JUDGMENT : Bernard-Livesey QC Deputy Judge of the High Court, Ch. Div. 17th December 2004

1. This is an appeal by the debtor from the decision of District Judge Venables sitting in Northampton CC on 8' September 2004 at the hearing of a bankruptcy petition. At that hearing the debtor opposed the making of a bankruptcy order on two grounds, only one of which is the subject matter of this appeal. The debtor contended that there was a genuine triable issue as to whether the creditor was entitled to charge interest on the invoices ("the interest argument").

2. District Judge Venables held that the interest argument had been an issue on which District Judge McHale had adjudicated on the 27th February 2004, when he dismissed an application to set aside the statutory demand, and that by virtue of **Turner v Royal Bank of Scotland** [2000] BPIR 683 it was not open to the debtor to argue the point again.

3. As will appear from a detailed examination of the facts, this case falls between Turner on the one hand and **Barnes v Whitehead** [2004] BPIR 693 and the question is on which side of the line it falls.

4. The debt arises out of a retainer made during 1997 between the debtor and his solicitors (Mason Bullock - "the creditor") for representation in a number of disputes and pieces of litigation both on his own personal account and on the account of a limited company (Resiliente Limitada) which he controlled. On the 12th June 2003 the creditor served a statutory demand in the total sum of £78,323.53, expressed as £66,455.13 of unpaid invoices and £11,819.30 of "*interest ... pursuant to [the] Creditor's Terms and Conditions".*

5. On 30th June 2003 the debtor made an application to set aside the statutory demand on the grounds that the debt was disputed on substantial grounds and that he had a counterclaim or set off which equalled or exceeded the amount of the debt. In support of his application he filed an affidavit which set out four arguments in support of his contention. None of these raised the interest point. By a witness statement dated the 15th July 2003 Mr Mason, the solicitor in the firm who dealt with the debtor, put in a response to each of the points which the debtor had raised.

6. In a witness statement dated 13' August 2003 the debtor responded to Mr Mason and raised a number of further points of dispute, the last of which was the interest point, in respect of which he stated *"Finally, I dispute the Respondent's claim to interest as set out in the statutory demand. I have not been notified by the Respondent that interest is payable upon outstanding invoices and there is no indication of the interest rate to be charged on the face of the invoices. "*

7. In a witness statement dated 5`h September 2003 Mr Mason (for the creditor) responded to each of the points made by the debtor. To the interest point he responded *"As to interest, the Terms of Business contain the right to interest on unpaid bills."*

   A copy of the relevant Terms of Business was exhibited to the statement.

8. On 27th February 2004 a hearing of the debtor's application took place before District Judge McHale. Prior to the hearing the solicitor representing the debtor served a short skeleton submission which set out only two of the many grounds of objection which had been raised. Under the heading "***Grounds of Dispute***" the skeleton set out two grounds as follows *"(A) Invoices addressed to Resiliente Limitada"*, which was then argued point by point, and *"(b) Respondent's Breach of Practice Rule 15"* - which was argued in like fashion.

9. Counsel who appeared for the creditor on that application informed me that in the light of the fact that only two points were taken by the debtor in his skeleton, he supplied a skeleton submission which dealt only with those points.

10. At the hearing there was oral argument limited to the two points. In an extempore judgment, District Judge McHale included the observation that the applicant has moved the goalposts in relation to what was in the original application and a large number of the matters which are raised in the affidavit are no longer proceeded with today. In essence, the matters that are raised before me today are, firstly, that the bills or the invoices, amounting to some £25,923.08 are to Resiliente Limitada and not to the applicant ... The second aspect is that there is an on-going application to the OSS in relation to alleged breaches of regulation 15 by the respondent.

11. By his judgment he upheld the `Resiliente Limitada' point and dismissed the ***`breaches of Regulation 15'*** point. The Order however merely stated "Application dismissed." What is quite clear is that there was no adjudication on the `interest point'.

12. In the result the Petition was presented stating the amount of the debt in the reduced sum of £40,532.50 plus interest of £8,667.18. Between service of the Petition and the hearing the debtor paid the amount of £40,532.50 and the Petition was amended to record the further payment. That left the amount of interest unpaid and the debtor sought at the hearing to take the interest point, which he had first raised in his statement dated 13th August 2003, as set out in para [6] above.

13. As I have indicated, the hearing was before District Judge Venables on 8th September 2004. There was argument as to the entitlement of the debtor to take the interest point at that stage. A transcript of the judgment of District Judge McHale was not available.

    I am told that District Judge Venables would have liked one to be obtained but was prevailed upon by the parties to proceed without because they felt that an adjournment to obtain one would involve excessive delay, waste of time and expense. That meant that there was an argument as to what District Judge McHale had, or could properly be taken to have, decided or taken into account.

14. In a short extempore judgment District Judge Venables observed that it was accepted that there was not any specific finding in relation to the interest point; she recorded that there were references to the interest point in the papers before District Judge McHale and said *"It seems to me that Judge McMcHale, when looking at whether or not the Statutory Demand should be set aside back in February 2004, had sufficient information before him to be clear and fully aware that the question of the Creditor's entitlement to interest was an issue for the Debtor and took this into account in determining how the Statutory demand should be dealt with. .... It is my view that that matter was properly considered by the learned Judge when it was dealt with on 27th February."*

    After considering the impact of Turner v Royal Bank of Scotland she said *"In this particular case there was an application which was adjudicated upon on 27' February which properly took into account the matters raised by the Debtor and by the Creditor, both parties appraising the Court of the issue of interest. The Court, having considered it on that occasion, allowed the demand to stand. That demand forms the basis of the petition itself which I... (inaudible)."*

15. The debtor has appealed to this court on the grounds that the District Judge was wrong to interpret the decision in Turner as precluding her from looking into matters on which there had been no explicit adjudication on the application to set aside the statutory demand. His argument can be put shortly in two propositions. First, that the authority of Turner establishes the proposition that it is only in the event of an actual prior adjudication that the debtor is prevented from taking the point at the petition stage. Since there was no actual adjudication by District Judge McHale there is nothing to prevent the point being raised at the hearing of the petition.

16. Alternatively, s 271 of the Insolvency Act and rule 6.25 of Rules as explained by Chadwick LJ in the subsequent case of West Bromwich Building Society v Crammer gives the court a discretion to look into the matter which ordinarily ought to be exercised in favour of the debtor in circumstances such as the present and certainly ought to have been so exercised in the instant case.

17. The creditor contends that the discretion to be exercised under s 271 should not be exercised in favour of a person who either did not raise the point in his (unsuccessful) application to set aside the statutory demand or having raised it, chose not to argue it at the hearing but abandoned it; in the instant case the debtor, having raised the interest point in his evidence and having abandoned it, ought not to be allowed to raise it at the hearing of the petition; the abandonment of the point is equivalent to a judicial rejection of it.

18. A preliminary point arises from the fact that the hearing of this appeal is by way of a review of the decision of District Judge Venables and not a rehearing. The creditor contends that her judgment is based on the finding, quoted in para 14 above, that District Judge McHale when making his decision took into account the matters raised in evidence as to the interest point by the parties, although he

made no mention of it in giving judgment; and that this finding could not be set aside, notwithstanding that it was probably wrong, because the parties had agreed to proceed without a transcript and on that basis her finding was one which was not incorrect.

19. On the preliminary point, it seems to me that District Judge Venables did not really have any basis for concluding that District Judge McHale took the interest point into account when making his decision. I do not see that the presence of the transcript of District Judge McHale's judgment provides anything other than confirmation of what could be presumed to have been the case. In any event, it seems to me that it would be inappropriate to regard as correct a finding by District Judge Venables which is confirmed by the transcript of the judgment of DC McHale to be incorrect. It has not been suggested that the transcript was inadmissible before me, nor could it be as it is a record of proceedings in the court below and it should therefore not be regarded as material which has to satisfy any requirements for the admission of fresh evidence. I therefore propose to approach this matter on the basis that District Judge Venables has misdirected herself and propose to rehear the matter.

The Law:

20. A consideration of the applicable principles should begin with s 271 of the Insolvency Act 1986 which provides *The court shall not make a bankruptcy order on a creditor's petition unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either*

(a) a debt which, having become payable at the time of the petition or having become payable, has been neither paid nor secured or compounded for, or

(b) a debt which the debtor has no reasonable prospect of being able to pay when it falls due.

Rule 6.25 provides *(1) On the hearing of the petition, the court may make a bankruptcy order if satisfied that the statements in the petition are true, and that the debt on which it is founded has not been paid, or secured or compounded for .....*

21. In **Brillouet v Hachette Magazines Ltd, Re a Debtor (No 27 of 1990)** [1996] BPIR 518 where a debtor sought to raise on the hearing of the petition arguments which he had raised unsuccessfully on the application to set aside the statutory demand, Vinelott J observed *"There may be rare cases in which it can be said that a debt claimed in a statutory demand against which there has been an unsuccessful attempt to set it aside and which has not been paid or secured or compounded for is not payable at the date of the petition, for instance, if as a result of legislation it were to become unenforceable between those two dates. But unless there is some change of circumstance of that kind it seems to me that all the petitioning creditor is required to do is to show that he has made a statutory demand, that either no attempt has been made to set it aside or an unsuccessful attempt has been made, and that the amount of the debt has neither been paid nor secured nor compounded for. The debtor cannot go back and reargue the very grounds on which he unsuccessfully sought to have the statutory demand set aside.* [Emphasis supplied].

22. The leading case is **Turner v Royal Bank of Scotland** [2000] BPIR 683 where the first judgment was given by Chadwick LJ. In it he quoted from the observation of Vinelott J and then set out and explained the statutory code applicable to personal insolvency contained in the Insolvency Act 1986 and the Insolvency Rules 1986: see esp. ibid at p 692E. He then said *"The scheme of those provisions, plainly, is to ensure that if the debtor wishes to dispute the debt, or wishes to raise a counterclaim or cross-demand against the creditor, he should have the opportunity to do so by an application to set aside the statutory demand; and that until that application has been heard and determined, no petition for bankruptcy can be presented. If an application to set aside a statutory demand is made, the court is required to consider, and adjudicate upon, any contention advanced by the debtor that he has a cross demand which extinguishes the debt. ....."*

And at p. 693 H he said: "*Questions as to the existence of the debt at the date of the presentation of the petition, and any cross-claim, are intended to be dealt with on an application to set aside the statutory demand - that is to say, before the petition is presented."*

As regards the discretion on the hearing of the petition under rule 6.25 of the 1986 Rules, at p. 694 A he said: "*But, it cannot have been intended, as it seems to me, that when exercising the discretion (which it undoubtedly has under r 6.25), whether or not to make a bankruptcy order at the hearing of the petition, the*

court is required to revisit the arguments which have already been advanced on the hearing of the application to set aside the statutory demand; and which have already been rejected at that hearing. As Vinelott J pointed out in the ***Brillouet*** *case. the debtor cannot go back and reargue the very grounds on which he unsuccessfully sought to have the statutory demand set aside. It will require some change of circumstance between the unsuccessful attempt to set aside the statutory demand and the hearing of the petition before the court (on the hearing of the petition) can be asked to go into the question which has alrea been determined at the hearing of the statutory demand. To hold otherwise would be to encourage a waste of court time, and a waste of the parties' money; and would defeat the obvious purpose of the statutory scheme."*

23. These observations were modified to some extent in the later case of **West Bromwich Building Society v Crammer** [2002] EWCA Civ at 1924 (unreported) where Chadwick LJ said: "*Those observations were plainly obiter in that case; but will be given, no doubt, the weight which they deserve. But they do not have the effect of depriving a court exercising its functions under s 271 of the duty to decide whether or not to make a bankruptcy order on the material which is then before it. Plainly, a court will ask itself whether arguments that are being run before it have already been run and failed; and it may go on to ask itself why arguments which have been run before it have not previously been run. But it is for that court to decide whether the conditions which must be satisfied before a bankruptcy order can be made are satisfied."*

24. Pausing there, in reliance on the above passages, counsel for the debtor argued that the discretion in the instant case should be exercised in the same way as Launcelot Henderson QC dealt with matters in **Commissioners of Inland Revenue v Lee-Phipps** [2003] BPIR 803 and HHJ Maddocks exercised it in the case of **Barnes v Whitehead** [2004] BPIR at p. 693.

25. Lee-Phipps was a case where the debtor had sought to make an application to set aside the statutory demand but it had been struck out for a procedural irregularity. There was therefore no hearing on the merits and the Deputy Judge observed at p. 809

> *[19] But where, as in the present case, there has been no reasoned determination at all at the earlier stage and the application has simply been struck out for a purely formal defect in the manner in which it was brought, then it seems to me that the principle referred to by Chadwick LJ is not even engaged in the first place.*

26. In **Barnes v Whitehead** the debtor was served with a statutory demand but did not apply to set it aside. When the petition was served the debtor then sought to dispute the debt. Judge Maddocks held that where a debtor had not challenged the statutory demand, while he exposed himself to the issue of a petition, he was not precluded from raising a dispute at the hearing of the petition. Accordingly, he did not regard as authority on the situation where there has been no prior application and thus no hearing in relation to the statutory demand. However, he also observed at p. 697: *"It is clear that the requirement of a statutory demand affords the debtor an opportunity to challenge the debt before a petition has been issued. Plainly the correct procedure is for him to do so at that stage by an application to set aside the demand. If he makes the application and it fails, then the decision of the court precludes him from raising the same grounds of challenge, or indeed other grounds available at that hearing, on the principle that it would be an issue already determined (issue estoppel) or in the latter case that it would be an abuse of process."*

27. In my judgment the essential difference between those cases where the debtor is prevented from raising an issue on the hearing of a petition and those where he is not so prevented is that in the former class of case there had been a hearing on the merits, at which the debtor had the opportunity to advance such arguments as he chose as to whether there was a valid debt (or set off or cross-claim) and those where there had not been such a hearing.

28. If there has not been a hearing, either because an application was not made (**Barnes v Whitehead**) or because it was dismissed for procedural reasons without a determination on the merits (**Commissioners of Inland Revenue v Lee-Phipps**), the discretion given by s 271 will almost invariably result in the non-application of the **Brillouet** and **Turner** principle.

29. Where however there has been a hearing on the merits, at which the point could have been advanced but was not advanced, the discretion given by s 271 will ordinarily be exercised in order to prevent the debtor taking the point on the hearing of the petition unless, following the observations of Chadwick LJ in **West Bromwich Building Society v Crammer**, the court having asked itself (and, I would add,

having also asked the debtor,) why the point was not taken on the hearing of the application to set aside, is satisfied with the reason advanced and that it would be in the interests of justice for the point to be taken again.

30. The position is even stronger where, as here, the point was taken in the statements lodged by the debtor but was not argued at the hearing. The reason for this is that a party who has taken a point on an application but not at the hearing, will ordinarily be regarded as having abandoned the point, because he has re-considered its validity and has decided that it is factually or legally without merit. The court will usually not allow the argument to be run again because it would be an abuse of process for the debtor to seek to do so.

31. I have used the word `***ordinarily'*** and `***usually***' because there may be exceptional circumstances which may justify the court taking a different course if it were to be persuaded that it should do so. I also take heed of the words of Chadwick LJ in Crammer (set out in full in para 23 above) that *"Plainly, a court will ask itself whether arguments that are being run before it have already been run and failed; and it may go on to ask itself why arguments which have been run before it have not previously been run."*

32. I have used the word `exceptional' merely in contradistinction to the terms `***ordinarily***' and `***usually'.*** How ***`exceptional'*** the circumstances have to be will need to be determined on a case by case basis. As I see it, the practice of the courts has moved from the very high level of what was exceptional as required by Vinelott J in **Brillouet** to a lower level in accordance with the observations set out in Crammer.

33. In the instant appeal, I not only asked myself, but also asked counsel for the debtor, why the interest point, having been raised in the statements lodged prior to the hearing of the application to set aside, was not raised in argument at the hearing. Counsel for the debtor, who did not appear below, simply had no explanation to offer. There is nothing in the papers or in the explanations put before me which displaces the ordinary inference, which I draw, that the debtor or those acting for him had concluded that the interest point should be abandoned. I have therefore concluded that there is no basis for exercising my discretion to allow the debtor now to argue the point for to do so would be an abuse of process on his part. This was essentially the conclusion to which the District Judge came, although by a slightly different route.

34. In these circumstances, in my judgment the appeal must be dismissed.

Mr Sebastian Prentis, instructed by EMW Law, Northampton, for the Appellant.
Mr David Nicholls, instructed by Shoosmiths, Reading, for the Respondent.