DOCTOR OF PHILOSOPHY

Joint operating agreements

a consideration of legal aspects relevant to joint operating agreements used in Great Britain and Australia by participants thereto to regulate the joint undertaking of exploration for petroleum in offshore areas, with particular reference to their rights and duties

Mildwaters, Kenneth Charles

Award date: 1990

Awarding institution: University of Dundee

Link to publication

General rights
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

• Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
• You may not further distribute the material or use it for any profit-making activity or commercial gain
• You may freely distribute the URL identifying the publication in the public portal

Take down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.
Joint operating agreements

*a consideration of legal aspects relevant to joint operating agreements used in Great Britain and Australia by participants thereto to regulate the joint undertaking of exploration for petroleum in offshore areas, with particular reference to their rights and duties*

Kenneth Charles Mildwaters

1990

University of Dundee

Conditions for Use and Duplication
Copyright of this work belongs to the author unless otherwise identified in the body of the thesis. It is permitted to use and duplicate this work only for personal and non-commercial research, study or criticism/review. You must obtain prior written consent from the author for any other use. Any quotation from this thesis must be acknowledged using the normal academic conventions. It is not permitted to supply the whole or part of this thesis to any other person or to post the same on any website or other online location without the prior written consent of the author. Contact the Discovery team (discovery@dundee.ac.uk) with any queries about the use or acknowledgement of this work.
JOINT OPERATING AGREEMENTS:

A Consideration of Legal Aspects Relevant to Joint Operating Agreements used in Great Britain and Australia by Participants thereto to Regulate the Joint Undertaking of Exploration for Petroleum in Offshore Areas with Particular Reference to their Rights and Duties.

VOLUME 2
# TABLE OF CONTENTS

## X. THE RELATIONSHIP BETWEEN THE PARTICIPANTS

1. Introduction 365
2. Agency 365
3. Fiduciary obligations 365
   3.1 Introduction 365
   3.2 Branches of the law relating to fiduciary obligations 371
   3.3 Remedies for breach of duty of good faith 373
4. The misuse by a Participant of property held in a fiduciary capacity 374
5. The Participant's duty of confidence 374
   5.1 Express duty of confidence 375
   5.2 Implied or imposed duty of confidence 375
      5.2.1 The nature of the relationship 376
      5.2.2 The subject matter and the circumstances in which it was received 377
      5.2.3 Is the information of a confidential nature? 377
      5.2.4 Was the information disclosed in circumstances imparting a duty of confidence? 380
   5.2.5 Exceptions 381
   5.2.6 The nature of the duty of confidence 381
   5.2.7 The duty of confidence and employees and contractors of a Participant 383
6. Purchase of property dealt with in a position of confidence 383
7. Conflict of duty and interest 384

Footnotes 386

---

## XI. THE OPERATING COMMITTEE

1. Establishment of the Operating Committee 405
2. The powers and duties of the Operating Committee 405
XIV. THE OPERATOR: DESIGNATION, ASSIGNMENT, RESIGNATION AND REMOVAL

1. Designation
2. Assignment of the operatorship
   2.1 General Prohibition against assignment
      2.1.1 Assignment of the benefit
      2.1.2 Assignment of the burden
   2.2 Exception - assignment to an affiliate of the Operator
3. Renunciation of authority by the Operator
4. Revocation of authority by the Participants
5. The effects of renunciation or revocation of authority of the Operator
   5.1 The rights of the Participants, the Operator and third parties
   5.2 The appointment of a replacement Operator
   5.3 The transition from the outgoing Operator to the incoming Operator

Footnotes

XV. DELEGATION AND VICARIOUS PERFORMANCE

1. The rule as to the delegation and vicarious performance
XVI. THE DUTIES OF THE OPERATOR

1. Introduction

2. Duties that arise from the contractual nature of the relationship

2.1 Duties that are spelt out in the Joint Operating Agreement

2.1.1 To maintain the petroleum title

2.1.2 To comply with all relevant legislation

2.1.3 Not to allow liens and encumbrances to be created

2.1.4 To enter into contracts for the purpose of the Operator's undertaking

2.1.4.1 Contracts generally

2.1.4.2 To inform the Participants of its requirements

2.1.4.3 To have contracts freely assignable

2.1.4.4 To contract as agent for the Participants

2.1.4.4.1 Disclosed agency

(a) As between the Participant and the third party

(a)(i) Contractual liability

(a)(ii) Payment to the Operator

(a)(iii) Special relationship between the Operator and the third party

(b) As between the Operator and the third party

(b)(i) Liability of the Operator

(b)(i)(i) Contractual liability

(b)(i)(ii) Election of the third party

(b)(i)(iii) The Operator's implied warranty of authority

(b)(ii) The rights of the Operator

2.1.4.4.2 Undisclosed agency

(a) The doctrine of the undisclosed principal
(b) The position of the undisclosed Participants 550
(b)(i) Rights and duties 550
(b)(ii) Effect of dealing with the Operator 552
(b)(ii)(i) Dealings by the Participants 552
(b)(ii)(ii) Dealings by the third party 553
(b)(ii)(ii)(a) Election 553
(b)(ii)(ii)(b) Defences and set-off 553
(b)(ii)(ii)(c) Settlement with the Operator 554
(c) The position of the Operator 554
2.1.4.4.3 Denial agency 555
2.1.4.4.4 Britoil proforma 557
2.1.4.5 The provision of goods, services and facilities by the Operator 558
2.1.4.6 The provision of goods, services and facilities by the Participants 558
2.1.5 To act as the representative of the Participants 559
2.1.6 To prepare, maintain and file records and reports 560
2.1.7 To consult with and provide information to the Participants 561
2.1.8 To undertake emergency expenditure and action 561
2.1.9 To dispose of the property of the Participants 562
2.1.10 To assist with the Participants' right of access 562
2.1.11 Insurance 563
2.1.12 To ensure insurance by contractors 565
2.1.13 OPOL 565
2.1.14 Litigation 565
2.1.15 To comply with the provisions set out in the petroleum title 566
2.1.16 To comply with the accounting procedure 567
2.1.16.1 Programmes and budgets 567
2.1.16.2 Authorisations for expenditure 568
2.1.16.3 Amendment of programmes, budgets and authorisations for expenditure 569
2.1.16.4 Cash calls 570
2.1.16.5 The accounting procedure 571
2.1.16.6 Bank accounts 573
2.1.16.7 Accounting records 575
2.1.16.8 Periodic reports of receipts and expenditure 575
2.1.16.9 Cash reconciliation 576
2.1.16.10 Inventories of material 576
2.1.16.11 Adjustments 577
2.1.16.12 Audit 577
2.1.16.13 Cost control 577
2.1.16.14 Chargeable expenditure 578
2.1.16.15 Receipts 579
2.1.17 To dispose of confidential data and information 580

2.2 Duties that may be implied 580
2.2.1 To perform the transaction undertaken 580
2.2.2 To follow the terms of the authority given 581
2.2.3 To exercise due care and skill 581
2.2.4 To respect the Participants title 584

Footnotes 586

XVII. THE FIDUCIARY DUTIES THAT ARISE FROM THE RELATIONSHIP BETWEEN THE OPERATOR AND THE PARTICIPANTS

1. Introduction 613
2. Fiduciary obligations 613
   2.1 Introduction 613
   2.2 Duties of good faith 615
   2.3 Remedies for breach of duty of good faith 616
3. The misuse by the Operator of property held in a fiduciary capacity 616
   3.1 Property other than money 617
   3.2 Money 618
4. The Operator's duty of confidence 625
   4.1 The duty of confidence and employees of the Operator 625
   4.2 The duty of confidence and contractors of the Operator 628
   4.3 Information disclosed in negotiations 631
5. Purchase of property dealt with in a position of confidence 632
   5.1 The relationship of service 633
   5.2 Consent and the effect of not having and having it 634
   5.3 The involvement of a third party in the purchase 636
JOINT VENTURE: PARTNERSHIP OR NOT?

XVIII. INTRODUCTION TO THE QUESTION: WHAT TYPE OF RELATIONSHIP IS A JOINT VENTURE?

1. Introduction
2. Terminology: joint venture and joint adventure
3. The approach adopted to answer the question

Footnotes
CHAPTER X

THE RELATIONSHIP BETWEEN THE PARTICIPANTS

1. INTRODUCTION

The contractual provisions governing the relationship between the Participants have been outlined. However, such provisions do not encompass the entire legal realm of the relationship between the Participants. The relationship between the Participants is governed, not only by the contractual terms of the Joint Operating Agreement, but also by implied terms arising as a matter of law from the circumstances surrounding the relationship itself. It is proposed to consider some of these implied terms by dealing first with the concept of agency and then with the concept of fiduciary obligations, in each case looking at the relationship of the Participants to each other. It is not suggested that the two concepts are independent of one another. It will become apparent that the two do overlap in some areas.

2. AGENCY

In the context of the joint venture utilised in the Industry a question is often raised as to whether the relationship between the Participants is that of principal and agent. It is not proposed to consider agency here. It is dealt with later in this thesis when the relationship between the Operator and the Participants is considered. However, it is submitted that in a typical joint venture as utilised in the Industry the Participants do not so conduct themselves that one Participant (in its capacity as a Participant) will be considered in law to represent the other Participants, the representation manifesting itself in such a way as to enable the Participant to affect the Participants' legal position in relation to third parties.

3. FIDUCIARY OBLIGATIONS

3.1 Introduction

In the context of the joint venture utilised in the Industry a
question is often raised as to whether the relationship between the Participants is a fiduciary relationship\(^1\). In *Mount Isa Mines Limited v Seltrust Mining Corporation Limited*\(^2\) Rowland J. made reference to the fact that he had been called upon to consider the terms of a Joint Operating Agreement "against a background of there being a fiduciary relationship between the co-venturers"\(^3\). It is submitted that, although the question is posed in this manner, this is not the correct way to determine the issue of whether the relationship between the Participants is a fiduciary one\(^4\). It is not a question of seeing whether the relationship is fiduciary per se and then applying certain rules to the relationship, but rather one of looking at the rules applicable to a person in a fiduciary position and seeing if one or more of the rules apply to the person under consideration: in this case, a Participant\(^5\). If a particular rule does apply to a Participant, it is not a case of there being a fiduciary relationship between the Participant and the other Participants and certain rules applying to the relationship, but rather a case of the Participant, because one or more of the particular rules apply to it as a Participant, coming under fiduciary obligations in relation to the activity or activities to which the applicable rule or rules relate\(^6\).

This suggested approach is not one subscribed to by Gibb C.J., in *Hospital Products Limited v United States Surgical Corporation*\(^7\). His Honour recognised that there was much guidance in the case law as to the duties of a person under fiduciary obligations, but "no comprehensive statement of the criteria by reference to which the fiduciary relationship may be established"\(^8\). His Honour added that "the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one"\(^9\). However, His Honour then appeared to alter his approach to the issue by adding "I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose"\(^10\).
It evolves from the suggested approach to the issue that just because a Participant is under a fiduciary obligation vis-a-vis the other Participants in relation to a particular activity it does not automatically follow that the Participant is under a fiduciary obligation in relation to all activities or some other activity that it undertakes vis-a-vis the other Participants. As Lord Wilberforce said in New Zealand Netherlands Society "Oranje" Inc v Kuys, a person "may be in a fiduciary position quoad a part of his activities and not quoad other parts:...". It is only where a particular rule applies to the activity being undertaken by the Participant that a fiduciary obligation will arise in relation to the conduct of that activity. An activity over which a fiduciary obligation will extend is determined by the character of the activity for which the relationship between the Participant and the other Participants exists: the searching or boring for, or exploring for, petroleum within the area to which the petroleum title relates. The character of the activity is determined by considering the terms of the Joint Operating Agreement and the course of dealings actually pursued by the Participant and the other Participants. Indeed a Participant can find itself under more than one fiduciary obligation in respect of the same activity that it undertakes.

It is submitted that for the same reason it is not correct to refer to agency and partnership, for example, as being fiduciary relationships. The characteristics of the particular relationship is irrelevant to the question of whether one or more of the participants to the relationship is to be subject to a fiduciary obligation. The fiduciary obligation flows from the acts the participants undertake or agree to undertake and not from the relationship itself. It is submitted that the same is true of a joint venture as utilised in the Industry.

Likewise the fact that the relationship between the Participants at one time or another during the course of the activity undertaken may be held to be that of principal and agent, does not give rise to fiduciary obligations by each Participant. It is again a question of the fiduciary obligations flowing from what a Participant is doing for, or has agreed to do for, the other Participants. It is submitted that the correct approach
to adopt when considering the relationship of principal and agent is to identify the circumstances in which a fiduciary obligation may arise and note these as situations in which agents may sometimes, but not always, find themselves. It may even be correct to go so far as to say that fiduciary obligations are a typical feature of the agency relationship.

If this suggested approach to the issue of whether the relationship between the Participants is a fiduciary one is correct it matters very little that the courts have experienced difficulty in defining what a "fiduciary" is, the full meaning that flows from the use of the term "fiduciary", or what the relationship between a fiduciary and its beneficiary is to be called. This is so because the courts are only concerned with fiduciary obligations; if the rule applies to a person the fiduciary obligation arises irrespective of these difficulties.

It should be pointed out that it is often possible, with meticulous drafting of the Joint Operating Agreement, for the Participants to avoid the imposition of the rules of equity which give rise to fiduciary obligations.

The Joint Operating Agreement regulates the basic rights and duties of the Participants inter se. If a fiduciary obligation is to be imposed on a Participant the obligation "must accomodate itself to the terms of the contract so that it is consistent with, and conforms to, them." The courts will not superimpose upon a Joint Operating Agreement a fiduciary obligation upon a Participant which will alter the operation which the Joint Operating Agreement was intended to have. If there is to be a fiduciary obligation, it must accomodate itself to the relationship between the Participants created by the Joint Operating Agreement. An example of this is to be found in Mount Isa Mines Limited v Séltrust Mining Corporation Limited.

The notion of excluding the rules of equity which give rise to fiduciary obligations is often tied in with the reluctance of courts to impose equitable doctrines on commercial transactions. This has led to the question as to whether a person who is a participant to a commercial transaction can be placed under a fiduciary obligation in
relation to another participant in the same transaction where the
transaction has been negotiated by the participants at arms length and on
an equal footing. It has been suggested that in such circumstances the
rules of fiduciary obligations should not apply purely because the
transaction is of a purely commercial nature. This issue was addressed
recently by the High Court of Australia in Hospital Products Limited v
United States Surgical Corporation. The case concerned a
distributorship agreement and the members of the High Court of Australia
were divided as to whether the commercial character of the transaction
precluded the imposition of fiduciary obligations on one of the
participants.

Gibbs C.J., relying on a number of Australian decisions, took the
view that evidence that a purely commercial transaction had been
negotiated at arms length and on an equal footing was "important, if not
decisive, in indicating that no fiduciary duty arose." One of the
grounds upon which His Honour placed some weight in deciding that there
was no fiduciary obligation was that the arrangement was a commercial
transaction and it was open to the participants to include in the contract
such terms as were necessary to protect their position. His Honour was of
the view that ordinary commercial contracts made in such circumstances
were unlikely to give rise to fiduciary obligations.

Wilson J. expressed reluctance to import fiduciary obligations into
commercial transactions, based upon the general reluctance of the courts
to extend equitable principles into the domain of commercial
transactions as well as upon the decisions cited by Gibbs C.J.

Dawson J. expressed a similar reluctance to that of Wilson J. and
implied a view similar to Gibbs C.J. when he said:-

"... a fiduciary relationship does not arise where one of the parties
to a contract has failed to protect himself adequately by accepting
terms which are insufficient to safeguard his interests. Where a
relationship is such that by appropriate contractual provisions or
other legal means the parties could adequately have protected
themselves but have failed to do so, there is no basis without more
for the imposition of fiduciary obligations in order of to overcome
the shortcomings in the arrangement between them."
His Honour then said:—

"To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principle upon which those remedies are based. It would be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law now imposes upon them."\(^{35}\)

Mason J., acknowledged the reluctance of courts to impose fiduciary obligations on purely commercial transactions and the "understandable" reluctance of equity to enter upon the field of commercial relationships but still held the view that to suggest that commercial transactions were outside the "fiduciary regime" was too simplistic. The fact that most purely commercial transactions would not give rise to fiduciary obligations did not mean that each transaction should not "be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship."\(^{36}\) His Honour held that if it was necessary for "relief in specie through the constructive trust, the fiduciary relationship being a means to an end" to be made available to the participant, then, equitable doctrines such as those of fiduciary obligations should penetrate purely commercial transactions\(^{37}\).

Deane J. did not address the issue of the commercial character of transactions or give support to the notion that fiduciary obligations could not arise in purely commercial transactions\(^{38}\).

The question that arises out of the judgements is: does the divergence in views really matter? It is submitted that it does not. Their Honours, despite their various responses to the conclusion that they were dealing with a commercial transaction, applied their minds to whether one or more of the rules of fiduciary obligations applied to the facts before them. They did not approach the issue involved as being simply a question of what was or was not a fiduciary obligation because the transaction under consideration by them was a commercial transaction, but rather they considered that the criteria necessary to give rise to fiduciary obligations were not present\(^{39}\). This would be the case in most purely commercial transactions. This approach was particularly evident in the judgement of Deane J.\(^{40}\).
3.2 Branches of the Law Relating to Fiduciary Obligations

The courts have developed two distinct lines of authority in relation to fiduciaries. The first line of authority uses the term "fiduciary" to describe powers given to a person to be exercised on behalf of another person. Such powers are often referred to as fiduciary powers and a person granted a fiduciary power is under a general equitable obligation when dealing with the power to act in an honest manner in what the holder of the power considers to be the other person's interest and to exercise the power for the purpose for which it was conferred. The power is not drawn from direct agreement between the holder of the power and the other person. The power derives from some statute, court order, will or trust deed with the result that the holder of the power is not subject to the immediate control and supervision of the grantor of the power or the other person. Supervision of the exercise of the power is by judicial review of the actions of the holder of the power.

It is submitted that this line of authority has little or no bearing upon the joint venture utilised in the Industry. In such a joint venture the Participants are in a position to protect and advance their own individual interests by agreement between themselves. The Participants can, for example, stipulate what rights and duties can be exercised or discharged by a Participant for them or on their behalf and how such rights may be exercised and such duties can be discharged. In this manner the Participants can control how their interests are served. There is no position of passivity. The Participants do enjoy a measure of control over the exercise of the powers conferred for the conduct of the Operations through the terms of the Joint Operating Agreement, the Operating Committee and voting on the Operating Committee. As such there is no requirement for equity to protect the Participants by imposing general obligations of the nature arising where fiduciary powers are conferred upon aParticipant who undertakes to exercise or discharge rights and duties on behalf of the other Participants. It is
submitted that it is not therefore necessary to discuss fiduciary powers and the holders of what may be called fiduciary offices in this thesis.

However this does not mean that where, in the case of a joint venture, a person, such as a Participant, undertakes to exercise or discharge certain rights and duties on behalf of the other Participants that equity will not intervene to ensure that the exercise of the rights and the discharge of the duties are undertaken in accordance with certain standards of legality and fidelity. Equity will intervene and it is here that the second line of authority is to be found.

In the second line of authority the term "fiduciary" is used to describe a person acting for, on behalf of, in the interest of, or with the confidence of another. Where such a situation exists, as it does, for example, in a number of situations between the Operator and the Participants, the person so acting will come under fiduciary obligations and equity will impose certain duties of good faith upon that person. The duties of good faith are designed to ensure that a position of trust, or confidence, or influence, held by a person in such a position is not abused.

Not all of the duties of good faith, and Finn suggests that there are eight such duties, are as a general rule applicable to the relationship between the Participants, and for that matter, the relationship between the Operator and the Participants. In this thesis it is proposed to address only those that in normal circumstances would apply to the relationship between the Participants or the relationship between the Operator and the Participants, viz,

(i) the misuse of property held in a fiduciary capacity;

(ii) the misuse of information derived in confidence;

(iii) the purchase of property dealt with in a position of a confidential character; and

(iv) conflict of duty and interest.
This is not to suggest that the duties of good faith that are not addressed will not or cannot apply to the relationship between the Participants per se or the relationship between the Operator and the Participants; given the right circumstances equity will impose the relevant duty of good faith.

The relationship of the Operator and the Participants will be discussed later in this thesis.

Each of the duties of good faith that will be considered in this thesis has its own policy objectives and, in itself, defines the type of relationship to which it will apply. To reiterate what has been stated above; where a duty of good faith applies to a Participant the Participant then, and only then, becomes a fiduciary for the purpose of that duty of good faith, and only that duty of good faith. Until a duty of good faith applies to a Participant, the Participant cannot be said to be a fiduciary and as such subject to the duty of good faith. A Participant may still be subject to more than one duty of good faith at the same time. In certain circumstances a Participant could act in breach of more than one duty of good faith at the same time.

It is said that each of the duties of good faith extracts its own distinctive standard of acceptable conduct from a person to whom it applies. As such it is not possible to make a general observation about the duties of good faith and the application thereof to a Participant who falls within the ambit of the duties. Each duty of good faith in relation to a Participant must be, and those to be addressed in this thesis will be, considered separately.

3.3 Remedies for Breach of Duty or Good Faith

It is not proposed in this thesis to discuss in any detail the remedies that would be available to the other Participants should a Participant act in breach of a duty of good faith. The remedies are adequately dealt with elsewhere. Where it is considered necessary, mention will be made in general terms of the remedies available to the
other Participants. This thesis is more concerned with the standard of conduct required of a Participant than with the effect of default in attaining that standard.

4. THE MISUSE BY A PARTICIPANT OF PROPERTY HELD IN A FIDUCIARY CAPACITY.

It is not the usual practice for a Participant to be required by the Joint Operating Agreement to take possession, control or ownership of property of the other Participants. If any one is required by the Joint Operating Agreement to so do, it is usually the Operator. It is not, however, inconceivable that a Participant could be required to so do. In such circumstances, in the absence of an agreement with the other Participants allowing the Participant to use their property for its own benefit, equity would impose a duty of good faith on the Participant not to misuse that property. The Participant comes under a fiduciary obligation to the other Participants in relation to their property. The Participant receives the property in trust and confidence and not in any right of its own.

It is not proposed to consider this duty of good faith and the consequential breach thereof here. It is dealt with later in this thesis when the relationship between the Operator and the Participants is considered. In the event that a Participant were to come under this duty of good faith vis-a-vis the other Participants the principles applicable would be as discussed in relation to the relationship between the Operator and the Participants.

5. THE PARTICIPANT'S DUTY OF CONFIDENCE

The general proposition is that where a Participant receives information in confidence from the other Participants or the Operator it must not use the information to the detriment of the other Participants or Operator without the consent of the other Participants or the Operator. The object of the rule is that a Participant cannot take unfair advantage of information received in confidence from the other Participants or the Operator.
This duty of good faith or, as it is often referred to, duty of confidence, does not only arise where there is a contractual relationship, such as the Joint Operating Agreement, between the Participants or, for the purpose of this thesis, the Operator and the Participants. Courts of equity will restrain a breach of the duty of confidence independently of any right which may exist at law.

5.1 **Express Duty of Confidence**

As will be appreciated the acquisition, interpretation and utilisation of information is the lifeblood of the Industry, even to the extent that data and information may be the subject of trade between participants in the Industry. For this reason, among others, it is usually provided as an express term of the Joint Operating Agreement that the Participants communicate and or receive specific information, or gain access to specific material, on the undertaking to keep the same secret and confidential. Such provisions may go so far as to stipulate the use to be made of the information by a Participant and to whom, if any one, further communication of the information may be made. In this manner a fiduciary obligation upon a Participant is established by the Joint Operating Agreement and steps are usually provided in the Joint Operating Agreement to ensure that secrecy and confidence are maintained for a given period of time. Such express imposition of the duty of confidence raises no particular issues for discussion in this thesis. Breach of an express term of the Joint Operating Agreement is dealt with in the same way as any other breach of contract. It is the implied or imposed duty of confidence, which sits alongside and is not excluded by the express terms of the Joint Operating Agreement, that requires consideration in this thesis.

5.2 **Implied or Imposed Duty of Confidence**

In the absence of an express provision in the Joint Operating Agreement the courts will be prepared, to a limited extent, to imply or impose a duty of confidence upon a Participant as a recipient of confidential information from the other Participants or the Operator.
In so doing it will prevent the Participant from using and or communicating the information76 without the consent of the other Participants or the Operator. It is submitted that as the Joint Operating Agreement has at its core the exploitation of the petroleum title, there is wide scope for the courts to imply or impose a duty of confidence upon each Participant as regards the petroleum title77.

The principle source of the duty of confidence is to be found:

(i) in the nature of the relationship between the Participants and the relationship between the Operator and the Participants; and

(ii) by reason of the subject matter and circumstances in which the subject matter was received by the Participant78.

Herein are also found the limits of the extent to which the courts will imply or impose a duty of confidence upon a Participant.

Before considering the principle sources of the duty of confidence, mention should be made of what has been referred to as the "tort" of "unfair competition"79. This notion was considered by Deane J. in Moorgate Tobacco Co. Ltd. v Philip Morris Limited80. Very briefly, the "unfair competition" notion is used to, inter alia, "describe what is claimed to be a new and general cause of action which protects a trader against damage caused either by "unfair competition" generally or, more particularly, by the "misappropriation" of knowledge or information in which he has a "quasi-proprietary" right"81.

Deane J. considered the notion to have found no place in Australian law82 as "unfair competition" did not, of itself, provide a sufficient basis for relief83. His Honour was of a similar view in so far as English law was concerned84.

5.2.1 The Nature of the Relationship

There are certain types of relationships between persons where the courts are predisposed to hold that a duty of confidence exists, such as
the relationship of employer and employee or of principal and agent. However, the relationship between the persons is not a determining factor.

5.2.2 The Subject Matter and the Circumstances in which it was Received

The general proposition is that where information has been communicated to a Participant in circumstances importing an obligation of confidence, and the information is confidential information, the courts will protect the other Participants or the Operator against misuse of the information by the Participant.

The general proposition will require the court to determine:

(i) whether the information communicated to the Participant is in itself of a confidential nature; and

(ii) whether the information was disclosed to the Participant in circumstances importing a duty of confidence.

5.2.3 Is the Information of a Confidential Nature?

To attract the duty of confidence the information communicated to the Participant must possess the necessary quality of confidentiality. This will not be so if the information is public property and public knowledge. The essential attribute appears to be that the information possess some degree of secrecy.

To ascertain whether the information has the necessary confidential attribute it is necessary to determine whether the Participants or the Operator in disclosing the information to the Participant, by their or its own acts, have stripped the information of any confidential quality which it may have otherwise possessed. Should the other Participants or the Operator have used the information themselves or itself or through a confidant to provide a service then that information is considered, in the main, to have ceased to have the necessary confidentiality and to be
available to the general public. However, this general principle is qualified if the information employed in the provision of a service is still thereafter capable of control. That is, the information could only be derived by a third party expending time and effort in ascertaining or reproducing the information from the service rendered. If this is the case then the information does not cease to have the necessary confidentiality despite the fact that the service rendered is available to the general public.

The information may also be stripped of its confidentiality if a term of the agreement under which the information is disclosed to the Participant reasonably creates an impression that the other Participants are, or the Operator is making a fairly open invitation to the Participant to make use of the information.

It is also necessary, even if the other Participants have not, or the Operator has not, placed the information in the public domain, that they or it must be able to show that the information possesses some degree of secrecy if they wish or it wishes to establish the duty of confidence. To determine this the courts have considered a number of factors:

(i) whether the information is still confidential notwithstanding that it is used in the provision of a service to the general public;

(ii) where the particular process is developed from material or information already available to the public, whether the steps necessary to complete the process are capable of being confidential;

(iii) when the information produced or obtained is the result of the expenditure of time and money either by way of research or the application of skill and ingenuity whether the necessary confidentiality is thereby indicated. This is particularly so when another person could only acquire or duplicate the information by going through the same process as the other Participants or the Operator. It is submitted that in the Industry this is one of,
if not the, most important indication that information disclosed by
the other Participants or the Operator to a Participant possesses the
necessary degree of secrecy so as to enable the courts to hold that
the information has the necessary confidentiality attribute; 100

(iv) the novelty or originality of the information will indicate
that the information has not already become known to the public; 101

(v) where the information belongs to a particular field of
endeavour, such as in the Industry, the degree of secrecy may be
gauged by the state of knowledge of others working in the same
field. 102 It is submitted that in the Industry this is another of
the more important indication that information disclosed by the other
Participants or the Operator to a Participant possesses the necessary
degree of secrecy so as to enable the courts to hold that the
information has the necessary confidentiality attribute;

(vi) the steps taken by the other Participants or the Operator to
preserve the secrecy of the information in an effort to prevent it
becoming public knowledge; 103

(vii) the intrinsic value of the information to the other
Participants, Operator, competitors or others, will indicate that the
information is potentially secret. 104 This does not mean the
intrinsic value in the sense of commercial value but in the
sense that the preservation of its confidentiality is of substantial
concern to the other Participants or the Operator. 105 It is
submitted that in the Industry this is another of the more important
indications that information disclosed by the other Participants or
the Operator to a Participant possesses the necessary degree of
secrecy so as to enable the courts to hold that the information has
the necessary confidentiality attribute; and

(viii) the secrecy of the information has, in a number of cases,
been tested by looking to the damage that would be suffered by the
other Participants or the Operator if the information were allowed to
be used or communicated by a Participant without restraint. 107 It
is submitted that in the Industry this is another of the more important indications that information disclosed by the other Participants or the Operator to a Participant possesses the necessary degree of secrecy so as to enable the courts to hold that the information has the necessary confidentiality attribute.

It should be appreciated that merely because a Participant is granted the right in confidence to use information disclosed to it, such as where there is a licensing of the information, the granting of the right is not incompatible with the duty of confidence in relation to the information. The fiduciary relationship can exist between the Participant and the other Participants or the Operator notwithstanding the granting of the right to use the information.

5.2.4 Was the Information Disclosed in Circumstances Imparting a Duty of Confidence?

It would appear that the courts have developed a number of alternative tests to determine whether the information was disclosed in circumstances imparting a duty of confidence. It is this factor which is of crucial importance to the scope of the duty of confidence owed by a Participant to the other Participants or the Operator in many cases.

The first test is to ask whether a reasonable man standing in the shoes of the Participant would have realised upon, reasonable grounds, that the information he received was given to him in confidence. Finn suggests that this test can lead to the situation where the reasonable man concludes that information is received in confidence even though no confidential information is in fact given. In which case it is suggested that the court would not restrain the use of the information by the Participant even if the test was satisfied.

The second test is to ask whether the information in itself possessing the necessary quality of confidentiality, has been disclosed only for a particular purpose? If this is the case, the use to which the Participant can put the information is limited to that particular purpose. Finn suggests that this test is of particular use where
there has been an unsolicited disclosure of information and yet the terms of that disclosure are redolent of the fact that the other Participants or the Operator regard the information as confidential and that, notwithstanding that the disclosure was unsolicited, the other Participants or the Operator clearly intended that the information be used for a particular purpose.

5.2.5 **Exceptions**

The duty of confidence is not an absolute duty. There are a number of exceptions to the duty\(^{113}\), some of which are listed below, which will not be further discussed in this thesis\(^{114}\):-

(i) disclosure under compulsion of law;

(ii) where the interest of the Participant requires the disclosure;

(iii) where there is a duty to the public to disclose\(^{115}\); and

(iv) the disclosure is made with the express or implied consent of the other Participants or the Operator.

5.2.6 **The Nature of the Duty of Confidence**

Two questions that do require consideration are:-

(i) the nature of the fiduciary obligation; and

(ii) at what point is the fiduciary obligation breached.

Where it is necessary to show that the fiduciary obligation has been breached by a Participant it is a question of fact involving the establishment of three elements\(^{116}\):-

(i) it must be shown that the confidential information has been used or disclosed by the Participant\(^{117}\);
(ii) it must be shown that the confidential information used was
directly or indirectly obtained by the Participant from the other
Participants or the Operator; and

(iii) it must be shown that the use or disclosure of the
confidential information by the Participant was inconsistent with
the limited purpose for which the information was disclosed by the
other Participants or the Operator.

The question of the nature of the fiduciary obligation has given
rise to a number of tests.

The stricter test to be satisfied is that the duty of
confidence is a duty not to use the information directly or indirectly
received without the other Participants' or the Operator's consent,
express or implied.

An alternative, and somewhat more lenient, test is that the
Participant should not take an unfair advantage or use the information in
a way which will prejudice the other Participants or the Operator without
the other Participants' or the Operator's consent, express or
implied. This test appears to imply that the use made of the
information must be prejudicial to the other Participants or the Operator
before equity will intervene.

A third test is that the Participant should not use the information
directly or indirectly without the consent of the other Participants or
the Operator even if a reasonable sum is offered for its use, such consent
can be express or implied. In general, an actual or threatened breach by a
Participant would be subject to restraint. However, if the duty of
confidence is one within a commercial context so that the duty is not to
use information without paying a reasonable sum for so doing, then a court
will not restrain the use but will award damages. The essence of
this test lies in the prohibition against not using the information unless
it is paid for rather than a restraint against the use of the information
at all.
In the context of the Joint Operating Agreement and the joint venture established thereby, it should be noted that only the person who is owed the duty of confidence, the other Participants or the Operator, can maintain an action against a Participant to protect the confidentiality of the information.

One final point remains to be made in relation to the breach of the duty of confidence. A breach of the duty may occur notwithstanding that the Participant has acted honestly and with good intentions or unintentionally or subconsciously.

The remedies for breach of the duty of confidence include injunction and accounting for profit and damages. The remedies will not be discussed here. They are adequately dealt with elsewhere.

5.2.7 The Duty of Confidence and Employees and Contractors of a Participant

It is not proposed to consider the position with regard to employees or contractors of the Participants. The position with regard to employees and contractors of the Operator is dealt with later in this thesis when the relationship between the Operator and the Participants is considered. In the event that a Participant does delegate to its employees, agents or contractors, the undertaking and discharge of its rights and duties then the principles applicable would be as discussed in relation to the relationship between the Operator and the Participants.

6. PURCHASE OF PROPERTY DEALT WITH IN A POSITION OF CONFIDENCE

In the exercise of its rights and the discharge of its duties it would be a rare occurrence for a Participant to be placed in the position where it manages or disposes of property belonging to the other Participants. However, if such a circumstance were to occur, it may give rise to a fiduciary obligation being imposed on the Participant.

It is submitted that a fiduciary duty will not arise where one
Participant purchases the property of the Participants in circumstances where the relationship between the Participants amounts to nothing more than co-ownership of that property.

It is not proposed to consider this fiduciary obligation here. It will be dealt with later in this thesis when the relationship between the Operator and the Participants is considered. In the event that a Participant does fall within the ambit of this fiduciary obligation the principles applicable would be as discussed in the context of the relationship between the Operator and the Participants.

7. CONFLICT OF DUTY AND INTEREST

The general rule is that if a Participant is in a fiduciary position it is not allowed to put itself in a position where its interest and its duty conflicts. The object of the rule is to prevent a Participant, who undertakes to act for or on behalf of another Participant or other Participants, from allowing any undisclosed personal interest to sway it from the proper performance of its undertaking. It is doubtful whether a position would arise under most Joint Operating Agreements where this rule would apply to the Participants.

Again, it is not proposed to consider this fiduciary obligation here. It will be dealt with later in this thesis when the relationship between the Operator and the Participants is considered. In the event that a Participant does fall within the ambit of this fiduciary obligation the principles applicable would be as discussed in the context of the relationship between the Operator and the Participants.

Where the Participants are little more than co-owners of property this rule will not apply to the Participants. However where the Joint Operating Agreement provides for the Participants to work together for a designated purpose, each Participant assumes duties under this rule to the other Participants to effect that purpose and the court will hold the Participants rigidly to their undertaking. If such is the case, it is submitted that the fiduciary obligation arises as a result of the mutual confidence that each Participant imposes on the other Participants.
in the appropriate circumstances\textsuperscript{134}. It is therefore especially important to define the scope and ambit of the business relations created between the Participants. This is determined by the character of the activity for which the joint venture was established. There is usually a specific purpose for which it was established and the nature and extent of the activity is usually determined by reference to the terms of the Joint Operating Agreement\textsuperscript{135} and the course of dealings between the Participants\textsuperscript{136}.

The general rule is that if there is no breach of the duty it is irrelevant that a profit making opportunity arose as a result of information derived as a Participant\textsuperscript{137}. However, if there is a breach of this rule the Participant may have to account for any profit\textsuperscript{138}.

Where the consent of the other Participants is sought, such consent must be given following the making of a full disclosure which sets out all the material facts and information which could affect the other Participants' consent\textsuperscript{139}.

However, notwithstanding that the Joint Operating Agreement may provide for the Participants to work together for a designated purpose, if the Joint Operating Agreement also provides in greater detail how the Participants are to stand in relation to each other in respect of a particular matter, for example, the assignment of all or part of the Interest of a Participant, such specific provision will remain unqualified by the general obligation. As such the duty under the conflict rule will not apply to a Participant who acts in accordance with its rights under the specific provision of the Joint Operating Agreement. There are limits between the ambit of matters for which there will or could be a duty under the conflict rule and the ambit of matters for which a Participant, as the owner of its Interest, has no such duty\textsuperscript{139}.
FOOTNOTES


2. Unreported decision of the Supreme Court of Western Australia delivered on 5th July 1985.

3. Unreported decision of the Supreme Court of Western Australia delivered on 5th July 1985, p. 8.

4. There is a tendency to use the terms "fiduciary" and "confident", the terms "fiduciary relationship" and "confidential relationship" and the terms "fiduciary obligation" and "confidential obligation", in each case to mean one and the same thing. In this thesis the terms "fiduciary", "fiduciary relationship" and "fiduciary obligation" will be used.

5. See Shepherd Law of Fiduciaries (1981) pp. 10-12 where the establishing of rigid rules in relation to what is a flexible concept is criticised. See also the comments of Laskin J. in Canadian Aero Service Limited v O'Malley (1974) 40 D.L.R. (3d) 371, 383-384 to the same effect. This was the approach adopted by Deane J. in Moorgate Tobacco Co. Limited v Philip Morris Limited


11. [1973] 1 W.L.R. 1126
16. See, for example, Cf. Birtchnell v The Equity Trustees Executors and Agency Co. Limited (1929) 42 C.L.R. 384, 407 where Dixon J. said, "The relation between partners is, of course, a fiduciary".


25. Unreported decision of the Supreme Court of Western Australia delivered on 5th July 1985.

26. Possibly the most cited dicta of this effect is that of Bramwell L.J. in *The New Zealand and Australian Land Co. v Watson* (1881) 7 Q.B.D. 374, 382:-

"Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation. I think there is no good ground for holding that these defendants have any fiduciary character towards the plaintiffs."


39. See Lehane "Fiduciaries in a Commercial Context" in Finn, editor, Essays in Equity (1985) 95, 104 who suggests that the issue of "commercial" transactions is a red herring.


41. Shepherd Law of Fiduciaries (1981) pp. 21 - 22 suggests that the courts have developed three traditional classifications of fiduciaries:

(a) property holders;

(b) representatives; and

(c) advisers.

Shepherd also suggests that there may be a fourth classification in development. The classifications are seen as overlapping.


43. Finn Fiduciary Obligations (1977) p. 3.


47. Finn Fiduciary Obligations (1977) p. 3.

48. Finn Fiduciary Obligations (1977) p. 3.

50. See for example Britoil 5.1.1. and Apea 4.8.


The "for, and on behalf of" test was proposed by the New South Wales Court of Appeal and discussed in Hospital Products Limited v United States Surgical Corporation [1984] 55 A.L.R. 417. Gibbs C.J. saw the test as being in most general terms and that all the facts and circumstances had to be carefully examined to see whether a fiduciary relationship exists (p. 435). The test, in effect, is "a fiduciary relationship exists where the facts of case in hand establish that in a particular matter a person has undertaken to act in the interests of another and not in his own" (p. 432). Mason J. said "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense." (p. 454). Dawson J. said:—

"... no satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary. It is usual - perhaps necessary - that in such a relationship one party should repose substantial confidence in another in acting on his behalf or in his interest in some respect. But it is not in every case where that happens that there is a fiduciary relationship ..."

There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other." (p. 488)

This test, at least insofar as the "representative" element is concerned, becomes circular. It is virtually a definition of agency. See Lehane "Fiduciaries in a Commercial Context" in Finn, editor, Essays in Equity" (1985) 95, 101.

54. Shepherd Law of Fiduciaries (1981) pp. 47 - 49 holds that the courts have held that there are at least two duties involved in considering fiduciary obligations; a duty of loyalty and a duty of care. Shepherd considers this view by the courts to be erroneous. Shepherd considers that the duty of loyalty may be one and the same thing as a fiduciary relationship between participants whereas the
duty of care arises in, inter alia, fiduciary situations, but not necessarily all fiduciary situations. To this end the duty of care has no necessary connection with fiduciary relationships. Shepherd therefore holds that fiduciary relationships are really questions of understanding the duty of loyalty.

55. Finn *Fiduciary Obligations* (1977) p. 4. See Shepherd *Law of Fiduciaries* (1981) p. 49 who suggests that the approach to the issue of abuse is to be made in two steps:—

(a) find the duty of loyalty (the fiduciary relationship) between the participants and then; and

(b) determine whether the duty has been breached.


56. Finn *Fiduciary Obligations* (1977) pp. 78 - 80. The eight duties of good faith are said to involve:—

(a) undue influence;

(b) misuse of property held in a fiduciary capacity;

(c) misuse of information derived in confidence;

(d) purchase of property dealt with in a position of a confidential character;

(e) conflict of duty and interest;

(f) conflict of duty and duty;

(g) renewals of leases and purchases of reversions; and

(h) inflicting actual harm on an "employer's" business.

"Stated comprehensively in terms of liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the liability is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain; or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it" (p. 433). "... The liability to account ... will not arise where the person under the fiduciary duty has been duly authorised, either by the instrument or agreement creating the fiduciary duty or by the circumstances of his appointment or by the informed and effective assent of the person to whom the obligation is owed, to act in the manner in which he has acted. The right to require an account from the fiduciary may be lost by reason of the operation of other doctrines of equity such as laches and equitable estoppel" (p. 437).


72. Breitol 17.2.


75. Finn Fiduciary Obligations (1977) p. 135.


82. See Victoria Park Racing and Recreation Grounds Co. Limited v Taylor (1937) 58 C.L.R. 479, 509 where the notion was in effect rejected by Dixon J.


87. **Coco v A.N. Clark (Engineers) Limited** [1969] R.P.C. 41, 47 per Megarry J. who stated that there were three elements normally required if a case of breach of confidence is to succeed:—

(a) the information itself must be of a confidential nature;

(b) that information must have been imparted in circumstances importing an obligation of confidence; and

(c) there must be an unauthorised use of that information to the detriment of the party communicating it.


88. **Coco v A.N. Clark (Engineers) Limited** [1969] R.P.C. 41, 47;
**Baneris v Commonwealth of Australia** [1987] 75 A.L.R. 327, 329;
**Stephens v Avery** [1988] 2 All E.R. 477, 479.


114. For further discussion of the exceptions see Finn Fiduciary Obligations (1977) pp. 156 - 159.


127. See, for example, Britoil 5.10.1 and 5.10.2.

128. Dean v MacDowell (1878) 8 Ch. D. 345, 351; section 30 of the Partnership Act 1898. For joint ventures see Cf. British American Oil Producing Co. v Midway Oil Co. 82 P. 2d. 1049 (1938); MacWilliam "Fiduciary Relations in Oil and Gas Joint Ventures" (1970) 8 Alberta L.R. 233.


J. spoke of the need for a "full and frank disclosure of all material facts"... adopting exactly the wording in Phipps v Boardman [1973] 2 All E.R. 756, 1227 (p234) to that effect. The burden of proof rests on the Participant (Dunne v English (1874) L.R. 18 Eq. 524) it is not sufficient to merely disclose that he has an interest (The Liquidation of the Imperial Mercantile Credit Association v Coleman (1873) L.R. 6 H.L. 189, 200 and 205; Alexander v Automatic Telephone Co. [1900] 2 Ch. 56; Gluckstein v Barnes [1900] A.C. 240) or to make such statements as would put the Participants or the Operator on inquiry (Dunne v English (1874) L.R. 18 Eq. 524. Cf. Swale v Ipswich Tannery Co. Limited (1906) 11 Com. Cas. 88, 96-97).


CHAPTER XI

THE OPERATING COMMITTEE

1. ESTABLISHMENT OF THE OPERATING COMMITTEE

The Operating Committee will either be established by the Joint Operating Agreement or required by the Joint Operating Agreement to be established within a stated period of time of the execution of the Joint Operating Agreement by the representative of the Participants.

2. THE POWERS AND DUTIES OF THE OPERATING COMMITTEE

The powers and duties vested in or imposed upon the Operating Committee by the Joint Operating Agreement will require the Operating Committee to exercise overall supervision and control of all matters pertaining to the Operations, including the management thereof. The Operating Committee will therefore be required to exercise overall supervision and control over the activities undertaken by the Operator pursuant to the Joint Operating Agreement. It will be through the Operating Committee that the Participants, through their appointed representatives, exercise their respective powers and control over all aspects of the Operations. It is usual to include within these powers and duties:

1. the consideration and determination of all matters relating to the general policies, procedures and methods of operation under the Joint Operating Agreement;

2. the approval of any public announcement or statement regarding the Joint Operating Agreement or the Operations;

3. the consideration, revision and approval or disapproval, of all proposed programmes, budgets and authorisations for expenditure prepared and submitted to it;
4. the determination of the timing and location of all wells drilled under the Operations and any change in the use or status of a well;\(^9\)

5. the determination of the timing and location at which the work and or expenditure conditions set out in the petroleum title are to be discharged;\(^10\)

6. the determination of whether the Operator will represent the Participants regarding any matters or dealings with, in the case of Great Britain, the Secretary of State for Energy, and in the case of Australia, the Designated Authority or the Joint Authority, any other governmental authority or third parties in so far as the same relate to the Operations. This power of determination will not be permitted to fetter the right of each Participant to personally deal with, in the case of Great Britain, the Secretary of State for Energy, and in the case of Australia, the Designated Authority or the Joint Authority or any other governmental authority in respect of matters relating to its own Interest;\(^11\) and

7. the consideration and, if so required, the determination of any other matters relating to the Operations which may be referred to it by the Participants (other than any proposed amendment of the Joint Operating Agreement) or matters otherwise designated under the Joint Operating Agreement for reference to the Operating Committee;\(^12\)

In general terms, all matters for decision under the Joint Operating Agreement, unless specifically provided otherwise, will be left to be determined by the Operating Committee;\(^13\).

3. REPRESENTATION OF THE PARTICIPANTS ON THE OPERATING COMMITTEE

The Operating Committee will consist of the representatives of some or all of the Participants.\(^14\)
Each Participant is usually required to appoint one representative and one alternate representative to the Operating Committee. The alternate representative will only be permitted to vote in the absence of the representative.

In some cases it is provided that a Participant with an Interest of less than a stated percentage is not entitled to appoint its own representative and alternate representative to the Operating Committee. This has arisen in Australia as a result of the proliferation of relatively small companies acquiring interests in joint ventures in the Industry. In such cases the usual position is that the Participant may, by notice of the Operator and the other Participants:

1. appoint the representative and alternate representative of another Participant; and

2. at any time and from time to time, substitute the representative and alternate representatives of another Participant in lieu of the representative and alternate representative previously appointed, to attend meetings of the Operating Committee and vote on its behalf.

More than one Participant will be permitted to appoint the same representative and alternate representative irrespective of the circumstances above mentioned. In the case that a representative and alternate representative is appointed to represent more than one Participant, the representative and alternate representative will represent each Participant separately.

Each Participant will be required to give notice to the Operator and the other Participants of the name of its representative and alternate representative in order to effect their appointment. This is usually required to be done as soon as possible after the date of execution of the Joint Operating Agreement or within a stated period of time from that date.
Usually a Participant may at any time and from time to time replace its appointed representative and or alternate representative by giving notice to the Operator and the other Participants of the name of the substitute.

The general rule is that each representative or alternate representative may be accompanied at meetings of the Operating Committee by such advisors as they consider necessary or to be reasonably required at such meetings. However, the advisors will not have the right to vote at any meeting of the Operating Committee.

4. THE AUTHORITY OF EACH PARTICIPANT'S REPRESENTATIVE

The representative or alternate representative of a Participant will be deemed to be, or will be, authorised by the Participant to represent and bind the Participant in relation to all such matters properly within the powers of the Operating Committee and which properly come before a meeting of the Operating Committee. Such authority will be required to include the authority to inform the Operating Committee of the decision of the appointing Participant.

5. THE CHAIRMAN OF THE OPERATING COMMITTEE

The representative of the Participant who is also the Operator is usually designated to be the chairman of the Operating committee. The chairman is usually not vested with dictatorial powers.

6. MEETINGS OF THE OPERATING COMMITTEE

The Operating Committee will be required to meet at regular intervals, although the Operating Committee may be permitted to alter the interval between meetings.

Outside of the regular meetings, the Operating Committee is required under some Joint Operating Agreements to meet whenever requested to do so by the Operator.
Whether a meeting of the Operating Committee is a regular meeting or one requested by the Operator (where such is provided for), the meetings are usually to be held at a stated place unless the Operating Committee otherwise determines. Such meetings are usually required to be called by the Operator giving to the Participants a stated period of notice of the date and time of the meeting.

The notice of meeting may also be required to be accompanied by an agenda and all information and data available to the Operator relating to the matters on the agenda that are to be considered at the meeting. The agenda and data will need to be in sufficient detail to enable the representatives of the Participants to discuss and take decisions on items on the agenda. In order to allow the Participants to contribute to the matters to be considered at a meeting of the Operating Committee, and in so doing removing some of the intangible power that the Operator has over the functioning of the Operating Committee, some Joint Operating Agreements provided that the agenda must be submitted to the Participants within a stated period of time prior to the date of the meeting. This is to enable each Participant to give notice to the other Participants within a stated period of time prior to the date of the meeting of additional matters which it desires to be considered at the meeting. If such a notice is given the matters contained in it will be required to be considered at the meeting of the Operating Committee. Usually if a matter is not listed on the agenda or added by way of notice as mentioned it may not be considered unless the Participants unanimously agree otherwise.

A further method by which a meeting of the Operating Committee may come about is by requisition of a Participant or Participants. It is usual to provide that a Participant or Participants holding, in aggregate, not less than a stated percentage of the Interests, can request that a meeting of the Operating Committee be convened. The request will have to be made by notice to the Operator and to all of the other Participants, stating the matters to be considered at the meeting. On receipt of the notice of request the Operator will be
required to promptly call a meeting of the Operating Committee to be held within a stated period of time of the receipt of the notice of request.

In any case, where a notice is required to be given of a meeting by the Operator the stated period of time that the notice must give of a meeting of the Operating Committee can always be waived with the consent of all the Participants and, in like manner, the time limit abridged.

Where a Participant is entitled to have, but does not have, a representative or an alternate representative at a meeting of the Operating Committee the usual position is that it may still vote on any matter on the agenda by:

1. appointing a proxy in writing, who may have to be the representative or alternate representative of another Participant, to cast its vote in relation to the matter; or

2. giving notice to the Operator, prior to the meeting or the submission of the matter for a vote at the meeting, of its vote in relation to the matter.

7. MINUTES OF MEETINGS OF THE OPERATING COMMITTEE

A written record of all matters upon which a vote has been taken during a meeting, and the result of the vote on each matter, will be required to be made by either the Operator, the chairman, who may appoint a secretary for each meeting for the purpose of making the record, or any Participant.

A copy of the record, normally referred to as minutes of the meeting, may be required to be provided to each representative prior to the conclusion of the meeting. In such cases, each representative may be required to initial the minute and in so doing, signify his understanding of the matters recorded therein.

A copy of the minutes of the meeting will be required to be
despatched to each Participant within a stated period of time from the end of the meeting. The purpose for this is to allow each Participant to signify its approval or disapproval of the minutes of the meeting. Each Participant will be required to do this by notifying the other Participants of its approval or disapproval within a stated period of time. Where a Participant disapproves of a matter referred to in the minutes of the meeting it will have to state in its notice the reason for its disapproval. If a Participant fails to notify its disapproval in this way within the time period it will be deemed to have approved of the minutes of the meeting.

The signification of disapproval will not affect the validity of the decision taken by the Operating Committee and reflected by the minutes of the meeting unless the Joint Operating Agreement specifically provides to the contrary. The decision of the Operating Committee will remain binding upon all of the Participants.

8. VOTING ON MATTERS WITHOUT CONVENING A MEETING OF THE OPERATING COMMITTEE

The Joint Operating Agreement will usually provide that a proposal which could be validly determined at a meeting of the Operating Committee may be submitted by the Operator by notice to all Participants for their consideration and vote without the necessity of holding a meeting of the Operating Committee.

There may be a restraint upon this procedure. A Participant or Participants in aggregate holding not less than a stated percentage of the Interests may be entitled, within a stated period of time after the receipt of a notice of proposal, to request a meeting of the Operating Committee to discuss the proposal. However, the right to request such a meeting may be curtailed where the notice requests a vote by telegram, cable, telex, telecopier or other facsimile communication on any proposal relating to the deepening, completing, side-tracking, plugging back, reworking, logging, coring, testing or abandoning of a well on which drilling equipment is then located.
Where the circumstances require such an urgent vote to be taken, or where the matters to be considered by their very nature require urgent determination, the need for urgent determination and a lesser period of time within which the determination is to be made should be stated in the notice submitting the proposal. The Participants are in such circumstances usually required to cast their vote within a lesser period of time than is provided for in normal circumstances. In all other circumstances the Participants will be required to cast their vote within a stated period of time after receipt of the proposal or within such reasonable deadline as is set by the notice of proposal.

The mechanics of voting where a meeting of the Operating Committee is not convened are usually such that each Participant, within the time period, will be required to give notice of its vote to the Operator or to the Operator and the other Participants. If a Participant fails to vote within the time period it is usual to provide that the vote of the defaulting Participant is deemed to be a vote either against or in favour of the proposal.

The Operator will be required to keep a written record of each vote cast and to promptly notify the Participants of the result of the voting. If a proposal receives the requisite majority of favourable votes the proposal will be deemed to be a decision of the Operating Committee and binding upon the Participants.

9. **SUB-COMMITTEES**

The Operating Committee is usually empowered to establish such sub-committees as it deems appropriate. Each sub-committee is usually constituted by representatives of each Participant who are entitled in their own right to appoint representatives to the Operating Committee. Therefore, if a Participant does not have an Interest that is large enough to permit it to appoint a representative in its own right to the Operating Committee it is precluded from appointing a representative to any sub-committee established by the Operating Committee.
The function of each sub-committee is determined by the Operating Committee. The Operating Committee decides the terms of reference of the sub-committee and the rules of procedure to be complied with. However, the recommendations and proceedings of each sub-committee can be advisory only.

10. THE VOTING PROCEDURE

Each Participant will be entitled to vote through its representative. The voting interest of each Participant will be in proportion to the Interest that it holds from time to time.

Where a Participant does not have an Interest that is large enough to entitle it to appoint a representative in its own right to the Operating Committee, the representative of the other Participants nominated to represent it at meetings of the Operating Committee will be allowed to vote in respect of that Participant's Interest. The manner in which this is done will depend upon the Joint Operating Agreement. The representative may be entitled to a vote with regard to each Interest that he represents separately and at the same time vote according to the separate wishes of the Participants he represents. Alternatively, the representative may be required to vote in respect of all Interests that he represents as one block. In this case, the representative will no doubt vote the block of Interests in accordance with the wishes of the Participant that appointed him to the Operating Committee.

Some Joint Operating Agreements provide that a Participant cannot abstain from voting. To deal with the situation where a Participant does not vote, the Joint Operating Agreement will provide that failure to vote on a matter will be deemed to be either a vote in favour or against the matter under consideration, as circumstances may require.

The need to determine what may be called the "passmark" for matters put to a vote is one of the most time consuming and difficult areas in
the negotiation of a Joint Operating Agreement. This is because decisions made by the Operating Committee are binding upon all Participants. After all, a blocking vote may be the only protection afforded to a Participant holding a minority Interest. Looked at another way, it also establishes which Participants have a right of veto over matters of which they disapprove. The degree of difficulty in negotiating the passmark would appear to increase where there are numerous Participants, some of whom have small Interests. The need to ensure that a decision can be made by the Operating Committee has to be weighed against overriding the wishes of one or more of the Participants. The passmark may also vary depending upon the type of matter upon which a vote is to be taken. There will usually be certain matters specified in the Joint Operating Agreement which require the unanimous consent of the Operating Committee, or where a Participant is not entitled to be represented of its own right on the Operating Committee, the unanimous consent of all Participants. These matters will usually include:

1. all decisions where there are only two Participants of the joint venture;

2. a decision to approve for any year a work programme or expenditure commitment which contemplates Operations in excess of the minimum work programme or minimum expenditure commitment for that year;

3. a decision to apply to the relevant authority for approval to surrender the petroleum title;

4. a decision to apply to the relevant authority for renewal of the petroleum title;

5. a decision as to the blocks to be relinquished on renewal of the petroleum title;

6. a decision as to the minimum work programme and the minimum
expenditure commitments to apply to each year of the renewed term of the petroleum title;

7. a decision to make any nomination or declaration, or to do any other act or thing, which will limit the time within which the Participants may apply for a related petroleum title;

8. a decision to apply for a related petroleum title; and

9. a decision to apply for a variation or suspension of any condition subject to which the petroleum title was granted.

In effect, the unanimous consent of all Participants is required to protect each of them from an unexpected additional expense in terms of quantum or a change in the scope of the Operations, that is, matters which affect a Participant’s basic rights and duties under the Joint Operating Agreement and in the petroleum title.

Those matters which do not require unanimous consent will require the affirmative vote of the Participant or Participants entitled to vote having individually or in aggregate an Interest of not less than a stated percentage. As a general rule, a majority vote will prevail. However, determining what the percentage shall be in each case is usually a contentious matter in most negotiations. It may also be the case, where unanimous consent is required, that in addition to a stated percentage Interest passmark a stated number of Participants will be required to vote in favour of the matter.

In the proceedings of the Operating Committee, each Participant will be required to act solely in its own interest. It will not be required to act in the interest of the Participants as a whole. The Participant’s individual interest is seen to be paramount; not the interests of the Participants as a whole. On the other hand, this does not mean that each Participant can promote its own interest so as to derive personal benefits not contemplated by the Joint Operating Agreement or which may cause harm to other Participants. If such were to occur, the conflict rule discussed above will apply.
However, once a vote has been taken, all Participants are bound by the decision of the Operating Committee, provided the decision was made in accordance with the Joint Operating Agreement. The Participants will be required to implement the decision in good faith and to maintain the integrity of the decision in all other decision making forums. Most Joint Operating Agreements will provide the Participants with the "safe guard" rights to withdraw, of non-consent and sole risk, in the event that they do not agree with the decision of the Operating Committee. These rights are discussed above.


3. Apea 5.1.

Ryan "Joint Venture Agreements" (1982) 4 A.M.P.L.J. 101, 125;
Ladbury "Mining Joint Ventures" (1984) 12 A.B.L.R. 312, 319; Brown
and Standen "Joint Ventures" in Young, editor, The Australian
Encyclopaedia of Forms and Precedents (1989), Vol. 7, 14,017.

5. Apea 5.8. See Leslie "Joint Ventures and Farmouts: Including Types
of Joint Ventures, Providing for Unknown Problems in the
Exploration and Production Stages and Trade Practices Legislation"
(1970), a paper delivered at the Law Institute of Victoria Seminar
on Mining Law, p.14; Merralls "Mining and Petroleum Joint Ventures
in Australia: Some Basic Legal Concepts" (1981) 3 A.M.P.L.J. 1, 7;
Ryan "Joint Venture Agreements" (1982) 4 A.M.P.L.J. 101, 125; Waite
"Australian Resources Joint Ventures: Some Legal Pointers for
Investors" (1985), a paper delivered at the Lawasia Symposium on
Energy Law, Jakarta, Indonesia, at p. 53; Brown and Standen "Joint
Ventures" in Young, editor, The Australian Encyclopaedia of Forms
and Precedents (1989), Vol. 7, 14,017.

6. Britoil 8.1(i); Apea 5.9. See Chate "The Structure of Joint
Mineral Ventures" (1969), a paper delivered at "The Law of Mining
in Australia", Committee for Post Graduate Studies in the
Department of Law, The University of Sydney, p. 5; Ryan "Joint
Venture Agreements" (1982) 4 A.M.P.L.J. 101, 125; Ladbury "Mining


Ventures" (1969), a paper delivered at "The Law of Mining in
Australia", Committee for Post Graduate Studies in the Department
of Law, The University of Sydney, p.5; Hill "Operating Agreements:
Vol. 2, 1, 6; Johnston "Some Issues in the Negotiation and
Operation of Resources Joint Ventures in Australia" (1985), a paper
delivered at the Lawasia Symposium on Energy Law, Jakarta,
Indonesia, at p. 70; Hill "Offshore Joint Operating Agreements -
Current Problems" in Crisis and Opportunity?: Problems of the Oil


Venture Agreements: Decision-Making and Management" (1981) 3

14. Britoil 8.2; Apea 5.1. See Chate "The Structure of Joint Mineral
Ventures" (1969), a paper delivered at "The Law of Mining in
Australia", Committee for Post Graduate Studies in the Department
of Law, The University of Sydney, p.5; Leslie "Joint Ventures and

15. Britoil 8.2; Apea 5.1.

16. Britoil 8.2; Apea 5.1.

17. Apea 5.5. See also Apea 5.1. See Chate "The Structure of Joint Mineral Ventures" (1969), a paper delivered at "The Law of Mining in Australia", Committee for Post Graduate Studies in the Department of Law, The University of Sydney, p.5.


22. Britoil 8.2.

23. Apea 5.1.

24. Britoil 8.2; Apea 5.2.

25. Britoil 8.2; Apea 5.4.

26. Britoil 8.8.1 (implied); Apea 5.4.

28. Apea 5.7.
31. Apea 5.11.
35. Apea 5.10.
36. Britoil 8.4.1; Apea 5.10.
40. Apea 5.11.
41. Britoil 8.4.2; Apea 5.11.

45. Britoil 8.4.4; Apea 5.10.
46. Apea 5.10.
47. Britoil 8.4.4(i).
48. Apea 5.10.
49. Britoil 8.4.4(ii).
50. Britoil 8.5; Apea 5.11.
51. Apea 5.11.
52. Britoil 8.5.
53. Britoil 8.5.
54. Apea 5.11.
55. Britoil 8.5; Apea 5.11.
56. Britoil 8.5; Apea 5.11.
57. Britoil 8.5; Apea 5.11.
58. Apea 5.12. A similar result may be obtained by a Participant requesting a special meeting of the Operating Committee to discuss the proposals; see Britoil 8.4.2.
60. Britoil 8.6.1; Apea 5.12.
63. Britoil 8.6.1; Apea 5.12.
64. Britoil 8.6.1.
65. Apea 5.12.
67. Apea 5.12.
68. Britoil 8.6.1; Apea 5.12.
69. Apea 5.12.

70. Britoil 8.6.2; Apea 5.12.

71. Britoil 8.6.2; Apea 5.12.

72. Britoil 8.7; Apea 5.6.

73. Apea 5.6.

74. Apea 5.6.

75. Britoil 8.7; Apea 5.6.


81. Bentham "The Legal Nature and Effect of the Joint Operating Agreement" in Kelly, editor, *Mineral and Petroleum Development in New Zealand: The Commercial Framework* (1987) 17, 25 raises the question of whether the company law concept of "oppression of a minority" could apply to joint ventures only to be inclined to dismiss it in view of the fact that the Participants freely enter into the Joint Operating Agreement. But is not that also the case with a company. The shareholders freely enter into a contract by purchasing the shares.


83. O'Regan and Taylor "Joint ventures and operating agreements" (1984) 14 V.U.W.L.R. 85, 93.


85. Apea 5.15(a).

86. Apea 5.15(b). See Apea 1.1(r) for the definition of the minimum work programme.

87. Apea 5.15(c).

88. Apea 5.15(d).

89. Apea 5.15(e).

90. Apea 5.15(f). See also the definitions in Apea 1.1(q) and 1.1(r).

91. Apea 5.15(g). See also the definition in Apea 1.1(gg).

92. Apea 5.15(h). See also the definition in Apea 1.1(gg).

93. Apea 5.15(i).


103. Apea 5.8.

CHAPTER XII

THE OPERATOR: AN INTRODUCTION

1. INTRODUCTION

The Operator is appointed by each Participant\(^1\) so that one person assumes the responsibility of co-ordinating and conducting the Operations on their behalf, subject to the overall supervision and control of the Operating Committee\(^2\). This is a matter of convenience to the Participants in that it is considered to be more efficient and less wasteful in terms of effort to have one person assume the responsibility. In any event, where there is more than a small number of Participants, it would not be practical for all of them to co-ordinate and conduct the Operations\(^3\).

The person appointed to be the Operator is invariably a company. In the course of research for this thesis in Great Britain and Australia not one instance was uncovered in which an entity other than a company had been appointed to be the Operator. The reason for this is the nature of the protection that the company offers to individuals who aspire, for whatever reason, to be an Operator and for this reason it is most unlikely an Operator will be appointed that is not a company. The assumption therefore made in this thesis is that the Operator will always be a company.

The person who is to be the Operator is designated in the Joint Operating Agreement\(^4\). There is no requirement that the Operator be a Participant. Further, there is no requirement that the Operator be one of the holders of the petroleum title. It is not inconceivable, although it would be unusual, that the Operator may be a Participant but not one of the holders of the petroleum title or one of the holders of the petroleum title but not a Participant. In Great Britain and Australia it is the general practice within the Industry for the Operator to be a Participant\(^5\). However, the Operator may be a subsidiary of a
Participant formed for the purpose of acting as the Operator or a company formed by all of the Participants to act as Operator with each Participant holding a share in proportion to its Interest.

It is possible that the Operator may not be a Participant and may have no interest, direct or indirect, in the petroleum title. Rather, the Operator could be an independent person who undertakes the co-ordination and conduct of the Operations for profit. This scenario is, however, most unusual in Great Britain and Australia, although not so in America.

In this thesis it is assumed that the Operator is a Participant who operates on a "no gain or loss" basis. This is the usual practice in the Industry.

The Operator is usually the Participant with the largest Interest. The rationale behind this is that the Participant with the largest Interest will incur the greatest expenditure and greater commitment will be generated in matters of co-ordination and conduct of the Operations. It is hoped that a prudent and economic management and conduct will result. It is not always the case that the Operator has the largest Interest. The Operator of the Ninian field development in the East Shetland basin of the United Kingdom Continental Shelf, for example, has a smaller Interest than a number of the other Participants.

In selecting the Operator the Participants are conscious that financial institutions, in conducting assessments of risk, will inevitably judge the competence of the Operator and in particular the ability of the Operator to bring any discovery of petroleum that warrants development into production within the timescale and budgets proposed at the time when the Participants are each negotiating finance for the development.

The principle on which the Operator operates, "no gain or loss", does not deter Participants themselves from seeking to act as the Operator. The reasons why a Participant may seek to be designated and would agree to being designated as the Operator are numerous and often unique to the circumstances relating to the purpose for which the Participants entered into the Joint Operating Agreement. Some of these reasons may be:
1. to make use of an intangible asset such as of existing know
how, staff and facilities in what is a very specialised area which
otherwise might not be fully employed;\textsuperscript{15}

2. to keep together existing specialised staff;

3. to keep existing know how, staff and facilities on a par with
technology;

4. to provide experience and training for staff;

5. to endeavour to establish a reputation within the Industry and
thereby enhance the chances of being invited to participate in future
joint ventures;

6. to influence the pace of the Operations; and

7. national pride.

The reasons why a Participant would not seek to be designated and
would not agree to being designated as the Operator are similarly
numerous and again often unique to the circumstances relating to the
purpose for which the Participants entered into the Joint Operating
Agreement. Some of the reasons may be:

1. lack of the necessary skill, technology, knowledge and or
expertise;

2. national prejudice;

3. other petroleum title commitments, in that the Participant may
not be in a position to be the Operator in relation to all petroleum
titles in which it has the largest Interest without over extending
its resources;

4. the approval, if any, required of any government or
governmental authority to the designation of the Operator in relation to a petroleum title may not be obtainable for whatever reason\(^\text{16}\).

2. **RELATIONSHIPS CONSIDERED**

To determine the rights and duties of the Operator attention in this thesis is focused on the relationship of:

1. the Operator and the Participants;

2. the Operator and third parties arising as a consequence of some act or omission of the Operator; and

3. the Participants and third parties arising as a consequence of some act or omission of the Operator.
FOOTNOTES


13. The Operator is Chevron Petroleum Co. Ltd. The field extends over two separate blocks each of which is held under licence by different persons. The Interests in block number 3/3 under licence number P.202 as at the end of 1989 were approximately:—

<table>
<thead>
<tr>
<th>Company</th>
<th>Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Britoil P.L.C.</td>
<td>30%</td>
</tr>
<tr>
<td>Enterprise Petroleum Ltd.</td>
<td>26%</td>
</tr>
<tr>
<td>Chevron Petroleum Co. Ltd.</td>
<td>24%</td>
</tr>
<tr>
<td>Murphy Petroleum Ltd.</td>
<td>10%</td>
</tr>
<tr>
<td>Ocean Exploration Co. Ltd.</td>
<td>10%</td>
</tr>
</tbody>
</table>

The Interests in block number 3/8a under licence number P.199 as at the end of 1989 were approximately:—

<table>
<thead>
<tr>
<th>Company</th>
<th>Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lasmo North Sea plc</td>
<td>60%</td>
</tr>
<tr>
<td>Ranger Oil (U.K.) Ltd.</td>
<td>40%</td>
</tr>
</tbody>
</table>


16. See the discussion below in relation to the need for the approval, in Great Britain, of the Secretary of State for Energy to the designation of the Operator.
CHAPSTER XIII

THE OPERATOR AND THE PARTICIPANTS

1. INTRODUCTION

The relationship of the Operator and the Participants must be considered against the background of the relationships to be considered in determining the rights and duties of the Operator, viz:—

1. the Operator and the Participants;

2. the Operator and third parties arising as a consequence of some act or omission of the Operator; and

3. the Participants and third parties arising as a consequence of some act or omission of the Operator.

It is considered necessary to categorise the relationship of the Operator and the Participants in an attempt to determine the doctrines of law applicable to the joint venture and in order to address the consequences of the relationship to the Operator and the Participants. By categorising the relationship it is then possible to consider whether or not to exclude or modify the incidents of the general law that flow from the relationship at the time of entering into the Joint Operating Agreement.

2. AGENCY

2.1. Introduction

The examination of each of the relationships involves, in part, the need to determine whether the Operator is the agent of the Participants. Before addressing this issue it is useful to examine what is meant by the term "agent".
"Agent" has to be seen in the context of the definition of agency. A number of commentators have discussed the merit or otherwise of attempting to define what agency is and have, in most cases, suggested possible definitions. It is not within the scope of this thesis to consider the discussion nor the suggested definitions. It will suffice to extract from the definitions the main features of the agency relationship: that two persons have so conducted themselves that one person (referred to as the agent) will be considered in law to represent the other person (referred to as the principal), the representation manifesting itself in such a way as to enable the agent to affect the principal's legal position in relation to third parties.

The Joint Operating Agreement may, as regards the relationship of the Operator and the Participants,:-

(i) expressly or by implication admit that the relationship is that of principal and agent;

(ii) seek to deny that the relationship is that of principal and agent; or

(iii) be altogether silent as to the nature of the relationship.

Where the Joint Operating Agreement expressly or by implication admits that the Operator is the agent of the Participants and confers upon the Operator the authority to do certain acts, the authority vests in the Operator the power to affect the Participants legal position in relation to third parties and the courts will, as a general rule, accept that the relationship is that of principal and agent.

This does not mean that the courts will always accept the description of the relationship given by the Joint Operating Agreement. If circumstances warrant an inquiry as to the nature of the relationship then how the relationship is described in the Joint Operating Agreement is not determinative of the nature of the relationship. There have been many cases in which the courts have held, on a full examination of the facts and circumstances surrounding the relationship, that the relationship is
that of principal and agent. This is notwithstanding the participants
denial that their relationship is such.\(^9\)

Likewise, notwithstanding that the Joint Operating Agreement may deny
that the Operator is the agent of the Participants, if circumstances
warrant an inquiry as to the nature of the relationship, then what the
relationship is described as in the Joint Operating Agreement is not
determinative of the nature of the relationship. There have been many
cases in which the courts have held on a full examination of the facts and
circumstances surrounding the relationship, notwithstanding the
participants denial that their relationship is that of principal and
agent, that relationship is one of principal and agent\(^10\).

Where the Joint Operating Agreement is silent as to the nature of the
relationship of the Operator and the Participants this will be determined
by considering all of the facts and circumstances surrounding the
relationship between the Operator and the Participants.

2.2 Determining the existence of an agency relationship

In determining whether the Operator is the agent of the Participants
the question is, in each case, whether the Operator and the Participants
have so conducted themselves that the Operator will be considered in law
to represent the Participants; the representation manifesting itself in
such a way as to enable the Operator to affect the Participants legal
position in relation to third parties\(^11\).

The answer to the question is to be found by considering all of the
facts and the circumstances surrounding the relations between the Operator
and the Participants in the light of general principles. It is a case of
determining the true intent and meaning of the agreement between the
Operator and the Participants and the true legal effect of the real
transactions between the Operator and the Participants. This includes the
need to consider the whole of the Joint Operating Agreement and not just a
few words or paragraphs. For example, the fact that the Joint Operating
Agreement may seek to deny or admit that the relationship between the
Operator and the Participants is that of principal and agent is not
conclusive of the existence or not of the relationship. Hence the answer to the question involves a consideration of questions both of law and of fact.

The primary question of law is whether there are facts from which it may be concluded that the Operator is or, at the material time, was the agent of the Participants\(^{12}\). If such facts do exist a secondary question of law then follows: Is the evidence admissible to prove the existence of the facts?\(^{13}\)

The facts from which the agency relationship may be inferred fall under two heads:-

(i) the act of appointment; that is, the authorisation by the Participants of the Operator to do certain acts on their behalf\(^{14}\); and

(ii) the act of the agent; that is, whether the Operator is to act for itself or for the Participants\(^{15}\).

Together the two factual components form a unity: the legal act of the Operator and the Participants. It is a case of considering the legal act as a whole; looking for the authorisation and the act of the agent in order to establish whether the facts exist or existed from which it may be concluded that the Operator is or, at the material time, was the agent of the Participants. It is the consideration of the factual components that establish the existence of an agency relationship, that will be addressed in this thesis. The admissibility of the facts to prove the existence of an agency relationship will be addressed only in passing.

The first factual component to be looked for is the act of appointment: the authorisation by the Participants. This act\(^{16}\) does three things\(^{17}\):

(i) it designates the Operator as the person who is authorised to do certain acts;
(ii) it defines the certain acts to which the authorisation is limited; and

(iii) it confers upon the Operator authority to undertake the certain acts for the Participants.

2.2.1 Designation

The designation of the Operator by the Participants gives rise to the need to consider a number of issues. These issues include:-

(i) the necessity of consent;

(ii) the legal capacity of the Operator;

(iii) the legal capacity of the Participants; and

(iv) the formalities of designation.

2.2.1.1 The necessity of consent

There has been debate amongst commentators as to whether the express or implied consent of each of the principal and the agents is required before an agent will be held to represent a principal. A number of commentators have taken the view that the principal must consent to the agent representing it and the agent must consent to so represent the principal. They point to reasoning such as that of Lord Pearson in the unanimous decision of the House of Lords in Garnac Grain Co. Inc. v H.M.F. Faure & Fairclough Ltd. as giving judicial support to their view. Criticism of this view has, in the main, been led by Fridman. The critics argue that it is not satisfactory to base agency on the notion of consent. They agree that in many cases consent will be relevant, even determinative in some cases, to establishing the existence of an agency relationship. However, they point to decisions where an agency relationship has been held to exist notwithstanding the absence of consent by the participants to the creation of the relationship.
The critics would appear to base agency on the notion of authority: it is the authority the principal confers on the agent to do certain acts, which gives rise to the agency relationship, and vests in the agent the power to affect the principal's legal position in relation to third parties. They see the agency relationship in terms of relations of power and liability: the agent being invested with a legal power to alter its principal's legal relations with third parties and the principal being under a correlative liability to have its legal relations altered.

Although the debate may appear somewhat academic it does have practical implications in that the Joint Operating Agreement may, as to the relationship between the Operator and the Participants,:

(i) expressly or by implication admit that the relationship is that of principal and agent;

(ii) seek to deny that the relationship is that of principal and agent; or

(iii) be altogether silent as to the nature of the relationship.

In all of these situations the question of consent, be it express or implied, is at the least an issue in determining the existence of an agency relationship between the Operator and the Participants.

2.2.1.2 The legal capacity of the Operator

An issue to be considered relates to the legal capacity of a company to act as the agent of another person: does the Operator have the legal capacity to act as the agent of the Participants?

The general principle is that any person is competent to be appointed as an agent and can affect the principal's legal position in relation to third parties provided the person has the ability to perform the act or transaction with which the principal has entrusted it. The ability to perform the act or transaction with which the agent is entrusted by its
principal is not dependent on the agent's capacity to so act or transact for itself. The agent may have limited or no capacity to so act or transact on its own behalf but that will not prevent the agent from so acting or transacting on behalf of its principal.

The general principle applies equally to companies as to natural persons. The contractual capacity of a company is the same as that of a natural person, save that a company must not act contrary to any general law or provisions of legislation relating to companies. Furthermore, in the case of a company registered in Great Britain it must not act ultra vires to its memorandum of association. Thus a company could be competent to be appointed as an agent and able to perform in the sense discussed above.

There is nothing in the general law or provisions of legislation relating to companies which would preclude the Operator from acting as the agent of the Participants. The issue of ultra vires does, however, require more detailed consideration.

The doctrine of ultra vires has been under legislative attack in recent years in both Great Britain and Australia. Nevertheless the doctrine cannot be totally ignored. What would be of concern to the Operator and the Participants is whether to act as an agent could be ultra vires the Operator's memorandum of association; that is, whether the very act of acting as an agent is ultra vires. Whether a company would be acting ultra vires by acting as an agent can be determined by considering the objects clause of its memorandum of association, where one exists. In the case of companies registered in Great Britain an objects clause is mandatory. In the case of companies registered in Australia they may have an objects clause. The Australian position is discussed in more detail below.

In so far as companies registered in Great Britain are concerned, the objects clause defines the capacity of the company to act. A company cannot act as a legal person and its legal personality does not exist outside the purposes defined in the objects clause. The purposes include the express objects set out in the objects clause as well as the
implied power to do any act which is reasonably incidental to the attainment or pursuit of the express objects, unless such an act is expressly prohibited by the memorandum of association. In general terms, to act beyond the purpose of the objects set out in the memorandum of association of a company is an ultra vires act. An act which is ultra vires the company is null and void. To reiterate, unless it is within the scope of the objects clause of its memorandum of association that a company can act as an agent to so act would be ultra vires.

Great Britain has sought to curtail, but not abandon, the doctrine of ultra vires in section 35 of the Companies Act 1985 (UK). The section established the principle that a company cannot plead that it has acted ultra vires against a party who has dealt with it in good faith where the dealing in question has been decided on by the directors. It is not proposed to consider the section in detail. It will suffice to point to a number of issues that the section raises and their ramifications in so far as the question under consideration is concerned:

(i) the section does not vest a company with the contractual capacity of a natural person. The memorandum of association of a company must still contain an objects clause;

(ii) the section will only be considered where a person dealing with a company finds its position affected by some want of capacity on the part of the company. The question for this purpose would be whether the Operator has the legal capacity to act as agent for the Participants. In the event that the Operator does not have the legal capacity to so act and by so doing it is acting ultra vires the person would then turn to the section. In such circumstances, provided the requirements of the section had been satisfied, there could be no question of a transaction being void for want of capacity of the Operator despite any limitation in the objects clause of its memorandum of association or at common law;

(iii) the requirements of the section that need to be satisfied in order for a person to invoke the aid of the section can be divided into three categories:
(a) the person must be **dealing** with the company. It is suggested that dealing, although capable of limitation to commercial transactions, is used in the section in a wider sense than that. How wide is a question that is not within the scope of this thesis. It is sufficient that it would include commercial transactions;

(b) the person must deal with the company in good faith. This is presumed unless the contrary is proved. Good faith will not be a constituent if the person had actual notice that the transaction in question was ultra vires the company. On the other hand, good faith will be present if the person would normally have been deemed to have had constructive notice that the transaction in question was ultra vires the company. For example, if the person honestly and reasonably failed to read and or understand the memorandum and articles of association, good faith will be present notwithstanding that under the law prior to the enactment of the section the person would have been deemed to have had constructive notice of the memorandum and articles of association. In between the two is the position where the person is put on inquiry because, for example, the transaction is so unusual or suspicious. It is submitted that in such circumstances if the person fails to make inquiry good faith will not be present. The time at which good faith must be present would appear to be at the time of entering into the transaction; and

(c) the transaction must be decided upon by the directors. A decision made by all of the directors or a majority of a duly constituted meeting of the board of directors would appear to satisfy this requirement. A decision by a single director may satisfy the requirement if either the company's board of directors consisted of one director or the director had the actual or ostensible authority of the board of directors to make the decision. The difficulty with satisfying this
requirement will arise from the fact that the decision of the directors must be in relation to the particular transaction. The day to day business of entering into transactions, other than major transactions which may be formally resolved upon or ratified by the board of directors, is usually delegated to subordinates. Further, such delegation is usually couched in very general terms. It would be a rare occasion that the authority specified the transaction that the subordinate was to enter into. This could preclude the argument that the subordinate entered into the transaction with the actual or apparent authority of the board of directors. Consequently, it would be only a very small fraction, if any, of the ultra vires transactions entered into by a company that would be validated by the section; and

(iv) if the section does not apply the doctrine of ultra vires will apply in relation to the transaction.

In the event that the Operator did not have the legal capacity to act as the agent of the Participants, and the transaction was not validated by section 35 of the Companies Act 1985 (UK), the transaction would be void.

Two questions that arise from this conclusion are:

(i) can the ultra vires act be ratified by the company and thereby made intra vires?; and

(ii) can the company alter the objects clause in its memorandum of association and thereby make the ultra vires act intra vires?

The answer to the first of these questions is that a company cannot, either by its directors or its shareholders, ratify an ultra vires act because a nullity cannot be ratified.

The second question needs to be considered in two parts. First, in so far as a company registered in Great Britain is concerned the objects clause of the memorandum of association may be altered by special
resolution so long as the alteration enables the company to do one or more of seven specified things. However, notwithstanding the passing of a special resolution, application may be made by a specified minority of shareholders or of certain debenture holders to the court to cancel the alteration. It is not within the scope of this thesis to consider in detail the seven specified things. It will suffice to note that they permit a company to extend or restrict its business activities. In the case of section 4(d) of the Companies Act 1985 (UK) the extension may go so far as entering into a different business if it can be conveniently or advantageously combined with the existing business of the company.

To determine whether any given additional business is one which can be conveniently or advantageously combined with the existing business of the company reliance will in the main be placed upon the judgement of the people in the best position to know; the directors and the shareholders. This does not mean that the court will not intervene. It is necessary that the new business contemplated by the alteration be such that the company is clearly and presently desirous to engage in, not immediately but in the near future. Further, the new business must not be destructive of, or inconsistent with, the company's existing business so as to substantially alter the business of the company. This does not mean that the new business cannot differ from the existing business. Provided the new and existing businesses are compatible the new business will not be seen as being destructive or inconsistent.

Bearing in mind that the court will attribute a fair and reasonable construction to the seven specific things it would be unusual to find that an alteration of the objects clause could not be brought within one or more of the heads. Even if the alteration were not within the ambit of the seven specified things, if no objection is raised to the alteration within the time specified, the alteration would thereafter be unimpeachable. Hence, provided proceedings are not commenced within the time specified which result in the cancellation of the alteration, a company would appear to be able to alter its objects clause notwithstanding that the alteration may not be within the scope of the seven specified things.
Second, notwithstanding the ability of a company to alter the objects clause of its memorandum of association so as bring within the objects clause an act which prior to the alteration would have been ultra vires, such alteration is not retrospective in effect. The alteration is effective as from the date when it is passed and does not affect prior acts. The company must have the legal capacity at the time that it entered into the act. Although capacity may subsequently have been conferred upon the company the legal capacity does not render an ultra vires act intra vires.

In so far as companies registered in Australia are concerned they may or may not have an objects clause in the memorandum of association.

There are three main categories of companies:

(i) Those companies that do not have objects. Such companies will be companies which, from the time of their formation or by subsequent alteration of their memorandum of association, have availed themselves of the removal of the requirement that the objects of a company must be stated in the memorandum of association. Since January 1, 1984 the objects of a company may be stated in the memorandum of association. A company can elect to have no objects stated in the memorandum of association.

These companies have:

(a) the legal capacity of a natural person plus the other powers, being purely corporate powers, provided by the Companies (Western Australia) Code 1981 (WA);

(b) no objects stated in the memorandum of association; and

(c) no limitation clause in the memorandum or articles of association.
In so far as the Operator and the Participants are concerned, if the Operator is one of these companies it will be competent to be appointed as an agent. It is submitted that the very act of acting as an agent is something that a natural person can do.

In this regard the objective of the Companies (Western Australia) Code 1981 (WA), that is, to abolish the doctrine of ultra vires in its application to companies, has been achieved;

(ii) Those companies that do have objects. Most companies formed prior to January 1, 1984 will fall within this category. Those that do not will include those that have altered their memorandum of association to delete the objects clause. Companies formed after January 1, 1984 that have elected to have or have altered their memorandum of association to include an objects clause will also fall within this category.

These companies have:

(a) objects stated in the memorandum of association;

(b) in some cases, the statutory powers in former Schedule 2 of the Companies (Western Australia) Code 1981 (WA);

(c) the legal capacity of a natural person plus the other powers, being purely corporate powers, provided the Companies (Western Australia) Code 1981 (WA); and

(d) no limitation clause in the memorandum of articles of association.

The doctrine of ultra vires will not apply if to be appointed as an agent falls within the scope of the objects clause of the Operator's memorandum of association.

But does the doctrine of ultra vires apply if to be appointed as an agent does not fall within the scope of the objects clause of
the Operator's memorandum of association? This question does not encompass the situation where the memorandum or articles of association expressly prohibit or limit the competence of the Operator to be appointed as an agent. That situation is discussed below.

As has been mentioned above, the object of the Companies (Western Australia) Code 1981 (WA) was to abolish the doctrine in ultra vires in its application to companies. In attempting to do this the Companies (Western Australia) Code 1981 (WA) distinguishes between the legal capacity of a company on the one hand and the restrictions on a company's freedom of action imposed by its internal rules on the other.

In so far as the legal capacity of all companies, no matter when formed, is concerned, it is clear that they have the legal capacity of a natural person plus the other powers, being purely corporate powers, provided by the Companies (Western Australia) Code 1981 (WA). In its endeavour to abolish the doctrine of ultra vires in its application to companies the Companies (Western Australia) Code 1981 (WA) has ensured that the legal capacity of the company is to predominate and prevail over any objects clause in the memorandum of association. The effect is that the objects clause in a company's memorandum of association cannot restrict the legal capacity of the company.

What then is the effect of the objects in the memorandum of association? It would appear that the company is bound to act within the scope of the purpose of the objects contained in the memorandum of association and that any act beyond the purpose of the objects is an ultra vires act. However, although the act may be ultra vires the company, it is not to be rendered null and void merely because it is ultra vires. In the absence of anything more, the act is valid and binding upon the company. The act itself can be employed or relied upon in certain proceedings against the company or any of its officers and, in certain circumstances, may ground an injunction.
The end result of this is that the doctrine of ultra vires will not apply to render the action of the Operator null and void if to be appointed as an agent does not fall within the scope of the objects clause of the Operator's memorandum of association. The action will be valid and binding upon the Operator and the Participants;

(iii) Those companies with limitation clauses. Such companies may fall within either of the other two categories in so far as an objects clause in the memorandum of association is concerned but the memorandum or articles of association will contain a limitation clause.

It is submitted that the limitation clause must be of such a nature as to restrict or prohibit the exercise by the company of the statutory powers conferred upon it and as such a mere object clause, other than an object which is in itself a restriction or prohibition, in the memorandum of association by itself would not amount to a limitation clause.

The situation may arise where there is a limitation clause in the memorandum or articles of association which restricts or prohibits the Operator from acting as an agent. The fact that such a restriction or prohibition is permitted in the memorandum or articles of association is recognised by the Companies (Western Australia) Code 1981 (WA).

Such a restriction or prohibition will not restrict the legal capacity of the Operator. It is not a restriction on the "exercise by the company of a power of the company". As has been mentioned above, against the background of the legal capacity of all companies, no matter when formed, it is clear that they have the legal capacity of a natural person plus the other powers, being purely corporate powers, provided by the Companies (Western Australia) Code 1981 (WA). In its endeavour to abolish the doctrine of ultra vires in its application to companies the Companies (Western Australia) Code 1981 (WA) has ensured that the
legal capacity of the company is to predominate and prevail over any restriction or prohibition contained in the memorandum or articles of association. The effect is that such a restriction or prohibition in the Operator's memorandum or articles of association cannot restrict the legal capacity of the Operator.

What then is the effect of the restriction or prohibition in the memorandum and articles of association? It would appear that the Operator is bound not to act in contravention of the restriction or prohibition. However, although an action may be in contravention of the restriction or prohibition it is not to be rendered null and void. In the absence of anything more, the act is valid and binding upon the Operator and the Participants. The only consequence is that the act can be asserted or relied upon in certain proceedings against the Operator or any of its officers and, in certain circumstances, may ground an injunction.

The end result of this is that the doctrine of ultra vires will not apply to render the action of the Operator null and void if to be appointed as an agent falls within a restriction or prohibition contained in the Operator's memorandum or articles of association. The action will be valid and binding upon the Operator and the Participants.

The only reservation to the above categorisation of companies in Australia is that it does not apply to foreign companies. This situation arises from the definition of the term "company". Section 67(1) of the Companies (Western Australia) Code 1981 (WA) has application to a "company". The definition of the term "company" does not appear to include a foreign company. In such circumstances the doctrine of ultra vires will apply to a foreign company as it does to companies registered in Great Britain. It is not proposed to discuss this aspect of the doctrine of ultra vires further as the Operator will in nearly all cases fall within the term "company".
The assumption therefore will be made in this thesis that the Operator has the legal capacity to act as an agent.

2.2.1.3 The Legal Capacity of the Participants

The general principle involved in considering the legal capacity of the Participants to appoint the Operator as their agent is that any person is competent to appoint an agent that can affect its legal position in relation to third parties provided the person has the ability to perform the act or transaction with which it has entrusted the agent. The ability to perform the act or transaction with which the agent is entrusted by its principal is dependent on the principal's capacity to so act or transact for itself: not on the agent's capacity to so act or transact for itself. The lack of capacity or the limited capacity of the principal cannot be overcome by the principal appointing an agent possessing the necessary capacity.

The general principle applies equally to companies as to natural persons. In this regard the doctrine of ultra vires has been discussed above and as such will not be repeated here. It will suffice to point out that where the doctrine applies it dictates that a company cannot appoint an agent where such an appointment would be ultra vires.

The assumption will be made in this thesis that the Participants have the legal capacity to appoint an agent.

2.2.1.4 The Formalities of Designation

As a general rule there are no special formalities for the designation of an agent. The designation may be in writing, oral or by deed. There are a number of exception to this general rule such as where the designation is required by statute to be in writing or by deed and where the designation is required by common law to be by deed.

In so far as a company registered in Great Britain or in Australia is concerned it may designate an agent in the same manner as a
private person could do so\textsuperscript{122} by means of any person acting under its authority, express or implied.

\textbf{2.2.2 Designation under the Joint Operating Agreement}

The person who will be Operator is designated\textsuperscript{123} in the Joint Operating Agreement.

In the context of determining whether the Operator is the agent for the Participants the designation of the Operator in the Joint Operating Agreement can be seen as the express consent of the Participants to the designation of the Operator as their agent to do certain acts. The consent of the Operator to the designation as agent to carry out certain acts may be expressed in the Joint Operating Agreement\textsuperscript{124} or implied from the facts and the circumstances surrounding the relation between the Operator and the Participants\textsuperscript{125}. No doubt where the Operator has executed the Joint Operating Agreement as a party thereto such circumstance will of itself give rise to the implication that it has consented to the designation of itself as Operator. Further, once the designated Operator commences to undertake the duties as set out in the Joint Operating Agreement to be undertaken by the Operator, such conduct would tend to put beyond doubt the existence of consent of the Operator to the designation.

In the context of determining whether the Operator is the agent of the Participants the requirement in Great Britain that the Secretary of State for Energy approve the designation of the Operator can be seen as a fetter on the capacity of the Participants to designate an agent to do certain acts.

\textbf{2.2.3 Definition of the acts}

The definition of the certain acts to which the authorisation of an agent is limited determines the extent, as between the principal and the agent\textsuperscript{126}, of the agent's authority\textsuperscript{127} to undertake acts for the principal. This authority, the agent's actual authority\textsuperscript{128}, may be express or implied\textsuperscript{129}. 
An important principle to be borne in mind when considering the actual authority, express or implied, that is vested in the agent by the principal is that the scope of the authority is confined to the limits of the power of the principal. A company cannot authorise its agent to do and act which is ultra vires the memorandum of association of the company. This is particularly relevant to a company registered in Great Britain. The doctrine of ultra vires has been discussed above. The same principles apply, as a general rule, to determining the scope of the actual authority that a principal may vest in its agent.

However, as between the principal and third parties, in addition to the agent's actual authority, the agent's apparent authority will have a bearing upon the limit of the agent's authority.

Once the certain acts to which the authorisation of the agent and the limit of that authorisation are established, such authorisation is subject to change or recall only in the manner in which it was established. This principle is particularly apposite, as will be seen, to the doctrine of apparent authority: the principal will be estopped from denying the authorisation if the third party did not know, or is not considered to ought to have know, that the authorisation has been changed or recalled.

2.2.3.1. Express actual authority

Express actual authority is the authority which the principal has given the agent wholly or in part by means of the express designation or some other words in writing. Looked at in the context of determining whether the Operator is the agent of the Participants the definition of the certain acts which the Participants have expressly authorised the Operator to do and the limitations that the express authorisation imposes upon Operator's authorisation to do those acts is to be found, in the main, in the Joint Operating Agreement. Hence the scope of the Operator's authority would be determined, in the main, by the construction of the words of the Joint Operating Agreement.
In constructing the words of the Joint Operating Agreement the ordinary principles applicable to the construction of contracts are applied. In applying these principles to determine the scope of any authority given by the Participants to the Operator regard will be had, in addition to the express words of the Joint Operating Agreement, to the facts and circumstances surrounding the relations between the Operator and the Participants as a whole. In particular, the construction will take into account the usual or normal course of the business in which the Operator is engaged. This is especially so where the words used in the Joint Operating Agreement are general rather than specific. General words will be construed liberally so as to permit the Operator to act in what may be termed the usual or normal way. For example, where there is ambiguity about the extent of the Operator's authority, if there is more than one possible interpretation of the words used, the Operator will be considered to have acted within the scope of its authority if it has acted in good faith and in accordance with a reasonable construction of the words used notwithstanding that the construction placed on the words used did not achieve the result intended by the Participants. This example may be open to some question in the present communications environment. The relative ease of communication may well dictate that the Operator should clear the ambiguity with the Participants once it is aware of the ambiguity. Furthermore, where the Operator is allowed a discretion, which will normally be the case where the words used do not deprive the Operator of any discretion, it is required to exercise that discretion in a bona fide way and no more.

2.2.3.2 Implied actual authority

Implied actual authority is the authority which is regarded by the law as having been given by the principal to the agent because of the interpretation by the law of the facts and circumstances surrounding the relations between the principal and the agent, such as the nature of the certain acts which the agent is authorised to do. In the context of determining whether the Operator is the agent of the Participants the most obvious example of implied actual authority arises in the form of the implied authority to do, in the usual way, whatever is necessarily or
normally incidental to the effective execution of what has been expressly authorised.

Another possible example of implied actual authority arises in the form of usual authority: the implied authority to do whatever an agent of the type, or in the trade, business or place concerned would usually, normally or ordinarily have the authority to do, whether so authorised or not, in the absence of an indication to the contrary. It would be a case of determining what authority, if any, it would be usual, normal or ordinary for an Operator to have in the conduct of its role as an Operator under a Joint Operating Agreement and as the agent of the Participants. Such authority would arise from the conduct of the business of an Operator under a Joint Operating Agreement and what is necessary for the proper and effective performance of the duties of the Operator rather than from the express words of the Joint Operating Agreement. Such authority will not be implied where there are indications to the contrary in the express words of the Joint Operating Agreement or in the facts and circumstances surrounding the relations between the Operator and the Participants and will not extend to any act that is outside of the usual, normal or ordinary scope of the employment and duties of an operator under a Joint Operating Agreement. So called "usual authority" is normally associated with persons in managerial type positions and in this regard may be apposite to the Operator's position under the Joint Operating Agreement.

2.2.3.3 Apparent authority

Apparent authority is in fact no authority at all: it is an authority which "apparently" exists. It does not result from the consent of the principal that the agent should have the kind of authority that is purported to be exercised or indeed any authority at all. The agent is a stranger to the legal relationship that arises between the principal and a third party as a result of apparent authority. The concept of apparent authority is confined exclusively to the relationship between the principal and a third party. Apparent authority is the legal relationship that results from a manifestation of consent, or what is regarded by the
law as a manifestation of consent, by the principal to a third party that
the agent should represent or act for the principal notwithstanding that
the agent does not have or has been expressly denied, or has been
relieved of the authority to so represent or act for the principal. Should the third party know of, or ought to have
known of, the agent's lack of authority or any limitation placed on
the authority that the agent does have or the withdrawal of that
authority, the third party is relieved of the benefits conferred by the
doctrine of apparent authority in so far as the transaction with the agent
is concerned. The law will regard the agent as having, in so far as a
third party is concerned who transacts with the agent without notice of
any want of authority on the part of the agent, the authority which would
normally be implied between the principal and the agent given the facts
and circumstances surrounding the relationship between the principal and
the agent and the representations made. The result is that implied
actual authority and apparent authority will more often than not co-exist
and coincide. Where it does not, apparent authority can be seen not
as creating the relation of principal and agent, but as extending the
actual authority of the agent. In the context of the relations
between the Operator and the Participants the most visible instance in
which the Operator may appear to have authority to act for the
Participants is where the Participants put the Operator in possession of
their property. This will be discussed in more detail below.

Although apparent authority is not so important in the context of
determining whether the Operator is the agent of the Participants, once it
is held that the Operator is in fact the agent of the Participants or that
the Participants have represented, or permitted it to be
represented, to a third party by words or conduct that
the Operator has been authorised to represent or act for them in a
particular manner or matter then the consequences which flow therefrom are
of great importance to the Participants and to the third party who dealt
with the Operator on the faith of the representation. This is not to
say that the Operator, not being the agent of the Participants prior to
the representation by the Participants to the third party, cannot bind the
Participants as principals under the doctrine of apparent authority as if
the Operator were their agent. Such an occurrence may well be rare but it
is an occurrence that does fall within the scope of the doctrine\textsuperscript{164}. Hence, the relation of principal and agent in such circumstances is created by operation of law rather then consent of the parties, and is often referred to as agency by estoppel\textsuperscript{165}.

In view of the fact that the Participants will invariably be a companies the doctrine of ultra vires must, once again, not be overlooked.

In so far as companies registered in Great Britain are concerned the doctrine of ultra vires is particularly relevant. The Operator cannot be clothed with apparent authority to do anything that is ultra vires a Participant\textsuperscript{166}. On the other hand, if what is done by the Operator is within or consistent with the objects of the memorandum or articles of association of the Participant and the Participant held out the Operator as having the authority to perform the act done, then a third party may be entitled to assume that the Operator has such authority, not having been put on inquiry or possessing actual or constructive knowledge\textsuperscript{167}, and that the relevant procedures internal\textsuperscript{168} to the Participant for giving the authority have been completed\textsuperscript{169}.

In so far as companies registered in Australia are concerned, the doctrine of ultra vires is less important. In view of the current situation whereby a company has the legal capacity\textsuperscript{170} of a natural person\textsuperscript{171} plus other purely corporate powers\textsuperscript{172} it is difficult to see where the limit can be placed upon the apparent authority of the Operator. The Operator would have the apparent authority to do all that is not unlawful and is consistent with the legal capacity of the Participants: that is, all that is consistent with what a natural person has the legal capacity to do plus other purely corporate powers. The legal principles that would apply, it is submitted, are the legal principles that would apply where the Participants were natural persons. It would be a question of what the Participants have represented\textsuperscript{173} or permitted it to be represented\textsuperscript{174}, to a third party\textsuperscript{175} by words\textsuperscript{176} or conduct\textsuperscript{177} that the Operator has been authorised to represent or act for the Participants in a particular manner or matter.
If what is done by the Operator is within or consistent with the authority that the Participants have held out the Operator as having, in the absence of actual knowledge of a want of authority or, in view of its connection with the Participant, ought to know of a want of authority, a third party may be entitled to assume that the Operator has such authority and that the relevant procedures internal to the Participants for giving the authority have been completed.

Before a third party could invoke the doctrine of apparent authority where the Operator is a company it would need to show:

(i) that a representation by words or conduct that the Operator had the necessary authority was made to the third party;

(ii) that the representation was made by a person or persons who had actual authority or would usually have had the authority to manage the business of the Participant either generally or in respect of those matters to which the act of the Operator relates;

(iii) that the third party relied upon the representation in transacting with the Operator; and

(iv) that the Participant did not lack the legal capacity to enter into the transaction made by the Operator with the third party nor lacked the legal capacity to delegate the authority to so transact to the Operator.

This discussion concerning the doctrine of ultra vires in so far as it affects third parties who transact with the Operator in relation to a matter which is outside of the legal capacity of the Participant, should be read in the light of the discussion above concerning section 35 of the Companies Act 1985 (UK). This is relevant in so far as companies registered in Great Britain are concerned as the statutory modification to the doctrine would appear to give wider protection in circumstances where the transaction was "decided on by the directors".
2.2.4 The definition of the acts under the Joint Operating Agreement

The examination of the words of the Joint Operating Agreement to determine the definition of the certain acts which the Participants have expressly authorised the Operator to do and the limitations that the express authorisation imposes on the Operator's authorisation to do those certain acts must necessarily, take place in a factual vacuum. Consequently, where the need would be in a practical situation to examine all the facts and circumstances surrounding the relation between the Operator and the Participants in certain circumstances, this cannot be practically undertaken or addressed in the course of this thesis. The old adage "every case turns on its facts" is very true in the examination of the relations between the Operator and the Participants. However, despite this obvious defect in the examination, some general observations may be made subject to the caveat that the facts and circumstances of a particular case may cause the general observations to be inapplicable.

The Operator is designated by the Participants to conduct the undertaking of the Operations; to conduct such activities as are necessary or desirable in order to implement and give effect to the terms and purpose of the Joint Operating Agreement. The purpose of the Joint Operating Agreement in effect reflects the purpose for which the petroleum title is granted and the intention of the Participants. In general, in so far as the Operator is concerned, that purpose is to search or bore for, or explore for petroleum in the area designated by the petroleum title, in relation to which the Participants have entered into the Joint Operating Agreement. Some Joint Operating Agreements may go further and include within their scope the getting of petroleum.

In conducting the undertaking of the Operations the Operator does so for and on behalf of the Participants. The Operator does not act for or on behalf of any person other than the Participants. The role of the Operator is the basic premise of the Joint Operating Agreement. Following this assumption, the Operator is vested by the Participants with wide and sweeping authorisation to undertake the Operations for the Participants. Nevertheless, the authorisation is not unlimited. Limitations upon the Operator's authority to do certain acts are to be found throughout the
Joint Operating Agreement and in the supervisory roll and overriding control of the Joint Operating Committee. 191

Apart from the general authority granted by the Participants to the Operator to conduct the undertaking of the Operations for and on their behalf, the Joint Operating Agreement sets out a number of specific acts that the Operator is likewise authorised to undertake. These specific acts will, in the main, be dealt with elsewhere in this thesis. It will be useful for the purpose of determining whether the Operator is the agent of the Participants to point to a number of the specific acts that assist the determination.

The Participants authorise the Operator to, inter alia:

(i) prepare and implement programmes and budgets concerning the Operations; 192

(ii) provide reports, data and information to the Participants concerning the Operations; 193

(iii) plan for and obtain services and materials required to undertake the Operations; 194

(iv) direct and control statistical and accounting services; 195

(v) provide all technical and advisory services required to undertake the Operations; 196

(vi) keep and maintain the petroleum title in full force and effect; 197

(vii) comply with all relevant Acts, regulations, by-laws and other legislative directions relating to the Operations and or the petroleum title; 198
(viii) keep the Joint Property free of liens, mortgages, charges and other encumbrances;

(ix) prepare and maintain, and where appropriate file, proper books, records and inventories of the Operations;

(x) prepare and provide the Participants with reports relating to the Operations;

(xi) prepare and file reports relating to the Operations required to be made to a governmental authority pursuant to any relevant Acts, regulations, by-laws and other legislative directions relating to the Operations and or the petroleum title;

(xii) consult with and keep informed the Participants of matters relating to the Operations;

(xiii) make or incur commitments for expenditure or take action warranted by the circumstances in the case of necessity or an emergency to safeguard lives, property or prevent pollution;

(xiv) dispose of Joint Property;

(xv) assist Participants with their right of access to the Operations;

(xvi) obtain and maintain all insurance required by any relevant Acts, regulations, by-laws and other legislative directions relating to the Operations and or the petroleum title;

(xvii) pursue, prosecute, defend or settle any claim relating to the Operations;

(xviii) make cash call to meet, and make, payments due in regard to the Operations.
(xix) open and maintain bank accounts for the Operations;  

(xx) control and disclosure of confidential data and information; and  

(xxi) exchange and trade in data and information.

In addition to the examples briefly mentioned above there are two further instances which provide better illustrations of the vesting of authority by the Participants in the Operator to do certain acts for them. These will be considered in greater detail later in this thesis.

The first example relates to the entering into of contracts for the purpose of the Operations. The general rule is that the Joint Operating Agreement will require the Operator to obtain all goods and services that it requires for the Operations by competitive bidding.

In the case of the Britoil proforma, where the Operator enters into a contract with a third party or a Participant to supply goods and services required for the Operations it is required to do so as agent for the Participants. The Operator is required to use its best endeavours to include as a term of such a contract that it is acting as the agent of the Participants.

The second example relates to the Operator acting as the representative of the Participants in certain circumstances. Where the circumstances authorise it the Operator is required to represent the Participants before governmental and other authorities and third parties in relation to the Operations.

Thus it can be said that, in the main, the Operator takes its authorisation to act on behalf of the Participants from the Joint Operating Agreement.

2.2.5 Conferal of authority

Whether a principal has in law conferred upon an agent the authority
to do certain acts and whether such authority as is conferred upon an agent vests in the agent the power to affect the principal's legal position in relation to third parties is a question of fact to be determined by a consideration of all of the facts and circumstances surrounding the relationship.

The vesting of the power may arise from the actual authority that the principal has given to the agent or the apparent authority of the agent. It does not matter which, for in both situations the authority is equally effective to vest in the agent the power to affect the principal's legal position in relation to third parties.

It is evident from the discussion above in relation to the definition of the certain acts which the Participants have expressly authorised the Operator to do on their behalf (which acts will be discussed elsewhere in this thesis) that the Participants have in many instances vested in the Operator the power to affect their legal position in relation to third parties albeit that in many of those instances the exercise of the power by the Operator is to be subject to restraining conditions.

2.2.6 The acts of the Operator

It is not essential to the establishment of the relationship of principal and agent that the agent openly act in the name of the principal. Provided the agent has the express actual authority of the principal to so act, the agent may act within the scope of its authority so as to affect the legal position of the principal in relation to third parties. This is so notwithstanding that the principal, or the existence of the principal, or the principal's connection with the transaction entered into by the agent with the third party is not disclosed to the third party. The third party will have intended, in most cases, to have transacted with the agent as a principal and not with the agent as the agent of the principal.

In so acting, the agent must intend to act on behalf of the principal and not for its own benefit.
The doctrine of undisclosed principal and the application thereof in the context of the Joint Operating Agreement is discussed elsewhere in this thesis.

2.3. Conclusion

It is submitted that in determining whether the Operator is the agent of the Participants within the context of the Joint Operating Agreements the conclusion must necessarily be that the Operator and the Participants have so conducted themselves that the Operator will be considered in law to represent the Participants.

It is further submitted that, despite the fact that in many Joint Operating Agreements the Operator and the Participants may seek to deny that the relation between them is that of principal and agent, the relation between the Operator and each Participant is that of principal and agent.

This thesis proceeds on the basis that the Operator is the agent of the Participants.

3. TRUST AND BAILMENT

Although it is submitted that the Operator is the agent of the Participants, this does not preclude the Operator, in certain circumstances, also being a trustee or a bailee. The relationships of principal and agent, trustee and beneficiary, and bailor and bailee can, despite being conceptually different, overlap. It is possible for the Operator to have a trustee or bailee capacity in relation to the Participants whilst at the same time being their agent.

The Participants may require the Operator to hold money or property on trust for them, the Operator taking the legal title and the Participants retaining the equitable title. It is the fact that the trustee holds the legal title which, in the main, distinguishes a trustee from an agent. An agent merely has the power, which arises from its
authority, to deal with its principal's title\textsuperscript{227}. An agent does not hold the title for its principal.

One of the reasons that the Participants may desire the Operator to hold money or property as a trustee rather than as an agent is to protect the asset should the Operator become insolvent.

At other times the Participants may merely require the Operator to take possession of money or chattels for them. The Operator will not be required to take title. In such circumstances the Operator will be a bailee of the money or the chattels. Although it has been suggested that it is unusual\textsuperscript{228} for a bailee to be the agent of the bailor it is submitted that in the context of the Joint Operating Agreement such does occur.

It is not suggested that because the Operator is an agent it follows that the Operator is a trustee\textsuperscript{229} or is a bailee\textsuperscript{230} of the Participant's money or property. It is because of the position that the Operator is placed in by the Participants in relation to their money or property that gives rise to the relationship of trustee and beneficiary or bailor and bailee: not because of the principal and agent relationship.

4. INDEPENDENT CONTRACTOR

Commentators\textsuperscript{231} from time to time have spoken of the Operator as being an independent contractor. This gives rise to the question of whether the Operator, being the agent of the Participants, can also be an independent contractor? This question in itself requires an answer to the question of what distinction, if any, is to be made between an agent and an independent contractor?: Is an independent contractor a class of agent?

The difficulty in answering the questions lies in the fact that, although there are areas of law where the use of the terms "agent" and "independent contractor" do overlap, the term "agent" is only relevant as a concept and only has meaning and importance in the law of contract and the law of property. The term "independent contractor" on the other hand
is only relevant as a concept and only has meaning and importance in the law of tort. An agent is, as has been discussed above, a party to a relationship whereby the agent has the power to affect the contractual or proprietary position of its principal, but who may, incidentally, affect its principal's legal position in other ways, for example, by the commission of a tort. On the other hand, an independent contractor, although being able to affect its employees legal position by, for example, the commission of a tort, does not have the power to affect the contractual or proprietary position of its employer. If an independent contractor were given that power, the person would be rightly deemed an agent.

It is submitted, therefore, that it is not possible to equate agents with independent contractors. It is not a case of a person, be it an independent contractor in so far as the law of tort is concerned, being an agent or an independent contractor. It is a case of a person being an agent or not an agent in so far as the law of contract and the law of property is concerned. On the other hand, in so far as the law of tort is concerned it is a case of whether the person, be it an agent or not in so far as the law of contract and the law of property is concerned, is an independent contractor, a servant or otherwise: it is not a case of the person being either an independent contractor, a servant or an agent. It is submitted that the question of agent or not has no place along side independent contractors and servants in the law of tort just as the question of independent contractor or not has no place along side agents in the law of contract and the law of property. The two relationships are by nature, and the kinds of acts in question are, so different as to be mutually exclusive.

It is submitted that where a Joint Operating Agreement provides that in certain circumstances the Operator may act as an "independent contractor" rather than an agent, what is meant is that the Operator may act, not as an agent for the Participants, but as a principal. The effect in so far as the Operator, the Participants and third parties are concerned of the Operator purporting to so act is discussed later in this thesis.
FOOTNOTES

1. In Kennedy v De Trafford [1897] A.C. 180, 188 Lord Herschell expressed the view that "No word is more commonly and constantly abused than the word "agent"."


See also the attempts by the judiciary at a definition, such as in International Harvester Company of Australia Pty. Ltd. v Carrigan’s Hazeldene Pastoral Company (1958) 100 C.L.R. 644, 652.

3. See also the criticism of the use of terms such as "agency relationship" in Powell, The Law of Agency: 2nd ed. (1961), pp. 31-32.

4. It is not the language used by the parties that establishes the existence of the agency relationship. The language used is not determinative. See Kennedy v De Trafford [1897] A.C. 180, 188; W.T. Lamb and Sons v Goring Brick Company Ltd. [1932] 1 K.B. 710, 720 and International Harvester Company of Australia Pty. Ltd. v Carrigan’s Hazeldene Pastoral Company (1958) 100 C.L.R. 644, 652, where the language was expressed in terms of there being an agency relationship and Commissioners of Customs and Excise v Pools Finance (1937) Ltd. [1952] 1 All E.R. 775 where the language sought to deny the existence of an agency relationship. It is the effect in law of the conduct of the parties, which includes the language used, that is investigated to determine whether an agency relationship has been established. See In re Nevill; ex parte White (1871) 6 L.R. Ch. App. 397; Gibson v O’Keeney [1928] N.I. 66; and Garnac Grain Co. Inc. v H.M.F. Faure & Fairclough Ltd. [1967] 2 All E.R. 353, 358.


Motor Union International Co. Ltd. v Mannheimer Versicherungs
Gesellschaft [1933] 1 K.B. 812, 820. See also McCann "The Role of
the Operator under a Joint Venture Agreement" (1982) 4 A.M.P.L.J.
256, 257; Williamson "Comment on the Role of the Operator under a
Joint Venture Agreement" (1982) 4 A.M.P.L.J. 275, 277; Jackson
"Agency in Joint Operating Agreements and Joint Ventures" [1986]
A.M.P.L.A. Yearbook 239, 239.

7. Commissioner of Customs and Excise v Pools Finance (1937) Ltd.
[1952] 1 All E.R. 775, 779; Garnac Grain Co. Inc. v H.M.F. Faure &
Fairclough Ltd. [1968] A.C. 1130, 1137 referring to Ex parte
Delhase. In re Megevand (1878) 7 Ch. D. 511. In Australia it is
not the practice to deny that the relationship is that of principal
and agent: see McCann "The Role of the Operator under a Joint Venture
239, 239; Smith "Comment on Operator of a Joint Venture - Principal

8. McCann "The Role of the Operator under a Joint Venture Agreement"

9. See Kennedy v De Trafford [1897] A.C. 180, 188; W.T. Lamb and Sons
v Goring Brick Company Ltd. [1932] 1 K.B. 710, 720; Midcon Oil and
Gas Ltd. v New British Dominion Oil Co. Limited (1957) 21 W.W.R.
228, 236; International Harvester Company of Australia Pty. Ltd. v
Carrigan's Hazeldene Pastoral Company (1958) 100 C.L.R. 644, 652.

10. Commissioners of Customs and Excise v Pools Finance (1937) Ltd.
[1952] 1 All E.R. 775. See Jackson "Agency in Joint Operating

11. John Towle & Co. v White (1873) 29 L.T. 78, 79-80. See Willoughby
"Control of Licence Operations" in Proceedings of the Petroleum Law
Seminar organised by the Committee on Energy and Natural Resources
(1978) Vol. 1, 5.1, 5.3.

12. Fridman "Establishing Agency" (1968) 84 L.Q.R. 224, 225; Jackson
"Agency in Joint Operating Agreements and Joint Ventures" [1986]


14. Muller-Freienfels "Law of Agency" (1957) 6 Am. J. Comp. L. 165,
172-173.


16. This act may be a unilateral act. See Chatenay v The Brazilian
Submarine Telegraph Co. Ltd. [1891] 1 Q.B. 79, 85 and Sinfra
Aktiengesellschaft v Sinfra Ltd. [1939] 2 All E.R. 675, 682.


This line of argument distinguishes authority from power; the authority creates the power and the act of the agent that affects the principal's legal position in relation to the third party is the power. See Fridman, The Law of Agency: 5th ed. (1983), pp. 15-17; and Markesinis and Munday, An Outline of the Law of Agency: 2nd ed. (1986), pp. 7-10.

The 'power-liability' relation is based on the discussion by Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning: editor, Cook: (1966), p. 52.


27. This applies equally to natural persons.

28. For example a company is prohibited, save in certain circumstances, from giving financial assistance to any person to enable it to purchase shares in the company. See section 143 Companies Act 1985 (UK); section 129 of the Companies (Western Australia) Code 1981 (WA). See also Trevor v Whitworth (1887) 12 App. Cas. 409, 414-420, 430 and 436.

29. It is submitted that the doctrine of ultra vires should be limited to those things that a company is not capable of doing because the memorandum of association of the company does not permit it. It should not be applied to activities of the company that are prohibited by general law or legislation, notwithstanding that they may be permitted by the memorandum of association. See Gower's Principles of Modern Company Law: Gower et. al., editors: 4th ed. (1979), 165; Ford Principles of Company Law: 2nd ed. (1978), p. 87; Temple "Ultra Vires: The Dual Approach" (1987) N.L.J. 1069.


31. Section 2(1)(c) of the Companies Act 1985 (UK).


Rolled Steel Products (Holdings) Ltd. v British Steel Corporation [1985] 3 All E.R. 52, 80 and 85.


35. Formerly section 9(1) of the European Communities Act 1972 (UK).


37. Prentice "Section 9 of the European Communities Act" (1973) 89 L.Q.R. 518, 523.


42. Section 35(2) of the Companies Act 1985 (UK).


49. Palmer's Company Law: editor, Schmitthoff: 23rd ed. (1982), Vol. 1, pp. 126-127 referring to some private companies and public companies incorporated prior to November 1, 1929. See sections 282(2) and 282(3) of the Companies Act 1985 (UK). See also the position accepted by Lawson J. in International Sales and Agencies Limited v Marcus [1982] 3 All E.R. 551, 560 and the discussion of the decision: McMullen "Case and Comment - Ultra Vires and Section 9 of


55. In Re Empress Engineering Company (1880) 16 Ch. D. 125, 130.


58. Section 5(2)(b) of the Companies Act 1985 (UK).

59. Section 5(1) of the Companies Act 1985 (UK).
60. In re National Boiler Insurance Company [1892] 1 Ch. 306, 311; In re Governments Stock Investment Company (No. 2) [1892] 1 Ch. 597, 603; In re Parent Tyre Company Ltd. [1923] 2 Ch. 222, 228 and 229.


62. In re Cyclists' Touring Club [1907] 1 Ch. 269, 275-276; In re Parent Tyre Company Ltd. [1923] 2 Ch. 222, 228-229.


64. Section 6(4) of the Companies Act 1985 (UK).

65. Grant v United Kingdom Switchback Railways Company (1888) 40 Ch. D. 135, 138; James v Buena Ventura Nitrate Grounds Syndicate Ltd. [1896] 1 Ch. 456, 466; Allen v Gold Reefs of West Africa Ltd. [1900] 1 Ch. 656, 665, 673 and 676.

66. An argument to the contrary was made by Holt "Alteration of a Company's Objects and the Ultra Vires Doctrine" (1950) 66 L.Q.R. 493, 496, relying upon Pacific Coast Coal Mines Ltd. v Arbuthnot [1917] A.C. 607 and Reg. (Conyngham) v Pharmaceutical Society of Ireland (1899) 2 Ir. R. 132 and referring to Re Walker and Smith Ltd. (1903) 88 L.T. 792, 794. This argument was rejected, and it is submitted correctly so, by Gower "Notes: Alteration of a Company's Objects and the Ultra Vires Doctrine" (1951) 67 L.Q.R. 41.

67. This summary is based on that of Gates set out in "Recent Changes to Corporate Capacity and Agency" (1985-1986) 15 F.L.R. 206, 207-208.

68. Section 73(1)(a) of the Companies (Western Australia) Code 1981 (WA). This section provides a wider power to alter the memorandum of association of a company than in the case of Great Britain. See Re The Broken Hill Proprietary Company Limited [1940] V.L.R. 323, 325.

69. Section 67(1)(b) of the unamended Companies (Western Australia) Code 1981 (WA) and its predecessors. Repealed and replaced by section 37(1A) of the Companies (Western Australia) Code 1981 (WA) as from January 1, 1984.

70. Section 37(1A) of the Companies (Western Australia) Code 1981 (WA).

71. See the interpretation in section 66B(d) of the Companies (Western Australia) Code 1981 (WA).

72. Section 67(1) of the Companies (Western Australia) Code 1981 (WA). Presumably a natural person refers to an adult natural person who has all his mental faculties and who is not bankrupt. Such a person has a plenary power to make contracts and dispositions.
73. See for example section 67(1)(a) to (g) inclusive of the Companies (Western Australia) Code 1981 (WA).

74. That is, no restrictions or prohibitions of the type referred to in section 67(2)(b) of the Companies (Western Australia) Code 1981 (WA). See section 34 of the Companies (Western Australia) Code 1981 (WA) as an example of a prohibition or restriction that a proprietary limited company must have in the memorandum of association.

75. Section 66C(a) of the Companies (Western Australia) Code 1981 (WA).

76. Section 73(1)(a) of the Companies (Western Australia) Code 1981 (WA). This section provides a wider power to alter the memorandum of association of a company than in the case of Great Britain. See Re The Broken Hill Proprietary Company Limited [1940] V.L.R. 323, 325.

77. This applies in respect of companies formed prior to the repeal of Schedule 2 of the Companies (Western Australia) Code 1981 (WA) on January 1, 1984 and then only to those companies that have not expressly excluded or modified in whole or in part the statutory powers in Schedule 2 of the Companies (Western Australia) Code 1981 (WA) by the memorandum or articles of association. See section 29(1)(c) of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (WA). See also Lipton and Herzberg Understanding Company Law: 2nd ed. (1986) p. 55.

78. See the interpretation in section 66B(d) of the Companies (Western Australia) Code 1981 (WA).

79. Section 67(1) of the Companies (Western Australia) Code 1981 (WA). Presumably a natural person refers to an adult natural person who has all his mental faculties and who is not bankrupt. Such a person has a plenary power to make contracts and dispositions.

80. See for example section 67(1)(a) to (g) inclusive of the Companies (Western Australia) Code 1981 (WA).

81. That is, no restrictions or prohibitions of the type referred to in section 67(2)(b) of the Companies (Western Australia) Code 1981 (WA). See section 34 of the Companies (Western Australia) Code 1981 (WA) as an example of a prohibition or restriction that a proprietary limited company must have in the memorandum of association.

82. Section 66C(a) of the Companies (Western Australia) Code 1981 (WA).

83. Section 67 of the Companies (Western Australia) Code 1981 (WA) was deemed by section 66A(c) of the Companies (Western Australia) Code 1981 (WA) to come into operation on January 1, 1984 and is deemed by section 66B(a) of the Companies (Western Australia) Code 1981 (WA) to relate to the legal capacity of any company formed before, on or after that date. See also Hawkesbury Development Co. Ltd. v Landmark Finance Pty. Ltd. [1969] 2 N.S.W.R. 782, 799; Re Edward Love & Co. Pty. Ltd. (In vol. liq.) [1969] V.R. 230, 233-234.
84. See the interpretation in section 66B(d) of the Companies (Western Australia) Code 1981 (WA).

85. Section 67(1) of the Companies (Western Australia) Code 1981 (WA). Presumably a natural person refers to an adult natural person who has all his mental faculties and who is not bankrupt. Such a person has a plenary power to make contracts and dispositions.

86. See, for example, section 67(1)(a) to (g) inclusive of the Companies (Western Australia) Code 1981 (WA).

87. Section 66C(a) of the Companies (Western Australia) Code 1981 (WA).


89. Section 68(1)(a) of the Companies (Western Australia) Code 1981 (WA). See Darvall v North Sydney Brick & Tile Co. Ltd. (No. 4) (1988) 6 A.C.L.C. 1,095.

90. Section 68(4) of the Companies (Western Australia) Code 1981 (WA).


92. Section 68(6)(d), (e) and (h) of the Companies (Western Australia) Code 1981 (WA). See Darvall v North Sydney Brick & Tile Co. Ltd. (No. 4) (1988) 6 A.C.L.C. 1,095.

93. Section 68(6)(c) and (g) of the Companies (Western Australia) Code 1981 (WA).

94. Section 68(6)(f) of the Companies (Western Australia) Code 1981 (WA).

95. That is, no restrictions or prohibitions of the type referred to in section 67(2)(b) of the Companies (Western Australia) Code 1981 (WA). See section 34 of the Companies (Western Australia) Code 1981 (WA) as an example of a prohibition or restriction that a proprietary limited company must have in the memorandum of association.

96. Section 67(1) of the Companies (Western Australia) Code 1981 (WA).

98. Section 68(1A) of the Companies (Western Australia) Code 1981 (WA).

99. Section 68(1)(a) and (b) of the Companies (Western Australia) Code 1981 (WA).

100. Section 67 of the Companies (Western Australia) Code 1981 (WA) was deemed by section 66A(c) of the Companies (Western Australia) Code 1981 (WA) to come into operation on January 1, 1984 and is deemed by section 66B(a) of the Companies (Western Australia) Code 1981 (WA) to relate to the legal capacity of any company formed before, on or after that date. See also Hawkesbury Development Co. Ltd. v Landmark Finance Pty. Ltd. [1969] 2 N.S.W.R. 782, 799; Re Edward Love & Co. Pty. Ltd. (In vol. liq.) [1969] V.R. 230, 233-234.

101. See the interpretation in section 66B(d) of the Companies (Western Australia) Code 1981 (WA).

102. Section 67(1) of the Companies (Western Australia) Code 1981 (WA). Presumably a natural person refers to an adult natural person who has all his mental faculties and who is not bankrupt. Such a person has a plenary power to make contracts and dispositions.

103. See for example section 67(1)(a) to (g) inclusive of the Companies (Western Australia) Code 1981 (WA).

104. Section 66C(a) of the Companies (Western Australia) Code 1981 (WA).


106. Section 68(1)(a) of the Companies (Western Australia) Code 1981 (WA).

107. Section 68(4) of the Companies (Western Australia) Code 1981 (WA).


109. Section 68(6)(d), (e) and (h) of the Companies (Western Australia) Code 1981 (WA).

110. Section 68(6)(c) and (g) of the Companies (Western Australia) Code 1981 (WA).

111. Section 68(6)(f) of the Companies (Western Australia) Code 1981 (WA).

112. Defined in section 5(1) of the Companies (Western Australia) Code 1981 (WA).

113. Defined in section 5(1) of the Companies (Western Australia) Code 1981 (WA).


118. For example, sections 53 and 54 of the Law of Property Act 1925 (UK); Auctioneers and Agents Act 1941 (NSW); Auctioneers, Dealers and Agents Ordinance, 1935 (NT); Auctioneers and Agents Act 1971-1985 (Qld); Auctioneers Act 1934-1961 (SA); Auctioneers and Estate Agents Act 1956 (Tas); Estate Agents Act 1980 (Vic); Real Estate and Business Agents Act 1978-1982 (WA).

119. For example, section 25 of the Trustee Act 1925 (UK) as amended by section 9 of the Powers of Attorney Act 1971 (UK); Conveyancing Act 1919, Part XVI, Div. 1 (NSW); section 156 of the Real Property Act and Ordinance 1886 (NT); section 104 of the Real Property Acts 1861 to 1986; Registration of Titles Act of 1884 (Qld); section 156 of the Real Property Act 1886-1985 and section 35 of the Registration of Deeds Act 1935-1982 (SA); section 70 of the Real Property Act 1862, Powers of Attorney Act 1934 and Registration of Deeds Act 1935 (Tas); section 94 of the Transfer of Land Act 1958 and section 117 of the Instruments Act 1958 (Vic); sections 143 and 144 of the Transfer of Land Act 1893-1972 and the Property Law Act 1969 (WA).

120. For example, where the act to be done involves execution of a deed by the agent the agent's authority to execute the deed must, as a general rule, be derived from a deed. See Steiglitz v Egginton (1815) Holt N.P. 141; Berkeley v Hardy (1826) 5 B. & C. 355, 359. See also Powers of Attorney Act 1971 (UK).

121. Under the Companies Act 1985 (UK). See also section 1(1) of the Corporate Bodies Contracts Act 1960 (UK).

122. Section 36 of the Companies Act 1985 (UK) and section 80 of the Companies (Western Australia) Code 1981 (WA).

123. Britoil 4.1.1; Apea 4.1

124. Britoil 4.1


128. Sometimes referred to as real authority. See, for example, Muller-Freienfels "Law of Agency" (1957) 6 Am. J. Comp. L. 165. See the definition by Diplock L.J. in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B. 480, 502.


132. Sometimes referred to as ostensible authority.


134. The presumption is made that the Joint Operating Agreement is not in itself a deed.


136. Wiltshire v Sims (1808) 1 Camp. 258, 259; Pole v Leask (1860) 28 Beav. 562, 574; Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B. 480, 502.

137. Pole v Leask (1860) 28 Beav. 562, 574.

138. Wiltshire v Sims (1808) 1 Camp. 258, 259; Sweeting v Pearce (1859) 7 C.B.N.S. 449, 480.


141. Moore v Mougue (1776) 2 Cowp. 479, 481.


144. There is debate between commentators as to whether usual authority and customary authority are one and the same thing and, whether they are or not, whether they are a subdivision of actual authority or subdivision of implied actual authority. See Reynolds Bowstead on Agency: 15th ed. (1985), pp. 95-97; Markesinis and Munday An Outline of the Law of Agency: 2nd ed. (1986), pp. 24-29; Fridman The Law of Agency: 5th ed. (1983), p. 54; Powell The Law of Agency: 2nd ed. (1961), p. 37; Hornby "The Usual Authority of an Agent" [1961] C.L.J. 239. It is not within the scope of this thesis to consider the debate. It will suffice to treat them as one and the same thing and as a form of implied actual authority.


Implied by conduct; see Collen v Gardner (1856) 21 Beav. 540, 542; Howard v Sheward (1866) L.R. 2 C.P. 148, 151; Summers v Solomon (1857) 7 El. & Bn. 879, 884; Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B. 480, 503.


168. This is often referred to as the procedures of “indoor management”. See Mahony v East Holyford Mining Company Ltd. (1875) L.R. 7 H.L. 869, 894.


170. See the interpretation in section 66B(d) of the Companies (Western Australia) Code 1981 (WA).

171. Section 67(1) of the Companies (Western Australia) Code 1981 (WA).

172. See for example section 67(1)(a) to (g) inclusive of the Companies (Western Australia) Code 1981 (WA).


Implied by conduct; see Collen v Gardner (1856) 21 Beav. 540, 542; Howard v Sheward (1866) L.R. 2 C.P. 148, 151; Summers v Solomon (1857) 7 El. & Bl. 879, 884; Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B. 480, 503.

178. Section 68A(4)(a) of the Companies (Western Australia) Code 1981 (WA). Note section 68C(1) of the Companies (Western Australia) Code 1981 (WA) which abolishes the doctrine of constructive notice in respect of certain documents. The exceptions to this abolition are set out in section 68C(2) of the Companies (Western Australia) Code 1981 (WA).

179. Section 68A(4)(b) of the Companies (Western Australia) Code 1981 (WA). Note section 68C(1) of the Companies (Western Australia) Code 1981 (WA) which abolishes the doctrine of constructive notice in respect of certain documents. The exceptions to this abolition are set out in section 68C(2) of the Companies (Western Australia) Code 1981 (WA).

180. Section 68A(3)(a) and (f) of the Companies (Western Australia) Code 1981 (WA). These may be seen as legislative adoptions of the rule in The Royal British Bank v Turquand (1856) El. & Bl. 327, 332. Section 66C(b) of the Companies (Western Australia) Code 1981 (WA) makes it clear that the object of the legislation is to clarify and codify the "indoor management" rule.


If the case of a company registered in Australia, section 68A(3)(b), (c) and (d) of the Companies (Western Australia) Code 1981 (WA) would entitle the third party to make certain assumptions in relation to authority where the representation is made by a person or persons who would usually have had the authority to manage the business of the participants.

184. In so far as companies registered in Australia are concerned the question of legal capacity is of little importance since January 1, 1984.


186. Model clause 2 of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988; Section 28 of the Petroleum (Submerged Lands) Act 1967 (C'th).

187. Britoil 2.1.1; Apea 2.1. See Argyle "Legal Structures for Participation in Mining Projects" (1981), a paper delivered at The
Law Society of Western Australia'a Mining Law Course 1981, Lecture 5, at p. 18.

188. Britoil 4.1.1; Apea 2.1 and 4.8.

189. Britoil 4.1.1 extends to the getting of petroleum subject to the necessary consent of the Secretary of State for Energy. The Apea proforma does not cover the getting of petroleum. Apea 2.1 expressly excludes production, treatment, storage and transportation of petroleum. These matters are to be dealt with by subsequent agreements in the event that petroleum is discovered and the discovery warrants further attention by the Participants.


193. Britoil 5.2.1(iii), Sect. I., 1.2; Apea 4.10(k) and Sect. I., 2 and 9.

194. Britoil 5.2.1(iv); Apea 4.11.

195. Britoil 5.2.1(v).

196. Britoil 5.2.1(vi).

197. Britoil 5.2.2. Implied from Apea 4.10(a), 4.10(h) and 4.10(m).

198. Britoil 5.2.2. Implied from Apea 4.10(a), 4.10(h) and 4.10(m) and 4.10(n).

199. Britoil 5.3; Apea 4.10(f).

200. Implied Britoil 5.2.2; Apea 4.10(m).

201. Britoil 5.6 and Sect. I., 3.2; Apea 4.10(j).

202. Britoil 5.7(i) and Sect. I., 4.1, 4.2, 4.3, 4.4, 4.5, 5; Apea 4.10(k).

203. Britoil 5.7(ii) and Sect. I., 1.2; Apea 4.10(m) and 4.10(n).
204. Britoil 5.8.1; Apea 4.10(e).
205. Britoil 5.9.2; Apea 4.12(c).
206. Britoil 5.9.2.
207. Britoil 5.10.1.
208. Britoil 6.3.1 and 6.3.2; Apea 4.10(c) and 4.10(d).
209. Britoil 7.1.1(i); Apea 14.6.
210. Britoil 7.3.1; Apea 4.13.
211. Britoil 19.1 and Sect. I., 2.2 and 2.3; Apea 4.10(h) and 9.2 and Sect. I., 3.
212. Britoil Sect. I., 2.1; Apea Sect. I., 3.
213. Britoil 17.1(ii) and 18.1; Apea 8.6.
214. Britoil 17.2.
215. Britoil 5.4.2; Apea 4.11(a). The exceptions to this rule are dealt with elsewhere in this thesis.
216. Britoil 5.4.4; This requirement and the exceptions thereto are dealt with elsewhere in this thesis.
217. Britoil 5.5; Apea 4.10(1). The circumstances are dealt with elsewhere in this thesis.


221. Keighley Maxsted & Co. v Durant [1901] A.C. 240, 261-262. As to whether the doctrine can be applied in cases of implied actual authority see Watteau v Fenwick [1893] 1 Q.B. 346, 348-349 where what has been referred to as usual authority was in issue and it was held, in effect, that the doctrine could apply. This view has been criticised and doubt has been expressed as to its correctness; see, for example International Paper Company v Spicer (1906) 4 C.L.R. 739, 763; Reynolds, Bowstead on Agency: 15th ed. (1985), p. 318; Fridman, The Law of Agency: 5th ed. (1983), pp. 228-229; Notes (1893) 9 L.Q.R. 111; Recent Cases (1893-94) 7 Harv. L.R. 49, 49-50; Mclaughlin v Gentles (1919-1920) 46 O.L.R. 477, 488-490.


239. Britoil 5.4.4.

CHAPTER XIV

THE OPERATOR: DESIGNATION, ASSIGNMENT, RESIGNATION AND REMOVAL

1. DESIGNATION

The person who is to be the Operator is usually designated in the Joint Operating Agreement\(^1\).

The consent of the Operator to the designation as the Participants' agent to do certain acts may be expressed in the Joint Operating Agreement\(^2\) or implied from the facts and the circumstances surrounding the relation between the Participants and the Operator\(^3\). No doubt where the Operator has executed the Joint Operating Agreement in the capacity of a participant, this will of itself give rise to the implication that it has consented to the designation of itself as Operator. Furthermore, once the designated Operator commences to undertake the duties set out in the Joint Operating Agreement to be undertaken by the Operator, such conduct would tend to put beyond doubt any question as to the consent of the Operator to the designation.

In Great Britain the Licence contains terms that require each Participant to individually "exercise any function of organising or supervising all or any of the operations of searching or boring for or getting petroleum"\(^4\). Another person may so act on behalf of a Participant holding the Licence with the written approval of the Secretary of State for Energy\(^5\). It follows that where there are two or more Participants and a person, whether or not a Participant, is designated to act as Operator, the duties of the Operator will include the exercise of some or all of the above functions. The onus is on each Participant to see that no person exercises some or all of such functions without the necessary approval. As a consequence, the approval of the Secretary of State for Energy to the designation will be required if each Participant is not to act contrary to the terms of the Licence. The failure of a Participant to comply with the terms of the Licence may result in revocation of the Licence\(^6\).
The criteria on which the Secretary of State for Energy must be satisfied before giving approval to the designation is that the Operator is competent to exercise the functions that are to be undertaken by it. It is the need to satisfy this criteria that has led to the questionable requirement that the Joint Operating Agreement be "approved" by the Secretary of State for Energy. It will undoubtedly be necessary to consider the terms of the Joint Operating Agreement to establish whether the designated Operator is competent to exercise the function to be undertaken by it. However, this does not mean that the terms themselves need to be approved.

Statutory provisions of a similar nature are not to be found in the licencing regime in Australia. In effect, the Petroleum (Submerged Lands) Act 1967 (C'th) does not recognise the concept of Operator - only the holders of the Permit.

2. ASSIGNMENT OF THE OPERATORSHIP

2.1. General prohibition against assignment

The Joint Operating Agreement usually provides that the Operator cannot assign the operatorship without the consent of the Participants. The right of the Participants to withhold their consent is usually absolute.

In Great Britain the consent of the Secretary of State for Energy to a proposed assignee of the Operator would be required. The reason for this and the effect of failing to obtain the consent of the Secretary of State for Energy is discussed above. This is not the case in Australia.

The question immediately posed is, what is the provision in the Joint Operating Agreement specifically designed to prohibit? It is submitted that it is designed to prohibit the situation arising whereby, other than with the consent of the Participants, an assignee of the Operator steps into the shoes of the Operator, for all purposes: that is, where the
Operator assigns both the benefit (the rights) and the burden (the liabilities) of the contract between the Participants and the Operator to an assignee of the Operator without the consent of the Participants.

In considering the purpose of the provision yet another question is posed: If, as it is submitted, the provision is designed to prohibit the situation arising whereby, other than with the consent of the Participants, an assignee of the Operator steps into the shoes of the Operator, for all purposes, is it correct to speak in terms of the assignment of the operatorship? That is, is it indeed possible in law for the Operator to assign both the benefit (the rights) and the burden (the liabilities) of the contract between the Participants and the Operator to a third party?

The answer to this second question requires a consideration of what is meant by the term "assignment". An assignment is "the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee". The contractual rights that arise under the contract between the Participants and the Operator are proprietary rights: they are, it is submitted, legal choses in action. This is not the place to discuss the distinction between legal and equitable choses in action, the historical distinction as to their respective assignability and the formal requirements to effect an assignment thereof. It will suffice to point out that it is possible to assign a legal chose in action in the absence, in the main, of statutory prohibition, prohibition on the ground of public policy or an express contractual prohibition. What is important to appreciate is that the use of the term "assignment" is primarily concerned with transfer of rights: the benefit of the contract.

2.1.1 Assignment of the benefit

For the time being, considering only the transfer of rights - the benefit of the contract - it is apposite to point out that two of the prohibitions against the assignment of a chose in action already referred to are present in the context of the Joint Operating Agreement, viz., a
prohibition on the ground of public policy and an express contractual prohibition.

In this context one of the prohibitions against the assignment of the benefit of the contract depends upon whether, on the construction of the Joint Operating Agreement between the Participants and the Operator taking into account the facts (including the subject matter of the Joint Operating Agreement) and circumstances surrounding the relationship between the Participants and the Operator, the contract is one which requires the personal performance of the Operator. Whether the contract will be so construed is a question of law. If, however, the contract is construed as one which requires the personal performance of the Operator, it would appear that such a legal chose in action could not be assigned by the Operator without the consent of the Participants, irrespective of whether the Joint Operating Agreement prohibited an assignment. The transfer of the benefit of the Joint Operating Agreement can only be effected in such cases by novation of the contract.

In determining whether the Joint Operating Agreement constitutes a contract between the Participants and the Operator which requires the personal performance of the Operator, it is submitted that the courts will take into account such matters as:

(i) whether the skill, experience and judgement of the Operator formed a material part of the consideration for the contract;

(ii) the extent to which the rights of the Participants under the contract would be altered by an assignment;

(iii) the good faith and credit-worthiness of the Operator; and

(iv) the non-pecuniary character of the right sought to be assigned.

Along side such matters must be placed the matters in rebuttal: if the Joint Operating Agreement itself expressly deals with the possibility of assignment or if the terms of the Joint Operating Agreement, when properly construed, are seen to provide for assignment, then the
contract ought not to be deemed to be one requiring the personal performance of the Operator 22.

However, it is submitted that, the Joint Operating Agreement does give rise to a contract between the Participants and the Operator that requires the personal performance of the Operator. There can be little doubt that a material consideration in the designation of the Operator by the Participants and, in the case of Great Britain, in the approval by the Secretary of State for Energy to the designated Operator, is the skill, experience and judgement of the person designated as the Operator.

To the extent that the Joint Operating Agreement calls for personal performance, the Operator lacks the capacity to assign the operatorship, unless the Joint Operating Agreement provides otherwise.

Coupled with the prohibition on the ground of public policy is the express prohibition against assignment in the Joint Operating Agreement. If the submission that the Joint Operating Agreement would give rise to the prohibition on the ground of public policy is correct then the coupling of the two prohibitions would put beyond doubt that the Operator could not assign any rights under the Joint Operating Agreement. If, on the other hand, the submission is incorrect it would be necessary to consider whether the express contractual prohibition is binding so as to render any assignment void and inoperative 23. This involves the construction of the Joint Operating Agreement, taking into account the facts and circumstances surrounding the relationship between the Participants and the Operator.

The mere presence of the prohibition will not necessarily prevent the assignment of all beneficial interests under the Joint Operating Agreement 24. If the prohibition is not a condition but is rather a stipulation in the nature of a warranty, a breach of the provision will give rise to a claim for damages without invalidating the assignment constituted by the breach 25. On the other hand, if the prohibition is a condition and is an essential part of the contract to the extent that the Participants would not have entered into the contract with the Operator unless assured of strict observance of the prohibition 26, or the
prohibition goes to the substance and foundation of the contract, then the effect of breach of the provision ought to be treated as voidable and inoperative as between the Participants and the Operator. For the same type of reason as mentioned above it is submitted that the express contractual prohibition is a condition, not a warranty, of the Joint Operating Agreement and as such breach thereof would give rise to the assignment being held to be void and inoperative.

**Assignment of the burden**

So much for the assignment of rights under the Joint Operating Agreement. What about the transfer of the liabilities - the burden of the contract?

To begin with, it is necessary to consider the distinction between conditional benefits and independent obligations, or "the pure principle of benefit and burden" discussed in *Tito v Waddell (No. 2)*. This has been discussed above in this thesis.

The general rule would hold that the Operator cannot transfer its duties under the Joint Operating Agreement in such a way that the contractual duties are transferred to a transferee of the Operator. To transfer the contractual duties under the Joint Operating Agreement would require the novation of the contract between the Participants and the Operator. This means that, with the consent of the Participants, a nominee of the Operator would be substituted for the Operator and the Operator would cease to have any rights and duties in relation to the Participants, in the absence of conditions to the contrary in any agreement effecting the novation.

It is submitted that it is not correct to speak of an assignment in such circumstances. A new contract is substituted for the existing contract. There is not a transfer of any property at all. There is the annulment of one contract and the creation of a substitute in its place. The new contract may be between the original participants or different participants. However, the important point is that the existing contract is discharged by the new contract.
The reason given for the Participants' consent to the novation could be the discharge of existing contract and the substitution of a new contract therefor and could also include the condition that the Operator remains responsible to the Participants for the conduct and performance by the new Operator of the rights and duties it assumes and is required to undertake and perform as Operator under the new contract. Otherwise, the Participants would merely be consenting to the extinguishment of the old Operator's rights and duties under the Joint Operating Agreement with the result that the substitution of the new Operator would amount to the acceptance of the new Operator as the sole person liable as Operator thereafter under the Joint Operating Agreement. It is important to appreciate that novation acts as a complete release: no rights can be reserved and no right of recovery can remain. On the other hand, it is important to appreciate that by novation both the benefit and the burden can, in effect, be passed from the old Operator to the new Operator.

The requirements for a valid novation can be summarised as follows:

(i) the consent of the Participants is required to the substitution of the new Operator;

(ii) there must be a total extinction of the original contract between the Participants and the old Operator; and

(iii) the novation must be supported by consideration.

Even if all the requirements are satisfied it is still necessary to demonstrate, although the satisfying of the requirements may in themselves so demonstrate, that the participants intended to effect a novation.

The novation may be express or implied. One consequence of this is that in many cases what is referred to as an assignment is in fact a novation. Agreements executed as assignments on closer examination turn out to be novations with a condition imposed that the old Operator is to remain responsible to the Participants for the conduct and performance by the new Operator of the rights and duties it assumes and is required to
undertake and perform as Operator. This is evidenced in provisions permitting the "assignment" of the operatorship to affiliates of the Operator.

If the Operator were to purport to "transfer" the duties under the Joint Operating Agreement without the consent of the Participants the agreement between the Operator and the purported transferee of the Operator would not amount to a novation. The purported transfer, which may operate as an assignment, may well be binding as between the Operator and the purported transferee of the Operator, but it could not per se deprive the Participants of their right to proceed against the Operator as the contracting party with the Participants.

The transfer of the burden of the contract should not be confused with the delegation by the Operator of its duties under the Joint Operating Agreement to a third party: so called "vicarious performance". Such is something quite different as will be demonstrated later in this thesis. There is no shifting of the burden from the shoulders of one person and onto those of another in such circumstances. The Operator will remain contractually liable to the Participants for the non-performance of the vicarious person. Furthermore, the vicarious person does not thereby acquire the right to sue the Participants as it is merely fulfilling the duties of another; it is not party to the contract between the Participants and the Operator, only to that between it and the Operator for whom it has undertaken to discharge specified duties.

2.2. Exception - Assignment to an affiliate of the operator

Provision is, however, usually made to allow the Operator to "assign the operatorship" to an affiliate of the Operator. It is submitted that what is meant by this provision is not that the Operator assigns the operatorship but that by way of novation of the contract between the Participants and the Operator, the affiliate of the Operator assumes the same rights and duties as the old Operator had under its contract with the Participants prior to the novation. This is particularly evident when
considering the provisions of the Joint Operating Agreement, which are usually expressed in terms of the affiliate assuming such rights and duties as a condition of the change in Operator under the Joint Operating Agreement.

The mechanics of effecting such an assignment will vary with each Joint Operating Agreement. In general two steps are required. First, the Operator is required to give to the Participants notice of its desire to pass the operatorship to an affiliate. Second, the affiliate enter into an undertaking in form and content approved by the Participants accepting and assuming all of the rights and duties of the Operator seeking to pass the operatorship to it and of an Operator pursuant to the Joint Operating Agreement.

The Participants are required to consent to the affiliate assuming the operatorship. They cannot withhold their consent if the necessary steps have been taken by the Operator and its affiliate. There is an absolute right of the Operator to pass the operatorship to an affiliate subject to the conditions imposed by the Joint Operating Agreement being satisfied. Nevertheless, in order to satisfy the requirements for there to be an effective novation the consent of the Participants is required.

As the Participants cannot withhold their consent to the passing of the operatorship by the Operator to an affiliate it is desirable that the situation where the affiliate subsequently ceases to be an affiliate of the old Operator be addressed. The recommended solution is to provide in the Joint Operating Agreement a mechanism divesting the affiliate of the operatorship in the event that it ceases to be a affiliate of the old Operator. The provision may go further and provide that such divestiture shall occur forthwith in the absence of a vote to the contrary by the Participants. A vote to the contrary could delay the time of divestiture or set aside the divestiture altogether, and in each case, subject to such conditions, if any, that the Participants may see fit to impose.

It is submitted that the mechanism adopted by the Britoil and Apea proformas approach the matter from a less than desirable perspective. The
Britoil proforma places reliance on the general provisions relating to the removal of the Operator. The Apea proforma contains a provision whereby on the affiliate ceasing to be the affiliate of the old Operator the Participants have the right to remove the affiliate as Operator. Each proforma places the onus on the Participants to instigate the action to divest the affiliate of the operatorship. If a vote is required to effect divestiture the position of a Participant with a large Interest, such as the old Operator who has disposed of its affiliate, could amount to a veto against divestiture. This would depend upon the percentage of affirmative votes required before a motion is deemed to have been passed. A motion that does not attract the necessary percentage of affirmative votes is deemed to be lost. On the other hand, if the suggested mechanism is adopted, such a Participant would not have what could amount to a veto against divestiture. Further, the hand of the Participants with smaller Interests would be strengthened; even if only from a bargaining position.

As a condition attached to the passing of the operatorship to an affiliate of an Operator the Participants will usually seek to ensure that the old Operator remains responsible to them for the conduct and performance by the affiliate of the rights and duties it assumes and is required to undertake and perform as Operator. After all, where there is a novation there is a new contract substituted for the old contract. The old Operator would, in the absence of a condition in the novation agreement, be released of all of its rights and duties under the contract other than those that arose prior to the novation.

The suggested approach to ensuring the continuity of responsibility by the old Operator is to provide in the Joint Operating Agreement that it is a condition of any such novation that the old Operator remains responsible to the Participants for the conduct and performance by its affiliate of the rights and duties the affiliate assumes and is required to undertake and perform as Operator.

It is submitted that such an approach is preferable to relying only on seeking to include such a condition as a provision of the undertaking entered into by the affiliate. There is no doubt that the old Operator would need to be a party to the novation agreement which would normally
contain the undertaking. However, it is not at all certain that the old Operator would have to accept such a condition being imposed upon it as a condition for the Participants entering into the novation agreement. After all, it is an undertaking in form and content approved by the Participants that is required to be given by the affiliate, not by the old Operator, that is, a pre-condition for the novation. If the affiliate agreed to all of the conditions imposed upon it by the undertaking it is questionable whether the Participants could prevent the passing of the operatorship on the basis that the old Operator had not accepted a condition sought to be imposed upon it. Furthermore, it is once again a question of voting power held by the Participant with the largest Interest. If it is a novation agreement then the possibility exists of the motion being lost because it fails to gain the necessary percentage of affirmative votes. If, however, continuity of responsibility by the old Operator were a condition of any such passing of the operatorship and such condition was imposed upon the old Operator by the Joint Operating Agreement then continuity of responsibility would apply to the old Operator following the passing of the operatorship in the absence of an amendment to the Joint Operating Agreement.

3. RENUNCIATION OF AUTHORITY BY THE OPERATOR

The Operator may resign as Operator: that is, the Operator may renounce the authority given to it by the Participants to act on their behalf.

There is nothing in the Joint Operating Agreement to suggest that the actual authority given by the Participants to the Operator is irrevocable or to suggest that the renunciation of the authority by the Operator would give rise to a claim for damages for breach of contract provided the appropriate methodology is adopted by the Operator in terminating its authority.

The renunciation by the Operator is effected by the Operator giving to the Participants notice of its intention to renounce its authority. The resignation will then become effective not earlier than a given period of time after the giving of the notice.
The requirement to give notice and the time restraint allows the Participants to take the necessary steps to seek and appoint an acceptable person who is willing, ready and able to act as Operator and to effect the transition from the outgoing Operator to the incoming Operator.

In the event that it is necessary or desirable to do so the Participants can abridge the time period imposed before the Operator's renunciation of authority becomes effective. This may also require the agreement of the outgoing Operator and the incoming Operator.

4. REVOCATION OF AUTHORITY BY THE PARTICIPANTS

Just as the Operator can renounce the authority vested in it by the Participants and thereby terminate the legal relationship between the Participants and the Operator, so the Participants can terminate that relationship by revoking the authority of the Operator.

It is submitted that such a right exists notwithstanding the terms of the Joint Operating Agreement and in the absence of the Operator's authority being irrevocable. One reservation to the exercise of the right may be that such will be ineffective if by the exercise of the right the Participants were to seek to avoid the obligation of indemnifying the Operator and thereby leaving the Operator personally liable in circumstances where the Operator has incurred personal liability by acting in pursuance of its authority.

Where the Participants can effectively revoke the authority of the Operator, the revocation is without prejudice to the fact that it may be wrongful as between the Participants and the Operator: that is, there is a power to revoke the authority of the Operator but there is not necessarily a privilege to exercise the power.

The Joint Operating Agreement will provide for the revocation of the authority of the Operator to be effected in a number of methods, each dependent upon certain events occurring. There are usually three methods.
The first method may be looked upon as being revocation at the wish of the Participants. There is no trigger mechanism. It is a case of the Participants deciding, for whatever reason or reasons, to remove the Operator by revoking its authority.

The revocation is effected by the Participants resolving to revoke the authority of the Operator and thereafter giving to the Operator notice of the resolution. The revocation becomes effective upon the lapse of a given period of time after the giving of the notice.

Some Joint Operating Agreements do not expressly address this method. Presumably this is because a vote by the Participants passed by the requisite majority would amount to a revocation of the authority of Operator in any event and as such it is not necessary to include such a provision in the Joint Operating Agreement.

The second method does have a trigger mechanism. The trigger mechanism is activated by the occurrence of any one or more of a number of events. This may be seen in terms of the Participants and the Operator having agreed that on the happening of any one or more of a number of events the Participants may resolve to revoke the authority of the Operator. The events may include such matters as:

(i) the presentation of, and the agreement of a court having jurisdiction to hear, a petition or application against the Operator;

(ii) the making of an order for the winding up of the Operator;

(iii) the passing of an effective resolution for the winding up of the Operator;

(iv) the enactment of legislation for the winding up of the Operator;

(v) the Operator becomes insolvent;
(vi) the Operator makes an assignment for the benefit of creditors; 

(vii) the Operator being unable to pay its debts as the same become due; 

(viii) a receiver is appointed of the whole or a material part of the assets or undertaking of the Operator; 

(ix) an encumbrancer takes possession of the whole or a material part of the assets or undertaking of the Operator; 

(x) the Operator ceases or threatens to cease to carry on its business or a major part thereof; 

(xi) a distress, execution or other process is levied, enforced or sued out upon or against any significant part of the property of the Operator and the same is not discharged within a specified period; 

(xii) the Operator defaulting in the performance of its duties pursuant to the Joint Operating Agreement and, where the default is capable of remedy, not commencing to rectify the default within a given period of time of notification of the default by the Participants; 

(xiii) the Operator, being also a Participant, reducing its Interest, other than by sale or disposal to an affiliate, below the level held by any Participant; or 

(xiv) the Operator, having been an affiliate of the old Operator and having become Operator as the result of a novation of the contract between the Participants and the old Operator, subsequently ceasing to be an affiliate of that old Operator. 

In relation to the events referred to at items (ii), (iii) and (iv) above the Joint Operating Agreement will often refer to the "dissolution, liquidation or winding up" of the Operator. Why this is so is unclear.
Liquidation and winding up are terms used to describe, in effect, the same thing. The term "liquidation" is said to be derived from the law of bankruptcy whilst the term "winding up" is said to be derived from the analogous process for dissolving a partnership or administering a deceased estate. The term "dissolution" is said to refer to the event that takes place only after the affairs of a company have been fully wound up. Although the terms may be used in a sense other than that contemplated by the relevant companies legislation. If this were the case, particularly in relation to the event referred to at item (iv) above, then the argument advanced would not necessarily apply.

What is more, it is submitted that the events referred to at items (ii), (iii) and (iv) above cannot be events in relation to the occurrence of which the Participants can elect to revoke the authority of the Operator. The commencement of the winding-up of the Operator would automatically revoke its authority just as the commencement of the winding up of a Participant would automatically revoke its authority in respect of that Participant.

In the appropriate case, once the mechanism has been activated it is then for the Participants to resolve whether or not to revoke the authority of the Operator. In the event that the Participants do resolve to revoke the authority of the Operator the revocation is effected by giving notice to that effect to the Operator. The giving of the notice may terminate the authority of the Operator forthwith or upon the expiration of a given period of time after the giving of the notice. Where there is a period of grace the time period can usually be varied at the behest of the Participants where the incoming Operator is in a position to assume the operatorship earlier than at the end of the stated time period and, presumably, later than at the end of the stated time period with the consent of the outgoing Operator.

In making the determination as to whether to remove the Operator the Participant who is also the Operator and any affiliate of that Participant which has a vote under the Joint Operating Agreement is, in effect, denied the power of voting on the issue. This does not preclude such Participants from participating in the deliberations of the Participants. What it does do is ignore the votes of those Participants and in so doing
provides a simple formula for recalculating the number of affirmative votes required to pass the resolution. 88

The third method by which the authority of the Operator may be revoked applies only in the case of Great Britain. It is revocation as a result of the Secretary of State for Energy giving notice withdrawing his approval to the Operator 89. The basis for the withdrawal of approval would have to be that the Operator has ceased to be competent to exercise all or any of the functions for which the approval was given 90. This may be seen in terms of the Participants and the Operator having, by implication, agreed that on the happening of such an event the authority of the Operator shall be revoked 91. Alternatively, it may be seen in terms of the happening of an event from which the Operator should reasonably infer that the Participants would not wish the authority to continue, where upon it should be revoked 92. The revocation becomes effective forthwith upon the giving of the notice 93.

It is submitted that the authority of the Operator does not cease until, at the earliest, the Operator has received notice of revocation 94 or notice of an act by the Participants or, in the case of the third method, by the Secretary of State for Energy, which is inconsistent with the continuation of the authority 95.

Notice, in each case where the Participants have resolved to revoke the authority of the Operator, will suffice if it is given or communicated by one or more of the Participants to the Operator 96.

There is nothing to suggest that the authority given by the Participants to the Operator is irrevocable or that the revocation of the authority of the Operator in any of the methods referred to above would give rise to a claim for damages for breach of contract, provided the appropriate methodology is adopted in so determining the authority.
5. THE EFFECTS OF RENUNCIATION OR REVOCATION OF THE AUTHORITY OF THE OPERATOR

5.1. The rights of the Participants, the Operator and third parties

Where the authority of the Operator has been renounced or revoked the Joint Operating Agreement usually provides that the outgoing Operator shall have no claim against the Participants as a consequence of the renunciation or revocation. Thus the termination of the authority of the Operator, howsoever arising under the Joint Operating Agreement, will not give to the Operator a right of action for damages for breach of contract.

Such renunciation or revocation is expressed to be without prejudice to any rights, obligations or liabilities which arose whilst the outgoing Operator was Operator. This only reiterates the common law position that would hold that where the authority of the Operator has been renounced or revoked such will not affect:

(i) any claim, arising before the effective date of termination, that the Participants may have against the outgoing Operator for failure to perform the terms of the contract between the Participants and the Operator or for negligence or wrongful conduct; or

(ii) any claim, arising before the effective date of termination, that the Operator may have against the Participants for an indemnity in respect of liabilities incurred on behalf of the Participants and within the scope of the authority of the Operator.

However, once the effective date of renunciation or revocation has arrived, subject to the Operator having notice of the revocation, the authority of the outgoing Operator ceases. Thereafter, as between the Participants and the outgoing Operator, the outgoing Operator cannot make the Participants liable for anything that it does on their behalf. Were the outgoing Operator to contract or otherwise transact with a third party thereafter the outgoing Operator would be personally liable in respect
thereof, either because the outgoing Operator would be taken to have contracted or transacted, on its own behalf, or because the outgoing Operator transacted as the agent of the Participants, in which event it would be liable for breach of the implied warranty of authority.

In so far as the reimbursement of the cost or expense incurred by the outgoing Operator in relation to the change of operatorship, the approach varies. The Britoil proforma provides for a different approach depending upon whether the authority of the outgoing Operator was renounced or revoked and, in the event of a renunciation, the point in time at which the authority was renounced. If the renunciation took place before the completion of all of the work obligations required under the Licence then the outgoing Operator is denied such costs and expenses. If the renunciation took place at a point in time after the completion of all of the work obligations, or if the authority of the outgoing Operator was revoked, then the outgoing Operator is entitled to recover such costs and expenses in so far as they are approved by the Participants. The power of the Participants in this respect is qualified in that they cannot unreasonably withhold their approval to such costs or expenses. The Apea proforma does not draw such distinctions. The outgoing Operator is entitled to reimbursement for such costs and expenses as are reasonably incurred as a consequence of the renunciation or revocation of the authority of the outgoing Operator.

The effect of the renunciation or revocation of the authority of the outgoing Operator upon third parties who contract or otherwise transact with the outgoing Operator as the agent of the Participants revolves around the issue of notice.

Where the third party relies upon the actual authority of the outgoing Operator, once it has actual or constructive notice of the renunciation or revocation of the authority of the outgoing Operator the Participants will not be liable for future contracts or other transactions of the outgoing Operator purported to be made or entered into on their behalf. Until the third party has such notice, notwithstanding the renunciation or revocation of the authority of the outgoing Operator, the
Participants will continue to be bound by contracts or other transactions of the outgoing Operator purported to be made or entered into on their behalf provided that the outgoing Operator is acting in an authorised or apparently authorised manner.

It is submitted that the situation is the same where the third party relies on the apparent authority or the "usual authority" of the outgoing Operator.

The notice to the third party need not take any particular form or be received from any particular person or persons. So long as the third party is aware of, or is deemed to be aware of, the true facts it will be fixed with notice of the renunciation or revocation, as the case may be, of the authority of the outgoing Operator. In the case of revocation by the commencement of the winding up of the outgoing Operator the third party will be deemed to have notice upon advertisement of the petition or application.

Where the outgoing Operator contracts or otherwise transacts with the agent of a third party, actual or constructive notice of the renunciation or revocation of the authority of the outgoing Operator by that agent will constitute notice to the third party if it is within the authority of that agent to receive notice and it is part of the duty of that agent to communicate notices to the third party.

5.2. The Appointment of a Replacement Operator

Where the authority of the Operator is renounced or revoked the Operator's successor is selected by the Participants.

The timing of the selection of the successor is dependent upon the circumstances giving rise to the renunciation or revocation of the authority of the outgoing Operator. It is usual to provide that the Participants shall meet and select the successor as soon as is practicable after notice has been given.
It is usual for the successor to be a Participant although, as has been pointed out above, the Operator need not be. The selection of the successor is made subject to the acceptance of the designation by the person selected\textsuperscript{112}. In the case of Great Britain, the designation will be made subject to the approval of the Secretary of State for Energy\textsuperscript{113}. Once the necessary approvals have been granted or given the incoming Operator assumes its position as Operator upon the effective date of renunciation or revocation of the authority of the outgoing Operator. The timing of this event is dependant upon the circumstances giving rise to the renunciation or revocation of the authority of the outgoing Operator\textsuperscript{114} and the right to abridge any period of time\textsuperscript{115}.

The question of the right of the outgoing Operator to vote for its successor is often addressed in the Joint Operating Agreement. It is usual to provide that the outgoing Operator or any affiliate of the outgoing Operator cannot, where the authority of the outgoing Operator was revoked\textsuperscript{116} or, in some cases, where it was either renounced or revoked\textsuperscript{117}, vote for itself or its affiliate. This is achieved either by providing that if the outgoing Operator or any affiliate of the outgoing Operator fails to vote or votes for itself to be appointed as the successor then such failure to vote or such vote shall be ignored\textsuperscript{118}, or by providing for a prohibition against the outgoing Operator or any affiliate of the outgoing Operator voting on the succession at all\textsuperscript{119}. In such cases the number of votes is adjusted in so far as the number of vote required to elect a successor is concerned\textsuperscript{120}.

5.3. The Transition from the Outgoing Operator to the Incoming Operator

On the effective date of renunciation or revocation of the authority of the outgoing Operator, the outgoing Operator is required to hand, deliver or give custody to the incoming Operator all property of whatsoever nature, including all records and documents, relating to and belonging to the Participants jointly and or severally in its possession, custody or control. This requirement does not relate to property which belongs to the outgoing Operator in its capacity as a Participant\textsuperscript{121}. 
In the event that a successor has not been appointed by the effective date of renunciation or revocation of the authority of the outgoing Operator, the handing, delivery or granting referred to is to be to the Participant having the largest Interest. In the event that the outgoing Operator is the Participant having the largest Interest, then the non Operator Participant with the next largest Interest is to be the recipient of the property.

The outgoing Operator is also required to use its best endeavours to transfer to and vest in the incoming Operator any rights it has under any contracts entered into exclusively for the purpose of implementing and giving effect to the terms and purpose of the Joint Operating Agreement. There is usually a corresponding obligation upon the incoming Operator to assume the obligations of the outgoing Operator under such contracts. Until the transfer is effected the outgoing Operator is deemed to hold the contracts from the effective date of renunciation or revocation, as the case may be, of its authority until the date of transfer "to the account and to the order of" the incoming Operator. During this interim period the Participants are required to indemnify and hold harmless the outgoing Operator from all obligations under the contracts.

To effectively carry out the transition from the outgoing Operator to the incoming Operator an audit of the accounts required to be established and maintained by the Operator, and an inventory of the property of the Participants are required to be undertaken at the cost and expense of the Participants. The audit and the inventory provides the basis of what is to be transferred to the incoming Operator by the outgoing Operator. Where an audit committee has been appointed pursuant to the Accounting Procedure the audit is usually to be conducted by the audit committee with the assistance and co-operation of the outgoing Operator as soon as practicable and within a stated period of time of the renunciation or revocation of the authority of the outgoing Operator.
FOOTNOTES


2. Britoil 4.1.


9. Britoil 5.1.1; Apea makes no reference to an assignment of the operatorship other than to an affiliate of the Operator.

10. The reasoning is based on model clause 24(1) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988. Failure to comply could lead to revocation under model clause 42 of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


27. Associated Newspapers Ltd. v Bancks (1951) 83 C.L.R. 322, 336-337.


29. [1977] Ch. 106


32. In re United Railways of the Havana and Regla Warehouses Ltd. [1960] 1 Ch. 52, 84 and 86, aff'd [1961] A.C. 1007; Scarf v Jardine (1882) 7 App. Cas. 345, 351; Tatlock v Harris (1789) 3 T.B. 174, 180; In re European Assurance Society: Miller's Case (1876) 3 Ch. D. 391, 393; Cuxon v Chadley (1824) 3 B. & C. 591, 595-596;


35. This summary is based on that of Marshall in The Assignment of Choses in Action (1950) p. 70. Cf. Wilson v Lloyd (1873) L.R. 16 Eq. 60, 74.


It is the necessity for the consent of the parties that would distinguish a novation and an assignment. The consent may be implied from conduct - see Chatsworth Investments Limited v Cussons (Contractors) Ltd. [1969] 1 W.L.R. 1, 4-5; In re Town's Drainage and Sewage Utilization Co.; Morton's Case (1873) L.R. 16 Eq. 104, 105-106; Bilborough Holmes (1876) 5 Ch. D. 255, 261; Hart v Alexander (1837) 2 M. & W. 484, 489; Rolfe v Flower, Salting & Co. (1865) L.R. 1 P.C. 27, 44-45; In re Family Endowment Society (1870) L.R. 5 Ch. App. 118, 132.

37. No extinguishment - Cuxon v Chadley (1824) 3 B. & C. 591, 596; Liversidge v Broadbent (1859) 4 H. & N. 603, 609-610, 611; Cochrane v Green (1860) 9 C.B.N.S. 448, 467; Wharton v Walker (1825) 4 B. & C. 163, 165; Wilson v Coupland (1821) 5 B. & Ald. 228, 232; Irsael v Douglas (1789) 1 H. Bl. 239; Hodgson v Anderson (1825) 3 B. & C. 842.

38. Liversidge v Broadbent (1859) 4 H. & N. 603, 610 and 611.


40. Hume v Munro (1942) 42 S.R. (N.S.W.) 218, 224-225; Hart v Alexander (1837) 2 M. & W. 484; Bilborough v Holmes (1876) 5 Ch. D. 255, 261; Chatsworth Investments Limited v Cussina (Contractors) Ltd. [1969] 1 W.L.R. 1, 4-5; Tito v Waddell (No. 2) [1977] 1 Ch. 106, 287.


44. Britoil 5.1.1; Apea 4.2.

45. The Britoil proforma relies on the general removal provisions discussed later in this chapter.

46. Apea 4.4 (d).

47. Britoil 5.1.2.


50. Britoil 4.2.1; Apea 4.3. It would appear that in the absence of the requirement in the Joint Operating Agreement that notice be given to the Participants that notice to one or more of them would be sufficient. See Bristow v Taylor (1817) 2 Starke 50, 51-52.

51. Britoil 4.2.1; Apea 4.5.

52. Britoil 4.2.1.

53. Apea 4.5(b).


55. Warlow v Harrison (1859) 1 El. & El. 309, 317; Read v Anderson (1884) 13 Q.B.D. 779, 781; Walker v Rostrom (1842) 9 M. & W. 411, 421-422; Griffin v Weatherby (1868) L.R. 3 Q.B. 753, 758-759.

56. In re Hannan's Empress Gold Mining and Development Co.: Carmichael's Case [1896] 2 Ch. 643, 646.

57. Britoil 4.2.2 (A)(i).

58. See, for example, the Britoil proforma.

59. Sections 117 and 120 of the Insolvency Act 1986 (UK); Section 9 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (C'th) defining the term "court".

60. Section 125(1) of the Insolvency Act 1986 (UK); Section 367(1) of the Companies (Western Australia) Code 1981 (WA).

61. Section 124(1) of the Insolvency Act 1986 (UK).

62. Section 363(1) of the Companies (Western Australia) Code 1981 (WA).

63. Britoil 4.2.2 (A)(ii)(a).

64. Section 125(1) of the Insolvency Act, 1986 (UK); Section 367(1) of the Companies (Western Australia) Code 1981 (WA).

65. Britoil 4.2.2. (A)(ii)(a); Apea 4.4(a).

66. Section 84(1) of the Insolvency Act 1986 (UK); Section 392(1) of the Companies (Western Australia) Code (WA). Note also section 122(1)(a) of the Insolvency Act 1986 (UK); section 364(1)(a) of the Companies (Western Australia) Code 1981 (WA).

67. Britoil 4.2.2. (A)(ii)(a); Apea 4.4(a).

68. Britoil 4.2.2. (A)(ii)(a); Apea 4.4(a).

69. Britoil 4.2.2. (A)(ii)(b); Apea 4.4(a). Commercial insolvency means that the company is unable to pay its debts as they become due: See Sandell v Porter (1966) 115 C.L.R. 666; Re Capital Annuities Ltd. [1978] 3 All E.R. 704, 717, 718 and 729; Re The Redhead Coal Mining Co. Limited (1893) 3 B.C. (N.S.W.) 50, 51.
70. Britoil 4.2.2. (A)(ii)(b).

71. Britoil 4.2.2. (A)(ii)(b); Apea 4.4(a). The test to be applied in determining whether the Operator is unable to pay its debts as the same become due is set out in the relevant companies legislation. See section 123 of the Insolvency Act 1986 (UK); section 364(2) of the Companies (Western Australia) Code 1981 (WA).

72. Britoil 4.2.2. (A)(ii)(c).

73. Britoil 4.2.2. (A)(ii)(c).

74. Britoil 4.2.2. (A)(ii)(d).

75. Britoil 4.2.2. (A)(ii)(d).

76. Apea 4.4(b).

77. Apea 4.4(c).

78. Apea 4.4(d).


81. See sections 201 to 205 inclusive of the Insolvency Act, 1986 (UK); Sections 382(6) and 411(5) of the Companies (Western Australia) Code 1981 (WA).

82. As to the time of commencement see sections 86 and 129 of the Insolvency Act 1986 (UK); sections 365 and 393 of the Companies (Western Australia) Code 1981 (WA).


As to the effect of the appointment of a liquidator see sections 91 and 103 of the Insolvency Act 1986 (UK); sections 371 and 394 of the Companies (Western Australia) Code 1981 (WA).

84. Note the comments made above in relation to items (ii), (iii) and (iv) referred to above.

85. Britoil 4.2.2 (A)(ii).

86. Apea 4.5.

87. Apea 4.5(a).
88. Britoil 4.2.2(A)(ii).


90. Model clause 24(2) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.

91. Dickson v Lilwall (1815) 4 Camp. 279, 280; Danby v Coutts & Co. (1885) 29 Ch. D. 500, 515; Emmenns v Elderton (1853) 4 H.L. Cas. 624; Lawson & Co. v Harris (1896) 12 T.L.R. 275, 276.

92. Smith and Jennings Case (1610) Lane 97. It may also be that the legal relationship is terminated by operation of law, by frustration. It is, after all, a relationship that requires certain fundamental circumstances to exist for its continuation and on the happening of an event which discontinues the existence of those fundamental circumstances the contract between the Participants and the Operator could be deemed to be frustrated.

93. Britoil 4.2.2(b).


95. Smith and Jennings Case (1610) Lane 97.

96. Bristow v Taylor (1817) 2 Starke 50, 51.

97. Britoil 4.2.3.

98. Britoil 4.2.3.; Apea 4.7.

99. Warlow v Harrison (1859) 1 El. & El. 309, 317.


102. Britoil 4.2.3.
103. Apea 4.7.


107. Munro v De Chemant (1815) 4 Camp. 215, 216; Ryan v Sams (1848) 12 Q.B. 460, 462; Stavely v Uzielli (1860) 2 F. & F. 30, 32.


110. Britoil 4.3; Apea 4.3.

111. Britoil 4.3; implied by Apea 4.3.

112. Britoil 4.3; Apea 4.3 and 4.6.


114. Britoil 4.3; Apea 4.5.

115. See the discussion above relating to the abridgement of the period of time.

116. Britoil 4.3.

118. Britoil 4.3.


120. Britoil 4.6; implied Apea 4.6.

121. Britoil 4.4.1; Apea 4.7. See Gomba Holdings UK Limited v Minories Finance Limited 1989 PCC 107, 109-110 - order to deliver documents.

122. Britoil 4.4.1; The Apea proforma has no provision of this nature.

123. Britoil 4.4.1; Apea 4.7.


125. Britoil 4.4.1. There is no similar provision in the Apea proforma. The outgoing Operator is not released and discharged from its duties, obligations and liabilities as Operator until the transfer has been effected: see Apea 4.7.

126. The accounts required to be established and maintained by the Operator are set out in the Accounting Procedure.

127. Britoil 4.4.2; Apea Sect. I, 4(c).

128. Britoil 4.4.2.

CHAPTER XV

DELEGATION AND VICARIOUS PERFORMANCE

1. THE RULE AS TO DELEGATION AND VICARIOUS PERFORMANCE

The general rule dictates that the Operator must not delegate its authority or vicariously perform its duties. The relationship between the Participants and the Operator, being that of principal and agent, is viewed as being a confidential relationship in which the Participants have reposed trust in the Operator of their choice. In consequence, the Operator is obliged to act personally unless permitted by the contract between the Participants and the Operator or by law to delegate its authority or to vicariously perform its duties. The Latin maxim "delegatus non potest delegare" applies to the relationship.

1.1 Express Permission

The Joint Operating Agreement will usually negate the general rule by expressly permitting the Operator to delegate its authority or to perform its duties vicariously.

In practice the Operator "contracts out" to persons with the necessary skill and expertise a vast amount of the work required to be performed or undertaken by it. At the Exploration Phase it is the owner of the drilling rig that undertakes the vast majority of the work required to be performed or undertaken by the Operator. The vast majority of work left to be performed or undertaken by the Operator is undertaken by specialist contractors appointed or engaged by the Operator. The work that is not contracted out is performed or undertaken by the Operator through its employees.
1.2 **Implied permission**

In the absence of express permission in the Joint Operating Agreement, the Operator would need to look to the law for the implied permission of the Participants to delegate its authority or perform vicariously its duties. It is submitted that the terms of the Joint Operating Agreement and the facts and circumstances surrounding the Joint Operating Agreement would give rise to the implied permission of the Participants. This is because permission will be implied, inter alia, where:-

(i) the act to be done by the deputy or sub-agent is purely ministerial and does not involve confidence or discretion;  

(ii) the Participants know, at the time of the Operator's appointment, that the Operator intends to delegate its authority or perform vicariously its duties and do not object to this. This is the case with nearly all Joint Operating Agreements; not least because the Operator, being a company, can only perform its duties to the Participants through third persons, be they employees of the Operator or contractors; 

(iii) the nature of the authority conferred on the Operator necessitates its execution wholly or in part by means of a deputy or sub-agent. Considering the duties of the Operator, it is abundently clear that the Operator could not undertake its duties to the Participants without delegating some or all of its authority or vicariously performing some or all of its duties; or 

(iv) from the conduct of the Participants or the Participants and the Operator, it can reasonably be presumed that the Operator was intended to have the power to delegate its authority or vicariously perform its duties. 

Where the implied permission of the Participants is found to be present, the Participants cannot object to the delegation or vicarious performance of the Operator's duties by the deputy or sub-agent,
provided that what is done by the deputy or sub-agent is in accord with the contract between the Participants and the Operator.12

However, there can be no delegation of authority or vicarious performance of duties if the Operator is obliged to exercise personal skill, or discretion, or a power or authority conferred on it.13 The same principle applies if the authorisation by the Participants for the Operator to act is made on personal grounds,14 based upon personal confidence in the Operator,15 or made for private reasons.

2. UNAUTHORISED DELEGATION OR VICARIOUS PERFORMANCE

Were the Operator to delegate its authority or vicariously perform its duties, in the absence of the express or implied permission of the Participants to do so, the Operator would be acting in breach of its duty to the Participants.17

Furthermore, the acts performed by the purported deputy or sub-agent will not be valid in cases where the validity of the acts are in issue.18 Moreover, no legal relationship will arise between the Participants and the purported deputy or sub-agent. No right of indemnity, to remuneration19 or of lien20 would arise in the purported deputy or sub-agent against the Participants.

Where the Operator has acted in an unauthorised manner it would be open to the Participants to ratify the purported delegation of authority or vicarious performance of duties.21

As has been mentioned above, in Great Britain each Participant is required to "exercise any function of organising or supervising all or any of the operations of searching or boring for or getting petroleum."22 The Operator may so act on behalf of the Participants with the written approval of the Secretary of State for Energy.23 However, what is the position where the Operator delegates its authority or vicariously performs its duties: is the consent of the Secretary of State for Energy required so as to ensure that the duties are carried out by an approved person?
In so far as the duties to be performed or undertaken by the Operator are not contracted out, that is, they are performed or undertaken by the Operator through its employees, it is submitted that the consent of the Secretary of State for Energy is to be implied from the consent of the Secretary of State for Energy to the Operator acting on behalf of a Participant. The argument would be that at the time of consenting to the designation of the Operator the Secretary of State for Energy would know that the Operator would have to delegate its authority or perform vicariously its duties: not the least because the Operator would be a company.

In so far as the duties to be performed or undertaken by the Operator are contracted out the same argument would apply. In addition there would be an argument that the duties performed or undertaken by the deputy or sub-agent would not involve the "exercise of any function of organising or supervising all or any of the operations of searching or boring for or getting petroleum".

3. AUTHORISED DELEGATION OR VICARIOUS PERFORMANCE

Where the Operator has the express or implied permission of the Participants to delegate its authority or vicariously perform its duties, the acts of the deputy or sub-agent will bind the Participants as if they were performed by the Operator.

There is a lack of clarity in the decisions as to how this result is arrived at. It is clear however that it is not arrived at by holding that the deputy or sub-agent becomes the agent of the Participants but rather by acknowledging that the Participants are bound by acts of their agent, the Operator. The argument would appear to be that there are two agency relationships: the first between the Participants (principal) and the Operator (agent), the second between the Operator (principal) and the deputy or sub-agent (agent). The Operator wears two hats in the overall situation - agent in one instance, principal in the other. Presumably the argument then follows that the Operator, in acting as principal in the second relationship does so as agent of the Participants. The consequence
of this is that the Participants, as principals of the Operator, become bound by the acts of the deputy or sub-agent.

The Operator will nevertheless remain responsible, at least in contract, to the Participants for the due execution of the duties it has undertaken to perform. Should the deputy or sub-agent default the Participants must look to the Operator. The delegation of authority or vicarious performance of duties does not create privity of contract between the Participants and the deputy or sub-agent. As such the deputy or sub-agent will be the agent of the Operator – not of the Participants – and will be liable to account to the Operator and not to the Participants. The Operator will be liable to account to the Participants. Consequently the Participants may only sue or be sued by the Operator and the deputy or sub-agent can only sue or be sued by the Operator.

Whether the Operator will be responsible to the Participants in tort for the acts of the deputy or sub-agent is a question that has been left open. There is, however, obiter dicta which would suggest that where the Operator has acted with reasonable care and skill in choosing the deputy or sub-agent the Operator will not be liable.

Likewise, whether the deputy or sub-agent will be liable to the Participants in tort for its acts is open to debate. Earlier decisions would indicate that liability in tort will not arise. However, since then there have been a number of decision involving issues of bailment which would indicate a change in attitude by the courts.

The bailment decisions held that if the Operator were to bail the Participants' goods with a deputy or sub-agent, the sub-bailee would be liable to the Participants if the goods were lost or damaged due to the negligence of the sub-bailee or the negligence or wrongful act of sub-bailee's servants.

To date the decisions have depended upon there being a bailment of goods as well as a delegation of duty. In such circumstances it would
appear that the deputy or sub-agent cannot be liable simply for negligence which detrimentally affects the Participants otherwise than through the loss of or damage to the Participants' goods\(^33\). Furthermore, the goods must have been owned by the Participants at the material time\(^34\).

However, there has been a gradual change in the scope of tort liability in recent years\(^35\). It would appear that provided there is sufficient proximity between the Participants and the deputy or sub-agent and there are no special considerations which ought to negative or reduce the duty of care\(^36\), the deputy or sub-agent may owe a duty of care to the Participants and will be liable for negligence causing financial loss\(^37\). There has been a suggestion that the deputy or sub-agent will not be liable unless it has caused loss in respect of money or property of the Participants\(^38\). It is submitted that the requirement that the Participants have a property right, which arises in the main upon the principles evolved in the law of bailment\(^39\), is questionable\(^40\). The deputy or sub-agent should be liable in tort to the Participants regardless of the existence of a property right where there is reliance.

It is further submitted that if the Participants were to commence an action in tort against the deputy or sub-agent, the deputy or sub-agent would be able to take advantage of an exception or limitation clause contained in the contract between the Participants and the Operator\(^41\).

Leaving aside the question of the liability of the deputy or sub-agent to the Participants in contract and in tort, it would appear that the deputy or sub-agent would be liable in equity were it to act in breach of any fiduciary duty that arose between itself and the Participants as a result of dealing with the property or affairs of the Participants with notice of the fact that the property or affairs were those of the Participants\(^42\). The fiduciary duties of deputies and sub-agents will be discussed in more detail later in this thesis.

If the above is correct it would hold that it is not necessary for the Joint Operating Agreement to provide that where the Operator delegates its authority or vicariously performs its duties the Operator remains
responsible to the Participants for acts of the deputy or sub-agent. Where such a provision is included in the Joint Operating Agreement care should be taken as to whether it is desirable for the sale of clarity to include liability in contract or in tort, or both.
FOOTNOTES


This is to be contrasted with the situation where the Operator is authorised by the Participants to appoint a substitute – See Schwensen v Ellinger, Heath, Western & Co. [1949] 83 Ll. L. Rep. 79. – or a person in addition to itself – See De Bussche v Alt (1878) 8 Ch. D. 286, 310; Ecossaise Steamship Co. Ltd. v Lloyd, Low & Co. (1890) 7 T.L.R. 76, 76; Tarn v Scanlan [1928] A.C. 34. – to undertake some or all of its authority or duties – See O'Keefe v London and Edinburgh Insurance Co. Ltd. [1928] N.I. 85, 98. It is submitted that such is not a delegation of authority or performance vicariously of duties. It creates an agency relationship between the Participants and the substitute or additional agent – See De Bussche v Alt (1878) 8 Ch. D. 286, 310–311 – and not, in most cases, between the Operator and the substitute or additional agent – See The New Zealand and Australian Land Company v Watson (1881) 7 Q.B.D. 374, 380; S.A. Joseph and Rickard Ltd. v Lindley (1905) 3 C.L.R. 280, 291–292; Calico Printers' Association v Barclays Bank (1931) 145 L.T. 51, 55.


3. De Bussche v Alt (1878) 8 Ch. D. 286, 310.

4. Palliser v Ord (1724) Bunbury 166; Toplis v Grane (1839) 5 Bing. N.C. 636, 650–651; S.A. Joseph and Rickard Ltd. v Lindley (1905) 3 C.L.R. 280, 291.


17. Solly v Rathbone (1814) 2 M. & S. 298, 300; Catlin v Bell (1815) 4 Camp. 183, 184.

18. Ex parte Sutton (1788) 2 Cox 84, 85; Doe Dem Rhodes v Robinson (1837) 3 Bing. N.C. 677, 679; In re Leeds Banking Co.: Howard's Case (1866) L.R. 1 Ch. 561, 566; In re Country Palatine Loan and Discount Co.: Cartmell's Case (1874) L.R. 91 Ch. App. 691, 696; Bell v Balls [1897] 1 Ch. 663, 670; Bird v Boulter (1833) 4 B. & Ad. 443, 447; Blore v Sutton (1817) 3 Mer. 237, 246; Lord v Hall (1848) 2 Car. & K. 698, 698; Brown v Tombs [1891] 1 Q.B. 253, 255; In re London and Mediterranean Bank; Ex parte Birmingham Banking Co. (1868) L.R. 3 Ch. App. 651, 653-654.

19. Schmaling v Thomlinson (1815) 6 Taunt. 147, 149; Mason v Clifton (1863) 3 F. & F. 899, 901.

20. Solly v Rathbone (1814) 2 M. & S. 298, 300-301.

21. The Lord Decres Case (1584) 1 Leonard 288, 288-289; Keay v Fenwick (1876) 1 C.P.D. 745, 753; De Bussche v Alt (1878) 8 Ch. D. 286, 311.


24. Model clause 24(1) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988 (emphasis added).


Nevertheless, the deputy or sub-agent may have certain rights of lien over goods and chattels of the Participants - See Mann v Forrester (1814) 4 Camp. 60, 61.


In a number of cases protection has been gained by the sub-bailee in an exclusion clause in the contract between the bailor and the bailee.

33. See, for example, Bart v British West Indian Airways Ltd. [1967] 1 Lloyd's Rep. 239.


43. See Britoil 5.1.2.
CHAPTER XVI

THE DUTIES OF THE OPERATOR

1. INTRODUCTION

It is possible to divide the duties of the Operator to the Participants into two groups:

1. those duties that arise from the contractual nature of the relationship between the Participants and the Operator; and

2. those duties that arise from the fiduciary nature of the relationship between the Participants and the Operator.

The duties of the Operator to the Participants will be discussed with these groups in mind. It is not proposed to discuss the duties, if any, of the Operator to third parties. Such does not fall within the ambit of this thesis.

Those duties that arise from the contractual nature of the relationship will be discussed in this chapter. Those duties that arise from the fiduciary nature of the relationship will be discussed in the following chapter.

2. DUTIES THAT ARISE FROM THE CONTRACTUAL NATURE OF THE RELATIONSHIP

The duties that arise from the contractual nature of the relationship between the Operator and the Participants can themselves be divided into two groups:

1. those duties that are spelt out in detail in the Joint Operating Agreement; and
2. those duties that the courts may imply in the absence of provisions of the Joint Operating Agreement or from the conduct of the Operator and the Participants modifying or negativing such provisions.

The duties of the Operator to the Participants that arise from the contractual nature of their relationship will be discussed with these groups in mind.

2.1 **Duties that are spelt out in the Joint Operating Agreement**

To determine what the duties of the Operator to the Participants are that are spelt out in the Joint Operating Agreement involves the interpretation of the contract between the Operator and the Participants. As each Joint Operating Agreement may vary considerably in so far as the duties of the Operator to the Participants are concerned it is not possible to lay down detailed rules as to the duties. All that can be done is to examine some of the duties of the Operator to the Participants that are usually spelt out in Joint Operating Agreements and make a number of general observations in relation thereto.

The Joint Operating Agreement will usually provide a list of the duties of the Operator to the Participants. Although the list will be limited it will be clearly stated that the listed duties are not intended to in any way limit the duties of the Operator to the Participants pursuant to the Joint Operating Agreement. The list is inclusive, not exclusive. What is more the list is usually somewhat vague and all embracing and is said to be always subject to the overall supervision of the Operating Committee in so far as the undertaking of the duties are concerned.

The general duties usually include:

(i) the preparation of the programmes, budgets and authorisations for expenditure, and following the approval of the programmes, budgets and authorisation for expenditure by the Operating Committee,
the implementation of the programmes, budgets and authorisation for expenditure\(^3\);

(ii) the provision of reports, data and information to the Participants in respect of the Operations\(^4\);

(iii) the planning for and obtaining of services and materials required to undertake the Operations\(^5\);

(iv) the direction and control of statistical and accounting services\(^6\); and

(v) the provision of all technical and advisory services required to undertake the Operations\(^7\).

In addition to the general duties the Joint Operating Agreement will impose, directly or indirectly, a number of specific duties upon the Operator. These specific duties will not be set out in the Joint Operating Agreement in list form. They will be scattered throughout the Joint Operating Agreement. A number of the specific duties vest certain rights in the Operator and impose certain duties on the Operator. It is not proposed to attempt to separate the rights from the duties. They will be treated together as little, if anything, is achieved by attempting to make such a separation.

A number of the primary specific duties imposed upon the Operator by the Joint Operating Agreement will be addressed below, and in so doing, so will a number of the rights vested in the Operator by the Joint Operating Agreement. Furthermore, a number of the specific duties imposed upon the Operator by the Joint Operating Agreement have been discussed above, for example, in relation to abandonment, non consent, Sole Risk Drilling, default and the Operating Committee.

2.1.1 To maintain the petroleum title

It is suggested that the most important duty imposed upon the Operator is to do, or cause to be done, all those things that are within
its control to keep and maintain the petroleum title in full force and effect. This duty may not be expressed in the Joint Operating Agreement. It can be gleaning from the standard of performance expected of the Operator, the requirement to make all payments required by the terms of the petroleum title, the relevant legislation pursuant to which the petroleum title was granted and the requirement, pursuant to the terms of the petroleum title and the relevant legislation pursuant to which the petroleum title was granted, to prepare and file certain reports, applications and returns.

2.1.2 To comply with all relevant legislation

In conducting the Operations the Operator is under a duty to comply will all relevant Acts, regulations, by-laws and other legislative directions relating to the Operations and or to the petroleum title in the conduct of the Operations.

2.1.3 Not to allow liens and encumbrances to be created

In so far as it is possible and reasonable for the Operator so to do, the Operator is under a duty to keep the Joint Property that it holds or that is under its control free of liens, mortgages, charges and other encumbrances.

2.1.4 To enter into contracts for the purpose of the Operator's undertaking

2.1.4.1 Contracts generally

The general rule is that where the Operator requires goods, services or facilities for the Operations the Operator is under a duty to obtain them by competitive bidding by sealed tender.

Like nearly all general rules there are exceptions. The main exception is in relation to contracts for the provision of goods, services and facilities with an estimated value below a defined value. Often this exception is tied to the need for circumstances to exist whereby the
Operator is of the opinion that competitive bidding is not warranted and has obtained the approval of the Operating Committee to waiving competitive bidding\textsuperscript{16}. In such cases the defined value can be varied by the Operating Committee\textsuperscript{17}. In other cases this exception is limited in its application to the situation where the Participants unanimously agree to waive the requirement for competitive bidding\textsuperscript{18}.

The second exception arise where the estimated expenditure on particular goods, services or facilities is to be greater than a defined value. The value is usually quiet substantial and may be varied by the Participants\textsuperscript{19}. The defined value can be varied by the Operating Committee within certain limits, or where the limits are exceeded, by the Participant\textsuperscript{20}.

The Operator will usually be under a duty to make a tender evaluation listing a selected group of persons who should be invited to tender\textsuperscript{21}. In determining the list of invited tenderers and the form and contents of the tender the Operator is under a duty to consult with the Participants\textsuperscript{22}. Nevertheless the final list is subject to the approval of the Operating Committee\textsuperscript{23}.

Once tenders have been received the Operator is under a duty to provide the Participants with details of the bids, any rebids or amendments to bids and of any impending negotiations with bidders where such do not constitute all of the invited tenderers\textsuperscript{24}. Having provided the Participants with the information the Operator is under a duty to consider any recommendation that they may make in relation thereto\textsuperscript{25}.

When the Operator does enter into a contract of the nature that does require the approval of the Operating Committee it is under a duty to give to all of the Participants notice that it has done so and copies of the commitment documentation and any subsequent amendments thereto\textsuperscript{26}.

The approach to the second exception to the general rule is applied in like manner to any revision to a commitment approved by the Operating Committee when certain defined amounts or percentage of upward revision in value is the result of the revision\textsuperscript{27}. However, claims by the contractor
for additional payments outside the scope of the exception are to be dealt with in accordance with other provisions of the Joint Operating Agreement.

Not all Joint Operating Agreements are so involved in so far as this issue is concerned. Others merely require the Operator to obtain the approval of the Operating Committee before entering into any contract for goods, services or facilities with a third party where the Operator estimates that the expenditure involved will exceed a stated value. This requirement can usually be waived or varied by the Participants.

However, irrespective of what method is adopted by the Joint Operating Agreement, where tenders are required to be called and the Operator, after considering the tenders, accepts a tender that is not the lowest tender, the Operator is usually required to notify the Participants of the reason for so doing.

2.1.4.2 To inform the Participants of its requirements

The Operator is under a duty to give to the Participants a detailed procedure of how it intends to implement its undertaking in respect to the employment of personal and the entering into of contracts. The procedure will usually require the Operator to give notice to the Participants of its requirements in this regard and to give them sufficient time to consider and respond to the proposals of the Operator in respect of such requirements.

The Operator is usually permitted, in so far as such is consistent with any approved programme or budget, to select and engage such number of employees, to determine who they shall be, the hours of work, the conditions of employment and remuneration, as it deems to be required to undertake the Operations. This may be qualified in that the Operator may be obliged to give notice of its requirements of manpower to the Participants before making any selection and engagement to allow the Participants to notify it of any personnel that they have who will satisfy the requirement. Where notification is given by a Participant to that effect, the Operator is under a duty to make reasonable efforts to utilise
the Participant's personnel on terms and conditions to be mutually agreed.

2.1.4.3 To have contracts freely assignable

Where the Operator enters into a contract in relation to the Operations it is under a duty to use its best endeavours to have the contract freely assignable to any subsequent Operator. The object of this requirement is to cover the situation where the authority of the Operator is renounced or revoked, necessitating the appointment of a new Operator.

2.1.4.4 To contract as agent for the Participants

There are three obvious ways in which the Operator may enter into contracts with third parties for goods, services or facilities required for the performance of its undertaking:

(i) as agent for the Participants as disclosed principals;

(ii) in its own name with no reference to any agency; and

(iii) as principal (usually coupled with a declaration of non-agency).

The ability of the Participants to sue or be sued by the third party on the contract will depend upon the way in which it has been entered into.

The general rule is that the Operator is to act as the agent of the Participants when entering into contracts with third parties for goods, services or facilities required for the performance of its undertakings. To this end the Operator is required to use its best endeavours to include as a term of any such contract that it is acting as the agent of the Participants.

The rationale for this requirement needs to be considered. It is submitted that the primary purpose in requiring the Operator to use its best endeavours to include as a term of any such contract that it is
acting as the agent of the Participants is a function of the principles of the law of agency.

2.1.4.4.1 Disclosed Agency

Where the Operator discloses to the third party at the time of contracting that it is contracting as the agent of the Participants, whether the Participants are named or not, and where the contract made is within the authority, be it express, implied or apparent, of the Operator:

(i) the Participants may be in a position to sue or be sued by the third party on that contract; and

(ii) the Operator may not be in a position to sue or be sued by the third party on the contract.

The important point to be appreciated is that the circumstances under discussion are such that the third party knows that it is dealing with the Operator as an agent for another person. It matters not that the third party does not know the identity of that other person.

As can be seen from the discussion so far, the rights and duties of three separate parties are affected by the contract entered into by the Operator in such circumstances; those of the Participants, the Operator and the third party. It is proposed to consider the rights and duties of each of the parties (although primarily those of the Participants and the Operator) in contract at this point rather than consider them separately at various places throughout the thesis. The rights and duties of each of the parties in tort is considered below.

(a) As between the Participants and the third party

(a)(i) Contractual liability

The general rule in the circumstances under discussion is that the Participants can sue and be sued by the third party on the contract. The Participants will be seen as in fact having made the contract with the
third party. The contractual relationship created will be between the Participants and the third party. The Operator will not be a party to that relationship. This type of explanation of what is deemed to occur in such circumstances is made necessary by the doctrine of consideration and the doctrine of privity of contract.  

There are a number of exceptions to the general rule.  

The first exception holds that the Participants are not bound by and cannot sue upon any contract made by the Operator outside the scope of its authority, be it express, implied or apparent.  

In the case of apparent authority the Participants will not be bound by the contract of the Operator if the third party had notice of the Operator's lack of authority. As has been discussed above, apparent authority requires that the third party does not know of, or ought not to know of, the lack of authority or any limitation on the authority that the Operator does have or the withdrawal of authority.  

The second exception holds that the Participants cannot sue or be sued on a contract made in such circumstances where the Operator contracts by deed unless they are described in the deed as a party to it and the deed is executed in their names. However, this common law rule has been modified over time by equitable and statutory initiatives.  

(a)(ii) Payment to the Operator  

In the circumstances discussed above it has been said that the Operator ceases to play a role in the relationship between the Participants and the third party once the contract has been entered into. This proposition may be altered where the Participants or the third party attempts to discharge its debt to the other by payment to the Operator.  

The general rule is that payment to the Operator has no relevance to the dealings between the Participants and the third party. To this general rule there are a number of exceptions.
The first exception arises where the third party has so conducted itself as to make the Participants believe that the Operator has discharged the Participants' liability to the third party. If in such circumstances the Participants pay the Operator the third party will not be able to make the Participants pay it, even if the Participants' liability to the third party has not been discharged by the Operator. The all important requirement is that there is a change of position between the Operator and the Participants caused by the conduct of the third party.

The second exception arises where the third party makes payment to the Operator in circumstances where the Operator has authority, be it express, implied or apparent, to receive the payment on behalf of the Participants. In such circumstances, provided the payment is made in the ordinary course of business, the payment to the Operator by the third party will be seen as payment to the Participants and the third party will have discharged its liability to the Participants. This conclusion arises in accordance with the general principles of the law of agency.

The third exception arises where the Operator receives payment from the third party, though unauthorised to do so, and pays the money over to the Participants. Once again, the third party will have discharged its liability to the Participants, but not if the Operator were to fail to pay the money over to the Participants.

The fourth exception arises where the Operator has a lien over the goods of the Participants in respect of a debt owed to it by the Participants. If a third party buys those goods from the Operator, pursuant to the Operator's authority to sell the goods, it can set off the Participants' debt to the Operator against the debt the third party owes the Participants.

(a)(iii) Special relationship between the Operator and third party

As was mentioned above, in the circumstances under discussion it has
been said that the Operator ceases to play a role in the relationship between the Participants and the third party once the contract has been entered into. This proposition may be altered where there is a special relationship between the Operator and the third party.

The first such relationship arise where the Operator has contracted with the third party in such a manner as to be personally liable on the contract. In such circumstances, if the third party were to sue the Operator rather than the Participants and proceed to final judgement against the Operator the third party will then be deemed to have elected conclusively to hold the Operator, rather than the Participants, liable on the contract and as such is barred from subsequently proceeding against the Participants. It matters not that the judgement against the Operator remains unsatisfied.

This situation will only hold good where the election of the third party is made with knowledge of the facts, is clear and unequivocal and where the third party not only has notice that the Operator is acting as an agent for another person but also knows the identity of that other person: the Participants. It has been suggested that the principle will also hold goods where the third party knows that the Operator is acting as an agent for another person but does not know the identity of that other person.

The second such relationship arises where the Operator owes money to the third party and is authorised, expressly or impliedly, by the Participants to receive the payment of money owed by the third party to the Participants and to deduct its debt to the third party from the amount owed by the third party to the Participants. In such circumstances the third party can set off the Operator's debt against its liability to the Participants.

The third situation arises where the third party is induced to contract with the Participants as a result of action by the Operator that is fraudulent, or as the result of a misrepresentation or non-disclosure by the Operator. In such circumstances, if the Operator was acting within
the scope of its authority, be it express, implied or apparent, and the action taken by the Operator if taken by the Participants would have enabled the third party to set up the fraud 64, misrepresentation 65 or non-disclosure against the Participants, the third party can set up the fraud, misrepresentation or non-disclosure against the Participants 66. It would matter not that the Participants did not know what the Operator was doing 67.

In so far as a mis-statement by the Operator is concerned, the Participants will not be bound thereby 68 unless it can be argued that the Operator was acting negligently and would be guilty of the tort of negligence in making the mis-statement and as such rendering the Participants vicariously liable.

It is submitted that this is an extension of the general rule that would allow the third party to set up against the Participants any defence which would be available to it against the Operator 70, but not defences or set-offs which the third party may have against the Operator but which are not connected with the instant transaction or are personal to the Operator 71. A set-off against the Operator would be a defence which is personal to the Operator and as such could not be set up by the third party against the Participants unless it is authorised by the Participants 72. However, the Operator must have acted within the scope of its authority, be it express, implied or apparent 73.

What is more, where the third party sues the Participants, the Participants will be entitled to set up against the third party any defence arising out of the transaction and any defence that is personal to the Participants. The Participants could not, however, set up any defence personal to the Operator.

(b) As between the Operator and the third party

(b)(i) Liability of the Operator
(b)(i)(i) **Contractual liability**

The general rule is that where the Operator makes a contract with a third party for the Participants, having disclosed to the third party at the time of contracting that it is contracting as the agent of the Participants, whether the Participants are named or not, the Operator thereafter drops out of the transaction. The contract will be between the Participants and the third party. The Operator, in the absence of other indications, cannot sue or be sued on the contract by the third party.

However, the situation can arise whereby the Operator, either together with the Participants or by itself, will be personally liable on a contract which it negotiates for and on behalf of the Participants. Whether such a situation will arise depends on the nature of the contract.

If the Operator contracts by deed, notwithstanding that it contracts expressly as the agent of the Participants, it will be personally liable as long as it is a party to the deed and has executed the deed in its own name.

If the Operator contracts in writing, other than by deed, the situation is different. The Operator can contract personally and in so doing make itself liable on the contract. The question to be answered is whether that is how the Operator and the third party intended to contract. The answer is found in the construction of the contract including the facts and circumstances surrounding the relationship of the Operator and the third party. This involves consideration of at least two factors.

The first factor is the nature of the signature of the Operator. If the Operator's signature is qualified by some words which show the representative character of the person signing, the Operator will not, as a general rule, be personally liable. If, on the other hand, the Operator's signature is unqualified or qualified by words which are merely descriptive of the person signing the Operator will, as a general rule, be personally liable.
While the signature of the Operator may be a determining factor, it may also result in uncertainty.\footnote{82}

In such cases resort must be had to the second factor. The contract and the facts and circumstances surrounding it must be examined in order to determine whether there is evidence which shows the intention of the parties. If, for example, the Operator revealed to the third party that it intended to contract personally it will not, as a general rule, matter that the Participants are also liable on the contract or that the Operator is described in the contract as acting as agent for another person. If the parties contracted with the intent that the Operator should be personally liable then so it will be.

This factor raises the question of what evidence is admissible. Parol evidence will not be admissible if its effect is to contradict the written contract.\footnote{83} Parol evidence will only be admissible where it is introduced to amplify the contract,\footnote{84} such as to show the real intention of the Operator and the third party or to establish that the Operator's signature was not personal to it but was understood by the Operator and the third party as being the signature of the Participants. In so construing the contract the knowledge of the third party as to the intention of the Operator may be relevant. If the third party did not think that the Operator was contracting personally the Operator will not be liable on the contract.\footnote{85}

Before considering the situation where the contract is oral mention should be made of two other situation that may arise where the contract is written.

The first situation is where the Operator has no authority to make a contract with the third party. If the Operator proceeds to contract with the third party it will not be liable on the contract\footnote{86} but will be liable to the third party for breach of the implied warranty of authority.\footnote{87}
The second situation is where the Operator is really the principal. In such circumstances the Operator will be personally liable on the contract to the third party.

This situation is not to be confused with the situation where the Operator contracts as agent on behalf of a principal that does not exists, such as a projected but non-existent company. In those circumstances the liability of the Operator will depend upon whether the Operator intended to involve itself personally in the contract. If liable does not arise on the contract it may still arise for breach of the implied warranty of authority. Where the contract is in writing, parol evidence will not be admissible to rebut the presumption and show that the Operator was not contracting personally. The only evidence admissible will be that which is contained in the terms of the contract or the surrounding circumstances.

If the Operator contracts orally with the third party the question of whether or not the Operator will be personally liable is a question of fact, dependent on the circumstances.

Notwithstanding the nature of the contract, the Operator can only be personally liable upon any contract entered into by it with the third party if such a contract is within the legal capacity of the Operator.

(b)(i)(ii) Election of the third party

The continuation of the Operator's personal liability to the third party where it is established that it is so liable on a contract together with the Participants will depend upon whether the third party declares its intention (that is, elects) of making the Participants or the Operator liable on the contract. If the third party elects to make the Participants liable to the exclusion of the Operator the personal liability of the Operator will cease. The third party cannot "recover" from both the Operator and the Participants. The most obvious example of such an election is where the third party sues the Participants to final judgement.
(b)(i)(iii) The Operator's implied warranty of authority

If the Operator has contracted as agent with the third party, but has not contracted personally, the Operator cannot be made personally liable on the contract. However, if the Operator has no authority to so contract, the Operator will be personally liable to the third party if the third party has contracted with it on the faith of its representation of authority.

If the Operator were to so contract knowing of the lack of authority it would amount to fraud and the Operator will be liable for deceit. If, on the other hand, the Operator were to so contract in the mistaken belief, however innocent, that it is contracting with the authority of the Participants then the Operator would be acting in breach of its implied warranty of authority. In such circumstances the extent of liability of the Operator will depend upon the nature of the wrong committed.

The principle involved in the later case is that a person who professes to act as an agent on behalf of somebody else impliedly warrants that it has authority to make the contract which has been made, unless it expressly disclaims such authority or the third party otherwise knows that the agent lacks such authority.

Where the Operator acts in breach of its implied warranty of authority the measure of damage will either be the loss which flowed directly therefrom as a natural or probable consequence, or the loss which was foreseeable by the parties as a probable consequence of the breach of warranty.

For there to be a breach of the implied warranty of authority and for the Operator to be thereby liable to the third party, the third party must be misled. This cannot occur where the Operator has admitted that it has no authority and the third party proceeds to contract with the Operator.
(b)(ii) The rights of the Operator

The general rule is that once the contract has been made by the Operator on behalf of the Participants with the third party, the Operator is not a party to the relationship created by the contract. The Operator cannot sue or be sued by the third party on the contract. There are, however, a number of exceptions to this general rule which would allow the Operator to personally sue the third party.

The most important exception arises where the Operator has contracted personally and as a result of that fact, is personally liable on the contract. In such circumstances the Operator can sue the third party to enforce the contract.

Another exception arises where the Operator is, in fact, the principal. In such circumstances, provided the identity of the principal was immaterial to the making of the contract by the third party and the Operator notifies the third party before suing that it is the real principal, or the third party, after discovering that the Operator is really the principal, has performed, in part at least, its side of the contract, the Operator may personally sue the third party on the contract.

The Operator's right to sue the third party may, however, be affected by what has transpired between the Participants and the third party. An example of this is where settlement, whether in part or in total, is effected between the Participants and the third party.

2.1.4.4.2. Undisclosed Agency

(a) The doctrine of the undisclosed principal

Where the Operator contracts with a third party in such a manner that the third party is not aware of the existence of the Participants at the time of contracting, whether by name or otherwise, and that the Operator
is contracting as their agent, the Participants will fall within the principles of the law of agency relating to undisclosed principals.

Under the doctrine of undisclosed principal the Participants may acquire rights and be subject to liabilities under the contract notwithstanding that the third party thought it was contracting with the Operator as principal. This means that, subject to a number of exceptions which will be discussed later in this thesis, the Participants can sue and be sued on any contract duly made on their behalf by the Operator, as long as the Operator acted within the scope of its authority in so contracting with the third party.\textsuperscript{110}

This is all subject to the proviso that the Operator did not intend to act on its own behalf for its own profit. If such is the case, the Operator will not have intended to contract for and on behalf of the Participants and the Participants will not be able to sue or be sued on the contract.\textsuperscript{111}

However, the doctrine of undisclosed principal will not apply to deeds entered into by the Operator.

(b) The position of the undisclosed Participants

(b)(i) Rights and duties

As a general rule it matters not that the Participants are undisclosed. They can sue and be sued on any contract made on their behalf. They will be in the same position as if they had been disclosed and as such it is not considered necessary to repeat what has already been mentioned above in relation to the Participants being disclosed.

This general rule is subject to two qualifications.

The first qualification relates to the circumstances in which evidence will be admissable to establish the existence of, and identify the Participants. Before the Participants can sue or be sued on a contract where they are undisclosed principles this is necessary.
There is some confusion in the decisions as to when parol evidence will be admitted for this purpose. The line of argument adopted in Humble v Hunter to the effect that where there is a contract in writing an undisclosed principal will be prevented from intervening under the parol evidence rule, as being inconsistent with the written contract, has been followed, but has more often that not been distinguished or questioned. So to begin with, it is necessary to accept that parol evidence may be admissible to contradict or vary a written contract, that refers to the Operator without disclosing that it is acting for the Participants. If this notion is accepted it then becomes a question of deciding on what basis, and when, such evidence will be admitted.

One view is that the description employed by the Operator in making and signing the contract may show that it impliedly contracts that there is no principal. If the Operator contracts as "owner" or "proprietary" such a contract may be implied. If the Operator contracts as "charterer" or "tenant" it may not.

Another view is that where the description used by the Operator in making the contract is such that it is capable of being interpreted as showing either that the Operator contracts as principal or that it contracts as agent, then parol evidence is admissible. It is argued that in such circumstances the admission of the evidence will not be to contradict or vary the contract, but to explain the contract. If, however, the contract makes it clear that the Operator has signed it as principal, parol evidence to establish the Participants as the principal would be inadmissible. This can be seen as holding that parol evidence as to the existence of the undisclosed Participants as the principal will be inadmissible where the circumstances indicate that the third party believed, and had reasonable grounds for believing, that it was contracting only with the Operator and not, either actually or possibly, with someone else whose identity has not been disclosed.

It would appear from the two views mentioned above that parol evidence will be admitted to establish the Participants as the undisclosed
principals of the Operator unless the exclusion of such principal is expressly or impliedly excluded by the terms of the contract, be they written or oral\textsuperscript{126}.

Where, however, the contract made by the Operator with the third party contains an \textit{express} term that the Operator is really the principal then there can be no right in the undisclosed Participants\textsuperscript{127}.

The position would be the same where the Operator to have contracted as the agent for a named principal. The true principal, the Participants, were they not named, could not introduce evidence to establish that they were the true principal and as such entitled to sue on the contract\textsuperscript{128}.

The second qualification relates to circumstances where the personality of the Operator is what induced the third party to enter into the contract with the Operator\textsuperscript{129}. In circumstances where the identity of the Operator is, or of the Participants would have been, material to the making of the contract, the failure of the Operator to disclose that it was contracting as the agent of the undisclosed Participants will preclude the Participants from suing on the contract\textsuperscript{130}. Whether the same rule applies in so far as the Participants being sued on the contract - that they can set up the identity or personality of the Operator - remains open.

(b)(ii) \textbf{Effect of dealing with the Operator}

(b)(ii)(i) \textbf{Dealings by the Participants}

Where the relationship of principal and agent between the Operator and the Participants is unknown to the third party, anything which occurs between the Operator and the Participants, such as the settlement by the Participants of their account with the Operator\textsuperscript{131}, before the third party discovers that the relationship exists, should be irrelevant to the question of liability of the Participants to the third party\textsuperscript{132}.
(b)(ii)(ii) **Dealing by the third party**

(b)(ii)(ii)(a) **Election**

Where the Participants are undisclosed principals it follows that the doctrine of election can only operate after the third party discovers the existence and identity of the Participants.

If the third party sues the Operator, whether before or after it has discovered the existence and identity of the Participants, and proceeds to final judgement, the liability of the undisclosed Participants will merge in the judgement obtained. It would matter not that the judgement remained unsatisfied.

(b)(ii)(ii)(b) **Defences and Set-off**

The third party is entitled to set up against the undisclosed Participants any defence which would be available to it against the Operator but not necessarily defences and set-offs which the third party may have against the Operator but which are not connected with the instant transaction.

It would appear to follow that the third party can set off any debts owed to it by the Operator against the Participants, which it could have set off against a claim by the Operator itself.

The defences would include fraud, misrepresentation, non-performance, illegality and mistake.

To be applicable it must be established, just as it would have to be established with any defence being set up by the third party, that the Operator has acted within the scope of its authority, be it express, implied or apparent. Further, in the case where the Participants are undisclosed, such defences or rights of set-off will extend to any defences or rights of set off which, including personal defenses, accrued, whether in the instant transaction or some prior or subsequent
transaction, before the third party knew of the existence of a real principal, albeit not the actual name of the principal.

(b)(ii)(ii)(c) Settlement with the Operator

If settlement with the Operator would discharge the third party in the event that the Operator were the real principal, then settlement with the Operator will operate to discharge the third party as against the real, undisclosed principal. To be applicable it would appear that the third party must make the settlement before it actually knows of the existence of a real principal, albeit not the actual name of the real principal.

(c) The position of the Operator

Because the Operator contracts personally where the Participants are undisclosed the Operator, as well as the undisclosed Participants, may sue and be sued upon the contract. However, the personal liability of the Operator on a contract entered into by it with the third party will be dependent upon the Operator's legal capacity to contract on its own behalf.

If the third party intended to contract with the Operator, the Operator may be precluded from setting up an undisclosed principal and thereby avoiding its personal liability.

The chance of the Operator being sued may depend upon the third party's election once it has discovered the existence of the undisclosed Participants. The notion of election has been discussed above.

The right of the Operator to sue the third party on a contract made on behalf of the undisclosed Participants is subject to a number of qualifications.

The first qualification holds that if the undisclosed Participants themselves sue the third party, or otherwise intervene, by prohibiting the
Operator from suing or settling with the third party, the Operator cannot sue. The only reservation would arise where the Operator has a lien, or other interest, over the goods which are the subject-matter of the contract. In such circumstances the Operator cannot be prevented from suing itself as in doing so it is protecting its own personal advantage under the contract both against the Participants and the third party.

The second qualification is that the third party can set up against the Operator any defence which would have been available against the undisclosed Participants. However, a right of set-off will not be available unless the action is brought by the Operator on behalf of the Participants. A debt due to the third party from the Operator itself may be set off if the Operator sues on its own behalf.

2.1.4.4.3 Denial of agency

As has been mentioned above, the general rule is that the Operator is required to use its best endeavours to include as a term of any contract entered into with a third party for goods, services and facilities required for the performance of its undertaking. However, it is not uncommon for the Operator to be required to enter into such contracts in its personal capacity. By requiring the Operator to contract expressly as principal the Participants are attempting to channel the relationships with the third party directly to the Operator so, it is hoped, insulating the Participants from the inconvenience of direct involvement in disputes, including litigation, that may arise out of such contracts.

Although in such circumstances and in so far as the relationship between the Operator and the Participants is concerned, the Operator will still be contracting as the agent of the Participants on a reimbursement basis and not for profit there is no reason why the Operator cannot contract in its personal capacity. The rights and obligation of the Operator when it contracts personally rather than as the agent of the Participants has been discussed above.
However, it must be borne in mind that where the Operator does contract with a third party without disclosing that it is contracting as the agent of the Participants or the identity of the Participants, unless the Operator expressly contracts personally the doctrine of undisclosed principle will normally apply\textsuperscript{159}.

Where the Operator does contract personally with the third party, the Participants will not be in a position to sue or be sued by the third party on that contract. Whatever may be the true legal character of the relationship between the Operator and the Participants\textsuperscript{160}. The doctrine of undisclosed principal will not apply\textsuperscript{161}. The fact that as between the Operator and the third party, the Operator has contracted personally will not affect the acquisition of property by the Participants. The Participants will acquire the property pursuant to their agreement with the Operator at the instant it passes from the third party\textsuperscript{162}.

Problems may occur in relation to damages for breach of contract by the third party if the Participants cannot sue because of the absence of privity of contract with the third party or the Operator cannot sue on behalf of the Participants\textsuperscript{163}. The third party may argue that the Operator, being entitled to reimbursement from the Participants and having contracted personally, has suffered no loss (in its capacity as Operator)\textsuperscript{164}. Alternatively, if the Operator has suffered loss then it can only recover damages for the loss that it has suffered\textsuperscript{165}. Whether it can be argued that the loss suffered by the Operator includes what is necessary to compensate the Participants for their loss is a moot point\textsuperscript{166}. On the other hand the Operator and the Participants may argue that a line cannot be drawn between the Operator acting simply in its capacity as such and the Operator in its representative capacity vis-a-vis the Participants\textsuperscript{167}. Further, they will argue that in the case of contracts entered into by an Operator in the Industry it is most unlikely that the third party would not have been aware of the fact of the Operator's representative capacity, and, in all probability other terms of the Joint Operating Agreement\textsuperscript{168}.
Alternatively, it may be possible to invoke the law of trusts to substantiate the contention of the Operator that it has the right, and the duty, to recover damages caused to the Participants by the third party notwithstanding that the Operator may have contracted personally\(^{169}\).

On the other hand, like problems may occur in relation to damages for breach of contract by the Operator if the third party cannot sue the Participants because of the absence of privity of contract with the Participants. Notwithstanding that the Operator will have entered into the contract with the third party in accordance with its duty under the Joint Operating Agreement, it is not clear that the Participants could be sued by the third party on the contract\(^{170}\).

2.1.4.4.4 Britoil proforma

Notwithstanding the requirement to include, if at all possible, the disclosure of agency any contract entered into by the Operator with a third party the Britoil proforma is unusual in that it also requires the Operator to use its best endeavours to have included in the contract a provision that requires the third party to look only to the Operator for due performance under the contract and yet for the Operator to be entitled to enforce the contract on behalf of all of the Participants including itself.

This appears to have two objectives\(^{171}\):

(i) to make the Operator the agent of the Participants so as to contract, and enforce contracts on their behalf; and

(ii) although third parties may look only to the Operator for performance, it can enforce contracts and issue claims on behalf of all the Participants, although their interests are separate and a breach of contract may affect each Participant in a different way and give rise to different measures of damages.
This provision, if it works, would have the effect of giving to the Participants all the benefits of a principal and none of the disadvantages. The Participants would have a right of action against the third party and the third party would be denied its right of action against the Participants.

2.1.4.5 The provision of goods, services and facilities by the Operator

As has been mentioned above, the general rule is that where the Operator requires goods, services or facilities for the Operations it is under a duty to obtain them by competitive bidding by sealed tender. However, the Joint Operating Agreement may allow the Operator or an affiliate of the Operator to provide such goods, services or facilities without the calling of tenders. Irrespective of the value of the goods, services or facilities to be provided, there is usually a requirement that the Operator obtain the prior approval of the Operating Committee to the terms, conditions and rates on which they are to be provided before entering into a contract for their provision. The Operating Committee will usually have the right to withdraw its approval.

Alternatively, the Joint Operating Agreement may provide that in the absence of the unanimous agreement of the Participants to the contrary, the Operator or an affiliate of the Operator may tender along with all other tenderers to provide such goods, services or facilities. Where the Operator estimates the expenditure involved will exceed a stated amount it may also be necessary for the Operator to obtain the prior approval of the Operating Committee before entering into a contract for the provision of such goods, services of facilities. The Joint Operating Agreement may provide that the need for the prior approval of the Operating Committee can be withdrawn with the unanimous approval of the Participants.

2.1.4.6 The provision of goods, services and facilities by Participants

If a Participant (other than the Operator) or an affiliate of a
Participant desires to provide certain goods, services or facilities required for the Operations and to which the tender provisions apply, the Operating Committee is usually authorised to waive the calling of tenders and to award the contract to the Participant or its affiliate. Before waiving the calling of tenders the Operating Committee will need to be satisfied with the terms, conditions and rates offered.

Alternatively, the Joint Operating Agreement may provide that in the absence of the unanimous approval of the Participants to waiving the calling of tenders, a Participant or its affiliate may tender along with all other tenderers to provide such goods, services or facilities. Where the Operator estimates the expenditure involved will exceed a stated amount it may also be necessary for the Operator to obtain the prior approval of the Operating Committee before entering into a contract for the provision of such goods, services or facilities. The Joint Operating Agreement may provide that the need for the Operator to obtain the prior consent of the Operating Committee can be waived with the unanimous consent of the Participants.

2.1.5 To act as the representative of the Participants

Each Joint Operating Agreement will specify the circumstances when the Operator will be under a duty to represent the Participants in matters or dealings with governmental authorities or third parties in relation to the petroleum title and the Operations. The approach will vary with each Joint Operating Agreement. The two proformas illustrate this.

The Britoil proforma provides that the Operator will only be under a duty to represent the Participants in such matters or dealings when so directed by the Operating Committee.

Any direction by the Operating Committee will nearly always reserve unto each Participant the unfettered right to deal direct with the Secretary of State for Energy or any governmental authorities in relation to matters or dealings affecting to its own Interest.
The Apea proforma provides that the Operator is under a duty to represent the Participants in all such matters or dealings. Where the circumstances reasonably allow, the Operator must obtain the prior consent of the Participants to representations on any matter that may materially affect them. Furthermore, where the circumstances reasonably allow, the Operator is required to arrange affairs so that each Participant can be separately represented at meetings with the governmental authorities. It is unclear what rights the Participants have by being represented at such meetings. The Operator will continue to be under a duty to represent the Participants. It would seem that the role of the Participants will be little more than that of an observer if the Operator is required to act in accordance with the directions of the Operating Committee.

2.1.6 To prepare, maintain and file records and reports

The Operator will be under a duty to prepare, maintain, and where appropriate, file proper books, records, reports and inventories of the Operations in compliance with the terms of the petroleum title, any Acts, regulations or by-laws and the accounting procedure. The Operator will be required to provide each Participant with a copy of all exploration progress reports, transparencies of geological and geophysical reports, daily drilling reports, well logs, core analyses, pressure and production tests, reservoir engineering surveys and estimates, forecasts of the estimated times of logging, testing or coring wells, reports furnished by the Operator to government authorities, reports on major developments, reports on information and data regarded as relevant by the Operator and such other reports as the Operating Committee may direct. The timing for the making of any report usually will be a matter of policy to be determined by the Participants; in so far as the same is not determined by the terms of the petroleum title or some Act, regulation or by-law.

Should a Participant require a report in addition to the reports prepared by the Operator in the performance of its duties, the Operator usually will be obliged to provide the report at the sole cost of the Participant.
Unless the need to do so is waived by the Operating Committee, all reports required to be made to a governmental authority must be provided to the Participants for review prior to submission. Immediately following the submission of a report the Operator will be required to provide a copy of the report to each Participant.

The Joint Operating Agreement will provide that each Participant can inspect all books, records and inventories relating to the Operations kept and maintained by the Operator. This right to inspect will not extend to books, records or inventories kept and maintained by the Operator for some other purpose; such as where kept and maintained by the Operator in its capacity as the owner of an Interest.

2.1.7 To consult with and provide information to the Participants

The Operator will be under a duty to consult with and keep the Participants informed of matters relating to the Operations. This will include all matters which may warrant the taking of insurance, either jointly or severally by the Participants, information of logging, coring and testing and copies of analyses of well logs and cores.

The Operating Committee will often be vested with the power to determine what other information relating to the Operations the Operator must inform the Participants about, and the times at which such information and data must be provided. Should a Participant require additional information or data, the Operator usually will be obliged to provide it at the sole cost of the Participant.

2.1.8 To undertake emergency expenditure and action

In the case of necessity or an emergency, to safeguard lives, property or prevent pollution, the Operator will be authorised to make or incur commitments for expenditure or take such action as is warranted by the circumstances. Having dealt with the situation the Operator will be under a duty to report to the Participants the circumstances that warranted the action and the cost and expense of taking the action.
Outside of the emergency type situation, the Operator's authority to make or incur commitments for expenditure and to take action is limited to such as is authorised by the Operating Committee or under the Joint Operating Agreement 208.

2.1.9 To dispose of the property of the Participants

Subject to the requirements of the accounting procedure, the Operator will be required to dispose of any property of the Participants that it considers no longer to be needed or suitable for the requirements of the Operations 209.

2.1.10 To assist with the Participants' right of access

As a general rule each Participant will have the right to observe and the right of access to the Operations and the area to which the petroleum title relates. A Participant will be allowed to exercise these rights at reasonable times and at its sole risk and expense 210. A Participant will be required to give reasonable notice to the Operator of the date on which it desires to exercise these rights and of whom will exercise the rights. Where the right of access is to be exercised by one individual, the Operator cannot refuse the individual access. However, if more than one individual at a time is to exercise the right of access, the Operator may refuse the additional individuals access if and to the extent that the granting of access would interfere with the conduct of the Operations 211.

As the Operations will be offshore the Operator will be required to provide facilities to enable the right of access to be exercised. This would include the provision of transportation and accommodation. The provision of transportation and accommodation will not be allowed to interfere with the conduct of the Operations and will be provided by the Operator at the cost of the Participant 212.
The Joint Operating Agreement may go as far as to grant to each Participant the right of access to core samples, logs and surveys or cuttings for the purpose of examination.

2.1.11 Insurance

As a general rule the Operator will be under a duty to obtain and maintain all insurance required by the petroleum title, any Act, regulation or by-law, the Joint Operating Agreement or any contract in respect of the Operations and property of the Participants. It will be for the Operating Committee or the Participants to decide from time to time what other insurance should be obtained and maintained by the Operator.

Insurance obtained and maintained by the Operator will be a cost to the Participants.

Where the Operating Committee has determined that a particular type of insurance is required, the Operator will be under a duty to obtain and maintain the insurance. However, a Participant will usually be allowed to elect not to participate as a co-insured in the insurance to be obtained and maintained by the Operator. If a Participant elects not to participate it must notify the Operator, and in some cases the other Participants, of its election. Furthermore, the non participating Participant must not do anything that may interfere, directly or indirectly, with the Operator's negotiation for, or placement of, the insurance on behalf of the other Participants. A Participant cannot elect not to insure. The non participating Participant must obtain and maintain insurance of the type determined upon by the Operating Committee in respect of its Interest. In addition, the non participating Participant will have to provide evidence of the insurance or other evidence acceptable to the other Participants of financial responsibility. The fact that the other Participants accept the non participating Participants' arrangements will not absolve the non participating Participant from its obligation to meet cash calls in respect of damage and loss and or the cost of remedying any such damage or loss. The insurance obtained and maintained by a non participating
Participant will be required to contain, or be endorsed with, a waiver of subrogation in favour of the other Participants and the Operator in respect of their irrespective interests\(^{222}\). Furthermore, the policy of insurance will need to provide that it will not be cancelled, amended or varied, or permitted to expire or lapse without the insurer first giving to the other Participants and the Operator a stated minimum period of notice\(^{223}\). The non participating Participant will be required to release, indemnify and hold harmless the other Participants and the Operator in respect of its Interest, from and against any and all claims, loss and damage which would have been covered by the insurance directed by the Operating Committee to be obtained and maintained by the Operator\(^{224}\).

Where the Operator obtains and maintains insurance for less than all the Participants, the cost will be borne by the participating Participants in proportion to their respective Interests\(^{225}\).

The Operator will be required to inform the participating Participants when the insurance has been taken out and to provide them with a copy of the relevant policies and evidence that such policies are current\(^{226}\). The requirement to so inform the participating Participants may be absolute\(^{227}\), or upon the request of a participating Participant\(^{228}\). The Operator will also be required to arrange for the participating Participants to be named in accordance with their respective Interests as co-insured on the relevant policies, with waivers of subrogation in favour of the other Participants and the Operator\(^{229}\).

The Operator will be under a duty to file all claims and take such steps as are warranted or desirable in the circumstances to collect any proceeds and recover any losses incurred. Where all of the Participants are participating in the insurance, the proceeds will usually be credited to the joint account of the Participants or paid to the Participants in proportion to their respective Interests. Where less than all the Participants are participating in the insurance, the proceeds will be paid to the participating Participants in proportion to their respective Interests\(^{230}\).
2.1.12 To ensure insurance by contractors

The Operator will be required to take all reasonable steps to ensure that all contractors and sub-contractors performing work in respect of the Operations or the property of the Participants obtain and maintain at all times all insurance required by the petroleum title, Act, regulation or by-law, the Joint Operating Agreement or any contract[231]. The Operating Committee will be authorised to determine from time to time what additional insurance is to be taken by contractors and sub-contractors[232]. In the absence of a determination by the Operating Committee, the Operator may make such a determination[233]. At the request of a Participant the Operator will be required to supply to the Participant evidence that the necessary insurance has been obtained and maintained by the contractors and sub-contractors[234]. Furthermore, the Operator will be required to take all reasonable steps to arrange for the contractors and sub-contractors to obtain from their insurers a waiver of subrogation in favour of the Participants and the Operator[235]. In addition, such policies of insurance will need to provide that they will not be cancelled, amended or varied, or permitted to expire or lapse without the insurer first giving to the Participants and the Operator a stated minimum period of notice[236].

2.1.13 OPOL

In Great Britain, the Operator will be required to be a party to the Offshore Pollution Liability Agreement dated 4th September 1974 as amended ('OPOL')[237], a member of the Offshore Pollution Liability Association Limited ('the Association') and to make OPOL applicable to such "offshore facilities" (as defined in OPOL) as are used for the purpose of the Operations[238].

2.1.14 Litigation

The Operator will be under a duty to notify the Participants of any incident, accident or circumstances causing damage to the property of the Participants[239], and where the cost thereof may exceed a stated amount,
of any claim relating to the Operations. It is usual to provide for the Operating Committee to determine from time to time what the stated amount should be.

The Operator will be under a duty to pursue, prosecute, defend or settle any claim relating to the Operations, other than claims between the Participants or claims covered by insurance.

However, where the total amount in dispute and or the total amount of damages together with any costs are estimated to exceed a stated amount, the Operator may need the prior approval of the Operating Committee before it can deal with such a claim. The stated amount will usually be determined from time to time by the Operating Committee.

Furthermore, the Joint Operating Agreement may provide that the Participants can decide that a claim in excess of a stated amount be defended on a joint basis. In such a case, the Operator will have to deal with the claim in accordance with directions given to it by the Operating Committee.

If a Participant wanted to participate in any such pursuit, prosecution, defence or settlement conducted by the Operator it would have the right to do so at its sole cost and expense. However, the Operator will not be obliged to defer any such pursuit, prosecution, defence or settlement pending notification by the Participants of their intention to participate.

2.1.15 To comply with the provisions set out in the petroleum title

Where the Operating Committee has not made a timely decision as to the location of and time for compliance with the minimum works programme or expenditure obligations set out in the petroleum title, and the works or obligations have not been performed or discharged by a sole risk project, the Operator will be under a duty to proceed to perform such works or discharge such obligations as are necessary to comply with the provision of the petroleum title.
2.1.16 To comply with the accounting procedure

2.1.16.1 Programmes and Budgets

Each year the Operator will be under a duty to submit to the Operating Committee or the Participants a recommended programme and budget and, in some cases, a provisional programme and budget for the next succeeding year.

The Operator will be required to include in the recommended programme and budget, the following information:-

(i) details of the projects and work to be undertaken. This will need to include provision to undertake projects or work required to satisfy the minimum work programme or expenditure obligation required by the petroleum title during the period to which the programme and budget relates;

(ii) such information as is required by the accounting procedure;

(iii) details of the number of employees and contract personnel required; and

(iv) an estimate of the costs and expenditure to be incurred by the Operator in relation to the items contemplated by the programme or otherwise, during each quarter of the budget period.

In addition, the Operator will be required to provide such other information and data as the Operating Committee may request.

Where the Operator has included in the recommended programme and budget the drilling of an obligation well, the programme and budget and any authorisation for expenditure relating to the drilling of that well will be deemed to have been approved by the Operating Committee unless the Operating Committee decides otherwise within a stated period of time.
Once a recommended programme and budget has been considered, revised and approved by the Operating Committee, the Operator will be authorised to proceed with it. The Operator will be required to forward a copy of the approved programme and budget to such Participants as request it.  

2.1.16.2 Authorisations for expenditure

Except in the case of necessity, the Operator will be under a duty to submit to the Participants an authorisation for the expenditure before entering into any commitment or incurring any expenditure under an approved programme and budget. The authorisation for expenditure will need to be prepared in accordance with and include the matters required by the accounting procedure. To the extent that the Operating Committee is required to approve an authorisation for expenditure, once approved the Operator will be authorised and obliged to proceed with the commitment or expenditure.

The Operator will only be entitled to make a cash call on the Participants in respect of an approved authorisation for expenditure or equivalent explicit commitment approval. The cash call will have to be made in accordance with the accounting procedure.

A Joint Operating Agreement may provide that the approval by the Operating Committee of a programme and budget authorises the Operator to incur the expenditure contemplated by the approved programme and budget. In carrying out the approved programme the Operator will be required to remain within the limits of the budget for the programme.

In addition to the case of necessity, a Joint Operating Agreement may provide a number of exceptions to the general position discussed above.
The first exception could be to allow the Operator to incur expenditure in excess of the approved budget, up to a stated percentage of the aggregate amount of such budget, or, in the case of any single item specified in the budget, up to a stated percentage of the amount budgeted in respect of that item. The Operator will be required to give prior notice to the Participants of the need for the excess expenditure as soon as the need becomes apparent and to report promptly to the Participants the amount of the expenditure actually incurred.

Notwithstanding this, if the amount involved in respect of any item referred to in the approved budget exceeds or is estimated to exceed a stated sum then the Operator will not be authorised to incur the expenditure without first obtaining the approval of the Participants.

The second exception could be to allow the Operator to have a fixed amount which it can expend on matters appertaining to the Operations and which are not included in the approved programme and budget. This will usually be expressed as a maximum amount and all expenditure will be aggregated. The aggregated expenditure will not be permitted to exceed the stated maximum amount. Furthermore, the Operator will not have to obtain approval for the expenditure. However, where expenditure has been made by the Operator in such circumstances and the Operating Committee subsequently approves the expenditure, the limit will be restored to the approved level. The Operator will be required to promptly report to the Participants the amount of expenditure actually incurred.

2.1.16.3 Amendment of programmes, budgets and authorisations for expenditure

The Operator will be bound by any amendment made by the Operating Committee to an approved programme and budget and or authorisation for expenditure. However, any such amendment will not invalidate any authorised commitment or expenditure entered into or made by the Operator prior to the amendment.
2.1.16.4 Cash calls

To avoid the Operator having to fund the expenditure of the Participants, the Operator will be required periodically, usually monthly, to furnish the Participants with a cash call requesting an advance for the following period. The notice of a cash call will usually have to be given within a stated time of the commencement of the period to which it relates and of when the Participants will be required to make the advance. The amount of the cash call will be determined by the Operator. The determination will be based on the Operator's estimate of the amount required to defray the payments due in the relevant period relating to the obligations authorised by the Participants and properly incurred by the Operator in connection with the Operations. The Operator's determination will be made on the latest information available to it.

The Operator will be required to state in respect of each advance the total amount required, analysed by Participant and currency required, the account to which payment is to be made and the due date or dates for payment. The due date or dates for payment will be determined by the Operator after taking into account the date or dates on which it estimates that it will be making a substantial amount of payments. It is usual for the Joint Operating Agreement to provide that a payment not be made by the Operator before the commencement of the period to which the cash call relates.

If it becomes necessary to change the amount or due date of any advance, the Operator will be authorised to do so on giving to the Participants a specified period of notice. Where a large sum is required to be paid by the Operator, and the Operator had not foreseen the need to make the payment at the time of making a periodic cash call, the Operator will be authorised to ask the Participants to pay a special cash advance to meet the payment. The Participants will be required to make the payment of the special cash advance within a stated period of the receipt of the notice.
The Operator will be required to make the cash calls in the currency provided for in the Joint Operating Agreement\(^{280}\). However, the Operator will be entitled to make a cash call in some other currency with the approval of the Operating Committee, but only to the extent that such currency is required to meet a contractual obligation and then only to the extent that the expenditure is in excess of a sum to be determined by the Operating Committee from time to time\(^{281}\) or as provided by the Joint Operating Agreement\(^{282}\). Alternatively, the Operator may be required to purchase the appropriate amount of the required currency\(^{283}\). The Operator will be required to keep the Participants informed of expenditure which is contractually required to be paid in currencies other than the currency provided for in the Joint Operating Agreement\(^{284}\).

The cash call will need to be accompanied by a statement prepared by the Operator indicating the authorisations for expenditure for which the funds are required and the amount attributable to each authorisation for expenditure\(^{285}\).

If the Participants are required to notify the Operator that an advance has been made, the Operator will be allowed to designate the place at which notice must be given\(^{286}\).

In the event that interest is received on advances paid by the Participants on a cash call, the Operator will be required to pay the interest to the Participants entitled to it\(^{287}\). Interest received by the Operator in respect of funds in a central disbursement account will usually be equitably apportioned by the Operator between the Operations using the account\(^{288}\).

2.1.16.5 The accounting procedure

The aim of the Participants is that the Operator will neither gain nor lose as a result of acting as Operator. This means that the Operator will not receive remuneration for acting as Operator, but will be reimbursed the actual costs it incurs. To this end a complex
accounting procedure will be established which will enable the Operator to truly reflect the actual cost of acting as Operator.

When considering the accounting procedure, and for that matter the joint venture utilised in the Industry, it must be borne in mind that a joint venture is a cost, not a profit, orientated relationship. The accounting data and information prepared by the Operator will be cost orientated. It will not include such items as equity, financing, revenues, royalties, taxes and depreciation. These items are the province of each individual Participant's accounts and will be addressed when they account for their share of expenditure, assets and liability relevant to the Operations.

Each Participant will be required to attend to its own accounting requirements. The Operator will be under a duty to provide the Participants with such accounting data and information as may be necessary for the Participants to attend to their requirements. This duty will extend to where it is reasonable to expect such data and information to be available from the accounting records kept by the Operator. This is usually measured by reference to what is required to enable a Participant to discharge its requirements by law, such as taxation returns, royalty statements of value and corporate returns, coupled with established Industry and accounting practice.

The only accounts the Operator will prepare and submit on behalf of the Participants are those required of it under some statutory obligation, and then only in so far as they relate to the Operations.

If all the Participants agree, the reporting requirements may be temporarily waived or varied to take account of the activity of the Operations.

The Operator may be under a duty to provide the Participants with financial information which goes beyond that required by the Participants to enable them to produce their own statutory and management accounts. This financial information may be required by the Participants to enable
them to:

(a) plan their future cash requirements; and

(b) monitor the Operator's expenditure against pre-authorised expenditure.

To enable the Participants to obtain the financial information it will be necessary to ensure that the information provided by the Operator meets the individual needs of each of the Participants.

2.1.16.6 Bank accounts

The Operator is usually, but not always, under a duty to open and maintain separate bank accounts in respect of funds. These accounts are often referred to as the joint account. The object is for the Operator to separate the funds of the Participants from those of its own. It is in these accounts that the Operator is required to deposit and keep the funds of the Participants for the purpose of the Operations. However, the Operator may be authorised to invest such funds as are not required to maintain a daily working credit balance in the account in such manner as the Operator may determine for the benefit of the joint account.

The Operator will be required to notify the Participants on opening the accounts and to provide them with the name of the bank and the account numbers and of any subsequent change to the information provided.

At the request of a Participant the Operator will be required to supply a copy of bank statements and bank mandates in respect of each of the separate accounts.
The Operator will be obliged to restrict the funds held in the bank accounts to a level consistent with that reasonably required for the conduct of the Operations. In the event that the funds held by the Operator exceed what is required for immediate disbursement, the Operator will be obliged to either deposit them in an interest earning account until they are required for disbursement or to repay them to the Participants entitled thereto. The interest received by the Operator will be required to be credited to the Participants or to the joint account. The Joint Operating Agreement may restrict the right to repay the excess funds. The excess may have to be greater than an amount determined by the Operating Committee from time to time as being required to be kept ready for disbursement by the Operator before the Operator can elect to repay the excess, after giving notice of its intention in that regard, to the Participants. Alternatively, the Joint Operating Agreement may provide that the Operator, if it determines that there is a significant excess, can advise details of the excess to the Participants and the Participants can elect to have their share of the excess reimbursed. Where a Participant so elects, the Operator will be required to refund to all Participants all excess funds to which they are entitled. If, however, the situation is that a Participant has advanced more than its share of actual expenditure, the Participant may request that the excess be refunded. In that event the Operator will be obliged to refund the excess to the Participant within a stated period.

The Operator will not be allowed, without the approval of the Operating Committee, to transfer amounts between any of the accounts held in different currencies. The Operator may be permitted to establish a central disbursement account out of which it can make all disbursements of expenditure to be borne by the Participants. In such circumstances the Operator will be permitted to transfer amounts from the separate accounts to the central disbursement account, but only in respect of payments already made by the Operator.
2.1.16.7 Accounting records

The Operator will be required to open and maintain such separately identifiable accounting records as may be necessary to record in a full and proper manner, and in accordance with the accounting procedure\textsuperscript{311}, all advances received by the Operator from the Participants and all expenditure incurred and receipts obtained by the Operator in connection with the Operations\textsuperscript{312}.

2.1.16.8 Periodic reports of receipts and expenditure

The Operator will be under a duty to periodically, usually monthly, send a report, in the manner and containing the information set out in the accounting procedure\textsuperscript{313}, to the Participants setting out details of all receipts obtained and all payments made in connection with the Operations during the preceding period\textsuperscript{314}.

It is important to the Participants that the reports accurately state the transactions of the Operator and the cumulative cost position of Operations as at a particular date. The reports should go so far as to provide an accurate classification of the expenditure to be made by each Participant. The reason for this is that the information is often included by the Participants in their own financial statements and as such the information must be of sufficient detail so as to enable the Participants to account for their costs in accordance with their own policy\textsuperscript{315}.

The Operator will be required annually, and or at such other intervals as the accounting procedure requires, to send a report to the Participants within a stated period setting out the Operator's estimate of accruals applicable to the joint account of the Participants\textsuperscript{316}. Furthermore, the Operator will be required periodically, usually quarterly, to send a report to the Participants containing a list of insurance and other claims and litigation outstanding as at the date of the report\textsuperscript{317}.
2.1.16.9  **Cash reconciliation**

The Operator will be under a duty periodically, usually monthly, to prepare a cash reconciliation in relation to advances and to provide the Participants with a copy within a specified time. As a result of the cash reconciliation the Operator shall, if necessary, adjust the amount of the advance or advances next due for payment.

2.1.16.10  **Inventories of material**

The Operator will be under a duty periodically to take a complete inventory of all controllable material forming part of the property of the Participants. The taking of the inventory will be required to be conducted in accordance with the Operator's standard procedure in force from time to time. A copy of the inventory will be required to be supplied by the Operator to the Participants on request. Before taking an inventory the Operator will be required to notify the Participants of its intention in that regard so that the Participants can be represented when the inventory is taken.

If the Operator operates a system of checking material by taking an inventory on a continuous basis, the Operator can notify the Participants whereupon a complete inventory will not be required. However, the Participants will have the right to attend and observe any part of the continuous check upon giving a specified period of notice to the Operator. Where this method is used the Operator will still be required to provide the Participants with a copy of all inventories.

The Operator will be under a duty periodically to make a reconciliation between the inventory list and the record of stocks held on account of the Participants. Any surplus or shortages as determined by the Operator will be required to be listed and notified to the Participants. The Operator will also be required to make the necessary inventory adjustments with relevant explanations where available.
The Operator will be under a duty to take a special inventory:-

(a) on the change of Operator;

(b) where there is an assignment under the Joint Operating Agreement; and

(c) at the request and cost of a Participant.  

2.1.16.11 Adjustments

The usual position will be that, subject to the right of audit, the annual reports prepared by the Operator are conclusively presumed to be true and correct after the lapse of a stated period of time, unless prior thereto a Participant makes a claim on the Operator for adjustment. The reverse will also be the case. If the Operator takes exception within the time period it can give notice to the Participants of any adjustment claimed in its favour. The rule as to adjustment usually will not apply to physical inventories, claims involving third parties or adjustments required by law.

2.1.16.12 Audit

The Participants will require the right to audit the accounts, book and records kept by the Operator in relation to the Operations. This is to enable the Participants to satisfy themselves that the Operator has complied with the terms of the Joint Operating Agreement and that all charges are proper.

2.1.16.13 Cost Control

The Operator will be under a duty to control costs in accordance with the accounting procedure.
2.1.16.14 **Chargeable Expenditure**

The Operator will be entitled to charge to the joint account of the Participants all items of expenditure in so far as they relate to, and are necessary for, the conduct of the Operations\(^{328}\). Matters usually covered in the accounting procedure as being expenditure chargeable to the joint account where incurred in this manner include:-

(a) petroleum title rentals and fees of whatsoever nature\(^{329}\);

(b) actual cost of salary and wages and related benefits of all personnel\(^{330}\). The manner in which the actual cost is arrived at will be set out in the accounting procedure\(^{331}\);

(c) administrative overhead costs\(^{332}\). The manner in which the administrative overhead costs are arrived at will be set out in the accounting procedure\(^{333}\), although it is not unusual for it to be a fixed percentage of personnel costs\(^{334}\);

(d) direct expenses reasonably and necessarily incurred by personnel who work directly under the control of the Operator\(^{335}\);

(e) materials\(^{336}\) purchased by the Operator from third parties\(^{337}\) or transferred from the Operator or any affiliated parties\(^{338}\);

(f) transport to move personnel and materials\(^{339}\);

(g) services, including the use of equipment and facilities, provided by Participants\(^{340}\), third parties\(^{341}\), the Operator or any affiliate of the Operator\(^{342}\). The manner in which the cost of services is arrived at will be set out in the accounting procedure\(^{343}\);
(h) damages and losses;

(i) legal expenses of litigation and other legal services;

(j) taxes and other governmental levies of every kind and nature;

(k) premiums for insurance;

(l) expenditure made in settlement of any claims, damages, judgements and other such expenses; and

(m) field expenses such as establishing shore bases, warehouses, camps and other field facilities.

2.1.16.15 Receipts

The Operator will be under a duty to credit the joint account with all sums received in connection with the Operations. Matters covered by this requirements include receipts resulting from:

(a) the sale of material and other property of the Participants;

(b) services provided by the Operator on behalf of the Participants to a third party or a Participant;

(c) the reimbursement by third parties of any sums expended by the Operator on behalf of the Participants;

(d) insurance and other claims made by the Operator on behalf of the Participants; and

(e) materials returned to the Operator or any of its affiliated parties from the Operations.
2.1.17 To disclose of confidential data and information

The Operator will be permitted, in its role as Operator (rather than as a Participant), to disclose confidential data and information to such persons as may be necessary in connection with the conduct of the Operations. However, in so doing the Operator will be under a duty to obtain from the person an undertaking of confidentiality of similar purport to that entered into by the Participants. Where the Operator has made such a disclosure it will be required to notify the Participants of the names of the persons to whom the disclosure was made and the details of the data and information disclosed.357

2.2 Duties that may be implied

Whether each of the duties to be discussed under this heading will apply to the relationship of the Operator to the Participants is determined by whether the relationship between the Operator and the Participants is contractual or not. It is submitted that although the Operator will in most instances, at least within the jurisdictions under consideration, undertake the duties imposed upon it by the Joint Operating Agreement on the basis of "no gain and no loss" the relationship between the Operator and the Participants is none the less contractual. The Operator is not, what has been termed a "gratuitous agent". The discussion which follows will proceed upon that basis.

2.2.1 To perform the transaction undertaken

The Operator is under a duty to the Participants to perform what it has undertaken to perform and to do so in accordance with the terms of the Joint Operating Agreement.358

The Operator may also be under a duty to the Participants to obey all lawful and reasonable instructions of the Participants in relation to the manner in which it carries out its duties.359 What is reasonable will depend on the facts and circumstances surrounding the relationship between the Operator and the Participants and what has been agreed to be undertaken by the Operator. It would not, for example, include
instructions which sought to extend the scope of the Operator's duties or undertaking.

Where the Operator obeys instructions of the Participants and exercises the necessary degree of care and skill in carrying out the instructions the Operator will not be liable to the Participants for any damage that may result to them. However, if the Participants were to have issued the instructions on the advice of the Operator, the Operator may be under a duty to the Participants to warn them of the likely consequences of it obeying the instructions.

In the event of there being any ambiguity as to what the Operator is required to do on behalf of the Participants and if the Operator realises or ought to realise that there is the ambiguity it would appear that the Operator ought to, if the circumstances so permit, seek clarification from the Participants before commencing to act. In all other circumstances, the Operator is only required to act on the interpretation which it has fairly and honestly assumed the ambiguous provision or instruction to bear.

2.2.2 To follow the terms of the authority given

The Operator must not exceed the authority that the Participants have given to it and must act in accordance with the general nature of the business being undertaken. This latter requirement arises from the implied authority of the Operator.

2.2.3 To exercise due care and skill

The Operator is under a duty to the Participants to perform what it has undertaken to perform with due care and skill. In the performance of its duties the Operator is expected to undertake what it has undertaken to perform "in a proper and workmanlike manner in accordance with methods and practices customarily used in good prudent oil and gas field practice and with a degree of diligence and prudence reasonably and ordinarily exercised by experienced operators" or to "use all reasonable efforts
to conduct efficiently, economically and diligently" the same "in accordance with good oil field and engineering practices and generally accepted conservation principles". 

The standard of care and skill required of the Operator is tested objectively. It is looked at in terms of what is usual or necessary in or for the ordinary or proper conduct of the undertakings that the Operator has entered into with the Participants, or what is reasonably necessary for the proper performance of those undertakings. The test is to look at the degree of skill an operator in the Operator's position would usually possess and exercise in similar circumstances and conditions to those of the Operator.

As long as the Operator has behaved with normal care and skill, having regard to the nature of the undertakings that the Operator has entered into with the Participants, and has acted in as reasonable a manner as could be expected from an Operator engaged to perform such undertakings, the Operator will have satisfied the standard of care and skill required of it. Whether the Operator has used due care and skill will be a question of fact.

Consequently, provided the Operator has exercised the required degree of care and skill it will not be liable for mere errors of judgement, as it does not guarantee the success of the performance of its undertakings. This is particularly the case where the Operator has a discretion to exercise.

In so far as contracting with a third party is concerned, the Operator is required to use due care and skill in making the contract, and in so doing to ensure that any such contract is binding in law upon the third party. This does not mean that the Operator guarantees the contract.

A major aspect of the Operator's duty to the Participants to exercise due care and skill is that it must not delay unreasonably the execution of its undertaking. If the Operator cannot execute its undertakings it
is required to inform the Participants. What is reasonable will depend on the facts and circumstances surrounding the relationship between the Operator and the Participants and what has been agreed to be undertaken by the Operator.

Further, the Operator has a duty to the Participants to keep them informed as to matters which are of their concern and as such must not delay unreasonably the communication of material information which it ought to pass on to them.

Where some kind of action is required to be taken and the Operator cannot obtain the instructions to the Participants, the Operator is under a duty to the Participants to act in such manner as it considers reasonable in the circumstances and in the best interests of the Participants. If in so doing the Operator exercises the required degree of care and skill, the Operator will not be liable to the Participants for any damage suffered thereby.

In considering the potential liability of the Operator to the Participants for loss or damage it is necessary to look at two aspects of liability; the contractual and the tortious.

If the Operator were to exceed its authority, and as a result the Participants suffer any loss, the Operator must answer to the Participants for the loss.

If the Operator is acting for reward and fails to exercise the necessary degree of care and skill the question may arise as to whether the Operator will be liable to the Participants in contract or tort. It would seem that the appropriate action would be in tort, as the degree of care and skill has been viewed by the courts to be in principle akin to the duty of care in negligence. Where the Operator is acting gratuitously the action would be in tort. In such cases the Operator would still owe to the Participants a similar duty in the performance of its undertaking although liability may lie only for gross negligence.
Because the Operator usually acts on the basis of no loss or gain it is usual for the Joint Operating Agreement to provide that the Operator should be liable to the Participants only for such loss or damage as results from the Operator's wilful misconduct, and then only in so far as the same does not extend to consequential loss or damage. The limitation is imposed because of the magnitude of the potential loss where offshore oil operations are concerned. Some Joint Operating Agreements go further and also refer to loss or damage as a result of the Operator's gross negligence. The term "gross negligence" is a term inherited from the United States of America and is usually avoided in Joint Operating Agreements which adopt English law. This is because of the reluctance of the common law to recognise degrees of negligence. "Gross negligence is simply ordinary negligence with a vituperative epithet." Daintith and Willoughby have suggested that a court may be less dismissive when attempting to construe a Joint Operating Agreement according to the intention of the Operator and the Participants. Where the term "gross negligence" is used it is usually defined in the Joint Operating Agreement. Such definitions usually are very similar to the definition of "willful misconduct."

The term "wilful misconduct" may be defined in the Joint Operating Agreement to mean an intentional and conscious, or reckless, disregard of the terms of the Joint Operating Agreement or any programme where such is not justified by special circumstances. The definition will exclude any error of judgement or mistake made by any director, employee, agent or contractor of the Operator in the exercise, in good faith, of any function, authority or discretion conferred upon the Operator.

The term "willful misconduct" may also be defined to mean such acts or omissions as are done or omitted to be done intentionally and so as to raise the belief that they were the result of a conscious indifference to the right or welfare of those who are or may be thereby affected.

2.2.4 To respect the Participants title

Although not strictly speaking a duty of the Operator to the Participants, the Operator is estopped from denying the title of the
Participants to any goods, money or real property possessed by the Operator on behalf of the Participants. This is because the possession of the Operator is the possession of the Participants 395. An exception to this rule would be where the possession by the Operator is not as agent for the Participants but on its own behalf, that is, the possession is personal to the Operator 396.

Another exception to this rule arises when a third party is entitled to the property in question. In such circumstances the Operator may be able to set up the title of the third party against any claim by the Participants 397, that is, plead jus tertii. It is not within the scope of this thesis to consider the application of this common law rule 398 and the statutory modifications thereto.
FOOTNOTES

1. Britoil 5.2.1; APEA 4.10, 4.11 and 4.12.
2. Britoil 5.2.1; APEA 4.8.
3. Britoil 5.2.1 (i) and 5.2.1 (ii); APEA 4.12.
4. Britoil 5.2.1 (iii); APEA 4.10 (k). See also APEA Sect. I, 9.
5. Britoil 5.2.1 (iv); APEA 4.11.
7. Britoil 5.2.1 (vi).
8. Britoil 5.2.2.
10. Apea 4.10(h).
11. Apea 4.10(m).
12. Britoil 5.2.2.; implied Apea 4.10(a), 4.10(h), 4.10(m) and 4.10(n).
13. Britoil 5.3; Apea 4.10(f).
14. Britoil 5.4.2; Apea 4.11(a).
15. Britoil 5.4.2(i); Apea 4.11(a).
16. Britoil 5.4.2(i).
17. Britoil 5.4.2(i).
20. Britoil 5.4.2(ii).
21. Britoil 5.4.2(ii).
22. Britoil 5.4.2(iii)(a).
23. Britoil 5.4.2(ii).
24. Britoil 5.4.2(iii)(b).
25. Britoil 5.4.2(iii)(b).
26. Britoil 5.4.2(iv).
26. Britoil 5.4.2(v)
27. Britoil 5.4.2(vi). See Britoil 7.3 for dealing with claims.
28. Apea 4.11 (c).
29. Apea 4.11.
30. Apea 4.11(a).
31. Britoil 5.4.2(vii); Apea 4.9.
32. Britoil 5.4.1; Apea 4.8 and 4.9.
33. Apea 4.9.
34. Britoil 5.4.3.


40. Spurr v Cass (1870) L.R. 5 Q.B. 656, 659; Cothay v Fennell (1830) 10 B. & C. 671, 672; Duke of Norfolk v Worthy (1808) 1 Camp. 337, 339; Thomson v Davenport (1829) 9 B. & C. 79, 86; Sims v Bond (1833) 5 B. & Ad. 389, 393; Moto Vespa S.A. v Mat (Britannia Express) Ltd. [1979] 1 Lloyd's Rep. 175, 179.


42. See Lysaght Bros. & Co. Ltd. v Falk (1905) 2 C.L.R. 421, 430 where the third party had actual notice. See also Overbrooke Estates Ltd. v Glencombe Properties Ltd. [1974] 1 W.L.R. 1335, 1341; Cf. Mendelssohn v Normand Ltd. [1970] 1 Q.B. 177, 182.

It is submitted that, notwithstanding dicta to the effect that neither "constructive notice" - see Manchester Trust v Furness [1895] 2 Q.B. 539, 545 - nor "presumed notice" - see Eagle Star Insurance Co. Ltd. v Spratt [1971] 2 Lloyd's Rep. 116, 128 - applies to commercial transactions, in such transactions it is, as in any type of transaction, a case of objectivity interpreting what interpretation one person is to put on the words and conduct of another, looked at in the light of the facts and circumstances surrounding the transaction - see Re Funduk and Horncastle (1973) 39 D.L.R. (3d) 94.


46. Should have known or have been put on enquiry; See Midland Bank Ltd. v Reckitt [1933] A.C. 1, 17-18; Canadian Laboratory Supplies Ltd. v Engelhard Industries of Canada Ltd. (1979) 97 D.L.R. 1, 10 and 17; A.L. Underwood Ltd. v Bank of Liverpool [1924] 1 K.B. 775, 788; Houghton and Company v Nothard, Lowe and Willis Ltd. [1927] 1 K.B. 246, 260; Hazlewood v West Coast Securities Ltd. (1974) 49 D.L.R.


48. See, for example, Harmer v Armstrong [1934] 1 Ch. 65.

49. See, for example, section 56(1) of the Law of Property Act, 1925 (UK) and section 7(1) of the Powers of Attorney Act, 1971 (UK).

50. Payment by the Participants - Kymer v Suwercropp (1807) 1 Camp. 109, 112; Waring v Favenck (1807) 1 Camp. 85, 87; Heald v Kenworthy (1855) 10 Ex. 739, 745, 746-747 and 747; Irvine & Co. v Watson & Sons (1880) 5 Q.B.D. 414, 416, 418-419 and 419.

Payment by the third party - See Monday v Williams (1905) 3 C.L.R. 1, 9, where the Operator is not authorised by the Participants to receive payment.

51. Robinson v Read (1829) 9 B. & C. 449, 454; Wyatt v The Marquis of Hertford (1802) 3 East 147, 148; Hopkins v Ware (1869) L.R. 4 Exch. 268; Davison v Donaldson (1882) 9 Q.B.D. 623; Heald v Kenworthy (1855) 10 Ex. 739, 746; Irvine & Co. v Watson & Sons (1872) L.R. 7 Q.B. 598, 609-610; Macfarlane v Giannacopulo (1858) 3 H. & N. 860, 865; Horsfall v Fauntleroy (1830) 10 B. & C. 755, 759; Smyth v Anderson (1849) 7 C.B. 21, 40-42.


54. Linck, Moeller & Co. v Jameson & Co. (1885) 2 T.L.R. 206; Crossley v Magniac [1893] 1 Ch, 594, 599.

55. Hudson v Granger (1821) 5 B. & Ad. 27, 31-32.


57. See the consideration and criticism of the doctrine of election by Reynolds "Election Distributed" (1870) 86 L.Q.R. 318.


61. Clarkson Booker Ltd. v Adjel [1964] 2 Q.B. 775, 792-793. See the discussion in Reynolds, Bowstead on Agency: 15th ed. (1985) pp. 349-352 and by Reynolds "Election Distributed" (1970) 86 L.Q.R. 318, 331-333 and the criticism of what are often cited as the leading cases on the doctrine of election — for example, Paterson v Gandassequii (1812) 15 East 62; Addison v Gandassequii (1812) 4 Taunt. 574; Calder v Dobell (1871) L.R. 6 C.P. 486, 491-492. See also Curtis v Williamson (1874) L.R. 10 Q.B. 57, 59; Pyxis Special Shipping Co. Ltd. v Drittas & Kaglis Bros. Ltd. (The 'Scaplake') [1978] 2 Lloyd's Rep. 380, 385. If the third party were to commence proceedings but not proceed to a final judgement. Whether an election will have been made by the third party and thereby barring it from proceeding against the other would appear to depend on whether the Operator has been prejudiced thereby — that is, move upon a notion of estoppel rather than actual election. See Scarf v Jardine (1882) 7 App. Cas. 345, 353-354, 361-362 and 364-365; Pyxis Special Shipping Co. Ltd. v Drittas & Kaglis Bros. Ltd. (The 'Scaplake') [1978] 2 Lloyd's Rep. 380, 385; Clarkson Booker Ltd. v Andjel [1964] 3 All E.R. 260, 266 and 267-268; Curtis v Williamson (1874) L.R. 10 Q.B. 57, 59-61; United Australia Ltd. v Barclays Bank Ltd. [1941] A.C. 1, 30. See Reynolds Bowstead on Agency: 15th ed. (1985) pp. 350-351.


64. Mullens v Miller (1882) 22 Ch. D. 194, 199-200; Raphael v Goodman (1838) 8 A. & E. 565, 570-571; Foster v Green (1862) 7 H. & N. 881, 884.


69. See for example the principle in Hedley Byrne & Co. Ltd. v Heller & Partners Ltd. [1964] A.C. 465. Note also section 2(1) of the Misrepresentation Act, 1967 (U.K.), where liability could attach despite the absence of fraud where the Participants would be liable for negligence had the representation been made fraudulently.


83. Calder v Dobell (1871) L.R. 6 C.P. 486 496.


86. Lewis v Parker (1852) 18 Q.B. 503, 511-512; Paquin Ltd. v Beauclerk [1906] A.C. 148.

87. The implied warranty of authority is discussed elsewhere in this thesis.

88. Carr v Jackson (1852) 7 Ex. 382, 385.


This situation has changed as a result of the Companies Act 1985 (UK). See Phonogram Ltd. v Lane [1981] 3 All E.R. 182.


94. See the discussion above on the capacity of agents. Contra Commonwealth Trust Co. v Dewitt (1973) 40 D.L.R. (3d) 113.

95. See the discussion above on the doctrine of election. See also Addison v Gandassequi (1812) 4 Taunt. 574.


The judgement must be a final judgement and not one that in accordance with the rules of some court is otherwise; for example, a

If the third party were to commence proceedings but not proceed to a final judgement. Whether an election will have been made by the third party and thereby barring it from proceeding against the other would appear to depend on whether the Operator has been prejudiced thereby - that is, move upon a notion of estoppel rather than actual election. See Scarf v Jardine (1882) 7 App. Cas. 345, 353-354, 361-362 and 364-365; Pyxis Special Shipping Co. Ltd. v Dritsa & Kaglis Bros. Ltd. (The 'Scaplake') [1978] 2 Lloyd's Rep. 380, 385; Clarkson Booker Ltd. v Andjel [1964] 3 All E.R. 260, 266 and 267-268; Curtis v Williamson (1874) L.R. 10 Q.B. 57, 59-61; United Australia Ltd. v Barclays Bank Ltd. [1941] A.C. 1, 30. See Reynolds Bowstead on Agency: 15th ed. (1985) pp. 350-351.

98. Polhill v Walter (1832) 3 B. & Ad. 114, 124.


103. Halbot v Lens [1901] 1 Ch. 344, 350-351.


105. Cooke v Wilson (1856) 1 C.B.N.S. 153, 162 and 164-165; Short v Spackman (1831) 2 B. & Ad. 962, 965 and 965-966.


113. (1848) 12 Q.B. 310.

114. Formby Brothers v Formby (1910) 102 L.T. 116, 117.

115. Formby Brothers v Formby (1910) 102 L.T. 116, 117, 117-118; Redebiaktiebolaget Argonaut v Han [1918] 2 K.B. 247, 249 (See the


120. Humble v Hunter (1848) 12 Q.B. 310, 315, 316 and 317.

121. Formby Brothers v Formby (1910) 102 L.T. 116, 117 and 118.


132. Fridman The Law of Agency: 5th ed. (1983), p. 230 doubts the authority of Armstrong v Stokes (1872) L.R. 7 Q.B. 598 today. In contrast, such a proposition is questioned by Reynolds, Bowstead on Agency 15th ed. (1985), pp. 338-339 where it is suggested that a settlement by the Participants of their account with the Operator before the third party discovers that the Participants are the undisclosed principals of the Operator will discharge the Participants' liability to the third party - relying on the judgement of Blackburn J. in Armstrong v Stokes (1872) L.R. 7 Q.B. 598, 609-610 and the fact that only Branwell L.J. in Irvine & Co. v Watson & Sons (1880) 5 Q.B.D. 414, 417-418 doubted whether the position of an undisclosed principal was different to that of a disclosed principal. This was contrasted with what was said by Baggally L.J. at p. 419 and Brett L.J. at p. 421. See also the discussion above in relation to election.

133. Marginson v Ian Potter & Co. (1976) 136 C.L.R. 161, 169; Priestly v Fernie (1863) 3 H. & C. 977, 983-984; Kendall v Hamilton (1879) 4 App. Cas. 504, 514-515; Petersen v Moloney (1951) 84 C.L.R. 91, 102-104. The judgement must be a final judgement and not one that in accordance with the rules of some court is otherwise; for example, a judgement in default of appearance. See Morgan v Lifetime Building Supplies Ltd. (1967) 61 D.L.R. (2d) 178. Further where the judgement is set aside it would appear that the bar to another action


136. Mullens v Miller (1882) 22 Ch. D. 194, 199-200; Raphael v Goodman (1838) 8 A. & E. 565, 571-571, Foster v Green (1862) 7 H. & N. 881, 884.


140. Mullens v Miller (1882) 22 Ch. D. 194, 199-200; Biggs v Lawrence (1789) 3 T.R. 454, 456-457 and 457.

141. It would appear that the third party must have actual knowledge, not constructive knowledge - Greer v Downs Supply Co. [1927] 2 K.B. 28. Cf. Baring v Corrie (1818) 2 B. & A. 137, 144 and 147; Isaac Cooke & Sons v Esherby (1887) 12 App. Cas. 271, 275-276 and 278.


142. Mannas v Henderson (1801) 1 East 335, 337; Mildred, Goyeneche & Co. v Maspons (1883) 8 App. Cas. 874, 885; Semenza v Brinsley (1865) 18 C.B.N.S. 467, 477-478.
144. Coates v Lewes (1808) 1 Camp. 444, 444-445.

145. It would appear that the third party must have actual knowledge, not constructive knowledge - Greer v Downs Supply Co. [1927] 2 K.B. 28. Cf. Baring v Corrie (1818) 2 B. & A. 137, 144 and 147; Isaac Cooke & Sons v Ezehelby (1887) 12 App. Cas. 271, 275-276 and 278.

146. Maanss v Henderson (1801) 1 East 335, 337; Mildred, Goyeneche & Co. v Mappons (1883) 8 App. Cas. 874, 885; Semenza v Brinsley (1865) 18 C.B.N.S. 467, 477-478.


148. See the discussion above on the capacity of an agent. See also the contrary view in Commonwealth Trust Co. v Dewitt (1973) 40 D.L.R. (3d) 113.


154. Atkyns v Amber (1796) 2 Esp. 493, 495.


a paper delivered at the Lawasia Symposium on Energy Law, Jakarta, Indonesia, at p. 65.


174. Britoil 5.4.5 (i).
175. Britoil 5.4.5 (i).
176. Apea 4.11 (a).
177. Apea 4.11 (b).
178. Apea 4.11.
179. Britoil 5.4.5 (ii).
180. Apea 4.11.
181 Apea 4.11 (a).
182. Apea 4.11 (b).
183. Apea 4.11.
184. Britoil 5.5.
185. Britoil 5.5.
186. Apea 4.10 (1).
187. Apea 4.10 (1) (i).
188. Apea 4.10 (1) (ii).
189. Implied Britoil 5.2.2; Apea 4.10 (m).
190. Britoil 5.6 and Britoil 5.7 (ii); Apea 4.10 (j) and Apea 4.10 (n).
191. Britoil 5.7 (i); Apea 4.10 (k).
192. Britoil 5.7 (i).
193. Britoil 5.7 (ii).
194. Britoil 5.7 (ii); Apea 4.10 (n).
196. Britoil 5.8.1; Apea 4.10 (e).
198. Britoil 5.8.2 (i); Apea 4.10 (k).
199. Britoil 5.8.2 (ii); Apea 4.10 (k).
200. Britoil 5.8.2 (i) and 5.8.2 (ii).
201. Britoil 5.8.2 (i).
202. Britoil 5.8.2 (i).
203. Britoil 5.9.2; Apea 4.12 (c).
204. Britoil 5.9.2.
205. Britoil 5.9.2; Apea 4.12 (c).
206. Britoil 5.9.2; Apea 4.12 (f) (ii).
207. Britoil 5.9.2; Apea 4.12 (f) (iii).
208. Britoil 5.9.2; Apea 4.12.
209. Britoil 5.10.1.
210. Britoil 6.3.1; Apea 4.10 (c).
211. Britoil 6.3.1.
212. Britoil 6.3.2.
213. Apea 4.10 (d).
214. Britoil 7.1.1 (i); Apea 14.6. See also the definition of required insurance at Apea 1.1 (ii).
215. Britoil 7.1.1 (i); Apea 14.1. See also the definition of determined insurance at Apea 1.1(f).
216. Britoil 7.1.1 (ii).
217. Britoil 7.1.1 (i); Apea 14.2.
218. Britoil 7.1.1 (i) (a); Apea 14.2 (a).
219. Britoil 7.1.1 (i) (b); Apea 14.2 (b).
220. Britoil 7.1.1 (i) (c); Apea 14.2 (c).
221. Britoil 7.1.1 (i) (c); Apea 14.2 (c).
222. Britoil 7.1.1 (i) (c); Apea 14.2 (d).
223. Apea 14.2 (d).
224. Apea 14.2 (e).
226. Britoil 7.1.1 (ii) (a); Apea 14.3 (a).
228. Apea 14.3 (a).
229. Britoil 7.1.1 (ii) (b); Apea 14.3 (b).
230. Britoil 7.1.1 (ii) (c); Apea 14.3 (c).
231. Britoil 7.1.3; Apea 14.5.
232. Britoil 7.1.3; Apea 14.5.
233. Apea 14.5.
234. Britoil 7.1.3 (i).
235. Britoil 7.1.3 (ii); Apea 14.5.
236. Apea 14.5.
237. See the general discussion in Arnold Britain's Oil (1978) pp. 27-29.
238. Britoil 7.2.1.
239. Britoil 7.3.1 (a).
241. Britoil 7.3.2; Apea 4.13.
242. Apea 4.13. See also Britoil 7.3.2 (a) (i) and Britoil 7.3.2 (a) (ii).
243. Britoil 7.3.2 (b); Apea 4.13.
244. Britoil 7.3.2 (b).
246. Britoil 7.3.4; Apea 4.13.
248. Britoil 8.9.1; Apea 6.4.
249. Britoil 9.1.1; Apea 6.1 (Operating Committee).
250. Apea 6.2.
251. Britoil 9.1.1 (i).
252. Britoil 9.4; Apea 6.1, 6.2, 6.3 and 6.4.
257. Britoil 9.4; Apea 6.4.
258. Apea 6.7.
263. Apea 6.5.
265. Apea 4.12 (a).
266. Apea 4.12 (f) (i).
267. Apea 4.12 (f) (iii).
268. Apea 4.12 (d).
269. Apea 4.12 (b).
270. Apea 4.12 (f) (iii).
271. Britoil 9.3 and 12.3.
274. Britoil Sect. I, 2.2; Apea Sect. I, 3.
275. Britoil Sect. I, 2.3.
278. Britoil Sect. I, 2.3.


293. Britoil Sect. I, 1.2; Apea 4.10 (m).
294. Britoil Sect. I. 1.3.


302. Britoil Sect. I, 2.7 (a); Apea Sect. I, 3, but in such manner as the Operating Committee shall determine.

303. Britoil Sect. I, 2.7 (b); Apea I, 3.


313. Britoil Sect. I, 4.1, 4.2, 4.3 and 4.4.


315. See Ashton "Joint Venture Accounting - Problem Areas" (1985) First Annual UK Oil and Gas Accounting Conference 19, 39-40.


323. Britoil Sect. I, 6.3.


328. Britoil Sect. II; Apea Sect. II. see also Britoil Sect. II, 13; Apea Sect. II, 12.


331. Britoil Sect. II, 2.1, 2.2. and 2.3; Apea Sect. II, 2 (b).


333. Ashton "Joint Venture Accounting - Problem Areas" (1985) First Annual UK Oil and Gas Accounting Conference 19, 30.

334. Britoil Sect. II, 3.2, 3.3., 3.4, 3.5 and 3.6; Apea Sect. II, 11 (b).


337. Britoil Sect. II, 5.2; Apea Sect. II, 3 and Sect. III.

338. Britoil Sect. II, 5.3; Apea Sect. II, 3 and Sect. III.

339. Britoil Sect. II, 6; Apea Sect. II, 4 (a), 4 (b) and 4 (c).


342. Britoil Sect. II, 7.2; Apea Sect. II, 5(b) and 5(c).

343. Britoil Sect. II, 7.2.1. and 7.2.2; Apea Sect. II, 5(a), 5(b) and 5(c).


348. Britoil Sect. II, 11.2; Apea Sect. II, 7 (c).
351. Britoil Sect. III, 1(i), 2 and 3.
352. Britoil Sect. III, 1 (ii) and 4.
354. Britoil Sect. III, 1; Apea Sect. II, 7 (b) and 7 (c).
356. Britoil Sect. III. 1 (vi) and 5.
357. Britoil 17.1 (ii).
360. The Overend & Gurney Company v Gibb (1872) L.R. 5 H.L. 480.
365. Britoil 5.2.2. Good oil field practice is said to be all those practices which are generally accepted in the Industry as good, safe, economical and efficient in exploring for and exploiting petroleum. See Blinn et. al. International Petroleum Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects (1986), 37.

366. Apea 4.10 (a).


368. Britoil 5.2.2.

369. The Overend & Gurney Company v Gibb (1872) L.R. 5 H.L. 480.


371. Hart v John Frame, Son and Co. (1839) 6 Ch. & Fin. 193.


373. Moore v Mourgue (1776) 2 Camp. 479; Smith v Cologen (1786) 2 T.L.R. 188n; East India Co. v Henchman (1791) 1 Ves. Jun. 287; Miles v Bernard (1795) Peake Add. Cas. 61; Dyas v Cruise (1845) 2 Jo. & La. T. 460; Guratkine v Campbell (1854) 1 Jur. (N.S.) 131; The Lady Worsley (1855) 2 Ecc. & Ad. 253; Lagunas Nitrate v Laginas Syndicate [1899] 2 Ch. 392; Morten v Hilton, Gibbs & Smith (1908) [1937] 2 KB 176n (H.L.); Gokal Chand-Jagan Nath v Nand Rom Das-Atma Ram [1939] A.C. 106; Sampson v Frazier Jelke & Co. (1937) 2 K.B. 170; Stafford v Conti Commodity Services Limited [1981] 1 All E.R. 691.


379. Proudfoot v Montefiore (1867) L.R. 2 Q.B. 511.


384. Britoil 5.2.3.; Apea 4.14, 4.15, 4.16 and 4.17.


386. Apea 4.14, 4.15, 4.16 and 4.17.


391. Britoil 27 (xxxix) (a).

392. Britoil 27 (xxxix) (b).
393. Britoil 27 (xxxix).
394. Apea 1.1 (pp).
396. Ex parte Davies. in Re Sadler See (1881) 19 Ch. D. 86.
CHAPTER XVII

THE FIDUCIARY DUTIES THAT ARISE FROM THE RELATIONSHIP BETWEEN THE OPERATOR AND THE PARTICIPANTS

1. INTRODUCTION

The contractual provisions governing the relationship between the Operator and the Participants have been outlined. However, such provisions do not encompass the entire legal realm of the relationship between the Operator and the Participants. The relationship is in such circumstances governed, not only by the contractual terms of the Joint Operating Agreement, but also by implied terms arising as a matter of law from the circumstances surrounding the relationship itself. It is proposed to consider some of these implied terms by dealing first with the concept of fiduciary obligations and then with the concept of agency, in each case looking at the relationship of the Operator and the Participants. It is not suggested that the two concepts are independent of one another. It will become apparent that the two do overlap in some areas.

2. FIDUCIARY OBLIGATIONS

2.1 Introduction

In the context of joint ventures utilised in the Industry a question is often raised as to whether the relationship between the Operator and the Participants is a fiduciary relationship\(^1\). The approach to be taken to the issue of whether a relationship is a fiduciary one has been discussed above in this thesis. It is not prepared to repeat the discussion here. It is submitted that, applying that approach, the question it to be answered by looking at the rules applicable to a person in a fiduciary position and seeing if one or more of the rules apply to the person under consideration: in this case, the Operator\(^2\). If a particular rule does or particular rules do apply to the Operator then the Operator, because one or more of the particular rules apply to it as Operator, comes under fiduciary obligations in relation to the activity or
activities to which the applicable rule or rules relate.

However, just because the Operator is under a fiduciary obligation vis-a-vis the Participants in relation to a particular activity it does not automatically follow that the Operator is under a fiduciary obligation in relation to all activities or some other activity that it undertakes vis-a-vis the Participants. It is only where a particular rule applies to the particular activity being undertaken by the Operator that a fiduciary obligation arises in relation to the conduct of that activity. An activity over which a fiduciary obligation will extend is determined by the character of the activity for which the relationship between the Participants and the Operator exists. The character of the activity is determined by considering the terms of the Joint Operating Agreement and the course of dealings actually pursued by the Operator and the Participants. This does not mean that the Operator cannot find itself under more than one fiduciary obligation in respect of the same activity that it is undertaking: it can.

The fact that the relationship between the Operator and the Participants may be held to be that of agent and principal, does not give rise to fiduciary obligations by the Operator. It is a question of the fiduciary obligations flowing from what the Operator is doing for, has agreed to do for, the Participants.

As has been pointed out above in this thesis it is often possible, with meticulous drafting of the Joint Operating Agreement, for the Operator and the Participants to avoid the imposition of the rules of equity which give rise to fiduciary obligations.

The written Joint Operating Agreement regulates the basic rights and duties of the Operator and the Participants. If a fiduciary obligation is to be imposed on the Operator the obligation "must accommodate itself to the terms of the contract so that it is constant with and conforms to, them." The courts will not superimpose upon a Joint Operating Agreement a fiduciary obligation upon the Operator which will alter the operation which the Joint Operating Agreement was intended to have. If there is to be a fiduciary obligation, it must accommodate itself to the
relationship between the Operator and the Participants created by the Joint Operating Agreement.

The notion of excluding the rules of equity which give rise to fiduciary obligations is often tied in with the reluctance of courts to impose equitable doctrines on commercial transactions. The question as to whether a person who is a participant to a commercial transaction can be placed under a fiduciary obligation in relation to another participant to the same transaction where the transaction has been negotiated by the participant at arms length and on an equal footing has been discussed above in this thesis. It is not proposed to repeat the discussions here. The matters discussed apply likewise to the relationship between the Operator and the Participants.

2.2 Duties of Good Faith

Where the Operator acts for, or on behalf of, or in the interest of, or with the confidence of the Participants, the Operator will come under fiduciary obligations and equity will impose certain duties of good faith upon the Operator. The duties of good faith are designed to ensure that a position of trust, or confidence, or influence, held by the Operator is not abused. As has been pointed out above, in this thesis it is proposed to address only duties of good faith that in normal circumstances would apply to the relationship between the Operator and the Participants, viz:

(i) the misuse of property held in a fiduciary capacity;

(ii) the misuse of information derived in confidence;

(iii) the purchase of property dealt with in a position of a confidential character; and

(iv) conflict of duty and interest.

This is not to suggest that the duties of good faith that are not addressed will not or cannot apply to the relationship between the
Operator and the Participants - given the right circumstances equity will impose the relevant duty of good faith.

2.3 Remedies for Breach of Duty or Good Faith

It is not proposed in this thesis to discuss in any detail the remedies that would be available to the Participants should the Operator act in breach of a duty of good faith. The remedies are adequately dealt with elsewhere. Where it is considered necessary mention will be made in general terms of the remedies available to the Participants. This thesis is more concerned with the standard of conduct required of the Operator than with the effect of default in attaining that standard.

3. THE MISUSE BY THE OPERATOR OF PROPERTY HELD IN A FIDUCIARY CAPACITY.

It is the norm for the Operator to be required by the Joint Operating Agreement to take possession, control or ownership of property of the Participants. Examples of this abound in Joint Operating Agreements, such as where an Operator who has resigned or has been removed is deemed to hold the rights in contracts it has entered into exclusively for the purpose of implementing and giving effect to the terms and purpose of the Joint Operating Agreement until the date of assignment thereof to the new Operator "to the account and to the order" of the new Operator, the requirement for an inventory of the property of the Participants held by the Operator to be undertaken on the transition from the outgoing Operator to the new Operator, and the requirement that the Operator not charge the property of the Participants held by or under its control. In some cases the requirement may go so far as the Operator taking possession, control or ownership of the petroleum title. In such circumstances, in the absence of a provision in the Joint Operating Agreement allowing the Operator to use the property of the Participants for its own benefit, equity will impose a duty of good faith on the Operator not to misuse that property. The Operator comes under a fiduciary obligation to the Participants in relation to their property. The Operator receives the property in trust and confidence and not in any right of its own.
Were the Operator to act so as to breach this duty of good faith in dealing with the property for its own benefit the Operator would have to restore the property and account to the Participants for any gain it made.\(^2\)

This duty of good faith and the remedy for breach thereof finds its roots in the law of trusts.\(^2\) Throughout the decisions the courts have maintained a strong analogy with the law of trusts.\(^2\) This is illustrated by the courts referring to a person, who in such circumstances is a fiduciary, as a constructive trustee of the property.\(^2\)

In considering of this duty of good faith it is proposed to deal first with the position where the property of the Participants consists of property other than money and then with the position where the property of the Participants consists of money. This approach is adopted as it would appear the courts have made a distinction of this nature in their approach to the duty.

Before proceeding to discuss the two positions it should be pointed out once more that it is always open to the Participants and the Operator to expressly provide in the Joint Operating Agreement for the displacement or modification of the general principles and rules discussed in this thesis in relation to the various duties of good faith.

3.1 Property Other than Money

In so far as the property of the Participants that the Operator has been given possession, control or ownership of is other than money the general rule that the Operator must not misuse the property applies to the Operator unless a right to use or deal with the property in some way for its own benefit is granted or conferred either:

(i) by some statute, instrument or agreement under which the Operator holds the property; or

(ii) by some independent right that does not arise by statute,
instrument or agreement under which the Operator holds the property.²⁷

It is submitted that it would be a very rare occasion indeed where a right to use or deal with property of the Participants for its own benefit would be granted or conferred on the Operator by statute, instrument or agreement and, in particular, by the Joint Operating Agreement²⁸. It is further submitted that most joint ventures as utilised in the Industry would not give rise to the type of independent right mentioned above.

Were the Operator to mix the property of the Participants that it had possession, control or ownership of with property of its own, the burden would fall upon the Operator to show which property was its own and to identify the property held on behalf of the Participants²⁹. This is because the Operator, as a fiduciary, would have a duty to distinguish the property held on behalf of the Participants from that which was its own³⁰. The Operator would have a duty not to confuse its own property with that which is subject to its fiduciary obligations³¹.

3.2 Money

Of more relevance to the joint venture utilised in the Industry is the position where the Operator is given possession, control or ownership of money with no rights to use it for its own benefit. This is what occurs under most Joint Operating Agreements. The Operator receives from the Participants money by way of cash calls and also receives from third parties money on the sale of property of the Participants, the proceeds from insurance claims made on behalf of the Participants and interest paid on advances paid by the Participants on cash calls.

It would be very rare for the Joint Operating Agreement to grant to the Operator the right, limited or otherwise, to use money received by it in the circumstances mentioned above for its own benefit³².

However, whether the Operator is under a fiduciary obligation to the Participants in relation to money it receives will depend largely upon the precise legal relationship between the Operator and the Participants and
upon the type of transaction in which the money is received by the Operator.

The importance of the status of the money received by the Operator, which reflects whether the Operator is under such a fiduciary obligation, is to be found in the effect of the Operator becoming bankruptcy or being wound up, as the case may be. Such an event would trigger the mechanism which allows the Operating Committee to resolve to remove the Operator. If the money is held by the Operator on trust for the Participants so that the fiduciary obligations discussed below apply, the money can be recovered by the Participants in specie, to the extent that the money is traceable, and transferred to the new Operator on transition.

The effect of the Operator being under a fiduciary obligation to the Participants in relation to money received is that the Operator must keep the money separate from its own. The Operator must maintain a trust account in respect of the money. The money will not, as a general rule, be available to the Operator's creditors in its bankruptcy or winding up.

The starting point in determination whether the Operator is under a fiduciary obligation to the Participants in relation to money received by it is to recognise that where the Operator receives money from:

(i) the Participants to use for the Participant's benefit, such as where a cash call is made in respect of a particular event and the Participants advance the amount of the call;

(ii) the Participants to hold pending a particular event, such as where a cash call is made in respect of a particular event and the Participants advance the amount called; or

(iii) a third party for or on account of the Participants, such as where the Operator exercises its right to dispose of any property of the Participants that it considers to be no longer needed or suitable for the requirements of the Operations, or exercises its
obligation to dispose of property of the Participants at the
direction of the Operating Committee or as required under the
petroleum title or any Act, regulation or by-law once a decision to
abandon the whole or part of the Operations is made43, or where the
proceeds of insurance claims44 or interest on advances paid by the
Participants on a cash call45 is received by the Operator,

the Operator could be held to be under a fiduciary obligation to the
Participants in relation to the money. Such circumstances are certainly
useful indications that the Operator is under a fiduciary obligation to
the Participants in relation to the money received. But it is suggested
that the courts will, having determined the facts leading to the
Operator's receipt of the money, also seek to establish what type of
relationship the Operator and the Participants intended to create between
themselves in relation to the money received by the Operator46. The
courts will endeavour to establish whether the relationship was to be that
of debt or contractual obligation only or whether it was to be that of
trustee and beneficiary as well47.

Naturally, where the Operator and the Participants expressly intended
their relationship to be one of trust the courts will recognise that
intention.

However, where there is no such expression of intent the courts may
impose the relationship of trustee and beneficiary where the imposition of
such would not be inconsistent or incompatible with the relationship that
the Operator and the Participants have in fact established by the Joint
Operating Agreement or their dealings48. In determining whether the
relationship of trustee and beneficiary should be imposed the courts have
tended to apply a number of criteria:—

(i) if, when considering the Joint Operating Agreement or dealings
of the Operator and the Participants as a whole49, the manifest
intention of the Operator and the Participants is that money received
be kept separate from those of the Operator50, there is strong
evidence of trust. The Joint Operating Agreement will usually
require the Operator to open and maintain separate bank accounts in
respect of money received$^{52}$ and to deposit and keep the money of
the Participants for the purpose of the Operations in the
accounts$^{53}$. The direction to the Operator that excess funds may be
invested for the benefit of the Participants$^{54}$ by implication
removes any right of the Operator to use the money for its own
benefit in the absence of an express provision to the contrary.

If, however, there is no such manifest intention of the
Operator and the Participants that the money received be kept
separate from those of the Operator the courts have tended to look to
see whether there are other indica of a trusteeship present in the
relationship between the Operator and the Participants$^{55}$. For
example, the court will ask such questions which relate to the
compatibility of the existence or not of the relationship of trustee
and beneficiary between the Operator and the Participants as:-

(a) is the Operator the agent of the Participants to receive
the money from a single transaction of the Participants$^{56}$?

(b) is the money the proceeds of a sale of property owned by
the Participants$^{57}$?

(c) is the account that is kept by the Operator only
consistent with a pure relationship of debtor and creditor$^{58}$?

(d) are the Operator and the Participants "commercial men"
who would want a trust to be introduced into their ordinary
business dealings$^{59}$?

(e) has the Operator, by its own unilateral act, constituted
itself to be the express trustee of the money received$^{60}$; and

(f) is the use, if any, which the Operator is intended to
have of the money inconsistent with the Operator being obliged
to keep the money separate from that of its own$^{61}$?
The mere fact that the Operator banks money that it receives which would not ordinarily be trust money in a separate bank account does not thereby make the money trust money unless the Operator by its own unilateral act has constituted itself to be the express trustee of money received.

It is possible for the Operator and the Participants to agree that money received by the Operator which would in the normal course of events be required to be kept separate not be kept separate from the Operator’s own account. Such agreement may expressly allow the mixing of funds or this may be implied where the Operator has, in the course of past dealings with the Participants, adopted such a practice to the knowledge of and without objection thereto by the Participants;

(ii) where the Participants entrust their property to the Operator to be sold the general rule is that the property remains that of the Participants until sale and, after the sale, the proceeds of the sale becomes that of the Participants. At law the relationship between the Operator and the Participants would be that of debtor and creditor. In equity the principles of beneficial ownership of the property sold would give to the Participants a prima facie equitable interest in the proceeds of the sale.

In such circumstances the courts would be more willing to impose a trust in relation to the proceeds of sale where a single transaction is involved.

If, rather than a single transaction being involved, there was, in such circumstances, an ongoing series of transactions involved the courts may be more readily prepared to displace the trust. Two separate situations would need to be considered:

(a) where the Operator and the Participants effect settlement after each individual transaction or after each group of related transactions, the courts would be more disposed to hold...
that the proceeds are trust money; and

(b) where a running account is kept by the Operator, with periodic settlement, say monthly, the nature of the account will be the principle factor in determining whether the relationship is one of trust or one of debt;

(iii) the courts are reluctant to impose a trust on a relationship such as that between the Operator and the Participants where an ordinary commercial transaction is involved, particularly if to do so would interfere with an accepted and well understood business practice in the field of endeavour pursued by the recipient of the money: in this case, the Operator.

Where the relationship of principal and agent is constituted by businessmen such as the Operator and the Participants, the court will infer, especially where ongoing dealings are concerned, that the Operator and the Participants intended that their financial dealings be settled on a debtor and creditor basis. In most cases of this type the nature of the account kept by the Operator will be conclusive of the debtor and creditor relationship only;

(iv) the nature of the account kept between the Operator and the Participants will, as has been mentioned above, often be the most compelling indicator of their intention. If there is an ongoing series of transactions involved and they effect settlement after each individual transaction or after each group of related transactions, the court will usually view this as a trust situation. However, where the Operator keeps a running account which is periodically settled by paying the balance (if any) to the Participants then the court will be disposed to view the relationship as that of debtor and creditor; and

(v) where the Participants put the Operator in funds, or provides security as a precondition for the performance of a contractual obligation or the entering into of a contract, the question of whether, until the contingency occurs for which the money
is paid to the Operator, the Operator holds those funds as trustee, debtor or contractual obligee arises. It would appear that the court addresses the question by asking:

(a) is the fund provided as a specific fund either to be held pending a particular event or to be used in a specific way; or

(b) is the fund provided or a payment made on the strength of a personal obligation assumed by the Operator to do a particular act76.

The question is usually answered by considering the terms, express and implied, of the Joint Operating Agreement under which the payment is made and the obligations assumed by the Operator because of the payment. A consideration of the usual terms of Joint Operating Agreements and in particular the provisions relating to budgets, programmes, cash calls and the accounting procedure leaves no doubt that the money received by the Operator is received as a specific fund either to be held pending a particular event or to be used in a specific way77.

The general rule is that, save where a single transaction is involved, a trust will be imposed because the relationship between the Participants and the Operator in relation to the fund will be that of principal and agent78.

Where the money is a prepayment as a form of security the question that is asked is whether the Participants and the Operator have manifested an intention that the Operator is to have the benefit of the money until either its return or use to meet the event secured against, or, whether the money must be kept in a separate account79? As has been indicated above, in most cases the Joint Operating Agreement will not grant to the Operator the right to the use of the money in any circumstances. It is clear that such money must be kept in a separate account.

If the Operator and the Participants agree that interest shall be paid by the Operator on a sum deposited with the Operator the general position is that it will be held to be a debt80. If, however, the sum
is separately banked the general position is that it will be held on trust. Otherwise it is a matter of the reasonable inference to be drawn in the circumstances.

4. THE OPERATOR'S DUTY OF CONFIDENCE

It is not proposed to consider in detail the duty of confidence owed by the Operator to the Participants. This is because the duty of confidence owed by a Participant to the other Participants or the Operator has already been discussed in some detail above. That discussion of the duty of confidence applies equally to the Operator as a Participant. All that will be considered in relation to the duty of confidence owed by the Operator to the Participants are three matters that were not discussed above.

If the relationship of the Participants and Operator is seen to be a relationship of principal and agent, the courts will be predisposed to holding a duty of confidence to exist notwithstanding the absence of an express provision in the Joint Operating Agreement.

4.1 The Duty of Confidence and Employees of the Operator

In the exercise of its rights and duties the Operator must, as a matter of expedience, if nothing else, engage employees to undertake various tasks. Recognition of this fact is found in the provisions in the Joint Operating Agreements relating to the Operator engaging employees of the Operator and also of the Participants as well as in the accounting procedure. In the course of their employment the employees are often granted access, directly or indirectly, to information of a confidential nature belonging to the Participants or the Operator. It is therefore necessary to consider the relationship of employer and employee established between the Operator and its employees in the context of this discussion of the duty of confidence.

Where the Operator and employee enter into a contract of employment the obligations of the employee will be determined by considering the terms of the contract of employment. In the absence of any express
term in the contract of employment the duties of the employee in respect of the use and disclosure of information are the subject of implied terms. It is the situation where the contract of employment does not contain express terms that is of concern here.

As a general rule the relationship of employer and employee is nearly always considered to be a fiduciary relationship giving rise to a duty of confidence, albeit in varying degrees depending upon the exact nature of the relationship. The duty of confidence will only protect the Operator from the misuse by its employees of information which is in itself confidential. It will not protect the Participant from the misuse by the Operator's employees of information which is in itself confidential. The quality of confidentiality has been discussed above. The same principles apply to the relationship between the Operator and its employees.

During the continuance of the employment relationship the employee is under a duty to serve the Operator with good faith and fidelity and the courts will imply such a term into the employment relationship. The extent of the duty will vary according to the nature of the contract of employment. This duty to serve the Operator with good faith and fidelity may cover information that is not in itself intrinsically confidential, and as such where the information is not confidential, as a general rule, the duty will not continue to bind the employee following the termination of his employment. Therefore, notwithstanding that the information is not confidential, any information which is:

(i) disclosed by the Operator to an employee only so that it may be used by the employee exclusively for the Operator's benefit so long as the employment relationship subsists; or

(ii) information which would assist a competitor or potential competitor to compete with the Operator's business or make inroads into that business;

may be protected by the duty of confidence imposed on the employee.
However the Operator cannot restrain an employee from using (as opposed to selling to a third party) skills or knowledge acquired in the course of his employment, despite the fact that they may have been considered to be "confidential" by the Operator during the course of employment with the result that the misuse thereof would have been a breach of the duty of good faith once the employment relationship has ceased to subsist unless the information is confidential. Where the information is confidential and is disclosed by the Operator to an employee for a particular purpose there is little difficulty implying a duty of confidence both during the continuance of the employment relationship and after it has ceased to subsist. Then it is suggested that the duty of confidence lasts for as long as the information remains confidential. To determine whether the information warrants such treatment it was suggested in *Faccenda Chicken Limited v Fowler* that all of the facts and circumstances must be considered and attention paid to such matters as:-

(i) the nature of the employment, in that if the employment is of such a nature that exposure to confidential information is part and parcel of the employment, a higher obligation may be placed on the employee as he will be expected to realise the sensitive nature of the information;

(ii) the nature of the information itself. The information must be of a confidential nature such as a trade secret or the equivalent of a trade secret;

(iii) whether the Operator impressed on the employee the confidentiality of the information. This must be more than merely telling the employee that the information is confidential; and

(iv) whether the information can be easily isolated from other information which the employee was free to use or disclose.
4.2 The Duty of Confidence and Contractors of the Operator

The Joint Operating Agreement will usually grant to the Operator the right to delegate to its agents or contractors the undertaking and discharge of its rights and duties\textsuperscript{101}. In the course of a project a vast amount of the duties to be undertaken by the Operator are contracted out. Recognition of this fact is to be found in the elaborate provisions in Joint Operating Agreements relating to the Operator entering into contracts for the purpose of the Operations\textsuperscript{102}. In the course of contracting out the Operator will be required to disclose certain confidential information to a contractor or a sub-contractor of the contractor for a particular purpose.

In so far as the duty of confidence between the agent or the contractor and the Operator is concerned the general principles discussed above apply. Once it is established that the information has the necessary quality of confidentiality then there is little difficulty applying the duty of confidence\textsuperscript{103}.

However, the more difficult issue is where the confidential information is communicated along a chain of people, such as where a the Operator discloses confidential information to a contractor who then discloses that same information to a third party, such as a sub-contractor to the contractor, with the express or implied consent of the Operator and then that third party does or threatens to misuse the confidential information.

The general position, in the absence of an express provision in the contract between the Operator and the contractor to the contrary, is that if the third party acquired the information while acting as the agent, employee or sub-contractor of the contractor and uses that information after that relationship has been terminated then the Operator would have no recourse against the contractor or the third party for the third party's misconduct\textsuperscript{104}.

This general proposition may be qualified by the knowledge of the third party as to the confidentiality of the information it has received.
from the contractor, particularly if the information was received as a result of the contractor acting in breach of its duty of confidence. It would appear that if the third party had knowledge of the breach of confidentiality by the contractor, that is:

(i) had actual knowledge of the breach\textsuperscript{105};

(ii) had implied knowledge of the breach\textsuperscript{106}; or

(iii) had constructive knowledge of the breach\textsuperscript{107};

then liability will attach to the third party and an action to restrain its use of the confidential information will be available to the Operator\textsuperscript{108}.

Even if the third party had no knowledge of the breach of the duty of confidence by the contractor, it would appear that the third party must cease the misuse of the information received from the contractor once it receives knowledge of the breach\textsuperscript{109}. There are three views on the matter:

(i) that the Operator is entitled to relief against the third party\textsuperscript{110}. This view pays no regard to the manner in which the information is acquired, the price (if any) paid for the information, or the detriment to the third party if it cannot use the information;

(ii) that, where the third party was a bona fide purchaser of the information who purchased it in good faith and without notice of breach, the third party should be free to use and exploit the information even if it subsequently finds that there has been a breach\textsuperscript{111}. The difficulty with this view is that it does not take into account the fact that the damage inflicted upon the Operator may not be as little as the purchase price paid for the information\textsuperscript{112}; and
(iii) the view advanced by Jones\textsuperscript{113} that calls for a balancing of the competing interests of the Operator and the bona fide third party purchaser of information who purchases in good faith and without notice of the breach. This view suggests that the Operator should have a prima facie right to proceed against the third party but the third party should be allowed a defence where it has changed its position to its detriment by acquiring the information. The remedy would require the Operator to reimburse the third party, in such circumstances, its expenditure, with interest, if relief is granted. To date there would appear to be no judicial support for this view\textsuperscript{114}.

Where the third party uses the confidential information whilst that relationship continues then there is no doubt that the contractor can restrain the third party's misconduct. Confidential information given by the contractor to the third party in confidence, irrespective of whether the contractor was the original possessor of the information, attracts unto the third party the duty of confidence to the contractor\textsuperscript{115}.

The contractor can restrain the third party and, if entitled to the use of the information for its own benefit, can recover damages from the third party\textsuperscript{116}.

If the third party profits from the information then it must account to the contractor for the profit. The contractor can also compel the third party to deliver up copies of the information\textsuperscript{117}.

Where the contractor has no right to benefit from the information, as regards the Operator, the contractor must hold any relief it obtains against the third party for the benefit of the Operator\textsuperscript{118}.

Questions that arise out of this discussion are whether the Operator can compel the contractor to act against the third party, or, whether the Operator can act against the third party?

It may be that a court will imply, where there is a contract between the Operator and the contractor, a contractual term to the effect that the
contractor warrants the secrecy of its agents, employees or sub-contractors.

Alternatively, a court might hold that the contractor has entrusted the third party with the contractor's duty of confidence and as such the contractor is answerable to the Operator for the manner in which the third party carries out the duty.\(^{119}\)

Yet another alternative is for a court to hold that if the contractor had acted in breach of its duty of confidence to the Operator in divulging the information to the third party then, since the contractor put the third party in possession, the third party's misuse of the information constitutes a breach of the contractor's duty to the Operator.\(^{120}\)

The situation has arisen where the courts have held that a third party does owe a duty of confidence to a person such as the Operator in respect of confidential information which has proceeded down the chain from, say, the Operator to the contractor and then from the contractor to the third party notwithstanding the lack of contractual relationship between the Operator and the third party.\(^{121}\)

However, the general application of this principle must be open to question. It would seem that the third party would need to know that the information is that of the Operator and the third party would need to have received the information for the purpose of performing itself a service originally commissioned by the Operator, or, the third party would need to have received the confidential information as an assignee from the contractor with full knowledge of the restrictions imposed by the Operator on the contractor's use of the information.\(^{122}\)

4.3 **Information Disclosed in Negotiations**

During the course of the exercise and discharge of its rights and duties the Operator will of necessity have to disclose confidential information to third parties when negotiating with them on contracts which may not eventuate. In the event that confidential information is disclosed and the contract does not eventuate, once it is established that
the information had the necessary quality of confidentiality there is little difficulty applying the duty of confidence\textsuperscript{123}. It would appear that the duty of confidence will extend to protect information disclosed during the period of the negotiations\textsuperscript{124} and after the negotiations have ceased\textsuperscript{125}. This would be particularly so where the Operator had made it clear to the person with whom the negotiations were conducted that the information was disclosed only for the purpose of those negotiations\textsuperscript{126}.

5. PURCHASE OF PROPERTY DEALT WITH IN A POSITION OF CONFIDENCE

In the exercise of its rights and the discharge of its duties the Operator is often in the position where it manages\textsuperscript{127} or disposes\textsuperscript{128} of property belonging to the Participants. This may give rise to a further fiduciary obligation being imposed on the Operator.

Equity will not regard a contract as having been made between independent parties\textsuperscript{129} where the Operator has acted for the Participants in some way in the management or disposition of property and contracts to purchase that property\textsuperscript{130}.

Equity limits the contractual freedom of the Operator who has been in a confidential position. This does not mean that equity absolutely prohibits a purchase in such circumstances by the Operator\textsuperscript{131}, but it does mean that equity will treat such a purchase as a transaction of great delicacy and will watch the transaction with the utmost diligence\textsuperscript{132}.

What the courts will seek to do is to prevent the Operator using information or knowledge acquired about a property as a result of, or in the course of, some confidential dealing with that property for the Participants' benefit for its own advantage in the purchase of that property. The court holds the view that the Participants in such circumstances are entitled to the benefit of the information in any dealing between them and the Operator\textsuperscript{133}.

This approach of equity may be expressly displaced by the terms of the Joint Operating Agreement which could allow the Operator to purchase
in such circumstances. Where this does occur, the terms will be interpreted very strictly.

5.1 The Relationship of Service

This duty of good faith covers situations in which a relationship of service is involved. Where the Operator undertakes for the Participants' benefit to provide some service in relation to their property or financial affairs the duty of good faith applies if the Operator is being relied upon by the Participants to act competently in discharging the service or to protect and or advance the Participants' interest. The duty of good faith will cover the Operator if it is acting as the servant of the Participants, undertakes to act as the servant of the Participants, is employed by the Participants to sell, manage or advise, or has bound itself to apply skill and knowledge for the Participants' benefit.

Not every relationship of service is a confidential one. There must be more than a performing of service. There must be reliance by the other participant upon the provider of the service to act competently and to protect or advance its interest. It is a question of reposing greater trust or confidence in the provider of the service.

There can be little doubt that the Participants do place reliance on the Operator to act competently and to protect or advance their interests. A consideration of the standard of performance expected of the Operator is in itself illustrative of this reliance.

The courts have characterised certain relationships of service as giving rise to this duty of good faith. At least four characterisations arise in the context of this thesis:

(i) where the Operator is empowered to sell, or to manage and sell, property of the Participants for the Participants' benefit;

(ii) where the Operator is empowered to manage property of the Participants for the Participants' benefit;
(iii) where the Operator undertakes to advance the Participants in the management or disposition of their property; and

(iv) where a person is engaged as an agent, or is employed, by the Operator to advise or assist the Operator in the exercise or discharge of its fiduciary obligations. In such circumstances the agent or employee is in a fiduciary position vis-a-vis the other Participants. However, for the duty of good faith to apply it must be shown that the agent or employee had been involved in some significant way with the duties assumed by the Operator in relation to the property. The agent or employee's duty is owed, not to the Operator, but to the Participants. As such any consent to purchase must come from the Participants.

If the Participants sought to invoke the purchase rule they would have to show that a fiduciary relationship existed in relation to the property purchased. It would not be sufficient just to show that the Operator had the opportunity to occupy a fiduciary position. Further the Participants would have to show that the property actually dealt with by the Operator was property in relation to which the Operator was in a fiduciary position.

5.2 Consent and the effect of not having and having it

If, without the consent of the Participants, the Operator purchases property it is dealing or has dealt with in a fiduciary capacity, subject to a number of very minor exceptions, the rule is that the contract is voidable at the suit of the Participants. This rule holds good no matter how fair the sale or the terms of sale may have been.

On avoidance the Participants are entitled, as a general rule, to an account of the profits of the property (but not with interest thereon) or an occupation rent. If the Participants do not elect to avoid the transaction it would appear that they are still entitled to compensation for any loss occasioned. Further, where the Operator has purchased the property and has itself disposed of the
property to a third party who has notice of the Operator's conduct then such transaction is also voidable at the option of the Participants 155.

If the Participants were aware of and consented to the purchase 156 and the transaction was fair the Operator can maintain the purchase. The onus is on the Operator 157 to establish that the transaction was, in effect, at arms length and that the Operator and the Participants were on an equal footing. It will not suffice to show that the Participants were merely aware of the circumstances 158.

To establish that the transaction is a fair one 159 it is necessary for the Operator to prove:-

(i) that it gave full value of the property; and

(ii) that it disclosed to the Participants any and all information it had acquired concerning the value of the property and concerning the contract itself.

The two elements of the test are distinct yet they do tend to overlap each other.

What amounts to full value for the property is to be determined at the time of sale, not when the action is commenced. However, an increase in the value of the property between the time of sale and the time of bringing the action may require the Operator to show that the likelihood of such an increase was not known to it at the time of the sale 160.

What amounts to a full disclosure of all and any information acquired concerning the value of the property and concerning the contract itself will vary from relationship to relationship 161. It would at least require the Operator to disclose all such matters known to it as would probably influence a reasonable man in the Participants' position 162. This would include such information as the Operator deliberately refrains from acquiring, but would not include information that the Operator was not aware of 163.
There is no doubt that the duty to disclose relates to information acquired after the Operator assumed the fiduciary position\textsuperscript{164}. It is less clear about information acquired before assuming the fiduciary position. It is suggested that the better view is that the Operator must apply all such knowledge as it possesses\textsuperscript{165}. The disability on the Operator to purchase continues after it has ceased to hold the fiduciary position. It continues for so long as the reason upon which the fiduciary relationship was founded continues to operate\textsuperscript{166}.

5.3 The Involvement of a Third Party in the Purchase

Some difficulty may arise where the property is first sold to a third party who turns around and on sells the property to the Operator. If it was the intention from the outset to undertake this route then there has been a breach of fiduciary obligation by the Operator\textsuperscript{167}. If, however, there was a bona fide sale to the third party followed by an independent arms length transaction to the Operator, there would have been no such breach\textsuperscript{168}. It is a question of whether the sale and subsequent purchase were genuine and independent transactions.

This general rule providing for the avoidance of contracts of purchase does not apply to contracts, or to pre-emptive rights, which antedate the assumption of the fiduciary position\textsuperscript{169}, nor to the grant of an option to purchase property\textsuperscript{170}.

The Operator could not retire from the fiduciary position with the object of purchasing the property\textsuperscript{171}, although an Operator who retires from a fiduciary position can purchase the property provided it does not use information acquired whilst in the fiduciary position and which has not been disclosed to the Participants\textsuperscript{172}. Further, the rule of avoidance will not necessarily apply where the Operator is technically in a fiduciary position but has no or only insignificant duties in that position in relation to the property purchased\textsuperscript{173}. 
The Operator cannot assist a third party to purchase from the
Participants even if the Operator derives no benefit from the purchase for
itself\textsuperscript{174}. If the Operator purchases the property as agent for a third
party and the third party was aware of the Operator's fiduciary position,
but the Participants were not aware of the agency, then the purchase is
voidable at the Participants' election\textsuperscript{175}. However, if the Participants
were aware of the agency and consented to it, then the Participants can
only have the contract set aside if it can be established that the
Operator and the third party acted in concert to conceal information from
the Participants or to mislead them\textsuperscript{176}.

On the other hand, if the Participants consent to the Operator acting
for both the Participants and a third party in a transaction, then the
Operator must not act to the benefit of either. Should the Operator
favour the third party the Participants will have a remedy against the
Operator for compensation. The compensation will generally be the
difference between the sale price and the real saleable value of the
property at the time of sale\textsuperscript{177}.

Where the Operator sells to a company of its own, a partnership in
which it was a member or a trust in which it had a substantial and
indefeasible vested interest the court would, as a general rule, hold that
the sale was in substance a sale to the Operator itself or one from which
the Operator derived an immediate benefit\textsuperscript{178}. As such the rule of
purchase would be held to apply\textsuperscript{179}. Outside such obvious cases, if in
the circumstances of a particular transaction it can be shown that the
price and terms are fair and proper then notwithstanding that the
Operator's interest in a company or trust is such that it can be
realistically said that it may be benefiting the company or trust for its
own advantage, the court will not intervene\textsuperscript{180}.

6. CONFLICT OF DUTY AND INTEREST

The general rule is that if the Operator is in a fiduciary position
it is not allowed to put itself in a position where its interest and its
duty conflicts\textsuperscript{181}. The object of the rule is to prevent the Operator
who undertakes to act for or on behalf of the Participants from allowing any undisclosed personal interest to sway it from the proper performance of its undertaking.

In the context of this thesis it is proposed to consider three categories of cases in which the conflict rule can apply to the Operator, viz: -

(i) where the Operator obtains a financial benefit from a person other than the Participants beyond any authorised remuneration;

(ii) where the Operator acts both for the Participants in its fiduciary capacity on one side of a transaction and as undisclosed principal either for itself or a third party on the other; and

(iii) where the Operator takes to its own account a benefit to the exclusion of the Participants.

Before undertaking the consideration of the three categories it is necessary to briefly consider the elements of the fiduciary obligation itself and determine when the duty of good faith will apply to the Operator.

6.1 The Duty Considered

The Operator is a fiduciary for the purpose of this rule if it undertakes to act for or on behalf of the Participants in some particular matter or matters. The undertaking may be:

(i) general or specific and limited;

(ii) contractual or gratuitous; and

(iii) assumed without request.
The "for or on behalf of" test was applied by Deane J. in United States Surgical Corporation v Hospital Products International Pty. Ltd. 187.

However, Gibbs C.J. 188 was of the view that the test could not be accepted without some qualification.

Dawson J. 189 looked more at the placing of trust or confidence in another person as being the crucial factor and suggested that substantial confidence in another will not always give rise to a fiduciary duty. This was because the fiduciary duty is inherent in the nature of the relationship between the participants where there is a position of disadvantage or vulnerability and one participant places reliance upon another.

Wilson J. 190 agreed with Dawson J. and Gibbs C.J.

Mason J. 191 followed the test of the New South Wales Court of Appeal.

The question of whether an undertaking by the Operator gives rise to a fiduciary obligation is a question of fact in each case 192. Equity will intervene at the point where it can positively be shown that the Operator has, by its own undertaking, consented to act in a particular matter in a capacity other than as its own principal 193. That is, the undertaking by the Operator is to act in the interest of the Participants 194. It is, therefore, extremely important that the Joint Operating Agreement defines the particular matter in relation to which the Operator has consented to act in a capacity other than as its own principal.

The undertaking given by the Operator need not necessarily require the Operator to discharge any pre-ordained duties. All of the powers, the authorities and the discretions that the Operator's undertaking authorises it to exercise or discharge for and on behalf of the Participants are embraced within the conflict rule just as much as are specific duties it undertakes to discharge.
6.2 The Nature of the Operator's Interest

The Operator's interest for the purpose of the rule signifies the presence of some personal concern of possible significant pecuniary value in a decision taken or transaction effected by the Operator. The personal concern may be direct or indirect and immediate or contingent. The pecuniary dimension may take the form of an actual prospective or possible profit to be made in, or as a result of, the decision the Operator takes or the transactions the Operator effects. Alternatively, the pecuniary dimension may take the form of some actual, prospective or possible saving, or diminution of a personal liability.

6.3 The Application of the Rule to a Third Party

Where the Operator undertakes to act on the Participants' behalf and then employs or relies on a third party to actually perform the undertaking, it would appear that, irrespective of the lack of privity of contract, there is a fiduciary relationship established between the third party and the Participants if the third party was aware that it was acting for the purpose of the Participants\textsuperscript{195}. If, however, the third party was not aware that it was acting for the purpose of the Participants, it would appear that it does not follow, ipso facto, that there is a fiduciary relationship between the third party and the Participants\textsuperscript{196}.

6.4 Unauthorised Remuneration

The general rule is that if the Operator undertakes a duty it cannot take any secret remuneration or financial benefit from the undertaking of the duty that is not authorised by law or by its contract\textsuperscript{197}. This general rule has been modified in a number of situations relevant to the Operator's role in a joint venture utilised in the Industry, viz.,:-

(i) there is no objection to the Operator doing something itself when it is entitled to employ another to do the same thing for reward\textsuperscript{198}. What the Operator cannot do is pay itself for its service\textsuperscript{199} without the informed consent of the Participants\textsuperscript{200}.
The principle extends to the Operator employing a third party of which it is a member or an employee to do the thing authorised by the Participants. It makes no difference that the Operator does not itself, in such circumstances, perform the service. The prohibition does not apply where the Operator is expressly authorised to charge for any service it renders or where the Operator has received the informed consent of the Participants to the employment;

(ii) the Participants are entitled to all of the advantages of the Operator's dealing, such as discounts, rebates, introduction fees and commissions which the Operator, as their agent, is able to extract. This is the case notwithstanding that the Participants would not have received the advantage but for the Operator. It follows that the Operator cannot, when executing its undertaking, use favourable terms as a source of pecuniary benefit for itself unless it has the approval of the Operator in so doing. The liability of the Operator to the Participants for such advantage only arises if the relationship of principal and agent between them existed in respect of the particular transaction in which the advantage was earned.

It follows from this that the Operator cannot charge the Participants for a sum greater than that which it expended to make a purchase for the Participants or, where selling for the Participants, provide the Participants with a sum less than that obtained; and

(iii) secret gifts of money or money's worth given or agreed to be given to the Operator in circumstances in which it could possible induce the Operator to show favour towards or exert influence on behalf of the donor in its dealings either with the Operator or the Participants are condemned by the courts. The basis of the condemnation of bribes and secret commissions being that such could tempt the Operator not to perform faithfully its duty to the Participants.
Once a bribe has been established, the court does not inquire into the donor's motive\(^ {216} \). It is irrebutably presumed in favour of the Participants, and against the Operator and the donor, that the Operator was influenced by the bribe\(^ {217} \) and as such the transaction is voidable by the Participants\(^ {218} \).

The essential characteristics of a bribe are\(^ {219} \):

(a) a payment of money or money's worth to the Operator in a fiduciary position;

(b) in circumstances in which the payment could possibly induce the Operator to show favour towards or to exert influence on behalf of the donor in the donor's dealings with the Operator or with the Participants; and

(c) the payment is not disclosed to the Participants.

This thesis is concerned is with the private and civil law aspects of bribes and secret commissions. The public and criminal law aspects belong elsewhere.

The most common form of bribe is a money gift made under the manifestly corrupt purpose of securing a favour from the Operator who, at the time of the gift, is acting for or on behalf of the Participants in some transaction with the donor\(^ {220} \). However, it is not essential that the payment be a gift or handed over with the manifestly corrupt purpose in mind. It is possible that the payment may have been earned by the Operator for services rendered to the donor, but nevertheless rendered in a transaction in which the Operator also acted for or on behalf of the Participants who were unaware that such payment was being made\(^ {221} \).

A bribe or secret commission may take a number of other forms, such as a gift of shares\(^ {222} \), the sale of shares under value\(^ {223} \), the grant of a lucrative sub-contract\(^ {224} \) or the relief of the Operator of a personal liability\(^ {225} \).
The bribe or secret commission must be made to the Operator in a fiduciary position. There must be some question open between the donor and the Operator, that is, they are still transacting or are about to transact business. If the payment or gift is made or agreed to be made, in that agreement to make the same is reached, after the transaction has been completed there is no breach of the fiduciary obligation by the Operator — unless it appears that such payment or gift was expected when the transaction was entered into, or was intended to affect future transactions.

If the Operator can show that it disclosed to the Participants that it would be receiving payment from the donor then the Operator can retain the payment. The disclosure must in fact be made. It is not sufficient that the Participants had the opportunity to find out. The disclosure must bring home to the Participants a proper appreciation of the facts surrounding the payment and as such put them to an election. Even then it must be shown that the Participants agreed, expressly or by implication, to the Operator having the payment. It is no defence to argue that the Operator had been assured by the third party that the third party had disclosed the payment to the Participants if in fact no such disclosure was made.

6.5 Assuming a Double Character

The general rule is that the Operator cannot, in the course of the same transaction, approbate and reprobate on its undertaking by acting as a fiduciary on one side and as an undisclosed principal in a private capacity on the other side.

If such activity is undertaken by the Operator without the consent of the Participants, the Participants are, as a general rule, entitled to rescind the transaction. The application of the general rule can vary, depending upon the type of transaction, viz,:-

(i) purchases by the Operator of property in the sale of which the Operator acts in a fiduciary capacity are voidable at the option of
the Participants in the absence of the prior consent of the Participants\footnote{236};

(ii) sales by the Operator of property in which it has an interest in the purchase of which it acts in a fiduciary capacity without disclosing its own personal interest\footnote{237}, no matter what the price, terms or loss suffered\footnote{238}, will set aside\footnote{239} at the option of the Participants;

(iii) in trade dealings by the Operator with a business that it manages in a fiduciary capacity the Participants have a right to any profit\footnote{240} unless the Participants expressly authorise the Operator to deal with the Operator's own business\footnote{241} or the Operator terminates the fiduciary relationship for the purpose of each separate transaction. The Operator can only charge to the Participants the cost price of any goods supplied by it\footnote{242}.

As has been discussed above in this thesis, Joint Operating Agreement will usually contain provisions which deal with the situation where the Operator or an affiliate of the Operator wishes to provide goods, services or facilities required for the Operations\footnote{243} and in such cases the authorisation of the Participants to the provision is, in effect, required before the Operator can enter into the transaction; or

(iv) a loan to the Participants, on which interest is charged, of money in which the Operator has an interest in the situation where the Participant is in a fiduciary capacity with a general power to raise money cannot stand unless the loan is made with the consent of the Participants. This is because the Operator assumes the character of a lender and profits from the interest\footnote{244}. Even if the Participants consent, if the Operator is and continues to act as an adviser in relation to the loan, the Operator must give to the Participants all reasonable advice that the Operator would give if the lender were a third party\footnote{245}. Where the power to borrow is specific in that it authorises the Operator to raise a certain sum at a designated rate of interest the Operator can then become a lender.
notwithstanding the lack of knowledge of the Participants.246

The Britoil proforma provides an illustration of both a general power given to the Operator to raise money for the Participants coupled with the express right of the Operator to be the lender. Where a Participant defaults in the payment of its share of an advance the Operator is required to make arrangements to meet any commitment falling due by borrowing the necessary money pending the receipt of the shortfall from the non-defaulting Participants. The money may be borrowed from a third party or provided by the Operator. Where the money is provided by the Operator the Operator is permitted to charge interest on the amount it makes available to the Participants. The manner in and the rate at which the interest is to be charged and paid is set out in the Joint Operating Agreement.247

6.6 Benefits Derived to the Exclusion of the Participants

This particular rule can be broken down into two sub-rules248:

(i) the Operator cannot, on its own account, derive any benefit which its undertaking authorises or requires it to pursue in its representative capacity; and

(ii) the Operator, even though acting in a matter outside of the scope of its undertaking to the Participants, cannot retain a private benefit made, if it has been made only through some actual misuse of its representative position.

6.6.1 The First Sub-Rule

The object of the first sub-rule is to prevent the Operator from acting on its own account in a transaction that it has undertaken to effect, if at all, for the Participants.249

The all important question is to determine what the Operator has undertaken to do for the Participants.250 Once that has been determined it is a case of establishing whether the Operator has acted for itself
when it should have acted, if at all, for the Participants.

The sub-rule prevents the Operator pursuing a gain in the field of endeavour embraced by its undertaking. It is this sub-rule that may prevent the Operator using information acquired in undertaking its role as operator other than for the benefit of the Participants. However, it does not mean that the Operator cannot pursue a gain in its private capacity if it is not within the field of endeavour embraced by its undertaking. The Operator's liability stems not from a conflict between the Operator's interest and the Participants' interest, but a conflict between the Operator's actual undertaking made to the Participants (its duty) and the Participants' interest.

The determination of the scope and ambit of the Operator's undertaking is a question of fact in each case. The court will not, as a general rule, enlarge nor diminish the scope of an undertaking which is specific as to the type of transaction which the Operator should effect, if at all, for the Participants.

However, if the undertaking is general in character in that it gives to the Operator a discretion as to the type of transaction that can be entered into the general rule is that the Operator is liable for a profit made on its own account only if it can be shown that, notwithstanding the general undertaking, it has undertaken specifically to pursue or to obtain that very benefit for the Participants.

6.6.2 The Second Sub-Rule

The general rule established by the second sub-rule is that the Operator is free to act on its own account in transactions falling outside the scope of its undertaking. If, however, a profit is derived by the Operator through some actual misuse of its representative position it cannot retain the profit as against the Participants even though it was made in a transaction in which it had no duty to the Participants.

The actual scope of the qualification to the general rule is somewhat uncertain. Most cases that have invoked the qualification seem to
indicate the need for some unconscionious conduct by the Operator in its representative position. Liability does not appear to be founded upon proof of an actual conflict\textsuperscript{254}. It would appear that the Operator would have to have used its position as a fiduciary to secure or to assist in obtaining the profit\textsuperscript{255}.

Further, it would seem to be that liability could arise in relation to transactions entered into by the Operator after the fiduciary relationship has been terminated\textsuperscript{256}, provided the nexus between the profit gained and the prior fiduciary position can be established.
FOOTNOTES


9. Possibly the most cited dicta of this effect is that of Bramwell L.J. in The New Zealand and Australian Land Co. v Watson (1881) 7 Q.B.D. 374, 382:--

"Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation. I think there is no good ground for holding that these defendants have any fiduciary character towards the plaintiffs."


The "for, and on behalf of" test was proposed by the New South Wales Court of Appeal and discussed in Hospital Products Limited v United States Surgical Corporation (1984) 55 A.L.R. 417. Gibbs C.J. saw the test as being in most general terms and that all the facts and circumstances had to be carefully examined to see whether a fiduciary relationship exists (p. 435). The test, in effect, is:-- "a fiduciary relationship exists where the facts of case in hand establish that in a particular matter a person has undertaken to act in the interests of another and not in his own" (p. 432).

Mason J. said:-- "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense." (p. 454).

Dawson J. said:-- ".... no satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary. It is usual - perhaps necessary - that in such a relationship one party should repose substantial confidence in another in acting on his behalf or in his interest in some respect. But it is not in every case where that happens that there is a fiduciary relationship ... There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is
a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other." (p. 488)

This test, at least insofar as the "representative" element is concerned, becomes circular. It is virtually a definition of agency. See also Finn "Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures" [1984] A.M.P.L.A. Yearbook 160, 167-168; Lehane "Fiduciaries in a Commercial Context" in Finn, editor, Essays in Equity" (1985) 95, 101.

11. Shepherd Law of Fiduciaries (1981) pp. 47 - 49 holds that the courts have held that there are at least two duties involved in considering fiduciary obligations; a duty of loyalty and a duty of care. Shepherd considers this view by the courts to be erroneous. Shepherd considers that the duty of loyalty may be one and the same thing as a fiduciary relationship between participants whereas the duty of care arises in, inter alia, fiduciary situations, but not necessarily all fiduciary situations. To this end the duty of care has no necessary connection with fiduciary relationships. Shepherd therefore holds that fiduciary relationships are really questions of understanding the duty of loyalty.


(a) find the duty of loyalty (the fiduciary relationship) between the participants and then,

(b) determine whether the duty has been breached.


"Stated comprehensively in terms of liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the liability is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain; or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it." (p. 433). "... The liability to account ... will not arise where the person under the fiduciary duty has been duly authorised, either by the instrument or agreement creating the fiduciary duty or by the circumstances of his appointment or by the informed and effective assent of the person to whom the obligation is owed, to act in the manner in which he has acted. The right to require an account from the fiduciary may be lost by reason of the operation of other doctrines of equity such as laches and equitable estoppel" (p. 437).

15. Britoil 4.4.1.

16. Britoil 4.4.2; Apea Sect. I, 4(c).

17. Britoil 5.3; Apea 4.10 (f).


22. Finn Fiduciary Obligations (1977) p. 89; Piety v Stace (1799) 4 Ves. Jun. 620, 622; Docker v Somes (1834) 2 My. & K. 656, 664-5; Ratcliffe v Graves (1683) 1 Vern. 196; Lee v Lee (1706) 2 Vern.
23. Finn Fiduciary Obligations (1977) p. 89.


25. Finn Fiduciary Obligations (1977) p. 89.


27. For example, a surviving partner has the right to purchase the estate of a deceased partner or to continue the business for a specified period notwithstanding that the surviving partner is the executor of the estate - See Vyse v Foster (1874) L.R. H.L. 318, 332. See also Finn Fiduciary Obligations (1977) p.91; Sharwood "Case Note: Societe General (Canada) v Sorrel Resources Limited" (1988) 7 A.M.P.L.A. Bulletin 156, 157; Desbarats, Greenfield and Hopkins "Recent Developments in the law of Interest to Oil and Gas Lawyers: Bank of Nova Scotia v Societe General (Canada)" (1988) 27 Alta. L. Rev. 124, 125; Denstedt "Bank of Nova Scotia v Societe General (Canada) et. al." (1989) 26 Resources 5, 6.

28. The issue of a limited right of use of enjoyment is dealt with in Finn Fiduciary Obligations (1977) p. 95-9.


32. The issue of a limited right of use or employment is dealt with in Finn Fiduciary Obligations (1977) pp. 108-110.


34. Britoil 4.2.2. (A)(ii)(a); Apea 4.4. (a).

36. Britoil 4.4.1; Apea 4.7.


40. See the accounting procedure and in particular Britoil Sect. I, 2.2 and Apea Sect. I, 3. See also the requirement for authorisations for expenditure, Britoil 9.2., 10.2, 11.2 and 12.2.


42. Britoil 5.10.1.

43. Britoil 5.10.2.

44. Britoil 7.1.1. (ii) (c); Apea 14.3 (c).


54. Britoil Sect. I, 2.7 (a); Apea Sect. I, 3.


56. Kirkham v Peel (1880) 43 L.T. 171, 172. Re Arthur Wheeler & Co. (1933) 102 L.J. Ch. 341. See the discussion on this point below.

57. Shackell v Howe, Thornton and Palmer [1908] V.L.R. 698. See the discussion on this point below.

58. King v Hutton (1900) 83 L.T. 68, 70.


62. In Re Fada (Australia); Ex parte Brown [1927] S.A.S.R. 590. See also Commissioner of Stamp Duties (Qld.) v Jolliffe (1920) 28 C.L.R. 178, 181.


66. Foley v Hill (1848) 2 H.L.C. 28, 35.


69. Kirkham v Peel (1880) 43 L.T. 171, 172; Re Cotton; Ex parte Cooke (1913) 108 L.T. 310; Spartali v The Credit Lyonnais (1886) 2 T.L.R. 178, 179-180.


72. Spartali v The Credit Lyonnais (1886) 2 T.L.R. 178, 180; Kirkham v Peel (1880) 43 L.T. 171, 172.


74. Kirkham v Peel (1880) 43 L.T. 171.


77. See Britoil 9.2, 10.2, 11.2, 12.2 and Sect. I, 2.2; Apea Sect. I, 3.

78. Hancock v Smith (1889) 41 Ch. D. 456, 461 and 462; In Re Arthur Wheeler & Co.; The Trustee v Kirby (1933) 102 L.J. Ch. 341; In re Hulton; Ex parte Manchester and Country Bank (1891) 8 Morr. 69.


82. Britoil 5.4.1 and 5.4.2 (vii); Apea 4.8 and 4.9. See also the accounting procedure.


101. Britoil 5.1.1; implied Apea 4.8.

102. See for example Britoil 5.4.2, 5.4.3 and 5.4.4; Apea 4.11 (a).

103. Such decisions as do support this concept are concerned with members of deliberative and representative bodies where there is a duty to maintain confidence about the body's discussions and affairs where the interest served by the body dictate that confidence be observed; See Attorney General v Jonathan Cape Limited [1975] 3 W.L.R. 606, 618. See Handley "Confidentiality and Rights to Intellectual Property" (1981) 3 A.M.P.L.J. 172, 173.


105. Prince Albert v Strange (1849) 2 De Gex & Sm. 652, 714. Barnes v Addy (1874) L.R. 9 Ch. App. 244; In re Blundell; Blundel v Blundel (1888) 40 Ch D. 370, 381; Soar v Ashwell [1893] 2 Q.B. 390, 394-395, 376, 405; Carl Zeiss Stiftung v Herbert Smith & Co. (No. 2) [1969] 2 Ch. 276, 296. Gibbs J. accepted the application of the remedies available to a beneficiary, such as the Participants would be, where a third party knowingly assists a fiduciary such as the Operator to violate its duty of good faith in Consul Development Pty. Ltd. v DPC Estates Pty. Ltd. [1975] 5 A.L.R. 231, 251, referring to Selangor United Rubber Estates Limited v Cradock (No. 3) [1968] 3 All E.R. 1073; Karak Rubber Co. Limited v Burden (No. 2) [1972] 1 All E.R. 1210; Gray v Lewis (1869) L.R. 8 Eq. 526 (reversed on other grounds: (1873) L.R. 8 Ch. App. 554; Cook v Deeks [1916-17] All E.R. Rep. 285, [1916] 1 A.C. 554. However, in the absence of actual knowledge Gibbs J. made the following comment, pointing out that he was not deciding the issue nor expressing a concluded view:-
"It may be that it is going too far to say that a stranger will be liable if the circumstances would have put an honest and reasonable man on inquiry, when the stranger's failure to inquire has been innocent and he has not wilfully shut his eyes to the obvious. On the other hand, it does not seem to me to be necessary to prove that a stranger who participated in a breach of trust or fiduciary duty with knowledge of all the circumstances did so actually knowing that what he was doing was improper. It would not be just that a person who had full knowledge of all the fact could escape liability because his own moral obtuseness prevented him from recognising an impropriety that would have been apparent to an ordinary man."

(p. 252)


"In my view the state of the authorities as they existed before Selangor did not go so far, at least in cases where the defendant had neither received nor dealt in property impressed with any trust, as to apply to them that species of constructive notice which serves to expose a party to liability because of negligence in failing to make inquiry. If a defendant knows of facts which themselves would, to a reasonable man, tell of fraud or breach of trust the case may well be different, as it clearly will be if the defendant has consciously refrained from inquiry for fear lest he learn of fraud. But to go further is, I think, to disregard Equity's concern for the state of conscience of the defendant."

(p. 264).

Gibbs J. did not find it necessary to make any pronouncement upon the issue, although the judgement of His Honour appeared to show an underlying assumption that the concept of constructive knowledge could apply. McTieran J. was adamant that the concept did apply.


111. Morison v Moat (1851) 9 Hare 241, 263. This view was rejected in Wheatley v Bell [1982] 2 N.S.W.L.R. 544.

112. Stevenson Jordan & Harrison Limited v MacDonald & Evans (1951) 68 R.P.C. 190, 195, on appeal (1952) 69 R.P.C. 10, 16 Evershed M.R. found that it was not necessary to comment on the matter.

113. Jones "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 L.Q.R. 463, 479. A similar view is exposed by Goff and Jones The Law of Restitution: 2nd ed. (1978) p. 520. See also Stevenson Jordan & Harrison Limited v MacDonald & Evans (1951) 68 R.P.C. 190 – an injunction may be granted in such circumstances.

114. Goff and Jones The Law on Restitution: 2nd ed. (1978) p. 547 that the courts of England have not recognised the "change of position" view. Note also the view of Gurry advanced in "Breach of Confidence" in Finn, editor, Essays in Equity (1985) 110, 123.


123. See footnote 103.


127. See, for example, Britoil 5.2.2 and 5.3; Apea 4.10 (f).

128. See, for example, Britoil 5.10.1 and 5.10.2.


130. Ex parte James (1803) 8 Ves. Jun. 337, 345; Fox v Mackreth (1789-91) 2 Bro. C.C. 400; Ex parte Lacey (1802) 6 Ves. Jun. 625; Williams v Scott [1900] A.C. 499; Wright v Morgan [1926] A.C. 788; Collins v Hare (1828) 2 Blis. (N.S.) 106; Jones v Thomas (1837) 2 Ye. C.Ex. 498; Charter v Trevelyan (1844) 11 C.& F.


135. Oliver v Court (1820) 8 Price 127, 161; Fox v Mackreth (1782) 2 Bro. C.C. 400, 424.


137. Crane v Allen (1814) 2 Dow. 289, 297–298.


140. Britoil 5.2.2; Apea 4.10 (a).

141. Rothschild v Bookman (1831) 5 Bli. N.S. 165, 190; Holman v Loynes (1834) 4 De G.M. & G. 270, 272; Austin v Chambers (1838) 6 Cl. & Fin. 1, 37–38.

142. Dally v Wonham (1863) 33 Beav. 154, 159; Andrews v Mowbray (1807) Wils. Ex. 71–72; Selsey v Rhoades (1824) 2 Sim. & St. 41, 49–50; Woodhouse v Meredith (1820) 1 Jac. & W. 205, 222; Wren v Kirton (1803) 8 Ves. 502, 503; Jones v Bouffier (1911) 12 C.L.R. 579, 614–615.

143. Tate v Williamson (1866) L.R. 2 Ch. App. 55, 61. This is not a common aspect of the joint venture utilised in the Industry.


147. Haygarth v Wearing (1871) L.R. 12 Eq. 320, 327.


152. Silkstone and Haigh Moor Coal Company v Edey [1900] 1 Ch. 167, 171.


156. Shepherd Law of Fiduciaries (1981) pp. 169-170 argues that it is only consent that is required. To show that the consent is valid it must be shown that there was full value and full disclosure – Attorney - General v Dudley (1815) G. Coop. 146; Edwards v Meyrick (1842) 2 Hare 60; Smedley v Varley (1857) 23 Beav. 358; Dunne v English (1874) L.R. 18 Eq. 524, 533; McPherson v Watt (1877) L.R. 3 App. Cas. 254. Cf. Holder v Holder [1968] Ch. 353, 391-392 where Harman L.J. held that disclosure was not of itself consent. It can be argued that Holder v Holder [1968] Ch. 353 is a
special case standing on its own facts. See the comments of Dankwerts L.J. at p. 399 and Sachs L.J. at pp. 404-406.

157. Holman v Loyne (1854) 4 De G. M. & G. 270, 271 - 272. Gibson v Jeyes (1801) 6 Ves. 266; Savery v King (1856) 5 H.L. Cas. 627, 655-656; Spencer v Topham (1856) 22 Beav. 573; Gresley v Mousley (1862) 31 L.J. Ch. 537; Pisani v Attorney General for Gibraltar (1874) L.R. 5 P.C. 516; Ward v Sharp (1883) 53 L.J. Ch. 313; Wright v Carter [1903] 1 Ch. 27; Moody v Cox and Hatt [1917] 2 Ch. 71; Christie v McCann (1972) 27 D.L.R. (3d) 544.


159. Shepherd Law of Fiduciaries (1981) pp. 169-170 argues that this in itself establishes that the consent is valid. See Thomson v Eastwood (1877) 2 App. Cas. 215, 236; Haywood v Knightroad [1927] V.L.R. 512; Dunne v English (1874) L.R. 18 Eq. 524, 532-533; In Re Biel's Estate, Gray v Warner (1873) L.R. 16 Eq. 577, 580; Luddy's Trustee v Peard (1886) 33 Ch. D. 500, 517-518; Oliver v Court (1820) 8 Price 127; Selsey v Rhoades (1824) 2 Sim. & St. 41, 49 - 50, aff'd (1827) 1 Bll. N.S. 1, 8; Gibson v Jeyes (1801) 6 Ves. 266; Lowther v Lowther (1806) 13 Ves. 95; Austin v Chambers (1838) 6 C. & F. 1, 37; Rothschild v Brookman (1831) 2 Dow. & C.L. 188; Dally v Wonham (1863) 33 Beav. 154; McPherson v Watt (1877) 3 App. Cas. 254; Jameson v Lister (1920) 149 L.T.Jo. 446; McKenzie v McDonald [1927] V.L.R. 134; Christie v McCann (1927) 27 D.L.R. (3d) 544; Lunghi v Sinclair [1966] W.A.R. 172. Cf McMaster v Byrne [1952] 1 All E.R. 1362.

260. Andrews v Mowbray (1807) Wils. Ex. 71, 109; Luff v Lord (1864) 22 Beav. 220, 227-230; Plovrwright v Lambert (1885) 52 L.T. 646. See Shepherd Law of Fiduciaries (1981) p. 169 suggests that a sale at an under value is permitted if the participants, with full knowledge and understanding of the under value, have consented to it - see Selsey v Rhoades (1824) 2 Sim. & St. 41, 49-50. See also Desbarats, Greenfield and Hopkins "Recent Developments in the Law of Interest to Oil and Gas Lawyers: Molchan v Omega Oil & Gas Limited" (1988) 27 Alta. L. Rev. 142, 142.

162. McMaster v Byrne [1952] 1 All E.R. 1362, 1368.

166. Carter v Palmer (1842) 8 Cl. & Fin. 657, 705; Re Bole's And British Land Company's Contract (1902) 71 L.J. Ch. 130; McMaster v Byrne [1952] 1 All E.R. 1362, 1367-1368. Cf. Holder v Holder [1968] 1 All E.R. 665, 672 per Harman L.J. See also a special knowledge acquired during the relationship — Allison v Clayhills (1907) 97 L.T. 709; Demerara Bauxite Co. Limited v Hubbard [1923] A.C. 673; Edwards v Meyrick (1842) 2 Hare 60; Montesquieu v Sands (1811) 18 Ves. 302; Learmonth v Bailey (1875) 1 V.L.R. 122.


168. Re Postlewaite; Postlewaite v Rickman (1888) 59 L.T. 58.


173. Sinnett v Darby (1886) 13 V.L.R. 97; Cf. Gould v O'Carroll (1963) 81 W.N. (Pt. 1) (N.S.W.) 170; Guest v Smythe (1870) L.R. 5 Ch. App. 551, 557-558; Sewell v The Agricultural Bank of Western Australia (1930) 44 C.L.R. 105, 112-113; Naylor v Winch (1824) 1 Sim. & St. 555, 566-567; Hinckley v Hinckley (1876) 2 Ch. D. 190, 198.


175. Ex parte Bennett (1805) 10 Ves. Jun. 381, 400; Turner v Trelawny (1841) 12 Sim. 49, 72; Ex parte Lonsdale & Co. [1911] St. R. Qd. 157.


182. The duty to disclose is strict – see Phipps v Boardman [1967] A.C. 46, 109 and The New Zealand Netherlands Society "Oranje" Inc. v Kuys [1973] 2 All E.R. 1222, 1225. Disclosure must be of all information within the Operator's possession relevant to the transaction. Merely giving the relevant documents, if complete, may not be enough. Explanation may be required – see Brian Pty. Ltd. v United Dominions Corporation Limited [1983] 1 N.S.W.L.R. 490. There is no discharge of the duty if the information is not relevant – see The New Zealand Netherlands Society "Oranje" Inc. v Kuys [1973] 2 All E.R. 1222, 1237 – or if it is incapable of effecting the


185. As is the case when the role of the Operator is considered: the Operator undertakes to conduct such activities as are necessary or desirable in order to implement and give effect to the terms and purpose of the Joint Operating Agreement. Britoil 5.11 and 27 (xvi); Apea 1.1 (n).

186. Such as the limited right of the Operator to represent the Participants in regard to matters or dealings with the Secretary of State for Energy, other governmental authorities or third parties in relation to the Operations unless directed to do so by the Operating Committee; Britoil 5.5.


192. The position of commercial transactions has been discussed above in this thesis. Where one participant agrees to negotiate a purchase, for example, for another - Amalgamated Television Services Pty. Ltd. v Television Corporation Limited [1969] 2 N.S.W.L.R. 257, 265 - it may be, or is, difficult to find the fiduciary element as each participant acts for itself - Keith Henry & Co. Pty. Ltd. v Smart Walker & Co. Pty. Ltd. (1958) 100 C.L.R. 342.


202. *In re Hill*: Claremont v Hill [1934] 1 Ch. 623, 634; Christopher v White (1847) 10 Beav. 523, 525.

203. Douglas v Archbutt (1858) 2 De G. & J. 148, 150-151; Willis v Kibble (1839) 1 Beav. 559, 560.

204. Turnbull v Garden (1869) 38 L.J. Ch. 331; Kimber v Barber (1872) L.R. 8 Ch. App. 56.


206. For example the Operator acts as the agent for more than one Participant and gets a bulk order discount which would not be available if dealing for one Participant. See also Boston Deep Sea Fishing and Ice Co. v Ansell [1886-90] All E.R. Rep. 65, 68-69.

207. Turnbull v Garden (1869) 38 L.J. Ch. 331; Hippisley v Knee Brothers [1905] 1 K.B. 1, 7; Copp v Lynch (1882) 26 Sol. Jo. 348; Jordy v Vanderpump (1920) 64 Sol. Jo. 324; Queen of Spain v Parr (1869) 39 L.J. Ch. 73; The Parkside [1897] P. 53, 57; McCartney v McCartney [1909] V.L.R. 183; Moss v Moss (No. 2) (1900) 21 N.S.W.R. (Eq.) 253; Re Heydon (1901) 1 S.R. (N.S.W.) 81; In re Four Solicitors; Ex parte The Incorporated Law Society [1901] 1 Q.B. 187, 189.


211. Nitedals Taendstikfabrik [1906] 2 Ch. 671, 674.


213. Hovenden & Sons v Millhoff (1900) 83 L.T. 41, 43.


217. Industrial and General Mortgage Co. Limited v Lewis [1949] 2 All E.R. 573, 577; Hovenden and Sons v Millhoff (1900) 83 L.T. 41, 43; It is irrelevant that the beneficiary suffers no loss – Parker v McKenna (1874) 10 Ch. App. 96; In re North Australian Territory Company (1892) 1 Ch. 322, 327; Reading v Attorney-General [1949] 2 K.B. 233, aff’d [1951] A.C. 507; Williams v Barton [1927] 2 Ch. 9; In re Smith, Smith v Thompson [1896] 1 Ch. 71; Chandler v Bradley [1897] 1 Ch. 315; Shepherd v Harris [1905] 2 Ch. 310; The Metropolitan Bank v Heiron (1880) L.R. 5 Ex. D. 319; Harrington v The Victoria Graving Dock Co. (1878) 3 Q.B.D. 549; Shipway v Broadwood [1899] 1 Q.B. 369; In re A Debtor [1927] 2 Ch. 367; Armegas Limited v Mundogas S.A. (The Ocean Frost) [1985] 1 Lloyd’s Rep. 1.

218. Panama and South Pacific Telegraph Co. v India Rubber, Gutta Percha and Telegraph Works Co. [1875] L.R. 10 Ch. App. 515.


"a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing, and (iii) that he fails to disclose to that other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person’s agent."


224. Panama and South Pacific Telegraph Company v India Rubber, Gutta Percha and Telegraph Works Company (1875) L.R. 10 Ch. App. 515, 527.


228. Smith v Sorby (1875) 3 Q.B.D. 552n; Hough v Bolton (1885) 1 T.L.R. 606; Galloway v Pedersen (1915) 34 N.Z.L.R. 513.

229. Implied consent - Baring v Stanton (1876) 3 Ch. D. 502; Great Western Insurance Co. v Cunliffe (1874) L.R. 9 Ch. App. 525; Stubbs v Slater [1910] 1 Ch. 632; Bartram and Sons v Lloyd (1904) 90 L.T. 357; Christie v McCann (1972) 27 D.L.R. (3d) 544.


237. Kuhlirz v Lambert Brothers Limited (1913) 108 L.T. 565, 567, (1913) 18 Com. Cas 217; Gillett v Peppercorne (1840) 3 Beav. 78, 83-84; Armstrong v Jackson [1917] 2 K.B. 822, 823-824; The Liquidators of the Imperial Mercantile Credit Association v Coleman (1873) L.R. 6 H.L. 189; Massey v Davies (1794) 2 Ves 317; Gibson v Jeyes (1801) 6 Ves. 266; Rothschild v Brookman (1831) 2 Dow & C.I. 188; Bentley v Craven (1853) 18 Beav. 75; Lucifero v Castel (1887) 3 T.L.R. 371 Tetly v Shand (1871) 25 L.T. 658; Skelton v Wood
(1894) 71 L.T. 616; Tito v Waddell (No. 2) [1977] Ch. 106, 240-244.

238. Gillett v Peppercorne (1840) 3 Beav. 78, 83-84;

239. Armstrong v Jackson [1917] 2 K.B. 822, 824; Rothschild v Brookman (1831) 2 Dow. & Cl. 188; Bentley v Craven (1853) 18 Beav. 75; King, Viall & Benson v Howell (1910) 27 T.L.R. 114; Hely-Hutchison v Brayhead Limited [1968] 1 Q.B. 549; Transvaal Lands Co. v New Belgium (Transvaal) Land and Development Co. [1914] 2 Ch. 488.


242. Chaplin v Young (No. 2) ( ) 33 Beav. 414, 416.

243. Britoil 5.4.4; Apea 4.11 (a).


247. Britoil 15.1 (ii) and 15.1 (b).


253. Russell v Austwick (1826) 1 Sim. 52, 62.


CHAPTER XVIII

INTRODUCTION TO THE QUESTION: WHAT TYPE OF RELATIONSHIP IS A JOINT VENTURE?

1. INTRODUCTION

In the Industry in Great Britain and Australia, it is generally accepted that the Joint Operating Agreement for the Exploration Phase originated in America. In so far as the general form of the typical Joint Operating Agreement for the Exploration Phase in Great Britain and Australia is concerned, this may well be correct. However, to suggest that the concept of the joint venture either as a business relationship or legal relationship, originated in America certainly is open to question. Other than to make a brief comment on this question, it is not the purpose of this thesis to consider the origin of the concept of the joint venture, either as a business relationship or a legal relationship. The historical development of the joint venture as a business relationship or commercial devise has been considered elsewhere.

Suffice it is to say that its roots have been traced back to ancient Egypt, Syria, Phoenicia and Babylonia, then through the Roman Empire and into Europe. From Europe, the concept, as a business relationship, spread to England and Scotland and from there to America. In Scotland and America the concept developed from being one of a business relationship to one of legal significance as the courts in those countries began, unlike in England, to recognise the joint venture as a legal relationship.

In State ex rel. Crane Co. of Minnesota v Stokke the origin of the legal recognition of the joint venture was claimed for America:

"The concept of joint adventure as a legal relationship or association sui generis is purely of American origin dating from about 1890. Just how or why it originated no one seems precisely to know."
However, claims of this type are not universally accepted, even within America. In the main, it is recognised that the joint venture gained recognition as a legal relationship in its own right in Scotland. The joint adventure (as it was called) was developed by the courts of Scotland during the eighteenth and nineteenth centuries as being something different from a partnership and a company. Whilst it is possible to accept that the joint venture was recognised as a legal relationship by the courts in Scotland at such an early time it is doubtful whether the joint venture is now recognised by those courts as a legal relationship which has characteristics akin to the joint venture as discussed in this thesis and which is distinguishable from partnership.

Although it is not within the scope of this thesis to consider the debate over the historical origin of the joint venture, it is necessary in considering the question of what type of relationship is a joint venture and to look at the consideration given to the joint venture by the courts in Scotland and America as well as by the courts in England and Australia. The necessity to consider the position in Scotland and America arises not only as a matter of interest because of certain similarities between the juridical systems nor because of the adoption of the general form of Joint Operating Agreement for the Exploration Phase in the American, Scottish, English and Australian jurisdictions. It arises mainly because of the the manner in which the terms "joint venture" and "joint adventure" have been used by the courts in America and Scotland and the discussion of that use by members of the High Court of Australia in United Dominions Corporation Limited v Brian Pty. Limited.

In their joint judgement Mason, Brennan and Deane JJ.'s confined their reference to foreign jurisdictions to Scotland:

"Such a joint venture (or, under Scots' law, "adventure") will often be a partnership."

Dawson J. went further and made reference not only to the joint adventure recognised by the courts in Scotland but also to the joint venture recognised by the courts in America:
"Whilst the concept of a joint venture is said to be the creation of American courts ..., it is a term which is widely used and is well known in Scottish law ..." 8

2. TERMINOLOGY: JOINT VENTURE AND JOINT ADVENTURE

Before proceeding to consider the joint venture in the common law of Scotland, America, England, Australia, Canada and South Africa it is necessary to address an issue of terminology: Is there any distinction between the terms "joint venture" and "joint adventure" when used in the Industry to refer to a relationship between participants seeking to undertake in unison as a co-operative endeavour the Exploration Phase?

The terms "joint venture" and "joint adventure" have been used by courts in the various jurisdictions referred to when considering whether or not the relationship that they have been called upon to examine and which exists between participants, is that of partnership. The early decisions of the English and Australian courts tended to follow what was then the approach of the courts in Scotland and referred to a certain relationship between participants as being that of joint adventure. With the passage of time, and perhaps by design to distinguish the position adopted by the courts in Scotland (if indeed there was any ground for distinction), along with the increasing use of the term "joint venture" by the courts in America, the term "joint adventure" began to fade in use and to be replaced by the term "joint venture" 9.

The point in time has now been reached where in the Industry 10 the terms "joint adventure" and "joint venture" are used interchangeably 11. It can, therefore, now be taken that the terms refer to one and the same thing 12. Throughout this thesis, unless because of the context in which the term is used or for some other reason, the term "joint venture" has been and will be adopted and is to be taken as including the term "joint adventure".
3. THE APPROACH ADOPTED TO ANSWER THE QUESTION

In considering the question of what type of relationship is a joint venture, there are a number of approaches that can be taken. For the purpose of this thesis it is proposed to look at a combination of three. This is not to be taken as suggesting that there are only three approaches. There are, no doubt, more.

The first approach is to look for a definition from the judicial pronouncements of the members of the courts.

The second approach is to look to the decisions wherein the courts have given consideration, directly or indirectly, to the relationship between participants undertaking an activity in unison as a co-operative endeavour and have concluded that, in effect, the legal relationship between the participants is, or is not, that of joint venture. This approach will involve the consideration of a number of judicial decisions and the drawing therefrom of the principles relied upon so as, in so far as such is possible, to determine what type of relationship a joint venture is. Furthermore, this approach will indirectly view the definition laid down in the judicial pronouncements of the members of the courts against the background of the cases that are considered. In so doing one of the major questions raised by the thesis will be canvassed: Does the law in England and Australia recognise a relationship between participants that is not a partnership but is a joint venture, and if so, how is the distinction between partnership and joint venture made?

The third approach is to look briefly at the work of the commentators to see if a definition can be drawn from their commentaries and as to how they view the judicial pronouncements of members of the courts and their decisions.
FOOTNOTES


2. The differing approaches of the courts in England, Scotland and America are dealt with in this thesis.

3. 272 N.W. 811, 817.


5. Consideration, for this reason, will also be given to the use of the term joint venture by courts in Canada and South Africa.


10. If not in most industries.

11. McPherson "Joint Ventures" in Finn, editor, Equity and Commercial Relationships (1987), 19, 19 at footnote 1 states that the term "venture" is a contraction of the term "adventure".