Neutral Citation Number: [2009] EWHC 540 (Comm)

Case No: 2007 FOLIO NO 1057

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2009

Before :

MR JUSTICE DAVID STEEL

- -

Between :

COLOUR QUEST LIMITED AND OTHERS	**Claimants**
- and -	
(1) TOTAL DOWNSTREAM UK PLC **(2) TOTAL UK LIMITED** **(3) HERTFORDSHIRE OIL STORAGE LIMITED**	**Defendants**
- and -	
(1) TOTAL DOWNSTREAM UK PLC **(2) TOTAL UK LIMITED**	**Part 20 Claimants**
- and -	
CHEVRON LIMITED	**1st Part 20 Defendant/ Third Party**
- and -	
TOTAL MILFORD HAVEN REFINERY LIMITED	**Fourth Party**
- and -	

HERTFORDSHIRE OIL STORAGE LIMITED

2nd Part 20
Defendant

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Jonathan Gaisman Q.C. & David Turner & Siobán Healy (instructed by **Kennedys**) for the **Colour Quest Claimants**
Lexa Hilliard (instructed by **Collins Solicitors**) for the **Douglas Jessop Claimants**
Justin Fenwick Q.C. & Paul Sutherland (instructed by **Pinsent Masons LLP**) for **West London Pipeline and Storage Ltd and United Kingdom Oil Pipelines Ltd**
Vernon Flynn Q.C. (instructed by **Linklaters L**LP) for **BP Oil UK Limited**
Laurence Rabinowitz Q.C. & Richard Handyside (instructed by **Simmons & Simmons**) for **Shell UK Limited**
Lord Grabiner Q.C. & Andrew Bartlett Q.C. & Julian Field & Alan MacLean & Alexander Antelme & Simon Birt (instructed by **Davies Arnold Cooper**) for the **First and Second Defendants**
Philip Edey (instructed by **Edwards Angell Palmer & Dodge UK LLP**) for **Hertfordshire Oil Storage Limited**
Jonathan Sumption Q.C. & Andrew Popplewell Q.C. & Michael Bools (instructed by **Herbert Smith LLP**) for **Chevron Limited**
Gordon Pollock Q.C. & Claire Blanchard (instructed by **Halliwells LLP**) for **TAV Engineering Limited**

Hearing dates: 1 October - 16 December 2008

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE DAVID STEEL

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Mr Justice David Steel:

Introduction

1. At about 0600 on Sunday 11 December 2005, a number of explosions occurred at the Buncefield Oil Storage Depot at Hemel Hempstead, Hertfordshire. At least one of the initial explosions was of massive proportions. Indeed it is thought to have been the largest peacetime explosion in Europe ever to have occurred. It measured 2.4 on the Richter scale and could be heard 200 km away.

2. The cause of the explosion was the ignition of an enormous vapour cloud that had developed from the spillage of some 300 tons of petrol from a storage tank. There ensued a large fire which engulfed a further 20 fuel storage tanks. The fire burned for a considerable period emitting large volumes of black smoke which remained visible over Southern England for several days. Some 2000 people were evacuated from their homes and the nearby M1 motorway was closed. Mercifully the timing of the explosion (and the day of the week) meant that only 43 people were injured in the incident, none of them seriously. There were no fatalities.

3. Apart from damage to a large proportion of the Buncefield site, significant damage was also caused to both commercial and residential properties outside the perimeter of the depot. In particular there was a substantial impact on the adjacent industrial estate. This was home to over 600 businesses employing about 16,500 people. All these businesses suffered disruption. The premises of 20 businesses employing 600 people were destroyed and the premises of another 60 businesses employing 3800 people were heavily damaged and unusable. The incident also damaged a great amount of housing throughout the St. Albans district. The claims are said to total in excess of £750 million. Little imagination is required to envisage the likely outcome if the explosion had occurred on the Monday morning with people at or on their way to work.[1]

4. The Buncefield depot was a large and strategically important fuel storage site or tank farm used by a number of oil companies. There was a throughput of 2.5 million tonnes per year. The depot received petrol, aviation fuel, diesel and other fuels by pipeline. These fuels were stored in tanks and distributed by pipeline or road tanker to London and South East England. It was handling a large proportion of the total supply to consumers in the South East. In addition the terminal acted as the main pipeline transit point meeting much of Heathrow's and Gatwick's demand for aviation fuel. On the day of the explosion, the site contained over 35 million litres of petrol, diesel and aviation fuel.

5. The depot contained various sites including (see attached plan at Appendix 1):

   a) Hertfordshire Oil Storage Ltd ("HOSL") site.

      It was in two sections, East and West, and formed the basis of a joint venture between Total and Chevron. HOSL West comprised 16 tanks and HOSL East had 10 tanks (although notably 3 were reserved for Total's exclusive use for

[1] With the added consideration that thereby the car parks would have been filling up: this in turn would have increased the force of the explosion by enhancing the congestion in the way of the advancing flame front.

the storage of aviation fuel). All the tanks were operated from a control room located in an administrative building on the HOSL West site. The control room was equipped with a Motherwell automated control and tank gauging system for the operation of Fina-Line and the HOSL storage and road loading facilities. HOSL West was the centre of the fire and explosion.

b) United Kingdom Oil Pipelines Ltd ("UKOP") and West London Pipeline and Storage Ltd ("WLPS") site: these were sometimes referred to as the BPA sites, BPA being the company engaged by WLPS and UKOP to operate the site.

This was also split in two, a North or Cherry Tree Farm Section and a main section all lying between the HOSL West and HOSL East site. There were 6 storage tanks and other facilities operated for the WLPS/UKOP shareholders. The whole site was heavily damaged in the incident.

c) BP Oil Ltd site.

This facility was on the south side of the depot and escaped major damage.

d) Ex-Shell UK site

This was on the south-west side of the depot. The tanks and office buildings formerly used by Shell had been closed down. In part it was used as a tanker park for Shell drivers picking up fuel under an exchange agreement with Chevron. In addition a large warehouse (the "Blackstone" warehouse) had been constructed on the site. This was heavily damaged.

6. The fuels arrived at the site through a system of three pipelines:

a) The Fina-line, a 10 inch diameter pipeline from the Lindsey Oil refinery on Humberside which terminated within the HOSL West site. Although it was not an asset of the Total/Chevron joint venture, it was operated, including the control of flow rates, from the same control room as the HOSL tanks.

b) The UKOP North pipeline, a 10 inch diameter pipeline running from Shell's Stanlow refinery on Merseyside. Having passed a pumping station at Kingsbury it terminated at the UKOP/BPA Cherry Tree Farm or North site. It could feed tanks in both the HOSL East and West sites as directed from the HOSL control room. However the flow rates were set at Kingsbury.

c) The UKOP South pipeline, a 14 inch diameter pipeline from Shell Haven and BP Coryton Refinery via Kingsbury with a spur terminating in the BPA Main site. Flow rates were also set at Kingsbury.

7. Motor fuel departed from the site by road tankers from dedicated loading facilities or "racks" at HOSL West, BP and BPA. However in the case of aviation jet fuel it left by road from a loading gantry or via two pipelines from the UKOP/BPA sites into the West London Pipeline System owned by WLPS and operated by BPA.

8. In the lead up to the explosion, the site was importing unleaded petrol through the Fina-line and the UKOP South pipeline and diesel through the UKOP North pipeline.

At the same time, unleaded petrol was being exported by road tankers filled at the gantry on the HOSL West site.

9. The HOSL control room was continuously manned by one or more pipeline and terminal supervisors on two watches: 0700 to 1900 and 1900 to 0700.

10. At the time of the explosions the weather was calm, cold, and humid. There was a very light westerly wind, the temperature was about 0° centigrade and the relative humidity was 99%.

11. The sequence of events was in summary as follows:

a) On 10 December 2005 at 0630, tank 915 in bund A at HOSL West started to receive part of a consignment of 10,500 m^3 of unleaded motor fuel (PU50) from the Fina-line which had earlier been filling Tank 901. This change was prompted by the low level alarm sounding on Tank 915 which was supplying fuel to the loading racks. The net rate of inflow allowing for the continuing outflow was about 140 m^3/hr. At this rate the available ullage would have been sufficient until well into daytime on 11 December.

b) The supervisors on duty in the control room were Mr Graham Nash as Pipeline Supervisor and Mr Mark Forde as Terminal Supervisor. At 0700 these two supervisors were replaced by Mr Philip Doran. In addition Mr Terry Fitt came on duty[2].

c) Shortly before the next change of watch, at about 1845, those in the control room arranged for Tank 912 in bund A to start to receive a consignment of 8,400m^3 unleaded motor fuel from the UKOP South pipeline at a pumping rate of about 500m^3 per hour set by Kingsbury. The pumping schedule contemplated that this delivery would run throughout the watch until about 0815 on 11 December.

d) Immediately prior to the commencement of delivery of this consignment, Tank 912 had available ullage of only 4,971m^3 (on the basis of the level set for the High alarm) and thus a transfer of the delivery to another tank was required before the end of the night-time watch to accommodate the remainder of the consignment.

e) At 1900 a shift handover in the control room took place. Mr Philip Doran (and Mr Terry Fitt) handed over to Mr Graham Nash (as Pipeline Supervisor) and Mr Mark Forde (as Terminal Supervisor).

f) The only relevant recorded activity in the control room involving the Motherwell system during the night (until immediately before the explosion) was the entering into the automated system at 1902 of the product data in respect of samples taken from the consignment entering Tank 912 from the UKOP South pipeline.

g) At about 2315 the terminal was closed to tankers to enable stock checking to be carried out. The terminal reopened for transfers into road tankers at about

[2] He was a Technician and thus not directly concerned with operations in the control room.

midnight. The stock check was completed at about 0130 and no abnormalities were reported.

h) At about 0100 on 11 December 2005 the pumping rate from the Fina-line pipeline into Tank 915 was increased to a net rate of 240m^3 per hour by those in the control room. Even at that rate there was sufficient ullage in Tank 915 to continue receiving fuel until after the end of the night shift.

i) At some point between 0300 and 0315 the tank gauge for Tank 912 became stuck and from then onwards the Motherwell system recorded an unchanged reading of 12.188m (96.41% full) notwithstanding that filling of the tank continued at a rate of about 550m^3 per hour.

j) Neither supervisor responsible for receipt of the consignment of oil in to Tank 912 noticed that the reading remained unchanged let alone appreciated that the gauge on tank 912 had become stuck.

k) The level in Tank 912 went past the High alarm level (12.630 metres) at about 0329 and then past a High High level alarm (12.730 metres) at about 0334. But since these were connected to the stuck tank gauge no alarm sounded.

l) The level continued to the independent safety switch and alarm (the TAV or Cobham switch) set at the "ultimate high" level of 13.114 metres. The mechanism was designed, if such a level was reached, to activate a trip function to close valves on the incoming pipes. But this did not operate because it was out of position having not been padlocked in its operating position following a recent test.

m) The floating tank lid was now near the edge of the roof. Calculations reveal that Tank 912 would have been completely full at 0520 in the sense that it would have begun to overflow through the roof vents.

n) At about 0538 a low-lying white mist began to develop in the vicinity of the North West corner of bund A in which various tanks including Tank 912 were situated. The mist was recorded on CCTV footage recovered after the incident.

o) By about 0546 CCTV cameras along Buncefield Lane on the western edge of the site showed that the mist had thickened to about 2 metres deep and was so dense that it was not possible to see through it. The mist appeared to flow away from Bund A in all directions.

p) At 0550 a tanker driver contacted the supervisors and informed them that there was a strong smell of petrol vapour at the loading bays and a strange white mist at the north end of the site. Mr Forde went to investigate at about 0553.

q) Between 0550 and 0600 a thick fog of between 5 and 7 metres in height was to be seen near the junction where Cherry Tree Lane meets Buncefield Lane. The fog continued to spread west of the Buncefield site into adjacent office car parks. Cars being parked off-site began to rev uncontrollably.

r) Without warning at 0553 the flow rate into Tank 912 was increased first to 890 m^3 per hour and on to over 900 m^3 per hour by those operating the UKOP pipeline off site at Kingsbury, thus increasing the rate of overflow by over 60%.

s) At 0559 Mr Forde contacted Mr Nash by radio and informed him that a tank seemed to have split and he should call the fire brigade.

t) On the basis that the relevant tank was Tank 912 but under the mistaken impression that Tank 912 was being filled from the Fina-line, Mr Nash immediately diverted the Fina-line delivery to Tank 911. In fact this resulted in a diversion from Tank 915 not tank 912 and accordingly the overflow continued.

u) At 0601 the first explosion occurred.

12. A remarkable feature of the story is the development of the mist cloud. The explanation is as follows. By 0600 some 300 tonnes of petrol would have overflowed through the breather holes at the top of the tank. Contact with the deflector plate on the tank roof and with the wind girder on the tank side would have had the result of a free cascade of liquid being naturally divided into droplets. These conditions would have promoted the evaporation of the lighter chemical compounds in the petrol.

13. The free fall of droplets would also have led to entrainment and mixing with air. With the ambient air temperature at 0°C and full saturation with water vapour, the fuel evaporation would have led to cooling to about -7 to -8°C. As a result much of the initial water content would have precipitated as ice mist. It is this mist which was, as already noted, observed on the CCTV cameras on site and demonstrated the scale of the fuel/air vapour cloud created. Subsequent calculations reveal that it must have amounted to over 100,000m² in area with a volume in the region of 200,000 m^3.

14. There were a number of potential ignition sources within the area of the mist cloud. In particular there is evidence of an internal explosion having occurred in a fire pump house located on the East side of the lagoon on the HOSL West site. These pumps were activated from the control room just before the explosion. There is also evidence of an internal explosion in an emergency generator cabin located on the south side of the Northgate buildings. Both would have constituted a powerful ignition source. As for further alternatives, witnesses spoke of car engines continuing to run even after their engines had been turned off.

The proceedings

15. There were an enormous number of claimants. They sensibly joined together in groups to bring proceedings. A list of all the Buncefield actions is at Appendix 2. For case management purposes they were divided into two groups - those outside the perimeter of the Buncefield site and those within. This demarcation reflected disparities revealed at an early stage as to the defendants' treatment of the issues of foreseeability and liability in ***Rylands v. Fletcher***.

16. It is convenient to start with a short description of the defendants:

a) Total: the company history is complicated,[3] but it is not necessary for the moment to enter into all the detail. The HOSL section of the Buncefield site originated from a joint venture agreement between Fina and Texaco in 1988. Put simply Fina was later taken over by Total although the precise identity of the party to the joint venture and the associated agreements within the Total camp at the time of the explosion was and remains a matter of controversy. The three Total companies (the first defendant, the second defendant and the fourth party) were jointly represented at the trial. I refer to them compendiously as Total.

b) HOSL, the third defendant was the joint venture company itself. It was owned by Total as to 60% and Chevron as to 40%. It was separately represented pursuant to instructions from a litigation sub-committee comprised of three directors appointed specifically for that purpose. The sub-committee did not concern itself with disputes as between HOSL and its shareholders.

17. Many claimants were content to await the outcome of the trial. In the event the following claimants participated in the hearing in one form or another:

a) Outside the fence (OTF):

i) Colour Quest Ltd & others – mainly a group of companies, many of which were situated in the local industrial estate. They were represented by Messrs Kennedys and for convenience were referred to as the Kennedys Claimants.

ii) Douglas Jessop & others – mainly individual claimants from the Hemel Hempstead area. They were represented by Messrs Collins. Again for convenience they were referred to as the Collins Claimants.

b) Inside the fence (ITF):

i) WLPS and UKOP – these companies were the legal owners of the sites at Buncefield other than those owned by HOSL and BP – the beneficial ownership being held by various participants pursuant to trust deeds. By the time of the explosion the participants were Chevron, Total, BP and Shell.

ii) BP Oil UK Ltd as above.

iii) Shell UK Ltd as above.

iv) BRE/Hemel 1 Limited owners of the Blackstone warehouse on the ex-Shell site.

18. The Part 20 defendants were:

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[3] By an Agreement dated 1 April 2000 between Fina and TotalFina Great Britain Ltd, Fina agreed to transfer to Total all its business and assets. TotalFina Great Britain Ltd was later renamed Total UK Limited ("TUKL"). It became a subsidiary of Fina, which was renamed Total Downstream UK Ltd. A similar merger between Total and Elf occurred later in 2000. Elf was eventually renamed Total Milford Haven Refinery Ltd.

a) Chevron[4].

b) TAV Engineering – this company was the manufacturer of the independent[5] TAV or "Cobham" alarm fitted to Tank 912 which failed to operate. During the course of the hearing Total's claim against TAV was settled and TAV took no further part in the proceedings.

c) Motherwell – this company was responsible for installing and maintaining the tank level equipment. Prior to the hearing, Motherwell went into liquidation and did not participate in the trial.

Case management

19. The early stages of the various actions were case managed by the Senior Master. The actions were all transferred to the Commercial Court in early 2007. At this time it was agreed between Total and Chevron that claims should be met on a 60/40 basis without prejudice to any arguments as to the final apportionment of responsibility for the claims.

20. A Case Management Conference took place in the Commercial Court in June 2007 which made provision for a trial of preliminary issues in October 2008. The order called for an exchange of lists of proposed issues for approval by the court at a restored CMC in October. By this stage the Report and Recommendations of the Commercial Court Long Trials Working Party was available in draft. As nominated judge for these proceedings I sought to implement many of the proposed recommendations by way of a pilot.[6]

21. At the restored CMC in October, a provisional list of issues was prepared, with disclosure ordered to take place in stages between December 2007 and February 2008. Witness statements were to be served by 25 April 2008. In the meantime there were to be steps taken to agree a list of expert issues. It was further ordered that all findings of fact or rulings of law were to be binding on all parties in the Buncefield actions.

22. The CMC was again restored in March 2008. The list of issues was settled and approved by the court. Short extensions of time for the service of witness evidence were granted. Leave to call expert evidence was given within four disciplines with a timetable for exchange between May and June 2008 against the background of an agreed form of instructions to the relevant experts.

23. The CMC was further restored in May 2008 at which leave was granted to the claimants to plead a case in public nuisance. More significantly, summary judgment

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[4] It is unnecessary to distinguish between Chevron and Texaco. In 1984, Texaco bought all of Chevron's European operations. In October 2001, the whole of the Chevron Corporation merged with Texaco Inc to form the ChevronTexaco Corporation. In May 2005, "Texaco" was dropped from the holding company name and it became known as Chevron Corporation. In July 2006, Texaco Limited changed its name to Chevron Limited.

[5] Independent in the sense of being unconnected to the gauge system.

[6] This was with particular reference to the recommendations for preparation of a court approved list of issues, identification of the issues to which witness statements related, isolation of expert issues in an agreed form of instructions, and timetabling of the trial.

was given for the claimants in the light of admissions made by Total and HOSL that either one or the other was vicariously liable for various acts of negligence by the relevant supervisor on duty at Buncefield on the night of 10/11 December 2005 as pleaded in the following sub-paragraphs of paragraph 6 of the particulars of claim:

i) Allowing the overfilling of Tank 912 and the escape of around 300 mts of unleaded petroleum from Tank 912 on the morning of 11 December 2005;

ii) Failing to prevent Tank 912 from overtopping by around 300 mts of unleaded petroleum which escaped on the morning of 11 December 2005;

iii) Allowing the pipeline to Tank 912 to discharge a greater quantity of petroleum than Tank 912 had the physical capacity to accept;

iv) Failing to divert the delivery of petroleum to a storage tank with adequate ullage before 4,971 cu.m of fuel had been delivered;

v) Failing properly to monitor the filling of Tank 912;

vi) Failing to observe or heed that the gauge for Tank 912 had become stuck at about 0300 on 11 December 2005;

vii) (without prejudice to the existence or institution of any system) failing to operate such system to ensure that Tank 912 on the night of 10/11 December was not overfilled and did not overtop.

24. Such admissions were subject to the questions of the foreseeability of any loss, the recoverability of economic loss and the proof of title to sue and quantum.[7] The first of these reservations requires some explanation. Initial investigation of the explosion by the HSE suggested that the magnitude of the overpressure generated by the ignition of the vapour cloud was unexpectedly great given what was perceived as the relatively uncongested environment.[8] It was this which encouraged Total to contend that much of the damage, particularly outside the perimeter of the site, was unforeseeable.

25. By the time of the trial this proposition had been refined to the rather remarkable contention, based on expert evidence (the admissibility of which was challenged), that overpressure damage to buildings more than 451 metres from the pump pad at close to Tank 912 was unforeseeable (with overpressure damage to tanks and associated structures only foreseeable within a much smaller radius).

26. In the event this proposition was abandoned very early in the trial and the claimants' participation in these preliminary issue proceedings thereafter was largely confined to

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[7] Thereafter in June further admissions were made by both Total and HOSL. It was accepted on the same basis that one or the other, subject to questions of consent in regard to claimants within the perimeter, was also liable to the claimants under the rule in ***Rylands v. Fletcher.***

[8] More astonishing might be thought to be the absence of fatal injury to those in the control room or even to those lorry drivers who were at the loading racks.

arguments regarding the recoverability of economic loss under one or more of the causes of action relied upon. The main focus of the hearing became the dispute between Total and Chevron as to the identity of the relevant defendant for liability purposes, the nature and scope of that liability and the consequential distribution of responsibility between the two companies.

27. Accordingly I propose to deal with these issues first. Of them the issue which attracted the greatest volume of material and submission was the question as to which of HOSL and Total was vicariously responsible for the negligence of the supervisors. It was Chevron's case that Total was liable. In this they received active support from HOSL. It was Total's case that HOSL was liable. No party suggested that both were liable or that any other person was liable.

28. It is a matter of great credit to the parties, their solicitors and their counsel that the trial and the preparations for it, which on any view were on a grand scale, were conducted with such efficiency. Of particular note was the fact that, the trial having started in early October 2008, the oral evidence was completed within 20 days. Final speeches commenced at the beginning of December and were completed on 16 December. Indeed this progress is in somewhat stark contrast to the notification received by the Court on 1 December 2008 from solicitors acting for the Health and Safety Executive and the Environment Agency giving notice of criminal proceedings commenced against Total, HOSL, Motherwell, TAV and BPA in respect of the explosion. Even committal proceedings are now not expected before May 2009.

Summary of the agreements relating to the joint venture

29. There were a large number of agreements relating to the joint venture. In due course I shall have to feed that contractual history into the overall chronology. But it was very much at the heart of Total's case that the identity of the "operator" of the HOSL site and thus, it was submitted, the person in control of the tasks being undertaken by Mr Nash and Mr Forde on the night in question was to be derived from the content of the contractual arrangements. It is accordingly helpful to get a bird's eye view of the agreements at an early stage.

30. On 18 March 1988, Fina and Texaco entered into a Joint Venture Agreement ('JVA'). The background was as follows. During the 1980's Texaco outgrew its storage facilities at Avonmouth and was looking for an opportunity to participate in Fina's much larger facility next door. At the same time Fina was planning the construction of the Fina-line from Humberside to Buncefield. This was a substantial enterprise involving an investment in the region of £50 million and requiring a suitable storage depot at its Southern end. Fina's then site at HOSL East was too small by itself but Texaco owned what became HOSL West which if added provided adequate space.

31. The parties initially agreed to enter into a joint venture to develop and operate the site at Avonmouth. Among other things it was agreed (i) that all property and other assets held for use in connection with joint operations at Avonmouth would be held by the Participants in equal shares (Clause 2.2.1); and (ii) that the Participants would incorporate a company, Bristol Oil Storage Ltd. ('BOSL') to 'undertake on their behalf the... operation and maintenance' of the facility as 'Operator' (Clause 2.8.1).

32. BOSL's duties were set out in Clause 2.9:

> "2.9 Authority and Duties of Operator
>
> 2.9.1 Texaco and Petrofina shall exercise all voting and other powers of control available to them in relation to the Operator so as to procure (insofar as they are able by the exercise of such rights and powers) that the Operator shall undertake inter alia the following responsibilities in connection with the operation and maintenance of the Facilities:…"

33. A number of functions were then set out in Clauses 2.9.1 (a)-(g). These contemplated the creation of an Accounting Procedure and Operating Regulations, and included at (a) – (d):

> "(a) the development and implementation within three calendar months after the date of this Agreement of an accounting procedure to regulate actions in relation to all expenditures made and all commitments incurred in connection with its [i.e. BOSL's] duties hereunder ("the Accounting Procedure");
>
> (b) the development and implementation within three calendar months after the date of this Agreement of procedures and regulations to govern [BOSL's] operation and maintenance of the Facilities ("the Operating Regulations");

(c) the receipt from the Constructor of the Facilities and the subsequent operation and maintenance thereof in accordance with the Operating Regulations and the Accounting Procedure.

(d) the provision of all technical and advisory services required for the safe and efficient operation of the Facilities."

34. A "management agreement" for the Avonmouth Terminal (and, by reason of clause 3.1.5 (below) the Buncefield Terminal) was foreshadowed in clause 2.10 of the JVA, which was headed "Allocation of Costs." That provided for some costs incurred by BOSL as operator to be borne equally by Chevron and Fina and other costs in proportion to their respective usage of the facilities in the relevant calendar year. Those costs to be borne equally were to include a "management fee" to be charged to BOSL as operator by either Fina or Texaco.

35. Clause 9 of the JVA, headed "Relationship of the Parties" included, at Clause 9.2, an agreement by each of Texaco and Fina, the then 50/50 joint venture participants:

> "to indemnify the other as to one half of any claim by or liability to (including any costs and expenses necessarily incurred in respect of such claim or liability) any party not being a party hereto, arising from the Joint Operations."

36. With regard to the Buncefield site, the situation was complicated by delays in obtaining approval for the project from Fina's head office. The agreement was therefore framed as a mutual option, entitling each party to require the other to enter into a new joint venture to develop and operate the HOSL sites (Clause 3.1.1), on terms 'substantially similar in all material respects' to those governing Avonmouth (Clause 3.1.5).

37. The option was duly exercised by Fina and in due course the parties entered into a Supplemental Agreement dated 21 May 1990. The Supplemental Agreement designated HOSL as the company which was to 'operate and maintain on their behalf' the facilities at Buncefield (Recitals C and D).

38. Clause 3 provided:

> "As contemplated by Clause 3.1.5 of the JVA, the terms and conditions set forth in clause 2 of the JVA in relation to the development at Avonmouth will apply mutatis mutandis to the joint development and subsequent operation of the petroleum storage and distribution facilities … situate at Buncefield…"

39. Clause 3.5 introduced a new provision (Clause 2.8.1) into the JVA which provided for HOSL to

> "...undertake on behalf of Texaco and Petrofina the acceptance from the Constructor of the joint facilities to be developed by Texaco and Petrofina hereunder and the subsequent operation and maintenance thereof."

40. On 31 January 1991 Fina entered into an agreement with BPA for the provision of manpower services for employment in the Buncefield control room "relating to the operation of" the HOSL terminal. It did so expressly as "owner of the Fina Pipeline and as operator for and on behalf of HOSL and the HOSL participants". The salient features of the agreement were as follows:

    a) There were obligations on the part of Fina (i) to allow access to the terminal (Clause 4.1); (ii) to comply with health and safety legislation applicable to the terminal (Clause 4.2); (iii) to provide the contractor with (among other things) manuals, procedures and other technical information (Clause 4.3); and (iv) to pay BPA's charges (Clause 5).

    b) BPA expressly assumed liability for third party claims in respect of personal injury or death, and damage to or loss of property arising from the 'default or negligent act or omission' of itself, its sub-contractors or its employees: Clause 6.4.

41. The relevant services to be provided by BPA were set out in Exhibit A. They called for the provision of manpower for the "control and operation" of the Fina-line and the HOSL terminal by way of a continuous double manned shift of the control centre and co-ordination with the UKOP facilities. The services were to be provided "in accordance with the operating manuals and procedures provided by [Fina]". As regards HOSL Terminal Operation these were to include:

> "4.2 - Operation of the terminal control system to monitor product receipt into tankage and dispatch to UKOP West London or terminal loading racks
>
> - Tankage management
> - Aviation fuel handling
> - ….
> - Liaison with UKOP Kingsbury control centre and HOSL terminal personnel…
> - …
> - Monitor work carried out within the Terminal that affects the equipment … in accordance with Fina operating and safety procedures
> - Day to day liaison with the nominated HOSL management Representative"

42. Paragraph 5 of the exhibit provided that "Procedures" covering all operations were to be provided by "the Company" (i.e. Fina) to cover the Fina-line and HOSL Terminal.

43. Thereafter a Supplemental Operating Agreement was executed on 6 January 1992. Clause 2 of the agreement read as follows:

> "2. IMPLEMENTATION
>
> 2.1 The parties hereto shall, during the continuance of the JVA, exercise all voting rights and other powers of control available to them in relation to [HOSL], so as to procure (insofar as they are able by the exercise of such rights and powers) that [HOSL] shall fully comply with the provisions of the Accounting Procedure and the Operating Regulations."

44. Both the procedure and the regulations were appended to the agreement. The more significant features of them were as follows:

a) Section I, para. 1.1(iii)(j) of the Accounting Procedure defined Fina as the Operator of the terminal. It distinguished between Fina's role in that capacity from its capacity as Participant.

b) Section I, para. 1.2 of the Accounting Procedure identified its purpose as being to ensure that Fina as Operator would be funded or reimbursed for its actual costs of operating the terminal. The procedural mechanism was a monthly cash call from Fina to the partners to fund an operating account in Fina's name at a level consistent with that necessary for 'Terminal Operations': para. 2. This was to be adjusted by a monthly cash reconciliation of actual expenditure by Fina: paras. 4 & 5.

c) Section II of the Accounting Procedure defined the categories of 'Chargeable Expenditure' which could be charged to the operating account and as regards staff costs dealt with the cost of its own employees (para. 2.1); the cost of employees "seconded" by Participants to work 'on Terminal Operations under the direct control of the Operator' (para. 2.2); the cost of agency staff engaged on a similar basis (para. 2.3); and subcontracted services provided by third parties (para. 3.1) or Participants (para. 3.3).

d) The combined effect of Clause 2.10.2 of the JVA and Section III of the Accounting Procedure was that Chargeable Expenditure on joint venture operations was to be funded by Participants in proportion to their usage of the terminal ('Class A Expenditure'), except for insurance premiums, rates, maintenance items above £10,000 and the Fina management fee, which were to be borne 50/50 ('Class B Expenditure').

e) The Operating Regulations were in Schedule 2. The schedule provided that words defined in the first schedule should have the same meaning. Thus Section A, para. 3.1 of the Operating Regulations provided:

> "The Operator [Fina] shall recruit and employ such staff as the Board [of HOSL] shall from time to time consider necessary for the proper conduct of the Terminal Operations and each of the Participants shall (if so requested by the Board) second personnel to [HOSL] on a full time basis and otherwise on terms to be agreed by the Participant."

> For this purpose, 'Terminal Operations' meant 'the operation and maintenance of the Terminal in accordance with the JVA, this Agreement and applicable law': Accounting Procedure, para. 1.1.iii(p).

f) Section B, para. 3.1 of the Operating Instructions made provision with regard to custody and control of the fuel stored at the terminal as follows:

> "4 Custody and Control
>
> 4.1 ….[HOSL] shall have custody and control of the Products at the Terminal in accordance with these Operating Regulations or as the board may otherwise determine however….each Participant shall retain all risk in its Product delivered to the Terminal"

g) The Operating Regulations also included provisions relating to Liabilities and Insurance at Section C. These provisions conferred limited rights of indemnity on the Participants against HOSL and vice versa. They were replaced by slightly different provisions in a Novation Agreement in 1994 (see below).

45. On the same date a Management Agreement between Fina and HOSL was executed although expressly effective from 1 June 1990. Its salient features were as follows:

a) The agreement recited the JVA provision for a jointly owned company, in the event HOSL, to operate and maintain the Buncefield terminal on the Participants' behalf.

b) Recital (G) read "[HOSL] and Fina now wish to establish the terms upon which Fina will provide [HOSL] with certain accounting and administrative support services".

c) In clause 1.1 "the terminal" was defined as "the petroleum storage and distribution facility operated and maintained by [HOSL] on behalf of Fina and Texaco".

d) Under Clause 3, Fina undertook to provide HOSL with 'general accounting and administrative services from time to time required by [HOSL] in connection with its operation of the Terminal'. For this purpose, Fina was to make available the services of its accounting, finance, insurance, legal and personnel departments, together with 'the use of such other of its departments as [HOSL] may from time to time require hereunder'; and was to provide 'engineering services of a routine nature.'

e) Clause 3.3 conferred a general authority on Fina to enter into contracts with third parties for the supply of services and equipment for the terminal.

f) Fina was to receive an indemnity in respect of its costs of providing the services (Clause 4.3) and to be entitled to a management fee of £35,000 a year, index-linked (Clause 5.1).

g) It was expressly recognised that in its capacity as the provider of these services, Fina would be responsible for the negligence of its employees.

Clause 4.3 conferred on Fina a right of indemnity against HOSL for debts and liabilities incurred 'in the proper perform ance of its obligations hereunder'; and Clause 7.2 provided HOSL should keep Fina indem nified against liabilities arising out of the performance of its duties, 'without prejudice to any claims which [HOSL] m ay have against Fina in resp ect of any neglig ence or Wilful Misconduct".

46. On 29 January 1993 Fina ("the Company") entered into a new agreement with BPA in regard to the provision of services at the Buncefield Term inal, once again contracting "as owner of the Fina P ipeline and as operator for and on behalf of HOSL and the HOSL Participants". The services set out in Exhibit A were as follows:

> "The Contractor shall provide one controller on a 24 hour shift basis whose prim e duties will in clude the day to day operation of the autom ated control system s located within the HOSL Control Room….
>
> The services shall…be undertaken in accordance with the operating manuals and procedures provided by [Fina] from time to time….
>
> PURPOSE OF JOB
>
> Day to day operation of the contro l system s located within the HOSL Cont rol Room for the control of Fina-line, the HOSL tank farm and loading racks.
>
> All duties to conform t o procedur es and work instructions in compliance with [Fina's] policy on Health, Safety and the Environment….
>
> MAIN DUTIES
>
> 1.0 Fina-Line Control
>
> 1.1 Operation of the Fina-Line SCADA system for the remote/automatic operation of pipeline equipm ent in accordance with operating procedures and work instructions.
>
> 1.2 Com pilation of run-sheets for charting of product movements through the pipeline.
>
> 1.3 Production and distribution of pum ping programm es in accordance with schedule and off-take requirements.
>
> 1.4 Liaison with HOSL and LOR personnel for general operational matters and fault rectification…..
>
> 2.0 HOSL Terminal Operation
>
> 2.1 operation of the Motherwell tank gauging system to control and monitor product receipts into HOSL storage.

> ….
>
> 2.3 Operation of the Motherwell tank gauging system for general tankage management.
>
> 2.7 Liaison with Duty Supervisor to maintain adequate tank rotation and any identified movement amendments to rectify stock situations.
>
> 2.8 Liaison with Kingsbury Control Centre with respect to receipts from the UKOP system.
>
> ….
>
> 2.15 Control and operation of [Fina's] Aviation facilities via the Motherwell control system."

47. The contractual story as between Fina, Texaco and HOSL now moves on some two years to late 1993 and the accession of Elf to the joint venture. First there was a Sale and Purchase Agreement dated 30 December 1993. This was an agreement between Texaco, Fina and Elf. HOSL was defined in clause 1.01 as "the limited company at the date of this Agreement operating the Buncefield Terminal." The agreement provided for the land to be conveyed to the three Participants as tenants in common with beneficial interests of 40%, 40% and 20% respectively and for all other joint venture assets to be owned by them in the same proportions: Clause 9.01.

48. Clause 5.02 dealt with the period up to the completion of the Sale and Purchase Agreement (referred to as the 'Buncefield Interim Period'). It provided:

> "In its capacity as manager of the Buncefield Terminal, Fina shall during the Buncefield Interim Period conduct all ordinary business in relation to the Buncefield Terminal in a proper and workmanlike manner and shall conduct operations in accordance with methods and practices customarily used in good and prudent oil storage practice with that degree of diligence and prudence reasonably and ordinarily exercised by experienced managers engaged in a similar activity under similar circumstances and conditions."

49. The parties envisaged that the JVA would be superseded by a new agreement the terms of which would depend on whether it was decided to continue with HOSL as a corporate vehicle for the joint venture or whether to liquidate it. Clause 4.01 of the Sale and Purchase Agreement accordingly required Fina and Texaco to notify Elf of their decision whether to liquidate HOSL (and BOSL) by 30 June 1994.

50. Under Clause 4.03(i) of the Sale and Purchase Agreement, if no decision about the fate of HOSL was notified by that date or if the decision was to retain it, Texaco and Fina were required to prepare a new JVA by 31 December 1994, to be known as the Consolidated Shareholder Agreement (or 'Buncefield CSA'). This instrument was defined in Clause 1.01 as

> "a consolidating shareholders agreement relating to the Buncefield Terminal, substantially in the form of the Buncefield JVA but amended to reflect the existence of an operating company."

51. The 'Buncefield JVA' for this purpose was defined as the JVA annexed to the Joint Venture Agreement Execution Agreement. This latter agreement was dated 1 January 1994. This was a conditional agreement which was to take effect if the decision was taken to liquidate HOSL. In that event, all three Participants were to execute a new JVA in a form which had been negotiated in detail between the three companies and was set out in an annexe. This form designated Fina as Manager of the terminal. Appended to it were a new Accounting Procedure and Operating Regulations, to replace those introduced by the Supplemental Operating Agreement of 1992. These provided for Fina to operate the terminal under the supervision of a Management Committee comprising representatives of the Participants.

52. There was also a Novation Agreement dated 1 January 1994. It provided for Elf to assume the rights and obligations under the existing JVA, with some amendments. In the event, since no revised JVA (or CSA) has been executed, it has continued to govern the Participants' relationship to this day.

53. Clause 2 provided for various amendments to the JVA. Clause 2 of the JVA was replaced by a new clause 2.2.1 which provided:

> "Subject as hereinafter provided, all of the property and other assets acquired or held for use in connection with the operation and maintenance of the Buncefield Terminal in accordance with this Agreement (as supplemented/amended and/or novated) shall be owned and borne by [Chevron], Fina and Elf and their permitted assigns and successors ("the Participants") in proportion to their undivided participating interests ("Participating Interests") as follows:-
>
> | | |
> |---|---|
> | [Chevron] | 40 |
> | Fina | 40 |
> | Elf | 20" |

54. Clause 3 provided:

> "3. Subject as expressly provided in this Novation Agreement all other provisions of the Joint Venture Agreement shall remain in full force and effect and binding on the parties thereto, insofar as the same are in force and effect and binding on those parties immediately prior to the Effective Date."

55. It substituted a new Accounting Procedure and Operating Regulations for those annexed to the 1992 Supplemental Operating Agreement. These were the same as the corresponding documents annexed to the Joint Venture Agreement Execution Agreement. They provided for 'the Manager' to perform substantially the same functions as 'the Operator' under the Accounting Procedure and Operating

Regulations of 1992. However, while the Novation Agreement remained in force, it was provided that references to 'the Manager' should be read as meaning HOSL and references to the 'Management Committee" as meaning the Board of HOSL: Clause 2(f).

56. The Operating Regulations had the following further provisions:

> "[HOSL] shall recruit and employ such staff as the [HOSL Board] shall from time to time consider necessary for the proper conduct of the Terminal Operations and each of the Participants shall (if so requested by the [HOSL Board]) second personnel to [HOSL] on a full time basis and otherwise on terms to be agreed by the [HOSL Board]." Section 1 para 2.1

57. Section III contained indemnities by and to the Participants:

> "1.1 Each of the Participants shall indemnify, hold harmless and defend each other from and against any and all liabilities, claims, demands, proceedings, damages, losses, costs, charges and expenses whatsoever arising directly or indirectly out of or as a consequence of the death or illness of or injury to any employee, servant or agent of such Participant or the loss of or damage to any equipment or property…of such Participant or any of its employees, servants or agents, whether or not resulting from or contributed to by any negligence or default on the part of [HOSL] or any of the other Participants or any of their employees, servants or agents…
>
> 1.2 Save as otherwise expressly provided herein, [HOSL] shall indemnify and hold harmless the Participants from and against any and all claims by third parties in respect of the injury to …any person or the damage to or loss or destruction of any property which may arise out of or in the course of or by reason of the Terminal Operations, save and except if and to the extent that [HOSL] is not indemnified in respect of any such personal injury, death or illness or damage to or loss or destruction of property by insurance taken out by [HOSL] pursuant to paragraph 2.1.2 of these Operating Regulations, then each of the Participants, to the extent of its Participating Interest, shall indemnify and hold harmless [HOSL] from and against any such claims by third parties (and from and against any and all actions, proceedings, liabilities, losses, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto)."

58. There followed sale agreements from Fina to Total and then Elf to Total. Thus by an agreement dated 1 April 2000 between Fina and TUKL (known at the time as TotalFina Great Britain Limited) Fina agreed to sell its business as a going concern to TUKL. In respect of any asset where the consent or licence of any third party was required, that agreement provided that Fina would hold such asset upon trust and for the benefit of TUKL absolutely (clause 4.3(a)). By a similar agreement dated 31 December 2000 between Elf and TUKL, Elf agreed to sell its business as a going

concern to TUKL. This agreement was on materially similar terms to the Fina Sale Agreement, and contained clause 4.3(a) in the same terms.

Documentary evidence

59. There was an enormous quantity of documentary evidence before the court relating to the claim by Total against Chevron (although substantially amplified by material relevant only to the claim against TAV which settled during the course of the trial). The chronological bundle of documents ran to 110 volumes. In addition there were a large number of other volumes containing all the relevant contractual documents, a transcript of the HSE inquiry, material from the internal Total inquiry, details of insurance arrangements, supporting material exhibited to the expert reports and so on. It was all treated as admissible at the instance of any party but predictably only a small proportion was referred to during the course of the trial. That is by no means a complaint. A core bundle would have been very difficult to maintain.

Total Witnesses

60. The following were called to give oral factual evidence on Total's behalf:

a) Mike Linley who was a director of HOSL from April 1998 to March 2003. During that period he was responsible, within Fina / Total's Supply Department, for Terminal Operations.

b) Brian Parsons who was General Manager of the HOSL East and West sites at the Buncefield terminal from October 1989 to February 1994. He was also General Manager of the Fina-line during that period.

c) Robert White who was General Manager of the HOSL sites and the Fina-line in succession to Brian Parsons from April 1994 to February 2008.

d) Jonathan Tonks who was Operations Manager of the HOSL sites and the Fina-line from February 2001 to August 2005. His line manager was Mr. White.

e) Keith Letchford who was Fina / Total's UK Group Insurance Manager from 1983 to 2001.

f) Robert McNiff who was Insurance Manager from 2002.

Chevron witnesses

61. The following were called to give oral factual evidence on Chevron's behalf:

a) Brian Spittlehouse who was Manager of UK Operations from 1988 to 1995 and a director of HOSL from 1989 to 1995.

b) Dennis Morgan who was Terminal Network Development Manager and a director of HOSL from November 1995 to April 1999.

c) Simon Humphries who was General Manager Supply and Distribution and a director of HOSL from July 1992 to July 1995.

d) David Lund who was a director of HOSL from July 1999 to July 2005. During that period he was Manager Terminals becoming General Manager Logistics from September 2005.

e) Nicholas Williamson who was a director of HOSL from February 1995 to April 1999.

f) John Holt who was a director of HOSL from July 1999 to March 2001.

g) Bryan Workman who was a director of HOSL from June 2001 to November 2005.

h) Leonard Magrill who was Director and General Manager Marketing and Planning from 1996 to 1997 and a director of HOSL from July 1984 to January 1992.

This list was in short made up of every single Chevron director of HOSL from 1989 to the eve of the explosion.

62. By and large I felt confident that most of these witnesses were doing their best to assist the Court. My primary reservation relates to Mr Linley. It is inevitable that witnesses get somewhat imbued with the party line of the person calling them. But my impression was that Mr Linley was somewhat evasive and unwilling to face up to the difficulties of reconciling his evidence with the contemporary material. But impressions can be very misleading. Furthermore I have very much in mind that the trial was taking place many years after the material events occurred. Indeed the underlying joint venture agreement was entered into over 20 years ago. The actual recollection of witnesses must inevitably have dimmed, giving rise to some gaps in the story and a degree of inconsistency.

63. In these circumstances I respectfully endorse the observations of Lord Justice Robert Goff in ***The Ocean Frost [1985] 1 Lloyds Rep. 1 p. 57*** to the effect that "where there is a conflict of evidence such as there was in the present case, reference to the objective facts and the documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth." It is against that background that I propose to set out in due course the broad history of the joint venture as emerges from the contemporary documentary material as a foundation to the resolution of the issues before me.

Total Statements

64. Before leaving the factual evidence I should record that Total in addition relied upon the following witness statements:

a) Sidney Sinclair who was Operations Manager of the HOSL sites and the Finaline from February 1992 to April 2001 handing over to Jonathan Tonks. It was accepted that his family commitments made it impossible for him to be called and that his statement, albeit not agreed, should be admitted subject to weight.

b) Steve Lewis who was Terminal and Pipeline Operations Co-ordinator at Buncefield from 2001 until the explosion. He was unwell and his statement was admitted on the same terms.

c) Siobhan Fanning who was the Supply Operator responsible for the scheduling and planning of the pipeline deliveries to Buncefield. Her evidence was agreed.

Other witness statements

65. A large number of other factual witness statements were served by Total but the makers were not in the event called and their statements were not admitted in evidence. The more notable were as follows:

a) Mark Forde who was the Terminal Supervisor on duty (together with Graham Nash as Pipeline Supervisor) at the time of the explosion.

b) Nigel Beedham who was Total's Terminal Operations Manager and a director of HOSL in succession to Mike Linley from March 2003 to January 2007.

c) Stephen Ollerhead who was Director of Logistics and a director of HOSL from 1997 until October 2003. He moved then to Paris as Logistics Co-ordinator of Marketing Europe. In December 2005 he was appointed to lead Total's Accident Investigation Team.

d) Lynne Donaldson who, in succession to Mr Ollerhead, was Director of Logistics from October 2003 to May 2007 and a director of HOSL throughout the same period to the present day.

Indeed Mr Forde, Mr Ollerhead and Miss Donaldson were actually included in the witness timetable formulated by Total shortly before the trial began.

66. The immediate consequence of the absence of these witnesses was as follows:

a) Not a single supervisor with experience of operating practices in the HOSL control room was called. It was explained that Mr Nash was not called as he was not regarded by Total as a reliable witness. Such was not suggested as regards Mr Forde who had been trained in terminal operations at Buncefield in the early 1990s in preparation for the introduction of the Fina-line and had been a supervisor since 1993 nor as regards other supervisors from whom statements were taken and tendered, most of whom had given evidence to the HSE or the Total investigation or both. The latter included David Martin a technician from 1994 to 2005 and a supervisor from November 2005 but trained in post from July 2005 and Philip Martin a supervisor from 1992 to 2002 (later to take over from Mr Tonks in August 2005). Another notable absentee was Mr Doran who handed over to Mr Nash and Mr Forde.

b) Only one Total director of HOSL (Mr Linley) was called. Yet he left that post some 2 ½ years before the explosion. This was despite the fact that statements had been taken from Philip Jordan a director from 1993 to 1996, Stephen Ollerhead, a director from 1997 to 2003, Nigel Beedham, a director from 2003 onwards and Richard Jones, a director from 2001 onwards. The other Total directors in the overall period included Peter Johnson 1989 to 1993, John Bond 1989 to 1993, Aidan Dwan 1993 to 1996 and Jonathan Bond 1997 to 1998 (although some or all of them may not have been available).

67. As might be anticipated, Chevron made some considerable play as to the absence of all these witnesses many of whom, it was accepted, were in the jurisdiction and ready, willing and able to give evidence. In particular I was invited to conclude that Messrs Forde, Ollerhead and Donaldson had been deliberately "pulled" because, insofar as they were able to speak to the issues, they had no answer to Chevron's case, or none that would bear examination. I will if necessary deal with that submission in due course.

Expert evidence

68. There were three areas of expertise on which oral evidence was called:

a) Data analysis. The focus here was on the information and database tables stored in the Motherwell Automatic Tank Gauging System computer drives. Chevron called Dr Harri Kytomaa a specialist in mechanical engineering with particular experience in the investigation of fires and explosions. He had held meetings in September 2008 with Mr Samuel Sudler, a Senior Project Engineer retained by Total, with particular experience in electronic control analysis. A joint memorandum was prepared following those meetings.

b) Operational negligence. Chevron relied upon the evidence of Mr Raymond Rich, the Logistics Support Operation Manager at the Alderm aston Petroleum Storage depot. Total relied upon the evidence of Mr Robin Heels, a consultant safety engineer with Vectra Group Ltd. Following meetings in July and August 2008, a joint memorandum was prepared in October 2008.

c) Accountancy. Total called Mr Martin Hall, a chartered accountant, who had examined Total's accounting records so as to determine whether any premiums incurred in effecting the Total group insurance programme had been charged to the joint venture.

The documentary history of the JVA

69. Having introduced the relevant agreements, my purpose in this section, given my approach to the witness evidence, is to set out the chronology of the joint venture as it appears from the contemporary documents. This will form a base upon which to assess the arguments although it will be necessary to consider some additional documents as individual issues are considered. I will try to introduce the competing arguments as the points of controversy emerge.

70. As outlined above the joint venture between Texaco and Fina relating to Buncefield arose out of another joint venture at Avonmouth. Fina and Texaco had adjacent sites in Avonmouth and in the mid 1980's, shortly after Texaco had acquired Chevron's business in the UK, Texaco proposed building a joint terminal. The response from Fina was to suggest a second joint venture at Buncefield to which site Fina was proposing to build its own pipeline. The concept involved making use of two sites at Buncefield - the "old HOSL" site to the North East which was operated by Fina in a joint venture with Texaco and Texaco's North London Terminal to the North West which was at that stage partly undeveloped.

71. In fact agreement on the Avonmouth joint venture was reached first. It was dated 18 March 1988 but the agreement contained an option to both parties to embark on the Buncefield joint venture. It was Chevron's case that Texaco thereafter operated, managed and controlled the BOSL terminal despite the terms of the JVA nominating the joint venture company BOSL as operator. It was also Chevron's case that Fina insisted that any joint arrangement at Buncefield if the relevant option was exercised was to be on the basis that Fina would operate, manage and control the facilities.

72. The option was duly exercised by Fina on 3 February 1989 following approval of the construction of the Fina-line. A few days later a meeting took place at Epsom between representatives of Texaco and Fina to discuss the joint development of the Buncefield site. The minutes do not record all those present (though they included A Mack and D Arney). The meeting approved the use of HOSL or a new company of the same name, HOSL 1989, as the joint venture vehicle. Item 11 of the minutes read:

> "11. It was agreed that Fina would operate and engineer HOSL 89 and provide secretarial service."

73. As provided in the JVA the duties of the Operator (see clause 2.9.1) included the operation and maintenance of facilities "in accord with the Operating Regulations and the Accounting Procedure." These regulations and procedure were themselves to be produced by the "Operator". Clause 2.10 dealt with the allocation of costs. Some were to be shared equally, others by reference to usage of the terminal. Amongst the former was to be "the management fee to be charged to the Operator by either Petrofina or Texaco for administration and support services".

74. This latter provision, it can be assumed, led to one of the items in the minutes of HOSL's first Board meeting on 23 May 1989:

> "5. It was agreed that Petrofina would propose the basis for the management fee…largely based on those already agreed for BOSL."

The question of staffing was postponed until the next meeting on 11 July 1989 where the minutes record:

> "8…No decision had yet been taken as to whether the staff would be seconded by the participants or employed by HOSL."

75. In the event, although staff at BOSL were in due course all employed by BOSL itself, the arrangement at HOSL was for all staff (other than subcontracted staff) to be "seconded" by Fina to HOSL. There was one exception at the early stages, a Mr Perrin from Texaco. Quite what "secondment" entailed was a matter of controversy. In particular whether it meant a temporary transfer of "employment" (Total's case) or a temporary transfer of "role or place of employment" (Chevron's case).

76. At the board meeting on 7 September 1989 chaired by Mr Johnson of Fina, Mr Johnson is recorded in the minutes as having "reported that Mr Parsons was to be appointed Manager of Pipeline Operations and the terminal at Buncefield." There is no documentation to suggest that this was other than a direct appointment by Fina without consultation with the HOSL board.

77. The first annual report of HOSL to the year ended 31 December 1989, albeit not filed at Companies House until 6 November 1990, spelt out the trading activity of the company. It was Total's case that the directors' description of that activity (repeated in every annual report thereafter) was both accurate and revealing:

> "The principal activity of the company became [trading only commencing post balance sheet] the operation of joint venture petroleum product storage facilities."

78. At a HOSL board meeting on 17 January 1990 there was a detailed discussion of manning levels. The minutes record as follows:

> "<u>Manning levels</u>
>
> Mr Parsons tabled an amended version of the paper outlining a proposal on the manning at Buncefield in 1991.
>
> The integration of terminal and pipeline manpower was agreed to be the most economic philosophy with ground fuels throughput being equitably shared between Petrofina and Texaco. Avtur [aviation fuel] would be solely for Petrofina's account as would be Fina-line costs.
>
> The proposition was on the basis of a management team comprising a Fina nominated general manager, two assistant managers and an engineer - the latter predominantly on pipeline work but contributing also to automation needs at the Terminal. The management team would be made up of secondees.

> There would be ten shift controllers provided on a contractual basis by BPA the six technicians and two clerical assistants would be directly employed by HOSL but could be drawn from Petrofina and Texaco staff."

79. Mr Parsons duly entered into negotiations with BPA. These were broadly concluded by the end of January 1990 although the final agreement was not executed until a year later. As already noted Fina was the counterparty and was recorded as "contracting for itself as owner of the Fina Pipeline and as operator for and on behalf of HOSL and the HOSL Participants."

80. Fina's position with regard to staffing was emphasised at the HOSL board meeting on 15 March 1990 at which Mr. Parsons is recorded in the minutes to this effect:

> "He said that with the exception of Mr Perrin who would be on secondment from Texaco and the BPA shift controllers Petrofina would wish to employ all the other staff. To effect the transfer of suitable personnel to Petrofina, Texaco would therefore first need to make them redundant."

It was Chevron's case that this statement of policy, taken with the nomination of the general manager, demonstrated Fina's determination to undertake the operation of the site. Total asserted that the position remained consistent with "secondment" of Fina staff to HOSL.

81. On 21 May 1990, the Supplemental Agreement relating to the Buncefield joint venture was executed. This recited the establishment of HOSL to "operate and maintain" the facilities. Indeed HOSL was defined as "the operator" in clause 3.5. In Total's submission, this was the clearest possible statement of the nature of the contractual bargain. It was however Chevron's case that despite that designation, in accord with the previous understanding, such activities were in fact delegated to Fina just as such activities were delegated to Chevron as regards the Avonmouth site.

82. At a board meeting on 30 May 1990 it was noted that Messrs Parsons, Perrin and Sinclair were "in situ". It was agreed by the board that "HOSL should take over the operation at Buncefield Terminal as soon as possible". It is of perhaps some passing interest that at the same meeting the secretary of HOSL announced that the registered office of the company needed to be changed in the wake of the change of name of the relevant building from Petrofina to Fina House in Epsom, Surrey.

83. In September 1990, newspaper advertisements were placed in the name of HOSL seeking oil terminal technicians. The advertisement described HOSL as a joint venture between Fina and Texaco which "operates at Buncefield Terminal, a fully automated and pipeline fed oil storage and distribution facility". Applicants were invited to write to Mr Parsons at HOSL.

84. One of the successful applicants was Mr Forde who in due course was on duty in the control room on the night of the explosion. His letter of appointment dated 4 October 1990 from Fina's personnel department confirmed his engagement "as a technician seconded to" HOSL. A similar letter of engagement was sent to another applicant, namely, Mr Nash on 29 October 1990. It follows, and Total place some emphasis on

this, both had been familiar with activities at HOSL for some 15 years by the time of the explosion.

85. By now it had become Mr Parsons' practice to prepare a "General Manager's Report" for presentation to the board of HOSL at the regular meetings (although later they came to be limited to two a year – one in February and one in July alternately at Buncefield and Avonmouth). It was Total's case that this demonstrated that he was responsible to the board for terminal activities whilst Chevron maintained that he was simply making reports on behalf of Fina.

86. In his report of 10 October 1990, having referred to "personnel placed at Buncefield under the HOSL mantle" he went on to record that as at the time of writing HOSL "has yet to assume any direct responsibility as an operator for the Terminal locations"[9]. He went on to report that the General Manager and both Operations Managers effectively took up their appointments with HOSL effective 1 June 1990.

87. At the board meeting at which Mr Parsons tabled this report the minutes record two further matters:

> "6 JOINT VENTURE STRUCTURE
>
> Mr Johnson reported that Fina's Legal Department had raised again the desirability of having a joint venture rather than a corporate vehicle for operations at Buncefield.
>
> It was agreed that there were good reasons for a corporate operation, not least the perceived independence from the two shareholders, but that a final decision should be taken following consideration of written proposals from Fina's Legal Department.
>
> 7 OPERATING BUDGET 1991
>
> The Operating Budget, previously circulated, was accepted with the exception of the manning structure appointments where it was agreed that costs relating to Operations Managers (pipeline and Terminal) should be merely split 50/50 rather than subdivided further."

88. This latter topic reflected the need to make allowance for time spent by staff based at HOSL on the Fina-line and the Total aviation tanks as opposed to joint venture activities. Chevron, while accepting that a rough and ready apportionment could be made (initially 50/50 and later 70/30) for budgetary purposes, submitted that the reality was that the staff were performing three tasks at once and they could not be "employed" by different entities for each of the different tasks. Total submitted that the division of costs demonstrated the ability to reflect a division of labour between different employers.

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[9] In the event "full responsibility for the management" of the site was undertaken by HOSL and notified to the directors by letter dated 15 October 1990.

89. At this stage as heralded in the October minutes there was something of a review of the retention of HOSL as the joint venture vehicle. It certainly was a live proposition from Fina's point of view. A letter from Fina's Legal Department to Texaco dated 2 November 1990 reads as follows:

> "I enclose herewith the long awaited Agreement related to the running of the Buncefield Terminal for your comments.
>
> As discussed at the last HOSL Board meeting this Agreement is based on the upstream Joint Venture Operating Agreement and appoints Fina as Operator of the two joint venture participants, Fina and Texaco, removing the need for a joint venture company. This preferred structure has also been discussed by David Codd and Malcolm Webb and I understand that no fundamental problems with this proposed structure were foreseen.
>
> Fina's preference for this joint venture arrangement is based on the cost savings involved and a wish to simplify the structure."

90. This agreement which was to become the Supplemental Operating Agreement was not in the event executed until January 1992. It is clear that Fina's understanding at this early stage was that Fina would be designated the operator and it is for that reason that the need for the continuation of HOSL was questionable. However it is clear from internal emails within Texaco in late 1990 that any proposal to disband the corporate structure would be vigorously opposed.

91. At the board meeting on 18 December 1990 Texaco was recorded as being "resolute in their wish to maintain the limited company structure". In Fina's view there was no justification for the continuance of the joint venture vehicle. But it is apparent from a letter dated 21 December 1990 from Fina's Legal Department that any hope of their persuading Texaco to liquidate HOSL was abandoned at that stage[10].

92. The letter is of some significance since it purports to outline Fina's perception and strategy in this respect as laid down by its Chief Executive:

> "As I have explained to you Fina wished to remove the limited company, HOSL, from the joint venture arrangements at Buncefield as part of its management strategy, introduced by its Chief Executive, to remove all unnecessary companies from its corporate structure."

93. The letter went on to draw a comparison with the position at Avonmouth:

> "I understand that the main line of argument against our proposals were that Texaco's management wished the Buncefield agreement to match the commercial terms in force at Avonmouth. Our document did that. Commercially the two are word for word the same - the only difference being the

[10] The topic was to re-emerge in late 1993.

> alteration of legal structure which required that, for example, where previously the term Board has been used, it was necessary to refer to the Management Committee. The basic commercial reflection of the Avonmouth agreement would have been quite apparent had our proposed documentation been reviewed."

94. The letter concluded:

> "At no point has Texaco actually set out what purpose it believes the joint venture company, HOSL, served nor why it felt it had to remain. However, notwithstanding the above, which I set out to put the record straight, I am resigned to the fact Texaco will not consider our proposals and therefore revert to the former structure.
>
> Accordingly please find enclosed for your comments a further draft Operating Agreement which provides for the continuance of HOSL and a draft management agreement which follow the format of the BOSL agreements."

95. In December 1990 Fina put in an application for a petroleum licence on HOSL's behalf. The application described the terminal as being under the management "of HOSL". Paragraph 1.12 reads:-

> "1.12 Hertfordshire Oil Storage Ltd will be the operator of the Terminal on behalf of Texaco and Fina in accordance with their Operating and Safety Manual and with statutory regulations. Organograms of the terminal management structure for operations and emergencies are included in the appendices."

Nonetheless confusingly the attached organogram placed the General Manager at HOSL under the line management of Fina's Distribution Manager at Epsom.

96. On 31 January 1991 the initial BPA agreement was entered into by Fina. At the board meeting on 5 March 1991 Mr Parsons apologised for the fact that Fina was unable to produce the operating costs due to difficulties with Fina's new computing system. He also reported that a draft of the Accounting Procedure and Operating Regulations had been circulated.

97. At the board meeting on 9 July 1991 it was noted that the Management Agreement was still not executed although as between the two legal departments agreement had been reached on almost all issues.

98. Following construction of the facilities there was an opening ceremony on 11 September 1991. It appears that a Texaco document describing the joint venture may have been distributed to those present. This contained the following on the question of responsibility:-

> "Responsibility for th e join t ven ture is ves ted in the HO SL Board consisting of four directors, two from each com pany. Management Services together with other central office support services are provided by Fina PLC."

99. The next board m eeting was on 10 January 1992. The board approved a proposal that Fina should engage the supervisors then supplied by BPA whereupon they would be "seconded to HOSL by the autum n of 1992 to c over both the term inal and the Fina-line operations."

100. In the m eantime the Supplem ental Operating Agreem ent had been executed. Despite the retention of HOSL as the joint venture com pany, the Accounting Procedure scheduled to the agreem ent define s "Operator" as Fina "in its capacity as Operator and not as a Participant", a definition also adopted for the purpose of the Operating Regulations. Further by virt ue of the Operating Regulat ions, "th e Op erator sh all recruit and em ploy such staff as the [HOSL] Board shall from tim e to tim e consider necessary" although "each of the Participants shall (if so requested by the [HOSL] Board) second personnel to [HOSL]."

101. Much debate was devoted to this agreem ent which Chevron contended was only consistent with delegation of all operational m atters to Fina (HOSL not being a participant). Total submitted that the agreem ent if properly construed in this way was "mistaken", was inconsistent with the contem porary Managem ent Agr eement and in any event had been fully overtaken by the terms of the later Novation Agreement.

102. The Management Agreement had indeed also been signed in the week p revious to the January meeting although expressly to be in effect as from 1 June 1990. The services expressly required from Fina under the agreem ent were largely (as its title pag e stated) expressed in term s of accounting and adm inistrative services. This demonstrated, on Total's case, that the scope of any delegation to Fina was very limited. Chevron subm itted that if it was necess ary to identify the term s upon which the tasks of operation and m anagement were in fact being undertaken by Fina, and such was outside the term s of the Operating Regulations, th en it was within th e terms of the Managem ent Agreement either by virtue of its express term s or by virtue of an implicit extension of the same.

103. The following m onth, on 27 February 1992, Mr Perrin, the Operations Manager seconded to HOSL from Texaco, reported on a visit to Buncefield by HSE inspectors on 13 February 1992. The note described the structure of HOSL as follows:

> "There still appears to be some confusion on the part of HSE on the accoun tability of joint venture operations using seconded and contract staff.
>
> I explained the set-up at HOSL, i.e., that whilst nobody is actually on the HOSL payroll as such, their responsibilities during secondm ent are directly to HOSL and report through HOSL management to the HOSL board."

104. These arrangem ents we re the subject of a m emorandum from Mr Par sons dated 24 March 1992 which enclosed an organogram dated 20 March 1992 headed "Integrated

Manpower for HOSL & Fina-line". This showed Mr Parsons, as HOSL General Manager, reporting to the HOSL Board, which in turn would report to the two joint venturers of which Fina was the "Management Company".

105. Total submitted that Mr Perrin's view was entirely accurate and was supported by the organogram. Chevron submitted that this proposition was wholly unworkable given the limited role and activity of the board and, as regards the organograms, the numerous and varied versions depicting the organisational layout in the documentation threw doubt on the validity of any of them.

106. In April / May 1992 a Personnel Safety Training Manual was prepared by Fina for use at and by HOSL. Issued as a "HOSL" document, it nonetheless contained Fina's policy statement with regard to the "Protection of Health, Safety and the Environment". Concurrently a "Risk Control Review" of HOSL and the Buncefield site was being prepared by Fina. The authors were Mr Johan Maertens of Petrofina's Health/Safety/Environment/Quality Department ("HSEQ") and personnel in Fina's Environment and Safety Audit Department. A further variation on the overall arrangements was set out in the initial draft as follows:

> "Fina PLC is the management company in the Joint Venture Agreement and runs HOSL with Fina plc and contract staff on behalf of Texaco Ltd and Fina plc and is responsible for the stock and financial operations of the terminal. HOSL is also responsible for Fina plc activities associated with operation and receipt of product from the Fina-line and the storage of aviation fuel for Fina plc only."

107. Again at about this time, a Terminal Emergency Procedures Manual was issued on 28 April 1992. It was expressed to be issued under the authority of the General Manager of HOSL. It was described as "the property" of HOSL. Attached to it was another copy of the organogram referred to earlier.

108. In April 1992 an Environmental Audit was conducted for HOSL. The relationship between HOSL and the joint venture companies was recorded as follows:

> "<u>HOSL relationship with Fina and Texaco</u>
>
> Under the terms of the Joint Venture Agreement, Fina plc has been nominated as the Managing Company with responsibility for providing the following support and services to HOSL,
>
> - Engineering
>
> - Accounting
>
> - Personnel
>
> - Administration - Purchasing Legal etc
>
> - EHS

> It was not clear during the Audit that the proper channels of communication are used when Texaco and Fina contact HOSL.
>
> It is recommended that the relationship between HOSL and Fina/Texaco is clarified by the HOSL Board of Directors. In the case of Fina, points of contact at a working level will be evident when the organisation chart and job descriptions are published. Texaco should follow the proper channels when dealing with an independent Joint Venture Company and ensure that the General Manager is kept fully informed."

Notably, as appears from this document, Fina thus regarded "engineering" and "environment, health and safety" matters as within their purview as the "managing company".

109. The draft Risk Control Review was forwarded to Mr Parsons for comment on 22 June 1992 under cover of a memorandum from Fina's Environment and Safety Audit. The memorandum made it clear that Petrofina "are attempting to apply a common approach across the Petrofina Group." This demonstrated, on Chevron's case, that Fina was in the process of imposing their safety requirements on all terminals regarded as in the group. It was Total's case that whilst a common approach was being sought HOSL retained its independence with a right of veto over any proposal which it was unwilling to implement.

110. In June 1992, Fina prepared an Operating and Safety Manual under the authority of Fina's Distribution Manager. This was expressed to be the property of Fina and was signed by Mr Dwan. A copy was sent to Mr White then Terminal Distribution Manager but who was shortly due to take over from Mr Parsons as General Manager. It was issued "for the information and guidance of all staff responsible for handling products within the company's terminals." The distribution list included the managers of, inter alia, Avonmouth, Buncefield and Kingsbury.

111. There was some dispute as to whether Mr White ever in fact saw this document and, if so, in what capacity. I am not sure the point is of any great significance. But given the scope of the document I think it very improbable that it was merely sent to distribution managers. Indeed attached to the manual were the Fina group policy statements on safety and quality including a short section on "Product Receipt".[11]

112. The next HOSL Board meeting was on 24 July 1992. The minutes record as follows:

> "5. PERSONNEL
>
> Mr Parsons reported that BPA had been given notice that their contract for the supply of shift supervisors and controllers

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[11] Pertinent to other aspects of the proceedings, this included the instruction: "Tanks must not be filled above the predetermined safe working level." As regards product receipt from a pipeline, having earlier dealt with the question of safe flow rates, the Manual stated:

"11. …Local receipt procedures must at all times be adhered to. A check must be carried out to ensure that product is capable of being received into appropriate tanks and periodic checks made on the volumes being received once product pumping commences…"

> would expire at end January 1993. Fina were currently interviewing five supervisors who would be responsible for terminal operations and pipelin e activ ities. T he question of continuing to em ploy the five contracted con trollers was un der consideration."

113. The final version of the Risk Control Review was published by Fina's HSEQ in August 1992. The passage cited above was rephrased as follows:

> "Fina plc is the m anagement company in the Joint Venture Agreement. HOSL runs with own and contract staff on behalf of Texaco Ltd and Fina plc and is responsible for the stock and financial operations of the term inal. HOSL is also responsible for Fina plc activities associated with operation and receipt of product from the Fina-line and th e storage of aviation fuel for Fina plc only. HOSL also provides certain services to the Fina laboratory built on HOSL land. Accounting procedures have been set up to allo cate costs associated with HOSL operatio ns and also the Fina-line, aviation fuel and Laboratory costs."

114. Fina's Environment and Safety Audit Departm ent issued an audit of the Fina-line on 10 Novem ber 1992. The question of organisa tion was dealt with in the following terms:

> "ORGANISATION AND RESPONSIBILITIES
>
> FINA-LINE is part of the integrated m anagement of HOSL. Fina Plc is the m anaging com pany for HOSL and staff are employed by Fina and seconded to HOSL, except for controllers (and supervisors until 31/01/93) who are sub-contracted f rom BPA. HOSL was audited on 7/9 April 1992 (report HSEQ 92/5 issued July 1992). The Audit m ade a number of recomm endations concerning the organisation, reporting responsibilities, interf aces with oth er com panies and operating procedures…...
>
> The attached organisation chart for the integ rated management of the HOSL term inal and FINA-LINE is plann ed to com e into effect on 1 st February 1993. Draft job descriptions have been produced for the positions above in the organisation chart."

115. Attached was an organogram in the form of a revised Integrated Manpower for HOSL & Fina-line which now showed the General Manager reporting to Fina's Distribution Manager as well as to the HOSL Board.

116. Mr Parsons produced his last report as General Mana ger on 12 February 1993. He was able to confirm the negotiation of th e new agreem ent between Fina and BPA as reflected in the Services Agreem ent dated 29 January 1993 which again recited that Fina was "contracting for itself as owner of the Fina Pipeline and as operator for and on behalf of HOSL and the HOSL Participants."

117. At the HOSL Board meeting that day, the following item was discussed and minuted:

> **"**Control Room
>
> As a result of the manpower changes outlined in the General Manager's report, a proposal was made to rearrange the Control Room to facilitate that Terminal and FINA-LINE controls being in the hands of the one Controller. This will enable the Supervisor to be free to attend to matters specifically requiring his attention out on the Terminal unless two persons are specifically needed in the Control Room at the time. The engineers would arrange a detailed estimate of the costs which would be split on a 50:50 basis with FINA-LINE."

This sort of material was relied upon by Chevron as demonstrating the difficulty of separating out work in the control room as regards the Fina-line from that associated with the HOSL tankage. Total argued that there was no real difficulty: it was simply an accounting exercise.

118. In respect of this last point, Total noted that in June 1993 Texaco conducted its own audit of the various financial features of the joint venture. In the introduction to the document (distributed amongst others to Mr Humphries, Mr Spittlehouse and Mr Parsons) the terminal is described as "operated" by HOSL albeit Fina operated other costs centres at Buncefield including the Fina-line and Fina-Aviation. The payroll costs, it was recorded, were split between the "joint venture operations and Fina-line operations." This split varied and was 50/50 as regards the General Manager but 80/20 as regards the technicians.

119. The HOSL Board met on 18 June 1993. The operating budget was approved and agreement was reached to terminate the BPA contract as at January 1995.

120. By now discussion was underway to arrange for Elf to become a member of the joint venture. As the discussions developed, a document entitled "Management of Health & Safety" at HOSL was authorised by Mr Parsons in August 1993 (revised in December 1993). Under the heading "organisation", the document asserts that "HOSL has responsibility for the storage and loading facilities and for product stock management and financial operation of the Terminal". The document went on:

> "Fina PLC is currently the Management Company supporting HOSL's Management in the following areas:
>
> Personnel
>
> Engineering
>
> Legal/Secretarial
>
> Accounting/Purchasing
>
> Environment, Health & Safety
>
> Total Quality".

As in the April 1992 Environmental Audit these tasks, as emphasised by Chevron, appear to extend somewhat beyond those specified in the Management Agreement.

121. Total however contended that the document merely showed that Fina was only acting in a "support role". This was apparent it was submitted from the role of the General Manager in the context of Health, Safety and the Environment which was spelt out in the document as follows:

> **"**General Manager has overall responsibility for all matters relating to Health and Safety at Work and the Protection of the Environment, and to ensure the satisfactory implementation of this Policy. He is responsible for ensuring that formal training of personnel is provided.
>
> In carrying out these duties, he will be supported by specialist staff in Fina plc including the Engineering Safety Officer and Manager, Environment and Safety Audit."

122. The issue is perhaps summarised by yet another organogram annexed to the document this time showing a reporting line from the General Manager to the HOSL Board with a pecked reporting line from the General Manager to "Fina Epsom".

123. The concept of liquidating HOSL (and BOSL) then came back into play. In an internal Elf memorandum dated 20 September 1993 Miss Ellison from Fina's legal department is reported as explaining that the main problem with the current structure was that of "two tier decision making" with the risk of a conflict of interest as between a director of HOSL and his employer. Pending a decision on the point, a revised JVA was to be prepared in conjunction with the Elf Sale and Purchase Agreement[12].

124. In October, Mr Sinclair issued a HOSL Quality Systems Manual incorporating the requirement of ISO9002 (a standard to which Fina was working in respect of all terminals in which it had an operational interest). That document recorded that Fina "had been appointed as the Management Company" but with the General Manager having direct access to the Board of HOSL and reporting thereto. The manual also included provisions relating to the preparation of "manuals, procedures and work instructions" to be issued under the authority of the General Manager. In addition, on 20 October, a HOSL Terminal Emergency Procedures Manual was issued under the authority of the General Manager.

125. These documents were relied upon by Total as support for the contention that HOSL retained complete autonomy in the field, an independence that was necessary it was submitted to enable it to serve its customers and shareholders in an impartial fashion. To contrary effect Chevron submitted that they demonstrated that Fina's safety and quality policy was being imposed on the HOSL management. To the extent that some form of veto on HOSL's behalf was being suggested that, it was submitted, was impossible to reconcile with the concurrent responsibility for both the Fina-line and the aviation tankage.

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[12] Further exchanges between the legal departments relating to a possible variation to the indemnity provisions of the Management Agreements are discussed hereafter.

126. On 30 December 1993 the Sale and Purchase Agreement between Texaco, Fina and Elf was executed. At risk of repetition the position was as follows. It accorded a period up to 30 June for Fina and Total to decide whether to retain or liquidate HOSL (and BOSL) and thus, if liquidated, to remove any reference to HOSL in all the documentation. In the period leading to the completion of the sale, Fina was to conduct the business of the Buncefield Terminal "in its capacity as manager".

127. In anticipation of the liquidation of HOSL "the current operating company", the Buncefield Joint Venture Execution Agreement was entered into which made provision for Fina to be "designated Manager of the Terminal", the specific services of the manager under clause 5 being largely the same as set out in the 1992 Management Agreement with all engineering work added under clause 6. In clause 9, provision was made for a "Management Committee which shall exercise overall supervision and control of Terminal Operations". There were scheduled Accounting Procedures and Operating Regulations consistent with this arrangement.

128. In the event the decision was taken not to liquidate HOSL under the terms of the Sale and Purchase Agreement, Fina and Texaco were required to prepare "the Buncefield CSA" incorporating the 1998 JVA and the 1992 Management Agreement. The Buncefield CSA was to be "substantially in the form of the Buncefield JVA but amended to reflect the existence of an operating company". The Buncefield JVA was defined as the agreement annexed to the Execution Agreement.

129. The potential difficulty in these drafting arrangements was spotted by Elf's in-house legal department. In a letter dated 16 December 1993, there is this passage.

> **"**The 1988 Joint Venture Agreement (with new page 16) is approved save that there is a typo. Clause 6.1.2 appears twice in the document. The second clause 6.1.2 should of course be clause 6.1.3!
>
> As an aside, I note that the new Accounting Procedure and Operating Regulations as referred to in the new Buncefield Joint Venture Agreement are to be annexed to the 1988 Joint Venture Novation Agreement. It seems to me that they will need to be doctored slightly to reflect the continued existence of HOSL. Alternatively, paragraph (f) of the Novation Agreement needs to be reworded slightly to make it clear that the new Accounting Procedure and Operating Regulations are to be read against the background of HOSL being in existence."

130. The doctoring was duly undertaken but in the form of the Novation Agreement dated 1 January 1994. This made Elf a party to the 1988 JVA as amended. One of the amendments was by way of substitution for the earlier Accounting Procedure and Operating Regulations annexed to the Supplementary Operating Agreement for those annexed to the Execution Agreement but "to be interpreted as if references to the Manager are to HOSL and references to the Management Committee are to the HOSL Board".

131. This material was at the heart of the dispute between Chevron and Total. Total relied in particular on the substitution of the new Accounting Procedure and Operating

Regulations to be construed on the basis that HOSL was the m anager. W hatever doubts there m ight be about th e position under the Supplem ental Operatin g Agreement, the new contractual bargain was, it was s ubmitted, entirely clea r. Chevron on the other hand drew attention to the apparent continuation of the earlie r arrangement of management by Fina which had on the face of it already been running for som e three years through until com pletion. The interpretation clause, it was submitted, was the rath er clum sy and hurried consequence of the decis ion to retain HOSL for purely formal reasons. In any ev ent it was contended whatever th e contractual definition of the Operator might be it did not bear on the question whether the tasks had been and remained in fact delegated to Fina.

132. The next HOSL Board m eeting was on 22 February 1994. It was reported that notice had been given to BPA for term ination of their contract on 31 January 1995. Under "personnel" it was noted that there had been several changes since the last m eeting and "it was agreed that Fina should cl osely supervise the Com pany's operations whilst the newly appointed personnel were finding their feet". In his report to the board, Mr Parsons announced that he was taking early retirem ent and (again without any apparent consultation by Fina with the H OSL board) "am being replaced by Robert White".

133. At the HOSL Board m eeting on 20 June 1994, the term ination of the BPA agreem ent was confirmed. The in tention was for "4 m ulti-skilled con trollers to be em ployed by Fina and seconded to HOSL". The 1995 HOSL budget was tabled at the sam e meeting.

134. Mr Spittlehouse comm ented on the budget in his m emorandum of 29 June 1994. His particular problem was the additional overtim e that would flow from a change from BPA staff to HOSL staff.

135. At a HOSL Engineering m eeting on 31 January 1995, representatives of Texaco inquired as to the im plementation of COMAH regulations at HOSL. Notably this was thought by the meeting to be the responsibility of Fina HSEQ.

136. On 14 February 1995, there was a meeting of the HOSL Boar d at which it was "noted that the partners had agreed to the liquidation of HOSL at an appropriate tim e". In the result the draft JVA attached to the Execution A greement was sent to Elf and Texaco by Mr Dwan, a Fina director of HOSL in June 1995.

137. The draft was further considered by a HOSL Board m eeting on 5 July 1995. The Operations Report of the General Manager was summ arised at paragraph 3 of the minutes:

> "OPERATIONS REPORT
>
> The Operations Report January to June 1995 was considered by the Board.
>
> It was noted that 3 ex-BPA controllers had joined the Company as duty supervisors and had undergone extensive training on terminal operations and, following a retirem ent, a new technician with electrical qualifications had been appointed.

> There are now 8 duty supervisors and 7 technicians working for the Company. The senior supervisor has been replaced by an operations co-ordinator working 50% of the time for HOSL."

138. By March 1996 Fina was having second thoughts about liquidating HOSL. The minutes of a HOSL Board meeting on 27 March include the following item:

> "(a) Possible Liquidation
>
> Mr Mann said that a meeting had been held in November to discuss the proposed joint venture agreement. Since that meeting Fina has been reassessing the need to liquidate the Company which will prove to be quite complicated. If it was decided not to liquidate, a new Joint Venture Agreement with amendments would be adopted in any case. It was agreed that Fina should recirculate the JVA with a note explaining its thinking behind retaining the limited company status. Texaco and Elf will then discuss the position with their lawyers."

In fact by the time of the next meeting on 19 July 1996, it had been decided to stick with HOSL.

139. The next HOSL Board meeting was on 21 March 1997. The JVA / Novation Agreement had still not been finalised. Yet another meeting was fixed for July 1997. In his report to the Board the General Manager made this comment as regards "Health and Safety":

> "Petrofina has decided to attempt accreditation under the International Safety Rating Scheme (ISRS) and will commence in the UK with an audit of HOSL in July 1997."

This was a further example on Chevron's case of the enforcement of Fina's standards of safety across the board for all terminals in which Fina had an active managerial interest, introduced without prior consultation with the HOSL board.

140. On 2 May 1997 a Terminal Managers' meeting was held attended by Mr White and his opposite numbers at WOSL and Sunderland. The other attendees were all from Fina's head office (including on this occasion Mr Ollerhead and Mr Coalwood the Operations and Safety Engineer at Fina's head office later to become the Loss Control Co-ordinator). Such meetings were then held regularly about twice a year.

141. At the Board meeting on 22 July 1997 the board was simply informed by Mr White of the fact that International Safety Rating Scheme accreditation had been sought. As regards the JVA, the minutes recorded:

> "The new Joint Venture Agreement is still in the drafting stage. It was questioned whether the original Agreement was still valid and pertinent to the Partners current operations and liabilities. A decision with regard to the need for a new Agreement will be taken prior to the next meeting after legal opinion has been sought by Fina."

142. As promised by Fina at the July 1997 Board meeting, legal advice was sought on the outstanding JVA and the status of HOSL. On 26 February 1998, Fina wrote to Texaco and Elf. Having spelt out the contractual history, the letter from Jonathan Bond (a Fina director of HOSL) concluded:

> "Whilst there is a legal framework in place for HOSL between the parties, this may not now strictly reflect the agreed evolution of operating practices at the practical level of the terminal."

It was recommended that each party should review the documentation to identify "necessary revisions to the JVA for the future."[13]

143. In January 1998 Fina adopted the International Small Site Safety Rating System (ISSSRS) as a common approach to health and safety at all "Fina operated terminals". This expressly was to include Buncefield. (This decision was reviewed and confirmed when TotalFina was formed in April 1999.)

144. In February 1998, Mr White issued two "work instructions" relating to product import, one for the Fina-line (W I10) and one for the UKOP line (W I11). The details of these instructions are not as such material since they were replaced in March 2002. However on Chevron's submission they were indicative of lax supervisor's practice prior to that time. Of particular note was a recommendation in the Fina-line work instruction (not repeated in the later version):

> "4. When the tank is approx 95% full, the ATG activated an alarm which signals to the Supervisor the need to switch to another tank if the batch receipt has not been completed."

145. At the HOSL Board meeting on 3 March 1998, the minutes also record approval of expenditure associated with the preparation of a report under the COMAH[14] legislation to "ensure that the Company [HOSL] complies". This was the first stage in the development of another topic which loomed large in the submissions of Chevron and Total. The matter is covered in some detail hereafter. For the moment it suffices to say that the focus of the debate was whether in due course Total expressly accepted in its response to the requirements of the regulations that it was, at least as a matter of fact, the operator of the HOSL site at Buncefield

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[13] Indeed at the HOSL Board meeting on 3 March 1998, the minutes record:

> "It was acknowledged that in strict terms the Joint Venture Agreement did not currently reflect the Partners' obligations and liabilities, but may however provide an acceptable level of risk. The Partners will seek legal advice to determine whether a new agreement is essential."

[14] Control of Major Accidents and Hazards Regulations 1991

146. We have now reached the tenth anniversary of the establishment of the JVA. On 16 September 1998 Mr White wrote to the HSE enclosing a draft of the "HOSL Health and Safety Procedures". Attached was a "comprehensive organisation sheet" which showed that Mr White reported to "Head Office Epsom". In the Statement of Activities, it was stated that Fina was "the management company controlling the activities of the terminal" although HOSL "as appointed management company" was responsible for safety.

147. On 7 January 1999, Mr Linley wrote to the terminal managers at HOSL, WOSL and Sunderland (together with joint venture board directors):

> "Further to our detailed review of Fina plc's Terminal Operations with respect to Health & Safety Management, it has been decided that a training programme be compiled for all those staff who work within the Terminal or who have line management responsibilities for Terminal Operations within a head office environment…
>
> Fina will advise its Joint Venture Partner of the costs associated with delivering the training programme and seek approval to proceed without delay."

148. Chevron relied upon this letter as only consistent with Fina's imposition of its safety requirements at all three terminals with associated depth of management being provided by head office. Total's position was that it begged the question whether HOSL was in a position to exercise independent judgment as to the appropriateness of such requirements in relation to the HOSL site.

149. At this stage Mr Linley was unhappy about the charges which the HSE was proposing to make in respect of reviewing compliance with COMAH regulations. On 19 January 1999 he wrote to the HSE to complain. He did so not simply on the basis that Fina would need in due course to contribute to these costs but also on the basis that, as the first sentence asserts, "Fina plc distributes petroleum products from numerous inland locations and acts as the Operating Company for two joint venture terminals located in close proximity to other petroleum storage depots".

150. Fina's HSEQ Department promulgated an accident reporting manual in February 1999 for use at HOSL and elsewhere. It was the manual which was acted on following a "near-miss" at Buncefield in 2003 (see below). The systems required investigation of serious accidents (or incidents with such a potential), follow up by on-site management, review by "senior management" and a final review by HSEQ.

151. At the HOSL Board meeting on 2 March 1999 Mr White reported on the fact that COMAH regulations had just come into force and explained the procedures and documentation which "the HSE expects the Company to adopt".

152. Fina's Risk Management System Training manual was furnished to supervisors when they were undertaking training (Mr. Doran's copy was in the bundles dated 23 March 1999). In April, Fina (this was shortly before the merger with Total) promulgated a "Safety and Health Loss Control Manual" as being a safety management system

(SMS) expressly applicable to HOSL, WOSL and Sunderland as being "Fina managed oil terminals".

153. Provisions of note were as follows:

> "1.1.4 The Com panies Senior Managers conduct regular safety tours.
>
> The Senior Manager on site conducts a safety tour on a m onthly basis, this is supported by further tours which are carried out by the Managing Director, General Manager and Operations Manager throughout the year at prescribed periods. …
>
> The Senior Manager on site attends at least half of all Safety Meetings….
>
> 1.1.6 The objectives are set annually by the Managing Company [Fina] and are sp ecific to the location. These are m easurable, tim e bounded and will often relate to particular elements contained within the Fina Safety Management System.
>
> 1.2 **LOSS CONTROL CO-ORDINATOR**
>
> The Loss Control Co-ordinator is responsible for the development, co-ordination, adm inistration and auditing of the Fina plc m anaged Oil Terminal Safety and Health Loss Control System and will advis e the General Manager on Safety and Health Loss Control.
>
> The Loss Control Co-o rdinator will ensure th at the safety and health lo ss control system and trainin g are developed, im plementation strateg ies identified and that approp riate system auditing is conducted to measure and evaluate the quality and com pliance of the system.
>
> 1.2.1 The Managing Companies Operations and Safety Engineer [Mr Coalwood] has been designated Loss Control Co-ordinator….
>
> 4.0 **TASK ANALYSIS**
>
> Fina plc recognises the need to identify the m ost critical tas ks carried out by its em ployees and contractors. Critical tasks are th ose relativ ely few tasks which have the highest potential for loss (safety, health, environment, quality, fire etc) if they are done incorrectly. All staff carrying out task analysis and

> risk assessment will have received appropriate training.
>
> 4.1.2 It was decided that any task which attracted a high rating required immediate attention in the form of a formal task procedure and work procedures or practices could cover those attracting medium or low ratings.
>
> 4.1.3 Critical tasks, procedures and practices will be reviewed as part of the accident investigation procedure … and in any case every 18 months."

There followed a table identifying that the Terminal Manager was responsible for appropriate task analysis.

154. This SMS was potentially an important feature of the dispute between Total and Chevron. Its primary significance from Chevron's perspective was its alleged support for a seamless management/operating system throughout the Fina/Total organisation. But it also had a significant bearing on the subsidiary issue as to whether personnel other than Mr Nash were responsible for the explosion. It was Total's case that the explosion was attributable to a wholesale disregard on the part of Mr Nash to well established and understood procedures. Although it was accepted that tank filling was a critical task, it was contended that even if a written work procedure should have been created its absence was not causative. Chevron's case was that, in line with the SMS, best practice required the preparation of a written task procedure and given the apparent lax manner in which activities were regularly undertaken in the control room, the absence of any such task procedure (taken with the consequential absence of instruction, supervision and audit) was one of the causes of the explosion.

155. The SMS was duly adopted by the HOSL Board at its meeting on 27 July 1999. At the same meeting Total (now being in control of Fina) sought approval "as the management company" of a partial pay increase for HOSL staff albeit other companies in the Total group would not pay any increase for a further year.

156. In the wake of the appointment of Mr Linley as Manager Terminal Operations a job description was prepared which made him responsible for ensuring that "Total Fina-line and the 7 oil storage terminals which TotalFina manages and engineers are operated and maintained in a safe and cost effective manner." The attached organogram placed him as Mr White's line manager.

157. On 25 November 1999 Mr Baner from Total's Head Office in Paris sent a memorandum to all Total Fina Terminal Managers (copied to Mr Linley and Mr Coalwood) drawing attention to the need to comply with the COMAH regulations which imposed a duty on "an operator of an establishment to take all measures necessary to prevent major accidents". The memorandum concluded:

> "It is recommended that we initiate immediately the drafting of MAPP documents for each COMAH site identified above but the top priority is to complete Safety Management System that

> has been developed under ISSSRS for the ex-Fina term inal and in particular the risk assessm ents for m ajor hazards under the existing assessm ent system . The next priority m ust be to develop a common Safety Managem ent System for all TotalFina terminals. ”

158. The first draft of the em ergency plan required by chapter 6 of the COMAH regulations was prepared by Messrs Osprey Associates. As regards the section dealing with information to the public the draft identified the operator as HOSL.

159. In tune with the ambition to introduce a common SMS, Mr Linley wrote in December 1999 to all employees for which his department was responsible including those at the HOSL site:

> “As an employer, To talFina GB h as a Duty of Care and is legally obliged to provide a safe working environm ent and to ensure that all ou r activ ities are carried ou t in a safe m anner. This is achieved by assessing the risks in carrying out our activities, ta king action to reduce th e level of risk as far as is reasonably practicable, putting in place system s of work where necessary and training our em ployees. These principles are embodied in what is comm only c alled a Safety Managem ent System (SMS) and the Directo rs have set an objectiv e of ensuring th at an SMS is in pl ace in all operational areas of Total during 2000.
>
> A great deal of effort has been put by all of us within “Operations” throughout 1999 to en sure that our revised SMS which we refer to as “S afety & Health Loss Control Manual”, is adopted at HOSL, Sunderland and W OSL. W e have set ourselves a target of having a common SMS for the term inal that we operate by the end of 2000.”

160. On 26 January 2000, notification under the COMAH regulations was given in respect of the Buncefield site. Regulation 6(2) provided that prior to 3 F ebruary, the “operator” of such establishments had to give notification of the inform ation specified in schedule 3 of the regulations. An “operato r” was defined as being a reference “to a person who is in control of the operation of the establishm ent” being the person upon whom the respons ibility lay to “pre vent m ajor accidents an d lim it th eir consequences”.

161. Schedule 3 required written notification of the following:-

> “1. the name and address of the operator;
>
> 2. the address of the establishment in concern;
>
> 3. the nam e or position of the person in charge of the establishment;… ”.

162. The letter, on Total notepaper and signed by Mr White as "General Manager" responded as follows:

> 1. Total Fina, Watford, Hertfordshire
>
> 2. HOSL, Buncefield Terminal
>
> 3. Mr White

163. It was Chevron's case that this reflected a clear recognition by Total that it appreciated that it was in control of all operations at the HOSL site and responsible for avoiding major accidents such as the December 2005 explosion. Total asserted that the notification was simply another example of Total acting on HOSL's behalf in supplying support services in the health and safety field.

164. On 23 February 2000 there was a HOSL Board meeting. The minutes record Mr White's report that the HSE was considering the HOSL procedures (including the SMS audited by DNV) against the background of the COMAH legislation. Mr White's report also advocated offering permanent employment to the two technicians then engaged on a temporary basis.

165. The DNV audit was issued in March 2000 in the context of the International Small Site Safety Rating System ("ISSSRS"). It was expressed in terms of being an audit of "TotalFina UK Terminal Operations" at HOSL, WOSL and Sunderland. The report stated in terms that "these terminals are all operated by TOTALFINA."

166. At the HOSL Board meeting on 26 July 2000 Mr White reported that "the implementation of the Total/Fina Safety Management System continues which includes making improvements to sections of the system as necessary." The two technicians were reported to have been duly recruited as permanent employees.

167. The same day, in the wake of Total's takeover of Elf, Mr Ollerhead wrote to Mr Nash to explain his position in the new company:

> "… we are pleased to confirm details of your appointment with Totalfina…With effect from 1st July 2000 you will be employed as Duty Supervisor HOSL and be based at H.O.S.L. This position will report to S. Sinclair, Operations Manager, HOSL."[15]

168. Mr White's job description with the Total/Fina organisation was updated in November 2000. It described his job purpose as having "overall responsibility for the safe and economic operation of both Fina-line and the HOSL Joint Venture."

169. By now operation at Buncefield had been underway for some 10 years. On 19 January 2001, an email from Mr Linley to Mr Ollerhead referred to discussions about

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[15] This letter furnishes a good example of the variable use of "HOSL" as an acronym for the company and an acronym for the relevant part of the Buncefield site. There are many other examples.

HOSL staffing between Mr Linley and Mr White which had led to the recommendation to Mr Ollerhead that amongst other things Mr Lewis be promoted to Operations Coordinator. Mr Ollerhead's permission to proceed was sought.

170. The HOSL Board met on 23 March 2001. It was agreed that a new technician be recruited to replace the technician recently promoted to supervisor.

171. In July 2001, Total HSEQ produced (or at least approved) a written procedure for the preparation, control and issue of work instructions and such like. The procedure was authorised by Mr Noake.

172. On 15 October 2001, there was a meeting at Buncefield between Mr Noake, Mr Tonks and Mr Lund to discuss various aspects of documentary procedures and records. On 22 October 2001, Mr Noake sent an email summarising the outcome of the meeting. One point was as follows:

> "Control room staff to be reminded of the need to check tank ullages at least once every shift and log this check (possibly using the daily log sheet). Can you send me a copy of whatever instruction you send out?"

173. The catalyst for this suggestion remains obscure. In any event no written instructions appear to have been issued.

174. On 8 and 9 November 2001, Total held a European Logistics Conference. The presentation covered the introduction to ISSSRS as follows:

> "In January 1998, PetroFina adopted the International Small Site Safety Rating System (ex Det Norske Veritas - "DNV") as the common approach to the Health and Safety Management at Terminals.
>
> Fina plc seconded one of their Operations Engineers to implement the protocol and organise the appropriate training. Work began in February 1998 with the aim of external accreditation for the Health and Safety Systems of the Fina plc operated Terminals.
>
> In April 1999, TOTALFINA is formed. The new Group reviews its approach to Health and Safety Management System and chooses ISSSRS as the "Group Standard"."

175. The manual was, it was explained, to be "owned" by the Terminal Operations Department supported by HSEQ. It was written by a member of the Operations Team (Mr Coalwood) with the aid of safety advisors from each terminal operated by Total (including Buncefield) and buttressed by safety tours by the Director Logistics and the Manager Terminal Operations.

176. These principles were duly passed on by Mr White to HOSL staff in a presentation called "Safety Alert".

177. On 11 March 2002, Mr Noake sent an email to Mr Linley, Mr White and Mr Lewis attaching various revised versions of various written procedures and work instructions. Mr Noake required copies of previous versions to be destroyed. Included were new versions of WI10 and WI11. The most notable amendment was the deletion in the Fina-line instruction of any reference to the High alarm. In the result the only alarm referred to in either set of instructions was the "Cobham switch". While Chevron was highly unimpressed by the content of these procedures, it became common ground that they were directed at quality[16] and not safety and thus did not constitute even an attempt to provide a task procedure as required by the Loss Control Manual for the admitted critical task of filling tanks.

178. At the HOSL Board meeting on 23 July 2002, Mr White reported that Level 3 ISSSRS had been achieved in May. As regards budget items, costs associated with COMAH work were agreed in principle.

179. It became clear during the course of the autumn of 2002 that Buncefield was a "top tier" establishment within the meaning of the COMAH regulations and Mr Linley reported as such to the HSE by letter on Total notepaper dated 19 December 2002 adding that the COMAH safety report for HOSL would be submitted by July 2003.

180. In a presentation to Total France Board members on 20 December 2002 by Mr White and Mr Linley, the management structure was shown with Mr White reporting to Mr Linley in regard to Buncefield as one of the "seven TFE operated terminals". A PowerPoint display at a Logistics meeting in January 2003 was to similar effect and included the objective of gaining acceptance of the Safety Report for COMAH compliance at HOSL.

181. In slight contrast, on 8 January 2003, the HSE wrote to Hertfordshire County Council notifying the change from lower tier to top tier and giving the name and address of the operator as HOSL.

182. DNV contributed a report by way of assistance towards the preparation of the HOSL COMAH report. DNV stated that Total "ran" HOSL. Messrs IKM consultants provided an advisory report on environmental risk having been appointed by Mr Coalwood of Total.

183. In March 2003 Mr Linley resigned as a director of HOSL to be replaced by Mr Beedham. At their meeting on 4 July 2003 the HOSL Board members were told by Mr White that the COMAH report was "being compiled by Total and will be ready for submission on its due date."

184. The COMAH report was duly filed with the HSE at the end of July. It was an enormous document. Though prescient in some respects, in the event its predictive aspects failed to cover the concatenation of circumstances that led to the enormous explosion in 2005. This was despite the fact that Tank 912 was identified as presenting the source of the major accident scenario:

> "1. Storage Tank No 912 -this tank contains gasoline which is the substance presenting the greatest flammable hazard. This is

[16] i.e. documents falling under the HOSL Quality Systems Manual.

> tank is as large as any other storing gasoline and is located in a central position between two similar vessels which also contain motor spirit. Should this tank be on fire it would affect both the adjacent vessels with in the bund thus providing maximum impact in terms of risk.
>
> Further to this the tank is located nearest to our western boundary adjoining both Buncefield Lane and the Industrial Estate. The bund containing this tank is also the nearest to Cherry Trees Lane. This lane can be quite busy during rush hour periods of day with traffic accessing adjacent work sites. Should a catastrophic tank failure occur then motor spirit could be released into both Cherry Trees Lane and Buncefield Lane."

185. The report gave as the route for communication with the competent authorities contact with Mr White at HOSL.

186. Attached to the report was the required Major Accident Prevention Policy (MAPP). This was signed on Total headed paper by Mr Ollerhead and Mr White as representing senior levels at the "operator's organisation".

187. As regards "Bulk Storage – Overfilling Measures" the COMAH report stated as follows:

> "Operational procedures.
>
> There are various types of operating procedure used at the terminal. All identified critical tasks have either a task practise or a task procedure. Further to these there are standard operating procedures. Staff consultation, information, instruction and training are all given as part of the adoption of any of these procedures. It is a requirement that the staff member signs documentation to demonstrate when he/she is satisfied and has obtained a good level of understanding of the procedures.
>
> …. The task practises and procedures have been based, wherever possible, on recognised published best practise.
>
> …
>
> Operating procedures can only be generated by the Terminal Manager in conjunction with the Senior Supervisor and Safety Adviser. ….See the attached organogram which details the terminal management and safety structure.
>
> Procedures are required to be re-examined at any stage should there be changes to the plant, equipment, staff and in any event at intervals not exceeding eighteen months. Critical task practises and procedures are required as part of the SMS, to be

> discussed with operators and technicians on annual basis to ensure their continuing relevance and validity."

188. We are now in the run up to the explosion in December 2005. On 8 August 2003, there was a "near-miss" involving Tank 903. The gauge stuck during loading and the level increased 4 metres above the reading. In the result the tank floating roof set off the Cobham alarm which had been set too high (indeed above the foam pourers). A Total incident report was duly filled in by Mr Tonks. The incident was described as resulting from "procedures inadequate" and indicated action in the form of an approach to BPA about filling time and flow rate.

189. No response was received from HSEQ but Mr White's reaction in an e-mail to all supervisors was instructive:

> "As most of you know we experienced a Near Miss situation last week when Tank 903 was almost overtopped during a filling from UKOP South.
>
> This resulted in the shearing of one of the foam pourers and damage to others.
>
> However, more serious is the issue of potential major accident which could have occurred had the tanks been belatedly switched.
>
> Following an investigation, involving members of Control Room Staff, we are urgently putting in place measures to ensure that this does not recur and Jon will be circulating some details in the Incident Report to be published soon.
>
> However, in the interim, we will need to exercise extreme care when receiving off any pipeline and, during this period at least, we must insist on regular checks via the tank gauging system when receiving into HOSL tanks.
>
> Please ensure that this is adhered to strictly and details documented on the log.
>
> We will keep you up dated as to progress on changes to procedure in order to avoid a recurrence."

Quite what changes in procedure or other remedial measures were put in place remains obscure.

190. Another near miss involving a sticking gauge occurred on 12 November 2003. Reports from the supervisor on duty explained that the Cobham alarm for Tank 906 had gone off[17]. The supervisor had noticed the gauge was not moving but assumed that BPA had stopped the supply without telling the control room at Buncefield. In fact filling continued for another hour. The supervisor explained that the incident had

[17] Furthermore the cut off did not operate as the trip mechanism was by-passed awaiting parts.

occurred early in his shift making "spotting the problem more understandable".[18] It does not appear that any action was taken by the HOSL management or even that any incident report was made to head office.

191. At the HOSL board meeting on 2 April 2004 neither of the above matters was brought to the board's attention. However it was noted that a new joint venture agreement had never been entered into by Chevron. It was thought that there were "about 10 different agreements which need to be checked for anomalies".

192. In August 2004 a response was sent to the HSE in regard to a number of matters which had been raised with regard to the COMAH safety report. In particular more detail was sought as to the way in which the SMS fitted into the overall organisational arrangement. The response, in tabular form, reemphasised the chain of command from the hierarchy in Total's head office through to the terminal manager. Notably in regard to responsibility for such matters as assessment of compliance with SMS the relevant person was identified as the UK Operations Manager (Mr Beedham) with the Terminal Manager Mr White as his deputy.

193. In October 2004 Mr Lund of Chevron asked Mr Beedham to supply a copy of the HOSL COMAH report which had been promised but not delivered.

194. In December 2004, the Hertfordshire Emergency Services Incident Committee (HESMIC) published an off-site Emergency Plan for the Buncefield Complex. This was written on the premise that there were four "site operators" including HOSL, as indeed was the standard form letter to be sent by BPA on behalf of the Buncefield Common Users to members of the public giving advice as to action to be taken in the event of an emergency.[19]

195. By now there was concern about the level of overtime being worked by supervisors from the point of view of expense and safety. It was proposed by Total's Human Resources Department that a ninth supervisor be engaged and a lump sum payment made to the eight existing supervisors to offset the loss of overtime. In February 2005, a technician was made up to supervisor, a payment of £5000 was made to each of the existing supervisors by Total and a replacement technician engaged (but all subject to HOSL Board approval).

196. At the HOSL Board meeting on 18 March 2005, the Texaco directors expressed approval of the engagement of a ninth supervisor but disapproval of the one-off payment and asked Total to make alternative proposals. However matters were in fact satisfactorily resolved by the time of the next board meeting on 15 July 2005, the last held before the explosion.

197. On 6 May 2005, Mr White announced that the initial COMAH audit test had been passed.

198. On 31 October 2005, the job description of Mr White was revised:

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[18] In fact the batch had only started at 1830 when there must have been precious little ullage available in the selected tank.

[19] Although the organisational chart shows that Mr White as General Manager reported to Total Watford and not the HOSL Board.

> "Carries responsibility of m anaging 2.5 m illion tonne/pa terminal an d 2 m illion tonne/pa p ipeline in addition to the management responsibilities of the Colnbrook jet handling facility…
>
> Responsibility for 13 Total staff and 5 contract personnel.
>
> ….
>
> Ensuring th at the term inal and pipelines are operated in accordance with leg islation, co mpany requirem ents and industry best practice …
>
> Position is field based at HOSL with line reporting to T erm. Ops. Manager… Liaison and day to day co ntact with most departments in HO [Head Office] …
>
> Accountable to the partner Com panies notably Total in the management role…"

199. Somewhat ironically on 5 Dece mber both Mr Nash and Mr Forde were recip ients of certificates of competency awarded by PTF Training Ltd.

200. The events of the night of 10/11 Decem ber are summarised abov e. As regards contemporary docum entation the position was as follows. Pum ping schedules were produced for both the Fina-line and the UKOP line. As regards the Fina-line, the initial schedule had been produced by Siobhan Fanning on 1 Decem ber 2005 but was amended a num ber of t imes. The fi nal version (No. 9) probably dated 7 Dece mber scheduled p arcel num ber 562A of 10500m ³ unleaded fuel for receipt by HOSL a s from 21:00 on 9 December at a flo w rate of 240 cu.m/hour. There was also a 'ru n sheet' for the Fina-line showing the sequence of parcels within the line.

201. As regards the UKOP line, the pumping programm e dated 9 Decem ber referred to parcel 123TX7 of which 8400 cu.m was due for delivery fro m 18:42 on 10 Decem ber to 08:14 on 11 December (i.e. a flow rate of 650 cu.m/hour). There was no run sheet.

202. Data from the Motherwell system reveals that the Fina-line deliv ery began at 2303 on 9 Decem ber initially into Tank 901. It was tran sferred to Tank 915 at 0655 on 1 0 December. Over th e n ext 24 hours the Low and Low Low level alarm s sounded regularly as product was taken at the racks. The change of watch took p lace at 0700 although Mr. Doran may have arrived a few minutes earlier. The handover sheet made no reference to the parcel.

203. Again the Motherwell data reveals that the inlet valve to Tank 912 from the UKOP line was opened at 09:36 although the de livery did not start until 1850. The watch changed again at 1900. The handover sheet was more informative than the earlier one:

> "Current batch 562A: PU50:915 (connected from 912)
>
> NOYS [not on your shift]
>
> BPA 912 open for TX7123"

204. At about 1902 so meone input the fuel properties of the UKOP batch into the Motherwell software. It is not clear whether it was Mr Nash whose watch had just started or Mr Doran or Mr Fitt (who provided the data) whose watch had just finished. During the course of the watch lim ited entries were m ade into a m ovement "diplog" which duly recorded that 562A was going into Tank 915.

Vicarious liability – the law

205. The primary issue between Chevron and Total was which of the two companies, Total or HOSL, was vicariously liable for the faults in the operation of the Buncefield site which were causative of the explosion[20]. There was no suggestion that any party other than Total was liable for the tortious acts of any employee acting off the Buncefield site (in particular at its head office in Watford). The issue arises only in regard to those employees engaged in work at Buncefield and in particular Mr White, Mr Tonks and Mr Nash. In this regard there was no suggestion that both companies were liable.

206. Acts or omissions on the part of Mr White and Mr Tonks may become material. But for present purposes it is sufficient to focus on the admitted carelessness of Mr Nash in causing or permitting the spillage. It was common ground that Mr Nash's contract of service was with Total. It is accepted that his want of care was causative of the explosion. The essential question that has arisen is whether Mr Nash, having been seconded to or borrowed by HOSL, is to be regarded as "pro hac vice" the employee of HOSL thus rendering HOSL liable in place of his general employer.

207. There was little if any dispute as to the relevant legal principles in this field. This is essentially an issue of fact. It can be pertinent to consider such matters as the manner of selection, the method of payment, the power of dismissal, the length of the service, the degree of training, the employment of machinery and so on. But it is well established that the most telling indicium is the identity of the person who has the right to control the employee's method of work : that is to say not the nature of the work but the manner in which it was to be undertaken.

208. The leading case in this field remains ***Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd & Anr [1947] A.C. 1.*** The harbour authority had hired a mobile crane to a firm of stevedores for loading a ship. The crane was accompanied by a craneman who was employed, paid and liable to be dismissed by the harbour authority although the hiring conditions stipulated that the craneman should be the employee of the hirer.

209. At the time the stevedores had the immediate direction and control of the operation of picking up and moving each parcel of cargo but no power to direct how the crane should be worked or the controls manipulated. In the course of the operation the craneman injured a third party by driving the crane negligently. The injured person sued the harbour authority and the stevedores. The House of Lords held that the harbour authority was liable:-

    a) The question was not determined by the terms of the agreement between the harbour authority and the stevedores;

    b) The harbour authority had not discharged the heavy burden of proof so as to shift onto the stevedores responsibility for the negligence of the craneman given that the craneman was exercising his discretion as to the manner of his driving.

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[20] For this purpose no distinction need be drawn as regards vicarious responsibility for liability arising in nuisance or in ***Rylands v. Fletcher.***

210. Lord Porter at p.17 put the matter this way:

> "The expressions used in any individual case must always be considered in regard to the subject m atter under discussion but amongst the m any tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone ot her than his general employer is authorized to do this he will, as a rule, be the person liable for the em ployee's negligence. But it is not enough that the task to be perfor med should be under his control, he m ust also control the m ethod of performing it. It is true that in m ost cases no orders as to how a job should be done are given or required: the m an is left to do his own work in his own way. But the ultim ate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done."

211. It should also be noted, as Lord Macmillan pointed out at p.14:

> "Servants cannot be transferred from one service to another without their consent and even where consent m ay be im plied there will always rem ain a questio n as to the ex tent and effect of the transfer."

212. It is right that circum stances can arise in which both the general em ployer and what might be term ed the temporary em ployer are vicariously liable. One example is to b e found in ***Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005] 4 All E.R. 1181***. But this cas e is of course of lim ited assistance to the presen t proceedings where no party suggests that both Total and HOSL are vicariously liable. Nonetheless there is a helpful passage from the judgment of May LJ on the general approach:

> "7. The opinions m ake clear that decisions of this kind depend on the particular facts and that m any factors may bear on the result (see Lord Porter at p 17). In assess ing th e facts, certain considerations will or m ay be relevant. These include: (a) the burden of showing that responsib ility does not rem ain with the general em ployer, is on the general em ployer and is a heavy one (Viscou nt Sim on at p 10, Lord Macm illan at p 13, Lord Uthwatt at p 21). (b) By whom is the negligent em ployee engaged? Who pays him? Who has power to dism iss him (Lord Simon at p 10)? In the present case the an swer to these questions is the general em ployer, the third defendants. (c) Who has the immediate direction and control of the relevant work (Lord Si mon at p 10, Lord Porter at p 16)? W ho is entitled to tell the em ployee the way in which he is to do the work upon which he is engaged (Lord Porter at p 16, L ord Uthwatt at p 23: "The proper test is whether or not the hirer had authority to control the m anner of executio n of the act in question. Given the existence of th at authority its exercise or

> non-exercise on the occasion of the doing the act is irrelevant.")
> (d) The inquiry should concentrate on the relevant negligent act, and then ask whose responsibility it was to prevent it (L ord Simon at pp 10, 11). In the Mersey Docks case, the stevedores had no responsibility for the way in which the crane driver drove his crane, and it was this which caused the accident (Lord Simon at p 12, Lord Macmillan at p 13, Lord Simonds at p 18). The ultim ate question m ay be, not what specific orders or whether any specific orders were given, but who is entitled to give the orders as to how the wo rk should be done (Lord P orter at p 17). (e) A transfer o f services can only b e effected with the employee's consent (Lord Porter at p 15, Lord Uthwatt at p 21). (f) Responsibility should lie with the master in w hose act so me degree of fault, though rem ote, may be found (Lord Simonds at p 18)."

213. May LJ concluded that on the facts both defendants were equally entitled (and in theory obliged) to control the negligent fitter and, there being no rule of law rendering dual vicario us liab ility impermissible, both defendants were liab le. Rix LJ accepted this approach:

> "78 The rem aining question is to attem pt to defin e the circumstances in which the liability should be dual. It is possible that where the right to control the m ethod of performance of the employee's duties lies solely on the one side or the other, then the responsib ility sim ilarly lies on the sam e side. That reflects the significance of Lord Esher MR's doctrine of entire an d absolute control. If so, then it will only be where the right of control is shared that vicarious liability can be dual. I would agree that the balance of authority is in favour of this solution. On this basis, I agree with May LJ' s a nalysis of the facts in this case as demonstrating a situation of shared control. I would go further and say that it is a situation of shared control where it is just for both em ployers to share a dual vicarious liability. The relevant employee, Darren, was both part of the temporary em ployer's team , unde r the supervision of Mr Horsley, and part of the genera l employer's sm all hired squad, under the supervision of its Mr Megson."

214. Rix LJ went on to consider how in subsequent cases the im position of dual vicarious liability might be refined:

> "79 However, I am a little sceptical th at the doctrine of dual vicarious liability is to b e wholly equated with the question of control. I can see that, where the assumption is that liability has to fall wholly and solely on the one side or the other, then a test of sole right of control has force to it. Ev en the Mersey Docks case [1947] AC 1, however, does not m ake the control test wholly determ inative. Once, however, a doctrine of dual responsibility becom es possible, I am less clear that either the existence of sole right of control or the existence of som ething

> less than entire and absolute control necessarily either excludes or respectively invokes the doctrine. Even in the establishment of a formal employer/employee relationship, the right of control has not retained the critical significance it once did. I would prefer to say that I anticipate that subsequent cases may, in various factual circumstances, refine the circumstances in which dual vicarious liability may be imposed. I would hazard, however, the view that what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence…..
>
> 80 One is looking therefore for practical and structural considerations. Is the employee, in context, still recognisable as the employee of his general employer and, in addition, to be treated as though he was the employee of the temporary employer as well? Thus in the Mersey Docks situation, it is tempting to think that liability will not be shared: the employee is used, for a limited time, in his general employer's own sphere of operations, operating his general employer's crane, exercising his own discretion as a crane driver. Even if the right of control were to some extent shared, as in practice it is almost bound to be, one would hesitate to say that it is a case for dual vicarious liability. One could contrast the situation where the employee is contracted-out labour: he is selected and possibly trained by his general employer, hired out by that employer as an integral part of his business, but employed at the temporary employer's site or his customer's site, using the temporary employer's equipment, and subject to the temporary employer's directions. In such a situation, responsibility is likely to be shared. A third situation, where an employee is seconded for a substantial period of time to the temporary employer, to perform a role embedded in that employer's organisation, is likely to result in the sole responsibility of that employer."

215. Total placed some considerable reliance on the proposition that the issue could turn on whether the relevant employee was "embedded" in the organisation of the temporary employer. In that respect it was submitted that Mr Nash had been seconded to HOSL for many years to perform a role which was on any view "embedded" in the organisation. I do not quarrel with that. But, assuming that this is the proper question, it seems to me that it simply begs the question on the facts of the present case. Mr Nash had worked for many years at the Buncefield site undertaking work which in large part concerned the joint venture. But whether he was embedded in HOSL's or Total's organisation is quite another question.

216. In a subsequent decision of the Court of Appeal (***Hawley v Luminar Leisure Ltd [2006] Lloyd's Rep. 1 and 112 307***) it was not thought that the application of either approach made any material difference. In the event the classical "control" test was re-affirmed in ***Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH***

[2008] EWCA Civ. 1257. Having cited at length from ***Mersey Docks***, the court went on:

> "49. All of t he members of the House of Lords referred to the authority to control the crane driver. That authority is conferred by the con tract of em ployment. It is only if the agreem ent between the general employer and the hirer is to be taken, in all the circum stances, as conferring on the hirer the power to control the m anner of e xecution of the work th at a transfer of vicarious liability can o ccur. Indeed, in our judgm ent no such transfer can take place without the consent of the em ployee, although of course that m ay be inferred: see the decision of the House of Lords in Nokes v Doncaster Am algamated Colliery [1940] AC 1014 . As Bridge J observed in Sm ith and another v Blandford Gee Cem entation Co Ltd [1970] 3 AER 154 at 160 in relation to a finding by a tribunal that a contract of serv ices had been transferred:
>
> > "To my mind, it runs counter to a fundam ental principle that a m an's contractual position, particularly in such a vita l matter as the identity of the master whom he is to serve, shall be crucially affected by an agreem ent between two oth er parties, the terms of which are never communicated to him."
>
> . …..
>
> 59 W e accept OT' s subm ission that the judge failed to take sufficiently into accoun t that, as Lo rd Sim on said in Mers ey Docks and Harbour Board, the burden on a party seeking to show a tran sfer or as sumption of liability to or by the h irer of an employee is a heavy one. This does not mean that the burden of proving the relevant facts is any different from that in any other civil trial. It emphasises that exceptional facts are required for a contractor to be vicariously liable for the negligence of his sub-contractor. Those facts were not present in this case."

217. It was common ground that the general employer of Mr Nash was Total. The question therefore arises whether Total have discharged the burden of proof so as to demonstrate that the manner in which Mr Nash was to conduct his work in the control room had been transferred to or adopted by HOSL.

218. The relevant activity was tank filling from a pipeline. Mr Nash, as pipeline supervisor, was in im mediate and sole ch arge of that activ ity. He negligen tly overfilled the relevant tank. As regards the identity of th e person with authority to give directions about the manner of tank filling operations, there was som e common ground. His immediate supervisor was Mr Tonks, the Operations M anager for the HOSL site an d the Fina-line. He in turn reported to Mr W hite the General Manager. These two m ade up what co uld be term ed the "m anagement" at Buncefield. It was accepted that,

allowing for some degree of discretion on the part of Mr Nash, between them they were responsible for providing training and instructions to Mr Nash as to how tank filling operations should be performed by him.

219. Against that background the issue narrowed down to the question whether the power of direction of this group (together with all others working at the HOSL site) had been transferred from their legal employer Total to HOSL. This issue included focus on a number of factors including:

a) Who engaged and paid Mr Nash? Who could dismiss him?

b) How long had he worked at the HOSL site?

c) Whose equipment was he using?

d) What role did the off-site Total staff have in regard to giving instructions to the "site staff"?

220. To an extent the answers to these specific questions merely beg the overall controversy. Mr Nash was engaged following an advertising campaign put in place by the general manager of HOSL and thereafter remained as a technician or supervisor for some 15 years, working throughout in the control room at the HOSL site. In that sense therefore Mr Nash was very much a "HOSL" man. What remained determinative however was whether Total had made good a case that control of Mr Nash's tank filling (and Mr White's activities as responsible for training and instruction in that regard) had been transferred to the HOSL board.

Vicarious liability - the agreements

221. In the result, much of the evidence and argument was directed to the question as to who was the nominated "operator" of the HOSL sites, Total or HOSL under the terms of the joint venture agreements. In one sense this issue was not directly in point. Certainly, if the right view is that Total was and remained the nominated operator of the sites throughout the joint venture, it would afford the strongest possible support for the view that the power of direction was not transferred. However, even if HOSL was to be regarded as the nominated operator by virtue of the terms of the 1988 JVA, the 1990 Supplemental Agreement and the 1994 Novation Agreement, it does not follow that it will be established that the power of direction was transferred.

222. This is for two principal reasons:

a) the terms of any agreement between Total and HOSL are not determinative (let alone one only between Total and Chevron);

b) there would remain an issue as to how HOSL set about conducting its operating obligations and as to whether, in particular, HOSL delegated its tasks to Total so that Mr White continued in fact to work under the direction of his employer Total rather than the HOSL board.

223. Nonetheless it was a dominant feature of Total's case that the effect of the 1988 JVA and the subsequent agreements was that, as between Total and Chevron, the Buncefield site was to be operated by the joint venture company HOSL. This in turn,

it was submitted, established (or at least strongly supported) the conclusion that Mr White (and thus Mr Nash) worked under the immediate direction of the board of HOSL. It followed, so it was contended, that the HOSL board retained ultimate responsibility for directing and controlling the manner of tank filling operation, if necessary in conflict with any instructions from or requirements of Total.

Joint Venture Agreements

224. It is worthy of comment before turning to the agreements that there is room for confusion in the nomenclature. The words "operator" and "operation" are not terms of art. They elide with other concepts. For instance an operator, in my view, is involved in "running" the relevant enterprise. But, in turn, in "running" an organisation, the person concerned must, it seems to me, be both "managing" and "controlling" it. The potential overlap between these concepts must be borne in mind.

225. There can be no doubt that the 1988 JVA taken with the 1990 Supplemental Agreement nominated BOSL as operator of the Avonmouth site and HOSL as operator of the Buncefield site. Thus as between Total and Chevron the relevant joint venture vehicle had to undertake the operation and maintenance of the respective site. In turn, responsibility for the management, direction and control of the 'operator' was to be vested in the relevant board. So far as shareholders were concerned they undertook to use their voting powers so as to procure the development and implementation of both an Accounting Procedure and Operating Regulations by the relevant operating company. Any management fees charged to the operating company by Total or Chevron (as may be the case) were to be borne in equal shares and other expenditure in proportion to usage.

226. So far so good from the perspective of Total's argument. But immediately on the commencement of operations at Buncefield in November 1990, the parties entered into the Supplemental Operating Agreement attached to which were the required Accounting Procedures and Operating Regulations. These specifically identified Total as having two roles, first as a non-operator Participant and second as Operator. Indeed by definition the operator was not HOSL as HOSL was not a participant.

227. As regards the Accounting Procedure the sole role of the joint venture company was to authorise expenditure (if approval by the Participants was delayed) as might be necessary for terminal operations: see Schedule 1, Section V, para. 1.2.

228. By virtue of the Operating Regulations, Total (as "operator") was to recruit and employ staff as the board considered necessary (with the Participants being required if so requested to second staff to HOSL: Schedule 2, Section A, para.3.1). As already noted HOSL's role was to provide reports to the participants on terminal operations (para 5.1), was responsible for compliance with statutory obligations (6.1), was required to monitor safety aspects (8.1), was responsible for accepting and containing product in the storage tanks (Section B, para. 2.1) and had custody and control (but not title or risk) of the product (para. 4.1).[21]

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[21] This agreement precisely matched the earlier agreement dated September 1989 relating to Avonmouth whereby Chevron was nominated as the operator.

229. It was Total's submission that the content of the Supplemental Operating Agreement so far as it referred to Total as the operator was "mistaken". This proposition was based in part on activities on the ground to which I will turn later. But the submission was said to be supported by three further considerations:-

a) that it was inconsistent with HOSL having custody and control of the product and undertaking the other responsibilities accorded to it.

b) that it merely reflected discussions about a proposal to dissolve HOSL; an idea which in the event was abandoned.

c) that it was inconsistent with the limited scope of the Management Agreement between Total and HOSL.

230. As regards the first of these points there is nothing which can be viewed as clashing with the designation of Fina as the "operator". Custody and control of fuel within the HOSL tanks (and only some of them at that) did not necessarily involve any coincident responsibility for operational activities. In any event, the activities for which HOSL remained responsible could be readily re-allocated or delegated elsewhere, not least to the designated operator. There was no bar to delegation. Indeed for instance such was in due course to be expressly achieved in regard to reports to participants under the Management Agreement: see below. Further, given that Total in due course employed all the relevant staff, there was no conflict with the position that Total was (or came) to undertake overall operational responsibility.

231. As regards the second point, namely that the confusion was occasioned by the proposal to dispense with the corporate structure of the joint venture, this proposal as recorded above had been put forward and foundered over a year earlier. By December 1990 the draft Supplemental Operating Agreement already reflected the decision to retain the corporate structure. Thus there is no material support for the proposition that Total's description as "operator" was in some respects, as suggested by Total, a "rogue definition".

232. As regards the third point, this has more apparent substance. The Management Agreement was executed on the same day as the Supplemental Operating Agreement although effective as from 1 June 1990 (shortly after the execution of the Supplemental Agreement). The Management Agreement was envisaged by clause 2.10.1 of the 1988 JVA as relating to "administration and support services". It expressly recorded the establishment of two "separate and distinct operations" at Buncefield of which one was to be the terminal "operated" by HOSL.

233. Clause 3 of the Management Agreement provided for the services specified to be provided by Total to HOSL. It was Total's case that these services were solely in the field of accounting and administration. It followed, it was submitted, that, given the entire agreement provision, the role of Total could not concurrently involve responsibility for "operation" of the terminal as such would have expressly been included in the services to be provided.

234. Chevron's response was that some of the functions as were expressly assigned under clause 3.2 were "operating" functions, including personnel management, preparation

of all reports [22] and routine engineering services. Accordingly there was no inconsistency with the consensual allocation of further operating functions.

235. It was accepted by Chevron that difficulties might arise as to the basis on which such additional services (if any) were provided if outside the scope of the Operating Regulations. Four possibilities were proposed:

a) they fell within the generic provisions of clause 3.1

b) the scope of the Management Agreement was expanded by tacit consent

c) there was an implied parallel agreement

d) the services were ex-contractual and provided either gratuitously or on the basis of quantum meruit.

236. I will, if necessary, turn to these options if the point arises. Suffice it for the moment to say that, although the terms of the Management Agreement may involve some degree of inconsistency with the designation of Total as the "operator" in the Supplemental Operating Agreement, the point falls well short of establishing that such designation was mistaken. In this respect it is helpful to have regard to the agreement between Total and BP Amade in January 1991 a year before the Management Agreement and the Supplemental Agreement.

237. As already noted, this agreement provided for the manning of the Buncefield control centre by BPA supervisors. The agreement expressly recited the fact that Total was entering into it as "operator for and on behalf of HOSL and the HOSL participants". Indeed it is made clear by Clause 14.3 of the agreement that Fina was acting as principal to the exclusion of HOSL:

> "Notwithstanding the foregoing, for the purpose of all liabilities, claims, actions, demands and proceedings arising out of or in connection with this Agreement (i) the Company agrees to assume itself the entire obligations, responsibilities and liabilities of itself, HOSL and each of the HOSL Participants; and (ii) the Contractor shall look only to the Company for the due performance of the obligations, responsibilities and liabilities assumed by the Company under this Agreement and nothing herein contained shall impose any liability upon or entitle the Contractor to make or bring any action, claim or proceedings on or against HOSL or any of the HOSL participants."

238. The obligations of Fina under the agreement included affording access to the "HOSL terminal" and compliance with "all health and safety legislation" applicable to the Terminal. Clause 4.3 provided as follows:

> "The Company shall provide the Contractor with all manuals, drawings, procedures and other technical information relating

[22] The very same function as was allocated to HOSL under the Operating Regulations Section A, para. 5.1.

> to the HOSL Ter minal and the equipm ent thereon which are necessary in accordance with good oil industry p ractice for the Contractor to perform the services."

239. These are all activities which Fina could only perform as opera tor. The services prescribed in Exhibit A covered th e entirety o f operations in the control room at Buncefield including the Fina-line, the UKOP fa cilities, and the aviation tanks on the HOSL East site. These had to be provided "in accordance with the op erating manuals and procedures provided by the Com pany [i.e. Fina]". In short th is agreem ent is entirely consistent with Total a cting as operator of the term inal and indeed deleg ating front line terminal operations to a third party. If that is righ t the organisation in which Mr Nash's role was embedded as from the time of his engagement in 1991 was Fina.

240. Notably the agreement with BPA was rep laced in 1993 with an agreement, so far as material, w hich m akes the poin t even clearer.[23] W hen the draft Managem ent Agreement was being considered, Mr Parsons wrote:

> "Having broadly adapted the Managem ent Agreement used for BOSL there is a need to ensure Petrofina, as th e management Company, reserves the right to engage third parties as necessary to enable it to discharge its operating responsibilities to HOSL. Sub-clause 3.3.2 of the MA covers this. Sub-clause 4.1 amplifies it specifically in the context of sharing the HOSL services and costs with Fina- line."

241. We can now m ove on to the accession of Elf in late 1993. By now the proposal to liquidate HOSL was also back on the table. Th e Sale and P urchase Agreement made express provision for Fina diligently to conduct "all the ordinary business" and the operations of the Buncefield Term inal du ring the period between th e date of th e agreement (30 Decem ber 1993) and the date of com pletion of the sale and purchase (in the event 1 January 1994). This activity was undertaken in Fina's "capacity as Manager".

242. It was Total's subm ission that the period during which Fina acted as op erator of the Terminal was confined to tho se two days. At any earlier stage, H OSL was the operator and indeed was so defined in the agree ment. Whilst the position is somewhat confused, it has to be observed:

a) the concept that a long period of operation by HOSL should be followed by a very short interm ission of operation by Fina would be wholly i mplausible and impractical.

b) indeed the proposal to liquidate HOSL only m akes sense against the background of HOSL having no practical value from the perspective of day to day operations and, either directly or indirectly, Fina should continue to undertake them.

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[23] Despite the fact that the Management Agreement had by then afforded authority to HOSL to execute such an agreement.

c) put another way, the appointment of Fina as "designated manager" does not on the face of it reflect a change in status but simply the removal of the corporate umbrella under which the management and operational activities took place.

243. The Sale and Purchase Agreement required Fina and Chevron to decide whether to liquidate HOSL. In anticipation of a decision to do just that the Execution Agreement was made on the day of completion. Annexed to it were replacement Accounting Procedure and Operating Regulations which designated Fina this time as "Manager", in contradiction to its status as a Participant, to work under the supervision of a management committee made up of representatives of the Participants.

244. Pending the decision (which was to be taken within 6 months) the Novation Agreement was entered into. The draft of this agreement had annexed to it the same Accounting Procedure and Operating Regulations as were attached to the Execution Agreement. Following an intervention by a member of Elf's legal department on 16 December 1993 there was added clause 2(f) to the Novation Agreement:

> "Such Accounting Procedure and Operating Regulations are to be interpreted as if references to the Manager are to HOSL and references to the Management Committee are to the HOSL Board."

245. Not surprisingly this provision was put to the forefront of Total's case. Total recognised that there had been no change on the ground but considered that the impact of the Novation Agreement either continued the legal responsibility of HOSL for the activities of the operational staff at the site or transferred such responsibility as from January 1994.

246. Chevron's response was that in reality HOSL both as operator under the 1988 JVA and as Manager under the 1994 Novation Agreement discharged its obligations throughout by delegating the functions to Fina, such functions being performed by employees of Fina both on and off site. Construed in its context, the Novation Agreement, it was added, far from being intended to introduce a sea change as regards operational responsibility was intended to maintain the status quo. If Fina had been in fact operating the Terminal, either directly or by way of delegation by HOSL, up to 1994, it continued to do so thereafter and remained responsible.

247. Into this debate must be added Total's reliance on Schedule 2, Section 1, para. 2.1 of the Operating Regulations:

> "The Manager shall recruit and employ such staff as the Management Committee shall from time to time consider necessary for the proper conduct of the Terminal Operations and each of the Participants shall (if so requested by the Management Committee) second personnel to the Manager on a full time basis and otherwise on terms to be agreed by the Management Committee."

248. But the difficulty from Total's perspective is as follows:

a) "secondment" is a somewhat ambiguous concept: it can encompass a temporary transfer of employment but it can equally reflect simply a temporary transfer of role or of place of work.

b) there were certainly no secondees within the meaning of the paragraph since there was no request by the HOSL board.

c) all staff remained employees of Fina: HOSL never employed anyone.

d) it was never suggested that the HOSL board was responsible for the activities of off-site employees of Fina insofar as their activities impinged on the operation of the Buncefield site.

Summary of the JVA Agreements

249. The outcome of this review of the Joint Venture Agreements and the associated contracts can be summarised as follows:

a) The parties intended that HOSL should have the same status as BOSL;

b) HOSL was simply the joint venture corporate vehicle for Buncefield;

c) The designation of HOSL as operator was not inconsistent with delegation of operational functions to Fina under the terms of the Supplemental Operating Agreement and/or the Management Agreement.

d) For three years Total had been the operator under the terms of the Supplemental Operating Agreement.

e) The option of liquidating HOSL does not appear to have been intended by the parties to impact on front line operational responsibilities one way or the other.[24]

f) In short, the agreements favour the conclusion that Fina operated the site but are not conclusive one way or the other: the determining factor, certainly from the perspective of deciding who was vicariously liable for Mr Nash, is an analysis of the factual state of affairs.

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[24] This is apparent from an early stage as demonstrated by Miss Mahmood's letter of 21 December 1990 (E(B)5/21) : As an aspect of its "management strategy" Fina viewed the corporate structure as unnecessary and Texaco only want to retain it so as to match the position at Avonmouth.

Vicarious liability – the facts

250. I turn now to the manner in which the Buncefield site was run. It was Chevron's case that, whatever the contractual position, the HOSL site was operated and managed by Total. In contrast, it was Total's case that the site was operated and managed by the board of HOSL.

The origin of the joint venture

251. It was Mr Spittlehouse's evidence that even before the JVAs were entered into, at a meeting between himself and David Arney of Texaco and Peter Johnson and John Bond of Fina it was made plain on Fina's behalf that any joint venture should be on the basis that day to day control and management of the facilities at Buncefield would be in Fina's hands. As a *quid pro quo*, Texaco would control and manage Avonmouth (BOSL).

252. I see no reason to reject that evidence:

a) I found Mr Spittlehouse to be a convincing witness, refreshingly clear and confident. His recollection and understanding was supported by the evidence of Mr Lund and Mr Magrill. No evidence was called to challenge it.

b) It is supported by the fact that Texaco/Chevron regarded itself as the "operator" of BOSL. This was a view that seems to have been shared by Total.

c) It also has some support from the minute of the meeting which took place on 21 February 1989[25] only weeks after Fina had exercised the option for the HOSL site contained in clause 3 of the JVA. The minute stated "it was agreed that Fina would operate and engineer HOSL 89[26] and provide secretarial service."

d) Indeed any request by Fina in this respect is entirely consistent with the fact that the catalyst for the Buncefield joint venture was the construction of the Fina pipeline which was an expensive facility that was to remain outside the joint venture[27].

253. Of course the mere fact that Fina was anxious for such an arrangement does not achieve that end. But it provides significant background colour to the parties' attitudes thereafter.

HOSL management

254. HOSL was the joint venture corporate vehicle (but it is a matter very much to be borne in mind when considering the contemporary material that HOSL is both an

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[25] D Arney and A Mack are recorded as present on Texaco's behalf in the body of the minute but the Fina attendees are not recorded.

[26] The reference to HOSL 89 was to a new corporate entity with that name. In the event the participants were content to make use of the existing company.

[27] As indeed were the aviation tanks.

acronym for the company and an identification of a place – namely a part of the Buncefield site). It was a pawn of the participants. It did not own any part of the terminal. It had no assets other than sums due from its shareholders in respect of shared operational costs. The board of directors was made up of four directors appointed by the participants.[28] In reality absent unanimity the board was deadlocked. It met only twice a year[29] for two hours alternating between the HOSL and BOSL sites.

255. There were only 16 persons on site, all employed by Fina. The most senior member of staff was the General Manager, Mr White, who had been in place for some 12 years and who was concerned not just with joint venture operations but also with the Fina-line and the aviation tanks which were outside the scope of the joint venture[30]. Mr White made bi-annual reports to the HOSL board but his line manager was Mr Linley and latterly Mr Beedham, the Operations Manager at Total's head office.

256. Total relied heavily on the description of HOSL's activity as contained in the annual directors' reports namely the "operation of joint venture petroleum storage facilities". Against that background it was Total's position that the general manager of HOSL was primarily if not solely responsible to the HOSL Board. This in turn was entirely consistent, it was submitted, with HOSL having undertaken full responsibility for the management of the tank storage facilities as from 1 November 1990 as announced by Mr Parsons in his report to the Board. The status of the board was said to be exemplified by Mr Perrin's memorandum dated 27 February 1992 relating to a visit by HSE inspectors.

257. It was Chevron's submission:

a) that, whilst there was limited and very intermittent contact between board members and site staff between board meetings,[31] the board was not realistically in a position to conduct day to day direction of the terminal operations.

b) that the primary purpose of the corporate structure of the joint venture was to provide a channel for funding capital expenditure and operating costs.

c) that the primary purpose of the board was to furnish a forum for discussion of high level topics of mutual interest and in particular decisions relating to the budget.

258. Given that on this basis the Board was not in a position to exercise managerial control of the site and to direct day to day operations, it was Chevron's case that all residual managerial functions could not be left to the discretion of the General Manager given the scale and importance of the operations being conducted at Buncefield. This view

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[28] Latterly 5 when Elf joined.

[29] At the time of the explosion the board had not met since 15 July 2005 and was not due to meet again until 10 March 2006.

[30] As well as the Colnbrook rail terminal.

[31] There was very little documentary evidence of such contact in the vast trial bundles covering the 20 years of the joint venture.

was also said to be nearly inevitable given the wealth of legislation impacting on such a site and the employees working there. Thus for instance Chevron contended that non-delegable duties owed by Total to its employees under for instance the Health and Safety at Work Act 1974 could not be satisfied without Total undertaking overall responsibility for the whole site and not just the Fina-line and the aviation tanks.

259. I agree with Chevron. In my judgment the upstream managerial functions could only be satisfactorily exercised by the hierarchy within Total's head office as employers of the HOSL management team. In this regard Chevron placed justifiable emphasis on part of the oral evidence of Mr Humphries:

> "But my point is that you cannot simply responsibly manage a terminal, particularly one which is storing gasoline, which is hazardous, by having a site manager taking all the decisions that are necessary to manage that site. Some of those decisions, in my opinion, if it is to be operated responsibly, and efficiently come to that, since the information can be shared across different terminals, need to be referred up into a management hierarchy, and I think -- health and safety is a prime example. We wouldn't want to go and write a health and safety system for one terminal, shall we say BOSL for the sake of argument, when in practice we could write a health and safety system for all of Texaco's terminals, with some tweaks for each terminal depending on the particular characteristics of that terminal. That wouldn't be an efficient way to do it.
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> Similarly, if we had complex decisions which the terminal manager didn't feel capable or we didn't think was capable of taking, then we would want a structure to deal with those decisions, namely, having higher managers, more experienced managers in place to handle them.
>
> That is what I believe we set up in the case of HOSL and BOSL, with Fina providing those sorts of management services in the case of HOSL and Texaco providing those sorts of management services in the case of BOSL. It was a nice sort of arrangement for us to enter into because it was 50/50.
>
> As far as your earlier question about the board meetings, yes, as far as HOSL was concerned we would see that as a chance to catch up on what was going on at HOSL, an operation which we weren't in day-to-day contact with. Similarly, I imagine at least, that Fina would think exactly the same of the board meeting at BOSL, they would have a chance to find out what Texaco had been doing in the intervening six months."

Hiring and firing

260. The on-site staff at Buncefield were all employed by Fina save for an initial period when Mr Perrin was seconded from Texaco and the control room was manned by BPA supervisors sub-contracted by Fina. In due course all became Fina employees, subject to Fina's pay scales, disciplinary procedures and promotion arrangements. It follows that, subject to transfer of control, with the employee's agreement, to a third party, Fina had a right to direct each employee in his duties.

261. Leaving aside sub-contracted staff and focusing on the General Manager, it is important not to lose sight of the fact that Mr Parsons was a Fina employee. In that

capacity it was common ground that he owed responsibility to Total/Fina for the operation of the Fina-line (which terminated in and furnished supply to the HOSL site) and for the Total/Fina aviation tanks (which were within the HOSL West site). More significantly his appointment as General Manager of HOSL was simply announced to the board as the relevant board minute records.[32] Likewise when Mr White replaced him in late 1992 this was arranged by Fina without any consultation with the board of HOSL.

262. Much was made by Total in submission that staff at the Buncefield site had been seconded to HOSL. There are some difficulties about that:

a) The nature of a "secondment" is variable: it can involve a change of employment: it can also simply involve a change of working site.

b) This is demonstrated by the appointment letters of Mr Nash:

a) 1990: "we are pleased to confirm your engagement with [Fina] … as a Technician seconded to [HOSL]".

b) 1992: "I am pleased to confirm your promotion to the position of Duty Supervisor,[HOSL]".

c) 1999: "You will be employed as Duty Supervisor with [Total] and will continue to be based at HOSL".

d) 2000: "you will be employed as Duty Supervisor, HOSL and be based at HOSL."

c) The secondment was not solely concerned with the joint venture facilities but also the Fina-line and the Fina –aviation tanks.

263. Fina's grip on the engagement of staff at the Buncefield site is further exemplified by the reaction to the proposal that, apart from the three Fina employees directing the BPA shift controllers, other staff would be employed by HOSL. This was rejected by Fina. Fina insisted on all other employees being Fina staff thus eliminating the possibility of any staff being seconded from Texaco. Indeed Fina required Texaco to make any employee who was to be transferred to be made redundant first. Furthermore this decision was simply reported to the HOSL Board in March 1990.

264. Consistent with this perception of Fina as the operator, Mr Parsons assumed responsibility for staffing albeit needing to get Fina's approval. My own reading of the Board minutes is that staffing issues were only raised with the HOSL board when there were budgetary implications. A substantial number of documents illustrate the practice followed in relation to the recruitment or transfer of Mr. White's subordinates at Buncefield. The practice was substantially the same as it had been in Mr. Parsons' day. Mr. White was required to complete a 'Justification Sheet' before hiring staff, which was submitted to the Terminal Operations Manager for approval. He in turn was required to get the approval of the Director of Logistics (although there may have

[32] As indeed was his departure in late 1992.

been an exception when the recruit was replacing someone else, so that there was no addition to the headcount).

Reporting Lines

265. There was a plethora of organograms in the documentation. Some, particularly in the early years, showed the General Manager reporting to the Board. Others, particularly in the later years, showed the General Manager reporting to Fina/Total.

266. Mr Parsons explained that he reported to the Director of Distribution at Epsom in regard to both the terminal and the Fina-line.

> "A. My immediate line manager would have been Mr Bond, reporting to Mr Johnson.
>
> Q. Mr Bond, I think, was the director of distribution at the Epsom head office of Fina, wasn't he?
>
> A. Yes, he was.
>
> Q. And Mr Johnson, what title did he have?
>
> A. General Manager Operations, and one of his functions was distribution.
>
> Q. Yes. Did the appraisals that Mr Bond conducted cover both the Fina-Line work and the terminal work?
>
> A. It would have involved my total work -- sorry, it is a word that is difficult in some circumstances – my overall work.
>
> Q. At Buncefield?
>
> A. At Buncefield.
>
> Q. That was presumably because he was your line manager for your overall work at Buncefield?
>
> A. Yes, he was."

267. Mr White took office as General Manager in February 1993. In his witness statement he said that he understood the HOSL board to have "overall strategic control" of the terminal. He explained the disparity between his responsibilities for the Fina-line on the one hand and the joint venture facilities on the other as follows:

> "13. As General Manager of HOSL I was answerable to the HOSL Board, whereas, as General Manager of the Fina-line, I was answerable to Total/Fina. In other words, I had two separate lines of upward reporting: directly to the HOSL Board in respect of the HOSL Terminal and directly to the Total/Fina "Manager Operations", with respect to the Fina-line.

> 14. In respect of my role as General Manager of HOSL, the Organisation Structure chart set out below accurately reflects the reporting lines in place when I was appointed to the role. The fact that I reported to the HOSL Board did not change during my time as General Manager, but by the time of the Incident the reporting lines below me had changed somewhat, such that each of the Operations Manager, Operations Co-ordinator and Administration Controller reported to me directly."

268. However, in his interview by the HSE inspectors there was this exchange to very different effect:

> "CHRISTINE MARSHALL: Right. So, the day-to-day things; getting the product through, getting the tanker drivers through, any running repairs to property or anything like that, all of that would go through you at the Total line, through Nigel?
>
> ROBERT WHITE: Yes. Providing it was within the budget which we mentioned a moment ago.
>
> JOHN WILKINSON: Sort of operational control then with Total, if that's a fair way to summarise it.
>
> ROBERT WHITE: Yes."

269. In his oral evidence given in cross examination he also presented a different picture from his witness statement which, absent any contradictory evidence from Mr Beedham, Mr Ollerhead or Ms Donaldson can be regarded, in my judgment, as more reliable. I summarise his evidence as follows:

    a) he looked to the board for allocation of resources and the setting of budgets in respect of the joint venture facilities;

    b) but he reported to what he described as his "boss", Total's Terminal Operations Manager at Watford, initially Mr Linley and, from 2003, Mr Beedham (who in turn reported to Mr Ollerhead and subsequently Ms Donaldson) in respect of all activities at Buncefield;

    c) in the result as regards day to day operations or any line management issues he took instructions from Total.

270. I have no doubt that Mr White was accorded a considerable degree of autonomy in terms of his management activities. Whilst in accord with his managerial discretion Mr White may have insisted from time to time on stricter safety standards than required by Total, no example was forthcoming in the evidence of Mr White refusing to apply Total requirements at the terminal by way of some independent stance being adopted by HOSL.

271. It is right that Mr Linley also sought to suggest that there was some form of bifurcated line management. A good example is his evidence at Day 8, pages 113 - 124:

> "Q. Mr White reported to you in his cap acity as the gen eral manager of HOSL as well as in his capacity as the gen eral manager of the Fina-Line, didn't he?
>
> A. If I can qualify the word "report" by saying that Mr White would have been in co ntact with me, in m y capacity as T otal terminal op erations m anager, to report to m e any m atters that he felt appropriate, but not to receive direction."
>
> "Q. That is com pletely untrue. You were his boss, weren' t you?
>
> A. It was certainly true I was his boss for the Fina-Line and it is certainly true I was a member of the HOSL board.
>
> Q. You were his boss for HOSL matters as well, were you not?
>
> A. My def inition of "boss", m y Lord, wouldn' t be the most appropriate response to say yes to counsel' s question. I didn' t consider m yself as th e sole person who directed Mr W hite in respect of HOSL operation."(page 114-115)
>
> "Q. You were not carrying out this exercise in your capacity as director of HOSL, you were carrying it out as term inal operations m anager or, as is explained in the first page, as Mr White's immediate manager. That is right, isn't it?
>
> A. I was carrying out the appraisal as Robert's line manager for Fina-Line operations. I was al so reviewing his perform ance and agreeing his objectives with res pect to term inal operations, mindful of what the HOSL board' s requirem ents for the terminal were." (pages 121 -122)

272. As already explained I felt uneasy with Mr Linley 's evid ence, not least where it departed from adm issions m ade by Mr W hite. Furthermore the contem porary documents are at variance with Mr Linley's suggestion:

(a) The only available job descrip tion for Total's Term inal Operations M anager relates to Mr. Linley and dates from Nove mber 1999. It recorded under the heading 'Context':

> "The job holder ensures that TotalF ina-Line and the 7 oil storage term inals in which TotalFina m anages and engineers [this included B uncefield], are operated and maintained in a safe and cost-effective manner."

And under the heading 'Job Purpose' and 'P rincipal Accountabilities' that he was:

> "responsible for ensuring that all te rminals operated by TotalFina, provide the service required by the Company and joint venture partners in a safe and efficient manner."

Annexed to it were two organograms, the second of which identified the seven terminals, including Buncefield, and showed Mr. White as reporting to him on the same basis as the managers of terminals wholly owned by Total. Mr Linley accepted this as an accurate description of his responsibilities.

(b) Mr. White's job description at the time of the incident was dated October 2005. This document, on a TotalFinaElf form, described the job holder as the General Manager of HOSL and pipeline operations at Buncefield, with additional responsibility for the Colnbrook jet handling facility near Heathrow. He was required to maintain 'liaison and day to day contact with most departments in HO'. The position was said to exist

> "to ensure where reasonably practicable that the terminal and pipelines deliver the Company [sc. Total's] requirements safely to the customer."

It added:

> "Accountable to the partner companies, notably Total in the management role, to provide a safe and efficient operating regime".

(c) Mr. White, like Mr. Parsons before him, was appraised by his line manager at Head Office. The form for 2002, recording an appraisal presumably carried out in early 2003, may be taken as typical. Mr. Linley reviewed Mr. White's performance against a number of objectives and agreed fresh objectives for 2003. Training courses were agreed, to be arranged by the Head Office HR department in the course of the year. In his concluding comments, Mr. Linley refers to Mr. White as 'managing both the FinaLine and TFE's largest UK terminal'.

(d) Mr White's Colnbrook responsibilities meant that he only spent three or four days a week on site. Indeed the establishment of Mr White's Colnbrook role is a further demonstration that he was under the complete control of Total. It occurred on Mr Beedham's instructions without any prior consultation with the HOSL board or Chevron directors, and when the latter complained they were met with the answer that it was no concern of theirs because the individuals were Total employees.

Health and Safety

273. It was Chevron's case that Mr Nash was by no means alone in having responsibility for the explosion. It was submitted that failings on the part of Total's head office staff in establishing a proper system for tank filling operations was a significant contributory cause. I will turn to that issue in due course but for the moment will concentrate on the question whether Head Office staff were responsible for safety issues at the terminal and, if so, whether this is material to the question whether Total were the operators and in control of the activities of the supervisors.

274. It is of note that the specifically identified services to be provided under the Management Agreement did not include responsibility for Health and Safety although it was clear that Fina accepted as long ago as 1993 that one of its tasks as the "management company" included health and safety.

275. By that time Fina's HSEQ had embarked on a risk control review which was the first stage in the creation of a safety management system. Significantly this was to be applied across all Fina's UK Terminals. These were perceived as including Buncefield. The first draft was in April 1992. It was promulgated as Issue 5 in December 1992. It encompassed a whole range of terminal operations including product receipt and tank filling.

276. Moving on, in 1997, Fina adopted ISSSRS. This was for application to all of "its" terminals, whether wholly owned or managed. These included Buncefield. There was no prior consultation with the board of HOSL. It was simply notified to the Board at its July 1997 meeting.

277. Mr Linley's oral evidence in relation to this furnishes a good example of its somewhat evasive nature.

> "Q. "Petrofina has decided to attempt accreditation under the ISSSRS scheme and will commence in the UK with an audit of HOSL in July 1997." The board was simply told that the decision had already been made and that the first steps towards implementing it were being taken at the very moment that this report was being prepared. That is what happened, isn't it?
>
> A. My Lord, my interpretation of this minute is that this audit was going to be a benchmark audit to understand what Safety Management System HOSL had in place and what potential gaps there may be with respect to the ISSSRS protocol. I believe in July 1997 there was not a Safety Management System that would have been recognised as ISSSRS.
>
> Q. Indeed. So the first stage in implementing ISSSRS would be to conduct such an audit, and that was already in hand, wasn't it?
>
> A. Yes, I would agree.
>
> Q. Yes, and it is saying: the decision has already been made and we are getting on with it, isn't it?
>
> A. My interpretation of this minute is that Petrofina, so Fina for the UK, was going to have ISSSRS as its Safety Management System and it wanted to understand the variances that the HOSL system had at that time to ISSSRS.
>
> Q. Mr Linley, you are trying to divert attention from the point of my question and you know you are doing that, don't you? Have a look at what it says: "Petrofina has decided to attempt accreditation ..." Had they already decided it or not?
>
> A. Yes, Petrofina had decided."

278. The true picture, in my judgment, is to be derived from Mr White's evidence to the HSE:

> "CHRISTINE MARSHALL: The safety management system. How were you aware that it was a change?
>
> ROBERT WHITE: There was quite a transformation from what we previously had to what we were now introducing.
>
> CHRISTINE MARSHALL: What changed?
>
> ROBERT WHITE: A huge documented system. There was quite a significant amount of retraining at that point, or training. It was brought in with a bit of a fanfare, recognised system, international small site safety rating system (inaudible). It is all there, anyway. It was quite a significant move, I think.
>
> CHRISTINE MARSHALL: When you say there was a fanfare, are there any particular individuals associated with that process?
>
> ROBERT WHITE: The sponsor of it was Steve Ollerhead, who was the director of HOSL at the time.
>
> CHRISTINE MARSHALL: The way we do things like that in our organisation is the person at the top of it will usually send out a global email or something of that sort saying, "This is the change that we are making. This is how we are going to phase it in. This is a training plan" and so on. Is that the sort of process Steve Ollerhead -
>
> ROBERT WHITE: Yes, plus we had one or two -- I certainly attended one major meeting with a lot of people. Maybe there were 20 people there, seemed to be key players in this who needed to be brought on board in the introduction of it, in terms of managers. The sessions were lead and driven by Steve.
>
> CHRISTINE MARSHALL: Would they all be Total people, as far as you know?
>
> ROBERT WHITE: Yes.
>
> JOHN WILKINSON: So, the installation of the system was out with your role in HOSL. In other words, the system was introduced to you. There was no consultation period beforehand. It was announced that this was going to happen?
>
> ROBERT WHITE: Yes.
>
> JOHN WILKINSON: Then there was a rollout, as you have described it in meetings and so on?

> ROBERT WHITE: Yes.
>
> JOHN W ILKINSON: Are you aware of what system Texaco were operating at that time and subsequently?
>
> ROBERT WHITE: No: I know they had a system but I do not know what it was. I think it was m entioned at one of the board meetings.
>
> JOHN W ILKINSON: Was there any decision process by the board on this? I should perhaps have asked that question as well, as to whether to adopt the system or that --
>
> ROBERT WHITE: Not to m y knowledge. It was an introduction by Total Fina Elf as part of the way that the management com pany m anaged or a part of the m anagement system for one of their terminals."

279. The first edition of the Loss Control Manual was issued in April 1999. It applied to HOSL, WOSL (another joint venture) and Sunderland (a w holly owned term inal). It expressly provides for its enforcement by the "Loss Control Co-ordinator" to be Fina's Operation and Safety Engineer at Head Office".[33]

280. The on-site staff at Buncefield (including Mr White) had no authority to m ake any changes to the Loss Control Manual. There was however a body known as OHSET set up by Head Office, form ed by th e Head Offic e safety m anagers and representatives of the terminals. This provided a forum for discussions of safety issues and the making of suggestions for changes to the manual.

281. By the end of 1999 Total had taken over Fina. Mr Linley thereafter sent out a circular to all terminal managers (including Mr White) to report that the directors of Total had set an objective of ensuring that a Safety Management System (SMS) was put in place during 2000.

282. This was du ly achieved[34] and in December 2002 Mr Linl ey and Mr W hite were able to m ake a presentation to senior m embers of the French group m anagement of the "top down" safety structure showing Mr White, as Terminal Manager, reporting to Mr Linley with Mr Linley in turn reporting to Mr O llerhead. The diagrammatic structure showed both the Logistics and HSEQ Departm ents reporting direct to the UK Managing Director.

283. This was in accord with Mr Linley's letter of May 2002 accom panying the summ ary version of the manual:

> "The manual demonstrates that TotalFinaElf intends to m anage health, safety and the environm ent with the sam e degree of expertise an d to exactin g standards as per other core business

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[33] Initially Mr Coalwood and later Mr Metcalfe and Mr Joliffe none of whom gave evidence.

[34] Indeed Total sought a ROSPA award.

> activities in order to effectiv ely con trol risk and prevent h arm to people.
>
> This manual describes the various management systems that we will use to achieve those objectives."

284. It follows that, if this material is taken at face value, Total was (and inten ded to be) in control of safety. The manual did not simply contain advice which HOSL was entitled to accep t or reject as so m inded. It was indeed, as Mr Sumption QC described it, a "top down comm and system". It follows that I found the concept summarised by Mr Tonks in the phrase "fortress HOSL" unconvincing as a reflection of the proposition that HOSL was able to exercise, if it wished, autonom y and independence from all or any part of the Total safety regime.

COMAH

285. Before going further, I should em phasise that the question as to the identity of the "Operator" for the purposes of the COMAH regulations does not arise f or decision in the present proceedings. During the course of final submissions, the court was notified by the HSE of crim inal informations laid against inter alia Total and HOSL. The HSE seek to invoke a breach of COM AH regulations vis-à-vis HOSL and not Total. Nothing in this judgm ent can be treated as touching on the legitim acy of that approach. The present discussion focuses on the factual circum stances of the notification and its significance as regards vicarious liability. I am not directly concerned with the proper construction of the regulations let alone m aking any finding as to the identity of the "operator" for regulatory purposes.

286. The Control of Major Accident Hazards Regulation [SI1999/743] ca me into force in April 1991. The regulations were directed at "the operator" being a person "in control of an establishm ent".[35] The operator was required to give a statutory notice by 3 February 2000.[36] The content of the notice was prescribed by Schedule 3 starting with the name and address of the "operator".

287. The basic obligation under th e regulation was f or the opera tor to "take all m easures necessary to prevent m ajor accidents and limit their consequences". Unsurprisingly a "major accident" expressly included fire or explosion.

288. The critical docum ent under the regulations was the "Major Accident Prevention Plan" (MA PP) and the Safety Managem ent System (SMS) to im plement it.[37] The MAPP and SMS were to be in a m uch m ore elaborate form for a "top tier" site like Buncefield. Furtherm ore a "safety report" ha d to be su bmitted to the HSE for approval.

289. It was a significant feature of the regula tions that m uch em phasis was placed o n general m anagement including organisational structure and procedures at "all levels of the organisation".

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[35] Regulation 2
[36] Regulation 6
[37] Regulation 5

290. On 26 January 2000 Mr White sent the required Regulation 6 notice on TotalFina notepaper. The letter and its attachment were drafted by Mr Pedar Baner, a safety engineer at Terminal Operations Department at Watford and sent to Mr White for signature. The covering letter referred to the enclosure as containing the required notification in respect of "our petroleum product storage site at Buncefield". The 'operator' was identified as TotalFina Great Britain Ltd with Mr White identified as the person in charge of the establishment. The address of the establishment was given as "Hertfordshire Oil Storage Limited, Buncefield Terminal" providing one of the myriad of examples where HOSL was used to identify the place rather than the company.

291. I am unable to accept Mr Linley's evidence to the effect that this was an inaccurate statement sent without his knowledge. As to its accuracy, it was consistent with Mr Linley's protests in 1999 on Total's behalf about the proposal to make the operator liable for the HSE costs in applying the regulations. As for his knowledge, Mr Baner reported to him on all matters relating to COMAH compliance and it was Mr White's recollection that the content of the letter had been discussed between Mr Baner, Mr Linley and Mr White. I accept that evidence.

292. By way of compliance with the regulations, Total head office then produced Issue 4 of the Loss Control Manual in September 2003. In addition, Mr Baner prepared the MAPP which was finalised in October 2002. These documents formed the basis of the Safety Report being prepared by Mr Coalwood.

293. When the question arose as to whether Buncefield was a top tier site (it had initially been thought by the HSE not to be so) it was Mr Linley as Manager Terminal Operations who confirmed as much by letter on TotalFina notepaper dated 19 December 2002.

294. Again Mr Linley's evidence on the capacity in which he wrote the letter was, it struck me, unconvincing if not lacking in frankness:

> "Q. The giving of that notice involved formally recognising to HSE, didn't it, that the operator was going to have the much more onerous obligations imposed on operators of top tier sites by COMAH?
>
> A. Yes, that is correct.
>
> Q. You told us on Thursday that you wrote that letter in your capacity as a director of HOSL.
>
> A. Yes, that is right.
>
> Q. And I suggested to you at the time that, since it was on Total notepaper and signed by you as terminal operations manager, you in fact wrote it on behalf of Total, and you didn't accept that.
>
> A. No, that is correct.

Q. If you wrote it as a director of HOSL, by what authority did you do that?

A. I was a director of HOSL.

Q. Did you take the view, Mr L inley, that a director of a company has authority to do anything on its behalf?

A. No, I think the H OSL board had given clear direction to Total to sup port the co mpany HOSL in its preparation of any information necessary to comply with the COMAH regulations.

Q. Did you think that all directors were entitled to deal with HSE about COMAH or was it just you?

A. I would say any director would have had that authority."

"Q. Did you think that it was appropriate for you to give that notice?

A. Yes, on behalf of HOSL, I did.

Q. If it was being given on behalf of HOSL, why did you think it was appropriate for you as opposed to Mr Tonks to reply ? After all, th is was an answer to a letter which the HSE had actually addressed to Mr Tonks, wasn't it?

A. Yes, that is right.

Q. They had addressed a letter to Mr Tonks, it was taken out of Mr Tonks' hand by him and you in com bination, and you wrote the answer.

A. Yes, that is correct.

Q. Why was that necessary?

A. It probably wasn't necessary but it's what I did.

Q. Yes. The only capacity in which you could have written that letter, Mr Linley, was the capacity in which you actually signed it, nam ely, as term inal operations m anager. That is right, isn't it?

A. I did sign it as term inal operations manager, but that wasn't my intent when I was writing the letter."

295. The Safety Report was submitted on 29 July 2003. Vast though it was, it had been prepared alm ost single-handedly by Mr C oalwood (with support from various consultants instructed by him [38]). Its term s are consisten t on ly with Total being th e

[38] DNV, IKM, ERM and Osprey

operator of the terminal rather than compiled by Total on HOSL's behalf. The "company" whose safety procedures are described is Total. The "Health and Safety Policy Statement" was a commitment by Total to achieve a high standard of protection. This was the MAPP. It was signed by the managing director of Total. By way of explanation of the way in which the SMS fitted in to the "overall organisation", reference was made to an organogram showing the General Manager reporting to Watford and only linked to the board of HOSL through Head Office. Given the evident interest of the HSE in these arrangements, I conclude that responsibility for safety left to the Terminal Manager, subject to intermittent oversight by the HOSL board, would not have been acceptable to the HSE.

296. For the purposes of considering the question of vicarious liability any study of the safety report demonstrates the integration of the Buncefield on-site staff into the Total management of the UK group. This was exemplified by the detailed table of responsibilities of a number of head office department personnel. The most striking example is the characterisation of the General Manager as deputy to the Terminal Operations Manager at Watford.

297. The position was neatly summarised by Mr White in his evidence to the HSE inquiry:

> "CHRISTINE MARSHALL: You have said to us that Total was the management company for the HOSL site.
>
> ROBERT WHITE: That is correct, yes.
>
> CHRISTINE MARSHALL: Can you just go into a bit more detail about how that works?
>
> ROBERT WHITE: I cannot actually tell you what their remit was to the joint venture because if I did have sight of the management agreement or -- again, whichever version of that it may be, or the initial set up, I do not recall it. So I am not sure of the sort of terms of reference to the joint venture.
>
> CHRISTINE MARSHALL: But in practical terms how does it work?
>
> ROBERT WHITE: Well, I guess the best place to start is that everyone - all of the people who are employed at HOSL are Total employees. So we all have line responsibilities going up into Total. As you have seen from the folder you have there, one of our principal documents in managing safety is the safety management system or loss control manual, which is a Total managed, edited, scripted, driven document. Therefore the system is driven by the management company."

Tank filling

298. It remains necessary to have regard to the specific and not just the general. The specific question remains: who had authority to give directions as to how the work of tank filling by Mr Nash was to be done? Up to this stage regard has been had as to

the general questions of management, operation, employment, reporting lines and safety. In my judgment they are all indicative of Total/Fina having a right to control the method of work of those at Buncefield. Was tank filling one such method of work?

299. The Total system was for all operations to be exposed to a risk assessment. If the outcome was classification as a critical task an appropriate task procedure would be prepared which would be reviewed every eighteen months or after any "serious or high potential accident". All this was the responsibility of the terminal managers with the advice of OHSET and overseen by HSEQ. A critical task was defined in the Total Loss Control Manual as one which had "the highest potential for loss (safety, health, environment, quality, fire etc) if they are not done correctly."

300. One of the major accident scenarios discussed in the Safety Report was a fire generated by an overfill of Tank 912. It was accordingly common ground that Total:

a) ought to have undertaken a risk analysis for tank filling;

b) if it had done so, it would have been classified as a critical task; and

c) this in turn would have given rise to a task procedure.

This is all of a piece with Total having authority to direct the manner in which tank filling should be conducted.

301. This is further supported by the section of the Safety Report expressly concerned with tank filling. This proclaimed once again that identified critical tasks should have an associated task practice or procedure which the staff concerned must sign to "demonstrate when he/she is satisfied and has obtained a good level of understanding of the procedures". The Report goes on to say that "all task procedures and practices are controlled documents and form part of the quality control system for the company [i.e. Total]."

302. By the same token, the Safety Report spelt out Total's policy with regards to accidents and near misses. This involved a standard accident investigation form for use at all terminals (including Buncefield). This was to be transmitted not to the HOSL Board but to Total Head Office, both to Mr Coalwood or his successor and to the Terminal Operations Manager (Mr. Beedham). The latter was to review every reported accident and discuss with HSEQ with a view to ensuring that "all necessary steps have been taken to prevent the incident happening again".

303. As Mr White recognised, only Total could give directions as to the lessons to be drawn from such an incident. The inevitable conclusion is that Total, as the body responsible for ensuring appropriate modification of the procedure, must equally have the authority as to the manner in which operations should be carried out in the first place.

Conclusion

304. The issue is the need to establish the identity of the person with authority to instruct Mr Nash as to the manner in which he conducted tank filling operations: whether it

was the Bo ard of HOSL or the Head Office Staff of Total. Som e guidance in this respect m ay be derived from the designation of the operator of the site in the agreements between Texaco and T otal. However th ese agreem ents are of slightly marginal relevance: ind eed even if they went so far as to designate on-site staff at Buncefield as em ployees of HOSL, this would not have been in any sense determinative. This is all the m ore so given that HOSL was not a party to any of the agreements (other than the Managem ent Agreement) and given the discussions in the run up to the joint ventures at both Avonm outh and Buncefield which contem plated that Fina would in fact m anage Buncefield and Texaco in fact m anage Avonm outh (this latter being as in deed occurred). Indeed the dele gation of m anagement and operation to one of the partne r oil m ajors would seem em inently sensible as was the case with BOSL.

305. Although there are a number of contem porary docum ents which suggest that HOSL was operating Buncefield, this is by no m eans surprising. Many of them contain a potentially confusing want of distinction between HOSL the com pany and HOSL the place. There was th e added com plication of the different status of the Fina-line an d the aviation tanks. In fact m ost of the documents in the later stages of the chronology are written on the basis that Fina was the operator/manager.

306. As regards the agreem ents them selves, in the three year period leading up to the Novation Agreem ent, Total was the designated operato r. Its role is exe mplified by the BPA agreem ent. Even after January 2004, Total would have rem ained so in the event that HOSL was liquidated. In fact the whole debate in the interim about amendment of the Managem ent Agreement to allow for an indem nity of Fina even in the event of negligent management (dealt with in detail hereafter) only makes sense if Fina was the operator: negligent accounting or administration would seem an unlikely source of liability requiring special provision.

307. The re-designation of HOSL as ope rator in the Novation Agreem ent appears to have been a temporary arrangem ent pending th e execution of a new joint venture agreement without any intention on the part of the parties to alter the existing arrangements for operation and m anagement. In short, the creation and retention of HOSL as the joint ven ture operatin g com pany was consistent with it rem aining the neutral forum for budgetary purposes without necessarily being involved in the day to day operations.

308. Another im portant feature of the arrangem ents was the continuing responsibility on Total for operation of the Fina-line and the flow into and out of the aviation tanks on the HOSL West site. It is true that the part icipants felt able to assess th e cost of work undertaken with regard to m atters associated with the joint venture and those which were not. But the concept of a supervisor be ing responsible to Total for, say, opening the Fina-line manifold but responsible to the HOSL board fo r the coincident flow into the chosen tank is difficult to accept.

309. The iden tity of the p erson v icariously responsible for the careless tank fillin g activities of Mr Nash is a question o f fact. The most senior on-site em ployee was the Terminal Manager. Any instruction to Mr Nash had to be channelled through the Terminal Manager. Mr White had been appointed as m anager by Total and retaine d his repo rting line to th e Term inal Operations Manager at Total' s Head Office with whom he was in regular contact. In contrast, the HOSL Board m et for two hours

every six months and was incapable of being concerned with day to day operations. Indeed documented communication between board members and HOSL staff over a 15 year period was minimal.

310. All the staff at the HOSL site were engaged and paid by Total. They were all subject to Total's promotion and disciplinary arrangements. Their place of work was allocated by Total. All these matters were undertaken without any discussion with let alone approval of the HOSL board.

311. All instructions relating to the safe operation of the Buncefield site were promulgated by Total in accord with standards adopted by Total for all terminals which it regarded as being operated by Total. It was Mr White who was responsible for identifying tank filling as a critical task and creating any necessary work procedure. These were to be audited every 18 months by Total head office staff. I am satisfied that Total had control of tank filling operations.

312. Total's perception of it being the de facto operator of the whole site is exemplified by the statutory notice dispatched to the HSE under the COMAH regulations. The Safety Report was prepared by Total. It was sent in without notice to the HOSL board. Indeed a copy was not furnished to the directors.

313. I conclude that Total has failed to discharge the burden of establishing that HOSL was responsible for the negligence of Mr Nash.

The missing witnesses

314. That conclusion is sufficient to dispose of this issue. But as already noted, a number of witnesses that Total was proposing to call were withdrawn either shortly before or shortly after the trial began. I shall revert later to discuss the position of the supervisors thus withdrawn. For the moment I want to deal with the significance, if any, of the withdrawal of Mrs Donaldson, Mr Ollerhead, and Mr Beedham.

315. I have already accepted the submission that the relationship between on-site staff and the head office staff is a critical part of the inquiry into the identity of the party vicariously responsible for Mr Nash. But the consequence of the withdrawal of these witnesses is that only Mr Linley was called by Total from off-site management (despite having ceased to be Manager of Terminal Operations and a Director of HOSL nearly two years before the explosion.)

316. As explained, in my judgment Chevron have, by reference to the documentation taken with the oral evidence, more than made out a prima facie case that the activities of the on-site staff were under the control of Total and not the board of HOSL. Mr Linley's evidence, if taken at face value, sought to contradict that case. The question arises as to whether Chevron could properly invite the court to conclude that, if called, those witnesses would have had no answer to the prima facie case or none that would bear examination and thereby fortify the conclusion as regards the identity of the party vicariously responsible for Mr Nash.

317. There was no suggestion that the three witnesses concerned were not ready, willing and able to give evidence. Each would unquestionably have spoken with some authority on the issues as to the nature of the relationship between Total employees at

Buncefield and the Total employees at head office, the identity of the operator of the Buncefield site and the scope and nature of services provided by the head office staff.

318. The leading case in this field is ***Wizniewski v Central Manchester Health Authority [1998] Lloyd's Rep. Med 223.*** The principles were summarised as follows:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified." (p240)

319. The point was put characteristically clearly by Lord Diplock in ***Herrington v British Railways Board [1972] AC. 877*** at p 930:

> "The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold."

320. Of course this is not a case in which no witness has been called. But no Total director of HOSL at the time of the explosion has been called or even one who was on the board at the time of the presentation of the COMAH report. The burden of proof on the issue of vicarious liability rests on Total. I have no doubt at all that it is proper to draw an adverse inference in the present case. There is, put at its lowest, a strong prima facie case to answer and no reason (let alone a satisfactory reason) has been given for their absence.

321. Put bluntly, absent any evidence from Mr Beedham, Mr Ollerhead and Ms Donaldson, I find that Mr White was acting (a) as a full time employee of Total in

running the terminal, (b) subject to Total's control and instruction and (c) not in any sense under the control or instruction of the HOSL board. In this connection, Mr Ollerhead's reaction to the first question posed to him in the course of Total's accident investigation is worthy of particular note: "Who is the operator: HOSL or Total?" "It's Total".

Terms of engagement

322. The conclusion that Total was in fact performing all operational, managerial and maintenance activities at the terminal may bring with it the need to determine the terms on which these services were being rendered. I say "may" because any difficulty in this regard does little to undermine the clear factual state of affairs.

323. On the assumption that Total's role as operator is not within the scope of the Accounting Procedure and Operating Regulations annexed to the Novation Agreement, the focus has been on the Management Agreement under which it is common ground that Fina/Total provided at least some services to HOSL. Notably it was executed contemporaneously with the Supplemental Operating Agreement nominating Fina as responsible for all aspects of management and operation in contrast to its role as a Participant and not itself amended thereafter even at the stage of the Novation Agreement.

324. Whilst there is nothing inconsistent with the delegation of additional operational functions by HOSL it must be regarded as surprising that, against the background of Fina's insistence on undertaking responsibility for operating the terminal and recognition of that role in the Supplemental Operating Agreement, the Management Agreement should have been of apparently such restrictive scope. But precisely the same state of affairs prevailed at Avonmouth.

325. But that said, the following points are worth noting:

a) Even the limited services required under clause 3.2 (such as the preparation of reports and the undertaking of routine maintenance) would be difficult, if not impossible, to furnish absent a concurrent role as operator. Indeed the Supplemental Operating Agreement required HOSL to provide reports on Terminal Operations as required by the Participants: this task was thus in turn delegated to Fina under the Management Agreement.

b) Also delegated were all engineering matters (in addition to routine maintenance undertaken by Fina as the management company) for which a fee was charged.[39]

c) Notably the handling of health and safety was not one of the specific functions assigned to Fina under clause 3.2, yet there can, in my judgment, be no dispute that such matters were in fact so assigned.[40] No fee was charged presumably because there was no incremental cost (other than the CO MAH costs which were shared under the Accounting Procedure) .

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[39] Initially £20,000 and later £30 per hour.

[40] This was recognised from an early stage.

d) Initially all operational activities were undertaken by a combination of management staff located at Buncefield supported by supervisors and technicians engaged from BPA. In due course all staff became employed by Total. There was thus no need for arrangements to be made for HOSL to pay any additional fee for these services as they were already all on Total's payroll.[41]

326. Throw in responsibility on the part of Fina for personnel, legal and secretarial matters, accounting, purchasing and quality and there is precious little left for the supposed operator HOSL to undertake. It is perhaps not surprising that by 1997 queries were being raised as to whether the agreements truly reflected the "current operations" of the participants.

327. The specific services provided for in the Management Agreement consisted essentially of back-office administration. They did not specifically include day to day operation, nor did they provide in terms for Fina to manage the terminal. So far, therefore, as Fina in fact managed and operated the terminal, there are only four possible legal bases on which it could have done so:

a) The first is that the management and operation of the terminal, although not listed among the specific services, came within the generic term "general... administrative services" in Clause 3.1 of the Management Agreement. The list of specific services is expressly said to be without prejudice to the generality of Clause 3.1: see Clause 3.2.

b) The second possibility is that although the Management Agreement did not in terms extend to the management and day to day operation of the terminal, its scope was impliedly expanded with the agreement of both Participants when Fina actually performed those functions and was paid its costs of doing so by HOSL.

c) Third, there was an agreement distinct from the Management Agreement, to be implied from the same matters, which covered just these additional services.

d) Finally, Fina could have managed and operated the terminal from day to day on no contractual basis at all, but gratuitously or on the basis of some restitutionary right to *quantum meruit*.

328. I feel unable to accept Chevron's submission that the generic provisions of Clause 3.1 were wide enough to encompass the entire range of services rendered by Fina. 'Administrative' services are not apt to cover operational or managerial functions.[42] Nor do I regard the liberty to use "such other departments" as might be required as broad enough to encompass such topics as day to day staff instruction and training, statutory health and safety compliance, non-routine maintenance and such like.

329. But as explained the only real alternative to the implication of an extended agreement between HOSL and Fina is that Texaco and Fina were content to leave all or most of

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[41] To be contrasted with say fees for computer services (E(B) 7/176) .

[42] Although it is clear that many of the Chevron witnesses regarded the express terms as broad enough.

such front line operational and m anagement activities to the on-site s taff subject only to the bi-annual supervision of the HOSL board. Against that background, I am driven to the conclusion th at the scope of the Managem ent Agreement was indeed expanded by tacit con sent. This is reflected in Total's perf ormance of those functions together with reimbursement of any expenses in accordance with clause 1.3.

Total off-site Negligence

330. As explained the primary issue between Chevron and Total was whether it was Total or HOSL that was vicariously liable for the negligent acts or omissions that led to the explosion. The admissions made by Total and HOSL as to what those errors were have already been set out. They all relate to the activities of Mr. Nash who was immediately responsible for the negligent tank filling operations on the night of 10/11 December 2005. It was Chevron's case that responsibility extended not just to others working at the HOSL site but also to Total's head office and off-site management personnel who were responsible for the application of the groups' safety management system at Buncefield.

331. Given my conclusion that Total was vicariously responsible for Mr. Nash's negligence (based in part on the role of Total's head office in the operation of the Buncefield terminal) the further question as to whether there was also fault on the part of say Mr White or more to the point on the part of head office employees (for whom Total is unquestionably vicariously liable) becomes somewhat redundant. But I should outline my conclusion on the topic. The issues were fully debated and it is right that the claimants should be aware of the full story. It also strikes me as appropriate that, if such would be unjust, blame should not rest solely on Mr Nash's shoulders.

332. In this regard a number of additional allegations of negligence were pleaded but the only one that needs to be considered at this stage is the contention that the defendants failed to institute or operate any or any adequate plan or system to ensure that Tanks receiving fuel in general were (and Tank 912 on the night of 10/11 December 2005 in particular was) not overfilled and did not overtop.

333. The focus of Chevron's complaint is the assertion that Total's head office staff were responsible for the absence of proper tank filling procedures in the control room. This in turn was said to flow from:

a) A failure to ensure that a risk assessment was performed as regards tank filling operations;

b) A consequent failure to categorise the operation as a critical task;

c) And the further consequence of a failure to promulgate appropriate written work procedures for use in the control room.

334. It followed, so the submission ran, that there was accordingly no standard of performance for the supervisors to follow and against which to train, assess and monitor the control room staff, a fault exacerbated by the failure to conduct a proper review of the topic following the near misses in 2003. Even if Mr Nash was broadly aware of the need to monitor the filling operation properly, it was submitted that it can be inferred (the more so in the absence of any evidence from any supervisor including Mr Nash, Mr Forde and Mr Doran) both that failure to plan or monitor delivery was a regular feature of control room practice and that written instructions would have brought home the need to do so. Thus the absence of written instructions was causative of the spill and the subsequent explosion.

335. Total did not accept that there was any shortfall in prescribed procedures and in any event denied that the absence of any such instructions was causative of the event. However, it was accepted by Total that no risk analysis had been undertaken by Mr White as required by Total's SMS. Accordingly there was no written task procedure within the meaning of the Safety Report.

336. For this purpose I conclude (and I am not sure it is controversial) that WI10 and WI11 can be disregarded. These were generated under the ISO9001 Quality Management System and not the Safety Management System. Their purpose would appear to have been to assist the efficient operation of the terminal by maximising the available ullage. They were originally issued in 1998. To the extent they touched on the avoidance of an overfill they merely noted:

> "Tank overfill is prevented by a roof mounted Cobham switch which, if actuated, will cause the pipeline manifold to close."

337. Although revised versions were prepared in early 2002 and were exposed to Total's internal audit and duly registered with HSEQ, as before, neither document contained any instructions for planning or monitoring tank filling operations or even for the use of the Motherwell system and its associated alarms. This situation, it was accepted, had to be contrasted with "best practice" as claimed for the Safety Management System in the Safety Report. In this regard it was common ground that best practice in the relevant field was represented by a paper published by the *American Petroleum Institute: Overfill Protection for Storage Tanks in Petroleum Facilities (API 2350*). It is clear that neither WI10 nor WI11 matched up with the requirements of this paper. Indeed it seems to me that they were if anything unhelpful, a view shared by the experts.

338. As regards the near-miss in August 2003, an incident report in accord with the SMS was duly dispatched to HSEQ. It identified "inadequate procedure" as a factor in the near miss. This Chevron submitted should have led to a complete review which in turn would have provided an appropriate opportunity for remedying the absence of a risk analysis (and in consequence the production of a task procedure). In Chevron's submission, both the nature of the incident and the suggestion that BPA should be approached so as to furnish proposed and actual flow rates were more than enough to make it clear that the operators were in fact neither calculating the filling times nor monitoring the Motherwell systems to assess flow rates. No evidence was called by Total to deal with the absence of any reaction to the report at HSEQ. It was simply submitted that the report of the near-miss would not have caught the attention of head office personnel in the manner which hindsight might suggest.

339. Further even if written procedures were promulgated, it was contended by Total that Mr Nash's own practice had been entirely acceptable as regards tank filling operations on all earlier occasions and thus written instructions would have made no difference. Put another way, it was said that Mr Nash knew his job perfectly well and unaccountably failed to match up to his usual standards on the night in question presumably because "his mind was not on the job".

Incorrect pipeline

340. I must revert to an issue of fact before tu rning to the qu estion of the ad equacy of the procedures and the sign ificance if any of any inadequacy. It was a striking feature of the incident that Mr Nash when warned by Mr Forde that a tank might have split diverted the Fina-line d elivery to T ank 911. It appears that he did so because he thought (a) that it was Tank 91 2 which was the relevant tank (presumably because the low level alarm s had been sounding and acknowledged regularly on Tank 915) and (b) that the Fina-line was filling it (not, as was the fact, the UKOP line).

341. Total's accident investigation team's conclusion was that throughout his shift from 1900 on 10 Decem ber Mr Nash was unaware that the true routing of fuel into Tan k 912 was from the UKOP line. During the trial it becam e Total's case that Mr Nash only became confused after the shift started and I gave leave to Total to withdraw an admission that the investigation team 's c onclusion had been correct. I rather doubt that the point is of any great significance. However it m ay have som e bearing on the quality of the handover procedure.

342. It is right to say at the ou tset that whilst the Total Accident Investigation team had the advantage of evidence from Mr Forde, Mr Nash and Mr Doran, the court did not share that advantage. In th e result, the po sition is very confused. As regard s the availab le evidence it appears as follows:

a) During the night watch of 9/10 Decem ber, the Fina-line was filling Tan k 901 until Mr Nash switched it to T ank 915 which was feeding the racks and on which a Low alarm had sounded.

b) When Mr Doran took over his shift at 0700 on 10 December, the Fina-line was already feeding Tank 915. However Mr Nash told Mr Doran that the Fina-line was feeding Tank 912: indeed he thought Tank 912 was feeding the racks.

c) During the shift Mr Doran was asked by Kingsbury to prepare to receive another consignm ent of unleaded fuel and, on discovering that the earlier consignment was already directed into Tank 915, directed the U KOP consignment into Tank 912 at about 1850 (i.e. only 10 m inutes before the end of his watch).

d) However Mr Doran did not orally infor m Mr Nash about the change in the arrangements as originally repo rted to him at the beginning of his shift: it was regarded as satisfactory so long as unleaded f uel was going into unleaded tanks.

e) Mr Nash did not look at the Mo therwell screen for Tank 912 levels un til the report of overflow. He then switched the Fina-line supply from Tank 915 to Tank 911.

343. This was difficult to reconcile with some of the other evidence. In particular:

a) the entry of the fuel properties in to the Moth erwell sys tem at th e chan ge of watch.

b) the movement dip log during the watch.

These entries were both made on the basis that the movement into Tank 912 was from the UKOP line.

344. It is difficult to resolve the issue without the benefit of witness evidence. On the material available I am not persuaded by Total's submission that Mr Nash's mistaken impression had been cured at the beginning of his last watch but somehow re-emerged later. In my judgment his decision to divert the Fina-line was probably attributable to a wholly muddled understanding about the full picture of terminal operations held throughout the watch.

Safe fill level

345. Much time was spent on the issue of the setting of the alarms and their relationship to the normal, safe and overfill levels designated by API 2350. One of the difficulties was that API 2350 was premised on, at most, a two alarm system with one, the High High alarm, being required to be independent from the gauging system. It follows that the latter could be regarded as equivalent to the Cobham/TAV alarm on Tank 912. This left at most only one alarm on the API model but left three alarms at Buncefield – the fixed High High alarm, the fixed High alarm and the adjustable user alarm (strikingly the latter was scarcely ever used).

346. The position as to tank levels on the API standard was not entirely easy to follow but appeared to be as follows:

(a) The overfill level is the level at which any additional fuel will spill out of the tank (or cause the floating roof to hit the tank-top): para. 1.3.11.

(b) The safe fill level is the level up to which the tank is "allowed" to receive fuel after the normal fill level has been reached. It is determined by reference to "the amount of time necessary to take the appropriate action necessary to completely shut down or divert product flow before the level of product in the tank reaches the overfill level": para. 1.3.17. Given the tight timing I accept the view that this does not mean that it is proper to fill to the safe fill level. It is simply the highest level to which the fuel can rise, consistent with avoiding an overfill.

(c) The normal fill level (corresponding to "normal capacity") is no higher than the point at which, assuming proper operating practices and a tank in good condition, the supervisor must begin to shut down so as to ensure that the safe fill level is not exceeded: para. 1.3.10.

347. In my judgment, the assumption underlying the whole scheme is that the operator should plan not to exceed the normal fill level, and should therefore start to shut down the flow long enough beforehand to ensure that the valve is completely closed before the normal fill level is reached. If he inadvertently reaches the normal fill level before taking action to shut down the flow, he must then do so at once: see Table 1 to para. 4.6, setting out emergency responses at each stage. The level may then unavoidably

rise to the safe fill level but should stop at that point. The safe fill level is not on any account to be exceeded: see Table 1.

348. It is important not to allow API 2350 (which seeks to establish best practice for a whole range of tank farms - from single unmanned tanks in the middle of nowhere to large manned tank farms such as Buncefield) to be applied as if it were a statute or regulation. It must be approached in a common sense manner. The high level alarm at Buncefield was set at 100% capacity on the Motherwell system.[43] Whilst there would be remaining ullage into which in exceptional circumstances further filling could take place up to a higher "safe" level which may itself be protected by a further alarm, the fill level for calculation and operational purposes should, in my judgment be the 100% level as notified on the Motherwell system[44].

349. As regards procedure, the API sets the following standards:

(1) Protection against tank overfill is best achieved by a combination of awareness of available tank capacity and inventory, and careful monitoring and control of product movement: API 2350, para. 1.4.1.

(2) Where level detectors and associated alarm systems are fitted, they are not an alternative to awareness of available tank capacity and inventory and careful monitoring and control of product movement, but constitute an "additional means of protection" supplementing them: API 2350, para. 1.4.1. Indeed this last observation in the API practice is followed by a "Caution" in the following terms:

> "CAUTION: High-level detectors and/or automatic shutdown/diversion systems on tanks containing Class I and Class II liquids shall not be used for control of routine tank filling operations. These devices are intended to signal a potential emergency and initiate certain manual responses or activate automatic response mechanisms."

(3) API 2350 provides that each filling should be planned in advance: para. 4.2.1. The anticipated final level should be determined at this stage. To provide a safety margin with respect to overfill, the normal capacity (normal fill level) of each tank should be used: para. 4.2.1.1. But the planned level must on no account exceed the safe fill level: para. 4.2.1.2.

(4) During the filling, the supervisor must conduct "regular scheduled monitoring of product receipts", including regular scheduled comparisons of (i) the remaining ullage with the remaining product volume to be received; and (ii) the product level indicated on the instruments with the product level which would be expected at any given time: para. 4.4.1.

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[43] Equivalent to the Max. Gross Volume (equivalent to the Max. Working Volume plus the volume below the Low Low alarm).

[44] The Motherwell system continued to record percentage volume (e.g. 105%) and ullage figures in negative terms (e.g. – 10 cm) thereafter but not in a directly monitorable form by reference to the High High alarm.

(5) For the purpose of planning and monitoring the filling, "frequent, acknowledged communication" should be maintained between the facility operator and the transporter (e.g. the pipeline operator): para. 2.1.2.

(6) If an electrical or mechanical failure occurs that affects the performance of the level detectors (e.g. a stuck gauge), fuel receipt must stop, and not begin again until either the detectors are functioning properly, or else manual operations and procedures have been implemented to allow for the absence of a functional gauging and alarm system: para. 2.2.2.

350. API practice calls for a proper system to be established to enforce these tank filling procedures:

(1) Most importantly there must be written procedures for avoiding tank overfill, which must cover (among other things) the planning and monitoring of product receipt: paras. 4.1.1, 4.2.1 and 4.4.1. API 2350 requires this notwithstanding that it is drafted on the assumption that the workforce will be knowledgeable, qualified and well trained: see paras. 4.7.1, 4.7.3, 4.7.4.
(2) The written procedures must be regularly reviewed in the light of experience by the facility operator: para. 4.1.3.
(3) The facility operator must conduct reviews or inspection of product receipt operations to ensure that the procedures are being followed: para. 4.1.2.
(4) Personnel assigned to control product movements must be knowledgeable and qualified, and "thoroughly familiar" with the written procedures and operating instructions: paras. 4.7.1, 4.7.2. There must be an organised program of training, with regular monitoring of performance so as to assess the need for refresher training: paras. 4.7.3, 4.7.4.
(5) There must be written procedures for testing inspecting and maintaining equipment associated with the overfill protection system: para. 4.8.1.

351. I unhesitatingly accept the need for written instructions. But there were in fact no written instructions for tank filling activity (leaving aside WI.10 and WI.11 which were irrelevant) let alone any compliant with API 2350. This was because, despite the requirements of Total's SMS no risk analysis had been undertaken by Mr White (all the more remarkable given the scenario centring on the overfilling of tank 912 which was at the heart of the Safety Report). This was a failure which remained unnoticed or unheeded by head office even after the near misses in 2003. In the result it was never identified as a critical task and no procedures were prepared.

352. The only written material available to the supervisors was the shift handover documentation together with pumping schedules and run-sheets[45]. The handover sheets were very unsophisticated. There was a Fina-line handover sheet but nothing specifically directed at the UKOP line at all. Even as regards the Fina-line, there was

[45] The maritime experience is that a change of shift or watch is a crucial event which often gives rise to error.

no requirement to record the remaining ullage and identify the estimated time to fill the present live tank or even the present flow rates.[46]

353. The near miss in August 2003 was justifiably described by Chevron as a dress rehearsal for the incident in December 2005. Tank 903 had been filling from the UKOP line when the gauge stuck. Despite the presence of two shift supervisors (predictably Messrs Nash and Forde) the fuel level rose some 4 metres to a level above the High High alarm. Eventually the TAV/Cobham alarm closed the inlet valve. It is legitimately suggested by Chevron that the only explanation of the incident is that there was no monitoring of the Motherwell screens. The supervisors were simply waiting for the alarms to sound.[47]

354. A report was duly prepared by Mr Tonks on the specified HSEQ form. It made suggestions for improving communication with Kingsbury (shades of Kingsbury's readiness to increase the UKOP flow rate without announcement in December 2005) although flow rates should have been readily observable on the Motherwell system. In fact the SMS required a complete review of critical tasks and associated procedures in the event of a near miss. But despite Mr White's personal expression of concern to on-site staff that there had been a risk of a "major accident" absent a late switch of tanks, it elicited no response from head office (now Watford).

Practice in the control room

355. It appears to be accepted that those in the control room fairly regularly filled tanks so as to generate a high level alarm. It was far from an invariable practice but the statistics derived from the Motherwell system after the explosion demonstrate that such occurred on over 20% of occasions (although it is fair to say that the fact that the process was usually being monitored was also apparent from the record). There is nothing surprising in this. Mr Tonks' evidence was to the effect that he regarded it as perfectly acceptable practice given the fact that ullage was often tight. Indeed the same picture emerges from the evidence given by the control room staff to the HSE.

356. But as already indicated API 2350 makes it plain that all planning and monitoring should be on the basis that the minimum residual ullage is representative of the normal fill level. API 2350 further makes it quite clear that alarms (other than user alarms) are not to be used as filling tools. But it is manifest that on many occasions the relevant controller must have been deliberately filling to a level at or above the high level alarm. The conclusion, in my view, has to be that even this proportion is unacceptable: indeed those in the control room should have been aiming to obtain a nil return (which should not have been difficult to achieve). This vice in the practice is enhanced by the fact that gauges had a propensity to stick so that, if one did stick, the supervisor on duty would be left waiting for an alarm which would not sound (aware only if he was watching that the level was increasing above 100%).

357. I am left with the clearest impression that practices within the control room were at best sloppy. Handover sheets were lacking in detail, variable alarms were seldom used, direction indicators on the Motherwell system were almost never used,

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[46] No attempt was ever made to audit the sheets or even inspect them randomly.

[47] The near miss in November was another feature which ought to have brought the point home.

calculations of time to completion were recorded, if at all, on scrap pieces of paper. There was in particular an overall want of planning and monitoring of filling operations. Further as already observed, the incident in December is only explicable on the basis that Mr Nash (or Mr Forde) was relying on the High and High High alarms to give him warning of the need to change tanks.

358. But would written instruction have made any difference? I agree with Chevron that unless there are written procedures, there is no standard to which supervisors can be trained, or by reference to which they can be effectively monitored or disciplined. Modern management techniques call for the drafting of appropriate written instructions which help limit misunderstanding and inconsistency within the control room.[48] In contrast to the submission that written procedures were not always necessary for routine operations, my own view is that routine operations are often those in which lax habits are most likely to develop, a view supported by the content of API 2350.

359. Mr White, in my view realistically, accepted that want of detailed procedures was a contributory factor in the run up to the explosion. There was no material to support the view that Mr Nash's approach to tank filling on the night of 10/11 December was simply an aberration leading to a one off wholesale departure from proper practice. In any event as with the managerial witnesses withdrawn during the trial, Total's failure to call any supervisors (not least Mr Forde) is a factor, in my judgment, which Chevron can legitimately pray in aid in support of its case.

360. My conclusion in this regard also takes account of the difficulties in relying on Mr Tonks to impose good practice let alone training. He accepted that he himself could not actually operate the Motherwell system. His supervision was limited to making occasional visits to the control room simply to observe whatever activity appeared to be taking place.

361. I conclude that Chevron (and the Claimants) have made good their case that one of the causes of the explosion was the failure to promulgate an adequate system to prevent overfilling of a tank. This was a fault which can be laid at the door of head office staff.

TAV Switch

362. I should add a word about the TAV switch which had been the cause of quite a degree of difficulty over the previous two years and which failed to operate on the night in question.

363. The history is as follows:

a) On 16 January 2002, Mr Lewis, the Terminal Operations Manager, sent an email to Total Watford drawing attention to the HSE requirement that the TAV overfill protection should be live at all times. Thus it was necessary in the event of a fault to "log it on the notice board", to write a defect report detailing both the fault and the action needed and to undertake repairs quickly.

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[48] Cf. ***The Marion [1984] AC 563***.

b) The TAV alarm test sheet for March 2003 records that the alarm for Tank 912 could not be tested as the test cable was broken. This state of affairs appears to have been the same in May 2003 and in July 2003.

c) The TAV switch on Tank 912 became inoperable again in May 2004 and was replaced. It also appears to have been inoperable in January, April, May and June 2004.

364. It was finally serviced in November 2005 but was left un-padlocked and thus unserviceable. On the face of it, the fault for this state of affairs lay either with TAV who designed and supplied the switch or Motherwell who were responsible for maintenance and testing. As explained the claim against TAV was settled during the course of the trial and Motherwell took no part in the trial having gone into liquidation.

365. It became Chevron's case however during the trial that, whoever Total may have delegated that task of maintenance to, Total remained responsible for all maintenance (and certainly for routine maintenance) under the Management Agreement. The difficulty with this submission was twofold. First Chevron had asserted that the failure of the TAV alarm was not causative. Surprising as that might seem I think it inappropriate to allow Chevron to adopt a different stance once TAV and Motherwell disappeared from the litigation. Secondly the issue was for that very reason never studied during the hearing. I say no more on the topic.

Indemnities

366. Given Total's vicarious responsibility for the negligence of Mr Nash [49], it is now necessary to turn to the consequential claim made by Total for an indemnity. Two such claims are made: first against Chevron under clause 9.2 of the 1988 Joint Venture Agreement and against HOSL under Section III para.1.2 of the Operating Regulations. A number of questions arise but the principal issue was this: was either clause intended by the parties to indemnify a party in respect of his own negligence?

367. The starting point here is the classic passage, well known to draftsmen of commercial contracts governed by English law [50], in the speech of Lord Morton in ***Canada Steamship Lines Ltd v R [1952] AC 192*** at ***p.208***:

> "Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows: -
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens ") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in ***The Glengoil Steamship Company* v. *Pilkington.16***
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If no doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada: In cases of doubt, the contract is interpreted against him who has stipulated and in "favour of him who has contracted the obligation."
>
> (3) If the words used are wide enough for the above purpose, the court must then consider whether the head of damage may "be based on some ground other than that of negligence," to quote again Lord Greene in the ***Alderslade*** case. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants."

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[49] And by definition for any negligence of head office staff.

[50] See ***E.E. Caledonia v Orbit Valve Co [1994] 1 WLR 1515*** per Lord Steyn at p.1523.

368. Fully conscious of the need to avoid an unduly rigid application of those principles the position remains in my judgment that:

a) clause 9.2 of the JVA does not expressly extend to negligence;

b) and whilst wide enough to cover negligence, there are obviously a number of other heads of liability to which the clause can apply e.g. breach of contract, breach of statutory duty, nuisance, ***Rylands v Fletcher*** etc.[51]

369. There is in any event an inherent improbability that a party would agree to indemnify another for negligent conduct for which the latter was responsible.[52] There is no or no sufficient other material relating to the parties' presumed intentions to set aside the presumption that liability in negligence is not covered.

370. A similar issue arises in regard to Part III of the Operating Regulations: does the indemnity in favour of a participant in para. 1.2 extend to losses arising from that participant's own negligence? The same points can be made. Indeed in this regard a further point arises. It is very striking that para 1.1 contains express words extending the indemnity to cover negligence of the indemnified participant whilst para. 1.2 does not. This disparity must be taken as intentional. In short the presumption emerging from ***Canada Steamship*** can be taken as all the stronger.

371. As indicated, there were a number of other construction issues but they are now of marginal relevance in the light of my conclusion that Total is vicariously liable for Mr Nash's negligence and that, as a consequence Total is not entitled to an indemnity under clause 9.2 or para 1.2. Nonetheless I will deal with some of the points.[53]

372. There is first the question whether clause 9.2 survived the emergence of the Operating Regulations. This in turn depends in my judgment in part on a threshold issue - namely the proper construction of para 1.2. It was submitted by Chevron that para. 1.2 should be read in two parts the first constituting an indemnity in favour of the participants up to the level of the insurance and the second part an indemnity in favour of HOSL in respect of the uninsured part of the indemnity paid to a participant (if the indemnity under the first part extended beyond the insurance) and for third party claims inclusive of claims based on HOSL's negligence.

373. I am unable to accept this construction albeit recognising that this is not an easy clause to construe. In my judgment, the clause should be construed as follows:

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[51] Indeed a participant was not as such going to be conducting terminal operations (negligently or otherwise): any liability would be by definition strict.

[52] See ***Smith v South Wales Switchgear [1978] 1 WLR 165*** per Lord Dilhorne at p.168.

[53] The manner in which HOSL would be entitled to an indemnity does not arise. However, it would on Chevron's case be under para. 1.2 (despite the negligence) or on Total's case under the Accounting Procedure (para 8.2). I prefer Total's submission.

a) HOSL shall indemnify a participant against claims by third parties arising out of the operation of the terminal (save where liability has accrued by the negligence of the participant).

b) If and to the extent that HOSL is not in turn indemnified in respect of the liability by insurance taken out pursuant to paragraph 2.1.2 of the Operating Regulations, the participants must indemnify HOSL for "such" claims in proportion to their participating interests.

374. If this construction of para.1.2 is correct, it has clear implications in regard to whether clause 9.2 of the 1988 Joint Venture Agreement continued in effect by virtue of clause 3 of the Novation Agreement:

> "3. Save as expressly provided in the Novation Agreement itself, the Joint Venture Agreement of 1988 is to continue in full force and effect."

375. The first difficulty (which had already arisen as from the earlier introduction of the version of the Operating Regulations annexed to the Supplemental Operating Agreement) is the establishment of a new and entirely inconsistent indemnity provision.

a) Under para 1.2 a full indemnity is to be furnished to a participant by HOSL to which Chevron would contribute under the Accounting Procedure in proportion to its throughput but subject to a deduction in respect of HOSL's primary liability insurance.

b) In contrast under Clause 9.2 a partial indemnity is to be furnished to a participant to which Chevron would contribute by reference to its shareholding without any allowance for insurance recoveries.

376. It follows, in my judgment that the para 1.2 indemnity provisions superseded Clause 9.2. This conclusion is fortified by the terms of the Novation Agreement following the joinder of Elf to the joint venture:

a) If clause 9.2 was still in effect, the consequence has to be, on Total's case, an implied amendment of clause 9.2 so as to read: "Each of Texaco and Petrofina and Elf agrees to indemnify the others ~~as~~ to the extent of their respective Participating Interests in respect ~~one half~~ of any claim by or liability to (including any costs and expenses necessarily incurred in respect of such claim or liability) any party not being a party hereto, arising from the Joint Operations."

b) This is somewhat unwieldy but, it is suggested, is necessary to reflect the impact of Clause 1(b) of the Novation Agreement:

> "Elf undertakes with each of Texaco and Fina to observe, perform, discharge and be bound by all liabilities and obligations of Texaco in respect of the Texaco assigned interest and Fina in respect of the Fina assigned interest in the place of Texaco and Fina

> respectively whether actual, contingent or otherwise arising on or after the Effective Date as if Elf had at all times been a party to the Joint Venture Agreement in relation to such respective interests in place of Texaco and Fina."

c) However on the face of it, Clause 1(b) is concerned with an assumption on the part of Elf of a 10% proportion of Texaco and Fina's liabilities so as to coincide with the grant of a 20% interest under clause 1(a).

d) The transfer of rights was achieved by Clause 2 which substituted an entirely new provision in the 1988 JVA allocating an interest in the Buncefield terminal to Texaco, Fina and Elf on a 40/40/20 basis. But no express provision was made for transferring to Elf the rights of indemnity under clause 9.2 (although of course as a Participant Elf could pray in aid the indemnity provisions under para. 1.2 of the Operating Regulations).

e) The conclusion that clause 9.2 had been superseded is further fortified by the deletion of the definition of "Joint Operations" by the Novation Agreement a phrase only to be found in Clause 9.2.

377. There is a second difficulty facing Total in regard to any reliance on the indemnity provisions either within the 1988 JVA (if it survived) or within the Novation Agreement. The question is whether they apply to a breach of contract for the provision of management services by Total to HOSL as opposed to management services (if any) provided by HOSL to the participants. In my judgment they do not. As already concluded, all operational and managerial services provided by Total to HOSL were furnished implicitly under the Management Agreement:

a) The Management Agreement gave rise to a distinct legal relationship outside the scope of the JVA (to which HOSL was not a party).

b) The terms of the Management Agreement expressly recognised that Fina would be liable to HOSL for defective performance of those services.

378. The third and last point on the indemnity provisions is this. Was Total a party to the JVA and/or the Novation Agreement? The difficulty here was as follows:

a) The legal interest of Elf and Fina in the Buncefield site was never transferred to TUKL prior to the explosion.

b) The shares in HOSL held by Elf and Fina were never transferred to TUKL prior to the explosion.

379. Total's answer to this is twofold: first, that despite the express provisions of clause 2(b), the parties proceeded on the common assumption that TUKL had become a party to the JVA as from the completion of the Sale and Purchase Agreement and second that the position was regularised by an exchange of correspondence by way of countersignature of TUKL's letter of 2 December 2005.

380. As regards the first point it is noteworthy that the directors' report stated in terms that TUKL was a participant. This in turn informed the letter of 2 December 2005 which read as follows:

> "Following the mergers of Total, Fina and Elf Groups, it is proposed that Total Downstream UK PLC and Total Milford Haven Refinery Limited (the "Transferors") transfer to Total UK Limited (the "Transferee") their shares held in Hertfordshire Oil Storage Limited ("HOSL") and their respective Participating Interest (as defined in the Joint Venture Agreement of 18th March 1988 as amended by Novation Agreement dated 1 January 1994) (The "Joint Venture Agreement") held in relation to Buncefield Terminal and Avonmouth Terminal (hereinafter the "Terminals") and any and all contracts (the "Contracts") entered into by the Transferors with you in relation to or in connection with the Terminals (a list of the Contracts is attached hereto in Schedule 1);
>
> Would you therefore please accept this letter as formal notification of the transfer and request for consent to the Transferee assuming all the obligations of the Transferors and to the Transferors being released from all the obligations pursuant to the terms of the said Joint Venture Agreement and Contracts.
>
> If you agree with the above transfer could you please confirm this by signing and returning to us the accompanying copy attached hereto."

381. Texaco's agreement was duly forthcoming in the form of a countersignature by the company secretary. In my view this was sufficient, despite the continued absence of a formal conveyance or share transfer, to confirm TUKL's status as a party to the joint venture.

The Management Agreement

382. It was Total's pleaded case that Clause 7.1.2 of the Management Agreement had been amended to delete the reference to negligence thus extending the obligation on the part of HOSL to keep Fina indemnified against all claims save only those arising from wilful misconduct (as defined).[54]

383. As I understood it, it was in the end suggested by Total that the form of the amendment which had been proposed by the legal department of Fina in August 1993 was thereafter accepted by Chevron as notified by a letter from Chevron's legal department in November 1993. I have no doubt there is no force in this submission.

384. The position seems to be as follows:

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[54] See the definition in clause 1.1. In my judgment Chevron have not made good any allegation of wilful misconduct on the part of Mr Nash: see below.

a) On 6 August 1992, Miss Ellison [55] of Fina's legal depa rtment wrote to Miss Mahmood of Texaco's legal department as follows:

> "HOSL and BOSL
>
> Following your m eeting today with Roger Sm ith there is another issue with regard to HOSL and BOSL which I would like to clear up and that is in respect of the Indemnities given by HOSL to Fina and by BOSL to Texaco.
>
> Although in the 1988 Joint Venture Agreement it was agreed that any liability incurred by either Texaco or Fina would be shared on a 50/50 basis between the two, irrespective of negligence or wilful m isconduct; when we ca me to execute the Management Agreements both for Texaco at Avonm outh and for Fina at Buncefield the m anagement com pany wa s indemnified by BOSL or HOSL (as the case m ay be) unless there was either negligence or wilful misconduct.
>
> This matter was raised at the las t Board Meeting and it was agreed that the respective lawyers should resolve the issue. My proposal is that we follow the standard North sea principle that where a company is acting as operator on a no gain no loss basis that they be indemnified for their actions or om issions on a full indem nity basis regardless of negligence and that an y liab ility that accrues due to it' s wilful m isconduct exp ressly ex cludes any liability for consequential losses.
>
> Clearly some detail needs to be put into the drafting, which I am happy to do, but first could you please confirm your agreement to the principle."

It is perh aps interesting that Miss Ellison regarded Fina as in an analogous position to an 'operator' in the North Sea. Indeed the whole purpose of any discussion of the topic must have been on the basis that Total was operating the HOSL site. There was little reason to think th at accounting or administrative errors could give rise to liability. But the m ore important thing to note is that the topic of the suggest ed amendment was not even discussed at the board meeting of HOSL held on 24 July 1992, let alone left to the lawyers to resolve.

b) In her reply on 14 August 1992 Miss Mahmood argued that "a slight amendment" should be effected "along the lines of the third paragraph of your letter". It w as not sugg ested th at s he had any authority to agree to su ch an amendment which in an y event needed to be p repared in writing and duly executed.

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[55] Yet another witness not called by Total.

c) This exchan ge continued with Mis s Ellison 's response of 21 August 1992 containing a proposed form of amendment:

> "I am glad that you agree in principle to the am endments I have suggested and propose that the best way to tackle this would be to amend the present Clause 7.1.2 and insert a new Clause 7.2. Please consider the drafting set out below where I have highlighted the insertion I have m ade in Clause 7.1.2. The proviso which previously stood at the end of that sub-clause has in addition been deleted. This drafting, of course, relates to the Man agement Agreem ent for HOSL but identical w ording shou ld be incorporated in to the BOSL Agreement, mutatis mutandis.
>
> > "7.1.2 at all tim es ke ep Fina indem nified and held harmless ag ainst all or any actions, proceed ings, claim s, demands and liab ilities whatsoever arising o ut of the performance of Fina's dutie s and obligations hereunder **regardless of any negligence by Fina** which m ay be brought or prosecuted against or incurred by Fina.
> >
> > 7.2 Fina shall not be liable to the C ompany or to Texaco for any loss or da mage arising out of activities under this Agreement unless su ch loss o r dam age results from its Wilful Misconduct and provided that in no case shall Fina be liable to the Com pany or to Texaco for any loss of profit or any other consequential loss.""

d) Matters were brought to a close on 26 August 1992, in Miss Mahm ood's response, where she expressed the belief that the wording would be accep table and predictably went on to say:

> "Subject to obtaining my client's confirm ation that they understand and accep t the revision, I shall revert to you as soon as possible so that we can agree brief a mending agreements as appropriate."

385. Miss Mahmood sent an em ail to Mr Spittlehouse on 27 August 1992 requesting his agreement to the proposal (passing on, in doing so, the inaccurate suggestion derived from Miss Ellison that the proposal had emerged from a HOSL Board meeting).

386. Mr Spittlehouse was asked about this em ail in his oral evidence. He had no recollection of it but told the court, and I accept his evidence, that it was not a m atter for him. He would have passed it on to Mr Hum phries for his approval. There is no material to suggest that any such approval was forthcom ing: indeed the absence of any formal agreement strongly supports that conclusion.

387. The following year negotiations for Elf's accession to the jo int venture got underway. These included the drafting of a new JVA for annexure to the Executio n Agreement. The draft included what later became clause 5.7:

> "The Participant shall, each as to its Participating Interest, keep the Manager indemnified and held harmless against any loss, injury or damage arising out of the performance of the Manager's duties and obligations hereunder except insofar as the said loss, injury or damage shall arise out of the Wilful Misconduct of the Manager provided that the Manager shall not be liable in any event, regardless of Wilful Misconduct, for any consequential loss."

388. This proposed indemnity in respect of Wilful Misconduct excluded consequential loss. This was challenged by Elf at a meeting on 25 November 1993. In response Miss Ellison is recorded as saying:

> "Fina explained that this was a common clause in their current JVA's and had been expressly allowed for by Board resolution between Fina and Texaco. Fina would produce a side letter on this point."

389. As appears once again the mistaken notion that there was a Board resolution on the point is repeated. No doubt for the purposes of furnishing the promised side letter, Miss Ellison wrote to Miss Mahmood the next day to say that she could not locate a copy of Miss Mahmood's reply to her letter of 6 August 1992 so as to be "in a position to demonstrate to Elf this is a concept already in existence and which we are only formalising in the new JVA."

390. Miss Mahmood replied on 30 November 1993:

> "Thank you for your letters of 26th and 29th November.
>
> Dealing firstly with your letter of 26th November, I confirm that I replied to your letter of 6th August 1992, confirming my agreement to each of Texaco and Fina being indemnified by BOSL or HOSL (as the case may be) unless the relevant party was guilty of wilful misconduct. Attached is a copy of my letter dated 25th August 1992 agreeing to your proposed amendment to both Management Agreements."

391. This letter is no more than a notification of "my agreement" (as had indeed been forthcoming) with no suggestion that "her client" had confirmed its agreement. It follows in my judgment that there is no basis for Total's submission that Miss Mahmood was communicating (with or without ostensible authority) the fact that her client had at some stage given her instructions to agree. It was merely a rehearsal of the inconclusive exchanges which had taken place a year earlier.

392. There was another meeting between lawyers on 1 December 1993 at which this exchange of correspondence was produced. There the trail ends with no other evidence of the making of an agreement at some stage prior to 30 November 1993. If (and I do not accept it) Miss Mahmood was asserting that an agreement had been reached, she was wrong. It is worth adding that no case was adduced that Miss Mahmood's letter was perceived as a representation to that effect, let alone that Total placed any reliance upon it so as to establish an estoppel.

393. Total sought to buttress its argument that an amendment had been made on the basis that clause 5.7 of the new JVA would not have been agreed absent a corresponding amendment to the existing Management Agreement. This has a provisional attraction but there are a number of insuperable hurdles to drawing any such inference:

a) The amendment remained undocumented despite the bureaucratic processes of the joint venture parties

b) No mention of it is contained in the minutes of meetings of the HOSL or BOSL Board

c) The new agreement was to reflect the accession of Elf which would not be managing either Buncefield or Avonmouth

d) As regards Buncefield, the existing Management Agreement (to which Elf was not a party) would remain in force until the future of HOSL was decided (something over which Elf had no control).

Wilful Misconduct

394. This issue does not arise given my conclusions that the Management Agreement was not amended. If I was wrong about the amendment issue, I would reject Chevron's contention that Mr Nash was guilty of wilful misconduct as defined namely "such wanton or reckless conduct as constitutes a disregard for harmful, foreseeable and avoidable consequences":

a) in the light of my conclusion that the supervisor had no proper instructions and such was causative of the explosion, it is accepted that Mr Nash must be acquitted of wilful misconduct;

b) even on the assumption that Mr Nash was properly instructed (or the absence of appropriate instruction was not causative of the explosion) I am wholly unpersuaded that Mr Nash wilfully misconducted himself in the sense prescribed simply by failing to pay any or any adequate heed to the Motherwell screen. No doubt it was lazy: but there were in theory no less than three alarms to warn him of any danger.

Consent

395. Once the vicarious liability of Total is determined, Total accepts that it is liable to claimants outside the perimeter fence of the Buncefield site in ***Rylands v. Fletcher.*** However Total denies liability to the claimants inside the fence (ITF) on the grounds of alleged consent to the bringing of oil product onto the HOSL West Site and its accumulation there. A similar point is taken as regards any liability in nuisance.

396. It is accepted by the ITF claimants that they did not object to the accumulation of petroleum products: indeed they were stored partly for their benefit. But it is submitted first that there was no 'consent' in the relevant sense because Total negligently failed to ensure that a safe system was established and followed for the routine filling of tanks on the HOSL West site thereby causing or contributing to the escape and, absent knowledge of the lack of a safe system, no consent was given to an accumulation that was by definition unsafe. Second and in any event any defence based on consent was vitiated given the escape was caused by Total's negligence in the tank filling operation on the night of 10 December which gave rise to the escape.

397. Total's position was that there had been no systemic fault and, in any event, the "consent" of the ITF claimants extended to all normal tank filling operations established over the years. As regards the admitted negligence on the night, Total's submission was that the defence of consent remained effective but the claim thus remained outside ***Rylands v. Fletcher*** (and nuisance) compelling the claimants to pursue their claim in negligence.

398. I turn to the authorities. In this regard Total placed particular emphasis on ***Attorney General v. Cory Brothers [1921] 1 AC 521.*** The facts of the two actions included in the proceedings were as follows. A colliery company had tipped a vast mass of colliery spoil on the side of a hill whereafter a landslide occurred. The tipping was under a licence from the owners of the land. In the first action the Attorney-General claimed an injunction against the colliery company in respect of damage done by the landslide to a public road. The landslide had been caused by depositing the spoil on the hillside without taking reasonable precautions to secure its stability. By the second action brought by the landowners who had granted the licence to tip, the plaintiffs claimed an injunction and damages against the company in respect of damage done by the landslide to houses belonging to the plaintiffs.

399. In the result the colliery company was held liable on the first claim both under ***Rylands v. Fletcher*** and in negligence and on the second claim in negligence. It was submitted by Total that the want of recovery in the second action in ***Rylands v. Fletcher*** demonstrated that where there was consent but damage caused by negligence the claimant must confine his claim to one in negligence.

400. I am not persuaded by this. In the first place it seems to me somewhat doubtful whether in the second action there had been an escape. Both the tip and the houses had been on the claimants' land. This in itself would preclude recovery on ***Rylands v. Fletcher*** principles. Certainly the arguments of the appellant land owners did not rely on ***Rylands v. Fletcher***. Second, if this is wrong, the point at issue was whether the license to tip extended to doing so carelessly and without securing the stability of the pile. In short whether the licence was a licence to create a nuisance or not.

401. In my judgment the speech of Viscount Finlay on which Total placed special emphasis must be read in that light:

> "The plaintiffs in the second action (the trustees) were themselves parties to the bringing of the colliery spoil upon their land. In consideration of payment they allowed Cory Brothers to have the use of their land for this purpose. There is no authority for applying the doctrine of ***Fletcher v Rylands*** to such a case, and, in my opinion, so to apply it would involve an unwarrantable extension of the principle of that decision. A plaintiff who is himself a consenting party to the accumulation cannot rely simply upon the escape of the accumulated material; he must further establish that the escape was due to want of reasonable care on the part of the person who made the deposit. If he does establish this he is entitled to succeed unless the licence was given in such very special terms as to prevent the licensor from complaining of negligence in carrying out the work licensed."

402. Indeed contrary to the submission made by Total, Lord Atkinson regarded a claim in ***Rylands v. Fletcher*** as valid despite the want of care:

> "The negligence of Cory & Co. in this respect makes them responsible as between them and the trustees for the escape of the colliery spoil, despite the licence enjoyed by them, on the authority of the case of ***Rylands*** v. ***Fletcher.*** They had permission to bring the spoil on the land of the trustees. By reason of that permission the company would not be liable to the trustees if the spoil escaped without any negligence on their part, as they would be liable if the trustees had been strangers with whom they had no contractual relations. No right or permission was expressly or impliedly given to them to exercise the right or permission they had obtained without reasonable care."

403. I did not derive any significant assistance from ***Peters v. Prince of Wales Theatre [1943] 1 KB 73*** which was cited by Total. This was simply another example where consent barred a claim under ***Rylands v. Fletcher*** although the discussion of ***Western Engraving v. Film Laboratories Ltd [1936] 1 All ER 106*** in the judgment of the court at p.79 is consistent with the claimants' position that negligence vitiates consent and does not bar the ***Rylands v. Fletcher*** claim. Of greater assistance is ***A Prosser & Son Ltd v Levy and Others [1955] 1 W.L.R. 1224.*** The claim concerned leakage of water from a redundant pipe. It was suggested that the tenants knew of the deficiencies in the plumbing system and thus consented to the escape. The court found that the owners of the property had been negligent.

404. The relevant law was set out by Singleton LJ. Having cited ***Rylands v. Fletcher*** he identified the exception to the general rule at p. 1230:

> "If the plaintiff has consented to the source of danger and there has been no negligence on the part of the defendant, the defendant is not liable, and the same applies if the water is maintained for the common benefit of both the plaintiffs and the defendant."

Thereafter having cited various examples including ***Peters*** he went on at p. 1233:

> "From these judgments it appears that there are two important elements for consideration, namely, negligence and consent. In the case of an ordinary water supply in a block of premises each tenant can normally be regarded as consenting to the presence of water on the premises if the supply is of the usual character. It cannot be said that he consents to it if it is of quite an unusual kind, or is defective or dangerous, unless he knows of that….. It appears to us that they cannot be said to have consented to the set-up or installation as it existed at the time the damage was caused. Over and above this, negligence on the part of the defendants which causes or contributes to the damage takes the case out of the exception to the rule in ***Rylands v. Fletcher.*** It cannot be disputed that the leaving of the pipe in the condition in which it was constituted negligence, as the judge said.."

405. In my judgment the "exception" to the rule in ***Rylands v. Fletcher*** there referred to is that of consent. Thus where there is negligence there is no defence available because the consent is vitiated. This view is consistent with the earlier authorities. There is no basis for the proposition (which by any standards seems unlikely) that where there is negligence the entire cause of action itself is no longer available.[56]

406. I revert to the propositions advanced by the claimants. The distinction between the position where there is an absence of consent by reason of systemic negligence and where there is vitiation of any consent by reason of negligent conduct at the time of the explosion is, on the above analysis, somewhat academic. In my judgment there is no defence of consent available to Total in regard to the ITF claimants.

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[56] See also *Clerk & Lindsell* 19th Ed para 21-23

Nuisance

407. As already noted, liability under ***Rylands v. Fletcher*** is admitted. There was no issue that any finding as to the identity of the party vicariously liable for any causative negligence was also applicable to that cause of action and to liability in nuisance (whether private or public). There were however a number of other issues relating to the validity of the claims in nuisance. I felt from time to time that Total was raising something of a moving target in relation to alleged difficulties in regard to both classes of nuisance. But in the event the issues narrowed down to a limited number of discrete points, all of which I regard as suitable for determination at this stage.

Private nuisance

408. The issue here is whether an "isolated escape" such as that said to be associated with the explosion at Buncefield giving rise to liability under ***Rylands v Fletcher*** can also constitute a private nuisance. Total submits that it cannot: a private nuisance, it is contended, can only arise from a "state of affairs".

409. This question was initially posed in this way: can there be a claim in nuisance where there is a claim in ***Rylands v Fletcher*** or are they mutually inconsistent? The short answer was "no". Indeed Total accepted that "on a suitable mix of facts" liability in private nuisance and ***Rylands v Fletcher*** can co-exist. Whatever this "suitable mix of facts" may be, this concession was clearly correctly made. I apprehend in particular that it is common ground that repeated escapes can give rise to liability on both bases. The principal burden of Total's argument thus became, in effect, that no claim in private nuisance can be advanced for a short-term or isolated escape.

410. Before looking at the authorities, I must confess to having some difficulty in identifying the borderline between an isolated escape on the one hand and a state of affairs on the other. It is simply a matter of degree. A single outbreak of fire may give rise to the prolonged escape of fumes and smoke. Then, again, a firework display may lead to damage from one firework.[57] Can the identity of the damaging aspect of the overall state of affairs or brevity of the event be decisive in whether there is a claim in ***Rylands v Fletcher*** only? This alone encourages me to accept the Claimants' submission that the transitory character of an activity may be a factor to be taken into account in assessing whether the tort of private nuisance has been committed but it is by no means determinative that it has not.

411. The explanation for this is fairly straightforward. It is accepted that ***Rylands v. Fletcher*** liability is a species of nuisance. But in my judgment the criteria or ingredients of the two causes of action are in some important respects different. In particular nuisance is dependent on establishing unreasonable user giving rise to a foreseeable escape whilst ***Rylands v. Fletcher*** is concerned with non-natural or extraordinary user leading to an escape whether foreseeable or not. It did not appear that Total disputed this broad analysis of the disparity between the two causes of action. What was contended by Total, however, was that ***Rylands v. Fletcher*** was an extension of the law of nuisance in to the realm of isolated escapes where liability would not otherwise arise.

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[57] ***Crown River v Kimbolton [1996] 2 Lloyd's Rep. 533***

412. In considering the authorities it has to be borne in mind that there will be cases in which it may not matter which cause of action is pursued (and the present case could well be one[58]). Equally there will be circumstances (perhaps in particular with an isolated occurrence) where liability can only be made good if at all under ***Rylands v. Fletcher***. Thus whilst repeated escapes might be readily foreseeable an isolated escape may be less so. So also the relevant escape may be attributable to an extraordinary but not unreasonable user.

413. In ***Midwood v Manchester Corporation***[59] the respondents relied upon ***Rylands v. Fletcher*** asserting that by storing gas which was ignited electrically the defendants were liable "as if for a nuisance". One of the specific arguments put forward by the appellant defendants was that an accidental escape of gas leading to an explosion could not be considered a nuisance as what was required was something of a continuous nature

> "It cannot, I think, be seriously contended that, where the premises of an adjoining owner are blown up by an explosion brought about through the agency of the defendants' system of electric lighting, there is not a nuisance….There was a gradual accumulation of explosive gas brought about by the fusion of the bitumen by the operation of the overheated electric wires, which process went on for some three hours, and ultimately resulted in an explosion. If that was not a nuisance I do not know what would be one**."** Per Collins MR (p605)

414. In contrast in ***Charing Cross Electricity Supply Co v. Hydraulic Power Co [1914] 3 KB 772*** the principle of ***Rylands v. Fletcher*** was applied to the escape of mains water where there was no statutory authorisation exempting the defendants from nuisance:

> "Did the nuisance arise? In my opinion it clearly did in this case. As I have said I am not going to repeat the reasoning which has already been expressed by Lord Sumner. I concur in his opinion that ***Midwood v. Manchester Corporation*** is a case which governs us and that the principle applicable in ***Midwood v. Manchester Corporation*** and in the present case is the principle in ***Rylands v. Fletcher***…" per Kennedy LJ at p. 784

415. These two cases provide paradigm examples of the overlap between the two causes of action even in respect of isolated escapes. This was explained by Lord Simonds in ***Read v. Lyons & Co [1947] AC 156:***

> "It is worthy of note that so closely connected are the two branches of the law that text-books on the law of nuisance regard cases coming under the rule in ***Rylands* v. *Fletcher*** as their proper subject, and, as the judgment of Blackburn J. in that case itself shows, the law of nuisance and the rule in ***Rylands v. Fletcher*** might in most cases be invoked

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[58] Although issues have arisen as regards the recoverability of economic loss.

[59] *[1905] 2 K.B. 597*

> indifferently. One typical illustratio n will suffice. In ***Charing Cross Electricity Supply Co.*** **v.** ***Hydraulic Power Co.*** it was the rule in ***Rylands*** **v.** ***Fletcher*** that was relied on by the Court of Appeal; but the authority of ***Midwood Co., Ld. v. Manchester Corporation*** was invoked and that was a case of nuisance and nothing else." At p 183

416. On the face of it these two cases demonstrate th at an isolated escape can give rise to liability in nuisance as well as ***Rylands v. Fletcher***. In contradiction to this, Total placed cons iderable emphasis on ***Attorney General v. PYA Quarries [1952] 2 QB 169(supra).*** In a passage at p. 192, Denning LJ observed.:

> "I quite agree that a private nuisance always involves som e degree of repetition or continuance. An isolated act which is over and done with, once and for all, may give rise to an action for negligence or an action under the rule in ***Rylands v. Fletcher,*** but not an action for nuisance. A good example is an explosion in a factory w hich breaks windows for m iles around. It gives rise to an action under ***Rylands v. Fletcher*** but no other action if th ere was no negligence: see ***Read v. J. Lyons & Co.*** But an isolated act m ay a mount to a public nuisance if it is done under such circumstances that the public right to condemn it should be vindicated."

Leaving aside that this passage was obiter, notab ly it exclud es circum stances involving negligence (and for that matter public nuisance). In the circum stances and having reg ard to th e la ter au thorities set ou t b elow, I feel unable to accord it th e significance that Total invites.

417. In ***Halsey v. Esso Petroleum [1961] 1 WLR 683*** the issu e was whether th ere w as liability for the im pact of hot acid smuts on washing hung out to dry in the plaintiff's garden as w ell as for dam age to the pain t of his car in the street. The judgm ent of Veale J contains no suggestion that the persistence or tim ing of the escape had any bearing on whether liability in nuisance could be established:

> "Nuisance is commonly regarded as a tort in respect of land. In ***Read v. J. Lyons & Co. Ltd.,*** Lord Simonds said: "he alone has a lawful claim who has suffered an invasion of som e proprietary or other in terest in lan d." In this connection the allegation o f dam age to the plain tiff's motor-car calls for special con sideration, since the allegation is that when the offending smuts from the defendants' chimney alighted upon it, the m otor-car was not actually upon land in the plaintiff' s occupation, but was on the public highway outside his door; Whether or not a claim in respect o f private nu isance lies f or damage to the motorcar in these circumstances, in my judgment such damage is covered by the doctrine in ***Rylands v Fletcher.***"

418. In ***British Celanese Ltd v Hunt***[60] metal foil escaping from factory premises caused a power failure. Lawton J set out the claimants' proposition in terms:

> "Most nuisances do arise from a long continuing condition; and many isolated happenin gs do not constitu te a nuisance. It is, however, clear from the authorities that an isolated happening by itself can create an actionable nuisance. Such an authority is ***Midwood & Co. Ltd.* v. *Manchester Corporation*** [1905] ***2* K.B.** 597, where an electric m ain installed by the defendants fused…The Court of Appeal he ld that the defendants were liable, all the Lords Justices being of the opinion that they had caused a nuisance… I am satisfied that the law is correctly stated in ***Winfield on Tort,*** 8th ***ed.*** at p.364: "W hen the nuisance is the escape of tangible things which da mage the plaintiff in the enjoym ent of his pr operty, there is no rule that he cannot sue for the first escape." (p969)

419. In ***Cambridge Water Co v. Eastern Counties Leather PLC [1994] 2 AC 264*** solvent from leather m aking processes entered the claim ants' water supply **.** The prin cipal issue was whether fores eeability of dam age was a requirem ent of not onl y a claim in nuisance but also for a claim under ***Rylands v. Fletcher***. In the speech of Lord Goff, the orig in o f ***Rylands v. Fletcher*** was clearly identified thus justifying the same approach as regards foreseeab ility. The associated exten sion of the law of nuisance into isolated escapes d id not preclu de the cause of action also covering continuing escapes. In short they were two discrete causes of action:

> "In particular, I do not regard the tw o authorities cited to your Lordships, ***West v Bristol Tramways Co. [I908] 2 K.B. 14 and Rainham Chemical Works Ltd v. Belvedere Fish Guano Co. Ltd. (1921) 2 A.C. 465***, as providing any strong pointer towards a contrary conclusion. It would moreover lead to a more coherent body of common law principles if the rule were to be regarded ess entially as an exte nsion of the law of nuisance to cases of isolated escapes from land, even though the rule as established is not limited to escapes which are in fact isolated. I wish to point out, however, that in truth the escape of the P.C.E. from E.C.L.'s land, in the form of trace elem ents carried in percolating water, h as not b een an iso lated escape, bu t a continuing escape resulting from a state of affairs which has come into existence at the base of the chalk aquifer underneath E.C.L.3 prem ises. Classically, this would have been regarded as a case of nuisance; and it would seem strange if, by characterising the case as one falling under the rule in ***Rylands v. Fletcher,*** the liability should thereby be rendered m ore strict in the circumstances of the present case."

I do not read the last sentence as holding th at an isolated escape s atisfying th e appropriate criteria could not constitute a nuisance.

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60 [1969] 1 W.L.R. 959

420. This view is supported in my judgment by the speech of Lord Hoffmann in ***Transco plc v. Stockport [2004] 2 AC 1*** which identifies the important influence that an isolated escape may have on the issue of the foreseeability of an escape:

> ***"Rylands v Fletcher*** was therefore an innovation in being the first clear imposition of liability for damage caused by an escape which was not alleged to be either intended or reasonably foreseeable. I think that this is what Professor Newark meant when he said in his celebrated article ("The Boundaries of Nuisance" (1949) 65 LQR 480, 488) that the novelty in ***Rylands v Fletcher*** was the decision that "an isolated escape is actionable". That is not because a single deluge is less of a nuisance than a steady trickle, but because repeated escapes such as the discharge of water in the mining cases and the discharge of chemicals in the factory cases do not raise any question about whether the escape was reasonably foreseeable. If the defendant does not know what he is doing, the plaintiff will certainly tell him. It is the single escape which raises the question of whether or not it was reasonably foreseeable and, if not, whether the defendant should nevertheless be liable. ***Rylands v Fletcher*** decided that he should." (para 27 per Lord Hoffmann)

421. Taken as a whole, these authorities do not support Total's submission. The position is that on appropriate facts there can be liability in private nuisance for a single or isolated escape as opposed to a state of affairs where there is both unreasonable or negligent user of land and foreseeability of escape.[61] The claimants, subject to proof of damage, have such a claim.

Public nuisance

422. I turn now to public nuisance. It is common ground that there are two limbs of public nuisance exemplified by the definition of the crime in ***Archbold: Criminal Pleadings Evidence and Practice***:

> "A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

423. Total accept that there was a public nuisance in relation to the second limb. This concession recognises that the public were obstructed in the exercise and enjoyment of their right to use the public highways around the Buncefield site as a result of the imposition of an exclusion zone on 11 December and for so long as it remained in force.

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[61] See *Clerk & Lindsell on Torts* 19th Ed para 20-16

424. The first question that arises is therefore whether as the Claimants contend there was a public nuisance within the first limb. Total say that the Claimants cannot make good a complaint that they suffered injury arising from impairment of the public exercise or enjoyment of ordinary rights "as such". Put another way Total say that where a landowner suffers injury by way of interference with the enjoyment of his private property such is not suffered in the exercise or enjoyment of rights common to the public at large and accordingly cannot give rise to a claim for public nuisance.

425. The second question that arises concerns the scope of recovery for the admitted liability under the second limb. This gives rise to two distinct points:

a) Total maintain that a claimant can only claim for interference with his own rights: losses which arise from interference with the ability of others (such as customers of the claimant) to exercise their rights are too remote; and

b) Total maintain that the class of those who can recover in public nuisance is restricted to those with proprietary interests proximate to or in the vicinity of the public nuisance.

First limb - interference with rights of the public as members of the public

426. It is the claimants' submission that where a defendant inflicts a common injury on the public whether in terms of its property or life or in terms of its health and comfort, then the public nature of the tort is sufficiently made out.

427. The starting point here is ***R v. Rimmington [2006] 1 AC 459***. It is to be noted that their Lordships accepted that the crime (and tort) as defined in *Archbold* was sufficiently certain:

> "I would for my part accept that the offence as defined by Stephen, as defined in *Archbold* (save for the reference to morals), as enacted in the Commonwealth codes quoted above and as applied in the cases (other than *R v Soul* 70 Cr App R 295) referred to in paras 13 to 22 above is clear, precise, adequately defined and based on a discernible rational principle. A legal adviser asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance would be apparent; if not, not."(per Lord Bingham at p 484)

The appeal in ***Rimmington*** was however successful because the public element of the offence was not made out. The circumstances of the alleged offence were the dispatch of hate mail which was properly to be regarded as a campaign against individuals in receipt of the mail and not against the public.

428. I accept the claimants' submission that the feature necessary to invoke a claim in public nuisance is one of common injury to the public:

> "But central to the content of the crim e was the suffering of common injury by m embers of the public by interference with rights enjoyed by them as such. I shall, to av oid weariso me repetition, refer to this feature in this opinion as "the requirement of common injury"."(***Rimmington*** para 6)

This common injury does not involve the inflic tion of a similar injury as in the hate-mail situation. It m eans the s imultaneous interference with th e rights of a significan t section of the public.

429. Such an app roach is sup ported by ***Attorney General v. PYA Quarries*** (supra) a case cited with approval by Lord Bingham in ***Rimmington***. Here the court was concerned with dam age, danger and discom fort to occupants of houses arising from projectiles, vibration and dust emanating from a quarry. I cite from the judgment of Romer LJ:

> "It is dif ficult to ascer tain with any precis ion f rom these citations how widely spread the effect of a nuisance must be for it to qualify as a public nuisance and to becom e the subject of a criminal prosecution o r of a relator action b y the Attorney-General. It is obvious, notwithstanding Blackstone' s definition, that it is not a prerequisite of a public nuisance that all of Her Majesty's subjects should be affected by it; for otherwise no public nuisance could ever be established at all."(p 182)

> "In the course of his judgm ent Turner L.J. said: It is not on the ground of a ny crim inal offence comm itted, or for the purp ose of giving a better remedy in the case of a criminal offence, that this court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this court m ust rest; and taking it to rest upon that ground, the only distinction which seems to m e to exist b etween cases of p ublic nu isance and private nuisance is this- that in cases of private nuisan ce the in jury is to individ ual property, and in cases of public nuisance the injury is to the property of mankind."(p 183)

> "It is, however, clear, in my opinion, that any nuisance is public which m aterially affects the reasonab le comfort and convenience of life of a class of Her Majesty' s subjects. T he sphere of the nuisance m ay be described generally as "the neighbourhood "; but the question whether the local community within that sphere com prises a sufficient num ber of persons to constitute a class of the public is a question of fact in every case. It is n ot necessary, in m y jud gment, to p rove that every member of the class has been injuriously affected; it is sufficient to show that a represen tative cros s-section of the class has been so affected for an injunction to issue."(p 184)

430. It follows that whilst a private owner's right to the enjoyment of his own land is not a right enjoyed by hi m in comm on with ot her m embers of the public, nonetheless any illegitimate interferen ce, being the very sam e interference contemporaneously

suffered by other members of the public, constitutes a common injury satisfying the public nature of a public nuisance.

431. This conclusion is supported by ***Corby Group Litigation v. Corby Borough Council [2008] EWCA Civ 463***. This was a case in which the preliminary issue was whether or not damages for personal injury could be recoverable in public nuisance. The case arose from a claim by mothers exposed to toxic materials in the vicinity of an industrial concern which had caused them to give birth to children with birth defects. Again, the assumed facts constituted a common injury to the public.

432. Is the answer as suggested at one stage by Total that claims in public nuisance and private nuisance are mutually exclusive? This proposition must fail. No suggestion emerges from the authorities that, where a sufficient body of the public has been subjected to the nuisance, the only claim lies in public nuisance and any claim in private nuisance is barred or vice versa:

a) Private nuisance involves interference with someone's private right to enjoy his own land. Public nuisance involves the endangering of the health, comfort or property of the public.

b) It follows that a collection of private nuisances can constitute a public nuisance:[62] but it does not follow either that in consequence the claim in private nuisance is subsumed or that a public nuisance involving interference with health or comfort cannot be freestanding.

433. That the causes of action are not mutually exclusive is apparent from a wide range of authority. The following are some examples:

a) ***British Celanese v. A H Hunt [1969] 1 WLR 959*** per Lawton J at 969A: "It is, however, clear from the authorities that an isolated happening by itself can create an actionable nuisance".

b) In ***Jan de Nul v Royal Belge [2000] 2 Lloyd's Rep. 700*** at paragraph 96, Moore-Bick J said: "Although [public nuisance] does sometimes arise for consideration in the context of an interference with the plaintiff's use and enjoyment of land similar to that which would support a claim in private nuisance (see, for example, **PYA)** that is not its essential nature".

c) In ***Corby,*** the Court had to consider whether personal injury was recoverable in public nuisance. Dyson LJ having just quoted extensively from Lord Bingham's speech in ***Rimmington*** observed at paragraph 30: "It is true that the same conduct can amount to a private nuisance and a public nuisance. But the two torts are distinct and the rights protected by them are different."

d) As regards textbook authority the 2006 edition of ***Winfield and Jolowicz on Tort*** states at page 643: "Nuisances are divided into public and private, although it is quite possible for the same conduct to amount to both" and then

[62] "a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances." see ***Atty Gen v PYA Quarries*** p 188, 190: see also ***R v Rimmington*** p 487

> again at p. 646: "The same state of affairs may, of course, constitute both torts, a private nuisance in so far as A suffers interference with the enjoyment of land and a public nuisance in so far as B suffers some special damage".

434. It is accordingly difficult to discern any difficulty in categorising the incident at Buncefield as a public nuisance within the first limb. The explosion was caused by negligence. A very large number of people were affected. Those who had an interest in land suffered private nuisance. The explosion endangered the health and comfort of the public at large. Subject to establishing a loss which was particular, substantial and direct (which is an issue for another day) there is a claim in public nuisance.

Second limb – obstruction to public highways

435. As regards the second limb, Total accept that it is no bar to the recovery of damages in public nuisance that the loss was economic loss. Equally as indicated the claimants accept that an individual claimant must establish a loss which was particular, substantial and direct, over and above that suffered by the public at large.[63]

436. But there are two further contentious points taken by Total which it is convenient and appropriate to determine at this stage:

> "iv) It is denied that such entitlement extends to any claim where the damage did not result from interference with the claimant's own exercise of the public right to use the public highways around the Buncefield site.
>
> v) It is denied that such entitlement extends to any claim where the damage that is alleged to be particular substantial and direct was not caused by injury to proprietary rights of the claimant in hereditaments in proximity to the public nuisance."

437. As regards the first point, it is contended by Total that only loss attributable to want of access by an owner of property or his employees is recoverable. But in my judgment a claimant is entitled to recover damages in public nuisance where not only is his access to his premises obstructed but loss of trade is caused by reason of his customers' right of free passage to the premises being likewise obstructed.

438. The starting point here is ***Wilkes v Hungerford (1835) 2 Bing N C 281*** where a bookseller who lost business as a consequence of potential customers being obstructed from use of the adjacent street for an unreasonable time and was held by the full court to be entitled to recover damages. One of the authorities cited by counsel for the plaintiff and relied upon by the Court as a "very strong case" was ***Baker v Moore Hil. 8 W. 3. C.B*** where by reason of a walk erected across a common way in Lambeth the plaintiff lost profits from his houses by reason of the consequent departure of his tenants. The case had been argued before the entire body of judges of

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63 As already noted this issue, which might compendiously be called the requirement for special damage, does not arise at this stage.

the Common Pleas and the Barons of Exchequer at Sergeants Inn and all found for the plaintiff. [64]

439. However it was submitted by Total that ***Wilkes*** was overruled in ***Ricket v Directors of the Metropolitan Railway [1867] LR 2 (HL) 175.*** In ***Ricket***, the plaintiff sued in respect of loss of trade to his public house. In carrying out its powers under the Railway Clauses Act the railway company obstructed a footpath, making access to the public house more difficult. It is to be noted that, in the argument for the defendants, it was not suggested that the decision in ***Wilkes*** was wrong but simply had no bearing (see p. 183):

> "The case of *Wilkes* v. *The Hungerford Market Company* has no bearing on the present question that merely declared what, under the particular circumstances which existed in that case, would establish a right of action ; but there the question is, whether, the works being lawful, and there being no right of action in that respect, the Plaintiff has a right to compensation by a novel interpretation of certain words in the statute."

440. The Lord Chancellor's speech nonetheless made reference to ***Wilkes***.

> "As far as I have been able to examine the cases, in all of them, except two, in which an individual has been allowed to maintain an action for damage which he has specially sustained by the obstruction of a highway, the injury complained of has been personal to himself, either immediately, or by immediate consequence. The two excepted cases are those of ***Baker v. Moore*** (mentioned by Mr. Justice Gould in ***Iveson v. Moore***) ; and ***Wilkes v. Hungerford Market Company*** …..The case of ***Baker v. Moore*** appears to me to be even more doubtful than that of ***Wilkes v. Hungerford Market Company***; and as to this latter case, Chief Justice Erle, in delivering the judgment of the majority of the Judges in the present case, observed:--"If the question were raised in an action now, we think it probable that the action would fail, both from the effect of the cases which preceded ***Wilkes v. The Hungerford Market Company*** and also from the reasoning in the judgment in ***Ogilvy v. Caledonian Railway Company***." In this observation upon Wilkes Case I entirely agree": at p.187/88

441. The Lord Chancellor was minded in those circumstances to rest his decision on the proposition that the loss was too remote for the plaintiffs to have maintained an action absent the statutory provisions. But he went on to consider the implications of the relevant statutes at p.196:

> "Upon a review of all the authorities, and upon a consideration of the sections of the statutes relating to this subject, I have satisfied myself that the temporary obstruction of the highway,

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[64] The Court also made reference to ***Iveson v Moore (1699) LD.Ray 486*** where obstruction to a public highway providing access to the plaintiff's colliery prevented customer access.

> which prevented the free passage of persons along it, and so incidentally interrupted the resort to the Plaintiff's public house, would not have been the subject of an action at common law, as an individual injury sustained by the Plaintiff in Error, distinguishing his case from that of the rest of the public. That, therefore, he altogether fails to bring himself within the general principle upon which a claim to compensation under the Acts in question has been determined to depend; that upon the construction of the clauses on which his claim is rested, the 6th section of the *Railways Clauses Act,* and the (58th section of the *Lands Clauses Act),* are both inapplicable, as his damage arose from the temporary operations of the company, and not from their permanent works. And upon the 16th section of the *Railways Clauses Act,* which does apply to his case, his damage was not of such a nature as to entitle him to compensation; the interruption of persons who would have resorted to his house but for the obstruction of the highway, being a consequential injury to the Plaintiff in Error too remote to be within the provisions of that section."

442. Lord Cranworth expressed more limited criticism of ***Wilkes*** at p. 199:

> "The Plaintiff relied on the case of ***Wilkes v. Hungerford Market Company***, and on other decisions following upon it. What was ultimately decided in that case was, that where a corporate body had, under lawful authority, obstructed a public thoroughfare, but had continued the obstruction beyond the proper and necessary time, a person living in a house bordering on the obstructed line might, in respect of that prolonged obstruction, sustain an action on the ground that, in consequence of the prolonged obstruction, passengers had been unable conveniently to pass by his door, and so that he had lost profit in his business. I confess that I have great difficulty in agreeing with that decision; a difficulty which, as I collect from the language of Sir William Erle, in delivering the judgment of the Exchequer Chamber in the case now before us, was felt by him, and the Judges who concurred with him. But it is enough to say that the relief to which the plaintiff was there held to be entitled was not founded on any suggestion of injury to the land, or to the house; the sole ground on which there can be any title to relief in this case but on an injury to the occupier which the Court must have held, in the language of Chief Justice Tindal, to have been the direct, necessary, natural, and immediate consequence of the obstruction."

443. Lord Westbury having expressed regret on the scale of judicial disagreement in the field dissented. He regarded the issue as one of statutory construction and concluded that loss of custom had "injuriously affected" within the meaning of the Act the public house as much as physical damage:

> "It is a fallacy, almost a mockery, to answer, "the custom is one thing, and the house another; and the injury is to the custom , not to the house." You cannot sever the custom from the house itself, or from the interest of the occupier; for the custom is the thing appertaining to the house which gives it its special character, and constitutes its value to the occupier, and for which he pays in the high rent he has agreed to give. If you diminish the custom of a public house, you dim inish its value either to let or sell, and therefore you deteriorate the public house and the interest of the tenant therein.": p. 205

444. He concluded as follows at p. 207:

> "The error in the d ecision (for so I must respectfully deem it to be) which has led to the judgm ent now appealed from , and to others upon which that judgm ent is founded, appears to m e to have arisen entirely fro m the meaning attributed to those words "injuriously affected," which have been interpreted to mean affected in such a manner as but for the statu tes wo uld constitute an injury at law, and w ould support an action for damages." But there is not, in m y judgment, any warrant for so interpreting or paraphrasing the words, which, in m y opinion, are plainly used in their ordina ry and popular sense; for it is evident th at lands affected in the proper ex ercise of the statutory powers cannot, in a legal sense, be said to be "injuriously affected.."

445. Before going further, it is worth noting that ***Ricket*** was decided in the era of great public works when the disparity of judicial policy as to plaintiffs' rights to claim in respect of losses attributable to building works was striking. ***Ricket*** itself affords a stark example: 4-0 in th e Queen's Bench, 6-2 in the Exchequ er Chamber to con trary effect, 2-1 in the House of Lords. Perhaps it is not surprising that even the tw o members of the majority in the House of Lords did not expressly overrule ***Wilkes***.

446. In ***Beckett v Midland Railway Company (1867) L.R. 3 CP 82***, there was another claim for compensation under the *Land Clauses Act*. The plaintiffs' house had been devalued by the construction of an em bankment in the v icinity. It was held that this was perm anent inju ry to the prem ises and as such recoverab le. ***Ricket*** was distinguished on the basis that the injury th ere had been of a tem porary character. In his judgment, Willes J expressed very reluctant acceptan ce of the decis ion in ***Ricket.*** More significantly whilst rather surp risingly stating that ***Wilkes*** "was unquestionably overruled in ***Ricket's*** case"[65] Willes J went on to assert th at ***Baker v. Moore*** had not suffered the same fate.

447. The next case in this prolonged sequence is ***Benjamin v Storr (1874) LR 9 CP 400***. The plaintiff kept a coffee house. Constant loading and unloading of goods from horse drawn vans at the next door auctioneers obs tructed the access of his custom ers to the

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[65] See also ***Martin v. LCC (1899) 14 TLR 575***

shop (as well as interrupting the light and causing a stench). The plaintiff succeeded in respect of that "particular, direct and substantial" damage.

448. Shortly thereafter the House of Lords reverted to the topic in ***Metropolitan Board of Works v McCarthy (1874) LR 7 HL 243***. This like ***Ricket***, was a claim under the ***Land Clauses Consolidation Act 1845*** in respect of an interest in land "injuriously affected". Lord Chelmsford stated as follows at p 256:

> "After the many irreconcilable decisions upon the compensation clauses in the *Land Clauses Consolidation Act*, and the *Railways Clauses Consolidation* Act, I think we may be said to have arrived at some settled conclusions upon the subject. It may be taken to have been finally decided that in order to found a claim to compensation under the Acts there must be an injury and damage to the house or land itself in which the person claiming compensation has an interest. A mere personal obstruction or inconvenience, or a damage occasioned to a man's trade or the goodwill of his business, although of such a nature that but for the Act of Parliament it might have been the subject of an action for damages, will not entitle the injured party to compensation under it. Some uncertainty still remains as to the particular character of the damage and injury to the house or land itself upon which a claim to compensation may be founded."

449. Taking this passage at face value, it seems to me that the House was accepting the continued validity of ***Wilkes*** in that interference with custom might provide a basis for recovery at common law but not under the Acts.[66]

450. ***Ricket*** was also distinguished in ***Fritz v Hobson (1880) LR. 14. Ch. D 542***. The plaintiff was a shopkeeper in Fetter Lane. Adjacent premises were being rebuilt. The building works prevented customers reaching the shop reducing the overall takings. The defendant argued inter alia that ***Wilkes*** had been overruled by ***Ricket***. The plaintiff successfully asserted that ***Ricket*** was distinguishable. On the facts, it was submitted that in ***Ricket*** the damage was held to be too remote since the access of only "casual" as opposed to regular customers had been interfered with. In any event it was accepted that as a matter of law ***Ricket*** was primarily concerned with the construction of the ***Land Clauses Acts.***

451. The issue came before the Court of Appeal in ***Lyons v Gulliver [1914] 1 Ch 631***. Access to the plaintiff's business was obstructed by theatre queues. The appellant defendant sought to distinguish ***Benjamin v Storr*** and ***Fritz v Hobson*** on the basis of want of particular damage. The Court affirmed the decision of the trial judge that there was an actionable nuisance[67] in respect of the consequent loss of custom.

452. In ***Blundy Clarke v North Eastern Railway [1931] 2 KB 334*** the plaintiffs were vendors of gravel and sand who transported their goods through the defendants' canal.

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[66] Lord O'Hagan expressed agreement with Lord Westbury's dissent in ***Ricket*** at p. 265.

[67] Phillimore LJ dissented on the basis that the "queue was nearly as offensive as a queue can be".

The issue was whether loss of profit was recoverable in public nuisance. The defendants argued that, whilst ***Wilkes*** was authority supporting recoverability, it had been overruled by ***Ricket***. The Court of Appeal (by a majority) did not agree.

453. Scrutton LJ stated as follows at p354:

> "The cases under the *Land Clauses Consolidation Act*, relevant for the reason already stated, I find it very difficult to reconcile. Lord Blackburn in ***Caledonian Ry. Co. v. Walker's Trustees*** goes through them in a way which relieves me of the necessity of referring to them in detail. He comes to the conclusion, as I understand his judgment, that the decisions of the House of Lords in ***Caledonian Ry. Co. v. Ogilvy*** and in ***Ricket's*** case are not consistent with the decisions in ***McCarthy's*** case (a), approving ***Beckett's*** case, and therefore he follows " the later and more deliberate decision " , that is, McCarthy' s case. The House of Lords in the ***Caledonian Ry. Co. v. Walker's Trustees,*** following ***McCarthy's*** case, did allow the claimant under the *Land Clauses Consolidation Act* to recover compensation, and therefore decided that the matter of which he complained would have given him a cause of action for particular damage before the Act authorizing it was passed. Now the plaintiff there complained of the closing of a public highway and substituting for it a lengthier road of a steeper gradient than the way closed, whereby the access to his house was injured. This decision appears to me to support the conclusion I have arrived at in the cases decided independently of the *Land Clauses Consolidation Act.*"

454. The inference is clear that he regarded ***Wilkes*** as still good law.[68] Greer LJ was more specific. Having confirmed that there was ample authority for the proposition that a trader with premises adjoining the highway who suffers damage to his business by reason of unlawful obstruction of the highway is entitled to recover such special damage he observed:

> "In ***Wilkes v. Hungerford Market Co.*** it was held that the defendants, who had obstructed a highway for a longer period than was justified by their statutory powers, were liable to pay damages to a bookseller whose shop adjoined the highway, and who proved loss of custom due to the unauthorized obstruction. In ***Ricket v.Metropolitan Ry. Co***. Lord Chelmsford in the course of his speech throws grave doubt on the correctness of the decision in ***Wilkes v. Hungerford Market Co.*** , but I do not think it can be said to have been overruled, and it is in accord with the earlier authorities to which I have referred, and having regard to the subsequent decision of the House of Lords in ***Metropolitan Board of Works v. McCarthy*** I think it ought to be regarded as correctly decided.

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[68] A view shared by Slade J in ***Gravesham Borough Council v British Railways [1978] Ch 379 at p. 398.***

> "If the diminution in value of business prem ises due to an unauthorized obstruction gives the owner a good cause of action, it seem s to m e that the interference with his business which gave rise to the loss of business earnings ought a fortiori to be regarded as particular dam age giving him a cause of action. These cases w ould afford am ple authority for the decision in the plaintiffs' favour of the point under consideration."at p. 368[69]

455. As regards ***Ricket*** itself he agreed with Scrutton LJ at p.364:

> "In ***Ricket's*** case it was held, first, that th e plaintiff claim ing compensation had not suffered any peculiar dam age which would have entitled him to succeed in an action for dam ages at common law; and secondly, that in any event he had not proved that his land was injuriously affected. It is d ifficult to reconcile this case with the decision of the Court of Common Pleas in the case of ***Beckett* v. *Midland Ry.* Co.**, which was approved by the House of Lords in ***Metropolitan Board of Works v. McCarthy*** **,** or with the decision of the House of Lords in the last named case; but, be this as it may, ***Ricket's*** case (1) is not an authority against the plaintiff's claim in the present case."

456. In ***Harper v. Haden & Sons [1933] Ch 298*** a claim in nuisance for obstruction of the highway failed because of its temporary character. Lord Hanworth, having cited ***Blundy*** picked up the theme and stated:

> "Greer LJ states express ly and I agree with him that ***Wilkes v. Hungerford Market*** ought not to be considered to have been overruled. As I have pointed out above the chief criticism directed against it is as to rem oteness of the dam age not that there was no prima facie cause of action in respect of the inju ry suffered. The court went on over the ground again and accepted the series of au thorities of which ***Iveson v. Moore*** and ***Rose v. Miles*** are typical examples."

457. In ***Gravesham v. British Rail [1978] 1 Ch 379***, Slade J expressed en tire ag reement with the judgment of Greer LJ in ***Blundy*** and went on to hold at p. 398:

> "I can see no difference in principle between the case where the relevant interference with a business consists of the obstru ction of its customers and the case where it consists of obstruction of its employees."

458. It is acco rdingly not su rprising that the decision in ***Ricket*** is now in a state of som e disrepair. In deed in ***Wildtree Hotel v Harrow L.B.C. [2001] 2 AC 1*** Lord Hoffman commented on the policy considerations arising from the original construction of the railways, which had led to a m arked disparity of judicial views with such as Lord Westbury on one side and Lord Cranworth and Lord Chelmsford on the other. Before

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[69] See also ***Harper v Haden [1933] Ch 298*** per Lord Hanworth at p. 306.

going on to express total agreement with Lord Westbury's dissent in ***Ricket*** he stated at p.9:

> "This case made it apparent that the arbitrary rules stated by, for example, Lord Cranworth in ***Ricket's*** case, were not necessary to keep the floodgates shut. The construction of the railways would have caused no loss to post houses or coaching inns if the trains had not run. So after ***Brand's*** case the cases on injurious affection caused by the construction of the works returned to more logical principles. ***Ricket v Metropolitan Railway Co LR 2. HL 175*** was explained and distinguished in later cases in your Lordships' House until it became very difficult to say for what proposition, if any, it remained authority."

459. I conclude that there is long standing and consistent authority in support of the proposition that a claimant can recover damages in public nuisance where access to or from his premises is obstructed so as to occasion a loss of trade attributable to obstruction of his customers' use of the highway and liberty of access.

Proprietary rights in the vicinity of the public nuisance

460. It has to be said that the suggestion that only those with proprietary rights in the vicinity of the public nuisance can claim is wholly inconsistent with the proposition advanced by Total that public nuisance is to be distinguished from and indeed is inconsistent with private nuisance because private nuisance is concerned with private rights to land.

461. The starting point here is ***Tate & Lyle v GLC [1983] 2 AC 509***. The plaintiff had a sugar jetty access to which was affected by silting of the river bed caused by construction of adjacent terminals. Tate & Lyle had to expend dredging expenses to enable vessels to reach the jetty.

462. The House of Lords unanimously recognised that the plaintiff had no relevant proprietary right and thus no claim in negligence or private nuisance. The majority held however that there was a claim in public nuisance. Lord Diplock's dissent was directed not at the absence of any relevant proprietary rights or want of proximity but at an issue of causation: namely that someone without proprietary rights could not complain of a public nuisance in circumstances in which his own actions (the obtaining of a license to erect the raw sugar jetty after authorisation of the construction of the offending terminals) gave rise to the loss.

463. In my judgment it is well established that whilst public nuisance embraces claims of those who complain of an interference with their use and enjoyment of land it is not confined to such claims:

a) In ***PYA***, Romer LJ stated at p.184: "Any nuisance is public which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects."

b) In ***Rimmington*** Lord Bingham introduced the topic this way at para. 6:-

> "It became clear over time that there were some acts and omissions which were socially objectionable but could not found an action in private nuisance because the injury was suffered by the local community as a whole rather than by individual victims and because members of the public suffered injury to their rights as such rather than as private owners or occupiers of land. Interference with the use of a public highway or a public navigable river provides the best and most typical example. Conduct of this kind came to be treated as criminal and punishable as such. In an unpoliced and unregulated society, in which local government was rudimentary or nonexistent, common nuisance, as the offence was known, came to be (in the words *of J R Spencer, "Public Nuisance-A Critical Examination"* [1989] CLJ 55, 59) "a rag-bag of odds and ends which we should nowadays call 'public welfare offences ". But central to the content of the crime was the suffering of common injury by members of the public by interference with rights enjoyed by them as such. I shall, to avoid wearisome repetition, refer to this feature in this opinion as "the requirement of common injury."

On the facts there was no actual or potential interference with land: one claim concerned a campaign of inflammatory letters: the other a "joke" package. Indeed many examples of public nuisance envisaged in the speech were not dependent on any interference with proprietary rights e.g. offering unfit meat for sale, making a hoax phone call or extinguishing the lights at a football match.

c) In ***Corby*** the claim was being made by mothers allegedly exposed to a contaminating substance which caused birth defects. The whole thrust of the defendant's argument on the strike out application was that public nuisance was like private nuisance and, since the latter could not give rise to a claim for personal injury because it was based on interference with enjoyment of the land, so also the former. This was rejected by the court at para 27:

> "It seems to me that it is at least arguable that Professor Newark was wrong to describe a public nuisance as a "tort to the enjoyment of rights in land". The definition of the crime of public nuisance says nothing about enjoyment of land and some public nuisances undoubtedly have nothing to do with the interference with enjoyment of land. As Lord Bingham said, the ingredients of the crime and the tort are the same. A public nuisance is simply an unlawful act or omission which endangers the life, safety, health, property or comfort of the public. As was said in *Salmond and Heuston on the Law of Torts (21* st edition 1986): "Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of making a

> bomb-hoax and the tort of allowing one's trees to overhang the land of a neighbour".”

d) Likewise in ***Jan de Nul v Royal Belge [2000] 2 Lloyd's Rep. 700*** dredging operations in one area of Southampton Water caused silting in the vicinity of commercial wharves and oyster bed of the parties. Moore-Bick J summarised the claim in public nuisance as follows at para 96:

> “Liability in public nuisance, however, raises more difficult questions. Although it does sometimes arise for consideration in the context of an interference with the plaintiffs use and enjoyment of land similar to that which would support a claim in private nuisance (see, for example, ***Attorney-General v. PYA. Quarries Ltd.,*** [1957] Q.B. 169), that is not its essential nature. Perhaps it is most commonly encountered in the context of obstruction of the highway or of a navigable waterway interfering with the public right of passage, but, as the editors of *Clerk & Lindsell* point out in par. 18-05, the scope of public nuisance is wide and the acts and omissions to which it applies are all unlawful. Private nuisance, on the other hand, is only concerned with interference with the use and enjoyment of land and may be committed by doing acts which are not necessarily unlawful in themselves.”

464. There is, in my judgment, no requirement for proximity in proprietary terms although of course such considerations may have a bearing on whether the claimant's damage is special in the sense of being “particular, direct and substantial.” The point is made clear in a recent decision of the Court of Appeal in ***Moto Hospitality Ltd v Secretary of State for Transport [2007] EWCA Civ 764***:

> “60. Mr Holgate seeks to extract two principles from the authorities: first, that the rights interfered with must be "appurtenant" to the claimant's land; secondly, the obstruction must be "proximate". The only reference to "appurtenant rights" in the 19th C Cases seems to be in the argument of counsel for the railway company in ***Walker's Trustees*** (p 267-8). He spoke of the need for the right to have " ... a degree of proximity to the affected property which made it, in a reasonable sense, an appurtenant of the property".
>
> 63. His argument failed, and his use of the term "appurtenant" was not followed by the majority. Lord Selborne mentioned the argument that the access was not "a right so connected with or incident to their real estate" as to give rise to compensation (p 280); but he regarded it as sufficient that the right of access "was direct and proximate and not indirect or remote" (p 285). The argument found a possible echo in the speech of Lord Blackburn, who referred to an action for obstruction of a public way as one for infringement of a right *attached* to the land" (p 298); but he was alone in using that language.

72. In summary, "proximity" appears as a relevant factor in the 19th C cases but not as a distinct test. Thus, for example, Lord Penzance spoke of "proximity to, *or relative position with"* the highway. In so far as one can find a common theme in the speeches, it echoes the common law requirement that the loss must be "particular, direct, and substantial". Thus the claim in ***Walker's Trustees*** succeeded because what had been a "direct, straight and level" access was "altogether cut off', leaving as the only alternative a "distant and circuitous access". Proximity may of course be a factor in deciding whether the damage is sufficiently "direct".

Shell claim[70]

465. The losses claimed by Shell in negligence, ***Rylands v Fletcher*** and nuisance fall under 3 heads:

a) the loss of aviation fuel being stored for Shell in tankage on the WLPS/ UKOP site immediately prior to the Incident (the Lost Fuel Claim);

b) losses suffered as a result of Shell's inability to supply aviation fuel to customers at Heathrow, Gatwick, Luton, Bournemouth and Farnborough airports, save only in reduced volumes and/or at increased cost (the Aviation Claim); and

c) losses as a result of Shell's inability to lift ground fuels by tanker at the HOSL West site in order to supply customers save only in reduced volumes and/or at increased cost (the Ground Fuels Claim).

466. Subject only to the issue of whether Total or HOSL were vicariously liable for the admitted negligence of Mr Nash, the supervisor on duty at the HOSL site at the time of the Incident, it was accepted that there was no defence to the lost fuel claim advanced in negligence. Accordingly no further issue arises on this claim.

467. As regards the Aviation Claim Total contends that Shell is not entitled to sue in negligence[71] for its financial losses arising out of its inability to use the UKOP and West London Pipeline Systems for the transportation of aviation fuel by pipeline to the Terminal, the storage of such fuel there and the transportation of such fuel by pipeline to Heathrow and Gatwick airports and by road to Luton, Bournemouth, and Farnborough airports.

468. Total's position in the List of Issues, adopted by HOSL, is as follows:

> "… if and insofar as physical damage has been caused to assets of which WLPS/UKOP (as the case may be) is the legal owner, then that owner is entitled to bring claims in respect thereof (and any recoverable consequential losses) in its own name against those legally responsible for causing such loss and/or damage. Insofar as such claims are brought in respect of or as a consequence of damage to assets which WLPS/UKOP (as the case may be) holds on trust, then any damages recovered are to be held on trust for the beneficiaries, and apportioned in accordance with the beneficiaries' respective interests. It is not appropriate for a

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[70] Similar issues may arise in regard to the BP claim but I make no specific findings in relation to it.

[71] It appeared to be common ground between Shell and Total that economic loss was not recoverable under ***Rylands v. Fletcher*** but was recoverable in public nuisance, subject to proof of special damage and subject to the issues discussed above. As regards private nuisance the position is in my judgment the same as for negligence: there must be an immediate right to possession of the land the enjoyment of which is interfered with. I do not regard ***Hunter v. Canary Wharf [1997] AC 655*** as affording authority for the proposition that beneficial ownership is sufficient in private nuisance.

> party with a mere beneficial interest, such as Shell alleges it has, itself to bring a claim against the alleged tortfeasor(s) in respect of loss due to physical damage to assets of which it is a beneficial owner, or loss and damage consequential thereto."

469. In short Shell's losses such as the Aviation claim arising out of its inability to use the UKOP and West London Pipeline Systems are said by Total to be pure economic loss and thus irrecoverable.

470. It is convenient to focus first on the "Aviation claim". Certainly, in the event that Shell were unable to establish liability in respect of that claim, it would follow, in my judgment, that the Ground Fuels Claim must fail as well. The Ground Fuel Claim has many similarities to the Aviation Claim the one point of distinction between them being that, whereas Shell was a beneficial owner of the WLPS / UKOP site, it had no beneficial interest in the HOSL West site from where it collected ground fuels in road tankers from Chevron.

471. It was accepted by Shell that English law has long set its face against affording title to sue to a person with merely a contractual interest in property which has been damaged: ***Cattle v Stockton Waterworks (1875) LR 10 QB. 453, Simpson & Co v Thompson (1877) 3 App. Cas. 279***.[72]

472. In more recent years, this pragmatic exclusion has been re-emphasised in two cases of the highest authority. In ***Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter) [1986] AC 1***, Lord Fraser approved the statement of principle constituting the limit or control mechanism to be imposed upon the liability of a wrongdoer towards those who have suffered economic loss on consequence of negligence, as contained in the judgment of Scrutton LJ in ***Elliot Steam Tug Co Ltd v Shipping Controller [1922] 1 K.B. 127 at p.139***:

> "At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right."

473. It was again reaffirmed in ***Leigh & Sullivan v Aliakmon Shipping Co. Ltd (The Aliakmon)[1986] AC. 785*** by Lord Brandon at p.809:

> "My Lords, there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it."

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[72] See also ***Societe Anonyme de Remorquage a Helice v. Bennetts [1911] 1 KB 243***

474. Despite this background, it was Shell's contention that the losses arising under the Aviation Claim could be recovered under one of four related grounds:

a) Shell was entitled to immediate possession of the damaged assets;

b) The claim fell within the exception to the general rule identified in ***Morrison Steamship Co Ltd v Greystoke Castle [1947] AC. 265;***

c) The claim fell within the exception to the general rule identified in ***Caltex Oil (Australia) Pty v The Dredge "Willemstad" (1976) 136 C.L.R. 529***;

d) The exclusionary rule is no longer good law.

475. This last proposition is, in my judgment, not open to Shell in this court and I will say no more about it.

Right to possession

476. In order to assess the merit of the suggestion that Shell had an immediate right to possession of the two pipeline systems it is necessary to start by setting out in summary form the range of agreements between Shell and the WLPS and UKOP relating to the ownership and use of the pipelines.

The WLPS pipeline system

477. The assets comprising the West London Pipeline System included in addition to the pipeline system itself the storage tanks on the WLPS / UKOP site and their associated plant and equipment, as well as all land and other rights of property held for the purposes of the pipelines and tankage.

478. The West London Pipeline System was, pursuant to clause 5.1 of the Deed of Appointment and Acknowledgment, held on trust by WLPS for BP Oil,[73] Downstream, Shell and Chevron as tenants in common in the shares and in the proportions to which they were entitled under the West London Pipeline and Storage Participants' Agreement also dated 31 July 1991. WLPS was itself owned by the same participants in the same proportions. For example it is common ground that as at 11 December 2005, Shell had a 39% beneficial interest.

479. The West London Participants' Agreement governed participation in the management, operation and maintenance of the West London Pipeline System and the methods by which the costs of these activities were to be defrayed. By clause 4.1, WLPS agreed to undertake (directly or through British Pipeline Agency Limited (BPA)) on behalf of the Participants the management, operation and maintenance of the West London Pipeline System.

480. Clause 3.1 provided that the West London Participants were to establish the West London Co-ordinating Committee (the WLCC). The role of the WLCC was (among other things) to make decisions on behalf of the Participants on all matters expressed to be dealt with by the WLCC under the agreement, and to make recommendations to

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73 BP Oil acquired the interest of Mobil Oil Company Ltd in WLPS in about 2000.

WLPS on behalf of the Participants with regard to the management, operation and maintenance of the West London Pipeline System. WLPS was obliged to comply, whenever reasonably practicable, with decisions and recommendations of the WLCC.

481. Clause 6 of the West London Participants' Agreement provided for the establishment of a "notional" tariff for the West London Participants for the storage and conveyance of aviation fuel. The tariff was to be set at a level so as to cover the costs and expenses of operating the West London Pipeline System (less payments made or due from non-Participant users) and a capital charge of 5% and a reasonable rate of return on capital invested.[74]

482. The conveyance and storage of aviation fuel through the West London Pipeline System was, by clause 12.1 of the West London Participants' Agreement, to be subject to Transportation and Storage Conditions published by WLPS. The WLPS Conditions provided (condition 7) that aviation fuel in the West London Pipeline System would be commingled, and that the rights of an owner of aviation fuel in the system would be limited to its deemed stock entitlement, measured in litres at a specified temperature (condition 8).

483. Clause 13 of the West London Participants' Agreement provided, in summary, that Participants would be entitled to use the various parts of the West London Pipeline System. The clause reads as follows:

> "13. USER RIGHTS
>
> 13.1 Participants shall be entitled to use the various parts of the West London Assets as follows:-
>
> 13.1.1 the storage facilities at Buncefield and the pipelines from Buncefield to Perry Oaks
>
> 13.1.2 The pipeline from Longford to Walton on Thames in accordance with the provisions of the Memorandum of Agreement
>
> 13.1.3 in the case of a Participant or Participants having financed such a Modification as referred to in sub-clause 10.3 that part of the West London Assets comprising the Modification
>
> 13.2 If a Participant wishes to use a part of the West London Assets to which it is not entitled under sub-clause 13.1 it must first obtain the approval of WLCC. WLCC shall use every reasonable endeavour to permit the Participant use of the part to which it is not entitled by sub-clause 13.1"

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[74] Although WLPS had established tariffs for non-Participant users, no third party ever used the West London Pipeline System for storing or transporting fuel.

The UKOP Pipeline System

484. The assets comprising the UKOP Pipeline System included collection facilities at various terminals and refineries (including at Shell's Stanlow and Shell Haven facilities), the main line sections of the UKOP Pipelines together with reception facilities and the pipeline control centre at Kingsbury. They also included all lands, buildings, and other rights of property vested in UKOP in connection with the UKOP Pipeline System.

485. UKOP held the UKOP Pipeline System on trust for BP Oil, Downstream, Shell and Chevron as tenants in common pursuant to clause 2 of the Trust Deed. UKOP was itself owned by the UKOP Participants in the same proportions as each participant beneficially owned the UKOP Pipeline System. It is common ground that Shell had a 48% beneficial interest in the UKOP Pipeline System as at 11 December 2005.

486. Recital (B) to the Trust Deed recorded that the parties had entered into a Participants' Agreement, also dated 15 July 1999, with regard to the participation in and the management and operation of the UKOP Pipeline System. In this regard the UKOP Participants' Agreement provided, among other things, that UKOP would (directly or through BPA) undertake on behalf of the Participants the management, operation and maintenance of the UKOP Pipeline System (clause 5.1); that the UKOP Participants would be entitled to unrestricted use of the UKOP Pipeline system (clause 6.1); and that the Participants would meet their share of the costs of operating and maintaining the UKOP Pipeline System in accordance with the principles set out in the agreement (clauses 4.2, 7.3 and 11). The agreement also provided for a Participants' Co-ordinating Committee, with whose decisions and recommendations UKOP was obliged to comply whenever reasonably appropriate.

487. The UKOP Participants' Agreement also made provision for the making available of the throughput capacity of the UKOP Pipeline System to non-participant users (clause 10). However, as in the case of the West London Pipeline System, no third party ever used the UKOP Pipeline System for transporting fuel and thus the UKOP non-participant user tariff was never charged.

488. UKOP was also the legal owner of the Common User Facilities at the Terminal. These facilities comprised roads, electricity cables and various other facilities which provided access and services to the various Terminal sites. UKOP held the Common User Facilities on trust for the Buncefield Common Users. At the time of the Incident, these comprised BP Oil, Downstream, Chevron, WLPS and UKOP, who beneficially owned the facilities as tenants in common in the same proportions as their respective beneficial interests under the Buncefield Common User Agreement. Although Shell was formerly one of the Buncefield Common Users, it had ceased to be so by the time of the Incident.

Operation of the WLPS and UKOP Pipeline Systems by BPA

489. WLPS and UKOP had no employees of their own, and their directors were appointed from among their respective Participants. The WLPS / UKOP site, the WLPS and UKOP Pipeline Systems and the Common User Facilities were all operated by BPA, a company jointly owned by Shell and BP. The UKOP and West London Pipelines and

tankage were controlled by BPA from Kingsbury, with operational support provided by BPA from a control room on the WLPS / UKOP site.

Beneficial ownership

490. It was of course clear that Shell was among the beneficial owners of the pipelines and their associated systems. This as such does not afford any right of recovery. This proposition was explained in the speech of Lord Brandon in ***The Aliakmon*** at p.812:

> "My Lords, under this head Mr. Clarke put forward two propositions of law. The first proposition was that a person who has the equitable ownership of goods is entitled to sue in tort for negligence anyone who by want of care causes them to be lost or damaged without joining the legal owner as a party to the action….In my view, the first proposition cannot be supported. There may be cases where a person who is the equitable owner of certain goods has also a possessory title to them. In such a case he is entitled, by virtue of his possessory title rather than his equitable ownership, to sue in tort for negligence anyone whose want of care has caused loss of or damage to the goods without joining the legal owner as a party to the action: see for instance *Healey* v. *Healey* [I9151 *1 K.B.* 938. If, however, the person is the equitable owner of the goods and no more, then he must join the legal owner as a party to the action, either as co-plaintiff if he is willing or as co-defendant if he is not. This has always been the law in the field of equitable ownership of land and I see no reason why it should not also be so in the field of equitable ownership of goods."

491. It was Shell's case that its aviation claim was not excluded by this principle since it had, it was submitted, possessory as well as equitable title. Since it was manifest that WLPS/UKOP (or perhaps more accurately BPA) had actual possession of the facilities, the nature of the possessory title asserted was a right to possession. If established, would this be sufficient to afford title to sue?

492. The issue first emerged in ***The Winkfield [1902] P 42.*** The claim was by the Postmaster-General in regard to mail bags that had been lost in a collision. The claim was against the non-carrying ship. The issue was whether a bailee in possession had a good claim against a third party for the value of goods lost where there was no liability to the bailor. The Postmaster was treated as a bailee in possession. A point was sought to be taken on the appeal by the ship owners that the appellant had not been in actual possession at the time of the loss. It was held that the point was not open as having not been taken below.

493. The issue re-emerged on appeal in ***Transcontainer Express Ltd v Custodian Security Ltd [1988] 1 Lloyd's Rep. 128***. The appellant sought to rely on an immediate right to possession as being sufficient possessory title, a point again not taken below. The respondents submitted that (if the point could be taken) a mere right to possession did not qualify as possessory title. The Court expressed the view that a right to possession was sufficient having in mind the judgment of Roskill J in ***The Wear Breeze [1967] 2***

Lloyd's Rep. 315 a decision approved in ***The Aliakmon***. Roskill J had there stated at p. 334:

> "In my judgment, the law of this country is and always has been that an action for negligence in respect of loss or damage to goods cannot succeed unless the plaintiff is at the time of tort complained of the owner of the goods or the person entitled to possession of them."

494. This point was again taken in ***The Hamburg Star [1994] 1 Lloyd's Rep. 399***. There were a number of issues arising on a jurisdictional dispute. The goods had been shipped in the form, arguably, of a bailment at will to the shipowners affording an immediate right to possession to the bailor as shipper. Having cited ***Transcontainer*** Clarke J accepted that an immediate right to possession was arguably sufficient to found a claim in negligence. As Clarke J pointed out, the views of Lord Brandon on the topic are clearly set out in ***The Jag Shakti [1986] A.C. 337 at p. 345***.

> "It has further, in their Lordships' opinion, been established, by authority of long standing, that where one person, A, who has or is entitled to have the possession of goods, is deprived of such possession by the tortious conduct of another person, B, whether such conduct consists in conversion or negligence, the proper measure in law of the damages recoverable by A from B is the full market value of the goods at the time when and the place where possession of them should have been given. For this purpose it is irrelevant whether A has the general property in the goods as the outright owner of them, or only a special property in them as pledgee, or only possession or a right to possession of them as a bailee."

495. Shell drew attention to an example of an equitable owner (who would otherwise have no claim) being entitled to sue in negligence by reason of her current possessory rights. ***Healey v. Healey [1915] 1 KB 938*** (referred to by Lord Brandon in ***The Aliakmon***) concerned a claim by a wife against her husband in respect of furniture and household effects held in trust for her as part of the marriage settlement. In a short judgment Shearman J said this at p. 940:

> "I am of opinion that the plaintiff has a title to the immediate possession of the chattels claimed by her, because the trustees of the settlement only hold them in trust to allow them to be used by her, and it is impossible for them to be used by her unless she has an immediate right to claim possession of them from the trustees. I, therefore, hold that the plaintiff is entitled to maintain this action against her husband without joining the trustees of the settlement as parties."

496. ***Healey*** was discussed in ***MCC Proceeds v. Lehman Bros [1998] 4 All ER 675.*** At p.689 Mummery LJ explained:

> "A careful reading of the statement of facts preceding the judgment of Shearman J reveals, however, that the wife was not

> merely the equitab le o wner of the chattels. T hey consisted of furniture and household effects ' in, on or about' the husband' s residence used by her. She had been in actual possession of the chattels when they were taken from her and she was entitled to immediate possession of them….. The case is not authority for the proposition that an equitable title alone suffices to support a claim for co nversion. The decision was squarely based on the wife's title to the immediate possession of the goods claimed."

497. To similar effect Hobhouse LJ said at p. 699:

> "Thus it was the plaintiffs ' pri mary subm ission that ' a person with an equitable interest in goods can sue for conversion as having an immediate right to posse ssion'; or, to put it another way, Macmillan had ' a good cause of action against Lehm an Brothers for dam age to its reversio nary in terest in the sh are certificates'- the ' reversionary interest' referred to being the equitable interest. The second basis for their case thus added nothing to the first. This argum ent was advanced, relying on ***Healey v Healey [1915] 1 KB 938*** and what Sir David Cairns had said in ***International Factors Ltd v Rodriguez [l979] 1 A11 ER 17 at 20-21, [1979] QB 351 at 357-358*** with the concurrence of Bridge LJ. ***Healey v Healey [1915] 1 KB 938*** is not authority for the cited propos ition, indeed it is authority against it as appears from what Shearm an J (at 940) said. The furniture and household effects in question had been rem oved from the house where she was living by the trustee, her husband. She claimed in detinue for their return:
>
> 'Now, the only title which it is necessary for a plaintiff to allege in order to m aintain an action in detinue is a title to the immediate possession of the goods. I am of opinion that the plaintiff has a title to th e imm ediate possession of the chattels claimed by her because the trus tees of the settle ment only hold them in tru st to allow them to b e used by her, and it is impossible for them to be used by her unless she has an immediate right to claim possession of them from the trustees.'
>
> The basis of the cause of action was the wrongful deprivation of legal possession, not the fact th at she was the beneficiary of the trust."

498. I proceed on the basis that an im mediate right to possession, leaving aside any equitable in terest that the claim ant m ay have, does affor d a sufficient interest in property to allow recovery for losses flowing from damage to or loss of the property.

499. Did Shell have a right to imm ediate posse ssion of the pipeline and its associated equipment? In support of an affirm ative answer Shell relied on the following principal matters:

a) Shell (in common with the other participants) had a right to use these assets.

b) WLPS and UKOP managed the assets on the participants' behalf.

c) WLPS and UKOP were obliged to act on instructions from the participants' co-ordinating committees.

d) WLPS and UKOP had no employees.

e) It was open to the participants to terminate the trust and thereafter call for transfer of the assets.

500. It followed, so the submission ran, that the relationship between Shell (and the other participants) on the one hand and WLPS and UKOP on the other was akin to that between, say, bailor and bailee.

501. I am unable to accept this submission:

a) WLPS and UKOP were joint venture vehicles set up with the purpose of holding title to real estate interests at Buncefield owned and pooled by the participants.

b) WLPS and UKOP also were accorded possession of the assets for the purposes of their operation.

c) WLPS and UKOP retained constructive possession but accorded actual possession of the bulk of the assets to BPA.

d) Shell and the other participants were merely entitled to make such use of the facilities in respect of their individual capacity requirements as the various co-ordinating committees (presumably acting on a unanimous basis) allowed.

e) This structure was wholly inconsistent with the right of any individual participant to call for immediate possession of the pipeline systems.

502. In my judgment Shell have in effect no better cause of action than a time charterer and this formulation of the claim must fail.

<u>The Greystoke Castle exception</u>

503. This well known but difficult case concerned a claim by cargo-owners against the non-carrying vessel for a contribution to general average arising out of a collision. The primary issue was whether the cargo-owners had only a derivative claim arising from an obligation to contribute towards the expenditure of the carrying vessel or whether they had a direct claim against the non-carrying vessel.

504. The majority accepted the existence of the primary liability. Lord Porter analysed the matter as follows at p. 296:

> "But it may be said that this is an answer to the contention that the damage is too remote, but does not deal with the allegation that it does not flow from the tortious act but from the contractual relationship between the ship and its cargo. Sir William McNair puts this contention in the words " Liability or

> damage arising from a " contract with a third party gives no ground for a claim for " dam ages in an action for negligence against a wrongdoer " unless the liability or dam age arose from physical injury" to the plaintiff' s pe rson or to property owned by or in the " possession of the plaintiff." For this contention there may be much to be said where the person or thing injured was not engaged, as is cargo when being carried in a ship, on a joint adventure. I do not, however, think it a pplies to su ch carriage. It is true th at general average is not affected by insurance law but the outlook upon the mutual obligation entered into by ship and cargo owners resulting in the undertaking of a common adventure m ay be illustrated by the fact that whereas in non-marine cases there is no loss unless the thing insu red is injured, in m arine insurance cases the loss of the adventure constitutes a loss for which underwriters are liable though the cargo itself be safe."

505. Lord Uthwatt put it this way at p. 310:

> "My Lords, under the law of the sea there is recognized a community between ship and cargo that does not obtain between carrier and custom er on land. This is shown by two well settled princip les. First, if a collis ion cau sing dam age to cargo occurs, and the carrying ship and the other vessel are both in fault, cargo could under the old law recover only a moiety of the damage and under statute can now only recover a due proportion determ ined by the degree of blam e. That conception finds no place in land carriag e, where there would be joint liability for the whol e. Secondly, the liability to contribute to general average expenditure is part of the law of the sea. The principle involved in general aver age contribution is peculiar to the law of the sea and extends only to sea risk s. (Cf. *Falcke* v. *Scottish Imperial Insurance Co.)* The law of the sea apart, n either at law nor in e quity can contribution be obtained on the ground that loss incurred by one person has delivered another from a common danger (see *Johnson* v. *Wild* (2)), or that expenditure incurred by one person has incidentally benefited another (cf. *Ruabon Steamship Co., Ld.* v. *London Assurance* (3).) Agency is not im plied from the circum stances, and there is no equity to claim relief. The sufferer both at law and equity must look to gratitude and not to the courts for his recompense. Under the law of the sea, however, ship and cargo are linked together in the fortunes of the voyage and, in a loose sense, there is in some respects a com pulsory partnership between ship and cargo in resp ect to the venture of sea carriage : Bell' s Principles, 9th ed., s. 437 ; Bell' s Comm entaries, 5th ed., vol. I., p. 534. Section 66 of the Marine Insurance A ct, 1906, aptly refers to the m atter as "the common adventure." A breach of th e duty to take care involving only dam age to the

> ship may therefore be and in my opinion is a breach of duty owed to cargo."

506. This emphasis on the peculiar legal status of claims arising in the marine context is to be contrasted with the much broader analysis of Lord Roche at p. 280:

> "On the other hand, if two lorries A and B are meeting one another on the road, I cannot bring myself to doubt that the driver of lorry A owes a duty to both the owner of lorry B and to the owner of goods then carried in lorry B. Those owners are engaged in a common adventure with or by means of lorry B, and if lorry A is negligently driven and damages lorry B so severely that whilst no damage is done to the goods in it the goods have to be unloaded for the repair of the lorry and then reloaded or carried forward in some other way and the consequent expense is by reason of his contract or otherwise the expense of the goods owner, then in my judgment the goods owner has a direct cause of action to recover such expense. No authority to the contrary was cited and I know of none relating to land transport."

507. Shell contended that the relationship between the participants and both WLPS and UKOP was a paradigm common adventure justifying the conclusion that Shell had a valid claim in negligence for the Aviation losses.

508. The ***Greystoke Castle*** has long presented difficulty in classification. It seems clear that Lord Uthwatt and Lord Porter did not share the broader view of Lord Roche but regarded the matter as concerned with the operation of maritime law. Such a view is reinforced by the comments of Lord Keith in ***Murphy v Brentwood District Council [1991] AC. 398*** at p 468:

> "It being recognised that the nature of the loss held to be recoverable in *Anns* was pure economic loss, the next point for examination is whether the avoidance of loss of that nature fell within the scope of any duty of care owed to the plaintiffs by the local authority. On the basis of the law as it stood at the time of the decision the answer to that question must be in the negative. The right to recover for pure economic loss: not flowing from physical injury, did not then extend beyond the situation where the loss had been sustained through reliance on negligent mis-statements, as in *Hedley Byrne.* There is room for the view that an exception is to be found in *Morrison Steamship Co. Ltd. v Greystoke Castle (Cargo Owners)* (19471 *A.C.* 265. That case, which was decided by a narrow majority, may, however, be regarded as turning on specialties of maritime law concerned in the relationship of joint adventurers at sea."

509. The whole basis of a general average claim is premised on a maritime common adventure:

> **"**66 General average loss
>
> (2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure."[75]

510. The Act goes on to provide that, in the event of a general average loss, the party sustaining the loss is entitled "subject to the conditions imposed by maritime law" to a rateable contribution from the other interested parties (one more of ship, freight and cargo): section 66(3). The loss must flow from an "extraordinary sacrifice or expenditure" incurred for the purpose of avoiding an insured peril: Section 66(2) and (6).

511. This finds no parallel in the field of road transport, or indeed, in any other field. Indeed it is not easy to identify the possible extent of the common adventure exception outside the maritime field.[76] Is a bus passenger in a joint venture with the driver? Is a railway company in a joint venture with the owner of the bridge over which the railway runs? Is a shipowner in a joint venture with a bridgeowner whose bridge regularly lifts to permit the vessel to pass? I think not but in any event I certainly do not regard the owner of petrol as being in a qualifying joint adventure with the owner of the pipeline through which it is at some future stage due to flow. I conclude that ***The Greystoke Castle*** exception affords no assistance to Shell.

Caltex v. Willemstad[77]

512. This well known Australian decision concerned damage caused by dredging to an underwater pipeline that carried crude oil from Caltex's oil terminal on one side of Botany Bay to a refinery on the other side of the bay and also refined product from the refinery back to the terminal. The crude oil was refined for Caltex pursuant to a processing agreement. Further the terminal owned the underwater pipeline. Caltex brought proceedings in negligence to recover the costs incurred in arranging alternative means of transporting the products in the period during which the damage to the pipeline was repaired.

513. Shell submitted that the analogy with the facts of the present case was very close. Indeed Shell adopted as part of its argument the reasoning of the High Court of Australia and in particular the judgment of Stephen J:

a) The use of the pipeline to convey refined products from a refinery to another's terminal was akin to a 'joint venture'.

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[75] *Marine Insurance Act 1906 (1906 c 41)*

[76] See also ***Londonwaste Ltd v. Amec Engineering Ltd 53 Con LR 66***

[77] ***Caltex Oil (Australia) Pty v The Dredge "Willemstad" (1976) 136 C.L.R. 529***.

b) The person to whom the petroleum product was being delivered had a real interest in the pipeline's continued operation despite having no proprietary or possessory interest in it.

c) The position of the pipeline was ascertainable from the charts: its use for conveying crude oil or refined products from terminal to refinery and vice versa could be readily inferred.

d) The damage to the pipeline was in breach of the duty of care owed to the refinery and it should have been apparent that more than one party was likely to be exposed to loss as a consequence.

e) The loss of use had the direct consequence of incurring expense in employing alternative modes of transport.

514. The analogy with the circumstances of the present case were further reflected, it was submitted, in Total's knowledge of Shell's activities at the Buncefield Terminal. In this connection it was submitted and accepted that Total knew *inter alia*:

a) the WLPS / UKOP site was an important junction in the UKOP Pipeline System;

b) it was the point of importation of aviation fuel into the WLPS/UKOP site and was the point of supply for aviation fuel to Heathrow and Gatwick airports;

c) Shell used a tanker loading gantry on the WLPS / UKOP main site to lift aviation fuel for the purpose of supplying it to customers at airports (as did TUKL from around August 2003);

d) in the event of a major accident at the HOSL West site, extensive damage would or might be caused to the HOSL site and the adjacent WLPS / UKOP site with the possible result that each of those sites would be severely damaged and rendered inoperable and Shell would suffer loss as a result.

515. The decision in the ***Willemstad*** was referred to by Lord Fraser in ***The Mineral Transporter***[78]**.** Having expressed the objection that the judgments failed to identify any acceptable let alone workable statement of principle he summarised his view as follows:

> "Their Lordships consider that some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence. The need for such a limit has been repeatedly asserted in the cases, from ***Cattle's*** case, L.R. 10 Q.B. 453, to ***Caltex***, 136 C.L.R. 529, and their Lordships are not aware that a view to the contrary has ever been judicially expressed. The policy of imposing such a limit is consistent with the policy of limiting the liability of ships and aircraft in

78 ***Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd & Anr (The Mineral Transporter) [1986] AC 1***

> maritime and aviation law by statute and by international agreement…
>
> Almost any rule will have some exceptions, and the decision in the ***Caltex*** case may perhaps be regarded as one of the "exceptional cases" referred to by Gibbs J. in the passage already quoted from his judgment, The exceptional circumstances may be those referred to by Stephen J at pp. 576-577 already mentioned. Certainly the decision in ***Caltex*** does not appear to have been based upon a rejection of the general rule stated in ***Cattle's*** case. For these reasons their Lordships are of the opinion that Yeldham J. erred in holding that the time charterer was entitled to recover damages from the defendant in this case." At p.25

516. Shell relied on the observation that almost any rule will have its exceptions and submitted that the circumstances of the present case being so close to that in ***Caltex*** could be regarded as one example. However it is only too apparent that the Privy Council was expressing at best very lukewarm support for the decision even in the Australian context.[79] At the level of the present court, clear and well-known rules should be the predominant ambition of English law principles, the more so where the suggested exception is in turn largely based on the concept of joint adventure which I have already discussed. In my judgment the ***Willemstad*** decision does not furnish an avenue for recovery by Shell.

517. It follows that for all these reasons, Shell's Aviation Fuel claim (and by parity of reasoning its Ground Fuel claim) must fail.

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[79] See also ***Londonwaste Ltd v. Amec Civil Engineering Ltd 53 Con LR 66***

WLPS and UKOP

518. These claimants urged the court to determine the issue posed as "what is the nature of the loss for which WLPS and UKOP are entitled to claim in respect of the loss of use of their facilities ?" The outcome was said to be material to a range of preliminary issues, vis:

a) Which ITF claimants are entitled to claim for loss of use?

b) Is there an overlap between the ITF claimants' claims for loss of use?

c) Does Shell have a claim for economic loss in respect of loss of use?

519. However I have answered the last of these questions to the effect that Shell has no such claim and accordingly any question of overlap does not arise. As regards entitlement to claim for loss of use there was no dispute as to WLPS and UKOP's entitlement to do so.

520. The residual issue is essentially one of quantum. But WLPS and UKOP sought to persuade me that I should trespass on the quantum issue by determining the "nature" of the loss for which WLPS and UKOP were entitled to claim. This was said to lead to the conclusion that the claimable loss was the "economic value" of the loss of use.

521. Posed this way the question is, it seems to me, either tautologous or meaningless. The reality was that WLPS and UKOP put a special meaning on the phrase "economic loss" as being equivalent to loss of the commercial rates for use of the facilities which could have been (but were not) charged to third parties.

522. Total's position is summarised in a letter from their solicitors dated 7 October 2008:-

> "We are not able to agree and do not agree that damages should be assessed by reference to the value that WLPS and UKOP might have charged on the open market for use of their facilities. If the tort had not occurred, WLPS and UKOP would not have sold the use of the facilities on the open market. Nor are we able formally to agree that the damages would represent "the economic value". The reason for that is that "economic value" is not a legally defined term, or a term of art in valuation. But we do agree, as indicated above, that the loss of use requires to be valued and that this should be done in a manner which is appropriate to the facts of the case. There are various ways of valuing a loss of use, which may involve matters such as interest on a capital value, allowances for depreciation and running costs, and so forth. The most appropriate approach in this particular case will largely depend on expert accountancy evidence and is essentially a question of fact tied to the particular circumstances of the case."

523. In my view this dispute, in regard to which WLPS and UKOP claim £105 million, should be determined in due course and not as part of these preliminary issues.

Whether the recoverable claim would have overlapped with all or any part of Shell's claim is immaterial.[80]

Postscript

524. I cannot leave this judgment without expressing my thanks and admiration for the work undertaken by solicitors and counsel in conducting the action. By any standards it was heavy litigation which was completed well within schedule.

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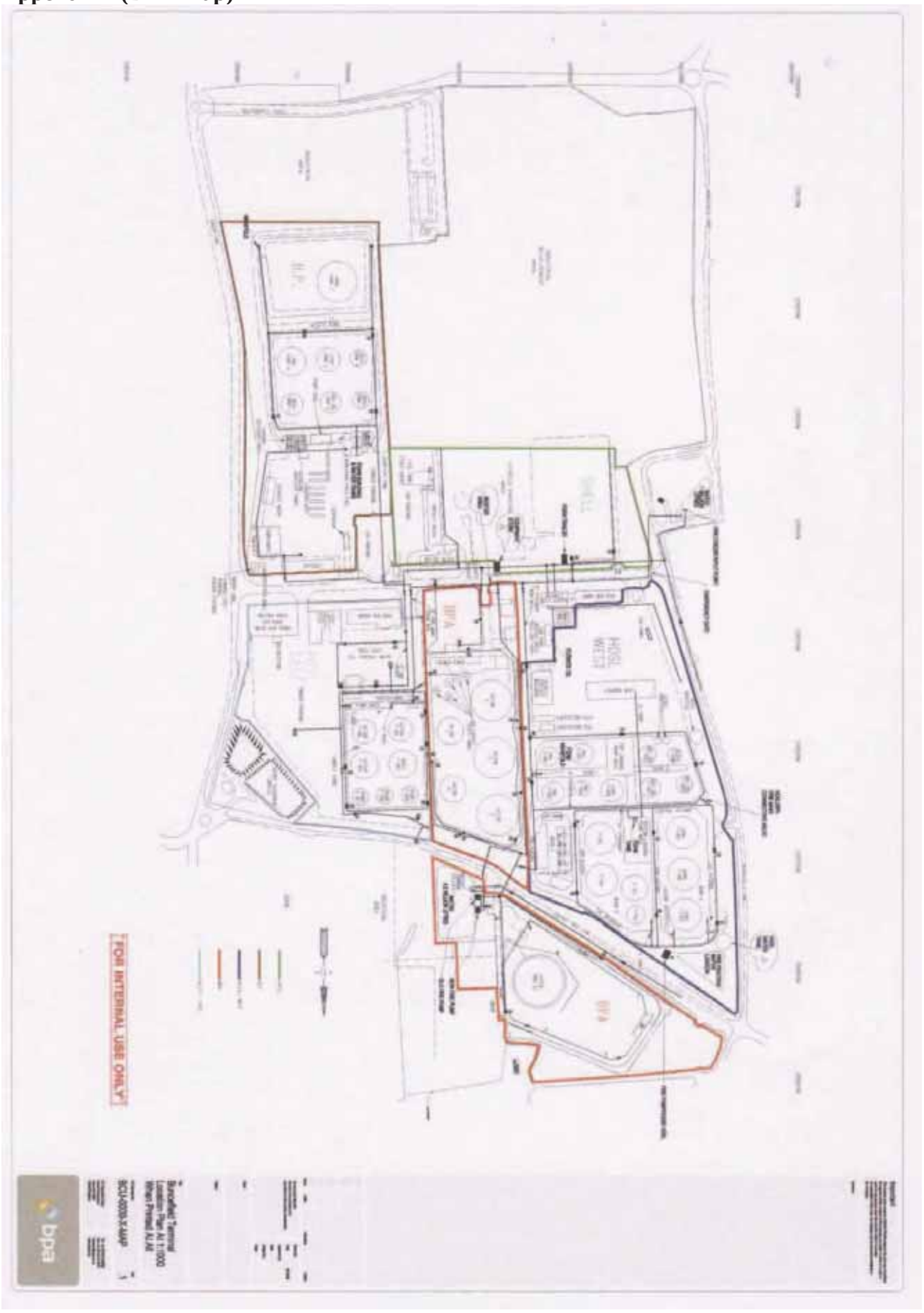
80 Save in the sense that absent a claim by Shell all or part of the claims in respect of loss of use might be said to disappear down a "black hole" if irrecoverable by WLPS/UKOP although I regard this proposition as begging the question: ***GUS Property Management v. Littlewoods (1982) SC (HL) 157.***

Appendix 1 (BPA Map)



Appendix 2

The following actions (including all Part 20 Claim s which have been or m ay be commenced within them) together constitute the Buncefield Actions:

	Folio No.	First Named Claimant First	Named Defendant
1.	2007 No. 1057	Colour Quest Limited	Total Downstream UK plc
2.	2007 No. 1160	Alcon Laboratories (UK) Limited	Total Downstream UK plc
3.	2007 No. 1146	BRE/HEMEL 1 Limited	Total Downstream UK plc
4.	2007 No. 1147	Douglas Jessop	Total Downstream UK plc
5.	2007 No.1149	Colbree Precision Limited	Total Downstream UK plc
6.	2007 No. 1155	Holywell Haulage Limited	Total Downstream UK plc
7.	2007 No. 1153	Schroff UK Limited	Total Downstream UK plc
8.	2007 No. 1150	UK Office Supplies plc	Total Downstream UK plc
9.	2007 No. 1154	John Morley Presentations Limited	Total Downstream UK plc
10.	2007 No. 1148	Steria Limited	Total Downstream UK plc
11.	2007 No. 1157	National Police Improvement Agency	Total Downstream UK plc
12.	2007 No. 1145	ADT Fire & Security Plc	Total Downstream UK plc
13.	2007 No. 1151	West London Pipeline & Storage Limited	Total UK Limited
14.	2007 No. 491	Shell UK Limited	Total UK Limited
15.	2007 No. 1152	BP Oil UK Limited	Total Downstream UK plc
16.	2007 No. 142	Marvell UK limited	Total Downstream UK plc
17.	2007 No. 255	Leonard Paul Myerovitz (1) & Linda Patricia Myerovtiz (2)	Total Downstream UK plc