JUDGMENT : Mr Justice Morison: Commercial Court. 13th July 2004

1. The question which arises in the present case is whether I should make a wasted costs order against Clyde & Co who are solicitors formerly on the record for the claimants in these proceedings. The brief facts are these.

2. The defendants were parties to an arbitration which they won. The claimants were ordered to pay the defendants' costs of the arbitration. They sought permission to appeal the arbitration award and that application was dismissed by Cooke J, on 2 March 2004, with costs. Some while later, the defendants' solicitors wrote and asked for a payment on account of costs. It was a modest request for the payment of some £6,000 of a total bill of costs of just over £10,000. There was no response to the request which was initially made on 26 May and repeated on 28 May 2004. On the basis of this silence the defendants' solicitors, Holman Fenwick & Willan, issued a written application for an order for an interim payment. That application was put before me, one of the paper work judges for that time. I noted that HFW had given their counterparty plenty of opportunity to make their position clear and had warned that unless there was some kind of positive response the court would be invited to deal with the matter in writing. I made the order on 8 June 2004. The next development so far as the court was concerned was a letter received from Clyde & Co, for the claimants, in which they complained about the order, suggesting that it should not have been done on paper but that a formal application notice should have been issued. Clyde & Co said that their clients were entitled to respond to the application and *wished to do so*. I immediately revoked the order on 21 June 2004 and suggested that an application notice was then filed so as to give Clyde & Co the opportunity to make representations on behalf of their client. In fact, on 11 June 2004 the claimant was declared bankrupt by the Cantonal Court of Zug, in Switzerland. Clyde & Co say that they were unaware of this when they wrote their letter to the court.

3. The court's power to make a wasted costs order against a firm of solicitors may only be engaged if the court is satisfied that the solicitors have acted unreasonably and have thereby caused costs unnecessarily to be incurred. Unreasonable conduct for this purpose is more than mere negligence. A wasted costs order should only be made in a clear case and will only be sparingly made. There is helpful guidance in the Practice Direction as to the procedure to be followed when a wasted costs order becomes in issue. Here, there is an application notice filed in accordance with Part 23 [see PD 53.3]. It is only appropriate for the court to make such an order if the legal representative has acted improperly, unreasonably or negligently and his conduct has caused a party to incur unnecessary costs and "it is just in all the circumstances to order him to compensate that party for the whole or part of those costs". In addition to these requirements I must also have regard to the principle of proportionality. The power to make such orders is draconian in nature and I remind myself that Clyde and Co are solicitors who serve the Commercial Court well.

4. On the evidence before me it appears that the decision of the Swiss Court did not have the effect of terminating Clyde & Co's retainer by operation of law until they became aware of the bankruptcy order and on 28 June 2004 the bankruptcy administrators confirmed that Clyde and Co were no longer instructed to act. I accept without question that when the letter of 17 June was written Clyde & Co did not know that their client had been declared bankrupt in Switzerland.

5. The question is whether Clyde & Co were instructed to write the letter of 17 June 2004 and if so who by. As the letter makes clear, their instructions were that their clients wished to make representations as to the making of an interim costs order. A Mr Ian Kilpatrick who was a director of the claimant company says that whilst still a director, and before the bankruptcy, he had given instructions to Clyde & Co to resist the defendants' "claim for costs in the arbitration proceedings and the claim for costs in the High Court proceedings". Mr Kilpatrick cannot have been authorised to act after the bankruptcy order. He filed the bankruptcy application on 9 June 2004 pursuant to which the order was made. The application was made on the basis of a resolution of the board at an extraordinary meeting of all shareholders held on 4 June 2004 which agreed the motion of the Administrative Board to declare insolvency. In other words, Mr Kilpatrick initiated the bankruptcy procedure shortly after the beginning of June. The plain inference to be drawn from these facts is that Clyde & Co had no express instructions from their clients to write the letter of 17 June stating that their clients wished to make representations as to the interim costs order. Indeed they cannot have had any express instructions after 9 June. Had Clyde & Co been in contact with their client before they wrote that letter, it is inevitable that they would have been told that Mr Kilpatrick was no longer authorised to act as the company had been placed into bankruptcy. The defendants say that by writing the letter without such instructions Clyde & Co were acting improperly. The plain reading of the letter was that their clients were aggrieved; they had not been given a proper opportunity to make representations; and they wished to have an opportunity to make them. It was also implicit from the letter that Clyde & Co's clients had something useful to say about the order. Immediately after Clyde & Co notified them of the bankruptcy HFW inquired about the instructions which Clyde & Co had received and when they had received them. These inquiries were either ignored or dealt with somewhat abruptly.

6. Clyde & Co say that they had implied authority to write the letter of 17 June having regard to Mr Kilpatrick's general instructions as to the costs issues. They also say that an application notice was required in any event for an interim payment order and the court could not make an order on paper unless there was express consent. Therefore the new application for an interim payment was inevitable and was not as a result of any misconduct on Clyde & Co's behalf. In any event it would not be just or proportionate to make a wasted costs order in the circumstances and I should refuse to make such an order in the exercise of my discretion.

7. In my view Clyde & Co have acted unreasonably in asserting in a letter that their clients wished to make representations as to an interim costs order. On the facts before me it is reasonable to infer that Clyde & Co did not have express instructions to write their letter. On 11 June Clyde & Co wrote and said that they had no instructions as to HFW's application for such an order. In the light of the correspondence the plain inference which was left by their letter of 17 June 2004 was that they had been in touch with their client since 11 June and had been told that the clients wished to make representations. That was not the true position. They had not been in touch with their client; they had not been told that their client wished to make representations as to the making of an interim costs order. By writing the letter of 17 June the court was misled into setting the initial order aside. It was proper to make the order on paper in the absence of any opposition to it. There may have been no formal consent but letters were unanswered and the defendants were entitled, I think, to proceed as they did. If objection were taken, and if it were not a mere formality, then the order would be, as it was, set aside. It was crucial to the revocation of the original order that by making it the court had unwittingly prevented Clyde & Co's clients from making representations. The purpose of the letter of 17 June was precisely to that effect; yet no such instructions had been given. I do not regard the general instructions which had been given by Mr Kilpatrick as amounting to a wish to make representations about the interim costs order. Clyde & Co have given no indication of what those representations might have been. Further, I regard Clyde & Co's attitude and response to legitimate inquiries thereafter as unhelpful and not of a standard to be expected of experienced litigators such as they are. But as I made clear in argument, I do not regard the way that Clyde & Co have behaved as stemming from anything other than over enthusiasm, which has led them to say more than their instructions permitted. Nonetheless, the court was misled and the defendants have incurred additional costs in obtaining yet another interim costs order and coming before the court, on notice, to ask for a wasted costs order, which was opposed.

8. I shall assess those costs having heard representations. There are three matters which require assessment, only two of which relate to the wasted costs order. The first is an assessment of the costs involved in the original application to me for the interim costs order. I assess those costs at £1,700. As to the costs caused by the letter of 17 June 2004, as I have indicated, I reject the argument that a further application would have been required in any event. The costs which are claimed total £9,479, of which £4,317 odd represent the costs of the hearing for the wasted costs order, In my view those costs should be assessed at £2,500. I heard argument on the figures and this assessment takes them into account, As to the earlier hearing again I assess those costs at £2,500 making a total of £5,000. Would it be just and proportionate to make an order in the sum of £5,000 against Clyde & Co? In my view it would be. As a result of misleading the court, their opponents have been put to additional expense, and despite the high opinion in which Clyde & Co are held, a wasted costs order against them is, in my judgment, justified.

9. Therefore I make an order for the payment of £5,000 to be paid by Clyde & Co to the defendants.

Mr S Cogley (instructed by Clyde & Co) for the claimant
Mr M Coburn (instructed by Holman Fenwick & Willan) for the defendant