



Neutral Citation Number: [2021] EWHC 2104 (TCC)

Case No: HT-2020-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 30/07/2021

Before :

MRS JUSTICE JEFFORD DBE

Between :

BLACK & VEATCH CORPORATION

Claimant

- and -

KAZSTROYSERVICE GLOBAL BV

Defendant

Roger ter Haar QC (instructed by Duane Morris LLP) for the Claimant
Alex Carless (instructed by Reed Smith LLP) for the Defendant

Hearing dates: 5 and 6 November 2020

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MRS JUSTICE JEFFORD :

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1. This matter arises out of a parent company guarantee (“the PCG”) given by the defendant, KazStroyService Global BV, (“Global”) in favour of the claimant (“B&V”) and guaranteeing the performance of Global’s subsidiary, KSS Petron Private Ltd. (“Petron”). On 1 December 2017, B&V made a demand on the PCG which went unpaid. These proceedings involve B&V’s claim on the PCG and Global’s defence in which it raises Petron’s cross-claims as a defence to any liability to pay under the PCG.
2. By consent the parties agreed to the hearing of what started as a single preliminary issue and became 5 questions and sub-questions for the court. I set these out further below.

Factual background

3. B&V is an engineering and construction company incorporated in the USA. Global is a holding company and, through its subsidiaries, including Petron, provides construction services.
4. By an agreement dated 28 November 2014, B&V and Petron formed an unincorporated consortium to undertake an EPC contract for the Indian Oil Corporation Ltd. The project was the design and construction of the Ennore LNG Regassification Facilities. That agreement is known as the Consortium Agreement and was subject to Indian law. In broad terms, under the Consortium Agreement B&V was responsible for engineering, procurement and commissioning and Petron was primarily responsible for construction and pre-commissioning works.
5. The EPC contract was dated 19 January 2016 and provided that B&V and Petron, as the Contractor, were to carry out and complete the project. The EPC contract was also subject to Indian law.
6. The consortium of B&V and Petron, as the Contractor, took possession of the site in August 2015. It is not in dispute that the project was significantly delayed and that disputes arose between B&V and Petron as to responsibility for additional works and for delays.
7. On 1 August 2017, Petron entered a corporate insolvency resolution process under Indian law and on or about 27 December 2019, Petron went into liquidation. Global’s case, disputed by B&V, is that in the meantime Petron had continued to operate as a going concern.

The Parent Company Guarantee

8. Clause 9.2 of the Consortium Agreement provided that “Upon execution of this Agreement, each Party shall provide a parent company guaranty to the other Party, substantially in the form attached hereto as Appendix E, for its obligations under this Agreement and the [EPC] Contract.” On 14 December 2015, Global executed a PCG in favour of B&V. In the PCG, Global is referred to as the Guarantor; B&V is the Beneficiary; and Petron is the Subsidiary.

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9. The PCG recited, at Recital D, that, pursuant to the terms of the Consortium Agreement, the Subsidiary had agreed to procure the provision of the guarantee and that “At the request of the Subsidiary, the Guarantor has agreed to guarantee performance of the Consortium Agreement by the Subsidiary as set out herein.”
10. The paragraph in issue in this hearing is paragraph 2 which is set out below with additions to indicate the two operative sentences and their parts:

[First sentence][part 1] In consideration of the Beneficiary entering into the Consortium Agreement with the Subsidiary, the Guarantor irrevocably and unconditionally guarantees to the Beneficiary the due, full and punctual performance and discharge by the Subsidiary of all its obligations under or arising from the Consortium Agreement and [part 2] undertakes with the Beneficiary that, whenever the Subsidiary fails to perform or discharge any such obligations when due, the Guarantor shall, on demand by the Beneficiary, perform or discharge or cause the Subsidiary to perform or discharge the obligation in respect of which such failure has occurred. [Second sentence] The Guarantor shall be entitled in or against any demand, action or proceedings by the Beneficiary to raise any equivalent rights in defense of liability as the Subsidiary would have against the Beneficiary under the Consortium Agreement.

11. So far as relevant, the PCG also contained the following provisions:
 - “3. For the avoidance of doubt, the Beneficiary is not required to demand or institute any legal or dispute resolution proceedings against the Subsidiary before making a demand on the Guarantor to perform its obligations under Clause 2.
 4. This Guarantee shall extend to any variation of or amendment to the Consortium Agreement and to any agreement supplemental thereto agreed between the Beneficiary and the Subsidiary and for the avoidance of doubt the Guarantor authorizes the Beneficiary and the Subsidiary to make any such amendment, variation or supplemental agreement.
 5. This Guarantee is a continuing guarantee and accordingly shall cover all of the obligations and liabilities of the Subsidiary under the Consortium Agreement and remain in full force and effect until all the said obligations and liabilities of the Subsidiary shall have been carried out, completed and discharged in accordance with the Consortium Agreement.”
12. On 1 December 2017, B&V made a demand on the PCG. The letter recited the guarantee, alleged breaches by Petron, and Petron’s insolvency. It concluded:

“Therefore, in light of the insolvency proceeding that has been filed by [Petron], and [Petron’s] continued failure to perform or discharge its obligations pursuant to the Consortium Agreement, Black & Veatch hereby demands that KSS Global, as Guarantor, perform or discharge, or cause [Petron] to perform or discharge, the obligations set forth in the Consortium Agreement and EPC Contract. In particular, Black & Veatch requires KSS Global to indemnify (sic) and hold Black & Veatch harmless for all such acts by [Petron] as Guarantor, and remedy the current lack of project and financial resources, improve construction management and supervision at site and improve rates of progress to the required levels and whether such liabilities have accrued or shall accrue in the future.”

The Petron arbitration and the present proceedings

13. In August 2019, Petron commenced arbitration proceedings against B&V under the Consortium Agreement. The seat of the arbitration is Mumbai and the rules are those of the Indian Arbitration and Conciliation Act 1996 (as amended), in accordance with clause 13.1.2 of the Consortium Agreement. At the time of the hearing before me, although a tribunal had been appointed, the arbitration had not progressed further.
14. On 17 January 2020, B&V issued the present proceedings against Global under the PCG. In the Particulars of Claim, and putting it in very short summary, B&V alleges that Petron failed adequately to mobilise resources and supply labour and resources to progress the works and failed to commence and complete its works in accordance with the Time Schedule and Progress Schedule, giving rise to breaches of the Consortium Agreement. B&V then alleges that Global failed, in breach of clause 2 of the PCG, to take sufficient steps to ensure due, full and punctual performance by Petron, and that Global then took over the performance of Petron's obligations on or about 20 January 2017. Paragraphs 20 and 21 of the Particulars of Claim plead that Global "assumed full responsibility" for the performance and discharge of Petron's obligations. Paragraph 22 pleads that Global failed to commence or complete work in accordance with the Time Schedule and the Progress Schedule "in breach of its assumed obligations" under the EPC Contract and the Consortium Agreement and that "consequently, KSS Global continued to be in breach of its obligations under clause 2 of the PCG".
15. The claims made exceed USD 14 million in value. There is virtually no particularisation of this claim. Given one of the arguments that arises on the nature of the claim, it is necessary to set out in a little more detail how B&V's claim is framed:
 - (i) Under the heading "Loss and Damage", B&V pleads first that, as a result of the defendant's breach of contract, B&V has suffered loss and damage. That appears to be a reference back to the breach of clause 2 of the PCG in that Global failed to perform and discharge "those obligations". "Those obligations" in turn refers back to what is described in paragraph 27 of the Particulars of Claim as B&V's demand on 1 December 2017 that Global "perform and discharge the obligations in respect of which it is alleged KSS Petron was in default (namely the entirety of KSS Petron's Scope of Work)". On the face of it, therefore, the alleged breach of clause 2 relates to any and all breaches committed by Petron as at December 2017.
 - (ii) Paragraph 30 alleges that as a consequence of breaches by both Petron and Global, B&V took over and completed Petron's Scope of Work and, as a result, has suffered loss and damage.
 - (iii) Paragraph 31 alleges that B&V suffered further loss and damage as a result of Petron's failure to comply with clause 6.3.4 of the Consortium Agreement. Clause 6.3.4 imposes on the parties an obligation to keep each other fully and promptly informed of all progress, events and matters affecting the Informing Party's Scope of Work.
 - (iv) Paragraph 32 states that B&V refers to and relies upon the indemnities provided by Petron in clauses 8.3.4 and 8.5.1 of the Consortium Agreement:
 - (a) Clause 8.3.4 provides that in the event of a material breach or default, "the Defaulting Party shall indemnify and hold harmless the other Party from all

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Owner and Third Party claims, costs, damages and expenses” incurred as a result.

- (b) Clause 8.5.1 provides that each party accepts full responsibility for its Scope of Works and, subject to specified provisions, agrees to hold the other harmless “from any claim made against the Indemnified Party by the Owner or any Third Party to the extent that such claim arises out of the Indemnifying Party’s Scope of Work or is caused by the Indemnifying Party’s fault or negligence in performing its Scope of Work.”
- (v) Particulars of Loss are then set out. B&V states that it is preparing the Consortium’s Final Bill and that at the date of the Particulars of Claim it has been able to identify that it has incurred “at least the following losses”. Round figures are then set out against the headings: (a) Material procured by B&V on behalf of Petron; (b) Civil work executed by B&V sub-contractor on behalf of Petron; (c) B&V site executed work on behalf of Petron; (d) Additional construction management required to manage works performed on Petron’s behalf and other Global and Petron impacts; (e) Other miscellaneous costs; and (f) overheads.
16. There are 3 further paragraphs in the Particulars of Claim addressing “Additional Claims”. B&V pleads that the project achieved Mechanical Completion approximately a year late. It contends that it is entitled to an extension of time for that delay and entitled to recover prolongation and other delay related costs from the Owner. However, B&V further pleads that if it is liable to the Owner for liquidated damages and/or cannot recover prolongation costs from the Owner, Petron is liable in respect of the same and B&V reserves the right to claim those costs from Global.
17. On 31 March 2020, Global served its Defence. The Defence set out cross claims under the headings (i) “Adjusted BOQ to reflect changes in design”, (ii) “Additional works undertaken by KSS Petron”, (iii) Delay, idling and further works”. Further particulars of the additional works were given in a Schedule to the Defence. Although briefly pleaded, the quantum for all claims in total was alleged to exceed USD 35 million. I was told that these claims are the same as those that Petron seeks to pursue in arbitration.
18. Paragraph 43 of the Defence reads as follows:
- “Pursuant to Clause 2 of the PCG, KSS Global is entitled to rely on KSS Petron’s claims under the Consortium Agreement as a defence to the claims made by B&V under the PCG. In particular, KSS Global is entitled to set-off (a) the full extent of B&V’s liability to KSS Petron under the Consortium Agreement against (b) KSS Global’s liability (if any) under the PCG.”*
- It was clear from this paragraph and the Defence as a whole that Petron’s claims were relied upon as a defence only and not as a counterclaim. Global placed express reliance on clause 2 of the PCG but also asserted that it would be entitled to rely on any defences that Petron might have in accordance with the principle of co-extensiveness, that is, that the liability of the guarantor is no greater or less than the liability of the principal.
19. No general Reply was served because the parties agreed instead to focus on a preliminary issue which went to whether Global is entitled to rely on Petron’s claims as defences to payment under the PCG. Further pleadings limited to these issues were served: (i) a

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Reply on 26 June 2020; (ii) a Rejoinder on 31 July 2020; and (iii) a Surrejoinder on 21 August 2020.

The preliminary issue(s)

20. The hearing of a preliminary issue was ordered by Stuart-Smith J by consent on 3 June 2020 and before the further pleadings. The formulation of the preliminary issue which the parties agreed and was thus ordered was this:

“By operation of the second sentence of paragraph 2 of the Parent Company Guarantee (as properly construed) or otherwise as a matter of law, which of the cross-claims advanced in the Defence is the Defendant entitled to rely upon as defences of the Defendant’s liability in respect of the claims advanced by the Claimant in the Particulars of Claim.”

21. On the face of it this was a short issue of law on the construction of a single sentence of the PCG. It is hardly surprising that the judge raised no concern about the hearing of such a preliminary issue to which the parties had consented or as to the one day time estimate which they had agreed. In particular, the application was made to the judge by putting before him a consent order without any further explanation of the intricacies of the shortly expressed issue or of the issues that might arise from it. What happened thereafter provides a salutary lesson in the pitfalls of preliminary issues.
22. Firstly, the parties proceeded to plead out their cases on the preliminary issue. B&V pleaded in the Reply that it was in the discretion of an Indian court or tribunal whether Petron would be permitted to rely on its cross-claims as a defence of equitable set-off and that a defence of equitable set-off was not, therefore, a right in defense of liability. In any event, B&V contended that the expression “any equivalent rights in defense of liability” meant only such rights as would extinguish B&V’s rights. Further, B&V relied on clause 14.5 of the Consortium Agreement as excluding any right of set-off and on clause 13.3 as providing that Global could only rely on Petron’s claims if Petron were joined to the proceedings. These pleas were responded to and elaborated on in the subsequent pleadings, vastly expanding the apparent scope of the preliminary issue.
23. These pleadings led the parties to identify issues of Indian law. They appear to have agreed to both serve expert evidence on Indian law, on an agreed list of issues, and to have agreed that this court should determine any material issues of Indian law in the course of the determination of the preliminary issue and on the documents. The parties reached this point without any reference to the court and disregarding CPR Part 35.4(1) which provides that no party may call an expert or put in evidence an expert’s report without the court’s permission. Despite that disregard for the CPR, one of the experts, Mr Banerji, was given instructions which purported to be pursuant to CPR Part 35.
24. The parties also formulated a 22 page Statement of Facts – the document was largely agreed but identified where facts were not agreed. The Statement of Facts contained a lengthy statement of background facts relating to the project and, in particular, Global’s alleged taking over of Petron’s role. By the time the matter came before me, however, much of this document was considered to be irrelevant to the issues I was asked to decide. As I have indicated, one issue of fact was whether Global had in fact “taken over” performance of Petron’s obligations – that was an issue I was not asked to and could not

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determine without evidence and I was told, in effect, that I should answer the questions it related to on the basis of an assumption and it appeared that I was being asked, if I thought the taking over point to be relevant, to give alternative hypothetical answers on the basis of the two possible assumptions.

25. Secondly, both parties' skeleton arguments set out the questions that would need to be addressed in order to answer the question posed by the preliminary issue. Mr ter Haar QC on behalf of B&V identified two questions but set out five reasons why the answer to his question no. 2 should be in B&V's favour. Mr Carless, for Global, identified five critical issues that needed to be addressed and/or answered, one of which had three sub-issues. Whilst it was possible, up to a point, to join the dots between these two sets of questions/issues, there remained a distinct lack of clarity as to the scope of what had originally appeared to be a short preliminary issue.
26. That caused me to raise with the parties, in advance of the hearing, the scope of the preliminary issues. That was responded to firstly by a 4 page letter signed by both parties' solicitors which identified that there was a significant issue of fact, namely whether Global had taken over Petron's works, which had emerged as the parties' cases developed; that that issue should not be determined at the preliminary issues hearing; that the issues might be determined without the need to resolve that issue of fact; but if that was not the case it was agreed that there would need to be a further hearing. The letter further set out the issues of Indian law.
27. Counsel then agreed a list of issues which was provided to me on the morning of the hearing – this was largely in line with Mr Carless' issues and was as follows:

Question 1: (a) Does the first sentence of paragraph 2 of the PCG impose primary or secondary obligations on KSS Global? (b) How does the characterisation of the nature of KSS Global's obligations affect the operation of the second sentence of paragraph 2 of the PCG?

Question 2: (a) What is the nature of equitable set-off under Indian law? (b) Is it a "right in defense of liability" for the purposes of the second sentence of paragraph 2 of the PCG?

Question 3: (a) For the purposes of considering whether KSS Petron has a defence of equitable set-off, does the relevant equitable discretion fall to be exercised from the perspective of an Indian court or tribunal or instead by the English court itself? (b) Are the circumstances of KSS Global, as opposed to KSS Petron, relevant for the purposes of considering that discretion? (c) On the facts, does KSS Petron have a defence of equitable set-off (subject to determination of the cross-claims)?

Question 4: Does Clause 13.3 of the Consortium Agreement mean that KSS Global is only entitled to rely on KSS Petron's cross-claims if KSS Petron is joined to the English proceedings and would be bound by the judgment?

Question 5: Would Clause 14.5 of the Consortium Agreement preclude KSS Petron from raising a defence of equitable set-off against B&V had an equivalent claim been brought under the Consortium Agreement?

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28. This judgment addresses these issues but these issues ought to have been formulated well before the hearing and not on the day of the hearing. It will be apparent from what I have said above that this matter was allowed to progress towards a hearing without clarity as to the issues to be addressed; without any reference to the court as to whether they should or could be addressed; with confusion as to the status of questions of fact and foreign law and whether those should be addressed and determined; and without any consideration of the hearing time which, unsurprisingly, exceeded the estimate.

Question 1(a)*The parties' cases: the defendant*

29. Although Mr ter Haar made his submissions on behalf of B&V first, it is convenient for me to set out first Global's position on this issue.
30. Global's case is that the PCG is a classic "see to it" guarantee, that is a guarantee pursuant to which the guarantor undertakes to see to it that another party performs its obligations. If the other party does not do so, the guarantor is put in breach of that undertaking and the beneficiary's remedy lies in damages for breach of the guarantee. The wording of the guarantee which provides for the guarantor to perform or discharge the other party's – in this case Petron's – obligations, is a device to make the guarantor liable for the breaches of the underlying contract by placing the guarantor in breach of his obligations under the guarantee if the underlying obligations are not discharged or performed. Such a guarantee does not contemplate that the guarantor will itself take over performance of the relevant obligations.
31. So far as question 1(a) is concerned, Global's case, therefore, is that its obligations under the guarantee are secondary not primary. The relevance of that categorisation of the nature of the obligation is that where the obligation is secondary the principle of co-extensiveness applies so that the guarantor is entitled to rely on any defence to the claims for breach of the underlying contract which the principal party to that contract would be able to rely on. That would be the position irrespective of the express wording to that effect in the second sentence of paragraph 2 of the PCG.
32. Mr Carless relied on the detailed consideration of the nature of a guarantee (as distinguished from an indemnity) set out by Sir William Blackburne in *Vossloh AG v Alpha Trains (UK) Ltd.* [2010] EWHC 2443 (Ch):
23. *A contract of guarantee, in the true sense, is a contract whereby the surety (the guarantor) promises the creditor to be responsible for the due performance by the principal of his existing or future obligations to the creditor if the principal fails to perform them or any of them. Depending on its true construction, the obligations undertaken by the surety may be no more than to discharge a liability, for example a particular debt, if the principal does not discharge it so that if for any reasons the principal ceases to be liable to pay that debt (it may have been discharged and replaced by some other debt or liability) the surety will not come under any liability to the creditor. The surety's liability in such a case is conditional upon the principal's failure to pay a debt so that if the condition is fulfilled the surety's liability will sound in debt. In contrast to that is the more usual case (sometime referred to as a "see to it" guarantee) where,*

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*on the true construction of the contract, the surety undertakes that the principal will carry out his contract and will answer for his default. In such a case, if for any reason the principal fails to act as required by his contract he not only breaks his own contract, but he also puts the surety in breach of his contract with the creditor, thereby entitling the creditor to sue the surety, not for the unpaid debt, but for damages. The damages are for the loss suffered by the creditor due to the principal having failed to do what the surety undertook he would do. See *Moschi v Lep Air Services* [1973] AC 331 at 344 to 345 (Lord Reid).*

24. *An essential distinguishing feature of a true contract of guarantee – but not its only one – is that the liability of the surety (ie the guarantor) is always ancillary, or secondary, to that of the principal, who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligation. The guarantor is generally only liable to the same extent that the principal is liable to the creditor.”*
33. That last point is the principle of co-extensiveness which does not apply where the contract is truly one of indemnity not guarantee and the “guarantor’s” liability is primary. I note that Sir William Blackburne in his consideration of the difference between a guarantee and an indemnity describes a guarantee in terms which encompass a conditional obligation and a “see to it” obligation, apparently regarding both as giving rise to a secondary liability. On the particular example given the distinction between the conditional obligation and the “see to it” obligation is whether the guarantor’s liability sounds in debt or damages.
34. In *Vossloh*, the guarantor’s obligations were expressly referred to as “primary” but, having regard to the guarantee as a whole, the judge concluded that the obligations were secondary. Similarly in this case, Mr Carless relied on paragraphs 3 to 5 of the guarantee which he submitted were characteristic of the secondary liability of the guarantor. All these points serve to illustrate that the wording of the guarantee is what matters and not any assumed or even identified nature of the liability.
35. In *MW High Tech Projects UK Ltd. v Biffa Waste Services Ltd.* [2015] EWHC 949 (TCC), under a parent company guarantee, the guarantor “as primary obligor” guaranteed the due and punctual performance by the Contractor of all the obligations under the Contract. The guarantee further provided that, in the event of default and on receipt of notice, the guarantor would “perform and fulfil in place of the Contractor each and every term in respect of which the Contractor has defaulted”. Stuart-Smith J, at [14], without any hesitation, described that as a form of guarantee under which the guarantor would be entitled to take every point in defence that was open to the primary obligor.
36. In *Alstom Combined Cycles Ltd. v Henry Boot plc* [2002] TCLR 2, the guarantor guaranteed “that the Contractor will well and truly perform and observe all the obligations, terms, provisions, conditions and stipulations in the Contract ...”. If the contractor failed to perform, the guarantor “shall take over from the Contractor and shall forthwith perform and observe or cause to be performed and observed such obligations”. There does not appear to have been any argument as to the significance of this wording but the judge accepted that a defence of set-off was available to the guarantor.

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37. Mr Carless' point is that where similar wording to that in the PCG has appeared in reported cases, there has been no argument that the guarantee contemplates that the guarantor will in fact perform the guaranteed obligations and do so giving rise to a primary liability. Rather the parties and the judges have proceeded on the assumption that the guarantor's liability is secondary.

The parties' cases: the claimant

38. The case advanced by Mr ter Haar QC for B&V is that the PCG is a somewhat unusual, but commercially meaningful, hybrid in which the guarantor's obligation is either to perform or discharge the underlying obligation itself or cause the Subsidiary to do so. The former obligation is a conditional primary obligation, whereas the latter obligation is of a "see to it" nature and a secondary obligation. The former obligation offers particular benefits to B&V where it is important for works to be carried out and a future claim for damages is no practical substitute.
39. So far as the nature of the guarantee is concerned, B&V's starting point is *Moschi v Lep Air Services Ltd.* [1973] AC 331. In that case, the guarantor had guaranteed "the performance of Rolloswin Investments Limited of its obligations" to pay various instalments. The relevant issue in that case (as summarised by Lord Reid at 344 E-F) was whether, the contract having been brought to an end, by the creditor's acceptance of a repudiatory breach by the debtor, before certain instalments were payable, the creditor could not claim those further instalments from the guarantor as the guarantor had no obligation to pay damages. Lord Reid set out the obligations as follows:

"To meet that argument I think that it is necessary to see what in fact the appellant did undertake to do. I would not proceed by saying that this is a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means. With regard to making good to the creditor payments of instalments by the principal debtor there are at least two possible forms of agreement. A person might undertake no more than if the principal debtor fails to pay any instalment he will pay it. That would be a conditional agreement, There would be no prestable obligation unless and until the debtor failed to pay. There would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceased to have any obligation to pay the instalment on the due date then he could not fail to pay it on that date. The condition attached to the obligation would never be purified and the subsidiary obligation would never arise. On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract. he not only breaks his own contract but he also puts the guarantor in breach of this contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do. In my view, the appellant's contract is of the latter type"

40. There is no doubt that that case is authority for the proposition that any document described as a guarantee is to be construed on its own words. The mere fact that it is

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called a guarantee does not bring with it all the legal consequences of a guarantee and the nature of the obligation may not attract those accoutrements. The decision does not address the question of whether the guarantor's obligation is primary or secondary, although it is referred to as subsidiary which implies the latter, but rather whether it sounds in debt or damages. In particular, the decision did not address the position where a liability to pay arose, so that the subsidiary obligation was "purified", but, for some reason, ceased to exist.

41. B&V, therefore, next relied on *Hyundai Heavy Industries Ltd. v Papadopoulos* [1980] 1 WLR 1129 which concerned a shipbuilding contract. The guarantee given to the builder provided that "*... we hereby ... irrevocably guarantee the payment in accordance with the terms of the contract of all sums due or to become due by the buyer under the contract and in case the buyer is in default of any such payment we will forthwith make the payment in default on behalf of the buyer.*" Mr ter Haar submits that that is of the same nature as the conditional obligation in the guarantee in this case in the sense that Global had agreed itself to perform if Petron did not.
42. In *Hyundai*, the House of Lords concluded that the termination of the contract did not affect the builder's accrued right to payment of instalments of the contract price such that the guarantor was obliged to pay. In the alternative and as it is summarised in the headnote:

"That even if the cancellation deprived the respondents of their accrued rights to payment by the buyers of the second instalment that did not deprive them of the right to have recourse against the [guarantors] for the amount of that instalment in view of the terms of the letter of guarantee." (Emphasis added)
43. The premise of this alternative position was that the cancellation of the contract deprived the builder of an otherwise already accrued right to payment of an instalment and the issue was whether that deprived the builder of the right to claim such payments under the guarantee. Viscount Dilhorne (at 1137F-H) put the question and answer as follows:

"If, contrary to my view, cancellation deprived the builder of his accrued right to payment by the buyer of the second instalment, would that also deprive the builder of the right to have recourse to the guarantors for the amount of that instalment? In my opinion the answer is in the negative. If the terms of the guarantee are such, as they clearly are in this case, as to guarantee payment of that instalment on the due date, the builder had an accrued right to payment by the guarantors. It was conceded that the builder had had an accrued right to payment of that sum by the buyer and by the guarantors. In my view the fact, if it was a fact, that the builder lost his right as against the buyer on cancellation, would not deprive the builder of his accrued right against the guarantors."
44. Each of their Lordships who addressed that issue placed reliance, as might be expected, on the terms of the guarantee pursuant to which the guarantors' obligation to pay arose when the buyer failed to pay the instalment on the due date. Their conclusion, as I have said, was that that obligation was unaffected by subsequent events which gave the buyer a defence to a claim for payment of the instalment. They also relied on the decision in *Hyundai Shipbuilding & Heavy Industries v Pournaras* [1978] 2 Lloyd's Rep 502. In that case, concerning a similar form of guarantee in relation to a shipbuilding contract, Roskill LJ had also emphasised the fact that there was an accrued right to payment under

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the contract prior to termination. It was argued in that case that the buyers would have a right of set-off against the yard and that the guarantor could rely on the same set-off in respect of liability under the guarantee. That argument was rejected:

“I have already indicated what I regard as the factual or business background of these letters of guarantee. It seems to me that, while no doubt like many guarantees they might have been more clearly drafted, one has very little difficulty in seeing that their avowed object is to enable the yard to recover from the guarantors the amount due irrespective of the position between the yard and the buyers, so that the yard gets its money from the guarantors without difficulty if the yard cannot get it from the buyers. Otherwise, if one gave effect to the argument based on the principles to which I have already referred [as to set-off] the commercial utility of this particular form of guarantee would be wholly nullified. I do not think there is anything which militates against giving that construction to these guarantees.” (per Roskill L.J. at 508)

45. I shall consider these authorities further below but, in short, B&V’s submission is that they demonstrate that where the guarantor’s obligation is of the conditional nature, that is to perform if the party whose performance is guaranteed does not, that is a distinct and primary obligation that is unaffected by the position as between the parties to the underlying contract and any defence to performance and/or liability under that contract cannot be relied upon by the guarantor.
46. So far as the authorities relied on by Global are concerned, Mr ter Haar submitted that, in the *MW High Tech* case, there was no claim against the guarantor who had been joined only to give substance to an undertaking in damages. The primary obligor point was not argued and the judge’s observations were obiter. Similarly in *Alstom v Boot* the issue was not argued. The cases are, therefore, of no real assistance.
47. One issue on which B&V’s case was somewhat unclear and was developed in argument was whether B&V could demand which course Global took, that is to perform itself or to cause Petron to perform, or whether that was at Global’s option.
48. In the Rejoinder, at paragraphs 8(1), Global set out its understanding of B&V’s case. At sub-paragraph (a), Global said that it understood B&V’s case to be that, upon default by Petron and following a demand by B&V, Global had the option to cause Petron to perform or discharge the obligation or to perform or discharge the obligation itself. Further, Global understood that B&V’s case was that Global had decided in favour of the latter option. There was no response to that paragraph in the Surrejoinder. However, in his skeleton argument, Mr ter Haar put his case this way: “Importantly, if KSS Petron was in breach of its obligations under the Consortium Agreement, and if required (“on demand”) by B&V, KSS Global was obliged to carry out any obligation undischarged by KSS Petron”. That appeared to involve the proposition that B&V, by the terms of its demand, could dictate whether Global performed or discharged Petron’s obligations or saw to it that Petron did so. In his oral submissions, Mr ter Haar made clear that B&V’s position was that it could demand one alternative or the other; he accepted that the demand had not, in fact, demanded one or other alternative mode of performance, leaving the options open to Global; but, he submitted, that the point was irrelevant since Global had in fact opted to take over Petron’s obligations. As I will come to, I do not regard the point as irrelevant because it remains material to the arguments on the nature of the guarantee.

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49. B&V's case, as I understand it, is rather that Global, having chosen to perform itself, assumed primary responsibility and liability. It seemed to me from the pleaded case that B&V's position was that that assumption of primary responsibility applied to Petron's past obligations and breaches and any future obligations and breaches. That is what, on my reading, appeared from the aspects of the Particulars of Claim set out at paragraphs 15 and 16 above. In the course of the hearing, however, Mr ter Haar clarified that B&V's case was that Global only acquired primary liability for obligations and breaches after it took over performance and he asserted on a number of occasions that B&V's claims in these proceedings were only in respect of Global's breaches after December 2017.
50. What follows, in B&V's submission, from the characterisation of the obligations as primary is that no issue of co-extensiveness of obligations arises and Global could only rely on what might be characterised as its own defences – in particular, it could not rely on any cross-claims that Petron might have had.
51. Thus the only basis on which Global could rely on Petron's cross-claims would be pursuant to the second sentence. B&V's case is that the same principle applies and the clause does not assist Global where its liability is a primary one. If that is wrong, B&V would advance the arguments as to the construction of that sentence which are the subject matter of further issues.

Discussion

52. As Mr Carless submitted, the first part of the first sentence is in the classic form of a "see to it" guarantee. That, it seems to me, sets the scene for the following part of the first sentence in which Global undertakes to perform or discharge the obligation that Petron has failed to perform or to see to it that Petron performs. So does Recital D. The purpose of the guarantee is to guarantee Petron's performance and not to impose an obligation on Global itself to perform. What the words are, therefore, doing is creating a breach by Global, as guarantor, when Petron's obligations are not performed. It is, as submitted, a device to place Global in breach when Petron does not perform. It is unrealistic to read the guarantee as providing two distinct and significantly different obligations in the two elements of part 2 of the second sentence and I do not accept Mr ter Haar's submission that the guarantee contemplates that Global might literally perform such obligations as Petron had failed to perform.
53. In my judgment, and reading the guarantee as a whole, that gives rise to a secondary and not primary liability. The further paragraphs of the guarantee are also consistent with secondary liability. Paragraph 4 which ensures that Global's liability is not discharged by a variation to the Consortium Agreement is meaningful only in the context of secondary liability. Paragraph 5 also provides that the guarantor's liability shall cover all of the obligations and liabilities of the Subsidiary under the Consortium Agreement until those obligations have been carried out, completed and discharged in accordance with the Consortium Agreement. It is possible to read that provision in a way that is consistent with the guarantor taking on the obligations of the Subsidiary under the Consortium Agreement but the far more natural reading is that the clause is referring to the Subsidiary's carrying out, completion and discharge of its obligations under the Consortium Agreement.

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54. As set out above, Mr ter Haar relied on the decision in *Moschi v Lep Air*, citing Lord Diplock at 349B-C, for the proposition that whether a contractual promise is a guarantee so as to attract all the legal consequences depends on the words used and that, in any event, such consequences may be expressly excluded. It is well known that a contract described as a guarantee may on its true construction be one of indemnity. That is the subject matter of the *Vossloh* decision. Similarly, an obligation described as primary may in fact be secondary. None of that is controversial but it does not answer the question as to how the present guarantee should be construed:
- (i) As I have already indicated, although the wording may be less common, it seems to me clearly intended to have the same effect as the more usual “see to it” guarantee – that can be seen from the first part of the sentence. To the extent that the decisions in *MW High Tech* and *Alstom v Boot* are of any assistance, they illustrate a court readily accepting that proposition. In my view, the two alternatives, as B&V would have it, of Global performing or discharging Petron’s obligations or causing Petron to perform or discharge its obligations simply reflect the fact that if Global secured performance by Petron there would be no relevant breach.
 - (ii) There was, as I have explained, some lack of clarity in B&V’s case as to the alternatives or options with B&V’s position ultimately being that B&V could demand that Global itself performed Petron’s obligations. That, in my view, is wrong. Nothing in the wording of the PCG gives B&V the right to demand that Global itself performs Petron’s obligations.
 - (iii) It follows that, even on B&V’s case, there would be an option for Global as to how it fulfils its obligation under the PCG. One option is to “cause the Subsidiary to perform or discharge” the obligation in respect of which default has occurred. On B&V’s case, if Global took the option of performing, its liability would be primary, but if it took the option of causing Petron to perform or discharge, and Petron failed to do so, Global’s liability would remain secondary. The fact that these two options (on B&V’s case) are open supports my view that the options are in reality devices to impose liability on Global.
 - (iv) If they were truly options, it would have the result that, unless Global could rely on the second sentence which I address below, Global would have no incentive to perform obligations already breached by Petron because to do so would be to give away the right to rely on any defences that Petron might have. It is improbable and uncommercial that the PCG would be intended to have that effect.
 - (v) It does not matter to that point what it is alleged that Global, in fact, did, as the issue is one of construction.
55. What is also improbable and uncommercial is the level of complexity that B&V’s construction potentially creates where Global “assumes responsibility” for performance. Mr ter Haar made it clear that B&V’s case was that, where Global took over performance of Petron’s obligations, that could only be prospective. Therefore, Petron remained primarily liable for performance and breach prior to the relevant date of take over and any obligation of Global under the guarantee in respect of such default would be secondary, although it was also submitted that if Global performed that obligation

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Petron's liability would be discharged. Subject to the other arguments advanced, and in accordance with the principle of co-extensiveness, Global would then be able to rely on any defences Petron might have, including any set-off, in respect of such prior default. In respect of any future performance, Global would be liable for its own defaults and only able to rely on its own defences.

56. Any claim against Global would, therefore, need to distinguish between the relevant breaches of secondary or primary obligations. To complicate matters further, say the relevant breach was a failure to perform an aspect of the works by a specified date, Petron would be in breach once it had failed to complete by that specified date. Until those works were completed there would be either a continuing breach or, at the least, continuing consequences of the breach. If Global took over performance at some date, Global would be liable in respect of Petron's breach up to that date (but that liability would be secondary) and Global would become primarily liable for the continuing breach after that date.
57. It is improbable that commercial parties would enter into an agreement – particularly one designated as a guarantee - with such complex and convoluted consequences and I find it impossible to conclude that this is what they intended to achieve by the inclusion of the words “perform or discharge”.
58. I address B&V's claims further below in the context of the arguments about equitable set-off but it is no answer to this point to say that, in these proceedings, B&V's claims are limited to ones for breach of Global's primary obligations post-takeover. I return to the detail of this submission below but it is simply an attempt by B&V to avoid the complexities that arise on its construction of the guarantee but does not meet the fact that it is improbable that commercial parties would intend to enter into a guarantee that could result in the convoluted arguments and distinct liabilities and defences that I have identified.
59. So far as the authorities relied upon by B&V are concerned, they are readily distinguishable:
 - (i) Firstly, each guarantee contained a simple obligation to pay an identified sum – that is different in character from an obligation to perform a complex contract and in no instance did the guarantee also contain an express “see to it” obligation.
 - (ii) The construction given to the guarantee containing this simple obligation to pay was then founded in the commercial purpose of the guarantee which was to secure payment of instalments to the builder/yard/ etc. whatever the position between them and the buyer. There is no such commercial purpose here and the commercial context points to a different construction.
 - (iii) In these cases, in any event, the beneficiary had an accrued right to payment and the guarantor had an accrued correlative obligation to pay. In the present case, there could be no accrued obligation to perform since, at best, the guarantee offered that as an option.
60. I should add two matters for completeness. Firstly, B&V's case appears to be that Global was not merely entitled to perform the obligations which Petron had failed to perform but rather to take over in its entirety the performance of the obligations under the Consortium Agreement. The PCG says nothing to that effect. It is conceivable that B&V

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could make repeated demands under the PCG in respect of successive breaches to which Global responded by performing each obligation but that is not, on any view, what happened on the agreed facts.

61. Secondly, Mr Carless also identified significant practical and legal objections to, or obstacles to, Global performing Petron's obligations. Some of these involve issues of fact and law. Mr Carless submits, for example, that Global would require various regulatory approvals without which its performance of the works would be unlawful in Indian law and that of the EPC by Global rather than by Petron could amount to a breach of the EPC (without the agreement of the Owner which was, as a matter of fact, not obtained). He submits that these matters are agreed between the Indian law experts to whom I refer below. It is not necessary for me to determine any of these issues and, indeed, I could not determine the questions of fact, but the short point is that it is inherently unlikely that the parties would have entered into an agreement which had the potential to raise these practical issues.
62. All these matters point towards the liability of Global to perform or discharge the obligations that Petron has failed to perform being a secondary liability which, in the normal course, sound in damages.

Question 1(b)

63. In the Reply, at paragraph 19.2, B&V pleaded that, Global having assumed responsibility for the works, Petron had no defences of liability in respect of claims for which Global was directly liable and as such there were no "equivalent rights in defence of liability" available to Petron which Global could raise in defence of claims under the PCG. In other words, on B&V's case, the second sentence was of no effect where Global's liability was primary. The Reply went on to set out the case that Petron would, in any event, have no defence of set-off under the Consortium Agreement to B&V's claims. The Reply did not otherwise address the position where the liability was secondary either on the true construction of the guarantee or in respect of breaches prior to "take over". In the Surrejoinder, B&V expressly denied that the principle of co-extensiveness (which was summarised in the Rejoinder) applied. Without prejudice to that contention, B&V denied that Global was entitled to rely on such a right in circumstances where the parties had agreed clear wording setting out the rights and obligations of Global as guarantor. That might be read as an assertion that even if the principle applied, the extent to which it could be relied upon was defined by the second sentence.
64. By the time of submissions in reply, a comprehensive note of which was provided to me, B&V's position was further articulated:
"Thus the second sentence only becomes relevant at all if and to the extent that a secondary obligation is being considered. In that situation, the second sentence defines the defences available to Global in response to a claim based upon a secondary obligation."
65. B&V's first submission then is that the second sentence plays no part if Global's liability is primary. Given my conclusion that the liability is secondary, it is unnecessary for me to decide whether the second sentence would take effect where the liability was primary.

Question 2*The formulation of the issue*

66. I have made my observations about the unsatisfactory way in which the scope of this hearing was expanded and the more extensive issues formulated. This question (2) does not seem to me to capture what the parties sought to argue. The issues seem to me to be whether the second sentence operates to limit the extent to which the principle of co-extensiveness applies and, if so, what is the true construction of that limitation. If that issue is turned round, then the question becomes what “defences” Global may rely upon and specifically whether they may rely upon the pleaded set-off of Petron’s cross-claims.
67. In my judgment, the second sentence makes express the principle of co-extensiveness. Although it might have been differently worded, it is intended to make express the principle that the liability of the secondary obligor can be no greater than that of the primary obligor. In simpler language it is intended to say that Global has whatever defences Petron has and that may include an equitable set-off.

A “right in defense of liability”

68. If I am wrong about that, and in any event, I address the meaning of “an equivalent right in defense of liability”.
69. The PCG is itself subject to English law. Therefore the meaning of the words “right in defense of liability” must, in the first instance, be construed as a matter of English law.
70. Given their natural meaning, it seems to me quite clear that the words mean any right which can be relied on to defend liability or, as Mr Carless put it, a claim to liability. I address this issue further below but, at first blush, that would encompass what, in English law, would be an equitable set-off. If a defendant raises a defence of equitable set-off and the court concludes that the test for an equitable set-off is met – that is the formal and functional elements as they are described in *Geldof v Simon Carves* [2010] EWCA Civ 667 - then the defendant has a right of set-off in defence of a claim. That would then be “a right in defense of liability”. That is consistent with the view of George Leggatt QC, then sitting as a Deputy High Court Judge in *Fearns v Anglo Dutch Paint and Chemical Co Ltd*. [2010] EWHC 2366 (Ch) at [21], and Hamblen J in *Stemcor UK Ltd v Global Steel Holdings Ltd*. [2015] EWHC 363 (Comm), both of whom regarded an equitable set-off as “a substantive defence” (at [34] to [37]). Further, I can see no reason to construe “right” in this context as limited to a right of legal set-off.
71. I do not accept Mr ter Haar’s argument that a set-off cannot be a defence to liability either to perform or to see to it that someone else does so. Although I do not dispute that one might talk about a liability to do something, the word “liability” is as commonly, if not more commonly, used to refer to the liability that arises in the event of failure to perform – Mr Carless’s “claim to liability”. In the context of a guarantee which bites in the event of default of the Subsidiary, that meaning is the more likely. Further, set against the legal background of the principle of co-extensiveness, far clearer wording would be needed to disapply that principle and limit the guarantor to relying on defences to the obligation to perform in the first instance as opposed to defences that could be relied upon in defence of liability for default.

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72. That also deals with B&V's argument, alternatively or differently expressed, that the second sentence limits the matters that Global may raise in defence to those that would extinguish Petron's liability. As Mr ter Haar put it at paragraph 40 of his skeleton argument: *"If KSS Petron could argue that it had no liability to carry out the relevant works or to supply materials, then KSS Global can put forward the same arguments."* B&V's case, therefore, appears to be that the sentence would only operate for the benefit of Global (a) if Petron had no obligation to perform (as in Mr ter Haar's example) or (b) Petron had an obligation to perform and/or liability for breach had arisen but Petron had some defence which relieved it of the obligation to perform or extinguished the liability. The scenario in (a) makes no sense. If Petron had no obligation to perform, there could be nothing for Global to guarantee and no basis on which B&V could claim under the guarantee. Global would simply be raising its own defence and not a defence of Petron. Scenario (b) departs so far from the principle of co-extensiveness that it would, as I have already said, require much clearer language to have the effect contended for. I can see nothing in the sentence that leads to that conclusion that that is its effect.
73. Some reliance was placed on the decision in *Fearn* and the statement at [25] that: *"I do not think it is right to regard either the existence or the exercise of a right of equitable set-off as having the effect of extinguishing or reducing the liability of either party to the other"*. That is only material to the argument that an equitable set-off does not extinguish liability and, in my view, that issue does not arise in this case.
74. In any event, the issue in *Fearn* was the date at which an equitable set-off could, to put it in simple terms, be regarded as operating. The judge's view was derived from three reasons or lines of authority to that effect. As to the second line of authority he concluded at [30]:

"This line of cases shows that in order for an equitable set-off to arise it is not necessary that the claim which is relied on as a set-off should be valid (on a true analysis of the law and the facts) but only that the claim should be asserted reasonably and in good faith. This being so, it cannot be the case that the exercise of a right of equitable set-off has the effect of extinguishing or reducing the other party's claim; otherwise a liability could be extinguished by a cross-claim which, although asserted reasonably and in good faith, turned out to be invalid."

From that passage it can be seen that what the judge was concerned with was the effect of the raising of the defence of equitable set-off and not its determination. That is similarly clear from [34] where he observes that if the mere existence of a right of set-off, even if not exercised, had the effect of extinguishing or reducing cross-liabilities it would create uncertainty and injustice and that *"It would be equally damaging to commercial certainty if it were the law that the assertion of a set-off has the effect of retrospectively reducing or extinguishing the cross-claim."*

75. At [50], the judge summarised his conclusions as follows:
"(1) Where one party has a claim against another party who has a cross-claim, the two claims cannot be netted off so as to extinguish each liability to the extent of the other except by agreement or a judgment of the court and once both liabilities have been established by agreement or judgment. (3) ... where two claims are (i) made reasonably and in good faith and (ii) are so closely connected that it would be manifestly

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unjust to allow one party to enforce payment without taking into account the cross-claim, neither party may exercise any rights contingent on the validity of its claim except in so far as it exceeds the other party's claim (equitable set-off). (4) Under CPR r 40.13 and the court's inherent jurisdiction, the court has a discretion to order any judgment to be set-off (in the sense of netter off) against any other such sum. The date at which such a set-off should be effected is the date on which the existence and amount of the two liabilities is established."

76. As Mr Carless submitted the decision in *Fearn* is authority not for the proposition that an equitable set-off does not extinguish a claim or liability but that it does not do so until the cross-claim is set-off by the court or tribunal. Paragraph 25 read properly and in context is referring to the raising of a cross-claim as an equitable set off and not to the position where it is given effect by the court. Even if I had formed a different view about either the applicability or the meaning of the second sentence, therefore, I would still have concluded that an equitable set-off could, in due course, extinguish a liability. Further, I note that, despite the conclusions as to the date on which this occurred, the judge referred to a right of equitable set-off even when speaking of raising the defence. That seems to me to be consistent with the natural meaning of the words in the PCG and not with more limited interpretation which B&V seeks to place on "right in defense of liability".

A defence in Indian law?

77. The second issue between the parties is more nuanced. The Consortium Agreement is subject to Indian law. It follows that any question of whether a matter can be relied on as "a right in defense of liability" must raise the question of whether the matter can be raised to defend liability under the Consortium Agreement and that must be a matter of Indian law. This is how the parties reached the point of obtaining expert evidence on Indian law and asking this court to determine issues of Indian law.

The Indian law evidence

78. Before I turn to the evidence on Indian law, I will address sub-paragraph (a) shortly. This sub-paragraph asks an academic question and I decline to answer a question which involves some general description of the character of a legal concept in Indian law.
79. The two expert jurists instructed are: (i) for B&V, Mr Gourab Banerji, a Senior Advocate and Barrister of many years standing, practising in the United Kingdom from Essex Court Chambers and (ii) for Global, Justice J N Patel, formerly a Judge of the High Court of Bombay in Mumbai and thereafter Chief Justice of the High Court of Calcutta at Kolkata. Both produced reports and agreed a Joint Memorandum.
80. Both the reports and the Joint Memorandum responded to six questions formulated by the parties. Questions 1 and 2 were as follows:

"Question 1

What are the requirements for a defence of equitable set off under Indian law?

Question 2

Is equitable set-off a substantive defence of liability in Indian law?

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81. As to question 1, the experts were broadly in agreement. They agreed the following points (as expressed by Mr Banerji in the Joint Memorandum):
- (i) *“The concept of equitable set-off is founded on the fundamental principles of equity, justice and good conscience”.*
 - (ii) *“Such mutual debts and credits or cross-demands to be available for extinction for way of equitable set off must have arisen out of the same transaction or ought to be so connected in their nature and circumstances so as to make it inequitable for the court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of this own.”*
 - (iii) *“When a plea ... in the nature of equitable set off is raised, it is not done so as of right, and the discretion lies with the court to entertain and allow such plea or not to do so. The discretion has to be exercised in an equitable manner.”*
82. Each of the experts set out further propositions which the other recorded that he did not disagree with. The experts did not disagree that an equitable set off is different from a legal set-off; that it would not be allowed where a protracted enquiry was needed for determination of the sum due; and that it should be supported by adequate documentary evidence. Justice Patel also stated that “the principle is made applicable even in those cases where the cross-claims is for an unascertained sum like that of damages but arising out of the same transaction provided the aforementioned conditions are fulfilled and it suits the convenience and mechanics of the litigation.” Mr Banerji did not disagree with that last proposition.
83. There was no such agreement on question 2 and it is convenient to set out the summary of the experts’ views in the Joint Memorandum:
- “9. The Claimant’s Expert is of the opinion that an equitable set off is not a substantive defence of liability under Indian law. In his view, when a plea in the nature of equitable set off is raised, it is not done so as a right and the discretion lies with the court to entertain such a plea or not to do so. Accordingly, the Claimant’s Expert asserts that it does not give rise to a substantial legal right but merely vests a discretion in the Court. Further, the Claim of equitable set off does not give rise to a substantive defence of liability but is rather an independent cross-claim which may reduce the quantum of the Claim.*
- 10. The Defendant’s Expert is of the opinion that unlike legal set off, equitable set off is a substantive and an equitable defence of liability. His conclusion that an equitable set off is a substantive defence is based on his assertion that a cross-claim can be relied on to form a defence of an equitable set off even if it is time barred, ie even if it could not be raised in an independent suit.”*
84. It is thus common ground that the defence of equitable set-off exists in Indian law. As I have said above, the meaning of the phrase “a right in defense of liability” is a matter of English law and the issue for this court would be whether the defence in Indian law met that description. In my judgment, the defence of equitable set-off in Indian law falls within that description and could, therefore, be relied upon as a defence to liability within the second sentence. Even if the question is posed as one of Indian law, I would give the same answer that it is, in principle, a “right in defense of liability”.

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85. The response, at least of the Claimant's expert, seems to have assumed that the issue was whether there was a defence "as of right" in Indian law. That gives a meaning to the phrase which, in my view, it does not have.

Discussion

86. The starting point is that a defence of equitable set-off is available in Indian law. It is not in the nature of a defence to liability that can be relied on as of right because the court retains an element of discretion as to whether a defendant should be entitled to rely on a cross-claim as an equitable set-off.
87. That position is, in principle, in no way different from the position in English law – the nature of the equitable, rather than legal set-off, is that the court must be satisfied that it would be unjust to enforce the claim without taking into account the cross-claims. But once the court concludes that issue in the defendant's favour there is a right to set-off that amount and it operates as a defence to the claim. In practice, in the courts of England and Wales, the fact that the cross-claim operates as a set-off may have material consequences not least to liability for costs. That emphasises the nature of the equitable set-off as a defence.
88. There is nothing in the legal evidence before me that would lead to the conclusion that the position is any different in Indian law.
89. The first difference between the experts is that Mr Banerji asserts that the cross-claim remains a separate claim that only goes to reduce the quantum of the plaintiff's claim. That is, however, exactly how an equitable set-off operates as a defence. Further, Mr Banerji emphasises that if the plaintiff's claim fails, the cross-claim will not succeed because, to paraphrase him, its only purpose is to reduce the plaintiff's claim. That is itself the characteristic of a defence.
90. I would add that, in answering question 1 as to the requirements for a defence of equitable set-off, neither expert disputed that there was such a defence and Mr Banerji's response "indicated the following requirements for a defence". The argument that it remains no more than an independent cross-claim is completely at odds with that.
91. The second point of difference seems to be founded on the dispute encapsulated in the question posed for the experts as to whether a defence of equitable set-off is "a substantive defence" as to which the experts disagree. That disagreement, however, turns on whether an equitable set-off can be relied on as of right or is a matter for the discretion of the court – on which point the experts, in fact, agree. The disagreement about whether an equitable set-off is a substantive defence seems to me to be an empty dispute. The word "substantive" does not appear in the PCG and cannot, in any event, be equated with "as of right". It may have been intended to capture the distinction between a substantive and a procedural defence. In English law, a right of equitable set-off is a substantive defence in that sense and there is nothing before me as to Indian law which takes a different line. As I have already said, if the court decides that a cross-claim should operate as an equitable set-off, there is a defence to all or part of the claim and one of substance.

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92. So a cross-claim that could, in Indian law, be relied upon by Petron as an equitable set-off, in my view, falls within the meaning of “a right in defence of liability” in the second sentence and the disagreement of the experts as to whether or not the defence is “substantive” does not seem to me to be material and does not cause me to depart from my initial view set out above. By the same token, a cross-claim that could be relied upon by Petron as an equitable set off can be relied upon by Global in defence of liability under the PCG.

Question 3

93. I can deal with sub-paragraphs (a) and (b) shortly.
94. Whether Petron can rely on a cross-claim as an equitable set-off is a question of Indian law. Even if it arises in proceedings in the English courts under a guarantee subject to English law, it must be determined in accordance with Indian law and, given the “discretionary” nature of the defence, the English court must apply itself to how the Indian court would exercise the discretion and not how the English court might do so (sub-paragraph (a)).
95. Global submits that it is for the English court to exercise the equitable discretion in accordance with Indian law but the manner in which an Indian court would approach the issue is only relevant to the extent that it informs the English court’s exercise of its own discretion. It is submitted that to require the English court to exercise the same discretion as it considers the Indian court would do would be unusual and not what is required by the second sentence (or I assume, on this argument, by the principle of co-extensiveness).
96. This seems to me to be a distinction without a difference. If the question of reliance on a cross-claim as an equitable set-off has to be determined in accordance with Indian law, the English court must proceed as it considers the Indian court would do. I fail to see how the English court could exercise its discretion in accordance with Indian law without doing so.
97. The issue is what defences Petron has - either because of the principle of co-extensiveness or the operation of the second sentence. The question on both these bases is whether Petron could rely on the cross-claim as a defence of equitable set-off and not whether Global can do so. Global can raise the equivalent right. The circumstances of Petron not Global are, if material, the ones that are, therefore, relevant. (Sub-paragraph (b)).
98. Sub-paragraph (c) invites me to decide on the hearing of a preliminary issue whether an Indian court would decide that Petron could rely on the matters in the Defence (in these proceedings) as an equitable set-off. Indeed Mr ter Haar made the point that the formulation of the issue permitted me to reach different conclusions on different cross-claims - even at this early stage of the dispute, in the face of the generalised pleading of the claims, and in the absence of any factual evidence. Although, having reached this point in the analysis of the second sentence, it can be seen how this question might require answering in order to answer the question in the original issue, I have no doubt that this goes way beyond what the court had in mind when the trial of this preliminary issue was ordered. Suffice to say that, if this extension of the scope of the issues had been drawn to the court’s attention in advance of the hearing, it is likely that it would not have been

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regarded as appropriate for the trial of a preliminary issue on written evidence. The parties having agreed, however, that I should decide this issue, I do so.

99. This issue was expressly put to the experts as Question 4 in the following terms: *“If an Indian court or Indian arbitral tribunal were considering a dispute between Black & Veatch and KSS Petron, would KSS Petron be entitled to rely on its cross-claims (as pleaded in KSS Global’s Defence) as a defence of equitable set off against a claim by Black & Veatch for non-performance of the Consortium Agreement.”*
100. At the risk of somewhat lengthy quotation, it is easiest to set out the dispute between the experts by reference to the Joint Memorandum:

“Claimant’s Expert’s view:

23. *The Claimant’s Expert, with reference to his earlier answers, has emphasised that when a plea in the nature of equitable set off is raised, it is not done as of right, the discretion lies with the court. The Claimant’s Expert agrees that cross-claim if made by KSS Petron would arise out of the same transaction in that they would also arise under the Consortium Agreement. In his view, the court or arbitral tribunal would be required to further consider whether a protracted enquiry is necessary for determination of the cross-claims. He has not offered a definite opinion as to the exercise of jurisdiction save and except saying that each cross-claim and sub-claim would have to be examined in order to ascertain whether or not it would require a protracted enquiry.*

Defendant’s Expert’s view:

24. *The Defendant’s Expert has categorically stated that in his view the Defendant would be allowed to raise all cross-claims arising out of the Consortium Agreement as a defence of equitable set off in the same proceedings. The Defendant’s Expert has observed that the claims of B&V and KSS Petron are closely connected and are arising out of the same set of agreements. In his view, while there is some authority that a defence of set off may not be allowed in case of a protracted enquiry, according to him, in the present set of facts, B&V’s claims are so intrinsically connected with KSS Petron’s claims arising out of the Consortium Agreement that B&V’s claims cannot be decided without adjudicating upon KSS Petron’s claims. The Defendant’s Expert has further stated that had he to decide the present matter as a judge of the Bombay High Court, he is confident that he would allow KSS Petron to raise its cross-claims by way of equitable set off.*

Area of Agreement:

25. *Both Experts agree as to the following:*
- (a) *The cross-claims if made by KSS Petron are closely connected and would arise under the same transaction, in that they also arise out of the Consortium Agreement.*
- (b) *The court or arbitral tribunal would be required to further consider, in the facts of a particular case, whether a protracted enquiry is needed for determination of the cross-claims.”*

101. The Joint Memorandum then sets out the Area of Disagreement which I will refer to below.

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102. From the expert evidence, it is common ground that a key issue is whether there is a sufficiently close connection between claims and cross claims that it would be unjust or inequitable for the court to allow the claim without taking into account the cross-claim. There is patently such a connection here as the claims of both B&V and Petron (relied on by Global as defences) arise out of the same contract and the same project. That much seems to be agreed between the experts.

103. The reason given by Mr Banerji for the Indian court not taking the cross-claims into account derives from what is also common ground namely that the court might not do so if the determination of the cross-claim(s) involved a protracted enquiry. On this topic, Mr Banerji's position is summarised as follows:

“27. this part of the report requires an assessment of facts, which he believes is beyond the remit of his expert report. He reiterates the contents of his earlier report and suggests that the court or tribunal will have to exercise its discretion by examining each cross claim and sub claim on the evidence and then taking a decision as to whether a protracted enquiry is required or not. Guidance on how to exercise such discretion may be found with reference to the judgments already cited in his report.”

104. Despite that open-ended view, I am still asked to determine this issue.

105. Without setting out the whole of Mr Banerji's report, the cases he refers to include the following:

- (i) *Dobson & Barlow Ltd. v Bengal Spg.* (1897) 21 Bom 126. Mr Banerji notes that the court declined to entertain a cross claim as a set off as it would depend on evidence unconnected with the case, the collection of which would inevitably be “a work of time”.
- (ii) That case was followed in *Girdharilal Chaturbhuji v Agarwal* AIR 1940 Nag 177, the judge observing that if an equitable set off was advanced the court had a discretion to say that it should not be allowed where a protracted enquiry was needed for the determination of the sum due. I observe that that gave little or no further guidance on the exercise of the discretion and that, on the facts, the claims were made on promissory notes and the cross claims arose out of different transactions.
- (iii) *Sankara Pillai v Parameswaran Pillai* AIR 1959 Kerala 352. This case also concerned a promissory note. The claim was admitted except for interest. The nature of the cross claim is difficult to discern from the judgment but there was at least an argument, denied by the plaintiff, that there was a specific agreement linking the cross-claim with the claim. The court was of the view that there would be a considerable delay in investigating the cross claim and that, given that the claim was admitted, there was no reason for the plaintiff to have to wait.
- (iv) *M Bhagwati Prasad v Hukumchand Mills Ltd* (1961) MPLJ 272. The factual background was summarised by H.R. Krishnan J as follows:
“On account of certain transactions, in particular two contracts, the plaintiff made a claim which has been countered by the defendant by a claim of set-off on equitable grounds, based on a large number of transactions spread over a number of years. The trial Court held that the defendant's claim was for an unliquidated sum of money, and in the circumstances of the case, would require an enquiry [too]

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elaborate and confusing to be held in course of the present suit. So it refused to entertain the claim as one for set-off and left it to the defendant to bring a separate suit.” (My emphasis)

Further, I quote the passage relied on both by Mr Banerji and Global (with some of the emphasis added in Mr Carless’ skeleton argument):

“In the case of an equitable set-off the principle contained in Order 8, rule 6 apply not strictly but only by analogy. Therefore the Court’s discretion in this regard is wider than in a case falling within the terms of that rule. Certainly that does not mean that the Court can do what it likes. Here also it should consider the question of convenience: if, for example, the claim of the defendant is (sic) equitable set-off relates to transactions that can be suitably investigated in the suit itself, then even if it is a claim for unliquidated sum it should be taken up. If on the other hand, the defendant’s version would involve an elaborate and complicated enquiry unconnected with, and over a period different from the version of the plaintiff, it is better to leave this to a fresh suit by the defendant, than confuse the issues in the instant suit.

The question is not one of the party’s right or the Court’s jurisdiction. It is ultimately one regarding the convenience, and of the mechanics of the litigation. In either event the defendant will have to pay court-fee, produce his documents and call his witnesses. If there is a separate suit, the documents will have to be filed in duplicate with certified copies and the witnesses may have to come twice, once in each case. This is additional trouble, and other things being the same, should be spared. But if the process of saving a party from this, will lead to confusion and delay, out of proportion to the saving, it would be proper to direct the defendant to sue separately. This is the position here.”

- (v) *Jitendra Kumar Khan v Peerless Finance* (2013) 8 SCC 769. The claim was for various commissions and incentives. The defendants sought by amendment to raise a cross-claim as an equitable set-off. The basis for the cross-claim is not explained in the judgment other than that it was a different cause of action. The court stated that the court had a discretion to adjudicate upon the alleged set-off and had to exercise that discretion in an equitable manner, and that an equitable set-off was not to be allowed where protracted enquiry was required for determination of the sum due. The court cited the cases referred to at sub-paragraphs (i) and (ii) above. In this case, the amendment was allowed. The court below had rightly taken the view that it was “a demand so connected in the nature and circumstances that [the claim and cross-claim] can be looked upon as a part of one transaction”.
- (vi) Mr Banerji’s report also exhibited the decision of the High Court in Delhi in *Cofex Experts Ltd. v Canara Bank* 1997 (43) DRJ (DB) 754 to which I was referred in argument.

106. The authorities relied upon make it plain that – and it is not in issue that – the court may have regard to whether the cross claim would involve a protracted enquiry on the facts in deciding whether it should be allowed to operate as an equitable set off. In almost all of the cases relied upon, the claim was a straightforward money claim. In the cases where the cross claim was not permitted to operate as an equitable set-off, it arose out of a different transaction and would have engaged a wholly different factual dispute. No case was cited to me which bore any factual similarity to the present case.

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107. Although Mr Banerji leaves the matter open for further factual enquiry, B&V's argument is that the cross-claims necessarily involve a protracted inquiry and would not, therefore, be taken into account.
108. Mr ter Haar submitted that B&V's claims "consist simply of claims for recompense for works done and materials supplied". During the course of argument, Mr ter Haar stated that all B&V's claims were for breaches by Global after December 2017. In his submissions in reply, Mr ter Haar submitted that B&V's claims are "relatively simple" claims for providing materials and doing works after January 2017 and that they do not involve any substantive investigation of the state of play between Petron and B&V before January 2017. I note that January 2017 is when, on B&V's case, Global took over performance of Petron's works in January 2017 but no demand was made on the guarantee until December 2017. That in itself would raise an issue, even on B&V's case, as to whether Global's liability prior to the making of the demand could be primary rather than secondary.
109. In any case, I return to B&V's pleaded claims which I set out at some length at paragraphs 15 and 16. On one view, it is impossible to know whether there is any merit in this submission as to the nature and scope of B&V's claims in the absence of any particularisation of those claims. At the same time, it seems highly unlikely that the claims are "relatively simple". Even if the claims are indeed for materials and labour after January 2017, the mere sums involved indicate a complex factual inquiry. But, in any event, the claim as pleaded, on its face, goes far further. B&V expressly pleads, albeit with no detail, a claim for loss and damage caused by all breaches by Petron and, correspondingly or independently, Global; B&V pleads claims for loss and damage for breach of clause 6.3.4; and B&V seeks to rely on the indemnities in respect of Owner and Third Party claims. Lastly, B&V reserves the right to make claims against Global for liquidated damages payable to the Owner and delay costs that it cannot otherwise recover. B&V's submission seeks to take advantage of the bare pleading to characterise it as a relatively simple claim but, even on the basis of this bare pleading, it is not.
110. In contrast, Mr ter Haar says that Petron's cross-claims involve detailed consideration of the history of the project. The first, second and third cross-claims all also encompass issues as to the scope of works. The third and largest cross claim extends to claims for delay and disruption which are potentially greater in scope than B&V's claims, although given the way B&V's case is pleaded that is less likely than B&V contends. However one looks at it, the issues that will arise on this cross-claim are inevitably tied up with the nature and extent of the obligations of the parties.
111. There was a hint in submissions that the right approach might be to consider the position taking account of the Petron arbitration. The argument appeared to be that, since Petron's claims were being pursued in arbitration, it would not suit the mechanics of this litigation to take them into account. The issue, however, is whether the claims could be relied on as an equitable set-off in hypothetical proceedings before an Indian court or tribunal. If the matter is not approached this way, it creates the result that Global cannot rely on defences under the PCG because the subsidiary relies on the same matters in other proceedings. That seems to me to be contrary to the secondary nature of Global's liability and the principle of co-extensiveness.

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112. I put myself in the position of an Indian court seized of B&V's claims against Petron and Petron's cross-claims. Both claims and cross-claims arise out of the same transaction. Both claims and cross-claims involve a potentially protracted enquiry into the facts – that is evident from the nature of the claims. Despite the efforts to argue the contrary, this is not a case where B&V has a simple money claim and Petron a wholly different type of claim. It seems to me that, applying Indian law principles, the court would conclude that it would be inequitable to adjudicate upon B&V's claims without taking the cross-claims into account and that Petron would accordingly be permitted to rely on them as a defence of set-off. I am in agreement with Justice Patel on this issue and my answer to question 3(c) is, therefore, yes.

Question 4

113. Clause 13.3 of the Consortium Agreement provides as follows:

“If any Third Party initiates dispute resolution proceedings against a Party (the “Defendant Party”) for a claim in any way related to the Contract [the EPC Contract with the Owner], the other Party may, subject to applicable law and rules, be joined by the Defendant Party or may intervene in the proceedings.Once a final decision is rendered in the proceedings the Parties shall have no further obligation to each other with regard to any claims or defenses that were, or could have been, adjudicated upon in the proceedings.”

114. A Third Party is defined in clause 1.1.22 as any Person (as defined) other than the Parties and the Owner.
115. Although this issue was identified as arising in the issues formulated on the day of the hearing, Global's position was that it was unclear if the argument was still pursued by B&V. Mr ter Haar made it clear that he relied on this clause solely as a reason why it would be unjust to allow Global to rely on Petron's cross-claims.
116. Clause 13.3 would potentially be relevant if Global (which would fall within the definition of a Third Party) initiated dispute resolution proceedings against B&V, on some hypothetical basis. It is not at all clear to me that the clause would be engaged where Global raises Petron's claims as a defence of equitable set-off – which itself does not obviously meet the description of initiating dispute resolution proceedings. It is unnecessary for me to decide that point of construction, given the limited reliance B&V placed on the clause. So far as that case is concerned, it does not seem to me to have any merit. The clause is clearly directed at what might broadly be regarded as third party claims and permits joinder to ensure that both parties to the Consortium Agreement are bound by the outcome of any third party claim in respect of the EPC Contract. As I have underlined the clause is, in any event, permissive not mandatory.
117. The broader point which B&V makes is that it is unsatisfactory to have Petron's claims potentially adjudicated upon in two different tribunals. That might be a reason for B&V to seek to rely on clause 13.3 to join Petron to these proceedings – and I make it clear that I am not deciding that the clause would apply in those circumstances - but that does not affect Global's position. In their solicitors' letter dated 17 August 2020, B&V, contrary to the pleaded reliance on clause 13.3, asserted that Global could not join Petron without the consent of B&V and Petron because the Consortium Agreement provided for

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arbitration in India. Unsurprisingly, therefore, there was no application to stay these proceedings unless and until Petron was joined.

Question 5

118. Clause 14.5 provides:

“This Agreement contains the entire agreement between the Parties with respect to the subject matter hereof. All prior negotiations and agreements by and between the Parties hereto with respect to the subject matter hereof are superseded by this Agreement and there are no representations, warranties, undertakings or agreements with respect to the subject matter hereof other than those expressly set forth herein or in an Appendix delivered in connection herewith. The rights and remedies of the Parties as expressly stated in this Agreement are to the exclusion of any other rights and remedies that may be available in law or in equity.” (Emphasis added)

119. Since the Consortium Agreement is subject to Indian law, the proper construction of this clause raises a further issue of Indian law and the question put to the experts was whether the Consortium Agreement excluded Petron’s rights of equitable set-off. I will turn to their evidence in a moment.

120. The starting point, in a sense, for B&V’s argument is other provisions of the Consortium Agreement. B&V relied on the following:

(i) Clause 8.4.2 which provides “step in” rights for the innocent party in the event of default by the other party.

(ii) Clause 8.4.6 which provides “the Parties’ sole and exclusive remedies and liabilities” in respect of termination.

(iii) Clause 8.6.1 which provides that all risks sustained by a Party arising out of the performance of its Scope of Work shall be its sole responsibility. The clause continues:

“Subject to the terms of Article 8.6.4 below, each Party reserves all rights and remedies with respect to the other Party or Third Party whose acts or omissions may have caused such loss or damage; provided, however, there shall be no interruption or cessation of work pending or during any proceedings to pursue such rights and remedies.”

(iv) Clause 8.6.4 provides a waiver or release from claims for loss of profit, loss of use, loss of opportunity, loss of goodwill and “any special, indirect, incidental or consequential loss or damage.”

121. I have also already referred to the indemnities in clause 8.4.3. Clause 8.4.5 imposes an express duty to mitigate in the event of default by the other party.

122. B&V argues that the Consortium Agreement does not expressly provide the remedy of equitable set-off and that the effect of clause 14.5 is, therefore, to exclude such a remedy.

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That submission is made, as a matter of Indian law, in reliance on the opinion of Mr Banerji which is expressed in the Joint Memorandum, paragraph 16, as follows [with numbering added]:

“... (1) Referring to Clause 8 of the Consortium Agreement, in his view the intention of the parties was clear that the allocation of liabilities inter parties would be limited to the sole and exclusive remedies as provided for by the Consortium Agreement. (2) Further, construing clause 14.5 a part of an entire agreement clause, he has noted that under Indian Law contractual stipulations that limit the liabilities of parties for specified breach of contract or completely exclude liability in case of such breach are generally enforceable. (3) Finally, he has relied on the plain language of a portion of Clause 14.5 for his conclusion that the clause expressly bars “remedies that may be available in equity” which would include equitable set off.”

123. So far as the first part (1) is concerned, Mr Banerji’s view of clause 8 as making it clear that the allocation of liabilities inter partes would be limited to the sole and exclusive remedies as provided for by the Consortium Agreement is not founded on any particular principle or application of principle of Indian law. It is simply his reading of the clause and, in my view, it is not a correct reading.
124. Clause 8 does not allocate liabilities. It deals with some particular instances such as termination and provides a set of remedies; it provides indemnities against third party claims; it excludes liability for some types of loss; it imposes a duty to mitigate; and so on. Clause 8.6.1 contains an express reservation of all rights and remedies with respect to the other Party whose acts or omissions may have caused loss or damage. That reservation is subject to clause 8.6.4 which excludes claims for specified types of loss. That clause does not otherwise limit the rights and remedies reserved to those expressly provided for in the Consortium Agreement. Although the meaning of “such” in “such loss and damage” is not entirely clear, it seems to me that read as a whole the clause must reserve claims for breach of contract. Although it was not the subject of any submissions at the hearing, I infer that B&V would not depart from that proposition as the Particulars of Claim advance, or anticipate advancing, claims for damages for breach of the Consortium Agreement which are not otherwise the subject of a specific remedy under clause 8.
125. It follows that in any case where the cross-claim is a claim for damages for breach of contract, it is expressly reserved by clause 8.6.1, and the clause cannot sensibly be read as reserving it as an independent claim but somehow excluding reliance on it as an equitable set-off. In the present case, the first and second claims are claims for payments to which Petron claims to be entitled under the Consortium Agreement, which is an express right under the Consortium Agreement, and the claims are also advanced on the basis of breach of B&V’s obligation to pay. The third cross-claim is entirely a claim for damages for breach of contract.
126. A right to assert an equitable set-off is not then precluded by the words relied upon by Mr Banerji in the third part (3) of the passage quoted above. The partial quote misses the point that the clause excludes “any other rights or remedies” that may be available in law or in equity. But the right to claim sums due under the Consortium Agreement is a right under the contract and a claim for damages for breach of contract is not some other right or remedy as it is reserved by clause 8.6.1. I would add that Mr Banerji’s reliance

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on the words “in equity” is also open to question – although the issue is not expressly addressed as a matter of Indian law, in English law, as explained in *Fearn* at [38], the expression “equitable set-off” is not referring to a jurisdiction of the courts of equity but to the jurisdiction to order a set-off where it is just and equitable to do so.

127. In any event, the Joint Memorandum records the agreement of the experts that there should be a clear and apparent intention to waive a right, relying on *All India Power Engineer Federation v Sasan Power Limited* 2017 1 SCC 487. The words excluding any other rights or remedies in equity are apt to exclude what might be termed free-standing equitable rights and remedies. There are no clear words that indicate an intention to exclude the right to rely on a claim under or for damages for breach of the contract (which can otherwise be advanced) as an equitable set-off relied on in defence.
128. The second part (2) of the passage above says no more than that an entire agreement clause of the type described is enforceable. That does not assist in the construction of the clause or, indeed, the Consortium Agreement as a whole.
129. Accordingly, my answer to question 5 is “no”.

Conclusions

130. My answers to the questions ultimately posed as preliminary issues are, therefore, as follows:
- (i) Question 1(a): the first sentence of paragraph 2 of the PCG imposes secondary liability.
 - (ii) Question 1(b): it is common ground that if the obligation is secondary, Global can rely on the second sentence of paragraph 2.
 - (iii) Question 2(a): I decline to answer this academic question.
 - (iv) Question 2(b): The second sentence of paragraph 2 does not more than make express the principle of co-extensiveness. It does not otherwise limit the effect of that principle. In any event, a defence of equitable set-off in Indian law is a “right in defense of liability” within the meaning of this sentence.
 - (v) Question 3(a): An Indian court or tribunal
 - (vi) Question 3(b): Petron
 - (vii) Question 3(c): Yes
 - (viii) Question 4: No
 - (ix) Question 5: No