Neutral Citation Number: [2008] EWCA Civ 1157

Case No: A3/2008/1037.PTA+(A)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE TOMLINSON
Claim no. 2004 Folio 1031

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st. October 2008

Before:

LORD JUSTICE TUCKEY
LORD JUSTICE WALL
and
LORD JUSTICE RIMER

- -

Between :

NIGERIAN NATIONAL PETROLEUM CORPORATION	**Appellant**
- and -	
IPCO (NIGERIA) LTD.	**Respondent**

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- -

Jonathan NASH Q.C. and James WILLAN (instructed by **Messrs Stephenson Harwood**)
for the **Appellant**
Michael LYNDON-STANFORD Q.C. and Ciaran KELLER (instructed by **Lovells LLP**)
for the **Respondent**

Hearing dates: 7 & 8 October 2008

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Judgment

Lord Justice Tuckey:

1. Can part of a New York Convention arbitration award be enforced? How should sequential applications for enforcement of such an award be approached? Tomlinson J. gave permission to appeal to enable these questions to be considered by this court after giving judgment for the claimant (IPCO) for over U.S. $85m. against the defendant (NNPC) on IPCO's adjourned application to enforce a convention award here.

2. IPCO is a Nigerian subsidiary of a Hong Kong registered company. In March 1994 it entered into a turnkey contract with NNPC, the state oil company of Nigeria, to design and construct a petroleum export terminal near Port Harcourt. The progress of the project was delayed by 22 months because, as IPCO contended, NNPC required substantial variations to the contract works. IPCO's disputed claims to be paid substantially more than the contract price were referred to arbitration in Lagos in accordance with Nigerian law as the contract provided. On 28 October 2004 the arbitrators issued their award in favour of IPCO in a net amount (taking account of NNPC's relatively small counter claim) of U.S. $152,195,971.55.

3. In November 2004 NNPC applied to the Federal High court in Nigeria to set aside the award and IPCO applied to our High Court to enforce it. NNPC's application has not yet been determined. IPCO's without notice application was successful but on NNPC's application on 12 April 2005 Gross J. adjourned enforcement on terms that NNPC pay IPCO approximately $13m., which it admitted was owing, and provide security to IPCO of $50m. NNPC complied with these conditions.

4. IPCO renewed its application to enforce the award before Tomlinson J. in February 2008 because NNPC's challenge to the validity of the award in Nigeria was taking very much longer to determine than first expected and because it alleged that Gross J. had been inadvertently misled in a manner material to his evaluation of the merits of one aspect of the challenge. Tomlinson J. [(2008) EWHC 797 (Comm.)] decided that both these matters justified revisiting Gross J's decision and the judgment he gave was for the amounts awarded by the arbitrators on two of IPCO's six heads of claim less credit for part of the $13m. paid under Gross J's order. NNPC says the judge had no jurisdiction to enforce part of the award in this way and that he should not have revisited Gross J's evaluation of the merits of its challenge to the award which in any event was correct. IPCO says the judge answered both questions correctly but by way of cross appeal contends that he should have gone further and given judgment on additional heads of claim which were the subject of the award. IPCO did not pursue before us its wider grounds of cross appeal (7, 8, 10 and 11) for which it did not have permission. It did pursue ground 9 for which we refused permission for reasons which appear later in this judgment.

5. With this short introduction to the factual background I can turn to the first question I posed at the beginning of this judgment. It is one of some importance upon which there is no English authority.

6. Sections 100 to 103 in Part III of the Arbitration Act 1996 reflect the obligations which this country assumed as a signatory to the Convention, to which Nigeria is also a party. Articles III, V and VI of the Convention provide:

> Article III
>
> Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the

territory where the award is relied upon, under the conditions laid down in the following articles…

Article V

1. Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: …

    (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or..

    (e) The award has not 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, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: ..

    (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

7. The relevant parts of the 1996 Act are:

    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 … 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, the 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-

(a) …party … under some incapacity;

(b) …arbitration agreement …not valid …;

(c) …not given proper notice …;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4)); …

(e) … composition of … arbitral tribunal or … procedure not in accordance with agreement … or law …;

(f) If 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. The 88 page award is in a conventional form. Paragraph 29.1 summarises the "awards" made to IPCO as damages for breach of contract. The sub-paragraph concludes:

Summary of Award to Claimant

Head of Claim No. 2 – Non-payment …	$1,641,234.00
Head of Claim No. 3 – Variations …	$58,521,249.55
Head of Claim No. 4 – Phase II prolongation …	$53,563.352.00
Head of Claim No. 5 – Standby …	$3,870,679.00
Head of Claim No.6 – Escalation of Contract Price...	$618,116.00
Head of Claim No. 7 – Financing Charges …	$34,514,356.00
TOTAL …	$152, 728,986.55

9. After dealing with the counter claim and costs the arbitrators concluded their award by saying:

> WE … DO HEREBY AWARD AND DETERMINE as follows:
>
> 1. The Respondent shall pay to the Claimant within twenty-one days of this Award the sum of U.S. $152,195,971.55 and Naira 5,000,000.00 for breach of contract and costs.

Interest was awarded on these sums at 14% from the date of the award until payment.

10. Tomlinson J. decided that IPCO could enforce the amounts awarded on heads 2 and 3 of its claim. His order reads:

> 2. The defendant pay to the claimant within 28 days the following monies owing under an arbitration award made on 28 October 2004 in Lagos Nigeria and attached to this Order ("the Award") such monies being the sum of :
>
> (1) U.S. $1,641,234 (being Head of Claim No. 2 – non-payment);
>
> (2) U.S. $58,521,249.55 (being Head of Claim No. 3 – Variations) less the amount of $7,691,086.33 paid in respect of this Head of Claim on 12 May 2005 (as part of the sum of $13,102,361.72 paid pursuant to paragraph 2 (1) of the order of Mr Justice Gross made on 12 April 2005) and
>
> (3) Interest to 17 April 2008 of U.S. $26,074,912.59.

The interest had been calculated at the rate awarded by the arbitrators.

11. Mr Nash Q.C. for NNPC points to the fact that neither the convention nor the 1996 Act expressly provides for part enforcement of an award where an award is challenged before the competent authority – in this case the court in Nigeria, the country in which and under the law of which the award was made. On the contrary, he submits that the Convention and the Act in such a case allocate jurisdiction between the enforcing court and the home court so that it is for the home court to decide whether there is a viable challenge to the whole or any part of the award and the enforcing court is left with the largely mechanistic task of deciding whether to enforce the award as it stands. It can only do so "in terms of the award" as an indivisible whole. It is not entitled to pick and choose which parts of the award it will enforce because that is for the home court to decide. Unless it decides to enforce the award in its entirety all it can do is adjourn pursuant to Article VI and section

103 (5) on terms as to security if appropriate. Not only is there no express provision for part enforcement in such a case but express provision is made for this in Article V.1(c) and section 103 (4) in the case where part of an award is made without jurisdiction. It follows that part enforcement is not permitted in any of the other cases listed in section 103 (2).

12. In support of these submissions Mr Nash relied upon the decision of Gross J. in *Norsk Hydro A/S v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm.) in which he set aside a judgment entered against two distinct parties when the Convention award had only been made against a single party. In the course of his judgment Gross J. said:

> 17. Ss 100 and following of the Arbitration Act 1996 … provide for the recognition and enforcement of New York Convention awards. There is an important policy interest, reflected in this country's treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as "mechanistic" as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of the New York Convention award may be refused (ss 102- 103 of the 1996 Act), the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. Additionally the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions …
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> 18. Viewed in this light as a matter of principle and instinct an order providing for enforcement of an award must follow the award. No doubt, true "slips" and changes of name can be accommodated; suffice to say that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties. To proceed in such a fashion, necessarily required the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal.

13. Mr Nash also relied on a number of authorities where the courts have had to consider whether to enforce domestic awards under what is now section 66 of the 1996 Act which says that such an award may be enforced by leave of the court "in the same manner as a judgment or order of the court to the same effect" and that judgment may be entered "in terms of the award". These cases show that the court will not enter judgment unless the award is in a form which can be treated as a judgment to the same effect. Thus enforcement was refused where the awards provided for payment of the difference between two commodity trading contracts (*Marguilies Brothers Limited v Dafnis Thomaides & Co. (UK) Limited* [1958] 1 Lloyds Rep. 205) and for payment in India (*Dalmia Cement Limited v National Bank of Pakistan* [1975] 1 QB 9) and did not provide for payment of interest on costs (*Walker Bros v Rome* [1999] 2 All ER (Comm.) 961).

14. So do the Convention and the 1996 Act prevent part enforcement of an award in a case such as this as Mr Nash contends? I start by thinking this is unlikely because the purpose of the Convention is to ensure the effective and speedy enforcement of international arbitration awards. An all or nothing approach to the enforcement of an award is inconsistent with this purpose and unnecessarily technical. I can see no objection in principle to enforcement of

part of an award provided the part to be enforced can be ascertained from the face of the award and judgment can be given in the same terms as those in the award.

15. The purpose behind the Convention is reflected in the language of the 1996 Act. Enforcement "shall not be refused" except in the limited circumstances listed in section 103 (2) where the court is not required to refuse but "may" do so. Under subsection (5) the court may adjourn but only if it considers it "proper" to do so. The enforcing court's role is not therefore entirely passive or mechanistic. The mere fact that a challenge has been made to the validity of an award in the home court does not prevent the enforcing court from enforcing the award if it considers the award to be manifestly valid (see *Soleh Boneh v Uganda Government* [1993] 2 Lloyds Rep. 208, 212). So I think Mr Nash's argument based on the allocation of jurisdiction is too restrictive and does not lead to the conclusion he contends for.

16. Nor do I accept his argument on construction. There is nothing which expressly prevents part enforcement in the language of the Convention or the statute. At first sight section 103 (4) supports Mr Nash's argument. It does allow for part enforcement where the tribunal has strayed beyond the limits of its jurisdiction. But this provision was necessary to make it clear that such an error does not give grounds for saying that no part of the award should be enforced. No such provision is required for the other cases in section 103 (2) which contemplate all or nothing challenges to the whole of the award.

17. The statute refers of course to "an" or "the" "award". Does this mean the whole award and nothing but the whole award as Mr Nash contends? I do not think so. Such a construction would have absurd commercial consequences and cannot have been intended. Mr Lyndon-Stanford Q.C. for IPCO gave the example of an award for £100m. and a challenge only to a £5m. part of it. On NNPC's case the court could not enforce the £95m. part of the award until after the challenge had been determined. This would encourage unscrupulous parties to mount minor challenges to awards so as to frustrate their speedy and effective enforcement. Mr Nash's answer to this example was to say that in such a case the court could enforce the whole award. But if the challenge was a good one that would not be a sensible or fair solution either. In this case the award included an order for the return of a car worth U.S. $20,000. Mr Nash accepted that the logic of his argument meant that if only this part of the award had been challenged none of the other parts of the award could be enforced. This amply demonstrates the commercial unreality of NNPC's position.

18. In these circumstances I think that the word "award" in this part of the 1996 Act should be construed to mean the award or part of it. To be enforceable it must be possible to enter judgment "in terms of the award" but in this case there is no difficulty about that as the exact correspondence between the award and the judgment shows. Put less formally if one were to ask whether enforcement of part of an award in accordance with its terms was enforcement of the award the answer would be "of course".

19. The English cases relied on by Mr Nash are concerned with the latter problem and shed no real light on the question of part enforcement. We were however referred to an Austrian case, which the judge relied on, which is of some relevance given the importance of uniformity in the interpretation of international conventions. In that case, reported in the 2005 Year Book of Commercial Arbitration, a Croatian manufacturer obtained a Convention award against an Austrian buyer for payment of a principal sum and payment of interest at an exorbitant rate. The Austrian Supreme Court allowed enforcement of the award for the principal but refused enforcement of the award for interest on the grounds of public policy applying Article V2 (b) of the Convention. In the course of its judgment under the heading Partial Enforcement the court said:

> 44. The Court of Appeal deemed in principle that a foreign arbitral award may be enforced only in part…. However, partial enforcement can only be considered when there are sufficient grounds in the foreign arbitral award, whose overall legal effect is at least partly in violation of public policy, for a clear division between acceptable and totally unacceptable legal consequences for the domestic legal system.
>
> 45. In the present case it is possible to grant enforcement on the main sum and deny enforcement of the awarded interest. However, this divisibility does not apply to the awarded rate of interest itself, since the award does not so provide. The domestic enforcement court may not make an apportionment according to its discretion. Hence, the Court of Appeal may not determine which de facto annual rate of interest, lower than 107.35%, could be acceptable, in the sense that it would not result in a violation of domestic public policy.

So the court allowed part enforcement of the award but refused to substitute its own award of interest because that would not be a judgment in terms of the award.

20. So I conclude that the judge was entitled to order part enforcement of this award in the way that he did. I should add that by its respondents notice and Cross Appeal IPCO sought to argue that if the judge was not entitled to make this order he could have achieved the same result by making payment of the two amounts a condition of the adjournment under section 103 (5). It is unnecessary to decide this point, but my reaction to it is that, whilst the judge might have had jurisdiction to make such an order, it would not have been right to make it if he had no jurisdiction to order part enforcement.

21. So I turn to the other grounds of NNPC's appeal which in effect contend that the judge should have continued the order made by Gross J. in April 2005. To understand the position I need to return to the history of the Nigerian proceedings.

22. When NNPC applied to set aside the award in November 2004 IPCO filed a notice of preliminary objection, the equivalent of a strike out application. At the time of the hearing before Gross J. it was confidently expected by both sides that the strike out application would have been determined by the end of 2005 at the latest. If it had succeeded Gross J. obviously anticipated that IPCO would return to court seeking immediate enforcement. In any event resolution at first instance of the strike out was seen as something of a watershed. It is against this background that Gross J. adjourned IPCO's application to enforce after carrying out an assessment of the merits of NNPC's challenge to the award in accordance with what this court said in *Soleh Boleh*.

23. It is unnecessary for me to set out the sorry history of what in fact happened or did not happen in Nigeria. Tomlinson J. did so in paras 22 to 49 of his judgment. This led him to conclude that resolution of IPCO's strike out application, even at first instance, was no closer in February 2008 than it had been 3 years earlier and that it might still be "very many years away". What had occurred in the Nigerian proceedings could, he said, properly be described as catastrophic.

24. This change of circumstances led Tomlinson J. to conclude that he was entitled to revisit Gross J's decision to adjourn. He obviously heard considerable argument about when it would be appropriate to do this. As it is now common ground that he was entitled to do so

it is unnecessary for us to consider this aspect of the case. But I would endorse the following passages from this part of Tomlinson J's judgment which I think give a helpful answer to the second question I posed at the beginning of this judgment:

> 73. 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.
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> 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... 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. ..
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> 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 sufficient change in circumstances…
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> 76. I do not consider that the change in circumstances.. should of itself be the occasion for a complete re-run of the exercise… 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 of the award. That decision should have been reached on a brief consideration – see … *Soleh Boleh*. 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.

25. As I have said all this was common ground on the appeal. What was controversial was Tomlinson J's decision to revisit Gross J's assessment of the merits of NNPC's challenge to the prolongation and finance charges heads of claim. Gross J. had concluded that it had a

realistic prospect of challenging these parts of the award on the grounds of duplication and for inadequacy of reasons linked to that challenge. Tomlinson J. was persuaded by IPCO that Gross J had been misled into his conclusion about duplication and that this entitled him to revisit that part of Gross J's decision. Having done so Tomlinson J. concluded that NNPC had no real prospect of reducing those parts of the award on the ground of duplication alone.

26. What remains a mystery however is why Tomlinson J. needed to embark on this exercise at all. It did not impinge upon the variations claim or the other claim for which he gave judgment and there is nothing in his judgment which suggests that his decision to allow those parts of the award to be enforced was affected by his re-evaluation of the merits of the duplication challenge. Before Gross J. NNPC had contended that IPCO was only entitled to the variations claim and that it had been duplicated in the prolongation and finance charges claims which totalled $88m. Gross J's conclusion was:

> … NNPC has a realistic prospect of reducing the award by up to some U.S. 88m. on the ground of duplication alone: i.e. the award would stand in respect of the U.S. $58.5m. for variations but would be set aside in respect of the additional US $88m. for prolongation costs and finance charges.

This is no doubt what led him to order NNPC to provide security in the round sum of $50m. as a condition of an adjournment for what he anticipated would be no longer than a few months.

27. Faced with the fact that no decision had been made by the Nigerian court after three years and one could not be expected for many years to come I am sure Tomlinson J. would have made the order he did irrespective of his reconsideration of the merits of the prolongation and finance charge claims. He was fully justified in doing so in accordance with the principles which he spelt out. It was no longer fair to keep IPCO out of the very large sum of money to which it was entitled under these two unchallengeable parts of the award by further adjourning the application to enforce them.

28. This conclusion makes it unnecessary to consider whether it was open to the judge to revisit Gross J.'s conclusion. We did not hear full argument about this so it would be wrong to express any final conclusion about it, but my preliminary view is that Gross J. was not misled in a way which would justify revisiting his decision on the principles approved by this court in *Collier v Williams* [2006] EWCA (Civ) 20 at paras 39 and 40. Gross J. may have accepted a bad point made by counsel for NNPC after hearing argument from counsel on both sides but that is not to say he was misled in any relevant sense.

29. I have referred to the parts of the award which the judge enforced as being unchallengeable. NNPC did not challenge the claim for non-payment at all. It does challenge the variations claim as part of a general complaint of inadequate reasons. Gross J's assessment was that he was largely unsympathetic to the reasons challenge as a whole but that it might have force in relation to the prolongation claim. Tomlinson J. concluded that NNPC had no realistic prospect of challenging the variations claim on the ground of inadequate reasons and refused permission to appeal this part of his decision. Mr Nash applied to us for permission but we refused to grant it. We did so because both judges had thought little or nothing of this challenge. Moreover on NNPC's case Tomlinson J should not have revisited Gross J's assessment which it did not appeal.

30. Finally I need to deal with IPCO's limited application for permission to appeal on ground 9 of its Grounds for Cross Appeal. This contends that the judge should have enforced the standby head of claim for $3.87m. plus interest and, by reference to the admission before Gross J. that $13m. was due, a further sum of nearly $6m. plus interest on the $13m. from the date of the award until it was paid.

31. As to the standby claim no challenge has been made at any time to this part of the award. Neither Gross J or Tomlinson J. referred to it in their judgments although they must have been aware of its existence and that it was unchallenged. But neither judge was conducting an exercise designed to secure or enforce every cent due to IPCO. Nor should they have done so given the uncertain prospects of the challenge to the award. In these circumstances we did not think it was appropriate to give permission to allow IPCO to attempt to persuade us that we should order enforcement of the award on this single head of claim.

32. When pressed for particulars to show how the $13m. was made up NNPC said that about $7.3m. had been allowed for its counter claim. The $6m. now claimed by IPCO represents the difference between this amount and $1.3m., the amount actually awarded by the arbitrators on the counter claim. NNPC's solicitors explained that the $7.3m., had been notionally allocated to the counterclaim as part of an internal process and that it was not conceded that any part of the $13m. was referable to any particular claim.

33. Tomlinson J. dealt with IPCO's claims arising out of the $13m. admission in para 108 of his judgment where he made much the same point as we have made about the standby claim. He gave NNPC credit for about $7.7m. of the $13m. against the variations claim as the judgment shows but refused to give it credit for the balance. By the same token he "[drew] back from following through the logic of NNPC's admission and requiring the payment of a further sum representing the unpursued counter claim" and the interest claim. We think he was justified in taking this approach, particularly in the light of the way the admission had been qualified by NNPC's solicitors.

Conclusion

34. For the reasons I have given in this judgment I would dismiss NNPC's appeal. It follows that I think Tomlinson J's judgment enforcing two heads of IPCO's claim should stand.

Lord Justice Wall: I have had the opportunity to read Tuckey LJ's judgment in draft. I am in complete agreement with it and cannot usefully add anything.

Lord Justice Rimer: I also agree.