JUDGMENT : The Hon. Mr Justice Morison : 28th June 2006

1. On 15 May 2006, Langley J granted a *'without notice'* injunction against 21 Respondents in favour of the claimants, whom I shall call Econet. In my judgment, the injunction should never have been sought as it was, and should not have been granted. On an application by the 1st, 2nd, 5th to 14th and 18th to 22nd Respondents, [a company called Celtel Nigeria BV was added as 22nd Respondent], on May 25 2006 I ordered that the injunction be lifted and these are the reasons for my decision.

2. Respondents 2 – 21 [the vendors] were, with Econet, shareholders in a Nigerian Company called VNL, the 1st Respondent, then known as Econet Wireless Nigeria Limited. Their participation as shareholders was pursuant to a Shareholders' Agreement [SHA] made in April 2002. Under the SHA, Clause 17.2 provided as follows:

"*17.2.1 In the event that any Shareholder shall decide to sell or transfer all or any part of its equity holding in EWN, it shall give written notice to the other Shareholders, setting forth in the full terms of such sale or transfer, including the sale price thereof, and give to the said Parties, the first right of refusal thereof.*

17.2.2 The Shareholders receiving the notice shall exercise their first right and option of refusal within 15 (fifteen) days from the date of receipt of the notice and in the event that they or any combination of them decide to buy the offered shares, they shall pay the sale or such other agreed price within 30 (thirty) days from the date of the initial notice under Clause 17.2.1.

17.2.3 The Shareholders exercising the option shall be at liberty to agree inter se on the proportion of the transferred equity to be acquired by each of them and in the absence of such agreement, the transferred equity shall be allotted to them based on the proportion of their respective then current shareholding in the Company.

17.2.4 If the Shareholders receiving the notice fail to exercise their respective rights and option of refusal or refuse to buy the shares at the offered or any other negotiated price, the Party selling or transferring the shares shall sell the same to any interested third party provided that the sale price in that event must not be lower than the price for which the Shareholders receiving the notice were willing and ready to pay for the offered shares."

3. The governing law of the SHA was expressly stated to be Nigerian Federal Law. The Disputes Resolution clause provided for arbitration in Nigeria in accordance with UNCITRAL Rules, by three arbitrators appointed by The Chief Judges of the Federal High Court of Nigeria.

4. On about 15 April 2006 Celtel made an offer to buy the shares of the vendors for a price of some US$755 million together with vendors' put options worth about US$460 million, a total consideration of US$1.2 billion, and Celtel offered, in addition, to add to VNL's share capital by subscribing for 32.89 million shares for a total consideration of US$250 million. In accordance with clause 17 Econet were to be given the opportunity to match that offer and that was done by the Offer Letter dated 15 April 2006. By the Offer Letter, Econet were informed that the vendors were 'minded to accept' Celtel's offer and were giving Econet the right of first refusal in respect of their shares. Accordingly the letter confirmed that they were making an offer on the same terms, mutatis mutandis, as that made to the selling shareholders and VNL. It indicated that Mr Usoro was authorised to receive a signed and dated acceptance copy of the offer letter and that the opportunity to accept would expire on the 15th day from the date when the letter was received. The letter confirmed that if the Offer were accepted then by no later than 30 days after receipt of the offer letter, Econet must credit the account of First Bank of Nigeria Plc "*who shall act as escrow agent with the sum of US$1,215,823,497.60*" failing which the offer was to be deemed void and of no effect. The offer letter was received by Econet on 18 April 2006 and it had annexed to it the Transaction Documents made between the shareholders and Celtel.

5. One of those documents was a Share Purchase Agreement made between the selling shareholders and Celtel under which it was provided that the obligations to sell and buy the shares would not become effective until either Econet rejected the offer in whole or in part, or failed to pay for the shares in accordance with the terms of the offer letter.

6. On 2 May 2006 Econet purported to accept, unconditionally, the offer of pre-emption. On 9 May 2006, Econet's Nigerian lawyers received the Transaction Documents with a confirmation that the "*date limit for payment of the purchase price is 18th May 2006*". Two days later Econet asked for an extension of time in which to pay since the Transaction Documents were not in an acceptable form to Econet and their financiers. The request for an extension of time was refused the next day. Econet's English lawyers then demanded that the Transaction Documents be put into proper form and provided to Econet by Monday 15 May 2006, at 7.00am otherwise the vendors should agree an extension of time. A further Email was sent late on Friday evening reiterating the request for the documents by first thing on Monday morning. This was followed by yet a further letter dated Saturday, 13 May 2006.

7. Thereafter the application to this court was prepared and presented to the Judge in the late afternoon. He indicated that he had only had a chance to skim read the affidavit of Mr Lombard who is responsible for the legal and commercial affairs department of the Econet Group. The evidence in that affidavit was said either to be in his own knowledge or "*supplied to me by the source stated*". At paragraph 31 he said: *"The Applicant has access to the funds to enable it to make the payment of US$1,215,823,497.60 subject to obtaining the Transaction Documents mutatis mutandis in executed form and subject to the appointment of an agreed escrow agent can then make the payment."*

8. Econet had asked for the appointment of an escrow agent different from the First Bank of Nigeria plc with whom they were in dispute.

The basis of the application before the court

9. There was a draft of an Arbitration Claim Form which Econet undertook to issue and serve in the form of the draft (and this was issued the following day). There was an affidavit, sworn, plus exhibits. The claim form sets out the grounds of the application for relief. I can summarise them:

(1) Reference is made to the SHA and the reference there to an UNCITRAL arbitration in Nigeria.

(2) "*Various disputes have arisen between [Econet] and various of the Respondents as to [Econet's] shareholding in .. VNL which are the subject of arbitration and/or legal proceedings in Nigeria.*"

(3) Details are given of Celtel's offer and the Offer Letter dated 18 April.

(4) "*The following terms are to be implied into the contract resulting from acceptance of the offer letter from the Vendors:*

(a) .. the respondents acting by their agent … were to supply the Transaction Documents to [Econet] within a reasonable time .. [namely] ..a sufficient period prior to the date for payment to enable (i) [Econet] to consider and approve the same and (ii) its bankers and funders to consider and approve the same and (iii) the parties to execute the same in time to arrange for the sum of US$1,215,823,497.60 to be credited to the escrow account in cleared funds

(b) The Offer constituted an implied if not express offer by VNL to issue the Subscription Shares to the Applicant on the same terms mutatis mutandis as the Celtel offer to subscribe for the same.

(c) Alternatively to (b), there was an implied term that if the Vendor's Offer was accepted by [Econet] the Vendors would procure that VNL enter into a Subscription Agreement and issue the Subscription Shares to [Econet] on the same terms mutatis mutandis as the Celtel Offer.

(d) that the Respondents and [Econet] would co-operate with each other to ensure the performance of the agreement and that neither party would do any act or thing which would prevent or hinder performance by the other.

Further or alternatively it was a condition precedent to [Econet's] obligation to make the payment by 5.00 pm on 18 May 2006 that it would be supplied by the Defendants with the Transaction Documents a sufficient period prior to the date of completion to enable (i) [Econet] to consider and approve the same (ii) its bankers and financiers to consider and approve the same and (iii) the parties to execute the same in time to arrange for the sum of US$1,215,823,497.60 to be credited to the escrow account in cleared funds."

(5) Reference was made to one of the Transaction Documents, namely the Share Purchase Agreement and to clause 23.2 which provided for disputes arising out of or in connection with that Agreement to be referred to and resolved by arbitration under the LCIA rules, with the seat of the arbitration being in London. Reference was also made to the Share Subscription Agreement [also a Transaction document enclosed with the Offer Letter] which also had an LCIA arbitration clause with its seat in London.

(6) The claim form then alleged that despite requests for the duly amended Transaction Documents the Vendors did not provide them until about 7.30 pm on 9 May. It further alleged that the Documents were still inadequate for a number of reasons. It was said that this conduct was in breach of the implied terms pleaded and also of express terms of co-operation in the Share Purchase Agreement and Share Subscription Agreement. It was also alleged that as there was no appointed or agreed escrow agent "*there is no person to whom [Econet] can make payment*".

(7) "*The dispute between the parties should be dealt with by arbitration pursuant to the provisions of the Share Purchase Agreement and the Share Subscription Agreement.*"

(8) "*The intended arbitration has not yet been commenced and no arbitrator has been appointed who might grant the relief sought, and there is no arbitral tribunal or other institution or person vested by the parties with the power to grant the relief sought.*"

(9) "*This application is made without notice to the Respondents and is urgent for the following reasons:*

(i) The intended arbitration has not yet been commenced and no arbitrator appointed and there is no time to do so before 18 May 2006;

(ii) Relief is required prior to 18th May 2006 as it is highly likely, if not certain, that the Defendants will claim to be entitled to treat themselves as discharged from any obligation to [Econet] and the Vendors will sell and transfer their shares and VNL will issue new shares in both cases to Celtel.

(iii) It was not known whether or not it would be possible to arrange payment of the money (which depended on the Defendants being willing and/or able to agree and execute the Transaction Documents by first thing on the morning of Monday 15 May 2006) until 15th May 2006.

(iv) There is a danger that if given notice of the application the Defendants might take steps to transfer and issue the shares or otherwise seek to defeat any order that might be made and render any arbitration or other proceedings nugatory."

10. As noted, the Affidavit indicated that the facts and matters stated within it were known to the deponent or supplied to him by "*the source stated*". Under a heading "*Reasons for urgency and applying without notice*", the

deponent referred to the need to make payment to the escrow agent by 18 May 2006 and he then continued, at paragraphs 30 and 31 as follows:

"There has not been time to initiate the arbitration proceedings or to appoint arbitrators. If the respondents are given notice of the arbitration claim form and application prior to the hearing first they will realise that [Econet] is unlikely to be in a position to make payment on 18th May 2006 and may decide that they do not have to wait for that date to pass, and second that in any event they may take steps to frustrate any order that may be made and to render any arbitration proceedings nugatory. There is a considerable amount of animosity between the parties. There are also arbitration proceedings taking place in London between VNL and ..(part of the Econet corporate group) over a management agreement. In these circumstances I believe the Respondents would be only too happy to take steps which would have the effect of thwarting [Econet].

[Econet] has access to the funds to enable it to make the payment of $1,215,823,497.60 subject to obtaining the Transaction Documents mutatis mutandis in executed form and subject to the appointment of an agreed escrow agent can then make payment."

11. At the hearing which took place on Monday 15 May at about 4.15pm, the Judge was presented with a skeleton argument, which he had read and apart from the affidavit he had 'looked at' the draft Order. "*I have not seen or got the exhibits to the affidavit. I do not think I want them probably.*" He was then shown correspondence between the parties and was told that this was fairly well summarised in the claim form. Counsel had indicated in his skeleton argument that it might be argued that the proper place of arbitration was Nigeria, because that was the place specified in the SHA but adverted to the fact that the powers under section 44 of the Arbitration Act could be exercised even where the seat of the arbitration is outside England & Wales. And the Judge had noted that "*you have drawn my attention to the arguments there might be about any place of arbitration*". He then turned his attention to the terms of the order.

Reasons why the order should be discharged

12. The Judge was being asked to intervene in a substantial commercial transaction where the target company, the vendors and the rival prospective purchaser all had rights and expectations. Very good reason would be needed to justify a hearing without notice. I do not consider that there were such grounds. What was being advanced as the reason did not make sense. Their alleged fear was that the vendors would not wait until 18 May 2006 once they knew of the application because they would realise that Econet were not going to advance those monies on that date despite the fact that the deponent said that monies could be paid when execution and identification of escrow agent was disposed of. Econet had access to the funds it was just a question of tying up loose ends. Under the terms of the deal with Celtel the contract could only become unconditional if the monies were not advanced by close of business Nigerian time on 18 May. In any event, as Econet knew, the terms of the deal with Celtel was dependent on consent being given of the NCC such consent being a requirement of VNL's digital mobile licence and of the Nigerian Communications Act 2003. I cannot understand why the proceedings needed to be rushed through on the Monday afternoon without notice. There was sufficient time to give the Respondents [and Celtel] notice of the application for an urgent hearing on 16 or 17 May before a Judge who had had the papers for sufficient time to be abreast of the issues. There was no discussion before Langley J. about the without notice aspect of the application and counsel did not draw his attention to the weakness of the case for proceeding in that manner.

13. It was quite unsatisfactory for the issue about the seat of the prospective arbitration to be dealt with as it was. Section 44 of the Act gives the court power to hold the ring until arbitrators become seised of the dispute. In this case the alleged arbitral provision was that contained in the Share Purchase Agreement and/or the Share Subscription Agreement, namely under LCIA Rules. Those Rules should have been drawn to the court's attention. An arbitration is commenced by a simple request sent to the Registrar of the LCIA court. Article 9(1) provides for cases where there is exceptional urgency when either party can apply for the expedited formation of the arbitral tribunal. The Tribunal has conferred upon them the power to order a party to provide security, to order the preservation of any property and to order on a provisional basis any relief which it would have power to grant on a final award. However, in general terms, the powers of the arbitrators are in lieu of making application to the court; applications to a court prior to the formation of the tribunal are permitted.

14. If the court's powers were being invoked because the Arbitral Tribunal under the LCIA Rules had not yet been formed, the court's order should have required Econet to undertake to have such a tribunal formed as soon as possible, so that the [allegedly] agreed method of dispute resolution could be invoked as soon as possible. Nothing was said in the order about this; there was no discussion of this in court or in counsel's skeleton argument. It is regrettable that if Econet had genuinely wanted to arbitrate their dispute in England, they had taken absolutely no step to proceed with the formation of a tribunal under the LCIA rules by the time I considered the application to discharge the injunction on 25 May 2006. In other words, they had done nothing for 10 days in that respect; yet the powers of the court under section 44 are plainly intended to cover over the crack between the moment of the application and the time when the arbitral tribunal can be formed and take its own decisions about preserving the status quo.

15. In fact, in my view Econet are unable to show a good arguable case that the LCIA arbitration provisions in the two Agreements referred to apply to the dispute between the parties and that this probably explains why they had not got on with it. The dispute between the parties concerns the way that the right of pre-emption is to be managed and operated. The implied terms are terms to be implied into the Offer Letter contract which was

made pursuant to the SHA. If for some reason the Offer Letter did not contain proper information, then a breach of clause 17 of the SHA could be alleged, subject to Nigerian Arbitration. There was no new governing law or arbitration provision after the Offer Letter was accepted. The working out of the right of pre-emption was a right conferred by the SHA and remained governed by its terms until the Transaction Documents had been executed and the shares transferred. In my judgment, that must have been the intention of the parties. As it was put in argument, why does Econet choose the dispute resolution mechanisms in two of the Transaction Documents annexed to the Offer Letter; there were other transaction agreements with other disputes mechanisms in them including arbitration in Holland.

16. The obvious forum for the arbitration was Nigeria. None of the Respondents has any connection with this jurisdiction; there is no evidence that they have any assets here. The case concerns the shares in a Nigerian company whose business is based in Africa. There are, as the affidavit makes clear, other proceedings in Nigeria about the workings of the SHA and incidents which have occurred between the parties as shareholders in VNL.

17. The Judge should have had his attention drawn to the difference between this court exercising its jurisdiction under section 44 when an English arbitration is in being or about to be in being, and the use of the court's exceptional powers under section 44 where the seat of the arbitration is elsewhere. If, in this case, there was no good arguable case that there was an English Arbitration clause, then there was no justification, in my judgment, for an application to this court under section 44 of the Act, and none was advanced to the Judge. What counsel submitted was as follows: "*Even if the vendors are correct the court can still grant an injunction under section 44 in support of a foreign arbitration (see section [2(3)(b)] [the reference was left blank] of the Arbitration Act). In the circumstances, if the court is otherwise minded to grant the injunctions sought, it should still exercise its discretion in favour of granting the injunction given that two of the three relevant agreements specify a London arbitration and these are the most recent and most likely to be the ones that govern the situation.*"

18. With respect to counsel, who was no doubt working hard under pressure of time, what is said in this quotation will not do. The assumption made is that the vendors are correct in saying that any dispute must be referred to Nigerian arbitrators; yet the court is being asked to make an order because the two London arbitration agreements are "*most likely to be the ones that govern the situation*". That is not a reason for making an order in support of a foreign arbitration; that is a reason for saying the arbitration is domestic and not foreign.

19. Absolutely no reason is advanced in support of a proposition that the English court should make an order in support of a Nigerian arbitral process and there is no such reason that can now be advanced. In other words, unless Econet could show a good arguable case for arbitration in London, the court's powers under section 44 could not be invoked. The Judge may well have been misled into thinking that it did not matter who was right about the location of the seat of the arbitration because of the statutory provisions to which counsel had drawn attention. In fact, none of the Respondents had or have any connection with this country and had the long arm reach of section 44 been invoked the first question would have been: 'why are you asking for an order from this court?' In short, to re-phrase counsel's submission, '"*if the vendors are correct*" [that the arbitration clause comes from the SHA] the court cannot still grant an injunction under section 44 because there is no basis upon which it could properly exercise such jurisdiction.' English Law is not the procedural law of the Nigerian arbitration and nor are there assets here. As Mr Brindle QC submitted on behalf of the Respondents, "*The natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration, especially where the curial law of the arbitration is that of the same country*". I agree.

20. Econet did not produce to the court the full 'run' of the exchanges between the parties about the completion of the Transaction Documents. Had they done so a different picture would have emerged. The respondents argued before me, vigorously, that right from the start, Econet's intention was to play for time because they knew that they would not be able to raise the wind in the allotted time. I find the dispute difficult to understand. There is no dispute that the Offer Letter annexed all the Agreements with Celtel which had to be matched by Econet. All that was required was a change of name, mutatis mutandis, so that Econet was made the purchaser. Instead, the parties have between them made a meal of the whole thing. Whilst the Offer Letter had identified the Escrow Agent as First Bank, the first version of the supplemental agreement which was designed to incorporate all amendments to the Transaction Agreements in one document identified the Escrow Agent as RCS Management, the Escrow Agent in respect of Celtel's offer. These documents were supplied on 9 May; the revised version was produced correctly identifying First Bank as the Escrow Agent, and sent as part of the bound copies on 11 May. Arguments developed as to whether the idea of a supplemental agreement was appropriate and Econet's distinguished Nigerian lawyer also argued about who should execute the documents first. Econet spent Friday and Saturday threatening the Respondents and demanding that they accept all the manuscript amendments they had provided; that they should agree to the appointment of Econet's primary lender, Standard Chartered Bank as Escrow Agent and that they execute all the documents by 7.00am on the Monday morning.

21. On 12 May, the Respondents sensibly suggested that there should be face to face physical execution of all the documents at a meeting to be held in the week starting 15 May. That would remove any issue as to who was to sign first. Econet had unconditionally accepted the Offer Letter and there the Escrow Agent was identified as First Bank. It was simply not right to allege in Counsel's skeleton argument that "*no agreed [escrow] agent has been appointed, there is no one to whom [Econet] can make payment*" Having expressly agreed to the terms of the Offer Letter it was not open to Econet to lay down the law as to who was to be the Escrow Agent.

22. In my view, Econet do not have a good arguable case for saying that the Respondents have broken any term as to co-operation, whether express or implied. I am very doubtful whether there is sensible room for implying any term such as is suggested. At most, in my view, there would be a duty to act in good faith. Bad faith is not alleged, I think, and nor could it be. The full run of correspondence shows a willingness of the vendors to resolve the differences in a sensible and practical manner. As to the express terms in the two Transaction Agreements, I do not consider that they apply to the working out of the terms of the Offer Letter and the execution of those contracts; just as I do not think their arbitration provisions apply before completion of the share sale to Econet.

23. There was serious non-disclosure or misrepresentation of the true position as to Econet's access to funds as at 15 May and 18 May 2006. In counsel's skeleton argument presented to Langley J. it was stated that Econet were willing and able to complete the transaction. That was not the true position as it emerged from documents disclosed by Econet following a disclosure order made by Colman J. after Langley J's order. In a witness statement filed on behalf of Econet after Langley J's order, Mr Lombard asserted that as at 14/15 May there was more than sufficient funds to make the required payment. But even taking his figures at best, and ignoring qualifications and pre-conditions, on the figures the total amount available was US$90 million short. But realistically the equity funding [supposedly for US$400 million] was not committed but rather was offered subject to conditions; and of the debt funding [US$975 millions] there was a conditional contractual commitment as to part and no contractual commitment as to US$475 million. Accordingly, the bald statement that as at 15 May Econet "*has access to the funds to enable it to make the payments*" subject to completion of the transaction documents and agreement as to the identity of an escrow agent was not true. It was also a statement that was not made on the basis of the deponent's own knowledge. He was relying on persons who provided him with information; but his affidavit said that in such a case the "*source*" of the information would be stated. There was no evidential material presented to the Judge to support the statement in the affidavit and a disclosure application had to be made to Colman J. to obtain it.

24. I regard this aspect of the case as unfortunate. It was critical to the grant of any order that the court should be satisfied that Econet were not playing for time and had commitments from funders subject only to the two qualifications referred to. That was not the case and had the Judge known it I very much doubt that the injunction would have been granted. It is apparent from the history that Econet were asking for extra time from an early stage. The reason for this now appears to be that this extra time was needed not because of problems over the documentation but because it was taking longer for them to find the money than the contractual time provided for in the SHA as reflected in the Offer Letter. By making the order the court was, effectively giving Econet the extra time which commercially they were unable to get by agreement. That was not, I think, the court's function.

25. I, therefore, summarise the position in this way:
    (1) It was inappropriate to seek from the court the injunctive relief without notice to the Respondents. There was no proper basis for making such an application.
    (2) This court was not the appropriate forum for an application for an injunction in aid of an arbitration, since the seat of the relevant arbitration was Nigeria and not England.
    (3) The Injunction should have contained an undertaking to form the arbitral tribunal at the first opportunity.
    (4) Econet had no arguable case for alleging a breach of contract by the Respondents, since there was no room for the implication of the terms alleged and in any event they could not show any linkage [causation] between the problems over the documentation and their failure to make payment to the Escrow Agent on 18 May 2006.
    (5) Langley J was seriously misled by the evidence as to Econet's access to funds.

26. In short, as I said at the beginning of this judgment, the injunction should never have been sought or granted, as it was.

Mr Stephen Moverley Smith QC and Mr Richard Ritchie (instructed by Finers Stephens Innocent) for the Claimant
Mr Simon Browne-Wilkinson QC and Mr Andrew Mitchell and Mr Edward Levey (instructed by DLA Piper Rudnick Gray Cary) for the 1st Respondent
Mr Ian Glick QC and Mr Mr Andrew Lenon (instructed by Linklaters) for the 22nd Respondent
Mr Michael Brindle QC and Ms Veronique Buehrlen (instructed by DLA Piper Rudnick Gray Cary) for the 3rd, 5th to 14th and 18th to 21st Respondents