ROLE OF THE OPERATOR UNDER A JOINT VENTURE AGREEMENT: COMMENT ON LIABILITY CONSIDERATIONS

By Gerald L.J. Ryan*

Should the operator be jointly appointed by all venturers or should the operator be severally appointed by each venturer? It is submitted that, if joint venturers wish to achieve several liability, it would be preferable for each of them severally to appoint the operator as its agent. They should not jointly appoint the operator as their agent because, by doing so, they would increase the risk that they could be jointly (or jointly and severally) liable.

In his very helpful paper, McCann would seem to contemplate a joint appointment of the operator by all venturers:

> It is obviously not practical for all participants in a joint venture to manage operations. Accordingly the JOA will designate an operator who is charged with the conduct of operations on behalf of the participants *jointly*[1] (emphasis supplied).

The example of a typical appointment clause given in the paper would also seem to provide for a joint appointment:

A typical clause which appoints the operator will be in the following terms:

> Subject to and in accordance with the terms and conditions hereinafter contained and of the Joint Venture Agreement the operator is hereby *appointed by the Participants* acting as joint venturers to manage, supervise and conduct the joint venture *on behalf of the participants* under the control of and in accordance with the instructions that the operator may from time to time receive from the Operating Committee.
>
> A later subclause will then go on to describe in more detail the functions which the operator is required to perform:
> The operator shall either itself or through such agents and independent contractors as it may engage, undertake and carry out *on behalf of the Participants* the following activities:[2] (emphasis supplied).

Two cases throw light on the importance of the distinction between a joint appointment of an agent and several appointments of an agent. *Tyser and Others* v. *The Shipowners Syndicate (Reassured)*[3] was a case involving several appointments of an agent. The action was brought for the total loss of the ship "Brunswick". The plaintiffs ("Tyser Group") were underwriters at Lloyds. The defendants were a group of 20 underwriters, not members of Lloyds, who called themselves "The Shipowners Syndicate (Reassured)". By a written agreement, the Shipowners Syndicate appointed one of their number (Mr. Corderoy) to sign policies of marine reinsurance "on behalf of the syndicate and *in the individual names of the members thereof*, said the manager affixing opposite the name of *each member* of the syndicate on each and every policy *the respective proportions* of risk taken by *each individual member* of the syndicate on the said policy". (emphasis supplied) The Tyser Group effected with the members of the Shipowners Syndicate, through their manager Mr. Corderoy, a policy of reinsurance upon the "Brunswick". The "Brunswick" sank, and some members of the Shipowners Syndicate being unable to satisfy their debts, the action was brought by the Tyser Group against the solvent

members of the Shipowners Syndicate on the basis that these members were jointly liable with the insolvent members of the Shipowners Syndicate. Mathew J rejected the claim by the Tyser Group, and held that liability on the policy was several and not joint. Thus the solvent members of the Shipowners Syndicate were liable only for their respective proportions of the claim: they were not jointly liable for the whole claim. Mathew J found that upon the face of the policy of reinsurance liability was several and not joint, and that the manager, Corderoy, had been appointed to subscribe policies for *each* member of the Shipowners Syndicate, i.e. he had been severally appointed as agent by each member of the Shipowners Syndicate:

> The question raised with reference to this policy was whether the liability of the members of the syndicate was joint or several. For the plaintiffs (Tyser Group) it was contended that the syndicate was in point of fact a firm or partnership; that the name "syndicate" imported combination for purposes of profit; and that there was therefore a joint liability upon the policy. For the defendants (Shipowners Syndicate) it was argued that upon the face of the policy the liability was several and not joint. It was said to be in the ordinary course of business that one underwriter should act for a number of other underwriters . . ., and should subscribe policies for *each member* of the group . . . I am . . . of the opinion that the liability upon the policy is several and not joint.[4] (emphasis supplied)

The language used in the appointment of the manager by the Shipowners Syndicate is in marked contrast to the language used in the appointment of the operator in the typical joint venture clause quoted above.

Keay and Another v. *Fenwick and Others*[5] was a case involving a joint appointment of an agent. The question arose as to whether co-owners of a ship, each of whom held separate shares in the ship, were jointly liable to pay commission to an agent who sold the ship. The jury found that the agent had been engaged by one of the owners (the managing owner) to sell the ship, and that in turn the managing owner had been authorised by the other owners to engage the agent and to pay a commission to the agent. The court held that the authority given to the agent was a joint authority from all owners and was not a several authority from each of them, and that accordingly, where the managing owner became insolvent, the other owners were to be jointly liable for the whole of the agent's commission

> It was contended first of all that this was not a joint authority, but only an authority from each defendant to sell his own shares, and that the authority could not in point of law amount to anything else. But, although it is true that each of several co-owners of a thing can only sell or authorize the sale of his own interest in that thing, yet it is also true that all the co-owners of a thing may combine and sell or authorize the sale of that whole thing: and this is really what the defendants did. *The authority they conferred was one authority given by them all collectively to sell the whole ship,and not several authorities given by them separately to sell their respective shares in her.*
>
> There is no legal principle or rule which precludes several co-owners from jointly retaining a solicitor to bring or defend an action relating to their common property: nor is there any reason why several co-owners of property may not act jointly in respect of it. Whether they have done so or not in any particular case, must depend on the circumstances of that case.[6] (emphasis supplied)

Bowstead on Agency contains the following passages

> The prima facie rule is that a contract made by two or more persons is joint. Thus where two or more persons give authority to an agent, the presumption is that they are authorising him to act only in such matters as concern them jointly, e.g. their joint property, and not in matters concerning one or the other alone. But there may be indications to the contrary: and of course the contractual liability (if there is a

> contract) of the co-principals may be held to be joint and several rather than joint, in appropriate cases . . .
> Where an agent is appointed by two or more persons jointly, he is not discharged unless he accounts to them all, except where the principals are partners. But an agent who has been severally appointed by one person cannot refuse to account separately to him on the ground that others are jointly interested in the money in the agent's hands.[7]

Halsbury states that

> Co-principals may jointly appoint an agent to act for them, and in such case become jointly liable to him, and may jointly sue him.[8]

It is submitted that, in the preparation of joint venture documents, it would be preferable to have each venturer severally appoint the operator/manager as its agent, rather than to have all venturers jointly appoint the operator/manager as their agent.[9] By doing this, the venturers minimize the risk of being *jointly* liable to third parties for the acts of the manager/operator,[10] and minimize the risk of being jointly liable to the manager/operator.[11] Further, by severally appointing the manager/operator, the venturers are lending weight to the view that they do not carry on business "in common" and therefore could not fall within the statutory definition of partnership,[12] with its accompanying problems of joint and several liability.

FOOTNOTES

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1. Part 2
2. Part 2
3. [1896] 1 Q.B. 135
4. *Ibid.* 138 and 139
5. (1876) 1 CPD 745, CA
6. *Ibid.* 752 *per* Lindley J.
7. Ed. 14 (1976) pages 36 and 155
8. *Halsbury's Laws of England* Ed. 4. Vol. 1., para. 726
9. The writer could find no authority, other than those set out above, dealing directly with the point. However the following material is helpful in a general way: *Joint Obligations* (1949) by Glanville Williams, 33–35 and 43–44. *Law of Contract* by Treitel (Ed. 4), 448–458.
10. *Tyser* v. *The Shipowners Syndicate (Reassured)* [1896] 1 Q.B. 135
11. *Keay* v. *Fenwick* (1876) 1 CPD 745, CA. As a matter of negotiated contract, the venturers might agree that, where one of the venturers defaults the other venturers will place the manager/operator in receipt of the necessary funds. But this is quite a different thing to the case where the venturers are to be jointly liable to the manager/operator.
12. Ryan, Gerald L.J. *Joint Venture Agreements* (1982) 4(1) *Australian Mining and Petroleum Law Journal,* 135–137. Even if there is a joint appointment of a manager/operator, it is submitted that the relationship is one of joint venture and not partnership.

This comment arose out of discussion on this issue during the Conference session after presentation of the paper entitled "Role of the Operator under a Joint Venture Agreement".