THE APPOINTMENT OF MULTIPLE RECEIVERS: *Kendle v Melsom* (1998) 72 ALJR 560†

THE ISSUE

The main issue in contention in *Kendle v Melsom* was whether, in the absence of an express provision in a mortgage agreement, a mortgagee can appoint multiple receivers over mortgaged property and empower them to act jointly and severally. The Supreme Court of Western Australia had decided in *Melsom v Velcrete Pty Ltd*[1] that a mortgagee in these circumstances could choose to make such an appointment. On appeal, Brennan CJ, McHugh, Kirby, Gummow and Hayne JJ all agreed that the appointment in this case was valid, however, their reasoning and explanation of the effect of a 'joint and several appointment' differed from that of the Supreme Court.

THE FACTS

On 12 June 1986, the Commonwealth Development Bank ('the Bank') appointed Melsom and Robson as receivers and managers ('the Receivers') of Velcrete Pty Ltd ('Velcrete'). The appointment was made pursuant to an express power to appoint a receiver in an equitable mortgage ('the Charge') granted by Velcrete over its assets and undertakings. The assets included those which Velcrete held as trustee under a deed of trust. Kendle later became and remained at the time of the hearing of this matter the trustee of the trust.

In 1990 Velcrete and Kendle ('the Appellants') commenced an action in the Supreme Court of WA against the Receivers, claiming damages for alleged acts of trespass, conversion and other tortious conduct between 12 June 1986 and 27 July 1988. The Receivers argued that they were not liable in tort because the alleged wrongful acts were actions taken by them pursuant to the powers conferred on them by their appointment. The Appellants contended that the actions were tortious because the appointment was invalid.

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† Decision also reported: 151 ALR 740, 26 ACSR 444, 16 ACLC 466. All citations will be to (1998) 72 ALJR 560.

1 (1996) 17 WAR 316. Judgment written by Malcolm CJ, Owen and Windeyer JJ concurring.

Parker J ordered that certain preliminary issues be determined prior to the trial of the tortious liability. After a hearing on these preliminary issues, Parker J declared that the appointment of the Receivers as joint and several receivers was invalid. The Full Court of the Supreme Court set aside those declarations and the Appellants appealed to the High Court.[2]

THE TERMS OF THE CHARGE AND THE APPOINTMENT

The specific terms of the Charge and the Appointment were fundamental to the Court's decision. The relevant terms were as follows:

Clause F3 of the Charge:

> [T]he 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 .

The clause then listed in paragraphs (a) to (o) the various powers that the receivers were entitled to exercise.[3]

Clause F31 of the Charge:

> 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 .[4]

Clause 2 of the Appointment Document:

> Where this appointment is directed to more than one person their appointment hereunder is joint and several[5]

THE DECISION

All 5 members of the Court allowed the appeal in part. The declaration of the Full Court of the Supreme Court of Western Australia that 'the appointment of the [Receivers] as the joint and several receivers and managers ... is valid' was set aside and replaced with a declaration that 'the Appointment is valid.' Notwithstanding the unanimous decision, three separate judgments were delivered: a joint judgment of Brennan CJ and McHugh J, a joint judgment of Kirby and Gummow JJ and a judgment by Hayne J.

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2 The facts are summarised in the judgments: 561 (Brennan CJ and McHugh J); and 565-6 (Gummow and Kirby JJ)

3 Ibid 567 (Gummow and Kirby JJ).

4 Ibid.

5 Ibid 565 (Gummow and Kirby JJ)

THE REASONS

All Judges agreed that notwithstanding the absence of an express power to appoint more than one person to the position of receiver, a plurality clause such as that contained in F31 of the Charge clearly allowed a plurality of persons to be appointed pursuant to clause F3 of the Charge [6]

Having determined that a plural appointment could be made, the next question was whether the powers had to be exercised jointly by the appointed receivers or whether they could be exercised severally.

Brennan CJ and McHugh J held that where a charge document has no express provision in relation to the exercise of powers by a plurality, it is necessary to examine the nature of the duties which the receiver is authorised to perform.[7] They held that the powers which had been granted to the Receivers pursuant to the Charge and Appointment in this case were the type of powers which had to be exercised in an orderly and consistent manner for the purposes of the receivership.[8] In their view, 'chaos could result'[9] if the Receivers could exercise these powers totally independently. Furthermore, their Honours held that in the absence of any contrary provision, a plurality of receivers were jointly responsible for the discharge of their duties and to account for the money got in, and that such joint responsibility would not be fair if each receiver was 'severally authorised to exercise those powers'[10]

Consequently, Brennan CJ and McHugh J held that where a charge authorises the appointment of a plurality of receivers with these types of powers, 'the powers must be conferred jointly unless the terms of the charge otherwise provide'[11] Authorities cited in support of this conclusion were: *RJ Wood Pty Ltd v Sherlock*,[12] *Wrights Hardware Pty Ltd v Evans*[13] and *Kerry Lowe Management Pty Ltd v Isherwood & Sherlock*.[14]

In reaching this conclusion, Brennan CJ and McHugh J[15] rejected the argument that the practicalities of the day-to-day running of a receivership required that the powers be exercised severally, an argument which had been previously upheld by the New Zealand Court of Appeal in *DFC*

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6 Ibid 562 (Brennan CJ and McHugh J), 567 (Kirby and Gummow JJ) and 571 (Hayne J)
7 Ibid 562
8 Ibid 563.
9 Ibid
10 Ibid
11 Ibid
12 Unreported Federal Court of Australia, 18 March 1988.
13 (1988) 13 ACLR 631
14 (1989) 15 ACLR 615
15 *Kendle v Melsom* (1998) 72 ALJR 560, 564.

Financial Services Ltd v Samuel[16] and the NSW Court of Appeal in *NEC Information Systems Australia Pty Ltd v Lockhart*.[17] They also rejected an argument that the purposes of a receivership would be frustrated if the powers were not conferred severally.[18] They did however acknowledge that the joint exercise of powers did not require 'every decision and every act, however trivial, to have the concurrence of all appointees'.[19] In their view, the Receivers should jointly decide the course of the receivership, but the implementation of that decision could be left to one of those Receivers, or an agent appointed by the Receivers.[20]

It is interesting to note that despite finding that a 'joint' appointment should have been made in this case, Brennan and McHugh JJ did not find that the 'joint and several' clause made the appointment invalid. In their view, the clause did not change the fact that the Receivers were a joint repository of the powers conferred under the Charge. The joint and several clause simply meant that as between themselves and the Bank the Receivers were both jointly and severally liable for any breach of their duties.[21]

Kirby and Gummow JJ commenced their analysis with an examination of the 'office' of receivership. They classified this 'office' as a piece of property and held that as a piece of property, it could not be owned both jointly and severally.[22] Their primary conclusion was that the Receivers in this case had been appointed to a single office and they held it jointly 'notwithstanding the addition in clause 2 of the Appointment of the words "and several"'.[23]

In addressing how the Receivers could exercise those powers, Kirby and Gummow JJ focussed on the wording of clause F3 of the Charge, particularly the words 'every ... such receiver'. They held that upon the true construction of this clause, the Receivers were allowed to act collectively or individually with respect to any one of those powers[24] and that either or both of the Receivers could validly bind Velcrete as its agent.[25] They also held that the words 'joint and several' as used in clause 2 should not be emphasised as they were simply an appropriate description of how two people appointed jointly to one office can

16 [1990] 3 NZLR 156
17 (1991) 22 NSWLR 518
18 *Kendle v Melsom* (1998) 72 ALJR 560, 564
19 Ibid 564
20 Ibid
21 Ibid
22 Ibid 565, 568
23 Ibid 567
24 Ibid 569
25 Ibid 570

exercise the powers separately.[26] In reaching these conclusions, Kirby and Gummow JJ[27] distinguished *DFC Financial Services Ltd v Samuel*[28] and *NEC Information Systems Australia Pty Ltd v Lockhart*.[29]

Thus, according to Kirby and Gummow JJ, the Receivers in this case were appointed jointly to a single office. Within that joint appointment, the Receivers could exercise their powers jointly and independently. In their Honours' view, the joint and several clause did not make the appointment invalid because it simply recognised that the joint receivers could act independently of each other.

Hayne J held that two things should be kept in mind when addressing the validity of a 'joint and several' appointment made pursuant to a charge which is silent about the exercise of powers:

(i) one must construe the particular charge, and

(ii) the preferred construction is one which will give effect to the commercial bargain which has been struck between the parties and recorded in the instrument.[30]

He discounted any 'commercial practice' argument except to the extent that it showed the commercial community did not think a joint and several appointment was unworkable.[31]

Hayne J identified three reasons as to why the power to appoint multiple receivers in this case should be construed so as to allow the receivers to act severally:

(i) given that the Charge allowed for different appointments to be made over different parts of the charged property, it was not based on the premise that the mortgaged premises would be dealt with as one piece of property over which there would be singular control;

(ii) there was no compelling authority in favour of the view that the power to appoint should be so confined, and

(iii) there was no reason to conclude that giving the power to the mortgagee to appoint more than one person to act jointly and severally would harm the mortgagor — but it was clear not allowing the mortgagee to make such an appointment would harm the mortgagee.[32]

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26 Ibid 569.
27 Ibid 570.
28 [1990] 3 NZLR 156.
29 (1991) 22 NSWLR 518.
30 *Kendle v Melsom* (1998) 72 ALJR 560, 572.
31 Ibid 572.
32 Ibid 572-3.

In direct contrast with Brennan CJ and McHugh J, Hayne J expressly discounted arguments that 'joint and several' appointments would lead to confusion and inefficiency.[33] He concluded that there was no reason why, in the absence of express provision, the power to appoint more than one person is to be read as a power to appoint them to act jointly.[34]

IMPLICATIONS ARISING FROM THE DECISION

Only Hayne J reached the same conclusion as the Supreme Court and held that a mortgagee could make a joint and several appointment of plural receivers where the mortgage/charge document was silent. Brennan CJ and McHugh J were clearly of the opinion that the appointment of plural receivers should only be joint in these circumstances, and Kirby and Gummow JJ held that the 'office' of receivership was a piece of property which could only be held jointly.

However, Kirby and Gummow JJ and to a lesser extent Brennan CJ and McHugh J, held that even where the appointment of plural receivers was 'joint', the receivers could act independently of each other: they did not need a 'joint and several' appointment to be able to exercise some of their powers independently. Furthermore, the judgments of Brennan CJ and McHugh J and Kirby and Gummow JJ suggest that even where the express power to make a joint and several appointment is not given in a mortgage/charge document, an appointment of joint and several plural receivers may be interpreted so that it does not invalidate the appointment.

Therefore, although drafters of mortgage/charge documents would be advised to respond to the criticisms of the High Court[35] and expressly include the power to make 'joint and several' plural appointments of receivers if that power is desired, the implication arising from this decision is that even in the absence of an express provision, such an appointment will not automatically be invalid. The validity or otherwise of a joint and several appointment will depend upon the proper construction and interpretation of both the mortgage/charge document and the appointment document.

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33 Ibid 573 — where he counters such statements by J O Donovan in *Company Receivers and Managers* (2nd ed, 1992) [3.120].

34 Ibid 573.

35 Ibid 565 (Gummow and Kirby JJ), 572 (Hayne J).