

JUDGMENT : MR. JUSTICE HART. Companies Court. 26th February 2001

1. This is the hearing of an application by Optimum Solutions Ltd. ("the company") acting by its sole director, Mr. Paul Williams, for an order discharging the appointment of provisional liquidators which was made by Ferris J on 11th October 2000, and an order dismissing the winding up petition presented by Yorkshire Electricity Group Plc and Eastern Electricity Plc on 6th October 2000.
2. The application has also been, subsequent to its issue, amended in order to seek the payment out in favour of the company of certain costs which are said to have been incurred on its behalf by solicitors between 5th October 2000 and 17th November.
3. I should say that although not formally asked to do so, I give leave to Mr. Williams to represent the company in person, and I do so notwithstanding the fact that the requirements of the practice direction in that respect have not been complied with. No point has been taken by the petitioners in relation to that, and it seems undisputed that he is not only the only director of the company but also the owner of over 90% of its issued share capital.
4. The petition is based on an alleged indebtedness to the petitioners as future creditors so far as the first petitioner is concerned in a sum of £42,044, under the terms of an order made by Laddie J on 20th September 2000 by which the company was ordered on or before 10th October 2000 to pay to the first petitioner the sum of £42,000 in relation to part of its costs in relation to a hearing in certain proceedings by the company against the petitioners and defined in the petition as "*the Patent Court 'proceedings'*", those being proceedings which had commenced in 1998; and, so far as the second petitioner is concerned, an identical sum of £42,000 also on account of its costs in the Patents Court proceedings.
5. The petitioning creditors also claim to be contingent or prospective creditors of the company for their taxed costs of the Patents Court proceedings in that, and I quote from the petition, "*by the terms of the Laddie order, the company was ordered to give a security for the petitioners' costs in the Patent Court proceedings by paying the sum of £950,000 into the court fund's office by 1st November 2000. Unless such security is given by 1st November 2000, there is to be judgment for, amongst others, each of the petitioners with costs of the Patents Court proceedings, such costs to be subject to a detailed assessment if not agreed.*" It is alleged in a petition that upon a detailed assessment of the petitioners' costs the company will be ordered to pay each of the petitioners' no less than £500,000.
6. The Patent Court proceedings were proceedings in which the company was suing inter alia the petitioners for misuse of information said to have been supplied to various individuals in the electricity industry under obligations of confidence. On 19th September last year, certain applications in those proceedings came before Laddie J, including applications by the petitioning creditors to strike out the claim and for security of costs, and an application by the company to amend its pleadings.
7. The application to strike out the claim was not successful, Laddie J indicating that while many aspects of the proposed amended statement of claim were unpromising, they were not unarguable and that the claim should not be struck out if they were arguable. However, as indicated, he made the orders which are recited in the petition so far as costs, security, and judgment for the petitioners in default of giving security were concerned.
8. It is right to record that the Patent Court proceedings had proved extremely expensive, even at the stage they had reached when the matter came before Laddie J, the company itself having financed the litigation to that date by means of, as I understand it, the proceeds of a legal expenses insurance policy which had provided some half a million pounds to that date. As the petition indicates, the costs incurred on the petitioners' part, as to which there is an issue to which I shall come, were no less than half a million pounds apiece; in fact, the evidence shows that the half a million pounds is itself a modest estimate of sums which have elsewhere been estimated to aggregate between the two petitioners to a sum of £1.7 million.
9. The application to set aside the appointment of the provisional liquidators is made upon the ground that it was the appointment of the provisional liquidators which itself rendered compliance with Laddie J's order impossible and that that appointment was itself only obtained as a result of (1) material non disclosure, and (2) as a result of improper reliance by the petitioners of a matter that had been disclosed to them in the course of Without Prejudice negotiations. It is also submitted that the appointment can in any event be

demonstrated to have been unnecessary both at its inception and to have remained or to have become unnecessary since.

10. It is submitted on behalf of the company by Mr. Williams that the petition is an abuse of the process of the court because it can now be demonstrated that the company could have paid the sums of money which it was ordered to pay as a result of Laddie J's order; that is to say the £84,008 to which I have already referred that became due to the petitioners on 10th October and also a further sum of £42,000 which became due on the same date to National Grid Plc, another of the defendants in the Patent Court proceedings, who had received the benefit of a summary assessment of costs in its favour in that sum.
11. The company says that as of the date of the petition it could have paid those sums and that, in any event, it is not liable for the much larger sums, namely the 1.7 million odd, or whatever a detailed assessment might reduce that to, which the petitioners on the face of it are entitled to proceed to detailed taxation of following the judgment in their favour, which happened automatically as a result of the company's inability to furnish the £950,000 security for costs by 1st November.
12. In examining those submissions which I have sought to so far only briefly to summarise, it is I think convenient to take the same course as Mr. Williams did in his submissions before me and to look at the issues of material nondisclosure and reliance on the Without Prejudice material together.
13. The primary basis relied on by the petitioners for referring Without Prejudice material to Ferris J on 11th October was that the material disclosed showed unambiguous impropriety on the part of the company. In that connection I was referred to the relatively recent decision of the Court of Appeal in **Dora v. Semper and ors.** on 15th March 1999, which does indeed establish that the Without Prejudice privilege will not extend to matters to which the label "evidence of unambiguous impropriety" can properly be attached.
14. The material, which was placed in front of Ferris J consisted of an agreement entered into on 2nd October 2000 between the company and a Guernsey registered company called cheaperbrands.com, whereby, and I shall have to look at it in more detail, certain patent rights owned by the company were apparently agreed to be sold by the company to Cheaperbrands for a sum of £7,000 and for the other agreements and considerations mentioned in it.
15. The point which can be stated shortly, which Mr. Williams takes in relation to reliance on that agreement in front of Ferris J is that there was no unambiguous impropriety on the face of that agreement, since the petitioners had themselves on a number of occasions in the course of the patent proceedings, and in particular in the course of the application for security for costs which they made in those proceedings, asserted (in contradiction of what had been contended for by Mr. Williams) that the patent rights had no real value.
16. The particular passage relied on by Mr. Williams was in the witness statement of Mr. Christopher Hickson, a partner in Slaughter & May, who in a witness statement in 1999 I think had said this at paragraph 37: *"Mr. Williams has previously stated that the main source of future-income for OSL lay with its intellectual property rights in the form of a portfolio of patents. It appears however from Mr. Williams' third affidavit that quite a number of discussions with venture capitalists and banks it has not been possible to raise such finance using such rights as security. Mr. Williams claims that the major obstacle for this has been that financial institutions could not understand the very specialist nature of OSL's technology or its market. It is submitted that financial institutions are far more astute than Mr. Williams suggests and that the reason he has been unable to raise finance from such rights is that they do not represent the value of the assets he claims. Rather, as previously indicated in the first affidavit of Patrick Lloyd of Ready and Groves, the claimant's portfolio is a drain on its resources in the estimated region of £45,000 a year in prosecuting and maintaining those patents. I am not aware of any reason that such an estimate should have changed."*
17. A similar point had been made in the very Without Prejudice correspondence in the course of which the disclosure of the Cheaperbrands agreement took place. That Without Prejudice correspondence was not shown to Ferris J, but Mr. Williams has sought to rely on it before me without objection from the petitioners.
18. It commences with a letter from Reynolds Porter Chamberlain, the solicitors then acting for the company, dated 29th September 2000, which, so far as-is material is in these terms: *"Our client has reflected upon and considered the order of 20th November 2000. Clearly if our client goes into liquidation the liquidator's fees would be*

paid from any available funds, as will preferential creditors. If there is eventually any dividend, it is likely to be very small.

Mr. Williams would prefer that OSL continue for the purposes of consultancy. Our client has instructed us to make the following proposal. (1) that your clients, that is the first, second and third defendants, agree not to enforce the order, that OSL will pay £10,000 to the first and third defendants for distribution between them however they see fit, and that all parties shall discontinue the litigation without admission and bearing their own costs, save for the said payment. (3) that OSL shall agree not to pursue any claim against any members of the pool or NGC in respect of the confidential information. Your clients have made it clear that they do not place any value on the patents. However as part of the above settlement our client would undertake that it would grant each of your clients an all past and present full members a non exclusive UK patent licence for them to use the patent rights without charge for the life of the patents. This would be in simple letter form per the attached draft. we appreciate that your clients are entitled to enforce the order, however if to do so the likely that to do so will merely cause the liquidation OSL. We therefore believe that the above is a practical approach. Given the time limits within the order we ask that you confirm whether your clients wish to accept this offer before 3rd October 2000. A letter in identical terms goes to Cameron McKenna".

19. That was replied to on 3rd October by Slaughter & May who indicated that, in four respects, the proposal was unacceptable as it stood. The second of those respects was formulated in this way. 'The retention by your client of its patent rights is by no means necessary to achieve the stated objective of allowing OSL to continue for the purpose of consultancy. You are correct to say that our clients ascribe no value to the patents. However, in order to be sure that the patents are not used in such a way as to frustrate the objective of the proposal set out in paragraph 1 above, our clients consider that it is necessary that the worldwide portfolio of patents or patent applications as the case may be assigned to them or their nominee absolutely.'
20. That was then followed by a letter of 4th October in which Reynolds Porter Chamberlain, in relation to that point, said, and I quote: "It is agreed that our client does not need to retain the patents to continue for the purpose of consultancy. For that reason our client has sold the entire patent portfolio to an unconnected third party. A condition of that sale was that our client could licence your clients by 12th October 200 on the terms set out in our letter of 29th September. our client is therefore not in a position to assign the patents to your clients."
21. The actual disclosure which was given to Ferris J so far as the petitioners' view of the value of the patents was concerned, was contained in Mr. Hickson's affidavit produced to Ferris J in which the following passages occur, which I quote, first in paragraph 5, "So far as the applicants are aware the company's only business is provision of consultancy services and research and development work through its controlling shareholder and sole director, Paul Williams. The applicants do not believe that it has any other employees. Mr. Williams has in the past asserted that the company's assets include valuable patent rights. Although the applicants do not accept that these rights have anything like the value ascribed to them by Mr. Williams this application is made in the circumstances described below in order to protect the company's interest in those rights".
22. In paragraph 30 of the same affidavit he said, in purported compliance with Insolvency Rule 4.25 (e) "I now turn to the estimate of value of the assets in respect of which the provisional liquidator is to be appointed. As I have previously explained, the company's sole assets are said to comprise a car, computers and patents. I do not know the value of these items but would not expect that the former two are of any significant value. In relation to the patents and patent applications of the company, Mr. Paul Williams has variously described them as being of 'potentially enormous value', and 'very considerable value'. These references can be found at paragraph 72 and 91 of the first affidavit of Paul Nicholas Williams respectively. As I have already explained he has also asserted that any exercise of the IBM option would lead to a realisation of £3 million for the company. However, no extrinsic evidence of their true worth has been presented. Therefore the true market value of those rights is entirely speculative."
23. Again, it appears both from the skeleton argument of Mr. Trower on behalf of the petitioners on the ex parte application before Ferris J, and from the transcript of what was said to Ferris J on that occasion, Mr. Trower indicated that his clients were sceptical as to the value placed on the patent rights by Mr. Williams.
24. Mr. Williams, complaint is that Ferris J would have been left with the impression that, while the petitioners were not placing any sum certain valuation on the patent rights, they were not indicating their own previously stated view that the patent rights were of no significant value whatsoever, and that, in the context in which the application was made and the previous statements by Mr. Williams were referred to,

Ferris J might have been left with the impression that they believed that the patent rights did have a significant value.

25. As I have already indicated, Ferris J did not have the benefit of seeing the context of the Without Prejudice correspondence, as a result of which the Cheaperbrands agreement was in fact disclosed. It seems to me that the inference which can be drawn from that correspondence is that while the petitioners were maintaining their previously expressed view that no value could be ascribed to the patents, the existence of the patents in some hands other than their own was a significant consideration. That is entirely intelligible if it is the case, as I was told that it was, that the patents and applications for patents are essentially the embodiment in patent form of the claims in respect of confidential information which were the subject of the Patent Court proceedings.
26. Plainly, those claims themselves, whatever their intrinsic worth, were capable of giving rise to very great value at any rate in the hands of the lawyers engaged to litigate about them and there is no doubt that the patent rights dealt with by the agreement had at the very least that considerable potential nuisance value so far as the petitioners were concerned.
27. The Cheaperbrands agreement itself needs to be considered in the light of the effect these matters might have had on Ferris J had they all been canvassed with him in the way in which Mr. Williams suggests that they ought to have been. As I have said, the agreement was made on 2nd October between the company and Cheaperbrands. The fifth recital to the agreement is in these terms, and I quote: "*OSL is engaged in proceedings in the High Court against National Grid Plc and others, the proceedings, and it is foreseen by OSL that the settlement of the proceedings may involve the grant of a licence affecting the patent rights to pool members, the electricity pool of England and Wales, (the electricity companies) in agreed terms*". Clause 1 provides for the sale to Cheaperbrands of all of OSL's '*right title interest in the patent rights subject to the following*', and then there is listed the rights of IBM under the IBM licence, the rights of XYZ under the XYZ licence and the rights reserved to OSL under clause 2 of the agreement. The consideration is then stated as £7,000 "*payable in cash within five days of execution of the agreement*", with a provision for OSL to execute assignments of the patent rights in an agreed form within 14 days after execution of the agreement. Clause 2 then provided in the following terms: "*The purchaser grants to OSL such rights over or relating to the patent rights as are required to enable OSL to comply with its obligations under each of the ISM licence and XYZ licence but on the basis that OSL shall account to the purchaser for any amounts up to a maximum equal to the purchase price payable by the purchaser under clause 1.2. Receive by OSL from either IBM or XYZ under the terms respectively of the 12M licence and the XYZ licence. 2.2 the purchaser grants to OSL the right to grant a non-exclusive licence to the electricity companies or either of them or their respective nominees to utilise the patent rights within the United Kingdom for no consideration other than settlement of claims in the proceedings and potentially agreement by certain of electricity companies not to challenge the patent rights provided that OSL gives notice to the purchase of its intention to grant such a licence within 10 days following execution of this agreement, in which case...*" and then, certain consequences follow.
28. Then I need not summarise the remaining terms, save to note the final clause 4.2: "*The parties acknowledge that the terms of this agreement have been negotiated at arm's length, each with the knowledge of the uncertainty regarding the value of the patent rights and that the particular circumstances of OSL with regard to the proceedings and accordingly neither party shall have any claim against the other with regard to the value or sustainability of the patent rights. Nor in respect of any warranty implied by statute. Nor any misrepresentation whether or not negligence, save that nothing again shall not operate to exclude liability arising from fraud.*"
29. Mr. Trower, on behalf of the petitioners, submitted to me that this was a very odd agreement, drawing particular attention to the fact that it had been made between the date of Laddie J's order and 10th October, when the sums due under it were payable, and the fact that the basis of the consideration of £7,000, that the basis of it had not been explained. He drew my attention also to the fact that the ability under the agreement for OSL to grant a non-exclusive UK patent licence to the electricity companies had obviously been tailored in such a way as to enable that offer to be made to the petitioners within a very limited window during which they would either have to take up the offer or lose all future benefit from the patent rights.

30. He pointed out that apart from a bare assertion by Mr. Williams in the witness statement in support of his application that the execution of the agreement was in the best interests of the company and its creditors, no attempt had been made to provide any evidence of the commercial justification for the agreement.
31. in his submissions to me, Mr. Williams has referred me to passages in his evidence where he has deposed to attempts he made to negotiate arrangements with other organisations for the disposal on advantageous terms of the patent rights and indicated to me that, at the end of the day, it was Cheaperbrands emerging with the offer it made that appeared to him to be the most advantageous available.
32. It seems to me that the Without Prejudice correspondence, which was not available, as I have indicated, to Ferris J, really makes the context of this agreement fairly plain. It had been explained to Laddie J in the course of the security application that the company had no funds by then available to it with which to fund the future litigation. At quite a late stage of the hearing before Laddie J, he was told the whole of the proceeds of the insurance policy had been used up. When he came to make his orders for payments on account of costs in the two sums of £42,040 to the petitioners and discussion took place as to the timing of that payment, it was made fairly clear to Laddie J by counsel then appearing on behalf of the company, on the express instructions of his clients, that there was no realistic possibility of those costs being paid otherwise than by way of set-off against any costs orders that in the future be made in their favour. In a word, it was clear and made clear to Laddie J that the effect of his order was to render the company insolvent, and indeed that it was in no position to continue the litigation so far as its own costs were concerned, let alone paying costs ordered against it, and let alone still further being able to provide £950,000 worth of security.
33. In the circumstances one can read the Without Prejudice correspondence as clearly indicating on behalf of the company that it was not good for any money at all; that the best that the petitioners could hope for in terms of cash was £10,000. Then we see the company indicating to the petitioners that while they could have a UK patent licence, they could not have the one thing that the company claimed that it had and which was of value, namely the patent rights themselves because, to and behold, they had already been assigned by the cheaperbrands agreement.
34. It seems to me that viewed in that light, the Cheaperbrands agreement was, unarguably, an unambiguously improper document. It was a document whereby an insolvent company was disposing of the only asset which it claimed to have which was of any value and which was being disposed of for a consideration which did not in any way reflect the value which had previously been claimed for it.
35. In those circumstances, it seems to me that the petitioners were entitled to rely on it in front of Ferris J, notwithstanding that it had been disclosed in the course of Without Prejudice correspondence, and they were entitled to rely on it as justification for making an application for the appointment of provisional liquidators.
36. It is a separate question as to whether they did enough to make plain to Ferris J their own previously expressed view that the patent rights had no substantial value, and it is perhaps a question of whether they should have told the learned judge, if this was the case, that in their view the only real value of the patent rights was the nuisance value which they represented should they be in the hands of anybody other than themselves.
37. It is as Mr. Trower submitted to me, always a question of judgment and to some extent impression as to what is material to be disclosed, on the making of an ex parte application. But it is also clear, and I doubt it needs emphasising by me, that any doubt on such a question in the minds of anybody making an ex parte application should always be resolved in favour of disclosure rather than nondisclosure.
38. The ability to make an ex parte application is a valuable right for a party but, at the same time, it denies, but its very nature, the other party what in normal circumstances is a fundamental requirement of justice, namely that no order should be made without giving him an opportunity to be heard.
39. That principle is what underlies the strictness of the requirement that full disclosure be made where a party is coming to the court ex parte on the basis that justice requires, in the particular circumstances, that an order be made without the other party being heard.

40. For myself, in this particular case, I have not been persuaded by Mr. Williams that there is anything that should have been said by the petitioners which was not said, or that had more than said, in particular had Ferris J been taken in terms to the earlier allegations and counter allegations that had been made in respect of the value of the patent rights and been taken to the context of the Without Prejudice negotiations in the context which the Cheaperbrands agreement was made, that it would have made any difference to the conclusion at which Ferris J arrived. Accordingly, I would not accede to the company's application to set aside the order on that ground.
41. It is then said by Mr. Williams, and correctly said, that it is not only material circumstances known to the applicant which fall to be disclosed to the judge on the ex parte application, but also material which he ought to know as a result of making reasonable enquiries. In that connection he relies on the fact that after presentation of the petition, Slaughter & May had written to Reynolds Porter on 9th October (that is to say, the Monday of the course of which the application for provisional course made) asking for confirmation assignment pursuant to clause 1.3 of Chamberlain week in the liquidators was in due that there had been no the agreement.
42. Mr. Williams tells me that in the press of business that followed service, or learning of the existence of the presentation of the petition, those who were then acting on behalf of the company neglected to inform Slaughter & May that there had in 'fact been no such assignment and that indeed according to Mr. Williams' evidence, the decision had been taken not to proceed with the assignments following the presentation of the petition. What Mr. Williams says is that reasonable enquiries would have included a chasing telephone conversation when nothing had been heard following the letter of 5th October.
43. In my judgment, there is nothing in that point. It seems to me that the enquiry made by letter on 9th October was itself a reasonable enquiry and nothing was learned as a result of it.
44. The other element of nondisclosure on which the company places particular reliance goes to the strength of the underlying allegation of liability and indebtedness contained in the petition. This relates in particular to the liability for costs which follows from the company's failure to provide security by 1st November, although in principle the point, if it is a good one, applies also to the two sums of £42,000 ordered to be paid on account of costs by the Laddie order.
45. In each case it is Mr. Williams, contention that on a detailed assessment it will be shown that nothing is owing and that it will be shown that, in respect of each of the sums of £42,000, they should never have been ordered and therefore ought to be repaid.
46. The point arises in this way. It is, of course, a clear proposition of law that a party who enjoys the benefit of an order for costs cannot recover under it anything more than that which he is liable to pay to his own solicitors. That one can conveniently be refer to as the indemnity principle. I was referred in that connection, both by Mr. Williams and by Mr. Trower on behalf of the petitioners, to the decision of the Court of Appeal in **Bailey v. IBC Vehicles Ltd**. 1998 (3) All ER 570 in the course of which Judge LJ pointed out at page 573 that the indemnity principle is well understood and that he went on to cite from a number of authorities which illustrate and elaborate on it, in particular **R v Miller Raymond**, [1983] 3 All ER 186, where Lloyd J considered the authorities and made the following observations and I quote: "*Once it was shown, as is now conceded, that Mr. Glennie was indeed the client, then a presumption arose that he was the person liable for the costs. That presumption could however be rebutted if it could be established that was an expressed or implied agreement binding on the solicitors that Mr. Glennie would not have to pay those costs in any circumstances*".
47. Then I can pick the quotation up again a little further down: "Unless those facts establish a clear agreement, express or implied, that in no circumstances will the solicitor seek to obtain payment from their client then the basic presumption stands".
48. The position in this case according to the petitioners, and indeed according to their solicitors, is that they are the clients of Slaughter & May and they are liable accordingly for their costs. The position was set out by them in a letter dated 8th June 1999, as follows. It is a letter to Bristows, who were the solicitors then acting for the company: "*We respond to your third letter of 7th June 1999 regarding this firm's charging arrangements. As you know, this firm is instructed to act on behalf of Eastern and Yorkshire in this litigation. Under a resolution made by Pool members it was agreed that the legal costs of the litigation which are payable by the second*

and third defendants will be paid by Pool members, each paying a proportion of the amount of those costs. As a matter of administration, our fee notes are rendered to the executive committee of the Pool and passed to the fund's Pool administrator which effects payment using funds from Pool members. As is apparent, from the fact that the arrangements relate to costs payable by Yorkshire and Eastern, these financial arrangements do not put those defendants in a position where they are not liable for the fees of Slaughter & May. There is no agreement that precludes Yorkshire and Eastern being liable for their fees".

49. That letter has been subsequently verified on oath by Mr. Hickson, and is also supported by witness statements which have been put in by the responsible employees of each of the petitioners.
50. Thus, the position is that both the solicitor and the clients have clearly stated that there is no agreement which precludes their being liable for the fees. When I say "the clients", I do not overlook the fact that Mr. Williams' submission is that on the whole of the evidence, the petitioners never were and never have been the clients of Slaughter & May. He submits that, without inviting me to rule on the point, there is a substantial question as to whether or not they were the clients of Slaughter & May, it having been clear from the pre-action correspondence that Slaughter & May were at that stage, in 1996 onwards, writing not on behalf of any one electricity company but on behalf of the collection of companies who go by the name of the Pool.
51. He also draws my attention to the fact that during the course of the hearing before me, it was made clear to him by those instructing Mr. Trower that the Slaughter & May fee notes which are said by the letter of 8th June 1999 to have been rendered to the executive committee of the Pool and passed to the Pool funds administrator, are in fact fee notes (as to my mind the letter itself indicated) addressed to the executive committee of the Pool. Therefore, this is not a situation in which the fee notes are addressed to the petitioners, but simply for administrative convenience passed in the first instance to the Pool for payment. Mr. Williams points out that if that is the case, then the inference is that VAT output tax is being charged by Slaughter & May to the Pool, or the executive committee of the Pool, which will have been claiming input tax accordingly and that this invoicing of VAT is quite inconsistent with any arrangement under which the Pool is paying these fees otherwise than as the recipient of the services concerned for the purposes of its business. This demonstrates, in Mr. Williams' submission, that the Pool is in reality the client.
52. Apart from the letter to which I have referred and the affidavit and witness statements which support it, the petitioners have disclosed only one document purporting to demonstrate that the position is as they describe it. That is a 1999 deed of indemnity which is certainly, as I read it, consistent with what they describe although it does not conclusively prove it. However, the VAT point which Mr. Williams has raised does remain unexplained.
53. Mr. Williams submits that the real vice of the petition is that, by founding itself on an estimated liability, it will, if successful, avoid the petitioners from having to reveal the fact that in this respect the emperor wears no clothes. The inference which he asks me to draw is that were there a detailed assessment, then the company would be able in front of the costs judge to exact disclosure from the petitioners, the defendants in the Patent Court proceedings, relevant to the question of whether they were or were not ever under a residual liability in respect of the costs and the inference he asks me to draw is that, on such disclosure, paper would emerge from which the only correct conclusion would be that the position is, as he would wish it to be, rather than as described by the petitioners and by the petitioners' solicitors.
54. In other words, he asks me to infer that the undisclosed documents upon which the petitioners and their solicitors are sitting would, if disclosed, demonstrate the existence of an agreement whereunder the two defendants concerned could not be liable for the costs of Slaughter & May.
55. That, I am bound to say, is an inference too far, so far as I am concerned. As it strikes my mind, it was inevitable once those two defendants were selected by the company to be the defendants for the purposes of the Patent Court proceedings that they would need, on some basis or another, to retain lawyers to act for them, and they have had lawyers acting on the record for them. Those lawyers must have been acting on some basis. The presumption must be that the petitioners were, therefore, the clients of those lawyers and the presumption, unless rebutted, must be that they are liable for their costs. The logic of Mr. Williams' submission must be that there must be some agreement under which they are not liable. If there is such an agreement, then it is equally clear that the letter dated 8th June 1999 contained a direct untruth, the

subsequent affidavit by Mr. Hitching is a perjury and the two witness statements made on behalf of the petitioners would be a contempt of court.

56. Those are not conclusions which I am prepared to draw. It seems to me that the inference to be drawn from the fact that no piece of paper has been produced to support the assertions which have been made is that no piece of paper exists which proves the matter one way or the other and that the court should therefore proceed on the basis of the presumption.
57. On that footing, it seems to me it cannot be said there was any-nondisclosure of a material point in this regard before Ferris J and it also seems to me that the reasoning by which I have arrived at that result necessarily involves the conclusion that this company is hopelessly insolvent; since, on any view of what might be the outcome of a detailed assessment of the-costs ordered by the Laddie order, they are well in excess of anything which the company could pay.
58. I will revert to that in a moment when considering what order to make on the petition but I should deal with a final argument which Mr. Williams made on behalf of the company as to why the appointment of provisional liquidators should not stand, namely, that it was unnecessary both at the time it was made and that it remains unnecessary now.
59. So far as the time at which it was made is concerned, I have no hesitation in rejecting Mr. Williams' primary submission which was that since, for the most part, the patent rights and applications for patents with which the Cheaperbrands agreement were concerned were registered either in the UK, in Europe, in North America, in Australia or New Zealand (in any event in jurisdictions in which the legal ownership of patents could be traced through a register), there was no risk to the patent rights in simply allowing the matter to be dealt with by a liquidator if appointed.
60. That seems to me to be a misconceived submission since, but for the appointment of provisional liquidators or some other remedy having an equivalent freezing effect on the further disposition of the patent rights, it would have been possible for further dispositions to take place and third party rights to be acquired.
61. Next he submitted that, even if the original order had been justified, once it had been discovered that the assignments had not been executed, it should have been clear to all concerned that the appointment-of provisional liquidators was no longer necessary and they should have voluntarily ceased to act or made an application for their own discharge. Once again, it seems to me that this overlooks the desirability, once they were in place, of their proceeding to investigate, as they have investigated, the arm's length nature of the Cheaperbrands agreement itself and the need to consider what steps to take both in relation to protecting the patent rights dealt with by that agreement and in considering what steps to take to preserve the company's position so far as the future of the Patent Court proceedings are concerned. As to the former, it appears that given the attitude to date of Cheaperbrands and the impecuniosity of the company, no substantial progress can be reported.
62. As to the latter, the provisional liquidators have made an application for directions and obtained directions from Blackburn J sanctioning their non-appeal of the Laddie order. A question which might have been quite difficult might have arisen had I taken the view that there was likely to be any extended time in the future pending the hearing of any petition during which provisional liquidators might continue to have a role. It is undoubtedly the case that the appointment of the provisional liquidators and the legal costs which they have incurred have been, as no doubt was anticipated at the time the order was made, extremely expensive. It is possible, with the benefit of hindsight, that other equally efficacious but less expensive remedies might have been appropriate or might have had the desired effect. However, I do not think it is necessary for me to speculate further as to what my decision might have been as to the future since the petition is before me for decision. It appears to me, as I have already indicated, that, on the basis of my approach to the question of the way in which the indemnity principle operates, the company is hopelessly insolvent and that notwithstanding the fact that, as at the date of the petition, all the indebtedness of the company relied on by the petitioners was either future or contingent, it is right to make a winding up order.
63. I should record, in that connection, two matters.

64. First, that I was referred by Mr. Trower to the decision of the Court of Appeal in **Byblos Bank v. Al Koutari** [1987] BCLC 232, as to the correct approach of the court when faced with a petition on the basis of future and contingent debts and in particular to the passages in the judgment of Nichol LJ, as he then was, at pages 246-248 A.
65. The second matter to which I should refer is Mr. Williams' submission that given that, at the date of the petition, neither of the petitioners was entitled to apply for a detailed assessment, they were not creditors for the purposes of section 122 of the Insolvency Act 1985, in that the contingency of the judgment in that respect had not then occurred. I am satisfied that that is not a sound submission. Even if I were not so satisfied, it seems to me clear in relation to the sums which they were ordered to pay on account (namely, the £42,000), that they had locus standi to present the petition. It is clear, as of today's date, on the basis of the information and evidence I have before me as to the state of affairs of the company, that it is unable to pay its debts.
66. There is one further point to which I should refer in that connection; namely, the contention of the company, made for the first time at some time after the Laddie order was made, that it does have an additional asset in the form of a debt owed to it by IBM in the sum of £3 million. That, if it were the case, would make a substantial difference to the analysis of its affairs. However, no satisfactory evidence that IBM is liable to the company in such a sum has been put before me and the point did not feature at all either in Mr. Williams' opening oral submissions or in his reply submissions and I have therefore discounted it in coming to the conclusion at which I have arrived.
67. I would, therefore, dismiss the applications and make an order winding up the company on the usual terms.

MR. TROWER: *My Lord, there are two matters in relation to costs, if I may. So far as the costs are concerned, the position of National Grid on the petition is that it supports -- the usual compulsory order includes, I think, one set of supporting creditor's costs, and I would ask your Lordship to just record that.*

The second point is this. I am instructed to make an application against Mr. Williams in section 56 of the Supreme Court Act against Mr. Williams personally. I am not instructed to make that application before your Lordship now. Indeed Mr. Williams is entitled to time to think about it. All I would invite your Lordship to do, de bene esse, is to make an order now joining Mr. Williams as a party to the proceedings in accordance with part 48.2 so that we can get that out of the way in the event that there is a determination that we are going to make such an application.

If your Lordship has got the White Book, page 870, 48.2, "Where the court is considering whether to exercise its power under section 55.1 to make a costs order in favour or against a person who is not a party to the proceedings that party as a person to be added for the purposes of costs only and must be given a reasonable opportunity to attend the hearing when the court considers the matter further."

HART Mr.J: *My view, without looking at all the small print on this is that such an application ought to be made by application, not by oral motion, and I do not think I am considering it until such an application has been made.*

MR. TROWER: *So be it. In that case I will not ask your Lordship to make any order at all and we can consider the position and make it in the normal way. Subject to that, I do not think I have anything else I need to add.*

MS. BRISTOLL: *My Lord, if I could just raise the issue of the costs of the provisional liquidators. Their remuneration can be dealt with on an application in the usual way. In relation to their costs I would ask that they be treated as expenses in the liquidation.*

Your Lordship's concern in relation to the legal costs has been noted but, as your Lordship saw from the reports, there has been an extensive amount of work that has had to be done as part of the investigations and obviously being involved on this application has caused a certain amount of cost to be incurred on the part of the provisional liquidators to put the matters before the court as officers of the court. Therefore, I would ask that there be costs treated as an expense of the liquidation rather than seeking them against any other party. In that way they can come out of the assets of the company.

HART Mr.J: *I have power to do that, have I?*

MS. BRISTOLL: *I believe so my Lord, yes. Under rule 4.30, which deals with remuneration of the provisional liquidator.*

HART Mr.J: *Remind me where I find that. Where is that?*

- MS. BRISTOLL: 4.30.
- HART Mr.J : *I have that.*
- MS. BRISTOLL: *Under (iii). "Without prejudice to any order the court may make as to costs the (inaudible)... the amount of any expenses incurred by him".*
- HART Mr.J : *I do not need to make any order, then.*
- MS. BRISTOLL: *If your Lordship is content with that. It was simply for the sake of clarity that we are asking for something on the face of the order; but if your Lordship is content that it is dealt with under the rules, then I leave it at that.*
- HART Mr.J : *Looks to me as if it is dealt with under the rules.*
- MS. BRISTOLL: *Then the provisional liquidator is content with that.*
- HART Mr.J : *Mr. Williams?*
- MR. WILLIAMS: *I am not sure really what I should say or ask for.*
- HART Mr.J : *I am not sure either. Maybe Mr. Trower could help. The thing that I should draw your attention to is that in most court proceedings these days, I am not sure if it applies to winding proceedings, if you wanted to take the matter further you would have to ask my permission to appeal and if you did not ask my permission to appeal, you would then be entitled to ask the Court of Appeal for permission to appeal, and if you did not ask me. for permission to appeal, ' you would still be entitled to ask the Court of Appeal.*
- MR. WILLIAMS: *I suppose the default is I should ask your Honour.*
- HART Mr.J : *The default is that you should ask and it is sometimes customary for those making such an application to make a little speech telling the judge why he was wrong.*
- MR. WILLIAMS: *There are clearly documents, including the completely redacted document that it is clear exist that go to*
- HART Mr.J : *It would be on the indemnity point would it not?*
- MR. WILLIAMS: *Yes. It is clear that there are documents which do set out why the Pool are paying these bills and the one agreement they have provided some substance to is irrelevant because it postdates the costs, and there is no evidence that operated. They have disclosed that there were resolutions before that, at least two, that clearly do go to the heart of how the Pool is paying these hills. The evidence on VAT, both from HM Customs and Excise and the notes that I passed up, do, I believe, raise substantive issues on that. There is also the point about the nondisclosure and the time and, you know, I hear what you say but you have heard my submissions on that.*
- HART Mr.J : *I am not going to give you permission to appeal on that basis. As I say, if you need it at all, I am not sure in insolvency proceedings of this kind, I am not sure you do, the rules all changed recently, then you can ask the Court of Appeal.*
- MR. WILLIAMS: *I do not know whether I should say something in terms of I believe there is case law on the issue of costs where solicitors have acted for a company in this sort of position and not been held liable for the costs of the company where they were unsuccessful, where they have tried to defend a company that is faced with winding up petitions or provisional liquidators.- I do not know if I need to say anything on those.*
- HART Mr.J : *At the moment, I have indicated to Mr. Trower that I am not going to be dealing with that until he puts a bit of paper in front of me actually making the application against you. There is some case law, there has been quite a recent case, two recent cases in the Court of Appeal on that subject, the later of which is called Northwest Holdings which is an appeal from a decision of my own, so you may have to find out about those.*
- MR. WILLIAMS: *I assume any applications would not be ex parte?*
- HART Mr.J : *No, you will definitely get notice.*
- MR. WILLIAMS appeared in person on behalf of Optimum Solutions Limited, the Applicant.
- MR. WILLIAM TROWER (instructed by Messrs Slaughter and May, London EC2) appeared on behalf of the 1st and 2nd Respondents.
- MS. SANDRA BRISTOLL (instructed by Messrs Norton Rose, London EC3) appeared on behalf of the 3rd and 4th Respondents.