

# PARTIES' CAPACITIES AND REFERENCES TO NEGLIGENCE IN AN EXCHANGE OF INDEMNITIES



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The dramatic images of the Buncefield fire in the UK in December 2005 demonstrated the destructive power of the release of a relatively small volume of hydrocarbons. The explosion resulted in substantial property damage. Liability for such losses has fuelled litigation between the participant oil companies that used the depot. The depot received fuel by pipeline. On 10 December 2005 one of the storage tanks received unleaded motor fuel but various alarms failed and, following the operational negligence of a Total employee, the tank overflowed. A vapour cloud developed from the spillage of approximately 300 tonnes of petrol. The vapour was ignited and an enormous explosion and fire occurred. A large proportion of the site was damaged, as too were third party commercial and residential properties outside the perimeter of the depot. The operating company, Hertfordshire Oil Storage Ltd (HOSL) was a joint venture company owned by Total and Chevron. There were several agreements which sought to delineate liability between the parties (a management, an operating and a joint venture agreement). The burden was upon Total to identify the contractual provision which gave them an indemnity as operator in respect of their own negligence. The Court of Appeal has now held that Total was not entitled to an indemnity under these contracts (*Shell UK Ltd v Total UK Ltd; Total UK Ltd v Chevron Ltd* [2010] 2 Lloyds Law Rep 467).

The court found that under the management agreement with HOSL, Total was not entitled to an indemnity as the losses were caused by their negligence.

The operating agreement stated that each of the participants would "indemnify and hold harmless and defend each other from... any and all liabilities... whatsoever arising directly or indirectly out of... the death or illness of or injury to any employee... or the loss of or damage to any equipment of property... of such participant, whether or not resulting from... any negligence ... of HOSL or any other Participant." The court was prepared to uphold and give effect to this knock for knock agreement between the participants in respect of their own personnel and property risks. That knock for knock agreement expressly allowed for indemnities in the context of the indemnified party's own negligence.



The agreement also dealt with liability for third party claims and provided to Participants an indemnity from HOSL in respect of all claims by third parties for personal injury or property damage made against participants arising out of or in the course of or by reason of the Terminal Operations, the expectation being that HOSL would be insured. If HOSL were not insured it provided that the Participants would indemnify HOSL as to their respective percentage interest. It did not refer expressly to the negligence of the Participants. The court held that because negligence was not expressly referred to in this element of the indemnity then therefore it was likely to be a deliberate decision by the draftsman to exclude the operation of the indemnity in the event of negligence i.e. if a party were negligent then the indemnity would not bite.

In construing the operating agreement with HOSL, the court held that Total was not provided with an indemnity for its own negligence because (1) that negligence was committed as operator, not as participant and (2) that the indemnity in respect of third party claims was deliberately drafted not to cover a participant in respect of its own negligence.

The joint venture agreement's liability provisions were found to be redundant (given the existence and scope of the operating agreement) but in any event the court held that it was designed to deal with sharing risks as between participants; it would not cover Total's liability in negligence when acting as operator.

#### **SUMMARY**

Parties should be clear as whether and to what extent indemnities apply when parties act in different capacities. If parties to an agreement intend that indemnities should always operate even in respect of their own negligence then the indemnity language used should expressly and consistently refer to negligence. A party seeking to be indemnified carries the burden of proving that any particular indemnity exists and will operate. Ambiguities will be construed against that party. Contract certainty will assist the parties in establishing the extent of their risk and thus enable effective insurance buying decisions to be made.

