AGENCY IN JOINT OPERATING AGREEMENTS AND JOINT VENTURES

By James G. Jackson*

The extensive amounts of capital required to fund modern mining and oil ventures together with the attendant risk associated with such activities have generally necessitated the combination of resources of a number of different enterprises to bring about a successful exploration and development programme. This author has previously investigated the legal status of such combinations particularly to test whether they amount to a partnership at law[1] and whether any particular legal obligations are owed *inter se* by participants.[2] In this paper some agency difficulties in joint operating agreements are considered. The combinations under review are generally called 'unincorporated joint ventures', 'joint operating agreements', or 'operating procedures.' The terminology varies from project to project and from country to country but the salient features are reasonably constant. In this paper the terms will be used interchangeably.

Joint operating agreements might deny that an agency relationship exists between the operator and non-operators, or attempt to provide for a limited agency in the operator, or they might simply be silent on this issue. It is my intention to analyse agency in joint operating agreements in order to answer the following questions:

Is the relationship between operator and non-operator normally one of agency *vis-à-vis* third parties?

Might a relationship of actual agency arise despite an express denial of this in an operating agreement?

What liability might non-operators have under the undisclosed principal doctrine?

Under what circumstances will ostensible agency arise in the event that there is no actual authority?

THE DEFINITION OF AGENCY

Halsbury defines agency thus:

> ... In law the word agency is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person

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1 Jackson J. G. 'Joint Ventures: Partnerships or not?' Occasional paper, *Centre for Petroleum and Mineral Law Studies*, University of Dundee, Scotland. (forthcoming). Also Ryan G. L. J. 'Joint Venture Agreements' (1982) 4 *A.M.P.L.J.* 135.

2 Jackson J. G. 'Fiduciary Relationships in Australian Joint Ventures' (1986) 14 *Aust. Bus. Law Rev.* 107.

> called 'the agent' has authority to act on behalf of another called the 'principal', and consents to so act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent.[3]

Bowstead's definition is that 'Agency is the relationship which exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other of whom similarly consents to represent the former or so to act'.[4]

The notion of consent implicit in both these definitions has been criticized. Fridman concludes that it is not completely satisfactory to base agency upon consent, even though, in many instances, 'consent is a relevant, and possibly a determining factor in the existence as well as the scope of an agency relationship'.[5]

The extent to which consent is required to prove agency is not simply a theoretical concern to be left to the arguments of Fridman, Halsbury, or Bowstead. In the application of agency law to the contracts of an operator in a mining or oil and gas venture, questions of consent are vital. The joint operating agreement may have expressly denied power to the operator to act as agent for the other parties, or the agreement may not have addressed the issue. Sometimes an express power to contract as agency may be given to the operator. In this latter situation consent is not at issue. The agency issues that may arise in that context more likely revolve around the disclosure or non-disclosure of the existence of the principals.[6] The present discussion is directed to a determination of the existence of agency when this has either been expressly excluded, or not raised in the operating agreement.

Despite the general inclusion of a notion of consent in the definition of agency, lawyers have been able to resort to certain legal fictions to establish its existence. There are cases for example, when an express denial of agency in a written agreement has not prevented the courts finding for a principal/agent relationship. In the House of Lords decision in *Garnac Grain Co., Inc. v. HMF Faure and Fairclough Ltd & Bunge Corporation*[7] Lord Pearson, whose speech received the unanimous support of the other Lords, made the following comments about establishing agency:

> The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in *Re Megevand: Ex parte Delhasse.*[8] The consent must, however, have been given by each of them, either expressly or by implication from their words and conduct. Primarily, one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing though likely to be less important.[9]

3 *Halsbury's Laws of England* (4th Ed.) Vol. 1 para. 701.
4 *Bowstead on Agency* (Sweet & Maxwell 14th Ed.) 1.
5 Fridman G. H. L. *The Law of Agency* (Butterworths 1983) 13.
6 See author's discussion in the part entitled 'Undisclosed Principals' *infra.*
7 [1967] 2 All ER 353.
8 (1818) 7 Ch. D. 511.
9 *Garnac* 358.

The reliance on *Re Megevand: Ex parte Delhasse* (a partnership case) by Lord Pearson supports the link between partnership and agency law in that a denial of agency, just as a denial of partnership, will not prevent the partnership or agency relationship arising at law when the facts so warrant it. Reconciling this proposition to notions of consent is either achieved by pointing to the contractual principle that it is the objective, not subjective intent which is investigated by the court, or by producing evidence of the parties' subjective intent which contradicts any written denial of agency, suggesting that the latter does not truly represent the facts of the matter. Another method is to characterize the consent as being implied.

In *Commissioners of Customs and Excise v. Pools Finance (1937) Ltd*[10] the Court of Appeal had to determine the effect of a clause which denied that any agency relationship arose in a situation where a collector of stake money from bettors deducted a commission and forwarded this money to promoters of a football and racing betting pool. The collector also paid out to winners after receiving money and information as to whom these were from the pools company. Denning L.J. with characteristic frankness said:

> Take now R. 11. It purports to make the collector the agent of the investors and not the agent of the promoters. It says that "the collector acts solely for his clients". This rule again goes too far. The true relationship of the parties is to be discovered from the facts, not from this clause ... The rule contradicts the facts and is to that extent invalid. This is no new doctrine. In life, actions speak louder than words. So they do in law ... So, here, these conditions cannot under the cloak of contract, be allowed to speak that which is false. They cannot assert that black is white and expect the courts to believe it. The courts do not willingly go behind the conditions of a contract in this way. They would far rather reconcile the conditions with the transaction as a whole than reject them altogether. But there does sometimes come a point when they must be overridden.[11]

Somerville L.J. also thought that agency was established.[12] Thus far it can be concluded that agency is a relationship, involving an element of consent, objectively determined, in which an express denial of an agency relationship will not necessarily be effective, involving an element of authority or capacity which is conferred on the agent by the principal.

Clearly, agency can also co-exist with other relationships. Hence, a co-tenant of land may have conferred some agency powers on his fellow co-tenant to enable sale of the joint property, or an employer may confer agency on his employee. It is also clear that a grant of agency, by its very definition, need not be exhaustive. The conferring of powers on another will usually contain some limitation. So it is without doubt that a principal may confer selected powers on his agent at his absolute discretion. Naturally this selectivity can give rise to difficulties in interpreting the limits of the agents power. The principal, by his activities, may create an estoppel preventing his denial that acts of the agent were outside the express powers conferred.[13]

10 [1952] 1 All ER 775.
11 *Ibid.* 780.
12 *Ibid.* 776, 781.
13 See author's discussion, in the part entitled 'Ostensible Authority' *infra.*

SPECIFIC EXAMPLES OF AGENCY IN OPERATING AGREEMENTS

The existence of agency in any given set of facts will clearly depend on the interpretation of the specific words used and the conduct of the parties. In relation to operating agreements this will be also the case. Nevertheless, it is possible to speak generally about certain aspects of operating agreements. For example, generally the parties to the agreement will appoint one of their number, or perhaps an outsider as the operator. He will have the general task of conducting the mining or drilling activities operating on a budget given to him by the parties. He will be subject to control by the parties, usually through the medium of an operating committee. Such control will not only be budgetary but will include specific provisions requiring unanimous consent before undertaking certain activities. McCann predicts that 'Australian courts will categorize the operator/participants relationship as that of principal and agent'.[14] I would support this prediction, though suggest that the courts are equally capable of describing the relationship as a 'joint venture', a relationship which will have as one of its characteristics, if not its most basic concept, agency law.[15] The following are examples relevant to the agency issue from actual operating agreements. The first of these is the 1981 Canadian Association of Petroleum Landman Operating Procedure, (CAPL agreement). This agreement provides for an operator to whom is 'delegated the control and management of the exploration, development and operation of the joint lands for the joint account'.[16] This clause also places a duty of consultation and an obligation to provide information to the non-operators upon the operator. (In the CAPL agreement the non-operators are referred to as 'joint operators'.) The operator faces expenditure restrictions of $25,000 for any single operation. Above this figure he must obtain written expenditure authorities from his fellow joint operators.

Other specific duties placed upon the operator include obligations:

- to keep, maintain and produce records, accounts, and reports, including quite detailed records relating to the drilling programme (cl. 305);
- to allow access to joint operations (cl. 307);
- to acquire any necessary surface rights for the joint account (cl. 308);
- to maintain leases on behalf of the parties (cl. 309);
- to obtain certain insurance policies to be maintained for the joint account and benefit of the parties (cl. 310); (an alternate clause provides for the parties to self insure);
- to pay certain taxes with respect to property held for the joint account (cl. 312);
- to initially pay all costs and expenses, to charge these costs and expenses ultimately to the parties, and to hold an operator's lien against non payment by any party.

14 McCann H. K. 'The Role of the Operator Under a Joint Venture Agreement' (1982) 4 *A.M.P.L.J.* 257, 258.

15 For more detail n. 2 *supra.*

16 CAPL cl. 301.

There is little doubt that the relationship so far described between the operator and non-operators in the CAPL contract is one of agency. The non-operators are vesting in the operator the power to make contracts on their behalf including those relating to insurance and lease maintenance. The operations conducted by the operator are described as 'being conducted for the joint account'[17] The operator is subject to close budgetary supervision and control and faces positive obligations to consult. The CAPL agreement does not specifically provide for an operating committee as do the other agreements considered below, but this is unlikely to be fatal to a finding of agency.

Despite the rather obvious suggestion that the operator is an agent, there is an attempt in the CAPL agreement to deny this. Clause 303 provides that the operator is to be an independent contractor who is to furnish all material, labour and services relating to exploration, development and operation. The operator does the hiring and firing, and all contractors used by the operator are to be the contractors of the operator. Taken by itself, this clause would seem to deny agency. However clause 402 provides: 'all liabilities incurred by the operator ... whether contractual or tortious, shall be for the joint account and shall be borne by the parties in accordance with their respective participating interests'. This indemnity clause suggests that the relationship of independent contractor may not be borne out in fact. The clause is not an indemnity clause in the true sense because it does not provide a guarantee that the liabilities of the operator will be met by the non-operators. Rather it suggests that his liabilities are to be shared in a predetermined fashion among all parties. This clause implies therefore that the operator is not simply an independent contractor whose debts are guaranteed by the non-operators. Rather, it suggests that the non-operators are to be taken as fellow principals in relation to liabilities incurred by the operator. Non-operators would respond to such claims by pointing to the obvious proposition that the status of contracts entered into by the operator will be determined by the terms of those contracts.

For example, the contract itself might provide that the third party can only look to the operator for recovery, or it might deny the existence of any undisclosed principals. In such an event the contract would probably operate to deny third parties rights against the non-operators. In the absence of this, the third party may well be able to establish that the operator was acting as an agent. The onus is clearly then on the operator in negotiating third party contracts to consider the potential liability of his non-operators.

There is as yet no standardized operating agreement for Australia despite the widespread use of such agreements in oil, gas and mining ventures. Nevertheless, the agreements used in Australia owe much to their overseas counterparts and contain many similar clauses. The agreement which will now be considered is confidential and will simply be referred to as the Australian Example. It should therefore be treated as an example of an Australian unincorporated joint venture agreement and not the only type in use.

17 *Ibid.* cls. 305, 307.

This agreement places the task of management on the operator who 'shall manage and conduct operations on behalf of the parties'. The operator is described as having an independent status and (like the CAPL agreement) 'shall furnish all material, labour and services necessary.' Employees are 'the employees of the operator.' Despite the very close wording of the two agreements in this part, the Australian example does not include contractors in this clause, unlike the CAPL agreement which specifically provided that contracts were to be those of the operator. The Australian agreement, like the Canadian one, places onerous obligations regarding the keeping of books and records, the providing of access to them by fellow venturers, and the furnishing of accounts. The operator is obligated to pay 'for the joint account' royalties, certain taxes, and maintain insurance policies. The operator faces budgetary restrictions similar to those in the CAPL agreement and is required, *inter alia*, to obtain the prior approval of the operating committee before entering into a contract involving an expenditure in excess of $50,000, or selling assets above a certain figure. The agreement sets up an operating committee made up of representatives of participants. Its functions include 'supervision of the operator' and the making of all decisions with respect to the activities of the joint venture unless these have been specifically left for the 'determination, approval, or consent of the parties.' The operating committee is given a large degree of power by this clause. Following on from this, it is not surprising that the Australian agreement does not provide that the operator is to be an independent contractor. There is a clause which provides that 'except as otherwise provided, the agreement does not purport to constitute one party the partner or legal representative of any other party'. However this exception may operate only to ensure that a *non-operator* is not the agent of any other. It seems reasonably certain that this particular agreement sets the operator up as agent for the non-operators in most matters with the possible exception of employee contracts.

The Australian agreement provides a clause which seeks to indemnify the operator and share his liabilities amongst the non-operators. Unlike the CAPL clause,[18] the wording is less likely to suggest that the operator acts as a co-principal. The clause states that 'the non-operators indemnify the operator against liabilities to third parties resulting from the acts or omissions of the operator', except where the operator himself is negligent. As noted above, the CAPL clause 402 suggested that the liabilities of the operator were for the joint account. This Australian clause seems less likely to bring the non-operators into a direct contractual relationship with the third party because it operates more as a true indemnity clause. Despite this comment however, it seems that the balance of the Australian agreement is more likely to create an agency relationship than the CAPL agreement.

These Canadian and Australian agreements stress the independent nature of the operator's role. He is described in the Canadian agreement as an independent contractor, an obvious attempt to deny agency by stressing the independence of the operator's task. But to what extent is the operator's

18 *Ibid.* cl. 402.

role an independent one, and are the terms independent contractor and agent mutually exclusive?

The first point is one that has been made above. Describing what is in fact an agency relationship in other than agency terms does not prevent agency from arising. So the term 'independent contractor' is not *per se* mutually exclusive of agency. Bowstead[19] supports this view and suggests that independent operators may have a 'wide general authority'.[20] In relation to distinguishing between servants, agents and independent contractors, he concludes that it is unlikely that the ideas involved and the terminology can be reduced to a satisfactory scheme. Powell is of similar view: 'When we examine the cases and statutes, it is impossible, as far as I am aware, to find any clear-cut distinction between agents and independent contractors. There are distinctions between servants and agents. Sometimes, indeed, it is possible that the term agents in this connection could equally well mean independent contractors who were agents'.[21]

The British example, which will now be discussed, is a form used widely in the North Sea. It also uses the terminology 'independent contractor', but is far more express in relation to agency generally. It provides for an operating committee which has powers of supervision and control over the operator. The operator is subject to these powers. The operator has the usual tasks of budgeting and programme preparation, provision of data *etc.* and is obliged to 'conduct' the operations. The operator determines selection and number of employees, but unlike the other agreements, the joint operating agreement does not specify that such employees are those of the operator.

The Canadian agreement considered above makes some attempt to deny agency. The Australian example took a middle of the road course in both expressly rejecting and accepting agency aspects. The British agreement adopts the most direct and legally realistic approach by providing that the operator will act as agent, except where he acts *expressly* as an independent contractor for reasons of commercial necessity. The operator is instructed to attempt to expressly contract on behalf of the parties to the joint operating agreement. At this stage the agency of the clause become particularly interesting because it is stated that third party contracts should provide, that the non-operators are not liable on these contracts; and that the operator can enforce the contract on behalf of all joint operators. This is despite the fact that the operator is generally to contract 'on behalf of all the parties'.

This clause represents a very clever piece of drafting in that if it works, it gives the non-operators all the benefits of a principal with none of the disadvantages. That is, the clause purports to save the non-operators' rights as plaintiff in an action against the third party, but deny *that* third party any rights against non-operators: a classic case of a non-operator both having his cake and eating it.

The clause has been drafted in this fashion not only in an attempt to ensure that a non-operator is not liable in the event of an insolvent

19 14 Ed. 12–13.
20 *Ibid.* 12.
21 Powell R. *The Law of Agency* (Pitman 1961) 18.

operation, but also to address the situation raised by Hill.[22] He notes that the operator who has acted as principal may not be able to recover on behalf of his co-venturers because of the rule that one who contracts as principal cannot plead agency.[23] The clause has a further advantage in that it puts the third party on notice of the existence of the non-operators. This will be particularly important in measuring the damages payable by the third party in the event of his breach.

There are at least some doubts as to the validity of the clause because it is initially difficult to quantify the consideration furnished by the non-operators. One should at least question a contract which seems to be entirely one sided in its potential operation. The better view is that the clause will work because in any given dispute the non-operators should be able to show that they have provided consideration, the payment of moneys to the operator, representing their share of the expenses, or the promise to pay such amounts. Furthermore the clause is contained in a commercial agreement and is obviously loss shifting in character. These attributes should assist in removing any doubts as to its validity.

UNDISCLOSED PRINCIPALS

The general rule where the existence of the principal is not disclosed and the contract is made by the agency in his own name is that either the agent or the principal may sue upon it.[24] Unless a personal qualification of the agent is material to the defendants signing the contract, the principal will have rights under the contract.[25] The fact therefore that an operator has contracted in his own name will not *per se* prevent the non-operators from suing on the contract, once it is proven that the contract was really made by the operator for the non-operator, that is, once agency itself is proven.

The general rule may be disturbed if it can be shown that the principal expressly contracted on his own behalf. In *Humble v. Hunter*[26] a charterparty was signed by the son of the owner of a ship, Grace Humble. The son signed as owner in the following way: 'It is . . . mutually agreed between C.J. Humble, Esq. owner of the good ship or vessel . . .'. In subsequent litigation, Grace Humble was called to give evidence that she was the real owner of the ship, and that the son had signed as agent and not as principal. Objection was taken to this examination on the basis that a person who has signed a contract expressly as principal cannot be admitted to prove, against the written instrument, that he was simply an agent. This objection was ultimately sustained by the Queen's Bench. Lord Denman C.J., and Patteson and Wrightman JJ. all separately applied the 1813 decision in *Lucas v. De la Cour*.[27] Wrightman J. commented:

22 'Energy Law 1981' Banff Centre, *International Bar Assoc.* Vol. 11, 12–13.
23 See author's discussion in the part entitled 'Undisclosed Principals' *infra.*
24 *Sims v. Bond* (1833) 110 ER. K. B. 834; *Langton v. Waite* (1868) LR 6 EQ 165; *Browning v. Provincial Insurance Co. of Canada* (1873) LR 5 PC 263.
25 *Dyster v. Randall & Sons* [1926] Ch. 932; *Brunton v. Thomson* (1846) 7 LTOS 430.
26 (1848) 17 L. J. QB 350.
27 I M & S 249, 105 ER 93.

> I thought at the trial that this case was governed by *Skinner v Stocks* (4 B & Ald 437). but neither in that nor in any case of the kind did the contracting party give himself any special description, or make any assertion of title to the subject matter of the contract. Here the plaintiff describes himself expressly as owner of the subject matter. This brings the case within the principle of *Lucas v De la Cour* (1 M & S 249) and the American authorities cited.[28]

Patteson J. noted that 'if the contract had been made in the son's name merely, without more, it might have been shown that he was agent only, and that the plaintiff was the principal', and suggests that the 'plaintiff must be taken to have allowed her son to contract in this form, and must be bound by his act'.[29]

In *Lucas v De la Cour* a partner had made a contract declaring that the subject matter of the contract was his property alone. Lord Ellenborough C.J. held (a passage cited with approval by Lord Denman C.J. in *Humble v Hunter*) that 'if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made'.[30]

The rule applied in *Humble v Hunter* and in *Lucas v De la Cour* is very much an evidentiary one and was argued largely on this basis in *Humble*. The defendants in that case argued that the rule that undisclosed principals in contracts may sue and be sued is subject to the paramount rule of evidence that parol testimony is not admissible to vary a written contract.

Despite the obvious evidentiary basis upon which the decision in *Humble v Hunter* was argued, the judgment continues to give rise to controversy. Powell[31] investigates the decision in the context of what he terms 'the implied contract theory' and 'the inadmissible evidence theory'. The latter is simply the rule that parol evidence cannot be used to contradict a written contract. The former interpretation suggests that in the situation where an agent describes himself as owner, he impliedly contracts that he is the only principal. Powell suggests that the 'true basis' of *Humble v Hunter* 'is that, if an agent impliedly contracts that he is the only principal, that is makes it a term of the contract that he is the only principal, the effect is to prevent the principal suing or being sued on the contract.'[32] Powell does suggest, however, that it is open to doubt whether the implied contract theory can be extracted from *Humble v Hunter*.[33] Bowstead[34] suggests that the rule excluding the principal by the express or implied terms of the contract and the evidentiary rule against variation of written contracts have frequently been confused. Bowstead is of the view that parol evidence is admissible to show who is the real principal, but suggests that the rights and duties of the undisclosed principal may well be

28 N. 26, 887.
29 *Ibid.* 887.
30 *Op. cit.* 93–94.
31 Powell *op. cit.* n. 21, 154.
32 *Ibid.* 155.
33 *Ibid.* 154.
34 *Op. cit.* 269.

excluded if inconsistent with the terms of the contract, express or implied.[35] Bowstead clearly supports the implied contract basis for exclusion of the principal, making the point that if the parol evidence rule was readily applied, the 'intervention of the undisclosed principal would be almost impossible'[36] a proposition which he claims does not accord with fact.[37]

Fridman[38] reviews a number of recent Canadian authorities which suggest that courts may be more and more unwilling to admit evidence that would identify an undisclosed principal.[39] He considers two possible situations involving the question of whether parol evidence should be admitted to prove the existence of the real principal:

- The description employed by the agent may show that he impliedly contracts that there is no agent: for example, when the agent contracts as owner;
- the description used by the agent may be ambiguous, and parol evidence may need to be admitted to explain the description rather than to vary or contradict it.[40]

The court's approach to the second of these situations will be considered shortly. Fridman's discussion of the implied contract that there is no agent raises the further issue of what liability arises where the contract *expressly* negates rights in other parties, such as undisclosed principals. In *United Kingdom Mutual Steamship Assurance Associates v. Neville*[41] Tully, the manager and part owner of a ship took out an insurance policy by joining a mutual insurance association (the plaintiff). A rule in the memorandum and articles of association which were incorporated into the insurance contract, provided that only members had rights and duties under the insurance contract. Tully became bankrupt, and Neville, another part owner of the ship with Tully, was sued by the Association for certain contributions owed by Tully. The Court of Appeal held that the insurance contract negated the ordinary rule of law that would otherwise have made Neville liable as an undisclosed principal.

This case should be of particular interest to parties to an operating agreement. It would seem that the position of manager/co-owner of a ship is not that different from that of an operator/co-owner in an operating agreement. Where, as is commonly the case, the operator is under an obligation to insure the property of the venture, non-operators will be vitally interested in ensuring that such policies operate to cover their share of the assets held in common. Insurance companies will be likewise keen to recover against non-operators in the event of the insolvency of the operator. Insurance policies such as those in *Neville's* case would deny the latter, though Lord Esher suggests that the undisclosed principal may be a *cestui que* trust in respect of the proceeds the member can reach.[42]

35 *Ibid.* 256.
36 *Ibid.* 260.
37 *Ibid.* 261.
38 Fridman *op. cit.* n. 5.
39 *Ibid.* 224.
40 *Ibid.* 224–225.
41 (1887) 19 QBD 110.
42 *Ibid.* 117.

Another case involving the express denial of rights to principals is the Scottish case of *Ransohoff & Wissler v. Burrell.*[43] In this case contracts for the sale of sugar provided that principals could not enforce contracts made on their behalf unless they had followed a procedure laid down by the Beetroot Sugar Association, namely that confirmation slips were to be signed by principals. The pursuers (Ransohoff & Wissler) had purported to sell sugar through their agents (Stewart Govan & Co) to the defender Burrell. Confirmation slips were not signed. One issue that arose after Burrell refused to take delivery of some sugar, was whether a contract of sale existed between the pursuers and the defender. The Court (Lord Young dissenting) held that the effect of the clause requiring the signing of confirmation slips was to alter the common law position which would have enabled the disclosed principal to sue the purchaser. Despite some ambiguity in the meaning of the clause, Lord Moncreiff summarized its effect as follows: 'The contract shall confer and impose no rights or liability on any principals except those who shall sign the same or the confirmation slips'.[44] There was no doubt in his mind that such a clause could act to deny recovery to the principal. Lord Young, in his dissenting judgment, highlighted the procedural nature of the confirmation slips and held that the procedure did not overthrow 'the rule of common law and of common justice and of common sense that a man is bound by a lawful contract which he admits that his agent made and signed in his name on his account and with his authority'.[45] Lord Young made the further point that if the buyer had been the party suing for breach of contract, there is little doubt that Ransohoff & Wissler would have been bound by their judicial admission that they were sellers and that the contracts were made and signed by them with their authority.[46]

The decision in *Ransohoff* is not one involving an undisclosed principal. The principals were specifically named in the contract by their agents who were acting 'on account of Messrs Ransohoff & Wissler, London'. Despite this, the majority gave effect to a clause denying the principal rights under his contract unless the formalities were complied with. It should not be assumed that the same result of no contract would have been obtained if the buyer had been suing. There is little doubt that the sellers suffered because they ignored provisions in their own standard form contracts. Nevertheless, the case would be of assistance to a contract in which an operator, who purported to be acting on his own authority, denied the existence of any other principal. The majority in *Ransohoff* would look to the express terms of the contract which would deny rights to any other party. The decisions in *Humble v Hunter* and *Lucas v De la Cour* would add strong support to this, because both prevent undisclosed principals recovering where the agent has denied their existence.

Such decisions operate to deny recovery to the undisclosed principal and to the third party, though they obviously do not prevent an operator from being sued by non-operators for losses suffered as a result of

43 (1897) 35 SC LR 229.
44 *Ibid.* 239.
45 *Ibid.* 236.
46 *Ibid.* 236.

a third party action being disallowed. The drafting of the clause denying the existence of undisclosed principals would require some care. This is particularly demonstrated by a group of cases involving undisclosed principals where the terminology used by the agent has been ambiguous as to the precise manner in which the agent has been contracting. Operators should take note of the difficulties caused by such cases when they are considering whether or not they are purporting to give their fellow venturers rights and obligations under contracts entered into.

In *Formby Brothers v. Formby*[47] the agent signed a building contract as 'J. Rimmer proprietor'. The Court of Appeal was of the opinion that both parties intended that Rimmer was to be contracting party. The agreement did not disclose the existence of the principal. Vaughan Williams J held: 'There is nothing in this contract to enable us to say that the terms of the contract are such that without contradicting the written contract, evidence would be given to make an undisclosed principal liable in addition to the party who actually signed the contract'.[48] His judgment and those of Farewell L. J. and Kennedy L. J. treat *Humble v Hunter* as still representing good law, despite the view to the contrary of Lord Russell C. J. in *Killick v. Price*.[49]

In fact, the court was unable to apply the rule in *Humble v Hunter* because an objection to evidence demonstrating that Rimmer was only an agent not been taken at the County Court. There is no doubt that the Court of Appeal saw *Humble v Hunter* as presenting a particular example of the parol evidence rule. The court would, but for this procedural point, have held that the term 'proprietor', like the term 'owner' is inconsistent with the notion of agency and would therefore prevent the introduction of evidence establishing the existence of an undisclosed principal.

In the 1917 decision in *Rederiaktiebolaget Argonaut v. Hani*[50] Rowlatt J had to determine the meaning of a charterparty signed by a company, Hansen Bros Limited, 'as Charterers'. The defendant claimed that he was the undisclosed principal of this company and sought to commence arbitration proceedings against the plaintiffs who were claiming a declaration that the defendant had no rights against them. Rowlatt J noted that 'an undisclosed principal cannot sue or be sued on the contract, if to do so would be to violate a term of the written contract'.[51] He held that the use of the words 'as charterers' were words indicating that it is a term of the contract that the persons who were to fill the position of charterer and to have the rights of charterers were Hansen Brothers and no-one else. The words 'as charterers' were not to be read as mere words of description. The effect therefore of the use of the term 'charterers' was the same as if the parties had expressly stipulated that no other parties had any interest in the contract.

One year after this decision, the House of Lords handed down the decision in *Fred Drughorn Limited v. Rederiaktrebolaget Transatlantic*.[52]

47 (1910) 102 LTR 116.
48 *Ibid.* 117.
49 (1896) 12 TLR 263.
50 [1918] 2 KB 247.
51 *Ibid.* 249.
52 [1919] AC 203.

The facts were similar to those in *Hani*. One W. R. Lundgren was described in the charterparty as 'W. R. Lundgren, Charterer'. Lundgren commenced an action against the ship owners for breach of the charterparty. Before the action came on for trial, Lundgren died, and the respondents, Red. Transatlantic were substituted as plaintiffs. Lundgren had been manager of this company. The company claimed that Lundgren had entered into the charterparty as agent on their behalf. At the trial the ship owners contended that any evidence to prove the existence of the undisclosed principal was inadmissible.

The House of Lords unanimously held that the evidence was admissible. This was surprising, not only because such a result seemed irreconciable with *Humble v Hunter, Formby Bros v Formby* and the *Hani* decision, but also because Lundgren himself had not signed the contract. It had been signed by a 'J. E. Hyde by telegraphic authority and as agents for Wilh. R. Lundgren'. The court could easily have seized upon this as providing stronger proof than that presented in the earlier cases of third party evidence, available on the face of the contract, implying that Lundgren was a principal.

The court did not overrule the earlier decisions, though Lord Shaw of Dunfermline disagreed with the *Hani* decision and thought that the principles of *Humble v Hunter* and *Formby Bros v Formby* may have to be reviewed'.[53] Lord Sumner thought there was a distinction between this case and the *Hani* decision in that different words were used. In *Hani* the agent signed 'as charterers' whereas in the instant case the description was simply 'charterer'. This is not a particular satisfying distinction.

Viscount Haldane drew a distinction between an owner or 'proprietor' and 'a charterer' suggesting that the first two terms implied ownership and proprietary rights, whereas the latter term is only contractual' ... it is in accordance with the ordinary business common sense and custom that charterers should be able to contract as agents for undisclosed principals who may come in and take the benefit of the charterparty'.[54] In the context of more than one owner or proprietor the usefulness of such a distinction starts to break down. Hence an operator who signed a contract as an 'owner or proprietor' when in fact he was only one of a number of joint venturers would not necessarily imply that there were no co-owners. If he signed a charterparty 'as charterer' again he does not imply that there are no other charterers. The difficulty that is encountered in applying *Humble v Hunter* emerges more from what is not said rather than what is. The court is left with the almost impossible task of determining the parties' intentions regarding potential undisclosed persons' rights and duties when the language used has been quite neutral in discussing their existence. Viscount Haldane's distinction is an attempt to provide a test to assist in the solution of this problem but one, it is submitted, that is not entirely satisfactory. Despite the criticism of *Humble v Hunter*, it at least places the onus on the agent when signing to ensure that any description applied to the person signing the contract will not exclude his principal. This is the only logical place to put this onus, because by

53 *Ibid.* 209.
54 *Ibid.* 207.

definition, the other contracting party will not know of the undisclosed principal. In turn, the principal will not always be precisely aware that the agent is negotiating a particular contract on his behalf. The principal will have his remedies against the agent in the event that the agent incorrectly discharges obligations placed upon him.

Viscount Haldane's approach was applied by Lawrence J in *Danziger v. Thompson*[55] to allow a landlord to introduce evidence to show that a flat had been rented in the name of undisclosed principals. Here the term used by the agent was 'tenant'. This term did not imply 'that the person so described is not acting as an agent or nominee'.[56] Lawrence J, in applying Lord Haldane's judgment, had the task of adopting a test which itself had distinguished between a lease and a charterparty implying that in the latter, evidence could not be admitted, whereas it could be admitted to prove the indisclosed principal in a charterparty because of its contractual nature. Lawrence J was able to avoid this problem by suggesting that Lord Haldane must have been discussing a lessor, rather than a tenant, this latter term he argued did not imply antecedent property rights. It is submitted that this judgment demonstrates the artificiality of Lord Haldane's test. It is of interest to note that in *Danziger* the admission of the evidence was at the insistence of the other contracting party, the landlord, not the undisclosed principal, nor the agent. This fact may well have been important in the result in the case.

In *Epps v. Rothnie*[57] Scott L. J. was of the opinion that both *Humble v Hunter* and *Formby Bros v Formby* no longer represented good law. He justified these remarks by reference to Lord Sumner's comments in the *Drughorn* case[58] Lawrence L. J. stated: 'It may also be observed that the only words in the agreement which could be contradicted by proof of agency are the words "hereinafter called the landlord", which are not necessarily inconsistent with the fact of the person so called being an agent for an undisclosed principal.'[59]

In 1949 Morris J had to determine in *O/Y WASA Steamship Company Ltd and N.V. Stoomschip 'Hannah' v. Newspaper Pulp & Wood Export Ltd.*[60] whether a charterparty which contained the terms 'disponent owners', 'owners' and disponents' and which did not disclose the principals, should be bound by *Humble v Hunter.* He held that *Humble v Hunter* did not apply.[61] Morris J after reviewing the authorities thought that 'there are two principles: first, that parol evidence is admissible to prove that a plaintiff in an action is the real principal to a contract, but that a person cannot claim to be principal to a contract if that would be inconsistent with the terms of the contract itself. As I read these passages, evidence must not be admitted if it contradicts the terms of the contract before the Court'.[62]

55 [1944] KB 654.
56 *Ibid.* 656.
57 [1945] 1 KB 562.
58 *Op. cit.* 565.
59 *Ibid.* 566.
60 82 Ll.L Rep 936.
61 *Ibid.* 954.
62 *Ibid.* 953.

Two New Zealand cases support the rule in *Humble v Hunter.* In 1960 the dissenting judgment of Gresson P. in *Fawcett v. Star Car Sales Ltd.*[63] concluded after an exhaustive review of the authorities that it was still good law. In that case the term used was "owner". The majority judgments did not consider *Humble v Hunter.* Moller J in *Murphy v Rae*[64] while holding that the case was still good law, held that its principle was applicable only to cases strictly within Lord Haldane's test within the *Drughorn* decision, and continued 'that is to say, where a person is described in a written contract as the "owner" or "proprietor" of property, and where it is a term of the contract that he should contract as "owner" or "proprietor" of that property. Moreover, I think that the principle is to be applied only when a full consideration of the whole contract brings it clearly within that area'.[65]

Murphy v. Rae dealt with joint property owners (the Murphys). Mr. Murphy purported to sell the joint property to Mr. Rae. The contract made no mention of Mrs. Murphy's interest, and described Mr. Murphy as 'vendor'. Moller J. accepted that Mr. Murphy had acted as agent for his wife and allowed evidence establishing that he had acted as an undisclosed agent. Moller J. held that the term 'vendor' did not bring *Humble v. Hunter* into operation. This term he thought was similar to the word 'tenant' in *Danziger's* case and the word 'charterer' in *Drughorn's* case. He was more troubled with a clause in the schedule to the contract which read 'All that the vendor's property situated at . . .' which the defendant had argued was very much a declaration of ownership, nevertheless this was accepted by him as being merely descriptive of the land and not of Mr. Murphy.[66]

Murphy v. Rae is of interest to joint venturers because it deals with the situation of a principal acting both for himself and as well as agent for a further undisclosed principal. This is very much the way operators' contracts may be entered into. Nothing is made of the fact that the agent is a co-owner, though as suggested above this fact might be an additional basis for distinguishing *Humble v. Hunter.*

The relative ease in which the court allowed the introduction of evidence allowing the proof of the undisclosed co-principal and the court's ability to again avoid *Humble v. Hunter* may be of some concern to joint venturers who may have assumed they are not bound by the acts of the operator. The term 'vendor' was held to have no particular significance in delineating an agreement as being one solely that of the parties signing. Finally, it should be noted that this was another case where the evidence was allowed in at the insistence of the agent and the undisclosed principal and against the wishes of the defendant.[67]

That the general rule relating to undisclosed principals is applicable to joint owners is further demonstrated by the decision in *Skinner v. Stocks*[68] (This decision was distinguished subsequently in *Humble v.*

63 [1960] NZLR 406.
64 [1967] NZLR 103.
65 *Ibid.* 109.
66 *Ibid.* 110.
67 *Cf. Jones v. Young* (1978) 21 NBr (2d) 482.
68 106 ER 997.

Hunter where Wrightman J. noted that the contracting party did not give himself any special description, or make any assertion of title to the subject matter of the contract). The plaintiffs were joint owners of whale oil. One of their number, Skinner, contracted to sell the oil to the defendant, who had no knowledge that others were involved in the transaction. It was held that the joint owners were entitled to sue the purchaser.

The final decision to be considered here demonstrates another possible approach to a resolution of the difficulties of the undisclosed principal doctrine. It is not one that will provide much comfort to parties to a joint operating agreement. In *Marginson v. Ian Potter*[69] one issue considered was the nature of the relationship four persons (who had formed a syndicate using their private company, Commerce Australia Pty. Ltd. as the medium for speculation in shares) had with a firm of stockbrokers who had advanced a large sum of money to the company for share trading. The trial judge had found that Commerce Australia Pty Ltd had acted as agent for the syndicate in its buying and selling transactions. Gibbs & Mason JJ in a joint judgment were of the opinion that at the time the contract was made the syndicators were the undisclosed principals of Commerce Australia Pty. Ltd.[70]

However, the approach of Jacobs J. is of more interest. He stated: 'Indeed there may not have been a situation of undisclosed principal at all. Commerce Australia Pty. Ltd. was the legal person in whom it was intended that the shares purchased would be legally vested. It held its rights under the contracts of purchase and would have held title to the shares as trustee for the appellant, among others. As such, Commerce Australia Pty. Ltd. acting within its powers as it undoubtedly was and therefore not in breach of trust, was entitled to be indemnified, and the respondents (the brokers) were entitled to be subrogated to its right of indemnity'. After reference to Halsbury,[71] His Honour continued: 'On this view of the matter, the appellant was with his co-venturers always liable to make good personally out of the purchased shares the indebtedness of the company to the respondents whether or not the respondents chose to sue the company to judgment. It does not matter whether the company is described as trustee or agent in this context. The same right to indemnify and consequent right in the creditor to be subrogated thereto existed . . .'[72]

The use of the law of trusts in order to provide a remedy to the creditor is of interest to parties to an operating agreement. There is more than a passing resemblance in the situations. In *Marginson v. Ian Potter* the investing parties were described as a 'syndicate' and by Jacobs J. as 'co-venturers'. The position of Commerce Australia Pty. Ltd. might be described as that of operator, taking its investment instructions from the venturers. Commerce Australia itself was not an investor, though this does not change matters much. According to Jacob's view the company contracted as trustee for the co-venturers, though he saw little difference in legal effect if the relationship was more properly characterized as one of principal and agent.

69 (1976) 136 CLR 161.
70 *Ibid.* 169.
71 *Halsbury's Laws of England* 3rd Ed. Vol 38 943–944.
72 *Ibid.* 175.

The law of trusts presents further interesting difficulties for operators. If some or all of their function is more than merely contractual, more than that of an agent, and is in fact at least 'quasi trustee' it becomes difficult to determine the precise limits of their liability to their co-venturers through the indemnity principle, or the limits of the co-venturer's liability for the debts of the operator.

OSTENSIBLE AUTHORITY

The discussion in the first three parts of this paper was based on the premise of actual authority. In this part that premise is removed and the potential liability of a non-operator based on apparent authority is considered. Such liability could emerge from common law or from provisions of the Partnership Act. Apparent authority amounts to an absence of authority, and arises where there is no agreement at all that the apparent agent will act for another. Bowstead suggests that the authority, as in the actual agency situation, stems from the principal's objectively determined consent, 'the difference being that in one case the consent is manifested to the agent and in the other to the third party'.[73] In *Hely-Hutchinson v. Brayheed Ltd.* apparent authority was described simply 'as the authority of an agent as it appears to others'.[74] A more detailed definition was provided in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*[75] where it was defined as

> a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent has actual authority to enter into the contract.[76]

The elements required to establish the existence of ostensible authority at common law would therefore include the following:

- A representation must be made, though it is not necessary that this be made by words, indeed the more difficult cases may well arise when this representation has been made by conduct.
- The representation must be made by or through the authority of the principal, it is not sufficient that the representation be made by the agent acting alone. However, as will be seen below, if an agent informs a third party that X is a principal, then X is bound by a subsequent contract if X has made that representation to the agent, or if the agent has himself made that representation to another person in the presence of X and X has allowed it to pass uncontradicted.

73 Bowstead *op. cit*, p. 4.
74 [1968] 1 QB 549, 583.
75 [1964] 2 QB 480.
76 *Ibid.* 503.

— There must be reliance on the representation on the part of the third party. So if the third party is not aware of the existence of a principal, recovery would not be possible. This rule does not appear to prevent the establishing of an estoppel when the existence of an apparent principal, but not the name of the principal is disclosed, even if the agent refuses to reveal the name to the third party. As indicated in the passage cited from *Freeman's* case, the requirement of reliance excludes an estoppel arising where the agent purports to make the agreement as principal. This is an important point to be appreciated by parties to an operating agreement because it may provide a relatively easy method for operators to exclude the possibility of such liability by an express clause that the operator contracts solely on his own behalf. But as discussed earlier in this paper, this may have the effect of destroying any rights the non-operators may otherwise have to sue on such contracts. One possible way around this might be to insert a clause that excludes the right of the third party to recover against any apparent principals, but protects the right of the third party to proceed against actual principals.

Apparent authority also may emerge under the Partnership Act, 1892 (NSW).[77] The ultimate basis for such liability is found in the common law and there is no point in treating these two as entirely separate sources of liability. It is clear that the major section dealing with estoppel in the Partnership Act, section 14(1), has application to situations which do not concern an existing partnership. It therefore is not necessary to establish that a joint venture is a partnership before the section could be applied.[78]

That the issues that will arise in establishing apparent authority in a joint operating agreement are not new is amply demonstrated by the 1863 decision of *Martyn v. Gray*.[79] The defendant (Gray) had assisted in financing the mining activities of Gregg, who was engaged in the getting up of a company to work a mine in Cornwall. Gregg had received as security a deposit of 250 shares in the mine, with an option to take the shares. Gray did not take up the option but visited the mine, and obtained information as to its prospects and future costs. At that time he also assisted in the paying of some wages. He allowed the manager of the mine to represent him, without contradiction, as a capitalist from London who had a large interest in the mine and who intended to work it vigorously. This representation had been made at a bank and not to the plaintiff. But subsequently it was repeated to the plaintiff by the mine manager, though

77 Similar legislation exists in other states and other parts of the British Commonwealth, being based largely on the Partnership Act, 1890 (UK).

78 *Bunny Pty Ltd v. Atkins* [1961] VLR 31; s. 14(1) provides:

> Every one who by words spoken or written, or by conduct represents himself, or who knowingly suffers himself to be represented as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

79 (1863) 14 CB (NS) 823; 143 ER 667.

Gray was not actually named. He argued that though his conduct may have amounted to a representation to the manager, so as to make him liable, for instance, for the manager's salary it did not amount to an authorization for the manager to repeat the representation. Gray further argued that it was necessary for a party who was to be charged as a partner to be personally identified. He relied on the decision in *Vice v. Lady Anson.*[80] It was held by all three appeal judges that Gray was liable. Erle CJ was strongly persuaded by Gray's silence in the face of the representation made at the bank that he was one of the proprietors of the mine.[81] The fact that Gray was never personally identified was not fatal to the plaintiff's claim, it being sufficient that the goods were supplied on the credit of a man of capital, (or in modern parlance on the credit of an existing principal whose name was undisclosed). Williams and Byles JJ also dismissed the appeal, Williams J suggesting a general rule that if the defendant informs AB that he is a partner in a commercial establishment, and AB informs the plaintiff, and the plaintiff believing the defendant to be a member of the firm, supplies goods to the firm the defendant is liable for the price.[82]

The South Australian Supreme Court was faced with a set of facts bearing some similarities to *Martyn v. Gray* in the 1923 decision of *Bryant Brothers v. Thiele.*[83] A creditor of Thiele sued four defendants arguing that their contribution of money to a business enterprise had caused either a partnership with Thiele or an estoppel against them to arise. The court held that the jury's finding of no partnership could not be disturbed. Gordon J could not find a 'particle of evidence' that the defendants had ever held themselves out personally as partners.[84] Representations made by Thiele to the creditor when he bought the goods were insufficient. Gordon J referred to the passage of Williams J cited above, but in doing so made the further point that no estoppel could arise against the defendant if he proves that he did not inform AB that he was a partner in the commercial establishment to which the plaintiff supplied the goods on the faith of the representation, because then the foundation for the estoppel would have gone.[85]

Gordon J also approved of a passage from Lindley[86] where he said in relation to holding out that 'the most difficult cases of this class occur where the defendant has not held himself out, but where he has been held out by others, and he alleges they had no authority to do so. Express authority is not necessary; the authority may be inferred from his conduct; and if a person has by signing prospectuses or allowing his name to be put on them, or by being party to resolutions, or by his own statements, though not intended to be repeated, or has in any other way so conducted himself as, in fact to have authorized the holding out which he repudiates he will not escape liability.[87] Poole and Angus Parsons JJ supported Gordon's

80 7 B & C 409.
81 *Ibid.* 673.
82 *Ibid.* 674.
83 [1923] SASR 393.
84 *Ibid.* 403.
85 *Ibid.* 403.
86 *Lindley on the Law of Partnership* Ed. Lindley W. B. & Andrews-Uthwatt A. (Butterworths 8th Ed.) 75.
87 N. 83, 402, 403.

conclusion that the appeal be dismissed. Poole J made the further point that to constitute an estoppel it is necessary that the conduct relied upon occur before the granting of credit.[88]

One difficult issue that will often arise in estoppel cases is the effect of silence on the part of the apparent principal. The difficulties of establishing the requisite representation in this context were amply demonstrated in the Canadian decision of *Crampsey v. Deveney*.[89] In this case a mother listed for sale property held jointly with her children. A buyer was ultimately found, but after contracts were signed by the mother and the purchasers, the children upon being requested to sign the transfer refused. The mother had not been given authority by the children to list the property. She did not notify them of this, and only two of the three children knew of the listing. She had acted as if she did not need their authority, and the children had not presumed to contradict her on this. It was held that the children's silence and inaction after all three had learned of the contract could not be built up into a representation by them to the purchaser that the mother had authority to sell their interests in the property. Judson J, who delivered the judgment of the court, made this comment: 'Silence and inactivity in the circumstances of this case are not a representation to a third party that their mother had authority to sell' but rather 'Silence and inactivity was evidence of disquiet approval and ignorance of rights and lack of knowledge.'[90]

One obvious source of information in relation to apparent authority in the context of oil and gas and mining law is that body of law which has emerged in the United States. As in the English model, the basis of liability can be found in common law and partnership legislation. There is however the additional notion of a 'joint venture' in United States law to which many operating agreements undoubtedly belong.[91]

Liability on the basis of apparent authority in United States' joint ventures has recently been analysed in some depth by Brelsford.[92] He suggests there are three common law prerequisites for establishing apparent authority in the United States: 'First, the principal must manifest to a third party consent to the agent's exercise of such authority, or knowingly permit the agent to exercise such authority. Second the third

88 *Ibid.* 403.

89 (1969) 2 DLR (3d) 161.

90 *Ibid.* 164. Cartwright C J C, Martland, Hall, & Spence JJ were the other judges in this case.

91 Boignon & Murphy treat a 'mining partnership' as that term is used in the United States as a form of joint venture, and one in which for liability purposes any distinction is largely insignificant. Boignon H. L. & Murphy C. L. 'Liabilities of Non Operating Mineral Interest Owners' 51 *University of Colorado Law Rev.* 153, 157, 160 Both Ryan and the present author (n. 1) have argued that such a form may also be emerging in Australia. However, the courts may well avoid the creation of a new and separate form of liability similar to that of partnership by careful application of trust and agency principles. One would hope that if a separate form does emerge the courts, unlike their counterparts in the United States, are able to draw a real distinction between such enterprises and partnerships. See also *Brian Pty. Ltd. v. United Dominions Corp. Ltd.* [1983] 1 NSWLR 490 and subsequent H.C. App. (1985) 59 ALJR 676.

92 Brelsford J. R. 'Apparent Authority and the Joint Venture' (1980) 13 *University of California (Davis)* 831.

party, acting in good faith, must reasonably believe the agent possesses real authority to act for a principal. Finally, the third party must actually be deceived and must rely upon the appearance of authority ... Apparent authority rests exclusively upon the acts or omissions of the principal. The agent's acts alone cannot establish his or her authority to act for the principal. The principal's conduct justifies the principal's ultimate liability. By acquiescing in the appearance of the agent's authority the principal misleads third parties. Thus the principal should be liable as though the agent's acts were actually authorized. In this way the law protects third parties who honestly and reasonably rely on the principal's acts or omissions.[93]

Brelsford also examines apparent authority under United States joint venture and partnership law. In relation to the former he discusses and then rejects the purported rule in joint venture law that apparent authority is not available to impose liability on co-venturers. This rule is said to have emerged from the decision in *Wrenn v. Moskin.*[94] If such a rule exists an express prohibition on members of a joint venture contracting without the consent of all other members would 'eliminate all risk of unexpected contractual liability'.[95] This, he argues, is an undesirable result in that it does not strike a proper balance between third party rights and those of the venturers.[96] In relation to the latter he describes the Uniform Partnership Act as requiring merely that the third party prove that the act in question was for apparently carrying on in the usual way business of the partnership.[97] He notes that undisclosed partners can be bound by the acts of a single partner and that such liability results from membership status.[98] This, he is critical of because it 'weighs too heavily in favour of third parties and disregards the valid commercial need for an informal business model possessing a reduced risk of vicarious liability'.[99]

To discover more recent examples of direct relevance of apparent authority being applied in the context of mining and oil and gas operating agreements it is necessary to turn to a number of cases from Texas, Oklahoma and California. The first of these cases is *Robinson Petroleum Co. v. Black Sivalls & Bryson.*[100] This decision (before the Supreme Court of Oklahoma) concerned an oil and gas lease owned by Robinson Petroleum. In April 1924, the company entered into a contract with Union Petroleum for the drilling of an oil and gas well thereon. If the well produced, Union was to receive a one-half interest with a further provision that if it produced one hundred barrels or more within fifteen days of completion, Robinson was to pay a sum of $8000. In the event of a dry hole, Union was to remove all material which it had used in drilling. Apart from the sum previously mentioned, drilling was to be done free of expense to Robinson. Union began drilling and ordered supplies from the

93 *Ibid.* 846, 847.
94 (1929) 226 App Div 563.
95 Brelsford *op. cit.* 843.
96 *Ibid.* 853.
97 *Ibid.* 849.
98 *Ibid.* 850.
99 *Ibid.* 855.
100 (1929) 280 P. 593.

defendant claimants, Black, Sivalls and Bryson. However a larger group of supplies had been ordered by the president of Robinson. This company through its president and his son took an active interest in other aspects of the work done on the lease and for a long period of time appeared to be in charge of the lease. It was held that while Robinson may have entered into a mining partnership with Union the judgment was, based 'at least to some extent' on the basis that the 'plaintiffs are estopped from denying the existence of partnership.[101] The court held further that 'while there was no specific or definite agreement about the profits and losses, we believe that their acts and conduct towards the claimants who furnished materials and labor were such as to make them each liable for the act of the other in drilling the oil well in question.'[102]

In *Foster v. Fisher*[103] Foster sought to recover the rental value of oil well drilling equipment from three defendants, Fisher, Day and Johnson, on the theory that they were joint adventurers or partners in the drilling of two oil wells. Day had represented himself to be a partner to the plaintiff by indicating that he was in charge of the issuing of royalty interests and would see that they were delivered. This was held to be sufficient to establish that he was a partner by estoppel. Johnson was the financier of the operation and there was no evidence of an express agreement of joint adventure or partnership between him and the others. He was found not to have represented himself to be a partner, or to have consented to any such representation. Wood J stated:

> 'His sole part in the transaction was to finance the drilling operations, for which he was to receive an agreed royalty interest. The fact that he paid bills which were submitted to him by Fisher and guaranteed the payment of other bills did not constitute him a partner by estoppel. Such conduct was entirely consistent with his agreement to finance the drilling. He was interested in the drilling and was present on the leases of numerous occasions but there is no evidence that he took part in the general management of such operations or in the hiring and firing of employees.'[104]

Moore PJ and McComb J concurred.

This Californian decision can be contrasted to that of the Supreme Court of Oklahoma in *EG Sparks v. Midland Supply Company*.[105] This was an attempt to make a person financing the development of an oil and gas lease liable to a supplier (Midlands) for material supplied. The financier (Sparks) admitted that the lease was held under the joint ownership of himself and the developer (Rathburn), and that he (Sparks) was to receive an assignment of some of the production. He had agreed to the charging of items against his credit for material furnished at the request of Rathburn. There was no evidence that he was to be repaid the amounts advanced other than by sharing of profit on a percentage basis. The court was therefore of the view that the defendant was estopped from denying the existence of a mining partnership.

101 *Ibid.* 596.
102 *Ibid.* 595.
103 (1941) 111 P2d 935 (District Court of Appeals, California).
104 *Ibid.* 938.
105 (1959) 339 P2d 1056.

In the 1946 Texas decision of *Hix v. Bellingsley*[106] the Court of Civil Appeals found an estoppel based on the use of the initials of the defendants in the name of their firm 'The R H & W Oil Company' a sign identifying the well in that name, the fact that the particular defendant (who was the appellant) was in charge of the drilling, the joint signing of promissory notes, and the fact that a permit had been made out to the various defendants in the name of the R H & W oil company.

A more recent example is the decision of the US Court of Appeals in *Misco-United Supply Inc v. Petroleum Corporation*[107] This case involved the by now almost standard set of facts in which the supplier of materials (Misco) having delivered to the operator (Pinner), then sued the non-operators when the operator was unable to pay. In this case however, the defendant, Petco, had withdrawn from the agreement before the delivery of the materials. It was held that Petco was not liable because Misco was unaware at the time of contracting of the participation of any other persons apart from Pinner. Hence the seller could not have reasonably believed that Pinner had actual authority to act for Petco if Misco was not aware of Petco's existence. The fact that it had withdrawn from the venture prior to delivery would not have been enough *per se* for Misco to avoid liability unless notice had been given to Misco.

Any attempt by non-operators to avoid liability for the contracts of the operator must take into account the possibility that liability may emerge on the basis of apparent authority even in the face of the most express limitation of agency powers, provided this limitation is not known to the third party. What therefore can be done on the part of the operator and/or non operators to reduce the likelihood of liability? I have previously discussed the inclusion of a clause either setting the operator up as the only principal, or the use of a clause that excludes the right of the third party to recover against any apparent principals, but protects the right of the third party to proceed against actual principals. These are matters that can be attempted in a formal sense which may or may not be either desirable, agreeable to all parties, or even legally effective. On a more operational level the cases discussed above suggest various dangerous practices to be avoided. Non-operators must be careful not to be seen as being in control of an operation by the ordering of materials, instructing employees, signing some contracts but not others, being placed in charge of a particular activity by the operator, or simply assuming that role and so forth. They must also be careful how they are represented by the operator or his servants particularly when such representation is made in their presence and remains unchallenged. Silence alone in such circumstances will not protect them. They need to be careful of the name of their operation and the way they are described in any documentation. Contracts entered into by the operator for which it is intended he is to be solely liable should be in his name, and not in the name of the parties or the unincorporated joint venture. Advertising by one of the parties to the joint venture may present particular dangers especially if reference is made to

106 (1946) 195 SW2d 219.
107 (1972) 462 F2d 75.

that party's 'partners', 'co-venturers' or 'fellow participants' in an operation and is allowed to go unchecked. Change in the composition of the parties to the joint venture also presents potential liability to the retiring venturer if proper notice is not given. It should be noted that there is little point in becoming particularly paranoic about apparent authority, if in fact, an actual agency relationship covering the very same activity exists at law. Apparent authority only assumes significance when actual authority is absent or of limited operation. But this is not to say that apparent authority cannot arise out of a situation where some, but not a complete measure of actual authority exists. Thus an agent who has been given authority to spend up to $10,000 may have been armed with the indicia of an agent with much more than that authority. One final potential source of estoppel may emerge from the registration on publicly available registers of licenses or other forms of joint interests. An unresolved issue under section 14 of the Partnership Act is whether registration under business names legislation amounts to a holding out in terms of that section. Higgins and Fletcher[108] and Bowstead[109] suggest that this is not sufficient to constitute an estoppel, particularly against a person who did not know the contents of the register. By analogy one would expect a similar view to prevail in relation to operating agreements.

SOME CONCLUSIONS

There is little doubt that agency law will play a very large part in litigation concerning third party contractual disputes involving parties to a joint operating agreement. Express denials of an agency relationship in an agreement will clearly not prevent such a relationship arising at law where the facts clearly point in that direction. A review of a number of different agreements in this paper suggests that agency generally exists between the operator and non-operators. Given that this is probably going to be the general case, is there any purpose to be served by not directly recognising this relationship in the agreement itself? The British Agreement considered does precisely that in a clause, which if it works, provides the non-operators with minimal liability and maximum rights. The clause also seeks to address the not inconsiderable undisclosed principal problems raised in the third part of this paper, by directing the operator to expressly contract on behalf of all parties to the operating agreement. McCann suggests that operators in Australia do not generally state in major contracts that they contract as agent for the participants.[110] This means that the undisclosed principal issue is a very real one for joint operators in this country. In particular, there is the danger that the contract may imply that there are no other undisclosed principals, thereby denying such persons rights of recovery under the contract.

I considered another practical difficulty for participants, that was the issue of ostensible authority. Non-operators cannot be certain that

108 Higgins P. & Fletcher K. *The Law of Partnership in Australia and New Zealand* (Law Book Co. 4th Ed.) 122.
109 *Op. cit.* 254.
110 *Op. cit.* 265.

their liability to third parties will be limited to their actual grant of contracting power to the operator. They will need to continually monitor both their own activities and those of the operator to ensure that nothing done by themselves or the operator can be seen as a representation to third parties that the operator has power to contract when this is not the case.