JUDGMENT : Mr Justice Blackburne. Ch. Div. 21st February 2003.

1. This is an appeal against orders made by Chief Registrar James on 28 November 2002, dismissing two applications by Peter Shalson to set aside statutory demands. In each case the respondent to the application, and therefore to this appeal, is DF Keane Ltd ("Keane's").

2. The background to the dispute is a contract dated 5 April 2000 to carry out extensions, alterations, refurbishments and other works to 98 Hamilton Terrace, London NW8. The form of contract was the intermediate form of JCT contract which provides for interim payments against certificates by the architect/contract administrator appointed under it. It also contains a right, in either the employer or the contractor, to have recourse to adjudication or arbitration as a means of settling any dispute or difference arising under it. Mr Shalson was the employer, Keane's the contractor, and Stephen Greenbury of The Stephen Greenbury Partnership Ltd the architect/contract administrator. The original contract sum was £1.95 million, but additional architect's instructions increased that figure to over £4.8 million. Work started in February 2000. Practical completion was reached some time in the spring of 2002.

3. At around the time of practical completion, there seems to have been a falling-out between Mr Shalson and Keane's. There were also differences between Mr Shalson and the architect/contract administrator, whose incorporated firm had by now undergone a change of name to Buller Greenbury Associates Ltd. This led, among other matters, to the termination of Buller Greenbury's appointment in June 2002, although they were reappointed in mid-September 2002. In the meantime a Mr Warren of Boyden & Co, the quantity surveyor appointed under the contract, purported to act as contract administrator, although he was never formally appointed to that role.

4. These proceedings concern statutory demands arising out of invoices submitted for payment by Keane's for sums certified as due by the architect/contract administrator. The first demand, dated and served on 12 July 2002, was for £102,443.56. It was based upon the unpaid balances of two invoices, one dated 21 December 2001 and the other dated 18 January 2002, and the whole of the sum claimed by a third invoice dated 24 May 2002. The second demand, dated and I think served on 2 August 2002, was for £31,082.80, being the amount of an invoice dated 10 July 2002.

5. Before the Chief Registrar the applications proceeded on three grounds. First, under Insolvency Rule 6.5(4)(b), on the basis that the certificates on which the invoices were raised had not been completed by the appointed architect; secondly, under rule 6.4(4)(d), on the basis that the contract contained a provision for arbitration which, if invoked, would lead to a mandatory stay of any legal proceedings under section 9 of the Arbitration Act 1996; and thirdly, under rule 6.5(4)(a) on the basis that there were cross-claims which equalled or exceeded the debts claimed. In the event the first of those three grounds was not pursued. The Chief Registrar rejected the second ground. As regards the third ground, he found that although there were cross-claims, they fell short of the debts claimed by £62,348.16.

6. Before me Mr Clay, appearing for Mr Shalson, advanced two grounds of appeal, in effect the second and third grounds advanced before the Chief Registrar. The first ground concerns the operation and effect of section 9 of the Arbitration Act 1996. That section provides as follows:

> *"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
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> *(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*
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> *(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*
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> *(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."*

I do not think I need to read subsection (5). Section 82(1) of the Act defines "*legal proceedings"* as meaning *"civil proceedings in the High Court or a county court."*

7. The broad thrust of Mr Clay's submissions in support of the first ground of appeal was that in order to enable Keane's claims for payment against Mr Shalson to be resolved by arbitration under the JCT contract, as it was Mr Shalson's wish that they should, the Chief Registrar should have set aside the statutory demands to enable arbitration to take place. There were two main ways in which he approached the matter. The first was to submit that the service of the statutory demands constituted the bringing of proceedings for the purposes of section 9 and that the Chief Registrar should have stayed them under the section by setting them aside, treating Mr Shalson's applications to set aside as if they were stay applications brought under the section. The second was to submit that, even if the service of the two demands did not constitute the bringing of legal proceedings for the purposes of the section, the later presentation of the bankruptcy petition, based upon the one or both of them, would be such proceedings which, on Mr Shalson's application under the section, the court would be obliged to stay. Recognising that this would be the inevitable outcome of the process initiated by the service of the two

demands, the Chief Registrar should have stopped the process when asked by Mr Shalson to do so, by setting them aside.

8. The Chief Registrar disposed of these contentions shortly in paragraphs 8- 10 of his judgment. He said this:

> *"8. Mr Clay submitted that the effect of the arbitration clause in the contract is that in the event that a petition is issued the debtor will be entitled to apply for a stay of the petition pending referral to arbitration. He had to accept that the argument set out in his skeleton that the statutory demand itself should be stayed for this reason could not be upheld because the statutory demand is not a 'legal proceeding' for the purpose of s 9 Arbitration Act 1996.*
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> *9. The petition, however, would be such a legal proceeding. He submitted that the fact that it could be stayed under section 9 was sufficient ground for the purposes of rule 6.5(4)(d) to set aside the demand. In the present case there has not yet been any referral to arbitration.*
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> *10. I indicated at an early stage that I did not accept this argument. It seems to me that the operation of a stay cannot take effect unless ' legal proceedings are brought'. The legal proceedings in question are the petition and the petition itself cannot be brought unless the statutory demand stands. A statutory demand is an essential precursor to the presentation of a petition because failure to pay the sum claimed in the demand within the prescribed period gives rise to a presumption of insolvency upon which a petition may be based. In the present circumstances it is not even certain that either a referral to arbitration or an application for a stay will be made."*

9. In advancing his submissions in support of the first ground of appeal, Mr Clay drew my attention to the decision of the Court of Appeal in ***Halki Shipping Corporation v Sopex Oils Ltd*** [1998] 1 Lloyd's Rep 465. He did so to emphasise the sea-change effected by section 9. No longer will courts consider, when deciding whether to grant a stay in favour of allowing an arbitration to proceed, whether the dispute is one which can be resolved by the court's summary judgment processes. Instead, and assuming that the dispute is within the scope of the arbitration agreement, the court is obliged to stay the court proceedings to allow the parties to have their dispute referred to arbitration as their contractually selected method of dispute resolution. Moreover, there is no minimum threshold of issue-arguability for resorting to arbitration, and thus for invoking the exercise of the court's power under section 9 to order a stay of any legal proceedings brought in respect of the dispute. A dispute for this purpose is any claim by one party against another which that other does not admit. What is more, in order to obtain a stay, it is not necessary (as section 9(2) makes clear) that by the time of the stay application the dispute has already been referred to arbitration. Nor does it matter that the dispute will only be referred, if at all, when other dispute resolution processes have been first exhausted.

10. Against this background Mr Clay submitted, when advancing the first way in which he put this ground of appeal, that the court should be willing to construe the expression *"legal proceedings",* when used in section 9, as embracing the service of the statutory demand on the basis that it operated as if it were an application for summary judgment. The court should be willing to do so, he submitted, because when application is made to set aside a statutory demand, the court is invariably invited, as it certainly was before the Chief Registrar on this occasion, to investigate the merits of the alleged creditor's claims and any cross-claims by the alleged debtor. Those, he said, were the very things which it is the purpose of section 9 that the court should not do when, as here, the alleged debtor wishes the dispute to be referred to arbitration. It matters not, he said, that as a matter of form the first step in any actual proceedings, in the sense of the issue of a court application, is by the alleged debtor (in this case Mr Shalson) as the person seeking the stay. Under the Civil Procedure Rules, the court looks to the substance, rather than to the form. The substance here was a wish by Mr Shalson to have recourse to arbitration as a means of resolving his dispute with Keane's and to this end, to prevent the dispute from becoming the subject of proceedings in a court of law.

11. In my judgment, the contention that the service of the statutory demand is a legal proceeding within the meaning of section 82(1) is untenable. It is no more than a formal demand which, if it is validly to form the basis of a bankruptcy petition, must satisfy the requirements of insolvency rule 6.1 and 6.2. As the Chief Registrar stated, a statutory demand is an essential precursor to the presentation of a petition, because failure to pay the sum claimed in the demand within the prescribed period gives rise to a presumption of insolvency upon which a petition may be based. It is, in short, an essential prerequisite to the commencement of a certain type of legal proceeding, but it is not itself a legal proceeding.

12. In ***In re A Debtor*** (No 88 of 1991) [1993] Ch 286 the question arose whether a statutory demand claiming the amount of two solicitors' bills, seeking recovery of costs for advice given and work done, constituted the bringing of an action within 69(1) of the Solicitors Act 1974. The Vice-Chancellor, Sir Donald Nicholls, held that it was not. The relevant prohibition in section 69(1) was that "no action should be brought" to recover any costs due to a solicitor before the expiration of one month from the date on which the bill is delivered in accordance with the requirements of the section.

13. In the course of his judgment the Vice-Chancellor said this (page 291G): *"... although 'action' is to be construed liberally I cannot accept that it is wide enough to embrace a non-legal process such as a statutory demand. A statutory demand is one of the statutorily prescribed prerequisites to obtaining remedies afforded to creditors by a bankruptcy order. The demand is not issued by a court. It does have legal consequences for a debtor, and it is for this reason that the legislation provides a court process which debtors can invoke in order to have the demand set aside. Despite this framework, Parliament cannot be taken to have intended that making a demand was within the scope of*

the prohibition on commencing actions. The phrase 'no action shall be brought' is too specific a reference to legal process for that to be a tenable construction."

Similarly here. Parliament has defined "*legal proceedings*" for the purposes, among others, of section 9 of the Arbitration Act 1996 to mean civil proceedings in the High Court or a county court. It is impossible in my view to stretch that definition to include the service of a statutory demand.

14. This brings me to the second way in which Mr Clay put the first ground of appeal. The contention here is that the Chief Registrar should have recognised that the inevitable outcome of the process initiated by the service of the statutory demands (unless they were set aside) was the bringing of legal proceedings by the presentation of a bankruptcy petition against Mr Shalson. The inevitable consequence of this process would be a stay, if not outright dismissal, of the petition to give effect to Mr Shalson's entitlement under section 9 to have Keane's claims against him resolved by arbitration. Accordingly, rather than allow this doomed process to continue, the Chief Registrar should have nipped the the matter in the bud by setting aside the statutory demands there and then in exercise of his power under insolvency rule 6.5(4)(d). Rule 6.5(4)(d) gives the court discretion to set aside the statutory demand if it is "*satisfied, on other grounds [other, that is to say, from the grounds set out in paragraphs (a), (b) and (c)], that the demand ought to be set aside*".

15. There are two authorities, both in the Court of Appeal, which explain how paragraph (d) is intended to operate. In ***In re A Debtor*** (No 1 of 1987) [1989] 1 WLR 271, Nicholls LJ observed at page 276D that: *"... the right approach to paragraph (4) of rule 6.5 is this. Under the Act, a statutory demand which is not complied with founds the consequence that the debtor is regarded as being unable to pay the debt in question, or if the debt is not immediately payable, as having no reasonable prospect of being able to pay the debt when it becomes due. That consequence, in turn, founds the ability of the creditor to present a bankruptcy petition because, under section 268(1), in the absence of an unsatisfied return to execution or other process, a debtor's inability to pay the debt in question is established if, but only if, the appropriate statutory demand has been served and not complied with. When therefore the rules provide, as does rule 6.5(4)(d), for the court to have a residual discretion to set aside a statutory demand, the circumstances which normally will be required before a court can be satisfied that the demand 'ought' to be set aside, are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case. The court's intervention is called for to prevent that injustice."*

Then a little later: "The court will exercise its discretion on whether or not to set aside a statutory demand, having regard to all the circumstances. That must require the court to have regard to all the circumstances as they are at the time of the hearing before the court."

16. In the later case of ***In re A Debtor*** (Nos 49 and 50 of 1992) [1995] Ch 66, Sir Donald Nicholls as Vice-Chancellor returned to the purpose and scope of the rule. The court there was concerned with a case where the undisputed part of the debt claimed by the statutory demand was less than the minimum bankruptcy level. At page 70C the Vice-Chancellor said this: *"Under paragraph (4)(d) the court has a residual discretion to deal with such a situation as justice and fairness require in the circumstances. Under the paragraph the court has power to set aside a demand in a case where there is no defence or counterclaim in respect of a balance of indebtedness which is less than the bankruptcy level. Furthermore, that jurisdiction is properly to be exercised if, in the circumstances, the consequence otherwise would be to permit the presentation of a bankruptcy petition which is bound to fail."*

The principle underlying this treatment of the statutory demand is to be found a little later in the judgment when, discussing what in that case the purpose was in leaving the statutory demand extant, the Vice-Chancellor said this: *"The only purpose in doing so would be for this demand to form the foundation for a bankruptcy petition. Here such a petition would be bound to fail. That being so, the very presentation of a petition would be oppressive and an abuse of process. It could be struck out summarily. Accordingly, at the earlier stage of the statutory demand the court should intervene. When able to foresee the inevitable the court will always intervene summarily to anticipate it. The court does not countenance parties proceeding to a blank wall."*

17. In this case, said Mr Clay, a stay of the bankruptcy process under section 9 was the inevitable result of the service of the two statutory demands. The Chief Registrar should have intervened summarily to anticipate this result by setting aside the two demands. He should not have countenanced the parties proceeding to a blank wall.

18. The difficulty which Mr Clay faced in pursuing this line of argument is that when the matter was before the Chief Registrar it could not be said that any bankruptcy petition founded upon the statutory statutory demands would be bound to fail. As the Chief Registrar observed, there had been no referral to arbitration when the applications were before him. It might have been otherwise if there had been, or possibly if it was plain there would be. As Mr Stuart, appearing for Keane's, pointed out, section 9 is not a defence to legal proceedings, much less is it a bar to the bringing of legal proceedings. It merely confers on a defendant who, with the claimant, is party to an arbitration agreement which covers the subject of their dispute a right to apply to the court to stay the legal proceedings. But unless and until the proceedings have been started and the defendant has applied for a stay, the question of a stay does not arise; and until it arises it cannot be said with confidence that a stay will be granted, limited though the court's right may be to withhold a stay once it is asked for.

19. The matter in any event was one of discretion. In my judgment the Chief Registrar was perfectly entitled in the exercise of his discretion to disregard the possibility that there might be a referral to arbitration. Pertinent to this was that, despite months of dispute, the first of the statutory demands having been served four months earlier, no step had been taken to refer the dispute to arbitration. Even now, I may add, there has been no attempt to go to

arbitration. Mr Clay sought to get around this by saying that to obtain a stay, there is no need to demonstrate that there has been a reference to arbitration. Besides, he said, there are sound reasons why Mr Shalson might not wish to initiate arbitration proceedings; for example, the expense involved. He is entitled, he said, to do nothing and instead say to Keane's, *"If you wish to press your claim to proceedings, you must do so by arbitration. I am under no obligation to start the process myself."*

20. It seems to me that Mr Shalson wants to have it both ways. He denies to Keane's the option of enforcing its claims through the bankruptcy court by pointing to his right to have recourse to the arbitration process, yet he claims the right to sit back and do nothing to invoke that process. In my judgment, the Chief Registrar was acting well within his discretion in refusing to accede to this argument.

21. It follows that I am no more persuaded by the second way in which Mr Clay advances this ground of appeal, than I was by the first.

22. In paragraph 19 of his skeleton argument in support of the appeal, Mr Clay advanced what was in effect a further variation of the same theme. He submitted that it was trite law that bankruptcy proceedings must not be used as a means of putting pressure on the other party where a better method of dispute resolution is available. Arbitration, he said, is such a method. Furthermore, in addition to arbitration this contract provided for adjudication under the **Housing Grants Construction and Regeneration Act 1996.** Adjudication provides a quick and simple remedy, from an adjudicator selected by the party initiating the adjudication or by an appointing body agreed between them, within 28 days. An adjudicator's decision, he said, could have been obtained long ago. It could have taken into account the state of the works and would have been enforceable immediately.

23. I do not agree that the availability of alternative, and for all I know speedier, methods of dispute resolution should have led the Chief Registrar to set aside the statutory demands. Provided the demand has been duly served, and there are no grounds under paragraphs (a)-(c) of rule 6.5(4) for setting it aside, I see nothing improper in a creditor resorting to bankruptcy proceedings as a means of enforcing payment. The mere fact that other methods of dispute resolution are available does not disentitle the creditor from proceeding down the bankruptcy path. Parliament has not attempted to circumscribe a creditor's right in these circumstances, and I do not consider that the proper exercise of the discretion under paragraph (d) requires the court to step in where Parliament has declined to proceed.

24. That leaves only the cross-claims issue under paragraph (a) of rule 6.5(4), which formed the third basis of Mr Shalson's application to set aside the statutory demands and the second ground of appeal before me.

25. The position here is that with the assistance of a Mr Chambi, a self-employed contractor with qualifications and a number of years' experience as a quantity surveyor, a schedule of snagging and other defects was drawn up, some concerned with mechanical and electrical matters and others with matters of a general nature. On the evidence before the Chief Registrar those defects were valued at £68,623.60. In addition, it was said that Mr Shalson had paid certain subcontractors direct. On the evidence before the Chief Registrar they totalled a further £51,435.84. There was also the estimated cost of repairing a tapestry, said to have been damaged during its removal under Keane's supervision from another property owned by Mr Shalson, the sum involved being £1,710. Adding all of these together, and assuming that they were all well-founded, there was still a shortfall of £19,700-odd as against the amounts claimed by the two demands. The Chief Registrar disregarded, correctly in my view, a further £30,000 that Mr Shalson said that he was proposing to pay to one of the subcontractors called RTT. But the Chief Registrar then went on to consider the extent to which, on the evidence, the schedule of defects was rightly to be taken into account in estimating the overall value of the cross-claims. He did so in the light of evidence in answer by Keane's, who on various grounds disputed that there was any substance in them.

26. Mr Clay challenged the Chief Registrar's approach to this. I do not propose to take up time considering whether, and if so the extent to which, the Chief Registrar was entitled to come to the view that at the end of the day the amount of the cross-claims fell to be discounted by a further £42,650-odd. I say that for two main reasons. The first is that on any view there was a shortfall, with the result that one at least of the applications to set aside the statutory demands is bound to fail. The second is that, as I am informed, Mr Shalson has since paid to Keane's £62,348.16. Following the Chief Registrar's decision that was the undisputed amount of the sums claimed, payment of that sum means that no bankruptcy petition will now be presented upon non-compliance with the demands. In short, apart possibly from the question of costs, it is academic whether the undisputed amount of the sums claimed is £19,700-odd or some larger, and if so what sum. Even then it appears that of the sums paid by Mr Shalson to subcontractors, £45,000 was only paid on 5 September 2002. That was well after service of both statutory demands and after Keane's served their evidence in response to Mr Shalson's application to set aside the earlier of the two demands.

27. Among the relief claimed by Mr Shalson, if his appeal had been successful, was an order that the sum of £62,348.16, which he says he paid under threat of presentation of the bankruptcy petition, should be repaid with interest. Even if I had thought that the Chief Registrar had wrongly dismissed Mr Shalson's applications, I do not see that I would have had jurisdiction to order repayment. Mr Clay, accepting that that was so, nevertheless voiced a concern that, having regard to the Chief Registrar's finding that there was no triable issue as to £62,348.16, Mr Shalson was or might be faced with a plea of issue estoppel were he to seek in other proceedings to argue that any of the items which go to make up that sum were in truth not payable despite the Chief Registrar's view that they were. He was therefore concerned that I should rule on the extent to which the

Chief Registrar was correct in finding the cross-claim was not as extensive as Mr Shalson, with Mr Chambi's support, was contending.

28. The short answer to this concern is, I think, that a decision reached on an application to set aside a statutory demand is not, whatever the result, a trial or hearing on the merits of the underlying debt or cross-claim: see ***Royal Bank of Scotland v Binnell*** [1996] BPIR 352 at 354. Moreover, Mr Stuart made clear that no issue estoppel was being or could be suggested. That being the position, I decline to embark upon the exercise of determining the extent to which the Chief Registrar was correct in discounting the cross-claims to the extent that he did.

29. In declining so to do, I am not to be taken as saying that the Chief Registrar was not entitled to embark upon that exercise. Paragraph 12.4 of the Insolvency Practice Direction provides that "*Where the debtor (a) claims to have a counterclaim, set off or cross demand (whether or not he could have raised it in the action in which the judgment or order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand or (b) disputes the debt (not being a debt subject to a judgment or order) the Court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue.*"

This entitles the court to inquire into the genuineness of the cross-claims. I mention this because there was, I think, a suggestion in the second ground of appeal, questioning the extent to which the Chief Registrar discounted the cross-claims, that he should not have done so but should simply have accepted the assertion of cross-claims by Mr Shalson, supported as they were by the evidence of Mr Chambi, and that it was inappropriate to subject them to any kind of critical appraisal. I do not agree. It is not the court's function to resolve genuinely contested issues but, as the practice direction makes clear, it is its function to evaluate whether there are genuinely triable issues. I do not consider that the Chief Registrar was going beyond that task.

30. In the circumstances I propose simply to dismiss the appeal.

Mr R Clay (instructed by Teacher Stern Selby) appeared on behalf of the Claimant.
Mr J Stuart (instructed by Merriman White) appeared on behalf of the Defendant.