Neutral Citation Number: [2017] EWCA Civ 2124

Case No: A2/2016/4109

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
HILDYARD J
[2016] EWHC 2492 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2017

Before :

LADY JUSTICE GLOSTER
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE PATTEN
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Appellants**

- and -

(1) ANTHONY VICTOR LOMAS
(2) STEVEN ANTHONY PEARSON
(3) RUSSELL DOWNS
(4) JULIAN GUY PARR
(in their capacity as Joint Administrators of Lehman Brothers International (Europe) (In Administration)) — **Respondents**

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Mr Malcolm Gammie CBE QC and **Ms Catherine Addy QC** (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the Appellants
Mr John Gardiner QC and **Mr Daniel Bayfield QC** (instructed by **Linklaters LLP**) for the Respondents

Hearing dates : 31 October and 1 November 2017

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Approved Judgment

Lord Justice Patten :

1. The administration of Lehman Brothers International (Europe) ("LBIE") began on 15 September 2008. Contrary to initial expectations, the administration has resulted in a substantial surplus (estimated to be between £6.6bn and £7.8bn) being available for creditors after payment of proved debts. This has given rise to a variety of issues in relation to post-administration interest and currency conversion claims which have been determined recently by the decisions of the Supreme Court and subsequently of this court in what have been referred to as the Waterfall I and Waterfall IIA applications: see *Re Lehman Bros International (Europe) (in administration) (No 4)* [2017] UKSC 38; *Burlington Loan Management Limited v Lomas & Ors* [2017] EWCA Civ 1462.

2. The existence of a surplus in the administration entitles creditors to the payment of statutory interest on their debts. Prior to 6 April 2017 and at the time of the hearing and judgment below, such interest was payable under Rule 2.88(7) of the Insolvency Rules 1986 ("the 1986 Rules") which provided as follows:-

> "Any surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company entered administration."

On 6 April 2017, the Insolvency Rules 2016 came into force and the 1986 Insolvency Rules were revoked subject only to certain transitional and savings provisions in Schedule 2 which are not relevant for present purposes. The payment of such statutory interest by LBIE and from any surplus in an administration made after the commencement date is now governed by Rule 14.23(7) of the Insolvency Rules 2016. For present purposes, that rule is not materially different from the former Rule 2.88(7) as Rule 14.23(7)(a) provides as follows:-

> "any surplus remaining after payment of the debts proved must, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the relevant date".

The "relevant date" in the case of LBIE is the date on which it entered administration (see Rule 14.1(3) of the Insolvency Rules 2016).

3. The rate of statutory interest payable under Rule 2.88(7) was prescribed by Rule 2.88(9) and for present purposes the rate of statutory interest payable under Rule 14.23(7)(a) is prescribed by Rule 14.23(7)(c) as the greater of the rate specified in s.17 of the Judgments Act 1838 on the date when the company entered administration and the rate applicable to the debts apart from the administration. In the present case, the Judgments Act rate at the relevant time was "8 pounds per centum per annum".

4. The issue on this appeal is whether the statutory interest payable on the proved debts is "yearly interest" within the meaning of s.874(1) of the Income Tax Act 2007 ("s.874"). If it is then the joint administrators will be required, subject to certain exceptions, to deduct basic rate income tax from the payments and to account for the

tax to HMRC. Since the amount payable by way of statutory interest is estimated to be in the region of £5bn the amount of tax in issue is considerable. Hildyard J held on the administrators' application for directions that statutory interest did not constitute yearly interest pursuant to s.874(1). HMRC now appeal against that determination.

5. So far as material s. 874 provides as follows:

> "(1) This section applies if a payment of yearly interest arising in the United Kingdom is made—
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> (a) by a company,
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> (b) by a local authority,
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> (c) by or on behalf of a partnership of which a company is a member, or
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> (d) by any person to another person whose usual place of abode is outside the United Kingdom.
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> (2) The person by or through whom the payment is made must, on making the payment, deduct from it a sum representing income tax on it at the [basic rate] in force for the tax year in which it is made."

6. The compulsory deduction of the tax gives HMRC the assurance that it will be collected and in most cases imposes on recipients of the statutory interest who are non-resident for UK tax purposes an obligation to pay tax which they would not otherwise have. That is a significant factor in the present case where many of the original creditors and subsequent purchasers of their debt are based abroad. In their cases recovery of the tax deducted will depend on their own domestic tax position and on whether there is a double taxation treaty in their country of residence.

7. Provisions for the deduction of tax at source have a long history. They can be traced back to Addington's Income Tax Act of 1803 which established a statutory scheme of taxation by reference to schedules of income and profits that remained a feature of income tax legislation for the next two hundred years. Interest of money was not included as a source of income in the schedules to the 1803 Act but "yearly Interest of Money" was charged to tax under s.208 of the Act.

8. Unlike the earlier Income Tax Act of 1799 introduced by Pitt, there was no provision in the Act of 1803 which allowed "annual interest" payable out of profits and gains to be deducted from those profits for the purpose of calculating taxable income. But the taxpayer was entitled under s.208 of the 1803 Act to deduct and retain from the yearly interest which he paid out of taxable profits an amount equal to the tax chargeable on the sum in question. The tax due on the yearly interest would be treated as discharged thereby enabling the Exchequer to obtain tax on the taxpayer's gross taxable income but leaving him able to recover the tax paid by deducting it from the interest which he paid.

9. These are not of course provisions of the same type as s. 874 which is concerned only to provide a collection mechanism in respect of tax payable by the recipient of the

statutory interest. Throughout the history of income tax legislation deductions of tax from payments of yearly interest have been employed for at least two purposes: the deduction of tax from the interest and its recovery for the benefit of the Revenue and the deduction of tax from yearly interest by a taxpayer for his own benefit in circumstances (such as under the Act of 1803) where he has no other means of reducing his own taxable income by reference to the interest payment. But in all these cases the deductibility of the tax has depended upon the interest in question being "annual" or "yearly" interest and Mr Gardiner QC for the administrators submits that this indicates that the rationale for deduction was that it was only intended to apply to contractual and other arrangements with some degree of permanence.

10. This distinction between annual and other forms of interest runs throughout the subsequent legislation. The Income Tax Act of 1805 included in Case III of Schedule D the profits on "all interest of money not being annual interest" and charged annual interest to tax under s.192 with a concomitant right for the taxpayer to deduct tax at source from annual interest payable out of taxable profits. The legislation was consolidated in the Income Tax Act of 1806. Income tax was then abolished in 1816 but re-introduced by Sir Robert Peel in 1842 with provisions on interest similar to those in the 1805 Act. Deduction at source in relation to payments of yearly interest continued in the Income Tax Act 1853 but all interest of money became taxable without distinction under Schedule D.

11. In none of this legislation was the phrase yearly or annual interest defined but some indication of its necessary characteristics can be found in s.15 of the Revenue (No. 1) Act of 1864 which authorised deduction of tax from payments of annual interest at the "Rate or a proportionate Amount of the several Rates of Income Tax which were chargeable ….. during the Period through which the same was accruing due….". The administrators rely on these provisions as indicating that yearly interest must accrue over the period to which it relates.

12. Under s.24(3) of the Customs and Inland Revenue Act 1888 tax was deductible from and accounted for to the Revenue in respect of any kind of interest that was not wholly paid out of taxed income. The deduction was made at the rate of tax applicable at the date of payment. But for yearly interest that was wholly paid out of taxed income, the taxpayer still had the right to deduct and retain the tax as the *quid pro quo* for not being able to deduct the interest payment in the calculation of his taxable profits and tax was deductible at the rates prevailing over the period of accrual. This remained the position until s.39 of the Finance Act 1927 changed the rate of interest to the one applicable at the time the payment became due.

13. This legislation up to 1918 was consolidated in the Income Tax Act 1918 which preserved the separate treatment of interest not wholly paid out of taxed income and yearly interest that was paid wholly out of taxed income and this continued to be the position under the Income Tax Act 1952 (see ss.169-170). The Finance Act 1965 introduced corporation tax and removed the right of companies to deduct and retain tax from payments of annual interest made wholly out of taxable profits. Further changes were made by the Finance Act 1969 which allowed annual interest to be deducted in computing chargeable profits or gains but also required tax to be deducted at source and accounted for to the Revenue in respect of yearly interest paid by companies or paid by any person to someone whose usual place of abode was outside the UK: see s.26(1) and (4). These provisions are the forerunner of what is now s.874

of the 2007 Act. The only differences in wording between s.874 and the earlier legislation are the omission of the words "of money" from the phrase "interest of money" and the use of the word "arising" in place of the phrase "arising or accruing" in the charging provisions of Schedule D. These changes were made as part of the re-write of the tax legislation preceding the 2007 Act but it is not suggested by either side in this appeal that the changes have affected the substance of the relevant provisions for the purposes of determining what constitutes "yearly interest".

14. The judge's view that statutory interest does not constitute yearly interest within the meaning of s.874 was based on the need, as he saw it, to identify a payment in the nature of interest which has accrued from day to day and is payable from year to year. Statutory interest, he held, did not have this quality of recurrence because it was paid retrospectively as compensation for the time value of money attributable to the period between the commencement of the administration and the payment of the proved debts. For this purpose he relied upon and adopted the analysis of rule 2.88(7) contained in the judgment of David Richards J (as he then was) in *Re Lehman Brothers International (Europe) (No. 5)* [2015] EWHC 2269 (Ch) at [149] where he said:

> "The right to interest out of a surplus under rule 2.88 is not a right to the payment of interest accruing due from time to time during the period between the commencement of the administration and the payment of the dividend or dividends on the proved debts. The dividends cannot be appropriated between the proved debts and interest accruing due under rule 2.88, because at the date of the dividends no interest was payable at that time pursuant to rule 2.88. The entitlement under rule 2.88 to interest is a purely statutory entitlement, arising once there is a surplus and payable only out of that surplus. The entitlement under rule 2.88 does not involve any remission to contractual or other rights existing apart from the administration. It is a fundamental feature of rule 2.88, and a primary recommendation of the Cork Committee that all creditors should be entitled to receive interest out of surplus in respect of the periods before payment of dividends on their proved debts, irrespective of whether, apart from the insolvency process, those debts would carry interest."

15. At [16]-[17] of his own judgment Hildyard J said:

> "16. In my judgment, the statutory right to interest is sui generis and is not to be equated with a right to interest which accrues over time. Accrual signifies that a sum certain is being added over time, so that at any given time the amount accrued may be ascertained. The exercise in reverse engineering posited by HMRC in seeking to characterise as "accruing" a sum which, it is common ground, does not in fact become payable unless and until a right arises "at the end of the day" is not justified.

> 17. I do not accept either HMRC's submission that, even though there is no accrual de die in diem (or, as Mr David Goy QC (leading counsel for HMRC) put it in oral argument, "you cannot say on a day-to-day basis that you will have an entitlement. So in that sense, you can't say it accrues"), there is what Mr Goy chose to call a "conditional accrual". In truth, in my judgment, there is no accrual at all: the statutory right to interest arises only if and when a surplus is established."

16. There is no doubt at all that statutory interest, as David Richards J explained, is not a continuing liability which accrues from day to day on a prospective basis over the period to which it relates. It is paid, as I have said, as statutory compensation for the loss which the creditors have suffered by being kept out of their money for the period of the administration. As this Court said in its judgment in Waterfall IIA, the calculation involved is made *ex post facto* and should be straightforward:

> "27. [The words of rule 2.88(7)] contain a built-in assumption that the whole of the principal of the relevant debts will already have been paid by dividend since, otherwise, there will be no relevant surplus. Reference back to the earlier provisions of Rule 2.88 shows that it is also to be assumed that, in addition to the whole of the principal, contractual interest due until the commencement of the administration will also, in the stated circumstances, have been proved for and paid. Thus the "debts proved" referred to in Rule 2.88(7) will include the whole of the principal and, probably in most cases, all outstanding pre-administration interest. The aggregate of those amounts will constitute the "debt" upon which statutory interest for the period since the onset of the administration is payable. The requirement that there should be a surplus out of which statutory interest is paid means that the aggregate of principal and pre-administration interest will for each creditor be a specific, known figure, ascertained during the course of the administration, prior to the calculation and payment of any statutory interest.
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> 28. It would in our view run entirely counter to that simple structure for the calculation of statutory interest to require that aggregate sum to be re-opened, to the intent that dividends are re-allocated first to interest and only then to principal, for the purpose of distributing a surplus which, on that re-allocation for all proving creditors, might leave all or many of them with a shortfall in payment of principal, so that on the re-analysis there was not even a surplus after payment of "the debts proved" within the meaning of Rule 2.88(7)."

17. The case for the administrators, which the judge accepted, was that the right to statutory interest was entirely dependent on the existence of an eventual surplus in the administration. Rule 2.88(7) did not create a right to the payment of interest which accrued or arose from the commencement of the administration even on a conditional basis. The relevant tax legislation talked for two centuries of interest "arising or

accruing" and was looking at a source of payment which flowed forward in real time throughout the relevant period. In the case of yearly interest, the payment must from its inception have a prospect of continuance for a significant period of time.

18. In the case of statutory interest, there is no obligation in existence at the outset which, to use the language in one of the authorities relied on, has the prospect of continuing over a tract of future time. The statutory entitlement to interest under rule 2.88(7) lacks any quality or capability of recurrence and is a one-off retrospective payment to be made once the proved debts have been paid. It cannot therefore constitute "yearly interest".

19. In support of these propositions we were taken to a number of decided tax cases in which the question of what constitutes "yearly interest" has arisen. It is important to emphasise at the outset that what we are called upon to decide on this appeal is the application of those words in s.874 to the payment of the particular statutory interest and not to any more abstract consideration of what might constitute yearly interest in any other statutory context. But, as I shall explain later in this judgment, the argument about the meaning of "yearly interest" has been conducted by reference to cases in which other forms of retrospective payments have been considered and it has not been suggested that the present appeal requires us to apply any different or special principle in applying the provisions of s.874 to statutory interest payable under the Insolvency Rules.

20. Mr Gardiner QC began with the question of what was meant by "interest". He referred us to the decision of Rowlatt J in *Bennett v Ogston* 15 TC 374 where the issue was whether repayment instalments to a moneylender under various loans were or included "interest of money" so as to be taxable under Case III of Schedule D to the Income Tax Act 1918. The decision confirms that interest means payment for the use of money. This is not controversial. But it is also clear that "interest" can become payable and be paid in a number of different circumstances. Interest is conventionally payable in respect of and during the period of a loan. In such cases it falls due at specified intervals according to the terms of the contract. But it may also become payable retrospectively as compensation for the time value of money which the claimant was entitled to but not paid. One could give numerous examples of this but two obvious ones come to mind. There is power under s.35A of the Senior Courts Act ("SCA 1981") for the court to award simple interest on a debt in respect of which judgment is given for any part of the period between the date when the cause of action arose and judgment. As part of its equitable jurisdiction, the court may also award interest in respect of any sums found due on the taking of an account. At common law interest on a debt was not recoverable absent a contractual entitlement to it: see *London, Chatham and Dover Railway Company v South-Eastern Railway Company* [1893] AC 429. But even this position has been ameliorated by the decision of the House of Lords in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2007] UKHL 34, [2008] 1 AC 561 that there is jurisdiction to award both simple and compound interest as damages for the non-payment of debts or as a restitutionary remedy in claims such as those for the recovery of money paid under a mistake.

21. The use of the word "interest" to describe the sums payable in both sets of circumstances indicates that, as a matter of language and common legal usage, it is not confined to cases in which the payment accrues due prospectively as it would do under a loan. It is therefore common ground on this appeal that statutory interest is

"interest" within the meaning of s.874 and that the administrators' argument that it is not "yearly interest" turns on the meaning and effect of the word "yearly". The point is in any event concluded by authority because in *Riches v Westminster Bank Ltd* [1947] AC 390 the House of Lords decided that a sum of money awarded as interest under s.3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 (now re-enacted as s.35A SCA 1981) as part of a judgment sum was "interest of money" within Schedule D of the Income Tax Act 1918 so as to be payable under deduction of tax under rule 21 of the All Schedules Rules of the Act.

22. The argument for the taxpayer in *Riches* was that the sum awarded by way of statutory interest under the 1934 Act was in reality damages for the wrongful detention of the money. The judgment had been obtained in proceedings for an account of the profits made by the deceased defendant from a sale of shares which he was contractually obliged to pay to the judgment creditor. That argument derived some support from an *obiter dictum* statement of Wright J in *Re National Bank of Wales* [1899] 2 Ch 629 at page 651 but it was rejected by the House of Lords. The analysis in the speeches in the Appellate Committee is instructive and I will return to them later in this judgment when I come to the question of what constitutes "yearly" interest. For the moment, however, the following extracts explain why a compensating payment could nonetheless be "interest of money" for the purposes of Schedule D.

23. Viscount Simon dealt with the point at page 398:-

> "Mr. Grant advanced a further argument that the added sum was not in the nature of "interest" in the sense of that expression in the Income Tax Acts because the added sum only came into existence when the judgment was given and from that moment had no accretions under the order awarding it. (Interest on a judgment debt is of course a separate matter and Mr. Grant did not challenge the view that this latter interest was subject to tax.) But I see no reason why, when the judge orders payment of interest from a past date on the amount of the main sum awarded (or on a part of it) this supplemental payment, the size of which grows from day to day by taking a fraction of so much per cent. per annum of the amount on which interest is ordered, and by the payment of which further growth is stopped, should not be treated as interest attracting income tax. It is not capital. It is rather the accumulated fruit of a tree which the tree produces regularly until payment."

24. Lord Wright (beginning at page 399) said:-

> "The contention of the appellant may be summarily stated to be that the award under the act cannot be held to be interest in the true sense of that word because it is not interest but damages, that is, damages for the detention of a sum of money due by the respondents to the appellant and hence the deduction made as being required under r. 21 is not justified because the money was not interest. In other words the contention is that money awarded as damages for the detention of money is not interest

> and has not the quality of interest. Evershed J. in his admirable judgment rejected that distinction. The appellant's contention is in any case artificial and is in my opinion erroneous because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied or a statute or whether the money was due for any other reason in law. In either case the money was due to him and was not paid, or in other words was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute, as for instance under s. 57 of the Bills of Exchange Act, 1882, or was unliquidated and claimable under the Act as in the present case. The essential quality of the claim for compensation is the same and the compensation is properly described as interest."

25. Finally, there is Lord Simonds (beginning at 406):

> "I come then to the second stage and ask what is the character of interest allowed under s. 28 of the Act of 1833. Here the argument is that, call it interest or what you will, it is damages, and, if it is damages, then it is not "interest in the proper sense" or "interest proper," expressions heard many times by your Lordships. This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which I see no justification. It confuses the character of the sum paid with the authority under which it is paid. Its essential character may be the same, whether it is paid under the compulsion of a contract, a statute or a judgment of the court. In the first case it may be called "interest" and in the second and third cases "damages in the nature of interest," or even "damages." But the real question is still what is its intrinsic character, and in the consideration of this question a description due to the authority under which it is paid may well mislead.
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> …..
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> Perhaps the position may become even clearer if for "damages" the word "compensation" is substituted. It would be difficult, I suppose, in a case where a man, being deprived of the use of his money, was awarded interest by way of compensation, to say that what he was awarded was not interest but something else. That is the very language of equity: cf. *Vyse v. Foster*. In that case, as James L.J. points out, the executors or trustees had committed a breach of trust by allowing trust money to remain

> outstanding on the personal security of persons engaged in trade; they were bound therefore to make good the trust funds and interest. The language that James L.J. employs is illuminating. "This court", he says, "is not a court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing anyone." The trustee must pay interest to compensate his cestui qui trust for the interest (I say nothing of his alternative remedy) he has lost. It might equally well be called damages or interest by way of damages. It is inherently a sum of money of precisely the same character as the interest awarded in a court of law under the Civil Procedure Act, 1833.
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> My Lords, having discussed in a general way the nature of a sum of money awarded as interest under s. 28 of the Civil Procedure Act, I turn to the cases decided under the Income Tax Acts to see whether they assist the appellant. I find in them just what I expected to find. The question in each case is whether the receipt is of an income or a capital nature: that is the test for income tax purposes, not whether it is called "interest" or "damages." [page 408]
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> …..
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> It was further urged on behalf of the appellant that the interest ordered to be paid to him was not "interest of money" for the purpose of tax because it had no existence until it was awarded and did not have the quality of being recurrent or being capable of recurrence. This argument was founded on certain observations of Lord Maugham in *Moss Empires, Ld. v. Inland Revenue Commissioners*, in regard to the meaning of the word "annual." It would be sufficient to say that we are here dealing with words in the Income Tax Act which do not include either "annual" or "yearly," but in any case I do not understand why a sum which is calculated upon the footing that it accrues de die in diem has not the essential quality of recurrence in sufficient measure to bring it within the scope of income tax. It is surely irrelevant that the calculation begins on one day and ends on another. It is more important to bear in mind that it is income." [page 410-411]

26. The administrators rely upon what Lord Simonds said in that last passage about "yearly" interest. Mr Gardiner says that it is important to bear in mind that the issue in *Riches* was whether the interest awarded under the 1934 Act was "interest of money" so as to form part of the payee's income rather than a capital payment which would not be taxable under Schedule D at all. This was because the deduction of tax had been made under rule 21 of the All Schedules Rules which applied to all forms of interest. If the payment was "interest of money" then tax was deductible at source either under rule 19 of the All Schedules Rules which allowed the payee to deduct and

retain the tax on "yearly interest" if paid out of taxable profits or under rule 21 which would apply if the interest payment was not made wholly out of taxable profits or gains. In the latter case the payee would be obliged to account for the tax to the Revenue just as under s.874 in the present case. It was not therefore necessary to decide whether the payments would have been yearly or annual interest for the purposes of rule 19 and there is disagreement between Mr Gardiner and Mr Gammie QC for HMRC as to how much assistance can be derived from *Riches* on that issue. I propose to return to these speeches later in this judgment once I have considered the other authorities which are relied on in relation to what constitutes yearly interest. I merely pause to observe at this stage that there is certainly no support in any of the speeches in *Riches* for the proposition that interest paid retrospectively as compensation cannot be treated as having accrued *de die in diem* over the period to which it relates even though it was not a current liability during that period.

27. The administrators' case turns on the use of the word "yearly". Mr Gardiner submitted that no case has ever been decided that "yearly interest" includes interest which does not accrue prospectively over at least one year. The judge was therefore right to say that it has to have this quality of recurrence at the commencement of and during the period to which it relates. As mentioned earlier, yearly interest was taxed between 1864 and 1925 at the rates applicable to the whole period over which it accrued. This, the administrators say, is a further indication that Parliament must have intended there to be an annual real time accrual. The essential nature of yearly interest has not changed since then.

28. I can start my survey of the authorities relied on with the decision of the Vice-Chancellor, Sir William Page Wood, in *Bebb v Bunny* (1854) 1 K & J 216. The issue was whether interest paid by a purchaser for late completion of a contract for the sale of some property was "yearly interest of money" within the meaning of s.40 of the Income Tax Act 1853. The argument before the Vice-Chancellor seems to have centred on whether there was any relevant distinction to be made between interest due under a mortgage and the interest on the purchase price payable under a contract for sale. One distinction relied on was that in the case of interest on purchase money the interest accrued from the contractual date of completion but was only payable once completion finally took place. The Vice Chancellor said:-

> "Most mortgage deeds contain only a covenant to pay the principal, with interest at a certain rate per annum, on a day certain. After that it accrues *de die in diem,* and the interest, without any particular reservation, ordinarily is received half-yearly, from year to year. It is difficult to see the distinction between interest so reserved and paid, and that which by special agreement accrues on purchase-money, which also goes on from day to day, and may run on for a year, or stop at any time on payment of the purchase-money, and which, in some shape or other, forms a lien on the property.
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> …..
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> The whole difficulty is in the expression "yearly " interest of money; but I think it susceptible of this view, that it is interest reserved, at a given rate per cent, per annum; or, at least, in the

> construction of this Act, I must hold that any interest which may be or become payable *de anno in annum,* though accruing *de die in diem,* is within the 40th section. I cannot make any solid distinction between interest on mortgage money and interest on purchase-money. The case has been very well argued, and it was chiefly in reference to the point made on the part of the vendor as regards Schedule D that I referred to the authorities of the Inland Revenue Office, who say that this schedule was framed more particularly in reference to the case of public bodies, such as parochial boards, who have no income out of which interest is payable, and are not assessed to the duty, and, having to pay interest on bonds or the like, are not therefore parties entitled to deduct the tax under section 40; so that the tax becomes payable by the receiver of the interest under Schedule D. I consider the Act very singularly worded, yearly interest being used apparently in the same sense as annual payments; but I am clearly of opinion that it means at least all interest at a yearly rate, and which may have to be paid *de anno in annum;* such as interest on purchase-money, as well as mortgage interest; and that, therefore, the purchaser is entitled to deduct the tax in this case. In fact, if this interest be not subject to such deduction, I do not well see how it can be charged with the tax at all."

29. Mr Gardiner relies on this decision about the meaning of "yearly" interest of money as providing a definition which is not complied with in the present case. The requirement that yearly interest must not only accrue from day to day but also be payable annually requires the payments, he says, to accrue prospectively and not retrospectively. HMRC's case by contrast is (and has to be) that statutory interest does accrue daily in the sense explained in the speeches in *Riches* and is yearly interest simply because in the case under appeal it covers and relates to a period of more than a year.

30. One obvious issue of some practical importance in the context of deduction of tax is that the taxpayer's obligation to deduct basic rate tax under s.874 arises when the payment is made and not, for example, at the end of a financial year as part of the calculation and payment of his own tax liabilities. In the case of statutory interest, this does not create a problem because the payment is made in respect of a past period and if the length of that period is the governing factor then the obligation to deduct the tax will be apparent and readily ascertainable as at the date of the payment. But the position is more complicated where the payments are made periodically and prospectively during the period to which they relate. Mr Gammie gave the example of a short-term bank deposit which in fact lasted for more than a year. He suggested that the interest it accrued would not amount to yearly interest because of the nature of the deposit and what must have been assumed to be the intention of the depositor at the inception of the arrangement. Mr Gardiner submits that this demonstrates that the issue of whether interest is yearly cannot simply depend on whether it covers a period of more than a year.

31. There is some authority about how to treat interest on short-term deposits of this kind. In *Goslings and Sharpe v Blake* (1889) 23 QBD 324 the Court of Appeal held that interest on a loan for a specified period of less than a year was not “yearly interest of money” under s.40 of the Income Tax Act 1853 even if the rate of interest was expressed as a “per annum” rate. Lord Esher MR indicated that the passage from the judgment of Wood VC in *Bebb v Bunny* quoted above should not be read as meaning that the adoption of a per annum rate of interest was sufficient in itself to make the interest yearly or annual interest within s.40. A short-term loan for a fixed period differed from a mortgage under which although the debt would usually become payable after six months, it would in most cases remain unpaid in return for interest over a prolonged period. Bowen LJ (at page 331) said:

> “The question is whether the interest in such a case, where the interest has to be paid at the expiration of the short period, is yearly interest of money within section 40. It seems to me it is not yearly interest at all; it is not calculated with reference to a year in any sense, although it is true that it is expressed in a notation which is borrowed from the language of cases where there are yearly loans, or where the interest is calculated by the year. It is convenient to express in that notation the amount of interest that has to be paid, but it is not calculated on a year, nor on the supposition that the loans would last for a year, therefore it is not yearly interest.”

32. The exclusion of short-term liabilities (even when calculated by reference to a per annum rate of interest) from tax provisions governing “yearly interest” has been followed by the Court of Appeal in *In Re T. Cooper* [1911] 2 KB 550; C*orinthian Securities Ltd v Cato* [1970] 1 QB 377; and *Cairns v MacDiarmid* [1983] STC 1778. In C*orinthian Securities* Lord Denning MR said (at page 382):

> “Interest is "yearly interest of money" whenever it is paid on a loan which is in the nature of an investment no matter whether it is repayable on demand or not. An ordinary loan on mortgage is usually in point of law repayable at six months. But it is still "yearly interest of money." On the other hand, when a banker lends money for a short fixed period, such as three months, and it is not intended to be continued, such a loan is not in the nature of an investment. It is not "yearly interest of money," but a short loan. That is shown by *Goslings and Sharpe v. Blake* (1889) 23 Q.B.D. 324, where Lindley L.J. said, at p. 330, referring to the ordinary mortgage: "In point of business, therefore, a mortgage is not a short loan; but a banker's loan at three months is a totally different thing."”

33. The same test was applied by Sir John Donaldson MR in *Cairns v MacDiarmid* but with a qualification about the reference to “investment”:

> “It is well settled that the difference between what is annual and what is short interest depends on the intention of the parties. Thus interest payable on a mortgage providing for repayment of the money after six months, or indeed a shorter

> period, will still be annual interest if calculated at a yearly rate and if the intention of the parties is that it may have to be paid from year to year (*Bebb v Bunny* (1854) 1 K & J 216, 69 ER 436 and *Corinthian Securities Ltd v Cato* (*Inspector of Taxes*) [1969] 3 All ER 1168, 46 TC 93). I would personally wish to avoid the use of the term 'investment' as providing any sort of test in the context of whether interest is annual interest, notwithstanding its use in the latter case, because it is possible to have a short term and indeed a very short term investment, eg overnight deposits, and such an investment does not involve any annual interest, regardless of whether the interest is calculated at an annual rate." [page 181]

34. An intention-based test may be relatively easy to apply when considering an ongoing contractual liability such as a mortgage or loan. The court can have regard to the nature and terms of the arrangement as well as the parties' expectation of how long the indebtedness will last. The more difficult cases are where a liability to pay interest is imposed usually by statute in relation to an unpaid debt and the timescale for repayment (and therefore for the continuation of the payment of interest) is not prescribed but remains in the discretion of the enforcing authority. An example of this is *Gateshead Corporation v Lumsden* [1914] 2 KB 883 which concerned interest due from a property owner on the unpaid amount of his liability for street improvements carried out by a local authority under the powers contained in the Public Health Act 1875 and the Gateshead Improvement Act 1867. Section 32 of the 1867 Act permitted the local authority to allow time for the repayment of the expenses with interest being payable on the amount from time to time outstanding. In this particular case the expenses had remained unpaid for a number of years. Notwithstanding this, the Court of Appeal held that the interest paid was not "yearly interest of money" under s.40 of the Income Tax Act 1853 so as to entitle the defendant to deduct income tax from the payments.

35. In his judgment Lord Sumner said that it might have been possible to treat the case in the same way as mortgage interest had there been evidence of a regular practice by the corporation of, in effect, investing their funds by giving the frontagers time to pay in return for the payment of interest. But no such facts had been established. He went on:

> "I do not say that the present case is concluded by the decision in *In re Cooper*, though I think it would be difficult to distinguish it; but applying the principle underlying that decision, I am unable to see how the words "yearly interest" can apply to this transaction. There is no agreement for a short loan or a long loan. The debt is due and repayment is not enforced; only in that sense is there a loan. Truly speaking there is simply a forbearance to put in suit the remedy for a debt. The repayment might have been enforced at any moment. The debt might have been paid by the debtor at any moment. It carried interest by law, because under s. 32 of the local Act the local authority could and did attach a rate of interest to it. The fact that the rate of interest is calculable at an annual figure is, as

> was pointed out in *Goslings v. Blake*, immaterial. The debt here was well secured, and the creditor, unlike the creditor in *In re Cooper*, did not desire immediately to enforce payment of it. The plaintiffs were no doubt to receive interest on it, but not in such a form as would apply to it the words "any yearly interest of money" in s. 40 of the Income Tax Act, 1853." [pages 889-890]

36. The administrators contend that the same analysis can be applied to statutory interest. The period which it will cover is indeterminate at the commencement of the administration and (aside from the question of whether there will be a surplus) will depend on how quickly the proved debts come to be paid. The decision in *Gateshead* confirms, they say, that the mere fact that the indebtedness and therefore the liability for interest subsists over a period of more than a year is insufficient to make the interest paid yearly interest.

37. It is convenient to turn now to the cases which consider interest payable as compensation for the time value of money either under some form of statutory regime or in relation to the court's equitable jurisdiction referred to earlier. The common feature in all these cases is that the liability for interest is not the product of some consensual process such as a mortgage or loan agreement in relation to which resort can be made to the presumed intention of the parties. The liability for interest is imposed on the taxpayer and (as in the case of statutory interest) is calculated retrospectively having regard to the period in question.

38. I can begin with the decision of the Court of Appeal in *IRC v Barnato* [1936] 2 All ER 1176, 20 TC 455. It concerned the liability of Captain Barnato for super-tax on the sums which he received under a judgment for an account against his former partners in the dissolved firm of Barnato Brothers. The sums found due on the taking of the account included an award of interest on the capital sums due down to payment. In order to be assessable to tax they had to constitute interest within the meaning of Schedule D of the Income Tax Act 1918. The argument for the taxpayer (as in *Riches v Westminster Bank Ltd*) was that the interest was in substance damages or compensation and was not therefore taxable as "interest of money". Reference was made in the judgment of Lord Wright MR to the court's equitable jurisdiction to award interest and to the judgment of James LJ in *Vyse v. Foster* (1872) LR 8 Ch App 309 (at page 333) where he said:

> "This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon."

39. The Court of Appeal distinguished the facts in *Barnato* from those considered by Wright J in *Re National Bank of Wales* (where the defaulting trustee had been fraudulent) without therefore having to decide whether the latter decision was correct. As mentioned earlier, Wright J's decision was eventually overruled by the House of Lords in *Riches*. They adopted the reasoning of the Court of Session in *Schulze v*

Bensted 7 TC 30 in relation to interest awarded on monies for which a trustee had failed properly to account. The Lord President had said in *Schulze* (at page 33):

> "Here the trustees on Hugh Lees estate were deprived of the use of this sum of £1,040, and if they had had it, presumably they would have invested it, and if they had invested it, presumably it would have yielded them 3½ per cent., and, therefore, as recompense for being deprived of the use of this trust money, they had awarded to them the sum which it would have earned in their hands, if placed in a proper trust investment. That appears to me to make it quite clear that this was interest in the proper sense of the word and not liquidated damages."

40. Case III Rule 1 of Schedule D taxed "(a) any interest of money, whether yearly or otherwise…" so that it was not necessary for the Court of Appeal in *Barnato* to decide whether the award of interest made to the taxpayer would also have been "yearly interest" within the meaning of the statute. But in *Barlow v CIR* 21 TC 354 the issue did arise in a case where a defaulting trustee who had misappropriated trust property entered into a deed dated 27 March 1930 by which he covenanted to pay a principal sum which was made up of the amount of the trust monies he was obliged to account for together with compound interest at 5 per cent per annum up to 1 January 1930. The deed also provided for the payment of interest from 1 January 1930 until payment of the principal sum. The question arose as to whether the interest element of the principal sum was yearly interest and therefore deductible by the taxpayer under s.24 of the Finance Act 1923 (as amended by the Finance Act 1927). It was not in dispute that the continuing interest was deductible but the Special Commissioners decided that the interest element included in the principal sum was either a capital sum or, if interest, was not yearly interest.

41. Finlay J followed the decision of the Court of Appeal in *Barnato* and held that the amount of interest comprised in the principal sum fell to be treated as interest rather than a capital payment. That left him to consider whether it was also yearly interest and, again, he differed from the Special Commissioners:

> "The general position of the law was laid down a long time ago in the case of *Bebb v Bunny*, 1 Kay & J. 216, where the matter was fully discussed by Page Wood, V.-C., and that decision, though I think there has once or twice been some doubt cast upon it, was a correct decision. A distinction was drawn very much later in a case of *Goslings and Sharpe v Blake*, but that case had reference to a very different subject matter, interest on a banker's short loan. It is very well known that in the City of London bankers lend money for very short periods, sometimes it is actually a period of hours, for a week or a fortnight or a month, and what was held there was that the decision in *Bebb v Bunny* did not apply to these bankers' short loans and that interest on these loans was not yearly interest of money. That appears to me to be a very different subject matter from this, and I think it would be enough to say that in my opinion upon this point of yearly interest of money this clearly is yearly

> interest of money, and I think that *Bebb v Bunny* shows that. I will add on this point, although I think the point does not appear to be expressly raised, that *Barnato*'s case is in point and that the interest in *Barnato's* case seems to me to have been exactly of the same nature as the interest here, and it does not appear there to have been suggested that the interest was not yearly interest of money. It seems to me, therefore, that that case, though I quite agree the point was not precisely raised, is in point here also."

42. The same issue arose in *Regal (Hastings) Ltd v Gulliver* (1944) 24 ATC 297. The company successfully sued its former directors for breach of fiduciary duty in order to recover the profit which they had made from the allotment to themselves and subsequent sale of shares in a subsidiary company. The House of Lords held that the directors were liable to account for and to pay the amount of the profits to Regal together with interest: see [1967] 2 AC 134n. The directors sought to deduct tax from the interest payments which Regal resisted. Having referred to the decision of the Court of Appeal in *Barnato*, Cassels J turned to the question whether the interest awarded was yearly interest:

> "Mr. Beney contended that this was not yearly interest, and cited *In re Cooper* ([1911] 2 K.B. 550), the bankruptcy notice case, which really turned on the validity of a bankruptcy notice in which the interest on the judgment debt was included in full without deduction of tax; and *Gateshead Corporation v Lumsden* ([1914] 2 K.B. 833), where interest paid by a frontager on a deferred payment of his part of the expenses of paving a street was held not to be 'yearly interest of money'. I do not think either of these cases very helpful.
>
> I have to deal with the facts in this case, where the House of Lords has held in 1942 that the defendants, the directors, are to be treated as having had, each of them, since 1935 the sum of £1,402 in trust for the plaintiff, and that the directors must be taken to have invested it at the moment they received it, and, therefore, must pay interest from that moment to the time, 6½ years later, when the House of Lords declared the defendants liable. I think these facts distinguish this case from such a case as *Gosling and Sharpe v. Blake* ((1889) 24 Q.B.D. 324), which dealt with bankers' short loans.
>
> I hold that this was yearly interest."

43. Mr Gammie relies upon these decisions as indicating that interest calculated retrospectively and payable as part of a compensatory award can amount not only to interest as held in cases like *Barnato* and *Riches* but also yearly interest. If Hildyard J is right and interest can only be yearly interest for the purposes of s.874 if it accrues prospectively from year to year then these cases must, he submits, have been wrongly decided.

44. The judge sought to avoid that conclusion by treating the payments of interest as having accrued over the period to which they related rather than becoming payable retrospectively as from the date of the judgment and Mr Gardiner in his own submissions said that they represented an obligation to pay interest which accrued on the principal amount in real time. But in my view this analysis is untenable.

45. The usual remedies for a breach of trust or breach of fiduciary duty are the taking of an account or the award of what is now commonly referred to as equitable compensation. Both are personal remedies which require the defaulting trustee or fiduciary to make compensation for the breach of duty complained of. The process of taking an account (whether in common form or on the basis of wilful default) requires the court to scrutinise the defendant's management of the trust property in order to determine the deficit in or loss to the claimant or the trust estate. This includes a consideration of any relevant questions of causation which the defendant seeks to raise. But the taking of an account does not of itself result in an enforceable order for compensation in favour of the claimant. It is still necessary for the claimant to obtain a judgment for the sum due on the taking of the account in order to become entitled to his money. The point can be illustrated by what Lord Browne-Wilkinson said in *Target Holdings Ltd v Redfern* [1996] AC 421 at page 437; a case in which the claimant had argued that its loss fell to be calculated at the date of the breach of trust without regard to subsequent events:

> "[T]he fact that there is an accrued cause of action as soon as the breach [of trust] is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach. I can see no justification for "stopping the clock" immediately in some cases but not in others: to do so may, as in this case, lead to compensating the trust estate or the beneficiary for a loss which, on the facts known at trial, it has never suffered."

46. This principle is also reflected in the relief granted by the House of Lords in *Phipps v Boardman* [1967] 2 AC where although the trustees were required to account for the profits made from the acquisition of shares with the benefit of information which had come to them in their capacity as trustees, a generous allowance was made for the skill and work which they had employed in making the acquisition a profitable one.

47. We were taken by Mr Gardiner to the decision of this court in *Vyse v. Foster* which is referred to in many of the tax cases as setting out the obligations of a trustee or executor in relation to a breach of trust. James LJ (at page 329) said:

> "If an executor commits a breach of trust, he and all those who are accomplices with him in that breach of trust are all and each of them bound to make good the trust funds and interest. If an executor or trustee makes profit by an improper dealing with the assets or the trust fund, that profit he must give up to the

> trust. If that improper dealing consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in such business; or at the option of the *cestui que trust*, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent."

48. As a statement of general principle this is incontrovertible. But the obligation of the defaulting trustee to make good the loss he has caused with interest is not to be treated as an ongoing obligation to pay in the same sense as a contractual obligation. It is an obligation to make good the loss (just as a tortfeasor is liable in damages) but the quantum and the amount of any interest are matters to be calculated on the taking of the account and are converted into an enforceable liability by the judgment which follows.

49. This has a particular relevance to the award of interest. The court's power to award interest in the exercise of its equitable jurisdiction is discretionary although interest will usually be awarded on the basis that the trustee is treated as having retained the money or trust property in his own hands regardless of whether he has in fact disposed of it. In *Wallersteiner v. Moir (No. 2)* [1975] QB 373 at page 388 Lord Denning MR explained the theoretical basis behind the court's power to award interest (including compound interest) in order to compensate for the loss suffered by the breach of trust. It is, however, clear from the judgment that this is the court awarding interest as compensation and not the defaulting trustee paying interest on the basis of a continuing obligation accruing periodically in real time from the date of the breach of trust:

> "The principles on which the courts of equity acted are expounded in a series of cases of which I would take the judgment of Sir John Romilly M.R. in *Jones v. Foxall* (1852) 15 Beav. 388, 391: of Lord Cranworth L.C. in *Attorney-General v. Alford* (1855) 4 De G.M. & G. 843, 851: of Lord Hatherley L.C. in *Burdick v. Garrick* (1870) 5 Ch.App. 233, 241-242 and of Sir W. M. James L.J. in *Vyse v. Foster* (1872) 8 Ch.App. 309, 333; (1874) L.R. 7 H.L. 318. Those judgments show that, in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position - who has misapplied the money and made use of it himself for his own benefit. The court:
>
> > "presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in these cases the court directs rests to be made," i.e., compound interest: see *Burdick v. Garrick*, 5 Ch.App. 233, 242, *per* Lord Hatherley L.C.

> The reason is because a person in a fiduciary position is not allowed to make a profit out of his trust: and, if he does, he is liable to account for that profit or interest in lieu thereof.
>
> In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money - years later - is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest. That was done by Sir William Page Wood V.-C. (afterwards Lord Hatherley) in one of the leading cases on the subject, *Atwool v. Merryweather* (1867) L.R. 5 Eq. 464n., 468-469. But the question arises: should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf. *Armory v. Delamirie* (1723) 1 Stra. 505. It may be that the company would have used it in its own trading operations; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But, whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, i.e., compound interest."

50. I do not therefore accept the argument of the administrators that the award of interest in cases like *Regal (Hastings) Ltd v Gulliver* can properly be treated as the payment of an ongoing liability no different from the mortgage loan cases referred to in the authorities mentioned earlier. The point applies *a fortiori* to other cases of retrospectively assessed interest under a statutory regime the most obvious example of which is s.35A SCA 1981. In such cases the liability is entirely the creature of the award made by the court under the statute and cannot be attributed to a pre-existing liability on the part of the defendant.

51. This brings me back to *Riches* and to the subsequent decision of the Court of Appeal in *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202. As I explained in the earlier part of this judgment, it is not open to the administrators in the light of the decision in *Riches* to contend that statutory interest is not interest for the purposes of s.874. But in my view the decision goes beyond this. It is clear from the passages quoted earlier that the House of Lords considered that interest awarded under s.3(1) of the 1934 Act did have the quality of recurrence necessary to make it interest rather than damages. Both Viscount Simon and Lord Simonds adopted the approach which one can trace through into the later cases like *Regal (Hastings) Ltd v Gulliver* of in effect treating as irrelevant the fact that the interest is payable from the date of judgment and is calculated retrospectively. Instead they concentrate on the duration of the liability if looked at hypothetically at the start of the period to which it relates. Viscount Simon talks (at page 398) of interest as the fruit which a tree produces regularly until payment and Lord Simonds (at page 410) says that interest awarded under the 1934

Act has the essential quality of recurrence because it is calculated as accruing from day to day.

52. In *Jefford v Gee* the Court of Appeal was required to decide a number of issues relating to the payment of interest under s.3 of the 1934 Act in relation to an award of damages for personal injury. The trial judge had awarded interest on damages for a period of almost 3 years between the date of the accident and the date of the trial. The tax consequences of the award were not directly in issue but were referred to in argument in relation to the purpose of the award and the appropriate rate of interest.

53. Lords Denning MR said (at page 149):

> "When the court awards interest on debt or damages for two, three or four years, the interest is subject to tax because it is "yearly interest of money": see *Riches v. Westminster Bank* [1947] A.C. 390. Furthermore, seeing that all the interest is received in one year, then, although it may cover two, three or four years' interest, nevertheless, the whole of it comes into charge for tax in the one year in which it is received. This may operate very hardly in those cases where this big sum changes the rate of tax as for instance, a low taxpayer is brought into a higher rate or a high taxpayer has to pay much of it away in surtax. But that cannot be helped. The tax man must collect all he can."

54. The judge said that this passage was based on a misreading of the decision in *Riches* because that case was concerned only with the deduction of tax under what was then rule 21 which depended on whether the sums in question were "interest of money" rather than yearly interest. That is, I think, right so far as it goes. But Viscount Simon did not in terms confine his analysis to rule 21 and I read the passage from Lord Simonds' speech quoted at [25] above as also indicating that an award of interest under s.3 was capable of being both interest of money and yearly interest. Lord Maugham in *Moss' Empires Ltd v IRC* [1937] AC 785 at page 795 had said that for a payment to be an "annual payment" within the meaning of rule 21 it "must be taken to have, like interest on money or an annuity, the quality of being recurrent or being capable of recurrence". Lord Simonds considered that an award of interest under s.3 of the 1934 Act did have that quality of recurrence for the reasons which he and the other members of the Appellate Committee give.

55. The judge's approach to what can constitute yearly interest seems to me inconsistent with this line of reasoning. If statutory interest cannot be yearly interest because it does not accrue prospectively in real time then, on one view, it is difficult to see how it can be interest at all. But the need for it to accrue *de die in diem* has been held in *Riches* to be satisfied even where there is no real time accrual. The same test applies equally to the type of statutory interest which we are concerned with on this appeal.

56. Mr Gardiner's principal submission is that statutory interest under the Act, even if interest, is not yearly interest because it does not accrue from year to year. The mere fact that it covers a period of several years is not, he says, in itself conclusive. The answer to this question does not, I accept, depend exclusively on the length of the period to which the interest relates. It is necessary to focus on the purpose of the

relevant provisions of the Insolvency Rules and on whether the administrators' obligation to pay interest in the event of a surplus should be treated as essentially a short-term liability (as in the case of short-term loans) regardless of how long the administration in fact lasts.

57. In my view it would be wrong to treat such statutory interest under the Insolvency Rules as a short-term liability of this kind. Unlike, for example, the indebtedness under the local Act in *Gateshead Corporation v Lumsden* which could have been called in at any time, the obligation of the administrators to pay interest on the proved debts was unlimited in point of time under rule 2.88(7) (and now rule 14.23(7)), was calculated (where the Judgment Act rate applies) by reference to a per annum rate of interest, contemplated a period of administration which could in many cases last over a prolonged period of time and did in fact endure for a number of years. It did therefore satisfy the definition in *Bebb v Bunny* in that it was payable from year to year whilst accruing from day to day. Unless the fact that it did not accrue prospectively in real time is fatal to the contention that it is yearly interest which, in the light of the authorities, it is not, I can see nothing in the Insolvency Rules or the other relevant surrounding circumstances which prevents it from being treated as the long-term liability which it in fact was.

58. For these reasons, I would allow the appeal.

Lady Justice Gloster :

59. I agree.

Lord Justice David Richards :

60. I also agree.

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