICES, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments: whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like."

In the same passage, Blackstone went on to state that an office-holder might have an estate in the office, either to him and his heirs, or for life, or during pleasure, or, with some exceptions, for a term of years. In that context and in the light of the basic principles outlined later in these reasons, it makes no sense to speak of an office, and thus of property, as being held "jointly and severally" rather than as being held jointly.

34 Some offices are of their nature insusceptible of appointment in favour of more than one individual[33]. In respect of other offices, a joint appointment may be made. However, with respect to joint appointees, questions have arisen whether "as to their office, [there is] but one person"[34] so that upon the death of one the office is vacated[35]. Those authorities are not of particular assistance in the present case. This is because cl F3 of the Charge itself deals with situations which arose in the past. It does so by providing that the Bank may remove any receiver and "in case of the removal retirement or death of any such receiver may appoint another in his place".

35 It is to be noted that the pleadings in this litigation present no issue as to the nature of any proprietary interest of the Receivers in the proceeds of enforcement

---

31 *Sykes v Cleary* (1992) 176 CLR 77 at 96; *Edwards v Clinch* [1982] AC 845 at 864-867.

32 Blackstone, *Commentaries on the Laws of England*, 5th ed (1773), Bk 2, Ch 3 at 36. See also Cruise, *A Digest of the Laws of England Respecting Real Property*, 2nd ed (1818), vol 3, Title XXV, §§ 1, 2 at 117; *Dale v Inland Revenue Commissioners* [1954] AC 11 at 26.

33 Comyns, *A Digest of the Laws of England*, 4th ed (1800), vol 5 at 136.

34 *Eyre v Countess of Shaftsbury* (1722) 2 P Wms 103 at 108 [24 ER 659 at 661].

35 *Jones v Pugh* (1692) 2 Salkeld 465 [91 ER 401].

of the Charge[36]. Clause F7 specifies the manner of application of moneys "received by any such receiver or by the Bank" under the Charge. The system of priorities ends with the payment of any surplus moneys to Velcrete. There is no issue as to the nature of the obligations of the Receivers to account under cl F7. However, consistently with the joint nature of their office, of which the requirement to account is an incident, we would treat the Receivers as bound under cl F7 jointly with respect to moneys received by them and by each of them.

The terms of the Appointment and the Charge

36 It is appropriate now to consider more fully the terms both of the Appointment and of the relevant provisions of the Charge.

37 Clause 1 of the Appointment specifies the taking of three steps by the Bank in exercise of its powers and authorities under the Charge. First, cl 1 states that the Bank appoints Mr Melsom and Mr Robson to be receivers and managers of the assets of Velcrete to which we have referred. It follows from what has been said above that a joint appointment of the Receivers to their office was validly made. Secondly, cl 1 states:

> "AND the Bank hereby confers upon and vests *in you* during the term of your appointment hereunder *all and every power authority and discretion vested in the Bank under or by virtue of the [Charge]* (other than the power of appointing receivers and managers) so far as the same may be lawfully delegated *together with all and every power authority and discretion conferred upon a receiver and manager* as well as *by the [Charge]* as by statute and otherwise howsoever". (emphasis added)

The Receivers submit that this conferred upon them, as against Velcrete, the powers in the exercise of which they performed the acts in respect of the assets of Velcrete which it alleges were tortious. Thirdly, cl 1 provides for the computation of the remuneration of the Receivers, identifying this as "your remuneration".

38 The first element in cl 1 is to be distinguished from the second. As we have emphasised, the first is an appointment to an office[37], whilst the second is concerned with the specification of the powers which are to attach to that office and be exercised by the office-holder.

---

36 cf *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 71 ALJR 1223 at 1227-1229, 1233-1234, 1236, 1243-1247; 147 ALR 1 at 6-9, 14-15, 18-19, 28-34.

37 cf *Walker v European Electronics Pty Ltd* (1990) 23 NSWLR 1 at 12.

The exercise of powers by the Receivers

39 We have indicated earlier in these reasons that the issues on the pleadings in this case do not involve the binding of Velcrete, with respect to third parties, by the activities of the Receivers. Nor does any question arise as to the enjoyment by Velcrete after default under the Charge and the execution of the Appointment, and as against third parties, of a right to immediate possession of the mortgaged premises sufficient to support an action in trespass or conversion against third parties[38]. Rather, the issues concern the exercise, adversely to Velcrete, by the Receivers of the powers ceded by Velcrete in the Charge granted by it to the Bank in consideration of the advances and accommodation provided to it. In particular, par (a) of cl F3 of the Charge conferred a power to take possession of, collect and get in the whole or any part of the mortgaged premises. The ceding by Velcrete of this and the other relevant powers was coupled with the creation of the Charge over the assets in question and is to be seen as the concession of leave and licence to those later validly appointed by the Bank as Receivers. The effect of the grant of the interest created by the Charge, coupled with the leave and licence, was to render consensual as against Velcrete acts which otherwise would have been tortious[39]. It is in this respect that it becomes necessary to consider the application of the term "joint and several".

40 Clause F3 stipulates that it is "every ... such receiver" who may be empowered by the Bank in the fashion described above. The term "such" identifies a receiver of the mortgaged premises, a receiver appointed to part thereof only, and also each of a plurality of persons who together are appointed to be receiver of the mortgaged premises or part thereof. Upon the true construction of the Charge and the Appointment, these powers are conferred and may be exercised by each of the Receivers whether or not those included in the plurality of receivers act collectively as to all of them, collectively as to some of them, or individually as to any one or more of them. It is "every ... such receiver" being "so appointed" who, "without any consent on the part of [Velcrete]", has the powers enumerated in pars (a)-(o) of cl F3.

41 The understanding of that construction is not advanced, and may be retarded, by emphasis upon the expression "joint and several". It is an appropriate description of the effect of the Appointment that the Receivers were appointed jointly to their office. However, the powers, authorities and discretions referred to

---

38 cf *International Factors Ltd v Rodriguez* [1979] QB 351 at 357-358, 359.

39 See *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605 at 615, 626-628, 630, 649, 653-654; *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 at 230; *Restatement of Torts*, 2d, vol 1, Ch 8, Title B, "Privileges Based on Past Consent - Irrevocable License", Scope Note (1965).

in cl 1 of the Appointment as capable of conferral upon them under the Charge were, in accordance with cl F3, and therefore in accordance with the Appointment which adopted them, susceptible of exercise by either or both of the Receivers. The source of their powers to deal with the assets of Velcrete is to be traced from the Appointment made by the Bank to the Charge granted by Velcrete and so ultimately to Velcrete itself. The consequence is to provide the Receivers and each of them with the answer to the claims in tort brought against them by Velcrete and the other appellant. The answer is that the acts complained of were committed with the leave and licence of Velcrete.

42 The statement in cl 2 of the Appointment that "their appointment hereunder is joint and several" is to be understood in the particular sense explained above. So understood, there is no element of invalidity in cl 2 or the Appointment as a whole.

Agency

43 The agency of the Receivers involves its own considerations which are not in point on the particular issues arising on this appeal. However, agency was at stake in a number of the authorities to which we were referred. It is appropriate for an understanding of those authorities to deal briefly with the matter.

44 The agency from Velcrete, rather than the Bank, had the peculiar incidents referred to in the authorities[40]. With respect to dealings by the Receivers with third parties, liability was imposed upon Velcrete rather than upon the Bank or the Receivers personally[41]. If the Bank itself had taken possession of the property over which it held the Charge, in equity and as mortgagee in possession it would have become the manager of property in which Velcrete was still interested. As mortgagee in possession, the Bank would have owed duties to Velcrete, including a strict liability to account[42]. In the Charge, this situation was avoided by provision for the appointment by the Bank of the Receivers and their treatment as agents not

---

40 *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354 at 381-382; *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 71 ALJR 1223 at 1226-1227, 1234-1235; 147 ALR 1 at 6, 15-16; *Powdrill v Watson* [1995] 2 AC 394 at 440. See also Pettit, *Equity and the Law of Trusts*, 8th ed (1997) at 649-650.

41 However, s 324 of the Code made the Receivers personally liable for certain debts incurred in the course of the receivership.

42 Waldock, *The Law of Mortgages*, (1950) at 237-241.

of the Bank but of Velcrete. Further, this agency of the Receivers was such that their acts would bind Velcrete in relation to third parties[43].

45 The term "joint and several" may be used to indicate the scope of the agency conferred upon a plurality of persons. In particular, it may indicate that all or any one of them may act so as to bring a third party into a contractual relationship with their principal. Thus, in *Guthrie v Armstrong*[44], there was a conferral by an underwriter upon a number of persons "jointly and separately" of a power of attorney and it was said:

> "Here, a power is given to fifteen persons jointly and severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is ... that the power is given to all or any of them to sign such policies, as all or any of them should think proper."

46 The considerations flowing from the construction of cl F3 of the Charge which led to the conclusion that Velcrete is to be taken to have conferred its leave and licence upon each of the Receivers also support the conclusions that either or both of the Receivers might validly be appointed with an agency to bind Velcrete. Each might, as provided in par (g) of cl F3, engage persons to assist in the conduct of the receivership and, under par (o), each might delegate any of the powers conferred with the written consent of the authorised Bank officer. But neither Receiver required the authority of the other to exercise the powers listed in cl F3 and vested by the Appointment.

47 We were referred to various authorities dealing with the appointment of a plurality of receivers[45]. None of them was a decision after a final hearing of the litigation in question, or an appeal from such a decision. All turned upon the terms of the particular instruments in question. Moreover, as has been pointed out[46], the judgments therein responded to submissions which apparently did not distinguish between a joint appointment of receivers to their office, and the ability or capacity of joint receivers to exercise severally as well as jointly the powers conferred upon them.

---

43 Waldock, *The Law of Mortgages*, (1950) at 242-243.

44 (1822) 5 B & Ald 628 at 629 [106 ER 1320 at 1320].

45 These included *Wrights Hardware Pty Ltd (prov liq apptd) v Evans* (1988) 13 ACLR 631; *Kerry Lowe Management Pty Ltd v Isherwood & Sherlock* (1989) 15 ACLR 615; *DFC Financial Services Ltd v Samuel* [1990] 3 NZLR 156; *NEC Information Systems Australia Pty Ltd v Lockhart* (1991) 22 NSWLR 518.

46 Lightman and Moss, *The Law of Receivers of Companies*, (1994), pars 4-07, 4-08.

48 In *DFC Financial Services Ltd v Samuel*[47], the respondent had guaranteed the obligations of certain companies to the plaintiff, under debentures secured upon assets of the companies which had been sold by receivers appointed by the plaintiff. The issue before the New Zealand courts was whether the alleged invalidity of the appointment of the receivers gave rise to an arguable defence to an action by the plaintiff on the guarantee. The Court of Appeal of New Zealand held that the receivers had validly been appointed to act jointly and severally when entering into possession and selling the real property. Likewise, in *NEC Information Systems v Lockhart*[48], a guarantor sought to set up the invalidity of the appointment of receivers under a debenture charge in answer to an action on the guarantee. In these cases the issue of "validity" thus arose in an incidental fashion not, as in the present litigation, in the immediate sense of providing the Receivers with a defence to an action in tort against them.

Orders

49 Paragraph 3 of the orders of the Full Court set aside the declaratory relief made by the primary judge and in place thereof "declared that the appointment of the Appellants (Defendants) as the joint and several receivers and managers of the assets of [Velcrete] on 12 June 1986 is valid". A declaration in those terms telescopes the several issues indicated above, namely the availability of a joint appointment and the capacity of parties so appointed to exercise their powers jointly and severally. A preferable course would be to make a declaration stating that the Appointment was valid. Further understanding would then be drawn from the reasons for judgment of this Court.

50 The appeal should be allowed and order 3 of the orders made by the Full Court should be varied as indicated. Otherwise, the appeal to this Court should be dismissed. The appellants should pay the costs of the appeal to this Court.

---

47 [1990] 3 NZLR 156.

48 (1991) 22 NSWLR 518.

51 HAYNE J. This appeal is brought in a proceeding in which the respondents are sued for trespass and conversion. The respondents allege that the acts of which the appellants complain were acts done pursuant to authority given by Velcrete Pty Ltd in the mortgage which it granted to the Commonwealth Development Bank.

52 The mortgage provided that:

> "At any time after the moneys hereby secured become payable or after this mortgage shall have become enforceable the Bank or an authorised officer of the Bank may appoint in writing any person to be receiver of the mortgaged premises or any part thereof ..."[49]

Because the mortgage provided that "words importing the singular number or plural number shall include the plural number and singular number respectively"[50] I have no doubt that the mortgage permitted the Bank, upon the happening of the events described, to appoint more than one "person to be receiver of the mortgaged premises or any part thereof". Further, because the mortgage provided that "the word receiver shall include a receiver and manager according to the nature of the appointment made by the Bank"[51] the Bank could choose to appoint a person or persons as receiver or as receiver and manager of all or part of the mortgaged premises.

53 The person or persons appointed as receiver (or as receiver and manager) has or have the powers given by the mortgage, including powers "to take possession of collect and get in the whole or any part of the mortgaged premises"[52] and "to carry on or concur in carrying on the business of the Mortgagor ... and to do all acts which the Mortgagor might do in the ordinary conduct of its business for the protection or improvement of the mortgaged premises or any of them or for obtaining income or returns therefrom"[53]. Whether the respondents have a sufficient answer to the allegations of trespass and conversion made against them in the proceeding depends upon whether they were validly appointed "to be receiver of the mortgaged premises" and whether, if validly appointed, the steps which they took were steps falling within the powers conferred by the mortgage. The first of these questions arises on this appeal; the second does not.

---

49 cl F3.

50 cl F31.

51 cl F31.

52 cl F3(a).

53 cl F3(c).

54 For my part I do not consider that much assistance can be gained from considering whether the respondents were appointed to an office, or from considering what might be understood to be the incidents ordinarily associated with an office. Where, as here, the respondents were appointed as receivers *and* managers it is important to recall not only that the duties and powers of a receiver are different from those of a receiver and manager but also that it was once commonplace to make separate appointments of receivers and of managers. Thus, in *In re Manchester and Milford Railway Co; Ex parte Cambrian Railway Co*[54] Jessel MR referred to what he described as "in practice, I believe, [the] general rule"[55] where a receiver had been appointed to a railway company of appointing as manager "either the directors ... or some of them, or the secretary, so as to keep the management in the board of directors". Nor did he see any difficulty about appointing more than one person as manager[56]. Of course, these statements were made in a context of appointment of receivers and managers by the court rather than pursuant to contract and the power of the court to make such appointments stemmed from the *Railway Companies Act* 1867 (UK) (30 & 31 Vict c 127)[57]. But for present purposes, those differences are not important. The offices concerned there, and here, are very similar. Thus, notwithstanding the fact that the context differs, I consider that the practice of which Jessel MR speaks casts doubt on the validity of arguing from what is said to be the singularity of an office of receiver, or receiver and manager, to the manner of exercise of powers by those who hold the office.

55 As presently framed, the statement of claim alleges simply that "the defendants" did certain things. No allegation is made to the effect that one of those defendants acted at any time without the concurrence of the other. If then, as I consider to be the case, the mortgage permitted the appointment of more than

---

54 (1880) 14 Ch D 645.

55 (1880) 14 Ch D 645 at 655.

56 "It seems to me that when you come to consider it, and when you give proper weight to the words 'if necessary' - when you come to give proper weight to the word 'due,' and proper weight to the ordinary course of the Court of Chancery in appointing a receiver as distinguished from a manager - where the business is to be carried on, it is a case for appointing a manager. Of course manager may mean managers in the plural." (1880) 14 Ch D 645 at 655.

57 Particularly s 4 which enabled a judgment creditor to obtain the appointment of a receiver and, if necessary, of a manager of the undertaking of the railway company "on Application by Petition in a summary Way to the Court of Chancery in England or in Ireland".

one person as receiver and manager, unless cl 2 of the Bank's appointment[58] makes the whole appointment bad, the conclusion that the Bank might validly appoint more than one person as receiver and manager, and has done so, may be sufficient answer to the appellants' claim. And I should say at once that even if I were of the view that the mortgage did not permit the Bank to appoint receivers and managers otherwise than to act in all respects jointly, I would sever cl 2 of the Deed of Appointment. I do not accept that if faced with the choice of appointing only jointly or not at all, the Bank would have chosen to refrain from making any appointment[59].

56 In my view, however, the Bank was not limited by its mortgage to appointing more than one receiver only on terms that those receivers act jointly. It is to be regretted that the question was not put beyond doubt by the mortgage but although the definition clause in the mortgage[60] twice deals with the case of two or more mortgagors or debtors (and makes plain that their covenants and agreements "shall bind them and every two or more of them jointly and each of them severally") the mortgage is silent about the exercise of powers by, or the liabilities of, multiple receivers.

57 The mortgage being silent about these matters, may the mortgagee make only a joint appointment? Courts have reached different conclusions[61].

58 Two considerations must be kept steadily in mind: first, the task is one of construing the particular mortgage and secondly, the construction to be preferred is that which will give effect to the commercial bargain that has been struck between the parties and is recorded in that instrument[62]. Of course, the fact that

---

58 Clause 2 reads: "Where this Appointment is directed to more than one person their appointment hereunder is joint and several".

59 *Whitlock v Brew* (1968) 118 CLR 445 at 461 per Taylor, Menzies and Owen JJ; *Fitzgerald v Masters* (1956) 95 CLR 420 at 427 per Dixon CJ and Fullagar J; *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 72 per Knox CJ.

60 cl F31.

61 *R J Wood Pty Ltd v Sherlock* unreported, Federal Court, 18 March 1988; *Wrights Hardware Pty Ltd v Evans* (1988) 13 ACLR 631; *Kerry Lowe Management Pty Ltd v Isherwood & Sherlock* (1989) 15 ACLR 615; cf *DFC Financial Services Ltd v Samuel* [1990] 3 NZLR 156; *NEC Information Systems Australia Pty Ltd v Lockhart* (1991) 22 NSWLR 518.

62 *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 437 per Barwick CJ; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348 per Mason J.

other mortgagors may commonly provide for the appointment of joint and several receivers and manager does not decide the point. It cannot be said that there is some "commercial practice" to which effect should be given in this instrument if it is said that this practice is to be identified only from the terms in which other parties have reached other agreements. The fact that such agreements are made establishes no practice. But it does demonstrate that arrangements whereby two receivers may act together or separately are not seen by the commercial community as being likely to produce unworkable confusion.

59 The question is a question about powers - the mortgagee's power to appoint more than one person as receiver (or receiver and manager) on terms that the persons appointed may exercise the powers which they are given severally. Or can the mortgagee appoint only on terms that the appointees' powers are exercised jointly? It is not a question about the liabilities of the mortgagor or of those who are appointed (although of course the terms of their appointment may well affect their liability). It is not a question whether those appointed hold office jointly, the successor vacating office on death or retirement of the other[63]. Even if the office is held jointly (and I need not decide if that is so) this would not mean that the appointment could not provide for the *powers* of the office to be exercised jointly and severally.

60 Once it is accepted that the mortgage gives the Bank power to appoint more than one person as receiver or receiver and manager, there is no reason to read that power of appointment as limited to a power to appoint persons to act jointly. Indeed there are several compelling reasons for adopting a construction of the power to appoint that would allow appointment on terms that would permit the appointees to act separately.

61 First, this mortgage provides that there may be separate appointments to different parts of the mortgaged premises[64]. The instrument, therefore, does not proceed from a premise that the mortgaged premises will be dealt with as a whole or as a single bundle of property over which there will be singular control.

62 Secondly, there is, in my view, no compelling authority in favour of the view that the power to appoint should be so confined. The authorities to which reference has been made in cases dealing with this point have included several decisions which have dealt with how an appointment of several persons to an office or as

---

63 *Jones v Pugh* (1692) 2 Salkeld 465 [91 ER 401]. This mortgage provides in cl F3 that "in case of the removal retirement or death" of a receiver, the Bank "may appoint another in his place".

64 cl F3.

agents should be construed[65]. But that is not the question which now arises. There is no doubt that the Bank purported to make a joint and several appointment; what is in issue is its power to do so. Even if[66] there is some presumption that an authority given to two or more persons is given to them jointly (and I need not decide whether that is so) the Bank in this case has purported to give the respondents authority to act jointly and severally.

63 Thirdly, there is no sufficient reason to conclude that construing the mortgage so as to give the mortgagee power to appoint more than one person to act jointly and severally will work any harm to the mortgagor. But to deny that power to the mortgagee would affect that party detrimentally. I have already said that I do not accept that the appointment of more than one person as receiver (or receiver and manager) with power to each to act separately will be likely to lead to confusion or other unacceptable results. The fact that such appointments are not uncommon shows this to be so. Thus, the possibility of "overlapping and, possibly conflicting, actions and decisions by receivers and managers with several authority"[67] should not be overstated. Further, if there is "duplication and the consequential inefficiency"[68], that stems from the appointment of more than one receiver and manager, not from their having power to act separately.

64 The mortgagor will be much affected by the extent of the powers conferred on whoever is appointed receiver and manager. But if more than one person is appointed receiver and manager, the way in which those persons divide or allocate (or fail to divide or allocate) particular powers or tasks will not affect the mortgagor nearly so directly. That is, what powers may be exercised will be much more significant to the mortgagor than who exercises those powers.

65 The mortgagee, on the other hand, will ordinarily have a very direct interest in identifying how the persons whom it appoints as receivers and managers are permitted to go about their task. Of course, it must be accepted that receivers and managers will almost always be appointed on terms that they act as agents for the mortgagor not the mortgagee. At first sight this may suggest that the principal, the mortgagor, has the greatest interest in the way in which the persons appointed as

---

65 See, for example, *Bell and Head v Nixon and Davison* (1832) 9 Bing 393 [131 ER 664] which held that two persons appointed as clerk to trustees of a turnpike road must act together in exercising the powers of the clerk; but cf *Guthrie v Armstrong* (1822) 5 B & Ald 628 [106 ER 1320] which held that a power of attorney given to 15 persons jointly and severally was validly exercised by four of those appointed.

66 As is suggested in *Bowstead and Reynolds on Agency*, 16th ed (1996) at par 2-042.

67 O'Donovan, *Company Receivers and Managers*, 2nd ed (1992) at par [3.120].

68 O'Donovan, at par [3.120].

its agents are to go about their task, but the agency created is unusual[69]. The agent is appointed not by the principal but by another and the agent is bound to account not only to the principal but to the appointing party. The appointment is made by the mortgagee pursuant to its rights as holder of the security which supports the debt owed to it. Once the mortgagee has appointed a receiver or receivers, control of the mortgaged property has passed from the mortgagor and it is the mortgagee, as the party appointing, which is concerned to set the terms of the appointment.

66 If, then, it is the mortgagee that has the principal interest in determining the way in which the powers of the receiver or receiver and manager are to be exercised, there is, in my view, nothing to indicate that the power to appoint more than one person is, in the absence of express provision, to be read as a power only to appoint those persons on terms that they act together in all respects.

67 It follows, in my view, that the Bank's power to appoint more than one receiver or receiver and manager over parts or all of the mortgaged premises was not limited to a power to do so on terms that the persons appointed always act jointly. I need not, then, decide whether one appointee could validly have delegated some or all of the tasks of the administration to the other. Each may, in accordance with the terms of his appointment, act jointly or severally.

68 The appointment was valid. I agree with the orders proposed by Gummow and Kirby JJ.

---

69 *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354; *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 71 ALJR 1223; 147 ALR 1.