England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2014] EWHC 576 (Comm)
Claim No. 2004 Folio 1031

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Claim No. 2004 Folio 1031
The Rolls Building
Fetter Lane
London, EC4A 1NL
14/03/2014

B e f o r e :

MR JUSTICE FIELD

Between:

IPCO (Nigeria) Limited	**Claimant/ Applicant**
- and -	
Nigerian National Petroleum Corporation	**Defendant/ Respondent**

Michael Black QC and Edward Knight (instructed by Weightmans LLP) for the Claimant/Applicant
Jonathan Nash QC, James Willan and Catherine Jung (instructed by Stephenson Harwood LLP) for the Defendant/Respondent
Hearing dates: 16, 17, 21, 22, 23 & 24 October 2013

HTML VERSION OF JUDGMENT

Mr Justice Field:

Introduction

1. This is an application by IPCO Nigeria Limited ("IPCO") to enforce an arbitral award dated 28 October 2004 ("the Award") under s.101 (2) of the Arbitration Act 1996 ("the Act"). It is the third such application by IPCO whose first task is to satisfy the Court that there has been a sufficient change in circumstances since the Court ordered (by consent) on 13 May 2008 to adjourn enforcement of the Award under s. 103 (5) of the Act to warrant a re-exercise of the discretion vested in the Court to enforce the Award under ss. 101 and 103 of the Act.

The factual background

2. IPCO is a Nigerian subsidiary of a Hong Kong company. It was incorporated in 1990 to carry on business as a turnkey contractor specialising in the construction of on-shore and off-shore oil and gas facilities. It is now effectively a shell company kept in existence for the purpose of enforcing the Award. By a contract dated 14 March 1994, IPCO agreed for a lump sum price to design and construct for the Defendant ("NNPC") a **petroleum** export terminal in the Port Harcourt area of Nigeria to be known as the Bonny Export Terminal ("BET"). The contract was governed by Nigerian law and contained an arbitration clause under which disputes between the parties were to be referred to arbitration in accordance with the Nigerian Arbitration and Conciliation Act 1990 ("the Nigerian Act").

3. There were disputes between the parties, particularly over a claim by IPCO for the cost of Variations which it said were responsible for a 22 month delay in completing the project. There followed a lengthy arbitration culminating in the Award under which IPCO was awarded the following sums:

    (1) Head of Claim No. 2 – Non-payment [of invoices]: US$1,641,234.00.

    (2) Head of Claim No. 3 – Variations: US$58,521,249.55.

    (3) Head of Claim No. 4 – Phase II Prolongation: US$53,563,352.00.

    (4) Head of Claim No. 5 – Standby: US$3,870,679.00.

    (5) Head of Claim No. 6 – Escalation of Contract Price: US$618,116.00.

    (6) Head of Claim No. 7 – Financing Charges: US$34,514,356.00.

4. On 15 November 2004, NNPC issued an Originating Motion in the Federal High Court in Lagos seeking to have the Award set aside under the Nigerian Act on the grounds that the arbitral Tribunal ("the Tribunal") lacked jurisdiction and had misconducted itself. Under

Nigerian law, an error on the face of the award can amount to "misconduct", although the mere fact that the supervisory Court would have decided a question of construction differently than did the Tribunal is not a ground for setting the award aside. A failure to give reasons can also amount to misconduct.

5. On 22 November 2004, IPCO filed a Notice of Preliminary Objection to NNPC's Motion seeking to strike it out on the ground that it was frivolous, vexatious and an abuse of process in that it was calculated to delay enforcement of the Award and to interfere with or delay the due administration of justice.

6. Nigeria is a New York Convention state and on 29 November 2004, on IPCO's *ex parte* application, David Steel J ordered, pursuant to s. 101 (2) and (3) of the Act, the payment by NNPC to IPCO of the sterling equivalent of the total of the sums awarded to IPCO under the Award (US$152,195,171+ Naira 5,000,000). NNPC then applied to have David Steel J's order set aside under ss. 103 (2) (f) and 103 (3) of the Act, alternatively to have the enforcement of that order adjourned pursuant to s. 103 (5); and IPCO cross-applied for security in the sum of US$50 million.

7. In relevant part ss.100 and 101 of the Act provide:

> S.100 (1) In this Part a 'New York Convention award' means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention. …
>
> (3) If Her Majesty by Order in Council declares that a state specified in the Order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order shall, while in force, be conclusive evidence of that fact.
>
> (4) In this section 'the New York Convention' means the convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.
>
> S.101(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.
>
> (2) A New York Convention award may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect.
>
> …
>
> (3) Where leave is so given, judgment may be entered in terms of the award.
>
> …
>
> 103(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
>
> (2) Recognition or enforcement of the award may be refused if the party against whom it is invoked proves—
>
> …

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the Court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

8. NNPC's applications and IPCO's cross-application were heard by Gross J, whose judgement is reported at [2005] EWHC 726 (Comm). In short, acting under s. 101 (5) of the Act, Gross J adjourned the enforcement of the Award ordered by David Steel J on terms that NNPC: (i) pay US$13,102,361.72 to IPCO (this sum being indisputably due); and (ii) provide security in the sum of US$50 million. Both parties were given liberty to apply.

9. In coming to his decision, Gross J adopted the approach of the Court of Appeal in *Soleh Boneh v Uganda Government* [1993] 2 Lloyd's Rep 208 and considered the strength of NNPC's challenges in the Lagos Federal Court to various of the sums awarded by the Tribunal. (NNPC's Motion to set the Award aside and IPCO's Preliminary Objection thereto had yet to be heard).

10. In respect of the Financing Charges award, Gross J held[1] that NNPC had at least an arguable case that the Tribunal had been guilty of misconduct in: (i) wrongly calculating these charges on the basis of the claimed figure for escalation rather than on the awarded figure; and (ii) failing to appreciate that IPCO did not incur financing charges in respect of the 25% profit mark-up. The sums involved here were respectively US$6 million (approx) and US$4 million (approx).

11. Gross J also held[2] that NNPC had an arguable case that in awarding the sums they did for Variations, Prolongation and Financing Charges, the Tribunal was guilty of duplication and of failing to give adequate reasons for preferring IPCO's case to that of NNPC. IPCO had claimed the cost of Variations in accordance with the costs provisions in clauses 52 and 55 of the contract and it was arguable that the costs therein defined already took into account the sums claimed separately for prolongation. NNPC therefore had a realistic prospect of reducing the awarded sums by US$88 million, leaving US$58.5 million for Variations for which the Award would stand[3]. NNPC also had an

arguable case that the Tribunal had wrongly construed the force majeure clause by applying its payment provision in accepting IPCO's claims when that provision only applied if the contract had been terminated, which was not the case. However, it was difficult to assess the impact of this challenge on the sums awarded because the Tribunal did not quantify the impact of each period of delay.

12. In paragraphs 52 (i) and 53 of his judgement, Gross J said:

> In the various respects already outlined, the NNPC application does have a realistic prospect of success. In particular, there is a measure of concern as to whether IPCO's recovery has been very substantially duplicated. However, as also underlined, the NNPC application faces formidable hurdles, not least in moving from well-founded criticism of the Tribunal (if such is established) to making good a case of misconduct within s.30 of the [the Nigerian Act]. Employing the terminology of Soleh Boneh, the award is, at least to the extent discussed, neither manifestly valid nor manifestly invalid.
>
> … I was neither attracted (i) to proceeding with the immediate enforcement of the order (even if accompanied by a condition that IPCO provide cross-security), thereby pre-empting the decision of the Nigerian Court, nor (ii) to merely adjourning the enforcement of the order, thus giving too little weight to the importance of enforcement and the arithmetical realities in the Nigerian proceedings. Instead, I was amply satisfied that practical justice would best be done by adjourning the enforcement of the order on terms, *inter alia*, requiring NNPC to pay the US$13 million indisputably due to IPCO and to provide appropriate security in London (and thus free of any domestic constraints) in an amount of US$50 million. The detail of those terms and the consequence that IPCO should have permission to enforce the order in the event of NNPC failing to satisfy them, have already been set out in the order drawn up following the conclusion of the hearing.

13. It is not in dispute that in deciding as he did, Gross J expected that IPCO's Preliminary Objection would be decided at first instance relatively quickly and that if it were upheld, this would be of fundamental importance because there would then be no basis on which the enforcement of David Steel J's order could be suspended.

14. Unfortunately, this expectation did not come to pass and in February 2008, Tomlinson J heard an application issued by IPCO on 17 July 2007 that the order of Gross J adjourning the enforcement of David Steel J's order should be reconsidered in the light of the fact that the Preliminary Objection had still not been heard and was unlikely to be finally determined for several years.

15. In his judgement Tomlinson J sets out in telling detail the sorry story of what had happened to IPCO's Preliminary Objection[4]. Putting things shortly, the Nigerian Judge originally seised of the Preliminary Objection was Okeke J, who, on 31 October 2005 (the date fixed for the hearing), reserved judgement without hearing oral argument, the parties having adopted their written addresses previously served on the Court. However,

before judgement was handed down, NNPC issued a Motion seeking an order from Okeke J that the Court transfer the case to the Chief Judge for re-assignment to another Judge of the Federal High Court on the ground that Okeke J had observed that the case was too confusing and complicated for her. On 2 December 2005, Okeke J adjourned to 1 February 2006 NNPC's Motion to have the case transferred and on 12 December 2005, the date set for delivery of the judgement on IPCO's Preliminary Objection, she ruled that: (i) that matter would be transferred to the Chief Judge for re-assignment to another judge; and (ii) if she were "exonerated" she would read her ruling on the Preliminary Objection which was ready to be delivered.

16. The Chief Judge then reassigned the whole action (NNPC's Motion to set aside the Award and IPCO's Preliminary Objection) to Auta J. At a hearing on 26 February 2006 before Auta J, NNPC contended that the whole suit had been transferred to Auta J who should conduct a re-hearing of the matter on which Okeke J had already received argument. IPCO on the other hand argued that only the Motion to transfer the case had been transferred. Auta J ruled that the whole suit had been transferred to him and adjourned the determination of the Preliminary Objection to 16 March 2006. IPCO then sought permission out of time from Auta J to appeal that ruling but was not allowed to make its application when it sought to do so on the last day such an application could be made. IPCO therefore filed a Notice of Appeal in the Nigerian Court of Appeal on grounds of law, as of right, and upon being granted permission to appeal on grounds of fact on 20 February 2007, filed a Notice of Appeal on such grounds on 24 February 2007.

17. On 4 December 2006, Auta J stayed proceedings before him pending IPCO's appeal, which appeal had not been heard by the time Tomlinson J gave judgement 17 April 2008 and, as we shall see, has still not been heard.

18. Tomlinson J decided that the order of Gross J adjourning enforcement of the Award could be reconsidered. The relevant paragraphs in his judgement are 73 – 76.

> 73. …. The Court is here concerned with the exercise of a jurisdiction derived from an international convention and given domestic effect by statute in the same terms as in other subscribing states. The approach to be adopted is not necessarily the same as that to be adopted in the domestic context. Nonetheless it is helpful to be reminded of the limited circumstances in which the Court will in that context countenance the revisiting of an earlier decision by a Court of co-ordinate jurisdiction. I would derive from those cases[5] at least the following principles which should guide the Court in a case such as the present. Plainly a judge of parallel jurisdiction cannot entertain what is in effect an appeal. Similarly a change of circumstances cannot ordinarily justify a variation of an earlier order unless at the least the change in circumstances impinges on or relates to the reason for seeking the variation. There must be some causative link between the change in circumstances and the variation sought.
>
> 74. An adjournment granted pursuant to section 103(5) of the Arbitration Act 1996 is by its nature a temporary holding measure. The appropriateness of maintaining such a measure in place will be dependent, crucially, on

developments before the supervisory Court. Gross J expressly approached his task upon the footing that a critical development would or might occur within months. There would be a first instance determination of IPCO's Preliminary Objection. If the Preliminary Objection succeeded in full measure the case either for immediate enforcement or for the provision of greater security would be significantly enhanced. It would certainly bring about a wholly new and different situation, since the supervisory Court, at any rate at first instance, would have declared the challenge to the award to be groundless. The emphasis before Gross J was on the speed with which the challenge to the award was being pursued by NNPC, and the early decision which could be expected on the question whether the challenge enjoyed a worthwhile prospect of success. Gross J gave a general liberty to apply. A paradigm situation in which the Court, exercising its jurisdiction under section 103(5), must reconsider its earlier decision by embarking on a consideration whether the adjournment of the decision on enforcement remains appropriate is where there has been a significant relevant development in the proceedings before the supervisory Court, the pendency of which is the prerequisite to the Court having jurisdiction even to consider adjourning the decision to enforce an award. NNPC's application for a re-hearing shortly before the assigned judge was due to deliver her reasoned judgment on the Preliminary Objection and the subsequent effect that that has had on the likely timescale within which there will be a determination of the Preliminary Objection is in my judgment a development of sufficient significance to justify, indeed to require, the Court to consider afresh whether the decision on enforcement of the award should be further adjourned. This is in no sense a disguised appeal against Gross J's decision. By definition it is a consideration which Gross J could not have undertaken. Gross J had to consider what was "proper" in the circumstances as they then obtained. Those circumstances have changed. It is my duty to consider what is proper in the new circumstances which now obtain.

75. I would however emphasise that the Court will not lightly entertain a suggestion that the discretion under section 103(5) must be considered for a second or subsequent time. Because the jurisdiction is responsive to developments before the supervisory Court it would be unwise and it is probably in any event impossible to attempt to fashion some threshold test as to what will be required in order to justify this course. It will certainly require significant change in circumstances. What has occurred in the Nigerian proceedings can I think properly and uncontroversially be described as catastrophic. However the test is stated, the Court is in my judgment in these dismaying circumstances entitled to consider whether in the light thereof a decision on enforcement should be further adjourned.

76. I do not consider that the change in circumstances, catastrophic though it is, should of itself be the occasion for a complete re-run of the exercise which has already been conducted before Gross J. Ordinarily a party should not in these circumstances be permitted to develop arguments or to deploy evidence which could equally well have been developed or deployed on the earlier occasion. Ordinarily a change in circumstances should most emphatically not be an excuse for a second bite at the cherry. Ordinarily, the Court will simply be concerned to

> consider whether the exercise of discretion which appeared proper in the circumstances which obtained earlier remains proper in the, *ex-hypothesi*, significantly different circumstances. That ought not ordinarily to require any revisiting of the Court's earlier decision as to the strength of the challenge to the award. That decision should have been reached on a brief consideration – see per Staughton LJ in the *Soleh Boneh* case at page 212. The need to reconsider the discretion must not ordinarily be regarded as an opportunity to re-run the argument on the strength of the challenge.

19. Tomlinson J also held[6] that Gross J had been innocently misled by Counsel for NNPC when dealing with the "duplication" challenge to the Variations award and that this too was a ground for reconsidering the order made by Gross J. In Tomlinson J's view, Gross J had been allowed to proceed on the basis that IPCO had priced the variations on a lump sum basis in accordance with clause 55 of the contract, when this was not the case. Instead, in its claim headed "Variations" for the extra and additional work, IPCO had expressly claimed the direct costs of these works and the profit thereon, and had not claimed all the costs which it was entitled to claim. Tomlinson J also held that whilst an argument as to inadequacy of reasons in respect of force majeure and prolongation was plausible, this was not so in respect of the Variations award. NNPC therefore had no realistic prospect of reducing the Award below US$58.5 million together with interest thereon and some proportion of the costs.

20. As to the other challenges to the Award that Gross J had found to be arguable, Tomlinson J found that IPCO had failed to establish a justification for reviewing those conclusions because no causative link had been demonstrated between them and the Preliminary Objection delay and the misleading of Gross J as to how IPCO had advanced its Variations claim.

21. In the result, by his order sealed on 13 May 2008, Tomlinson J set aside the order of David Steel J and ordered that NNPC should pay the sums awarded under Head of Claim No. 2 – US$1,641,234.00 and Head of Claim No. 3 –Variations: US$58,521,249.55, less the US$7.7 million already paid, leaving it to the Nigerian Court to decide whether to uphold NNPC's challenges to the Prolongation and Financing awards, those being challenges that Gross J had held to be plausible. It was also ordered that the decision on enforcement of the Award be adjourned pursuant to s. 103 (5) of the Act, with liberty to apply.

22. Both sides appealed to the Court of Appeal, NNPC contending that: (i) there was no power to order enforcement of part of a New York Convention award; and (ii) Tomlinson J had erred in holding that Gross J's order could be revisited on the ground that the judge had been misled as to the duplication argument. As to (i), the Court of Appeal decided that there was power to enforce part only of the Award. As to (ii), the Court of Appeal held that, since Tomlinson J had agreed with Gross J's finding that the Variations award of US$58.5 million would stand and it was common ground that Tomlinson J's decision to enforce the Variations award could be justified by the long delay in having NNPC's set-aside Motion determined, Tomlinson J's finding that Gross J's decision on duplication

could be revisited had not been necessary for his overall decision to order payment of the "Variations" and "Non-Payment" awards. Since the Court of Appeal had not heard full argument as to whether Tomlinson J had been justified in revisiting this decision of Gross J, it held that it would be wrong to express any final view about it, but their preliminary view was that Gross J had not been misled in a way that would justify revisiting his decision on the principles approved by the Court of Appeal in *Collier v Williams* [2006] EWCA (Civ) 20 at paras 39 and 40.

23. NNPC petitioned the House of Lords for leave to appeal the decision of the Court of Appeal, and Tomlinson J's order was stayed pending the outcome thereof. Then on 2 December 2008 NNPC issued and on 4 December 2008 moved *ex parte* an application for an order that Tomlinson J's order continue to be stayed on the ground that evidence had recently come to light that the Award had been obtained by IPCO's fraud. No order was made on the *ex parte* application and the application was moved before Flaux J *inter partes* on 16 December 2008, by when the House of Lords had refused leave[7] to appeal the judgement of the Court of Appeal.

24. The evidence relied on by NNPC was a first witness statement of Engineer Mohammed Mabai Bello, a Senior Engineer with NNPC who was first involved in the BET Project when a Deputy Manager at **National** Engineering & Technical Company, then an affiliate of NNPC. In this statement Engr. Bello deposed as follows.

> 24.1 On or around 16 October 2008 he was contacted by a Max Nduaguibe who stated that he had been contacted by two IPCO employees, a Quantity Surveyor (later identified to be Mr Wale Badmus) and the Accountant, Mr Blessing Wogu, who wanted to discuss with NNPC how IPCO had relied on forged documents in the arbitration. Mr Nduaguibe also produced a document bearing the date July 2008 and headed "Bonny Export Terminal Arbitral Award, A Proposal for Review Support Services". Page 1 is headed "The Statement of Proof". The makers of the statement (apparently two in number) are not identified therein but one of them was Mr Wogu. They express concern at the way their IPCO expatriate colleagues are behaving in respect of the NNPC/IPCO arbitration and state that it is their mission "to stop NNPC from releasing to IPCO already paid into Dutch [Deutsche] Bank and assist NNPC to put an end to this frivolous claim of IPCO anywhere on the globe" and "to draw a program of activities that will be submitted to the GMD (Group Managing Director) and strictly adhered to if we are to meet the time to beat the appeal date and file necessary municipal (Nigerian) legal processes that will disable the enforcement of New York Convention Award (Section 103 of the Act)" in return for a reward to compensate them for missing out on a bonus payable by IPCO of around US$ 7.5 million. The makers of the statement go on to allege forgery of documents put before the Tribunal and give 6 Variation claims as examples: Real Engineering Nigeria (perimeter fencing and steel fabrication); Embeco Nigeria Ltd (plant and equipment hire, concrete supply and erection of platform); Eddyson International (fire foam); Coseda Nigeria Ltd (swamp buggies); and Geosite Surveys (houseboat). The statement goes on: "We will get IPCO contractors and vendors

who were ignorantly used in the process but variously owed since 1998 through 2001 to support with witness documents and stand as witnesses should the need arise in a bid of putting off this claim. However, a guaranteed prompt payment of the outstanding will be good bait."

24.2 Mr Nduaguibe also handed to Engr. Bello a copy of an IPCO weekly update for the week ending 24 March 2002 which stated that a comparison review between the Interim Variation submission of 1999 and the final Variation submission had found that there was a large amount of contradictory information. One copy of the final submission had been retrieved and the damaging material removed and "Fred" was to retrieve the second copy from PPMC[8] in order to do the same.

24.3 On 20 October 2008, the GMD's office received a letter dated 15 October 2008 from Danagogo & Danagogo Advocates on behalf of a group of seven creditors stating that they had discovered that IPCO had forged documents, "a development that was confirmed by [Mr Wogu] when confronted on the matter."

24.4 On 20 November 2008, NNPC presented the Nigerian Attorney General with a formal complaint based on the first statement and the IPCO weekly update and on the same date Engr. Bello was provided by Mr Nduaguibe with a second statement headed "Background" made by one unidentified individual (Mr Wogu) in which were identified further examples of inflated Variations claims based on forged documents.

24.5 Engr. Bello also exhibited documents relating to the Variation claims for the additional houseboat (Variation 18), perimeter fencing (Variation 17) and concrete supply (Variation 15) in support of a submission that the evidence of forgery so far collected was only "the tip of the iceberg".

25. Prior to the hearing on 16 December 2008, Mr Wogu had been arrested on 20 November 2008 and on 24 November 2008 the Nigerian police seized documents and computers from the offices of IPCO in Lagos. Some of the documents (over 200 files) had been returned before 16 December 2008, but 5 files were retained.

26. In giving judgement on NNPC's stay application, Flaux J said that he was sceptical about the timing of the application and of NNPC's motive but he stayed Tomlinson J's order so as "to hold the ring" whilst an application was made under s.103 (3) of the Act to set aside that order and/or to order that enforcement of the Award be further adjourned. Flaux J also directed that NNPC should serve detailed particulars of its allegations of fraud and forgery and he set a timetable for the service by both sides of their evidence. He also ordered that NNPC must maintain the guarantees in the sum of US$80 million providing the security ordered by Gross and Tomlinson JJ and by the Court of Appeal[9].

27. Pursuant to the order of Flaux J, NNPC served: (i) Particulars of Fraud ("POF"); (ii) the second witness statement of Engr. Bello; (iii) the witness statement of Mr Roger Williams, the Commercial Director of Leighs Paints (one of IPCO's sub-contractors) who confirmed that several documents held by IPCO which purportedly originated from Leighs Paints were forgeries; (iv) the witness statement of Mr David Leishman,

Managing Director of SLG Petrochemical Limited (another of IPCO's sub-contractors) who confirmed that numerous documents held by IPCO which purportedly originated from SLG Petrochemical were neither known to him nor on the company's records.

28. The POF plead 19 instances of fraud in Optional Item claims, 36 instances of Variation fraud and one instance of Prolongation fraud. The Tribunal no award for the Optional Items claimed. These particulars going to Optional Items, a majority of which allege forged/false purchase orders, are accordingly asserted in support of an allegation that IPCO was operating a systematic fraud that included Variation and Optional Item claims. As for the Variation fraud particulars, a majority of these allege that forged/false purchase orders were submitted to the Tribunal. There are also several instances where it is alleged that there are forged documents that support the plea of fraud but which were not submitted to the Tribunal.

29. In his second witness statement Engr. Bello refers to and exhibits two statements made by Mr Wogu to the police dated respectively 21/11/08 and 29/11/08 and statements made by seven of IPCO's creditors[10] who were owed money for supplies used in the BET Project for which it is alleged IPCO had claimed inflated sums from NNPC. One of those creditors, Chief Alagba, says in this statement that when he spoke to Mr Wogu in August 2008 to complain that his company had not been paid he saw a document that showed that IPCO was claiming very much more than the sum for which his company had invoiced IPCO. The other creditors said in their statements that following the raising of the alarm by one of Chief Alagba's companies they had been told that IPCO had inflated the amount actually due to them.

30. In his first police statement, Mr Wogu relates an occasion when a gentleman (Chief Matthew Alagba) representing a creditor of IPCO, Maduala Enterprises, came to his office and was shocked by the amounts specified in a document as being due to his company. Elsewhere in this statement, Mr Wogu says, "In the issues of forgery I will say we carried out exercises in 2004 and 2005 towards incorporating the claims and variation cost into our Accounts and this led to the increased figures we posted as outstanding to the Vendors. Backups were generated in addition to the ones submitted on the Claims and Variation to the Arbitration Tribunal…"

31. In his second police statement, Mr Wogu states:

> 31.1 He got involved in the claims, variations and optional items documentation that was being looked into in 2001 when the IPCO Executive Committee ("EXCOM") mandated work towards a figure of between US$64 million and US$70 million which led to attaching doctored photocopies.
>
> 31.2 On the instructions of Mr Rea, IPCO's Managing Director, he carried out the review mentioned in the IPCO Abuja weekly report for 4 March 2002 ("the Abuja Weekly Report") which revealed invoices with the same number for the same work but with different amounts inserted. Thereafter, on the instructions of EXCOM he removed the contradictory copies and replaced them with other

copies generated as backups to the amounts claimed for variations and optional items.

31.3 He identifies many documents, mainly purchase orders, that were substitute documents with higher prices than that charged by the supplier. Many of these documents are in respect of a supplier originally called ICS and subsequently called Merchant International Inc ("MII"). At one stage he says, "Again I will say these were done for audit" and later he states, "Yes more backups were generated after the award in 2004 for the Audit I mentioned above. It was between October 2004 and June 2005 at EDO House Lagos."

32. Engr. Bello describes in his second witness statement how in 1999 in the course of the BET contract IPCO had submitted claims to NNPC's Engineering and Technology Division for each Variation Order ("VO") accompanied by a package of supporting documents which were referred to the Owner's Project Management Team ("OPMT") and how in 2001, following the intervention of the President of Nigeria, IPCO submitted its Final Claim for Variations (and other heads of claim) which were reviewed both by the OPMT and a committee specially set up for the purpose, the Obialo Committee.

33. In paragraph 69, Engr. Bello sets out his understanding of how the fraud operated:

69.1 IPCO fraudulently overstated its Optional Item, Variation and Prolongation claims. Senior officers within IPCO directed that those claims be inflated to a particular financial value.

69.2 That process (the "Original Fraud") was perpetrated by producing various forged documents for the purposes of the Final Claim to be sent by IPCO to NNPC.

69.3 However, again at the instructions of senior officers within IPCO, a review was carried out to ensure that the Final Claim was consistent with earlier Interim Claims submitted by IPCO to NNPC. That review was carried out by Mr Wogu, who identified that the Final Claim was not consistent with the Interim Claims (because of the Original Fraud).

69.4 IPCO arranged for the Final Submission to be reclaimed from NNPC. It then engaged in a process (the "Second Fraud") whereby it suppressed documents which tended to reveal the fraud; and forged fresh documents (principally subcontractor invoices, Subcontractor Payment Certificate Controls ("SPCC's"), Purchase Orders ("POs"), but also letters of intent, agreements, way bills, time sheets and milestone/completion documents) to use in place of the suppressed documents in order to support its (fraudulently inflated) claim.

69.5 The revised Final Submission was submitted to NNPC for payment and, later, formed the basis of IPCO's claim before the Tribunal.

34. Engr. Bello then gives examples, by reference to documents seized from IPCO by the police, of what he alleges were "Purchase Order Frauds" whereby false purchase orders stating a falsely inflated price for goods or services received by IPCO were submitted by IPCO in support of its Variations claim in the arbitration. In the course of this part of his

evidence Engr. Bello observes that there were many cases where in addition to false POs in respect of particular suppliers, there were found in IPCO's documents an MII invoice for the same supply and for the same inflated price but which had not been produced to the Tribunal. He goes on:

> It seems that IPCO realised, during Mr Wogu's review, that the MII invoices were not credible, and therefore removed them and replaced them which (sic) [with] much more sophisticated forgeries as part of the Second Fraud … The existence of these MII documents therefore demonstrates that the description of the fraud contained in the IPCO weekly update, i.e. an initial fraud followed by a review and "improved" forgeries, is a true account of IPCO's fraud.

35. Pursuant to an order of Tomlinson J made on 29 January 2009, NNPC served on 13 March 2009 a Schedule identifying each and every document relied in support of an allegation of fraud or forgery. On NNPC's application the Nigerian police had provided copies of documents contained in the 5 files they had retained, copies of which were supplied to IPCO. It is these documents which NNPC relied on in pleading the POFs.

36. On 13 March 2009, 20 charges were preferred against IPCO and the following present and/or former officers or employees, Mr Olefumi Lapido, Mr Wogu, Mr Jim Bazor, Mr Paul Lawrence, Mr Mike Simpson and Mr Peter Rea, alleging conspiracy to defraud by making a false final variation claims. The charges included separate counts relating to the allegations of forgery made by the 7 creditors referred to above.

37. On 27 March 2009, NNPC filed a Notice of Motion in Nigeria seeking, inter alia, leave to amend its Re-Re-Amended Originating Motion to set aside the Award by pleading the fraud allegations.

38. IPCO was ordered by Flaux J to file its evidence in opposition to the Fraud Allegations by 17 April 2009. However, by letter dated 9 April 2009, IPCO through their solicitors, Lovells, sought NNPC's agreement to an extension for the service of their evidence to at least 31 July 2009. NNPC had served over 1,600 pages of evidence; given the lapse of time (over 10 years in some cases) former employees were proving difficult to trace, contact and interview; access to third party suppliers was proving difficult, particularly those no longer in business; IPCO only had a skeleton staff in Nigeria who had been subjected to threats; document taken by the police had not be returned. The letter continued:

> 9. As you and your client are aware, our client is suffering serious financial prejudice as a result of your client's failure to pay for work carried out on the BET Project, for which there is no satisfactory explanation (we note that your client's case on this application is merely that sums awarded in respect of the work carried out carried out were inflated). Given the likely delay if this matter goes back to Nigeria, and not withstanding our client's arguments (among others) that your client is not entitled to raise these allegations now, that any application in Nigeria is time barred and that in all the circumstances it would not be proper to adjourn

enforcement in any event, our client is entitled to have a fair opportunity properly to prepare its evidence to answer comprehensively your client's allegations of fraud.

10. There is no prejudice or significance suffered by your client in agreeing to the terms of the extension sought, given that your client's application to adjourn the decision on enforcement pending the outcome of your client's application to set aside the Award in Nigeria. Indeed, we understand that your client has now, belatedly, filed an application in Nigeria to set aside the Award on the basis of the alleged fraud which is due to be listed shortly. Consequently a decision on the issue as to whether or not your client's application in Nigeria is time-barred will probably be heard within the next several weeks, and such decision will have a significant impact on the nature of your client's application in this jurisdiction. Additionally, the proposed amendments to the timetable for the hearing are entirely consistent with your client's invitation to the Court to "hold the ring".

39. By letter dated 16 April 2009, NNPC's solicitors, Stephenson Harwood, refused IPCO's request for an adjournment and stated therein:

> 3. The nature of NNPC's application is such that it only needs to establish a prima facie case of fraud. Therefore, unless IPCO's evidence unequivocally explains the documentary evidence of fraud presented by NNPC, IPCO will fail to resist NNPC's application on the merits. IPCO are not entitled to additional time simply to contact every conceivable witness from whom it may want to put forward a witness statement in the jurisdiction where the issue of fraud is to be finally determined (i.e. Nigeria). We see no reason why, if IPCO has a straightforward and irrefutable answer to the allegations of fraud, it cannot marshal its evidence and put it forward in the available time before the hearing scheduled in June…
>
> 10. The hearing of our client's application in Nigeria is not a reason to seek an adjournment from the English Court and the original timetable was not fixed on the basis that the English Court should await the decision in Nigeria. In any event at the time of writing we do not know when the application is likely to be heard...

40. Lovells then wrote to Stephenson Harwood on 20 April 2009 conceding NNPC's application that Tomlinson J's order be varied to order that enforcement of the Award be adjourned under s. 101 (5) of the Act. The key parts of this letter read:

> 9. Even more importantly … the Court will not be conducting a trial of the alleged fraud issues at the hearing in June. It will exercise its discretion, following a brief consideration of the available material, as to whether your client's allegations have a real prospect of success on the merits. In this regard, the burden on our client (a matter to which we return below) is very onerous…
>
> 11. Notwithstanding these difficulties, progress has been made ... IPCO is confident that it will in due course be in a position to provide straightforward and robust answers, supported by compelling evidence, to most, if not all, of your client's allegations.

> However, as to your third "principal objection", given the number and nature of your client's allegations, the difficulties outlined above and the task of the English Court on an application of this nature (we do not accept that your third "principal objection" in your paragraph 3 accurately sets out the question for the English Court or the test to be applied), our client reluctantly accepts that the decision on further enforcement of the Tomlinson Order should be adjourned.
>
> Our client's decision in this regard is based on a realistic assessment that the English Court is unlikely on a summary application of this nature to carry out a detailed examination of the evidence or to determine at this stage that your client's proposed challenge to the award on the variations head of claim has no real prospect of success. Accordingly, our client accepts that the appropriate place to determine whether your client is entitled to bring such a challenge (a matter which we understand may be determined by the Nigerian Court in *fairly short order*[11]), and, if so, for its determination, is Nigeria.
>
> We note for the record that our client's decision has been reached with the greatest of regret. It is entirely without prejudice to all its rights (including to return to the English Court in the case of further delay by NNPC in Nigeria)…

41. Stephenson Harwood replied by letter dated 8 May 2009 stating, inter alia:

> In relation to the penultimate paragraph in your fax, we understand that directions have been given in relation to the application to amend[12] and that the hearing is now scheduled for 17 June 2009. We do not know (and can only assume that you do not know either) whether or not our client's Application will be *"determined by the Nigerian Court in fairly short order"* on or after that date, and the Consent Order is not made on the basis that any expectation or understanding you have as to when the question of fraud will be determined in Nigeria is correct.
>
> Nor do we accept your reference to a *"right to return to the English Court in the case of further delay by NNPC in Nigeria) …"*. As appears hereafter, it is in fact your client which is delaying progress in Nigeria by launching satellite applications designed to harass our client's officers and employees, but in any event your concession is that the issue of fraud should be determined in Nigeria in accordance with Nigerian procedure. The Consent Order is made on that basis. Your client does not have the right to shuttle back and forth between the two jurisdictions depending on where it perceives its tactical advantage to lie at any given moment.

42. Thereafter, the parties entered into a Consent Order dated 17 June 2009 ("the Consent Order") by which it was ordered, inter alia, that: (i) those parts of Tomlinson J's order directing payment of the Non-Payment award (US$1,641,234) and the Variations award (US$58,521,249.55, less US$7,691,086.33) be set aside; (ii) the decision on enforcement of the Award be adjourned pursuant to s. 103 (5) of the Act; (iii) there be liberty to apply generally. At the Court's request (Gross J), a letter dated 11 June 2009 in agreed terms was provided by Stephenson Harwood to the Court setting out the developments that had occurred since the hearing before Gross J. The ninth paragraph of that letter reads:

> IPCO has subsequently accepted that the question of whether the award was obtained by (IPCO's) fraud and should be set aside, ought to be resolved by the Courts in Nigeria, which (as you will be aware) are the Courts of the seat of the arbitration (and before which there is a pending application to set aside the award). As a result, it has been agreed that certain parts of [Tomlinson J's Order] should be set aside (i.e. so as to prevent enforcement for the time being of the remainder of the award); that any decision on enforcement of the award should be adjourned with liberty to apply; that NNPC should maintain its guarantees in favour of IPCO; that various undertakings in support of the English proceedings should be discharged; and that IPCO should pay NNPC's costs.

43. Meanwhile, respectively on 5 June and 10 June 2009, IPCO filed a Notice of Motion in Nigeria seeking to restrain NNPC from prosecuting its Notice of Motion of 27 March 2009 and filed a Preliminary Objection to the same Notice of Motion on the ground of lack of jurisdiction given IPCO's appeal from the decision of Auta J. And on 17 June 2009, the parties agreed that NNPC's Notice of Motion of 27 March 2009 and IPCO's Preliminary Objection thereto should be adjourned to be heard after the hearing of the appeal against the decision of Auta J.

44. The trial of the conspiracy charge against IPCO and the other individual defendants was set to begin on 23 September 2010. On 18 September 2010, Danagogo and Danagogo wrote to the Inspector General of Police on behalf of the seven creditors referred to in paragraph 29 and fn 10 above, stating that these witnesses: (i) did not have the financial resources to travel to Abuja to give evidence at the trial; (ii) had made their statements in furtherance of recovery of the debts owed to them by IPCO; (iii) had sworn further statements making it clear that their earlier statements had been predicated on Chief Alagba's statement; and (iv) were not disposed to participate in the prosecution and if compelled to do so, their evidence would "be in line with their present resolve". In his further statement, Chief Alagba said that the document he saw in August 2008 was unsigned and on plain paper, the figure mentioned in his statement related to the provision of security guards, not the supply of mechanical, engineering and building materials, and two specified invoices were genuine. In their further statements the other creditors said that it was Chief Alagba who had told them he had seen a document indicating that IPCO had inflated the debt owed to their companies and they were not aware of any forged documents.

45. On 1 December 2010, the Nigerian Federal High Court struck out the conspiracy charge, acceding to a Motion filed by the Inspector General of Police on 22 September 2010 for leave to withdraw the charge.

46. On 17 January 2011, NNPC's lawyers, Babalakin & Co ("B&C") wrote to the Honourable Attorney General of the Federation & Minister of Justice ("the HAGF") complaining about the Police decision to withdraw the charges. This letter described the application for leave to withdraw the charges as "spurious" and went on:

> We find it shocking that a matter in which the NNPC (and by extension the Federal Government of Nigeria) is alleged to have been defrauded of several millions of United States Dollars could be treated with such levity. ..
>
> If this charade is allowed to stand, the Federal Government would not only have been defrauded of a large sum of money, but is exposed to the potential loss of a colossal sum of money currently in excess of US$200,000,000.00 …
>
> The English Courts have already compelled NNPC to pay IPCO US$14,743,596.00 … and to furnish bank guarantees for the aggregate sum of US$80,000,000.00 … Please note that the only impediment that has restrained the English Courts from entering final judgment against the NNPC is the criminal investigations of IPCO and its prosecution which ought to be pending.
>
> In light of the foregoing, we write to urge your esteemed office to urgently wade into this matter, file fresh charges against the accused persons and take over the conduct of the prosecution and to pursue it to a logical conclusion.

47. On or about 17 May 2011, B&C wrote again to the AG stating, inter alia:

> ... [W]e respectfully wish to emphasize that the continued absence of fresh charges against the accused persons entitles IPCO Nigeria Limited to proceed with the enforcement of the arbitral award against the Federal Government of Nigeria in the United Kingdom. Please recall that the potential liability of the Federal Government of Nigeria is in excess of US$200 million with interest accruing thereon daily.
>
> We therefore humbly urge your esteemed office to expedite action in respect of the prosecution of the accused persons in order to prevent any financial embarrassment of the Federal Government of Nigeria in the United Kingdom.

48. Three weeks later, NPCC's lobbying bore fruit. On 22 June 2011, 21 charges were preferred against the original defendants by the Nigerian Director of Public Prosecutions ("the DPP") founded on the allegation that the Variations claim had been fraudulently inflated by use of false and forged documents. On 1 November 2011, B&C wrote again to the HAGF[13] complaining about plans for service of the charges on the defendants and stating:

> ...we wish to reiterate that it is imperative to expedite the diligent prosecution of the charge against the accused persons in the **national** interest. In this regard, kindly recall that the Federal Government of Nigeria faces an impending risk of losing well over US$200 million in the event of a failure to diligently prosecute this matter, as we have copiously explained in our previous correspondence."

49. Meanwhile, on 19 May 2011, at a hearing before the Federal Court of Appeal at which IPCO was seeking to merge its two Notices of Appeal (law and fact), the Court of Appeal pointed out that the Notice of Appeal as to fact had been signed by an unidentified person on behalf of IPCO's counsel, Mr Babatunde John Fagbohunlu, which rendered invalid that Notice of Appeal. Accordingly, on 6 October 2011, IPCO applied for an extension of

time to file another Notice of Appeal as to fact, but when that application was heard on 21 February 2012, the Court of Appeal observed that the first Notice of Appeal had first to be withdrawn and only then could an application for an extension of time be made. Accordingly, IPCO withdrew the Notice of Appeal as to fact and on 9 March 2012 made a fresh application for an extension of time in which to file a replacement Notice of Appeal as to fact and to combine the two Notices of Appeal by amending the existing Notice of Appeal as to law. This fresh application was due to be heard on 18 April 2012 but the Court of Appeal did not convene on this date. Then on 13 April 2012, NNPC filed a Motion to set aside the permission granted by the Nigerian Federal Court of Appeal on 20 February 2007 to IPCO to appeal Auta J's decision of 5 July 2006[14] on the ground that IPCO's application for permission (as distinct from the subsequent Notice of Appeal as to fact) had not been signed by a legal practitioner enrolled to practise as such, but on behalf of such a legal practitioner, Mr Fagbohunlu. On this date, NNPC also filed affidavits opposing IPCO's Motions for an extension of time and to amend the Notice of Appeal as to law.

50. Returning to the chronology, by letter dated 1 November 2011, B&C wrote to the HAGF criticising his office's decision to serve the new Charge Sheet through use of the bailiff, and proposing that the Commissioner of Police (Rivers State) locate and secure the attendance of the accused in Court for trial or that an arrest warrant be issued. The letter went on:

> Again, we wish (sic) reiterate that it is imperative to expedite the diligent prosecution of the charge against the accused persons in the **national** interest. In this regard, kindly recall that the Federal Government of Nigeria faces an impending risk of losing well over US$200 million in the event of failure to diligently prosecute this matter, as we have copiously explained in our previous correspondence…

51. By letters dated 1 March and 21 March 2012, B&C wrote again to the HAGF urging his office diligently to prosecute the new charges.

52. On 24 July 2012, IPCO issued the application to enforce the Award now before the Court and by letter dated 31 August 2012, B&C yet again urged the HAGF to prosecute the charges diligently:

> Please note that it is very expedient and crucial to take necessary steps to diligently prosecute this matter as we can confirm that the 1st accused person (IPCO Nigeria Limited) is currently exploiting the situation by making active efforts in a Court of competent jurisdiction in the United Kingdom, through their Counsel, to seek the judicial enforcement of the Arbitral Award made against the Federal Government of Nigeria in favour of the 1st accused person. If successful in this scheme, the Federal Government of Nigeria may incur liability to the 1st accused person in excess of US$200,000,000.00 …
>
> It is our earnest hope that your office would take necessary and effective steps to prevent a situation whereby the Federal Government of Nigeria is exposed to such

> an avoidable liability … as well as the attendant ridicule, embarrassment and derision that the nation and its institutions would undoubtedly face among the comity of nations.

53. Further letters in a similar vein were sent by B&C to the Inspector General of Police dated 4 and 18 October 2012 and to the Deputy DPP (18 October 2012).

54. At a hearing on 15 October 2012, the Federal Court of Appeal declared that it could set aside its decision of 20 February 2007 giving leave to IPCO to appeal Auta J's decision on the facts and indicated that IPCO should agree to this and bring another application for leave to appeal which would be granted as a matter of course.

55. On 22 October 2012, the Deputy DPP, produced a memorandum in which he stated, inter alia, that: (i) the only way to delay enforcement of the Award was to maintain the criminal prosecution and thereby meet the requirement of Article V (e) of the New York Convention; and (ii) the criminal prosecution had no real prospect of success because of lack of evidence: the 20 allegedly falsified Variations and Option Claims were not attached to the proof; there was no statement from NNPC attached to the proof; the prosecution witnesses were unwilling to testify and had said in notarised statements that they had no evidence that sums due had been inflated. In his view, a committee should be established to verify the claims of IPCO and NNPC, advise whether there is a prosecutable matter and negotiate with the parties as to the amount, if any, due.

56. By letter dated 14 January 2013 the Deputy DPP wrote to IPCO stating that HAGF was of the firm belief that a successful prosecution against IPCO was unsustainable: there was no reasonable prospect of conviction and it was not in the public interest to waste public resources on the prosecution of the case. The HAGF had therefore decided to discontinue the prosecution of IPCO and its officers and to convene a roundtable meeting of all the stakeholders in the matter to explore the possibilities of an out of Court settlement. A letter in almost identical terms dated 22 January 2013 was sent to NNPC. The difference between the two letters was that in the latter, although it was stated that the HGAF was of the belief that a successful prosecution against IPCO for forgery was unsustainable, it was not stated that the HAGF had decided to discontinue the criminal prosecution of IPCO.

57. On 5 February 2013, NNPC applied to the Federal Court of Appeal to strike out or dismiss IPCO's appeal against the decision of Auta J on the ground that since Okeke J had now retired from the bench, she could no longer deliver her ruling and thus IPCO's appeal was academic.

58. On 18 February 2013, NNPC's GMD sent a long letter to the HAGF in which he said, inter alia: (i) NNPC had not at any time sought the aid of the Federal DPP in respect of civil matters between NNPC and IPCO; (ii) the invitation to a meeting to settle the civil dispute was difficult to comprehend; (iii) the statement that the only impediment to IPCO's enforcement of the Award was the prosecution of IPCO and its staff for forgery was factually and legally flawed: NNPC's case for fraud has always depended on the

documents, not on the prospect of a criminal prosecution; (iv) the prosecution had been poorly handled in a number of respects; (v) NNPC sought the HAGF and the Minister of Justice to issue a fiat to Counsel nominated by NNPC to take over the prosecution against IPCO.

59. On 26 February 2013, IPCO filed a Notice of Preliminary Objection to NNPC's recent strike out Motion and at a hearing before the Federal Court of Appeal on 27 February 2013 both parties' applications were adjourned to 11 April 2013 for the adoption of written addresses.

60. On 28 February 2013 there was disclosed to IPCO a report by the Inspector General of Police dated 30 December 2008 to the Federal Ministry of Justice on the police investigation into Mr Wogu's allegations of forgery and fraud.

61. Following a meeting between the HAGF and NNPC on 19 February 2013, on 4 March 2013 the HAGF appointed Mr Solomon Asemota SAN, to exercise the HAGF's powers in respect of the prosecution of the charges laid against IPCO and its officers at NNPC's expense. In a letter dated 8 March 2013 to NNPC, the HAGF stated, "in view of emerging facts, there is a prima facie case against IPCO…"

62. On 10 April 2013, IPCO filed an application for judicial review of the HAGF's decision to grant his fiat to Mr Asemota SAN and on 21 April 2013 IPCO filed a Notice of Motion for an injunction restraining the HAGF from proceeding with the prosecution whether directly or indirectly.

63. The Court of Appeal did not convene on 11 April 2013 and when on 10 June 2013 the matter came up for the adoption of written addresses, it was adjourned once again, this time to 29 October 2013.

Has IPCO satisfied the Court that there has been a sufficient change of circumstances to justify a re-consideration of whether the Award should be further enforced in whole or in part?

64. It is common ground that this is the first issue to be determined by the Court and that if the decision of the Court is against IPCO, that will be the end of this application.

65. It also common ground that the approach that the Court should take in deciding this issue is that articulated in paragraphs 73 – 76 of Tomlinson J's judgement. The change of circumstances must be significant and causatively linked to the variation of the earlier order; and if there be a sufficient change of circumstance for the original decision on enforcement to be reconsidered, that ought not ordinarily to require any revisiting of the Court's earlier decision as to the strength of the challenge to the arbitral award that was the foundation for the original decision to adjourn enforcement.

66. Consideration has also to be given to the meaning and effect of the Consent Order which for this purpose must to be assessed against the relevant factual background. The Consent

Order was made in NNPC's application to set aside, on the basis of its allegations of fraud, that part of Tomlinson J's order sealed on 13 May 2008 that ordered the payment of US$1,641,234.00 and US$58,521,249.55, respectively awarded under Non-Payment and Variations heads of claim, less the US$7.7 million already paid. It was NNPC's case that, pursuant to *Soleh Boneh*, it had a sufficient prospect of success in establishing its fraud allegations in a challenge to the Award in Nigeria that no part of the Award should be enforced and that IPCO's enforcement application heard by Tomlinson J ought to be adjourned pursuant to s. 103 (5) of the Act. As recounted in paragraphs 27 – 35 above, in support of its application to vary Tomlinson J's order, NNPC relied on: (i) the POF; (ii) its Schedule identifying each and every document relied on in support of its forgery and fraud allegations; (iii) the second witness statement of Engr. Bello; and (iv) the witness statements of two officers employed by two sub-contractors, Mr Roger Williams and Mr David Leishman.

67. The evidence before Flaux J in support of the temporary stay application – principally the first witness statement of Engr. Bello -- was not intended to be relied on by NNPC but reference to it could have been made by IPCO and NNPC had they chosen to do so.

68. The remaining part of the background to the Consent Order are the letters from Lovells dated 9 and 20 April 2009 and the letters from Stephenson Harwood dated 16 April 2009, 8 May 2009 and 11 June 2009, which are all referred to in detail in paragraphs 38 – 41 above.

69. In my judgement, having regard to the terms of the Consent Order and the factual background to the agreement embodied therein, IPCO were conceding by agreeing to that order that the NNPC's case on fraud in support of its application to vary Tomlinson J's order established a prima facie case of sufficient cogency to require the Court to adjourn IPCO's enforcement application under s.103 (5). Further, in my view, the Consent Order was not made on the basis that NNPC's application to amend its Re-Re-Amended Motion by pleading fraud would be heard and determined "in fairly short order".

70. Mr Black QC for IPCO advanced the following 8 separate occurrences which he contended both singly and in aggregate required the Court to consider afresh whether all or part of the Award should be enforced. The first 7 of these occurrences were matters relating to NNPC's fraud case. The 8th was the decision of the Nigerian Federal Court of Appeal made on 15 October 2012 setting aside the leave to appeal Auta J's decision previously granted to IPCO. It was Mr Black's overall theme that these occurrences, particularly 1 – 7, showed that: (i) NNPC's fraud allegations were not made bona fide but solely for the purpose of blocking enforcement of the Award; and (ii) NNPC has known or suspected from the outset that its fraud allegations were false or at least would appear materially weaker if the true circumstances in which they came to NNPC's attention were revealed by it.

(1) The report of the Inspector General of Police dated 30 December 2008 to the Federal Minister of Justice concerning the police investigation into Mr Wogu's allegations of forgery and fraud disclosed on 13 February 2013 [Para 60 above]

71. This report sets out a brief summary of the facts found by the police and it is tolerably clear that it is based on the statements made by Mr Wogu before and after his arrest, the statements made by the seven creditors referred to in paragraph 29 above and the documents seized from IPCO's offices. The report also records how the President of Nigeria was informed of the forgery and fraud allegations and how he directed the GMD of NNPC to liaise with the HAGF and the Inspector General of Police on the issue. In paragraph 10 of the report it is stated that documents in respect of 22 Variations and 4 Optional Items have been found to be forged by the insertion of inflationary figures and that "[i]t was through submission of these fraud documents to the arbitration panel that enabled IPCO to obtain a favourable award of $153 million USD against the NNPC. The arbitral award is currently a subject of appeal at the instance of NNPC before the *British House of Lords."*

72. Paragraph 11 reads:

> In order to enhance the appeal case of NNPC, it is recommended that the Hon. Attorney-General should initiate *Criminal Proceedings* against the two Nigerians and the four expatriate staff of *IPCO (Nigeria) Ltd* who were found to have conspired and forged various payment documents of creditors. To this end, all the documents recovered during Police search have been carefully scrutinized and the relevant ones retained for further evidential proof.

73. Mr Black submitted that had IPCO known of this report prior to the Consent Order it would have affected IPCO's decision whether to contest NNPC's application to vary Tomlinson J's order because it shows that IPCO was facing "a carefully planned pincer movement" trapping IPCO between NNPC relying on Mr Wogu's evidence and the apparent independent corroboration by the seven creditors, and the police, with the object of enabling NNPC to resist enforcement of the award.

(2) The qualification by the 7 creditors of their original police statements and their refusal to attend to give evidence. (3) The withdrawal of the first set of criminal charges.[Paras 23.3, 29, 36, 44 & 45 above]

74. Mr Black submitted that these occurrences seriously undermined NNPC's forgery and fraud case. Several of the charges originally preferred against IPCO and its officers and employees were founded on the allegations made by the 7 creditors in their original statements and NNPC had relied on the criminal investigation and evidence concerning the 7 creditors in support of its application to vary Tomlinson J's order. Mr Black contended that the original statements made by the 7 creditors had been orchestrated by Mr Wogu. In his first statement dated July 2008, Mr Wogu says: "We will get IPCO contractors and vendors who were ignorantly used in the process but variously owed since 1998 through 2001 to support with witness documents and stand as witnesses should the need arise in a bid of putting off this claim"; and in his witness statement dated 12 July 2013, he says that he told Dr Max Nduaguibe ("Dr Max") about Chief Alagba's visit in August 2008 when he opened up to the Chief about the forged documents and that later he "coordinated a meeting between Dr Max and the creditors … it was easy to

approach the creditors in this way." The change of position adopted by the creditors showed that their original statements had been false, submitted Mr Black. Mr Wogu had accordingly orchestrated false evidence from the creditors.

(4) The lobbying of the HAGF by and on behalf of NNPC leading to the preferment of new charges and the further lobbying urging the diligent prosecution thereof. [Paras 46 and 47 – 53 above.] (5) The HAGF's decision to issue his fiat to Mr Asemota SAN following further lobbying by NNPC in the face of the Deputy DPP's announcement that the prosecution of the charges against IPCO had no realistic prospect of success.[Paras 58,62 and 62 above]

75. The correspondence showing the vigorous lobbying of the HAGF by and on behalf of NNPC from 17 January 2011 to 18 February 2013 was disclosed to IPCO well after the making of the Consent Order. It will be recalled that throughout this lobbying the HAGF was repeatedly reminded of the importance of the prosecution of the criminal charges to NNPC's application in Nigeria to have the Award set aside. In Mr Black's submission, this correspondence showed that : (i) NNPC was fearful that without the criminal charges, its challenge to the Award in Nigeria would be seriously weakened; and (ii) there was effectively a concerted effort by NNPC to use the criminal charges to prevent enforcement of the Award.

(6) The Deputy DDP's view that the prosecution of the new charges had no realistic chance of success. [Paras 55& 56 above],

76. Mr Black argued that this was a highly material occurrence that seriously undermined NNPC's case in fraud and forgery against IPCO.

(7) Mr Wogu's change of evidence in his witness statement dated 27 September 2013 in respect of the MII documents

77. In his second statement headed "Background", Mr Wogu states that he was mandated by EXCOM in 2001 to look towards a figure of US$64 million to US$470 million when making Variation and Optional Item claims, pursuant to which he and others attached doctored copies to the claims. He also states he was requested on 26 February 2002 to carry out a review of the interim (1999) and final (2001) Variation submissions following which contradictory documentation was retrieved from NNPC and replaced with additional back-ups using inflated rates to bring the total amount claimed to US$70,185,405.06. Then, with the introductory words, "The forgery covered all segments of the awards, that is; (1) Variation orders (2) Optional items …" Mr Wogu goes on to give examples of where forged documents were used, including Variation Orders 14, 16 & 19 where Purchase Orders were issued for an inflated sum and issued to MII who never supplied or knew about the order. At the end of the statement, Mr Wogu notes that, after the Award in 2004, IPCO embarked on more detailed backup and ledger integration of the costs claimed.

78. In his Background statement Mr Wogu may be saying that some MII documents were forgeries created and used before the Award but this is far from clear. The same can be said in respect of his second statement to the police where he talks about the use of doctored photocopies in IPCO's final submission of Variation and Optional Items claims in 2001 and then, in the course of giving examples of this pre-Award fraud, he refers to instances where fictitious MII documentation was used. However, it is also to be noted that in this statement, as he did in his "Background" statement, Mr Wogu refers to a post Award audit fraud where MII forged documentation was used.

79. In his witness statement dated 12 July 2013, Mr Wogu says MII was used for forging most of the foreign Purchase Orders used in the Variations submission to the Tribunal where original copies of the purchase orders might be found in the OPMT procurement file. Later in paragraphs 111 – 113 of this statement, Mr Wogu states that he was instructed to incorporate the additional costs arising from Variation forgeries into the project costs report and accounts and further forgeries were produced for this purpose. This was what he was referring to in his first police statement when he said he carried out exercises in 2004 and 2005 towards incorporating the Variation costs into IPCO's accounts.

80. However, in a short witness statement dated 27 September 2013, Mr Wogu says: "My First Witness Statement [dated 12 July 2013] incorrectly gives the impression that MII documents were forged prior to the issue of the Award; MII forgeries were in fact created after the Award during the exercise described at paragraphs 111-113 of my First Witness Statement."

81. Mr Wogu then goes on to state that MII forged documents were used in the audit fraud where there was no original document evidencing the cost of supply that would pass muster with the auditors. In these situations, a fictitious supply by MII was created using documents that appeared to be original and genuine, when they were not.

82. Mr Black submitted that Mr Wogu's Second Witness Statement dated 27 September 2013 seriously undermines his earlier evidence that was being relied on by NNPC in support of its application to vary Tomlinson J's order and is an attempt to turn the "post-award" forgeries into "pre-award" forgeries along the lines that if there were forgeries post-award, it is to be inferred that the claim submitted to the Tribunal was falsely inflated.

(8) The decision of the Nigerian Federal Court of Appeal made on 15 October 2012 setting aside the earlier grant of leave on 20 February 2007 to IPCO to appeal Auta J's decision that he would determine NNPC's Re-Re-Amended Motion to set aside the Award and IPCO's Preliminary Objection thereto. [Paras 16, 49, 54, 57, 59 & 63 above]

83. Mr Black submitted that this decision of the Nigerian Federal Court of Appeal has set the civil proceedings in Nigeria over the validity of the Award back some 5 ½ years and is the sort of change of circumstance involving the curial Court that Tomlinson J considered a sufficient ground for re-exercising the Court's discretion.

Discussion and Decision

84. In my view, since by entering into the Consent Order IPCO were agreeing that NNPC's pleaded fraud case based on the POF, the Schedule of Documents, the second witness statement of Engr. Bello and the witness statements of Messrs Williams and Leishman, amounted to an arguable challenge to the Award in Nigeria, a change of circumstance relating to NNPC's fraud case will only be sufficient to re-open the exercise of the Court's discretion if it shows that that fraud case is hopeless and/or not bona fide. Thus, the question is not, as Mr Black suggested at one point in his submissions, whether there has been a subsequent development which would or might have persuaded the Court not to vary Tomlinson J's order in the manner achieved by the Consent Order.

85. In my judgement, none of Mr Black's first 7 subsequent occurrences demonstrates that NNPC's fraud challenge is hopeless or is not advanced bona fide or is otherwise a reason justifying a re-consideration by the Court whether to exercise its discretion to enforce the Award in whole or in part.

86. Taking first the police report dated 30 December 2008, this in my view is an unexceptional document save to the extent that it recommends the initiation of criminal proceedings "to enhance the appeal case of NNPC". In particular, it is not something from which it is to be inferred that the police knew that the evidence of Mr Wogu was false or that they were indifferent to the strength of the evidence so far obtained and were acting solely to assist NNPC to challenge the Award. I agree that it is questionable whether the police should have had in mind NNPC's appeal to the House of Lords when recommending criminal proceedings, but this does not undermine NNPC's fraud case in support of its application to vary Tomlinson J's order, based as it was squarely on the documents and Mr Wogu's evidence that he had been involved in forging documents submitted to the Tribunal as part of IPCO's Variations claim.

87. As to the change of position adopted by the 7 creditors and the withdrawal of the first set of charges, these events again do not significantly undermine NNPC's fraud case assembled in support of its application to vary Tomlinson J's order. In his second statement, Chief Alagba continued to say that he had seen a document setting out inflated figures, adding that it was because it fell out of an IPCO file that he assumed that it had been prepared by IPCO. Furthermore, in saying in their later statements that their evidence had been based on what Chief Alagba had told them, the other creditors were merely repeating the substance of their first statements. It is also to be noted that none of the 7 creditors said in their new statements that the original evidence they had given was false. Further, unlike the criminal charges that were tied to the creditors' statements, NNPC's fraud case was based not solely or principally on the oral evidence of the 7 creditors but on documents found in the possession of IPCO and on Mr Wogu's evidence. It is also worth noting that the forgeries connected to companies run by the 7 creditors pleaded in the POF are principally in respect of Optional Items, not Variations. Finally, I find that the evidence before me falls well short of proving the allegation by Mr Black that Mr Wogu orchestrated the evidence of the creditors knowing that it was false.

88. Turning to Mr Black's 4th and 5th subsequent events, the repeated insistence in the lobbying of the HAGF by or on behalf of NNPC that NNPC's challenge to the Award was in the **national** interest and dependent on the vigorous prosecution of IPCO and the individual defendants is unattractive. The key consideration for the Nigerian prosecution authorities was not NNPC's challenge to the Award, but whether they had or could obtain sufficient evidence to have a reasonable prospect of obtaining convictions on the charges that had been preferred. NNPC's lobbying does not, however, undermine the strength of NNPC's pleaded case in fraud supported by the evidence served in compliance with the order of Flaux J. Nor does it establish that NNPC's challenge to the Award in Nigeria is not bona fide. It is not appropriate that I make any observations as to the propriety of the HAGF's decision to issue his fiat for the appointment of Mr Asemota SAN to prosecute the charges laid against IPCO and the other defendants, and I decline to do so.

89. As for the Deputy DPP's view reached on 22 October 2012 that the prosecution of the new charges against IPCO and the individual defendants had no realistic prospect of success, this decision was based on the evidence the prosecution had been intending to call, principally that of the 7 creditors who had expressed extreme reluctance to attend the upcoming trial, and not on NNPC's analysis of the scheduled documents referred to in the POF and Mr Wogu's evidence. In my opinion, this decision therefore comes nowhere near to qualifying as a sufficient change of circumstances to warrant going behind the Consent Order and considering afresh whether to enforce the Award.

90. Turning to Mr Wogu's corrective witness statement dated 27 September 2013, there is no doubt that he did say in his witness statement of 12 July 2013 that MII documents were forged pre-award. Whether he said this in his Background statement and his second police statement is not clear, see paragraphs 76-77 above. The Court has not heard why Mr Wogu said that some MII documents were forged pre-award in his 12 July 2013 witness statement. Mr Nash QC for NNPC suggested that Mr Wogu may have been led into error by Engr. Bello's speculative suggestion in paragraph 87 of his second witness statement that, "[I]t appears that MII invoices were a feature of the Original Fraud. It seems that IPCO realised, during Mr Wogu's review, that the MII invoices were not credible, and therefore removed them and replaced them which (sic) much more sophisticated forgeries as part of the Second Fraud …" It was a speculative suggestion because at the time Engr. Bello made this witness statement, NNPC did not have access to Mr Wogu personally. Mr Nash's reasoning may be correct but without hearing from Mr Wogu on the question, the Court remains unsure as to the reasons why Mr Wogu said what he did in his 12 July 2013 statement.

91. In my opinion, Mr Wogu's witness statement of 27 September 2013 does not mean that I must conclude that the whole of his evidence had been rendered worthless, and I decline to do so. In my judgement, Mr Wogu's last witness statement does not undermine NNPC's fraud case to anything like the extent necessary to justify going behind the Consent Order. In each case where the POF plead forged MII documents it is made clear that these documents were not submitted to the Tribunal but are relied on as evidence from which a fraudulent submission can be inferred. In short, I think this development in

the evidence is within the range of risk that IPCO must be taken to have accepted when it entered into the Consent Order.

92. I come then to Mr Black's 8th and last change of circumstance, namely the decision of the Nigerian Court of Appeal made on 15 October 2012 setting aside the grant of leave on 20 February 2007 to IPCO to appeal the decision of Auta J. In my judgement, this too is not sufficient to stand as a reason for going behind the Consent Order. In his judgement, Tomlinson J described the delay in the civil proceedings in Nigeria wherein NNPC was seeking to set aside the Award in the face of IPCO's Preliminary Objection Motion as "catastrophic". At that point, an appeal from the decision of Auta J could have taken four years down to 2010 and a further appeal to the Supreme Court an additional five years. Thus, when IPCO agreed in the Consent Order that NNPC's fraud allegations should be determined in civil proceedings in Nigeria it could have had no expectation as to when those matters would be dealt with and it must have been fully aware of the risk of very significant further delay resulting from the introduction into the extant proceedings of the fraud allegations. Further, IPCO was itself responsible for the decision of the Federal Court of Appeal on 15 October 2012 since that stemmed from an elemental error on the part of its lawyers in not having the relevant application notices to the Court signed by an admitted member of the profession, but by someone acting on such a person's behalf, contrary to established authority.

93. My conclusion that IPCO has failed to establish any change of circumstances justifying a further application to enforce the Award in whole or part means that Tomlinson J's order, as varied by the Consent Order, must remain undisturbed and IPCO's application must be dismissed.

94. At the hearing, NNPC's fraud case was investigated against the possibility that the court would be satisfied that the court should consider enforcement of the Award afresh, and having considered this aspect of the case I can say that even if I had been persuaded that it were appropriate to consider enforcement afresh, I would still have refused to enforce any part of the Award because, in my opinion, NNPC have a good prima facie case that IPCO practised a fraud on the Tribunal which undermines the validity of the whole Award.

95. My reasons for this conclusion are as follows. First, I think that the correct approach would have been to proceed on the basis that if NNPC's fraud case were substantially proved, the whole Award would be vitiated. There is a dispute between the Nigerian law experts as to the effect on the Award of a finding of fraud against IPCO. IPCO's expert, a retired Nigerian Supreme Court Justice, Justice Belgore, expresses the view that only that part of the Award affected by any proven allegation of fraud would be set aside. NNPC's expert, Mr Daudu SAN, a legal practitioner of over 30 years standing, on the other hand, is of the opinion that if parts of the Award were fraudulently procured, the whole Award would be vitiated. Mr Daudu's view is cogently argued and chimes with Lord Bingham's observation in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6 at [15] that… *"fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that fraud unravels all: fraus omnia corrumpit. It also reflects the practical*

basis of commercial intercourse," and I think the appropriate course would have been to assume that there was a realistic prospect that the Nigerian Court would agree with Mr Daudu's view and find that the whole Award is vitiated if NNPC's fraud allegations are substantially proved.

96. Second, I am of the opinion that such an assessment should have to be on the basis that NNPC's fraud allegations would not be statute-barred in Nigeria. As to this, the Nigerian law experts are again divided, the late Justice Esho expressing the opinion that they would be time-barred, with Mr Daudu saying they would not be.

97. Third, I am not satisfied, despite the submissions of Mr Black, that the evidence of fraud on a *Soleh Boneh* assessment of NNPC's fraud case would be subject to the principle stated in *Ladd v Marshall* [1954] 1 WLR 1489 because this would be the approach of the Nigerian Court that hears NNPC's challenge to the Award.

98. Fourth, adopting the aforesaid approach, NNPC have adduced evidence that establishes a good prima facie case that numerous claims submitted to the Tribunal were fraudulently inflated. Very helpfully, Mr Nash provided a Schedule giving particulars of the evidence NNPC relied on in respect of each of the POF that relates to a Variation claim. In respect of about 17 of the pleaded Variation frauds, NNPC alleged that fraudulently altered POs were submitted to the Tribunal. In many other pleaded instances of fraud, NNPC relied on admittedly forged documents (including MII forged documents) that were not put before the Tribunal but are adduced for a "reverse inference" that the documents that were submitted -- calculation sheets and the like -- were dishonestly inflated.

99. NNPC places substantial reliance on the witness statements of Mr Wogu made on 12 July and 27 September 2013. In the former, Mr Wogu confirms what he says in his two police statements and he goes on to state that: (i) the Variation claims were prepared by Mike Simpson, Doug Atkin, John Fowler and Wale Badmus, all of whom were employed by IPCO; (ii) forged documents were generated by himself and others as backups to the inflated amounts claimed in respect of Optional Items and Variations in the arbitration; and (iii) the creation of these documents was authorised variously by Messrs Peter Rea, Paul Lawrence and Jim Bazor.

100. NNPC also relies on witness statements made by representatives of 13 of IPCO's subcontractors who confirm that documents submitted to the Tribunal concerning purported supplies from their firms were forged or related to non-genuine supplies that support 4 of the alleged Variation frauds and 15 of the Optional Items frauds.

101. The evidence also includes reports from handwriting experts, Mr Radley, instructed by NNPC, and Mr Ansell instructed by IPCO. In Mr Radley's opinion, save for 6 poor quality photocopies, the handwriting on the POs submitted by IPCO to the Tribunal is that of Mr Wogu and there is strong evidence that Mr Wogu wrote the text on 6 poor quality photocopies.

102. Mr Radley is also of the opinion that Mr Rea and Mr Lawrence wrote all of the signatures on the admittedly forged documents, and that the possibility of another individual having copied their signatures may be realistically disregarded. In the experts' joint statement, Mr Ansell says he is of the view that there is strong evidence that the signatures on the forged documents are those of Mr Rea and Mr Lawrence; and in an Addendum, he states that the questioned signatures could be good copies but this is very unlikely. In the light of this evidence, NNPC asks: if the documents were forged after the Award, what were Messrs Rea and Lawrence doing signing them?

103. In the course of his examination of the documents Mr Radley also noticed from some impressions on certain documents that: (i) an original invoice, purportedly from Frankie Enterprises, dated 28 October 2008, had been written whilst resting on an IPCO PO dated 12 November 1998; (ii) the original of an invoice, purportedly from Geodiez Nigeria Ltd, dated 3 January 1999, had been written while resting on an IPCO PO dated 15 January 1999; and (iii) the entries and signature on an IPCO monthly time chart dated August 1997 were all written whilst the document remained in the same position whilst on top of a SPCC dated 31 March 1997. In the experts' joint statement, Mr Ansell agreed with Mr Radley's analysis of these 3 documents, but in his Addendum he expresses the view that the 3 examples given by Mr Radley do not amount to mass or multiple fabrication of documents but may only, taken alone, indicate "administrative error or poor office practices".

104. In the light of Mr Radley's evidence on the 3 examples, which NNPC says is compelling, NNPC contends that the Frankie Enterprises invoice and the Geodiez Nigeria Ltd invoice could not, if they were genuine documents, have been written on top of IPCO's retained copies of POs, since the invoices would have been written at the offices of Frankie and Geodiez, not at IPCO's offices, and at different times. NNPC further notes that representatives of Frankie and Geodiez have confirmed in witness statements that the two invoices are in fact forgeries. NNPC also points out that: (i) the two invoices bear earlier dates than the POs on which they were resting, even though they must have been written after the POs were written; and (ii) the time chart was filled out all in one go (since the chart had not moved during the completion of all the entries), whereas the normal expectation would be that the chart had been filled out over a lengthy period.

105. IPCO accepts through the evidence of Mr Atkin that the sums expressed in the altered POs submitted to the Tribunal (which he calls "Reference Purchase Orders") were larger than those appearing in the original POs but contends that these alterations were bona fide adjustments to include such costs as customs dues, transportation and stevedoring charges. Mr Atkin says he has reviewed each of the Reference Purchase Orders referred to in IPCO's Response Schedule to NNPC's POF and is satisfied, on the basis of his knowledge, inter alia, of the rates involved on the BET Project and a retrospective cross check using reasonable uplift percentages, that in each case the "Total value" box was honestly intended to reflect, and did reflect, the true cost of the work installed. Mr Atkin also denies that he was involved in any way in the forgery of documents.

106. IPCO also contends that the fact that a different sum had been inserted into the submitted "Reference Purchase Orders" than that which appeared on the original PO was discernible from a fairly cursory examination of the documents.

107. It was Mr Fowler who led the team that collated and submitted the claim documents to the Tribunal. In his witness statement, Mr Fowler says that he looked carefully through each of the Variation packs and confirms that he saw nothing that indicated any form of fraud or fraudulent inflation of any claim. He goes on to state that, having conducted a review of the same, he accepts that many of the documents alleged by NNPC to be forgeries are indeed forgeries, but in his view they were created by Mr Wogu after the Award to persuade an independent accountant, Ms Funke Okubadejo, who had been asked to review a profit and loss statement that took account of the Award, that falsely stated liabilities in the P&L statement were genuine rather than false. By creating these false liabilities (the settlement of which would then be his responsibility) Mr Wogu would have had the opportunity to control substantial funds once NNPC had paid out on the Award.

108. In his 3rd witness statement, Mr Rea denies giving any instruction to produce forged documents whether pre or post the Award and also opines that: (i) Mr Wogu forged documents after the Award but not before; and (ii) the Abuja Weekly Report is a forgery. Mr Rea also denies Mr Wogu's assertion that every transaction control document with his writing on was a forgery because he (Mr Wogu) was never involved in drawing up transaction control documents in the ordinary course of business.

109. In his witness statement of 12 July 2013, Mr Wogu denies Mr Fowler's allegation that he had carried out a fraud post the Award for his own benefit and observes that in any event it would have been impossible for him to organise payments to himself and/or to IPCO's contractors given IPCO's sophisticated payment controls and the fact that he was not a signatory on IPCO's bank accounts. Mr Wogu also states that there were no such things as "Reference Purchase Orders": the altered PO's with inflated prices were forged by himself and other members of IPCO's staff.

110. Mr Black submitted that the timing of NNPC's fraud allegations was deeply suspicious and Mr Wogu's evidence was wholly unreliable and should be rejected out of hand. In Mr Black's submission, the MII forged documents are not reconcilable to the documents actually submitted to the Tribunal and do not give rise to any reverse inference; instead, they simply show that Mr Wogu was engaged in an exercise of forgery for his own dishonest purposes. Mr Black also argued that there was no good reason for not accepting Mr Atkin's evidence as to the use of Reference Purchase Orders and that the alterations in the Total value box in these documents would have been easily discernible. Further, the evidence of the 13 sub-contractors should be given very little weight since it was remarkable that these witnesses should have been able to recall unaided events of 1997 and to have maintained their records to the necessary high degree in the following 16 years. And as to Mr Radley's handwriting evidence: (i) the fact that Mr Rea and Mr Lawrence signed many forged documents does not prove that they knew they were forgeries when they signed them; (ii) the two invoices written on top of other

documents commented on by Mr Radley were submitted to the Tribunal in respect of Optional Items, not Variations, and it was entirely possible that the entries in the time chart had been filled in on one occasion.

111. In my judgement, the evidence presented by IPCO and the submissions made by Mr Black do not demonstrate that NNPC's fraud allegations are unsustainable or constitute only a very weak case. On the contrary, I conclude that NNPC has established a good prima facie case that is fit to go to trial in Nigeria with the benefit of full discovery and the cross-examination of the various witnesses. In particular, I think there is considerable force in Mr Nash's submissions that: (i) unless the Tribunal were warned that the "Total value" stated in a PO included additional associated costs, they would naturally assume that the "Total value" simply stated the purchase price decided on by IPCO and did not include any subsequent on-costs; (ii) the use of Reference Purchase Orders sits oddly with the fact that for many other claims IPCO submitted a PO stating the purchase price and, for associated costs, included a separate item in the Calculation Sheet under the heading "INL Support Items"; (iii) the fact that forged documents were created in respect of transactions for which claims were made in the arbitration does give rise to an inference, albeit a rebuttable one, that those claims were falsely made; (iv) in advancing the allegation that Mr Wogu had privately practised a post award fraud for his own benefit, IPCO has failed to provide any convincing explanation as to how it was that Mr Wogu would have been able to ensure that the Variation proceeds of the Award were diverted to himself and the sub-contractors involved; (v) the figures chosen by Mr Atkin for his cross-checks appear to be arbitrary figures and his application of percentage uplifts on a cumulative basis is illogical and unreasonable; and (vi) the hand writing evidence of Mr Radley, who is an expert witness of high repute, provides considerable support for NNPC's fraud allegations.

112. Mr Black argued that the fact that a challenge to a New York Convention award in the country of origin was regarded as arguable on an enforcement application in this court did not mean that adjournment of the application was inevitable. Instead, the court applies a sliding scale having regard to the merits and where the challenge in the curial court is not going to take place within any commercially relevant timescale -- which is the situation here -- the discretion under s. 103 (5) should be exercised in favour of enforcement. In short, the court should ensure that the risk that there might eventually be a successful challenge in the curial court should lie on the party making the challenge, not on the party who has won a currently valid award.

113. In support of this submission, Mr Black cited, inter alia[15], *Continental Transfer Technique Ltd v Federal Government of Nigeria* 697 F. Supp.2d 46 (2010), a decision of the US District Court for the District of Columbia. Here, the plaintiff sought to enforce a New York Convention award issued in England against the Federal Government of Nigeria ("Nigeria") on 14 August 2008 in circumstances where on 23 April 2009 the Nigeria Federal High Court had granted Nigeria's ex parte application for an extension of time in which to apply to set the award aside and an injunction restraining the plaintiff from seeking to enforce the award pending Nigeria's motion for an interlocutory injunction to like effect. Judge Friedman referred to the following factors that the US

Court of Appeals for the 2nd Circuit stated in *Europcar Italia S.p.A. v Maiellano Tours*[16] should be weighed when determining whether to adjourn an enforcement application under Article VI of the Convention:

> (1) the general objectives of arbitration – the expeditious resolution of disputes and the avoidance of protracted and expensive litigation; (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved; (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce the award (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute; (5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive "suitable security" and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country … and (6) any other circumstances that could tend to shift the balance in favor of or against adjournment…
>
> > Because the primary goal of the Convention is to facilitate the recognition and enforcement of arbitral awards, the first and second factors on the list should weigh more heavily in the district court's determination.

114. Judge Friedman went on to decline to adjourn the matter because: (i) the procedural history of the case strongly indicated that Nigeria had moved to set aside the award in order to manufacture a defence to the plaintiff's claims before the District Court; (ii) an unbiased Nigerian court would not apply a standard of review that differed substantially from that applied in the District Court; (iii) there was uncertainty surrounding the Nigerian proceedings; and (iv) the federal policy was in favour of arbitration and its enforcement.

115. In my judgement, the principles to be adopted when considering whether to adjourn the enforcement of a Convention Award are those articulated by Gross J in his April 2005 judgement, which are substantially similar to the factors identified by the US Court of Appeals in *Europcar*. Applying those principles, if I were exercising the discretion under s. 103 (5) afresh I would order an adjournment on terms that the existing security of US$80 million be maintained, with liberty to apply, notwithstanding the likely delay in the determination of NNPC's challenge in Nigeria. I would do so in light of: (i) my finding that NNPC has a good prima facie case that IPCO fraudulently procured a substantial part of the Award rendering it arguable that the Award as a whole is vitiated; (ii) the scrutiny of NNPC's challenge to the Award in Nigeria would likely be of a higher level than that undertaken in this court pursuant to the *Soleh Boneh* approach; (iii) the parties, both of whom are Nigerian, agreed to an arbitration in Nigeria; (iv)

considerations of comity that are due to the courts of Nigeria; (v) the presence in Nigeria of a plenitude of NNPC assets against which IPCO could enforce if NNPC's challenge were unsuccessful; (vi) the continued applicability of the orders made by Tomlinson J and the Court of Appeal that NNPC must maintain security in the sum of US$80 million.

Conclusion

116. For the reasons given above, IPCO's application to enforce the Award fails. It is in Nigeria where the enforceability of the Award must be decided and I call upon the Nigerian courts to use their powers of case management to expedite not only the hearing of NNPC's challenge to the Award, but also any resulting appeals. The Award was issued on 28 October 2004; NNPC's Notice of Motion to set it aside was filed on 15 November 2004; NNPC's Motion for leave to plead its fraud case was filed on 27 March 2009; and still there has been no substantive determination as to the validity of the Award. For the sake of the parties and the reputation of the Nigerian legal system, this Gordian Knot must surely be cut as quickly as possible.

Note 1 Paras 36, 37 and 39. [Back]

Note 2 Paras 44 - 50 [Back]

Note 3 Para 48 [Back]

Note 4 [2008] EWHC 797 (Comm), paras 21 - 54 [Back]

Note 5 *Chanel v. Woolworth* [1981] 1 WLR 485; *Butt v. Butt* [1987] 3 All ER 657; *Barrow v. Bankside Agency Ltd* [1996] 1WLR 257;*Rosling v. Pinnegar C.A.*, October 1998, unreported; *Ryan v. Friction Dynamics Ltd* [2001] C.P.R. Rep 75; *The Leadmill Ltd v. Omare* [2002] EWHC 1226 (Ch); *Lloyds v. Ager-Hanssen* [2003] EWHC 1740 (Ch); *Collier v. Williams* [2006] 1 WLR 1946; *Edwards v. Golding* [2007] EWCA Civ 416; *Kensington International Ltd v Republic of Congo* [2008] 1 Lloyd's Rep 161. [Back]

Note 6 Paras 77 - 83 [Back]

Note 7 Leave was refused on 11 December 2008 [Back]

Note 8 Pipelines Product Marketing **Corporation**, a subsidiary operating company of NNPC to which was transferred the responsibility for the BET Project. [Back]

Note 9 These guarantees remain in place. [Back]

Note 10 Chief Matthew D Alabo Alagba, Managing Director of Maduala (Nig) Ent; Chief K U Joel, CEO of Udoka Bestman International Ltd; Felix Okpokiri, Manager of TNT Business Centre; Edward Itorito, Managing Director of Igorigo Brothers Nig Ltd; Anywabnwu, Magnus C, Managing Director of AMAC & Co (Nigeria); Edward Alakpa, Managing Director of Eddyson International; and Nwokolo, Josiah N, owner of N. Ugotex & Co. [Back]

Note 11 Italics supplied. [Back]

Note 12 I.e. NNPC's Notice of Motion seeking leave to amend its Re-Re-Amended Originating Motion to set aside the Award by pleading its fraud allegations. [Back]

Note 13 The letter was “ccd” to the DPP, the Minister of **Petroleum** Resources, and the GMD and the Secretary of NPCC. [Back]

Note 14 See paragraph 15 above. [Back]

Note 15 The other US cases cited were:*Sarhank Group v Oracle* ***Corporation***, 2002 WL31268635 (S.D.N.Y. Oct 9, 2002); *MGM Productions Group v Aeroflot Russian Airlines* 573 F. Supp. 2d. 772 (2003) (S.D.N.Y.); *In Re Arbitration Interdigital Communications (Interdigital v Samsung)*, 528 F. Supp. 2d. 340 (2007) (S.D.N.Y.); *G.E. Transp. S.P.A. (United States) v Republic of Albania* 693 F.Supp. 2d. 132 (2010) (D.C.); *Chevron, Texaco v Republic of Ecuador* Civil Action No. 12-1247 (JEB) (2013) (D.C.);*Corporación Mexicana de Mantenimento Integral, S.DE R.L. C.V. v Pemex-Exploración Y Produción* 10 Civ.206 (AKH) (2013) (S.D.N.Y.). [Back]

Note 16 156 F.3d 310 (1998). [Back]
