

Article Information

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Power to sign but not to sell? Appointing a receiver correctly

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*Piper Alderman's Brisbane based Property team has recently acted for a purchaser in a receiver-appointed sale, which has presented some difficulty obtaining registration of a transfer document, due to the terms of the Receiver appointment. **Partner, Peter Dwyer** and **Senior Associate, Mark Askin** share their experience to assist mortgagees and receivers who are involved in selling property pursuant to a mortgage to ensure that appointments validly and clearly provide the receiver with a power to sell the property.*

Facts

The Property was subject to a mortgage in favour of a major bank. The mortgagor defaulted under the mortgage and the bank exercised their right under the mortgage to appoint a receiver to sell the Property.

The terms of the mortgage gave the bank the power to appoint a receiver in the event of mortgagor default and generally provided that the bank may give the receiver any powers, which it considers necessary or desirable, including, power to sell the property.

The terms of the appointment were contained in a relatively standard deed – it generally provided the Receivers with “all the powers, authorities and discretions... under and by virtue of the mortgage and at law”. In reliance on these terms of appointment, the Receivers sold the Property and the transfer documents were lodged with the relevant Titles Office to complete the transfer of the Property.

Power to sell

While the Titles Office accepted that the Receivers had been validly appointed (i.e. there had been a default under the mortgage and the mortgagee had appointed a receiver) it did not accept that the Receiver had power to sell the property, because in its view, the Receivers delegation of power under the deed did not expressly provide for the power to “sell the property”.

In other words, despite the mortgage conferring on the mortgagee the power to sell the Property in the event of a default (and the deed of appointment confirming that the Receiver had all the powers under the mortgage), the provisions of the mortgage merely listed the powers which the mortgagee was entitled to delegate to a receiver, and the deed of appointment did not go far enough so as to confer the power to sell.

As the Receivers were appointed to the property of an individual and not a company, there was no express authority to sell the Property contained in governing legislation in addition to the powers granted under the deed (i.e. like there is in the Corporations Act 2001).

Outcome and tips

The issue was eventually resolved by the provision of additional documentation confirming the validity of the appointment and vesting of the relevant power to sell in the Receiver.

However, in light of the intrusive approach that some land registries take with respect to the examination of documents, mortgagees, receivers and practitioners should take care when preparing what is ordinarily considered a fairly standard document, to ensure that the power to sell is specifically vested in the Receiver.

Failure to vest the receiver with the power to sell could result in the seller failing to comply with critical contractual obligations (normally the obligation to provide a registrable transfer on settlement and the delivery of good title).

If you have any questions about this update or on Property and Projects matters generally, please contact Peter, Mark or a member of our team.