

JUDGMENT : HIS HONOUR JUDGE BOGGIS QC: TCC : 2nd August 2000.

1. This is an appeal by Mr Parke from the refusal of District Judge Dowling to set aside a statutory demand served on him by The Fenton Gretton Partnership.
2. Mr Parke has a leasehold interest in premises known as Bar 2 Sixty, Broad Street Birmingham. He entered into an agreement with FGP for building works to be carried out at the premises. Works were done between May and July 1999 and in October 1999 FGP sought payment of their final account of £169,269. They had already received £427,750 from Mr Parke by way of interim payments. Mr Parke did not pay the final account. He said the works had not been finished, there were no certificates of practical or final completion, there were snagging works to do and there had been delays.
3. Faced with this dispute FGP sought the appointment of an Adjudicator pursuant to Section 108 of the Housing Grants, Construction and Regeneration Act 1996. Mr J E Price was duly appointed by the RICS on 11 November 1999. He wrote to Mr Parke on 12 November 1999, but the letter was returned marked "Gone away". The letter had been sent to the former home of Mr Parke; no documents had been sent to the agents who represented him in the building works. On 25 November 1999 Mr Price gave directions and sought further addresses for Mr Parke from FGP. Those addresses were supplied on 26 November. On 10 December Mr Price heard from solicitors for Mr Parke. By a letter dated 16 December 1999 Mr Parke's solicitors sought an extension of time until 12 January for the submission of their client's case. FGP declined to consent to the giving of further time and so Mr Price proceeded with his adjudication. His decision letter is dated 17 December 1999. He decided that FGP was entitled to payment within 7 days by Mr Parke of £169,269 plus interest of £5,457.18 continuing at the rate of £62.6 per day, plus £3,000 plus VAT for FGP's costs, plus £1,400 plus VAT for his own fees. He concluded that he was making a Peremptory Order and he gave notice that the parties had his permission to enforce the Order.
4. By a Statutory Demand dated 6 January 2000 FGP sought £181,132.77 from Mr Parke being the total amount of the adjudication. Mr Parke applied to set the Demand aside. His application was heard on 7 June and it failed. His appeal is now before me.
5. On 31 May 2000 Mr Parke commenced proceedings in the Birmingham Technology and Construction Court against FGP seeking a declaration that the sum of £427,750 already paid to FGP represented an overpayment of £4,879.21. It follows necessarily that Mr Parke contends that on his figures for the final account the sum adjudicated as due is challenged in its entirety. FGP has put in a defence to the TCC proceedings upholding the adjudicator's figure. I am satisfied that the District Judge was not aware that the TCC proceedings were on foot by the time the matter came before him; he was told only that they were proposed.
6. Pursuant to Rule 65 (4) of the Insolvency Rules 1986 the Court may set aside a Statutory Demand if the Debtor appears to have a counterclaim equalling or exceeding the debt, or if the debt is disputed on substantial grounds or if the creditor holds security or if the court is satisfied on other grounds that the Demand ought to be set aside.
7. The Practice Direction made under the CPR for Insolvency Proceedings states in paragraph 12.3 that where the Statutory Demand is based on a Judgment or Order the Court will not at this stage go behind it and enquire into the validity of the debt nor as a general rule will it adjourn the application to await the result of an application to set aside. In paragraph 12.4 it is provided (a) that where the debtor claims to have a counterclaim, set off or cross demand (whether or not he could have raised it in the action) which equals or exceeds the amount of the debt, or (b) that where the debtor 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.
8. Mr Parke's case is first, that the adjudicator's decision does not give rise to a debt; it is a mere declaration of entitlement to payment and further it is subject to final decision, arrived at by court proceedings or arbitration, which decides the underlying dispute.

9. Secondly, he says that the debt is disputed on substantial grounds. Thirdly, he says that he has a Counterclaim or Cross Claim which equals or exceeds the debt. Fourthly he says that on "other grounds" being principally the TCC proceedings, it would be right to set aside the demand.
10. FGP argues that the 1996 Act represents a sea change in the approach to building disputes providing a speedy remedy which results in financial disputes being resolved quickly and causing financial liabilities to be discharged without prevarication. According, FGP is entitled to stand on the adjudication and pursue it by way of bankruptcy proceedings even if there is an underlying challenge.
11. The starting point is s 108 (3) of the Act. It is there provided that the building contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings by arbitration or by agreement. The binding nature of the adjudicator's decision is confirmed by paragraph 23(2) of the Scheme for Construction Contracts (England and Wales) Regulations 1998 which provides that the decision of the adjudicator is binding on the parties and they shall comply with it until the dispute is finally determined by proceedings, arbitration or agreement.
12. That the decision is binding and enforceable is confirmed by the body of decisions that has grown out of s 108 that adjudication decisions will be enforced whether or not the merits of the decision are challenged (**Macob v Morrison**), that the award will be enforced despite counterclaims for defects (**A and D Maintenance and Construction v Pagehurst**), and that the fact of proceedings continuing is irrelevant to enforcing adjudication proceedings (**Herschel v Breen**).
13. In my judgment the adjudication does create a debt which may form the basis of a Statutory Demand.
14. The next question is the status of that debt for the purposes of paragraphs 12.3 and 12.4 of the Practice Direction. In my judgment the adjudication falls to be treated in the same way as a judgment or order and the Court will not go behind it.
15. That leaves as the final question whether the debtor has a Counterclaim set off or cross demand on the basis of evidence of a genuine triable issue.
16. Mr Parke has brought TCC proceedings in which he says not only that he does not owe the adjudicated figure, but that once the final account is properly drawn, it is he who is owed money. In my judgment that is a valid cross claim going to the sum demanded and I am satisfied that there is a genuine triable issue about the final account. This is confirmed by the Defence in the TCC proceedings. On this basis the Statutory Demand ought to be set aside.
17. However, it is argued that there is no provision for a stay in the scheme of the 1996 Act, and that if the cross claim were permitted to stop recovery of the adjudicated sum, this would allow what is intended to be a binding decision to be reopened. I do not accept this argument. In my judgment it cannot be right that an employer or main contractor can be made bankrupt when it is known that he has proper proceedings on foot which if successful will result in a payment to him. I do not accept that the scheme of the 1996 Act is that an adjudication can be pursued to bankruptcy no matter the underlying state of account. The court would be required to close its eyes to the overall position, which in the context of bankruptcy is in my judgment wrong in principle.
18. The District Judge was not told the true state of the TCC proceedings. On the basis of the cross claim contained in those proceedings, I shall allow the appeal and set aside the statutory demand.