Neutral Citation Number: **[2023] EWHC 2662 (Comm)**

Case No: **CL-2020-000729**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **19 October 2023**

Before :

Dame Clare Moulder DBE
Sitting as a Judge of the High Court

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Between :

Bank of Baroda and others	**Claimants**
- and -	
GVK and others	**Defendants**

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Karishma Vora (instructed by **Reed Smith LLP**) for the **Claimants**

Hearing dates: **19th October 2023**

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JUDGMENT

Dame Clare Moulder **Thursday, 19 October 2023**
(**14:10** pm)

Judgment by **DAME CLARE MOULDER DBE**

1. This is the Court's judgment on the claim brought by the First to Fifth Claimants to recover sums advanced to the First Defendant (the "Company") plus interest and fees pursuant to two facility agreements entered into in 2011 and 2014 (the "2011 Facility Agreement" and the "2014 Facility Agreement" respectively and together the "Facility Agreements").

2. The Claimants also claim against the Second to Tenth Defendants pursuant to guarantees and indemnities in the 2011 Facility Agreement, subject to certain financial caps. The Second to Tenth Defendants did not accede to the 2014 Facility Agreement, so there is no claim under guarantees in respect of that facility.

Non-attendance of the Defendants at trial

3. The Defendants' application to adjourn the trial was considered by the Court on the morning of the first day of the trial, 10 October 2023. The Court heard submissions from counsel for the Claimants. The Defendants were not present and were not represented.

4. The Court refused permission for an Indian lawyer to address the Court on behalf of the Defendants on the application for the reasons set out in the judgment given at that hearing ([2023] EWHC 2560 (Comm)).

5. The application to adjourn was refused for the reasons set out in the separate judgment given on 10 October 2023 ([2023] EWHC 2559 (Comm)).

6. When the Defendants then failed to attend the trial on the afternoon of 10 October 2023, following the refusal of the application to adjourn, the Court adjourned the hearing to the following morning to allow the Defendants to be contacted and to attend remotely. However, no one appeared for the Defendants on the morning of 11 October 2023 and, despite a further adjournment at 10.30 and further emails between the Claimants' solicitors and the legal department of the First Defendant, no one appeared for the Defendants when the hearing resumed at 2.00 pm on 11 October 2023 and the Court determined to proceed in the absence of the Defendants pursuant to CPR 39.3. The full reasons are set out in the judgment of the Court dated 11 October 2023 ([2023] EWHC 2558 (Comm)).

7. As a result of their non-attendance on 11 October 2023, no evidence was called for the Defendants. However, the Claimants still need to prove their case. In this regard, I have adopted the approach referred to by Foxton J in *GASL Ireland Leasing A-1 Ltd v SpiceJet Ltd* [2023] EWHC 1107 (Comm):

> "When a trial is not attended by the one of the parties, there is still an obligation of fair presentation on the Claimant. Cresswell J in Braspetro Oil Services v FPSO Construction Inc [2007] EWHC 1359 (Comm), [33], held that the Claimant was required to draw to the attention of the Court "points factual or legal that might be to the benefit of the Defendant". I am satisfied that this has

> been done. I have adopted the same approach in this case as HHJ Waksman QC (as he then was) did in *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm), [14], namely carefully examining GASL's evidence to establish whether it had made out its case to the requisite standard. This has been no "rubber-stamping" exercise."

8. The White Book at paragraph 32.5.3 provides that:

> "Where the Court proceeds with a trial in the absence of a party (Rule 39.3) who has filed witness statements, those statements are not hearsay evidence put in by them. Absent proper hearsay notice in accordance with CPR Part 33, the Court is not obliged to take account of them (*Williams v Hinton* [2011] EWCA Civ 1123 (where the judge took into account such evidence but the Court of Appeal stated he was not obliged to do so).)"

9. As will be apparent from what follows, although this Court was not obliged to take into account the evidence of the Defendants, it has done so both in relation to the expert evidence on Indian law and the accounting evidence.

10. I also acknowledge that throughout the hearing counsel for the Claimants has sought to draw the attention of the Court to points that might be to the benefit of the Defendants. In this regard I allowed her to ask questions in-chief of the witnesses called for the Claimants so that points raised in the evidence of the Defendants' witnesses could be put to the Claimants' witnesses. However, I have confined her submissions and my judgment to the Defendants' pleaded case and have not sought to address in any detail issues which were unpleaded or which were not necessary for my decision.

11. I set out below my detailed reasons for finding that the Claimants have made out their case to the requisite standard, both to demonstrate that this has not been a rubber-stamping exercise and so that this can be of assistance to any judge who may have to consider an application that may be made by the Defendants under CPR 39.3(3) to set aside the order giving effect to this judgment, as to whether the condition in CPR 39.3(5)(c) ("a reasonable prospect of success at the trial") is satisfied.

<u>Indian law evidence</u>

12. On issues of Indian law the Claimants relied on the evidence of Mr Justice Gupte and the Defendants have obtained two reports from Mr Justice Sen.

13. Mr Justice Gupte is a former judge of the Bombay High Court in India, who served as a judge for eight years until June 2021. In 2015, when the Commercial Division of the Bombay High Court was established, he was the first judge appointed as a single judge of the Commercial Division.

14. Mr Justice Gupte produced a report dated 2 June 2023. He also produced a draft of the Table of Agreed and Disagreed issues. In that document, Justice Gupte set out his views by way of a rebuttal to the evidence of Mr Justice Sen in his report of 11 September 2023.

15. The Court has permitted Mr Justice Gupte to put in evidence that part of the draft Table which represents his evidence, consistent with the order of Cockerill J of 4 July 2022 which provided for rebuttal evidence on the part of the Claimants.

16. Justice Sen is a former justice of the Supreme Court of India. He produced two reports dated 23 May 2022 and 11 September 2023, but as his evidence was not put before the Court by the Defendants he was not cross-examined.

17. Similarly, the evidence of Justice Gupte was not tested in cross-examination.

18. For the purposes of determining whether the Claimants have proved their case, the Court has considered the written evidence of Justice Sen and the evidence of Justice Gupte, having regard to the areas of disagreement.

Quantum evidence

19. Mr Ramasubramanian is Group Head, Strategic Solutions Group at ICICI Bank. His evidence is that he has been responsible for this account at the Bank since mid-2018 and had access to the files and documentation relating to it. He provided both factual witness statements on behalf of the Claimants and evidence going to quantum. This evidence was adduced and the Court permitted supplemental questions to be put by counsel for the Claimants in-chief.

20. The Defendants had obtained an expert report from Mr Chilakamarri, a partner in CSCL & Associates, a chartered accountancy firm. I understand from his report that Mr Chilakamarri is a qualified chartered accountant, with over 17 years of experience in the fields of audit and accounting. This evidence was not adduced by the Defendants and the Court is therefore not obliged to take account of it. However, as referred to below, I have taken this evidence into account.

21. As regards the calculations of Mr Chilakamarri, however, his evidence is of limited assistance in that he has taken the balances payable as of 6 May 2021 and these calculations have not been updated.

22. By contrast in his evidence, Mr Ramasubramanian has provided updated calculations to the Court to 10 October 2023.

Background

23. The Claimants are banks incorporated in India but lending through various branches, both domestic in India and abroad.

24. The First to Fifth Claimants are the current lenders under the 2011 and 2014 Facility Agreements. The Fourth Claimant, acting by its Bahrain branch, is additionally the Facility Agent and the Sixth Claimant is the Security Agent. References to the “lenders” in this judgment are to the lenders from time to time under the Facility Agreements.

25. The First Defendant is a company incorporated in Singapore. The Defendants are part of the GVK Group of companies ("GVK"), an Indian conglomerate which operates in the energy, natural resources and transportation sectors in India and elsewhere. The Sixth Defendant, GVK Power and Infrastructure Ltd ("GVK PIL"), is the ultimate parent company of the GVK Group.

26. The 2011 Facility Agreement was entered into on 17 September 2011 (and was subsequentially amended). Under the 2011 Facility Agreement, the lenders agreed to make available to the Company a term loan facility of $1 billion and a letter of credit facility.

27. On 29 September 2011, the First to Seventh Defendants entered into an Equity Subscription Agreement and on the same day the Sixth Claimant and First to Seventh Defendants entered into a Security Agreement.

28. The purpose of the 2011 and 2014 Facility Agreements was to provide part of the funding for the acquisition of the Hancock Companies and the development of their assets into working coalmines with supporting rail and port infrastructure.

29. In the 2011 Facility Agreement, the Second to Fourth Defendants are the "Singapore Parent Guarantors", the Fifth to Sixth Defendants are the "Indian Parent Guarantors" and the Seventh to Tenth Defendants are the original guarantors (together "the Guarantors").

30. The material clauses of the 2011 Facility Agreement for the purposes of this judgment are as follows. By clause 8, the Company was obliged to repay the loans in full by ten approximately equal semi-annual instalments, with the first repayment instalment falling 66 months after the first utilisation date; that is 6 April 2017.

31. Clauses 10 and 11 dealt with the rate of interest, its calculation and the payment dates. Interest was fixed by reference to LIBOR and a margin (and mandatory costs, which are not claimed).

32. Interest was payable on the last day of the three-month term, other than the first period. The margin was amended by letter dated 5 December 2012 to 6% per annum. Clause 10.6 provided for default interest on overdue amounts of 2% per annum above the rate of interest. Clause 10.6(d) provided for compound interest. Clause 10.7 required the Facility Agent to promptly notify the parties of the rate of interest determined.

33. Clause 22.2 provided that it was an event of default if the Company did not pay on the due date any amount payable by it under the 2011 Facility Agreement in the manner required by it, unless the non-payment was caused by technical or administrative error and was remedied within three business days of the due date.

34. Clause 22.28 provided that if an event of default was outstanding, the Facility Agent may by notice to the Company cancel all or any part of the total commitments and/or declare that all or part of any amounts outstanding under the 2011 Facility Agreement are immediately due and payable.

35. The guarantee and indemnity from each Guarantor was set out in clause 17. The obligations applied jointly and severally to the Guarantors, save for the Fifth to Sixth Defendants to which they apply severally, and subject to certain prescribed caps on liability, as increased by the equity subscription deed. A prescribed limitation of liability also applies to the Singapore Parent Guarantors.

36. Clause 48 expressly stated that the agreement was governed by English law.

37. Clause 33.1 provided that the Company must pay to the Facility Agent an agency fee. The fee letter provided for an annual fee of $30,000.

38. In relation to the 2014 Facility Agreement, this was entered into on 26 March 2014 (and amended subsequently) originally for US$44 million and was subsequently increased to allow up to US$250 million. Of this, approximately $160 million was drawn down.

39. Interest was fixed by reference to LIBOR and a margin of 6% was payable (together with mandatory costs, which again are not claimed).

40. The first instalment repayment date matched the 2011 facility, being 5 April 2017, and subsequent repayment instalments were at six-monthly intervals from that date. The agency fee for that facility was $6,000 per annum. The 2014 Facility Agreement was governed by English law and otherwise was the same in the material respects concerning the points in issue for the purposes of this judgment (but without the guarantees having been given).

41. The Company went into default in relation to interest by 2014. Some defaults were remedied. The repayment instalment due on 6 April 2017 was not paid in full. Since then, the Company has failed to pay all the interest due and payable, plus the fees.

42. In relation to the 2014 facility, the first default in payment (disregarding any payments which were regularised) was on 6 May 2015.

43. By letter dated 2 November 2020, the Facility Agent gave notice pursuant to clause 22.28 of the 2011 Facility Agreement to accelerate the loans. The acceleration notice stated in material part:

> "Pursuant to clause 8 and clause 10 of the Facility Agreement, the Company was required to repay (a) the Loans by way of ten approximately equal semi-annual instalments and (b) interest as and when such interest amounts are due.
>
> From 9 February 2015, the Company has failed to make payments of these amounts in full or at all, as required under the Facility Agreement. As a result, in accordance with Clause 10.6 (Interest on overdue amounts) of the Facility Agreement, these unpaid sums have been accruing interest at the default rate since the respective due dates, along with certain fees (the "Outstanding Amount").

> As of September 30, 2020 the Outstanding Amount is US$1,522,229,227.75 and remains due, owing and unpaid from the Company and interest continues to accrue at the default rate accordingly thereon. As a result of the Company's failure to pay the Outstanding Amount, an Event of Default has occurred and is continuing under clause 22.2 ("Non-payment of the Facility Agreement")."

44. The notice continued:

> "In accordance with Clause 22.28 (Acceleration) of the Facility Agreement, we on behalf of the Majority Lenders hereby give you notice that the Loans, together with accrued interest (including default interest) and all other amounts accrued or outstanding under each of the Finance Documents are immediately due and payable. Further, we on behalf of the Majority Lenders hereby demand that the Loans all accrued interest up and to including the date of payment (including default interest) and each such other amount due and owing under the Finance Documents be repaid immediately."

45. By a letter dated 2 November 2020 from the Facility Agent to the Guarantors, the Facility Agent noted the Events of Default and the acceleration notice referred to above and, pursuant to clause 17 of the 2011 Facility Agreement, demanded immediate payment of the sums due by the Company under the 2011 Facility Agreement.

46. An equivalent notice dated 2 November 2020 was given to the Company in respect of the 2014 Facility Agreement. This also relied on the non-payment of amounts due as the relevant event of default entitling the lenders to accelerate the loans.

47. The acceleration notice stated:

> "From May 6, 2015, the Company has failed to make payment of these amounts as required under the Facility Agreement. As a result, in accordance with clause 8.4 (Interest on overdue amounts) of the Facility Agreement, these unpaid sums have been accruing interest at the default rate since the respective due dates (the "Outstanding Amount"). As of September 30, 2020, the outstanding amount is US$220,979,648.31 and remains due, owing and payable by the Company and interest continues to accrue at the default rate accordingly thereon."

48. The background to the Interim Solution Undertaking (as defined below) is set out in the evidence of a meeting note of a meeting held in May 2017 between the lenders under the 2011 and 2014 Facility Agreements and GVK. In March 2016, GVK entered into an agreement to sell a 33% stake in Bangalore International Airport Ltd. GVK offered an interim solution to the lenders, wherein GVK requested approval for the sale of the stake in return for an upfront cash payment and a pledge over 32% of the shares of GVK AHPL, the holding company of Mumbai Airport, plus 16% of the proceeds from a future sale of Bangalore Airport and 32% of the proceeds from a future sale of Mumbai International Airport. The interim solution was implemented in March 2017: the Fourth Claimant as Facility Agent entered into an agreement (the "Interim Solution Undertaking") with the

First and Sixth Defendants and three companies of GVK that were not party to the Facility Agreements. The Interim Solution Undertaking was governed by Indian law.

49. Mr Ramasubramanian in his witness statement provides further background. He says that in about 2015/2016 the accounts of the Company under the 2011 and 2014 Facility Agreements were classed as non-performing assets ("NPAs"). The principal reason for this was that the Company had not been keeping up with its repayment obligations under the 2011 and 2014 Facility Agreements. His evidence was that:

> "with the accounts of the Company being classed as non-performing, the Lenders agreed to enter into negotiations with the Company to try to come to a commercial solution in light of the large and growing sums that were due and payable to the Lenders under the Facility Agreements ("a Comprehensive Resolution")… As a first step in this direction, the Lenders entered into the Interim Solution Undertaking (the "ISU") in March 2017.
>
> One of the key terms of the ISU was that it contained the Framework Solution… This set out a general framework for a Comprehensive Resolution, and … the Lenders and members of the GVK Group had a series of meetings where they tried to reach a Comprehensive Resolution.
>
> However, the parties were not able to reach agreement towards a Comprehensive Resolution. Throughout the period of time that negotiations were ongoing towards the ISU and then towards a Comprehensive Resolution, the Company failed to meet its obligations as set out in the Agreements to repay the loan amounts disbursed… The parties entered into the ISU allowing the Obligors to complete the [Bangalore] sale. A portion of the funds received … following this sale were used to satisfied some of the amounts outstanding under the [Facility] Agreements."

<u>Issues for determination of liability</u>

50. It appears to be common ground that the amounts were lent under the Facility Agreements and not repaid on the scheduled due dates. As referred to below, the Defendants' expert, Mr Chilakamarri, agrees the amount of principal which is currently outstanding.

51. The Claimants have confirmed that for the purposes of this judgment their primary case in relation to the acceleration of both the 2011 and 2014 facilities is based on the Event of Default resulting from non-payment of amounts due. Accordingly, although the Claimants referred in their skeleton to other events of default, namely in relation to the alleged failure to obtain the Australian mining lease and failure to provide security under the 2014 Facility Agreement as events of default, it is, in my view, not necessary to address these.

52. The issues which the Court has to consider in relation to liability are as follows:

    a. whether the acceleration notices were valid;
    b. the effect of the RBI circulars;
    c. force majeure;

d. liability under the guarantees;
e. the limitation period for interest;
f. default interest.

53. Before addressing the issues referred to above, there is an overarching issue which appears to have been introduced in the rebuttal report of Mr Justice Sen. That report appears to go further than the Defendants' pleaded case, in that it appears to introduce a case that the Facility Agreements are governed by Indian law.

54. As Justice Sen's evidence was not adduced by the Defendants and he was not cross-examined, it is not wholly clear whether this was in fact his intention. It is clearly the Defendants' pleaded case that Indian law is relevant to the issue of the effect of the moratorium resulting from the RBI circulars and this is discussed below. The Defendants' pleaded case relying on the RBI circulars goes to the issue of the validity of the acceleration notices and the default interest charged during the period of the moratorium.

55. Indian law is also pleaded as relevant to the implied terms which the Defendants say should be implied into the Facility Agreements and the ISU and is also discussed below.

56. To the extent that Justice Sen was seeking to introduce a wider case, this does not reflect the Defendants' pleadings and can therefore be dealt with shortly.

57. Justice Sen appears to rely on the following factors in support of the proposition that the Facility Agreements should be governed by Indian law:

a. the sending of the acceleration notices and demands under the guarantees by the Facility Agent and security agent to addresses of the lenders in India.
b. the incorporation of the lenders in India.
c. the insolvency proceedings currently taking place in relation to the Sixth Defendant in separate proceedings.
d. the RBI circulars.
e. that the ISU was registered in India.
f. that Indian parties cannot contract out of Indian law.

58. The evidence of Justice Gupte was that the sending of notices does not affect the governing law of the Facility Agreements. Further, not all the parties to the contracts are Indian, so there is no public policy issue as a matter of Indian law which would require the Facility Agreements to be governed by Indian law. Where there is an international element, his evidence was that the parties can choose the applicable law: *Sasan Power Ltd v North American Coal Corporation India* at [26].

> "Therefore, the question whether two Indian companies could enter into an agreement to be governed by the laws of another country would not arise in this case. So long as the obligations arising under the Agreement-I subsist and the American Company is not discharged of its obligations under the Agreement-I there is a "foreign element" therein and the dispute arising therefrom. The autonomy of the parties in such a case to choose the governing

> law is well recognised in law. In fact section 28(1)(b) of the 1996 Act expressly recognises such autonomy."

59. Justice Sen also relied on the case of *TDM Infrastructure Private Ltd v UE Development India Private Ltd*. Justice Gupte's evidence was that this case was limited to Indian companies and had no foreign element.

60. Justice Gupte accepted that foreign branches of Indian banks are subject to Indian banking and company laws in relation to their internal management and compliance, but his evidence was that this does not mean that the Facility Agreements have to be governed by English law. His evidence was that the governing law of an ancillary agreement does not affect the law of the other agreement.

61. In relation to the insolvency proceedings, his evidence was that they would be governed by Indian law, the Indian Insolvency and Bankruptcy Code, but that the initiation of such proceedings does not affect the governing law of the liabilities. The matters of substantive law will be determined in accordance with the governing law of the Facility Agreements.

62. I accept the evidence of Mr Justice Gupte, which is supported by the case law to which he refers.

63. As to the choice of law, applying the Indian case law, in this case a foreign element exists because some of the parties are not Indian companies, so there is no bar to the choice of English law.

64. Although the insolvency proceedings are governed by Indian law, I see no reason why the English Courts would apply the law of one jurisdiction in which the insolvency proceedings happen to be brought as overriding the express choice of law of the parties to govern their contractual arrangements. The insolvency proceedings, in my view, have no bearing on the substantive issues under the English law agreements and the rights of the parties thereunder.

65. There is no basis, in my view, for concluding that the matters relied on by Justice Sen lead to the application of Indian law. In relation to the RBI circulars, the ISU and force majeure, the applicability of Indian law is addressed separately below.

<u>Acceleration Notices</u>

66. In relation to the acceleration notices, the Defendants' pleaded case is that the purported notice was served before 29 March 2022 and without any reasonable notice and was therefore ineffective by reason of the implied terms of the ISU, as set out at paragraph 49 of its Re-amended Defence.

67. In their pleadings, the Defendants say that, notwithstanding its title, the ISU contained legally binding contractual obligations and, pursuant to clause 13, was expressly governed by Indian law. The Defendants therefore pleaded that in the circumstances there were further terms of the ISU which were implied as a matter of Indian law that:

i. The lenders would not be entitled to enforce the Defendants' payment obligations under or connected to the 2011 and 2014 Facility Agreements until 29 March 2022, being the long-stop date under clause 4.1(b)(i) of the ISU for a listing of the shares of GVK ADL, GVK AHPL or MIAL.
ii. Alternatively, the lenders would only be entitled to enforce the Defendants' payment obligations on reasonable notice and in particular, having regard to the purpose and terms of the ISU, a reasonable period was not less than 12 months.

68. It was pleaded that those terms were to be implied into the ISU as a matter of Indian law on the grounds that it was reasonable and equitable, necessary to give business efficacy to the ISU, and (applying the officious bystander test), goes without saying, capable of clear expression and does not contradict any express term of the ISU.

69. Justice Gupte in his evidence explains that Indian law applies a five-point test as to whether or not terms are to be implied. He referred to the authority of *Khardah Company Ltd v Raymon & Co (India) Private Ltd* at [36]:

> "If on a reading of the document as a whole it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed."

70. His evidence was that *Nabha Power Ltd (NPL) v Punjab State Power Corporation Ltd* sets out the test by reference to the case of *BP Refinery (Westernport) Pty Ltd v the President, Counsellors and Ratepayers of the Shire of Hastings*. The conditions to be satisfied are:

i. that it must be reasonable and equitable;
ii. necessary to give business efficacy to the contract;
iii. it goes without saying, ie the Officious Bystander test;
iv. capable of clear expression; and
v. must not contradict any express term of the contract.

71. It was submitted for the Claimants that the ISU is without prejudice to the Claimants' ability to enforce the Facility Agreements and the alleged implied terms contradict clause 18 of the ISU. It was submitted that it is not enough that terms would be implied into the ISU. The Defendants would have to show that such terms were implied into the Facility Agreements.

72. It was submitted for the Claimants that none of the alleged implied terms were reasonable and equitable or necessary to give business efficacy or met the Officious Bystander test. The objectives of the ISU were to facilitate the Bangalore Airport sale and provide that the sale proceeds would be used to make payments under the Facility Agreements. Further, it was submitted that the airports were sold before the dates relied on by the Defendants. Bangalore Airport was sold in 2017 and the sale in relation to Mumbai was agreed in 2020.

73. As referred to above, clause 4.1(b)(i) of the ISU contained a "long-stop date" for a listing of the shares of GVK ABL, GVK AHPL or MAIL and it is this date that the Defendants seek to imply into the ISU as deferring the payment obligations under the Facility Agreements.

74. Clause 18.2 of the ISU provides:

> "The terms and conditions stated in this Interim Solution Undertaking are solely in respect of the Interim Solution, shall be without prejudice to (a) the obligations of GVKCD in relation to the payment obligations of GVKCD pursuant to the Hancock Facility Agreement and the 2014 Facility Agreement and (b) any other transaction/dispute and, subject to subclause 2.3 and 8.5(f) above, shall not be construed as an acknowledgement or waiver by any Bank or 2014 Facility Bank of their rights under the Hancock Facility Agreement and the 2014 Facility Agreement or any other transaction which has otherwise been or may be entered into by the Banks."

The "Hancock Facility Agreement" is there a reference to the 2011 Facility Agreement.

75. The implied term contended for by the Defendants would, in my view, contradict an express term of the ISU, namely Clause 18.2, which expressly preserves the payment obligations under the 2011 and 2014 Facility Agreements. The only express carve-out in clause 18.2 is by reference to clauses 2.3 and 8.5(f). There is no additional carve-out in relation to the IPO referred to in clause 4.1. Further, it has not been shown that it is necessary in order to give business efficacy to the transaction that such a term should be implied.

76. For these reasons, I find that no such term was implied into the ISU and the acceleration notices were not therefore invalid by reason of the alleged implied terms in the ISU.

<u>RBI Moratorium</u>

77. Turning then to the circulars issued by the Reserve Bank of India as a consequence of the COVID epidemic.

78. The Defendants say that on 27 March 2020 and 23 May 2020 the Reserve Bank of India issued two circulars which provided for a moratorium on all commercial term loans for a combined period of five months from 27 March 2020 to 31 August 2020. The material parts of those circulars relied upon by the Defendants provided as follows:

In the circular dated 27 March 2020:

> "In respect of all term loans … all commercial banks … are permitted to grant a moratorium of three months on payment of all instalments falling due between March 1, 2020 and March 31, 2020. The repayment schedule for such loans, as also the residual tenor, will be shifted across the board by three months after the

> moratorium period. Interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period."

The circular dated 23 May 2020 provided:

> "In view of the extension of lockdown and continuing disruption on account of COVID-19, all commercial banks … are permitted to extend the moratorium by another three months, ie from June 1, 2020, to August 31, 2020, on payment of all instalments in respect of term loans…
> Accordingly, the repayment schedule for such loans, as also the residual tenor, will be shifted across the board. Interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period."

79. The Defendants' pleaded case (paragraph 78C of the Re-Amended Defence) is that:

> "As interpreted by the Indian Supreme Court, these moratoriums applied mandatorily to all commercial banks and financial institutions regulated by the RBI (whether in India or not). This includes all the Claimants."

80. Further, the Defendants pleaded (paragraph 78F) that:

> "The effect of the RBI moratoriums was that:
> (1) No commercial banks or financial institutions could declare an event of default <u>within the moratorium period</u>;
> (2) No asset could be downgraded to a non-performing asset during the moratorium period; and
> (3) The moratoriums also banned the charging of: (a) default interest; (b) penal interest or (c) compound interest, during the moratorium period."
> [Emphasis added]

81. Finally, the Defendants pleaded an implied term (paragraph 78D) that:

> "…It was an implied term of the 2011 and 2014 Agreements that the Claimants were all regulated by and had to adhere to the Reserve Bank of India regulations for the purpose of the instant contracts. Such implied term [was that]:
> "The Claimants, whether their branches are located in India or abroad, are subject to the regulatory oversight of the Reserve Bank of India and/or Government of India. The Claimants must abide by any circulars the Reserve Bank of India might issue from time to time or any other mandatory Indian law unless they have specific permission from the Reserve Bank of India or the Indian Government to derogate from those circulars or other law."

82. It was submitted for the Claimants that the First to Fourth Claimants are foreign branches of Indian banks, that the First to Fourth Claimants are subject to regulatory oversight by the Reserve Bank of India, but are not subject to all Indian laws. It was submitted that the moratorium did not extend to foreign borrowers. Further, to the extent the Claimants voluntarily offered the moratorium to the Defendants, the offer was not accepted.

83. It was submitted for the Claimants that the moratorium was only available if the assets were "standard assets", and the assets had already been declared as non-performing assets in 2017 to 2018. There was an additional circular issued on 17 April 2020 by the Reserve Bank of India which made it clear that the moratorium only applied to accounts classified as standard. This is also clear from the FAQs issued by the Reserve Bank of India on 1 April 2020 and the Governor's statement in April 2020, which referred to the categorisation of "standard assets" being those eligible for relief. Further, it was submitted for the Claimants if the moratorium circulars were applicable they did not prevent the lenders from declaring an event of default if the default occurred before the moratorium.

84. As to whether there was an implied term, it was submitted for the Claimants that this is a question of English law, but there was no implied term of the Facility Agreements that they would abide by the RBI circulars. Such an implied term, it was submitted, is not necessary to give business efficacy nor is it "obvious".

85. The evidence of Mr Justice Sen was that:

> "the Claimants are all banks incorporated in India, having registered offices in India, and as such are Indian entities and the foreign branches cannot constitute separate legal entities. The Claimants are therefore bound by all RBI circulars. All business concerns carrying out banking functions fall under the ambit of the Banking Regulations Act, the provisions of which have to be complied with."

86. Mr Justice Sen's evidence was that:

> "it is a cardinal rule of Indian corporate law that branches are parts of the principal entity... The mere fact that any Claimant transacts business through one of its branches located outside India would not change the nature of the obligation on the main entity; a branch is not a separate legal entity."

87. In his oral evidence Mr Justice Gupte addressed certain circulars relied on by Justice Sen to support his opinion that the Claimants would be bound by the RBI circulars. Firstly, in relation to a circular in 2008, Mr Justice Gupte's evidence was that it related to structured financial products which required the prior approval of the Reserve Bank of India and then in 2014, a further circular, which again Mr Justice Gupte said applied only to structured products and, finally, a circular in December 2022 (Operations of subsidiaries and branches of Indian banks in foreign jurisdictions and in IFSCs), which again he said was not applicable.

88. Mr Justice Gupte's evidence was that even if one were to assume that the moratorium in the RBI circulars extended to foreign businesses and foreign jurisdictions, it only applied where the lenders exercised their discretion and he referred to the decision in the *Governor Reserve Bank of India v Velankani Information Systems Ltd*.

89. His evidence was that under the circulars all term loan and cash/ credit/ overdraft accounts were eligible to avail themselves of the benefits under the relief package, provided that

such accounts were standard assets as of 1 March 2020. He said that this was clear not only from the reading of the three circulars, but also specific stipulation to that effect in the circulars of 17 April 2020 and 23 May 2020.

90. His evidence was there was no relief in the circulars requiring avoidance of a declaration of an event of default, either generally or during the moratorium period, when such event of default did not result from non-payment of an instalment during the moratorium. Further, his evidence was that read with the Supreme Court judgment in the case of *Small Scale Industrial Manufacturers Association v Union of India* the circulars do not give any relief from compound/ default/ penal interest generally, but only on instalments falling due during the moratorium period and for accounts which were standard assets as of 1 March 2020, which opted to avail themselves of the benefits of the moratorium.

Discussion

91. The Defendants' case based on an implied term can be disposed of shortly. The test is well known under English law, being that stated by Lord Neuberger in *Marks and Spencer Plc v BNP Paribas*, as referred to in *Duval v 11-13 Randolph Crescent Ltd* at [51] [2020] UKSC 18. The term to be implied must be necessary to give business efficacy to the contract or so obvious that "*it goes without saying*". A way of assessing whether a term is necessary to give business efficacy to a contract is to consider whether without the term the contract would lack commercial or practical coherence.

92. In my view, it is not necessary to give business efficacy to the Facility Agreements to imply a term that the lenders must abide by any circulars the Reserve Bank of India might issue from time to time or any other mandatory Indian law. The lenders will have to comply with whatever regulatory rules apply to them, but this does not mean that the borrower needs to have rights in that regard under the contract in order to give effect to the lending arrangements under the Facility Agreements.

93. In my view, it is not necessary to decide whether the circulars applied mandatorily to all commercial banks and financial institutions regulated by the RBI, whether in India or not, since even if the circulars applied to the lenders, the lenders had a discretion whether to apply the moratorium. This is clear from the evidence of Mr Justice Gupte and the case of *Small Scale Industrial Manufacturers Association v Union of India* before the Supreme Court of India at [25]:

> "…Each lending institution is best placed to assess the requirements of its customers and therefore the discretion was left to the lending institutions concerned."

94. In the event the Claimants accept that ICICI, as Facility Agent, did offer a moratorium to the Defendants. The email read:

> "You may opt for the postponement of interest and principal instalments falling due between March 1, 2020, to May 31, 2020. If you wish to opt for the

> moratorium facility, please revert to your Relationship Manager on email latest by April 5, 2020."

95. However, the Claimants' case is that the Defendants did not respond to the offer to extend the moratorium and there is no evidence before the Court that they responded. Thus, even if the lenders under the Facility Agreements were minded to extend the moratorium, notwithstanding that the loans did not meet the criteria of being standard assets, the Defendants did not elect to take advantage of the moratorium.

96. Even if the moratorium could be applicable, notwithstanding the absence of any election by the Defendants, the Defendants' pleaded case is that the effect was that no commercial banks or financial institutions could declare an event of default <u>within the</u> moratorium period, but in this case the acceleration notice was given after the end of the moratorium period (on 2 November 2020).

97. The Defendants also pleaded that no asset could be downgraded to a non-performing asset during the moratorium period and Justice Sen appears to rely on this in his report.

98. The evidence before the Court is that NPAs include a debt which has remained outstanding or overdue for more than 90 days (as reflected in the RBI circular dated 1 July 2015). However, the evidence before the Court is that the loans in this case had already been downgraded to a non-performing asset during 2015 to 2017, and thus <u>prior</u> to the moratorium period. Further, the moratorium did not apply to NPAs, as is evident by the Q&As and other documents referred to above.

99. Finally, the Defendants pleaded that the moratoriums banned the charging of default interest, penal interest or compound interest during the moratorium period. The Defendants relied on the case of *Small Scale Industries* in which the Court said:

> "Once the payment of instalment is deferred, as per circular dated 27 March 2020, non-payment of the instalment during the moratorium period cannot be said to be wilful and therefore there is no justification to charge the interest on interest, compound interest, penal interest for the period during the moratorium."

100. However, the evidence of Mr Justice Gupte was that the circulars read with the Supreme Court judgment in *Small Scale Industrial Manufacturers Association* do not give relief from compound/ default/ penal interest generally, but only on instalments falling due during the moratorium period. I accept that evidence. It seems to me clear from the judgment in *Small Scale Industries* that interest continued to accrue on amounts throughout the period of the moratorium and only where an instalment of principal had been deferred in the moratorium period would there be no default interest or compound interest on that deferred instalment. The instalments under the Facility Agreements were not deferred by virtue of the moratorium and interest continued to accrue on the unpaid amounts, including default interest.

<u>Force Majeure</u>

101. Turning to force majeure, it was the Defendants' pleaded case (paragraph 78M of the Re-Amended Defence) that in the present case the Defendants became unable to repay the Claimants' loans due:

> "In large part to the catastrophic impact on its receivables as a direct result of COVID-19."

102. The Defendants pleaded that section 56 of the Contract Act 1872 (as interpreted by Indian case law) operated to suspend the Defendants' obligations until the Government declared the force majeure event to be no longer operative.

103. The Defendants pleaded (paragraph 78M):

> "The Government of India has not yet declared the COVID-19 force majeure events to be over. Accordingly, the Claimants' notices of default and accelerations were (a) invalid since they were issued during a period when the parties' rights and obligations were suspended by virtue of the COVID-19 force majeure event and (b) they were premature and in any event did not represent the sums that might have been said to be due by the Defendants. Accordingly, the notices of demand and acceleration are invalid."

104. The evidence of Mr Justice Gupte was that force majeure can arise either by express provision in the contract, a condition subsequent, or implied provision arising under section 56 of the Indian Contract Act 1872, which can result in the frustration of the contract where it becomes illegal or impossible to perform.

105. His evidence (section 51 of his report) was that:

> "the impossibility referred to in section 56 is not only physical or literal impossibility, but also extends to events which strike at the basis of the contract so as to frustrate the practical purpose of the contract."

106. He referred (paragraph 61 of his report) to the Delhi High Court in *Halliburton* where the Court observed that "the question as to whether COVID-19 justified non-performance or breach of a contract ought to be examined in the facts and circumstances of each case, that every breach or non-performance could not be justified or excused merely on the invocation of COVID-19 as a force majeure condition. For that the Court:

> "would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether genuinely a party was presented or is able to justify its non-performance due to the epidemic/pandemic."

107. The Court in *Halliburton* further observed at 70:

> "It is the settled position in law that a force majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in Energy Watchdog, it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a "real reason" and a "real justification" which the Court would consider in order to invoke a Force Majeure clause."

108. Justice Gupte's evidence was also that section 56 of the Indian Contract Act operates as a measure of frustration of a contract, bringing it to an end. His evidence was that it has never been considered in Indian law as a measure operating to suspend contractual obligations as long as the alleged impossibility continues.

109. The Defendants relied on three circulars relating to force majeure. Mr Justice Gupte's evidence was that the three circulars had no application. The first, in February 2020, related to public procurement contracts. The second, in March 2020, was a decision of the Ministry of Home Affairs to treat COVID as a notified disaster for the purposes of the State Disaster Relief Fund. The third circular related to road contractors and public works. His evidence therefore was that these were of no application to the present case.

110. I accept the evidence of Mr Justice Gupte as to the principles of Indian law set out in his report pertaining to force majeure. I accept that the Government of India has not declared force majeure generally in a way which that could apply in relation to these contracts.

111. Further, in my view, on the evidence, COVID-19 and the economic fallout did not strike at the basis of these Facility Agreements, nor did it frustrate their practical purpose, nor cause impossibility of performance. The Company had already defaulted on payments in the Facility Agreements and the loans had been declared as non-performing assets. As referred to above, the non-payments had led to the ISU in 2017 and the discussions that accompanied that. On the evidence before the Court, COVID was not the reason why the facilities had gone into default.

112. Further, I accept that section 56, if it applied, would operate to terminate the contract and does not therefore support the Defendants' case that the obligations were suspended as a result of force majeure.

113. For all these reasons, I reject the Defendants' contention that the Claimants' notices of demand and acceleration were invalid on the basis that they were issued during a period when the parties' rights and obligations were suspended by virtue of the COVID-19 force majeure event.

Liability under the Guarantees

114. In relation to the Guarantees, the Defendants' pleaded case is that the purported demand to the Guarantors was served before 29 March 2022 and without reasonable notice, and was therefore ineffective by reason of the implied term in the ISU. Alternatively, it was pleaded

that the obligation of the Guarantors was to pay on demand any amount due and owing which each obligor does not pay. However, the sum was not due and owing.

115. Further, it was pleaded that given that the purported demand to the Guarantors and the acceleration notice were issued "virtually simultaneously", the sum could not have been due and owing by the Company and/or the Company could not have failed to pay that sum at the time when the purported demand to the Guarantors was issued and/or received. Accordingly, the conditions for the liability of the Guarantors pursuant to clause 17.1 were not met when the purported demand was issued and/or received, and it was therefore ineffective as a demand under clause 17.1 of the 2011 Facility Agreement.

116. Clause 17.1(a) provides (in relation to each Guarantor other than GVK PIL and GVK Natural Resources Private Limited) that:

> "(ii)…whenever each Obligor does not pay any amount when due under or in connection with any Finance Document, that Guarantor must immediately on demand by the Facility Agent pay that amount as if it were the principal obligor in respect of that amount."

117. Further, Clause 17.1(a)(iii) provided that each Guarantor (other than GVK PIL and GVK NRL):

> "agrees with each Finance Party that if, for any reason, any amount claimed by a Finance Party is not recoverable from that Guarantor on the basis of a guarantee then that Guarantor will be liable as a principal debtor and primary obligor to indemnify that Finance Party in respect of any loss it incurs as a result of a Guarantor failing to pay any amount expressed to be payable by it under a Finance Document on the date when it ought to have been paid."

Identical provisions appear in Clause 17.1(b) in relation to the obligations of GVK PIL and GVK NRL (expect that the obligations are several and not joint and are expressly subject to the cap in Clause 17.9).

118. In my view, the Defendants' case based on implied terms in the ISU fails for the reasons set out above.

119. In relation to the Defendants' case that the conditions in clause 17.1 had not been satisfied because at the time the demand was issued under the guarantee the Company could not have failed to pay the amount due is, in my view, dependent on the date on which the debt became due and notices were given, which under the 2011 Facility Agreement is determined in accordance with clause 45.3.

120. The last three instalments only became due once the notice of acceleration had been given by the lenders. If there was a failure to pay the amount on that due date, then the condition in Clause 17.1 ([the] Obligor does not pay any amount when due) is satisfied and the lenders were entitled immediately to make the demand under the guarantee. There was no additional grace period built into the due date for payment.

121. It seems that the acceleration notice in relation to the facility was given to the Company on 2 November 2020 by email, and therefore received on that day (when the email was received). However, the demand under the Guarantee on the Second to Fourth Defendants was also made on 2 November 2020, as it was received on 2 November 2020 (being delivered in person by courier).

122. At that point it seems to me that the Company had not yet failed to pay the amount due on that date and thus the condition had not been satisfied which would entitle the lenders to make the demand under Clause 17.

123. However, in relation to the demand on the Fifth to Tenth Defendants, these were received only on 3 November 2020 and accordingly it seems to me that the condition of non-payment by the Company on the due date had been met and the lenders were entitled to make the demand under Clause 17.1 on 3 November 2020, being the date on which the demand notice pursuant to Clause 17 was given pursuant to Clause 45.3.

124. Further, whether or not I am correct in my interpretation of the guarantee provision in Clause 17.1(a)(ii) and 17.1(b)(ii), the Second to Fourth Defendants are liable under the terms of the indemnity contained in clause 17.1(a)(iii) in respect of "any loss it incurs as a result of a Guarantor failing to pay any amount expressed to be payable by it under a Finance Document on the date when it ought to have been paid."

125. The acceleration notice under the 2011 Facility Agreement was effective to accelerate the remaining instalments such that all outstanding amounts became due and payable by the Company and under the terms of Clause 17 the Guarantors guaranteed the punctual performance of all obligations of the Company under the Facility Agreement. In my view, therefore, the Guarantors are liable under the indemnity for the amounts owing by the Company. In the alternative, there is an indemnity in Clause 34.2 given by the Parent Guarantors in respect of any loss or liability which that Secured Party incurs as a consequence of the occurrence of any Event of Default or any failure by an Obligor to pay any amount due under a Finance Document on its due date. In the absence of any argument to the contrary, this would also appear to apply to the Parent Guarantors in respect of the amount claimed.

Interest - Limitation

126. The Defendants raised in their pleadings a claim that contractual interest which was brought more than six years after the interest became due was time-barred. This was not particularised and in those circumstances, in the absence of the Defendants, I do not propose to consider it further.

Default interest

127. In relation to default interest, the Defendants pleaded that:

> "on the true construction of clause 10.6 of the 2011 Facility Agreement the Lenders have no automatic right to Default Interest …. The Company's liability to pay Default Interest is conditional upon (1) Default Interest being calculated and applied in accordance with clause 10.6 that is to say during the Terms for the overdue amount and not retrospectively and (2) a demand being made by the Facility Agent for the payment of Default Interest…."

128. It was submitted for the Claimants that liability accrues when the amount becomes overdue, but is not payable until it is demanded. It was further submitted that the calculation may be made at any time after the amount is overdue.

129. Clause 10.6 of the 2011 Facility Agreement provides, so far as material, in relation to interest on overdue amounts:

> "If an Obligor fails to any amount payable by it under the Finance Documents, it must immediately on demand by the Facility Agent pay interest on the overdue amount from its due date up to the date of actual payment, both before, on and after judgment…
> ... the Facility Agent may (acting reasonably): (i) select successive terms of any duration of not less than one month and not more than three months; and (ii) determine the appropriate Rate Fixing Day for that Term."

130. A corresponding provision is contained in the 2014 Facility Agreement.

131. The principles of contractual construction are well established: *Wood v Capita* [2017] UKSC 24, at [8] to [15].

132. In my view, the natural meaning of the words are clear when the phrase is broken down into its component parts as follows:

    i. "it must immediately on demand by the Facility Agent pay interest on the overdue amount";
    ii. "from its due date up to the date of actual payment, both before, on and after judgment."

133. The first half of the phrase is the obligation to pay the interest when demanded. The second half is the calculation of the interest which is running or accruing from the due date to the date of actual payment. There would be no meaning attributed to the words "from its due date" if the interest only accrued from the date of demand, and the phrase does not say "from the date of demand."

134. Looking at the natural meaning of the words in their context, this is a professionally drafted contract. There is no reason to infer that the parties intended to state that interest would only accrue from the date of demand.

135. Further, I accept the submission for the Claimants that the Claimants' interpretation is consistent with business common sense. There is no obvious business or commercial reason

why interest on the amount which was not paid would only start to run on that amount when demanded. For these reasons, I therefore conclude that interest accrued on the defaulted amount from the due date until the date of payment.

136. As to the calculation of the applicable rate of interest, the relevant provision states:

> "Interest on an overdue amount is payable at a rate which subject to paragraph (c) below is 2% per annum above the rate which would have been payable if the overdue amount had during the period of non-payment constituted a loan in the currency of the overdue amount."

137. There is no basis in the language of the clause for the Defendants' construction that the rate has to have been determined during the term. Viewing the language in context, it is a professionally drafted contract and there is no basis advanced why the Defendants' interpretation would be consistent with business common sense. The rate is capable of being calculated retrospectively.

138. An additional argument was advanced for the Defendants that the interest would fall foul of the Usurious Loans Act 1918. Mr Justice Gupte's evidence was that the Usurious Loans Act would not be applicable in this case by virtue of section 21A of the Banking Regulation Act. That provides:

> "Rates of interest charged by banking companies not to be subject to scrutiny by Courts: Notwithstanding anything contained in the Usurious Loans Act 1918 or any other law relating to indebtedness in force in any State, a transaction between a banking company and its debtor shall not be reopened by any Court on the ground that the rate of interest charged by the banking company in respect of such transaction is excessive."

139. I accept this evidence which appears to me to provide a complete answer to this point and reject the Defendants' contention.

Quantum

140. Turning to quantum, the amounts claimed as at 10 October 2023 are set out in Re-amended Annex A, which is before the Court.

141. Mr Ramasubramanian clarified in his oral evidence that the date at the bottom of Re-amended Annex A is wrong and that the calculations have in fact been done to 10 October 2023.

142. Mr Ramasubramanian also drew the Court's attention to an error in KRX3, one of the supporting sheets for Re-Amended Annex A, where the amount for Indian Overseas Bank had a period instead of a comma in one of the numbers, but the substantive calculations were unaffected.

143. The process underpinning the figures and totals which are set out in Re-Amended Annex A are that interest payable for each term from the inception of the 2011 agreement to August 2018 was calculated independently by the lenders. From August 2018 to May 2021, the Facility Agent calculated the interest payable and communicated this to the Company for each relevant term. As such, in August 2018 the lenders provided their account statements to the Facility Agent from the inception to August 2018. The Facility Agent consolidated these account statements to provide to the Company the amount of interest payable for each relevant term. The amounts computed by Mr Ramasubramanian have been computed by taking the records of the lenders up to 2018 and thereafter the records of the Facility Agent.

144. Clause 32 of the 2011 Facility Agreement provides that:

> "32.1 Accounts maintained by a Lender in connection with the Agreement are prima facie evidence of the matters to which they relate for the purpose of any litigation proceedings.
>
> 32.2 Any certification or determination by a Lender of a rate or amount under the Agreement will be, in the absence of manifest error, conclusive evidence of the matters to which it relates."

An identical provision is contained in Clause 31 of the 2014 Facility Agreement.

145. In the RFI, the Defendants said that no certificates or determinations had been provided. Alternatively, if they were provided, the Defendants said that they were not conclusively binding as they were subject to manifest error. The Defendants also challenged the interest claimed and raised in particular that the Claimants had failed to account for the sum of US$8,629,029.93 paid by the Defendants to the Claimants and/or that the Claimants have failed to give credit for all sums paid by the Defendants.

146. It was also said that the Claimants had failed to give credit for the mandatory COVID moratoriums on the charging of interest.

147. The evidence before the Court is that certificates as to the rates of interest were provided, but more significantly Clause 32 (and 31 respectively) applies to any determination by a lender of an amount under the agreements. It seems to me that pursuant to clause 32 the accounts of the lenders are prima facie evidence. Further, the amounts claimed by the Claimants have not been treated as conclusive but have been subject to examination by the Defendants' own expert, who agrees the principal amount outstanding.

148. Further, in relation to queries which were identified and raised by Mr Chilakamarri in relation to the interest calculations and in particular the sum of $8,629,029.93 referred to in the RFI, this has now been addressed in the report of Mr Parkar.

149. As to the impact of the COVID moratorium relied on in paragraph 2.2 of the RFI, as set out above, this has been addressed above in this judgment and does not alter or invalidate the calculations of the Claimants in relation to interest for the reason set out above.

Principal

150. In light of the findings above and having regard to Re-amended Annex A, I find that the principal amount sum owing under both facilities at 10 October 2023 is US$1,132,450,591.19.

151. This accords with the Defendants' calculations done by Mr Chilakamarri, bar a very small difference: see paragraphs 19 and 31 of his report. His total was US$1,132,450,594.

152. I note that there has been a partial repayment which was made from the proceeds of the sale of Bangalore Airport which is reflected in the Excel spreadsheets before the Court. I note from the evidence of Mr Chilakamarri that there is no dispute in this regard. At paragraph 29 of his report he said:

> "The Defendants had also paid certain payments out of the sale proceeds of BIAL amounting to US$27 million. These payments were adjusted by the Claimants against both principal and to some balance of interest payable. I observe that principally there is no dispute in terms of this repayment."

Interest

153. In relation to interest, Mr Chilakamarri appeared in his report (paragraph 23) to challenge the method of apportionment of principal and interest.

154. However, Mr Chilakamarri agreed on the principal amount outstanding, which would not be the case if he thought amounts repaid should have been credited against principal which had not been so credited.

155. Mr Chilakamarri was of the view (paragraph 21 of his report) that the Claimants' claim for interest had been overstated by the sum of $8,648,445:

> "I observe that there is a difference in payment of adjusted amounts considered by the Claimants and the amounts of interest that were paid by the Defendants and the amounts of interest that are acknowledged by the Claimants to have been paid by the Defendants. To the extent that the Claimants' claim for interest has been overstated by US$8,648,445."

156. This discrepancy has now been addressed by Mr Parker in the evidence attached to the most recent witness statement of Mr Ramasubramanian.

157. Mr Ramasubramanian has accepted that in his original spreadsheet he did not deal with payments both received and due to the Singapore branch of Bank of India. He now accepts that payments of some $10 million were both received and due.

158. Mr Parker stated that this left a small discrepancy of some $240,000 plus interest, which GVK say they have paid, and he said he could not resolve the discrepancy. However, the evidence of Mr Ramasubramanian to the Court was that on an aggregate basis that amount

had been "more than addressed by the extra credit given by the other lenders if you look at it on a consortium basis".

159. It seems to me that since the specific amount queried by Mr Chilakamarri of US$8,648,445 has now been explained and the necessary adjustment made to the figures for Bank of India in the revised spreadsheets, the amounts of interest are now capable of being approved. I therefore accept that the interest figures provided in Re-Amended Annex A can be accepted as correctly stating the amount owing at 10 October 2023.

160. I therefore find that the amount of interest owing at 10 October 2023 on both facilities is US$1,058,358,139.92.

Agency Fees

161. In relation to agency fees, the Company was obliged to pay an agency fee, which in relation to the 2011 Facility Agreement was $30,000 per annum and in relation to the 2014 Facility Agreement is $6,000 per annum. Those agency fees remain outstanding in the sum of $180,000 and $30,000 respectively.

Conclusion

162. For the reasons therefore set out above, I give judgment for the Claimants in these proceedings. I invite the Claimants' representatives to prepare a draft order which gives effect to this judgment.

163. I will now deal with any consequential matters which the Claimants wish to raise at this stage.